

# Pharmacy Business Ownership Bill 2023

## Statement of Compatibility

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

In accordance with section 38 of the *Human Rights Act 2019*, I, Shannon Fentiman MP, Minister for Health, Mental Health and Ambulance Services and Minister for Women make this statement of compatibility with respect to the Pharmacy Business Ownership Bill 2023 (the Bill).

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

## Overview of the Bill

The *Pharmacy Business Ownership Act 2001* (2001 Act) has been in place for over 20 years and significantly amended during that time. The 2001 Act is outdated and limits Queensland Health's ability to ensure compliance with its requirements. The Bill repeals the 2001 Act and replaces it with a modern and effective framework to regulate pharmacy business ownership. In particular, the Bill:

- incorporates and clarifies the requirements in the 2001 Act relating to who may own or hold an interest in a pharmacy business, and retains the limits on the number of pharmacy businesses that a person may own or hold an interest in;
- establishes a licensing framework for the ownership of pharmacy businesses;
- establishes a regulatory council as a statutory body to administer the Act and transfers all regulatory functions from Queensland Health to the regulatory council;
- prohibits the council from issuing a licence if the pharmacy is located in, or directly accessible from, a supermarket;
- prohibits third parties from exercising inappropriate control over how pharmacy business owners provide pharmacy services related to medicines and provides that clauses in a contract or agreement that allow a third party to exercise inappropriate control are void;
- allows the council to audit licence holders and requires council to publish annual reports about compliance and audit activity;
- requires the council to maintain a register of licensed pharmacy businesses, which may be made public;
- modernises existing provisions relating to the functions and powers of inspectors, legal proceedings, delegations and protections from civil liability;
- restricts disclosure of information obtained in connection with the administration of the legislation to specified limited circumstances; and
- replicates the existing regulation-making power and provides that regulations may be made about fees, waiver of fees, record keeping and pharmacy premises standards.

The Bill will implement the Government Response to particular recommendations of the Health, Communities, Disability Services and Domestic and Family Violence Prevention Parliamentary Committee (Committee) in its *Report No. 12 – Inquiry into the establishment of a pharmacy council and transfer of pharmacy ownership in Queensland* (Committee Report).

In May 2018, the Committee was tasked with inquiring into the establishment of a pharmacy council and the transfers of pharmacy ownership in Queensland. The Committee Report, tabled on 16 October 2018, made 11 recommendations.

On 16 April 2019, the Government Response to the Committee Report (Government Response) was tabled in the Legislative Assembly. The Government Response accepted all 11 recommendations in full or in principle and identified that legislative amendments were required to respond to recommendations 6, 8, 9, 10 and 11. The Government Response also committed to introducing a licensing scheme to support the regulation of pharmacy ownership in Queensland and implement multiple recommendations from the Committee report.

The Bill will implement the Government Response to recommendations 8, 9, 10 and 11 of the Committee Report. Recommendation 6 of the Parliamentary Committee Report recommended the establishment of an advisory council to advise Queensland Health on its administration of the legislation. The Bill departs from the Recommendation 6 by establishing a regulatory council rather than an advisory council. This reflects stakeholder feedback and promotes consistency with the approach taken in most other Australian jurisdictions including New South Wales, Victoria, South Australia and Western Australia, where pharmacy business ownership laws are administered by regulatory councils.

## Human Rights Issues

### **Human rights relevant to the Bill (part 2, division 2 and 3 of the *Human Rights Act 2019*)**

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

- Right to take part in public life (section 23)
- Right to property (section 24)
- Right to privacy and reputation (section 25)
- Right to a fair hearing (section 31)
- Rights in criminal proceedings (section 32)
- Right to health services (section 37).

Where rights are potentially limited by the Bill, I have provided an analysis of the justification.

### **Human rights potentially limited by ownership, control and licensing requirements**

#### *Right to property*

##### (a) the nature of the right

Every person has the right to own property alone or in association with others and must not be arbitrarily deprived of their property. Case authority suggests ‘arbitrary’ in this context refers to conduct that is capricious, unpredictable, or unjust, and also refers to interferences which are not proportionate to a legitimate aim sought.

‘Property’ includes all real and personal property interests recognised under general law (for example, interests in land, contractual rights, money 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.

While the Bill retains and clarifies the existing requirements in the 2001 Act relating to who may own or hold an interest in a pharmacy business, the Bill establishes a new licensing scheme for pharmacy business ownership. Clause 15 provides a person must not own a pharmacy business unless the person holds a pharmacy business licence for the business that is in effect. The maximum penalty for non-compliance is 200 penalty units.

Under clause 23, only an eligible person may apply for a licence. An *eligible person* is defined in clause 10 to mean:

- a practising pharmacist;
- a corporation whose directors and shareholders are all practising pharmacists;
- a corporation whose directors are a combination of practising pharmacists and close adult relatives (spouses and adult children) of pharmacists, where practising pharmacists hold the majority of shares and all voting shares;
- a friendly society that on 29 April 2005, carried on a pharmacy business in Queensland or another State;
- a friendly society that is an amalgamation of two or more friendly societies mentioned above; and
- the Mater Misericordiae Ltd (Mater).

The licensing framework further provides a licence holder is required to be a fit and proper person, in accordance with the criteria outlined in clause 72.

Under clause 28, the council may grant an application for a pharmacy business licence only if satisfied the applicant:

- is an eligible person;
- is a fit and proper person; and
- does not already hold an interest in the maximum permitted number of pharmacy businesses.

These restrictions will limit the right to property by preventing any person who does not meet these criteria from obtaining a licence and therefore from owning a pharmacy business.

Under the 2001 Act, owners and holders of lesser interests, for example, the interest of a shareholder, are collectively referred to as owners. The Bill makes a distinction between ‘owning’ a pharmacy business and holding a lesser interest, which is termed a ‘material interest’.

Clause 13 defines a *material interest* to mean the interest of a shareholder of a corporate owner, a beneficiary of a trustee owner, or another interest, other than the interest of an owner of the business, that entitles a person to receive consideration that varies according to the profits or takings of the business.

Clause 16 restricts the holding of material interests in businesses to practising pharmacists and their close adult relatives. The maximum penalty for non-compliance is 200 penalty units.

These restrictions will limit the right to property by preventing any person who is not a practising pharmacist or a close adult relative of a practising pharmacist who owns or has an interest in the same business from holding a material interest in a pharmacy business.

The Bill also limits the right to property by retaining the caps in the 2001 Act about how many pharmacy businesses a person may own or hold an interest in. Clause 17 provides a person, which includes a natural person or pharmacist-controlled corporation, may hold an interest in a maximum of five pharmacy businesses. Permitted friendly societies and the Mater may hold an interest in a maximum of six pharmacy businesses. *Interest* is defined to mean an ownership interest or a material interest.

Clause 70 provides that it is an offence to sell or transfer the licence to someone else. It is also an offence for a person to buy or receive a transfer of a licence. This will restrict property rights by preventing licence holders from exercising certain aspects of property rights because they will not be able to sell or transfer their licence, and others from being able to buy or receive a transfer of a licence.

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

The objective of restricting pharmacy ownership primarily to pharmacists is to ensure that an appropriately qualified person has oversight and control of the pharmacy business. Pharmacy businesses hold large amounts of restricted and controlled medicines, which, if misused, could cause significant harm to individuals and the community. Limiting the right to property by restricting ownership of and interests in pharmacy businesses promotes responsible possession and distribution of medicines, helping to promote community safety.

The purpose of establishing a licensing framework is to ensure the robust administration of the pharmacy ownership and interest requirements. This framework will improve transparency and public accountability through the thorough collection of pharmacy business ownership and interest information, allowing the council to fulfil its regulatory responsibilities more effectively and proactively monitor and enforce compliance with the Act.

The intent of limiting the number of pharmacy businesses that a person may own or hold an interest in is to ensure that the owner can provide the required level of oversight, personally supervise and maintain an active interest in each of their pharmacy businesses. This helps to ensure each pharmacy operation is being conducted in accordance with applicable laws, policies, guidelines, and good pharmacy practice. This in turn promotes the health and safety of the public and public confidence in the services provided by pharmacy businesses.

A further objective of limiting the number of pharmacy businesses that an individual or entity may own is to prevent market dominance or inappropriate market conduct. During the Committee's inquiry into pharmacy business ownership, some stakeholders raised concerns that relaxing the ownership restrictions may result in corporate retailers concentrating their services in regional centres, resulting in the closure of smaller pharmacy businesses in surrounding rural and remote areas and reduced access to pharmacy services in those communities.<sup>1</sup> Limiting the right to property by retaining the ownership restrictions may assist in ensuring independently owned pharmacies continue to operate and serve their communities, particularly in rural and regional areas, and provide adequate access to medicines and services. This supports the right to health services in section 37 of the Human Rights Act.

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<sup>1</sup> Committee Report, pages 60, 62 and 63.

Overall, the pharmacy business ownership and interest requirements recognise that medicines are not ordinary items of commerce and have the potential to cause significant harm to individuals if misused and negatively impact the community if distributed improperly. The purposes outlined seek to maximise public health outcomes and are consistent with a free and democratic society based on human dignity, equality, and freedom.

(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 on the right to property will achieve the purposes of promoting community safety and ensuring adequate community access to medicines and pharmacy services. The Bill imposes a requirement that pharmacy businesses can only be owned by eligible persons – practising pharmacists, pharmacist-controlled corporations, certain friendly societies and the Mater. Material interests in pharmacy businesses may only be held by practising pharmacists and close adult relatives of practising pharmacists. This promotes the running of pharmacy businesses in accordance with the professional ethics of pharmacists, ahead of commercial considerations. For example, there is a risk that a non-pharmacist owner may decide against providing low or no profit medicines and services, whereas a pharmacist owner will be bound by their professional and ethical values and obligations.

The limitation on the right to property imposed by restricting the number of pharmacy businesses that a pharmacist or corporation may own or hold an interest in ensures that owners and interest holders can provide the required level of oversight, personal supervision, and active interest in each of their pharmacy businesses. This helps to ensure pharmacy operations are being conducted in accordance with applicable laws, policies, guidelines and good pharmacy practice.

Similar justifications for limiting the right to property by restricting pharmacy ownership and interest requirements have been echoed both nationally and internationally. In 2009, the European Court of Justice ruled that pharmacy ownership restrictions are justified as they aim to ensure the provision of medicinal products to the public is reliable and of good quality.<sup>2</sup>

The Committee Report found that the objectives of the 2001 Act are best achieved by maintaining the restrictions on who may own or hold an interest in a pharmacy business. The Committee Report ultimately concluded that the existing ownership requirements should be retained as there was no compelling reason for the deregulation of ownership requirements for pharmacies in Queensland.<sup>3</sup>

The Committee Report expressed concern that any removal or relaxation of the ownership requirements would result in reduced access to medicines and quality of services, particularly in regional and remote areas of Queensland.<sup>4</sup>

The limitation on the right to property imposed by the licensing framework allows the council to have appropriate oversight over all ownership of and interests held in pharmacy businesses. This ensures the requirements about who can own or hold an interest in a pharmacy business, and how many pharmacy businesses they may own or hold an interest in, can be properly and

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<sup>2</sup> *Commission v Italy*, Ownership and Operation of Pharmacies can be Restricted to Pharmacists Alone (Court of Justice of the European Communities, 19 May 2009), <http://www.curia.europa.eu/jcms/upload/docs/application/pdf/2009-05/cp090044en.pdf>.

<sup>3</sup> Committee Report, page 63.

<sup>4</sup> *Ibid.*

effectively monitored and enforced. This also responds effectively and proportionally to concerns raised in the *Report No 4: 2018-19 Managing transfers in pharmacy ownership* by the Queensland Audit Office (QAO), which found the systems operated under the 2001 Act do not allow for proper enforcement and regulation of the ownership requirements. The Committee similarly found there is expectation by industry and other stakeholders that the requirements are effectively administered and proactively enforced.<sup>5</sup>

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

The right to property recognises that restrictions on the use of property will not violate this right ‘so long as they serve objectives of general interest and do not constitute a disproportionate and intolerable interference with the rights of the owner, impinging on the substance of the right’.<sup>6</sup> The notion that the regulation must be proportionate embraces the idea that there must be a reasonable relationship between the means employed and the aim pursued. Alternative options to the pharmacy business ownership and material interest requirements include a blanket removal of the requirements, or significant modification of them (for example, by greatly increasing the cap on the number of pharmacy businesses a person may own or hold an interest in). These options, however, would fail to achieve the purpose of the Bill and conflict with the findings of the Committee that the objectives of the 2001 Act are best achieved by retaining the current ownership restrictions. These options would also significantly differentiate Queensland from other Australian jurisdictions.

Alternative options to the licensing framework include maintaining the status quo or retaining the current notification approach and making minor amendments to the 2001 Act to improve compliance processes. However, these alternatives would not achieve the objectives the licensing framework is designed to achieve, or be appropriate, given the QAO’s finding that Queensland Health’s current systems are not properly enforcing and regulating the requirements.

As the purpose of the limitation to property is to promote public safety and availability of medicines and pharmacy services, the objectives cannot be achieved through any other reasonably available and less restrictive means. The restrictions are considered to appropriately balance the rights of the business owner or interest holder, and the public interest in promoting public health and safety by ensuring owners and interest holders continue to prioritise the health needs of the community.

(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 Bill strikes a balance between the competing rights of individuals and the community’s right to the provision of safe, accessible and health-focussed pharmacy services, that is reasonable and demonstrably justifiable in a free and democratic society.

Pharmacy businesses hold large quantities of medicines, which if misused, have the potential to cause significant harm to public safety. Given the importance of public safety, health, and

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<sup>5</sup> Committee Report, page 63.

<sup>6</sup> N Jayawickrama, *The Judicial Application of Human Rights Law* (2002) at 916.

wellbeing to the entire community, it is appropriate that pharmacy ownership and material interest requirements limit the ownership and control of pharmacies to practising pharmacists who carry professional and ethical obligations. It is also appropriate to impose and enforce a moderate limitation on the property rights of individuals who own or hold interests in pharmacy businesses. The interferences on the right to property imposed by the Bill are proportionate to the legitimate objectives of the Bill.

(f) any other relevant factors

Nil.

**Human rights potentially limited by suitability assessments and processes**

*Right to privacy and reputation*

(a) the nature of the right

The right to privacy protects individuals against unlawful or arbitrary interferences with their privacy, family, home, or correspondence. Privacy is generally understood to comprise of freedom from unwarranted and unreasonable intrusions into 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 the law, while the concept of arbitrariness extends to interferences that may be lawful but that are capricious, unpredictable, unreasonable, and disproportionate. It protects privacy in the sense of personal information, data collection and correspondence.

Clause 73 provides the council with the power to ask the police commissioner to provide a criminal history report about a person who is or has applied to be a licence holder, or director or shareholder of a corporate applicant or licence holder, to assist in determining whether the applicant or licence holder is a fit and proper person to hold a licence. Schedule 1 defines *criminal history* to mean the person's criminal history as defined under the *Criminal Law (Rehabilitation of Offenders) Act 1986*, other than spent convictions. The Criminal Law (Rehabilitation of Offenders) Act defines *criminal history* as the convictions recorded against that person in respect of offences.

Clause 75 requires a licence holder, or director or shareholder of a licence holder, to notify the council if the licence holder, director or shareholder is convicted of an indictable offence during the term of the licence. A maximum penalty of 100 penalty units applies for non-compliance.

Clause 76 requires a licence holder, or director or shareholder to notify the council if they become aware of any changes to a matter considered in determining whether the licence holder is a fit and proper person. A maximum penalty of 50 penalty units applies for non-compliance.

Clause 81 provides the council with the power to request further information or documents from a licence holder that the council reasonably requires to determine whether the licence holder is an eligible person, or a fit and proper person to own a pharmacy business. The council can also seek further information or documents required to determine whether a person holds a material interest in the pharmacy business or otherwise considers necessary for the administration of the Act.

These clauses may adversely affect an individual's right to privacy, by making the provision and consideration of personal information an essential requirement in the process of obtaining and retaining a licence to own a pharmacy business.

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

The main purpose of limiting the right to privacy by allowing the council to undertake a fit and proper person assessment, obtain the criminal history of a person who is the applicant or a shareholder or director of a corporate applicant for a licence, and request any further information or documents necessary to decide the application, is to determine whether applicant for a pharmacy business licence is an appropriate person to own a pharmacy business. The purpose of requiring licence holders, and directors and shareholders of corporate licence holders, to advise of any criminal convictions and changes to matters relevant to whether the licence holder is a fit and proper person is to ensure the council is made aware of any changes that may impact a licence holder's ability to maintain the high standards required to operate and control a pharmacy business.

These limits on the right to privacy are narrow in scope – they apply only to applicants for and holders of pharmacy business licences, and their shareholders and directors. By participating in a statutory licensing scheme, a person has, as a condition of participation, accepted the monitoring and enforcement provisions of the scheme.

Accordingly, these provisions are consistent with a free and democratic society based on human dignity, equality and freedom.

- (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 provisions requiring disclosure of criminal history are intended to promote the safe and competent provision of pharmacy services. They achieve this by ensuring the council can make a properly informed assessment of whether a person who is in a position of control over a pharmacy is, or remains, a fit and proper person to hold a licence. Such information will bring to light any history or incidents that may indicate that a person may not operate the pharmacy business in a safe and competent fashion, for example, previous convictions relating to serious drug offences, or cancellation of professional registration for unsafe practices.

The provisions requiring licence holders to notify the council of changes in specified circumstances, and allowing the council to require licence holders to provide other information and documents relevant to the licensing scheme, are intended to ensure the council is fully informed about matters relevant to the licence holder's ongoing eligibility and fitness to hold the licence. This will ensure community pharmacy businesses are compliant with the Bill. Proactive monitoring allows for early identification and correction of issues before they cause an owner or interest holder to be non-compliant.

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

The powers conferred on the council to request a person's criminal history and require licence holders to disclose certain information are necessary to ensure the integrity of the licensing



framework and the suitability of potential and existing licence holders. Without the power to obtain a person's criminal history information, there is no other way for the council to independently verify whether a person is suitable to hold a licence. Similarly, there are no other less restrictive ways of ensuring the council is aware of information impacting the suitability of a licence holder during the term of a licence, other than to require licence holders to provide such information and compel compliance with the requirement.

The limitation on the right to privacy is justified by the fact that pharmacy businesses hold large quantities of potentially dangerous substances. There is a need to ensure the individuals who own those businesses are fit and proper to do so, to minimise the risk of diversion or inappropriate use of substances. Provisions of this nature are common in occupational regulation legislation where, for public health and safety reasons, the integrity of applicants or licence holders must be rigorously assessed.

To mitigate the limitation on the right to privacy, the Bill includes suitable safeguards to ensure this information is used only for appropriate purposes. These safeguards include:

- the creation of an offence for the disclosure of confidential information unless the disclosure is required or permitted by the Bill;
- a requirement for the council to seek a person's written consent to obtain their criminal history report; and
- a requirement for the criminal history information to be destroyed following use for the purpose for which it was obtained.

In addition, the requirement in the Bill for a licence holder to advise of new convictions for an indictable offence during the term of a licence is subject to a 'reasonable excuse' exception, meaning the offence will not apply if the licence holder has a reasonable excuse for non-compliance with the notification requirement.

Further, the Bill provides that an applicant for a new licence, or other application, has a reasonable period of up to 14 days to comply with any notice for further information or documents, and the council may only request information or documents that the council needs to decide the application. The collection and use of personal information will also remain subject to the requirements of the *Information Privacy Act 2009*, including the requirement that an individual must be made aware of the purpose of the collection of information and its potential disclosure.

As the purpose of the limitation to the right to privacy is to enhance public safety and confidence in pharmacy services, the objectives cannot be achieved through any other reasonably available and less restrictive means. The powers of the council to request and access certain information appropriately balances the rights of the applicant, and the public interest in ensuring pharmacy business owners possess the necessary qualities to own and control a pharmacy business.

(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 limitations in the Bill are appropriate and adapted to achieving the objectives of the Bill.

Pharmacy services are an integral element of Queensland's health system. The licensing scheme is intended to promote professional, safe and competent provision of pharmacy services and maintain confidence in the pharmacy profession. This requires that the licensing authority be fully informed about matters relevant to eligibility and fitness requirements under the scheme. The associated limitations on the right to privacy are narrow in scope. They apply only to applicants for and holders of pharmacy business licences, and their directors and shareholders, who, by participating in a statutory licensing scheme, accept those limitations. They also apply only to obtaining information relevant to the licensing scheme.

Accordingly, the ability for the council to obtain a person's criminal history and any other information relevant to eligibility and fitness requirements, the requirement for personal disclosure, and offence provisions relating to that requirement, in conjunction with relevant safeguards, strike an appropriate balance between the public safety objectives of the Bill and participants' right to privacy.

(f) any other relevant factors

Nil.

**Human rights potentially limited by administrative decision-making powers**

*Right to a fair hearing*

(a) the nature of the right

The right to a fair hearing affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It applies to both criminal and civil proceedings and guarantees that such matters must be heard and decided by a competent, impartial and independent court or tribunal.

The Bill may limit the right to a fair hearing by conferring decision-making powers on the council and their delegates. While these powers are administrative and not judicial in nature, the council's powers are sufficient to substantially affect the rights and financial circumstances of licence holders. In some cases, these powers can be exercised without first affording the impacted applicant or licence holder an opportunity to be heard, thus potentially breaching the requirements of natural justice.

Part 4 allows for applications to be made for new licences, renewal and restoral of existing licences, changes to licences and suspension, cancellation or surrender of licences. Each application process contains decision-making criteria which must be applied by the council when deciding whether to grant or refuse the application. Part 4 also allows the council to impose conditions on licences and to make certain changes to licences on the council's own initiative.

For example, clause 29 provides the council may refuse to grant a licence if the council is not satisfied the applicant meets the criteria for grant of a licence under clause 28. These include the eligible person requirements, the 'fit and proper person' requirements, and the proposed pharmacy premises requirements. Clause 30 provides the council may impose conditions on the grant of a licence the council considers appropriate.

Clause 63 allows the council to change the conditions on a licence if necessary to ensure the proper operation of the pharmacy business to which the licence relates, or the health and wellbeing of customers of the pharmacy business to which the licence relates. However, clause 64 requires that before the council decides to change a condition under clause 63, the council must give the licence holder a show cause notice and allow them an opportunity to respond before making the decision.

Clauses 65 and 66 allow the council to suspend or cancel a licence in particular circumstances including, for example, if the licence was obtained because of materially incorrect, false, or misleading information, or if the licence holder is no longer an eligible person. However, clause 67 requires that before the council decides to suspend or cancel under clauses 65 or 66, the council must give the licence holder a show cause notice and allow them an opportunity to respond before making the decision.

Clause 68 provides the council may decide to immediately suspend or cancel a licence without a prior show cause process if the council reasonably suspects carrying on the pharmacy business for which the licence was granted poses an immediate risk to public health or safety.

For all the decisions mentioned above the council must give the applicant or licence holder an information notice, including the reasons for the decision and information regarding rights of review. The applicant or licence holder may then apply for internal merits-based review of the decision and, subsequently, external review by the Queensland Civil and Administrative Tribunal (QCAT).

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

The council's power to decide to refuse a licence application, or set a condition on the licence, without first giving the applicant or licence holder an opportunity to respond to the proposed decision, limits the applicant or licence holders right to a fair hearing. The purpose of this limitation is to ensure efficient functioning of the licensing scheme in achieving the objectives of the Bill.

The council's power to decide to immediately suspend or cancel a licence without first giving the licence holder an opportunity to respond to the proposed decision, also limits the licence holders right to fair hearing. The purpose of this limitation is to ensure the council can act quickly to ameliorate an immediate risk to public health posed by the carrying on of a pharmacy business.

These limitations operate only in respect of participants in the licencing scheme, serve a public safety purpose, and are mitigated by the internal and external merits review processes in the Bill. The limitations are therefore consistent with a free and democratic society based on human dignity, equality and freedom.

(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 limitations on the right to a fair hearing with regard to licensing decisions will achieve its intended purpose of ensuring the efficient operation of the licensing scheme by providing a streamlined process for determining licence applications and related decisions.

The limitation on the right to a fair hearing with regard to immediate suspension or cancellation of a licence will achieve its intended purpose of addressing an immediate risk to public safety posed by the carrying on of a pharmacy business by allowing the council to act quickly to prevent the carrying on of the business. Requiring the council to issue a show cause notice and allowing the licence holder a period of time to respond would impair the council's ability to act quickly to address the immediate risk.

The power to suspend rather than cancel a licence will ensure the council can fully investigate the circumstances relating to the suspension and allow the licence holder to further explain or remedy the issue where possible. This will protect the public by preventing the licence holder from continuing to operate under the licence in a way that may pose a risk to public health and safety, but minimise the loss of pharmacy services to the community.

The power to cancel a licence will ensure the council can respond to serious incidences of non-compliance with the Act, which are unlikely to be able to be remedied. This will also achieve the purposes of Bill in promoting the professional, safe and competent provision of pharmacy services and maintaining public confidence in the pharmacy profession.

The Bill also provides the council may make a required change to a licence on its own initiative if the council reasonably suspects a ground for cancelling or suspending a pharmacy business licence exists, and reasonably believes that imposing a condition on the licence instead of suspending or cancelling the licence will ensure the health and wellbeing of customers. For example, if the relevant pharmacy business is in a rural area and cancelling or suspending the licence would have the effect of preventing people from accessing necessary medicines and health care advice, the council may instead decide to impose a condition requiring a practising pharmacist other than the licence holder to carry on the business for a prescribed period.

These limitations on the right to a fair hearing will therefore achieve the purpose of ensuring the Bill can be administered effectively, while also promoting the Bill's broader objective of public health and safety.

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

With regard to licensing decisions, there is no less restrictive and reasonably available ways to ensure the efficient functioning of the licensing scheme. An alternative option is to require a show cause notice for each decision to refuse a licence application or decision to set a condition on a licence and provide applicants or licence holders an additional opportunity to be heard before the decision is made. However, the Bill provides for internal and external review processes that have the same effect. When the council makes a licensing decision, the council is required to provide the relevant person or persons with an information notice identifying the decision, outlining the reasons for the decision, and providing information about review rights. Additionally, the Bill provides that an applicant may seek internal review of the council's decision regarding their licence application. If an applicant is dissatisfied with the outcomes of the internal review, they may seek external review of the decision through QCAT.

With regard to the council's immediate suspension and cancellation powers, there is no less restrictive and reasonably available way to address an immediate risk to public health or safety posed by the carrying on of a pharmacy business. For non-immediate risks, the Bill also provides the council may make a required change to a licence on their own initiative if the

council reasonably suspects a ground for cancelling or suspending a pharmacy business licence exists, and reasonably believes that imposing a condition on the licence instead of suspending or cancelling the licence will ensure the health and wellbeing of customers. However, a decision to impose a condition under these provisions is subject to a show cause process, which would impair the council's ability to address an immediate risk.

(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 limitations in the Bill are appropriate and adapted to achieving the objectives of the Bill.

Pharmacy services are an integral element of Queensland's health system. The licensing scheme is intended to promote professional, safe and competent provision of pharmacy services and maintain confidence in the pharmacy profession.

This requires that the licensing scheme operate efficiently. The limitations on the right to a fair hearing with respect to licensing decisions ensure the council can make timely decisions. The Bill also provides internal and external merit review processes for those decisions. Applicants and licence holders are therefore afforded the opportunity to be heard in relation to the merits of licensing decisions.

It also requires that the council have powers to address immediate risks to public health posed by the carrying on of a pharmacy business. The limitation on a right to a fair hearing regarding decisions to immediately suspend or cancel a licence ensure the council can act quickly to address the immediate risk. These decisions are subject to internal and external review processes, allowing licence holders an opportunity to be heard on the merits of the decision. Other provisions of the Bill allow the council to set licence conditions to address non-immediate risks, with a show cause process.

These limitations on the right to a fair hearing are narrow in scope – they apply only to applicants for and holders of pharmacy business licences. By participating in a statutory licensing scheme, a person has, as a condition of participation, accepted these limitations.

The Bill therefore balances its public safety objectives with the limitation on applicants' and licence holders' right to a fair hearing.

(f) any other relevant factors

Nil.

*Right to property*

(a) the nature of the right

As outlined above, the right to property provides every person has the right to own property alone or in association with others and must not be arbitrarily deprived of their property.

Clauses 27 and 50 may limit this right, by allowing the council to ask an applicant to inspect the proposed licensed premises on the stated day, or another day agreed between the applicant and the council.

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

The purpose of limiting the right to property by allowing a council to ask an applicant to ensure the premises is made available for inspection by the council is to support the operation of the scheme and ensure the pharmacy premises complies with the relevant requirements to achieve public health outcomes. Standards relating to pharmacy premises will be prescribed by regulation, to ensure that pharmacy businesses meet requirements necessary for safe and hygienic dealings with medicines.

- (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 on the right to property will achieve its purpose of enabling better monitoring of pharmacy ownership requirements, by allowing the council to inspect the pharmacy business premises of an applicant for a licence or an applicant who is applying for licence relating to a new business or a change of pharmacy business premises.

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

An alternative to allowing council to inspect a pharmacy business premises in certain circumstances would be to removing this power from the Bill. This, however, would fail to achieve the intended purpose of improved monitoring and compliance with the pharmacy business ownership framework.

This power is subject to appropriate safeguards, as the council does not have an unfettered right to enter the premises. For example, the council must ask the applicant to ensure the premises is available for inspection on the stated day, or an alternate day that is agreed between the applicant and the council.

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

The purpose of limiting the right to property by allowing the council to ask an applicant to ensure the premises is made available for inspection by the council is to support the operation of the scheme and ensure pharmacy ownership requirements are properly monitored and enforced to achieve public health outcomes.

- (f) any other relevant factors

Nil.

## Human rights potentially limited by council provisions

### *Right to take part in public life*

#### (a) the nature of the right

Every person in Queensland has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives. This includes a right for every eligible person to have access on general terms of equality, to the public service and to public office.

Participation in the conduct of public affairs is a broad concept and covers all aspects of public administration. Individuals participate in the conduct of public affairs when they are members of legislative bodies or hold executive office. The right protected by section 23 of the Human Rights Act has been interpreted by the United Nations Human Rights Committee as providing a right of access, on general terms of equality, to positions in both the public service and public office.

The right to take part in public life is limited to ‘eligible persons’. This internal limitation allows for legislation to prescribe matters such as eligibility for membership to a body.

The Bill limits the right to take part in public life by outlining the council’s composition requirements in clause 150, along with the provision of disqualifying factors in clause 151. Clause 156 provides that the Minister may end a member’s appointment where the member has been guilty of misconduct, or has neglected the member’s duties or performed the member’s duties incompetently. Clause 164 also limits the right to take part in public life by restricting the ability of council members with a conflict of interest to take part in the council’s decision about the matter to which the conflict of interest relates.

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

The purpose of the limitation on the right to take part in public life, by outlining the council’s composition requirements, is to ensure members collectively have the appropriate experience, skills and knowledge for the efficient and effective performance of the council’s functions. Imposing disqualifying factors, including an ability for the Minister to end a member’s appointment in particular circumstances and prescribing a requirement for members to declare conflicts of interest and restricting participation in related matters, supports the integrity and accountability of council members and transparency in the council’s decision-making. This is essential to ensure good governance, achieves the purpose of the Bill, and is consistent with a free and democratic society based on human dignity, equality and freedom.

#### (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 Bill establishes a regulatory council with at least five members who have a mixture of experience and skills in law, accounting, business or financial management, representing the pharmacy sector or consumers or another area or field which the Minister deems necessary or beneficial for the council to perform its functions.

For effective performance, it is necessary for the council to have members that collectively provide the council with the required skill set and expert knowledge to perform its functions. The prescribed membership outlined in the Bill will ensure the council includes members with commercial acumen and subject matter expertise to effectively undertake its functions and responsibilities. As such, the limitation is directly related to the purpose.

As members of an independent statutory body, council members have a duty to act in the council's best interest. To achieve this, the Bill provides that council members must disclose changes in their criminal history or declare a personal interest. It further restricts council members from participating in council consideration of a matter where there is a personal interest in the matter. This will ensure the suitability of members, accountability of the council and transparency in decision-making, and promotes good governance.

Similar limitations on the membership of statutory boards and councils are common across the statute book and ensure that such bodies can fulfil their purposes and functions effectively and with an appropriate level of accountability.

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

The provisions are necessary to ensure the council is constituted with the appropriate expertise and to ensure that appointments to the council and the exercise of functions by the council are transparent and accountable.

(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 in the Bill relating to council membership strike a balance between competing rights that is reasonable and demonstrably justifiable in a free and democratic society.

The council's role will be to administer the pharmacy ownership legislation. It is essential that the principles of good governance apply, and appropriate persons are appointed and continue to represent the council to ensure the council can effectively undertake its functions. To achieve this, the Bill prescribes matters relating to eligibility, disqualification, removal, and good governance. Accordingly, the limitations on a person's right to take part in public life are reasonable and justified when balanced against the public interest in the council performing its functions effectively and with integrity.

(f) any other relevant factors

Nil.



## **Human rights potentially limited by council provisions**

### *Right to privacy and reputation*

#### (a) the nature of the right

As outlined above, the right to privacy protects individuals against unlawful or arbitrary interference with their privacy, family, home, or correspondence.

Clause 181 will limit the right to privacy and reputation by allowing the Minister to obtain the criminal history of a person applying to be a member of the council or its chief executive officer, subject to the person's consent.

Clause 182 will also limit this right by requiring council members and the chief executive officer to disclose information about changes in their criminal history.

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

The purpose of the limitation on the right to privacy and reputation, by giving the Minister the ability to obtain a person's criminal history and the requirement for council members and chief executive officer to disclose certain information, is to ensure members of the council and chief executive officer possess the characteristics to ensure the effective and efficient performance of the body. There is a strong public interest in ensuring there is appropriate oversight and accountability imposed on people who seek appointment, or are appointed, to the council or as chief executive officer.

To achieve this, the Bill allows the Minister to request a criminal history report about a person who is being considered for membership of the council or chief executive officer. The Bill also requires council members and the chief executive officer to disclose any convictions for indictable offences that occur during their terms appointment unless the member or chief executive officer has a reasonable excuse.

It is in the public interest that the membership of public bodies be open to scrutiny by the Minister to whom the public body is responsible, and that members are obligated to disclose matters that would disqualify the person from being a member. The limitation on the right to privacy allows the Minister to ensure the suitability of a proposed or existing member, thereby safeguarding the integrity of the council. Corresponding considerations apply in relation to the chief executive officer.

It is considered that any impact upon a person's right to privacy resulting from the power in the Bill to obtain the criminal history of council members, and the requirement for council members to disclose new convictions, is justified to ensure the integrity and appropriateness of those appointed, or being considered for appointment, to the council. Council members will be expected to uphold the public trust invested in the body and should therefore be held to high standards of integrity and propriety. Corresponding considerations apply in relation to the chief executive officer.

- (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 purpose of the limitation on the right to privacy is to ensure the integrity of the membership and leadership of the council by providing appropriate oversight and accountability mechanisms. To determine a person's suitability for appointment, the Minister requires the power to independently verify their suitability. These limitations on the right to privacy are necessary to ensure relevant information is obtained and a person's suitability as a member or chief executive officer is evaluated.

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

Without the power to obtain a person's criminal history information, there is no other way for the Minister to independently verify whether the person is suitable for appointment. Furthermore, requiring members to disclose new convictions will allow the Minister to assess ongoing suitability for council membership. As council members should be held to high standards of integrity there is no less restrictive way to verify the suitability of proposed members. Corresponding considerations apply in relation to the chief executive officer.

It is considered that any impact on a person's right to privacy resulting from the power in the Bill to obtain the criminal history of council members, and the requirement for council members to disclose new convictions, is justified in order to ensure the integrity and appropriateness of those appointed, or being considered for appointment, to the council. Council members will be expected to uphold the public trust invested in the council and should therefore be held to high standards of integrity and propriety. Corresponding considerations apply in relation to the chief executive officer.

The requirements to disclose certain information under the Bill is considered to appropriately balance human rights in a less restrictive manner by way of safeguards. The Bill provides the Minister is only able to obtain the proposed member's or chief executive officer's criminal history if the person consents. If the person does not consent, they will not be eligible for appointment. It will also be an offence to use or disclose a person's criminal history unless the disclosure is required by the Bill or required or permitted by law. The criminal history information of a member or proposed member of the council or chief executive must also be destroyed once it is no longer required. Additionally, the offence provision compelling a council member or chief executive officer to advise of new convictions within a 14-day timeframe will not apply if the council member or chief executive officer has a reasonable excuse for non-compliance.

The collection and use of personal information will also remain subject to the requirements of the Information Privacy Act, including the Information Privacy Principles that require the corporation to make the individual aware of the purpose of the collection of information and its potential disclosure.

- (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 in the Bill relating to council membership strike a balance between competing rights that is reasonable and demonstrably justifiable in a free and democratic society.

To ensure the council can effectively undertake its functions, the Bill prescribes matters relating to eligibility, disqualification and removal, and good governance. Accordingly, the limitations on a person's right to privacy are reasonable and justified, when balanced against the public interest in the council performing its functions effectively and with integrity.

- (f) any other relevant factors

Nil.

### **Human rights potentially limited by council provisions**

#### *Right to a fair hearing*

- (a) the nature of the right

As outlined above, the right to a fair hearing affirms the right of all individuals to procedural fairness when coming before a court or tribunal. This includes the right to a fair and public hearing before a competent, independent and impartial court or tribunal established by law.

Clause 151 provides a person is disqualified from continuing as a council member if the person has a conviction, other than a spent conviction, for an indictable offence, is an insolvent under administration, is disqualified from managing corporations under the *Corporations Act 2001* or contravenes a provision of the Bill.

Clause 151 also provides a person is disqualified from becoming a council member if the Minister asks the person for written consent to obtain the person's criminal history report, and the person refuses or does not give the consent within 14 days after being asked for it.

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

The purpose of limiting the right to a fair hearing by immediately disqualifying a council member in certain circumstances is due to the significance of the council and its responsibilities. Council members are expected to uphold the public trust vested in the body and must be held to high standards of integrity and propriety.

- (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 on the right to a fair hearing by disqualifying or removing a council member from office achieves the purpose of upholding high standards of integrity and propriety of the

council by allowing for the immediate removal of a person's authority to continue as a council member, without receiving and considering submissions from the person.

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

Options that may be less restrictive than the disqualification or removal of council members include a requirement to allow a person to make submissions regarding their disqualification or removal in specified circumstances. However, this alternative would not achieve the purpose of maintaining the integrity of the council. The disqualifying circumstances are those which are sufficiently serious to threaten the integrity and public standing of the council, regardless of any contextual or mitigating factors. They are also simple to establish as a matter of fact. An opportunity to make submissions therefore serves no purpose. Further, allowing a person who has a conviction for an indictable offence, or is disqualified from managing corporations under the *Corporations Act 2001*, to continue serving on the council while making submissions would reduce public confidence in the council.

(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 in the Bill relating to council membership strike a balance between competing rights that is reasonable and demonstrably justifiable in a free and democratic society.

The council's role will be to administer the pharmacy ownership legislation. To ensure principles of good governance apply, and appropriate persons are appointed, the Bill prescribes matters relating to eligibility, disqualification and removal, and good governance. Accordingly, the limitations on a person's right to a fair hearing are reasonable and justified, when balanced against the public interest in the council performing its functions effectively and with integrity.

(f) any other relevant factors

Nil.

### **Human rights potentially limited by inspection powers**

*Right to privacy and reputation*

*Right to property*

(a) the nature of the right

As outlined above, the right to privacy and reputation protects the individual from all interferences and attacks upon their privacy and reputation.

The right to property provides that every person has the right to own property alone or in association with others and must not be arbitrarily deprived of their property.

Part 8 will limit both the right to privacy and right to property by allowing an inspector to enter a place if the occupier consents, the place is open to the public, the inspector's entry is

authorised by a warrant, or the place is a licensed pharmacy business that is open for business or otherwise open for entry.

Part 8 will also limit both the right to privacy and right to property by providing authority for inspectors to seize evidence, require a person to provide their name and address or other information, and require a person to produce a document.

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

The purpose of limiting the rights to privacy and property, by equipping inspectors with the power to enter places, seize evidence and obtain information in specified circumstances, is to enable inspectors to obtain critical information relating to the affairs and activities of pharmacy business owners. These powers will enable inspectors to perform their role, and more broadly achieve the purpose of the Bill to promote the professional, safe, and competent provision of pharmacy services and maintain public confidence in the pharmacy profession. These powers are necessary to support a robust regulatory system and enable effective monitoring and enforcement of compliance with the legislation.

(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 on the rights to privacy and property will achieve the purpose of facilitating the effective operation of the licencing framework by providing inspectors with the necessary powers to enter and seize property.

These powers will enable inspectors to obtain critical information relating to the affairs and activities of pharmacy business owners to support a robust regulatory system and enable effective monitoring and enforcement of compliance with the Bill. The functions and powers are conferred only to the extent reasonable and necessary to achieve the purpose. Similar powers exist within licensing and regulatory frameworks across the statute book.

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

These proposals represent the least restrictive and reasonably available way of ensuring inspectors can effectively monitor and enforce compliance with the Bill. A number of safeguards have been incorporated to lessen the negative impact of these powers on the right to property and right to privacy and reputation including:

- requiring an inspector to produce their identity card before exercising a power under the Act in relation to another person;
- providing an inspector may only enter a place if the inspector has the consent of the occupier, a warrant, or the place is a public place and entry occurs at a time the place is open to the public;
- outlining particular processes that must be followed by the inspector if they are entering a place under a warrant;
- requiring receipts to be provided for seized items;
- requiring seized items to be returned unless they are forfeited; and
- the ability to claim compensation from the State if loss is incurred because of an exercise of power by an inspector.

In light of the relevant safeguards, the entry, search and seizure powers in the Bill are justified as they ensure that authorised persons can access and collect accurate and relevant information and evidence to achieve the monitoring and enforcement functions of the public health and wellbeing aims of the Act, including ensuring pharmacy businesses are operating safely and in accordance with expected healthcare standards.

In the absence of the limitations on the right to privacy and property, the monitoring and enforcement functions and the overall aims of the Bill may be undermined, and offences may not be able to be effectively investigated and prosecuted.

(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 Bill balances the objectives of the Bill and limitations of human rights related to inspection functions and powers.

The main purposes of the Bill are to promote the professional, safe and competent provision of pharmacy services by pharmacy businesses and to maintain public confidence in the pharmacy profession. The inspectors' role will be to investigate, monitor and enforce compliance with the Bill in pursuit of those objectives. The associated powers and safeguards strike an appropriate balance between the imposition on the right to privacy and property and the importance of ensuring inspectors can effectively monitor and enforce compliance with the Bill.

(f) any other relevant factors

Nil.

### **Human rights potentially limited by inspection powers**

#### *Right to a fair hearing*

(a) the nature of the right

As outlined above, the right to a fair hearing affirms the right of all individuals to procedural fairness when coming before a court or tribunal. This also gives effect to a reasonable limitation on the right against self-incrimination.<sup>7</sup>

Clause 133 provides it is not a reasonable excuse for a person to fail to comply with a document production requirement on the basis that complying with the requirement might incriminate the person or expose the person to a penalty. Clause 134 provides that it is not a reasonable excuse for a person to fail to comply with a document certification requirement on the basis that complying with the requirement might incriminate the person or expose the person to a penalty.

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<sup>7</sup> *Re an application under the Major Crime (Investigative Powers) Act 2004* [2009] VSC 381 [118].

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

The purpose of limiting the right to a fair hearing with respect to the document production and certification requirements is to ensure effective compliance with the licensing scheme. Where a person is required to keep a document or information under legislation, it is appropriate to waive the benefit of the self-incrimination rule in relation to that document or information. To allow a claim of privilege for these documents or information would effectively facilitate a failure to keep the records, or their destruction or falsification. A similar provision applies in relation to document production compelled under section 180 of the *Medicines and Poisons Act 2019*.

- (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

A failure to comply with an inspector's document production or certification requirement is subject to a reasonable excuse exception, but this does not include claiming the right against self-incrimination.

The former Scrutiny of Legislation Committee considered the abrogation of the privilege against self-incrimination may be justified if a person is required to produce documents required to be issued or kept under an Act. Similarly, the Queensland Law Reform Commission, in its 2004 report, *The Abrogation of the Privilege Against Self-Incrimination*, noted that by participating in a statutory scheme, such as through obtaining a licence or other form of registration, a person has, as a condition of participation, accepted the enforcement provisions and waived the benefit of the privilege against self-incrimination. The Law Reform Commission also observed that to allow a claim of privilege in relation to records of this type would thwart the purpose of the legislation, since it would facilitate a failure to keep the records, or their destruction or falsification, with little fear of detection.

The documents required to be produced or certified under clauses 133 and 134 are documents given to the person under the Bill or documents required to be kept under the Bill, so they fall directly within the categories of documents identified by the Scrutiny Committee and Law Reform Commission. This limitation on the right to a fair hearing, therefore, achieves the aim of creating an effective licensing scheme, by ensuring the documents required under the Bill are kept and maintained.

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

The provisions in the Bill represent the least restrictive and reasonably available way of effective operation of the document requirements under the Bill. Without cooperation by the person who has been given or is required to keep or certify a document under Bill, it would not be possible for the inspector to obtain documents by alternative means, or to ensure their authenticity. This limitation is justified as the provisions enable inspectors to enforce the framework by ensuring their enforcement capability is not compromised.

The limitation is mitigated as the Bill provides a limited immunity against the future use of the document given or certified in compliance with the requirement. The limited immunity does not apply in relation to an offence under the Bill or administrative action.

- (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

These proposals and safeguards strike an appropriate balance between the imposition on the right to a fair hearing, and the importance of ensuring inspectors can effectively monitor and enforce compliance with the Bill.

- (f) any other relevant factors

Nil.

### **Human rights potentially limited by information sharing powers**

#### *Right to privacy and reputation*

- (a) the nature of the right

As outlined above, the right to privacy and reputation protects the individual from all interferences and attacks upon their privacy and reputation.

The Bill will limit this right by allowing disclosure of confidential information by a person performing a function under the Act (for example, a council member, or the chief executive officer of the council) to prescribed entities for certain limited purposes. The prescribed entities include, for example, a coroner and an official under the *Health Ombudsman Act 2013*. Under schedule 1, *confidential information* is defined as personal information, information about the person's commercial activities and criminal history information. It does not include information that is publicly available.

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

The purpose of the limitation is to facilitate information sharing within the health sector regulation framework and assist relevant compliance entities to undertake well-informed and comprehensive investigations into activities that may endanger the health and safety of the public. This will provide for the appropriate regulation of pharmacists owning or holding a material interest in a pharmacy business.

Any limitation on rights is justified because adequate safeguards are in place and appropriate information sharing is necessary to ensure relevant compliance entities can undertake well-informed and comprehensive investigations into activities that may endanger the health and safety of the public.

- (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 on the right to privacy will achieve the purpose of facilitating information sharing within the health sector regulation framework by expressly providing for which entities, and under what circumstances, confidential information may be disclosed. The



limitation on the right to privacy will also achieve the broader objective of monitoring and promoting compliance with laws and regulations relevant to public health, safety and wellbeing including, for example, laws relating to the registration of pharmacists.

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

The amendments in the Bill are the least restrictive and reasonably available way to achieve the identified purposes. The amendments are reasonably adapted to minimise the impact on the person's right to privacy as much as possible while still achieving the objectives of the Bill. The absence of these amendments would prevent relevant entities from being able to effectively monitor and promote compliance with relevant laws and regulation applying within the health sector, risking adverse impacts for public health and safety. It would also prevent the council from being able to effectively fulfil its functions.

Appropriate safeguards are in place to ensure the information provided is used only for permitted purposes. For example, the circumstances in which information can be disclosed are limited and appropriately defined and the Bill provides it is an offence to use or disclose the information other than as required or permitted by the Bill.

(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

Information sharing processes are necessary within the Queensland and national health systems to ensure their effective functioning and to protect and promote the health and safety of Queenslanders. Permitting disclosure to an exhaustive list of prescribed entities in limited circumstances is appropriately balanced with safeguards on the use of disclosed information and penalties for its misuse.

(f) any other relevant factors

Nil.

### **Human rights potentially limited by reversal of onus of proof provisions**

*Right to a fair hearing*

*Rights in criminal proceedings*

(a) the nature of the right

The right to a fair hearing affirms the right of all individuals to procedural fairness when coming before a court. It also guarantees that such matters must be heard and decided by a competent, impartial and independent court. In the criminal law context, an initial requirement is that there is a clear and publicly accessible legal basis for all criminal prosecutions and penalties, so the criminal justice system can operate in a way that is predictable to the defendant. The criminal proceeding right under section 32 of the Human Rights Act sets out a number of minimum guarantees for persons charged with criminal offences. Many of these rights also assist in establishing a fair trial, including a person's right to be presumed innocent until proven guilty and the onus on the prosecution to prove the offence beyond a reasonable doubt.

The Bill limits these rights by creating numerous offences containing a reasonable excuse provision, which is considered to reverse the onus of proof. For example, where the Bill prohibits a person from doing something in the absence of a reasonable excuse, it is generally appropriate for the accused person, rather than the prosecution, to provide the necessary evidence of the reasonable excuse.

The Bill also limits this right by replicating the existing evidentiary provisions contained in the 2001 Act which reverse the onus of proof. For example, clause 199 provides that a certificate purporting to be signed by the chairperson of the council or the chief executive officer stating that, for example, a stated document is a pharmacy business licence, is evidence of the matter.

The Bill further limits these rights by replicating the existing derivative liability provisions under the 2001 Act. These provisions provide that executive officers can be taken to have committed the offences of their corporate entity. Provisions of this type create a presumption of guilt or responsibility, and effectively relieve the prosecution of the obligation to prove the elements of the offence for the person taken to have committed it.

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

The purpose of limiting the right to a fair hearing and rights in criminal proceedings by requiring the accused to provide evidence of a reasonable excuse, is to ensure that evidence is provided by the individual best positioned to provide that evidence. The existence of a reasonable excuse exception will also ensure individuals are afforded an opportunity to raise an appropriate defence for failing to comply with an obligation.

The Bill aims to promote the professional, safe and competent provision of pharmacy services and maintain public confidence in the pharmacy profession. It is appropriate that an executive officer who is in a position to influence the conduct of a corporation be required to ensure the corporation complies with the legislation. The executive officer who is responsible for a contravention of the legislation should be accountable for their actions and not be able to ‘hide’ behind the corporation.

These provisions relate to non-contentious matters and are considered justified on the basis that it enables the council to put evidence before the court about a range of basic matters without the need to call witnesses. For example, clause 199 provides that certain stated documents are evidence of the matters contained within, for example, that during a particular period of time, a particular person was appointed as an inspector.

(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 on the right to a fair trial and rights in criminal proceedings will achieve its purpose of creating a reasonable excuse exception in certain circumstances, by providing a person with an opportunity to raise a ‘reasonable excuse’ for failing to comply with a requirement. Without a ‘reasonable excuse’ exception, the relevant offences would be unnecessarily strict and penalise individuals for non-compliance with obligations that they may be unable to comply with.

In the circumstances where a reasonable excuse exception arises, the facts giving rise to a reasonable excuse would be within the particular knowledge of the accused person. For example, clause 133 provides that a person must not contravene a document production requirement unless the person has a reasonable excuse. The reason for a person not complying with a document production requirement is a matter within their own knowledge and which they can prove by giving evidence.

The executive liability provision in clause 203 achieves its purpose of maintaining public confidence in the pharmacy profession, by providing that in certain circumstances, the executive officer may be proceeded against for, and convicted of, the offence against the deemed executive liability provision, regardless of whether corporation has been proceeded against for, or convicted of, the offence. This will ensure there is appropriate oversight of all pharmacy businesses in Queensland and aims to deter the conduct of executive officers who authorise, permit, or is knowingly concerned in the corporation's conduct constituting an offence under the Bill.

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

The provisions in the Bill are the least restrictive way to achieve the identified purposes. In the absence of reasonable excuse exceptions, the prosecution or inspector would be forced to prove the negative, that is, that the accused did not have a reasonable excuse – a task that could cause the prosecution or inspector real difficulties. As the facts of the defence of reasonable excuse are entirely within the defendant's knowledge, the reasonable excuse exceptions in the Bill strike a fair balance between the rights of the person subject to the offence and the purpose of the provision in ensuring the integrity of pharmacy businesses.

Further, there is no less restrictive and reasonably available ways for maintaining public safety and confidence in the pharmacy progression, than by replicating the existing evidentiary provisions and executive liability provisions. As the regulation of the ownership of pharmacy businesses is critical in ensuring the safety and efficacy of its operations, the offences reversing the onus of proof in limited circumstances are justified.

(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 limitations on an individual's right to a fair hearing and rights in criminal proceedings are reasonable and are proportionate to achieve a legitimate outcome. Further, as the Bill deals with situations where there may be serious risk of harm to the health and safety of the public (for example, allowing a pharmacy business to be carried on without supervision of a pharmacist), the Bill limiting the right to a fair hearing and rights in criminal proceedings by including reasonable excuse exceptions, and replicating the existing evidentiary provisions and executive liability provisions under the 2001 Act is justified.

(f) any other relevant factors

Nil.

## Human rights potentially limited by compliance audits

### *Right to privacy and reputation*

#### (a) the nature of the right

As outlined above, the right to privacy and reputation protects the individual from all interferences and attacks upon their privacy and reputation.

Clause 208 may limit the right to privacy by equipping the council with the powers to audit the operations of the holder of a pharmacy business licence.

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

The purpose of limiting the right to privacy by providing the council to audit the operations of pharmacy business licence holders is to ensure compliance with the Bill. This power is limited in scope – it may be exercised only in relation to the operations of a pharmacy business licence holder and only to the extent that the operations relate to the obligations of the licence holder under the Bill. By participating in a statutory licensing scheme, a person has, as a condition of participation, accepted the monitoring and enforcement provisions of the scheme.

Accordingly, this provision is consistent with a free and democratic society based on human dignity, equality and freedom.

#### (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

Authorising the council to audit the operations of a licence holder and requiring the licence holder to participate in the audit is intended to enable the council to effectively monitor compliance with the Bill. It will achieve this by ensuring the council has access to the information it needs to properly assess licence holders' compliance with the Bill.

The audit process, and the requirement for council to publish annual reports about compliance and audit activity, is intended to promote transparency and accountability of pharmacy owners generally and the council.

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

There are no reasonably available less restrictive ways to achieve the purpose. Audits provide the council with the opportunity to review a licence holder outside of the usual licence renewal process, to assess whether the licence holder is operating in compliance with the Bill. Without undertaking audits, noncompliance may not be detected until the annual licence renewal process.

The approach in the Bill is reasonable and appropriate because it will respond to the Committee's recommendation that Queensland Health improve transparency regarding the compliance of pharmacists with the ownership requirements. It is proportionate because the Bill provides the council may audit the operations of a pharmacy business licence holder only

to the extent they relate to the obligations of the holder under the Act. The approach will be effective because it includes a requirement for licence holders to give the council full and free access to all documents and property belonging to, in the custody of, or under the control of, the holder to the extent the document or property is relevant to the audit. A maximum penalty of 50 penalty units will compel compliance with this requirement.

- (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 ability for the council to audit licence holders and requirement for the council to publish an annual report will allow industry and members of the community to consider the degree of compliance by industry with the Act and actions taken by the council to ensure compliance. This is appropriately balanced with safeguards on the permitted scope of the audit and prohibition on the published report containing confidential information unless the information was provided to the council by the person to whom the information relates for the purpose of publication.

- (f) any other relevant factors

Nil.

### **Human rights potentially limited by statutory immunity provisions**

*Right to equality before the law.*

- (a) the nature of the right

The right to equality before the law affirms the right that no one is above the law. This principle applies not only to ordinary citizens, but to the government, its officers, and instrumentalities. In general, the government, and those acting on its behalf, should be subject to the same liabilities, civil and criminal, as any individual. The right to equality before the law is enshrined in article 15 of the Human Rights Act and is also contained in article 26 of the ICCPR.

The right to equality before the law also affirms the right that every person is entitled to the equal protection of the law without discrimination. This requires public entities, as well as courts and tribunals in undertaking certain functions, to treat people equally when applying the law and to not apply the law in a discriminatory and arbitrary way.

However, not all treatment that differs among individuals or groups, will amount to prohibited inequality. The UN Human Rights Committee has recognised that ‘not every differentiation of treatment will constitute discrimination if the criteria for such differentiation are reasonable and objective’.<sup>8</sup>

Clause 210 will limit the right to equality before the law, as it provides immunity from prosecution to officials for acts done, or omissions made, honestly and without negligence under the Act. Officials include council members, the chief executive officer, inspectors,

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<sup>8</sup> UN Human Rights Committee, General Comment 18 on non-discrimination: <https://www.ohchr.org/en/treaty-bodies/ccpr/general-comments>

employees of the council, and persons acting under their direction. This increases the pool of people against whom a person is unable to take legal action.

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

The purpose of the limitation on the right to equality before the law is to create certainty for officials when undertaking their functions. Exposure to personal civil liability may discourage officials from undertaking their functions. It is not considered appropriate for an individual to be made personally liable as a consequence of carrying out their responsibilities under the legislation, where the person has acted honestly and without negligence.

Clause 210 aligns with section 198 of the 2001 Act and with similar immunities for officials in other legislative regulatory schemes.

- (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 on the right to equality before the law will achieve its purpose of creating certainty for the officials acting under the Act to enable them to effectively discharge their responsibilities.

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

Removing the immunity is an alternative to the proposed limitation. However, this option would hinder the ability of officials to effectively undertake their functions due to the risk of incurring related liabilities.

Clause 210 is consistent with the principle of legality, which provides executive immunities should be only as wide as necessary to achieve the legislative purpose and should not unduly derogate from individual rights.

Adequate safeguards are contained within clause 210, because it provides that a person who is unable to take civil action against an official, can instead seek legal redress from the council. Furthermore, the immunity is limited to civil liability, where the official acted honestly and without negligence. Therefore, persons may still take legal action against an official for the tort of negligence, or other civil wrongs where the official acted dishonestly.

- (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 limitation on the right to equality before the law is appropriate when considering the need for officials to effectively undertake their responsibilities, the scope of the immunity, and limitations and conditions attaching to the immunity.

- (f) any other relevant factors

Nil.

## Conclusion

In my opinion, the Pharmacy Business Ownership Bill 2023 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 Human Rights Act.

**THE HONOURABLE SHANNON FENTIMAN**  
MINISTER FOR HEALTH, MENTAL HEALTH and AMBULANCE SERVICES  
and MINISTER FOR WOMEN

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