

# **Criminal Code and Other Legislation (Misconduct, Breaches of Discipline and Public Sector Ethics) Amendment Bill 2009**

## **Explanatory Notes**

### **Objectives of the Bill**

The Bill will amend:

1. the *Criminal Code* to include a new offence of “Misconduct in relation to public office” to prohibit any public officer from abusing their office to dishonestly obtain a benefit for themselves or another, or cause a detriment to another. The new offence will also prohibit former public officers from using any information gained because of their former position, to dishonestly gain a benefit or cause a detriment;
2. the *Crime and Misconduct Act 2001* to allow the CMC to lay disciplinary charges for official misconduct against certain public service officers and members of the police service whose employment in the public sector has ended;
3. the *Misconduct Tribunals Act 1997* to extend the jurisdiction of the Misconduct Tribunal to include certain public service officers and police officers whose employment in the public sector has ended;
4. the *Police Service Administration Act 1990* to:
  - enable disciplinary action, in the form of disciplinary declarations, to be made against former police officers who resign, retire or otherwise cease employment following serious breaches of discipline or misconduct;
  - require persons who apply to become members of the Queensland Police Service to disclose any previous serious disciplinary finding made against them in their previous employment in the Queensland Police Service or any other Queensland public sector agency; and

- enable the Commissioner of Police, in determining a person's suitability to be employed in the Queensland Police Service, to obtain disciplinary information about a person who has been previously employed in the Queensland Police Service or any other Queensland public sector agency.
5. the *Public Service Act 2008* to:
- repeal the definition of "interest" in Schedule 4 and clarify that references to interests and conflicts of interest have their ordinary meaning under the general law;
  - enable disciplinary action, in the form of disciplinary declarations, to be made against former public service officers whose employment in the public service ends, following serious breaches of discipline or misconduct;
  - ensure that disciplinary action can be initiated and continued against officers who move to another department;
  - require people who apply for public service positions to disclose any previous serious disciplinary action taken against them in previous public sector employment, including the Queensland Police Service;
  - enable chief executives, in determining a person's suitability for appointment, to obtain disciplinary information about a person who has been previously employed in the Queensland public sector, including the Queensland Police Service; and
  - provide that the Office of the Integrity Commissioner is not a statutory office holder who may be removed from office by the Governor in Council under the *Public Service Act 2008*.
6. the *Public Sector Ethics Act 1994* to provide that all Members of the Legislative Assembly are considered a 'designated person' under the Act and are able to seek the Integrity Commissioner's advice on conflict of interest matters involving themselves.

## **Reasons for the Bill**

The Criminal Code and Other Legislation (Misconduct, Breaches of Discipline and Public Sector Ethics) Amendment Bill 2009 implements recommendations made by the Crime and Misconduct Commission (CMC) in its report *Public Duty, Private Interests: Issues in pre-separation conduct and post-separation employment for the Queensland public sector*

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(the CMC Report) and the former Criminal Justice Commission (CJC), in its report *Safeguarding Students: Minimising the risk of sexual misconduct by Education Queensland staff* (the CJC Report).

Recommendation 2 of the CMC Report proposed the introduction of a broad offence similar to the common law offence of misconduct in public office into the Criminal Code. The CMC was of the view that the present Criminal Code offences are deficient in that they do not provide for all serious abuse or breach of public trust by a public official.

In response to the recommendation a new offence of “Misconduct in relation to public office” will be included in the Criminal Code. The offence will apply to a public officer who acts or fails to act in abuse of the authority of office (or other specified conduct) and does so with intent to dishonestly gain a benefit for, or cause a detriment to, any person. The new offence will also prohibit former public officers from using any information gained because of their former position, to dishonestly gain a benefit for themselves or another person, or to dishonestly cause a detriment to another person.

The Bill deviates from the common law approach by including, as an element of the offence, an intention to dishonestly gain a benefit for or cause a detriment to, any person and in doing so provides clarity to officials as to the conduct to be expected of them. Such an approach is based on section 142.2 of the Criminal Code (Cwlth).

Further, the definition of “interest” in Schedule 4 to the *Public Service Act 2008* will be repealed as it does not capture all interests which can lead to a conflict of interest within that Act. The amendments will provide that references to interest and conflict of interest in the Act have their ordinary meaning under the general law. The provision will also note that, in relation to an interest, the definition in the *Acts Interpretation Act 1954*, s.36, does not apply. This approach has the advantage of retaining flexibility in application of the terms to different scenarios and keeping their contemporary meaning.

It is considered that a person has a conflict of interest in circumstances when ‘a situation in which someone’s private interests could conflict with their obligations, such as by being personally advantaged by knowledge gained through public office’. In particular, chief executives owe many of the same duties to the State as officers of companies do to the company. This includes a fiduciary duty not to gain advantage in circumstances where there is a conflict between his personal interest and those of the

State. Although equity might also govern the conduct of public servants, the purpose of section 102 of the *Public Service Act 2008* is to engage those principles of equity to govern the conduct of chief executives.

In response to the CJC's Report, the Bill will provide for an extension of power to allow disciplinary findings to be made against public servants after their employment ends.

Under existing provisions of the *Public Service Act 2008* and the *Police Service Administration Act 1990*, disciplinary action can only be taken against a current public service officer or police officer. If an officer resigns or retires or their employment otherwise ends, disciplinary action ceases. The Bill amends the *Public Service Act 2008* and the *Police Service Administration Act 1990* to extend the power to make disciplinary findings against public servants and police officers who cease employment after the grounds for the disciplinary action arose.

In addition to the above issue, there is an existing difficulty in relation public service officers who move departments before a disciplinary process is undertaken or completed. The Bill will therefore amend the *Public Service Act 2008* to clarify that an agency chief executive may either investigate the matter and make a disciplinary finding or delegate the authority to the public service officer's new Chief Executive Officer (CEO). This will give CEOs the discretion to decide if it is more appropriate for an investigation or disciplinary proceeding to be conducted within the current employing agency or the previous agency. However, in relation to the imposition of penalty, only a public service officer's current chief executive may enforce a penalty upon the officer.

The amendments will also place a positive obligation on applicants who join the public service or the Queensland Police Service to disclose any serious disciplinary findings that have previously been made against them. The *Public Service Act 2008* further provides that, for a current public service officer, a failure to disclose this information, without reasonable excuse, may result in disciplinary action, including dismissal.

The *Public Service Act 2008* states that 'the Governor in Council may remove a term appointee from office at any time'. Schedule 2 of that Act lists those statutory office holders who are not deemed 'term appointees' and was drafted with the intention of enacting the pre-existing exemptions listed in the Public Service Regulation 2007, to maintain the status quo in relation to the power to remove term appointees.

The Office of the Integrity Commissioner was not listed in Schedule 2 as it had not been listed in the Schedule to the repealed *Public Service Act 1996*. The Office was not included in the original Schedule to the now repealed *Public Service Act 1996* as this Act pre-dated the establishment of this role.

Currently, the CMC can investigate public servants and police officers even if they have resigned or retired. However, the CMC's ability to lay disciplinary charges for official misconduct is restricted to current public servants (who are prescribed as being subject to the Misconduct Tribunal's jurisdiction) and members of the police service, which includes police officers, police recruits and staff members.

The *Crime and Misconduct Act 2001* will therefore be amended to also allow the CMC to lay disciplinary charges for official misconduct against public servants (who are prescribed as being subject to the Misconduct Tribunal's jurisdiction) and members of the police service whose employment ceases after the disciplinary matter arises.

The *Misconduct Tribunal Act 2001* will be amended to also allow the Misconduct Tribunal, in its original jurisdiction, to hear and decided charges of a disciplinary nature of official misconduct in relation to public servants whose appointment or unit of public administration has been declared by regulation to be subject to the jurisdiction of the Misconduct Tribunal and members of the police service who have resigned, retired or otherwise cease to be so employed.

The Misconduct Tribunal will be able to make a disciplinary declaration about the order that the Misconduct Tribunal would have made if the person had continued to be employed.

The Misconduct Tribunal's appellate jurisdiction will also be extended in relation to disciplinary declarations made in relation to a disciplinary charge of misconduct against former police officers and public servants (whose appointment or unit of public administration has been declared by regulation to be the subject of the jurisdiction of the Misconduct Tribunal).

Where a former public service officer or police officer is found to be liable for disciplinary action, despite his or her employment ending, the relevant amendments in the Bill will provide for the recording of the penalty that would have been imposed on the former officer, had they remained so employed, in the form of a disciplinary declaration.

The amendments further clarify that no action may be taken to enforce a penalty or fine mentioned in a disciplinary declaration and the disciplinary

declaration does not affect the person's resignation or retirement or benefits, rights and liabilities arising from the resignation, retirement or the employment otherwise ending.

The Bill makes further amendments to the *Police Service Administration Act 1990*, the *Crime and Misconduct Act 2001* and the *Misconduct Tribunals Act 1997* to have regard to amendments being made to those Acts by the Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Bill 2009 currently before the Parliament.

Amendments are being made to the *Public Sector Ethics Act 1994* to provide that all Members of the Legislative Assembly are able to seek the Integrity Commissioner's advice on conflict of interest matters. The amendments are proposed on the basis that all Members can be confronted with potential conflicts of interest and should therefore be able to seek the Integrity Commissioner's advice.

### **Estimated Cost for Government Implementation**

The financial impact on agencies arising from the implementation of the amendments of the Bill will be minimal and will be met from within existing agencies' budget allocations.

### **Consistency with Fundamental Legislative Principles**

*Does the Bill have sufficient regard to the rights and liberties of individuals?*

Providing for a procedure to discipline former officers by a declaration can be seen as adversely affecting the rights of individuals. However, given the public interest in having a scheme to properly assess and record the ground of discipline, it is considered that the Bill achieves an appropriate balance between the rights of the individual and the public interest.

The use of a person's previous Queensland public service or Queensland Police Service disciplinary information to determine their suitability for employment can be seen as adversely affecting the rights of the individual concerned. This is particularly so where the disciplinary information is relatively minor in nature, or due to the passage of time the relevance of the information may be reduced. However, due to the public interest in upholding and maintaining the ethical standards of government employees, it is considered essential that this information be made available to CEOs to maintain public confidence in government agencies.

The Bill provides that the information need only be provided by a former CEO where the information is reasonably necessary for the CEO to make decisions about the appointment of the person. Additionally, the *Public Service Regulation 2008* and the *Police Service Administration Act 1990* require a chief executive officer or the commissioner, if they seek to rely on such information, to disclose the information to the person and provide the person with a reasonable opportunity to make representations to the chief executive or the commissioner about the information. It is therefore considered that the Bill achieves an appropriate balance between the rights of the individual and the public interest. Furthermore, the Public Service Commission will issue a Directive to provide further guidance to agencies about the principles that must be observed when considering the disciplinary information.

## **Consultation**

The Public Service Commission, the Queensland Public Sector Union, the Queensland Police Union, the Queensland Commissioned Officers' Union, the Crime and Misconduct Commission, the Senior Member of the Misconduct Tribunal and the Integrity Commissioner were consulted on the relevant parts of the Bill.

# **Notes on Provisions**

## **Part 1                      Preliminary**

*Clause 1* stipulates that the Act's short title is the Criminal Code and Other Legislation (Misconduct, Breaches of Discipline and Public Sector Ethics) Amendment Bill 2009.

*Clause 2* provides that subject to sections 55(2) and 77(2) the Act will commence on a day fixed by proclamation.

## **Part 2                      Amendment of Criminal Code**

*Clause 3* provides that this part amends the Criminal Code.

*Clause 4* inserts a new offence in the Criminal Code which prohibits a public officer from: dealing with information gained because of office; performing or failing to perform a function of office; or doing an act or making an omission in abuse of the authority of office, with intent to dishonestly gain a benefit for the officer or another, or to dishonestly cause a detriment to another person. The offence is a crime which carries seven years imprisonment.

A key element of the offence is the ‘dishonest intent’. The flexibility of the dishonesty concept is that it allows an assessment of a public officer’s conduct against the standards of ordinary honest members of the community. Further, the offence refers to the public officer’s ‘functions’ of office and as such goes beyond the concept of ‘duty’.

Clause 4 also provides that a person who ceases to be a public officer in a particular capacity is guilty of a crime if, with intent to dishonestly gain a benefit for the officer or another person or to dishonestly cause a detriment to another person, the person deals with information gained because of the capacity. The offence carries a maximum penalty of seven years imprisonment.

Clause 4 provides that a reference to information gained because of office or a particular capacity includes information gained because of an opportunity provided by the office or capacity.

Clause 4 provides that within the new section 92A: “authority” of office includes the trust imposed by office; “deals with” includes uses, supplies, copies, and publishes; “information” includes knowledge; and “office” in relation to a person who is a public officer means the position, role or circumstance that makes the person a public officer.

## **Part 3                      Amendment of Public Service Act 2008**

*Clause 5* provides that this part amends the *Public Service Act 2008*.



*Clause 6* provides that chapters 6 and 7 have provisions that relate to former public service officers.

*Clause 7* amends section 47 and provides that a ruling may be made about former public service officers.

*Clause 8* amends section 53 and provides that the commission chief executive may make a ruling about a matter relating to the application of chapter 6 or 7 to a former public service officer.

*Clause 9* amends section 65 by adding a new subsection (4) which clarifies that a reference to interest or conflict of interest is a reference to those matters within their ordinary meaning under the general law. The reference further notes that the definition in the *Acts Interpretation Act 1954*, section 36, does not apply. As a new reference to interests and conflicts of interest is being inserted the section omits the words 'direct and indirect' as these are no longer needed.

*Clause 10* amends section 101 by inserting the reference to the new interpretation of the term interest.

*Clause 11* amends section 102 by inserting the reference to the new interpretation of the term interest and conflicts of interest.

*Clause 12* inserts a new section 179A that provides that if a chief executive proposes to appoint or second a person, the chief executive may require this person to disclose any serious disciplinary action that has been taken. This requirement must be complied with before the appointment or secondment takes effect and in the way stated by the chief executive, including any timeframes. The chief executive is not required to further consider the person for appointment or secondment if that person fails to comply or gives false or misleading information in response to the requirement. Serious disciplinary action means disciplinary action involving dismissal, transfer or redeployment to other employment, reduction of remuneration or classification level or rank or a disciplinary declaration which includes either dismissal or reduction of classification level or rank as the penalty that would have been taken against the person if the person's employment had not ended.

*Clause 13* amends section 185 by inserting the reference to the new interpretation of the term interest.

*Clause 14* amends section 186 by inserting the reference to the new interpretation of the term conflicts of interest.

*Clause 15* amends the heading of chapter 6 (Disciplinary action for public service officers) to include a specific reference to former public service officers.

*Clause 16* inserts a new preliminary part 1 consisting of section 186A, which provides for certain definitions which are relevant for chapter 6. This clause also inserts a new part 2 heading – ‘Disciplinary Action’.

*Clause 17* amends section 187 by inserting a new ground of discipline if a public service officer does not comply with a requirement under section 179A(1) to disclose particulars of any previous serious disciplinary action, without a reasonable excuse.

Clause 17 provides that a disciplinary ground arises when the act or omission constituting the ground is done or made. This clause also amends section 187 to clarify that a former public service officer or a public service officer who has changed employment to another department, may be disciplined on the same grounds as current public service officers, provided that the chief executive is reasonably satisfied that the grounds to discipline the officer existed before the officer’s employment ended or the officer changed employment. Clause 17 also renumbers sections 187(1A) to (2) as section 187(2) to (4) respectively.

*Clause 18* inserts a new section 187A. Section 187A relates to how disciplinary action may be taken against a public service officer after the officer changes employment. New section 187A applies if a public service officer holds an appointment with a department and a disciplinary ground arises in relation to the officer and, after the disciplinary ground arises, the officer changes employment to another department. Clause 18 allows a discipline finding to be made about the officer’s employment in the previous department, even though the officer now holds an appointment with another department (employing department).

Clause 18 provides that if the officer’s previous chief executive makes a finding that the officer is liable for disciplinary action, and both the previous and employing department’s chief executives agree that disciplinary action is reasonable in the circumstances, only the employing department’s chief executive can take the action, or order that the action be taken.

Clause 18 allows an officer’s previous chief executive to delegate the authority to make a disciplinary finding about the officer to the employing department’s chief executive. This includes the police commissioner delegating their powers to another chief executive. If this delegation is

made and the employing department's chief executive makes a disciplinary finding about the officer, the employing department's chief executive can take disciplinary action against the officer under section 188 without the agreement of the officer's previous chief executive. Clause 18 also provides that the previous chief executive may give to the employing department's chief executive any information about a public service officer or a disciplinary ground relating to the officer to help the employing department's chief executive to perform a function under subsections (4) or (5).

*Clause 19* amends section 188 to clarify that an officer's chief executive may take the disciplinary action or order that the act be taken against a public service officer. It also provides that if the disciplinary action is taken following an agreement under section 187A(4) between the previous chief executive and the employment department's chief executive, the chief executives must agree on the disciplinary action.

*Clause 20* inserts new sections 188A-188B. New section 188A (Disciplinary action that may be taken against a former public service officer) applies if a disciplinary ground arises in relation to a public service officer and after the ground arises, the officer's employment as a public service officer ends for any reason. This clause provides that the previous chief executive may make a disciplinary finding or take, or continue to take, disciplinary action against the former public service officer in relation to the disciplinary ground. Any disciplinary finding or disciplinary action must be made or taken within a period of two years after the end of the officer's employment. Clause 20 provides that this time limit does not affect an investigation of a suspected criminal offence or an investigation of a matter for the purpose of notifying the CMC of suspected official misconduct under the *Crime and Misconduct Act 2001*, nor does it stop disciplinary action being taken following an appeal or review.

Clause 20 provides that when disciplining a former public service officer, the previous chief executive may make a disciplinary declaration and may not take any other disciplinary action. A disciplinary declaration is a declaration of a disciplinary finding against the former public service officer and the disciplinary action, including a penalty, that would have applied had the officer's employment not ended. The chief executive may only make a disciplinary declaration if the disciplinary action that would have been taken against the officer if the officer's employment had not ended would have been termination of employment reduction of classification level. Clause 20 clarifies that the making of a disciplinary

declaration does not affect the officer's resignation or retirement or any benefits, rights or liabilities arising from the resignation or retirement.

New section 188B (Information about disciplinary action to be given by chief executive) applies if the chief executive of a department asks the chief executive of another department for disciplinary information about a person who is or was a public service employee and the information is reasonably necessary to decide about an appointment, or continued appointment, of the person to the chief executive's department or a disciplinary finding, disciplinary action or disciplinary declaration the chief executive is considering in relation to the person.

New section 188B provides that, unless the other chief executive is reasonably satisfied that giving the information may prejudice an investigation, the other chief executive must give the requested disciplinary information. This clause provides that disciplinary information means a current investigation into whether the person should be disciplined, a finding that the person should be disciplined, possible disciplinary action under consideration and disciplinary action, including a disciplinary declaration.

*Clause 21* amends section 190 to provide that a chief executive must comply with this Act, any relevant directive of the commission chief executive and the principles of natural justice in relation to disciplining a public service officer or former public service officer.

*Clause 22* amends section 194 to provide an extension of the types of decisions about which an appeal may be made, to include a disciplinary declaration made about former public service officer. Clause 22 provides that an appeal may be made to the commission chief executive against a decision under a disciplinary law to discipline a former public service officer. This includes a disciplinary declaration of termination of employment.

*Clause 23* amends section 196(b) to expand the categories of persons who may lodge an appeal about a decision to discipline the officer under section 194(1)(b) to include a former public service officer.

*Clause 24* amends section 207 by inserting a note to clarify that this section has no relevance to an appeal against a disciplinary declaration.

*Clause 25* amends section 211 by inserting a note to clarify that this section has no relevance to an appeal against a disciplinary declaration.

*Clause 26* amends section 212 by inserting a note to clarify that this section has no relevance to an appeal against a disciplinary declaration.

*Clause 27* amends section 213 to provide that this section does not apply to a person who is appealing against a disciplinary declaration.

*Clause 28* amends the heading for Chapter 9, part 2 to clarify that it applies to the *Public Service Act 2008*.

*Clause 29* inserts a new part 3 containing transitional provisions for the Criminal Code and Other Legislation (Misconduct, Breaches of Discipline and Public Sector Ethics) Amendment Act 2009.

This clause provides that in relation to a public service officer who changes employment from one department to another department, section 187A only applies if this change occurs after the commencement of this part. For section 188A, a person is a former public service officer only if their employment as a public service officer ends after the commencement of this part.

*Clause 30* amends schedule 2 by inserting the Queensland Integrity Commissioner as a statutory office holder who is not deemed a term appointee who may be removed from office by the Governor in Council under the *Public Service Act 2008*.

*Clause 31* amends schedule 4 (Dictionary) by inserting new definitions and omitting the definition of 'interest'.

*Clause 32* provides for an amendment to the definition of *public sector disciplinary law* and *disciplinary declaration* in Schedule 4, relating to the operation of QCAT.

## **Part 4                      Amendment of Police Service and Administration Act 1990**

*Clause 33* provides that this part amends the *Police Service Administration Act 1990*.

*Clause 34* amends section 1.4 (Definitions) to provide the specified meaning of new terms used in the *Police Service Administration Act 1990*.

*Clause 35* amends section 5AA.8(2) by inserting new subsection (e) which identifies the categories of disciplinary action, including disciplinary declarations, that must be disclosed to the commissioner by a person who is seeking to be engaged by the service.

*Clause 36* inserts new section 5AA.10A (Information about disciplinary action to be given by chief executive) which, upon request of the commissioner, imposes an obligation upon a chief executive of another government department to disclose the disciplinary information of an employee or former employee in specified circumstances. Subsection (3) defines the meaning of the term ‘disciplinary information’ for the purposes of this section.

*Clause 37* amends section 5AA.11(2) by inserting new subsection (ba) to extend the relevant information that the commissioner may consider in making an assessment of the suitability of a person to be engaged by the service to include information provided to the commissioner by a chief executive of another department under new section 5AA.10A.

*Clause 38* amends section 5AA.14(3)(a)(v) to provide an additional example of authorised disclosure of relevant information to a person who has an entitlement under another Act to seek the information.

*Clause 39* inserts a new part 7A (Disciplinary declarations against former officers) to create a scheme to enable disciplinary investigations to be undertaken in relation to former police officers and provide for the taking of disciplinary action in the form of disciplinary declarations.

New section 7A.1 (Power to conduct disciplinary investigation against a former officer) provides a discretionary power for the commissioner to undertake disciplinary investigations against former police officers. The section clarifies who is a former officer and sets out the criteria that may be considered in determining whether a disciplinary investigation into a former officer should be continued or commenced. Subsection 7A.1(4), subject to the exceptions provided in subsections (5) and (6), establishes time limits for the completion of the investigation and any subsequent disciplinary action. The note for subsection (3) clarifies that the commissioner’s delegation power under section 4.10 of the *Police Service Administration Act 1990* applies to powers provided under Part 7A.

New section 7A.2 (Disciplinary action that may be taken against a former officer) enables the commissioner to make a disciplinary finding and take disciplinary action against a former police officer. The section identifies the limits of the type of disciplinary action that may be taken. Subsection

(4) clarifies the limited affect a disciplinary declaration has. For example, a disciplinary declaration does not affect a person's superannuation entitlement. Subsection (5) defines the term disciplinary declaration for the purposes of the section.

New section 7A.3 (Procedure) prohibits the commissioner from making a disciplinary declaration unless the former officer is provided with an opportunity to respond to the disciplinary allegations in accordance with the prescribed process. Subsection (4) enables the taking of disciplinary action whether or not the former officer responds or participates.

New section 7A.4 (Commissioner to notify former officer of decision) sets out the requirements for the commissioner to provide a former officer with notice about a disciplinary matter decision or disciplinary declaration made and the form the notice must take.

New section 7A.5 (Notice of misconduct finding to Crime and Misconduct Commission) sets out the notification requirements which apply to the commissioner when a former officer if found guilty of misconduct or a misconduct matter is otherwise decided.

*Clause 40* amends section 9.3 to expand the categories of who may apply to have a matter reviewed by the commissioner for police service review to include a former officer who is aggrieved by the making of a disciplinary declaration in relation to a breach of discipline.

*Clause 41* inserts new Subdivision 2A (Disclosure provisions about disciplinary information) into part 10, division 1.

New section 10.2CA (Information about disciplinary action to be given by commissioner) sets out the circumstances when the commissioner must provide disciplinary information of a person who is or was a member of the service to a chief executive of another government department. Subsection (3) defines the meaning of the term 'disciplinary information' for the purposes of this section.

*Clause 42* inserts the new Division into part 11 to provide for Transitional and Declaratory provisions in relation to the Criminal Code and Other Legislation (Misconduct, Breaches of Discipline and Public Sector Ethics) Amendment Bill 2009.

New section 11.7 (Amendment of regulations by Governor in Council unaffected) declares that the amendment to any regulation by Parliament does not affect the power of the Governor in Council to further amend or repeal the regulation.

New section 11.8 (Former officer) clarifies who is a former officer for Part 7A.

*Clause 43* amends schedule to expand the type of information that is relevant information for the specific classes of persons.

*Clause 44* provides amendments relating to the operation of QCAT. The Queensland Civil and Administrative Tribunal Bill 2009 (QCAT Bill) and the Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Bill 2009 have a combined effect of transferring the Misconduct Tribunal's functions to the Queensland Civil and Administrative Tribunal (QCAT). To give effect to the QCAT Bill, clauses 44 will make amendments to the specified provisions of the *Police Service Administration Act 1990* as amended by Part 4 of the Criminal Code and Other Legislation (Misconduct, Breaches of Discipline and Public Sector Ethics) Amendment Bill 2009.

## **Part 5                      Amendment of Police Service (Discipline) Regulations 1990**

*Clause 45* provides that this part amends the *Police Service (Discipline) Regulations 1990*.

*Clause 46* amends section 9 to apply the stated grounds for disciplinary action to Part 7A of the *Police Service Administration Act 1990*.

*Clause 47* inserts a new section 13. The new section 13 sets out the matters that the commissioner may take into consideration in deciding whether to continue or start a disciplinary investigation against a former officer under section 7A.1 of the *Police Service Administration Act 1990*.

## **Part 6                      Amendment of Police Service Administration (Review if Decisions) Regulation 1990**



*Clause 48* provides that this part amends the *Police Service Administration (Review of Decisions) Regulation 1990*.

*Clause 49* amends section 4 by amending the specified terms to enable a former officer who applied for a review to be a party to the review.

*Clause 50* amends section 6A to enable a former officer to apply for a review of a decision, which is open to review in accordance with the process set out in the section.

*Clause 51* amends section 11 to allow a former officer to withdraw a review that the former officer has applied for.

## **Part 7                      Amendment of Crime and Misconduct Act 2001**

### **Division 1 Act Amended**

*Clause 52* provides that this part amends the *Crime and Misconduct Act 2001*.

The Queensland Civil and Administrative Tribunal Bill 2009 (QCAT Bill) and the Queensland Civil and Administrative Tribunal (Jurisdiction Provisions) Amendment Bill 2009 (the QCAT Jurisdictions Bill) have the combined effect of repealing the *Misconduct Tribunals Act 1997* and inserting the relevant provisions of that Act into the *Crime and Misconduct Act 2001*. Divisions 2 and 3 of the Criminal Code and Other Legislation (Misconduct, Breaches of Discipline and Public Sector Ethics) Amendment Bill 2009 make amendments to the *Crime and Misconduct Act 2001* to have regard to the fact that the QCAT Bill may commence before or after the amendments being made by the Criminal Code and Other Legislation (Misconduct, Breaches of Discipline and Public Sector Ethics) Amendment Bill 2009 may commence before or after the QCAT Bill.

### **Division 2 Amendments having effect before the operation of QCAT.**

*Clause 53* amends section 50. This clause firstly provides that the amendments being made to section 50 by the clause only have effect if the *Misconduct Tribunal Act 1997* is not repealed by the QCAT Bill before this division is commenced.

The amendments in this clause have the effect of extending the scope of the ability under existing section 50 to lay official misconduct charges to include members of the police service whose employment has ended and certain public sector officers whose appointment has ended; regardless of whether the employment or appointment has ended before or after a charge is laid.

The clause inserts a new subsection (4) which provides that in relation to paragraph (b) of the definition of ‘prescribed person’ a regulation may not declare a court or the police service to be a unit of public administration that is subject to the jurisdiction of a misconduct tribunal; and then goes on to provide that in relation to subparagraph (ii) of paragraph (b) of the definition of ‘prescribed person’ in the amendments being made to section 50(5) (see below), a regulation may declare an appointment, or unit of public administration in which an appointment is or was, to be subject to the jurisdiction of a misconduct tribunal before or after the appointment ends. The example in the clause makes it clear how this is intended to operate. For example a resignation occurs before an investigation is finalised and the investigation continues after resignation. The investigation when finalised establishes that the conduct is so serious that proceedings should be taken against the former officer and, at that point in time a regulation is made prescribing the appointment.

The clause inserts a definition of ‘prescribed appointment’ and a new definition of ‘prescribed person’ in section 50(5).

‘Prescribed appointment’ means an appointment in a unit of public administration, which appointment or unit is declared by regulation to be subject to the jurisdiction of a misconduct tribunal.

‘Prescribed person’ means:

(a)

- (i) a member of the police service; or
- (ii) a member of the police service whose employment ends after the official misconduct happens, regardless of whether the employment ends before or after a charge is laid; or

(b)

- (i) a person (other than a judge or holder of judicial office or member of the police service) who holds a prescribed appointment; or

- (ii) a person (other than a judge or holder of judicial office or member of the police service) being the holder of a prescribed appointment, whose appointment ends after the official misconduct happens, regardless of whether the appointment ends before or after a charge is laid. As noted above, the example in paragraph (b) of the definition of prescribed person in new section 50(4) being inserted by the clause makes it clear the regulation prescribing the appointment or unit of public administration can be made before or after the appointment ends.

*Clause 54* inserts a new part 8 into chapter 8 of the *Crime and Misconduct Act 2001*.

A new transitional section (proposed section 392) is inserted into the new part. The new transitional section provides that the amendments being made by clause 53 of the Bill to the to the definition of ‘prescribed person’ in section 50 to include members of the police service whose employment has ended and certain public sector officers whose appointment has ended only apply only apply to such persons whose employment or appointment ends after commencement of the section.

*Clause 55* provides for the repeal of Division 2 if the *Misconduct Tribunal Act 1997* is repealed by the QCAT Bill before this division is commenced.

If the *Misconduct Tribunals Act 1997* is so repealed the provisions of Division 3 will apply.

### **Division 3 Amendments relating to the operation of QCAT**

*Clause 56* amends section 50. This clause firstly provides that the amendments to the section being inserted by the clause only have effect if, before the section commences, the *Misconduct Tribunals Act 1997* is repealed by the QCAT Bill and the amendments to section 50 under division 2 have not commenced.

The references to provisions of the *Crime and Misconduct Act 2001* in this division are therefore references to the provisions of the *Crime and Misconduct Act 2001* as amended by the QCAT Bill.

Under section 50 of the *Crime and Misconduct Act 2001* disciplinary proceedings for official misconduct can be started against currently employed members of the police service or certain currently appointed public sector officers whose unit or appointment is declared to be subject to QCAT’s jurisdiction. The amendments in this clause have the effect of also allowing disciplinary proceedings for official misconduct to be started

against members of the police service whose employment has ended and certain public sector officers whose appointment has ended; regardless of whether the employment or appointment has ended before or after the start of a disciplinary proceeding for the official misconduct.

The clause inserts a new subsection (3) which provides that in relation to paragraph (b) of the definition of 'prescribed person' being inserted into section 50(4) by the clause (see below) a regulation may not declare a court or the police service to be a unit of public administration that is subject to QCAT's jurisdiction. New subsection 50(3) further provides that for sub paragraph (ii) of paragraph (b) of the definition of 'prescribed person' a regulation may declare an appointment, or unit of public administration in which an appointment is or was, to be subject to QCAT's jurisdiction before or after the appointment ends. The example in the clause makes it clear how this is intended to operate. For example a resignation occurs before an investigation is finalised and the investigation continues after resignation. The investigation when finalised establishes that the conduct is so serious that proceedings should be taken against the former officer and, at that point in time a regulation is made prescribing the appointment.

The clause inserts a definition of 'prescribed appointment' and a new definition of 'prescribed person' in section 50(4).

'Prescribed appointment' means an appointment in a unit of public administration, which appointment or unit is declared by regulation to be subject to QCAT's jurisdiction.

'Prescribed person' means:

- (a)
  - (i) a member of the police service; or
  - (ii) a member of the police service whose employment ends after the official misconduct happens, regardless of whether the employment ends before or after a charge is laid; or
- (b)
  - (i) a person (other than a judge or holder of judicial office or member of the police service) who holds a prescribed appointment; or
  - (ii) a person (other than a judge or holder of judicial office or member of the police service) being the holder of a prescribed

appointment, whose appointment ends after the official misconduct happens, regardless of whether the appointment ends before or after a charge is laid. As noted above, the example in paragraph (b) of the definition of prescribed person in new section 50(4) being inserted by the clause makes it clear the regulation prescribing the appointment or unit of public administration can be made before or after the appointment ends.

The clause provides for the repeal on commencement of the amendments to section 50 if the *Misconduct Tribunals Act 1997* is not repealed by the QCAT Bill before the section is commenced or the amendments of section 50 of the *Crime and Misconduct Act 2001* under division 2 have been commenced before the section is commenced.

*Clause 57* amends section 219B to omit the definition of ‘reviewable decision’ and refer to proposed section 219BA for a definition of ‘reviewable decision’.

*Clause 58* inserts a new section 219BA (Meaning of ‘reviewable decision’) which states that ‘reviewable decision’ means:

- (a) a decision made in relation to an allegation of misconduct against a prescribed person, other than a decision made by a court or QCAT; or
- (b) a finding mentioned in section 7.4(2A)(b) or section 7A.5(1)(b) of the *Police Service Administration Act 1990* that misconduct is proved against an officer.

‘Decision’ made in relation to a disciplinary allegation of misconduct, if a disciplinary declaration is made, includes the disciplinary declaration. The note provides that the reviewable decision may also involve the failure to make a disciplinary declaration.

‘Disciplinary declaration’ means a disciplinary declaration made under section 188A of the *Public Service Act 2008* and a disciplinary declaration under section 7A.2(2) of the *Police Service Administration Act 1990*.

‘Prescribed person’ in relation to a prescribed person mentioned in paragraph (a)(ii) and (b)(ii) of section 50(4) means:

- (a) a prescribed person against whom a disciplinary declaration has been made; or

- (b) in relation to an appeal started by the Crime and Misconduct Commission under section 219G of the *Crime and Misconduct Act 2001* –
- (i) a prescribed person mentioned in paragraph (a) ; or
  - (ii) a prescribed person whom a disciplinary declaration has not been made of a ground of appeal states that a disciplinary declaration should have been made.

The effect of these provisions is to extend QCAT's existing review jurisdiction to include where the original decision was in relation to the making of, or failure to make, a disciplinary declaration.

*Clause 59* inserts new section 219DA which provides that for the avoidance of all doubt QCAT may hear and decide, or continue to hear and decide, an allegation of official misconduct brought against a prescribed person (defined in paragraph (a)(ii) or (b) (ii) of the definition of 'prescribed person' in section 50(4) of the *Crime and Misconduct Act 2001*), despite the person's employment or appointment having ended before or during the QCAT hearing or after the hearing and before QCAT makes its decision.

*Clause 60* amends section 219G which deals with QCAT's review jurisdiction to include sections 7A.4 and 7A.5 of the *Police Service Administration Act 1990* as being inserted by this Bill. These sections provide for the giving of notices to the former officer and the commission following certain decisions in respect of former officers.

*Clause 61* amends section 219I to provide that it only applies to a prescribed person defined in paragraph (a)(i) or (b)(i) of the definition of prescribed person in section 50(4) of the *Crime and Misconduct Act 2001* i.e. it does not apply to a prescribed person whose employment or appointment ends.

*Clause 62* inserts new section 219IA which provides that in respect of a prescribed person defined in paragraph (a)(ii) or (b)(ii) of the definition of prescribed person in section 50(4) of the *Crime and Misconduct Act 2001* (i.e. a prescribed person whose employment or appointment has ended), QCAT can only make a disciplinary declaration. QCAT can only make a disciplinary declaration if the order that QCAT would have made under section 219I(1) (QCAT's powers for official misconduct) if the prescribed person's employment or appointment had not ended would have been that the prescribed person be dismissed or be reduced in rank. A disciplinary

declaration does not affect the person's resignation or retirement or the benefits, rights and liabilities arising from the resignation or retirement.

*Clause 63* amends section 219J to:

- provide that no action may be taken to enforce a penalty or fine mentioned in a disciplinary declaration made under the section
- provide that a disciplinary declaration can only be made if the discipline that QCAT would have imposed if the person's employment or appointment had not ended would have been that the prescribed person be dismissed or reduced in rank
- provide that a disciplinary declaration does not affect the person's resignation or retirement or the benefits, rights and liabilities arising from the resignation or retirement.

The terms 'decision', 'disciplinary declaration' and 'discipline' are defined for the purposes of the section.

*Clause 64* amends section 219L to clarify that section 219L (which deals with QCAT's powers to suspend orders), does not apply to disciplinary declarations.

*Clause 65* amends section 219M. Section 219M deals with appeals from QCAT exercising original jurisdiction. This clause amends the section to have regard to the fact that the appeal may be from QCAT's decision under section 219IA in relation to a prescribed person defined in paragraph (a)(ii) or (b)(ii) of the definition of prescribed person in section 50(4) of the *Crime and Misconduct Act 2001* i.e. a former police officer or public sector officer against whom a disciplinary declaration has been made or against whom there has been a failure to make a disciplinary declaration; and to provide that in these cases the appeal tribunal or Court of Appeal may make a disciplinary declaration if there was a failure by QCAT to make a disciplinary declaration or set aside the disciplinary declaration and make another disciplinary declaration.

A disciplinary declaration can only be made by the appeal tribunal or Court of Appeal if the order the appeal tribunal or Court of Appeal would have made if the prescribed person's employment or appointment had not ended would have been that the prescribed person be dismissed or reduced in rank.

A disciplinary declaration made under the amended section does not affect the way in which a prescribed person's employment or appointment ended or the benefits, rights and liabilities arising before the employment ended.

*Clause 66* inserts a new part 7 into chapter 8 of the *Crime and Misconduct Act 2001*. A new transitional section (proposed section 392) is inserted into the new part. The new transitional section provides that the amendments being made to the definition of ‘prescribed person’ in section 50 to include members of the police service whose employment has ended and certain public sector officers whose appointment has ended only apply to such persons whose employment or appointment ends after commencement of the relevant provisions.

The clause goes on to provide that the section is repealed if the relevant provisions (being sections 56(2) and 56(3) of the *Criminal Code and Other Legislation (Misconduct, Breaches of Discipline and Public Sector Ethics) Amendment Act 2009*) are repealed under section 56(4).

## **Part 8                      Amendment of *Misconduct Tribunals Act 1997***

*Clause 67* provides that this part amends the *Misconduct Tribunals Act 1997* and that the part only has effect if the *Misconduct Tribunals Act 1997* is not repealed by the QCAT Bill before the part is commenced.

*Clause 68* inserts new section 14A which provides that for the avoidance of all doubt a misconduct tribunal may hear and decide, or continue to hear and decide, a charge against a prescribed person defined in paragraph (a)(ii) or (b)(ii) of the definition of prescribed person in section 50(5) of the *Crime and Misconduct Act 2001*, despite the person’s employment or appointment having ended before or after the tribunal’s hearing or after the hearing and before the tribunal makes its decision.

*Clause 69* amends section 15 to ensure the Misconduct Tribunal’s appellate jurisdiction extends to where a disciplinary declaration is made, or where there has been a failure to make a disciplinary declaration.

This clause amends section 15 to include disciplinary declaration within the meaning of the term ‘decision’ as used in the section; and also to state that in the section ‘prescribed person’, in relation to a prescribed person mentioned in the *Crime and Misconduct Act 2001* section 50(5) paragraphs (a)(ii) and (b)(ii), means a prescribed person against whom a disciplinary declaration is made.



*Clause 70* amends section 18 to include sections 7A.4 and 7A.5 of the *Police Service Administration Act 1990*.

*Clause 71* amends section 25 to provide that it applies to a prescribed person defined in paragraph (a)(i) or (b)(i) of the definition of prescribed person in section 50(5) of the *Crime and Misconduct Act 2001*.

*Clause 72* inserts new section 25A which provides that in respect of a prescribed person defined in paragraph (a)(ii) or (b)(ii) of the definition of prescribed person in section 50(5) of the *Crime and Misconduct Act 2001*, the misconduct tribunal can only make a disciplinary declaration. A disciplinary declaration is a declaration of the order the misconduct tribunal would have made under section 25(1), including a penalty. The tribunal may only make a disciplinary declaration if the order the misconduct tribunal would have made under section 25(1) if the prescribed person's employment or appointment had not ended would have been that the prescribed person be dismissed or reduced in rank. No action may be taken to enforce a fine or penalty mentioned in a disciplinary declaration and a disciplinary declaration does not affect the person's resignation or retirement or the benefits, rights and liabilities arising from the resignation or retirement.

*Clause 73* amends section 26 to extend the misconduct tribunals' appellate jurisdiction to where a disciplinary declaration has been made or a decision not to make a disciplinary declaration has been made. The clause amends section 26 to:

- provide that no action may be taken to enforce a penalty or fine mentioned in a disciplinary declaration made under the section
- provide that a disciplinary declaration can only be made if the discipline that misconduct tribunal would have imposed if the person's employment or appointment had not ended would have been that the prescribed person be dismissed or reduced in rank
- provide that a disciplinary declaration does not affect the person's resignation or retirement or the benefits, rights and liabilities arising from the resignation or retirement.

The terms 'decision', 'disciplinary declaration' and 'punishment' are defined for the purposes of the section.

*Clause 74* amends section 28 to clarify that the section does not apply where the punishment is a disciplinary declaration.

*Clause 75* amends section 37 to have regard to the fact that the appeal may be from the misconduct tribunal's decision under section 25A in relation to a prescribed person defined in paragraph (a)(ii) or (b)(ii) of the definition of prescribed person in section 50(5) of the *Crime and Misconduct Act 2001*; and to provide that in these cases the court may make a disciplinary declaration if the misconduct tribunal failed to make a disciplinary declaration, or set aside the disciplinary declaration and make another disciplinary declaration.

A disciplinary declaration can only be made by the court if the order the court would have made if the prescribed person's employment or appointment had not ended would have been that the prescribed person be dismissed or reduced in rank.

A disciplinary declaration made under the amended section does not affect the way in which a prescribed person's employment or appointment ended or the benefits, rights and liabilities arising before the employment ended.

*Clause 76* inserts new section 49 to make it clear that the definition of 'prescribed person' before the amendments continues to apply in respect of a misconduct tribunal proceeding that has not been finalised before commencement of the amendments.

*Clause 77* repeals the part if the *Misconduct Tribunals Act 1997* is repealed by the QCAT Bill before the part is commenced.

## **Part 9                      Amendment of Public Sector Ethics Act 1994**

*Clause 78* provides that this part amends the *Public Sector Ethics Act 1994*.

*Clause 79* amends section 27 by omitting 'a Government member' and inserting 'a member of the Legislative Assembly' as a 'designated person' to whom the Integrity Commissioner can give advice.

*Clause 80* amends section 34. This clause provides that the Premier is not able to request and be provided with a copy of the documents containing a request for advice and the advice provided by the Commissioner to a 'non-government member'.

*Clause 81* amends the schedule by deleting the definition of ‘government member’ and inserting a new definition for ‘non-government member’.

## **Part 10                      Amendments of Acts in schedule**

*Clause 82* provides that the schedule amends the Acts mentioned, unless another provision of this Act amends the particular Act.

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