Police Powers and Responsibilities and Other Legislation 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, Mark Ryan MP, Minister for Police and Corrective Services and Minister for Fire and Emergency Services, make this statement of compatibility with respect to the Police Powers and Responsibilities and Other Legislation Amendment Bill 2021 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The main objectives of the Bill are to:

- reduce knife crime by expanding the police banning notice (banning notice) regime to apply to an adult who unlawfully possesses a knife in a relevant public place,
- limit re-traumatisation of victims' families and friends by introducing a new framework for parole decisions about a life sentenced prisoner who has committed multiple murders or who has murdered a child (restricted prisoner),
- strengthen the 'No Body, No Parole' (NBNP) framework to incentivise earlier prisoner co-operation to locate a homicide victim's remains,
- provide the Parole Board Queensland (the Board) with greater flexibility to respond to increased workload and the risks different prisoners pose to community safety,
- create administrative and operational efficiencies for the Queensland Police Service (QPS), enhance intelligence gathering and ensure Commonwealth child sexual abuse offences are updated in relevant Queensland legislation, and
- create indictable offences for wilfully and unlawfully killing or seriously injuring a Queensland Corrective Services (QCS) dog, or QPS dog or horse, reflecting the seriousness of the offending in line with community expectations.

The Bill will achieve these objectives by:

- amending the *Police Powers and Responsibilities Act 2000* (PPRA) to:
    - expand the scope of banning notices to include persons who unlawfully possess a knife,
    - permit QPS civilian employees and translators working as monitors to independently monitor surveillance devices,
    - allow police to dispose of forfeited drug samples to the chief executive officer of the Australian Federal Police, a police service of another State, or an entity established under the law of the Commonwealth or a State to investigate corruption or crime,

  - include five Commonwealth child sexual abuse offences as prescribed internet offences in section 21B,
  - expand the protection of police methodologies in court to include QPS staff members who provide evidence,
  - clarify that an assumed identity can be used for training and administrative purposes,
  - expressly provide for historical backstopping of assumed identities,
  - expand the delegation to authorise assumed identities to include the Superintendent in charge of covert operations,
  - extend court removal orders to apply to prisoners in police custody who wish to voluntarily assist police; and
  - replace references to 'Aborigine' with 'Aboriginal peoples'.
- amending the *Police Powers and Responsibilities Regulation 2012* (PPRR) to:
  - permit QPS civilian employees and translators working as monitors to independently monitor surveillance devices.
- amending the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (CPOROPOA) to:
  - include nine Commonwealth child sexual abuse offences as reportable offences in Schedule 1.
- amending the *Corrective Services Act 2006* (CSA) to:
  - introduce a new discretion for the President of the Board to declare that a life sentenced prisoner who has committed multiple murders or murdered a child (restricted prisoner), must not be considered for parole for up to 10 years,
  - provide that a restricted prisoner subject to a declaration (restricted prisoner declaration) must meet a higher threshold for exceptional circumstances parole release,
  - where a declaration is not in force, the Bill creates a presumption against parole, which will place the onus on a restricted prisoner to demonstrate that they do not pose an unacceptable risk to the community,
  - introduce a new discretion for the Board to consider a prisoner's cooperation in locating a homicide victim's remains at any time after sentencing, instead of requiring the Board to wait until the prisoner applies for parole,
  - where the Board has determined that a no body-no parole prisoner has not co-operated satisfactorily (no cooperation declaration), the prisoner is restricted from reapplying for parole where there is no new cooperation,
  - amend section 193(5A) to extend the time the Board may decide to not consider a further application for parole for a life sentenced prisoner to no more than three years,
  - amend section 234 to provide minimum quorum requirements for certain parole matters to enable the Board to adjust its meeting arrangements according to the risks different prisoners pose to community safety,
  - provide a new power to prescribe parole decisions that must be published, and
  - temporarily extend parole consideration timeframes under section 193(3) for 60 days, for a period of six months.
- creating a new indictable offence for wilfully and unlawfully killing or seriously injuring a police dog or horse under the *Police Service Administration Act 1990* (PSAA) or a corrective services dog under the CSA; and

- including numerous Commonwealth Criminal Code offences against children as disqualifying offences under the *Working with Children (Risk Management and Screening) Act 2000* (WWCA).

Human Rights Issues

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

In my opinion, the human rights that are relevant to the Bill are:

- Recognition and equality before the law – section 15 (relevant to clause 38 with respect to expanding the existing police banning notice (banning notice) regime, so it applies to an adult who unlawfully possesses a knife in a relevant public place, that is, licensed premises, a public place in a safe night precinct and public events where alcohol is sold and clauses 52 to 56 with respect to including a number of Commonwealth Criminal Code offences as disqualifying offences under the WWCA).
- Freedom of movement – section 19 (relevant to clause 38 with respect to expanding the existing banning notice regime, so it applies to an adult who unlawfully possesses a knife in a relevant public place, that is, licensed premises, a public place in a safe night precinct and public events where alcohol is sold).
- Privacy and reputation – section 25 (relevant to clause 4 with respect to the nine Commonwealth Criminal Code offences to be included in Schedule 1 of CPOROPOA, clause 30 with respect to including five additional Commonwealth Criminal Code offences as prescribed internet offences in section 21B 'Power to inspect digital devices for the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004*' of the PPRA, clause 38 with respect to expanding the existing banning notice regime, so it applies to an adult who unlawfully possesses a knife in a relevant public place, that is, licensed premises, a public place in a safe night precinct and public events where alcohol is sold, clauses 39 and 44 with respect to the independent monitoring of surveillance devices and clauses 52 to 56 with respect to including a number of Commonwealth Criminal Code offences as disqualifying offences under the WWCA).
- Protection of families and children – section 26 (relevant to clause 4 with respect to the nine Commonwealth Criminal Code offences to be included in Schedule 1 of CPOROPOA, clause 30 with respect to including five additional Commonwealth Criminal Code offences as prescribed internet offences in section 21B 'Power to inspect digital devices for the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004*' of the PPRA and clauses 52 to 56 with respect to including a number of Commonwealth Criminal Code offences as disqualifying offences under the WWCA).
- Right to liberty and security – section 29 (relevant to clause 30 with respect to including five additional Commonwealth Criminal Code offences as prescribed internet offences in section 21B 'Power to inspect digital devices for the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004*' of the PPRA, clause 38 with respect to expanding the existing banning notice regime, so it applies to an adult who unlawfully possesses a knife in a relevant public place, that is, licensed premises, a public place in a safe night precinct and public events where alcohol is sold and clauses 46 to 51 with respect to the new indictable offence in the PSAA to wilfully and unlawfully kill or seriously injure a police or corrective services dog or police horse).

- Fair hearing – section 31 (relevant to clause 41 to allow QPS staff members to claim privilege in court and not disclose information in relation to police methodologies).
- Criminal proceedings – section 32 (relevant to clause 41 to allow QPS staff members to claim privilege in court and not disclose information in relation to police methodologies).

Human rights relevant to the amendments to the CSA are examined comprehensively below.

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 of the *Human Rights Act 2019*)

Amendments to the PPRA

Expansion of banning notices

The amendments to banning notices in the Bill, limits the following rights:

- Right to equality – section 15.
- Freedom of movement – section 19.
- Privacy and reputation – section 25.
- Security and liberty of person – section 29.
- Fair hearing – section 31.

(a) the nature of the right

The Bill expands the existing banning notice regime, so it may apply to a person who unlawfully possesses a knife in a relevant public place, that being, licensed premises, a public place in a safe night precinct and public events where alcohol is sold. This will exclude the person for no more than one month from a relevant public place, or for up to three months if the initial banning notice is extended.

Section 15 of the *Human Rights Act 2019* (HR Act) reflects the essence of human rights: that every person holds the same human rights by virtue of being human and not because of some particular characteristic or membership of a particular social group. Discrimination includes (but is not limited to) direct and indirect discrimination as defined in the *Anti-Discrimination Act 1991* (for example, on the basis of age, impairment, political belief or activity, race, religious belief or religious activity, sex and sexuality). The right requires that public authorities, courts and tribunals treat all people equally when applying the law, and do not apply the law in a discriminatory or arbitrary way, in a manner that has no objective justification.[1] This right will be limited if banning notices were to be disproportionately applied to members of the community with particular personal attributes such as their race or age.

Section 19 of the HR Act is based on Article 12 of the International Covenant on Civil and Political Rights and gives each person in Queensland the right to move freely without being arbitrarily forced to remain in, or move to or from, a particular place. The right includes freedom from physical and procedural barriers, like requiring permission before entering a public park or participating in a public demonstration in a public place. The amendments will

[1] *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [136]; *Matsoukatidou* [2017] VSC 61 [50], [58], [104].

interfere with the right by limiting a person who is subject to a banning notice from entering a relevant public place for the banning notice period.

Section 25 of the HR Act protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. Only lawful and non-arbitrary intrusions may occur upon privacy, family, home, correspondence and reputation. The QPS is permitted to share information about a person who has received a banning notice, so licensed premises are aware that person is banned, which interferes with the right. Police have the power to require a person's name and address for the issue of a banning notice, which is a further interference with privacy.[2]

Section 29 of the HR Act protects an individual's right to liberty and security of person, including protection from arbitrary arrest or detention, and that where liberty is deprived it is in accordance with procedures established under law. This right is limited by the amendment due to the power to detain a person when issuing a banning notice.

Section 31 of the HR Act protects the right to a fair hearing. The right is concerned with the procedural fairness of a decision. What fairness requires will depend on all the circumstances of the case. Broadly, it ensures a party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to their opponent.[3] The right is limited as a person may be detained and issued a banning notice on the spot, shortly after the threatening, violent, offensive or disorderly behaviour has occurred.

(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 limitations to expand banning notices to capture persons who unlawfully possess a knife in a relevant public place is to:

(i) deter persons from unlawfully possessing a knife in a relevant public place, and thereby reduce the opportunity for them to commit offences with a knife and consequently enter the criminal justice system; and

(ii) overall, lower rates of knife related offences in relevant public places, to increase community safety.

(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

Banning notices are an efficient way of removing a person who is behaving in a threatening, violent, offensive or disorderly manner from a relevant public place. The proposal will expand the banning notice regime to include a person who has unlawfully possessed a knife in a relevant public place. Should a person breach a banning notice then they may be charged by police and face a maximum penalty of 60 penalty units. Importantly, banning notices can provide an additional layer of protection to licensed premises and for community members who attend these public areas.

[2] *DPP v Kaba* (2014) 44 VR 526; [2014] VSC 52 [132]–[134].
[3] *Knight v Wise* [2014] VSC 76 [36].

These amendments act as a preventative tool by ensuring that persons who unlawfully possess a knife in a relevant public place cannot return to that area for up to one month. By doing so, the threat to the public by having a potentially armed person in a high-risk public space is reduced for that time.

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

Banning notices are an existing regime within the PPRA complete with safeguards and review mechanisms. For instance, section 602C, 'Police officer may give initial police banning notice' applies the regime only to adults. Section 602J, 'Actions not prohibited by notice' of the PPRA provides that a banning notice does not prohibit the respondent for the notice from entering or remaining in the respondent's residence, place of employment or place of education. Further, banning notice powers are subject to appropriate review provisions via sections 602N, 'Internal review for police banning notices', 602O, 'Commissioner's decision about notices' and 602P, 'Review by QCAT'. These existing safeguards ameliorate the impact of the limitation on human rights.

The issue of banning notices is focused on behaviour, that is, as per section 602C of the PPRA, where the respondent has behaved in a disorderly, offensive, threatening or violent way. The possession of a knife in contravention of section 51 of the Weapons Act is merely listed as an example of what could be classified as disorderly, offensive, threatening or violent behaviour for the issue of a banning notice. Section 51 of the Weapons Act has a number of safeguards built into the section, providing examples of reasonable excuses for possession of a knife in public as follows:

- A person may carry a knife on his or her belt for performing work in primary production,
- A scout may carry a knife on his or her belt as part of the scout uniform,
- A person may carry a knife as an accessory while playing in a pipe band,
- A fisher may carry a knife for use while fishing,
- A person who collects knives may exhibit them at a fete or another public gathering,
- A person may use a knife to prepare or cut food at a restaurant in a public place or when having a picnic in a park, and
- A person may carry a pen knife or Swiss Army knife for use for its normal utility purposes.

Further, under section 51(4), it is a reasonable excuse to physically possess a knife for genuine religious purposes, for example, a Sikh may possess, in a public place, a knife known as a kirpan to comply with the person's religious faith.

When a banning notice is issued, police are authorised to share the information under section 173EMA of the *Liquor Act 1992* (the Liquor Act) about the banned person with the approved operator for an ID scanning system to which an approved ID scanner in regulated premises is linked. Particular licensed premises use ID scanners to assist in the identification of persons who may have banning notices. There are a number of provisions in the Liquor Act and *Liquor Regulation 2002* (Liquor Regulation) that protect this personal information and provide penalties for the disclosure of personal information held in ID scanners, for instance section 173EI 'Privacy' and section 173EM 'Privacy' of the Liquor Act. Further, under section 3FA of the Liquor Regulation the licensee must ensure the ID scanning equipment on

the premises is physically secure and reasonable measures are taken to ensure there is no unauthorised physical or electronic access to the equipment. These safeguards ameliorate any impact upon the right to privacy.

Alternatives to combat knife crime were considered including, research into other Australian jurisdictions. For instance, sections 10C to 10I of the *Control of Weapons Act 1990* (Vic) provides the Chief Commissioner with the power to nominate an area where police can search people for weapons without a warrant and without any reasonable suspicion or belief. These search areas are known as designated areas, and searches can be planned or unplanned. This alternative is not a less restrictive way to achieve the purpose identified.

(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, the on the spot issue of a banning notice may be viewed as inconsistent with principles of natural justice.

> *However, the need to protect the safety of the public by providing an immediate response is considered to outweigh the need for extensive formal natural justice processes. The ability for police to respond to unacceptable conduct by issuing a banning notice will provide an immediate sanction and deterrent to a person. This immediacy will send a clear message to the person that violence and antisocial behaviour is unacceptable and will not be tolerated*.[4]

There is a reasonable community expectation that relevant public places will have additional measures in place to address potential violence. Banning notices assist with this by removing people who behave in a particular way from the area and preventing their return for a period of time. The notices do not target persons with a particular characteristic or membership of a particular social group. Banning notices only apply to adults as per the existing provisions. The proposal will act as a preventative measure against potential knife related violence.

The additional time for which a person who unlawfully possesses a knife may be detained due to the issuing of a banning notice will be minimal. The issuing of a banning notice is a relatively quick process with police having the power to detain and photograph a person at a police vehicle along with a watch-house or police station. Consequently, where appropriate, a person may be detained and issued a banning notice at the relevant public place where the offending behaviour has occurred, minimising their time in custody.

Reducing the opportunity for knife crime to occur allows the community to enter, remain and be safe in public spaces. It also removes the potential for people to make poor decisions that may involve using a knife to commit a crime.

Police are concerned that people who unlawfully possess knives are not considering the potential for serious harm and death should a knife be produced during an altercation. This can result in lifechanging consequences for the offender and the victim. Banning notices are a fair and reasoned response to knife crime in relevant public places. They are not a criminal sanction, but the person may incur a financial penalty if they breach the banning notice. These

[4] Explanatory Notes, Safe Night Out Legislation Amendment Bill 2014 (Qld).

considerations outweigh any potential limitation that could be said to arise in relation to the rights discussed.

(f) any other relevant factors

The Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 enhanced the operation of banning notices in the PPRA by, amongst other amendments, providing broad examples of the behaviours for which an initial police banning notice can be given to aid interpretation and enhance the consistency of police decision-making in issuing initial police banning notices.[5] One of the objectives of that Bill was to further the Government's commitment to reducing the risk of harm from alcohol-fuelled violence. The amendment in this Bill includes the unlawful possession of a knife into the examples of behaviours.

Include five Commonwealth child sexual abuse offences as prescribed internet offences

The amendments to include five Commonwealth child sexual abuse offences as prescribed internet offences in the PPRA limits the following rights:

- Privacy and reputation – section 25.
- Security and liberty of person – section 29.

(a) the nature of the right

Section 25 of the HR Act protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. For example, the right to privacy protects the individual against interference with their physical and mental integrity, freedom of thought and conscience, legal personality, sexuality, family and home, and individual identity (including appearance, clothing and gender). The proposal limits this human right by expanding the number of prescribed internet offences under section 21B of the PPRA that allow police to inspect a digital device in the possession of a reportable offender.

Section 29 of the HR Act protects people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense. It is directed at all deprivations of liberty. It encompasses deprivations in criminal cases but also in cases of vagrancy, drug addiction, entry control, mental illness etc.

The fundamental value which the right to liberty and security expresses is freedom, which is a prerequisite for individual and social actuation and for equal and effective participation in democracy.[6] The proposal will limit this right as the inclusion of new child sex offences may result in the detection and arrest of more child sex offenders.

[5] Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020.
[6] *Kracke v Mental Health Review Board (General)* 2009 VCAT 646 [664]-[665]; *Director of Public Prosecutions v Kaba* (2014) 44 VR 526; [2014] VSC 52 [110]).

(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 amendment to section 21B 'Power to inspect digital devices for the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004*' of the PPRA to include five Criminal Code 1995 (Cwlth) offences is to ensure that police can use digital device inspection powers to disrupt recidivist child sex offending cycles and effectively manage reportable offenders in the community.

The five Commonwealth child sex offences are:

- section 474.23A, 'Conduct for the purposes of electronic service used for child abuse material',
- section 474.25C, 'Using a carriage service to prepare or plan to cause harm to, engage in sexual activity with, or procure for sexual activity, persons under 16', and
- section 474.27AA(1), (for the sender), (2) (for another person) & (3) (in the presence of sender or another person), 'Using a carriage service to "groom" another person to make it easier to procure persons under 16 years of age'.

The amendment is a proper purpose when considering the protection of the human rights of others, namely children. Section 26(2) of the HR Act provides that every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child. Further, the United Nations Convention of the Rights of the Child (UNCRC), provides:

> *States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:*
>
> *(a) The inducement or coercion of a child to engage in any unlawful sexual activity;*
>
> *(b) The exploitative use of children in prostitution or other unlawful sexual practices;*
>
> *(c) The exploitative use of children in pornographic performances and materials.*[7]

This places the obligation to protect children on the government through the functions of public authorities.

(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

Computers have opened a new sphere of high-tech crimes where information communication technology equipment and or data are used for offending or as a tool for the commission of an offence. Prevention, disruption and early intervention are key strategies to reduce the social costs to victims and offenders.

The purpose of authorising police officers to inspect devices is to identify online activity which has or may lead to offending behaviours such as accessing child related websites, searching for and viewing images of children and researching or accessing groups who endorse child exploitation including child exploitation material. The amendment ensures that a reportable

[7] Article 34 of the United Nations Convention of the Rights of the Child.

offender who is convicted of any of the five Commonwealth sex offences is subject to digital device inspection powers. Device inspection powers under section 21B of the PPRA can also be used if: in the last three months the reportable offender has been released from government detention or sentenced to a supervision order; or a magistrate makes a device inspection order for the reportable offender. This reduces the risk of the reportable offender committing further reportable offences against children.

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

There are a number of safeguards within existing section 21B of the PPRA to ameliorate the impact on the limitation of the human rights. For instance, a police officer may not carry out an inspection if at least four inspections have been carried out in relation to a reportable offender in the last 12 months. Any additional inspections require an order from a magistrate. Further, there are no powers of entry or of search under the section.

(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

As to the impact on the human right to privacy and liberty, it is recognised that expanding the number of prescribed internet offences represents limitations to the rights of the reportable offender. However, on balance, providing enhanced community safety by ensuring that digital devices of specific child sex offenders are appropriately inspected for evidence of further offending, outweighs the impact on the limitation of the human rights.

(f) any other relevant factors

Section 21B of the PPRA currently lists eight Criminal Code (Cwlth) and three Criminal Code (Qld) offences as prescribed internet offences. In June 2019, the joint meeting of the Ministerial Council for Police and Emergency Management and Council of Attorneys-General noted that states and territories that have not yet progressed legislative amendments to expand their registration and supervision schemes to apply to Commonwealth child sex offenders should do so as soon as practicable.

Other amendments in this Bill insert nine Commonwealth child sexual offences into Schedule 1, 'Prescribed offences' of CPOROPOA. Inserting five of these offences into section 21B of the PPRA aligns with the intent of the section and CPOROPOA to protect the lives of children and their sexual safety.

Independent monitoring of surveillance devices by QPS civilian monitors

The amendments to permit QPS civilian employees and contracted translators to monitor surveillance devices without constant police supervision limits the following right:

- Privacy and reputation – section 25.

(a) the nature of the right

Section 25 of the HR Act protects people from unjustified interference with their personal and social individuality and identity. It protects the individual's interest in the freedom of their personal and social sphere in the broad sense. This encompasses their right to individual

identity (including sexual identity) and personal development, to establish and develop meaningful social relations and to physical and psychological integrity, including personal security and mental stability.[8] The proposal limits this human right by permitting QPS civilian employees and contracted translators to monitor surveillance devices without constant police officer supervision.

(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 amendment is to alleviate inefficiencies. The pressures have become increasingly acute due to an increased volume of foreign language conversations being captured by surveillance devices. In such cases, the current practice is for an approved civilian translator to monitor and interpret conversations being transmitted by a surveillance device under the direct and constant supervision of a police officer. This requires police officers to sit in the monitoring room for extended periods while the translator interprets a foreign language.

(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

The QPS utilises civilian police employees and contracted translators to monitor telephone calls and messages lawfully intercepted under warrants issued pursuant to the *Telecommunications (Interception and Access) Act 1979* (Cwlth). However, the PPRA does not expressly authorise the QPS to use such persons to monitor surveillance devices (issued under warrants pursuant to Chapter 13, 'Surveillance devices', PPRA) without the constant presence of a police officer. Currently, section 612, 'Assistance in exercising powers' of the PPRA and section 14, 'Security of facilities used under a surveillance device warrant' of schedule 9 of the PPRR when read together, do not expressly allow QPS civilian employees and translators to monitor surveillance devices without a police officer being present at all times.

The Bill will alleviate this inefficiency by permitting QPS civilian employees and translators to monitor surveillance devices without constant police officer supervision, in the same way they are able to monitor intercepted telecommunications. Therefore, the limitation imposed has a direct relationship with, and helps to achieve, the purpose.

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

QPS employees who currently monitor intercepted telecommunications are vetted and are required to undergo one on one training to meet specific competencies. They are initially supervised by a senior experienced monitor as part of a mentoring program and must comply with strict guidelines. The monitors are then supervised by a police sergeant who provides line management to several monitors in the monitoring room. Translators are sometimes employed on a contractual basis but are also appropriately vetted and where applicable trained to conduct this work. A tailored level of training is intended to be provided to all monitors of surveillance devices.

[8] *Kracke v Mental Health Review Board (General)* (2009) 29 VAR 1; [2009] VCAT 646 [619]-[620].

(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

The impact on the human right to privacy by this amendment is minimal. Surveillance device warrants are existing provisions in the PPRA and PPRR that permit QPS civilian employees and contracted translators to assist with monitoring. QPS civilian employees and translators will continue to be supervised under the amended provisions, but that supervision will not need to be carried out constantly by a police officer. The amendment merely is to relieve the burden of having to constantly supervise the civilian employees or contracted translators by a police officer as they carry out their duties. On balance, this efficiency measure outweighs the impact on the limitation of the human right.

(f) any other relevant factors

Not applicable.

Expand the protection of police methodologies

The amendment in the Bill to protect QPS staff members from disclosing police methodologies, limits the following rights:

- Fair hearing – section 31.
- Criminal proceedings – section 32.

(a) the nature of the right

Section 31 of the HR Act affirms the right of all individuals to procedural fairness when coming before a court or tribunal. The right of every person not to receive an unfair trial is deeply ingrained in the rule of law and is recognised under the common law.[9] It applies to both criminal and civil proceedings and guarantees that such matters must be heard and decided by a competent, impartial and independent court or tribunal.

When thinking about whether a court or tribunal is competent, independent and impartial, the following factors may be relevant: it is established by law; it is independent of the executive and legislative branches of government, or has, in specific cases, judicial independence in deciding legal matters in judicial proceedings; it is free to decide the factual and legal issues in a matter without interference; it has the function of deciding matters within its competence on the basis of rules of law, following prescribed proceedings; it presents the appearance of independence; and its officers have security of tenure.

What constitutes a 'fair' hearing will depend on the facts of the case and will require the weighing of a number of public interest factors including the rights of the accused and the victim (in criminal proceedings). What is 'fair' in the context of a fair hearing will involve a triangulation of the interests of the victim, the accused, and the community.[10] In other words, a fair trial does not require a hearing with the most favourable procedures for the accused. The

[9] *R v McFarlane; ex parte O'Flanagan* (1923) 32 CLR 518, 541-2; *Re an application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415; [2009] VSC 381 [39]; *Tomasevic v Travaglini* (2007) 17 VR 100; [2007] VSC 337 [68].
[10] R v A (No 2) [2002] 1 AC 45.

proposal limits this right by having a criminal court decide that some, or all, of the evidence of a QPS staff member should not be disclosed in order to protect police methodologies.

Section 32 of the HR Act protects the right to be presumed innocent until proven guilty. This imposes on the prosecution the onus of proving the offence, guarantees that guilt cannot be determined until the offence has been proved beyond reasonable doubt, gives the accused the benefit of doubt, and requires that accused persons be treated in accordance with this principle.[11]

The proposal limits this right, specifically the right to examine, or have examined, witnesses against the person and to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution. These rights are limited as the protection of police methodology may limit the questions that would otherwise be asked of a witness by a defendant or their legal representative in cross-examination.

(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 proposal is to afford the same right to QPS staff members that is currently available to police officers in a court proceeding, by allowing them to apply to the court to protect police methodologies when giving evidence.

It is considered these purposes are proper. The disclosure of methodologies could compromise the future detection and investigation of serious criminal offences. Seeking to prevent or reduce crime is a proper purpose consistent with the values of our society.[12]

(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

Police services around the world use police methodologies to carry out criminal investigations. Some of these methods and procedures are specific to law enforcement and are needed to be kept confidential to prevent criminal elements from countering their effectiveness.

For example, the locking and encrypting of electronic storage devices, such as mobile telephones and computers, are common strategies used by criminals to defeat investigating police should the device be seized. To address this, approved police and staff members from the QPS Electronic Evidence Unit use numerous confidential methods to access and download these devices when seized by police.

The amendment helps achieve its purpose by ensuring, at the court discretion, that police employees cannot be compelled to reveal police methodologies in a court hearing if, for example, it would reasonably prejudice the effectiveness of a lawful method or procedure for investigating a contravention of the law.

[11] UN Human Rights Committee, *General Comment No. 32: Article 14 (Right to Equality before Courts and Tribunals and to a Fair Trial)*, 90th sess, UN Doc CCPR/C/GC/32, UN Doc A/62/40 Vol 1, Annex 6 (23 August 2007) [30] ('*General Comment No. 32*').

[12] Re Application under the Major Crime (Investigative Powers) Act 2004 (2009) 24 VR 415, 449-50 [151]; Tajjour v New South Wales (2014) 254 CLR 508, 552 [41], 562 [77], 571 [111]-[112], 583 [160].

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

The protection from disclosing methodologies is at the discretion of the court. Under section 803 of the PPRA a court may require the disclosure of the methodology if the information is necessary for the fair trial of the defendant; to find out whether the scope of a law enforcement investigation has exceeded the limits imposed by law; or in the public interest.

'Staff member' is defined by the PSAA, which places an appropriate limit on persons who may be afforded the protection to 'officers of the public service assigned to perform duties in the police service; and persons appointed as staff members by the commissioner under section 8.3(5) or the *Public Service Act 2008*, chapter 5, part 5.'[13]

These factors ameliorate the limitation on the human rights.

(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

As to the impact on the rights to a fair hearing and in criminal proceedings it is recognised that expanding the protection of police methodologies to also capture QPS staff members could be seen to represent a further limitation of those rights. However, the disclosure of protected information, among other risks, has the potential to prejudice further investigations of contraventions of the law, reveal the identity of a confidential source of information, endanger a person's life or physical safety, or facilitate a person's escape from lawful custody. In the context of accessing electronic information, disclosure of the methodologies could reasonably be expected to prejudice the effectiveness of a lawful procedure for detecting and investigating a contravention of the law.

On balance, providing enhanced community safety by ensuring that police methodologies are appropriately kept confidential in a court proceeding, outweighs the limitation on human rights.

(f) any other relevant factors

Not applicable.

Amendments to the PSAA and CSA

Offences to wilfully and unlawfully kill or seriously injure a police or corrective services dog or police horse

The amendments to insert a new indictable offence into both the PSAA and CSA, limits the following right:

- Security and liberty of person – section 29.

(a) the nature of the right

Under section 29 of the HR Act the right to liberty entitles all persons to liberty of the person, including the right not to be arrested or detained except in accordance with the law. The fundamental value this right expresses is 'freedom', which is a prerequisite for individual and

[13] s 2.5, *Police Service Administration Act 1990.*

social actuation and for equal and effective participation in democracy.[14] The right to liberty is about protecting people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense. The right is relevant whenever a person is at risk of imprisonment. Absence of arbitrariness, means that the law contains adequate safeguards, both procedural and substantive, to ensure that the power may be used only for its designated purpose and may not be abused.[15]

The amendments limit this right in two ways. Firstly, creating an indictable offence allows police to engage the investigative powers contained in section 365(2), 'Arrest without warrant' of the PPRA. These powers include the power to arrest a person reasonably suspected of committing the offence without charge while police investigate the offence. This is particularly important where police have not witnessed the offence occurring and need to detain a suspect while they conduct inquiries to gather evidence of the commission of the offence. Secondly, the right is limited at sentencing for the offence as the maximum penalty is five years imprisonment. Taking a person's liberty away through imprisonment or other court ordered sentence needs to be reasonable and justified in a society based on human dignity, equality and freedom.

(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 indictable offence is to adequately protect police and corrective services dogs and police horses by providing parity with other like offences. New South Wales has a specific indictable offence under section 531 of the *Crimes Act 1900* (NSW) to intentionally kill or seriously injure an animal knowing that the animal is being used in the execution of a law enforcement officer's duty. That offence is punishable by a maximum penalty of five years imprisonment.

While the PSAA contains the offence of 'Killing or injuring police dogs and horses', this is a simple offence punishable by a maximum penalty of 40 penalty units or two years imprisonment. The penalty and classification as a simple offence does not reflect the seriousness of more significant assaults on police animals, for example, the stabbing of police dog 'Kaos' to the throat, which required life-saving veterinary care.

A further purpose is to address a gap in the law. Previously offenders have been charged with 'Serious Animal Cruelty' under section 242 of the Criminal Code and the prosecution has been unable to prove the elements of that offence with regard to serious assaults and injuries caused to police dogs, because the elements of the offence effectively require the intent to torture an animal. This is evidenced by the Explanatory Notes that accompanied the insertion of the Serious Animal Cruelty offence into the Criminal Code, which stated:

[14] *Kracke v Mental Health Review Board (General)* 2009 VCAT 646 [664]-[665]; *Director of Public Prosecutions v Kaba* (2014) 44 VR 526; [2014] VSC 52 [110]).
[15] *Kracke v Mental Health Board & Ors (General)* (2009) 29 VAR 1; [2009] VCAT 646 [187], quoting Jack Beatson et al, *Human rights: Judicial Protection in the United Kingdom* (2008) [3-21].

> The new offence will target those persons who intentionally inflict severe pain or suffering upon an animal; in effect the torture of an animal.[16]

And:

> The Bill introduces a new offence of serious animal cruelty. This offence will apply to a narrow cohort of offenders who intentionally torture an animal.[17]

Finally, the amendment reflects community expectations about the serious nature of wilfully and unlawfully killing or seriously injuring a police or corrective services dog or police horse.

(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

Currently there is no specific indictable offence that adequately deals with the killing or injuring of police or corrective services animals. The Criminal Code offence of 'Serious animal cruelty' (s 242) is difficult to prove as it requires the prosecution to prove that the offender intended to inflict serious pain or suffering. While the Criminal Code offence of 'Injuring animals' (s 468) is an indictable offence, it is only punishable by a maximum of two years imprisonment unless the animal is stock.

Through the Crimes Amendment (Animal Cruelty) Bill 2005, New South Wales introduced the offences of section 530, 'Serious Animal Cruelty' and section 531, 'Killing or seriously injuring animals used for law enforcement' at the same time. The positioning of the offences consecutively to each other emphasises the need for two distinct offences and highlights the differing elements of each offence. Serious animal cruelty focuses on acts analogous to torture or prolonged suffering whereas the offence of killing or seriously injuring police or corrective services animals is focused on single acts of assault/retaliation on a police or corrective services animal, which is a risk inherent to the unique role the animals have in law enforcement.

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

The alternative of inserting one new indictable offence into the Criminal Code, that covered wilfully and unlawfully killing or seriously injuring a law enforcement animal, instead of separate offences into each of the PSAA and CSA, was considered. Including a law enforcement animal under s 468(2), 'Injuring animals' of the Criminal Code was also considered. Both alternatives may have reduced regulatory burden and the second alternative would have resulted in a maximum penalty of seven years as opposed to five years imprisonment. Although these alternatives may have been reasonably available, they were not a less restrictive way to achieve the purpose identified.

(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, it is recognised the new offences and penalties will result in some offenders being subject to greater monetary fines or other more serious penalties including

[16] Explanatory Notes, Criminal Law Amendment Bill 2014, page 2 (Qld).
[17] Explanatory Notes, Criminal Law Amendment Bill 2014, page 6 (Qld).

periods of imprisonment. However, the criminal actions of offenders need to be held to account with appropriate penalties. The proposal is balanced by requiring that the offender has acted wilfully and unlawfully. Further, being an indictable offence, the existing criminal safeguards contained in the PPRR will apply, including:

- the right of a suspect for an indictable offence to communicate with friend, relative or lawyer (s 23 of Schedule 9 of the PPRR),
- the right of a suspect for an indictable offence to remain silent is not affected (s 24 of Schedule 9 of the PPRR), and
- the responsibility for police to caution a relevant person about the right to silence (s 26 of Schedule 9 of the PPRR).

On balance, offences and maximum penalties that indicate the serious nature of the offending and reflect community expectations outweighs the limitations on an offender's rights that may occur as a result.

(f) any other relevant factors

Not applicable.

Amendments to the CPOROPOA

Include nine Commonwealth child sexual abuse offences as reportable offences in CPOROPOA

The amendments to include nine Commonwealth child sexual abuse offences as prescribed offences in schedule 1 of CPOROPOA limits the following right:

- Privacy and reputation – section 25.

(a) the nature of the right

Section 25 of the HR Act protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. For example, the right to privacy protects the individual against interference with their physical and mental integrity, freedom of thought and conscience, legal personality, sexuality, family and home, and individual identity (including appearance, clothing and gender).

The amendment limits this right as a person will become a reportable offender under CPOROPOA if they are convicted and sentenced to a period of imprisonment or a supervision order for any of the prescribed Commonwealth child sexual abuse offences.

(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 limitation is to ensure that new methods of child sex offending are recognised as relevant offences under schedule 1 of CPOROPOA. This will ensure ongoing supervision of persons convicted and sentenced to a period of imprisonment or a supervision

order for those offences. Those convicted persons are required to comply with reporting conditions under CPOROPOA for prescribed amounts of time.

The Bill inserts the following nine offences in the *Criminal Code 1995* (Cwlth) into Schedule 1 of CPOROPOA:

- section 272.15A, "Grooming" person to make it easier to engage in sexual activity with a child outside Australia,
- section 471.25A(1), (2) & (3), 'Using a postal or similar service to "groom" another person to make it easier to procure persons under 16',
- section 474.23A, 'Conduct for the purposes of electronic service used for child abuse material',
- section 474.25C, 'Using a carriage service to prepare or plan to cause harm to, engage in sexual activity with, or procure for sexual activity, persons under 16'; and
- section 474.27AA(1), (2) & (3), 'Using a carriage service to "groom" another person to make it easier to procure persons under 16 years of age'.

The listing of these new offences in Schedule 1 of CPOROPOA ensures that offenders who employ new methods of child sex offending and previously not captured methods will be subject to reporting under CPOROPOA. The amendment is a proper purpose when considering the protection of the human rights of others, namely children. Section 26(2) of the HR Act provides that every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child. Further, the UNCRC, provides:

> *States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:*
>
> *(a) The inducement or coercion of a child to engage in any unlawful sexual activity;*
>
> *(b) The exploitative use of children in prostitution or other unlawful sexual practices;*
>
> *(c) The exploitative use of children in pornographic performances and materials.*[18]

This places the obligation to protect children on the government through the functions of public authorities.

(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

Computers have opened a new sphere of high-tech crimes where information communication technology equipment and or data are used for offending, or as a tool for the commission of an offence. Prevention, disruption and early intervention are key strategies to reduce the social costs to victims and offenders.

The proposal ensures that an offender who is convicted of one of the nine new Commonwealth child sex offences is required to report where they are residing, the nature of their employment, vehicle details and other details required under CPOROPOA. This aligns with the objects of CPOROPOA 'to require particular offenders who commit sexual, or particular other serious offences against children to keep police informed of the offender's whereabouts and other

[18] Article 34 of the United Nations Convention of the Rights of the Child.

personal details for a period of time after the offender's release into the community.'[19] This demonstrates there is a rational connection between the limitation to be imposed and its purpose.

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

Combatting child sexual abuse requires close collaboration across all jurisdictions and consistency in each jurisdiction's offender reporting legislation is key to this. No less restrictive reasonably available ways to achieve the purpose have been identified.

(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

As to the impact on the human right to privacy, it is recognised that expanding the number of offences in Schedule 1 of CPOROPOA represents an intrusion into the privacy of the reportable offender. However, on balance, providing enhanced community safety by ensuring that child sex offenders who commit new and emerging offences are required to report under the conditions prescribed by the CPOROPOA, outweighs the limitation on the right to privacy.

(f) any other relevant factors

In June 2019, the joint meeting of the Ministerial Council for Police and Emergency Management and Council of Attorneys-General noted that states and territories that have not yet progressed legislative amendments to expand their registration and supervision schemes to apply to Commonwealth child sex offenders should do so as soon as practicable.

Amendments to the CSA

New parole framework for restricted prisoners

In Queensland, the *Penalties and Sentences Act 1992* (Qld) (PSA) provides that the penalty for the offence of murder is either imprisonment for life or an indefinite sentence. This penalty cannot be varied or mitigated, and an offender receiving a life sentence will be under the supervision of Queensland Corrective Services (QCS) for the remainder of their life, during their time in prison, or if they are granted release on parole.[20]

Prisoners in both Australia and overseas have challenged the application of their life sentence in court. In some cases, prisoners have argued that a life sentence without release on parole is not compatible with human rights. To date, courts have consistently upheld that a prisoner sentenced to life imprisonment has no right to release into the community.

Once a court of law has sentenced a prisoner to life imprisonment, it is the responsibility of the Parliament and the Executive (government), as representatives of the community, to determine the appropriate policies for the management of prisoners.

[19] s 3(1A) *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004.*
[20] Queensland Sentencing Advisory Council Maximum penalties | Sentencing Advisory Council Queensland (sentencingcouncil.qld.gov.au)

All people, including prisoners and offenders, should be treated with inherent dignity and respect. The new parole framework for life sentenced multiple murder or child murderers seeks to balance the human rights and dignity of these prisoners with that of victims' families and the wider community.

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

Human rights have been considered throughout the development of the new parole framework.

The human rights engaged by the amendments include:

- the right to protection from torture and cruel, inhuman or degrading treatment (section 17(a) and (b) of the HR Act),
- the right to liberty and security of person, in particular the right not to be detained arbitrarily (section 29(1) and (2) of the HR Act),
- the right to humane treatment when deprived of liberty (section 30(1) of the HR Act),
- the right to a fair hearing (section 31 of the HR Act),
- rights in criminal proceedings, in particular, the protection from self-incrimination (section 32(2)(k) HR Act),
- the right not to be punished more than once (section 34 of the HR Act), and
- right not to receive increased penalty (section 35(2) of the HR Act).

<u>Protection from torture and cruel, inhuman or degrading treatment (section 17(a) and (b) HR Act)</u>

Section 17 of the HR Act ensures that a person is not subject to torture or treated or punished in a cruel, inhuman or degrading way. Drawn from Article 7 of the International Covenant on Civil and Political Rights, the elements of this right are broken down into a number of components. The following have relevance for this statement:

- torture – intentionally inflicted severe physical or mental pain or suffering (section 17(a)),
- cruel or inhuman treatment – severe pain or suffering that is not necessarily intentionally inflicted (section 17(b)),
- degrading treatment – suffering of a lesser extent, including humiliation (section 17(b)).

The degree and circumstances of an action or omission will determine whether the threshold for one or more elements of this prescribed treatment is met.

Cruel, inhuman or degrading treatment (section 17(b) HR Act)

Cruel, inhuman or degrading treatment can include acts that humiliate or debase a person. However, for actions to be considered cruel and inhuman treatment, a minimum level of severity must be attained. The harm does not need to be intentionally inflicted (like torture). When a person is deprived of liberty, an act that is considered cruel or inhuman treatment must go beyond what is considered the inevitable suffering or humiliation of detention.

For a life sentenced prisoner, a limitation of this right would lie in removing the prospect of ever being released on parole, even if the prisoner has rehabilitated themselves.[21] A parole regime must provide for the prospect of release as well as the possibility of review.[22] Indefinite detention without the prospect of release can amount to inhuman treatment. For these rights to be limited under the new parole framework, it would require a restricted prisoner declaration to be made with no possibility of review. In practice, a restricted prisoner declaration may make a review difficult, however the restricted prisoner declaration merely delays the possibility of review and the prospect of release. A restricted prisoner declaration does not remove the possibility of either review or release.

It should also be considered that at international law the definition of 'cruel, inhuman or degrading' is reserved for 'conduct on the part of the state and its officials which is to be utterly condemned as outrageous and unacceptable in any circumstances'.[23] An act 'so severe as to shock the national conscience'.[24]

For these reasons, restricted prisoner declarations engage, but do not limit, section 17(b) of the HR Act. The presumption against parole for restricted prisoners engages, but does not limit, section 17(b) of the HR Act.

Torture (section 17(a))

The new parole framework is not intended to cause pain or suffering, so is not considered to limit the freedom from torture as defined in section 17(a) of the HR Act. Notwithstanding, treatment or punishment that does not reach the high threshold reserved for condemnation as torture in section 17(a) may constitute cruel, inhuman or degrading treatment or punishment under section 17(b) if it attains a minimum level of severity.

For these reasons, restricted prisoner declarations engage, but do not limit, section 17(a) of the HR Act. The presumption against parole for restricted prisoners does not engage section 17(a) of the HR Act.

Right to liberty and security of person (section 29(1) and (2) HR Act)

Section 29(1) of the HR Act protects an individual's right to liberty. Section 29(2) protects a person from arbitrary detention. These rights draw on Articles 9 and 11 of the International Covenant on Civil and Political Rights.

These rights extend to a prisoner on parole, as noted by the United Nations Human Rights Committee.[25] 'Convicted prisoners are entitled to have the duration of their sentences administered in accordance with domestic law. Consideration for parole or other forms of early release must be in accordance with the law,[26] and such release must not be denied on grounds that are arbitrary within the meaning of Article 9. If such release is granted upon conditions

[21] *Vinter v United Kingdom* (2016) 63 EHRR 1, 37 [110]; *Minogue v Victoria* (2018) 264 CLR 252, 272 [53] (Kiefel CJ, Bell, Keane, Nettle and Edelman JJ), 276 [72] (Gageler J).
[22] *Vinter v United Kingdom* (2016) 63 EHRR 1, 37 [110].
[23] *Taunoa v Attorney-General* [2008] 1 NZLR 429,500 [170], 501-2 [176]-[177] (Blanchard J), 544 [340] (McGrath J agreeing), quoted with approval in *Certain Children v Minister for Families and Children [No 2] [2017]* VSC 304;(2017) 52 VR 441, 518 [245] (Dixon J).
[24] *Taunoa v Attorney-General* [2008] 1 NZLR 429, 529 [289] (Tipping J).
[25] Human Rights Committee, *General comment No. 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 6-7 [20].
[26] 1388/2005, De Léon Castro v Spain, para 9.3.

and later the release is revoked because of an alleged breach of the conditions, then the revocation must also be carried out in accordance with law and must not be arbitrary and, in particular, not disproportionate to the seriousness of the breach. A prediction of the prisoner's future behaviour may be a relevant factor in deciding whether to grant early release.'[27]

The question then lies in whether a restricted prisoner declaration constitutes 'arbitrary' detention. In human rights, the concept of arbitrary is defined to mean capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.[28] The amendments in this Bill provide that restricted prisoners may not be able to apply for parole as early, or as often, as currently allowed. The presumption against parole for restricted prisoners may also be considered disproportionate in its application. As questions of proportionality arise when considering justification of limits on human rights under section 13 of the HR Act, it is convenient to consider these questions in the next stage of the analysis.[29]

Alternatively, section 29 of the HR Act is positively engaged in that it provides greater protection for victims and the wider community from restricted prisoners being considered for parole. Greater security of person is afforded by removing the real or perceived threat of the restricted prisoner being released into the community.

Humane treatment when deprived of liberty (section 30(1) HR Act)

Section 30(1) of the HR Act provides that all persons deprived of liberty be treated with humanity and with respect for the inherent dignity of the person. This right draws on Article 10(1) and 10(2)(a) of the International Covenant on Civil and Political Rights and recognises the particular vulnerability of persons in detention and requires that they are treated humanely. It generally complements the right to be free from torture and cruel, inhuman and degrading treatment (section 17 of the HR Act).

The right to humane treatment when deprived of liberty in section 30(1) of the HR Act means that individuals who are detained under the laws and authority of the State should not be subject to any hardship or constraint that is in addition to that resulting from the deprivation of liberty.[30] That is, a person who is detained retains their human rights subject to only the restrictions that are unavoidable in a closed environment.

The right to humane treatment when deprived of liberty in section 30(1) of the HR Act 'prescribes conduct which is unacceptable in our society but of a lesser order [than cruel, inhuman or degrading treatment under section 17(b)], not rising to a level deserved to be called outrageous'.[31]

[27] 1492/2006, Van der Plaat v. New Zealand, para 6.3.
[28] Explanatory note, Human Rights Bill 2018 (Qld) 22; *PJB v Melbourne Health* [2011] VSC 327; (2011) 39 VR 373, 395 [85].
[29] Following the approach in Minogue v Thompson [2021] VSC 56, [86], [140].
[30] *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 169 [108] (Emerton J); *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, 686 [111] (Riordan J); *Certain Children v Minister for Families and Children* [No. 1] (2016) 51 VR 473, 505 [175] (Garde J); *Certain Children v Minister for Families and Children* [No. 2] (2017) 52 VR 441, 517 [243(c)] (Dixon J); UN Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th sess (1992) [3].
[31] *Taunoa v Attorney-General* [2008] 1 NZLR 429, 500 [170],501-2 [176]-[177] (Blanchard J), 544 [340] (McGrath J agreeing), quoted with approval in *Certain Children v Minister for Families and Children* [No 2] (2017) 52 VR 441, 518 [245] (Dixon J).

Whether a prisoner's rights under section 30(1) of the HR Act are limited, must take into consideration that 'although prisoners do not forgo their human rights, their enjoyment of many of the rights and freedoms enjoyed by other citizens will necessarily be compromised by the fact that they have been deprived of their liberty'.[32] Prisoners serving a term of imprisonment do not have a right to be at large in the community, therefore being refused parole is not a hardship or constraint that is additional to the deprivation of liberty.

Nonetheless, the mental hardship caused by the new parole framework may be considered a limitation of this right. It could be argued that a lengthy restricted prisoner declaration subjects a prisoner to an additional hardship of hopelessness due to the practical effect of restricting the hope of being released if rehabilitated. Any potential limitation of human rights in the new parole framework is limited to this application.

Fair hearing (section 31 HR Act)

Section 31 of the HR Act is modelled on article 14(1) of the International Covenant on Civil and Political Rights and applies to criminal trials and civil proceedings. This right reflects the common law tradition of the 'due process of the law'. Section 31(1) provides a right to a fair hearing before a court or tribunal in a civil proceeding. It reflects the obligation on the State to set up by law independent and impartial courts and tribunals and provide them with the competence to hear and decide on criminal charges and rights and obligations in civil proceedings.

Arguably, the Board is considered to fall into the category of 'tribunal'.[33] The right to a fair hearing includes an implied right to access courts to vindicate legal rights and interests.[34] However, this does not extend to legal rights and interests being vindicated before a court or tribunal. '[T]he right to access a court or tribunal… does not apply where domestic law does not grant any entitlement to the person concerned. For this reason, the [United Nations Human Rights] Committee held this provision to be inapplicable in cases where domestic law did not confer any right to be promoted to a higher position in the civil service, to be appointed as a judge or to have a death sentence commuted by an executive body'.[35] In this context, the new parole framework does not limit a restricted prisoner's right to a fair hearing, as there is no change to a prisoner's ability to appear before the Board to justify their right to parole.

Protection from self-incrimination (section 32(2)(k) HR Act)

Section 32(2)(k) of the HR Act provides for the right of a person not to be compelled to testify against themselves or to confess guilt. The Bill will introduce section 175H(5)(b) which provides for the President, in considering whether to make a restricted prisoner declaration, to ask any person for further information or documents the President reasonably requires to make the decision. For the avoidance of doubt, this power is not intended to abrogate the protection from self-incrimination. Individuals will not be compelled to confess guilt or testify against themselves. Therefore, this right is not engaged or limited.

[32] *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 169 [109]-[111] (Emerton J).
[33] *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 72 [305] (Bell J).
[34] *Bare v Independent Broad-Based Anti-Discrimination Commission* (2015) 48 VR 129, 250 [375] (Tate JA), citing *Wilson v First Country Trust Ltd* [No 2] [2004] 1 AC 816, 834 [32], 835 [35].
[35] *William A Schabas, Nowak's CCPR Commentary* (NP Engel, 3rd ed, 2019) 362[16] (references omitted).

Right not to be punished more than once (section 34 HR Act)

Section 34 of the HR Act provides that a person should not be punished more than once for an offence.

It may be considered that a restricted prisoner declaration retrospectively alters the original punishment given to a restricted prisoner for their offending and be perceived to 'add' to the prisoner's punishment. However, the Canadian Supreme Court has found that an extension of the period of parole ineligibility, when an offender's individual circumstances are considered and with procedural safeguards in place, may not amount to 'punishment' for the purposes of the right not to be punished more than once.[36]

Therefore, as the President of the Board must take each prisoner's individual circumstances into consideration before making a restricted prisoner declaration, this right is not limited.

Right not to receive increased penalty (section 35(2) HR Act)

Section 35(2) of the HR Act provides that a penalty must not be imposed on any person for a criminal offence that is greater than the penalty that applied to the offence when it was committed. This right is based on Article 15 of the International Covenant on Civil and Political Rights.

The United Nations Human Rights Committee has not found changes to parole regimes breach Article 15 of the International Covenant on Civil and Political Rights. Parole regimes are discretionary, and decisions are based on the behaviour of the convicted person. For example, if a parole regime appears more lenient, there is no certainty that a person would benefit from this leniency.[37]

Restricted prisoner declaration

Consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 Human Rights Act 2019)

(a) the nature of the right

The fundamental value in the right to protection from cruel, inhuman or degrading treatment is to ensure that all people are treated humanely, lawfully and with respect when deprived of liberty. This right acknowledges that a person should not be harmed or be deprived of rights due to being lawfully detained.

The fundamental value that the right to liberty expresses is 'freedom', which is 'a prerequisite for individual and social actuation and for equal and effective participation in democracy'.[38] The right to liberty is about 'protect[ing] people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense.'[39]

The right to humane treatment when deprived of liberty recognises the vulnerability of prisoners, whose civil and political rights are compromised because of their imprisonment or

[36] Canada (Attorney-General) v Whaling [2014] 1 SCR 392, 421 [63] (Wagner J for the Court)
[37] Sarah Joseph and Melissa Castan, *The International Covenant on Civil and Political Rights: Cases, Materials and Commentary* (OUP, 2nd ed, 2000) [15.15].
[38] *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 140 [665] (Bell J).
[39] *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 140 [664] (Bell J); *DPP (Vic) v Kaba* (2014) 44 VR 526, 558 [110] (Bell J); *Loielo v Giles* (2020) 63 VR 1, 58 [214] (Ginnane J).

detention.[40] It also recognises that prisoners are human beings and, like all of us, are entitled to dignity and respect for their human rights, subject only to the constraints that are inherent in detention.[41]

(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 primary aim of the restricted prisoner declaration is to protect victims' families, friends and the broader community from further trauma caused by restricted prisoners being considered for parole at ongoing short intervals. This purpose ultimately serves to protect and promote the human rights of victims and the broader community. Victims have a right to 'physical and psychological integrity' as an aspect of the right to privacy in section 25(a) as well as the right to security of the person in section 29(1) of the HR Act.[42]

A secondary aim is to protect the community, given that a declaration will prevent certain people who present an unacceptable risk to the community from applying for parole and being released into the community. Members of the community have a right to protection of life and security of the person in sections 16 and 29(1) of the HR Act.

These purposes are legitimate. They are consistent with the values of our free and democratic society.

(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

Presently, prisoners can reapply for parole every 12 months. Every parole application requires notice to eligible persons, which includes victims and their families, who are then given an opportunity to make a submission to the Board. Applications for parole often receive media attention. For many victims and their friends and family, this process is stressful and retraumatising.

The amendments in this Bill allow the President of the Board to make a restricted prisoner declaration for up to 10 years. A prisoner is prevented from applying for parole for the duration of the declaration (except where seeking exceptional circumstances parole), which means that victims and their families will not face the stress and trauma that comes with parole applications for that period of time. Accordingly, the restricted prisoner declaration helps to achieve its purpose of protecting victims' families, friends and the broader community from further trauma associated with parole applications.

A restricted prisoner declaration also places an additional barrier on a prisoner who presents an unacceptable risk to the community from being released into the community. Accordingly, the restricted prisoner declaration helps to achieve its purpose of protecting the community. It might be argued that the framework is not rationally connected to that purpose because the

[40] *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 166 [93] (Emerton J).
[41] *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 166 [96], 169 [108] (Emerton J).
[42] *Pretty v United Kingdom* (2002) 35 EHRR 1, [61]; *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 126 [599] (Bell J); Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person),* 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 2-3[9].

Board already considers the risk to the community in parole applications. However, an additional barrier provides additional protection to the community.

The restricted prisoner declaration is rationally connected to its purpose of protecting victims and the broader community.

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

A number of safeguards have been built into the Bill to ensure that the limits on human rights are the least necessary to achieve the purpose of protecting victims and the community. These safeguards include:

- an upper limit to the duration of declarations in section 175I(3) to ensure periodic review and the prospect of eventual release,
- a 'public interest' test under section 175H(1) for deciding whether to make a restricted prisoner declaration, with the public interest necessarily requiring consideration of the impact on the prisoner's human rights,
- the inclusion of guidance at section 175I(4) to assist the President in setting an appropriate length for the declaration,
- allowing a restricted prisoner who is subject to a declaration to be released in exceptional circumstances by means of an exceptional circumstances parole order under section 176A,
- an 'unacceptable risk' test under section 176A for an exceptional circumstances parole order, with the impact on human rights necessarily being relevant to what is an unacceptable risk,
- conferring the power to make a restricted prisoner declaration on the President of the Board, who is required to give proper consideration to human rights and exercise discretions compatibly with human rights as a public entity under the HR Act,
- conferring the power to make an exceptional circumstances parole order on the Board, which has the same human rights obligations as a public entity, and
- conferring the function of preparing a restricted prisoner report under section 175F on the chief executive, who also has the same human rights obligations as a public entity.

Consideration was given to a number of alternatives. However, none would limit human rights to a lesser extent while still achieving the purposes of the restricted prisoner declaration, for the following reasons:

- A period of less than 10 years for the upper limit of declarations – This would expose victims and others to the stress and trauma that comes with a parole application within a shorter period of time. An upper limit of 10 years is required to provide the President with the power to reduce harm to victims for a longer period that reflects the seriousness of the prisoner's offending.
- A narrower class of prisoners in the definition of 'restricted prisoner' in section 175D – this would expose a greater range of victims to the stress and trauma of regular parole applications. It would also be less effective in ensuring that people who present an unacceptable risk to the community are not suitable for parole and potential release.
- Relying upon the existing power of the Board to refuse a parole application where a prisoner presents an unacceptable risk to the community – arguably, this might be as

effective in achieving the purpose of community protection, but it would not be as effective in reducing the trauma to victims that comes with the application itself.

- Removing the requirement to notify an eligible person under section 188 when a prisoner applies for parole – it is not clear that this would achieve the purpose of reducing stress and trauma to victims. Not knowing may induce more stress. It would also prevent victims form providing a report which would remove an important source of information for the Board to properly consider an application for parole.
- Setting additional criteria a prisoner must meet before making a further parole application, rather than a declaration – this would not be a reasonably practicable alternative. It is not possible to devise additional criteria that do not require evaluation by a person such as the President.
- Amending the *Ministerial Guidelines to the Parole Board Queensland* (which the Board must consider under section 242E) – this alternative would not prevent a prisoner from applying for parole, which is the trigger for stress and trauma for victims.

There is no less restrictive, but equally effective, way to achieve the purposes of preventing trauma to victims and protecting the community. Accordingly, the limits imposed on human rights by the restricted prisoner declaration are necessary to achieve their purposes.

(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 (section 13(2)(f)), a restricted prisoner declaration has the potential to lengthen the period that a person is deprived of their liberty. A prisoner may even suffer a sense of hopelessness that they cannot be released for a period of up to 10 years even if they rehabilitate themselves in that time. Ultimately, what is at stake is rehabilitation, which is 'required in any community that establish[es] human dignity as its centrepiece'.[43]

While these impacts on the human rights of prisoners are weighty, it must be remembered that prisoners do not have a human right to be released from prison regardless of the risk they present to the community. As the European Court of Human Rights has held, states have a positive obligation to protect the public, and they 'may fulfil that obligation by continuing to detain such life sentenced prisoners for as long as they remain dangerous.'[44] Rather than a guarantee of release, human rights demand there be a prospect of release if a prisoner has rehabilitated themselves, and regular review to give prisoners an opportunity to show they have rehabilitated themselves.[45] While reviews should take place at regular intervals, 'it is not for the Court to determine when that review should take place.'[46] The restricted prisoner declaration allows for a review to be delayed for up to 10 years, but it does not remove the possibility of review, nor the hope of eventual release. The extent of the limit on human rights is also mitigated by the various safeguards built into the Bill outlined above. For example, human rights considerations are embedded in the 'public interest' test and the President is required to exercise discretions compatibly with human rights.

[43] *Vinter v United Kingdom* (2016) 63 EHRR 1, 38 [133]
[44] *Vinter v United Kingdom* (2016) 63 EHRR 1, 37 [108]
[45] *Vinter v United Kingdom* (2016) 63 EHRR 1, 37 [110]
[46] *Vinter v United Kingdom* (2016) 63 EHRR 1, 40 [120]

The impact on liberty is not disproportionate or arbitrary. Accordingly, the right not to be arbitrarily detained in section 29(2) is engaged but not limited. Alternatively, even if the right is limited, that limit is reasonable and demonstrably justified.

On the other side of the scales (section 13(2)(e)), there are significant benefits to be gained by reducing the stress and trauma experienced by family and friends of multiple murder or child murder victims. There is a need to protect victims from re-traumatisation experienced by each parole application, particularly when these applications are made at regular and frequent intervals. Providing victims, their families and friends with confidence that they need not stress about the prisoner being considered for release into the community promotes their right to liberty and security of person (section 29 of the HR Act). It also provides the community with confidence that a prisoner with a restricted prisoner declaration will not be considered for release into the community unless there is effectively no risk associated with that decision, providing confidence in the parole system and protecting collective human rights.

Accordingly, the government has determined that the impacts on human rights are outweighed by the importance of protecting victims and the community through restricted prisoner declarations.

(f) any other relevant factors

Restricted prisoner declarations are limited to a particular cohort of prisoners that have been sentenced to life imprisonment for the most heinous of crimes. They are intended to protect vulnerable members of the community that have become victims to these extreme crimes. The amendments do not remove all hope of being granted parole but instead set a much higher threshold for a restricted prisoner being granted parole.

Presumption against parole for restricted prisoners

Consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 Human Rights Act 2019)

(a) the nature of the right

The fundamental value that the right to liberty expresses is 'freedom', which is 'a prerequisite for individual and social actuation and for equal and effective participation in democracy'.[47] The right to liberty is about 'protect[ing] people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense.'[48]

The right to humane treatment when deprived of liberty recognises the vulnerability of prisoners, whose civil and political rights are compromised because of their imprisonment or detention.[49] It also recognises that prisoners are human beings and, like all of us, are entitled to dignity and respect for their human rights, subject only to the constraints that are inherent in detention.[50]

[47] *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 140 [665] (Bell J).
[48] *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 140 [664] (Bell J); *DPP (Vic) v Kaba* (2014) 44 VR 526, 558 [110] (Bell J); *Loielo v Giles* (2020) 63 VR 1, 58 [214] (Ginnane J).
[49] *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 166 [93] (Emerton J).
[50] *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 166 [96], 169 [108] (Emerton J).

(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 primary aim of the presumption against parole is the protection of the community. The presumption will ensure restricted prisoners who present an unacceptable risk to the community are refused release into the community.

Members of the community have a right to protection of life and security of the person in sections 16 and 29(1) of the HR Act.

This purpose is legitimate and consistent with the values of our free and democratic society.

(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

Presently, for all prisoners applying for parole the Board is required to grant or refuse the application. Ministerial parole guidelines provide that when considering whether a prisoner should be granted parole the highest priority for the Board should be the safety of the community. The Guidelines provide that the Board should consider whether there is an unacceptable risk to the community.

The amendments in this Bill require the Board to refuse to grant a restricted prisoner's parole application, *unless* satisfied the prisoner does not pose an unacceptable risk to the public. This reverses any potential presumption for parole, and instead starts from the basis that the Board must refuse a prisoner's parole application.

This reversal places an additional barrier on a prisoner who presents an unacceptable risk to the community from being released into the community. Accordingly, the presumption against parole helps to achieve its purpose of protecting the community.

It might be argued that the framework is not rationally connected to that purpose because the Board already considers the risk to the community in parole applications. However, an additional barrier provides additional protection to the community.

The presumption against parole is rationally connected to its purpose of protecting the broader community.

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

Consideration was given to alternatives. However, none would limit human rights to a lesser extent while still ensuring the protection of the community to the same degree, for the following reasons:

- Relying upon the existing power of the Board to refuse a parole application where a prisoner presents an unacceptable risk to the community – this does not change the threshold of what is required from the prisoner to be released on parole.
- Inserting more specific considerations regarding restricted prisoners into the *Ministerial Guidelines for the Parole Board Queensland* (which the Board must consider under section 242E) – this alternative would continue to place the onus on the Board to gather evidence that proves the prisoner is no longer a risk to the community,

rather than placing the responsibility on the restricted prisoner to demonstrate they are not an unacceptable risk to the community.

There is no less restrictive, but equally effective, way to achieve the purposes of the amendment to ensure the protection of the community. Accordingly, the limits imposed on human rights by the presumption against parole for restricted prisoners are necessary to achieve their purpose.

(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, it is acknowledged that a presumption against parole increases the threshold restricted prisoners must meet to be released on parole. This engages the prisoner's right to liberty, and the right to humane treatment when deprived of liberty.

A restricted prisoner's right to not be arbitrarily detained, the right protected by section 29(2) of the HR Act, lies in whether the detention is capricious, unpredictable, unjust, or unreasonable.[51] While the presumption against parole may be considered to be disproportionately applied to restricted prisoners, given the heinous nature of their crimes and the suffering they have caused, the presumption cannot be argued to be unjust or unreasonable. At law, it has been recognised that a prediction of the prisoner's future behaviour may be a relevant factor in deciding whether to grant early release'.[52] Therefore, any potential limitation of this right is considered to be justified, in balance with the need to protect victims and the community, including a victim's right to liberty and security of person.

The mental hardship caused by the presumption against parole for restricted prisoners engages the prisoner's right to humane treatment when deprived of liberty (section 30(1) of the HR Act). This lies in an additional hardship of hopelessness due to the prisoner not released into the community unless the prisoner can prove they have rehabilitated themselves. However, these prisoners do not have a right to be at large in the community, therefore this is not considered a hardship or constraint that is additional to the deprivation of liberty.

The presumption against parole is confined to restricted prisoners, those sentenced to life imprisonment for multiple murders or the murder of a child. The normal parole process for considering suitability for release to parole will continue to be relevant where a prisoner has proven they have rehabilitated themselves and are no longer a risk to the community.

The need to protect the community is a weighty consideration, as it involves protecting the human rights of victims of crime, including their right to liberty and security. It also involves upholding societal values and the principles of punishment, requiring that a prisoner sentenced to life imprisonment is only released into the community when they can prove they are no longer a risk to the public.

[51] Explanatory note, Human Rights Bill 2018 (Qld) 22; *PJB v Melbourne Health* [2011] VSC 327; (2011) 39 VR 373, 395 [85].
[52] 1492/2006, Van der Plaat v. New Zealand, para 6.3

Accordingly, the government has determined that the impacts on human rights are justified by the importance of protecting the community by introducing a presumption against parole for restricted prisoners.

(f) any other relevant factors

Not applicable.

Strengthening the No Body, No Parole framework

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

The framework for No Body, No Parole (NBNP) to be amended by this Bill requires the Board to refuse to grant parole to a NBNP prisoner unless they have provided satisfactory cooperation in locating the homicide victim's remains. The amendments in the Bill strengthen the original intention of the NBNP policy by incentivising prisoners to provide cooperation earlier by:

- introducing a new discretion for the Board to consider a prisoner's cooperation in locating a homicide victim's remains at any time after sentencing, instead of requiring the Board to wait until the prisoner applies for parole; and
- where the Board has determined that a NBNP prisoner has not co-operated satisfactorily (no cooperation declaration), restricting the prisoner from reapplying for parole where there is no new cooperation.

The NBNP amendments in the Bill engage the following human rights:

- the right to protection from cruel, inhuman or degrading treatment (section 17(b) HR Act),
- the right to liberty and security of person, in particular the right not to be detained arbitrarily (section 29(1) and (2) HR Act),
- the right to humane treatment when deprived of liberty (section 30(1) HR Act), and
- rights in criminal proceedings, in particular, the protection from self-incrimination (section 32(2)(k) HR Act).

Protection from cruel, inhuman or degrading treatment (section 17(b) HR Act)

The NBNP policy works to restrict the availability of parole for prisoners unless they can provide cooperation in locating a victim's remains. Where a prisoner chooses not to cooperate, they have no prospect of being released to parole. For prisoners serving a life sentence, this means they may never be released from prison.

Equivalent rights to section 17(b) of the HR Act (Freedom from cruel, inhuman or degrading treatment) in comparable jurisdictions are considered as limited in circumstances where a prisoner serving a life sentence is given no real prospect of release.[53] This may be contrary to human dignity and amount to inhuman and degrading treatment because the restriction may induce a sense of hopelessness in the prisoner, diminishing their possibility of rehabilitation.

[53] *Vinter v United Kingdom* (2013) 63 EHRR 1; *Minogue v State of Victoria* (2018) 264 CLR 252; *Minogue v Victoria* (2019) 93 ALJR 1031.

To avoid limiting section 17(b), a parole regime must provide for the prospect of release as well as the possibility of review.[54] The proposed changes to the NBNP framework include clearer restrictions on prisoners who have not satisfactorily cooperated in locating a victim's remains from reapplying for parole, but keep open the possibility for the prisoner to seek review of the constraint on their parole consideration. For this reason, it is concluded that section 17(b) is not limited by the NBNP framework and changes in this Bill.

Right to liberty and not to be detained arbitrarily (section 29(1) and (2) HR Act)

The right to liberty (section 29(1) HR Act) and the right not to be detained arbitrarily (section 29(2)) have been interpreted as applying to parole insofar as parole release must not be denied on grounds that are arbitrary.[55] The NBNP policy requires parole release to be denied if the prisoner has not provided satisfactory cooperation.

This engages the right not to be detained arbitrarily. Whether the right is limited will turn on whether this refusal of parole is arbitrary. Arbitrary likely has a particular meaning in the context of human rights. The Explanatory Notes to the HR Act provide that it means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.

Because questions of proportionality arise when considering justification of limits on human rights under section 13 of the HR Act, it is convenient to consider these questions below (under headings (b) – (e)) before making a determination as to whether any limitation on the right to liberty is arbitrary.

Right to humane treatment when deprived of liberty (section 30(1) HR Act)

The right to humane treatment when deprived of liberty is relevant whenever prisoners are 'subjected to hardship or constraint other than the hardship or constraint that results from the deprivation of liberty'.[56] Refusing to grant a prisoner parole is not in itself a hardship or constraint that is additional to the prisoner's deprivation of liberty. There is always the prospect a prisoner will not be suitable for release and will be required to serve their sentence in full.

However, it may be argued that NBNP prisoners are subject to an additional hardship of hopelessness where the policy operates to restrict their prospect of release to parole because they have not provided satisfactory cooperation, even if they have taken other steps towards rehabilitation. In this aspect, the policy limits the section 30(1) right to humane treatment when deprived of liberty. The justification for this limitation is considered further below.

Protection from self-incrimination (section 32(2)(k) HR Act)

Section 32(2)(k) of the HR Act provides for the right of a person not to be compelled to testify against themselves or to confess guilt. The NBNP policy works to incentivise a prisoner to provide cooperation to police that may assist in locating a victim's remains. This information

[54] *Vinter v United Kingdom* (2013) 63 EHRR 1.
[55] Human Rights Committee, *General comment No. 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 6-7 [20].
[56] *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 169 [108] (Emerton J); UN Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty)*, 44th session (1992) [3].

may not have been previously divulged by the prisoner and so consideration is given to whether this limits section 32(2)(k).

NBNP is predicated on a previous finding of the prisoner's guilt of a homicide offence. Further, the prisoner is not required to provide any information, and may choose to continue not cooperating. For these reasons this right is not limited by NBNP.

Consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 Human Rights Act 2019)

(a) the nature of the right

The right to humane treatment when deprived of liberty (section 30(1) HR Act) recognises the vulnerability of prisoners, whose civil and political rights are compromised because of their imprisonment or detention. It also recognises that prisoners are human beings and, like all of us, are entitled to dignity and respect for their human rights, subject only to the constraints that are inherent in detention.

The right not to be detained arbitrarily and the right to liberty express the fundamental value of freedom. In this context it protects individuals from unlawful and arbitrary interference with their physical liberty.

(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 amendments in the Bill make changes to the process for NBNP decisions that will support the original intention of the policy. The NBNP policy serves an important purpose in addressing the particular distress to victims' families experienced where the victim's body or remains are not located. This situation is an affront to basic human values surrounding the dignified disposal of a deceased person's remains and robs families of their opportunity to honour and properly grieve their deceased loved ones. Long after the offence has been committed, and the offender brought to justice, this situation acts as a continued source of trauma for the victim's family.

The purpose of the NBNP policy is to address this indignity by making parole release for homicide prisoners contingent upon the prisoner providing satisfactory cooperation in locating the victim's remains. It serves the dual purposes of reducing trauma for a victim's family and incentivising prisoners to cooperate in locating a victim's remains. It sends a tough message that prisoners who choose not to cooperate should not be able to access the privilege of parole.

The NBNP policy also promotes the cultural rites of the deceased victim's family by attempting to support the recovery of the victim's remains so they can be appropriately laid to rest in accordance with their beliefs and customs. These cultural rights are protected under sections 27 (cultural rights generally) and 28 (cultural rights of Aboriginal and Torres Strait Islander peoples) of the HR Act.

(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

The limitation results from prisoners being restricted from accessing parole if they do not provide satisfactory cooperation towards locating the victim's remains. This limitation is the key to achieving the purpose of NBNP. Prisoners who cooperate, including where cooperation comes after sentencing, may still be considered to have provided satisfactory cooperation.

This is evidenced in how the NBNP policy has operated since its introduction. Since commencing in 2017, the NBNP policy has been applied and finalised in relation to nine prisoners, as at 31 July 2021. In five finalised matters, the Board determined the prisoner had cooperated satisfactorily in the investigation of the offence. This is despite the victim's remains in these matters not being located.

While the overall policy intention for NBNP is not being changed by the Bill, the amendments will further strengthen its purpose and provide additional protection from harm for the deceased victim's family if prisoners were to repeatedly reapply for parole without providing additional cooperation in locating a victim's remains.

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

No reasonably available alternatives have been identified that would achieve the purpose of the NBNP as effectively as the approach included in the Bill.

A less restrictive alternative to the NBNP policy would be to provide that the Board must consider a prisoner's cooperation when deciding whether to grant the prisoner's parole application, but to provide no requirement for the Board to refuse parole if cooperation was not satisfactory. This approach would be less restrictive because release would not be contingent upon cooperation, so the prisoner's prospect for parole may be greater.

However, this approach would not be as effective as the proposed approach. This is because the incentive to provide cooperation would not be as strong for the prisoner, who may still be able to be released while choosing not to cooperate. Opportunities to secure cooperation with this approach would be limited. This approach would also limit any opportunity for an incentive to be placed on a prisoner earlier than at the time parole is considered, which is a key aim for the amendments to the process provided for in this Bill.

The Bill also includes numerous safeguards for the prisoner's rights, such as allowing the Board to consider at any time whether the prisoner has capacity to cooperate. This might include their mental capacity, for example, where a prisoner may develop Alzheimer's Disease, removing the plausibility of further cooperation or their capacity to cooperate based on their role in the offending, where the circumstances of the offence are such that the prisoner does not have relevant knowledge. The process for decisions also ensures procedural fairness for the prisoner, for example ensuring the prisoner can put matters to the Board for their consideration and retaining the prisoner's right to seek judicial review of a decision by the Board.

As another important safeguard to the policy, a prisoner whom the Board has considered not to have cooperated satisfactorily will continue to have the opportunity to seek to have their cooperation reconsidered. The Bill provides a broad discretion on the President or Deputy

President to permit a prisoner's cooperation to be reconsidered. This includes where the prisoner has provided additional information, their capacity to provide cooperation has changed or it is otherwise in the interests of justice to consider the matter again. This approach leaves open the incentive for the prisoner to cooperate and ensures they are never permanently deprived of the prospect of parole.

A further safeguard is included in new section 175P(4) to provide that a no cooperation declaration ceases where a prisoner no longer falls within the definition of a NBNP prisoner. This accounts for circumstances where a victim's remains are subsequently located after the question of the prisoner's cooperation has been considered by the Board.

(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

For a prisoner serving a long or life sentence, the effect of the NBNP policy is that the prisoner may never be released from prison if they do not provide cooperation, even where the prisoner has taken other steps towards rehabilitation. It is accepted this limits section 30(1) by imposing additional constraints on their prospect of parole release not experienced by other prisoners. It is also accepted that this engages the right to liberty in section 29 by raising the question of whether this refusal of parole is arbitrary.

While these impacts on the human rights of prisoners are weighty, it must be remembered that prisoners do not have a human right to be released from prison regardless of the risk they present to the community.

Cooperation has always been linked to parole suitability because it forms part of a prisoner's rehabilitation. The policy also serves an important purpose by seeking to reduce trauma for the families of victims of homicide. To support this purpose, it sends a tough message to prisoners that if they choose to withhold the information that could assist in that purpose, they will not be suitable to access the privilege of release to parole. These reasons for refusing parole cannot be argued to be unjust, unreasonable or disproportionate.

Because the impact on the right not to be detained arbitrarily is not disproportionate, the impact is therefore not arbitrary. It follows that while these amendments engage the right to liberty, in my opinion they do not limit it. However, even if the right to liberty is limited, the limitation is reasonable and demonstrably justified.

The Bill provides safeguards to appropriately mitigate any limitations to human rights. This includes consideration of the prisoner's capacity to provide cooperation. Where a prisoner does not have the capacity to cooperate, they are still able to satisfy the cooperation test. Further, the policy ensures the prisoner is never permanently deprived of the opportunity to have their cooperation reconsidered, ensuring the incentive to cooperate remains along with an avenue to parole for the prisoner.

On balance, the Bill strikes a fair balance between the importance of the purpose of the amendment for the families of victims and the limitation on rights that may occur as a result. Therefore, any limitation to human rights is reasonably and demonstrably justified.

(f) any other relevant factors

Not applicable.

Publication of Board decisions

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

The Bill inserts a new section 235A into the CSA that requires the Board to publish information, to be prescribed in regulation. This may include a decision or class of decisions made by the President or the Board about a class of prisoner, and specified details of a decision.

These amendments engage the right to privacy in section 25(a) of the HR Act. The amendments also promote the 'freedom to seek [and] receive … information' under section 21(2) of the HR Act and the open justice principle in section 31(3) which provides that all decisions made by a tribunal (the Board) be publicly available.

Right to privacy (Section 25 HR Act)

Section 25 of the HR Act protects a person's (a) privacy and (b) reputation. The scope of the right to privacy is very broad. It covers privacy in the narrow sense (for example, personal information, data collection and correspondence), and also in a broader sense (interference with physical or mental integrity, freedom of thought and conscience, legal personality, individual identity, sexuality, family and home). This right is drawn from Article 17 of the ICCPR.

The right to privacy includes internal limitations. 'The protection against interference with privacy, family, home or correspondence is limited to *unlawful* or *arbitrary* interference. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate. The protection against attack on reputation is limited to *unlawful* attacks. It prohibits an attack on a person's reputation that is unlawful and intentional based on untrue allegations.'[57]

The question is then whether the publication of parole decisions is lawful and/or arbitrary.

As discussed earlier, in relation to human rights, arbitrary means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.[58] Publication of parole decisions is not considered to be unpredictable, unjust or unreasonable.

Depending on the nature of the information published, the impact on the right to privacy may be considered disproportionate but not unlawful or arbitrary. Because questions of proportionality arise when considering justification of limits on human rights under section 13 of the HR Act, it is convenient to consider these questions below (under headings (b) – (e)) before making a determination as to whether any limitation on the right to privacy will be arbitrary. This is further explored below.

Freedom of expression (Section 21(2) HR Act)

Section 21(2) of the HR Act provides for the right to freedom of expression. Modelled on Article 19 of the ICCPR, this right covers both the right to hold and express an opinion through

[57] Explanatory Notes, Human Rights Bill 2018 (Qld)
[58] Explanatory note, Human Rights Bill 2018 (Qld) 22; PJB v Melbourne Health [2011] VSC 3 27; (2011) 39 VR 373, 395 [85].

speech, art, writing (or other forms of expression) and to seek out and receive the expression of others' opinions.

Section 21(2) upholds the right to seek, receive and impart information and ideas but it is also acknowledged at international law that this right may be limited. There is Victorian authority to suggest that freedom of expression may include a right to access information held by government, because it includes the 'freedom to seek, receive and impart information'.[59]

That position has been confirmed by the United Nations Human Rights Committee with respect to the equivalent right in the ICCPR.[60] According to the European Court of Human Rights, the equivalent right in Europe does not contain a general right to government-held information.[61]

Open justice (Section 31(3) HR Act)

Section 31 of the HR Act provides for the right to a fair hearing, including section 31(3) that all judgements or decisions made by a court or tribunal in a proceeding must be publicly available.

The open justice principle is not absolute.[62] As the explanatory note states, 'There is acknowledgement in international law that certain proceedings or circumstances will justify a court supressing all or part of a judgement. The general limitations clause (clause 13), will provide for this.'[63] Accordingly, the right to privacy must be weighed against the open justice principle. This balance is considered further below.

(a) the nature of the right

The right to privacy protects an individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. While the concept of privacy is broad, it is recognised that the protection of privacy must be balanced against other factors. Only interferences on privacy that are unlawful or arbitrary will limit the right to privacy.

(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

It is in the public interest that the community has confidence in the Board's decisions to release prisoners to parole given the need to ensure the protection of the community. The publication of certain decisions will serve this purpose while promoting the principle of open justice (section 31(3)) and the freedom to seek, receive and impart information (section 21(2)).

(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

[59] *XYZ v Victoria Police* (2010) 33 VAR 1, 86-95 [515]-[559] (Bell J); *Horrocks v Department of Justice* [2012] VCAT 241, [110] (Ginnane J).
[60] Human Rights Committee, *General Comment No 34 – Article 19: Freedoms of opinion and expression*, 102nd sess, UN Doc CCPR/C/GC/34 (2 September 2011) 4-5 [18]-[19].
[61] *Bizottsag v Hungary* (European Court of Human Rights, Grand Chamber, Application no. 18030/11, 8 November 2016) [156].
[62] Compare *Wagners Cement Pty Ltd v Boral Resources (Qld) Pty Ltd* [2020] QSC 124, [11] (Bond J).
[63] Explanatory note, Human Rights Bill 2018 (Qld) 25.

There is a rational connection between allowing for the publication of certain parole decisions and ensuring public confidence in parole decisions. By making details public, such as whether parole is granted and the reasons for granting parole, the community is more aware of the factors that inform parole decisions and how their safety is protected.

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

There are no less restrictive ways to achieve the purpose that would be as effective as allowing for the publication of certain decisions. Simply not publishing any information, while less restrictive to a prisoner's privacy, would not achieve the purpose of the amendments.

Implementing this intention through a regulation will allow human rights to be safeguarded by ensuring clear guidelines about what decisions are to be made public. A safeguard has been included for the regulation to prescribe specified details of the decisions that are to be published. This can ensure the prisoner's right to privacy is appropriately balanced with the purpose of the publications.

(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

The amendment serves an important purpose in ensuring public confidence in parole decisions that are ultimately about protecting the community.

It is accepted that such publications will engage the right to privacy of individuals. Publications could include some details such as the nature of offending and reasons for granting parole. I am satisfied that the publication of such details is not disproportionate to individual privacy. Because the impact on the right to privacy is not disproportionate, the impact is therefore not arbitrary. It follows that while these amendments engage the right to privacy, in my opinion they do not limit it. However, even if the right to life is limited, the limitation is reasonable and demonstrably justified.

The full extent of any limitation to a prisoner's privacy enabled by the Bill will depend on the nature of the information to be published, which will be prescribed in the regulation. Any regulation prescribing information to be published will need to be accompanied by a human rights certificate in accordance with section 41 of the HR Act. This will allow for more detailed consideration of the impact on the right to privacy in a more specific context and ensure the approach appropriately balances the purpose of publications with any limit on privacy.

(f) any other relevant factors

Publication of certain parole decisions is an approach taken in some other Australian jurisdictions. Section 72(7)(b) of the *Corrections Act 1997* (Tas) requires the Parole Board of Tasmania to publish decisions to release prisoners. The Tasmanian board publishes all the required decisions on its website.

Section 107C of the *Sentence Administration Act 2003* (WA) provides that the Chairperson of the Prisoners Review Board may make public a decision of the Board, including reasons, if it is in the public interest. The WA Board's policy manual provides that decisions to release or

cancel parole for certain serious offenders will be published. Decisions are published on the WA Board's website.

Amending the timeframe for parole reapplications by life-sentenced prisoners

The Bill amends section 193(5A)(a) of the CSA to extend the maximum period a life sentenced prisoner can be restricted from reapplying for parole after having their application refused. This period is currently 12 months. The Bill will extend this period to up to three years.

Once commenced, if a life sentenced prisoner has a parole application refused, the Board will be able to set a period of up to three years within which the prisoner cannot make another parole application under section 180 CSA. During that period, a prisoner will still be able to apply for exceptional circumstances parole under section 176 CSA, and the Board can consent for an application to be made before the period ends under section 180(2)(a)(ii). After that period has elapsed, the prisoner is then permitted to reapply for parole.

The decision to set a period a life sentenced prisoner cannot reapply for parole after a parole refusal is distinct from the restricted prisoner framework. The amendments are targeting different cohorts of prisoners. While both capture life sentenced prisoners, the restricted prisoner provisions are limited to certain life sentenced prisoners, who have committed arguably the most heinous of crimes. This amendment is a less severe measure that aims to reduce harm to victims. This lies in the ability for the Board to consent to the prisoner applying for parole, the prisoner having access to the existing exceptional circumstances parole process and the ordinary parole decision making processes. That is, the presumption against parole does not apply, nor the more formal restricted prisoner declaration.

This amendment increases the time that a life sentenced prisoner can be restricted from reapplying for parole after a refusal, narrowing their opportunity to seek parole in that time and serve that part of their custodial sentence in the community.

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

The human rights engaged by the amendments include:

- the right to liberty and security of person, in particular the right not to be detained arbitrarily (section 29(1) and (2) of the HR Act), and
- the right to humane treatment when deprived of liberty (section 30(1) of the HR Act).

Right to liberty and security of the person – section 29(1) and (2) HR Act

Section 29(1) of the HR Act protects an individual's right to liberty. Section 29(2) protects a person from arbitrary detention. These rights draw on Articles 9 and 11 of the ICCPR.

These rights extend to a prisoner on parole, as noted by the United Nations Human Rights Committee.[64] 'Convicted prisoners are entitled to have the duration of their sentences administered in accordance with domestic law. Consideration for parole or other forms of early release must be in accordance with the law,[65] and such release must not be denied on grounds

[64] Human Rights Committee, *General comment No. 35: Article 9 (Liberty and security of person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 6-7 [20].
[65] 1388/2005, De Léon Castro v Spain, para 9.3

that are arbitrary within the meaning of Article 9. If such release is granted upon conditions and later the release is revoked because of an alleged breach of the conditions, then the revocation must also be carried out in accordance with law and must not be arbitrary and, in particular, not disproportionate to the seriousness of the breach. A prediction of the prisoner's future behaviour may be a relevant factor in deciding whether to grant early release.'[66]

The right to liberty entitles all persons to liberty of the person, including the right not to be arrested or detained except in accordance with the law. Providing for the Board to impose a longer restriction on a life-sentenced prisoner reapplying for parole may engage this right by delaying the time a prisoner may be able to be considered for parole release. However, the right will only be limited if this delay is arbitrary. The question then lies in whether the restriction on reapplying constitutes 'arbitrary' detention. In human rights, the concept of arbitrary is defined to mean capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.[67]

The amendment provides for the Board to set a period up to three years where the prisoner is restricted from reapplying for parole. The setting of this period follows a decision by the Board to refuse the prisoner's parole application. The decision on the length of the restriction would consider the individual circumstances of the prisoner, and likely success of a future parole application in setting an appropriate length. The right will only be limited if this delay is arbitrary. The question then lies in whether the restriction on reapplying constitutes 'arbitrary' detention. In human rights, the concept of arbitrary is defined to mean capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.[68] Because questions of proportionality arise when considering justification of limits on human rights under section 13 of the HR Act, it is convenient to consider these questions below (under headings (b) – (e)) before making a determination as to whether any limitation on the right to liberty will be arbitrary.

Alternatively, section 29 of the HR Act is positively engaged in that it provides greater protection for victims and the wider community from life-sentenced prisoners being considered for parole. Greater security of person is afforded by removing the real or perceived threat of the restricted prisoner being released into the community.

Humane treatment when deprived of liberty (section 30(1) HR Act)

Section 30(1) of the HR Act provides that all persons deprived of liberty be treated with humanity and with respect for the inherent dignity of the person. This right draws on Article 10(1) and 10(2)(a) of the ICCPR and recognises the particular vulnerability of persons in detention and requires that they are treated humanely.

The right to humane treatment when deprived of liberty in section 30(1) of the HR Act means that individuals who are detained under the laws and authority of the State should not be subject to any hardship or constraint that is in addition to that resulting from the deprivation of liberty.[69]

[66] 1492/2006, Van der Plaat v. New Zealand, para 6.3
[67] Explanatory note, Human Rights Bill 2018 (Qld) 22; *PJB v Melbourne Health* [2011] VSC 327; (2011) 39 VR 373, 395 [85].
[68] Explanatory note, Human Rights Bill 2018 (Qld) 22; *PJB v Melbourne Health* [2011] VSC 327; (2011) 39 VR 373, 395 [85].
[69] *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 169 [108] (Emerton J); *De Bruyn v Victorian Institute of Forensic Mental Health* (2016) 48 VR 647, 686 [111] (Riordan J); *Certain Children v Minister for Families and Children*

That is, a person who is detained retains their human rights subject to only the restrictions that are unavoidable in a closed environment.

Whether a prisoner's rights under section 30(1) of the HR Act are limited, must take into consideration that 'although prisoners do not forgo their human rights, their enjoyment of many of the rights and freedoms enjoyed by other citizens will necessarily be compromised by the fact that they have been deprived of their liberty'.[70] Prisoners serving a term of imprisonment do not have a right to be at large in the community, therefore being refused parole is not a hardship or constraint that is additional to the deprivation of liberty.

While a longer restriction, such as under a restricted prisoner declaration examined above, might be argued to cause additional mental hardship for a prisoner and create a sense of hopefulness at the prospect of release, the same cannot be successfully argued for this amendment. Given the limited period the Board decide to restrict a prisoner from reapplying for parole once refused, the fact that it follows a process where the Board has considered the prisoner and refused their application, and that there are avenues still open to the prisoner to make an application, this amendment does not place additional hardship on the prisoner beyond that inherent in their sentence of imprisonment.

Therefore, this right may be engaged, but is not limited by this amendment. Even if it was considered to limit this right, the limitation is justified for the reasons that follow.

(a) the nature of the right

The fundamental value that the right to liberty expresses is 'freedom', which is 'a prerequisite for individual and social actuation and for equal and effective participation in democracy'.[71] The right to liberty is about 'protect[ing] people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense.'[72]

The right to humane treatment when deprived of liberty recognises the vulnerability of prisoners, whose civil and political rights are compromised because of their imprisonment or detention.[73] It also recognises that prisoners are human beings and, like all of us, are entitled to dignity and respect for their human rights, subject only to the constraints that are inherent in detention.[74]

(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 amendment is to limit the adverse impact a yearly parole application by a life sentenced prisoner has on a victim/s of the offence. This purpose ultimately serves to protect and promote the human rights of victims and the broader community. Victims have a

[No. 1] (2016) 51 VR 473, 505 [175] (Garde J); *Certain Children v Minister for Families and Children* [No. 2] (2017) 52 VR 441, 517 [243(c)] (Dixon J); UN Human Rights Committee, *General Comment No 21: Article 10 (Humane treatment of persons deprived of their liberty),* 44th sess (1992) [3].

[70] *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 169 [109]-[111] (Emerton J).

[71] *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 140 [665] (Bell J).

[72] *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 140 [664] (Bell J); *DPP (Vic) v Kaba* (2014) 44 VR 526, 558 [110] (Bell J); *Loielo v Giles* (2020) 63 VR 1, 58 [214] (Ginnane J).

[73] *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 166 [93] (Emerton J).

[74] *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 166 [96], 169 [108] (Emerton J).

right to 'physical and psychological integrity' as an aspect of the right to privacy in section 25(a) as well as the right to security of the person in section 29(1) of the HR Act.[75]

A secondary aim is to protect the community, given it will prevent life-sentenced prisoners who present an unacceptable risk to the community from applying for parole and being released into the community for a set period. Members of the community have a right to protection of life and security of the person in sections 16 and 29(1) of the HR Act.

These purposes are legitimate. They are consistent with the values of our free and democratic society.

(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

There are approximately 315 life-sentenced prisoners in custody in Queensland. Presently, once a prisoner has reached their parole eligibility date they can reapply for parole every 12 -months, despite a parole application being refused by the Board.

In the existing time between a life sentenced prisoner having had a parole application refused, and making a subsequent new parole application, there can be limited, if any, meaningful change in the prisoner's circumstances for the Board to consider.

Every parole application requires notice to eligible persons, which includes victims and their families, who are then given an opportunity to make a submission to the Board. For many victims and their friends and family, this process is stressful and retraumatising.

After a life sentenced prisoner has had a parole application refused, allowing the Board to set a longer period where the prisoner cannot make another parole application provides the opportunity to lessen this impact on victims. It also ensures the community is protected for that period as the prisoner will not be released to parole.

The restriction on reapplying is rationally connected to its purpose of protecting victims and the broader community.

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

The Bill replaces an existing 12-month limit on the period a life-sentenced prisoner can be restricted from reapplying for parole, after being refused parole by the Board. This timeframe is not considered to be long enough in all matters to ensure victims are adequately protected from the trauma of repeated applications for parole. Therefore, there are no less restrictive approaches that would achieve the purpose as effectively as this amendment. Accordingly, the limits imposed on human rights by this amendment are necessary to achieve their purposes.

Additionally, a number of safeguards are included surrounding this amendment to minimise any limitation on an impacted prisoner's human rights:

- an upper limit of three years ensures the opportunity for review in the near future, noting that prisoners are serving a sentence of life imprisonment,

[75] *Pretty v United Kingdom* (2002) 35 EHRR 1, [61]; *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 126 [599] (Bell J); Human Rights Committee, *General Comment No. 35: Article 9 (Liberty and security of person),* 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 2-3[9].

- full discretion for the Board to set a period below three years to account for the prisoner's circumstances and prospects of rehabilitation,
- the ability for the prisoner to apply for exceptional circumstances parole in that time (see section 176 CSA),
- discretion for the Board to allow another parole application before the restriction ends (section 180(2)(a)(ii) CSA), and
- retaining the power to make this decision on the Board, which has the same human rights obligations as a public entity.

(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, the amendment may lengthen the period a life sentenced prisoner is deprived of their liberty. However, as outlined above, this is in the context that prisoners do not have a human right to be released to parole regardless of the risk they present to the community. The State will always have a positive obligation to protect the public, and 'may fulfil that obligation by continuing to detain such life sentenced prisoners for as long as they remain dangerous.'[76] Rather than a guarantee of release, the prisoner must have a prospect of release including regular review.

This amendment applies where a life sentenced prisoner has been refused parole because their continued detention is necessary for the protection of the community. The amendment provides the Board discretion to set a maximum of three years before the prisoner can seek to have their parole reviewed. Therefore, the amendment provides for review at most every three years.

Given the seriousness of offending behaviour and significant time served in custody under a non-parole period, if a life sentenced prisoner has been refused parole, it is unlikely that there will be a meaningful change in their circumstances within a year to justify a change in parole decision.

The extent of the limitations to a prisoner's human rights are mitigated by the inclusions of clear safeguards. The amendment gives a discretion to set a period up to three years, with no minimum period that must be set. This allows the individual circumstances to be considered for each matter and an appropriate period determined by the Board. Avenues to seek parole despite the restriction also remain open to the prisoner, through making an exceptional circumstances application, or by the Board giving permission for the prisoner to apply earlier.

On the other side of the scales, this amendment provides significant benefits by allowing greater opportunity to protect victims of these offences from the potential for yearly parole applications. The availability of longer restrictions also increases the protection for the community during that time.

The amendment appropriately balances the protection of victims and the community with the need to ensure the prisoner continues to be afforded the opportunity to rehabilitate and seek parole. The impact on liberty is not disproportionate or arbitrary. Because the impact on the

[76] *Vinter v United Kingdom* (2016) 63 EHRR 1, 37 [108]

right not to be detained arbitrarily is not disproportionate, the impact is therefore not arbitrary. It follows that while these amendments engage the right not to be detained arbitrarily, in my opinion they do not limit it. However, even if the right to life is limited, the limitation is reasonable and demonstrably justified.

(f) any other relevant factors

Not applicable.

Temporary extension to the parole consideration timeframes

The Bill provides for a temporary extension to the timeframes for parole decisions to be made from 120 days to 180 days (or from 150 days to 210 days if deferred), for a period of six months. This lengthens the consideration of a prisoner's parole application and potentially impacts on the timing of a prisoner's release to the community. For those not granted parole the extended parole consideration timeframes are of limited consequence, other than in the instance of timely decision making. This amendment applies to all prisoners applying to the Board for parole for a set period of six months from commencement (on proclamation).

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

This amendment engages but does not limit the following human rights.

Right to liberty and security of the person – section 29(2) HR Act

Section 29 HR Act entitles all persons to liberty of the person, including the right not to be arrested or detained except in accordance with the law. The temporary extension for parole decisions could engage the right not to be arbitrarily detained where it allows for the grant of parole and subsequent release to occur later than current timeframes.

However, the right will only be limited if that continued detention is arbitrary. Arbitrary has a particular meaning in the context of human rights. The Explanatory Notes to the HR Act provide that it means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought. A decision not to grant parole itself is not arbitrary, there is always the possibility that a prisoner will not be released to parole.

Similarly, the extended timeframes will not result in arbitrary detention. The earliest a prisoner can apply for parole is 180 days prior to their parole eligibility date. Even if the Board grants parole, a prisoner cannot be released before their parole eligibility date. If a prisoner applies at the earliest time possible, under the extended timeframes, the Board would still be required to decide the application within 180 days, so there would be no arbitrary detention. If the Board defers the matter and takes up to 210 days to make the decision this is because the Board requires additional material to decide the prisoner's application. This similarly would not be arbitrary detention because the Board is still considering the prisoner's suitability for release.

For these reasons, it is concluded that while the right may be engaged it is not limited by the temporary extension of the decision-making timeframes.

Right to a fair hearing – section 31 HR Act

The right to a fair hearing affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It applies to both criminal and civil proceedings and

guarantees that such matters must be heard and decided by a competent, impartial and independent court or tribunal.

The temporary extension for parole decisions could engage the right to a fair hearing, insofar as a fair hearing is to be carried out in a timely manner. However, the right is not limited. Timeframes will still be provided for the decision to be made within. These timeframes are still timely and align the earliest point the prisoner can apply for parole before their eligibility date. A prisoner will still have recourse through judicial review where a decision exceeds those timeframes.

Amendments to the WWCA

The proposed amendments to the WWCA do not engage or limit rights in criminal proceedings and the right not to be tried or punished more than once. The purpose and effect of preventing a person from engaging in child-related work is to not penalise persons for a criminal offence, but to assist in protecting children from harm in situations where the criminal history of a person represents that it would not be in the best interests of children to issue that person a working with children authority.

It is well established in common law that the actions of a regulatory body to dismiss, disbar, de-register or cancel a professional's right to practise in various industries and professions is not viewed as a punitive measure; it is a protective measure that operates to ensure the adequate standard of services to the public and to maintain the reputation of the profession.[77]

Although the blue card system does not strictly amount to professional registration, it does seek to prohibit individuals with certain criminal histories or other relevant history from engaging in child-related industries where it would not be in the best interests of children for them to do so.

International jurisprudence also suggests that this sort of consequence, i.e. restrictions regarding work for individuals with certain types of offending, does not constitute punishment. For example, the New Zealand Court of Appeal has held in relation to a corresponding right in their Bill of Rights, that it would be erroneous to treat the word 'punished' as '*embracing punishment outside the ambit of criminal processes and its associated enforcement of the public law*'.[78]

Accordingly, any measures imposed by the WWCA, resulting in the automatic issuing of a negative notice or the prohibition against applying for a blue card, are clearly protective rather than punitive measures as there is no element of punishment involved.

Rights limited

The human rights limited by the amendments to the WWCA are:

- Recognition and equality before the law (section 15).
- Privacy and reputation (section 25).

[77] *Ziems v Prothonotary of the Supreme Court of NSW* [1957] HCA 46; *Clyne v NSW Bar Association* [1960] HCA 40; *New South Wales Bar Association v Evatt* [1968] HCA 20. See also *Queensland College of Teachers v TSV* [2015] QCAT 186 for an application of these principles in relation to teacher registration.
[78] *Daniels v. Thompson* [1998] 3 NZLR 22.

Recognition and equality before the law – section 15 HR Act

(a) nature of the right

Every person has the right to enjoy the person's human rights without discrimination, and every person is equal before the law and is entitled to the equal protection of the law without discrimination.

This right reflects the essence of human rights: that every person holds the same rights by virtue of being human and not because of a characteristic or membership of a group. The definition of discrimination under the HR Act is broad and extends to discrimination based on attributes which are currently outside the scope of discrimination under the *Anti-Discrimination Act 1991*.

A person's eligibility to work with children under the WWCA is assessed based on their criminal record. It is possible that criminal conviction could come within the scope of discrimination under the HR Act. Additionally, there could be an indirect and disproportionate impact on groups who are over-represented in the criminal justice system, for example, Aboriginal peoples and Torres Strait Islander peoples.

(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 amendments to the WWCA promote the rights under section 26(2) of the HR Act by improving the protections afforded to children.

The proposed amendments strengthen the disqualifying offence framework by elevating additional Commonwealth offences which criminalise emerging forms of child sexual abuse and capture other types of serious offending behaviour (for example, organ trafficking). They are consistent with the principles for administering the WWCA, that the welfare and best interests of the child are paramount and that every child is entitled to be cared for in a way that protects the child from harm and promotes the child's wellbeing (section 6 WWCA).

The purpose of the limitation on recognition and equality before the law is to protect children from harm. Including new Commonwealth Criminal Code offences in the disqualifying offence framework ensures that persons convicted of such offences are disqualified from working in child-related work. The offences identified are of such a nature (for example, offences to target administrators of child abuse websites, the grooming of third parties and organ trafficking) that persons convicted of such offences should never be able to engage in child-related work.

(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

The limitation imposed by the Bill achieves the purpose of protecting children from harm by ensuring that persons convicted of such offences are unable to make an application for a blue card. It also ensures that a person charged with such an offence has their blue card suspended, or their blue card application withdrawn.

The potential limitation on the right to recognition and equality before the law is necessary to prevent individuals with convictions for specified Commonwealth offences from making a blue card application or entering or continuing in regulated child-related environments.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the amendments. The alternative of not prescribing these offences in the disqualifying offence framework will lead to reduced protections for children.

(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

The purpose of protecting children from harm requires the elevation of certain Commonwealth Criminal Code offences to the disqualifying offence framework under the WWCA. While acknowledging that the amendments will prohibit persons with specified convictions from ever engaging in child-related work and the importance of not disadvantaging persons with a particular attribute, the safeguards provided by the amendments are critical to uphold the effective operation of the blue card system.

Therefore, on balance, it is considered that the limitation on the right to recognition and equality is reasonable and demonstrably justifiable. The limitation to the right is based on ensuring that persons who have been convicted of significant Commonwealth offences are prevented from being able to work with children in Queensland. The importance of protecting children by disqualifying persons with this type of criminal record outweighs the limitation on the right to equality before the law.

(f) any other relevant factors

Not applicable.

Privacy and reputation - section 25 HR Act

(a) nature of the right

The right to privacy and reputation under section 25 of the HR Act protects individuals from unlawful or arbitrary interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally.

Article 8 of the European Convention on Human Rights provides that 'everyone has the right to respect for his private and family life, his home and his correspondence.' While similar to section 25 of the HR Act, Article 8 of the European Convention on Human Rights is framed as a positive obligation. In comparison, section 25(a) of the HR Act provides that "a person has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with".

The European Court of Human Rights has interpreted Article 8 of the European Convention on Human Rights to find that, while there is no general right to employment, the notion of

'private life' in Article 8 does not exclude, in principle, activities of a professional or business nature. Therefore, restrictions imposed on access to a profession have been found to affect 'private life'. Similar observations have been made in Victorian jurisprudence.

If the right to privacy and reputation does extend this far, an assessment under section 13 has been undertaken.

(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 limitation on the right to privacy is to provide stronger protections for children. Assessment based on criminal record is important because certain types of offending behaviour are considered relevant when assessing whether a person is eligible to engage in child-related work.

(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

The potential limitation on the right to privacy and reputation is necessary for the protection of children from harm as it will prevent persons with concerning histories from being able to work with children and is consistent with the paramount principle under section 6 of the WWCA.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the amendments.

The current assessment framework under the WWCA, which incorporates a consideration of the best interests of children, is well-established and long-standing. In the over 20 years of operation of the WWCA, the interpretation of this threshold has been clarified by the Court of Appeal decision in *Commissioner for Children and Young People and Child Guardian v Maher & Anor* [2004] QCA 492 and consistently applied in an extensive body of Queensland Civil and Administrative Tribunal jurisprudence.

A key tenet which has guided decision-making is the principle that any prejudice or hardship that an applicant has experienced, or would experience, by not holding a blue card is irrelevant to determinations under the WWCA.

(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

The purpose of the amendments is to provide stronger protections for children by elevating certain Commonwealth Criminal Code offences to the disqualifying offence framework under the WWCA. While acknowledging that the amendments will prohibit persons with specified convictions from seeking work in any child-related work, the amendments are important to uphold the paramount principle for administering the WWCA. The importance of the purpose of limiting the right to privacy outweighs the potential negative limitation on an individual's right to privacy.

(f) any other relevant factors

Not applicable.

Conclusion

In my opinion, the Police Powers and Responsibilities and Other Legislation 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 a free and democratic society based on human dignity, equality and freedom.

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