

Victims of Crime Assistance and Other Legislation Amendment Bill 2023

Statement of Compatibility

FOR

Amendments to be moved during consideration in detail by the Honourable Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence

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

In accordance with section 38 of the *Human Rights Act 2019*, I, the Honourable Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence, make this statement of compatibility with respect to amendments to be moved during consideration in detail of the Victims of Crime Assistance and Other Legislation Amendment Bill 2023 (Bill).

In my opinion, the amendments are compatible with the human rights protected by the Human Rights Act. I base my opinion on the reasons outlined in this statement.

Overview of the Amendments

The amendments to be moved during consideration in detail of the Bill will amend the *Police Powers and Responsibilities Act 2000* (PPRA) to:

- ensure sufficient processing time for DNA samples impacted by the backlog in crime scene processing and analysis; and
- support implementation of the recommendations from the Commission of Inquiry into Forensic DNA Testing in Queensland (2022 Commission of Inquiry) and Commission of Inquiry to examine DNA Project 13 concerns (Project 13 Commission of Inquiry) (together, 'Commissions of Inquiry') regarding the review and retesting of DNA samples.

Currently under section 490 of the PPRA, DNA samples taken from a person suspected of having committed an indictable offence and results of the DNA sample analysis (collectively, 'DNA material') must be destroyed within a reasonably practicable time after the end of one year from:

- the day the arrest for the indictable offence is discontinued under the relevant provisions;
- the day the proceeding for the indictable offence is discontinued before a court;
- the day the person is found not guilty of the indictable offence; or
- the day the sample is taken, if a proceeding for the indictable offence is not started within one year after the sample was taken.

Forensic Science Queensland is currently experiencing a substantial backlog in crime scene sample processing and analysis. Processing times for these samples increased sharply from the time the 2022 Commission of Inquiry commenced on 13 June 2022. Processing times for cases in this backlog are expected to exceed one year. Some have already exceeded this timeframe.

Without associated crime scene samples being processed, the reference samples collected from suspects under chapter 17 of the PPRA cannot be used for elimination or comparative analysis purposes. Due to the testing backlog, DNA material from suspects in serious criminal offences will approach the timeframe for destruction under section 490(1)(d) of the PPRA before they can be compared against crime scene samples.

In addition, Queensland Health has identified historical DNA material that was retained in contravention of the PPRA destruction requirements. This material could be relevant to conducting reviews of historical cases as recommended by the Commissions of Inquiry.

The amendments modify the powers and destruction requirements for DNA material affected by the backlog and review.

For DNA samples taken between 1 January 2007 and 12 June 2022 where the DNA material has not been destroyed as required by section 490, the amendments provide that during a period of three years from commencement (the review period), the DNA material is not required to be destroyed. The DNA material must be destroyed within a reasonably practicable time after the end of the review period if a proceeding for the indictable offence is not brought against a suspect within the review period.

For DNA samples taken between 13 June 2022 and 13 June 2025, the amendments provide that the DNA material must be destroyed within a reasonably practicable time after the end of three years from the day the sample is taken if a proceeding for the indictable offence is not started within three years after the sample was taken.

The amendments provide that DNA material that is retained may be dealt with under chapter 17 of the PPRA as if it was never required to be destroyed under section 490.

The amendments also provide that for the affected DNA material:

- the keeping of DNA material is declared to be valid and lawful as if the modified powers and destruction requirements introduced by the amendments were in force when the destruction of the DNA material was required under 490(1) of the PPRA;
- the use of DNA material for evidence or any other purpose to start, continue or discontinue a proceeding for an indictable offence is declared to be valid and lawful as if the modified powers and destruction requirements introduced by the amendments were in force when the destruction of the DNA material was required under 490(1) of the PPRA.

Human Rights Issues

Human rights relevant to the amendments (Part 2, Division 2 and 3 of the Human Rights Act)

In my opinion, the human rights that are relevant to the amendments to be moved during consideration in detail of the Bill are:

- right to recognition and equality before the law (section 15);
- right to privacy (section 25); and
- right to a fair hearing (section 31).

(a) the nature of the right

Right to recognition and equality before the law

The right to recognition and equality before the law is a stand-alone right that also permeates all human rights. It encompasses both the right to recognition as a person before the law and the right to enjoy human rights without discrimination. The right to recognition and equality is limited where the law is applied differently to some individuals or sectors of society.

The amendments will limit the right to recognition and equality before the law as they will:

- apply different retention periods to DNA material associated with persons suspected of having committed indictable offences depending on when the DNA sample was taken;
- validate the historical retention of affected DNA material; and
- declare the DNA material and use of the DNA material for evidence or in relation to a proceeding for an indictable offence to be valid and lawful as if the modified provisions were in force when the DNA material was required to be destroyed under the current provisions.

Right to privacy

The right to privacy protects individuals against unlawful or arbitrary interference with their privacy, family, home, or correspondence. Privacy is generally understood to comprise freedom from unwarranted and unreasonable intrusions into a person's individuality, identity, and activities that society recognises as falling within the sphere of individual autonomy. The concept of lawfulness in the context of the right to privacy means that no interference can take place except in cases envisaged by law. The concept of arbitrariness extends to interferences that may be lawful but that are capricious, unpredictable, unreasonable, and disproportionate.

DNA samples are a sensitive form of data that contain unique personal information, including information about familial relationships, ancestry, physical attributes and health. The results of DNA analysis of a sample may also contain information indicating alleged offending behaviour.

The amendments will limit the right to privacy as they will validate the retention of affected DNA material that was required to be destroyed, extend the retention period of the DNA material, and permit the use of DNA material in accordance with chapter 17 of the PPRA (for example, to take steps necessary to ensure results are included in the approved DNA database, QDNA, under section 489(1)(d)). The amendments will also declare the use of DNA material for evidence or in relation to a proceeding for an indictable offence to be valid and lawful as if the modified provisions were in force when the DNA material was required to be destroyed under the current provisions.

Right to a fair hearing

The right to a fair hearing affirms the right of all individuals to procedural fairness and natural justice when coming before a court or tribunal. It guarantees that proceedings must be heard and decided by a competent, impartial and independent court or tribunal after a fair and public hearing, and that all judgments or decisions are publicly available. Broadly, this right ensures a party has a reasonable opportunity to be heard and respond to allegations made against them in conditions that do not place them at a substantial disadvantage. The right also embraces principles of a justice system that operates in a way that is predictable to the parties and the open and transparent administration of justice. The concept of a fair hearing is concerned with matters of procedural fairness, rather than substantive fairness in relation to the merits of a particular decision. What constitutes a 'fair' hearing depends on the facts of the case and requires the weighing of a number of public interest factors including the rights of the parties.

Rules of evidence govern the admission of evidence in criminal proceedings, including providing discretion for the court to exclude evidence that is improperly or unfairly obtained.

The amendments will limit the right to a fair hearing as they will affect the operation of the rules of evidence in criminal proceedings for indictable offences by declaring that the use of the DNA material for evidence is valid and lawful as if the modified provisions were in force when the DNA material was required to be destroyed under the current provisions.

- (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

Right to recognition and equality before the law

The purpose of the limitation on the right to recognition and equality before the law, by applying different retention periods to DNA material, validating the historical retention of affected DNA material and declaring the retention and use of DNA material for evidence or in relation to a proceeding for an indictable offence to be valid and lawful, is to balance the rights of persons suspected of an indictable offence with the rights and interests of victims and the community by ensuring indictable offences are able to be properly investigated and prosecuted to preserve the integrity of the criminal justice system.

Right to privacy

The purpose of the limitation on the right to privacy, by validating the historical retention of affected DNA material, extending the retention period of the DNA material, permitting the use of historical DNA material in accordance with chapter 17 of the PPRA and declaring the use of DNA material for evidence or in relation to a proceeding for an indictable offence to be valid and lawful, is to balance the rights of persons suspected of an indictable offence with the rights and interests of victims and the community by ensuring indictable offences are able to be properly investigated and prosecuted to preserve the integrity of the criminal justice system.

Right to a fair hearing

The purpose of the limitation on the right to a fair hearing, by altering the operation of the rules of evidence by declaring the use of certain DNA material for evidence or in relation to a proceeding for an indictable offence to be valid and lawful, is to balance the rights of persons suspected of an indictable offence with the rights and interests of victims and the community by ensuring indictable offences are able to be effectively prosecuted to preserve the integrity of the criminal justice system.

- (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

Right to recognition and equality before the law

The limitation on the right to recognition and equality before the law will achieve its purpose by ensuring the investigation and prosecution of indictable offences is not compromised by the testing backlog or sub-optimal DNA analyses identified by the Commissions of Inquiry.

The amendments support the proper investigation of indictable offences by allowing affected DNA material to be retained and analysed for use in identifying or eliminating suspects. DNA profiles of suspects are compared to crime scene samples or with previously stored profiles, to assist investigators to determine whether evidence can be linked to or eliminate a suspect. The amendments also inform and support effective prosecutions by allowing affected DNA material to be used as evidence or in relation to a proceeding for an indictable offence.

The limitation balances the right of persons suspected of indictable offences and defendants in proceedings to recognition and equality before the law with the rights and interests of victims and the community to ensure indictable offences are able to be properly investigated and prosecuted to preserve the integrity of the criminal justice system.

Right to privacy

The limitation on the right to privacy will achieve its purpose by ensuring the investigation and prosecution of indictable offences is not compromised by the testing backlog or sub-optimal DNA analyses identified by the Commissions of Inquiry.

The amendments support the proper investigation of indictable offences by allowing affected DNA material to be retained and used in accordance with chapter 17 of the PPRA to identify or eliminate suspects. DNA profiles of suspects are compared to crime scene samples or with previously stored profiles to assist investigators to determine whether evidence can be linked to or eliminate a suspect. The amendments also inform and support effective prosecutions by allowing affected DNA material to be used as evidence or in relation to a proceeding for an indictable offence. As criminal proceedings are generally public, information disclosed in the proceedings will be publicly available, including evidence relating to DNA material.

The limitation balances the right to privacy of persons suspected of indictable offences and defendants in proceedings through some restrictions on the retention, recording and use of DNA material relating to them, with the rights and interests of victims and the community to ensure indictable offences are able to be properly investigated and prosecuted to preserve the integrity of the criminal justice system.

Right to a fair hearing

The limitation on the right to a fair hearing will achieve its purpose by ensuring the prosecution of indictable offences is not compromised by the sub-optimal DNA analyses identified by the Commissions of Inquiry.

The amendments support effective prosecutions by declaring that the use of certain DNA material for evidence is valid and lawful, ensuring that DNA material that was required to be destroyed under the current provisions will not be improper on that basis, while preserving the ultimate discretion of the court in relation to the admission of evidence.

The limitation balances the right of defendants to a fair hearing, with the rights and interests of victims and the community by ensuring indictable offences are able to be properly investigated and prosecuted to preserve the integrity of the criminal justice system.

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

The amendments to be moved during consideration in detail of the Bill are the least restrictive and reasonably available ways to ensure the investigation and prosecution of indictable offences is not compromised by the testing backlog or sub-optimal DNA analyses identified by the Commissions of Inquiry, by balancing the rights of persons suspected of indictable offences and defendants in proceedings with the rights and interests of victims and the community by ensuring indictable offences are able to be properly investigated and prosecuted to preserve the integrity of the criminal justice system.

- (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

In my opinion, the amendments to be moved during consideration in detail of the Bill strike a balance between competing rights and interests that is reasonable and demonstrably justifiable in a free and democratic society. The balance between the right to recognition and equality before the law, the right to privacy, and the right to a fair hearing is set out in further detail below.

Right to recognition and equality before the law

The importance of the right to recognition and equality before the law for persons suspected of indictable offences and defendants in proceedings must be balanced against the interests of victims and the community in ensuring indictable offences are able to be properly investigated and prosecuted and preserving the integrity of the criminal justice system.

The amendments are reasonably adapted to ameliorate the impacts on human rights as much as possible, by limiting the DNA material to which the modified retention, recording, and validating provisions apply to samples taken during defined periods, prescribing a review period of three years, customising the retention periods for DNA material, and retaining the requirement for the destruction of the DNA material at the end of the retention period unless otherwise authorised.

Right to privacy

The limitation on the right to privacy will be authorised by law and is appropriate to preserve the integrity of the criminal justice system. Retaining, recording or using DNA material in accordance with the modified requirements set out in the amendments to be moved during consideration in detail of the Bill would not be unlawful and would not be arbitrary. The amendments balance the right to privacy for persons suspected of indictable offences and defendants in proceedings against the interests of victims and the community in ensuring indictable offences are able to be properly investigated and prosecuted.

The amendments are reasonably adapted to ameliorate the impacts on human rights as much as possible, by limiting the DNA material to which the modified retention, recording and validating provisions apply to samples taken during defined periods, prescribing a review period of three years, customising the retention periods for DNA material, and retaining the requirement for the destruction of the DNA material at the end of the retention period unless otherwise authorised. The impact of the amendment on the right to privacy is also reduced by important safeguards regarding the use and disclosure of DNA material, including who can access DNA material, how DNA material can be used, confidentiality obligations, and consequences for unauthorised use or disclosure.

Right to a fair hearing

The importance of the right to a fair hearing for defendants in proceedings must be balanced against the interests of victims and the community in ensuring indictable offences are able to be properly investigated and prosecuted and preserving the integrity of the criminal justice system. The amendments are reasonably adapted to ameliorate the impacts on human rights as much as possible, by limiting the DNA material to which the validating provisions apply to samples taken during defined periods and preserving the ultimate discretion of the court in relation to the admission of evidence.

- (f) any other relevant factors

Nil.

Consideration of other rights

The amendments to be moved during consideration in detail of the Bill will operate retrospectively to the extent that they validate the retention of DNA material that occurred prior to commencement of the provisions. However, it is my opinion that the amendments do not engage or limit section 35 of the Human Rights Act. Section 35 prohibits the retrospective application of criminal liability, protecting people from being found guilty of an offence for an action that was not an offence at the time the action occurred, and from being unfairly penalised in situations where a penalty has increased after they committed an offence. The right does not, however, prevent retrospective changes that do not form part of the criminal liability, penalty, or punishment. The amendments do not change criminal liability, rather the amendments validate the retention of DNA material for the purpose of the investigation of a person suspected of committing an indictable offence. Therefore, the amendments to be moved during consideration in detail of the Bill do not interfere with the right to be protected from the retrospective application of criminal liability.

Conclusion

In my opinion, the amendments to be moved during consideration in detail of the Bill are compatible with human rights protected by the Human Rights Act because they limit human rights only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

YVETTE D'ATH MP
ATTORNEY-GENERAL AND MINISTER FOR JUSTICE
MINISTER FOR THE PREVENTION OF DOMESTIC AND FAMILY VIOLENCE

© The State of Queensland 2023