

Principles of good legislation: OQPC guide to FLPs



Retrospectivity

Office of the Queensland Parliamentary Counsel



Retrospectivity

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Summary

Consider whether legislation operates in relation to facts or events that happened before the Bill is given assent. Retrospective legislation may interfere with the rights and liberties of an individual under section 4(3)(g) of the Legislative Standards Act 1992 and if it has an adverse affect on rights and liberties, or imposes obligations, then a strong argument is required to justify that impact. However, retrospective legislation may be justified if it is beneficial, curative or validating in nature.

The common law presumption against retrospectivity

This fundamental legislative principle reflects the common law presumption that Parliament intends legislation to operate prospectively rather than retrospectively (see paragraphs [\[2\]](#)-[\[25\]](#)).

The presumption can be displaced if the legislation expressly states that it is intended to apply retrospectively or if that intention is clearly implied in the words of the statute (see paragraphs [\[26\]](#)-[\[31\]](#)). The presumption is also displaced or at least weakened if the legislation can be characterised as declaratory, validating or procedural (see paragraphs [\[32\]](#)-[\[43\]](#)).

In Queensland, the common law presumption is reinforced by provisions in the [Acts Interpretation Act 1954](#) (see [\[44\]](#)) and the [Statutory Instruments Act 1992](#), section 32 (see paragraphs [\[45\]](#)-[\[46\]](#)).

Issues considered by Parliamentary committees

Parliamentary committees generally consider it undesirable that legislation be drafted to apply retrospectively, particularly if retrospective operation may affect:

- an individual's liability to be investigated for misconduct (see paragraphs [\[62\]](#)-[\[64\]](#)); or
- an individual's liability to be prosecuted (see paragraph [\[65\]](#)); or
- an individual's criminal (see [\[66\]](#)-[\[72\]](#)) or civil (see paragraphs [\[83\]](#)-[\[88\]](#)) liability.

However, Parliamentary committees have on some occasions recognised that the imposition of retrospective liability may be justified, for example, in matters of child protection (see paragraphs [\[73\]](#)-[\[78\]](#)).

Parliamentary committees do not usually object to legislation operating retrospectively if the legislation is generally beneficial and only the State will suffer disadvantage: see [\[89\]](#)-[\[97\]](#). Similarly, Parliamentary committee do not usually object to retrospective legislation that:

- cures a defect, such as inadvertent expiry of legislation (see [\[100\]](#) or fixes errors (see paragraphs [\[101\]](#)-[\[104\]](#)); or



- removes uncertainty either from the general law or legislation (see paragraphs [\[105\]](#)-[\[115\]](#)); or
- validates particular past actions in a manner that does not adversely affect accrued rights or interests (see paragraphs [\[122\]](#)-[\[134\]](#)); or
- is necessary for the continuing administration of amended legislation (see paragraphs [\[135\]](#)-[\[139\]](#)).

Parliamentary committees have expressed reservation about attempts to rely on previous announcements of proposed policy to justify retrospectivity (see paragraphs [\[116\]](#)-[\[121\]](#)).

The information contained in this chapter is current as at 19 June 2013.



Introduction

- [1] Section 4(3)(g) of the [Legislative Standards Act 1992](#) provides that legislation should not adversely affect rights and liberties, or impose obligations, retrospectively.

The presumption against retrospectivity

General principles

- [2] This fundamental legislative principle follows the presumption at common law that, unless the contrary intention appears, Parliament intends legislation to operate prospectively and not retrospectively.
- [3] Simply expressed, the essential idea is that the law looks forwards not backwards.¹ As the former Scrutiny of Legislation Committee (the ***Scrutiny Committee***) observed:

The principle *nova constitutio [sic] futuris formam imponere debet, non praeteritis* (a new law ought to be prospective, not retrospective, in its operation) is ancient in origin, and can be traced to Roman law. At common law it was regarded to be unfair to prosecute a person tomorrow for something that was lawful today (*Phillips v Eyre* (1868) LR 6 QB 1 at 23). This principle is also reflected in Article 15 of the [International Covenant on Civil and Political Rights].²

- [4] At common law, the general presumption is a rule of construction applied by the courts in the interpretation of legislation. It ‘fits in with the general approach adopted by the courts of limiting the statutory invasion of established rights’.³
- [5] A well known statement of the presumption against retrospectivity was articulated in *Maxwell on the Interpretation of Statutes*:

It is a fundamental rule of English law that no statute shall be construed to have a retrospective operation unless such a construction appears very clearly in the terms of the Act, or arises by necessary and distinct implication.⁴

- [6] However, this statement has been criticised for being ‘too dogmatically framed’ and for purporting to describe as a rule something that is ‘really no more than a presumption which, in a particular case, may be outweighed by other factors.’⁵

¹ *Lex prospicit non respicit*—Jenk. Cent. 284

² [LA 2009 No 11 p 26 para 112](#)

³ Pearce & Geddes *Statutory Interpretation in Australia* (LexisNexis Butterworths, 7th Ed, 2011) p 327 (‘Pearce & Geddes (2011)’)

⁴ P St. J Langan *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 12th Ed, 1969) p 215 (‘Langan (1969)’)



- [7] The leading case on the issue of retrospectivity in Australia is [Maxwell v Murphy](#) where Dixon CJ, in discussing the rules of construction, summarised the presumption applied at common law as follows:

The general rule of the common law is that a statute changing the law ought not, unless the intention appears with reasonable certainty, to be understood as applying to facts or events that have already occurred in such a way as to confer or impose or otherwise affect rights or liabilities which the law had defined by reference to the past events.⁶

- [8] However, it is interesting to note that in a relatively recent discussion of the presumption against retrospectivity in the Queensland Court of Appeal in [R v GT](#), Atkinson J indicated that the test expressed in *Maxwell v Murphy* may now be stricter:

The rule against retrospectively taking away a right or imposing a liability is a basic human right imposed or at least recognised by the common law. In my view, given the greater recognition given to human rights by both international and national law over the past fifty years, “reasonable certainty” may no longer be considered a sufficiently clear statement of the test. The presumption against retrospectivity can only be displaced in legislation by express provision or words of plain intendment.⁷

- [9] Her Honour continued:

If there is any ambiguity about the construction, the interpretation should be favoured which avoids retrospective operation of the statute. In *In re Athlumney; Ex parte Wilson*, Wright J said:

“Perhaps no rule of construction is more firmly established than this—that a retrospective operation is not to be given to a statute so as to impair an existing right or obligation, otherwise than as regards matters of procedure, unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.”⁸

International obligations

- [10] Australia has ratified the [International Covenant on Civil and Political Rights](#) (the *ICCPR*), which prohibits retrospective criminal laws in [Article 15](#):

No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when

⁵ F A R Bennion *Bennion on Statutory Interpretation* (LexisNexis, 5th Ed, 2008) p 317 (“Bennion (2008)”).

⁶ *Maxwell v Murphy* [1957] HCA 7 at [7]; (1957) 96 CLR 261 at 267; the Scrutiny Committee cited this particular passage in its consideration of the [Weapons Amendment Bill 2011](#) in [LA 2011 No 06 p 28 para 45](#).

⁷ [2005] QCA 478 at [27]

⁸ [2005] QCA 478 at [28] (citations omitted)



it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby.

Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations.

- [11] This is a prohibition on retrospective criminal laws but there is no corresponding prohibition in the ICCPR on retrospective non-criminal laws. Australian domestic law permits retrospective criminal legislation in certain circumstances, but such legislation is rare, and criminal laws are presumed not to have retrospective operation.⁹

Legislative recognition of principle against retrospective criminal laws

- [12] Victoria's *Charter of Human Rights and Responsibilities Act 2006* and the Australian Capital Territory's *Human Rights Act 2004* include provisions about retrospective criminal laws that are similar to Article 15 of the ICCPR.
- [13] The *Charter of Human Rights and Responsibilities Act 2006* (Vic) provides:

27 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 that offence, that 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 which was a criminal offence under international law at the time it was done or omitted to be done.

The *Human Rights Act 2004* (ACT) provides:

25 Retrospective criminal laws

- (1) No-one may be held guilty of a criminal offence because of conduct that was not a criminal offence under Territory law when it was engaged in.
- (2) A penalty may not be imposed on anyone for a criminal offence that is heavier than the penalty that applied to the offence when it was committed. If the penalty

⁹ *The Laws of Australia: 'Human rights: Justice: Retrospectivity'* (Thomson Reuters) at [21.6.440]



for an offence is reduced after anyone commits the offence, he or she benefits from the reduced penalty.

Meaning of retrospectivity

- [14] There has been comprehensive discussion of the meaning of retrospectivity at an academic level. The author of one text has asserted that there is no agreed definition of retrospectivity and that retrospectivity is a matter of degree:¹⁰

Whether a law is retrospective is not a simple matter of timing. Rather, retrospectivity will be a matter of degree, and will depend on how the actions and events occurring before the enactment of the new law relate to those occurring afterwards.¹¹

- [15] The High Court has also commented, when it considered whether provisions of the *Integrated Planning and Other Legislation Amendment Act 2004* operated retrospectively, that the word ‘retrospectivity’ is not always used with a constant meaning.¹²

- [16] The authors of *Statutory Interpretation in Australia* have put it succinctly as follows:

All legislation impinges on existing rights and obligations. Conduct that could formerly be engaged in will have to be modified to fit in with the new law. [...] It cannot therefore be said that in this sense legislation is retrospective because this is true of all legislation. Legislation only operates retrospectively if it provides that rights and obligations are changed with effect prior to the commencement of the legislation. The statement of the law advanced by Dixon J in *Maxwell v Murphy* in referring to ‘rights or liabilities which the law had defined by reference to the past events’ confirms this view.¹³

Deciding whether a statutory provision is retrospective

- [17] Before a court applies the presumption against retrospective operation it must be satisfied that the statute is in fact retrospective.¹⁴
- [18] However, whether a statutory provision is in fact retrospective can often be difficult to decide. For example, there may be difficulties if the provisions of a Bill apply to an event that comprises several components, some of which happened before the Bill’s commencement and some after.

¹⁰ C Sampford *Retrospectivity and the Rule of Law* (Oxford University Press, 1st Ed, 2006) p 9 (‘Sampford (2006)’)

¹¹ Sampford (2006) p 29

¹² *Chang v Laidley Shire Council* [2007] HCA 37 at [111]; (2007) 234 CLR 1 at 32

¹³ Pearce & Geddes (2011) pp 323-324

¹⁴ Langan (1969) p 216



- [19] The author of one text has suggested that for deciding whether an enactment that relates to events occurring over a period is retrospective, '[l]ittle guidance can be given beyond saying that it is necessary to look at the substance of the matter [...]. The problem ought never to arise, because the drafter should have included transitional provisions that make clear the intention.'¹⁵ The same author has even stated:

... [i]t is the duty of the drafter to supply appropriate transitional provisions so as to make clear whether, and if so to what extent, the enactment has a retrospective effect.¹⁶

Future operation of legislation based on past conduct or events

- [20] A statutory provision is not retrospective simply because it relies on conduct or events that happened before the provision existed.

- [21] The point has been made clearly as follows:

It is important to grasp the true nature of objectionable retrospectivity, which is that the legal effect of an act or omission is retroactively altered by a later change in the law. However the mere fact that a change is operative with regard to past events does not mean that it is objectionably retrospective. Changes relating to the past are objectionable only if they alter the legal nature of a past act or omission in itself. A change in the law is not objectionable merely because it takes note that a past event has happened, and bases new legal consequences upon it.¹⁷

- [22] On occasion, the Scrutiny Committee commented on the distinction drawn by the courts between legislation having a prior effect on past events and legislation basing future action on past events. In examining the [Transport Operations \(Road Use Management-Interlocks\) Amendment Bill 2009 \(P\)](#)¹⁸, the Scrutiny Committee quoted the following passage from the decision of the Full Court of the Supreme Court of Victoria in *Robertson v City of Nunawading*:

... [the] principle is not concerned with the case where the enactment under consideration merely takes account of antecedent facts and circumstances as a basis for what it prescribes for the future, and it does no more than that.¹⁹

¹⁵ Bennion (2008) p 323

¹⁶ Bennion (2008) p 325

¹⁷ Bennion (2008) p 317

¹⁸ '(P)' indicates that the Bill is a Private Member's Bill.

¹⁹ *Robertson v City of Nunawading* [1973] VR 819 and 824, quoted in [LA 2009 No 12 p 25 para 22](#)



Power of parliament to legislate retrospectively

- [23] The presumption against retrospectivity in no way limits the sovereignty of Parliament to legislate retrospectively if it wishes to do so. By contrast, the United States Constitution expressly prohibits the passing of *ex post facto* laws (i.e. retrospective laws).²⁰
- [24] The distinction between the capacity of legislatures in Australia and the United States to legislate retrospectively was discussed in *R v Kidman*.²¹ In that case the High Court upheld the validity of the retrospective operation of provisions of the *Crimes Act 1915* (Cwlth) in circumstances where it had been contended that the Commonwealth Parliament did not have constitutional power to enact retrospective criminal laws. Isaacs J observed:

There is no prohibition in the Australian Constitution against passing *ex post facto* laws, as there is in the American Constitution, both as to the States and the United States. The prohibition to the United States apparently assumes that Congress would otherwise have had the power. Therefore, in my opinion, no distinction can be validly drawn between *ex post facto* laws—regarding them as criminal only—and any other kind of retroactive laws.²²

- [25] The Queensland Parliament's sovereignty to legislate as it wishes was alluded to in the case of *A-G (Qld) v Fardon*.²³ Although this case was not specifically about the issue of retrospectivity—the issue before the Queensland Court of Appeal essentially concerned whether the Queensland Parliament had power to enact the *Dangerous Prisoners (Sexual Offenders) Act 2003*—de Jersey CJ made the following observation:

The Queensland Parliament has complete power to make laws “for the peace welfare and good government” of the State (s 2 *Constitution Act* 1867), subject only to the Commonwealth Constitution and territorial limitation. Such laws may adversely affect the interests and rights of persons, whether prospectively or retrospectively (*McCawley v R* (1918) 26 CLR 9, 54-5, *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 533-40).²⁴

Displacement of the presumption against retrospectivity

- [26] The presumption against retrospectivity can only be displaced in legislation by express provision or words of plain intendment.

Express provision

- [27] The presumption against retrospectivity can be displaced by an Act which contains an express commencement provision by which the Act comes into operation on a prior date. For instance, an Act could contain a provision that the Act, in whole or part:

²⁰ Article I, sections 9(3) and 10

²¹ [1915] HCA 58; (1915) 20 CLR 425

²² [1915] HCA 58 per Isaacs J; (1915) 20 CLR 425 at 442-3

²³ [2003] QCA 416

²⁴ [2003] QCA 416 at [20]



- (a) is deemed to come into operation on a specific prior date; or
- (b) is deemed to come into operation by reference to a prior date determined, but not specified, in the Act (for example, by reference to the commencement of another Act).²⁵

[28] The Scrutiny Committee commented, in relation to an express provision, that:

... the presumption against retrospectivity has no room for operation where an Act is deemed to come into operation on a date earlier than when it is made. In such a case, it is clear that the Parliament's intention is that the legislation is to operate retrospectively. The Act will, therefore, affect rights and obligations in existence on and after the deemed date of commencement, even though the law at the time was in different terms.²⁶

Necessary implication or intendment

[29] A court will consider the presumption against retrospectivity as being displaced if it can discern a necessary implication or intendment that the Act is to have retrospective effect.²⁷

[30] As to the meaning of 'necessary intendment', the High Court's decision in [Worrell v Commercial Banking Co of Sydney](#) is frequently cited. In that case, the joint judgment of the Court (Barton, Isaacs and Rich JJ) stated:

Necessary intendment only means that the force of the language in its surroundings carries such strength of impression in one direction, that to entertain the opposite view appears wholly unreasonable.²⁸

[31] It is submitted that under current legislative drafting practice, it would be preferable to avoid reliance on an implication of the retrospective operation of legislation being construed from the language of the Act in favour of an express statement.

Retrospectivity in relation to particular classes of Acts or provisions

[32] In addition to the displacement of the presumption by express provision or necessary intendment, there are particular classes of Acts or provisions that may be considered as exceptions to the presumption against retrospectivity. They are:

- (a) declaratory Acts or provisions; and
- (b) validating Acts or provisions; and

²⁵ A I MacAdam & T M Smith *Statutes: rules and examples*, (Butterworths, 3rd Ed, 1993) pp 127-128 ('MacAdam & Smith (1993)')

²⁶ [AD 2008 No 9 p 28 para 19](#)

²⁷ Pearce & Geddes (2011) p 330

²⁸ [\[1917\] HCA 67](#); (1917) 24 CLR 28 at 32



(c) procedural Acts or provisions.

Declaratory Acts or provisions

- [33] An Act or provision that declares the meaning of earlier Acts or provisions may be regarded by the courts as forming an exception to the presumption against retrospectivity.²⁹ A declaratory Act or provision does not change the pre-existing law—it simply makes its meaning clearer. These Acts or provisions ‘are extremely rare as most amending Acts do change the law in some way’.³⁰
- [34] A useful illustration of a declaratory Act is contained in the case of *Re Gardiner*.³¹ The case involved a question whether litigation costs relating to a deceased estate could be deducted from the value of the estate for the purposes of calculating the succession duty payable by the estate. An Act passed in 1929 had used the words ‘testamentary expenses’ but contained no definition of those words. The 1929 Act was amended in 1934 by the insertion of a definition of ‘testamentary expenses’ that effectively excluded litigation costs as a deduction. Cleland J held that the 1934 amendment simply explained the earlier Act and had relation back to the time when the 1929 Act was passed and that the presumption against construing retrospectively did not apply.
- [35] This exception is to be distinguished from a declaratory provision that is not intended to be simply a declaration of the meaning of pre-existing law.

Validating Acts or provisions

- [36] A validating Act or provision is intended to overcome an invalidity arising under the pre-existing law—in essence, to make legal that which was illegal or to make illegal that which was legal. Such Acts or provisions must operate retrospectively and by their very nature rebut the presumption against retrospectivity.³²
- [37] *Taylor v Anstis* provides an example of the operation of a validating Act.³³ In that case, an Act to establish an egg marketing board had been ruled invalid by the Supreme Court of Victoria on 19 September 1939. A new validating Act came into force on 9 October 1939 and on 19 October 1939 the defendant egg producer was charged with failing to furnish a return to the board in response to a notice that the board had given him on 31 July 1939. The Court held that the new validating Act had the effect of retrospectively making the failure to furnish the return an offence even though it was not an offence when the omission occurred. Mann CJ dealt with the issue as follows:

The question is whether the validating Act has the effect of retrospectively making that failure to furnish a return an offence and now punishable as such, though it was not an

²⁹ Pearce & Geddes (2011) p 331-332

³⁰ MacAdam & Smith (1993) p 129

³¹ [1938] SASR 6

³² Pearce & Geddes (2011) p 332

³³ [1940] VLR 300



offence when the omission occurred. It is unnecessary to stress once more the strength of the presumption against an interpretation of any Act of Parliament which would lead to such a result if any other reasonable effect can be given to the language of the Act. The words of the relevant portion (section 3) of Act No. 4658 are, 'It is hereby declared that the body known as The Egg and Egg Pulp Marketing Board is and has always been validly constituted under the Principal Act and that the appointment of the said board and any elections of members thereof are and always have been valid'. ...

To put the matter more specifically it is impossible for me now to declare that the defendant committed no offence, because, when he failed to obey the notice of the Board, there was no validly constituted Board, without contradicting the declaration of the Legislature.³⁴

- [38] There have been a number of cases that have considered the issue of the operation of a validating Act in relation to pending proceedings.³⁵ Questions have arisen, for instance, as to what effect an Act that alters the rights of parties, by taking away or conferring a right of action, has on pending actions if it is not expressly applied to those pending actions. It has been suggested that it 'would seem desirable for validating Acts to make clear their application to both past and current legal proceedings'.³⁶

Procedural Acts or provisions

- [39] The presumption against retrospectivity does not apply to an Act or provision that is concerned only with procedure and does not retrospectively impact a substantive right.
- [40] *Rodway v R* is one of several cases that have considered statutes dealing with matters of procedure only. The High Court was asked to determine whether the ruling of a trial judge gave retrospective effect to provisions of an amending Act contrary to both common law principle and section 16(1) of the *Acts Interpretation Act 1931* (Tas).³⁷ The appellant had been convicted of charges of defilement of a girl under 17 years and indecent assault of a female. During the period when the offences were alleged to have been committed, defilement was an offence under section 124(1) of the *Criminal Code* (Tas) and indecent assault of a female was an offence under section 127 of the Code. Those provisions were contained in Chapter XIV of the Code. During that period, section 136(1), also in Chapter XIV, provided:

No person shall be convicted of any crime under the provisions of any of the foregoing sections of this chapter, or of an attempt to commit the same, on the evidence of the person in respect of whom the crime is alleged to have been committed or attempted, unless the evidence of such person is corroborated in some material particular by other evidence implicating the accused.

³⁴ [1940] VLR 300 at 305

³⁵ See Pearce & Geddes (2011) pp 333-334

³⁶ Pearce & Geddes (2011) p 334

³⁷ [1990] HCA 19; (1990) 169 CLR 515



- [41] Between the date when the applicant was charged and the date his trial commenced, section 136 of the Code was repealed and a new section substituted for it. The new section provided:
- (1) At the trial of a person accused of a crime under chapter XIV or XX, no rule of law or practice shall require a judge to give a warning to the jury to the effect that it is unsafe to convict the person on the uncorroborated evidence of a person against whom the crime is alleged to have been committed.
 - (2) A judge shall not give a warning of the kind referred to in sub-section (1) unless satisfied that the warning is justified in the circumstances.
- [42] At trial, the judge held that the new section 136 applied and that the old section had no application. This was upheld by the Supreme Court of Tasmania (Court of Criminal Appeal).
- [43] The High Court dismissed the appeal. It held that the new section 136 applied to the trial on the ground that the amendment did not affect existing rights or obligations. It said the new section operated to affect the way in which rights fell to be determined at trial, and therefore, did not fall within the presumption against the retrospective operation of a statute.

Statutory restrictions on retrospectivity

- [44] All Australian jurisdictions, under their respective Interpretation Acts, provide for the preservation of any right, privilege, obligation or liability acquired under an Act despite the Act's amendment.³⁸
- [45] Also, there are limitations on retrospectivity in delegated or subordinate legislation. There is an absolute prohibition against backdating subordinate legislation in New South Wales, Victoria and South Australia.³⁹
- [46] In Queensland, there is a similar prohibition except for beneficial retrospectivity. The *Statutory Instruments Act 1992*, section 32, provides for the commencement of an instrument prospectively. However, section 34 allows an instrument to expressly provide for beneficial retrospectivity, that is, retrospectivity that does not decrease a person's rights or impose liabilities on a person other than the State, a State authority or a local government. Subordinate legislation that purports to have an adverse affect cannot be made without the authority of an Act.

³⁸ *Halsbury's Laws of Australia*: 'Statutes: Operation: Retrospective Effect' (LexisNexis) at [385-495]. In Queensland, see the *Acts Interpretation Act 1954*, s 20(2)(c).

³⁹ Pearce & Argument *Delegated Legislation in Australia*, (LexisNexis Butterworths, 4th Ed, 2012) p 473



Parliamentary committees' approach to retrospectivity

Generally

- [47] It was the practice of the Scrutiny Committee to bring all provisions in Bills that had retrospective effect to the attention of Parliament—even if the Scrutiny Committee was not concerned about the implications of the provision.⁴⁰ The successor Parliamentary committees to the Scrutiny Committee appear to have adopted this practice also. As a result, there are numerous discussions by Parliamentary committees about retrospectivity.
- [48] In evaluating legislation with retrospective effect, Parliamentary committees typically have regard to:
- (a) whether the retrospective application is beneficial to persons other than the State; and
 - (b) whether individuals have relied on the legislation and have a legitimate expectation under the legislation before the retrospective operation applies.⁴¹
- [49] The Scrutiny Committee, at least, had no concerns about retrospective provisions that do not adversely affect any person other than the State.⁴²

'Curative' or validating legislation

- [50] The practice of retrospectively validating legislation is not a practice the Scrutiny Committee endorsed. It considered the practice could adversely affect rights and liberties or impose obligations retrospectively and therefore breach fundamental legislative principles. However, the Scrutiny Committee recognised that there are occasions on which curative retrospective legislation, which does not significantly affect

⁴⁰ See the [Scrutiny of Legislation Committee Report No 10 Annual Report 1997-1998 \(October 1998\) p 7 para 2.14](#)

⁴¹ [AD 2007 No 4 p 4 para 10](#); [AD 2005 No 12 pp 15-16 paras 5-8](#); [AD 2005 No 12 p 12 para 6](#); [AD 2004 No 3 p 29 para 4](#); [AD 2002 No 11 pp 7-8 paras 3-9](#); [AD 2002 No 10 pp 19-20 paras 3-10](#). For the application of this principle see, for example: [AD 2007 No 6 pp 26-27 paras 3-11](#); [AD 2005 No 13 p 10 para 11](#); [AD 2005 No 6 p 5 paras 21-24](#); [AD 2004 No 7 pp 16-17 paras 19-24](#); [AD 2004 No 5 pp 16-17 paras 14-18](#); [AD 2003 No 10 pp 4-5 paras 26-33](#); [AD 2002 No 4 p 21 para 24](#); [AD 1999 No 3 p 25 paras 4.17-4.19](#)

⁴² [AD 2007 No 4 p 4 paras 14-16](#); [AD 2006 No 4 pp 18-19 paras 19-27](#); [AD 2005 No 12 pp 11-12 paras 3-12](#); [AD 2004 No 5 p 35 paras 5-7](#); [AD 2004 No 3 pp 29-30 paras 3-7](#); [AD 2004 No 1 p 9 paras 12-15](#); [AD 2003 No 11 pp 15-16 paras 11-17](#); [AD 2002 No 8 p 23 paras 7-8](#); [AD 2002 No 3 pp 4-5 paras 6-15](#)



individuals' rights and liberties, is justified in order to clarify a situation or correct unintended legislative consequences.⁴³

- [51] The Explanatory Notes for a retrospective validating provision should give enough explanation to show whether the validation will have a significant adverse impact on the rights of individuals. Otherwise, the relevant Parliamentary committee may comment on the inadequacy of the Explanatory Notes and seek further information from the Minister.⁴⁴

Parliament's role to directly authorise retrospectivity

- [52] The Scrutiny Committee preferred that retrospective validation be by Act rather than regulation.
- [53] Clause 27 of the [Environmental Protection Amendment Bill 1996](#) sought to rectify some of the consequences flowing from two items of subordinate legislation made under the [Environmental Protection Act 1994](#), by inserting a new part about validations and related provisions into the Act.
- [54] In its examination of the Bill, the Scrutiny Committee summarised the issue that the Bill was dealing with as follows:

It would appear that the first regulation [the *Environmental Protection (Interim) Regulation Amendment (No.2) 1996*] attempted to impose a moratorium on the licensing and approval requirements of this legislative package. The action taken was, however, to have too broad an effect, necessitating a further regulation [the *Environmental Protection (Interim) Regulation Amendment (No.3) 1996*] to achieve the requisite result in a more limited way. Both regulations anticipated in their Explanatory Memoranda that anomalies may arise from the amendments and that they would be *dealt with retrospectively through amendments to the Act or Regulation*. (emphasis in original)⁴⁵

- [55] The Bill sought to retrospectively validate actions taken by administering authorities and the public during the period covered by the two items of subordinate legislation. The Scrutiny Committee stated:

... there are some occasions in which retrospective legislation may be justified. In this case, the drafting of the first amending regulation would appear to have produced a number of unintended consequences that would have unfairly penalised citizens if allowed to stand.

⁴³ [LA 2011 No 6 pp 28-29 para 49](#); [AD 2007 No 6 pp 26-27 paras 3-11](#); [AD 2005 No 13 p 10 para 11](#); [AD 2005 No 12 pp 15-16 paras 5-8](#); [AD 2005 No 6 p 5 paras 21-24](#); [AD 2004 No 7 pp 16-17 paras 19-24](#); [AD 2004 No 5 pp 16-17 paras 14-18](#); [AD 2002 No 4 p 21 para 24](#); [AD 1999 No 3 p 25 paras 4.17-4.19](#)

⁴⁴ [AD 2002 No 4 p 21 paras 25-28](#)

⁴⁵ [AD 1996 No 3 p 5 para 2.2](#)



However, where the Committee accepts that retrospective changes to legislation are justified, the Committee does not support the granting of broad authority to make regulations with retrospective effect. The Committee would prefer that retrospective validation is done by [primary] legislation. If any retrospective regulation making power is permitted, it should be tightly constrained.⁴⁶

Retrospective impositions generally objectionable

Penalty liability

- [56] The retrospective imposition of a liability to pay a penalty—in particular a criminal penalty—is one of the most objectionable things that can be provided for in legislation. One of the most commonly understood aspects of the rule of law in a democratic society is that laws only impose liability prospectively, because to do otherwise would be arbitrary.
- [57] The Scrutiny Committee considered a retrospective liability to pay a penalty to be objectionable.⁴⁷ In examining the [Education \(Teacher Registration\) Amendment Bill 1996](#) the Scrutiny Committee was concerned about a provision that would allow the Board of Teacher Registration to conduct an inquiry into the alleged misconduct of a person who was unregistered as a teacher at the commencement of the provision, which provided as follows:

Inquiry about teacher who is no longer registered at commencement

- (1) This section applies to a person who was a registered teacher at any time within 1 year before the commencement of this section but is not registered at the commencement.
 - (2) An inquiry may be made about the person for a matter mentioned in section 43(2) that happened while the person was registered and within 1 year before the commencement.
- [58] The Scrutiny Committee noted that, in effect, persons who were no longer registered could be the subject of inquiry by the Board and, if a matter were proven on the balance of probabilities, obligations in the form of penalty orders could be imposed on persons who were not previously subject to the Board's jurisdiction.⁴⁸ The Scrutiny Committee said:

⁴⁶ [AD 1996 No 3 p 8 paras 2.19-2.20](#)

⁴⁷ [AD 1996 No 5 p 2 para 1.10](#)

⁴⁸ [AD 1996 No 5 pp 1-2 paras 1.4-1.5](#)



... in the absence of compelling reasons for the retrospective application, [the provisions] should be amended to operate prospectively with regard to teachers who become deregistered after the commandment of this Bill.⁴⁹

- [59] In considering the [Youth Justice \(Boot Camp Orders\) and Other Legislation Amendment Bill 2012](#), the Legal Affairs and Community Safety Committee (the **LACSC**) noted that the Bill inserted a new provision into the [Youth Justice Act 1992](#), allowing a court to make a ‘boot camp order’ against a child for an offence committed before the new section commenced. The LACSC observed that the Explanatory Notes for the Bill did not:

... raise this potential issue of fundamental legislative principle or provide any justification for this retrospective provision and the Committee therefore draws this to the attention of the Legislative Assembly. It is possible this provision may even fall in the objectionable category of retrospective provisions.⁵⁰

- [60] The Committee recommended that the relevant Minister address the issue in his response to the Committee’s report.⁵¹

- [61] However, in reviewing the [Criminal Law Amendment Bill 2012](#), the LACSC took the view that the policy objectives of the Bill outweighed the breaches of fundamental legislative principles, including the retrospective extension of certain minimum non-parole periods.⁵²

Investigation liability

- [62] The Scrutiny Committee objected to retrospective extensions of who could be investigated under legislative provisions.⁵³ The issue arose in the course of the Scrutiny Committee’s examination of the [Education \(Teacher Registration\) Amendment Bill 1996](#) and the Scrutiny Committee considered that:

... in the absence of compelling reasons for retrospective application, [the proposed section] should be amended to operate prospectively with regard to teachers who become deregistered after the commencement of this amendment Bill.⁵⁴

- [63] In response to the Committee’s concerns the Minister advised:

The department is of the view that on this occasion, the public interest clearly calls for a displacement of the fundamental legislative principle that legislation is generally presumed to operate prospectively. The wider public interest, that is, the community’s concern to ensure that teachers responsible for the care, control and welfare of children (who are legally obliged to attend schools for compulsory education) are of good

⁴⁹ [AD 1996 No 5 p 2 para 1.10](#)

⁵⁰ [LACSC Report No 18 \(2012\) p 48](#)

⁵¹ [LACSC Report No 18 \(2012\) p 48](#)

⁵² [LACSC Report No 3 \(2012\) pp 27-29 para 3.2 and p 31 para 3.7](#)

⁵³ [AD 1996 No 5 p 2 paras 1.9-1.11](#)

⁵⁴ [AD 1996 No 5 p 2 para 1.10](#); see also [AD 2002 No 11 p. 5 paras 31-35](#)



character, and competent to discharge their function as teachers, and the more particular public interest, the protection and safety of children, are of sufficient importance to warrant limiting this particular fundamental legislative principle. I note also that should an inquiry be activated under section 63, a respondent teacher's fundamental right to refuse to answer questions that might self-incriminate is upheld under proposed section 45K.

The Committee also raises in paragraph 1.7 that an obligation to pay a penalty order may be retrospectively imposed under the combined effect of section 45R(2) and section 67. The department will give further consideration to the points raised by the Committee with a possible view to amending 45R(2)(a) by omitting the words "or (e)" from this paragraph.⁵⁵

- [64] Despite the Ministerial response, the Scrutiny Committee still considered there was an objectionable infringement of an individual's rights and liberties. It noted that the Parliament was legislating retrospectively in a way that directly affected the rights of individuals who were not identified and whose alleged offences were not known.⁵⁶

Extending time for starting offence proceedings

- [65] The Scrutiny Committee referred to Parliament, without express objection, a provision in the [Natural Resources and Other Legislation Amendment Bill 2003](#) that would allow a court, if it considered it just and equitable in the circumstances, to extend a time for starting proceedings for unlawful tree clearing under the [Land Act 1994](#) even if the time had already expired before the provision commenced.⁵⁷

Changes affecting criminal responsibility of individuals

- [66] In its examination of the [Criminal Code and Other Legislation Amendment Bill 2010](#), the Scrutiny Committee observed that clauses 4 and 6 of the Bill sought to amend sections 23 and 304B of the Criminal Code.
- [67] Clause 11 of the Bill gave retrospective operation to the changes by inserting a new section 728 into the Criminal Code which provided as follows:

Application of amendment Act

- (1) This Code, as amended by the amendment Act, sections 4 and 6, applies to proceedings for an offence started after the commencement of the sections, whether the act or omission constituting the offence happened before or after the commencement of the sections.
- (2) Subsection (1) does not apply to proceedings for an appeal from a conviction or sentence that happened before the commencement of the amendment Act, sections 4 and 6.

⁵⁵ [AD 1996 No 6 p 28 para 5.8](#)

⁵⁶ [AD 1996 No 6 p 28 para 5.10](#)

⁵⁷ [AD 2003 No 2 pp 6 para 5 \(9th dot point\)](#) and [p 7 paras 7-8](#)



...

- [68] The Scrutiny Committee said that the retrospective operation of these clauses may affect the rights and liberties of individuals seeking to rely on the excuse of ‘accident’ or the partial defence of killing for preservation in an abusive domestic relationship.⁵⁸
- [69] The Scrutiny Committee noted that the Explanatory Notes did not address these matters and invited the Minister to provide information about whether the amendments had adverse effects.⁵⁹
- [70] In response the Minister stated that the amendment of section 23 of the Code:

... legislatively enshrines the ‘reasonably foreseeable consequence’ test as articulated in *R v Taiters* [1997] 1 Qd R 333. As clearly stated in the Explanatory Notes, it is not intended to alter the current law and the amendment has been carefully drafted accordingly. While the amendment to section 23(1)(b) will operate retrospectively to the extent that it will apply to offences committed prior to the commencement of the amendment (provided proceedings have not commenced), such an approach does not adversely affect the rights and liberties of individuals. The law remains unchanged and will apply consistently pre and post amendment.⁶⁰

The Scrutiny Committee made no further comment regarding the legislation.⁶¹

Taking DNA samples from persons subject to interstate parole order

- [71] In examining the [Police Powers and Responsibilities and Other Legislation Amendment Bill 2011](#), the former Legal Affairs, Police, Corrective Services and Emergency Services Committee (the **LAPCSESC**) noted that clause 61 sought to insert a new section 487A into the [Police Powers and Responsibilities Act 2000](#) that would retrospectively allow a police officer to take a DNA sample for analysis from a person who was subject to an interstate parole order and transferred to custody in Queensland before the commencement of the provision. The sample could only be taken from a person who committed an offence for which a DNA sample may have been taken in the originating jurisdiction and the results of the DNA analysis were not recorded on CrimTrac.⁶²
- [72] The LAPCSESC noted that the Explanatory Notes argued justification for the proposed provision because of the link between DNA testing and solving crime, and the public interest in ensuring that offenders are brought to justice. Also, the power to take a DNA sample without a court order accorded with the current accepted practice when taking

⁵⁸ [LA 2011 No 1 p 36 para 40](#)

⁵⁹ [LA 2011 No 1 p 36 paras 42-43](#)

⁶⁰ [LA 2011 No 3 p 11 \(Letter from the Attorney-General to the Scrutiny Committee, 7 March 2011, p 2\)](#)

⁶¹ [LA 2011 No 3 p 11 para 4](#)

⁶² [LAPCSESC Report No 5 p 59](#)



DNA from a transferred prisoner who is detained in a corrective services facility. The LAPCSESC stated that it was satisfied that retrospectivity was justified in this situation.⁶³

Reporting orders on offenders to protect interests of children

- [73] On several occasions, the Scrutiny Committee drew Parliament's attention to retrospective changes to reporting requirements for offenders who posed a risk of committing further sexual offences against children.
- [74] The [Sexual Offences \(Protection of Children\) Amendment Bill 2002](#) sought to amend the [Criminal Law Amendment Act 1945](#) to put in place a new scheme permitting a judge to order an offender to report to police at regular intervals determined by the court.⁶⁴ The Scrutiny Committee noted that the change, though not a punishment, represented a substantial imposition on an offender.⁶⁵
- [75] The Scrutiny Committee subsequently considered the impact of reporting requirements in the [Child Protection \(Offender Reporting\) Bill 2004](#).⁶⁶ The Scrutiny Committee began its assessment by noting that:

In introducing a legislative scheme of this nature, which involves persons who have committed offences, been convicted and sentenced to terms of imprisonment, the drafters have had to confront the issue of the extent to which the bill will impact upon persons who have already committed offences, or have committed and been convicted of, relevant offences.⁶⁷

- [76] The Scrutiny Committee noted that certain provisions of the Bill appeared to affect existing child offenders.⁶⁸ It stated that, although the question of whether a particular legislative provision is actually retrospective is often complex and difficult, the provisions signalled the possibility that the provisions could operate retrospectively in respect of existing child offenders.⁶⁹ However, the Scrutiny Committee concluded:

... [o]f course, any possible issues of retrospectivity must be balanced against the perceived propensity of child offenders to re-offend, and the consequent imperatives to protect children.⁷⁰

- [77] While noting that the retrospective impact of the provisions was unclear, the Scrutiny Committee also noted the arguments in the Minister's Speech and the Explanatory Notes in favour of imposing the Bill's reporting obligations on all relevant offenders, other than those who had already been released into the community on the conclusion of their term

⁶³ [LAPCSESC Report No 5 p 59](#)

⁶⁴ [AD 2002 No 11 p 21 para 30](#)

⁶⁵ [AD 2002 No 11 p 22 paras 35-37](#)

⁶⁶ [AD 2004 No 9 p 11 para 3 para 22](#)

⁶⁷ [AD 2004 No 9 p 3 para 22](#)

⁶⁸ [AD 2004 No 9 p 4 para 25](#)

⁶⁹ [AD 2004 No 9 p 4 para 27](#)

⁷⁰ [AD 2004 No 9 p 4 para 29](#)



of imprisonment. In the circumstances it made no further comment on the possible retrospective provisions of the Bill.⁷¹

- [78] The [Criminal Law \(Two Strike Child Sex Offenders\) Amendment Bill 2012](#) sought to impose a mandatory term of life imprisonment for certain offenders convicted of more than 1 sexual offence involving children. Under the Bill, an offender could be sentenced to the mandatory term even if he or she had committed the first offence involving a child before the Bill was passed. The LACSC considered the retrospective operation of the Bill was justified on child protection grounds.⁷²

Civil liability damages reduced to protect affordability and availability of public liability insurance

- [79] The [Personal Injuries Proceedings Amendment Bill 2002](#) sought to make extensive limitations on actions for personal injuries in order to protect the viability of insurance against personal injuries. The Scrutiny Committee was most concerned about clause 5 of the Bill, which amended the [Personal Injuries Proceedings Act 2002](#) and which the committee was most concerned was taken to have commenced on the day the Bill was introduced (on 18 June 2002). The Explanatory Notes stated that potential adverse affects on individuals had to be balanced against the interests of the community as a whole in achieving affordability of insurance.⁷³

- [80] The Scrutiny Committee commented that the Bill protected claimants in relation to costs and outlays incurred before 18 June 2002 and that it was also not applicable where proceedings had already been started as at 18 June 2002, or where an offer of settlement had been made by a party. Nevertheless, the Scrutiny Committee concluded that:

... the bill extends the operation of the *Personal Injuries Proceedings Act 2002*, which introduces various limitations upon the capacity to sue and recover damages for personal injuries, to claims based on injuries occurring before 18 June 2002. The Act will now operate retrospectively, and to the detriment of some potential claimants. This issue is canvassed at length in the Attorney's Second Reading Speech and in the Explanatory Notes. The committee refers to Parliament the question of whether, in the circumstances, the retrospective operation of the Act brought about by cl.5 of the bill has sufficient regard to the rights of potential claimants, as well as the interests of the community as a whole.⁷⁴

Retrospectivity justified by nature of activity—unjust enrichment

- [81] The Scrutiny Committee considered that reliance on illegal activity committed before enactment as a trigger for confiscation proceedings could arguably be justified because

⁷¹ [AD 2004 No 9 p 5 paras 31-33](#)

⁷² [LACSC Report No 2 \(2012\) pp 34-37 paras 3.2 and 3.3](#)

⁷³ [AD 2002 No 7 p 20 para 10 \[Personal Injuries Proceedings Amendment Bill 2002 Explanatory Notes pp 1-2\]](#)

⁷⁴ [AD 2002 No 7 p 20 paras 12-14](#)



people engaged in unlawful conduct should not be allowed to unjustly enrich themselves at the expense of other individuals or the community.⁷⁵

- [82] In examining the [Criminal Proceeds Confiscation Bill 2002](#) the Scrutiny Committee noted that the confiscation scheme was designed to capture property derived from serious crime-related activity occurring in the 6 years before the date of commencement of the Bill. The Scrutiny Committee concluded that while the Bill would affect certain matters before its enactment, it was probably not retrospective in nature.⁷⁶

Commercial liability

- [83] The Scrutiny Committee expressed concern when only one party to a commercial arrangement was apparently to receive the benefit of retrospectivity.⁷⁷ This issue has also been addressed by the Finance and Administration Committee (the **FAC**) in the course of considering the [Electricity \(Early Termination\) Amendment Bill 2012](#). The Bill proposed to insert a new provision into the [Electricity Act 1994](#), providing that residential and small business customers could terminate their contracts with the electricity retail supplier in certain circumstances.⁷⁸ The provision was to operate retrospectively. The FAC noted that the retrospective operation of the provisions could be seen as beneficial to the customers and that the ‘... only entities that are likely to suffer loss from the retrospective operation of these consumer protection clauses are the retail entities’.⁷⁹ The Explanatory Notes to the Bill stated that:

... [w]hile retrospective application is not something done lightly, the government is taking this step to ensure that all existing market contract customers benefit from this protection.⁸⁰

Fuel subsidy scheme

- [84] In examining the [Revenue and Other Legislation Amendment Bill 1998](#) the Scrutiny Committee noted that part 3 of the Bill sought to make a number of amendments of the now repealed [Fuel Subsidy Act 1997](#) that were mostly retrospective.⁸¹
- [85] The Scrutiny Committee generally considered most of the amendments were beneficial to members of the community (who would obtain the benefit of subsidies under the Act) and were adverse only to the State (which was paying the subsidy).
- [86] However, the Scrutiny Committee remained concerned about clause 17. That clause sought to amend section 108 of the Act, which at the time implied into any contract for

⁷⁵ [AD 2002 No 10 p 11 paras 47-50](#)

⁷⁶ [AD 2002 No 10 p 11 para 50](#)

⁷⁷ [AD 1999 No 1 pp 20-21 paras 4.13-4.28](#)

⁷⁸ [FAC Report No 16 \(2012\) p 11](#)

⁷⁹ [FAC Report No 16 \(2012\) p 12](#)

⁸⁰ [Electricity \(Early Termination\) Amendment Bill 2012 Explanatory Notes p 3](#)

⁸¹ [AD 1999 No 1 p 20 para 4.10](#)



the sale of fuel by a ‘manufacturer or importer’ to a ‘registered person’ a term that essentially deferred the entitlement to the payment of the fuel subsidy.⁸²

- [87] This particular amendment would have the effect of expanding the range of businesses subject to a deferment of the contractual entitlement to payment of money. The Scrutiny Committee stated this particular provision would have an adverse effect on private fuel-distribution businesses.
- [88] The Scrutiny Committee referred its concerns to Parliament while noting that, although by a possibly questionable administrative requirement, during the relevant period the arrangements may already have been conducted on the basis of the proposed provision as retrospectively amended.⁸³

Benefits may be conferred retrospectively

- [89] The Parliamentary committees do not generally object to retrospective provisions that were beneficial to members of the community and only adverse to the State, such as provisions requiring the State to—
- (a) pay subsidies to various members of the community or provide other forms of help;⁸⁴ or
 - (b) reduce tax, whether through a decrease in amount, an increase in exemptions or deductions, or another way of reduction.⁸⁵
- [90] Part 7 of the [Guardianship and Administration and Other Legislation Amendment Bill 2012](#) sought to amend the [Penalties and Sentences Act 1992](#) to impose an ‘offender levy’. However, certain provisions operated to exclude particular classes of offender from the levy retrospectively. The effect of the retrospective operation was to benefit these individuals and therefore the Legal Affairs and Community Safety Committee (the **LACSC**) considered that it did not offend against the fundamental legislative principles.⁸⁶
- [91] An example for paragraph (b) is contained in the Scrutiny Committee’s examination of clause 47 of the [Revenue and Other Legislation Amendment Bill 1998](#), which sought to amend the now repealed [Stamp Act 1894](#) by inserting a new section 88.⁸⁷ The new section:

⁸² [AD 1999 No 1 p 20 paras 4.12-4.14](#)

⁸³ [AD 1999 No 1 pp 20-21 paras 4.16-4.28](#)

⁸⁴ [AD 2006 No 9 pp 27-28 paras 3-9](#); [AD 2003 No 9 pp 7-8 paras 3-9](#); [AD 2001 No 1 p 25 paras 3-10](#); [AD 1999 No 1 p 20 paras 4.10-4.13](#)

⁸⁵ [FAC Report No 5 \(2012\) p 4 para 3.3.1](#); [AD 2006 No 9 pp 27-28 paras 3-9](#); [AD 2004 No 3 pp 11-12 paras 1-9](#); [AD 2003 No 7 pp 28-29 paras 7-9](#); [AD 1999 No 1 p 24 paras 4.46-4.51](#)

⁸⁶ [LACSC Report No 14 \(2012\) pp 25-26](#)

⁸⁷ [AD 1999 No 1 pp 24-25 paras 4.46-4.52](#)



- (a) declared a particular security (an Exchanging Instalment Note) issued under the deed poll signed by the State on 8 October 1998 not to be, and to be taken never to have been, a marketable security or a right in respect of shares; and
- (b) provided that various schedules of the repealed [Stamp Act 1894](#) imposing duty did not apply to an Exchanging Instalment Note, which exempted citizens dealing in those securities from the obligation to pay stamp duty.

[92] The Scrutiny Committee stated that:

Since the effect of the bill is to validate exemptions from stamp duty otherwise payable to the State, the effects upon members of the community would appear to be entirely beneficial, and the adverse effects to be confined to the State. The committee accepts the retrospective aspects of the two new sections introduced into the *Stamp Act* by cl.47, given that any adverse impact falls entirely upon the State.⁸⁸

[93] Similarly, the FAC did not object to the retrospective operation of provisions in the [Building Boost Grant Amendment Bill 2012](#), as it considered that the extension of eligibility to receive a grant conferred a benefit on eligible recipients.⁸⁹

[94] The Scrutiny Committee did not object to a provision of the [Environmental Protection Amendment Bill 1996](#) that retrospectively removed unintended consequences of existing legislation that would have unfairly penalised citizens if allowed to stand.⁹⁰

Corrective national scheme legislation

[95] A complex national legislation scheme that remedied a defect was, in Queensland, retrospectively applied so that it covered the same period as the corresponding Commonwealth legislation.

[96] Clause 11 of the [Financial Services Reform \(Consequential Amendments\) Bill 2002](#) sought to insert section 29 into the [Corporations \(Ancillary Provisions\) Act 2001](#) to validate anything done or omitted to be done by a person or body during the 'relevant period' had the bill, or none of the provisions of the *Financial Services Reform Act 2001* (Cwlth), been in operation at the time. The relevant period meant the period starting on the commencement of the *Financial Services Reform Act 2001* (Cwlth), schedule 1, part 1 and ending immediately before the date of assent of the amending Act.⁹¹

[97] The Scrutiny Committee considered this unobjectionable, stating:

... the committee accepts that because of the complex nature of the relevant national scheme legislation, protection of the kind offered by proposed s.29 may well be

⁸⁸ [AD 1999 No 1 pp 24-25 paras 4.51-4.52](#)

⁸⁹ [FAC Report No 10 \(2012\) pp 5-6 para 31](#)

⁹⁰ [AD 1996 No 3 p 8 para 2.19](#)

⁹¹ [AD 2002 No 10 pp 15-16 paras 21-27](#)



appropriate. Moreover, the committee agrees that the operation of the section does not appear to be adverse to individuals or organisations.⁹²

Defects may be cured retrospectively

Legislative declaration about status of legislative body

- [98] The Scrutiny Committee did not object to legislation retrospectively declaring a statutory body (in this case, Legal Aid Queensland) to be an exempt public authority under the *Corporations Law* (Cwlth) from the day it had come into existence as it did not consider individuals would be in any way disadvantaged by the retrospectivity.⁹³

Retrospectivity to produce equity before the law

- [99] In its examination of the [Revenue and Other Legislation Amendment Bill 1998](#) (introduced on 19 November 1998), the Scrutiny Committee noted that clause 2(6) sought to give retrospective effect to Part 2 from 1 December 1998. The amendments in Part 2 were consequential to amendments to Commonwealth legislation that enabled non-bank financial institutions (*NBFIs*) to issue cheques from the commencement date. To ensure a 'level playing field' between banks and NBFIs, the Bill sought to retrospectively impose the same debits tax liabilities on NBFI cheque accounts as applied to bank cheque accounts.⁹⁴ The Scrutiny Committee noted that the financial sector (including the NBFIs) was aware of the impending legislative changes before the commencement date.⁹⁵

Retrospectivity to cure adverse impact of inadvertent expiry of legislation

- [100] The Scrutiny Committee considered it unobjectionable and, indeed, appropriate for legislation to retrospectively cure a gap in the recognition of various matters under the [Trans-Tasman Mutual Recognition \(Queensland\) Bill 2003](#).⁹⁶ This gap was caused by the inadvertent expiry of the [Trans-Tasman Mutual Recognition \(Queensland\) Act 1999](#). The Bill sought to re-enact the Commonwealth Act to provide continuity of the existing arrangements until such time as the Commonwealth completed its review of the Trans-Tasman Mutual Recognition Arrangement. The Scrutiny Committee noted that the Explanatory Notes and the Premier's second reading speech asserted that:

... the purpose of these provisions of the bill is to preserve and safeguard the system which has been established since the Trans-Tasman Mutual Recognition Arrangement was instituted. This arrangement is clearly both facilitative and beneficial in nature.

⁹² [AD 2002 No 10 p 16 para 24](#)

⁹³ [AD 1999 No 1 p 2 para 1.13](#). The provision was contained in the [Justice Legislation \(Miscellaneous Provisions\) Bill 1998](#).

⁹⁴ [AD 1999 No 1 p 18 paras 4.4-4.5](#)

⁹⁵ [AD 1999 No 1 p 19 para 4.6](#)

⁹⁶ [AD 2003 No 7 p 48 paras 21-22](#)



Moreover, given the circumstances surrounding the expiry of the 1999 Act as outlined by the Minister and the Explanatory Notes, the committee accepts that it is appropriate this bill should operate retrospectively to the expiry date, and that any actions taken in the meantime under the 1999 Act should be validated.⁹⁷

Retrospectivity to fix numbering error

- [101] The Scrutiny Committee did not object to a retrospective declaratory provision made to clarify the commencement of particular provisions following a numbering error that occurred in the Bill to Act process.
- [102] In examining amendments of the [Motor Vehicle Securities and Other Acts Amendment Act 2001](#) contained in a schedule to the [Tourism, Racing and Fair Trading \(Miscellaneous Provisions\) Bill 2002](#) (introduced on 6 March 2002), the Scrutiny Committee considered the effect of the following proposed new section:

46A Declaration about commencement of certain provisions

To remove any doubt, it is declared that the *Motor Vehicles Securities and Other Acts Amendment Act 2001*, s.19(4), part 3, s.35, 36, 38 to 40, 42 and 46(2) are always taken to have commenced on 7 June 2001.

- [103] The Scrutiny Committee noted that the date or dates upon which the provisions mentioned in new section 46A actually commenced was difficult to establish by reference to the *Statutory Annotations* and *Updaters*. It also observed, given the effect of the section was to declare that these provisions were taken to have commenced on 7 June 2001, that neither the Minister's Second Reading Speech nor the Explanatory Notes made any reference to 'this presumably retrospective provision'.⁹⁸

- [104] In response, the Minister advised:

Because of the incorporation of amendments in-committee and the subsequent clerical renumbering of the amending Bill, the references in section 2(1) of the amending Act to part 2A and sections 19(3A), 31, 31A, 32A to 32C, 34, and 38(2) should be read as references to part 3 and sections 19(4), 35, 36, 38 to 40, 42 and 46(2) respectively. The declaration merely confirms the Parliament's clear legislative intent.⁹⁹

The Scrutiny Committee thanked the Minister for the information and made no further comment about the amendment.

⁹⁷ [AD 2003 No 7 p 48 para 19](#)

⁹⁸ [AD 2002 No 3 pp 23-24 paras 17-20](#); see also [LACSC Report No 10 \(2012\) pp 2-3 para 2.1](#), which considered a change to the [Industrial Relations \(Transitional\) Regulation 2012](#) to ensure that it was consistent with a provision of the *Industrial Relations Act 1999*.

⁹⁹ [AD 2002 No 5 p 33 paras 3-5](#); see also the Health and Community Services Committee's (the *HCSC*) comments on the [Health Legislation \(Health Practitioner Regulation National Law\) Amendment Bill 2012](#), which was validating legislation to fix an unintended consequence of legislative amendments: [HCSC Report No 2 \(2012\) p 4 para 3.1](#)



Removal of uncertainty in the general law

[105] Retrospective clarification of contentious general law retrospectively may be unobjectionable as parliamentary intervention may be the only effective way to end competing claims and conflicts in case law within a practical time frame.

[106] In examining the [Choice of Law \(Limitation Periods\) Bill 1996](#), which was part of a national legislative scheme aimed at achieving uniformity on limitation period laws throughout Australia, the Scrutiny Committee did not object to provisions clarifying that the law of the cause (rather than the law of the forum) applied to proceedings started after the legislation's commencement.¹⁰⁰ Causes of action arising before the commencement of the legislation for which a proceeding had not been started were retrospectively affected.

[107] The Bill was not passed before parliament was prorogued, so it was reintroduced. On the introduction of the first Bill, the Scrutiny Committee had expressed concern that intending plaintiffs may be detrimentally affected by the application of the Bill.¹⁰¹ The Scrutiny Committee noted that the Minister's second reading speech for the reintroduced Bill had addressed this issue as follows:

Clause 3 of the Bill is not directed at retrospectively affecting the rights of potential litigants. Retrospective laws are generally passed to validate past actions, correct defects in legislation or confer benefits retrospectively. The purpose of this Bill is to obviate the contentious decisions of the High Court in cases such as *McKain v Miller* which evidence some disagreement between the members of the Court concerning procedural and substantive aspects of the law. Therefore, this Bill is neither validating past actions nor correcting defects in legislation, but removing the uncertainty in this choice of law area. [...]

It may affect a small and unquantifiable number of potential litigants, who for whatever reason have not initiated civil action despite having a right to do so.

To minimise the impact on potential litigants, it is proposed to delay the commencement of the Bill for a period of possibly six months. Moreover, given that this Bill has been mooted for some time, its terms cannot come as a surprise to the legal profession, which should, of course, be advising its clients accordingly.¹⁰²

[108] The Scrutiny Committee stated that its misgivings about the potentially detrimental impact on intending litigants were allayed by the Minister's advice that the commencement of the Bill would be delayed.¹⁰³

¹⁰⁰ [AD 1996 No 2 pp 1-2, paras 1.1-1.7](#)

¹⁰¹ [AD 1996 No 2 p 1 para 1.6](#)

¹⁰² [AD 1996 No 2 p 2 para 1.7](#)

¹⁰³ [AD 1996 No 2 p 2 para 1.8](#)



Removal of uncertainty in legislation

Declaration about witness's privilege at Crime and Misconduct hearing

[109] In examining the [Criminal Code and Jury and Another Amendment Bill 2008](#) (introduced on 26 August 2008), the Scrutiny Committee noted that clause 12 of the Bill sought to amend the [Crime and Misconduct Act 2001](#) to insert a new section 192. The new section was essentially a transitional provision declaring, with retrospective effect to 1 January 2002, that a witness at a commission hearing was not entitled to refuse to answer a question on the ground of the self-incrimination privilege or the ground of confidentiality.¹⁰⁴

[110] The Scrutiny Committee observed that the Explanatory Notes sought to justify the amendment as follows:

This is consistent with the previous longstanding interpretation of section 192. It is consistent with the position for investigation hearings under section 190 of the *Crime and Misconduct Act 2001* and equivalent provisions of the previous *Criminal Justice Act 1989* and the *Crime Commission Act 1997* which the *Crime and Misconduct Act 2001* replaced. There would be serious and costly consequences relating to previous, existing and future prosecutions if the retrospective declaration is not made.¹⁰⁵

[111] The Scrutiny Committee referred to Parliament the question whether the proposed retrospective operation was justified.¹⁰⁶

[112] The Attorney-General responded to Scrutiny Committee's concern by reiterating the justification contained in the Explanatory Notes. The Committee noted the response without further comment.¹⁰⁷

Protecting contracts

[113] The Scrutiny Committee did not object to legislation retrospectively protecting contracts from attacks based on the existence of conflicting provisions in legislation. A provision having carefully limited operation dealing with the conflict was viewed by the Scrutiny Committee as remedying a defect of a technical nature.

[114] The [Tourism, Racing and Fair Trading \(Miscellaneous Provisions\) Bill 2002](#) (introduced on 6 March 2002) sought to amend requirements in relation to the positioning of an information sheet and warning statement at the front of a contract for the purchase of a proposed lot. The proposed provisions applied to contracts that had been entered into since 1 July 2001. The Scrutiny Committee noted the provisions would prevent a buyer

¹⁰⁴ [LA 2008 No 9 p 23 para 46](#)

¹⁰⁵ [LA 2008 No 9 p 23 para 48](#) [[Criminal Code and Jury and Another Amendment Bill 2008 Explanatory Notes pp 4-5](#)]

¹⁰⁶ [LA 2008 No 9 p 24 para 52](#)

¹⁰⁷ [LA 2008 No 10 p 29 paras 20-21](#)



from cancelling a contract on the basis of failure to comply with the law as then in force, and in that respect might be regarded as adverse to the interests of such buyers.¹⁰⁸ The Scrutiny Committee commented:

... buyers who have already terminated on the basis of the noncompliance will not be prejudiced, and there would seem to be nothing preventing buyers who have not so far terminated from doing so provided they act before this bill becomes law. [...] Moreover, and without having examined the matter in detail, it appears to the committee to be arguable that the defect involved is of a relatively technical nature, concerning simply the order in which two sheets at the top of a contract are placed.¹⁰⁹

Clarifying retirement village exit fees

- [115] In its examination of amendments of the [Retirement Villages Act 1999](#) contained in the [Civil Proceedings Bill 2011](#), the LAPCSESC considered a clause that sought to insert a new section about exit fees paid by retirement village residents to scheme operators that applied retrospectively. The LAPCSESC was satisfied that the retrospectivity was justified because:

The amendment does not apply to exit fees already calculated. By inserting a missing term, the provision alters contracts already entered into. The change will only operate prospectively, by ‘crystallising’ in the future when residents vacate their units. Notwithstanding this prospective operation, the provision affects existing rights, and the committee therefore considers that it applies retrospectively. The committee is satisfied that retrospective application of the amendment is justified in this case to achieve the policy objective of consumer fairness.

The committee acknowledges that there will always be specific instances at the margins where it is not clear whether the provision applies. However, the committee is satisfied that, on balance, the amendment is likely to reduce problems and confusion over the calculation of exit fees by reference to a resident’s length of stay in their unit.¹¹⁰

Reliance on announced proposal as basis for later retrospectivity

Balanced assessment is required

- [116] The Scrutiny Committee did not support retrospectivity merely because the government had announced its intentions to retrospectively legislate. The Scrutiny Committee sometimes referred to announcement of this kind as ‘legislation by press release’. However, in assessing its concerns in particular instances, the Scrutiny Committee took the following factors into account: the number of persons affected, the period of notice given and the extent to which adverse affects could be avoided beforehand.

¹⁰⁸ [AD 2002 No 3 p 23 para 13](#)

¹⁰⁹ [AD 2002 No 3 p 23 para 14](#)

¹¹⁰ [LAPCSESC Report No 8 \(2011\) p 15](#)



- [117] In examining amendments in the [Education \(Accreditation of Non-State Schools\) and Other Legislation Amendment Bill 2005](#) (introduced on 10 May 2005), the Scrutiny Committee considered two additional grounds upon which a school's eligibility for government funding may be withdrawn had retrospective operation. The Scrutiny Committee noted that the government's intention to make these amendments had been publicly announced by the Minister on 15 November 2004 and concluded that:¹¹¹

[a]lthough the committee does not promote the practice of 'legislation by press release', the practice of publicly announcing a change in legislation prior to making the change serves to forewarn affected individuals, and to decrease reliance on the existing legislation. On that basis, relevant school governing bodies will have had approximately six months in which to consider terminating the offending types of arrangements.¹¹²

Prior actual notice may effectively remove the basis of objecting to a later retrospective law

- [118] In examining the [Queensland Law Society Legislation Amendment Bill 1996](#) the Scrutiny Committee considered amendments that would remove a right to recover from the Legal Practitioners Fidelity Guarantee Fund losses arising from certain types of mortgages arranged by solicitors.¹¹³
- [119] The Scrutiny Committee did not object to applying the new law retrospectively to the day the Bill was introduced into Parliament because:

... persons potentially affected by the changes to the law are expressly required to not only be notified, but to give their written authorisation of any action to be taken under the law as amended. The Committee also notes that the Queensland Law Society provided its members with a document on the changes being introduced in the Bill entitled *Mortgage Lending – Urgent Legislative Update*.¹¹⁴

Ethical regard for position of public service officers

- [120] On a number of occasions the Scrutiny Committee expressed concern about whether the public announcement of proposed legislation (for the purpose of reducing objections to retrospectivity) compromised public service officers bound to uphold the existing law, despite promises of retrospective immunity.
- [121] In examining the [Natural Resources and Other Legislation Amendment Bill 2005](#), the Scrutiny Committee expressed its concern as follows:

Apart from the fact that it pre-empts the Legislative Assembly's ultimate approval of the bill, such an approach will place departmental officers in the invidious position of

¹¹¹ [AD 2005 No 6 p 4 para 10](#)

¹¹² [AD 2005 No 6 p 4 para 11](#); see also [AD 2003 No 3 pp 3-4 paras 16-23](#); [AD 2002 No 6 p 34 para 12](#); [AD 2001 No 4 p 6 paras 7-8](#); [AD 2001 No 1 pp 39-41, paras 10-15](#)

¹¹³ [AD 1996 No 4 pp. 19-23 paras 6.6-6.11](#)

¹¹⁴ [AD 1996 No 4 p 20 para 6.9](#)



refusing to take administrative steps which, under the current legislation, are normally both necessary and appropriate, on the basis that their behaviour will later be retrospectively legitimised.¹¹⁵

Some past actions may be validated

Preserving an established administration of the law later requiring validation

Corporations law

[122] The [Corporations \(Administrative Actions\) Bill 2001](#) was introduced following the High Court's decisions in *Re Wakim; Ex parte McNally* and *The Queen v Hughes*, which cast doubt upon the constitutional validity of substantial tracts of the corporations law scheme.¹¹⁶ The Commonwealth, State and Territory governments introduced packages of bills to reconstitute the scheme on a different basis, to validate possibly invalid administrative actions carried out during the life of the former scheme and its predecessor, and to make ancillary amendments to accommodate the new scheme.¹¹⁷

[123] Actions taken under the previous law had to be validated as any other course of action would have left an impossible amount of legal decision-making in limbo. The Scrutiny Committee referred to Parliament the retrospective validation of administrative actions under the corporations law scheme, but noted that the invalidities in question were potential rather than judicially established and that the relevant corporations law had been operating for over 10 years on the assumption that it was constitutionally valid.¹¹⁸

Revenue law

[124] The Scrutiny Committee did not expressly object to a revenue law being retrospectively amended for reasons of clarity when the amendment did not alter the position of taxpayers. There was no element of surprise in the amendment. The revenue in question had already been paid or had been the subject of an expectation of payment.¹¹⁹

Miscellaneous authorisations granted but needing confirmation

[125] The Scrutiny Committee did not object to retrospective validation of authorisation for an ordinary operational matter. For example, the Scrutiny Committee did not have any

¹¹⁵ [AD 2005 No 13 p 19 para 39](#); see also [AD 2001 No 4 p 6 para 12](#); [AD 1999 No 13 pp 12-15, paras 4.3-4.21](#)

¹¹⁶ *Re Wakim; Ex parte McNally* [1999] HCA 27; (1999) 198 CLR 511 and *The Queen v Hughes* [2000] HCA 22; (2000) 202 CLR 535

¹¹⁷ [AD 2001 No 3 p 1 para 4](#)

¹¹⁸ [AD 2001 No 3 p 3 paras 16-18](#)

¹¹⁹ See the Scrutiny Committee's consideration of the [Housing and Other Acts Amendment Bill 2005](#) in [AD 2005 No 3 pp 3-4 paras 3-9](#); and the Scrutiny Committee's response to ministerial correspondence regarding the [Revenue Law Amendment Act \(No. 2\) 1995](#) in [AD 1996 No 1 p 13](#)



concerns about proposed provisions of the [Plant Protection Amendment Bill 1996](#) that sought to confirm the validity of inspectors' approvals already issued under specified regulations in relation to fruit coming out of a pest quarantine area.¹²⁰

Fishing quotas

- [126] The [Fisheries Amendment Bill 2001](#) contained a provision validating the past inadvertent application, to two 'eligible licences', of a formula relating to the calculation of 'transferable catch quotas'. This minor change to the fishing quota was made without significant comment from the Scrutiny Committee.¹²¹

Protection against plant disease

- [127] A provision of the [Plant Protection Amendment Bill 2004](#) sought to validate retrospectively a particular Ministerial notice declaring quarantine for citrus canker. The Scrutiny Committee referred the matters to Parliament without express objection, noting that:

[w]hile the validation would clearly impact on persons adversely affected by that declaration, the committee notes that the Explanatory Notes assert that legal and judicial opinion strongly suggests the notice was in fact valid, and that the validation is being enacted only out of an abundance of caution.¹²²

Land use under local government law

- [128] In examining the [Brisbane Markets Bill 2002](#) the Scrutiny Committee noted, without express objection, the retrospective effect of provisions validating building work carried out at a place and the use and occupation of the place as a market.¹²³ The Brisbane Markets had operated at the site since March 1960 and the Scrutiny Committee was unable to establish any disadvantage to anyone, noting that:

The bill may perhaps be adverse to the interests of landowners in the Markets site area, as it will regularise a series of developmental activities in relation to which they were denied the opportunity to lodge objections, or which may even have been of a type prohibited outright or in some other way restricted, by planning legislation. The extent, if any, to which neighbouring landowners could be said to be disadvantaged by the bill is a complex issue, and impossible to determine on the available information. In short, the committee is unable on the available information to clearly identify any adverse consequences flowing from the validations made by the bill.¹²⁴

¹²⁰ [AD 1996 No 4 p 17 paras 5.3-5.7](#)
¹²¹ [AD 2001 No 1 pp 27-28 paras 4-8](#)
¹²² [AD 2004 No 5 p 33 para 49](#)
¹²³ [AD 2002 No 4 pp 11-12 paras 3-15](#)
¹²⁴ [AD 2002 No 4 p 12 paras 10-11](#)



Authority of person acting in a role

- [129] In examining the [Public Records Bill 2001](#) the Scrutiny Committee had no concerns about the validation of acts done by a person acting or purporting to act as State Archivist under legislation that did not expressly provide for a person to act in the absence of the incumbent.¹²⁵ The Scrutiny Committee stated:

It seems clear from the bill that persons have in fact acted in the position, and the committee assumes [the proposed provision] reflects concerns over possible consequences of this lack of express statutory authority on the validity of acts performed by the relevant persons. Any decisions of acting State Archivists would doubtless at all times have been assumed by all parties involved to be valid.¹²⁶

Retrospectivity to rectify inadvertent removal of power to provide a concession

- [130] The Scrutiny Committee had no concerns about a provision contained in the [Housing and Other Acts Amendment Bill 2005](#) (introduced on 8 March 2005) that sought to amend the *State Housing (Freeholding of Land) Act 1957* (now the [Housing \(Freeholding of Land\) Act 1957](#)) to retrospectively rectify the unintended removal of the chief executive's power to give a concession to a purchaser on the price of freehold land purchased from the State.¹²⁷ The amendments were taken to have commenced on 31 December 2003. The Scrutiny Committee stated:

The [Explanatory] Notes assert that these amendments, rather than impacting negatively on the rights and liberties of individuals, in fact provide benefits to departmental clients. This statement seems clearly correct.¹²⁸

Retrospectivity to validate employment

- [131] The Scrutiny Committee had no concern, in its consideration of the [Education \(Accreditation of Non-State Schools\) and Other Legislation Amendment Bill 2005](#), about a provision validating the casual employment of staff by the Queensland Studies Authority, a statutory body, prior to the enactment of the Bill's provisions.¹²⁹

State guarantee affected by boundary changes

- [132] In examining the [Gas Security Amendment Bill 2011](#) the Scrutiny Committee noted that clause 6 sought to insert a new section 783 in the [Mineral Resources Act 1989](#) to provide that the proposed amended definition of 'affected land', for the purposes of the Collingwood Park state guarantee, was taken to have effect on and from 5 November 2008.¹³⁰ The Scrutiny Committee noted the explanation for the amendment was that the

¹²⁵ [AD 2002 No 1 p 29 paras 53-58](#)

¹²⁶ [AD 2002 No 1 p 29 paras 56-57](#)

¹²⁷ [AD 2005 No 3 p 4 paras 10-14](#)

¹²⁸ [AD 2005 No 3 p 4 para 12](#)

¹²⁹ [AD 2005 No 6 p 5 paras 21-24](#)

¹³⁰ [LA 2011 No 5 p 23 para 25](#)



State Guarantee was intended to apply to land that was in Collingwood Park at the time the State Guarantee was given, and that the boundaries of Collingwood Park had since changed.¹³¹

[133] The Scrutiny Committee invited the Minister to provide further information about boundary changes to the suburb of Collingwood Park and the impact the clause would have on the rights and liberties of individuals under the Collingwood Park State Guarantee.¹³²

[134] The Scrutiny Committee received the following advice from the Minister:

The purpose of clause 6 is to confirm that the changes in clause 4 [amending the definition] have applied since the commencement of the State Guarantee in 2008. The amendment confirms the original intent of the State Guarantee and will not negatively impact any claims submitted to date. There are no existing claims in relation to land other than residential land. As such, clause 6 does not affect the rights and liberties of individuals.¹³³

Retrospectivity necessary for ongoing administration of amended legislation

[135] The Scrutiny Committee considered that when legislation was amended in a way that affected its ongoing administration there was significant merit in an argument that it was justifiable to make amendments about the processing of applications under the legislation pending when the legislation was amended because the amendments were necessary for the ongoing administration of the legislation.

[136] In examining the [Child Safety \(Carers\) Amendment Bill 2006](#) the Scrutiny Committee noted that clause 54 of the Bill sought to insert a number of transitional provisions into the [Commission for Children and Young People and Child Guardian Act 2000](#). The provisions applied primarily to applications that had been made under the Act before 17 January 2005 and were still outstanding at the date of the Bill's commencement.¹³⁴ The Scrutiny Committee noted that the Explanatory Notes included the following justification:

It is probably fair to say that the new provisions are generally more demanding upon persons associated with child care than were the previous provisions, and in this respect the application of the new provisions would be adverse to them.

The Explanatory Notes primarily justify the retrospective application of the new provisions on the basis that, given the nature of the processes which the Act regulates, the persons affected will in any event become subject to the new provisions in due course. For example, even if an outstanding application for a suitability notice were to be

¹³¹ [LA 2011 No 5 p 23 para 27](#)

¹³² [LA 2011 No 5 p 24 para 31](#)

¹³³ [LA 2011 No 6 p 51](#) [Letter from Minister for Employment, Skills and Training to Scrutiny Committee, 11 May 2011]

¹³⁴ [AD 2006 No 3 pp 4 paras 25-26](#)



finalised in accordance with the pre-existing law, the capacity of the person to retain the suitability notice thereafter will be subject to the commissioner's new powers in relation to considering grounds for cancellation and the like. The committee concedes that there is significant merit in this argument.¹³⁵

Retrospectivity justifiable in public interest

- [137] In examining the [Adoption Bill 2009](#) the Scrutiny Committee noted that clause 343 proposed to retrospectively alter a person's expressed objection under section 39AA of the now repealed [Adoption of Children Act 1964](#) to the release of identifying information to another person associated with the same adoption that occurred before 1 June 1991.¹³⁶ The Scrutiny Committee quoted the following passage from the Explanatory Notes' lengthy justification for this provision:

[The retrospective operation] will adversely affect the person's right (as expressed in their objection) to preserve their anonymity from others associated with the same adoption, by keeping their identifying information confidential. This is necessary to promote the rights of adopted people to obtain information about the identity of their birth parents and for birth parents to obtain information about the post-adoption identity of their child who was adopted, which was previously denied to them by another person's information objection.

The consultation conducted about this proposed reform demonstrated that the concerns of people who have lodged objections relate to being contacted by another person associated with the adoption and the consequences of such contact if it results in their family and friends learning of the adoption. However, people were generally not concerned that the person receiving the information would behave in a criminal or problematic way.

A range of measures have been included in the Adoption Bill to reduce the likelihood that a person who lodged an objection to the release of information under part 4A of the *Adoption of Children Act 1964* will experience unwanted contact by another person associated with the same adoption.

The proposal to retrospectively remove a person's previous objection to the release of identifying information is considered reasonable in light of the fundamental right of other parties to an adoption to know their family history and heritage.¹³⁷

- [138] The Scrutiny Committee noted that clause 343 would affect the rights of individuals who would have legitimate expectations, based on section 39AA of the repealed [Adoption of Children Act 1964](#), and drew the matter to Parliament's attention without express objection.
- [139] The State Development, Infrastructure and Industry Committee (the *SDIIC*) did not consider the retrospective operation of parts of the [Water Resource \(Cooper Creek\) Plan](#)

¹³⁵ [AD 2006 No 3 pp 4-5 paras 28-29](#); see also [LACSC Report No 5 \(2012\) p 21 para 2.5](#) and [pp 33-36 para 3.1](#)

¹³⁶ [LA 2009 No 2 pp 7-8 paras 44-45](#)

¹³⁷ [LA 2009 No 2 p 8 para 49 \[Adoption Bill 2009 Explanatory Notes pp 18-19\]](#)



[2011](#) to be objectionable. The Plan required that previously issued water licences would be amended by the chief executive to be made consistent with the Plan and the SDIIC noted that the practical effect of this amendment would be to limit ‘the amount of water that can be taken from the Plan area’.¹³⁸ However, the Committee cited, without apparently disapproval, the justification offered in the Explanatory Notes that the ‘... implementation of the policy objectives of the overall Plan outweighs the potential adverse impacts ... on individuals’.¹³⁹

¹³⁸ [SDIIC Report No 1 \(2012\) p 2 para 2.1](#)

¹³⁹ [SDIIC Report No 1 \(2012\) p 2 para 2.1](#)