

Principles of good legislation: OQPC guide to FLPs



Criminal history

Office of the Queensland Parliamentary Counsel



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Summary

Consider whether legislation requires or authorises requests for, or the disclosure of, information concerning a person's criminal history. The legislation may interfere with the rights and liberties of an individual under section 4(2)(a) of the Legislative Standards Act 1992 if, in particular, it affects a person's existing rights under the Criminal Law (Rehabilitation of Offenders) Act 1986.

The CLROA provisions

The [Criminal Law \(Rehabilitation of Offenders\) Act 1986](#) (CLROA) regulates the disclosure of information about a person's criminal history.

If a matter falls within the definition of a person's 'criminal history' under the [CLROA](#) (see [\[1\]-\[7\]](#)), the person is not required to disclose the matter other than in particular circumstances and other persons are prohibited from disclosing it (see [\[8\]-\[18\]](#)).

General views expressed by parliamentary committees regarding abrogation of the CLROA provisions

Parliamentary committees have expressed concern about the following types of legislative provisions, on the basis that they tend to erode the rights conferred by the [CLROA](#):

- provisions defining 'criminal history' to include matters specifically excluded by the [CLROA](#) definition (see [\[20\]-\[21\]](#)); and
- provisions that permit the disclosure of convictions after the expiry of the 'rehabilitation period' prescribed by the [CLROA](#) (see [\[22\]-\[23\]](#)); and
- provisions that are unclear as to whether the [CLROA](#) provisions are displaced (see [\[24\]](#)).

Circumstances in which parliamentary committees have considered the abrogation of the CLROA provisions to be justifiable

Parliamentary committees have, however, generally considered that the displacement of the [CLROA](#) provisions may be justified if the purpose of the displacement is to:

- protect children or other vulnerable persons (see [\[29\]-\[38\]](#)); or
- protect the public interest or the interests of consumers (see [\[39\]-\[47\]](#)); or
- reduce risks to authorised inspectors (see [\[48\]-\[52\]](#)); or
- facilitate the administration of courts or tribunals (see [\[53\]-\[55\]](#)); or



- prevent crime (see [\[56\]](#)-[\[57\]](#)).

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



Criminal history under the *Criminal Law (Rehabilitation of Offenders) Act 1986*

Recorded convictions

- [1] Section 3 of the [Criminal Law \(Rehabilitation of Offenders\) Act 1986](#) (CLROA) defines ‘criminal history’, in relation to any person, to mean ‘the convictions recorded against that person in respect of offences’. Section 3 defines ‘offence’ to mean ‘an act or omission that renders the person doing the act or making the omission liable to punishment’. ‘Conviction’ is defined in section 4 of the [Penalties and Sentences Act 1992](#) to mean ‘a finding of guilt, or the acceptance of a plea of guilty, by a court’. Convictions that form part of a person’s criminal history under section 3 of the [CLROA](#) are convictions ‘by or before any court for an offence, whether recorded, in Queensland or elsewhere’. Accordingly, recorded convictions for simple offences (which usually are summary convictions before the Magistrates Court) and regulatory offences (less serious offences usually involving the imposition of a moderate fine) can form part of a person’s criminal history under the [CLROA](#).

Matters that are not ‘recorded convictions’ for CLROA¹

- [2] The following matters do **not** fall within the definition of criminal history under the [CLROA](#) because they are not recorded convictions:
- a charge, which is defined in section 3 of the [CLROA](#) to mean:
 - an allegation formally made in court that a person has committed an offence where—
 - (a) the allegation is not pursued to a final determination in a court; or
 - (b) a conviction is not recorded by a court in respect of the allegation; or
 - (c) a conviction recorded by a court in respect of the allegation is to be deemed, pursuant to law, not to be a conviction.
 - An infringement notice offence issued under the [State Penalties Enforcement Act 1999](#) that has been paid²
 - A conviction that is set aside or quashed
 - A conviction that is not recorded³

¹ Other matters that the former Scrutiny of Legislation Committee considered also fell outside the definition of ‘recorded conviction’ are mentioned in paragraph [21] below.

² [State Penalties Enforcement Act 1999](#) s 25 and compare [Transport Operations \(Road Use Management—Driver Licensing\) Regulation 2010](#), s 75(2)

³ See *R v Millar* [1998] QCA 276; [2000] 1 Qd R 437



Courts are afforded discretion to record or not record convictions in accordance with the [Penalties and Sentences Act 1992](#).⁴ If a penalty is specified for an offence or contravention, then the offence or contravention may be punishable on conviction (whether recorded or not recorded) by a penalty not less than the minimum penalty specified for the offence (if any) and not more than the maximum penalty specified for the offence.⁵

However, the discretion is not absolute. Courts must not record convictions when making orders for release⁶ and recognisances for property-related offences.⁷ Similarly, when sentencing a child, courts must not record convictions in particular circumstances.⁸

Courts may make orders for other recognisances,⁹ restitution and compensation,¹⁰ non-contact,¹¹ bans,¹² fines,¹³ probation¹⁴ and community service,¹⁵ whether or not a conviction is recorded. However, courts may only order intensive correction,¹⁶ suspended imprisonment¹⁷ or imprisonment¹⁸ if a conviction is recorded.

Section 12(3) of the [Penalties and Sentences Act 1992](#) states that an unrecorded conviction is taken not to be a conviction for any purpose. However, courts have held that a person who has been convicted of a criminal offence has a criminal conviction, whether or not it is formally recorded.¹⁹ When considering whether or not to exercise their discretion under section 12, courts acknowledge that provisions like section 12 are not designed to enable the criminal conviction to be concealed from bodies or authorities whose duty it is to determine whether or not an applicant is a fit and proper person to be licensed under an Act.²⁰

⁴ [Penalties and Sentences Act 1992](#) s 12(1)

⁵ [Acts Interpretation Act 1954](#) ss 41 & 41A

⁶ [Penalties and Sentences Act 1992](#) s 16

⁷ [Penalties and Sentences Act 1992](#) s 22

⁸ [Youth Justice Act 1992](#) ss 175 and 183

⁹ [Penalties and Sentences Act 1992](#) s 29

¹⁰ [Penalties and Sentences Act 1992](#) s 34

¹¹ [Penalties and Sentences Act 1992](#) s 43A

¹² [Penalties and Sentences Act 1992](#) s 43H

¹³ [Penalties and Sentences Act 1992](#) s 44

¹⁴ [Penalties and Sentences Act 1992](#) s 90

¹⁵ [Penalties and Sentences Act 1992](#) s 100

¹⁶ [Penalties and Sentences Act 1992](#) s 111

¹⁷ [Penalties and Sentences Act 1992](#) s 143

¹⁸ [Penalties and Sentences Act 1992](#) s 152

¹⁹ *R v Beissel* [1996] QCA 488; (1996) 89 A Crim R 210

²⁰ *R v Beissel* [1996] QCA 488; (1996) 89 A Crim R 210. It is unclear how this decision reconciles with the default position under section 5(2) of the [CLROA](#), that is, a person is not required to disclose a conviction that is not part of his or her criminal history. However, the decision is reflected in the increasing number of statutory exceptions to section 5(2) (for example, section 9A of the [CLROA](#)) requiring disclosure of a broad array of criminal history information prior to entry into certain professions. Moreover, in *R v Briese; Ex parte A-G (Qld)* [1997] QCA 10; [1998] 1 Qd R 487 the court stated that where a conviction is not recorded, the offender has rights similar to those relating to spent convictions under section 8 of the [CLROA](#), that is, the offender is entitled to deny ever having been convicted.



Furthermore, the acceptance of a plea of guilty before, or a finding of guilt by, a court that does not record a conviction, does not form part of a person's criminal history under the [CLROA](#).

- A recorded conviction that is deemed not to be a conviction

An example of a 'deeming provision' of this kind is the now repealed section 252 of the [Corrective Services Act 1988](#). The section specified that a conviction for an offence in respect of which a community service order was made was deemed not to be a conviction other than for a few particular purposes. In *Warry v P B Pty Ltd*, the Supreme Court of Queensland held, applying section 252 and section 5(2) of the [CLROA](#), that cross-examination about that type of conviction for the purpose of attacking a person's credibility was impermissible.²¹

Infringement notices and traffic histories

- [3] The [State Penalties Enforcement Act 1999](#) establishes a scheme permitting the issue of infringement notices that impose 'on-the-spot' fines for a variety of minor offences, as an alternative to court proceedings. These fines, which are known as 'infringement notice offences', are offences under various Acts and regulations and prescribed as 'infringement notice offences' in schedules 1 to 5 of the [State Penalties Enforcement Regulation 2000](#). The schedules also prescribe the amount of the infringement notice fine associated with each offence. Infringement notice fines are considerably less than the statutory maximum penalties usually accompanying offence provisions and which might be incurred if an infringement notice offence were dealt with by a court.
- [4] Under section 25 of the [State Penalties Enforcement Act 1999](#), payment of an infringement notice fine avoids the need for the offender to appear in court and brings the matter to an end. As the matter is dealt with otherwise than before a court, it is not a conviction. Infringement notice offences therefore, when not brought before a court, do not form part of a person's criminal history under the [CLROA](#).
- [5] Infringement notices are commonly issued for traffic offences and it is therefore important to be aware of the distinction between a person's 'criminal history' under the [CLROA](#) and his or her 'traffic history'.²² Traffic histories are maintained by the Department of Transport and Main Roads and, under section 77 of the [Transport Operations \(Road Use Management\) Act 1995](#), may be disclosed in specific circumstances.
- [6] Under the [Transport Operations \(Road Use Management\) Act 1995](#), 'traffic history' means the history of:

²¹ *Warry v P B Pty Ltd* [1999] QCA 154 at [13]. Section 5(2) of the [CLROA](#) prohibits requests for disclosure of charges or convictions that do not form part of a person's criminal history except as provided for in s 5(3).

²² 'Convicting' is defined in schedule 4 of the [Transport Operations \(Road Use Management\) Act 1995](#) to include payment of a penalty under the [State Penalties Enforcement Act 1999](#) but this is inconsistent with the definition of *conviction* under the [Penalties and Sentences Act 1992](#) and the [CLROA](#).



- contraventions dealt with under the Act, including by the recording of demerit points under a regulation; and
 - the contraventions of section 328A of the [Criminal Code](#) (dangerous operation of a motor vehicle).
- [7] Accordingly, some offences may form part of a person's traffic history but not part of his or her criminal history, while in other cases the same offence will form part of both a person's traffic and criminal histories.

Disclosure of criminal history

- [8] Under section 5(2) of the [CLROA](#), a person who is asked or required to disclose a charge or a conviction that is not part of the person's 'criminal history' is not obliged to disclose that information for any purpose.
- [9] However, section 5(3) provides that a person may be required or requested to disclose a charge or conviction if the requirement or request is made:
- (a) for the purposes of an inquiry being conducted pursuant to authority conferred by or under an Act; or
 - (b) in criminal or civil proceedings before a court if the fact of the conviction or charge is relevant to an issue in the proceedings or the court has granted permission for the requisition or request to be made.
- [10] Section 6 of the [CLROA](#) prohibits the disclosure of particular recorded convictions if a specified period of time, known as the rehabilitation period, has expired.
- [11] The rehabilitation period is only capable of running in relation to a conviction for which:
- the offender does not receive a custodial sentence; or
 - if the offender does receive a custodial sentence, the custodial or non-custodial sentence is 30 months or less.²³
- [12] If a person, other than a person dealt with as a child, is convicted of an indictable offence, the rehabilitation period is 10 years commencing on the date the conviction is recorded.²⁴ If a person is convicted on indictment but is dealt with as a child, or is not convicted on indictment, the rehabilitation period is five years commencing on the date the conviction is recorded.²⁵ However, in any case where an order of a court made in relation to the conviction is not satisfied within the rehabilitation period, the rehabilitation period is extended until the date the order is satisfied.

²³ [CLROA](#) s 3(1), definition of *rehabilitation period*

²⁴ [CLROA](#) s 3(1), definition of *rehabilitation period*, paragraph (a)

²⁵ [CLROA](#) s 3(1), definition of *rehabilitation period*, paragraph (b)



- [13] For the prohibition under section 6 of the [CLROA](#) to apply, the person making the disclosure must know that the rehabilitation period has expired. Therefore, if the person making the disclosure does not know of the [CLROA](#) or its effect when making the disclosure, there is no contravention of section 6.²⁶
- [14] In addition to the prohibition on disclosure of spent convictions, sections 8 and 9 the [CLROA](#) provide that:
- it is lawful for the person against whom a spent conviction is recorded to claim (even under oath) that they have not suffered the conviction; and
 - authorities charged with the function of assessing a person's fitness to be admitted to a profession, occupation or calling or for any other purpose, must disregard spent convictions, unless the person who suffered the conviction is expressly required by law to disclose his or her criminal history,²⁷ or the authority making the assessment is expressly required by law to have regard to the criminal history of the person.²⁸
- [15] However, despite sections 6, 8 and 9 of the [CLROA](#), the Act permits the disclosure of recorded convictions after the end of the rehabilitation period if:
- the person who suffered the conviction is again convicted for an offence in Queensland or elsewhere and the rehabilitation period for the earlier conviction has expired at the time of the later conviction; or
 - the person to whom the conviction relates makes the disclosure; or
 - the person making the disclosure has a legitimate and sufficient purpose and does so under a permit granted by the Minister; or
 - the conviction falls under an exception to the duty to disregard convictions under section 9 of the [CLROA](#); or
 - the conviction is disclosed in a recognised law report of judicial proceedings or a report of judicial proceedings made for educational, scientific or professional purposes or for historic research or a lecture, course or discussion given or held for those purposes; or
 - the conviction is disclosed to a Crown prosecutor, a police prosecutor or another person prosecuting a charge of an offence with a view to those particulars being disclosed to the court in the event of the defendant being convicted; or
 - the conviction is disclosed in a report made by a person who is required by law to make a report that includes references to or a disclosure of the conviction; or

²⁶ *Robinson v Laws* [2001] QCA 122; [2003] 1 Qd R 81 at [129]; Criminal Code s 22(1)

²⁷ See paragraph [18]

²⁸ However, spent convictions may still be considered when an assessment is to be made of an offender with a view to a court, the Queensland Parole Board, or a regional parole board constituted under the [Corrective Services Act 2006](#), making an appropriate order in relation to the offender.



- the conviction is disclosed in discharge of a duty under the [Public Records Act 2002](#); or
- the conviction is disclosed by members of a police service or another person in discharge of the person's duties within a police department.

[16] Further, despite a person's right to refuse to disclose convictions not forming part of that person's criminal history, and the right not to disclose spent convictions, applicants for particular positions listed in section 9A of the [CLROA](#) may still be required to disclose such information. For example, applicants for positions in the Queensland Police Service must, if requested, furnish information regarding contraventions or failures to comply with any provisions of the law, whether committed in Queensland or elsewhere.

[17] Section 9A also places disclosure requirements on a wide range of persons, including justices of the peace and commissioners for declarations, teachers, employees of particular government departments and applications for particular positions such as local councillors or judges. The disclosure requirements for each class of person vary and are set out in detail in section 9A. However, one common provision for the classes of applicants listed in the section is that the Commissioner of the Police Service, may, upon request, disclose information about an applicant's criminal history and convictions to a person who, in the opinion of the commissioner, or the delegated person, has a legitimate and sufficient interest in obtaining the information.

[18] In addition to section 9A of the [CLROA](#), other legislation imposes separate disclosure requirements on persons seeking entry into particular professions. For example, Part 5AA of the [Police Service Administration Act 1990](#) provides a statutory framework enabling the Commissioner of the Police Service to gather a wide range of information about current and intending police officers, staff members, and external service providers.²⁹ The information that may be gathered includes the person's criminal history, which is defined in wide terms to include unrecorded convictions, spent convictions and charges. The Act states that these provisions apply despite anything in the [CLROA](#).

General view of parliamentary committees about abrogating rights under the CLROA

[19] It was the practice of the former Scrutiny of Legislation Committee (the *Committee*) to refer to Parliament for its consideration any erosion of the policy of the [CLROA](#). The Committee drew to the attention of the Parliament any proposed provisions that:

- provided a definition of 'criminal history' that differed from the definition in the [CLROA](#); or
- displaced the rehabilitation period provisions of the [CLROA](#) by requiring spent convictions to be disclosed; or

²⁹ [AD 2003 No 12 p 18 paras 7-12](#)



- was ambiguous as to which aspects of the [CLROA](#) were to be displaced, particularly regarding the rehabilitation period.³⁰

Legislation expanding the CLROA definition of ‘criminal history’

[20] At various times, the Committee invited the relevant Minister to provide further information in relation to, or drew the attention of Parliament to, definitions of ‘criminal history’ that included information and events expressly or impliedly excluded from the definition of ‘criminal history’ under the [CLROA](#).

[21] The Committee specifically recognised the following as falling outside the definition of criminal history under the [CLROA](#):

- charges for offences;³¹ and
- traffic histories (although see paragraphs [3]-[7] above);³² and
- unrecorded convictions and spent convictions;³³ and
- convictions that have been set aside or quashed on appeal;³⁴ and
- investigative information where no person was ever charged with an offence (for example, because the complainant had died or was unwilling to proceed);³⁵ and
- information about prosecution of offences (such as court briefs);³⁶ and
- information regarding circumstances surrounding the commission of offences.³⁷

Displacement of rehabilitation period

[22] On various occasions, the Committee invited the relevant Minister to provide further information about proposed provisions that defined ‘criminal history’ to generally include events ‘before or after the commencement [of the proposed provisions]’, because the provisions may displace the rehabilitation period.³⁸

³⁰ See, for example, [LA 2011 No 2 p 8 para 15](#); [LA 2010 No 13 p 11 para 15](#); [LA 2010 No 11 p 3 para 13](#); [LA 2010 No 8 p 13 para 32](#); [LA 2009 No 10 p 11 para 16](#); [LA 2009 No 10 p 6 para 19](#)

³¹ [LA 2010 No 13 p 11 para 16](#); [LA 2009 No 3 p 20 para 11](#)

³² [LA 2010 No 13 p 11 para 16](#);

³³ [LA 2010 No 13 p 22 para 10](#); [LA 2010 No 8 p 14 para 33](#); [LA 2009 No 10 p 10 para 9](#); [LA 2009 No 9 p 20 para 8](#)

³⁴ [LA 2009 No 3 p 20 para 11](#)

³⁵ [LA 2010 No 8 p 14 para 33](#); [LA 2010 No 2 p 12 para 9](#); [AD 2007 No 4 p 6 para 14](#); [AD 2005 No 7 p 2 paras 7-8](#)

³⁶ [LA 2010 No 8 p 14 para 33](#); [AD 2002 No 6 p 29 para 19](#)

³⁷ [AD 2008 No 11 p 56 para 19](#)

³⁸ [LA 2010 No 13 pp 11-12 para 20](#); [LA 2010 No 8 p 14 para 33](#); [LA 2010 No 2 p 13 para 13](#)



[23] The Committee also drew to Parliament’s attention proposed provisions that would otherwise expressly or impliedly alter the rehabilitation period in the [CLROA](#).³⁹ For example, the Committee commented on proposed provisions that:

- required or permitted the disclosure of convictions after the end of the rehabilitation period; or
- displaced the right to deny convictions once the rehabilitation period had ended; or
- displaced the duty to disregard particular convictions once the rehabilitation period had ended.⁴⁰

Ambiguous displacement provisions

[24] The Committee recognised a potential for ambiguity in provisions of national laws (implemented by Queensland legislation) that apply as if enacted as Queensland legislation and stated that ‘matters relating to the criminal history of persons will be subject to legislation of participating jurisdictions that prohibits, or does not require, the disclosure of spent convictions’. The Committee noted that such provisions may have the practical effect of making the rights of an individual under the law dependent upon the operation of competing Acts and regulations.⁴¹

Safeguards

[25] When the Committee identified disclosure of criminal history information as a potential breach of fundamental legislative principles, it would take into account any statutory safeguards that protected the subject of the disclosure from the adverse effects of the disclosure.

[26] Safeguards considered by the Committee included:

- a requirement that the criminal history information must be disclosed to the person about whom the information relates and that person must be allowed a reasonable opportunity to make representations about the information;⁴² and
- a requirement that criminal history information is only disclosed with the consent of the person to whom it relates;⁴³ and
- a requirement that the criminal history information be kept confidential and destroyed after use;⁴⁴ and

³⁹ [LA 2009 No 10 pp 6-7 para 20](#)

⁴⁰ [AD 2008 No 11 p 57 para 23](#)

⁴¹ [LA 2010 No 13 p 11 para 18](#)

⁴² [LA 2010 No 13 p 22 para 12](#); [LA 2009 No 3 p 20 para 9](#)

⁴³ [LA 2010 No 13 p 22 para 12](#); [LA 2010 No 8 p 14 para 40](#)

⁴⁴ [LA 2010 No 13 p 22 para 12](#); [LA 2009 No 3 p 20 para 9](#)



- a right of appeal to a court in relation to the decision to disclose the criminal history.⁴⁵

[27] The Committee encouraged minimisation of the area of impact of onerous disclosure requirements. Also, when proposed provisions, for example, the disclosure provisions in the [Police Powers and Responsibilities and Other Legislation Amendment Bill 2003](#), required the disclosure of a broad range of information, the Committee queried whether the requirements ought to be imposed on so many people.⁴⁶

Circumstances in which parliamentary committees have considered abrogation justified

[28] The erosion of rights under the [CLROA](#) has been considered necessary in relation to legislation regulating the topics listed below.

Children

[29] Rights under the [CLROA](#) are often displaced in legislation promoting the protection of children.⁴⁷ The Committee considered that this may reflect increased public expectations.

[30] The Committee commonly noted that broad criminal history screening requirements were appropriate in legislation permitting the investigation of registered teachers and applicants for registration due to the close, ongoing association the teaching profession has with children.⁴⁸

[31] This approach was also adopted by the Industry, Education, Training and Industrial Relations Committee (the *IIETIRC*) when it considered the [Education and Training Legislation Amendment Bill 2011](#). The Bill amended the [Education \(Queensland College of Teachers\) Act 2005](#) to allow persons convicted of a serious offence, but not subject to an imprisonment order, to apply to the Queensland College of Teachers for a declaration that they were eligible to apply for registration or permission to teach. When considering an application for an ‘eligibility declaration’, the Queensland College of Teachers would be entitled to access and consider the same information as it would if it were considering the suitability of an applicant for registration or permission to teach. The information that the college would be able to consider included:

- police and other information about the person’s Queensland and interstate criminal history (including every conviction of the person for an offence whether before or

⁴⁵ [AD 2005 No 7 p 2 para 8](#)

⁴⁶ [AD 2003 No 12 p 18, paras 7-12](#)

⁴⁷ [AD 2005 No 10 pp 11-12 paras 3-15](#) and [pp 28-29 paras 8-20](#); [AD 2005 No 7 pp 1-2 paras 1-12](#); [AD 2004 No 8 pp 3-4 paras 3-11](#); [AD 2003 No 11 p 11 paras 12-17](#); [AD 2002 No 11 pp 8-9 paras 10-18](#); [AD 2002 No 8 p 2 para 9](#)

⁴⁸ [AD 2005 No 10 p 12 paras 10-12](#)



after commencement and every charge for an offence made against the person, in Queensland or elsewhere, whether before or after commencement); and

- information about the person's criminal history from the Director of Public Prosecutions; and
- information from the Chief Executive responsible for corrective services about sexual offender orders under the [Dangerous Prisoners \(Sexual Offenders\) Act 2003](#).

[32] The IETIRC noted that the requirement for disclosure and consideration of this information might affect the rights and liberties of individuals—in particular the right to work and the right to information privacy.⁴⁹ However, the IETIRC noted the statement in the explanatory notes for the Bill that the potential breach of fundamental legislative principles was appropriate given the on-going community interest in issues of child protection.⁵⁰ The IETIRC did not recommend any amendment to this particular aspect of the Bill.⁵¹

[33] The [Child Protection and Other Acts Amendment Bill 2010](#) amended the [Child Protection Act 1999](#), which allows the Chief Executive to obtain the criminal history of a parent of a child, an adult member of the parent's household or an adult alleged to have harmed or to be at risk of harming a child. The Bill amended schedule 3 of the Act to insert a new meaning of criminal history that included all convictions, charges and disqualifications under child protection legislation. The Committee noted the way the breach of fundamental legislative principles was justified by the explanatory notes, which explained that the power of the Chief Executive to obtain criminal histories, when taking action under the Act, enhanced decision making in the best interests of the child.⁵²

[34] The [Child Protection and Other Acts Amendment Bill 2010](#) also amended the [Commission for Children and Young People and Child Guardian Act 2000](#) to provide for criminal history checks and suitability assessments for persons engaged or proposed to be engaged by the Commission. Again, the definition of criminal history under schedule 7 of that Act included all convictions and charges. The Bill amended the Act to allow the Commissioner to request information about a person's criminal history, the circumstances of a conviction or charge in their criminal history and the circumstances of investigations relating to the possible commission of a serious offence by the person.

[35] The Committee noted that the Bill would override the [CLROA](#) principles that:

- a person need not disclose spent convictions; and
- other people are prohibited from disclosing spent convictions; and

⁴⁹ [IETIRC Report No 5 \(2011\) p 39 para 10](#)

⁵⁰ [IETIRC Report No 5 \(2011\) p 39 para 13](#) [[Education and Training Legislation Amendment Bill 2011 Explanatory Notes p 16](#)]

⁵¹ [IETIRC Report No 5 \(2011\) p 3](#)

⁵² [LA 2010 No 8 p 14 para 34](#) [[Child Protection and Other Acts Amendment Bill 2010 Explanatory Notes p 12](#)]



- when considering a person's fitness for a profession or for any other purpose, officials must disregard spent convictions.⁵³

[36] On the question of breach of fundamental legislative principles, the Committee again referred to the explanatory notes which justified the breach on the basis that the Commission is an independent statutory oversight body with the primary purpose of promoting and protecting the rights, interests and wellbeing of children and young people.⁵⁴

[37] In a similar way, legislation about the appropriateness and competence of proposed guardians, administrators and community visitors will often contain provisions displacing rights under the [CLROA](#).⁵⁵

Vulnerable persons

[38] Rights under the [CLROA](#) are also commonly displaced in legislation that is protective of vulnerable persons or persons with a disability.⁵⁶ For example, the [Criminal History Screening Legislation Amendment Bill 2010](#) amended a large number of Acts so as to require disclosure of criminal history information, including charges, spent convictions and investigative information by people working with children or people with disabilities. The Committee noted that the Bill provided a different definition of criminal history to the definition in the [CLROA](#) by requiring the disclosure of charges. The legislation also permitted disclosure of spent convictions. The Committee drew Parliament's attention to the amendments for the purpose of considering whether the Bill had sufficient regard to the rights and liberties of individuals.⁵⁷ However, the Committee also referred to the explanatory notes which justified the amendments on the basis that they promote the safety of children and adults with disabilities.⁵⁸

Public interest and consumer protection

[39] In addition to disclosure under section 9A of the [CLROA](#), legislation will often allow a registering authority for a particular profession to have regard to spent convictions of, and mere charges against, persons seeking registration.⁵⁹ For example, the [Occupational Licensing National Law \(Queensland\) Bill 2010](#) provided for a national law to regulate the licensing of certain occupations. The Committee noted that clause 8(1) of the Bill would allow the Licensing Authority to ask the Commissioner of the Police Service for a report

⁵³ [LA 2010 No 8 p 13 para 30](#)

⁵⁴ [LA 2010 No 8 p 14 para 35](#) [[Child Protection and Other Acts Amendment Bill 2010 Explanatory Notes p 14](#)]

⁵⁵ [AD 2002 No 5 p 8 paras 10-15](#); [AD 2000 No 1 pp 2-3 paras 12-17](#)

⁵⁶ [AD 2006 No 8 pp 3-5 paras 8-18](#); [AD 2006 No 1 pp 7-8 paras 3-14](#)

⁵⁷ [LA 2010 No 2 p 11 para 1](#)

⁵⁸ [LA 2010 No 2 p 13 para 15](#) [[Criminal History Screening Legislation Amendment Bill 2010 Explanatory Notes p 8](#)]

⁵⁹ [AD 2003 No 7 pp 10-11 paras 7-13](#)



including information about a person's criminal history relevant to whether the person satisfies the probity requirements under the National Law.

- [40] The definition of 'criminal history' under the National Law included all convictions, whether or not recorded, and no matter when they occurred, all pleas of guilty or findings of guilt by a court whether or not a conviction was recorded, all charges made against a person and full traffic offence histories, no matter when the traffic offences occurred. The Committee noted that the Bill adopted a definition of criminal history that included charges for offences and traffic histories and that might displace the rehabilitation period under the [CLROA](#) or be ambiguous as to which aspects of the [CLROA](#) were displaced.⁶⁰
- [41] The explanatory notes provided that the definition of 'criminal history' under the National Law was broad so as to capture occupation specific requirements (for example, traffic histories for public passenger drivers) and the Licensing Authority must have capacity to consider the broad range of information for determining whether a person should be licensed or not.⁶¹ Despite the justification contained in the explanatory notes, the Committee invited the Minister to provide further information about the operation of the proposed provisions of the Bill and the National Law.⁶²
- [42] Similarly, proposed clause 25 of the [Police Legislation Amendment Bill 2010](#) amended the [Prostitution Act 1999](#) to allow the Minister to request an extended criminal history, including every conviction and charge, for a person who is a member of the Prostitution Licensing Authority, or is applying to become a member. The explanatory notes for the Bill justified the potential breach of fundamental legislative principles on the basis that the proposed amendments supported the safety and security of clients and sex workers, ensured confidentiality of sensitive information and maintained public and client confidence in the integrity of the Prostitution Licensing Authority. The explanatory notes also highlighted the requirement that, prior to the use of the extended criminal history report, the information contained in the report must be disclosed to the subject of the report and that person must be given a reasonable opportunity to make representations about the information. Also, in relation to prospective members, the applicant must consent to the Minister requesting the extended criminal history report.⁶³ The Committee nevertheless referred to Parliament the issue of whether proposed clause 25 had sufficient regard to the rights and liberties of individuals.⁶⁴
- [43] The [Health Practitioner Regulation National Law Bill 2009](#) provided that an applicant for registration as a health professional must disclose their criminal history. The Bill defined 'criminal history' to include all convictions (whether recorded or not and whenever

⁶⁰ [LA 2010 No 13 p 11 para 16](#)

⁶¹ [LA 2010 No 13 pp 11-12 para 20](#) [[Occupational Licensing National Law \(Queensland\) Bill 2010 Explanatory Notes p 7](#)]

⁶² [LA 2010 No 13 p 12 para 21](#)

⁶³ [LA 2010 No 13 pp 22-23 para 12](#) [[Police Legislation Amendment Bill 2010 Explanatory Notes p 5](#)]

⁶⁴ [LA 2010 No 13 p 21 para 1](#)



occurring) and all charges. The Committee noted that this definition was broader than the definition of ‘criminal history’ under the [CLROA](#) and displaced the rehabilitation period under the [CLROA](#) by requiring disclosure of spent convictions.⁶⁵

- [44] The Committee referred to the explanatory notes which stated that the primary purpose of the national registration and accreditation scheme was to protect the safety of the public. The explanatory notes also stated that the criminal history information would be kept confidential and that applicants would have an opportunity to make submissions and, ultimately, to appeal to the Queensland Civil and Administrative Tribunal if refused registration.⁶⁶
- [45] The [Transport Operations \(TransLink Transit Authority\) Bill 2008](#) established the TransLink Transit Authority and allowed the Minister to request criminal history reports from the Commissioner of the Police Service in relation to particular corporate officers of TransLink. The Bill defined ‘criminal history’ to mean ‘criminal history as defined under the Criminal Law (Rehabilitation of Offenders) Act 1986, other than for a spent conviction’. When considering the Bill, the Committee noted that it did not override safeguards contained in the [CLROA](#),⁶⁷ and that it imposed disclosure obligations ‘of a type which has become common in recent years and are reasonable’.⁶⁸ In reaching this conclusion, the Committee referred to the explanatory notes for the Bill which explained that, if the Minister’s request for a criminal history report relates to a prospective appointee, the appointee must consent to disclosure before the Minister makes the request. The explanatory notes also stated that destruction requirements apply to the criminal history reports disclosed and that the need for such reports to extend to all offences is justified by the legitimate need for the board to maintain public confidence.⁶⁹
- [46] The Committee took a similar approach when considering the [Vocational Education, Training and Employment and Other Legislation Amendment Bill 2007](#). The Bill amended the [Vocational Education, Training and Employment Act 2000](#) to allow the Minister to obtain criminal history reports for members of the boards of statutory TAFE institutes. ‘Criminal history’ was defined to mean criminal history as defined under the [CLROA](#) to the extent the criminal history relates to indictable offences, other than spent convictions. The Committee referred to the explanatory notes for the Bill, which explained that the ‘potential breach of fundamental legislative principles is justified on the grounds that board members will be accountable for an entity that is not only publicly-funded but will also undertake significant commercial activities’.⁷⁰ The Committee also noted that the Bill did not override the safeguards contained in the

⁶⁵ [LA 2009 No 10 p 11 para 16](#)

⁶⁶ [LA 2009 No 10 p 11 para 18](#) [[Health Practitioner Regulation National Law Bill 2009 Explanatory Notes p 12](#)]

⁶⁷ [AD 2008 No 6 p 37 paras 41](#)

⁶⁸ [AD 2008 No 6 p 37 paras 42](#)

⁶⁹ [AD 2008 No 6 p 36 para 40](#) [[Transport Operations \(TransLink Transit Authority\) Bill 2008 Explanatory Notes p 28](#)]

⁷⁰ [AD 2007 No 11 p 24 para 12](#) [[Vocational Education, Training and Employment and Other Legislation Amendment Bill 2007 Explanatory Notes p 8](#)]



[CLROA](#) and that the disclosure obligations are of a type that had become more common and are reasonable.⁷¹

- [47] The [Community Services Bill 2007](#) contained proposed provisions dealing with the screening of persons working in, or intending to work in, the Department of Communities. The Committee considered that the proposed disclosure provisions of the Bill adversely affected the right to privacy. The Committee also considered that the provisions may prevent a person from being employed or result in termination of their employment.⁷² The explanatory notes for the Bill justified the proposed disclosure provisions on the basis that information about an applicant’s criminal history may indicate a pattern of behaviour which could compromise that person’s ability to undertake departmental duties safely and competently.⁷³ The explanatory notes also stated that the proposed provisions do not render an applicant in possession of a criminal history ineligible for employment and are necessary to protect the safety of vulnerable clients, because departmental employees may work in, for example, youth justice or child care licensing settings, or manage the performance of service providers.⁷⁴ Despite these statements in the explanatory notes, the Committee referred to Parliament the question of whether the proposed disclosure provisions had sufficient regard on the one hand to the rights of the applicants, and on the other to the rights of vulnerable clients with whom the applicants may come in contact.⁷⁵

Risk to inspectors acting under authority

- [48] Displacement of rights under the [CLROA](#) has been necessary in legislation authorising access to criminal histories (including spent convictions) of persons reasonably suspected of being present at premises, so as to help an authorised person to decide whether the unaccompanied entry to the premises would create an unacceptable level of risk to the authorised person’s safety.⁷⁶
- [49] A recent example of this issue arose in relation to the [Fair Trading Inspectors Bill 2011](#). Proposed clause 63 of the Bill permitted the Chief Executive to ask the Commissioner of the Police Service for a written report about the criminal history of a person if an inspector reasonably suspects that person may be present at a place when the inspector enters (in accordance with other provisions of the Bill) and may therefore create an unacceptable level of risk to the inspector’s safety. The Committee noted that the Bill:
- did not refer to the [CLROA](#), did not define ‘criminal history’ and was ambiguous as to which aspects of the [CLROA](#) were displaced;⁷⁷ and

⁷¹ [AD 2007 No 11 p 24 paras 14-15](#)

⁷² [AD 2007 No 4 p 6 para 15](#)

⁷³ [AD 2007 No 4 p 6 paras 16-17](#) [[Community Services Bill 2007 Explanatory Notes p 5](#)]

⁷⁴ [AD 2007 No 4 p 6 paras 16-17](#) [[Community Services Bill 2007 Explanatory Notes p 5](#)]

⁷⁵ [AD 2007 No 4 p 7 para 20](#)

⁷⁶ [AD 2005 No 5 pp 22-23 paras 13-16](#); [AD 2003 No 2 pp 5 and 6 para 5](#) and [p 7 paras 7-8](#)

⁷⁷ [LA 2011 No 2 p 8 para 16](#)



- allowed criminal history to be requested, on the basis of a ‘reasonable suspicion’ that a person might create an unacceptable level of risk to an inspector;⁷⁸ and
- did not identify whether the criminal history would be provided upon payment of a fee;⁷⁹ and
- did not detail protections of individual privacy generally included in legislation.⁸⁰

[50] The Committee noted that the explanatory notes for the Bill justified the potentially unnecessary collection of private information on the basis of the necessity to determine whether an inspector’s unaccompanied entry of a place would create an unacceptable level of risk to the inspector’s safety.⁸¹ However, the Committee observed that measures, other than obtaining a criminal history and which may have greater regard to rights to privacy, may be available to help an inspector decide whether unaccompanied entry would create an unacceptable level of risk to the inspector’s safety.⁸² The Committee asked the Minister to provide further information regarding whether the proposed provision had sufficient regard to rights and liberties of individuals to privacy.⁸³

[51] The Committee dealt with similar issues when considering the [Water Supply \(Safety and Reliability\) Bill 2008](#). The Bill allowed authorised officers to enter premises and the Chief Executive could request a criminal history report in relation to a person when an authorised officer reasonably suspected might be present at a place when the authorised officer entered the place. The Bill defined ‘criminal history’ to mean criminal history as defined under the [CLROA](#), other than for a spent conviction.

[52] In considering the Bill, the Committee noted that the disclosure might adversely affect the rights and liberties of a person who was reasonably suspected of being present at a place entered by an authorised officer.⁸⁴ The Committee referred to the explanatory notes for the Bill, which explained that the potential breach of the right to privacy must be balanced against an authorised officer’s right to a safe and secure working environment, and the obligation of the State to provide such an environment to its employees. The explanatory notes also stated that authorised officers are unarmed, and may work in remote areas with sometimes little assistance should they be confronted with a violent or dangerous situation. The power to request disclosure of criminal histories provides an opportunity for the authorised officer to request to be accompanied by a police officer if it is considered that unaccompanied entry to a place would create an unacceptable level of risk to the authorised officer’s safety.⁸⁵ Finally, the

⁷⁸ [LA 2011 No 2 p 8 para 16](#)

⁷⁹ [LA 2011 No 2 p 8 para 16](#)

⁸⁰ [LA 2011 No 2 p 8 para 16](#)

⁸¹ [LA 2011 No 2 p 8 para 17](#) [[Fair Trading Inspectors Bill 2011 Explanatory Notes p 7](#)]

⁸² [LA 2011 No 2 p 8 para 16](#)

⁸³ [LA 2011 No 2 p 8 para 18](#)

⁸⁴ [AD 2008 No 6 p 54 para 42](#)

⁸⁵ [AD 2008 No 6 p 54 paras 41](#) [[Water Supply \(Safety and Reliability\) Bill 2008 Explanatory Notes p 14](#)]



explanatory notes stated that the Bill provided stringent safeguards to protect the confidentiality of the information disclosed.⁸⁶ The Committee referred to Parliament the question of whether the proposed disclosure provision had sufficient regard to the rights and liberties of persons who may be affected by it.⁸⁷

Courts and Tribunals

- [53] The [Queensland Civil and Administrative Tribunal Bill 2009](#) allowed for criminal history checks to be conducted of members and adjudicators of QCAT and people being considered for appointment as members or adjudicators. In defining ‘criminal history’, the Bill adopted the definition under the [CLROA](#) but also expressly included charges for offences, spent convictions and convictions that were quashed or set aside on appeal. The Committee observed that the extension of the definition of criminal history was a statutory modification of the fundamental right to be presumed innocent until proven guilty.⁸⁸ It considered the explanatory notes for the Bill, which stated that the proposed provisions were required primarily for the child protection jurisdiction of QCAT,⁸⁹ and concluded that the explanatory notes provided detailed information and justification indicating sufficient regard to the rights and liberties of individuals.⁹⁰
- [54] The [Transport and Other Legislation Amendment Bill 2008](#) amended the [Transport Infrastructure Act 1994](#) and the [Transport Operations \(Road Use Management\) Act 1995](#) to allow courts to make exclusion orders prohibiting persons who are convicted of a dangerous goods offence from being involved in the transport of dangerous goods.⁹¹ The Committee noted that the Bill would introduce into both Acts a definition of ‘criminal history’ that included unrecorded convictions and charges and therefore extended beyond the definition of criminal history under the [CLROA](#).⁹² The Committee further noted that the Bill also permitted the disclosure of spent convictions and therefore displaced the rehabilitation period under the [CLROA](#).⁹³
- [55] The explanatory notes acknowledged that the Bill’s departure from the scheme under the [CLROA](#) was a breach of fundamental legislative principles. However, the notes stated that the breach was justified because there was no requirement for a court to take into account a person’s spent convictions or charges when making an exclusion order and a court was only required to consider those matters if they were relevant to making an exclusion order. The explanatory notes also stated that the making of an exclusion order

⁸⁶ [AD 2008 No 6 p 54 paras 41](#) [[Water Supply \(Safety and Reliability\) Bill 2008 Explanatory Notes p 14](#)]

⁸⁷ [AD 2008 No 6 p 54 para 43](#)

⁸⁸ [LA 2009 No 3 p 20 para 11](#)

⁸⁹ [LA 2009 No 3 p 20 para 9](#) [[Queensland Civil and Administrative Tribunal Bill 2009 Explanatory Notes p 18](#)]

⁹⁰ [LA 2009 No 3 p 20 para 1](#)

⁹¹ [Transport Infrastructure Act 1994](#) s 452 and [Transport Operations \(Road Use Management\) Act 1995](#) s 160

⁹² [AD 2008 No 11 p 56-57 para 22](#)

⁹³ [AD 2008 No 11 p 57 para 23](#)



was a serious matter which could affect a person's livelihood and acknowledged that it was therefore imperative that a court could examine the person's conduct over a lengthy period of time to assess whether the person had established a pattern of behaviour that necessitated the making of the order.⁹⁴ The Committee noted that the explanatory notes to the Bill provided extensive justification for the abrogation of rights under the [CLROA](#) and particularly noted the fact that under the Bill, a court could only make an exclusion order after it had considered a number of factors, only one of which was a person's criminal history.⁹⁵

Crime prevention

- [56] Proposed clause 104 of the [Juvenile Justice Amendment Bill 2002](#) amended the *Juvenile Justice Act 1992* (now the [Youth Justice Act 1992](#)) to authorise the Commissioner of the Police Service to disclose spent convictions of, and mere charges against, persons visiting, or applying to visit, a detention centre. The Committee referred to the explanatory notes for the Bill, which explained that the proposed disclosure provisions were modelled on an existing power, in section 244 of the [Corrective Services Act 2006](#). According to the explanatory notes, that provision is regarded as an important tool in maintaining the security and good order of correctional facilities and the proposed provisions were necessary to ensure that the manager of a youth detention centre could assess the risk posed to children in the detention centre or to the staff and security of the centre.⁹⁶ The Committee referred to Parliament the question of whether the conferral of the power upon the Chief Executive was reasonable in the circumstances.⁹⁷
- [57] Proposed clause 7 of the [Drugs Misuse Amendment Bill 2002](#) inserted a new section 61 into the [Drugs Misuse Act 1986](#) to authorise the Commissioner of the Police Service to disclose spent convictions of persons applying for licences to grow industrial cannabis and of persons associated with the person applying for the licence.⁹⁸ The Committee referred to Parliament the question of whether the proposed provisions had sufficient regard to the rights of applicants and licensees.⁹⁹

⁹⁴ [AD 2008 No 11 p 57 para 24](#) [[Transport and Other Legislation Amendment Bill 2008 Explanatory Notes pp 42-43](#)]

⁹⁵ [AD 2008 No 11 p 57 para 24](#)

⁹⁶ [AD 2002 No 6 p 29 para 21](#) [[Juvenile Justice Amendment Bill 2002 Explanatory Notes p 4](#)]

⁹⁷ [AD 2002 No 6 pp 29-30 paras 18-23](#)

⁹⁸ [AD 2002 No 5 pp 1-2 paras 3-9](#)

⁹⁹ [AD 2002 No 5 p 2 para 9](#)