

Public Health and Other Legislation (COVID-19 Management) Amendment Bill 2022

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, Yvette D'Ath MP, Minister for Health and Ambulance Services and Leader of the House, make this statement of compatibility with respect to the Public Health and Other Legislation (COVID-19 Management) Amendment Bill 2022.

In my opinion, the Public Health and Other Legislation (COVID-19 Management) Amendment Bill 2022 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

On 29 January 2020, a public health emergency was declared under section 319 of the *Public Health Act 2005* due to COVID-19. The public health emergency has been extended on several occasions by regulation, most recently until 22 September 2022.

To support Queensland's response to the public health emergency, temporary amendments were made to the Public Health Act to provide the Chief Health Officer and emergency officers with extraordinary powers to contain and respond to the spread of COVID-19. This temporary legislative framework has been integral to Queensland's successful response to COVID-19, including immediate efforts to eliminate and suppress the virus, and ongoing strategies to manage the endemic risks of COVID-19. The ability to respond quickly and flexibly over the course of the public health emergency has enabled Queensland to avoid significant disruption to daily life while preventing thousands of cases, keeping the community safe and ultimately saving lives.

Unless further extended by an Act of Parliament, the temporary emergency framework will expire on 31 October 2022 or earlier if the Minister for Health and Ambulance Services ends the public health emergency. Based on the current trajectory of COVID-19 and Queensland's strategy for managing the next stage of the public health emergency, it is unlikely the full suite of emergency powers will be necessary after October 2022 to manage the public health response. Accordingly, it is proposed not to further extend the current emergency legislative framework for COVID-19.

In place of the current framework, it is proposed to insert temporary and more targeted powers to manage COVID-19 as a notifiable condition under the Public Health Act until 31 October 2023. This will provide a step-down approach to managing the pandemic response and enable Queensland to continue to respond to serious risks to the community, protect the capacity of the health system and implement national decisions and advice about the ongoing management of COVID-19. The proposed powers will be subject to new procedures, limitations and safeguards to enhance transparency and scrutiny of public health directions, including potential limitations on human rights.

Amendments to the *Public Health Act 2005*

The Bill ensures the most critical public health measures needed to respond to the ongoing risks of COVID-19 are available as Queensland moves to the next phase of its public health response, the ongoing management of COVID-19. It does this by amending the Public Health Act to provide temporary, targeted powers to deal with COVID-19 outside of a declared public health emergency.

Specifically, the amendments supplement the existing framework in chapter 3 of the Public Health Act for the management of controlled notifiable conditions. The amendments insert limited and temporary powers to make and enforce public health directions targeted at maintaining health system capacity and protecting vulnerable members of the community as COVID-19 continues to circulate in Queensland. The powers will also enable the Chief Health Officer to issue public health directions to implement national decisions and expert public health advice.

Public health directions

The Bill provides limited, temporary power for the Chief Health Officer to give public health directions where threshold conditions are met. The direction-making power expires on 31 October 2023.

The impact of the COVID-19 pandemic is unprecedented, and the trajectory of COVID-19 remains unpredictable. New variants are emerging with increasing rapidity, and with uncertain characteristics in terms of transmissibility, severity of outcomes, and their ability to escape immunity from vaccination and prior infection.

The directions that the Chief Health Officer will have the power to make are those that are considered likely to be the most effective in responding to and managing future outbreaks that present a serious risk to the health system or the community. These have been identified based on the current restrictions that are in place, and the latest health and medical advice from Queensland and Australian experts. These direction powers are limited to mask mandates in stated circumstances, time-limited isolation and quarantine for diagnosed cases and symptomatic close contacts, and vaccination requirements for workers in specified settings.

These direction-making powers can only be exercised if the Chief Health Officer is reasonably satisfied the direction is necessary to respond to or prevent a serious risk to the public health system or community from COVID-19, or to give effect to a decision or agreement of National Cabinet or advice or recommendations from a COVID-19 advisory body. Failure to comply with a direction is an offence.

The Bill preserves that the State is not liable to pay compensation for loss or damage suffered by persons due to the exercise of COVID-19 measures, as is the case under the current emergency framework.¹

As with public health directions given under the current emergency framework, the Chief Health Officer will be required to revoke a public health direction as soon as it is no longer needed.

¹ Section 366 of the Public Health Act.

As an additional safeguard under the stepped-down approach to managing COVID-19, the Bill provides that a public health direction expires 90 days after it takes effect. This ensures directions are re-considered and updated as necessary to respond to the fluctuating risks of COVID-19 in Queensland.

Enforcement powers of authorised persons

Part 3 of the Bill provides limited powers to authorised persons to enforce compliance with public health directions. These powers supplement the existing powers of authorised persons for the management of controlled notifiable conditions.

Enforcement action will include, firstly, giving a person the opportunity to comply with a direction voluntarily. If this does not occur, an authorised person may require a person to comply (i.e., require a person to go to and stay at a stated place or leave a workplace). If necessary, the authorised person may enforce the public health direction with the help and force reasonable in the circumstances.

In exercising these powers, proposed new sections 142N and 142O will permit authorised persons to enter a place where an authorised person reasonably suspects a person may be contravening a public health direction, without a warrant or consent, and seize evidence. However, these sections do not permit an authorised person to enter a dwelling or a place where health procedures or consultations are being undertaken. Also, the power to seize evidence applies only to evidence that a person has committed the offence of contravening a public health direction under new section 142K.

These amendments will ensure that authorised persons can respond swiftly and effectively to serious public health risks for COVID-19 and ensure compliance with directions.

Enforcement through the State Penalties Enforcement Regulation 2014

Part 4 of the Bill amends the *State Penalties Enforcement Regulation 2014* to make failure to comply with a public health direction an offence for which a penalty infringement notice (PIN) may be issued under the *State Penalties Enforcement Act 1999*.

PIN offences are an alternative to prosecution through the court system. A person who is issued a PIN for an offence may discharge their liability by payment of a financial penalty. There is no requirement for the offence to be prosecuted through the court system, although a person may elect to go to court to challenge the offence or the penalty imposed by the PIN.

Scrutiny and transparency of public health directions

The Bill includes measures to increase Parliamentary scrutiny and transparency of decision-making for public health directions.

Part 3, new proposed section 142L, applies particular provisions of the Human Rights Act, *Parliament of Queensland Act 2001* and *Statutory Instruments Act 1992* to public health directions as if they were subordinate legislation. The application of these provisions means that public health directions given by the Chief Health Officer must be tabled in Parliament and will be subject to scrutiny by a Parliamentary Committee and disallowance.

A *justification statement* must be tabled in Parliament with a public health direction. This statement, defined in proposed new section 142C, will give a summary of the Chief Health Officer's reasons for giving the direction and state whether the Chief Health Officer considers

the direction is *compatible with human rights*, within the meaning given by the Human Rights Act.

Part 3, new proposed section 142H, will also require the Chief Health Officer to publish the justification statement within five days after giving a public health direction.

By treating public health directions like subordinate legislation for purposes of these provisions, the Bill elevates the consideration of human rights and increases the transparency and accountability of public health directions. The amendments expose public health directions to effective scrutiny through the Parliamentary Committee process.

Applying these provisions to public health directions is appropriate given the potential impacts of a direction on a person's human rights. It supplements the existing protections under the Human Rights Act, by extending the framework applicable to subordinate legislation to public health directions. This recognises the appropriate accountability of Parliament for the ongoing management of COVID-19.

Amendments to the *Corrective Services Act 2006*

Part 2 of the Bill extends the following temporary legislative measures in chapter 6, part 15A of the *Corrective Services Act 2006* for up to twelve months:

- two modifications to the power to make an emergency declaration under section 268 of the *Corrective Services Act* that provide for a declaration to be made:
 - about any corrective services facility, not just a prison, so that a declaration can be made about the Helana Jones Centre (a community corrections centre) and work camps;
 - for up to 90 days, instead of three days as is ordinarily required by the Act; and
- authorisation for Queensland Corrective Services (QCS) to temperature check and refuse entry to any person exhibiting COVID-19 symptoms.

This extension will ensure QCS can continue to take action to protect vulnerable prisoners, and its workforce, by managing COVID-19 in the correctional environment with control measures that have proven to be effective and are clearly authorised under law.

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:

- Right to equality before the law (section 15)
- Right to life (section 16)
- Right to protection from cruel, inhuman or degrading treatment (section 17(b))
- Right not to be subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent (section 17(c))
- Freedom of movement (section 19)
- Freedom of thought, conscience, religion and belief (section 20)
- Freedom of expression (section 21)
- Peaceful assembly and freedom of association (section 22)
- Taking part in public life (section 23)

- Right to property (section 24)
- Privacy and reputation (section 25)
- Protection of families (section 26(1))
- Protection of children (section 26(2))
- Cultural rights – generally (section 27)
- Cultural rights – Aboriginal peoples and Torres Strait Islander peoples (section 28)
- Right to liberty and security of person (section 29)
- Humane treatment when deprived of liberty (section 30)
- Fair hearing (section 31)
- Right to education (section 36)
- Right to health services (section 37)

Parts of the Bill that engage relevant human rights

Section 15 – Right to equality before the law

Part 3, proposed sections 142E, 142F, and 142Q of the Bill, are relevant to this right. These sections authorise the Chief Health Officer to give a public health direction and provide authorised persons with powers to enforce public health directions.

Section 16 – Right to life

Parts 3 and 4 of the Bill are relevant to this right. Part 3 authorises the Chief Health Officer to give a public health direction and provides authorised persons with powers to enforce public health directions. Part 4 provides that a failure to comply with a public health direction is an offence for which a PIN may be issued under the State Penalties Enforcement Act.

Section 17(b) – Right to protection from cruel, inhuman or degrading treatment

Part 2 of the Bill is relevant to this right. Part 2 extends temporary modifications to the chief executive's power to make a declaration of emergency for corrective services facilities under the Corrective Services Act.

Section 17(c) – Right not to be subjected to medical treatment without full, free and informed consent

Part 2 of the Bill is relevant to this right. Part 2 extends a head of power under the Corrective Services Act to screen persons entering corrective services facilities for COVID-19 symptoms.

Part 3, proposed sections 142E(1)(d) and 142F, are also relevant to this right. These sections authorise the Chief Health Officer to give a public health direction prohibiting workers from entering or remaining at stated workplaces if they have not been vaccinated against COVID-19, and other related requirements.

Sections 19 – Freedom of movement

Part 2 of the Bill is relevant to this right. Part 2 extends temporary modifications to the chief executive's power to make a declaration of emergency for corrective services facilities under the Corrective Services Act and extends a head of power to screen persons entering facilities for COVID-19 symptoms.

Part 3, proposed sections 142E(1)(b) and (c) and 142F, are also relevant to this right. These sections authorise the Chief Health Officer to give a public health direction requiring isolation of persons who test positive for COVID-19 or quarantine of persons who are symptomatic close contacts, and related requirements.

Section 20 – Freedom of thought, conscience, religion and belief

Part 3, proposed sections 142E and 142F, are relevant to this right. These sections authorise the Chief Health Officer to give a public health direction, including requirements relating to the power to make the direction.

Section 21 – Freedom of expression

Part 3, proposed sections 142E and 142F, are relevant to this right. These sections authorise the Chief Health Officer to give a public health direction, including requirements related to the power to make the direction.

Section 22 – Peaceful assembly and freedom of association

Part 2 of the Bill is relevant to the right to freedom of association. Part 2 extends temporary modifications to the chief executive's power to make a declaration of emergency for corrective services facilities under the Corrective Services Act.

Part 3, proposed sections 142E(1)(b) and (c) and 142F, are also relevant to this right. These sections authorise the Chief Health Officer to give a public health direction requiring isolation of persons who test positive for COVID-19 or quarantine of persons who are symptomatic close contacts, and section 142F includes related requirements.

Section 23 – Taking part in public life

Part 3, proposed sections 142E(1)(b), (c) and (d) and 142F, are relevant to this right. These sections authorise the Chief Health Officer to give a public health direction requiring isolation of persons who test positive for COVID-19, quarantine of persons who are symptomatic close contacts, vaccination against COVID-19 for workers to enter or remain at stated workplaces, and related requirements.

Section 24 – Right to property

Part 2 of the Bill is relevant to this right. Part 2 extends temporary modifications to the chief executive's power to make a declaration of emergency for corrective services facilities under the Corrective Services Act.

Part 3, proposed sections 142E(1)(b) and (c), 142F, and 142R, are relevant to this right.

Sections 142E(1)(b) and (c) authorise the Chief Health Officer to give a public health direction requiring isolation of persons who test positive for COVID-19 or quarantine of persons who are symptomatic close contacts, and section 142F includes related requirements.

Proposed section 142R removes an entitlement to compensation for losses or damages incurred because of an exercise of a power in relation to a public health direction for COVID-19. The

scope of the right to property does not include a right to compensation if a person is deprived of their property.² As such, the right is not engaged by this provision.

Section 25 – Privacy and reputation

Part 2 of the Bill is relevant to this right. Part 2 extends temporary modifications to the chief executive's power to make a declaration of emergency for corrective services facilities under the Corrective Services Act and extends a head of power to screen persons entering facilities for COVID-19 symptoms.

Part 3 is also relevant to this right. Part 3 authorises the Chief Health Officer to give a public health direction and provides authorised persons with powers to enforce public health directions.

Section 26(1) – Protection of families

Part 3 is relevant to this right. Part 3 authorises the Chief Health Officer to give a public health direction, including requirements relating to the power to make the direction, and provides authorised persons with enforcement powers.

Section 26(2) – Protection of children

Part 3 is relevant to this right. Part 3 authorises the Chief Health Officer to give a public health direction, including requirements relating to the power to make the direction, and provides authorised persons with enforcement powers

Section 27 – Cultural rights – generally

Part 3, proposed sections 142E and 142F, are relevant to this right. These sections authorise the Chief Health Officer to give a public health direction, including requirements relating to the power to make the direction.

Section 28 – Cultural rights – Aboriginal peoples and Torres Strait Islander peoples

Part 2 of the Bill is relevant to this right. Part 2 extends temporary modifications to the chief executive's power to make a declaration of emergency for corrective services facilities under the Corrective Services Act.

Part 3, proposed sections 142E and 142F, are also relevant to this right. These sections authorise the Chief Health Officer to give a public health direction, including related requirements.

Section 29 – Right to liberty and security of person

Part 3, proposed sections 142E(1)(b) and (c) and 142F, are relevant to this right. These sections authorise the Chief Health Officer to give a public health direction requiring isolation of persons who test positive for COVID-19 or quarantine of persons who are symptomatic close contacts, and related requirements.

² Explanatory Notes, Human Rights Bill 2018 (QLD), page 22. See also *Halwood Corp (in liq) v Roads Corp* [2008] VSC 28.

Section 30 – Humane treatment when deprived of liberty

Part 2 of the Bill is relevant to this right. Part 2 extends temporary modifications to the chief executive's power to make a declaration of emergency for corrective services facilities under the Corrective Services Act.

Part 3, proposed sections 142E(1)(b) and (c) and 142F, are also relevant to this right. These sections authorise the Chief Health Officer to give a public health direction requiring isolation of persons who test positive for COVID-19 or quarantine of persons who are symptomatic close contacts, and related requirements.

Section 31 – Fair hearing

Part 4 is relevant to this right. Part 4 amends the State Penalties Enforcement Regulation to make the failure to comply with a public health direction an offence for which a PIN may be issued under the State Penalties Enforcement Act.

Section 36 – Right to education

Part 2 of the Bill is relevant to this right. Part 2 extends temporary modifications to the chief executive's power to make a declaration of emergency for corrective services facilities under the Corrective Services Act.

Part 3, proposed sections 142E(1)(b) and (c) and 142F, are also relevant to this right. These sections authorise the Chief Health Officer to give a public health direction requiring isolation of persons who test positive for COVID-19 or quarantine of persons who are symptomatic close contacts, and related requirements.

Section 37 – Right to health services

Part 3, proposed sections 142E(1)(b) and (c) and 142F, are relevant to this right. These sections authorise the Chief Health Officer to give a public health direction requiring isolation of persons who test positive for COVID-19 or quarantine of persons who are symptomatic close contacts, and related requirements.

Human rights promoted by the Bill

Section 16 – Right to life

Section 16 of the Human Rights Act provides that every person has the right to life and has the right not to be arbitrarily deprived of life. This imposes substantive and procedural obligations on the State to take appropriate steps and adopt positive measures to protect life. The protective obligation extends to requiring authorities to put in place measures that would protect an individual from real and immediate risks to their life.

The UN Human Rights Committee has commented that the right to life should not be interpreted narrowly. They interpret the right as placing positive obligations on States to 'take appropriate measures to address the general conditions in society that may give rise to direct

threats to life’, including the prevalence of life-threatening diseases, and to ensure appropriate access to healthcare.³

The Bill promotes the right to life by inserting powers to support the Queensland Government’s public health response to COVID-19 for twelve months following the expiry of the temporary emergency legislative framework.

The Bill enables the Chief Health Officer to issue limited types of public health directions where it is reasonably believed the direction is necessary to:

- prevent or respond to a serious risk to the public health system or the community as a result of COVID-19, or
- give effect to national advice or a national decision, including a decision or agreement of National Cabinet, or advice or recommendations of a national COVID-19 advisory body, such as the Australian Health Protection Principal Committee (AHPPC) or the Australian Technical Advisory Group on Immunisation.

COVID-19 is a life-threatening virus, particularly for vulnerable members of the community. As has been seen in other jurisdictions and internationally, the unrestricted spread of COVID-19 also has the capacity to place tremendous strain on hospital and health systems, compromising the availability of quality care for the broader community.

The Bill further promotes the right to life by continuing temporary amendments to the Corrective Services Act which enable QCS to adopt measures within corrective services facilities that limit the spread of COVID-19 and protect the health and safety of staff, prisoners and visitors.

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

Amendments to the Public Health Act

Section 13 of the Human Rights Act provides that ‘a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.’ It also sets out factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

This section contains an assessment of whether any limitations on human rights stemming from the amendments to the Public Health Act are reasonable and justifiable. In this regard, it is important to note the Bill does not directly impose any requirements or restrictions, including in relation to mask-wearing, isolation or quarantine, or vaccination of workers in particular settings. Instead, it authorises the Chief Health Officer to give directions about these matters only if certain circumstances exist that justify the exercise of this power at the time the direction is issued. Based on experience with responding to COVID-19 to date, the need for, and nature of, specific directions is highly context-dependent, requiring an assessment of the risks and other variables at the time the direction is made. This is because the risks to the health system

³ Human Rights Committee, General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights (the right to life), 124th sess (8 October to 2 November 2018).

and the community fluctuate, sometimes quite rapidly, during and between successive waves of COVID-19. Further the impacts of waning immunity and repeated infection with COVID-19 are not yet fully understood, nor are the potential long-term health impacts of COVID-19, which could change the context in which directions are given.

The Bill requires the Chief Health Officer to publish a justification statement for each public health direction given, and to table this statement in Parliament. The justification statement is to include an assessment of the direction's compatibility with human rights.

The analysis set out below focusses on the powers provided by the Bill. Specific analysis of the point-in-time restrictions in any directions given under the Bill will be provided in the justification statements accompanying those directions. The 90-day expiry of public health directions will ensure the continual re-evaluation of the data underpinning a direction to appropriately respond to changing risk profiles.

(a) the nature of the right

Right to recognition and equality before the law

Section 15 of the Human Rights Act provides that every person is entitled to equal protection of the law without discrimination and has the right to enjoy their human rights without discrimination. This requires public entities, as well as courts and tribunals, to treat people equally when applying the law and to not apply the law in a discriminatory or arbitrary way.

Discrimination includes, but is not limited to, direct and indirect discrimination as defined in the *Anti-Discrimination Act 1991*. Direct discrimination occurs where a person with a particular attribute is treated unfavourably because of that attribute. Indirect discrimination occurs where there is a requirement, condition or practice imposed that is the same for everyone, but unreasonably disadvantages a person because they have one or more attributes.

The public health direction power is limited to directions about mask wearing, isolation and quarantine requirements for positive cases or symptomatic close contacts, and vaccination-related requirements for workers. These are the restrictions most likely to be needed over the next twelve months as Queensland continues the transition to living with COVID-19.

The requirements in a direction may, directly or indirectly, discriminate against a person. For example, an isolation direction, which limits freedom of movement, may disproportionately affect access to services by people with a disability. However, in practice, any restriction on the movement of people made under a direction has included an exemption for a person to leave their principal place of residence or move freely to obtain medical treatment to preserve the person's quality of life. This exemption has allowed people requiring medical attention or other forms of care or support, such as disability services, to access that care or support.

A vaccination direction may prohibit people working in certain high-risk places, such as residential aged care and shared disability accommodation, from attending a workplace unless they are vaccinated against COVID-19. However, in practice public health directions have included exemptions from being vaccinated, including if a person has a recognised medical contraindication. Higher rates of vaccinations, particularly in vulnerable settings, also provide increased levels of protection for vulnerable cohorts including the elderly and immunocompromised, and reduce workforce impacts to maintain continuity of care.

A mask wearing direction could also result in discrimination if a person is treated unreasonably if they are not wearing, or cannot wear, a mask because of a protected attribute, such as a disability or age. In practice, a public health direction requiring mask wearing will have exceptions, such as for people who have a disability, medical condition or illness or other reason that means they cannot wear a mask. This means the mask wearing requirement does not disproportionately impact on certain classes of person.

The power may only be exercised where the Chief Health Officer reasonably believes a direction is necessary to prevent or respond to a serious risk to the public health system or the community as a result of COVID-19, or to give effect to a decision or agreement by National Cabinet or advice or recommendations of a COVID-19 advisory body such as AHPPC.

Right not to be subjected to medical treatment without consent

Section 17(c) of the Human Rights Act provides that a person must not be subjected to medical or scientific experimentation or treatment without the person's full, free and informed consent.

The Bill authorises the Chief Health Officer to make a direction prohibiting workers in specific settings, such as aged care facilities, from attending the workplace if they are not vaccinated against COVID-19. While the Bill will allow a direction to be made that prevents workers from entering a specified setting for work if they are not vaccinated, the power does not extend to compelling anyone to be vaccinated without their consent. Arguably, this means that the right in section 17(c) is not limited.⁴

However, international human rights cases suggest the right may be limited in circumstances where a person is left with little practical choice but to receive the treatment.⁵ Depending on the requirements of a direction, the practical effect may be to require a person to choose between being vaccinated or to not attend a workplace, which may put the person at risk of losing their employment. It is possible that the proposed direction-making power will leave people with little practical choice but to receive a vaccine, so that while consent is given, that consent may not be full and free for the purposes of section 17(c).

If the right is limited, there are safeguards in place that mitigate the human rights impact. For example, vaccination requirements to date have been subject to exceptions and consideration of alternative arrangements in specified circumstances. The Bill will also require the Chief Health Officer to publish a justification statement providing a summary of the rationale and assessment of compatibility with human rights for each direction, ensuring transparent communication about the consideration of the impact on this right and possible other least restrictive options that formed part of the decision to issue the direction. In addition, a worker who is required to be vaccinated under a public health direction has a range of options available and will be required to give informed consent to being vaccinated before the vaccination can occur.

Freedom of movement

Section 19 of the Human Rights Act provides that every person lawfully within Queensland has the right to move freely within Queensland, enter or leave Queensland, and choose where they live. The right means that a person cannot be arbitrarily forced to remain in, or move to

⁴ *Kassam v Hazzard* [2021] NSWSC 1320, [55]-[70].

⁵ *GF v Minister of COVID-19 Response* [2021] NZHC 2526, [70]-[72].

or from, a particular place. The right also includes the freedom to choose where to live, and freedom from physical and procedural barriers, such as requiring permission before entering a public park or participating in a public demonstration in a public place. The right may be engaged where a public entity affects a person's freedom of movement.

The power of the Chief Health Officer to issue public health directions will limit the right to freedom of movement by authorising the Chief Health Officer to require persons to isolate for periods of up to seven days, if necessary, to prevent or respond to a serious risk posed to the public health system or community as a result of COVID-19 or to give effect to decisions or agreements of National Cabinet or advice or recommendations of national COVID-19 advisory bodies. In limited circumstances, such as if a person who is in isolation continues to experience fever or acute respiratory symptoms of COVID-19 at the end of the prescribed isolation period, or if a person who is required to quarantine is exposed to another positive case of COVID-19 during the prescribed quarantine period, the Bill permits a direction to include requirements for an additional isolation or quarantine period of up to seven days.

Separating persons with COVID-19 or that have a high likelihood of having COVID-19 has been vital to managing the spread of the virus in the community. Isolation and quarantine are key measures in Queensland's current approach to managing diagnosed cases and close contacts based on national guidelines developed by the AHPPC. Given the ongoing limited treatments for COVID-19 and the increase in vaccine- and immunity-resistant strains, restricting movement continues to be a necessary measure to manage the risks posed by persons who have a high likelihood of transmitting the virus to others.

Freedom of thought, conscience, religion and belief; Freedom of expression; Peaceful assembly and freedom of association; Cultural rights – generally; Cultural rights – Aboriginal peoples and Torres Strait Islander peoples

The power of the Chief Health Officer to issue public health directions may restrict the ability of persons to leave their homes or other premises, or to freely move about and engage in activities if required to isolate. These restrictions may limit the rights of persons to engage and gather with others in the community.

Section 20(1)(b) of the Human Rights Act provides that every person has the right to freedom of thought, conscience, religion and belief, including the freedom to demonstrate the person's religion or belief either individually or as part of a community, in public or in private. The right to *hold* a belief is so important that it is an absolute right; however, limitations on how a person *manifests* their belief can be justified. A direction to isolate or quarantine limits a person's ability to publicly demonstrate and practice their religion or beliefs.

Section 21(2) of the Human Rights Act provides that every person has the freedom to seek, receive and impart information and ideas of all kinds. It protects almost all kinds of expression if it conveys or attempts to convey a meaning. Ideas and opinions can be expressed in various ways, including in writing, through art, or orally. Restricting a person's movements and contact with others and requiring a person to wear a mask in particular settings may limit the ways in which they can express their opinions and ideas.

Section 22(1) of the Human Rights Act provides for the right of individuals to gather for a common purpose or to pursue common goals. It protects both the participants and organisers of peaceful assemblies. Requiring a person to isolate limits the ability for a person to peacefully assemble with others for a common purpose.

Section 27 of the Human Rights Act protects the rights of all people with particular cultural, religious, racial and linguistic backgrounds to enjoy their culture, declare and practice their religion, and use their language in the community. It promotes the right to practise and maintain shared traditions and activities and recognises that enjoying one's culture is intertwined with the capacity to do so in connection with others from the same cultural background. Requiring a person to isolate or wear a mask may limit a person's ability to engage with others who share their cultural background.

In addition to the general cultural rights, section 28 of the Human Rights Act recognises that Aboriginal peoples and Torres Strait Islander peoples hold distinct cultural rights as Australia's First Peoples. They have the right to enjoy, maintain, control, protect and develop their culture, language and kinship ties with other members of their community. The right also protects Aboriginal people's and Torres Strait Islander people's right to maintain and strengthen their distinct spiritual relationship with the land, territories, waters, coastal seas and other resources, and to conserve and protect the environment. Directions to require self-isolation may limit the ability of Aboriginal people and Torres Strait Islander people to engage with community and their traditionally owned or otherwise occupied lands and waters.

The limitations on these human rights because of a period of isolation or quarantine is temporary and directly linked to the restriction on a person's movement. Isolation or quarantine requirements also do not prevent people from engaging with others or holding or conveying thoughts and beliefs in ways that do not involve contact with others, such as through telephone or email contact. As stated above, restricting the movement of persons with COVID-19 and symptomatic close contacts has been vital to managing the spread of the virus in the community.

Right to privacy and reputation

Section 25 of the Human Rights Act provides that a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with and not to have the person's reputation unlawfully attacked.

The amendments to the Public Health Act engage the right to privacy, which is broadly construed and includes a specific right against interference with a person's physical integrity as well as a person's personal information. The Bill engages the right to privacy by authorising the Chief Health Officer to issue public health directions that may interfere with a person's bodily autonomy. For example, isolation or quarantine requirements, vaccine requirements or requiring a person wear a mask in particular settings. A direction can also include requirements for certain workers to provide evidence of their vaccination status to employers, and for operators of stated workplaces to keep records of workers' vaccination status, and to produce such records to an authorised person for inspection on request.

The right to privacy is also engaged by the amendments providing authorised persons with powers to ensure compliance with public health directions. These include the power to enter a place, to require a person to comply with a direction, to seize evidence, and to use force that is reasonable in the circumstances.

However, the right to privacy is subject to an internal limitation in that it applies only to interferences with privacy that are 'unlawful' or 'arbitrary'. This internal limitation applies here, because the Bill only authorises the making of a lawful direction predicated on a reasonable belief that the restriction is necessary to respond to a serious risk posed to the public health system or community as a result of COVID-19, or to give effect to a decision or

agreement of National Cabinet or advice or recommendations of a COVID-19 advisory body for a nationally consistent response to managing the threat of COVID-19.

The powers available to an authorised person are also predicated on the lawful making of a public health direction and are subject to safeguards including a requirement that a person be offered the opportunity to voluntarily comply before enforcement powers are used, and, where reasonably practicable, the occupier will be informed before a place is entered. The Bill provides authorised persons with the minimum powers necessary to ensure compliance with a public health direction.

Right to property

Section 24 of the Human Rights Act provides that all persons have the right to own property alone or in association with others and must not be arbitrarily deprived of their property. Property includes real and personal property (e.g. land, money, chattels) and is generally interpreted liberally to encompass economic interests in a broad sense.⁶ Similarly, deprivation is construed broadly to include the substantial restriction on a person's use or enjoyment of their property.

Requirements to isolate or quarantine may restrict a person's use of private property, albeit temporarily. Further, this human right is also engaged by virtue of the potential loss to workers or business owners due to changes in the delivery of services if workers or business owners are required to isolate or quarantine for up to seven days.

However, given the need to protect human life and limit the risks of COVID-19, it is considered that the temporary limitation on a person's right to property when addressing the public health risks through a requirement to isolate or quarantine, is not an arbitrary limitation on human rights.

Taking part in public life

Section 23 of the Human Rights Act provides that every person in Queensland has the right to take part in public life. This includes the right to participate in the conduct of public affairs and the right to vote and be elected at State and local government elections. Being part of community consultations with government, attending local council meetings, participating in public debate, and taking part in referendums or other electoral processes are important aspects of taking part in public life.

A person who is subject to an isolation or quarantine direction may be temporarily limited in the ways in which they can take part in public life.

A requirement to be vaccinated in order to work in a setting operated by government may limit the way in which a person can take part in public life.

Right to protection of families and children

Section 26 of the Human Rights Act recognises families as the fundamental unit of society entitled to protection. This right encompasses more than non-interference; it is a guarantee of institutional protection of the family by society and the state. 'Family' is interpreted broadly,

⁶ See *PJB v Melbourne Health (Patrick's Case)* (2011) 39 VR 373; [2011] VSC 327 [87].

extending to different cultural understandings of family. Internal limitations of lawfulness and arbitrariness apply to the right of protection of the family.

Physical separation of families could occur under the amendments made to the Public Health Act if, for example, a person is required to isolate. This limitation would be temporary and would not restrict other means of communication and engagement among family members, for example through phone calls, video conferencing or social media. The limitation on the right to protection of families would also not be arbitrary, as the actions would be taken in an effort to protect the health and safety of family members and the wider community.

Every child has the right, without discrimination, to the protection that is in their best interests as a child. The right recognises that special measures to protect children are necessary given their vulnerability due to age. The best interests of the child should be considered in all actions affecting a child, aimed at ensuring both the full and effective enjoyment of all the child's human rights and the holistic development of the child. Best interests depend on the individual circumstances of the child.

A direction to isolate has the potential to impact children through, for example, temporarily restricting their movement, restricting the movement of family or other contacts, or restricting their access to certain facilities or events. Also, directions may not consider the child's views or give their views due weight, which does not respect their capacity to influence the determination of their best interests. However, there are other aspects of the child's best interests which weigh in favour of the amendments, such as their right to life and their health and wellbeing.

Right to liberty and security of person

Section 29 of the Human Rights Act provides that every person in Queensland has the right to liberty and security and must not be subjected to arbitrary arrest or detention or deprived of their liberty except on grounds, and in accordance with procedures, established by law. The concept of detention includes not only detention in a prison, but all forms of detention, including for the purposes of medical treatment.

The Bill authorises the Chief Health Officer to issue isolation and quarantine directions that may restrict the ability of persons to leave their homes or other premises, albeit temporarily. A direction to isolate at home or at another premises may limit the right to liberty and security because preventing a person from leaving their homes or other premises interferes with their liberty.

This right is subject to a number of internal limitations and qualifications. Relevantly, detention must not be arbitrary in the sense that it must not be capricious, unpredictable or unjust or otherwise disproportionate to the legitimate aim that is sought. The isolation direction power is clearly defined and subject to limits, including that a direction can only apply to a person who has tested positive to COVID-19 or is a symptomatic close contact. Further, the direction can only be made if reasonably believed necessary to prevent or respond to a serious risk posed to the public health system or community as a result of COVID-19 or to give effect to decisions or agreements of National Cabinet or advice or recommendations of national COVID-19 advisory bodies. In addition, an isolation period in a direction is limited to a maximum period of seven days.

In limited circumstances, such as if a person who is in isolation continues to experience fever or acute respiratory symptoms of COVID-19 at the end of the prescribed isolation period, or if

a person who is required to quarantine is exposed to another positive case of COVID-19 during the prescribed quarantine period, the Bill permits a direction to require an additional isolation or quarantine period of up to seven days. This is consistent with Queensland's current approach to managing diagnosed cases and close contacts based on national guidelines developed by AHPPC.

The right to liberty and security also incorporates a number of procedural elements, including that a person who is required to isolate must be informed at the time of isolation of the reason for detention and that a detained person is able to apply to a magistrate for a declaration or order regarding the lawfulness of the person's isolation. These procedural aspects of the right will continue to be limited in relation to the making of isolation directions by the Chief Health Officer as appeal rights are not included. However, new procedural aspects have been built into the Bill, including that public health directions will automatically expire after 90 days. After 90 days, the Chief Health Officer will need to consider whether to make a new direction in the same terms, which would be subject to the same procedural safeguards as the original direction, including the requirement to publish a justification statement for the direction—which must explain the rationale for the direction and consider its compatibility with human rights—and to table the direction in Parliament within 21 days so that it may be disallowed.

In addition, the Bill provides that a direction must be revoked as soon as reasonably practicable after the Chief Health Officer forms the belief that the public health direction no longer satisfies the threshold conditions for making a direction in section 142E(3). This will mean the Chief Health Officer will need to revoke a direction as soon as it is reasonably believed it is not needed to prevent or respond to a serious risk to the public health system or community, or to give effect to a decision or agreement of National Cabinet or advice or recommendation of a COVID-19 advisory body. This procedural requirement provides protection against ongoing limitations to the right to liberty and security of the person.

Humane treatment when deprived of liberty

Section 30 of the Human Rights Act provides that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. The right to humane treatment means that people in detention should not be subject to hardship or constraint in addition to the deprivation of liberty. However, some rights are unavoidably restricted in a closed environment, for example, freedom of movement, elements of freedom of expression and some elements of privacy.

The Bill will authorise the Chief Health Officer to direct persons to isolate or quarantine for a period of up to seven days. The isolation or quarantine requirement engages the human right of humane treatment when deprived of liberty.

In limited circumstances, such as if a person who is in isolation continues to experience fever or acute respiratory symptoms of COVID-19 at the end of the prescribed isolation period, or if a person who is required to quarantine is exposed to another positive case of COVID-19 during the prescribed quarantine period, the Bill permits a direction to require an additional isolation or quarantine period of up to seven days. This is consistent with Queensland's current approach to managing diagnosed cases and close contacts based on national guidelines developed by the AHPPC.

Like all rights in the Human Rights Act, the right to humane treatment when deprived of liberty can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom. In addition, isolation and quarantine are now

undertaken in a person's home or other premises determined by the person and persons are permitted to leave the premises or to permit others to enter the premises for essential medical and humanitarian purposes.

Right to fair hearing

Section 31 of the Human Rights Act provides that a person charged with a criminal offence has the right to have the charge decided by a competent, independent and impartial court or tribunal after a fair and public hearing. This right affirms the right of all individuals to procedural fairness and protects natural justice.

The Bill may limit this right because a person issued with a PIN is issued a penalty for committing an offence without having a court or tribunal decide the charge. However, a person may choose to challenge the offence or penalty imposed in a PIN in court where they will receive the benefit of a fair hearing. As such, any limitation on this right is minor in nature.

Rights in criminal proceedings

Section 32 of the Human Rights Act enshrines the rights of people charged with criminal offences. Rights in criminal proceedings include the right to be presumed innocent until proven guilty, the right to be tried in person and the right to examine witnesses. This imposes on the prosecution the onus of proving the offence and guarantees that guilt cannot be determined until the offence has been proved beyond reasonable doubt.

Part 4 of the Bill may limit this right because a person issued with a PIN becomes liable for a penalty for committing an offence without a trial and the rights that accompany a criminal proceeding. However, a person may choose to challenge the offence or penalty imposed in a PIN in court where they will receive the benefit of a trial and the rights that accompany a criminal proceeding. Further, if a PIN is issued for an offence, no finding of guilt is made in respect to the alleged offence. As such, any limitation on this right is minor in nature.

Right to education

Section 36 of the Human Rights Act provides that every child has the right to access primary and secondary education appropriate to their needs. The right to education also says that every person has the right to have access, based on their abilities, to equally accessible further vocational education and training. The right to education is intended to be interpreted in line with the *Education (General Provisions) Act 2006* and to provide rights in relation to aspects of Queensland's responsibilities for education service delivery. Internationally, this right has been interpreted as requiring that education be accessible to all individuals without discrimination.

Individuals may be temporarily restricted from attending schools or other educational institutions if they are subject to a direction to isolate in order to prevent or respond to a serious risk posed to the public health system or community as a result of COVID-19, or to give effect to decisions or agreements of National Cabinet or advice or recommendations of national COVID-19 advisory bodies. However, online learning or electronic delivery of educational opportunities may be offered to students isolating at home.

Right to health services

Section 37 of the Human Rights Act provides that every person has the right to access health services without discrimination and must not be refused necessary emergency medical

treatment. The amendments do not limit or place any impediments on a person's right to receive health services. If a person is required to undertake isolation or quarantine, they will be provided with the health services they require.

The amendments to the Public Health Act may limit the right to freedom of movement by authorising the Chief Health Officer to direct persons to isolate for up to seven days if the person tests positive to COVID-19 or is a close contact with symptoms. As a consequence, there may be restrictions on a person's ability to access non-urgent health and medical services temporarily while in isolation.

In practice, any restriction on the movement of people includes an exemption for a person to leave their principal place of residence or move freely to obtain medical treatment to preserve the person's quality of life. This measure does not extend to cosmetic or non-urgent medical treatments but ensures access for people requiring medical attention or other forms of care, such as people with disability.

As such, this right is not limited by the amendments.

(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

Protecting the health and safety of the public is a fundamental responsibility of government and is consistent with a free and democratic society based on human dignity, equality and freedom. The purpose of the limitations on human rights in the Bill is to protect Queenslanders from serious risks to health and safety, including the potential for loss of life that could occur without an effective public health response to COVID-19.

Protecting public health is clearly a legitimate objective.⁷ For example, vaccines protect the community as a whole by increasing protection and reducing the severity of the impact of COVID-19 in the community.

The focus of the Bill is on ensuring the most critical measures needed to respond to COVID-19 are available. The temporary legislative framework supporting Queensland's response to the COVID-19 public health emergency will expire on 31 October 2022, or when the Minister for Health and Ambulance Services ends the public health emergency declaration, whichever is earlier. On expiry, the legislative framework will revert to its pre-pandemic provisions, which do not provide the Chief Health Officer with any powers to respond to a serious public health risk.

While the COVID-19 pandemic persists, with COVID-19 circulating widely in the community, targeted measures are needed to support an ongoing proportionate response to serious risks posed by COVID-19 as they emerge. The amendments reflect that the risks of COVID-19 are scaling up and down as transmission continues and new variants emerge.

⁷ See, for example, *Boffa v San Marino* (1998) 92 Eur Comm HR 27.

The targeted powers proposed in the Bill are proportionate to the risk posed by COVID-19 based on the current understanding of the severity of the disease, impact of vaccination on severe disease, and ability of the health system to manage outbreaks within overall system capacity. While it is difficult to predict the timing and nature of emerging variants, the proposed targeted powers provide the mechanisms most likely to be effective in managing ongoing COVID-19 risks in the twelve months following expiry of the temporary legislative framework.

Isolation, masks and vaccination are the most effective measures at protecting the health system from the uncontrolled and unmanageable spread of COVID-19. They are also crucial measures for protecting vulnerable cohorts from COVID-19, which continues to represent a serious public health risk to these groups even with high rates of vaccination.

(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 of human rights is necessary to ensure that public health officials can implement effective ongoing measures to respond to the COVID-19 pandemic. The limitations of human rights in the Bill are incidental to the grant of powers to the Chief Health Officer to issue public health directions in relation to vaccination, isolation and mask wearing requirements.

The public health direction power is targeted to those factors that are most likely needed over the next twelve months as Queensland continues the transition to living with COVID-19:

- *Isolation and quarantine* – The ability to isolate or quarantine persons with COVID-19 or their symptomatic close contacts prevents people who have the virus, or are at high risk of having the virus, from further spreading COVID-19 in the community. This has been shown to have a significant impact on overall transmission, which could otherwise put the health system at risk from uncontrolled spread of COVID-19.
- *Masks-wearing* – Masks are a key protective measure to reduce the risk of people contracting and transmitting COVID-19, particularly in indoor spaces where physical distancing cannot be maintained. Mask mandates have applied more broadly as needed during the pandemic, to manage increased risk of transmission from highly transmissible variants. At times of serious risk to the community, the requirement to wear a mask has applied in other indoor public settings and outdoors when unable to remain physically distant from others.
- *Vaccination* – Vaccination has proven to be an important factor in protecting the community, especially vulnerable cohorts, from the severity of COVID-19.

These measures will help respond to a serious risk to the public health system or the community as a result of COVID-19, including new variants of concern or particular outbreaks. The measures are also important to protect and support vulnerable cohorts from COVID-19, particularly within vulnerable settings, and to maintain a nationally consistent public health response.

An exercise by the Chief Health Officer of the power to make a public health direction must be done having regard to human rights. Depending on the circumstances and nature of the requirements imposed, the direction may not in fact limit human rights.

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

The purpose of the Bill is to implement targeted, temporary measures needed to respond to the ongoing management of COVID-19. This purpose cannot be achieved through any other reasonably available and less restrictive means.

Extensive campaigns by the Queensland and Commonwealth Governments have educated members of the public about the risks of COVID-19 and how to minimise their potential exposure to infection. However, education campaigns alone are not sufficient to effectively respond to the current health risks of COVID-19 and emerging COVID-19 variants.

While the vaccination coverage for COVID-19 is high in Queensland, immunity from the virus is increasingly waning. It is unknown whether a vaccine-resistant strain will emerge, leading to more serious outcomes. Additionally, current variants appear to be immune escaping. Other factors that also remain unknown include the long-term impact of vaccination on severe disease given waning immunity, whether more effective vaccines may be developed, and the interplay between COVID-19 and other viral illnesses leading to more moderate to severe outcomes. All of these factors could dramatically shift the COVID-19 landscape and place the community and public health system in jeopardy. However, it is generally believed that repeated waves of COVID-19 will decrease in severity over time.

The ability to protect and support people in vulnerable settings and maintain a working public health system are crucial parts of the ongoing COVID-19 response. Legislating for vaccine, isolation and mask wearing requirements is the most appropriate way to ensure the community, particularly vulnerable cohorts and settings, are protected and the capacity of the public health system is maintained. For example, the least restrictive way to ensure that a highly transmissible variant of COVID-19 is not transmitted rapidly through the community and into vulnerable settings is to require people to wear face masks in circumstances where transmission is otherwise highly likely. Reliance on public education campaigns for compliance has produced variable responses across the pandemic experience.

Ensuring compliance with public health directions is also necessary to preserve the health and safety of Queenslanders and the public health system and slow the transmission of COVID-19. The proposed compliance framework provides an opportunity for voluntary compliance before penalties apply, supporting a least restrictive approach. The ability to impose immediate fines also acts as an appropriate deterrence against determined non-compliance, and extreme or egregious behaviour that presents a serious risk to public health.

For these reasons, the amendments to the Public Health Act to give effect to the targeted, temporary measures needed to respond to COVID-19 are the least restrictive and reasonably available way to achieve the purpose of the Bill.

The Bill continues safeguards to ensure that any potential impact on human rights is minimised and no greater than necessary to respond to the COVID-19 pandemic. These include:

- When making public health directions, the Chief Health Officer is required to consider the impact on human rights impacts.
- The public health direction powers may only be exercised by the Chief Health Officer and cannot be delegated.
- Before issuing a direction, the Chief Health Officer must have a reasonable belief that the direction is necessary to prevent or respond to a serious risk to the public health system or

the community as a result of COVID-19, or is needed to give effect to a decision or agreement of National Cabinet or advice or recommendation of a COVID-19 advisory body, such as AHPPC.

- The Chief Health Officer must publish a justification statement containing a summary of the rationale for each public health direction and an assessment of the direction's compatibility with human rights.
- A public health direction must be tabled in Parliament within 21 calendar days after it is notified on the Queensland Health website or in the gazette and is subject to referral to a Parliamentary Committee and disallowance.
- If at any time the Chief Health Officer is satisfied that a direction is no longer necessary to prevent or respond to a serious risk to the public health system or community, or the direction is no longer needed to give effect to a decision or agreement of National Cabinet or advice or recommendation of a COVID-19 advisory body, the direction must be revoked.
- Directions to isolate or quarantine can only apply to persons who have tested positive to COVID-19 or are a symptomatic close contact, and only for periods of up to seven days.
- Vaccination-related requirements included in a direction must be limited to workers in particular settings. Personal visitors and family members visiting residents of aged care facilities will not be required to be vaccinated in order to enter the facility.
- Directions must state the period during which they apply and that non-compliance with the direction is an offence.
- A direction will expire 90 days after it takes effect.
- A person will be given an opportunity to voluntarily comply with a direction before an authorised person can enforce a public health direction.
- A person who fails to comply with a direction does not commit an offence if they have a reasonable excuse for not complying.
- Directions may include exceptions and safeguards to minimise adverse impacts on human rights and other interests. For example, a person who is required to isolate may be permitted to obtain medical supplies.

The most significant human rights limitations relate to the right to freedom of movement, particularly for persons who are subject to an isolation or quarantine direction. To a lesser extent, restrictions on movement will also limit rights to freedom of thought, conscience, religion and belief; freedom of expression; peaceful assembly and freedom of association; and cultural rights.

The limitation on the right not to be subjected to medical treatment without consent is also significant, particularly for those who have an objection to being vaccinated against COVID-19.

As explained above, these limitations are unavoidable and have been mitigated to the greatest extent possible.

As the Queensland community transitions to living with COVID-19, a significant number of the previous temporary measures put in place to respond to COVID-19 will no longer be needed. As such, the Bill does not extend certain extraordinary measures, previously exercised through the COVID-19 pandemic, that will no longer be necessary to support Queensland's

health response after 31 October 2022. This includes measures like quarantining of domestic arrivals and restrictions on the movement and gathering of people through widespread lockdowns and restrictions on particular businesses.

However, removing some of these measures will require individuals, businesses and facilities to self-manage the health risk posed by COVID-19 for their particular context. Facilities like hospitals, residential aged care and disability accommodation are all capable of self-managing visitor restrictions to their facilities and have routinely done so prior to the pandemic. The Chief Health Officer can support these facilities through the issuing of guidance about visitor restrictions and other relevant matters after 31 October 2022. This is the least restrictive way of implementing other types of measures that do not form part of the temporary targeted response moving forward. This balances human rights and public health risks while also reducing regulation where it is no longer required.

(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 benefits of significantly reducing Queenslanders' exposure to severe adverse outcomes from COVID-19 and preserving access to emergency and life-sustaining treatment for persons who develop serious health complications substantially outweigh the limitations on human rights.

Failure to put in place temporary powers for these limited public health measures could result in worse outcomes during future waves of the COVID-19 pandemic in Queensland, especially if new variants of concern or vaccine resistant strains of COVID-19 begin circulating in the community.

The temporary, targeted public health measures will help to prevent Queensland's health infrastructure becoming overwhelmed and protect vulnerable communities. For example, requiring vaccination of workers in vulnerable settings assists in maintaining continuity of care if vulnerable residents become ill. A vaccinated workforce in a vulnerable setting is less likely to experience severe illness, and more likely to remain available to provide care.

Although the amendments made to the Public Health Act to support the Queensland Government's ongoing health response to COVID-19 potentially limit many human rights, the limitations are generally temporary in nature and consistent with internal limitations in the Human Rights Act.

As described above, safeguards exist to ensure that limitations on human rights are no more onerous than is required to respond to COVID-19 at this time. The targeted powers are limited in nature to ensure a balanced and proportionate response is taken to address the public health risk and promote human rights to the greatest extent possible in the current context.

Importantly, the Bill does not extend extraordinary measures previously relied on during the public health emergency that are no longer considered proportionate or effective, for example, limiting gatherings of individuals, regulating businesses (such as density limits), implementing border controls, and imposing vaccine requirements for the general public through restrictions on entry to hospitality, entertainment and other places.

On balance, the Bill's limitations on human rights are reasonable and justified to ensure the preservation of life and protection of the community from more severe impacts of COVID-19.

(f) any other relevant factors

Not applicable.

Amendments to the Corrective Services Act – Extension of modifications to section 268 of the Corrective Services Act

Section 268 of the Corrective Services Act enables the chief executive (QCS Commissioner) to declare that an emergency exists in relation to a prison for a stated period if a situation threatens the security or good order of a prison, or the safety of a prisoner, or another person in a prison. The making of a declaration allows the chief executive to take certain actions including restricting access to activities in a prison.

The Bill extends a temporary modification applying the scope of this power from a *prison* to applying to any *corrective services facility*. This enables a declaration to be made about any corrective services facility (such as the Helana Jones Centre and work camps, which are currently not captured by the definition of prison under the Corrective Services Act). The Bill also extends the modified maximum duration that a declaration can be made for, from three to 90 days.

The provisions extended by the Bill allow for a declaration to apply to additional prisoners and be in place for a longer period of time.

(a) the nature of the right

Protection from torture and cruel, inhuman or degrading treatment

Section 17 of the Human Rights Act prohibits three distinct types of conduct: torture; cruel, inhuman or degrading treatment or punishment; and medical or scientific experimentation or treatment without consent. Only the protection from cruel, inhuman and degrading treatment is engaged by the amendments to the Corrective Services Act, and so the other aspects of the right under section 17 are not addressed in this section.

The right imposes both negative and positive obligations on the State. The negative obligation prevents the State from carrying out acts that amount to cruel, inhuman or degrading treatment. The positive obligation requires the State to adopt safeguards and mechanisms to ensure that cruel, inhuman or degrading treatment or punishment does not occur (or, at the very least, that there are few or no opportunities for it to occur without detection). The right protects the principle of dignity – the innate value of all human beings.

Cruel and inhuman treatment involves a high degree of suffering, though not necessarily intentionally inflicted. Degrading treatment is focused less on severity of suffering but on humiliation (which is a subjective test). For conduct to amount to cruel, inhuman or degrading treatment or punishment, it need not involve physical pain and can include acts that cause both physical and mental suffering. Treatment or punishment that humiliates or debases a person, causes fear, anguish or a sense of inferiority, or is capable of possibly breaking moral or physical resistance or driving a person to act against their will or conscience, can be cruel, inhuman or degrading.

The amendment limits the right to the extent that isolating prisoners to reduce the risks of COVID-19 transmission may be considered inhuman or degrading in a custodial environment only where this occurs for a prolonged and sustained period under an emergency declaration. There are no other limitations to this human right engaged by this amendment.

Freedom of movement

Section 19 of the Human Rights Act provides that every person lawfully within Queensland has the right to move freely within Queensland, enter or leave Queensland, and choose where they live. This means that a person cannot be arbitrarily forced to remain in, or move to or from, a particular place. The right also includes the freedom to choose where to live, and freedom from physical and procedural barriers, like requiring permission before entering a public park or participating in a public demonstration in a public place. It also protects the rights of individuals to enter and leave Queensland.

The amendment limits the freedom of movement where, under an emergency declaration, a corrective services facility is forced to cease or restrict movement of staff, visitors, or prisoners in response to the COVID-19 emergency, such as through quarantine periods.

Freedom of association

The right to freedom of association in section 22(2) of the Human Rights Act protects the rights of individuals to join together with others to formally pursue a common interest, such as political groups, sporting groups, professional clubs, non-government organisations and trade unions. It includes the freedom to choose between existing organisations or to form new ones.

The amendment limits the freedom of association to the extent a prisoner may be unable to receive visits in circumstances where movement is restricted to mitigate the spread of COVID-19. The amendments may also limit the rights of a visitor whose association with a person detained in a corrective services facility will be impacted because of similar measures.

Property rights

Section 24 of the Human Rights Act protects the right of all persons to own property and provides that people have a right not to be arbitrarily deprived of their property. The ability to own and protect property historically underpins many of the structures essential to maintaining a free and democratic society based on human dignity, equality and freedom. The right includes the protection from the deprivation of property. The term ‘deprived’ is not defined by the Human Rights Act, however deprivation in this sense is considered to include the substantial restriction on a person’s use or enjoyment of their property, to the extent that it substantially deprives a property owner of the ability to use their property or part of that property (including enjoying exclusive possession of it, disposing of it, transferring it or deriving profits from it).

Property is likely to include all real and personal property interests recognised under general law (for example, interests in land, contractual rights and shares) and may include some statutory rights (especially if the right includes traditional aspects of property rights, such as to use, transfer, dispose and exclude). The right does not provide a right to compensation.

The amendment limits the property rights of prisoners in corrective services facilities (that is, other than prisons) to the extent that the ability to receive property from outside the facility, including mail and other items, may be limited or delayed due to the risk of COVID-19 transmission.

Right to privacy

Section 25 of the Human Rights Act protects the right to privacy. The underlying value of the right to privacy is the ‘protect[ion] and enhance[ment of] the liberty of the person – the

existence, autonomy, security and well-being or every individual in their own private sphere.’⁸ It protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is very broad, but at its most basic is concerned with notions of personal autonomy and dignity.

The right protects privacy in that personal sense (and 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 right to privacy protects individuals against unlawful or arbitrary interferences with their privacy. The concept of lawfulness in the context of the right to privacy means that no interference can take place except in cases envisaged by the law. The concept of arbitrariness in the context of the right to privacy carries a human rights meaning of ‘capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought’.⁹

The amendment limits the right to privacy to the extent it may restrict a prisoner’s private relationships through visits, where a corrective services facility is required to restrict access and contact to manage the risks of COVID-19. This restriction is consistent with the potential restrictions that may be imposed to protect prisoners, staff, and visitors during a declaration of emergency currently, including if an incident requires visitors to be removed from a facility.

As questions of proportionality arise when considering justification of limits on human rights under section 13 of the Human Rights 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.

Protection of families

The right to the protection of families and children in section 26 of the Human Rights Act recognises that families are the fundamental group unit of society and entitles families to protection by the society and the State. The meaning of families is broad and recognises that families take many forms and accommodates the various social and cultural groups in Queensland whose understanding of family may differ. Cultural, religious and other traditions will be relevant when considering whether a group of persons constitute a *family*.

The amendment limits the protection of families and children to the extent that they may restrict a prisoner’s relationship with a family member because a prisoner may be unable to receive visits where a corrective services facility is required to restrict access and contact to manage the risks of COVID-19. The amendment may also limit the right for the family of a prisoner if they are prevented from visiting.

Cultural rights – Aboriginal peoples and Torres Strait Islander peoples

Section 28 of the Human Rights Act recognises the special importance of human rights for Aboriginal peoples and Torres Strait Islander peoples, and explicitly protects their distinct

⁸ *Director of Housing v Sudi* [2010] VCAT 328, 29 (Bell J).

⁹ *WBM v Chief Commissioner of Police* (2012) 43 VSCA 159, 114 (Warren CJ, Hansen JA agreeing)

cultural rights as Australia's First Peoples. The core value underpinning the various cultural rights protected under section 28 of the Human Rights Act is recognition and respect for the identity of Aboriginal peoples and Torres Strait Islander peoples, both as individuals and in common with their communities. Of particular significance to Aboriginal peoples and Torres Strait Islander peoples of Queensland is the right to self-determination, as is reflected in the preamble of the Human Rights Act.

The right recognises that spiritual, economic and material connection with traditional lands and waters is an essential component of that identity and is inextricably connected to Aboriginal peoples' and Torres Strait Islander peoples' cultural heritage, language and kinship ties.

The amendment limits the cultural rights of Aboriginal peoples and Torres Strait Islander peoples to the extent that, in responding to the COVID-19, a prisoner's access to cultural visits or the ability to transfer Aboriginal prisoners or Torres Strait Islander prisoners to a corrective services facility closer to their family may be restricted to manage the risk of COVID-19 transmission.

Humane treatment when deprived of liberty

Section 30 of the Human Rights Act provides a right to humane treatment when deprived of liberty. This requires all detained persons to be treated with humanity and with respect for their inherent human dignity, recognising the particular vulnerability of all persons deprived of their liberty. Individuals who are detained should not be subject to any hardship or constraint that is in addition to that resulting from the deprivation of their liberty (that is, a person who is detained should retain all their human rights subject only to the restrictions that are unavoidable in a closed environment).

The right is informed by a number of United Nations standards, including the United Nations Standard Minimum Rules for the Treatment of Prisoners which covers matters such as accommodation conditions, adequate food, personal hygiene, clothing and bedding standards, exercise, medical services, and disciplinary procedures. Under the International Covenant on Civil and Political Rights, the application of the right to humane treatment when deprived of liberty cannot depend on government resources and must be applied without discrimination.

The amendment limits the right to humane treatment when deprived of liberty to the extent that isolating prisoners to reduce the risk of COVID-19 transmission may be considered inhumane in a corrective services facility if for a prolonged or sustained period.

Right to education

The right to education under section 36 of the Human Rights Act empowers people to realise other human rights, achieve social mobility, participate fully in the community and enjoy human existence.

Relevantly, the right to education provides that every person has the right to have access, based on the person's abilities, to further vocational education and training that is equally accessible to all. This right is understood to go towards helping 'to achieve steady economic, social and cultural development and full and productive employment.'¹⁰

¹⁰ Part III, Article 6 of the International Covenant on Economic, Social and Cultural Rights, adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966.

The right to education is a right to access education (not a right to education). Access in this context carries a particular human rights meaning, incorporating underlying principles of non-discrimination, physical accessibility and economic accessibility.

The right to have access to education is likely to be considered a systemic right (similar to the equivalent right under the European Convention of Human Rights). This means the right is likely only to be limited if there is a systemic breakdown of the provision of education resulting in a person not having access to a minimum level of education.

The amendment may limit the right to education where a corrective services facility is required to restrict movement and contact between prisoners in response to COVID-19 risks and these requirements may impact the availability of educational services to prisoners for a prolonged period. It would not be limited by short disruptions to services.

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

The ability to rapidly respond to the risks associated with COVID-19 is necessary to mitigate the spread of COVID-19, prevent loss of life, and ensure the safety of staff, prisoners and visitors. Providing that a declaration can be made for any corrective services facility ensures that prisoners in facilities not otherwise gazetted as prisons are afforded the same protection and level of responsiveness.

Protecting the health, safety and wellbeing of people in the Queensland community, including those in the State's custody, from the risk posed by COVID-19 and its spread promotes the right to life (protected under section 16 of the Human Rights Act) in the context of the positive obligations that right places on the State in relation to protecting the health and safety of its citizens. This is a proper purpose consistent with a free and democratic society based on human dignity, equality and freedom.

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

Corrective services facilities are uniquely vulnerable to the spread of COVID-19 due to the close proximity of prisoners and staff, transience of prisoners and staff into and out of facilities, and limited ability to maintain social distancing or utilise other controls such as remote work.

In addition to these environmental challenges, prisoners are at increased risk of experiencing severe illness from COVID-19. While to date over 28,000 doses of COVID-19 vaccinations have been administered to prisoners in Queensland, the fluctuating nature of the prison population makes determining the vaccination status of the overall prisoner cohort challenging.

Effective risk mitigation strategies are therefore essential to the ensuring the health and safety of staff, prisoners and visitors.

Despite these inherent challenges, QCS has successfully managed and responded directly to the risks posed by COVID-19 with a targeted approach developed specifically for the custodial environment. The controls used to respond to these risks are regularly reviewed by QCS, including the stepping down from some measures that have previously been relied on, such as centre-wide restrictions on visitors, or requiring all visitors to be fully vaccinated against COVID-19.

However, QCS has determined that given the operational environment, a baseline level of controls is still required while there continues to be community transmission of COVID-19, with the flexibility to increase controls alongside escalating risk. This includes screening individuals entering facilities for COVID-19 symptoms, excluding visitors that are exhibiting COVID-19 symptoms (or offering non-contact visitation), mask wearing and isolating prisoners that have tested positive or who are symptomatic.

Imposition of these controls is mainly authorised by a declaration made under section 268 of the Corrective Services Act. This enables the QCS Commissioner to make directions to put in place controls that mitigate the risk of COVID-19 spreading in correctional facilities. This includes COVID-19 vaccination requirements for staff entering or working in facilities.

Extending the application of the declaration powers to all corrective services facilities is essential to prevent loss of life, ensure QCS can respond to the unique risks surrounding COVID-19, and ensure the safety of staff, prisoners and visitors. The declaration powers enable measures to be taken to prevent the spread of COVID-19 throughout all corrective services facilities.

Temporarily extending the time a declaration can be made in response to COVID-19 under section 268 from three days to 90 days, provides the certainty required for the duration of the COVID-19 response in line with the roll-out of restrictions or control measures in the correctional environment. Temporarily extending the application of the declaration for up to 90 days or until COVID-19 is no longer a controlled notifiable condition also ensures QCS can continue to respond as necessary to the unique risks surrounding COVID-19, and ensure the safety of staff, prisoners and visitors, without having to re-make the same declaration under section 268 every three days.

A further extension of these modifications to section 268 is necessary to ensure that QCS can ensure the health and safety of staff and prisoners in all custodial environments.

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

No less restrictive and reasonably available ways of achieving the purpose have been identified. Due to the human-to-human transfer of the virus, restrictions need to be imposed in the correctional environment to reduce the risk of transmission.

Adequate safeguards are also in place to reduce the extent of any human rights limitations associated with this amendment and exercise of the power to make a declaration, including:

- The QCS Commissioner must reasonably believe a situation exists at a corrective services facility that threatens or is likely to threaten the security or good order of the facility or safety of a prisoner or another person in the facility, to make a declaration.
- The making of a declaration is subject to the approval of the Minister.
- All decisions made under a declaration, such as decisions to restrict visits or cancel activities, are themselves decisions that must be made in a way that is compatible with human rights in accordance with the Human Rights Act.
- The expanded declaration-making power is only available while COVID-19 is declared to be a controlled notifiable condition under the Public Health Act.
- A declaration can only be made for a set period of time after which it must cease or a new declaration must be made.

- While not required by statute, all declarations made under section 268 in response to COVID-19 have been made publicly available. This will continue to occur.
 - The amendment is a temporary measure and will expire on 31 October 2023.
- (e) the balance between the importance of the proposed amendment, 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 balance, the purpose of the proposed amendment outweighs the potential limitations on the identified rights, noting the limitations on human rights of this amendment will be restricted to controls necessary to manage the risks COVID-19 presents to the correctional environment. The amendment is for the purpose of protecting the health, safety and wellbeing (and right to life) of staff, prisoners and visitors. There are also sufficient safeguards in place to minimise any human rights limitations incurred by striving to achieve that purpose. It is therefore considered that the amendment is compatible with human rights.

- (f) any other relevant factors

Not applicable.

Amendments to the Corrective Services Act – Extension of power to screen persons entering corrective services facilities

- (a) the nature of the right

Right to protection from medical or scientific experimentation or treatment without consent

Section 17(c) of the Human Rights Act ensures an individual has the right not to be subjected to medical or scientific experiments or treatment without the person's full, free, and informed consent. The amendment engages this right to the extent that participation in COVID-19 screening may be a requirement before entering a corrective services facility to mitigate the potential risk of contagion. A person may be refused entry to a corrective services facility where they display a high temperature or flu-like symptoms.

The screening is non-invasive. Further, a participant may self-report symptoms, choose not to enter a facility and not undergo any screening. It is therefore unlikely that such measures would meet the threshold for limiting this right, however, if the right is considered to be limited, that limitation is considered justified for the reasons set out below.

Right to privacy

Section 25(a) of the Human Rights Act protects the individual from all unlawful and arbitrary interferences and attacks upon their privacy. This extends to private relationships. The amendment limits the right to privacy of staff and visitors to the extent that they may be required to participate in COVID-19 screening, including temperature checks before being granted approval to enter a corrective services facility.

(b) the nature of the purpose of the limitation, 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 reduce the risk of COVID-19 spreading through corrective services facilities. This supports a safe working environment for QCS staff and a healthy and safe living environment for all prisoners while in the State's custody and accommodated in facilities.

Protecting the health, safety and wellbeing of people in the Queensland community, including those in the State's custody, from the risk posed by COVID-19 and its spread promotes the right to life (protected under section 16 of the Human Rights Act) in the context of the positive obligations that right places on the State in relation to protecting the health and safety of its citizens. This is a proper purpose consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

COVID-19 screening prior to entry to a corrective services facility is done via the checking of temperature and review for flu-like symptoms. It is minimally invasive, including through the use of self-report of symptoms or non-contact thermometers. People exhibiting a temperature over 37.5 degrees or flu-like symptoms are able to be refused access to a corrective services facility by the chief executive.

Providing that persons seeking access to a corrective services facility may be required to be subject to COVID-19 screening, and the ability to refuse entry for persons who display a high temperature or flu-like symptoms, is necessary to mitigate the spread of COVID-19, prevent loss of life, and ensure the safety of staff, prisoners and visitors.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

No less restrictive and reasonably available ways of achieving the purpose have been identified. The checking of temperature and review for flu-like symptoms is as minimally invasive as possible, including through the use of self-report of symptoms or non-contact thermometers.

Relying solely on individuals to self-report symptoms would not be as effective as using the screening technology. Many individuals may be unaware they are experiencing a fever, and so this approach would increase the risk of COVID-19 being spread in a corrective services facility.

Safeguards have also been put in place, including that the amendment contains an internal limitation restricting its application to corrective services facilities where a declaration under section 268 of the Corrective Services Act is in place. The amendment is also temporary, expiring on 31 October 2023.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

While it is accepted that this amendment places some limitations on human rights, the extent of that limitation is minimal, with non-invasive screening methods having been adopted.

On balance the purpose of the proposed amendment outweighs the potential limitations on the identified rights, noting any limitation on human rights will be restricted to responding to COVID-19.

Further, the purpose of the amendment is to protect the health, safety and wellbeing (and right to life) of staff, prisoners and visitors. The COVID-19 screening requirement aims to prevent the introduction and spread of COVID-19 into facilities in a non-invasive way. It aims to prevent loss of life and ensure the health and safety of prisoners and those working or engaging with the correctional environment.

(f) any other relevant factors

Requiring staff and visitors to undertake COVID-19 screening is consistent with the World Health Organization recommendation for strong infection prevention control measures, including adequate testing and screening, irrespective of whether or not there are suspected cases in the community.

Conclusion

In my opinion, the Public Health and Other Legislation (COVID-19 Management) Amendment Bill 2022 is compatible with human rights under the Human Rights Act because it limits the identified human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

YVETTE D'ATH MP
MINISTER FOR HEALTH and AMBULANCE SERVICES
and LEADER OF THE HOUSE

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