

Justice Legislation (COVID-19 Emergency Response—Permanency) Amendment Bill 2021

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019*, I, Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence make this statement of compatibility with respect to the Justice Legislation (COVID-19 Emergency Response—Permanency) Amendment Bill 2021.

In my opinion, the Justice Legislation (COVID-19 Emergency Response—Permanency) Amendment Bill 2021 is compatible with the human rights protected by the *Human Rights Act 2019* (HR Act). I base my opinion on the reasons outlined in this statement.

Overview of the Bill

On 29 January 2020, a public health emergency was declared under section 319 of the *Public Health Act 2005* in relation to COVID-19 (the COVID-19 public health emergency). The COVID-19 public health emergency was declared for all of Queensland.

The Queensland Government put in place a range of temporary measures for the purpose protecting the health, safety and welfare of persons affected by the COVID-19 emergency and to assist Queensland businesses and individuals suffering financial and operational stress caused by the public health emergency.

The Justice Legislation (COVID-19 Emergency Response—Permanency) Amendment Bill 2021 (the Bill) permanently implements certain aspects of temporary laws that were made in the Justice portfolio in response to the COVID-19 public health emergency. The three key reform areas in the Bill are documents reforms, domestic and family violence (DFV) reforms, and liquor reforms. The Bill also extends the operation of the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 (Leases Regulation).

Documents Reforms

The Bill modernises the arrangements for the making, signing and witnessing of affidavits, statutory declarations, general powers of attorney (GPAs) for businesses, deeds and particular mortgages by allowing these documents to be made in electronic form, signed electronically and witnessed over audio visual (AV) link in certain circumstances.

Affidavits, Statutory Declarations and Oaths

Affidavits, statutory declarations and oaths normally need to be taken in the physical presence of a lawyer, justice of the peace (JP), commissioner for declarations (Cdec), notary public, conveyancer or another person authorised to take an oath under the law of the State, the Commonwealth or another state or territory.

The Bill allows affidavits, statutory declarations and oaths (except for oaths of office and oaths of allegiance) to be witnessed over AV link by a narrower cohort of special witnesses or prescribed persons. The Bill provides that a special witness is an Australian legal practitioner, a government legal officer who is an Australian lawyer and who witnesses documents in the course of the government work engaged in by the officer, a JP or Cdec approved by the Director-General of the Department of Justice and Attorney-General (DJAG), a notary public, a JP or Cdec employed by a law practice that prepared the document, or a JP or Cdec employed by the public trustee, if the public trustee prepared the document.

For affidavits and statutory declarations that are witnessed in person, the Bill allows them to be signed electronically and made in counterparts if they are witnessed by a special witness or a prescribed person (however, counterparts cannot be used where they are physically signed).

For affidavits and statutory declarations that are witnessed over AV link, the Bill allows these documents to be physically signed or electronically signed, and/or made using counterparts if witnessed by a special witness or prescribed person, with procedural requirements to apply.

However, electronic signatures on statutory declarations can only be used for a land or water dealing where electronic conveyancing (or eConveyancing) is used. If a statutory declaration is lodged or deposited in the land registry or register of water allocations, it must be physically signed and must otherwise be made, signed and witnessed in accordance with the *Oaths Act 1867*.

Powers of attorney

A power of attorney (other than an enduring power of attorney) can be made either as a general power of attorney under the *Powers of Attorney Act 1998* or by deed.

Powers of attorney are required to be witnessed. For example, a power of attorney for an individual that is used for a land transaction is required to be executed and witnessed in accordance with the *Land Title Act 1994* and *Land Act 1994*. A general power of attorney under the *Powers of Attorney Act 1998* must be witnessed by an adult. A power of attorney for an individual in a deed must be executed in accordance with the *Property Law Act 1974*, and therefore must be sealed or witnessed.

The Bill allows powers of attorney for businesses (corporations, partnerships and unincorporated associations, but not sole traders) to be signed electronically, in counterparts and by split execution and without a witness.

The Bill also provides that a general power of attorney for an individual under the *Powers of Attorney Act 1998* or a power of attorney for an individual given under a deed must be a physical document that is signed in the presence of a witness, unless:

- the document containing the power of attorney given by an individual under a deed is part of a commercial or other arms-length transaction; and
- the power of attorney is given for the purpose of the commercial or other arms-length transaction.

However, if a general power of attorney under the *Powers of Attorney Act 1998* or a power of attorney under a deed is used for a land or water dealing, it must continue to be executed in accordance with the *Land Title Act 1994* and *Land Act 1994*.

Deeds

The Bill removes the common law requirement for a deed to be executed on paper, parchment or vellum and provides that deeds can be made in the form of an electronic document and electronically signed using an “accepted method”. An “accepted method” for electronically signing is a method which identifies the signatory and the signatory’s intention in relation to the contents of the document, is as reliable as appropriate for the purposes of the document, and is consented to by all the signatories to the document.

The Bill allows deeds to be made in counterparts and by split execution. This means that each signatory can sign an identical copy of the deed that need not contain a signature of any other person who is to sign the document. It also means that company officers are no longer required to sign the same physical document.

The Bill removes the requirement for deeds to be sealed or stated to be sealed, but instead requires the deed to contain a clear statement that it is executed as a deed.

The Bill simplifies the execution requirements for corporations and removes the requirement for corporations to use their common seal. If the corporation chooses to use its common seal, the application of the seal may be witnessed in person or by AV link. This approach mirrors the execution requirements for corporations under section 127 of the *Corporations Act 2001* (Cth).

The Bill clarifies the way a corporation can execute a deed, aiming for consistency with execution requirements in the *Corporations Act 2001* (Cth).

The Bill also allows an individual to sign a deed on behalf of a partnership or unincorporated association without a witness.

The Bill removes the need for witnessing of an individual’s signature on a deed. However, as stated above, a power of attorney for an individual given under a deed must be a physical document that is signed in the presence of a witness, unless:

- the document containing the power of attorney given by an individual under a deed is part of a commercial or other arms-length transaction; and
- the power of attorney is given for the purpose of the commercial or other arms-length transaction.

However, the Bill ensures that deeds lodged or deposited in the land registry or register of water allocations in relation to land and water dealings must continue to be executed in accordance with the *Land Title Act 1994* and *Land Act 1994*.

Mortgages

The Bill clarifies that for particular mortgages (lodged under the Electronic Conveyancing National Law (ECNL)), a mortgage that is held by a mortgagee on the same terms as the mortgage that is lodged for electronic conveyancing, as required by the participation rules under the ECNL, can be electronically signed by a mortgagor or mortgagee and does not need to be witnessed, as long as it complies with section 11 of the *Property Law Act 1974*.

Advance Health Directive (AHD) certificates

The Bill also allows nurse practitioners, in addition to doctors, to sign a certificate which forms part of an AHD stating that the person making the document appears to have capacity to make the document.

Domestic and family violence (DFV) reforms

The Bill modernises, streamlines and increases accessibility to DFV proceedings by providing for alternative verification arrangements for private applications for protection orders and variations of domestic violence orders, in urgent situations; allowing DFV proceedings by AV link or audio link; and allowing electronic filing of documents in DFV proceedings in particular circumstances.

Liquor reforms

The Bill allows licensees of a subsidiary on-premises licence (meals) (i.e. licensed restaurants) to apply for a permanent condition of the licence authorising the sale of a maximum of 1.5 litres of wine (i.e. two bottles) with a takeaway meal up to 10pm. An approval is conditional upon the licensee establishing systems and procedures to ensure the responsible service of takeaway liquor.

Other amendments

The Bill also extends the expiry of a regulation made under section 23 of the *COVID-19 Emergency Response Act 2020* until two years after the COVID-19 legislation expiry day, unless ended sooner, and makes other minor and miscellaneous amendments to support the reforms outlined above.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

Documents Reforms

With the advent of the COVID-19 emergency, it was necessary to quickly adopt modified arrangements to allow important legal documents to continue to be made. Making these arrangements permanent, however, requires careful consideration of the risks involved in adopting these modified arrangements and the impact on human rights.

The reforms radically modernise the making, signing and witnessing of these important documents. These modified arrangements represent a significant change to long-standing legal practices. These practices and traditions have been central to the administration of justice, the legitimacy of civil and criminal proceedings, and so the rule of law and procedural fairness. While the use of technology provides unique opportunities to modernise and adapt practices, it is important that the solemnity in making these documents not be eroded and exposure to abuse and fraud, especially in relation to vulnerable people, is limited.

In my opinion, the human rights relevant to these reforms are:

- recognition and equality before the law (section 15, HR Act);
- property rights (section 24, HR Act);

- privacy and reputation (section 25, HR Act);
- fair hearing (section 31, HR Act); and
- rights in criminal proceedings (section 32, HR Act).

Making documents electronically (electronic signature, electronic documents) and in counterparts

The Bill allows GPAs for businesses (corporations, partnerships and unincorporated associations), deeds and particular mortgages to be made in the form of an electronic document and signed electronically. The Bill also allows these documents to be made in counterparts and by split execution.

The Bill also allows affidavits and statutory declarations that are witnessed in person to be made in the form of an electronic document and signed electronically and made in counterparts if witnessed by a special witness or prescribed person. It also allows affidavits and statutory declarations to be witnessed over AV link and, when witnessed in this way, to be physically signed or electronically signed, and/or made using counterparts if witnessed by a special witness or prescribed person, with procedural requirements to apply.

The Bill does not prescribe a certain type of technology that must be used in applying an electronic signature or a particular way that an electronic signature must be applied. Rather, the Bill provides that the electronic signature must use an ‘acceptable method’ which identifies the signatory and is ‘as reliable as appropriate for the purpose for which the document is given’.

Electronic signatures can cover everything from a scanned physical signature added to documents, typed signatures, clicking “I accept” on a website, replying to an email, to digital signatures and Public Key Infrastructure (i.e. the technical and administrative requirements for managing encryption). All are intended to link an identifiable person to information held in electronic form. The various technological approaches have differing degrees of trustworthiness of the information and the identity of the person signing the information. However, an electronic signature does not have to be unique to the person who is using it.

Making a document electronically, and by application of an electronic signature, may increase the risk of fraud. For example, a person’s electronic signature could be taken and used without their consent. In addition, given the broad meaning of electronic signature, a person could fraudulently sign a document on behalf of a person without their authority. As the Bill does not prescribe acceptable methods of electronic signature, there is greater potential for electronic signatures to be used improperly.

A deed created fraudulently could be used to deal with a person’s property or financial assets without their knowledge or consent or in a way that is detrimental to their rights and interests. For this reason, it limits property rights (section, 24 HR Act).

The creation, storage and transmission of electronic documents also brings new security issues. Documents created and stored electronically may be more susceptible to data breaches or cyber-attack. There is an increased risk that the use of technology to make and execute documents will mean personal information (such as names, addresses and other private details) is more susceptible to data breaches and/or cyber security issues (when compared to traditional physical documents). In many cases, the servers for private platforms for making, transmitting and storing documents are located offshore, further heightening risks. Documents signed by

the signatory and then transmitted electronically or by post to the witness for signature may be more vulnerable to interception by a third party.

For these reasons, the Bill limits the right to privacy and reputation (section 25, HR Act) and property rights (section 24, HR Act) (if the interception or breach resulted in fraud).

Taking of an oath or affirmation / Witnessing by AV link

The Bill allows oaths or affirmations (except for oaths of office and oaths of allegiance) to be administered over AV link by persons who are authorised to administer an oath. Affidavits and statutory declarations may be witnessed over AV link by a narrow cohort of special witnesses or other prescribed persons.

Allowing an oath, affirmation or declaration to be administered over AV link may impact the perceived solemnity of the occasion, leading some individuals to not fully appreciate the gravity of making a declaration or statement under oath or affirmation or the consequences of making a false statement.

The use of AV technology may also impact effective communication, including through the diminished ability to use non-verbal cues and gestures. The use of AV link to administer an oath or affirmation and witness a document may also disadvantage vulnerable groups in the community, including those for whom language and communication barriers are exacerbated by electronic communication. This may impact a person's capacity to adequately prepare documents to support their case in a proceeding.

The use of AV technology is also highly dependent on a high quality internet connection. A poor AV connection may be a particular problem for people in remote and rural areas with poor quality internet connections.

These factors may in turn impact on the quality of evidence, including evidence relied on in civil and criminal proceedings, impacting the fairness of those proceedings.

Allowing affidavits and statutory declarations to be witnessed over AV link could also increase the risk of evidence being provided under duress or coercion. For example, a witness could be coerced into making a fraudulent affidavit which is used in evidence against a defendant in a criminal proceeding. One of the essential conditions of a fair trial according to law is that a person may only be convicted on evidence legally admissible against him or her.¹ If the fraudulent affidavit forms the basis for the defendant's criminal conviction, it will have interfered significantly with the defendant's right to a fair trial and rights in criminal proceedings. Similarly, a statutory declaration which has been made under duress or coercion could be unjustly used to the detriment of a party in a proceeding.

For these reasons, this proposal limits the right to a fair hearing (section 31, HR Act), rights in criminal proceedings (section 32, HR Act) and the right to recognition and equality before the law (section 15, HR Act).

¹ *Re Application under Major Crimes (Investigative Powers) Act 2004* [2009] VSC 381, Warren CJ referring to Winneke CJ and Smith J in *Chappell v A Ross and Sons Pty Ltd* [1969] VR 376.

The nature of AV communication also increases the risk that the communication may be intercepted or recorded without the consent of a person involved in the witnessing process. This limits the right to privacy and reputation (section 25, HR Act).

Witnessing a signature on a document by AV link may also increase the risk of undue influence and fraud. This is because in the AV environment, a witness may not be able to assess the existence of duress or fraud by third parties as thoroughly as they can when they are witnessing a document in person (for example, where the witness can converse with the signatory on their own). The use of AV technology also impacts the ability to pick up on non-verbal cues or properly assess the person's demeanour. Dialogue is also likely to be less fluid and reactions harder to gauge. The use of AV link could also exacerbate language barriers and make it more difficult for the witness to satisfy themselves that the person understands the document being made.

A deed which has been procured improperly could be used to deal with a person's property or financial assets without their knowledge or consent or in a way that is detrimental to their rights and interests. For this reason, it limits property rights (section, 24 HR Act).

Special witnesses

The Bill restricts who can witness statutory declarations and affidavits by AV link to a narrow class of witnesses (special witnesses and prescribed persons) and also restricts the use of electronic signatures to circumstances where a special witness or prescribed person has witnessed the document (whether in person or by AV link).

A special witness must be an Australian legal practitioner, a government legal officer who is an Australian lawyer and who witnesses documents in the course of the government work engaged in by the officer, a JP or Cdec approved by the chief executive of DJAG for this purpose, a JP or Cdec employed by a law practice that prepared the document, a notary public or, for a document prepared by the public trustee, a JP or Cdec who is an employee of the public trustee.

The introduction of special witnesses for affidavits and statutory declarations made in certain circumstances may reduce access by certain groups of people (especially people from low socio-economic backgrounds who may not be able to afford access to a lawyer and people who have communication difficulties) to available witnesses and thus indirectly restrict their ability to make these documents using the modified arrangements.

For this reason, this proposal limits the right to recognition and equality before the law (section 15, HR Act).

AHD certificates

AHDs must include a certificate signed and dated by a doctor that states that the principal, at the time of making the AHD, appears to the doctor to have the capacity necessary to make it. This requires the doctor to conduct a capacity assessment before signing the certificate. Further, after the doctor signs the certificate, the person making the document needs to sign the document in the physical presence of a JP, Cdec, notary public or lawyer.

The Bill will make permanent the expansion of who may undertake a capacity assessment and sign a certificate about a person's capacity to make an AHD to include a nurse practitioner.

This amendment has the effect of broadening the level of qualification, skills and training required for a person who undertakes a capacity assessment and signs a certificate to verify capacity for the purpose of an AHD. This makes making AHDs more accessible and enhances access to advance care planning support. Advance care planning is a key component of comprehensive health care in Queensland and making an AHD is a crucial part of this advance care planning for many people. Allowing nurse practitioners to undertake a capacity assessment and sign a certificate to verify capacity for the purpose of an AHD will increase the accessibility of making an AHD, and thus advance care planning.

Therefore, ensuring AHDs are accessible and that the ability to make an AHD is not constrained by availability of an appropriate doctor who can assess and attest to capacity for the required certificate is a proper purpose. It gives individuals more freedom to make informed choices in relation to their future health care (including in respect of life sustaining treatments or the withdrawal of life sustaining treatments) and enables them to record those decisions in a formal, binding way.

These amendments are not considered to limit human rights.

DFV reforms

In 2020, in response to the COVID-19 public health emergency, temporary measures were implemented by the *Domestic and Family Violence Protection (COVID-19 Emergency Response) Regulation 2020* (DFV COVID Regulation) to provide modified arrangements for the making, signing and witnessing of various documents. These measures were for the purpose of protecting the health, safety and welfare of persons affected by the COVID-19 emergency by reducing physical contact between persons (and, in turn, complying with social distancing and other public health measures required to minimise the spread of COVID-19).

A range of temporary measures were also put in place in 2020 in response to the public health emergency to facilitate the safe continuance of court proceedings and the ongoing protection of people who feared or experienced domestic and family violence during the COVID-19 emergency. These measures temporarily modified arrangements for domestic and family violence court proceedings to enable proceedings under the *Domestic and Family Violence Protection Act 2012* to be conducted by AV link or audio link; to allow private applications for domestic violence orders (DVOs) and variations to DVOs to be verified by an applicant informing a magistrate that the application is true and correct, as an alternative to verifying by statutory declaration; and to allow electronic filing of private applications for DVOs and other documents in a DFV proceeding.

It was considered that those temporary measures limited a number of human rights (including the right to recognition and equality before the law, right to a fair hearing and others), primarily because of their impact on vulnerable and disadvantaged people and because of how DFV court proceedings would be conducted as a result of the measures. These limitations were identified in the context of the COVID-19 emergency where the delivery of court services and domestic and family violence Magistrates Court proceedings had been significantly complicated by the impact of COVID-19 and social distancing, self-quarantine and self-isolation requirements under public health directions. It was also very difficult for private applicants to meet existing requirements regarding statutory declarations, as social distancing requirements impacted the availability of witnesses (for example, because the temporary closure of the Justices of the Peace (JPs) in the Community Program impacted access to JPs).

However, reflecting on the usefulness of these temporary measures, the Bill makes the option of using alternative arrangements permanent in particular circumstances in an effort to maintain improved access to justice and accessibility to the courts for victims of DFV and support the Queensland Government's aim of eliminating DFV and the associated social and economic costs. Importantly, the traditional methods of verifying and filing applications and appearance in proceedings will remain available, and the Bill includes safeguards regarding the use of the alternative methods including that the alternative methods remain at the discretion of, or oversights by, the court and court registrars. As a result, making these alternative arrangements a permanent option (and in addition to existing traditional methods) is not considered to limit human rights.

Liquor reforms

The proposed amendments to the *Liquor Act 1992* to provide for licensed restaurant operators to be permanently authorised to sell a maximum volume of 1.5 litres of takeaway wine with a takeaway meal do not limit human rights.

Other amendments

The minor and other miscellaneous amendments under the Bill do not limit human rights. To the extent that a new regulation were to be made under section 23 of the *COVID-19 Emergency Response Act 2020*, any limitation on a human right would be addressed in a human rights certificate to accompany the making of the regulation.

To the extent the Leases Regulation is continued as a result of this amendment, at this point, there are no reasonably foreseeable limitations on human rights in addition to those detailed in the human rights certificate that accompanied the making of that regulation, although it will apply for an extended period.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Documents Reforms

(a) the nature of the right

The right to *recognition and equality before the law* (section 15, HR Act) provides that each person is entitled to the equal protection of the law and to enjoy human rights without discrimination. The definition of discrimination includes both direct and indirect discrimination. The right to equality before the law encompasses the right to access the administration of justice in such a way as to guarantee that no particular individual is deprived, in procedural terms, to their right to justice.²

The right to a *fair hearing* (section 31, HR Act) is a fundamental principle of common law, both in relation to criminal and civil proceedings. It confers on a person charged with a criminal

² Human Rights Committee, International Covenant on Civil and Political Rights, *General Comment No. 32* (Ninetieth session, Geneva, 9 to 27 July 2007).

offence or a party to a civil proceeding, the right to a fair and public hearing by a competent, independent and impartial court or tribunal. A fair hearing is a personal right “so deeply rooted in our system of law and so elementary as to need no authority to support it. It is a right which inheres in every system of law that makes any pretension to civilisation”.³ The concept of a fair hearing is concerned with matters of procedural fairness, rather than substantive fairness in the sense of the merits of a particular decision.⁴ Reflecting the common law tradition of the due process of the law, it is manifested in rules of law and of practice designed to regulate the course of a trial.⁵ The right to a fair hearing is closely related to the particular *rights in criminal proceedings* (section 32, HR Act). Section 32 of the HR Act expressly guarantees the majority of the elements that constitute the right to a fair hearing in a criminal proceeding, and therefore these rights do not necessarily require separate analysis.⁶

The protection of *property rights* (section 24, HR Act) encompasses ‘free use, enjoyment and disposal of all [one’s] acquisitions’.⁷ It protects the right of all persons to own property (alone or with others) and protects individuals from the arbitrary deprivation of their property, including real property, shares, etc. In a human rights context, ‘arbitrary’ means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.⁸

The *right to privacy* (section 25(a), HR Act) protects a person from having their privacy arbitrarily interfered with. The purpose of this is ‘to protect and enhance the liberty of the person – the existence, autonomy, security and well-being or every individual in their own private sphere’.⁹ In the context of the Bill, the right protects against arbitrary interference with a person’s private information as well as protecting their correspondence and communications with others.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the documents reforms is to modernise the way in which important legal documents are created, in line with contemporary business practice, and to improve accessibility. The Bill embraces modern technology to provide new and alternative pathways for document execution, in addition to the ordinary physical approach, which will allow individuals to choose their preferred method of document execution. The reforms will make it easier for individuals to make and sign important legal documents without the need to be physically present.

The reforms will therefore improve access to justice, reduce transaction costs, and increase the efficiency of conducting private and commercial transactions.

³ *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 at [203], Tate JA referring to *R v McFarlane* (1923) 32 CLR 518.

⁴ *Knight v Wise* [2014] VSC 76.

⁵ *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 at [205].

⁶ Following the approach of Warren CJ in *In Re Application under Major Crimes (Investigative Powers) Act 2004* [2009] VSC 381 at [40].

⁷ *PJB v Melbourne Health* (2011) 39 VR 373.

⁸ Explanatory notes, Human Rights Bill 2018 (Qld); *PJB v Melbourne Health* (2011) 39 VR 373.

⁹ *Director of Housing v Sudi* (2010) 33 VAR 139.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

In order to modernise the way in which documents are created, the Bill modifies:

- physical paper requirements: by allowing affidavits, statutory declarations, GPAs for businesses (corporations, partnership and unincorporated associations), deeds and particular mortgages to be made in electronic form and signed electronically; and
- physical witnessing requirements: by allowing oaths (except oaths of office and oaths of allegiance) to be administered over audio visual link by persons who are authorised to administer an oath; and affidavits and statutory declarations to be witnessed over AV link.

These modifications help to achieve the purpose of the Bill which is to provide new and alternative pathways for document execution.

The use of technology to make, sign and witness affidavits, statutory declarations, deeds, GPAs and particular mortgages will modernise the way that these important legal documents are created in line with contemporary practice. It will do this by ensuring that technology – such as AV technology and electronic signatures – is available for use should it be appropriate and suitable to those involved in the making of a relevant document. In modern society, technology is commonly and routinely used by individuals to express their wishes or enter into agreements, as well as by businesses and government to undertake their functions. Enabling certain documents to be made, signed and witnessed electronically is in keeping with contemporary uses of technology.

The requirement for a special witness to witness documents signed electronically or made over AV link, is not absolutely required for the purpose of modernising document creation. However, it is an important safeguard against the risks associated with the use of technology, such as fraud and undue influence. Without the requirement for a special witness, there would likely be a more significant impact on the human rights of individuals making these documents that would outweigh the advantages of the modified procedures and ultimately undermine achieving the overall purpose of the Bill.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

To overcome the need for persons to make, sign or witness certain documents in the physical presence of others, there are no less restrictive reasonably available alternatives. Maintaining the status quo – that is, traditional face-to-face, hard copy, wet ink signature documents – is not in keeping with contemporary practice and the prevalent use of technology in society and will not achieve the same efficiencies for document execution.

The Bill includes a number of procedural requirements and safeguards to manage the risks of fraud, undue influence and improper use of electronic signatures, and in turn ameliorate the impact on human rights.

For example, affidavits and statutory declarations:

- can only be witnessed over AV link by a narrow cohort of special witnesses and other prescribed persons;

- can only be signed electronically if witnessed by a special witness or other prescribed person (either in person or by AV link);
- must include particular statements that the contents of the document are true, or true to the best of the person's knowledge, and that the person signing the document understands that knowingly making a false statement is an offence; and
- must include details of the witness's name, the type of witness (for example, a legal practitioner, JP, etc.) and place of employment.

The introduction of a narrow cohort of special witnesses for documents signed electronically or made over AV link provides an appropriate safeguard against the risks associated with the use of technology to make and witness documents. Special witnesses under the Bill are limited to types of witnesses who are more likely to have access to and be familiar with using AV technology for the purposes of making and executing these documents. These types of witnesses are also more likely to be astute to the risks of fraud, have the appropriate training or experience to be able to verify the identity of the signatory and assure themselves that the document they witness is the same as the document that the signatory signs and that the signatory is making the document freely and voluntarily. These safeguards will particularly benefit vulnerable persons (such as seniors or victims of domestic and family violence) who may be coerced or pressured into making documents. In addition, most of the special witnesses are likely to have had a prior association with the person making the document (for example, legal practitioners can only witness documents over AV link if they prepared the document for their client) and therefore are more likely to be aware of the contents of the document and will have had other opportunities to assess the person's capacity to make the document, including duress.

In addition, the Bill also limits who can act as a substitute signatory in certain circumstances and excludes persons such as spouses and other relatives from signing documents on behalf of a person when the document is witnessed over AV link or the signatory is giving the direction to sign in the physical presence of the substitute signatory. These restrictions further provide additional safeguards for protecting against the risk of fraud, coercion or undue influence in making a relevant document.

The Bill also requires all persons to consent to any AV recording which serves to protect a person's right to privacy.

The Bill does not permit deeds for individuals to be executed electronically if the sole purpose of the document is to create a power of attorney – these types of documents must continue to be executed on paper in the presence of a witness, in accordance with the *Powers of Attorney Act 1998*. The Bill provides that a general power of attorney for an individual under the *Powers of Attorney Act 1998* or a power of attorney given by an individual under a deed must be a physical document that is signed in the presence of a witness, unless the document is part of a commercial or other arms-length transaction; and the power of attorney is given for the purpose of the commercial or other arms-length transaction. Importantly, this ensures that higher risk deeds (particularly deeds between family members where risks of elder abuse might be more prevalent) continue to be signed on paper and witnessed.

Importantly, the Bill does not remove a person's ability to sign and witness affidavits and statutory declarations in person if that is preferable to an individual or they do not have access to the required technology. The Bill simply provides additional measures for making, signing

and witnessing affidavits and statutory declarations using electronic signatures and AV technology, as well as in person.

While the Bill does not prescribe the methods to be used for electronic signatures, a regulation-making power is included in the Bill to enable, should it become necessary and appropriate, the prescription of acceptable methods of electronic signature to set minimum standards to protect against fraud and the improper use of electronic signatures. While including minimum standards in the Bill may represent a less restrictive alternative (to ameliorate the impact on property rights and the right to privacy), it has not been included at this stage to achieve maximum flexibility for the future because:

- technology in this area is developing at a fast pace and prescribing certain methods in the Bill would risk being quickly outdated or obsolete; and
- reforms may be proceeding in other jurisdictions and it would be desirable for Queensland to aim for as much consistency as possible with other jurisdictions.

Some legal stakeholders were also not supportive of prescribing certain types of electronic signatures in the Bill.

In relation to the impacts on the right to a fair hearing and rights in criminal proceedings, it is particularly relevant that the ordinary rules of evidence continue to apply in civil and criminal proceedings. These rules dictate that where evidence has been unlawfully or improperly obtained (such as by fraud or coercion), it may be excluded. This is a significant safeguard which enables the Court to make informed assessments about the veracity of particular evidence given on an electronically-made affidavit or statutory declaration to ensure it is properly admissible in a relevant proceeding.

(e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales is the importance of ensuring that individuals are not made susceptible to fraud and, similarly, are not coerced, pressured or unduly influenced into dealing with their property in a particular way, or having their privacy interfered with, or being adversely and unjustly affected in criminal or civil proceedings. On the other side of the scales, however, is the importance of ensuring that the way certain documents are made, signed and witnessed in Queensland is in keeping with contemporary practice and the increased use of technology by individuals, business and government.

To the extent the Bill impacts on the right to recognition and equality before the law, the right to a fair hearing and rights in criminal proceedings, property rights and the right to privacy and reputation, it is considered that the documents reforms strike an appropriate balance.

Because the impact on property rights and the right to privacy is not disproportionate, the impact is also not arbitrary.

Therefore, it follows that, to the extent that these human rights are limited by the Bill, the limitations are nonetheless reasonable and demonstrably justified.

(f) any other relevant factors

Not applicable.

Conclusion

In my opinion, the Justice Legislation (COVID-19 Emergency Response—Permanency) Amendment Bill 2021 is compatible with human rights under the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

SHANNON FENTIMAN MP
Attorney-General and Minister for Justice
Minister for Women and Minister for the Prevention of Domestic and Family Violence

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