Parliamentary Committees



Justice and Other Legislation Amendment Bill 2019

Report No. 60, 56th Parliament
Legal Affairs and Community Safety Committee
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Legal Affairs and Community Safety Committee

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Acknowledgements

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Contents

Abbreviations

1958 Act	*Coroners Act 1958*
Acts Interpretation Act	*Acts Interpretation Act 1954*
Anti-Discrimination Act	*Anti-Discrimination Act 1991*
BAQ	Bar Association of Queensland
CCC	Crime and Corruption Commission Queensland
CLC	Caxton Legal Centre
committee	Legal Affairs and Community Safety Committee
Coroners Act	*Coroners Act 2003*
Coronial Services Report	Queensland Audit Office, *Report 6: 2018-19: Delivering coronial services*
CPA	*Civil Proceedings Act 2011*
CSA	*Corrective Services Act 2006*
DC Act	*District Court of Queensland Act 1967*
DJAG / department	Department of Justice and Attorney-General
DPP Act	*Director of Public Prosecutions Act 1984*
DPSOA / DPSO Act	*Dangerous Prisoners (Sexual Offenders) Act 2003*
DRC Act	*Dispute Resolution Centres Act 1990*
Drugs Misuse Act / DMA	*Drugs Misuse Act 1986*
Evidence Act	*Evidence Act 1977*
Human Rights Act	*Human Rights Act 2019*
JPA	*Judges (Pensions and Long Leave) Act 1957*
Land Court Act	*Land Court Act 2000*
LSA	*Legislative Standards Act 1992*
MC Act	*Magistrates Court Act 1921*
Ombudsman Act	*Ombudsman Act 2001*
Penalties and Sentences Act	*Penalties and Sentences Act 1992*

PGBA	*Peace and Good Behaviour Act 1982*
POQA	*Parliament of Queensland Act 2001*
PLA	*Property Law Act 1974*
QCAT	Queensland Civil and Administrative Tribunal
QCAT Act	*Queensland Civil and Administrative Tribunal Act 2009*
QDN	Queenslanders with Disability Network
QHRC / Commission	Queensland Human Rights Commission
QLS	Queensland Law Society
Retail Shop Leases Act	*Retail Shop Leases Act 1994*
SOCLA Act	*Serious and Organised Crime Legislation Amendment Act 2016*
UCPR	Uniform Civil Procedure Rules
Wilmar decision	*Wilmar Sugar P/L v Burdekin District Cane Growers* [2017] QSC 3
YJA	*Youth Justice Act 1992*

All Acts are Queensland Acts unless otherwise specified.

Chair's foreword

This report presents a summary of the Legal Affairs and Community Safety Committee's examination of the Justice and Other Legislation Amendment Bill 2019.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff and the Department of Justice and Attorney-General.

I commend this report to the House.

Peter Russo MP

Chair

Recommendation

The committee recommends the Justice and Other Legislation Amendment Bill 2019 be passed.

1 Introduction

1.1 Role of the committee

The Legal Affairs and Community Safety Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* (POQA) and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility include:

- Justice and Attorney-General
- Police and Corrective Services
- Fire and Emergency Services.

Section 93(1) of the POQA provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles, and
- for subordinate legislation – its lawfulness.

The Justice and Other Legislation Amendment Bill 2019 (Bill) was introduced into the Legislative Assembly and referred to the committee on 28 November 2019. The committee is to report to the Legislative Assembly by 21 February 2020.

1.2 Inquiry process

On 3 December 2019, the committee invited stakeholders and subscribers to make written submissions on the Bill. Submissions were received from six stakeholders.

The committee received a public briefing about the Bill from the department on 10 December 2019. A transcript is published on the committee's web page. See Appendix B for a list of officials.

The committee received written advice from the department in response to matters raised in submissions.

The committee held a public hearing on 17 January 2020. See Appendix C for a list of witnesses.

The submissions, correspondence from the department and transcripts of the briefing and hearing are available on the committee's webpage.

1.3 Policy objectives of the Bill

The principle objectives of the Bill are 'to amend criminal and civil law legislation within the justice portfolio to provide for fairness, legislative clarity and improved administration of justice and operational efficiency in court and government processes'.[2] To achieve these broad policy objectives, the Bill proposes to amend thirty-three Acts and four Regulations. Key amendments include:

- ensuring that all inquests come within the ambit of the *Coroners Act 2003* (Coroners Act), regardless of when the death, or disappearance or suspected death occurred, and addressing

1 *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

2 Department of Justice and Attorney-General (DJAG), correspondence dated 9 December 2019, briefing note, p 1.

issues identified by the State Coroner and highlighted in the Queensland Auditor-General's *Delivering Coronial Services Report 6: 2018-19* (Coronial Services Report)[3]

- amending the Criminal Code to:
  - clarify in section 359E (Punishment of unlawful stalking) that the circumstance of aggravation applies to unlawful stalking directed at a 'law enforcement officer' when or because the officer is investigating the activities of a criminal organisation, consistent with the aggravating circumstance in section 359 (Threats)
  - clarify the operation of section 463 (Setting fire to crops and growing plants) to ensure the offence applies to the setting fire of naturally growing grass and vegetation
  - expand the summary disposition of indictable offences relating to property by increasing the amount under the definition of 'prescribed value' in section 552BB (Excluded offences) from $30,000 to $80,000, and
  - enable an accused person's lawyer to make a written application under section 652 (Proceedings to transmit charge for summary offence) to transmit charges for summary matters on behalf of the accused
- amending the *Dangerous Prisoners (Sexual Offenders) Act 2003* (DPSOA) to correct an anomaly in its operation with respect to prisoners returned to custody on parole suspensions and to clarify its application to those serving periods of detention while being held in custody in a corrective services facility
- amending the *Peace and Good Behaviour Act 1982* (PGBA) to:
  - include criminal activity likely to pose a risk to the safety of a member of the public in the definition of disorderly activity, and
  - allow for appeal of a decision of a magistrate to return a prohibited item
- amending the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act) to:
  - clarify that interest payable on any basis (including discretionary, statutory or contractual interest) should not be taken into account when determining whether an amount, value or damage or sum claimed, or sought to be recovered, exceeds the monetary limits of QCAT's original jurisdiction (including the minor civil disputes jurisdiction)
  - provide flexibility in appointment processes by removing the requirement for the Minister to advertise for applications from appropriately qualified persons to be appointed as senior members and ordinary members, and
  - simplify the process for changing a QCAT member's entitlement to remuneration and allowances (entitlements) by no longer requiring details of the entitlements to be recorded in the member's appointment instrument, and instead providing that the Governor in Council may determine the entitlements for all senior and ordinary members from time to time.[4]

1.4 Government consultation on the Bill

In relation to the consultation undertaken by the Government on the Bill, the explanatory notes to the Bill state:

> *The Chief Justice; the President of the Land Court; the President of the Children's Court; the Chief Judge; the Chief Magistrate; the President of QCAT; and the State Coroner were consulted on*

[3] See Queensland Audit Office, *Report 6: 2018-19: Delivering coronial services*, 18 October 2018, https://www.qao.qld.gov.au/sites/default/files/reports/delivering_coronial_services.pdf.

[4] Explanatory notes, pp 1-5.

amendments contained in the Bill of relevance or interest to them and their comments were taken into account in finalising drafting of the Bill.

The following stakeholders were also consulted on the amendments contained in the Bill expected to be of relevance or interest to them and their comments were taken into account in finalising drafting of the Bill: the QLS, the Bar Association of Queensland; Legal Aid Queensland; the Queensland Human Rights Commission; the Appeal Costs Board; the Public Trustee of Queensland; the Aboriginal and Torres Strait Islander Legal Service; the Queensland Council for Civil Liberties; the DPP; the Crime and Corruption Commission; the Parole Board Queensland; the Commonwealth Director of Public Prosecutions; Women's Legal Service Queensland; Queensland Advocacy Incorporated; Protect All Children Today; Bravehearts; Caxton Legal Centre Inc.; Community Legal Centres Queensland; and Aboriginal and Torres Strait Islander Women's Legal Services NQ Inc.[5]

The department advised further:

The President of QCAT was consulted and was supportive of the approach to the proposed amendments to remove the requirement to advertise for applications for persons to be appointed as senior members or ordinary members. However, the President was not consulted on the specific amendments as they are included in the Bill. No other stakeholders were consulted on the proposed amendment.[6]

1.5 Estimated cost for government implementation

According to the explanatory notes, the amendment proposed in the Bill to section 159A(1) (Time held in presentence custody to be deducted) of the *Penalties and Sentences Act 1992* (Penalties and Sentences Act) is expected to increase the efficiency of some proceedings.

The amendment to section 552BB (Excluded offences) of the Criminal Code is expected to increase the number of matters finalised in the Magistrates Courts, but the department is unable to estimate the likely cost. It will, however, be met from existing agency resources.[7]

1.6 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

Recommendation

The committee recommends the Justice and Other Legislation Amendment Bill 2019 be passed.

5 Explanatory notes, p 12.

6 DJAG, correspondence dated 17 December 2019, p 1.

7 Explanatory notes, p 6.

2 Examination of the Bill

This section discusses issues raised during the committee's examination of the Bill.

2.1 Coronial services in Queensland

The Bill proposes to amend the Coroners Act to extend the Act's operation to all inquests regardless of when a death, disappearance or suspected death occurred. The Bill also addresses issues identified by the State Coroner and highlighted in the Queensland Auditor-General's Coronial Services Report.[8]

2.1.1 Application of *Coroners Act 2003* to 'pre-commencement deaths'

Under the transitional provisions of the Coroners Act, the repealed *Coroners Act 1958* (1958 Act) applies to 'pre-commencement deaths'. Pre-commencement deaths are 'deaths that were reported to a police officer or coroner before the commencement of the Coroners Act, or in relation to which an inquest was held before commencement, but reopened after commencement'.[9]

The department advised that 'the effect of the current transitional provisions is that there is a 'hard core' of remaining cases that have not received the benefit of the modern coronial regime and remain unresolved'.[10]

Clauses 39 to 41 of the Bill propose to amend the transitional provisions to provide that inquests that have been previously heard, or are part-heard, under the 1958 Act can be reopened under existing provisions of the Coroners Act, subject to the requirements of those provisions. This includes circumstances in which new evidence casts doubt on the original finding or if it is otherwise in the public interest.[11] The Attorney-General elaborated:

> *The bill provides a discretionary power for a coroner to stop an inquest that is currently being heard under the repealed Coroners Act 1958 without concluding that inquest or making any findings, and to reopen the inquest under the current act. This means that the current act, including the power to require a witness to give evidence at an inquest that would tend to incriminate the witness, will apply to inquests into deaths that were reported before the commencement of the act. To be clear, this will apply even if the person has claimed the privilege against self-incrimination at a previous inquest under the repealed Coroners Act 1958*.
>
> *I acknowledge that this amendment may affect rights retrospectively. However, this is justified to support coroners in finding the truth and potentially provide answers to loved ones. I note that there are significant existing protections in the Coroners Act 2003 for witnesses who are compelled to give such evidence. These existing protections will mean that any compelled evidence will not be admissible against a witness in a criminal proceeding, other than in a proceeding for perjury.*[12]

2.1.1.1 Requirement to keep specimen tissue

The proposed amendments in the Bill relating to transitional provisions from the 1958 Act require amendment to the keeping of specimen tissues because, under the 1958 Act, there was no provision that required the keeping of specimen tissue. In certain circumstances, where an inquest is reopened

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8 Explanatory notes, pp 1-2. See also, Hon Yvette D'Ath MP, Attorney-General and Minister for Justice, Queensland Parliament, Record of Proceedings, 28 November 2019, p 3949.

9 DJAG, correspondence dated 9 December 2019, briefing note, p 1.

10 DJAG, correspondence dated 9 December 2019, briefing note, p 1.

11 DJAG, correspondence dated 9 December 2019, briefing note, p 1.

12 Hon Yvette D'Ath MP, Attorney-General and Minister for Justice, Queensland Parliament, Record of Proceedings, 28 November 2019, p 3950.

and there is old specimen tissue stored, the Bill provides that that old specimen tissue be retained indefinitely.[13]

2.1.2 Delegation of preliminary examinations

There is currently no scope under the Coroners Act for a doctor (for example, a forensic pathologist), or for someone under the supervision of a doctor, to undertake a preliminary examination without the coroner's authority or at the coroner's direction.[14]

Clause 28 proposes to insert new section 11AA into the Coroners Act. New section 11AA would allow approved doctors, and suitably qualified persons (for example, a coronial nurse) under the supervision of an approved doctor, to perform certain preliminary examinations in relation to a death, upon that death being reported to a coroner under section 7(4) of the Coroners Act.

The proposed amendments are intended to assist in identifying those deaths that do not require further coronial intervention and can therefore be 'triaged' out of the coronial system at an early stage.[15] The Attorney-General explained the background to the amendment:

> *The amendment responds in part to a recommendation by the Queensland Auditor-General and draws from the model in place in Victoria so as to allow those deaths that do not require coronial intervention to be quickly identified.*[16]

2.1.3 Delegation of powers to a registrar

The Bill proposes to amend the Coroners Act to allow the appointment of more than one coronial registrar.[17] During the public briefing, departmental officials stated that they hoped that the delegation of some tasks to the additional coronial registrar 'will take some of the load off the coroner'.[18]

Responding to a question from the committee as to whether the provisions would allow a court registrar, as distinct from a coronial registrar, to be assigned certain tasks delegated from the coroner, the department advised:

> *… the Bill facilitates the appointment of more than one coronial registrar; it does not specifically relate to clerks of the court.*
>
> *However, included in the Bill (at clause 36) is an amendment to allow the delegation of certain powers to a registrar or an* appropriately qualified *deputy registrar. Those powers are as follows:*
>
> - *under section 16, in an investigation, to require a person to give information, a document, or anything else that is relevant to the investigation; and*
> - *to provide consent to the removal of tissue under the* Transplantation and Anatomy Act 1979*.*
>
> *At section 85 of the Coroners Act, each clerk of the court under the* Justices Act 1886*, other than a police officer, is a deputy registrar. Accordingly, the amendment could allow the delegation of these powers to a clerk of the court in circumstances where a clerk of the court was appropriately qualified.*[19]

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13 Public briefing transcript, Brisbane, 10 December 2019, p 6. See also, DJAG, correspondence dated 9 December 2019, briefing note, p 6.

14 DJAG, correspondence dated 9 December 2019, briefing note, p 2.

15 DJAG, correspondence dated 9 December 2019, briefing note, p 2.

16 Hon Yvette D'Ath MP, Attorney-General and Minister for Justice, Queensland Parliament, Record of Proceedings, 28 November 2019, p 3950. See also Queensland Audit Office, Coronial Services Report, p 7.

17 See, for example, clauses 33, 34, 35, 36, 37.

18 Public briefing transcript, Brisbane, 10 December 2019, p 6.

19 DJAG, correspondence dated 12 December 2019, p 1.

2.1.4 Discretion to order an autopsy and cease an investigation

The Bill proposes to allow a coroner to stop investigating a death after an autopsy is completed, if the coroner has determined the death is due to natural causes, the death is reportable under certain criteria, and an autopsy certificate has been issued.[20] The department advised that the Bill's amendments do not alter the process for reportable deaths.[21]

2.1.5 Cultural or spiritual considerations

Clause 28 would introduce proposed new section 11AA(5) which provides that an examiner, prior to a preliminary examination, must whenever practicable, give consideration to:

- the possibility that the person's family may be distressed because of cultural or spiritual beliefs,
- any concerns by a family member in relation to the procedures to be performed for the examination.

This reflects existing requirements in section 19(5) of the Coroners Act in relation to autopsies.[22] According to the department, the proposed provision 'will also serve to support decision-making consistent with the *Human Rights Act 2019*'.[23]

2.1.6 Stakeholder views and department response

2.1.6.1 Application of Coroners Act 2003 to 'pre-commencement deaths'

The Caxton Legal Centre (CLC) was supportive of the proposed new sections 100A-100E of the Act which allow a coroner to stop an inquest currently being held under the 1958 Act and reopen it as an inquest under the Act. CLC stated:

> *In our Coronial Assistance Legal Service we have provided advice and representation to a number of families who will benefit from these amendments, and may after many years, understand the truth of what caused the death of their loved one.*[24]

In contrast, the Queensland Law Society (QLS) expressed concern in relation to proposed section 100D of the Coroners Act at clause 41. The QLS stated:

> *… This section abrogates the right to maintain a claim for privilege against self-incrimination and also applies retrospectively. Both the privilege against self-incrimination and objection to retrospective legislation are cornerstone principles of our justice system which should very rarely be ignored. In our view section 100D is not justified and risks unfairness to witnesses not adequately protected by the other provisions in the* Coroners Act 2003.[25]

2.1.6.2 Delegation of preliminary examinations

The CLC supported the intention of proposed new section 11AA and noted that the provision will assist the coroner to triage deaths and that the Queensland Auditor-General in the Coronial Services Report had recommended that there be a coordinated state-wide triage process for deaths reported to the coroner by the Queensland Police Service.[26] The CLC expressed concern however, that section 11AA(5) may impinge on the rights of families from particular religious or cultural backgrounds. Further, CLC noted that, unlike requirements placed on a coroner prior to performing an internal autopsy under

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20 Clause 29; DJAG, correspondence dated 9 December 2019, briefing note, p 2; explanatory notes, p 16.

21 Public briefing transcript, Brisbane, 10 December 2019, p 5.

22 DJAG, correspondence dated 9 December 2019, briefing note, p 2.

23 DJAG, correspondence dated 9 December 2019, briefing note, p 2.

24 Submission 3, p 6.

25 Queensland Law Society, correspondence dated 23 January 2020, p 3.

26 Submission 3, p 2.

section 19 of the Act, proposed section 11AA does not require any information to be provided to the person who raised the concern.[27]

The CLC recommended that:

- proposed section 11AA be amended to require the coroner (rather than the examiner (or other person supervised by the examiner)) to consider any concerns raised by family or other person with sufficient interest, and
- proposed section 11AA and section 19 of the Coroners Act be amended to require the coroner to provide written reasons justifying the decision to order a preliminary examination or autopsy despite concerns raised by family or other person(s) with sufficient interest.[28]

In response, the department stated that requiring a coroner, rather than an examiner, to consider concerns raised by family or another person 'would potentially undermine' the expected efficiency gains from the proposed amendments.[29] The department also noted that under section 14 of the Coroners Act, the State Coroner may issue guidelines in relation to any matter that is:

> *… relevant and desirable to ensure best practice in the coronial system (this could include consideration of family members' concerns about preliminary examinations). The current guidelines focus strongly on the interests of families and loved ones, including the importance of keeping families regularly informed about a loved one's death*.[30]

The department stated that a requirement to provide written reasons for both an autopsy and preliminary examination would impose additional burdens on the coronial system which is contrary to the intention of these amendments. The department added that clause 42(2) of the Bill would amend the definition of 'investigation' in schedule 2 of the Coroners Act to include a preliminary examination. A preliminary examination report will be capable of being accessed by members of the public (including family members) in accordance with section 54 of the Coroners Act, as the report would be an 'investigation document' because of the amendment at clause 42 of the Bill.[31]

2.2 Criminal Code and the *Penalties and Sentences Act 1992*

The Attorney-General advised that the Bill includes some key amendments to the Criminal Code to 'simplify and clarify the operation of existing provisions and make procedural enhancements to increase efficiency in the criminal justice system'.[32] With respect to the proposed amendments to the Penalties and Sentences Act, the Attorney-General said that they are intended to 'enhance judicial discretion and reduce complexity in relation to pre-sentence custody calculations, particularly where there are multiple offences that are not all before the sentencing court'.[33]

2.2.1 Punishment for unlawful stalking of a law enforcement officer

Clause 49 of the Bill would amend section 359E (Punishment for unlawful stalking) of the Criminal Code to clarify that the circumstance of aggravation applies to unlawful stalking directed at a 'law enforcement officer' when or because the officer is investigating the activities of a criminal

27 Submission 3, pp 2-3.

28 Submission 3, p 6.

29 DJAG, correspondence dated 15 January 2020, attachment, p 2.

30 DJAG, correspondence dated 15 January 2020, attachment, p 2.

31 DJAG, correspondence dated 15 January 2020, attachment, p 3.

32 Hon Yvette D'Ath MP, Attorney-General and Minister for Justice, Queensland Parliament, Record of Proceedings, 28 November 2019, p 3951.

33 Hon Yvette D'Ath MP, Attorney-General and Minister for Justice, Queensland Parliament, Record of Proceedings, 28 November 2019, p 3951.

organisation. This amendment would make the provision consistent with the aggravating circumstance in section 359 (Threats).[34]

The definition of 'law enforcement officer' that would apply is the current definition at section 1 of the Criminal Code. The department advised that it covers three categories of people:

> *… It can be an officer of a law enforcement agency, a person appearing for the director under the DPP Act, a person authorised by the CCC or a person that belongs to a class of person who is authorised in writing by the Commissioner of the Police Service or the Crime and Corruption Commission as a law enforcement officer. It is a very broad definition of law enforcement officer.*[35]

The amendment is intended to clarify amendments made in 2009 to the offences of stalking and making threats. The department elaborated:

> *… In 2009 there were two amendments made, one to the offence of threats in the Criminal Code and one to the stalking offence. They both provided for a circumstance of aggravation when a law enforcement officer was investigating an offence. The words law enforcement officer were used with respect to the threats offence but the words law enforcement went missing from the amendment to the circumstance of aggravation to the stalking offence, so this is just to clarify, as per the intention at the introduction of those circumstances of aggravation in 2009, that it was always meant to apply to that broad definition in section 1 of the Criminal Code.*[36]

2.2.2 Setting fire to vegetation

Clause 50 of the Bill would amend section 463 (Setting fire to crops and growing plants) of the Criminal Code to include a new provision heading—Setting fire to vegetation—and to expand its application. According to the department, the proposed amendment seeks to modernise the language of the provision, and to clarify that the offence will apply to any naturally growing grass, for example, grass growing on a roadside, and other vegetation.[37]

2.2.3 Excluded indictable offences

In general, the District Court or the Supreme Court deals with indictable offences, while simple and regulatory offences are dealt with summarily before a Magistrate. Part 8, Chapter 58A of the Criminal Code creates exceptions in the way indictable offences under the Criminal Code are dealt with, by providing the legislative framework for when indictable offences can be, or are required to be, heard and decided summarily.[38]

The Bill, at clause 51, would expand the summary disposition of indictable offences relating to property by increasing the amount under the definition of 'prescribed value' in section 552BB of the Criminal Code from $30,000 to $80,000.[39]

According to the department, Queensland currently has a relatively low monetary limit on finalising property offences in the Magistrates Court where an offender pleads not guilty—$30,000—compared to Victoria and New South Wales, where the monetary limits for some offences relating to property that may be heard and decided summarily are $100,000 and $60,000, respectively.[40]

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34 Explanatory notes, p 3.

35 Public briefing transcript, Brisbane, 10 December 2019, p 4.

36 Public briefing transcript, Brisbane, 10 December 2019, p 5.

37 Public briefing transcript, Brisbane, 10 December 2019, p 4.

38 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 5.

39 See also, DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 6; explanatory notes, p 21.

40 DJAG, correspondence dated 9 December 2019, briefing note, p 6.

At clause 52, the Bill proposes to amend the Criminal Code to allow a charge for an indictable offence that is otherwise required to be dealt with summarily under section 552BA (Charges of indictable offences that must be heard and decided summarily) to be dealt with on indictment if it proceeds as an alternative charge for another indictable offence.[41]

2.2.4 Proceedings to transmit change for summary offence

The Bill (clauses 53 and 54) amends sections 651 and 652 of the Criminal Code to allow either a person charged or their lawyer to make an application to transmit a summary charge or charges from a Magistrates Court to a higher court registry and omit the requirement for a declaration under the *Oaths Act 1867* to be signed by that person for an application.[42]

2.2.5 Criminal Law (Rehabilitation of Offenders) Act 1986

Clause 57 of the Bill propose to amend the *Criminal Law (Rehabilitation of Offenders) Act 1986* to remove the requirement for the Minister to authorise the prosecution of offences under the Act.[43] The explanatory notes state the amendment will ensure 'the commencement of any prosecution by any prosecuting agency or a private citizen is no longer reliant on the authorisation of the Minister', and 'that that the amendment will prevent prosecutions for the offence being unnecessarily delayed'.[44] The proposed amendment would align Queensland with all other Australian jurisdiction with a spent conviction scheme.[45]

2.2.6 Penalties and Sentences Act 1992

2.2.6.1 Time held in presentence custody to be deducted

Clause 164 of the Bill would amend section 159A(1) (Time held in presentence custody to be deducted) of the Penalties and Sentences Act to remove reference to 'and no other reason'. The intention of the amendment is to provide a sentencing court with increased flexibility in relation to the consideration of presentence custody.[46]

2.2.6.2 Consolidation of sentencing principle from the Regulation into the Act

Clauses 163, 165 and 167 of the Bill propose to relocate the sentencing principle at section 4 of the Penalties and Sentences Regulation 2015 into section 9 (Sentencing guidelines) of the Penalties and Sentences Act. The Bill provides transitional provisions accordingly. The intention of the amendments as stated in the explanatory notes, is to 'improve the accessibility of the criminal law'.[47]

2.2.7 Stakeholder views and department response

2.2.7.1 Criminal Code

The Bar Association of Queensland (BAQ) submitted that it understood the rationale behind clause 51 of the Bill, amending section 552BB (Excluded offences) of the Criminal Code, but expressed concern that this amendment 'will result in a large increase in the number of matters of considerable seriousness being dealt with in the Magistrates Court'.[48] The change in jurisdictional limits will, according to BAQ, 'almost certainly impose a significantly greater burden on magistrates, who will be

41 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 6; explanatory notes, p 21.

42 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 7; explanatory notes, p 21.

43 Explanatory notes, pp 21-22.

44 Explanatory notes, p 9.

45 Explanatory notes, p 9.

46 Explanatory notes, p 30.

47 Explanatory notes, pp 5, 30.

48 Submission 4, pp 1-2.

obliged to preside over long and complicated trials (such as fraud cases) with unrepresented defendants'.[49]

The QLS expressed support for the BAQ over their concerns that the increase 'will create difficulties for defendants to access legal assistance funding, particularly in otherwise complex matters'.[50] The QLS also submitted that some of its members noted that the right to elect a trial by jury should be retained for indictable offences as a matter of general policy.[51]

The BAQ and the QLS expressed support for the proposed amendment to section 651 of the Criminal Code, which would make the process of transferring summary charges to the superior courts simpler.[52]

2.2.7.2 Penalties and Sentences Act 1992

The BAQ also supported the proposed change to section 159A of the Penalties and Sentences Act which would enable judges to declare presentence custody as time already served under a sentence even if associated summary charges were not, for whatever reason, being dealt with at the same time. According to BAQ, this amendment and the amendment to section 651 'would greatly reduce the number of last-minute applications for an adjournment on the morning of sentence'.[53]

2.3 Administration of the courts

The Attorney-General advised that the Bill proposes amendments to multiple Acts for the purposes of legislative clarity and improving the administration and efficiency in court and government processes.[54] The following summarises proposed amendments to the *Land Court Act 2000* (Land Court Act); the *District Court of Queensland Act 1967* (DC Act), the *Magistrates Courts Act 1921* (MC Act), the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act); and the *Civil Proceedings Act 2011* (CPA).

2.3.1 Civil Proceedings Act 2011

The Bill propose to amend the CPA to provide an assessor (appointed under Chapter 13, Part 7 of the *Uniform Civil Procedures Rules 1999* (UCPR)) with the same protection and immunity as a witness before the Supreme Court.[55] The department noted that the proposed amendment is consistent with recent amendments to the CPA that provide referees the same protection and immunity as a Supreme Court judge performing a judicial function. It is also consistent with the protection and immunity provided by section 77 of the CPA to account assessors and cost assessors appointed under the UCPR.[56]

2.3.2 *District Court of Queensland Act 1967*

The department advised that the District Court generally does not have jurisdiction to try a person charged with an indictable offence if the maximum penalty is more than 20 years. Existing section 61 (Criminal jurisdiction if maximum penalty more than 20 years) of the DC Act provides exceptions to this general restriction, including 22 specific sections of the Criminal Code.[57]

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49 Submission 4, p 2.

50 QLS, correspondence dated 23 January 2020, p 3.

51 Submission 6, p 3.

52 Submission 4, p 1; submission 6, p 3.

53 Submission 4, p 1.

54 Hon Yvette D'Ath MP, Attorney-General and Minister for Justice, Queensland Parliament, Record of Proceedings, 28 November 2019, p 3951.

55 See clauses 19-24; explanatory notes, p 2.

56 DJAG, correspondence dated 9 December 2019, briefing note, attachment, pp 2-3.

57 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 8.

Clause 68 of the Bill proposes to add two Criminal Code offences—sections 228A (Involving child in making child exploitation material) and 228B (Making child exploitation material)—to the list of exceptions to the general jurisdictional restriction placed on the District Court.[58]

The intention of the amendment is to correct a drafting oversight that arose when the *Serious and Organised Crime Legislation Amendment Act 2016* (SOCLA Act) introduced a new circumstance of aggravation to the provisions in the Criminal Code but did not make a corresponding amendment to the DC Act. According to the department, 'The District Court is the appropriate court to hear and determine these matters and is otherwise responsible for all child exploitation material offences under the Code'.[59]

2.3.3 *Judges (Pensions and Long Leave) Act 1957* and consequential amendments

Clause 87 of the Bill would amend the *Judges (Pensions and Long Leave) Act 1957* (JPA), section 5 (Pension of judge retiring on account of ill health), to replace the current requirement that a medical practitioner prescribed under a regulation certify to the Minister that a judge's retirement is because of permanent disability or infirmity in order for the retiring judge to be entitled to a pension. Under the Bill, a judge would be entitled to an annual pension if the judge retires and two proposed requirements are satisfied: firstly, that a specialist health practitioner certifies to the Minister that the judge's retirement is because of permanent disability or infirmity; and secondly, that the Minister is satisfied the judge's retirement is because of permanent disability or infirmity. A new definition for the term 'specialist health practitioner' would be inserted by the Bill (clause 87(2)).[60]

There are consequential amendments in the Bill to the *Corrective Services Act 2006* (CSA) in respect of former senior board members of the Parole Board Queensland (clause 45), and to the *Crime and Corruption Act 2001* in respect to former chairpersons of the Crime and Corruption Commission (clause 47).

In response to a request from the committee, the department clarified the proposed provisions in respect to former senior parole board officers:

> *Section 240(1)(a) of the CSA is a corresponding provision stating that section 5 of the JPA applies to a former senior board member (i.e. a person who has held office as president or deputy president) if the member resigned the office of president or deputy president and the current certification pre-condition is met.*
>
> *…*
>
> *Clause 45 of the Bill makes a corresponding consequential amendment to section 240(1)(a) of the CSA to replace the current certification pre-condition with the new pre-conditions for a senior board member who has resigned the office of president or deputy president (CSA amendment).*
>
> *The CSA amendment does not change the entitlement of a senior board member to whom the provision applies.*[61]

2.3.4 Land Court Act 2000

The Land Court exercises jurisdiction under a range of statutes, for example hearing objections to mining lease applications and associated environmental authorities referred to the court under the *Mineral Resources Act 1989* and the *Environmental Protection Act 1994*. In exercising certain of these

58 Explanatory notes, p 4.

59 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 8.

60 Explanatory notes, p 24.

61 DJAG, correspondence dated 17 December 2019, p 2.

functions, the Land Court does not make a final determination but a recommendation to the relevant Minister (recommendatory jurisdiction).[62]

Part 20 of the Bill proposes amendments to the Land Court Act which respond to issues raised by the President of the Land Court of Queensland.[63] Key amendments include:

- *limiting the court's power to rehear matters to those involving mistakes of fact, as mistakes of law are more appropriately addressed by way of appeal (clause 90);*
- *requiring Land Court members to be lawyers with extensive relevant experience, in recognition of the increasingly complex and technical nature of Land Court matters (clause 91);*
- *clarifying (for both the Land Court's judicial and recommendatory functions) the scope of the Land Court's, and the President's, powers to make orders or directions to enable procedural issues to be addressed in a timely and responsive manner (clause 92); and*
- *specifying and consolidating the costs powers of the Land Court in its recommendatory jurisdiction (consolidated recommendatory costs provisions) (clause 105).*[64]

Clauses 99 to 102 propose amendments to improve the administration of the Land Court including:

> *… preserving public service entitlements of acting judicial registrars; providing appropriate approving authorities for leave of absence of the President and Land Court members; allowing for delegation of the registrar's functions (with the President's approval) to an appropriately qualified officer of the Land Court; and allowing for the appointment of associates for the President and Land Court members.*[65]

2.3.5 *Magistrates Courts Act 1921*

Clause 148 of the Bill proposes to amend section 4 (Jurisdiction of the Magistrates Courts) of the MC Act to clarify that the Magistrates Courts jurisdiction includes personal actions for the recovery of chattels. The department advised this amendment addresses conflicting decisions about whether the Magistrates Court has jurisdiction to make orders for the recovery of motor vehicles.[66]

2.3.6 Jurisdictional monetary limits

The Bill proposes amendments to the DC Act, the MC Act and the QCAT Act to clarify the operation of the jurisdictional monetary limits. Under clauses 69 and 149, respectively, the Bill proposes to amend section 68 of the DC Act, and insert new section 4AAA in the MC Act, to:

> *… clarify that interest payable on any basis (including statutory, contractual and discretionary interest awarded by a court) should not be considered when determining whether the amount, value or damage sought to be recovered in an action exceeds the jurisdictional monetary limits for the Court.*[67]

Consistent with this, clause 184 proposes to amend the QCAT Act to clarify that interest payable on any basis (including discretionary, statutory or contractual interest) should not be considered when

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62 DJAG, correspondence dated 9 December 2019, briefing note, p 3.

63 DJAG, correspondence dated 9 December 2019, briefing note, p 3.

64 DJAG, correspondence dated 9 December 2019, briefing note, p 4.

65 DJAG, correspondence dated 9 December 2019, briefing note, p 4.

66 DJAG, correspondence dated 9 December 2019, briefing note, p 12; see section 123 of the *Personal Property Securities Act 2009* (Cth).

67 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 9.

determining whether an amount, value or damage or sum claimed, or sought to be recovered, exceeds the monetary limits of QCAT's original jurisdiction.[68]

2.3.7 Queensland Civil and Administrative Tribunal Act 2009

2.3.7.1 Members' entitlements

At present, section 186(2) of the QCAT Act requires the remuneration and allowances (the entitlements) of all senior and ordinary QCAT members be approved by Governor in Council and recorded in the Executive Council Minute appointing the member (appointment instrument). Where a change is proposed to the entitlements for a class of QCAT members, or an individual member, the appointment instrument for each member must be remade to record the change.[69] The department submitted that this process 'imposes an unnecessarily heavy administrative burden' on the department.[70]

To simplify the process for implementing changes to a QCAT member's entitlements, clause 187 would remove the necessity to remake each member's appointment instrument each time the member's remuneration or allowances change.[71]

2.3.7.2 Appointment of members

Section 183 of the QCAT Act provides for the appointment of senior and ordinary QCAT members, including the eligibility requirements and selection process. Currently, the Minister must advertise for applications from appropriately qualified persons to be considered for selection.[72]

Clause 186 of the Bill proposes to remove the requirement for the Minister to advertise for applications in this way. According to the department, the amendment will offer greater flexibility in managing resources[73] and is consistent with the equivalent Acts in Victoria and New South Wales.[74] The department elaborated:

> *… It really is about not having to go through a full advertising process each time if you suddenly need a new member so that QCAT can respond to its resource requirements. No other civil and administrative tribunal of the other states and territories has that advertising requirement, but … it does not mean that QCAT would not go through a public process or advertising requirement from time to time. They might do an expression of interest and … have that pool of readily available applications to draw from.*[75]

The President of QCAT was consulted on the removal of the requirement to advertise.[76]

2.3.8 Stakeholder views and department response

2.3.8.1 Civil Proceedings Act 2011

The QLS noted the intent of the provisions in the Bill to amend the CPA at section 59(4)(b) but submitted that the amendment would create ambiguity having regard to the definitions in the Act regarding a 'money order' and a 'money order debt'. The QLS submitted that it believed 'the proposed

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68 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 9.

69 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 15.

70 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 15.

71 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 15.

72 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 15.

73 Public briefing transcript, Brisbane, 10 December 2019, p 3.

74 DJAG, correspondence dated 15 January 2020, attachment, p 15.

75 Public briefing transcript, Brisbane, 10 December 2019, p 3.

76 Public briefing transcript, Brisbane, 10 December 2019, p 3.

sub-section needs to be further refined in keeping with the context of the CPA and the policy intent'.[77] To achieve this, the QLS suggested sub-section 59(4)(a) be amended (to deal with fixed costs orders), and new sub-sections (4)(b) and (5) be inserted, as follows:

> *(a) if the money order includes an amount for damages or an amount for costs and the relevant amount is paid within 21 days of the date of the order, interest on the amount is not payable unless the court otherwise orders; or*
>
> *(b) if the money order includes an order for costs but does not include an amount for costs:*
>
> > *(i) the amount certified in a certificate of a costs assessor under rule 737(2) of the* Uniform Civil Procedure Rules 1999*, or the amount agreed for the costs, is a money order debt for the purposes of this section; and*
> >
> > *(ii) interest on the costs is not payable if the costs are paid within 21 days after service of the certificate of a costs assessor or after the agreement, unless the court otherwise orders.*
>
> *(5) For the purposes of this section, an order of the registrar or judgment within the meaning of rules 740(1) and (2) of the* Uniform Civil Procedure Rules 1999 *is not a money order or a money order debt.*[78]

In response the department advised: 'The issue raised by QLS (concerning the implications of the definitions of *money order* and *money order debt*) will be further considered by DJAG'.[79]

2.3.8.2 Court and tribunal Acts

Concerning amendments to the DC Act, the MC Act and the QCAT Act, the QLS sought greater clarity of the provisions, particularly their effect on matters in court that have already commenced, and suggested that transitional provisions be included in the Bill, and that the amendments to these Acts only apply to new matters filed.[80] The department noted the submission of the QLS in relation to these Acts but stated that transitional provisions were not necessary. The department added that the Bill's provisions will apply prospectively for any determination made by the District Court and QCAT after the commencement, and for any action brought in the Magistrates Court after the commencement.[81]

According to the CLC, many of their clients seek detinue claims to recover low value items or items with sentimental value. For many seeking these items, the cost of court action for items of low value has been prohibitive.[82] The CLC supported the Bill's proposal to clarify that Magistrates Courts have power to order the return of a chattel.[83]

The CLC was, however, concerned that the Bill would not achieve this objective because there is ambiguity as to whether the word 'value' (that would be added to section 4(a) of the MC Act by clause 148) refers to 'the recovery of chattels, and if so, whether injunctive relief would now be available, or whether the court's powers will remain confined to monetary remedies'.[84] The CLC proposed some drafting amendments.[85]

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77 Submission 6, p 2.

78 Submission 6, p 2.

79 DJAG, correspondence dated 15 January 2020, attachment, p 7.

80 Submission 6, p 4.

81 DJAG, correspondence dated 15 January 2020, attachment, pp 9, 11, 13.

82 Submission 3A, pp 3-4.

83 Submission 3A, p 5.

84 Submission 3A, p 5.

85 See submission 3A, p 7.

The CLC held the view that QCAT 'urgently needs to be given jurisdiction to deal with detinue claims and should be able to order return of a relevant chattel/s as well as damages for their wrongful detention in appropriate cases'.[86] CLC further submitted:

> *… At the very least, QCAT should be given power to order the return of chattels within QCAT's monetary limit. We say this because of the points made earlier about the low value of some individual detinue cases that tends to be so problematic for our clients.*[87]

The QLS was supportive of CLC's submission in respect of the proposed amendments, with the exception of CLC's suggestion that the monetary jurisdiction of QCAT be extended to hear matters involving personal property values at more than its jurisdictional limit, currently at $25,000, and the CLC's submission that the value of the item should not matter if only its return is sought.[88]

The department stated that it would further consider the suggested amendments to the MC Act to give jurisdiction for recovery of possession.[89] On CLC's submission regarding the jurisdiction of QCAT, the department stated the comments were noted, but that the suggested proposals fall outside of the scope of the Bill.[90]

2.3.8.3 Land Court Act 2000

The QLS raised a number of concerns in relation to clause 92 of the Bill to amend the Land Court Act. Some QLS members considered that the reference to 'a proceeding' in replacement section 22(1) may have unintended consequences. In particular, it might impact the Land Court's ability to issue directions when performing functions and exercising powers in recommendatory matters.[91] The department advised that replacement section 22 would apply to both the exercise of the Land Court's judicial and recommendatory functions by operation of section 52B(1)(e).[92]

Regarding the proposed amendment to section 22(2) of the Land Court Act, the QLS submitted it would prefer any problems or deficiencies with the Land Court Rules (LCR) to be addressed by amendments to the rules, rather than through the making of directions.[93] In response, the department noted that:

- *the replacement provision is clear that general directions of the President relate to matters of procedure only, and that the interests of justice are paramount in making an order or direction under the section;*
- *the Land Court is well placed to decide whether in a particular proceeding it is appropriate for an order inconsistent with the LCR to be made;*
- *the replacement provision is also in line with the equivalent directions power under the* Planning and Environment Court Act 2016*.*[94]

The QLS queried whether an order or direction under section 22(1) prevails to the extent of any inconsistency over a general direction under section 22(2) or vice versa.[95] The department advised that

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86 Submission 3A, p 8.

87 Submission 3A, p 8.

88 QLS, correspondence dated 23 January 2020, pp 1-2.

89 DJAG, correspondence dated 15 January 2020, attachment, p 4.

90 DJAG, correspondence dated 15 January 2020, attachment, p 4.

91 Submission 6, p 5.

92 DJAG, correspondence dated 15 January 2020, attachment, p 10.

93 Submission 6, p 5.

94 DJAG, correspondence dated 15 January 2020, attachment, p 10.

95 Submission 6, p 5.

'this is not expected to be an issue in practice where general directions under section 22(2) will be about procedural matters of general application only'.[96]

2.3.8.4 Queensland Civil and Administrative Tribunal Act 2009

On the Bill's proposed amendment of the QCAT Act to remove the requirement of the Minister to advertise for applications for members of QCAT, the QLS stated that its view was that 'these positions should be advertised to ensure transparency and diversity of appointments'.[97] In reply, the department advised:

> *The QCAT Act will continue to-*
>
> - *provide eligibility requirements for appointment, includinq that the person has, in the Minister's opinion, a certain level of knowledge, expertise or experience relating to a class of matter for which functions may be exercised by the tribunal; and*
> - *require the Minister, in recommending persons for appointment as members, to have regard to specified matters, such as the range of knowledge, expertise and experience of QCAT members.*[98]

2.4 Administration of justice

The Bill proposes amendments to multiple Acts for the purposes of improving processes associated with the administration of justice in Queensland.[99] The following summarises proposed amendments to the *Anti-Discrimination Act 1991* (Anti-Discrimination Act), the *Dangerous Prisoners (Sexual Offenders) Act 2003* (DPSOA), the *Drugs Misuse Act 1986* (Drugs Misuse Act), the *Evidence Act 1977* (Evidence Act), the *Legal Profession Act 2007* (Legal Profession Act), the *Ombudsman Act 2001* (Ombudsman Act), the *Peace and Good Behaviour Act 1982* (PGBA) and the *Retail Shop Leases Act 1994* (Retail Shop Leases Act).

2.4.1 Anti-Discrimination Act 1991

At present, section 138 of the Anti-Discrimination Act provides a time limit of one year for making a complaint, with the Queensland Human Rights Commission (QHRC) having a discretion to accept a complaint outside that time limit if the complainant shows good cause.[100]

The Bill includes amendments to the Anti-Discrimination Act to allow the QHRC to defer a decision about the acceptance of out-of-time complaints in some circumstances until after the parties have participated in a conciliation conference.[101]

2.4.2 Dangerous Prisoners (Sexual Offenders) Act 2003

The Bill proposes to amend the DPSOA to correct an anomaly in its operation with respect to prisoners returned to custody on parole suspensions and to clarify the DPSOA's application to those serving periods of detention while being held in custody in a corrective services facility.[102]

The department described the purpose of the proposed amendment:

> *Section 206 of the Corrective Services Act says that when your parole is cancelled you return to serve a period of imprisonment but when your parole is suspended you return to serve a*

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96 DJAG, correspondence dated 15 January 2020, attachment, p 10.

97 Submission 6, p 6.

98 DJAG, correspondence dated 15 January 2020, attachment, pp 13-14.

99 Public briefing transcript, Brisbane, 10 December 2019, p 2.

100 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 1.

101 Clauses 7-14; explanatory notes, p 2.

102 Explanatory notes, p 3.

suspension period. They just do not use those words term of imprisonment which makes it clear that they are captured. That is an anomaly because obviously when the Parole Board has decided to suspend or cancel a prisoners parole they have been engaged in a risk behaviour which means that they should be reconsidered under the DPSO scheme, and if they return to imprisonment within the last six months of that term of imprisonment then they will be able to be captured by the legislation if they also meet the other criteria under the DP(SO) Act.[103]

2.4.3 Drugs Misuse Act 1986

The explanatory notes advise that the Bill proposes to amend the Drugs Misuse Act to correct an anomaly in its operation relating to the disclosure of identifying information about a drug informer in certain court proceedings. To rectify the anomaly, the Bill proposes to include a definition of 'informer' in section 4 of the Act and amend sections 119 and 120 to ensure a person can be prosecuted for an offence of disclosing identifying information about a drug informer.[104]

2.4.4 Evidence Act 1977

The proposed amendment to the Evidence Act extends the ability of the court to order the exclusion of the public when a section 93A statement of an affected child or special witness is being presented.[105]

According to the explanatory notes, the amendment would address the current anomaly and offers an additional level of protection to vulnerable witnesses.[106]

2.4.5 Legal Profession Act 2007

The department advised that the Bill (at clauses 135, 137, 138, 143 and 144) would strengthen the provisions in the Legal Profession Act relating to directors of insolvent incorporated legal practices and corporations.[107]

The Bill also proposes to:

- clarify that the QLS has power to charge fees for assessing applications for exemption from, or deferral of, the obligation to undertake the practice management course (clause 139)
- clarify that the power for the QLS to conduct a trust account investigation of the affairs of a law practice may be exercised routinely not just in relation to a particular allegation or suspicion (clause 141), and
- clarify eligibility for government legal officers, in-house counsel and volunteer lawyers to move admissions to the legal profession that are without conditions (clause 136).[108]

The Bill also would amend the Legal Profession Regulation 2017, section 7 as a consequence of the latter amendment.[109]

2.4.6 Ombudsman Act 2001

The Bill proposes at clause 156 to amend section 86 of the Ombudsman Act to allow the Queensland Ombudsman to delegate the making of a decision about a human rights complaint under section 66 of the *Human Rights Act 2019* (Human Rights Act) to an appropriately qualified officer. According to the explanatory notes to the Bill, the provision is consistent with the delegation of equivalent decisions by

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103 Public briefing transcript, Brisbane, 10 December 2019, p 5.

104 Explanatory notes, pp 4, 10.

105 Explanatory notes, p 10.

106 Explanatory notes, p 11.

107 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 12.

108 Explanatory notes, pp 4, 27, 28.

109 Clauses 145, 146.

the other relevant referral entities such as the Crime and Corruption Commission and the Health Ombudsman.[110]

2.4.7 Peace and Good Behaviour Act 1982

The Bill proposes to insert a new definition for 'criminal activity' in section 33 of the PGBA, and amend and renumber the definition of 'disorderly activity' to provide that disorderly activity includes criminal activity that is likely to pose a risk to the safety of a member of the public.[111]

The department advised that when introduced as part of the restricted premises order scheme by the SOCLA Act, the definition of 'disorderly activity' was intended to include general criminal and anti-social behaviour occurring at a declared restricted premises.[112] However, in a recent Magistrates Court decision, the definition was considered and interpreted not to include unspecified criminal activity.[113]

According to the department, the amendment ensures consistency with the main object of the PGBA. That is:

> *… to protect the safety, welfare, security and peace and good order of the community from risks presented by people engaging in antisocial, disorderly or criminal conduct, and achieve the intended purpose of the provision.*[114]

Clause 159 amends section 88 (Who may appeal) to provide at paragraph (e) that a decision to make or refuse to make an order under section 51 (Court may order return of prohibited item) for the return of a prohibited item may be appealed.[115]

2.4.8 Retail Shop Leases Act 1994

Part 8 of the Retail Shop Leases Act provides a framework for resolution of retail tenancy disputes. The Bill proposes to amend the Act to remove the current arrangements, where the Minister has the power to appoint mediators, and to generally align the appointment process with that under the *Dispute Resolution Centres Act 1990* (DRC Act). Consistent with the DRC Act, proposed new section 95 of the Retail Shop Leases Act would enable the chief executive to appoint an appropriately qualified person as a mediator.[116]

2.4.9 Stakeholder views and department response

2.4.9.1 Anti-Discrimination Act 1991

The QHRC and the Queenslanders with Disability Network (QDN) were supportive of the provisions in the Bill relating to the Anti-Discrimination Act.[117]

According to the QHRC, complaints are often about more than one incident, some complaints are about matters that have occurred over a period of time, and some complaints include incidents that have occurred within the one year limit as well as incidents that occurred out-of-time.[118] The QHRC

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110 Explanatory notes, p 11.

111 Clause 158.

112 *Peace and Good Behaviour Act 1982*, Part 4, under the scheme a senior police officer may make an application to court for a restricted premises order. The order may be made if the court is satisfied the police officer reasonably suspects that one or more *disorderly activities* have taken place on the premises and are likely to occur again on the premises.

113 DJAG, correspondence dated 9 December 2019, briefing note, p 5.

114 DJAG, correspondence dated 9 December 2019, briefing note, p 5.

115 Explanatory notes, p 29.

116 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 16.

117 Submission 2, p 4 and submission 5, p 1.

118 Submission 2, p 2.

submitted that in recent years, the number of complaints received by the Commission has increased significantly, with a consequential impact on resources. The commissioner stated: 'Given the primary purpose of dealing with complaints is to resolve them through conciliation, the decision-making process for out-of-time complaints diverts resources from achieving the purpose'.[119] The QHRC considered that 'the proposed amendments will simplify processes for dealing with the subject complaints, and improve efficiencies for the Commission to the benefit of the public'.[120]

The QLS submitted that it had concerns with the exception of the requirement in proposed section 16A(4A) of the Anti-Discrimination Act that an 'in-time' matter is not able to proceed in the Tribunal until a decision has been made on a related out-of-time matter. The QLS considered that the word 'must' lacked flexibility and recommended that the proposed section be amended to give the commissioner the discretion to progress a matter to the Tribunal in appropriate circumstances.[121]

The QHRC responded to QLS during the public hearing:

> *… There are a couple of pathways from the commission to a tribunal for an unresolved complaint. One of them is under 164A: after a conciliation conference has been held, if it has not been resolved, then the person making the complaint can ask the commissioner to refer the complaint to the tribunal. The section provides that the commissioner has to do that. This amendment provides that when we have taken a matter that has both an in-time claim and an out-of-time claim to conference and it has not resolved, we then have to make a decision about the out-of-time component. The amendment is saying that it is okay for us not to send that over to the tribunal until we have made that decision.*[122]

The department noted submissions relating to proposed changes to the Anti-Discrimination Act and stated:

> *… It is the intention of the amendments that in-time and out of time complaints are taken to conciliation before deciding whether to accept the out of time component of a complaint. It is proposed that the commissioner will decide whether to accept the out of time component before referring a complaint to the Tribunal because, if the out of time component of the complaint is accepted, it would be more efficient for the Tribunal and less costly for the parties for the matters to be dealt with together.*[123]

2.4.9.2 Ombudsman Act 2001

The Queensland Ombudsman and the QDN expressed support for the Bill's proposed amendment to the Ombudsman Act.[124] The Queensland Ombudsman stated that the amendment 'will facilitate the effective and efficient operation of the Office when dealing with complaints about matters involving alleged breaches of human rights and requiring decisions under the Human Rights Act'.[125]

2.4.9.3 Dangerous Prisoners (Sexual Offenders) Act 2003

The BAQ and the QLS expressed concern at the proposed extension of the operation of the DPSOA to persons who commit serious sexual offences as children, and whose sentences of detention extend into adulthood so that they are transferred to the adult prison system.[126] The BAQ noted that it is presently possible for a child to be sentenced to a period of detention without a conviction being

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119 Submission 2, p 2.

120 Submission 2, p 4.

121 Submission 6, pp 1-2.

122 Public hearing transcript, Brisbane, 23 January 2020, p 6.

123 DJAG, correspondence dated 15 January 2020, attachment, p 7.

124 Submission 1, p 1 and submission 5, p 1.

125 Submission 1, p 1.

126 Submission 4, p 2; submission 6, p 4.

recorded (in accordance with section 183 of the *Youth Justice Act 1992* (YJA)) and the proposed amendments would potentially expose a child sentenced to detention without the recording of a conviction to the provisions of the DPSOA. The BAQ suggested the operation of the Act be limited to cases sufficiently serious as to warrant the recording of a conviction.[127] The QLS questioned the 'appropriateness of such legislation being utilised for a certain class of juvenile offender as a matter of general principle'.[128]

In response to the BAQ and the QLS, the department stated:

> *The DPSOA has previously been applied to offenders sentenced to detention under the* Youth Justice Act 1992 *(Qld) (YJA). The amendments to the DPSOA do not expand the ambit of the Act.*
>
> *The applicability of the DPSOA to an offender has always been whether or not an offender meets the definition of 'prisoner' contained in section 5(6) of the Act.*
>
> *…*
>
> *Children serving periods of detention who reached certain ages have always been liable to transfer into a correctional centre for adults. However, over the course of a number of amendments to the YJA, the legal mechanism to effect transfer from youth detention to adult prison has changed. The proposed amendments clarify the application of the DPSOA to people who have been sentenced under the YJA but are serving that sentence in an adult correctional centre.*[129]

2.4.9.4 Drugs Misuse Act 1986

The QLS expressed concern in its submission that the amendments to the Drugs Misuse Act do not appear to provide any means for the court to inquire into an informer's identity, where it is in the interests of justice to do so.[130]

The department noted the QLS' comments in regard to the Drugs Misuse Act and stated:

> *The amendments in the Bill correct an anomaly to ensure the lawful disclosure of information necessary to ensure that a person can be prosecuted for an offence of disclosing identifying information about a drug informer under section 119 of the DMA.*
>
> *The amendments in the Bill do not otherwise alter the current limitations on identifying an informer within sections 119 and 120 of the* Drugs Misuse Act 1986*, which prohibit any person, including the court, from making inquiries into the informer's identity.*[131]

The QLS noted the department's response and stated:

> *… we suggest that if amendments are to be made to these provisions then they should be made consistent with other* informer *protections; see for example the court's discretion in section 151B of the* Weapons Act 1990*.*[132]

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127 Submission 4, p 2.

128 Submission 6, p 4.

129 DJAG, correspondence dated 15 January 2020, attachment, pp 6-7, 9.

130 Submission 6, p 4.

131 DJAG, correspondence dated 15 January 2020, attachment, p 10.

132 QLS, correspondence dated 23 January 2020, p 3.

2.4.9.5 Peace and Good Behaviour Act 1982

On the proposed amendments to the PGBA, the QLS submitted that clause 158 of the Bill 'would appear to broaden the scope' of restricted premises orders, an amendment that, if passed, 'may have unintended consequences'.[133] At the public hearing, the QLS elaborated:

> *The example that came to mind when we were looking at this … was protestors, such as the Extinction Rebellion protestors. If they are holding meetings to plan protests to disrupt traffic that would be a criminal offence. It would be a place where a criminal offence is taking place. The criminal offence that they were discussing would involve some risk to members of the public. These very broad powers would come into play in relation potentially to that sort of political protest activity.*[134]

QLS further stated:

> *The application of that sort of legislation can really depend upon the imagination of a police officer who wants to apply it. It will now be drawn so broadly that it will apply to any place where people are meeting and where any sort of criminal activity is taking place. That could include quite minor things. There is the added element that it has to be a criminal activity which would pose some risk to the public, but it is often not difficult to suggest that minor criminal activity poses some risk. If it were students sharing small amounts of drugs between themselves, if it were people gambling illegally—because it interacts with the criminal law more generally as new offences are created—the powers under those provisions will be applicable to the new offences as well. It might be a failure of my imagination to come up with any more specific examples, but the risk in such broadly drawn legislation is that you just do not quite know where it might end up being applied and used in ways that it was never intended by the people who passed the legislation to be used.*[135]

In response to the concerns expressed by the QLS in its submission about clause 158, the department stated that the proposed definition of 'disorderly activity' is consistent with the intended purpose of the restricted premises scheme when it was introduced in 2016 and is also consistent with the current objectives of the PGBA.[136]

2.5 Succession and property legislation

The Bill proposes a number of amendments to clarify and streamline certain aspects of succession and property legislation.[137]

2.5.1 *Commercial Arbitration Act 2013*

Clause 26 of the Bill proposed to amend the *Commercial Arbitration Act 2013* (CA Act) to correct a minor technical drafting error identified in the Supreme Court decision of *Wilmar Sugar P/L v Burdekin District Cane Growers Ltd* (the Wilmar decision).[138] The amendment corresponds with recent amendments to the New South Wales and Northern Territory legislation.[139]

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133 Submission 6, p 5.

134 Public hearing transcript, Brisbane, 17 January 2020, p 2.

135 Public hearing transcript, Brisbane, 17 January 2020, p 3.

136 DJAG, correspondence dated 15 January 2020, attachment, p 12.

137 Hon Yvette D'Ath MP, Attorney-General and Minister for Justice, Queensland Parliament, record of proceedings, 28 November 2019, p 3951.

138 [2017] QSC 3; explanatory notes, p 15.

139 DJAG, correspondence dated 15 January 2020, attachment, p 8.

2.5.2 Property Law Act 1974

Currently, a trustee of the estate of a bankrupt under the *Bankruptcy Act 1966* (Cth), or a liquidator under the *Corporations Act 2001* (Cth), may disclaim 'onerous' property. The department explained that in the case of freehold land, this may occur when the land is subject to a registered mortgage and the debt secured by the mortgage exceeds the value of the property.[140]

The department advised that the effect of disclaimer is that the bankrupt or the company no longer has any interest in the land. Sometimes, disclaimer means that a mortgagee seeking to exercise a power of sale cannot comply with the requirements of section 84 (Regulation of the exercise of the power of sale) of the *Property Law Act 1974* (PLA) and must obtain a vesting order from the court in order to deal with the property. The State, through the Department of Natural Resources, Mines and Energy, is usually made a respondent to these court applications. This process results in costs to the State, the court and the mortgagee.[141]

The Bill (at clauses 176 to 182) proposes to amend the PLA and the Property Law Regulation 2013 to clarify that a mortgagee may exercise a power of sale following the disclaimer of freehold land by a trustee in bankruptcy or liquidator, without the need to apply for court orders under the *Bankruptcy Act 1966* (Cth) or the *Corporations Act 2001* (Cth).[142]

2.5.3 Succession Act 1981

The Bill, through clauses 202 to 206 and 208, would remove the requirement in the *Succession Act 1981* (Succession Act):

- to obtain the court's leave to apply for an order authorising a will to be made, altered or revoked on behalf of a person without testamentary capacity, and
- that the testator be alive when the Registrar executes a will or other instrument made pursuant to an order of the court.[143]

With respect to the latter proposed amendment, the department advised:

> *… The amendment will overcome situations where the testator dies before the will is properly executed, even though it was validly made or altered by a court while the person was alive. It is anticipated that such a scenario would only occur in very limited circumstances.*[144]

2.5.4 Stakeholder views and department response

2.5.4.1 Commercial Arbitration Act 2013

In regard to amendments to the CA Act, the QLS noted the proposed amendment to section 27H(1)(a) but submitted that section 27H(1)(b) also required further clarity, in reference to the Wilmar decision, on the use of the phrase, 'that purpose'. The QLS suggested alternative text for subparagraph (b).[145]

The department advised that, as national uniform legislation, QLS' suggestion for the clarification of 'that purpose' in section 27H(1)(b) would need to be considered separately to the Bill.[146]

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140 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 14.

141 DJAG, correspondence dated 9 December 2019, briefing note, attachment, pp 14-15.

142 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 15.

143 Explanatory notes, p 5; DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 16.

144 DJAG, correspondence dated 9 December 2019, briefing note, attachment, p 16.

145 Submission 6, p 3.

146 DJAG, correspondence dated 15 January 2020, attachment, p 8.

2.5.4.2 Property Law Act 1974

The QLS was broadly supportive of the proposed amendments to the PLA, but submitted that the drafting of subsections 84A(1) and (2) could be simplified and that the qualifying wording in (b) and (c) of each of these sections is unclear. The QLS suggested alternative drafting.[147]

In response, the department advised:

> *While the requirements in new section 84A(1)(b) and (c) are related, they are separate and distinct. Paragraph (b) ensures that the section will not apply if there is an application for a vesting order on foot. Paragraph (c) ensures the section will not apply if the property has already been subject to a vesting order to a party other than the mortgagee. Accordingly, it is appropriate that the requirements are kept separate and similarly for new section 84A(2)(c) and (d).*
>
> *Section 84A(1) relates to a disclaimer under the* Bankruptcy Act 1966 *(Cth). Section 84A(2) relates to a disclaimer under the* Corporations Act 2001 *(Cth). While the requirements are similar, it is appropriate that the different disclaimer processes be dealt with separately.*[148]

2.6 Miscellaneous provisions

The Bill proposes a number of miscellaneous amendments to Queensland statutes 'to streamline administrative processes, clarify various provisions and make amendments of a technical or drafting nature'.[149]

The Bill's provisions in relation to these Acts did not receive comment from stakeholders during the committee's inquiry into the Bill.

147 Submission 6, p 5.

148 DJAG, correspondence dated 15 January 2020, attachment, p 12.

149 Explanatory notes, p 5.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

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

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the Legislative Assembly.

3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the LSA requires that legislation has sufficient regard to the rights and liberties of individuals.

Clauses 59, 62, 72 and 158 of the Bill could be seen to raise issues of interference with or restriction on the general rights and liberties of individuals.

The amendments potentially engage the fundamental legislative principle in section 4(2)(a) of the LSA which requires legislation have sufficient regard to rights and liberties of individuals.

3.1.1.1 Clause 59 – amendment to Criminal Law (Rehabilitation of Offenders) Act 1986

Clause 59 would amend section 12 of the *Criminal Law (Rehabilitation of Offenders) Act 1986* to remove the current requirement that any prosecution under that Act must have the authorisation of the Minister. (This Act protects persons with spent convictions from being identified as convicted persons, by prohibiting the disclosure by any person of a conviction to another person where the rehabilitation period for that offence has expired.)

The current restriction could be seen as a safeguard on the otherwise unfettered right of any person to institute a prosecution for revealing the spent convictions of an individual. The explanatory notes give this justification:

> *The amendment will align Queensland with every other Australian jurisdiction with a spent conviction scheme …*
>
> *… The extent to which the fundamental legislative principle might be infringed is justified on the basis that the amendment will prevent prosecutions for the offence being unnecessarily delayed. The amendments will mean that prosecutions will be able to be initiated by either the Director of Public Prosecutions (DPP), the Queensland Police Service (QPS) or a private individual. Both the DPP and the QPS must make decisions to initiate or continue prosecutions in accordance with the DPP Guidelines which provide a transparent decision making process. Finally, the conduct of private prosecutions are safeguarded by section 10(1)(c)(ii) of the Director of Public Prosecutions Act 1984 (Qld) which provides that the DPP can take over any summary prosecution either upon the direction of the Minister or on the Director's own motion.*[150]

The committee is satisfied that any limitation on the rights and liberties of the individual is minor and that any breach of fundamental legislative principle is justified.

3.1.1.2 Clause 62 – amendment to Dangerous Prisoners (Sexual Offenders) Act 2003

Clause 62 proposes to amend the definition of 'prisoner' in section 5 of the DPSOA. The amendment aims to ensure that prisoners returned to custody due to a suspension of a parole order and those

[150] Explanatory notes, p 9.

serving periods of detention while being held in custody in a corrective services facility are within the reach of that Act.

The amendment in clause 62 potentially increases the number of prisoners who may be susceptible to an order under the DPSOA, allowing for the ongoing supervision or detention of a prisoner beyond their period of imprisonment. Any breach might be regarded as being aggravated by the fact that the provision will have some retrospective effect (considered below).

The explanatory notes describe the amendment as being to correct an anomaly, and state any breach of fundamental legislative principle is justified:

> *… on the basis that the legislation ensures the protection of Queensland's children and community from sexual offenders who have or may be determined to pose an unacceptable risk of committing a further serious sexual offence*.[151]

The committee is satisfied that any limitation on the rights and liberties of the individual is not great, and in any event justified by the aim of the principal Act to protect the community from certain sex offenders.

3.1.1.3 Clause 72 – amendment to the Drugs Misuse Act 1986

Clause 72 would amend sections 119 and 120 of the Drugs Misuse Act to, in the words of the explanatory notes:

> *… correct an anomaly in its operation with respect to authorising the disclosure of details pertaining to a drug informer in court proceedings solely for the purposes of prosecuting a person who unlawfully disclosed the identifying information about a drug informer*.[152]

The explanatory notes suggest that the amendment regarding informers might not have sufficient regard to the rights and liberties of individuals, as it better facilitates the ability to prosecute individuals for unlawfully disclosing information about a drug informer.

The explanatory notes state any breach of fundamental legislative principle is justified:

> *… on the basis that the legislation ensures the protection of persons who have provided assistance to police and prosecuting agencies from being identified for their safety and consequently provides benefits for the administration of justice.*[153]

The committee is satisfied that any disregard for the rights and liberties of the individual is slight, and in any event justified by the aim of the principal Act to protect informers.

3.1.1.4 Clause 158 - amendment to the Peace and Good Behaviour Act 1982

Clause 158 proposes to amend the definition of 'disorderly activity' in section 33 of the PGBA to add 'criminal activity at the premises that is likely to pose a risk to the safety of a member of the public'.

The amendment will extend the reach of the 'restricted premises' scheme under that Act. The amendment might be seen to limit the rights and liberties of individuals, as it expands the circumstances in which an order could be made that might restrict a person's freedom of movement and association.

The explanatory notes state any breach of fundamental legislative principle is justified:

> *… to ensure the existing scheme can effectively disrupt and deter the activities of criminals to protect the safety, welfare, security and peace and good order of the community. While the amendment expands the circumstances in which an order can be made, the potential breach is*

[151] Explanatory notes, p 10.

[152] Explanatory notes, p 10.

[153] Explanatory notes, p 10.

safeguarded by a requirement that a restricted premises order can only be made by a magistrate when it is appropriate to do so following consideration of various public safety imperatives.[154]

The committee is satisfied that any disregard for the rights and liberties of the individual is slight, and justified by the aim of the principal Act.

3.1.2 Administrative power

Section 4(3)(a) of the LSA requires that the rights, obligations and liberties of individuals should be dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.

3.1.2.1 Clause 28 – amendment to the Coroners Act 2003

Clause 28 inserts new section 11AA in the Coroners Act to provide for preliminary examinations. Section 11AA will allow for preliminary examinations to be conducted by certain doctors approved by the State Coroner for the purpose (an examiner), or a suitably qualified person under the general supervision of an examiner (such as a coronial nurse).

In providing for examinations to be conducted by persons other than a coroner, the new section could be seen to raise an issue of fundamental legislative principle in relation to the delegation of administrative power. The explanatory notes suggest this issue arises in this context because:

… the rights of family members or other interested persons may be engaged, for example where a person objects to the preliminary examination on the basis of religious beliefs.[155]

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.

Depending on the seriousness of a decision and its consequences, it is generally inappropriate to provide for administrative decision-making in legislation without providing for a review process. If individual rights and liberties are in jeopardy, a merits-based review is the most appropriate type of review.[156]

The explanatory notes state that the power is appropriately limited and defined in the following ways:

- *a person performing an examination must either be a doctor approved by the State Coroner, or a suitably qualified person acting under the supervision of an approved doctor;*
- *the purpose of any examination undertaken is to assist the coroner in performing his or her functions under the Act in respect of the death; and*
- *the types of preliminary examinations are specifically defined and exhaustively listed; and the doctor (including the doctor supervising a suitably qualified person) must wherever practicable consider, that in some cases a deceased person's family may be distressed by the examination, and any concerns raised by a family member, or another person with a sufficient interest.*[157]

As to the question of appropriate review:

Given the importance of the timeliness of preliminary examinations (for example, certain tests will only be viable if taken within a few days following the person's death), as well as the

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154 Explanatory notes, p 12.

155 Explanatory notes, p 7.

156 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 18.

157 Explanatory notes, p 7.

mirroring of the current provision in the Act in relation to considering family concerns before ordering internal autopsies (which will generally be more invasive than preliminary examinations), it is undesirable and unnecessary for the provision to be subject to a merits-based appeal. The amendment is therefore considered justified.[158]

In the circumstances, the committee is satisfied that any breach of fundamental legislative principle is justified.

3.1.3 Natural justice

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.[159] These principles include that justice be open and public.

3.1.3.1 Clause 51 – amendment to the Criminal Code

Clause 51 amends section 552BB of the Criminal Code, increasing the 'prescribed value' from $30,000 to $80,000. This has the effect of requiring a number of indictable offences relating to property to be dealt with summarily in a Magistrates Court under section 552BA (and thus not able to be tried before a jury).

Clause 51 raises an issue of natural justice in that it limits a right to trial by jury.

The explanatory notes state:

… the amendment is intended to promote the more expeditious disposal of charges and consequently provides benefits for the administration of justice.[160]

As mentioned in the explanatory notes, the Criminal Code already contains provisions which moderate the summary disposition of indictable offences, including:

- section 552D which provides that a magistrate must abstain from dealing with a matter in certain circumstances
- section 552J of the Criminal Code which provides that, if a person is summarily convicted or sentenced under section 552A, 552B or 552BA, the grounds on which the person may appeal include that the Magistrates Court erred by deciding the conviction or sentence summarily
- section 552H of the Criminal Code, under which magistrates generally only have jurisdiction to impose a maximum penalty of 3 years imprisonment for indictable offences.[161]

3.1.3.2 Clause 76 – amendment to the Evidence Act 1977

Clause 76 amends section 21AAA of the Evidence Act to extend the existing power of a court to order the exclusion of the public to a situation where a section 93A statement of an affected child or special witness is being presented.

In extending powers to 'close' a court, clause 76 raises an issue of natural justice which contemplates that judicial proceedings shall be conducted openly and publicly.

The explanatory notes state:

It is in the interests of justice that children and persons with an impairment of the mind are not discouraged from being witnesses. The amendment is consistent with existing provisions in the Evidence Act 1977 *allowing the courts to be closed in certain circumstances, including while pre-*

158 Explanatory notes, p 7.

159 *Legislative Standards Act 1992*, section 4(3)(b).

160 Explanatory notes, p 8.

161 Explanatory notes, p 8.

> *recorded evidence is being presented. Further, the amendment contains a safeguard by limiting the court's power to exclude the public to non-essential persons. The ability to exclude the public in this circumstance addresses a current anomaly and offers another level of protection to vulnerable witnesses. In doing so, the amendment is consistent with the rationale underpinning the existing exception to the open justice principle and is justified on the same basis.*[162]

In the circumstances, the committee is satisfied that the breaches of fundamental legislative principle in clauses 51 and 76 are justified.

3.1.4 Delegation of administrative power

Section 4(3)(c) of the LSA requires that legislation allows for the delegation of administrative power only in appropriate cases and to appropriate persons.

Powers should be delegated only to appropriately qualified officers or employees.[163]

The appropriateness of a limitation on delegation depends on all the circumstances including the nature of the power, its consequences and whether its use appears to require particular expertise or experience.[164]

3.1.4.1 Clause 36 – amendment to the Coroners Act 2003

Clause 36 amends section 86 of the Coroners Act to allow the State Coroner to delegate to a registrar the power to provide consent under the *Transplantation and Anatomy Act 1979* for removal of organ and tissue. The Bill also provides that the State Coroner may delegate to a registrar the power to require a person to give information relevant to an investigation of a death.

The explanatory notes state:

> *The registrar is appointed by the Governor in Council and the powers proposed for delegation are clearly defined, limited, and consistent with the role of the registrar. Allowing for the discretion for the State Coroner to delegate certain powers in the circumstances described above is considered justified to allow for the efficient operation of the Coroners Court of Queensland.*[165]

3.1.4.2 Clause 101 – amendment of the Land Court Act 2000

Clause 101 amends section 50 of the Land Court Act to allow the registrar of the Land Court to delegate the registrar's functions or powers under that Act.

The explanatory notes state:

> *… this amendment is appropriate as it requires the delegate to be an appropriately qualified officer of the Land Court.*[166]

Additionally, it can be noted that the section requires any delegation to have the approval of the president of the Land Court.

3.1.4.3 Clause 156 – amendment of the Ombudsman Act 2001

Clause 156 amends section 86 of the Ombudsman Act to allow the Ombudsman to delegate a decision about a human rights complaint under section 66 of the *Human Rights Act 2019*.

The amendment was included in the Bill at the request of the Ombudsman.

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[162] Explanatory notes, pp 10-11.

[163] The *Acts Interpretation Act 1954*, section 27A contains extensive provisions dealing with delegations.

[164] Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 33.

[165] Explanatory notes, p 8.

[166] Explanatory notes, p 11.

The explanatory notes state that:

> *… this amendment is appropriate in the circumstances as it requires the delegate to be appropriately qualified. The amendment is also consistent with the delegation of equivalent decisions by the other relevant referral entities such as the Crime and Corruption Commission and the Health Ombudsman.*[167]

Additionally, it can be noted that the section currently already permits delegation of powers under the Ombudsman Act. The amendment extends this existing power of delegation to powers under the Human Rights Act.

3.1.4.4 Conclusion – clauses 36, 101 and 156

In the circumstances, regarding each of these various delegations, the committee is satisfied that the breach of fundamental legislative principle is justified.

3.1.5 Protection against self-incrimination

Clause 41 amends the Coroners Act to apply that Act to all deaths, so as to allow for new or re-opened inquests to be held under that Act for deaths that pre-date the commencement of that Act.

Unlike the 1958 Act, the Coroners Act includes a power to compel a witness at an inquest to give self-incriminating evidence.

Clause 41 inserts section 100D which provides that the clause 41 amendments will have effect despite any right or privilege acquired by, or accrued to, a person under the repealed Act.

Section 100(2) aims to remove any doubt, by declaring that the Coroners Act will apply in relation to a person giving evidence at an inquest reopened under the amendments effected by clause 41, even if that person has claimed the privilege against self-incrimination or incrimination of the person's spouse under the repealed Act.

These amendments invoke a consideration of two aspects of the fundamental legislative principles:

- whether legislation has sufficient regard to the rights and liberties of the individual depends on whether, for example, it provides appropriate protection against self-incrimination[168]
- additionally, whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect the rights and liberties, or impose obligations retrospectively.

The principle that legislation should provide appropriate protection against self-incrimination:

> *… has as its source the long established and strong principle of common law that an individual accused of a criminal offence should not be obliged to incriminate himself or herself.*[169]
>
> *Provisions denying the privilege [against self-incrimination] are rarely essential to the operation of legislation, although there is a perception that they are essential.*[170]

Denial of the protection afforded by the privilege against self-incrimination is only potentially justifiable if:

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167 Explanatory notes, p 11.

168 *Legislative Standards Act 1992*, s 4(3)(f).

169 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 52.

170 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles:* The *OQPC Notebook*, p 52.

- the questions posed concern matters that are peculiarly within the knowledge of the persons to whom they are directed and that would be difficult or impossible to establish by any alternative evidential means
- the legislation prohibits use of the information obtained in prosecutions against the person
- in order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming a right).[171]

In support of the abrogation of the right against self-incrimination, the explanatory notes state:

> *Abrogating the privilege against self-incrimination is necessary to help a coroner find out what actually happened to cause a death which supports the coroner making recommendations or comments to prevent similar deaths happening in the future. Appropriate safeguards are included. The coroner may not require a person to give evidence that may incriminate them unless satisfied it is in the public interest. Further, evidence given is not admissible against a person in any criminal proceeding, with the exception of perjury. Derivative evidence is also not admissible against the person.*[172]

The explanatory notes state the potential use of coercive powers in new or re-opened inquests for deaths that occurred prior to the commencement of the Coroners Act is justified:

> *… to ensure the hard core of remaining cases under the repealed Act that have not received the benefit of the new coronial regime, and in which ordinary police investigative powers have been exhausted, can be dealt with consistent with the objects of the current Act and in line with community expectations.*[173]

The committee is satisfied the abrogation of the privilege against self-incrimination, with retrospective effect, is justified.

3.1.6 Retrospective rights and liberties

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect the rights and liberties, or impose obligations retrospectively.[174]

3.1.6.1 Clause 55 – amendment to the Criminal Code

Clause 55 impacts on the operation of clause 49. Clause 49 amends section 359E(4) of the Criminal Code, which deals with an aggravated circumstance of the offence of unlawful stalking. That provision currently reads:

> *Also, a person is liable to a maximum penalty of imprisonment for 10 years if any of the acts constituting the unlawful stalking are done when or because the officer is investigating the activities of a criminal organisation.*

Clause 49 replaces the phrase 'the officer is' with the phrase 'the stalked person is a law enforcement officer'. According to the explanatory notes, this amendment is to correct a drafting error.[175] (As section 359E currently reads, the phrase 'the officer' has what might be termed orphan status, unable to be related back to any previous use of the word 'officer'. Additionally, there is no link to a stalked person.)

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171 Scrutiny of Legislation Committee, *Alert Digest* 1 of 2000, p 7, para 57; *Alert Digest* 13 of 1999, p 31; and *Alert Digest* 4 of 1999, p 9, para 1.60.

172 Explanatory notes, p 6.

173 Explanatory notes, p 7.

174 *Legislative Standards Act 1992*, s 4(3)(g).

175 Explanatory notes, p 8.

Clause 55 inserts a transitional provision (section 752) in the Criminal Code to provide that section 359E(4) as amended by the Bill will apply to a crime of unlawful stalking 'whether any of the acts constituting the unlawful stalking have been done before or after the commencement.'

Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.

There is a common law presumption against retrospectivity. In a criminal context, the principle against retrospectivity is reflected in two statutory provisions:

- section 11 of the Criminal Code provides that a person cannot be punished for doing or omitting to do an act unless the act or omission constituted an offence under the law in force when it occurred; nor unless doing or omitting to do the act under the same circumstances would constitute an offence under the law in force at the time when the person is charged with the offence
- section 11(2) is relevant regarding penalties. It provides that if the law in force when the act or omission occurred differs from that in force at the time of the conviction, the offender cannot be punished to any greater extent than was authorised by the former law, or to any greater extent than is authorised by the latter law
- section 20C(2) of the *Acts Interpretation Act 1954* (Acts Interpretation Act) states that if an Act makes an act or omission an offence, the act or omission is only an offence if committed after the Act commences
- section 20C(3) of the Acts Interpretation Act is relevant regarding penalties. It provides that if an Act increases the maximum or minimum penalty, or the penalty, for an offence, the increase applies only to an offence committed after the Act commences.

It can be noted that the human rights set out in the Human Rights Act include:

> *Section 35 Retrospective criminal laws*
>
> *(1) A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.*
>
> *(2) A penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed.*
>
> *(3) If a penalty for an offence is reduced after a person committed the offence but before the person is sentenced for the offence, the person is eligible for the reduced penalty.*
>
> *(4) Nothing in this section affects the trial or punishment of any person for any act or omission that was a criminal offence under international law at the time it was done or omitted to be done.*

Here, it can be noted that proposed section 752(2) expressly displaces the operation of section 11(2) of the Criminal Code and section 20C(3) of the Acts Interpretation Act.

The explanatory notes state:

> *The circumstance of aggravation is narrow in application and applies only to those persons who unlawfully stalk a law enforcement officer when or because they are investigating the activities of a criminal organisation. A transitional provision is included to ensure that the intended scope of the offence applies to acts or omissions that occur before or after commencement of the amendment which arguably has the potential to impact the applicable penalty for criminal offending retrospectively. While the amendment is considered to merely clarify the existing circumstance of aggravation, any potential infringement of the fundamental legislative principles is justified to ensure the intended operation of the provision, by ensuring law enforcement officers can effectively investigate the activities of criminal organisations safe in the*

knowledge that a sufficiently deterrent penalty applies to those who would unlawfully stalk them.[176]

Three observations can be made regarding this extract:

- It is beyond 'arguable' that the amendment has the potential to impact the applicable penalty for criminal offending retrospectively. It clearly has such potential.
- It is debateable whether the amendment 'merely clarifies' the existing circumstance of aggravation.
- It can be accepted that the amendment ensures the intended operation of the provision in respect of law officers. However, it can achieve that aim without being given retrospective effect.

The committee accepts that the amendment is appropriate and corrects a drafting error. The committee is satisfied that the proposed amendment, which features an adverse retrospective operation, is sufficiently justified.

3.1.6.2 Clause 65 – amendment to the Dangerous Prisoners (Sexual Offenders) Act 2003

Clause 65 inserts transitional provisions (sections 70 and 71) in the DPSOA to give retrospective effect to the amendment proposed at clause 62, to apply to applications and orders made before the commencement of the amendment.

The committee refers to the exposition on retrospectivity above.

In the present context, the explanatory notes state:

The retrospective effect of the amendments to the DPSOA ensures its continued application to certain prisoners, in particular, those who have been returned to custody on parole suspensions and those serving periods of detention while being held in custody in a corrective services facility.[177]

The committee is satisfied that any limitation on the rights and liberties of the individual from this retrospective operation is not great, and in any event justified by the aim of the principal Act to protect the community from certain sex offenders.

3.1.7 Immunity from proceedings

Clause 20 extends the reach of an existing immunity provision. Section 77 of the CPA currently provides immunity to assessors. Clause 20 amends section 77 to extend the immunity to costs assessors and account assessors.

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.[178]

A person who commits a wrong when acting without authority should not be granted immunity. Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees. The preferred provision provides

[176] Explanatory notes, p 8.

[177] Explanatory notes, p 8.

[178] *Legislative Standards Act 1992*, s 4(3)(h).

> *immunity for action done honestly and without negligence … and if liability is removed it is usually shifted to the State.*[179]

One of the fundamental principles of law is that everyone is equal before the law, and each person should therefore be fully liable for their acts or omissions. However, conferral of immunity is appropriate in certain situations.[180] One such situation relates to persons acting judicially.

The explanatory notes refer to this 'exception' and state:

> *It is generally accepted that persons acting judicially and as part of the judicial process should be free from personal attack on the basis of illegal or negligent action when performing their roles or appearing as a party or witness in a hearing.*[181]

The explanatory notes give this justification for the extension of immunity in clause 20:

> *The proposed protection and immunity will ensure that assessors can act with appropriate confidence. The role of assessor would be difficult to carry out if the assessor could be the subject of allegations and litigation against them personally in relation to their actions in office.*
>
> *Given the nature of the role of assessors, their actions and decisions are subject to the supervision of the court. Across the statute book, there are other examples where similar immunity is provided including to adjudicators, mediators and other categories of assessors.*[182]

The committee is satisfied that the extension of the immunity to assessors is warranted and the breach of fundamental legislative principle is justified.

3.2 Explanatory notes

Part 4 of the LSA requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

Some criticisms can be made regarding the section dealing with consistency with the fundamental legislative principles. The explanatory notes would more readily assist those considering the Bill if the specific provision in the Bill was referenced when the explanatory notes are considering the issues of inconsistency with the fundamental legislative principles. This is particularly so in this case, given the 'omnibus' nature of the Bill.

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179 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 64.

180 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles*: *The OQPC Notebook*, p 64.

181 Explanatory notes, p 6.

182 Explanatory notes, p 6.

Appendix A – Submitters

Sub #	Submitter
001	Queensland Ombudsman
002	Queensland Human Rights Commission
003	Caxton Legal Centre
003A	Caxton Legal Centre
004	Bar Association of Queensland
005	Queenslanders with Disability Network
006	Queensland Law Society

Appendix B – Officials at public departmental briefing

Department of Justice and Attorney-General

- Ms Leanne Robertson, Assistant Director-General, Strategic Policy and Legal Services
- Ms Imelda Bradley, Director, Strategic Policy and Legal Services
- Ms Sarah Kay, Director, Strategic Policy and Legal Services
- Ms Julie Rylko, Director, Strategic Policy and Legal Services
- Ms Kim Chandler, Director, Strategic Policy and Legal Services
- Ms Jane Flower, Acting Principal Legal Officer, Strategic Policy and Legal Services

Appendix C – Witnesses at public hearing

Queensland Law Society

- Luke Murphy, QLS President
- Ken Mackenzie, Deputy Chair Criminal Law Committee
- Andrew Shute, Chair Litigation Rules Committee

Queensland Human Rights Commission

- Neroli Holmes, Acting Queensland Human Rights Commissioner
- Julie Ball, Principal Lawyer

Statement of Reservation

The LNP members of the Committee are generally supportive of the Bill.

However, members are concerned about the implications this Bill will have on the hearing and potential sentencing of offenders for indictable property offences. As outlined in the Bill, clause 51 proposes to expand the summary disposition of indicatable offences relating to property by increasing prescribed value under s552BB from $30,000 to $80,000.

The impact this will have on the underfunded and overburdened Magistrates Court will likely be significant. This is certainly the view of the Bar Association of Queensland who expressed in their submission, 'the proposed change in jurisdictional limits will almost certainly impose a significantly greater burden on magistrates, who will be obliged to preside over long and complicated trials'.

The current law appropriately acknowledges the value of property owned by law abiding and hardworking Queenslanders. Amending the law as proposed may result in significant consequences.

James Lister MP
Deputy Chair
Member for Southern Downs

James (Jim) McDonald MP
Member for Lockyer