Queensland Government

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Office of the
Director-General

Department of
Justice and Attorney-General

The Honourable Dean Wells MP
Acting Chair
Legal Affairs, Police, Corrective Services and
Emergency Services Committee
Parliament House
George Street
BRISBANE QLD 4000

Dear Mr Wells

Thank you for your letter dated 9 November 2011 regarding the referral of the Criminal and Other Legislation Amendment Bill 2011 (the Bill) to the Legal Affairs, Police, Corrective Services and Emergency Services Committee (the Committee).

Ms Louise Shephard, Director, Strategic Policy will be the Committee secretariat's point of communication with respect to this inquiry. Ms Shephard can be contacted on 3239 6084 or by email louise.shephard@justice.qld.gov.au.

I note that the Committee will be seeking an initial overview briefing from the Department in early 2012 on the purpose of, and proposals in, the Bill, including the consultation carried out on the proposed amendments and the outcomes of such consultation. I will be pleased to address the Committee at that briefing, along with a number of departmental officers. I will await your advice as to the date of such briefing.

As requested, please find enclosed a Parliamentary Committee briefing note to assist the Committee in its determination of the Bill and to facilitate the pending oral briefing. In particular, the briefing note provides: detail of the policy to be given effect by the Bill; the application to the Bill of the fundamental legislative principles; and a summary of the issues raised during consultation on the draft Bill with external stakeholders.

I trust the enclosed material is of assistance.

Yours sincerely

Philip Reed
Director-General
9/12/11

State Law Building
50 Ann Street Brisbane
GPO Box 149 Brisbane
Queensland 4001 Australia
Telephone (07) 3239 3520
Facsimile (07) 3239 3474
Website www.justice.qld.gov.au
ABN 13 846 673 994

Parliamentary Committee Briefing Note
For the Legal Affairs, Police, Corrective Services and Emergency Services Committee - Criminal and Other Legislation Amendment Bill 2011

Background and Policy Intent

Criminal law related amendments

- The Criminal and Other Legislation Amendment Bill 2011 (the Bill), in particular, amends the Criminal Code and the *Drugs Misuse Act 1986* to ensure Queensland's criminal offences reflect community expectations, keep pace with emerging criminal conduct, and provide appropriate sanction, particularly for criminal activity that threatens vulnerable Queenslanders.

- The Department of Justice and Attorney-General's review of Queensland's child sex and child sex-related offences was undertaken having regard to recent Commonwealth child sex-related reforms in the *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010.* The Commonwealth, States and Territories have shared roles in dealing with child sexual exploitation. States and Territories are responsible for child sex-related offences that occur domestically and the Commonwealth for offences that occur across or outside Australia. This division of responsibility reflects the Commonwealth's legislative power under the Constitution.

- It is not uncommon that criminal offending may breach offences in both jurisdictions. In such cases the police use their discretion to charge appropriately. However, where a choice exists, the relevant maximum penalties will often dictate the decision. In utilising the Commonwealth offences, investigations by Queensland police must be conducted in accordance with the detention, arrest, search/seizure and interviewing protocols and other procedures governed by Commonwealth legislation. This has the potential to cause operational difficulties for Queensland police.

Child exploitation material offences – penalties; virtual images; and joinder on indictments (clauses 27, 34 – 38 and 41)

Penalties

- Queensland's Criminal Code contains a number of offences aimed at addressing child exploitation material. Sections 228A to 228C of the Criminal Code provide for the offences of: involving a child in the making of child exploitation material; making child exploitation material; and distributing child exploitation material. These offences carry a maximum penalty of 10 years imprisonment. Section 228D prohibits possessing child exploitation material and carries a maximum penalty of five years imprisonment.

- 'Child exploitation material' is defined in section 207A of the Criminal Code to mean material that, in a way likely to cause offence to a reasonable adult, describes or depicts someone who is, or apparently is, a child under 16 years: in a sexual context, including for example, engaging in a sexual activity; or in an offensive or demeaning context; or being subjected to abuse, cruelty or torture. 'Material' is defined to include anything that contains data from which text, images or sound can be generated.

- The seriousness of these offences cannot be questioned. Such offences are not victimless crimes because the collection of such material is likely to encourage those who are actively involved in corrupting the children involved in the sexual activities depicted and who recruit and use those children for the purpose of recording and distributing the results.

- The seriousness of these offences was recognised by the 2008 amendment to section 9 of the *Penalties and Sentences Act 1992* to displace the sentencing principle of 'imprisonment as a last resort' in relation to the sentencing of offenders for child exploitation material offences.

- A review of the sentences imposed for child exploitation material offences since the 2008 amendment reveals the following:
  - For the offence of possessing child exploitation material (section 228D) – the sentencing range is one to three years imprisonment depending on the amount of material possessed and its content; such sentence including a period of actual detention; and
  - For the offence of distributing child exploitation material (section 228C) – the sentencing range appears to start at two years imprisonment with the sentence including a period of actual detention.

- The Bill amends the child exploitation offences to increase the maximum penalties and to omit the current distinction in penalties between possessing child exploitation material (section 228D – currently five years) and the other offences of involving a child in the making of child exploitation material, making child exploitation material and distributing child exploitation material (sections 228A to 228C). The penalties in sections 228A to 228C are increased from 10 years to 14 years and the penalty for the offence of possessing child exploitation material (section 228D) is increased from five years to 14 years imprisonment.

- **Attachment 1** provides a jurisdictional comparison of maximum penalties for child exploitation material across Australia.

- As outlined on page 5 of the Explanatory Notes to the Bill, the amendments to increase the maximum penalties omit the current penalty distinction for the offence of possession.

- The argument for distinguishing the offence of possession is that, in relation to contraband, the criminal law regards distribution as objectively more serious than mere possession. However, in the case of child exploitation material offences the 'commodity' in question is a child who is often subject to appalling physical and sexual abuse. It is vital that the market for such material is targeted. Such an approach is not unprecedented. The Criminal Code recognises that the offence of receiving tainted property creates the market for criminal activity such as theft and applies a higher maximum penalty.

- Removing the current penalty distinction also recognises the wide variety of circumstances in which child exploitation material offences can be committed and that there will be cases where the mere possession of material carries a greater criminality than the offence of distributing.

- The Commonwealth makes no such distinction. All offences carry a maximum penalty of 15 years imprisonment. In New South Wales and the Northern Territory, the offences of possession, production and distribution all carry a maximum penalty of 10 years imprisonment.

Virtual images

- Offenders have been convicted and sentenced under the child exploitation material offences where the material in question was animated or virtual images of children (for example, *R v Grehan* [2010] QCA 42).

- Animated or virtual images of children are contemplated by the provisions as falling within the definition of 'child exploitation material' given the defence contained in section 228E(5) of the Criminal Code that the material is a computer game of a certain classification.

- The Explanatory Notes to the Criminal Code (Child Pornography and Abuse) Amendment Bill 2004 which inserted the child exploitation material offences into the Criminal Code expressly stated in relation to the definition of 'child exploitation material':

  "*This definition is broad enough to catch any material at all – images, sound recordings, objects and written descriptions. It also includes data from which text, images or sounds can be generated (see the definition of 'material').*

  It is not necessary to prove that a child depicted in the material was in fact less than 16 years of age at the time the image or material was created. It is also not necessary for the material to depict a real person."

- The issue of whether animated or virtual images are caught by the definition of 'child exploitation material' was recently discussed in *R v MBM [2011] QCA 100* at paragraph 22, where White JA, with whom the other members of the Court of Appeal agreed, commented that the definition may not encompass cartoon characters or persons who are plainly not real, in the sense of portraying flesh and blood persons, since the reference is to 'someone who is, or apparently is, a child under 16 years'. Justice White's comment was *obiter* given that the offender had been convicted of a number of images and films including a number involving animated images and the point was not taken on appeal.

- However, in a recent sentence for possession of child exploitation material, a District Court judge took the view that the effect of the Court of Appeal decision in *MBM* is that the point is open and determined that the definition of 'child exploitation material' does not include animated or virtual images (*The Queen v Bradley John Furse,* unreported, Judge McGill SC, Townsville District Court, 2 June 2011). This decision was subsequently followed by another District Court judge who did not take into account hundreds of cartoon images depicting fictional characters engaged in sex acts when sentencing an offender for possession of child exploitation material (*The Queen v John Alfred Horan*, unreported, Judge Reid, Rockhampton District Court, June 2011).

- Judge McGill SC reasoned that animated or virtual images are not material which depicts someone who is or is apparently a child under 16 years. The Judge regarded the term 'someone' as clearly indicating a reference to a natural person, that is, a real flesh and blood human being. The Judge also noted that if the legislature had intended to criminalise the possession of depictions of imaginary persons or material such as cartoons and virtual images that it could have done so by expressly extending the definition to such material as was done with the Commonwealth Criminal Code definition (section 474 of the Commonwealth Criminal Code defines 'child pornography material' as material that depicts a person, or a representation of a person).

- It is submitted that Parliament's intention in enacting the provisions was to include fictional and animated characters. This is clear from the Explanatory Notes and from the inclusion of the defence provided in section 228E(5). It is appropriate to shield the community from offensive fictional material which describes the sexual or social abuse of children. Further, the possession of such images may lead to a toleration of actual child exploitation. As a safeguard the child exploitation material defences include where the conduct engaged in was for a genuine artistic, educational, legal, medical, scientific or public benefit purpose and the conduct was reasonable for that purpose.

- Clause 27 amends the definition of 'child exploitation material' as contained in section 297A to clarify Parliament's intention to encompass, animated, virtual and fictitious characters.

Joinder on indictments

- It is common that for the offence of possessing child exploitation material, a forensic examination of a seized computer will reveal large quantities of image and video files depicting child abuse. The quantities may range from hundreds, to tens of thousands, to hundreds of thousands, with such possession occurring over an extended period.

- Section 567 of the Criminal Code provides the 'basic rule' that where an indictment (the document that commences the criminal proceeding in the Supreme and District Courts) contains more than one offence, each offence charged must be set out as a separate count. This means that each image or video file would have to be charged as a separate offence.

- Section 568 of the Criminal Code provides an exception to the 'basic rule'. It allows a single count to combine several instances of offences, as long as they are of the same legal offence. Specific provision is made for the offences of stealing, receiving, fraud, forgery and uttering. Section 568 has the effect of streamlining the process.

- Exceptions are allowed because, in the case of property offences, it is not uncommon to have a high volume of the same type of offence committed by a single offender. Such cases can present evidentiary challenges in relation to the particularisation of charges. Similar difficulties are encountered with the child exploitation material offences, particularly regarding the efficacy of the dates relied upon to indict an offender under section 228D (Possessing child exploitation material).

- The current approach, because of the evidentiary difficulties, is to use the date of seizure as the date alleged in the indictment because this is a known date and can easily be proven. However, the date of seizure may not reflect the true extent of the criminality involved. Although the indictment gives the appearance of a single act of possession, in reality the volume of the material possessed and the other evidence (for example, the admissions of the accused) may reflect a continuing course of conduct where material was accumulated over a prolonged period, and at frequent and regular intervals. It is important at sentence that the criminality, which includes the timeframe of the offending, is properly and fully reflected to ensure that the penalty imposed reflects the gravity of the offending.

- The Bill amends section 568 to extend the provision to the child exploitation material offences. This will enable the Crown to allege that on dates unknown between two specified dates the offender came into possession of child exploitation material, thus more accurately reflecting the extent of the offending. Further, the amendment will streamline the process by avoiding multiplicity of counts in a single indictment. The amendment will allow the Crown to better reflect on the face of the indictment that the possession involved multiple acts of possession and the accumulation of the material over an extended timeframe.

- In practice section 568 is used when the offender has indicated a willingness to plead guilty. In the case of a trial, the preferred practice would be to indict a separate count for each transaction as best as can be established on the evidence; to avoid duplicity in the charge and unfairness to the accused. Furthermore, in practice if an offender indicated that some of the images were lawfully possessed then those images would be charged as separate counts on the indictment and resolved by way of a trial; the remaining acts of possession would be rolled up in a single charge pursuant to section 568 of the Criminal Code, thus eliminating any unfairness.

Penalties where child has an impairment of the mind (clauses 28 – 30)

- Sections 208, 210 and 215 of the Criminal Code provide for the offences of unlawful sodomy, indecent treatment of children under 16 and carnal knowledge with or of children under 16, respectively. The offences of sodomy and unlawful carnal knowledge carry maximum penalties of 14 years imprisonment or life imprisonment where the child is under 12 years or under the care of the offender. The offence of indecent treatment of a child carries a maximum penalty of 14 years imprisonment or 20 years where the child is under 12 years or under the care of the offender.

- Section 216 of the Criminal Code deals with the abuse of a person with an impairment of the mind. Unlawful carnal knowledge of a person with an impairment of the mind carries 14 years imprisonment or life if the victim is under the guardianship of or in the care of the offender. Indecently dealing with a person with an impairment of the mind carries 10 years imprisonment or 14 years if the victim is under the care or guardianship of the offender or is the lineal descendent of the offender.

- Unlike the Commonwealth, there is no specific circumstance of aggravation regarding a child victim with an impairment of the mind (refer section 272.10 Commonwealth Criminal Code).

- Sections 208, 210 and 215 are amended to create a new circumstance of aggravation where the child has an impairment of the mind. The offences of sodomy and unlawful carnal knowledge will carry maximum penalties of life imprisonment where the child has an impairment of the mind. The offence of indecent treatment of a child will carry a maximum penalty of 20 years imprisonment in such a case.

- The amendments recognise the increased vulnerability of children with a mental impairment to the predations of sex offenders.

Procuring and 'Grooming' a child for sexual activity (clauses 32 and 33)

- Section 217 of the Criminal Code provides the offence of procuring a child or a person with an impairment of the mind to engage in carnal knowledge. The offence carries a maximum penalty of 14 years imprisonment. The term 'procure' is defined to mean knowingly entice or recruit for the purposes of sexual exploitation. Section 218A of the Criminal Code provides the offence of an adult using electronic communication with intent to: procure a child under 16 (or a person the adult believes is under the age of 16) to engage in a sexual act; or expose, without legitimate reason, a child under 16 (or a person the adult believes is under the age of 16) to any indecent matter. The offence carries five years imprisonment or 10 years if the child is under 12.

- A number of jurisdictions, including the Commonwealth, have an offence of 'grooming' to complement the procuring offences. The term 'grooming' refers to wide-ranging behaviour that is designed to facilitate the later procurement of a child for sexual activity (for example, an offender might build a relationship of trust with the child, and then seek to sexualise that relationship). This allows for the potential for police to intervene before a sexual act or sex-related activity takes place.

- Clause 33 of the Bill inserts new section 218B (Grooming children under 16) in the Criminal Code. The offence captures conduct committed with the intention to facilitate the procurement of a child under the age of 16 for sexual activity or to expose the child to any indecent matter. The offence of grooming adopts the maximum penalty currently available for the offence of procuring (section 218A) which is five years imprisonment or 10 years if the child is under 12. The maximum penalty for procuring is increased as outlined below. The new grooming offence applies to all communications and is not limited to electronic communications.

- The maximum penalties for the offence of using the internet to procure children (section 218A) is increased to 10 years imprisonment or 14 years where the child is under 12 years to accommodate the new offence of grooming and to better align with the Commonwealth (refer section 272.14 Commonwealth Criminal Code). Further, a new circumstance of aggravation is created in circumstances where the procuring conduct involves the offender meeting with the child or going to a place with the intention of meeting the child. Such a circumstance of aggravation adopts the approach in New South Wales where such conduct attracts a greater sanction in recognition of this overt act.

Animal cruelty/ welfare (clauses 3-18, 39-40 and 57)

New offence of serious animal cruelty

- Clause 39 amends the Criminal Code by the insertion of a new offence of 'serious animal cruelty'. The offence is an indictable offence carrying a maximum penalty of seven years imprisonment and will apply to a person who kills, seriously injures or causes an animal prolonged suffering and does so intending to inflict severe pain or suffering on the animal – in effect, the torture of an animal.

- The majority of acts of animal cruelty in Queensland are prosecuted under section 18 of the *Animal Care and Protection Act 2001* (ACPA) which is a simple offence carrying a maximum penalty of $100,000 (1,000 penalty units) or two years imprisonment. Section 18 provides that it is an offence to be cruel to an animal, is very broad and can extend to deliberate cruelty or reckless conduct. The new offence focuses on the intentional infliction of severe pain or suffering.

- The new offence also differs from section 468 (Injuring animals) of the Criminal Code, which provides that any person who wilfully and unlawfully kills, maims or wounds any animal capable of being stolen is guilty of an indictable offence. The offence carries a maximum penalty of up to three years imprisonment or seven years in the case of stock. Section 468 treats the animal as a form of personal property and therefore is limited in its application. The offence does not apply to the injuring of a wild animal or to a person who injured an animal that they owned. In effect, section 468 is really about damage to property and not animal cruelty.

- The existing offences do not adequately provide for the cases where a person intentionally inflicts severe pain and suffering on an animal. Given that the offence of killing livestock carries a maximum of seven years imprisonment, a similar maximum penalty can be justified for the new offence.

Increase penalty for section 18, Animal Care and Protection Act 2001 (ACPA)

- The majority of acts of animal cruelty are prosecuted under section 18 of the ACPA. The new offence of serious animal cruelty will apply to a narrow cohort of offenders who intentionally torture an animal. It is anticipated that the majority of animal cruelty cases will continue to be prosecuted under section 18 of the ACPA. The increase in the maximum penalty will complement and better align with the new offence of 'serious animal cruelty' and will encourage the imposition of sentences that meet community expectations.

Powers of inspectors

- The ACPA allows for the appointment of inspectors whose functions are to investigate and enforce compliance with the ACPA. RSPCA employees may be appointed as inspectors. The ACPA provides for the various powers of inspectors that are necessary to enable inspectors to carry out their functions. A review of the powers of entry to a place (with or without a warrant), entry to vehicles and the seizure powers reveal a number of inconsistencies.

- The ACPA defines the phrase 'animal welfare offence' to mean an offence against the ACPA (with a few exceptions) and an offence against section 468 of the Criminal Code. The new offence of 'serious animal cruelty' is included in the definition of 'animal welfare offence'.

- An inspector may enter a place if he/she reasonably suspects any delay in entering the place will result in the concealment, death or destruction of anything at the place that is: evidence of an animal welfare offence against the ACPA; or being used to commit, continue or repeat an offence. An inspector may obtain a warrant to enter a place when there is a reasonable suspicion there is a thing that may provide evidence of an offence against the ACPA. An inspector may enter a vehicle if he/she reasonably suspects it will provide evidence of an animal welfare offence. Upon entering a place, an inspector may seize an animal or thing if he/she reasonably suspects it is evidence of an offence against the ACPA or an animal welfare offence.

- The relevant provisions in the ACPA are amended to address these inconsistencies and ensure the powers of entry, obtaining of a warrant, seizure and other relevant powers apply to an animal welfare offence (as amended). The amendments will also mean that the powers of inspectors under the ACPA apply to the investigation of the new offence of serious animal cruelty and thereby ensure evidence obtained during the investigation is relevant and admissible in proceedings for the indictable offence.

- Further, the amendment to the *Justices Act 1886* will ensure that RSPCA inspectors who investigate the new offence of serious animal cruelty can proceed to commence a prosecution in the Magistrates Courts for the offence.

- In recent years, the RSPCA Queensland has established itself as a credible prosecutorial body and has over 200 barristers and solicitors throughout Queensland on its pro bono panel, including a number of prominent barristers appointed as Queens Counsel or Senior Counsel.

- While RSPCA inspectors will be able to commence proceedings and have carriage of the committal hearing, it is appropriate that the independent Director of Public Prosecutions continue to have the sole responsibility of preparing, instituting and conducting criminal proceedings on indictment in the higher courts on behalf of the State.

Prohibition orders

- Section 183 of the ACPA allows a court to order that a person convicted of an animal welfare offence must not acquire or possess: any animal (or a stated type of animal); or any animal (or stated type) for trade or commerce or another purpose. Such an order (prohibition order) may be made permanently or for a stated period. A court may make a prohibition order against a person only if the court is satisfied on the balance of probabilities it is just to make the order in the circumstances. The court must consider: the nature of the animal welfare offence; the effect of the offence on the animal the subject of the offence; the welfare of the animal and any other animal owned by the person; and the likelihood of the person committing another animal welfare offence.

- The Bill amends the ACPA to strengthen the making of prohibition orders in relation to the offences of animal cruelty (section 18 of the ACPA), injuring an animal (section 468 of the Criminal Code) and the new offence of serious animal cruelty. Where a person is convicted under section 18 of the ACPA the court will be required to make a prohibition order unless satisfied it would be unjust to make the order in the circumstances. The offender will bear the onus of satisfying the court, on the balance of probabilities that the court should abstain from making the order. The court will retain its discretion as to the length of the order and the conditions of the order.

- A person convicted of an offence under section 468 of the Criminal Code or the new serious animal cruelty offence will be subject to a mandatory order prohibiting the offender from possessing etc an animal of the type subject of the offence (e.g. if convicted of harming a dog the order will prohibit the offender from possessing etc any dog). The order will apply for a minimum period of two years. The court will retain discretion to widen the ambit of the prohibition order or extend the length of the order.

- The new offence of serious animal cruelty applies to a person who intentionally inflicts severe pain or suffering on an animal. Section 468 of the Criminal Code applies to a person who wilfully and unlawfully kills, maims or wounds an animal (other than a wild animal). Section 18 of the ACPA applies to a person who is cruel to an animal, in particular by causing it unjustifiable, unnecessary or unreasonable pain including killing the animal in an inhumane way. A default position of prohibiting such offenders from possessing animals is justified on the basis of the moral significance of animals and the obligations we, as a society, owe to protect them from suffering.

- The Bill amends the ACPA to allow a court to make an interim prohibition order against a person charged with an animal welfare offence where the court is satisfied there are reasonable grounds for believing the person poses an unacceptable risk of committing an animal welfare offence before the completion of the proceeding for the charged offence. The court retains discretion as to whether to make the order and the extent of the prohibition. New section 187A allows for the amendment or revocation of the interim prohibition order but restrictions are placed on the person subject to the order in terms of frequency of application.

- Section 187 (Contravention of prohibition order unlawful) of the ACPA is amended to extend to the contravention of an interim prohibition order.

Appeals by Attorney-General

- Section 669A (1) of the Criminal Code provides for the Attorney-General to appeal against sentence.

- The principle of sentencing double jeopardy provides that when an appeal court decides whether to allow a Crown appeal against sentence and in exercising its discretion to re-sentence an offender, it is required to take into account the offender's exposure to a type of double jeopardy; namely, the stress and anxiety that an offender is presumed to experience when faced with being sentenced for a second time.

- The following three fetters have developed at common law under the principles of sentencing double jeopardy:

- that in re-sentencing the penalty will generally be less than the sentence the Court of Appeal considers should have been imposed at first instance;
- that in re-sentencing, the penalty will generally be toward the lower end of the available sentencing range; and
- the submissions of the Crown at first instance are generally binding, either in determining whether to intervene or in determining the re-sentence. The court is reluctant, other than in exceptional circumstances, to allow an appeal against a sentence that lies within the range contended for by the Crown at first instance.

- Most Australian jurisdictions have legislated to remove the principles of sentencing double jeopardy from the appeal process. The Bill amends section 669A(1) to completely remove the ability of the Court of Appeal to take into account the principles of sentencing double jeopardy when considering Attorney-General appeals against sentence. That is, when the Court of Appeal finds error on the part of the sentencing judge, the Court cannot rely on principles of sentencing double jeopardy to nevertheless exercise its residual discretion not to intervene; and when re-sentencing the respondent, the Court cannot rely on principles of sentencing double jeopardy.

- The Bill does not remove the residual discretion of the Court of Appeal to decline to intervene based on considerations that do not include the principles of sentencing double jeopardy (such as the deteriorating ill health of the offender; delay in bringing the appeal; to ensure parity in the sentence imposed on co-offenders; and the negative impact of incarceration of the person on their family).

Drug offence reform (Clauses 44 – 55)

Amending the definition of 'analogue' (clauses 45 and 51)

- An amendment to the *Drugs Misuse Act 1986* (DMA) in 2008 expanded the definition of dangerous drug to encompass 'analogues' of the dangerous drugs listed in schedules 1 and 2 of the *Drugs Misuse Regulation 1987* (DMR). The aim of this amendment was to target underground chemists who make slight changes to the molecular structure of existing illicit drugs to create new drugs not specifically identified in the DMR schedules. This addresses the speed with which new synthetic drugs, mainly amphetamines, are designed and the difficulty of legislatively keeping pace with the creation of new drugs. It is preferable to put the position beyond doubt and to prescribe the new drugs but the analogue provisions create a stop gap.

- The definition of 'dangerous drug' in terms of 'analogues' include:

- a thing that has a chemical structure that is substantially similar to the chemical structure of a scheduled dangerous drug or its derivative (limb 1); and
- that has a substantially similar pharmacological effect (limb 2).

- This description has subsequently presented evidentiary problems. In most cases there is no way to prove the second limb of the test, that is, that the substance has a substantially similar pharmacological effect as a scheduled drug. For the most part, the drugs that could be brought under the extended definition as analogues are new and there have not been particular studies undertaken about the effects of the drugs. Accordingly, the criminal standard of proof to show that the substance has a substantially similar pharmacological effect as an already scheduled drug cannot be discharged. The amendment to the definition of analogue is designed to overcome this evidentiary problem.

- The Bill amends the second limb of the definition to overcome such evidentiary difficulties and focuses on the objective purpose behind the manufacture, supply and possession with such purpose proven from the surrounding circumstances, that is, that the new drug was manufactured and sold as a substance intended to provide the user with the same effect as a scheduled illegal drug.

Amendment of section 9A- Defence of reasonable excuse (clause 46)

- Section 9A of the DMA provides the offence of possessing relevant substances or things and carries a maximum penalty of 15 years imprisonment. A 'relevant substance' is a substance that is, or contains a controlled substance listed in Schedule 6 of the DMR (in an amount of or exceeding the amount listed in schedule 8A). The controlled substances listed in schedule 6 of the DMR are substances that are used to manufacture illicit drugs. However some of the listed substances may be possessed by the public generally, either in pure form or the listed substance may be contained in a substance (for example, a paint remover or nail polish remover which contains the controlled substance: 4-hydroxybutanoic acid (Gamma-butyrolactone)).

- Section 9A is only made out if the substance is 'unlawfully' possessed. Section 4 of the DMA defines 'unlawfully' as meaning without authorisation, justification or excuse by law. Therefore, unless there is some type of approval under law or statutory excuse, the offence is committed. There is no approval under law or statutory excuse that applies to the possession of a paint remover or nail polish remover (as an example).

- The Bill therefore amends section 9A to insert a reasonable excuse defence to preclude all innocent possessions of a relevant substance. This will not increase the evidentiary onus on the prosecution to establish the offence.

New offence of trafficking in precursors (clause 47)

- Schedule 6 of the DMR lists controlled substances which are precursor chemicals. These substances are used to manufacture dangerous drugs, chiefly, amphetamine-based drugs. Schedule 8B of the DMR lists apparatus (e.g. glassware, pill presses) that are also capable of being used in illicit drug production.

- A person illicitly dealing with schedule 6 precursor chemicals or schedule 8B drug apparatus may be charged with unlawful possession, unlawful supply or unlawful production of those items under section 9A-9C of the DMA. Each of these offences carries a maximum of 15 years imprisonment.

- The specific offence of trafficking in precursor chemicals is designed to appropriately reflect the criminality of a person engaged in the commercial supply of precursor chemicals or apparatus required for illicit drug production. While such persons may be able to be charged with the existing possession, supply or production offences, in some cases these offences fall short of reflecting the true criminality of the conduct where the scale of supply reaches a very high level.

Amendment to clarify meaning of section 10(4) (clause 48)

- Section 10(4) of the DMA provides an offence punishable by a maximum of two years imprisonment for failure to take reasonable care and precaution with a hypodermic syringe or needle.

- In 16 June 2009 the District Court sitting in its appellate jurisdiction heard the matter of *Monckton* v *Youngberry* [2009] QDC 199, an appeal from the Magistrates Court. In that case District Court Judge Ryrie overturned the conviction for an offence under section 10(4) of the DMA for failure to take reasonable care and precaution with a syringe that was used for lawful medication. While Section 10(4) does not specifically require that the syringe/needle was for use in connection with a dangerous drug, the Judge was of the view that as the offence sat within the DMA, such a connection should be made out.

- The amendment to section 10(4) clarifies the intention by declaring that the needle or syringe does not have to be for use in connection with a dangerous drug. This accords with the plain meaning of the subsection and with extracts from the second reading speech to the Bill that introduced the offence.

Disclosure to Australian Crime Commission (clause 49)

- The Queensland Police Service (QPS) often deals with the Australian Crime Commission (ACC) with respect to dealings in illicit drugs. In the course of this work, QPS discloses to the ACC information gathered under section 43D of the DMA from 'end user declarations' (these are documents showing details of a person to whom a controlled precursor chemical is supplied).

- Section 43U of the DMA permits information obtained under section 43D to be disclosed to 'a police officer'. The difficulty is that the ACC employs both police officers and civilians. While the QPS can disclose information to a police officer, it is often the case that the matter will be handled solely by a civilian without the aid of a police officer. In these circumstances, they are not able to disclose the information. It is against this background that the definition of 'police officer' in section 4 is to be amended.

Fair Trading amendments

Amendments to the Collections Act 1966

- This Act regulates collections from the public for charity or community purposes. Except for the special circumstances of the Minister's appointment of inspectors under section 27 to carry out investigations, there is no provision for the appointment of inspectors generally. The amendments will improve the administration of the Act by deeming fair trading inspectors generally as inspectors under this Act.

- Additionally, the Bill implements a recommendation of the Independent Review of Queensland Government Boards, Committees and Statutory Authorities (Webbe-Weller Review) to allow the chief executive to appoint members under the Act instead of the Governor in Council as the Act presently provides. This will streamline the appointment process.

Amendments to the Credit (Commonwealth Powers) Act 2010

- This Act preserves certain provisions of the former consumer credit legislation, including that relating to conduct deeds. These conduct deeds are documents prepared by the chief executive and executed by a credit provider, under which the credit provider agrees to stop engaging in stated conduct or to take certain action. Written conduct deeds are currently made available by the Department for inspection by the general public. The amendments enhance the accessibility of conduct deeds by members of the public by allowing the Department to publish this register on its website.

Amendments to the Land Sales Act 1984 and Land Sales Regulation 2000

- This Act regulates the sale of residential units purchased off-the-plan within a proposed community management scheme. It currently enables buyers to avoid a contract if the registrable transfer form is not provided by the seller within 3.5 years of the day the contract was made (unless the Minister grants an extension).

- The amendments remove the current process which requires developers to apply to the Minister for an extension of time, and which also requires this extension to be prescribed in the *Land Sales Regulation 2000*. The benefits to consumers provided by this process are outweighed by the associated administrative burden involved for both developers and government. Instead, vendors will be able to specify the time for giving the registrable transfer form in the instrument of purchase, up to a maximum of 5.5 years, but otherwise a default period of 3.5 years will apply.

- A number of additional minor technical amendments are also included to clarify and modernise these provisions. The *Land Sales Regulation 2000* is also being amended by the Act to remove the provisions supporting the current extension process.

Amendments to the Liquor Act 1992

- The amendments exempt hospitals and nursing homes from applying for a liquor licence to serve a quantity of liquor equivalent to not more than two standard drinks per day. Essentially the amendments will enable a nursing home to serve up to two standard drinks per day to adult residents and their adult guests; and hospitals to serve up to two standard drinks per day to adult inpatients. If a nursing home or hospital wished to supply a greater quantity of liquor to residents and their guests or inpatients respectively, they would need to apply for a licence as is currently the case under the Act. These venues have been identified as low-risk venues and the exemptions are consistent with those which already exist in the Act for the sale of liquor to residents and adult guests in places such as retirement villages. The amendments will not apply to nursing homes and hospitals in a restricted area declared under the *Liquor Regulation 2002* pursuant to section 173H of the Act.

Amendments to the Residential Services (Accreditation) Act 2002

- These amendments provide the chief executive with the power to impose conditions on the renewal of accreditations under the Act. The benefit of conditional accreditation is the Department may allow the continued operation of a service while mandating conditions to facilitate service improvement. Failure to re-accredit a service may result in cancellation of registration of the service and possible closure of the service. The amendments also enhance access to undertakings by the general public, by allowing the Department to publish registers of undertakings on its website.

- These amendments were previously included in the draft Fair Trading and Other Legislation Amendment Bill 2011 (which included other fair trading amendments now in the Criminal and Other Legislation Amendment Bill 2011). Following Machinery-of-Government changes in early 2011, administration of the Act is now with the Minister for Community Services and Housing and Minister for Women. However, these amendments continue to be included with these fair trading amendments to facilitate their timely consideration by Parliament.

Amendments to the Retirement Villages Act 1999

- A number of these amendments implement the recommendations of the 2008 Ministerial Working Party, which was comprised of stakeholders from the retirement village industry, and was established to discuss issues relating to the Act. The remaining amendments were identified by government or stakeholders in order to enhance the operation of the Act.

- The amendments confirm that the chief executive must not register a retirement village scheme where the scheme is contrary to the regulatory framework under the Act. The amendments also clarify the meaning or improve the operation of the Act by amending a number of existing provisions.

- In particular, the amendments clarify (a) the 'termination date' for a residence contract where a relative has an initial right to reside in the unit; (b) the capital replacement fund may be used to pay for reinstatement of accommodation where the operator is partly or wholly liable for reinstatement of the unit; (c) how general service charges paid by the village operator over a vacated unit are to be applied, particularly the amount of these charges which should go into the maintenance reserve fund; and (d) that it is the most recently published CPI figure that must be used for village budgeting.

Amendments to the Roman Catholic Church Lands Act 1985

- The purpose of the Act is to divest deceased registered proprietors and lessees of land interests they held on behalf of the Roman Catholic Church, and to vest those interests in one of the current corporate trustees of the various Archdioceses of Queensland. The Bill corrects an omission by inserting a land title reference for St Michael's Church at Pine Mountain into the schedule of land interests vesting in the Corporation of the Trustees of the Roman Catholic Archdiocese of Brisbane. This amendment was requested by lawyers for the Corporation.

Amendments to the Security Providers Act 1993

- Amendments to the *Security Providers Act 1993* passed in 2009 (which commenced in February 2011) require security firms to be members of a security industry association, which has been approved by the chief executive.

- The 2009 amendments provided security industry associations with a right of appeal to the Magistrates Court if aggrieved by an adverse decision of the chief executive about approval of the association. However, the appeal provisions were not amended to reflect the establishment of the Queensland Civil and Administrative Tribunal (QCAT) as the review body for decisions made under the Act.

- The amendments in the Bill address this issue by providing security industry associations with a right to apply to QCAT for a review of a decision of the chief executive to refuse to approve (or withdraw approval) of the association.

- The amendments also enable the chief executive to impose conditions on the approval of a security industry association, but only where the condition is necessary to ensure the association complies with the requirements of the approval, as prescribed by regulation. In appropriate cases, imposing conditions will allow the chief executive to address concerns about the performance of the association without necessarily withdrawing approval, which would have a serious impact on the association and its members. A security industry association aggrieved by a decision to impose a condition will be able to apply to QCAT for a review.

The application to the Bill of the Fundamental Legislative Principles

The Committee is referred to pages 9 -13 of the Explanatory Notes to the Bill where potential breaches of fundamental legislative principles are identified and justified.

Paragraphs 1 – 9 deal with the creation of new offences.

Paragraphs 10 – 12 and 14 deal with the increases in maximum penalties.

Paragraph 13 deals with the issue of 'joinder'.

Paragraph 15 deals with the extension of inspector's powers under the Animal Care and Protection Act.

While the issue of the strengthening of prohibition orders is discussed in paragraph 16, the Explanatory Notes do not specifically deal with the introduction of interim prohibition orders which may be made if a person is charged with an animal welfare offence (as amended in the Bill). While the making of an order in such circumstances imposes prohibitions on a person not yet convicted of an offence, the provision is justified to ensure the welfare and safety of animals. The court may make an interim prohibition order only if satisfied there are reasonable grounds for believing there is an unacceptable risk the person will commit an animal welfare offence before the completion of the proceeding for the alleged offence. The court must not make an order unless the person has been given an opportunity to be heard about whether the order should be made. The defendant can apply to have an interim order amended or revoked if at least six months has passed after the interim order was made or after the person last made an application for amendment or revocation.

Paragraph 19 deals with the removal of the principles of sentencing double jeopardy from the appeal process under section 669A(1) of the Criminal Code.

Paragraphs 20 and 21 deal with amendments to the *Retirement Villages Act 1999,* the *Credit (Commonwealth Powers) Act 2010* and the *Residential Services (Accreditation) Act 2002.*

Consultation

Pages 13-14 of the Explanatory Notes list the entities and agencies consulted on the Bill.

Criminal law amendments

Comment on a draft of the Criminal Law amendments (except for the animal cruelty amendments) was received from the Chief Justice of the Supreme

Court, the President of the Court of Appeal, the Chief Judge of the District Court, the Chief Magistrate, Legal Aid Queensland, the Queensland Law Society, the Sentencing Advisory Council, the Crime and Misconduct Commission, Protect All Children Today, Bravehearts, the Bar Association of Queensland and the Queensland Council for Civil Liberties.

The RSPCA was consulted about the animal cruelty offences.

Comments from these stakeholders generally informed the final version of the Bill.

Fair Trading and Liquor Act Amendments

The amendments to the *Collections Act 1966*, *Credit (Commonwealth Powers) Act 2010*, *Land Sales Act 1984*, *Liquor Act 1992*, *Residential Services (Accreditation) Act 2002* and *Retirement Villages Act 1999* were previously contained in the Fair Trading and Other Legislation Amendment Bill 2011. This Bill was released for public consultation in late 2010.

Submissions were received from the National Financial Services Federation in relation to the proposed amendment to the *Credit (Commonwealth Powers) Act 2010* and the Queensland Law Society in relation to the proposed amendments to the *Retirement Villages Act* 1999 and the *Land Sales Act 1984*. The feedback was considered when revising the proposed amendments to ensure they would operate effectively.

As the need for the amendments to the *Roman Catholic Church Lands Act 1985* and *Security Providers Act 1993* was identified more recently, and the changes are essentially machinery in nature, there was no public consultation on these amendments prior to their introduction.

Attachment 1

Commonwealth, State and Territory child pornography and child abuse material

	Legislation	Involving a child in making	Possession	Production	Sale/Distribution
		Section /Max Penalty	Section /Max Penalty	Section /Max Penalty	Section /Max Penalty
Cth	*Criminal Code 1995* ***(outside Australia)***		273.5/child porn/15 years 273.6/child abuse material/15 years	273.5/15 years 273.6/child abuse material/15 years	273.5/15 years 273.6/child abuse material/15 years
	(Use through a carriage service)		474.20/child porn/15 years; 474.23/child abuse/15 years	474.20/child porn/15 years; 474.23/child abuse/15 years	474.20/child porn/15 years 474.23/child abuse/15 years
NSW	*Crimes Act 1900*	s91G/ 14 years (child under 14) or 10 years (child of or above 14)	s91H/ 10 years	s91H/10 years	s91H /10 years
VIC	*Crimes Act 1958*	S69/10 years	s70/ 5years	s68/10 years	---
	Classification (Publications, Films and Computer Games) (Enforcement) Act 1995				S57A/10 years (transmission)
QLD	*Criminal Code*	s228A/10 years	s228D/5 years	s228B/10 years	s.228C/10 years
WA	*Criminal Code* *(WA sections inserted by No. 21 of 2010)]*	S217/10 years	S220/7 years * see possess with intent to distribute 10 years	S218/10 years	s.219/10 years - a person who distributes; - a person who possess with the intention of distributing
SA	*Criminal Law Consolidation Act 1935*	S63B(Procuring child indecent act)/ 10 years for basic offence/ 12 years for aggravated offence (i.e. knowing victim was under the	s.63A/<u>if first offence</u>: 5 years (basic offence); 7 years (aggravated offence i.e. knowing victim was under the	s.63(a)/basic offence – 10 years; aggravated offence – 12 years	s.63(b)/ basic offence – 10 years; aggravated offence – 12 years;

		age of 14 years)	age of 14 years); if subsequent offence: 7 years (basic offence); 10 years for aggravated.		
TAS	Criminal Code Act 1924 #Re Max penalty: In Tasmania (s.389) Subject to the provisions of the *Sentencing Act 1997* or of any other statute, and except where otherwise expressly provided, the punishment for any crime shall be by imprisonment for 21 years, or by fine, or by both such punishments, and shall be such as the judge of the court of trial shall think fit in the circumstances of each particular case.	S 130/ 21 years#	s130C/21 years (130D:also accessing charge)	s130A/21 years	S130B/21 years
ACT	*Crime Act 1900*	S64(1)/ use child under 12/ 1500 pu (1500 x 110 = 165 000), 15 years imprisonment or both; 64(3) use child 12 or older/ 1000 pu or 10 years or both	S65/ 5 years (or 500 pu or both)	S64A/12 years or 1200 pu or both	S64A/12 years or 1200 pu or both
NT	*Criminal Code Act*	s.125 E/ 14 years	s.125B/10 years	s.125B/10 years	s.125B/10 years