



LEGAL AFFAIRS, POLICE, CORRECTIVE SERVICES AND EMERGENCY SERVICES COMMITTEE

Members present:

Hon. D.M. Wells MP (Acting Chair)
Mr J-P. H. Langbroek MP
Mr J.P. Bleijie MP
Mr C.J. Foley MP
Mrs B.M. Kiernan MP

Staff present:

Ms A. Powell (Research Director)
Ms A. Honeyman (Principal Research Officer)

EXAMINATION OF THE CIVIL PROCEEDINGS BILL 2011

TRANSCRIPT OF PROCEEDINGS

WEDNESDAY, 26 OCTOBER 2011

Brisbane

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Committee met at 11.34 am

ACTING CHAIR: Good morning, ladies and gentlemen. I declare this public meeting for the examination of the Civil Proceedings Bill 2011 open. I thank you for your interest and for your attendance here. I welcome members of the executive arm of government to the legislature and I also welcome the one bona fide genuine practising member of the public who has turned up on this particular occasion.

Mr LANGBROEK: Let them identify themselves.

ACTING CHAIR: I have just met Kirsten. We have a genuine member of the public. For this reason, I have to read the full rigmarole of the introductory remarks. I would like to acknowledge the traditional owners of the land upon which we meet today and the custodians of the sacred lands of our state.

The Legal Affairs, Police, Corrective Services and Emergency Services Committee is a statutory committee of the Queensland parliament. As such, it represents the parliament. It is an all-party committee that adopts a non-partisan approach to its inquiries. I would like to introduce the members of the committee present today: my deputy chair and the member for Surfers Paradise, John Paul Langbroek; Julie Attwood, the member for Mount Ommaney; Jarrod Bleijie, the member for Kawana; Chris Foley, the member for Maryborough; and Betty Kiernan, the member for Mount Isa. I am Dean Wells, the member for Murrumba and acting chair of the committee. Barbara Stone, the chair of the committee, is ill with pneumonia.

On 24 August 2011, the Civil Proceedings Bill 2011 was introduced into the parliament and was subsequently referred to the committee for examination and report to the House. The committee has advised the public of its examination of the bill by advertising in the print media, on the committee's website and also by writing directly to a number of individuals and organisations. The committee's business section of the parliament of Queensland website also provides information on the business before each committee for each sitting week. I stress that the committee is undertaking an examination process on behalf of the parliament and as yet has made no recommendations or put forward any proposals. The committee is being addressed in its examination of the bill by officers from the Department of Justice and Attorney-General. A public hearing on this bill will be held on Friday 28 October.

The committee's proceedings are lawful proceedings and are subject to the standing rules and orders of the Queensland parliament. I ask all persons present to turn their mobiles off or to put them on silent. In the unlikely event of the need to evacuate, please follow staff directions. Members of the public are reminded that they are here to observe the hearing and may not interrupt the hearing. In accordance with standing order 208, any person admitted to this hearing may be excluded at the discretion of the chair or by order of the committee. Representatives of the media may attend and may record the hearing.

BRADLEY, Ms Imelda, Director, Strategic Policy, Department of Justice and Attorney-General

FORD, Mr David, Deputy Director-General, Liquor, Gaming and Fair Trading, Department of Justice and Attorney-General

LANG, Ms Jennifer, Acting Assistant Director-General, Strategic Policy, Legal and Executive Services, Department of Justice and Attorney-General

REED, Mr Philip, Director-General, Department of Justice and Attorney-General

RYAN, Mr Terry, Deputy Director-General, Justice Services, Department of Justice and Attorney-General

SAMMON, Mr Damian, Director, Fair Trading Policy, Department of Justice and Attorney-General

WOO, Ms Linda, Executive Director, Office of Regulatory Policy, Department of Justice and Attorney-General

ACTING CHAIR: Today we will be briefed by Mr Phillip Reed, Director-General; Mr Terry Ryan, Deputy Director-General, Justice Services; Mr David Ford, Deputy Director-General, Liquor, Gaming and Fair Trading; Ms Jennifer Lang, Assistant Director-General, Strategic Policy, Legal and Executive Services; Ms Linda Woo, Executive Director, Office of Regulatory Policy; Ms Imelda Bradley, Director, Strategic Policy; and Mr Damian Sammon, Director, Fair Trading Policy. I thank you all very much for being here and for giving your advice.

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I remind you that the standing orders of the parliament apply. The journalists and others who have said to you that you are allowed to lie to parliament are not telling you the truth. You are bound by the rules of parliament. It is a breach of privilege of the parliament to tell anything other than the truth. I advise you that you speak under absolute privilege. That means to say that you can call me anything that you like, however, if you repeat it outside that invites another set of legal principles. Also, if a journalist asks you, 'Do you stand by what you said in the parliament?', if what you said in the parliament would outside of the parliament have been defamatory, then the doctrine of constructive repetition will apply to you and you may be sued for defamation. It is very advisable not to take the principle of absolute privilege too far, but I do not think anybody is going to do that today. I think that what we are going to do now is going to be rather mundane. I welcome you and thank you for coming. Please brief us.

Mr Reed: Thank you very much for those opening remarks. I thought we would take you through the various provisions of the bill. Thanks for the opportunity to appear before you today. I note that I wrote to you on 17 October providing background details on the bill and the consultation undertaken on the various provisions. The main purpose of the Civil Proceedings Bill 2011 is the enactment of a new Civil Proceedings Act to apply to civil proceedings in the supreme, district and magistrates courts. The proposed Civil Proceedings Act incorporates and modernises procedural and substantive law from the Supreme Court Act 1995 and integrates civil procedure provisions from the Supreme Court of Queensland Act 1991. The proposed new act will give effect to the recommendations of the rules committee established under the Supreme Court of Queensland Act 1991.

One of the functions of the rules committee, which comprises representatives of the supreme, district and magistrates courts, is to advise the minister about the repeal, reform or relocation of the provisions of the Supreme Court Act 1995. In the performance of this function, in 2002 the rules committee embarked upon a review of the Supreme Court Act 1995. This review was conducted by former Justice the Hon. Glen Williams AOSC and the Hon. Justice Margaret Wilson. In 2004, the rules committee instructed the Office of the Queensland Parliamentary Counsel on the preparation of a draft Civil Proceedings Bill and in late 2010 the rules committee conducted public consultation on the draft Civil Proceedings Bill and their draft advice to the Attorney-General on the bill prepared by His Honour Judge Douglas McGill SC.

The proposed Civil Proceedings Act is the culmination of extensive research and consultation. The result is a clear, logically ordered and modern set of provisions that has received the support of stakeholders and will provide clarity to persons accessing the civil jurisdiction of our courts. There are related and consequential amendments in the bill providing for the repeal of the Supreme Court Act 1995 and the repeal of obsolete provisions of the Supreme Court of Queensland Act 1991, the Supreme Court of Queensland Act 1991 to contain provisions specific to the Supreme Court and not to other courts, amendments to the District Court of Queensland Act 1967 and the relevant Magistrates Court legislation to harmonise the provisions common to all three courts and to assist in the integration, consistency and effectiveness of the court registries.

The detailed advices provided to the Attorney-General by the rules committee in relation to the Civil Proceedings Bill 2011 and the Supreme Court Act 1995, updated to reflect the current numbering of the bill, have been tabled before the Legislative Assembly and I also provided them to you on 17 October. The bill also includes amendments to other statutes within the Justice portfolio as follows: the bill amends the Associations Incorporation Act 1981 to allow associations to transition seamlessly to the Commonwealth Corporations Act 2001 or the Corporations (Aboriginal and Torres Strait Islander) Act 2006 without incurring transfer duty and capital gains tax. A submission on the amendment was received from the QUT business school. QUT was concerned whether associations originally incorporated under the Religious Educational and Charitable Institutions Act 1861 would have the internal structure necessary to pass the resolution needed to effect the transfer. Only the large RECI Act corporations are likely to want to take advantage of the new transfer provisions and those corporations are expected to already have the structure and constitution required to make this transfer. A specific definition of 'special resolution' for the RECI Act has also been included in the bill. QUT has been engaged to prepare a detailed discussion paper in relation to the range of other issues of concern for associations. The present amendment has been progressed separately because it has been specifically requested by the larger associations.

The bill proposes amendments to the Births, Deaths and Marriages Registration Act 2003 to ensure the integrity of the information provided to the registrar about the burial or cremation of a deceased person. The amendments provide that the person in charge of a crematorium or cemetery where a deceased is cremated or buried must provide notice of the cremation or burial to the registrar. This will be used to verify the information provided by the funeral director or other person who arranges for the disposal of the deceased person's body.

The amendments will also require the person in charge of a crematorium or cemetery to lodge the notice electronically unless, because of the location or some other exceptional circumstances, electronic lodgement is not possible. In a submission to the parliamentary committee, the Australian Funeral Directors Association expressed concern at the proposed exemption from electronic lodgement and stated that regional and rural operators should not be permitted to be exempt. It is possible that the association's concerns result from a misunderstanding as to the scope and intent of the exemption.

The exemption is necessary to provide for areas where there is no internet access or where exigent circumstances arise—for example, where there is temporary failure of internet access. It is not a blanket exemption for rural or regional operators. There will also be amendments to the Cremations Act 2003 to ensure that the person in charge of a crematorium labels a person's ashes with prescribed identifying information.

The Australian Funeral Directors Association submission to the parliamentary committee supports this. The association has made some specific suggestions as to the information that should be required to be printed on the ashes container. Subject to the passage of the bill, these will be taken into account in setting the necessary amendments to the Cremations Regulation 2003.

The Information Privacy Act 2009 regulates the fair collection and handling in the public sector environment of personal information. While the act permits Queensland agencies to disclose personal information to a law enforcement agency, this does not extend to the law enforcement agencies of the Commonwealth—for example, the AFP or other states and territories. While some interstate agencies may obtain the information using compulsory powers, this option is not available to all relevant agencies with law enforcement functions.

The proposed amendments permit Queensland agencies to disclose personal information to law enforcement agencies in other jurisdictions if they are satisfied the disclosure is necessary for specified functions or purposes. In submissions to the parliamentary committee, the AFP and the Queensland Information Commissioner have supported these amendments.

The bill also amends the Right to Information Act 2009 and the Information Privacy Act 2009 to allow the Information Commissioner to approve leave for her deputies, consistent with the practice in many private and public organisations. The proposed amendments will also remove the requirement for the Information Commissioner to apply to the minister for recreational leave, sick leave and the like. They are aligned with provisions applying to the Ombudsman. The new provisions will allow the Information Commissioner to take leave in accordance with their entitlements. In the submission to the parliamentary committee, the Information Commissioner has supported these amendments.

The bill also amends the Retirement Villages Act 1999 to provide that particular exit fees paid to a scheme operator must be calculated on a daily pro rata basis. This will apply if an existing contract does not provide an alternate method of calculation or the contract is entered into after commencement. These amendments aim to provide fairness and certainty for retirement village residents in how their exit fee will be calculated. The need for this amendment was identified by village residents including the Association of Residents of Queensland Retirement Villages. Although other review work is presently being undertaken in relation to the act, particularly about what happens should a village close, it was considered important to progress this important consumer protection amendment as soon as possible.

The amendment has been revised since it was first released for consultation when it was included in the draft Fair Trading and Other Legislation Amendment Bill as a result of the substantial resident feedback received during that consultation. Submissions on the amendment were received from the Association of Residents of Queensland Retirement Villages, the Queensland Law Society and the lead operator representatives, being Aged Care Queensland Inc. and the Retirement Villages Association.

The present drafting of the amendment does not apply the daily pro rata calculation method to a resident's first year of occupation. In other words, the calculation percentage for the first year applies in full regardless of whether the resident occupied for the entire year or not, with only a percentage for subsequent years being reduced in accordance with the length of actual occupation in those years.

The Association of Residents of Queensland Retirement Villages asserts the daily pro rata calculation method should apply to all years. However, this would substantially alter an existing well-tolerated industry practice. In general, the Association of Residents of Queensland Retirement Villages supported the amendment.

The main criticism of the amendment came from the Queensland Law Society and the village operator representatives. Their core concerns were the possible retrospective effect of the amendment and the restriction on freedom of contract. In relation to retrospectivity, the Queensland Law Society and the operator assert that the amendment may alter existing validly entered into resident contracts. The amendment applies the daily pro rata calculation method to existing contracts where the contract does not specify any other calculation method. As the amendment does not change the calculation method but only applies the daily pro rata method where no other method has been prescribed, the amendment ensures clarity and certainty and is arguably not truly retrospective in nature.

In relation to freedom of contract, the Queensland Law Society and the operator representatives assert the amendment will prevent all future contracts from prescribing a calculation method other than the daily pro rata method. The amendment will mandate the daily pro rata method for all future contracts, thereby enshrining the calculation method which is the fairest to residents. Having one calculation method for all resident contracts will also assist potential residents to compare different villages when deciding which one to enter.

The operator representatives were also concerned about the potential of the amendment to decrease village valuations. They assert that the mandatory daily pro rata calculation method for all future contracts has the potential to diminish their expected contracts and thereby decrease the value of the Brisbane

village. At present the expected exit fee income stream for most villages is dependent on many variables and this would need to be considered in arriving at a valuation for the village. As such, mandating a daily pro rata calculation method is unlikely to cause any significant revision of existing valuations.

The bill also contains other technical and facilitative amendments. The bill amends the Electoral Act 1992 to clarify the operation of a provision that allows for the enrolment of voting up to the day before polling day. The Electoral Commission of Queensland requested these minor and technical amendments.

The bill also provides for regulation-making power to specify departments and state public authorities that may receive electoral roll information and the purposes for which the information be received. The Electoral Commission was also consulted on this amendment, though as this is a matter of government policy the ECQ has no comment. Any resulting legislation will also be subject to consultation. Agencies will be consulted concerning the designation of appropriate agencies and for purposes for which the access may be given. The Electoral Commissioner and corresponding Commonwealth minister because of the joint roll arrangements are expected to be consulted in due course on the appropriateness of any draft regulation.

The bill amends the Justices of the Peace and Commissioners for Declarations Act 1991 to allow justices of the peace and commissioners for declarations to record details of any identification documentation cited in the performance of their duties. This amendment provides the discretion for JPs and commissioners for declarations to record these details; it does not require them to. This is a facilitative amendment made at the request of some justices of the peace.

Finally, the bill amends the Queensland Civil and Administrative Tribunal Act 2009 to provide that a member whose term of appointment has expired can continue to sit as a member for the purpose of finalising a proceeding. This provision is similar to new section 21 proposed for insertion in the Supreme Court of Queensland Act 1991 by clause 108 of the bill, which provides that a judge who starts a hearing or proceeding before retiring remains a judge for the purpose of finishing that proceeding.

Finally, in a submission to the committee the QLS additionally raised concerns about the name of the bill, particularly that the bill is not styled 'and other legislation amendment bill'. The department has received advice on this issue from the Office of the Queensland Parliamentary Counsel and it has confirmed that the usual practice is not to include 'and other legislation amendment' in the short title of the bill for a principal act even if the bill includes amendments. For a bill for a principal act such as the Civil Proceedings Bill, it is the long title of the bill which contemplates the picture. Listing the affected other legislation in the bill's table of contents and explanatory notes are additional indicators of the bill's scope. Accordingly, the Office of the Queensland Parliamentary Counsel has advised that it does not agree with the society's contention that the bill's short title does not have sufficient regard to the institution of parliament as in breach of fundamental legislative principles. We are very happy to answer any questions you may have to clarify any matter that I have raised or any other matter you want to raise.

ACTING CHAIR: I understood you perfectly right up until the point where you were saying why the bill should not be called 'and other acts amendment bill' since it is obviously 'and other acts amendment bill'. I do not know why we would resist that.

Mr Reed: With all due respect, what we have tried to do is say that, where it is primarily a principal act, which it is in this case because it is primarily the civil proceedings components which are the principal act, that is the title of the bill and the long title picks up all of the other amendments. It is not that the act is silent on them in the beginning; it is just not in the primary title of the bill. But I am just here trying to pass on the Queensland Parliamentary Counsel's views on this matter. Obviously it is up to the committee to decide whether it wants to deliberate further on that matter.

ACTING CHAIR: Do honourable members have any questions?

Mr BLEIJIE: I do. Following on from the Acting Chair's point about the title of the bill, it is a bit of a mishmash. There is quite a structure of civil procedure. It then talks about JPs. There is quite a contentious issue with the retirement villages. With the retirement villages, correct me if I am wrong but you mentioned fair trading.

Mr Reed: Yes.

Mr BLEIJIE: There was a draft bill, correct?

Mr Reed: That is right.

Mr BLEIJIE: Is that draft bill morphed into this now?

Mr Reed: The exit fee provision has been morphed in, but it is amended from what it was in the draft.

Mr BLEIJIE: Was that on the basis of residential people living in retirement villages that it was then further amended? Can you explain what was in the draft bill and what we have ended up with now in this bill?

Mr Reed: The short answer is, yes, it was a result of those consultations but I am happy to hand to Damian Sammon.

Mr Sammon: The draft Fair Trading and Other Legislation Amendment Bill was drafted to include a number of retirement village amendments including the exit fee and exit fee amendment. The amendment to the associations act is also in this particular bill and some other pieces of legislation. Most of those other

amendments that are not in the bill that is before you today are in the Criminal and Other Legislation Amendment Bill that has also been referred to the committee. I believe you called for submissions on that. Essentially, the Fair Trading and Other Legislation Amendment Bill has been broken into two pieces. There are two amendments in this bill before you today and the other amendments are in the Criminal and Other Legislation Amendment Bill. However, there are two further amendments that are not in either of those bills.

Mr BLEIJIE: So we have gone from a draft fair trading bill to a Civil Proceedings Bill to a criminal bill and other amendments which are not in a bill yet?

Mr Reed: That is correct.

Mr BLEIJIE: So essentially we are going to have three bills dealing with what was contained in one bill, apart from the civil proceedings. With the Civil Proceedings Bill there was a long consultation process. I do not know whether the department can give guidance on this, but I would have thought that it is such an issue that it could have been contained within its own bill. Did the department give advice to the AG about having this separate and these other matters being dealt with in the other bills?

Mr Reed: Clearly the primary purpose of the legislation, and I think the desire to ensure a speedy passage of the bill, is to ensure that the work that has been undertaken over quite a considerable period of time on the civil proceedings is able to be enacted if possible this calendar year. For the other amendments as they have come forward we have looked at appropriate vehicles rather than trying to always have individual acts or individual amendments to primary legislation to batch matters. I do not think there is anything untoward about it in the sense that it was the previous minister who initiated the fair trading amendments originally. A different department was doing it at the time. When it then came into this department as we were looking at the legislative program it was clear that, if we wanted certain matters to progress and to try to get them in place rapidly, it would be better if we attached them to a bill which had a reasonable chance of passage during this calendar year. Hence the amendments that are associated with this particular bill are those and others have been introduced in the criminal law amendment bill with a view to trying to get those through as well. But obviously there is a limited amount of time that the parliament is sitting. I do not think there is anything more than the expediency of trying to get certain matters enacted before the calendar year.

Mr BLEIJIE: Can you expand on the expediency of those matters before the end of the calendar year?

Mr Reed: What I have identified in here are the matters that are associated with the bill—so the Associations Incorporation Act, the BDM changes. There has obviously been in relation to the funeral and crematoriums industry a fair amount of media comment about particular practices and this is trying to address those. The Information Privacy Act in terms of trying to ensure that we can work more effectively with the Commonwealth and other states and territories and remove an administrative burden as well in terms of fairly straightforward matters that are having to go all the way up at the moment to a minister to approve the leave of a commissioner, that is not urgent but it is something that would be, in a terms of getting better administrative process, something that we would think should happen as a matter of course. Then we move into the retirement village exit fees issue, which we believe from the residents' perspective is something that they would like to see clarified as soon as practicable. Then there are technical amendments in the Electoral Act, which obviously would be preferable to have in place before the election. Then, of course, in the JPs area, the JPs have raised issues with the Attorney and we are trying to facilitate those.

ACTING CHAIR: And the expiring QCAT members.

Mr Reed: Of course. Sorry, that was the last one. We are clearly coming up to a point where the terms of that first batch of members expire. Clearly, what we are endeavouring to do from this point of the passage of the bill onwards—but certainly if it were possible before the expiry of the terms of those members—is to have this provision in place to ensure that any member who is not going to be reappointed or who does not continue but who still has matters on the books can still be in a position to be able to finalise those.

Mrs KIERNAN: Just on the change to the JP act, the act itself says that the JP may actually record information and we are allowing them to do that. What happens if a person objects to their information to be recorded by a JP for their right to privacy? Can the JP object to sign the documentation without recording it?

Mr Reed: That is a good question?

Ms Bradley: I think the answer is yes. It basically allows the JP to take comfort from sighting and recording information from the identifying documents. Ultimately, if the person is not prepared to give it and the JP is not prepared to witness, they would have to find someone else to witness the document.

Mrs KIERNAN: Okay. It could be problematic in small communities where you have one JP or a commissioner of declarations where the JP has the right of refusal on a person saying, 'I don't want you to record my private information.'

Mr Reed: And that is theoretically true.

Mrs KIERNAN: It is a big probability in the bush.

Mr Reed: But it is a 'may', not a 'must'. We will need to see in practice whether it actually becomes a problem. It is an enabling provision for those who would like to do this. I suppose the question is how many are likely to then say, 'If you don't allow me to record this, I am not going to witness the documents.'

Mrs KIERNAN: I have to say that in smaller communities where people are very conscious of their privacy they may rock down to the local JP—and everyone knows everyone in smaller communities and this is where JPs are most used; in more remote communities, in more isolated places—and the JP says, 'I'm going to record all of your information and photocopy it and keep it on my file.' That person, who has to have that documentation witnessed again or go to the local magistrate, or whatever, is then placed in a position where a JP—and I get the 'may'—says, 'I'm not going to witness that documentation unless you hand over all of this personal information.'

Mr Reed: The current situation, one assumes, is that somebody could refuse now to witness if they did not feel comfortable with having been presented information. There is just no specific power that says that they may do it.

Mrs KIERNAN: But it is a whole other level that you are now giving through this legislation. You are actually giving JPs the ability to say, 'I'm not going to sign unless you hand over all of this personal information.' That could leave people in a situation where, for whatever reason, they do not want to comply with that but they need that JP's signature.

Ms Lang: It is important to be aware that JPs can currently do that. There is nothing to prevent them from doing that. JPs are often presented with individuals who they do not know and asked to witness documents that have far-reaching consequences. So it is a check and balance in terms of potentially entering mortgage documents—signing a whole range of documents that JPs may wish to be satisfied as to the identity of the individual appearing before them before they witness the document.

Mrs KIERNAN: But it is keeping the record of all of that information. You can sight all of that and say, 'Okay, I am really satisfied that you are who you are,' but this now allows for them to record and keep copies of that person's personal information.

Ms Lang: They are required to keep it in a secure way. The bill requires that.

Mrs KIERNAN: Yes. I am sorry, but I have lived in very small communities and I am really aware of small communities and how they interact and people's guarding of their right of privacy in those small communities. The biggest concern is, 'I'm not going to sign it if you don't hand over your information.' I have real concerns about that.

Mr Reed: Without doing anything, I put back on the record that it is a 'may' not a 'must' at the moment. A JP could decline to sign something on the basis that they are not happy with what has been shown to them, but it does take it to that next step of having the opportunity to retain information. If there is anything that we can do to provide further information, I am happy enough to come back. We see this as a fairly straightforward process. It is not meant to be an onerous one in the sense that it allows somebody to do something but they do not have to do it. But I take your point in terms of the potential implications of it. It would be up to the committee. As I said, I am happy to come back with further information but it is up to the committee to deliberate and decide if this an issue that collectively you feel is problematic.

Mrs KIERNAN: There are a lot of JPs out there.

Mr Reed: I fully understand that and I have had a a lot of dealings with JPs and I understand the importance of their role.

ACTING CHAIR: We look forward then to your further thoughts on that.

Mr FOLEY: In my office I and my two electorate staff are all JPs. If someone comes in at the moment we just ask them, 'Have you any identification?' I am not sure whether we photocopy that or whatever. Are we prescribing something here more onerous than that?

Mr Reed: No. As I understand it, what we are doing here is enabling somebody to retain information. At the moment, what you would do is authorise the documents, having sighted whatever is required or prescribed for that particular process that you are entering into and then the person leaves with the signed authorised documents, whereas here the opportunity is that they may retain that information and record that information. So it is a 'may'; it is not a 'must'. It is just allowing them to keep the record.

Mr LANGBROEK: I was just asking the JP in my electorate office, who is my electorate officer, via email. I will have to await a response. I was interested in asking her about her on-the-ground, practical experience. To my mind, for a JP signing something or witnessing something, people who are having something signed by someone would understand the seriousness of it. I can understand the member for Mount Isa's practical experience in this regard, but I would have thought that, if there are any doubts and the JP does not want to sign it—because they have doubts about the person's ID—then we should be doing as much as possible—

Mrs KIERNAN: No, my question was not about the person's ID; my question was about the retaining of people's personal information by a JP.

Mr LANGBROEK: The *Animal Farm* aspect.

Mrs KIERNAN: Yes

Mr LANGBROEK: Okay.

ACTING CHAIR: We will pursue that further.

Mr Reed: We will see whether we can provide you with any other information.

Mrs ATTWOOD: I have a question about JPs as well. I have a large number of JPs registered in my electorate and we have a large demand for JP services. We have a number of JPs in the community who work at the local shopping centre. I want to find out what issues the JPs raised about this particular provision.

Ms Bradley: We could go back to the JPs branch and get further information, but my understanding is that JPs raised concerns that they were not able to retain this information. They were concerned that, should they have to attest in court to the fact that it was them—that they had witnessed it—what documentation they had sighted to verify. So it actually came from JPs who were concerned, because they felt that they did not have the power to request that information.

Mrs ATTWOOD: And the second question is one that one of my JPs raised with me quite some time ago, and that is about the issue of power of attorney recording systems and the administration of the information in regard to a power of attorney—how that is updated on a regular basis. Is there any review of that administrative process in relation to power of attorney?

Ms Bradley: Sorry, I am having trouble hearing.

Mrs ATTWOOD: One of my JPs raised with me quite some time ago now—I am trying to recollect what it is all about—the power of attorney and how we record those details on the system. Do we have any administration of those details in terms of using that power freely and providing that up-to-date information on the power of attorney?

Ms Lang: The issue about the registration of powers of attorney has been dealt with by the Queensland Law Reform Commission in its recent report and there has been an interim response that has been tabled. There is no register of powers of attorney kept but people wishing to use them, particularly in relation to land transactions, register them with the titles office.

Mrs ATTWOOD: Okay.

ACTING CHAIR: Now for something completely different. This is a question that might perhaps be most appropriately answered by the person who gave the drafting instructions to the parliamentary counsel in respect of the Retirement Villages Act, but I will leave that to you, Philip. Are you aware of the obiter of Judge Robin in the Paragon case?

Mr Reed: Personally, no.

ACTING CHAIR: It seems to me that what the proposed amendment to the Retirement Villages Act does is merely give legislative effect to the obiter of Judge Robin in the Paragon case. It seems to me that we are just legislatively stating the current common law.

Mr Sammon: I feel a little uncomfortable about describing it doing exactly that, because there are people with I suppose a much better understanding of the dynamics of that case, who might have a different view to me. Certainly when the Law Society, the residents association and the Retirement Village Association give evidence on Friday, they might be able to explain to the committee what their view is of the particular case and whether this amendment in the way it is prescribed restates that.

ACTING CHAIR: Deep and profound as is my respect for the views of the citizens of Queensland and all of them on all subjects, it is the view of the judge in the case that moves me most deeply. It seems to me that we are simply saying what the judge was saying. Is that not correct?

Mr Sammon: The policy is to implement a legislative system so that any person entering a retirement village contract that has an exit fee that is calculated on the basis of time in future that time will be determined according to a daily pro rata basis.

ACTING CHAIR: I understand that perfectly. The question that I am asking you is—and it is a leading question; it is a question of counsel for your side, not counsel for the other side: is it not the case that all we are doing with this piece of legislation is giving legislative effect to the existing law, as stated by Judge Robin QC in the Paragon case?

Mr Sammon: Subject to the earlier comment that you made that it was obiter in that case and also that there are certain commentators who believe that the decision might have been different in another case or if it was taken on appeal, not that it could be taken on appeal because it was obiter: I just restate that the policy is to require that any exit fee be calculated on a daily pro rata basis. If that is what Judge Robin was saying in this case, then that is what this amendment would do.

ACTING CHAIR: To take the words of Sir William Gilbert that he puts into the mouth of a successful lawyer, he says, 'I'll never assume that a rogue or a thief is a gentleman worthy of implicit belief, because his attorney sent me a brief (Said I to myself said I)!' I have enormous respect for people who are arguing cases and who have taken briefs from various people. But what we have here is the view of a judge. In the doctrine of precedent, the judge's word on the subject is the law for the time being until we change it here in this parliament or until a higher court changes it. What I am putting to you, and it is not being put in any sort of hostile way—the answer to the question actually I would suggest to you is yes—is it not the case

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that all we are doing with this proposed piece of legislation is giving legislative force to what Judge Robin QC said in the Paragon case? If you want to take the question on notice and come back to me, that is okay. But I am putting to you my view that that is all that we are doing, and I think that it is correct.

Mr Reed: We will come back and confirm whether that is the view of the department as well. I am happy to—if it is a yes, it is a yes.

ACTING CHAIR: Thank you very much indeed. Could you go to the question please of what is the mischief that you are seeking to correct—and this is a question of micro-economics—with the retirement villages amendment?

Mr Reed: The exit fee amendment?

ACTING CHAIR: Yes, the exit fee issue.

Mr Reed: What we are trying to ensure is that if somebody leaves part way through a year they are not actually being forced to pay a full year's fees. It is as simple as that.

ACTING CHAIR: So it is the injustice that falls randomly on individuals that we are trying to correct?

Mr Reed: Yes, that is right. Well it may not be so random given the growth in retirement villages. But certainly there is an inconsistency. So what we are trying to do is create a consistency.

ACTING CHAIR: Well it will be random, won't it?

Mr Reed: That is true. In terms of the individuals in the retirement villages, yes.

ACTING CHAIR: If one little old lady is there for two years and one day, as in the Paragon case, and another one is there for two years and 11 months and they both pay a full year's exit fees, that is random, is it not?

Mr Reed: Okay. I will take your words for that in the sense that I am not arguing with you—

ACTING CHAIR: They are not my words. I am asking you: is this not the case?

Mr Reed: It will depend on the individual circumstances of the individual. Therefore, if that is random, then that is random. If it is just what occurs for an individual at any particular point in time, whether that is random I am not sure. I am happy enough to call it random if that resolves the discussion or the debate.

Mrs KIERNAN: I have a couple of questions on this as well. It says the amendments will commence on proclamation thereby giving scheme operators time to revise their residents' contracts. So is this going to be retrospective, or if a contract is in place does that stand?

Mr Reed: As I described earlier—but I understand that we were covering a lot of ground in what I said earlier—it will apply to an existing contract if the existing contract has no mechanism for dealing with these fees.

Mrs KIERNAN: So if it is silent it will apply to it.

Mr Reed: If it is silent it applies. Otherwise it is in a new contract from that point of proclamation and commencement.

Mrs KIERNAN: But it says here thereby giving scheme operators time to revise their residents' contracts to incorporate mandatory daily pro rata. Do they have to do that?

Mr Reed: The contracts will be amended by the legislation—

Mrs KIERNAN: New contracts.

Mr Reed: No. The contracts that exist that do not have a provision at the moment for exit fees prescribed in them will automatically have a provision through this legislation. So what we are trying to do is enable the operators to be in a position to ensure that everybody is aware of that and then amend any subsequent contracts that they are issuing.

Mrs KIERNAN: For them to revise and put the new provision in because it was silent in the first place—

Mr Reed: That is right.

Mrs KIERNAN: And say, 'Okay, this is what it—

Mr Reed: By the passage and commencement of the legislation, it will happen automatically for the existing contracts. The law will say that it is there. But it is enabling time for people to actually get used to this situation now. I think that is an important thing. There are changes.

Mr FOLEY: Mr Reed, my understanding is that if the contracts are silent then the requirement is that they go to a daily valuation basis. Has there been any research done by your department on what percentage of contracts are silent in this respect? The nature of contract law, I suppose like precedents, is that contracts float and change as required by market conditions, legislative changes et cetera. So is there a huge number of contracts that this involves? The only contracts that people such as the Law Society could argue then are going to be retrospectively changed are ones that are silent. It would appear to me that that would be a very old contract where maybe that was not an issue in the really early days of retirement villages. Are there many newer contracts that do not have that provision?

Mr Reed: I will ask David Ford to answer.

Mr Ford: The answer is that we have no statistical basis for giving you a precise answer, but our feel for it is that most contracts have a mechanism already on the face of the contract and therefore would not be affected. Our understanding also is that the more recent a contract is, the more likely it is to have that sort of provision included.

Mrs ATTWOOD: Can I ask a question about the contracts that are not silent that will not be affected by this particular change. Do you anticipate any issues with contracts that have already been signed prior to this bill that might cause problems for people coming out of retirement villages? What are the sorts of methods prescribed in those other contracts? Do you anticipate that you are going to get some more legal problems because of those existing contracts?

Mr Ford: I will let Damian add any thoughts he may have. My understanding is that there are a range of mechanisms for calculating exit fees and some of those just include a fixed fee—that is a scale fee rather than a proportional fee. There will, in all probability, be some issues with some of those contracts. I think that is probably inevitable. This set of amendments does not attempt to remedy any of those situations in part because, as this industry has grown and the contracts have changed over time, I do not think we could really be confident about doing that retrospectively. The other thing that is important to recognise with any retirement village exit fees is that they are a significant proportion of the way the operators get their returns from the retirement villages. It would be very difficult to put in place equitable retrospective provisions across-the-board that would completely change the economics of the retirement villages retrospectively potentially. That could have far more serious effects on the viability of the villages than on helping the residents.

Mrs ATTWOOD: I was just concerned for existing contracts that older people have undertaken and how they will be affected in the future because of the methods that have been employed in those contracts.

Mr Reed: Certainly from the passage of the legislation forward it will be clear.

Mrs ATTWOOD: Yes, I understand that.

Mr Reed: And it is a clear in a retrospective sense for those that are silent. Obviously there are legacy contracts that will continue in place for some period of time.

Mr FOLEY: Just a follow-up to that then, you mentioned before that you do not have any empirical data as to the extent of the number of older style contracts without any mechanism for determining exit fees. Isn't this then heavy-handed if you do not have any empirical data either way? Why are we changing contracts? In the previous context a person would have entered into a contract and they would have gone to their lawyer and said, 'This is a contract,' and the lawyer would have looked at it and said, 'Yes, it looks okay.' This is before exit fees became an issue. If you do not have any data either way, why are we witch-hunting old contracts?

Mr Reed: We do not think it is heavy-handed in the sense that we are trying to give certainty from a point forward. We know that there is a gap for some contracts. Therefore, if there is a gap then surely the opportunity should be provided to people to have some sort of fairness in terms of how the fees might be calculated if the contract is silent. So we are trying to enable in a consumer protection way individuals who have signed up to something that is silent actually having an understanding of how the fee will be calculated were they to exit.

Mr Ford: I will just add one small thing. The case that the chairman raised, the Paragon case, has also obviously raised doubt in the minds of many as to how this matter ought be interpreted for existing contracts. So one of the goals of this—and I make no comment on the issue that we are coming back to the chair on—will be to clarify that situation going forward.

ACTING CHAIR: I would like to compliment the department and particularly Mr Sammon on the amendment as drafted. May I say that what I was putting to you a little while ago is really a pretty simple proposition of law—and that is that the law of the land is the last thing that the judge in the highest court that has considered the matter says about it. Given that we are proposing to say in our legislation the same thing as the judge said, it follows that what we are doing is simply giving legislative effect to the existing common law and that the proposition that has been put to us by the Law Society and by the proponents of the retirement villages is in fact a proposition that lacks intellectual rigour.

They want us first of all to believe that Judge Robin QC is wrong and that his views do not constitute the law of the land, which is contrary to what every lawyer in the state of Queensland knows. Then, after we have believed that, they want us to believe that this has retrospective effect. Its retrospectivity can exist only if the doctrine of precedent does not exist. That is all I am saying to you. I just wanted you to come back and confirm that.

I do have another question about the effect of it. What effect does this have on the business models of the retirement villages industry? To what extent, perhaps expressed in terms of dollars, perhaps expressed in terms of numbers of people affected, does this change have on their business model?

Mr Reed: David?

ACTING CHAIR: Again, if the answer is not immediately available, please take it on notice.

Mr Ford: We have done no rigorous modelling because we do not have the empirical data on which to do that. Our expectation on the anecdotal information that we have, though, is that there will be relatively few contracts affected by this. Therefore, that will contain the impact on the industry. Obviously it is likely that, of those villages which are impacted, the bulk of people will be affected because presumably they use the same standard contract for most of the residents there. Having said that, though, the change is simply to move from a potential situation of the village operator getting a full year of whatever the exit fee increment is to getting a proportion of that which may be eleven-twelfths; it may be one-twelfth.

At the end of the day our belief is that the impact on the economics of the village is likely to be at the margin rather than hugely significant, which is why we do not support the view that has been put forward in the submissions that it would have a significant impact on the valuation of the villages nor on the economics of the villages.

Mr FOLEY: In my previous life as an accounting partner we would often look at people and say, 'What, this is crazy.' On day 366 you are being asked to pay the full thing. I have little sympathy for the gouging that goes on there. I go back to my previous point about the lack of empirical evidence in making those assessments. Twenty years ago if you entered into a housing loan there was no requirement for a life insurance policy to secure that loan should anything happen to the borrower. The reality is if anything did happen to the borrower perhaps the property was foreclosed. It could have a calamitous effect on the remaining people. I really struggle to see the difference.

In other words, this would be like going back and saying, 'All of those old loans now, because there could have been a bad effect of that lack of life insurance policy to cover it, we should now insist on life insurance policies under the old loan,' but the person's health circumstances have changed. I have some concerns over this retrospectivity issue because we are trying to rewrite an agreement that was already made earlier that we do not even know is widespread.

Mr Ford: I think the point needs to be made that we are not trying to rewrite the contracts; we are simply trying to clarify the contracts. It is those contracts which are silent on the matter which are impacted by this. The second thing in terms of the economics is that the difference in what may have been possible under previous interpretations of the law or previous beliefs of the operators and what would be possible now is really only at the margin in terms of the amount of exit fee for that final period which is calculable. The basic calculation of the exit fee, any other financial arrangements which may hang around that exit fee—some villages, for instance, will offer a discount for people going in on the basis of people paying a higher exit fee—all of those sorts of arrangements remain in place. The only thing we are changing is the calculation of that marginal final year, if indeed we are changing it.

Mrs KIERNAN: I have a couple of questions about the Associations Incorporation Act amendment. It is allowing associations to move over under the Commonwealth Corporations Act. I see there are a number of requirements that they have to satisfy to do that. Why are we doing that? What if the body under our act, under the Associations Incorporation Act, is noncompliant and they are just going over to the Commonwealth act? What are the safeguards? It is probably not relevant but—

Mr Reed: No, it is certainly relevant in understanding what the change would effect. Clearly moving to Corporations Law is going to be more onerous than remaining under the associations law, so I cannot imagine that individuals that might fit into that later descriptor of yours would willingly put up their hand to move across to the Corporations Law knowing the requirements of the regulatory burden that exist under the Corporations Law. I think the reverse is probably the case. It would suit very large associations that do not fit neatly under the associations legislation because of the scale of their operations and the fact that they may be operating across state borders to be under the corporations legislation.

Mrs KIERNAN: Who would that be as an example?

Mr Sammon: I do not think they have made a submission to the committee.

Mrs KIERNAN: I did not see anything.

Mr Sammon: What the director-general said is completely true. The kind of association that is likely to wish to move over to a Corporations Act structure is likely to be a larger association with a large financial turnover and a lot of assets. Almost inevitably such an association would get careful legal advice before making such a transition. Does that answer your question?

Mrs KIERNAN: We have some associations that probably hold property today, whereas our incorporated bodies used to be the sporting groups or the smaller groups. They have grown over years as in our associations to hold fairly substantial land holdings, money in the bank, still having the responsibilities of debtors, creditors and all of those sorts of things. I understand the larger associations that might want to do that. If they have been an organisation that has been noncompliant under state legislation, what protection is there if they move over into the federal—

Mr Sammon: Are you asking what check will be made about their compliance in the new corporate structure or under the—

Mrs KIERNAN: Well, what was their history?

Mr Sammon: I cannot say one way or another about their history, but there is the process that is set out in the bill that would need to be put forward to be considered before an association—

Mrs KIERNAN: It is a statutory declaration.

Mr Sammon: It requires a vote by the members and the application needs to be jointly signed by three members of the management committee that have been provided with the authority to do that by the association. Whether there is a history of noncompliance from that particular association, I cannot say one way or the other what impact it would have on this particular application.

Mrs KIERNAN: Right.

ACTING CHAIR: I would like to thank honourable members. I would especially like to thank the members of the executive government, members of the department, for attending. May I thank Hansard and the secretariat for their assistance. May I thank our solitary member of the Queensland public for her attendance.

Committee adjourned at 12.40 pm