

# Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024

## 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* (HR Act), I, Yvette D’Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence make this statement of compatibility with respect to the Criminal Justice Legislation (Sexual Violence and Other Matters) Amendment Bill 2024 (the Bill).

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

## Overview of the Bill

The Bill implements the third major tranche of legislative reforms arising from recommendations made by the Women’s Safety and Justice Taskforce (the Taskforce) in its two reports, *Hear her voice – Report One – Addressing coercive control and domestic and family violence in Queensland* (Report One) and *Hear her voice – Report Two – Women and girls’ experiences across the criminal justice system* (Report Two).

## Human Rights Issues

### Human rights relevant to the Bill (Part 2, Division 2 and 3 HR Act)

I have considered each of the rights protected by part 2 of the HR Act. In my opinion, the human rights that are relevant to the Bill are:

- recognition and equality before the law (section 15);
- right to protection from torture and cruel, inhumane or degrading treatment (section 17);
- freedom of movement (section 19);
- freedom of expression (section 21);
- right to privacy and reputation (section 25);
- right to protection of families and children (section 26);
- right to liberty and security of person (section 29);
- right to a fair hearing (section 31); and
- rights in criminal proceedings (section 32).

### Amendments that promote human rights

In my opinion the human rights that are promoted by the Bill are:

- right to protection from torture and cruel, inhumane or degrading treatment (section 17);
- right to privacy (section 25);
- right to protection of families and children (section 26);

- right to cultural rights – generally (section 27) and cultural rights – Aboriginal and Torres Strait Islander peoples (section 28);
- right to liberty and security of person (section 29);
- right to humane treatment when deprived of liberty (section 30);
- right to a fair hearing (section 31); and
- rights in criminal proceedings (section 32).

The amendments to the Criminal Code to create a new position of authority offence promote the right to protection from torture and cruel, inhumane or degrading treatment (section 17); right to protection of families and children (section 26); and right to liberty and security of person. These rights are promoted as the offence seeks to protect children aged 16 or 17 years from sexual interactions with adults who have children under their care, supervision or authority. The new offence aims to ensure victims' rights are protected and promoted.

Amendments to the *Evidence Act 1977* (Evidence Act) also promote the right to a fair hearing and rights in criminal proceedings by ensuring relevant evidence is considered admissible by the court and supporting special witnesses in relevant proceedings to provide their best evidence. These promote victims' and community rights by supporting truth and fairness in the criminal justice system.

The amendments to the *Corrective Services Act 2006* (CSA) promote a range of rights including the right to protection of families and children (section 26), cultural rights (sections 27 and 28), the right to liberty and security of person (section 29) and the right to humane treatment (section 30), by removing barriers to participation in programs or services that: (i) involve prisoners and their families; or (ii) involve connecting a prisoner with their culture; or (iii) may support the prisoner to be released; or (iv) support the humane treatment and rehabilitation of prisoners. In addition, the amendments promote the right to privacy (section 25) and the rights in criminal proceedings (section 32) (in particular, the protection from self-incrimination) by providing for information that a prisoner discloses to be kept confidential and protecting any admissions about the offence that the prisoner makes on remand from being used against the prisoner in proceedings for that offence.

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

#### *Amendment of the CSA*

In my opinion the human rights that are limited by these amendments are:

- the right to protection from self-incrimination (section 32(2)(k)).

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

A person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law (section 32(1)). Additionally, a person charged with a criminal offence is entitled without discrimination to minimum guarantees including not to be compelled to testify against themselves or to confess guilt (section 32(2)(k)). It is the latter right that is relevant for the purposes of the amendments to the CSA.

New sections 344AA and 344AB of the CSA, as inserted by the Bill, do not prescribe any requirement for a prisoner to make admissions about the facts constituting the alleged offence for which they have been charged and are detained on remand in custody prior to participating in a program. While some programs available to prisoners include, as a condition of

participation, a requirement that the prisoner admits to the facts constituting the alleged offending conduct, this is not required by the amendment. Therefore, generally, the amendment does not limit the right to the protection from self-incrimination. Rather, the amendment promotes this right by providing that anything said or done in those circumstances is inadmissible in legal proceedings for the charged offence.

The amendment provides for prescribed programs or services to be excluded from the application of the inadmissibility of evidence provision through regulation. If a program is prescribed, this presents a limitation of the right to protection from self-incrimination because information that is disclosed will not be inadmissible against the prisoner on remand. The extent of this limitation is narrow as excluded programs must be prescribed, participation in the program will be voluntary so an admission is not compelled, and the provision requires a prisoner to be notified that they are participating in an excluded program.

(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 support the proper administration of criminal justice. For certain types of alleged offending that could be discussed in programs, conferral of this provision may prejudice the chances of prosecution for particularly serious or high harm offending. This in turn may cause distress to a victim or undermine community confidence in the criminal justice system.

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

Criminogenic programs are designed to directly target an offender's criminogenic needs and causes of offending that have been empirically linked to recidivism. Certain types of programs require an offender to address their dynamic changeable risk factors and discuss their individual crimes and complete offence mapping to better understand and address the factors contributing to their offending behaviour. This can involve discussion of particularly high harm offending.

For such offending, the perception that alleged offenders could admit to conduct while in custody and subsequently not be convicted for that conduct may cause particular distress to a victim and erode confidence in the criminal justice system. To combat this, the ability to exclude a program from the application of the inadmissibility of evidence provision ensures that, where appropriate, evidence of an offender's conduct if the offender chooses to participate in a program while remanded is still admissible.

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

There is no less restrictive and reasonably available way of achieving the purpose of the limitation. Without the ability to exclude a certain program that creates victim distress or uncertainty, there is no way to remedy the concerns that may be created by the provision applying to certain programs.

A range of safeguards are also present to mitigate the extent of any limitations. These safeguards include:

- exclusions can only be made with regard to particular programs, not groups of offenders, ensuring that the content of the program and what may be discussed is the determining factor for whether the inadmissibility provision should be excluded;

- participation in a program is not required by the provision and is at the discretion of the prisoner;
- exclusions must be prescribed in regulation, otherwise the provision will apply;
- development of a regulation requires a human rights certificate ensuring that the need to exclude the program outweighs the benefit to the prisoner of participating in the program while remanded is compatible with human rights; and
- the amendment requires QCS to notify a prisoner if they are participating in an excluded program.

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

On one side of the scales, the amendment limits the right to protection from self-incrimination by providing for certain programs to be excluded from the inadmissibility of evidence provision for remanded prisoners. While the extent of the limitations presented by this aspect of the amendment is narrow, as participation in any of these programs remains voluntary, and the prisoner is not compelled to participate or provide any information that could be self-incriminating, limitations must be justified.

On the other side of the scales, the amendment further aims to work in support of the rehabilitation of offenders, ultimately serving to promote community safety, without prejudicing the proper administration of criminal justice. However, the nature of certain activities in custody may require the discussion of particularly high harm offending. If such offenders were unable to be brought to justice despite having made disclosures, this may defeat the purposes of the amendment. It may therefore not be appropriate for all programs to be in scope for the provision, and an option to exclude prescribed programs is required. There are also significant safeguards in place to mitigate the extent of the limitations. Importantly, the exclusion can only be prescribed in regulation, and will only apply to certain programs and offenders must be notified that they are participating in an excluded program.

Therefore, it is considered that the limitations on human rights presented by the amendment are justified and that the amendment is compatible with human rights.

(f) any other relevant factors

Nil.

## **Amendment of the Criminal Code**

### ***Position of Authority Offence***

In my opinion the human rights that are limited by these amendments are:

- recognition and equality before the law (section 15); and
- the right to liberty and security of person (section 29).

(a) the nature of the right

The right to recognition and equality before the law protects multiple rights, including the right to recognition as a person before the law and the right to enjoy human rights without discrimination. This right recognises that every person holds the same human rights by virtue of being human and not because of some particular characteristic or membership of a particular social group. Section 15(2) protects the right of a person to enjoy their human rights without

discrimination. Section 15(3) protects the right of a person to equality before the law and provides equal protection of the law without discrimination.

This right may be limited as the conduct being criminalised relates to sexual conduct with persons above the age of sexual consent, and the absence of consent is not an element to the offence. Therefore, it could be considered that the offence discriminates on the basis of age against people between the ages of 16 and 17 by dismissing their ability to consent to sexual activity in the circumstances contemplated in the offence.

This right may also be limited as it is a defence to the offence that the accused was engaged in a lawful marriage with the child. This defence does not extend to de facto relationships, and may be considered to apply on a discriminatory basis.

The right to liberty and security of person includes that a person must not be subject to arbitrary arrest or detention (Section 29(2)). This right may be engaged if a person is arrested, charged and detained for the position of authority offence and subsequently convicted and sentenced.

(a) 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 position of authority offence has the legitimate purpose of protecting children aged 16 or 17 years from sexual interactions with adults who have children under their care, supervision or authority. The Taskforce, in line with the findings of the Royal Commission into Institutional Responses to Child Sexual Abuse, recommended that the Criminal Code be reviewed to ensure it addresses the sexual exploitation of children and young people by adults who occupy a position of authority over those children. The position of authority offence inserted by the Bill makes it an offence for an adult who has a child of or above the age of 16 under their care, supervision or authority to engage in sexual acts with the child.

(b) 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 rights will achieve the legitimate purpose of protecting children aged 16 or 17 years from sexual interactions with adults who have children under their care, supervision or authority. The Royal Commission into Institutional Responses to Child Sexual Abuse Criminal Justice Report (CJ Report) was critical of provisions that require authority to be “abused” or “exercised” to vitiate consent. It was stated, “we do not see what evidence of ‘abuse’ – in the sense of misuse – or ‘exercise’ of authority should be needed beyond the existence of the relationship of authority”. The CJ Report noted that “abuse by persons in positions of authority over their victims is a particularly common scenario in institutional child sexual abuse” and that “research suggests that it is also a particularly damaging form of abuse and is subject to particularly lengthy delays in reporting.”<sup>1</sup>

The CJ Report acknowledged that views might differ as to whether a position of authority offence is an appropriate protection for vulnerable young people who may be at particular risk of exploitation by those who have authority over them, or whether it is an unnecessary restriction on young people who should be regarded as being able to make their own decisions about sexual contact once they reach the age of consent. The CJ Report ultimately recommended a review of any position of authority offences that apply in circumstances where the child is 16 or 17 years, and an amendment to the offences if the prosecution must prove

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<sup>1</sup> 2017, Royal Commission into Institutional Responses to Child Sexual Abuse, *Criminal Justice Report*, Parts III – VI Chapter 13 Position of Authority Offences, 98.

more than the existence of a relationship of authority (for example, that the authority be abused or exercised). Noting the particular vulnerability of children identified by the CJ Report, even above the age of consent, to this kind of abuse, it is necessary to create an offence where consent is not a factor.

The position of authority offence deems seven categories of people as being taken to have a child under their care, supervision, or authority. These categories reflect positions of authority where the existence of the position of authority is, of itself, sufficient to demonstrate the exploitative nature of any sexual relationship that occurs between an adult in that position of authority and the young person under their authority. Other persons beyond those deemed to have a child under their care, supervision, or authority may also be in a position of authority for the purposes of the offence. Those accused people who are not captured by the deeming provision will have their cases assessed on a case-by-case basis, by a jury who must be satisfied of the fact they had the child under their care, supervision or authority.

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

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

However, some safeguards have been added to minimise any unintended consequences arising from the offence. It is a defence to the offence that the adult and the child were lawfully married. This defence does not extend to de facto relationships or other relationships. There are safeguards in place to protect children who seek to enter into a lawful marriage. An order from a judge or magistrate must be made authorising a person 16 or 17 to marry, and it can only be made in exceptional and unusual circumstances. It is proposed that requiring a lawful marriage provides protections against this defence being used in circumstances of forced marriage. These protections do not exist for de facto or other relationships, and therefore the defence is limited to lawful marriages. This a necessary limitation in order to protect children under the age of 18 from the sexual interactions targeted by the offence.

Other defences include that the adult believed on reasonable grounds that the child was at least 18 years of age; and, if the adult is not in an excluded category, that the adult is a person who is less than 3 years older than the child, and the act or omission constituting the offence did not, in the circumstances, constitute sexual exploitation of the child. These defences are intended to limit the operation of the offence so that it operates in accordance with the right to procedural fairness and rights in criminal proceedings.

(d) 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 amendments protect children from sexual interactions with adults who have children under their care, supervision, or authority. They promote a child's right to protection (section 26) and recognise a child's particular vulnerability to abuse from adults in positions of authority.

On balance, the importance of protecting children from sexual interactions outweighs the limitations on the right to recognition and equality before the law and the right to liberty and security of person. I consider that the amendments are proportionate for this purpose.

(e) any other relevant factors

Nil.

## **Amendment of the Evidence Act and Evidence Regulation**

### ***Special witness alternative arrangements, videorecorded evidence and directions hearings***

In my opinion, the human rights that are limited by these amendments are:

- recognition and equality before the law (section 15), particularly, the right to equal protection of the law without discrimination (section 15(3));
- right to a fair hearing (section 31); and
- rights in criminal proceedings (section 32), particularly the right to examine, or have examined, witnesses against the person (section 32(2)(g)).

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

The right to a fair hearing (section 31) relates to procedural fairness and allows a right for parties to be heard and respond to allegations made against them in a public hearing before a competent, independent and impartial court or tribunal established by law. What constitutes a ‘fair’ hearing will depend on the facts of the case and, in the context of a criminal proceeding, will involve a triangulation of the interests of the victim, the accused, and the community.<sup>2</sup>

Section 32(2) of the HR Act sets out the various rights in criminal proceedings, including the right of an accused to examine, or have examined, witnesses against the person (section 32(2)(g)). This requires an accused to be given adequate opportunity in the proceedings to question a witness who will give evidence against them.

While the amendments around special witness measures will not limit a defendant’s ability to cross-examine or put their case before the witness, the amendments will alter court procedure and may limit a defendant’s ability to confront their accuser by changing the way in which this occurs. Requiring courts to record and store evidence of special witnesses in sexual offence proceedings for use in subsequent proceedings may limit a defendant’s ability to cross-examine the witness again in those subsequent proceedings. The amendments in relation to directions hearings may limit these rights by creating restrictions on the manner and form in which special witnesses may be questioned.

The right to recognition and equality before the law (section 15) protects the right to recognition as a person before the law and the right to enjoy human rights without discrimination. Section 15(3) protects the right of a person to equality before the law and provides that each person is entitled to the equal protection of the law without discrimination. This right may be limited as the protection afforded by creating a presumption in favour of certain special witness alternative arrangements is limited where there is not appropriate equipment and facilities available to accommodate an order or direction for the arrangements. Similarly, the requirement to videorecord a special witness’s evidence only applies where appropriate equipment and facilities are available. It is more likely that technological facilities may not be available for facilitating an order for certain special witness arrangements or the videorecording of evidence in remote courtroom locations. This may have a disproportionate impact on those living remotely, particularly First Nations communities.

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<sup>2</sup> *R v A* (No 2) [2002] 1 AC 45.

(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 assist victim-survivors and special witnesses to give their best evidence in court by minimising the re-traumatisation that may occur by the court process.

Improving a victim-survivor's experience in the proceedings serves the legitimate purposes of supporting truth and fairness in the criminal justice system.

Providing that the presumption in favour of certain special witness arrangements and the requirement to videorecord evidence apply only where appropriate equipment and facilities are available is for the proper purpose of the efficient allocation of public resources, and to promote victims' rights.

(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 Taskforce found that the court process can be retraumatising for victim-survivors. The amendments in relation to special witness arrangements will give special witnesses (including victim-survivors) choice about how they will give evidence and will improve their experience of the court process. Requiring the videorecording and storing of evidence given by special witnesses in certain proceedings may reduce the number of times witnesses are required to appear in subsequent proceedings. The extent of the limitation is reduced, as the court will not be required to make an order for the alternative measures, or for the videorecorded evidence to be admitted in subsequent proceedings, if it is not in the interests of justice to do so.

Providing a blanket requirement that the alternative arrangements must always be granted, or the evidence videorecorded, is not an efficient allocation of resources. It is intended that in most cases the appropriate technology will be present to facilitate an order for a special witness measure or an order for the evidence to be videorecorded. The extent of this limitation in relation to special witness arrangements is also reduced as the court may make any other order it thinks fit to facilitate an order or direction where the presumption applies. This may include for example, adjourning the proceedings until suitable equipment to accommodate an order can be provided in an appropriate courtroom.

The amendments in relation to directions hearings will allow a court to make orders about the way in which a special witness gives evidence for the fair and efficient conduct of the proceeding. The court may give directions it considers appropriate for this purpose. To allow special witnesses in relevant proceedings to give their best evidence, it is appropriate to provide an opportunity where the manner in which this evidence is given can be determined.

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

There is no reasonably available alternative to achieve the purpose of the amendments. The Taskforce found that requiring special witnesses to prove they need alternative arrangements to provide their evidence can be traumatising. Similarly, requiring that evidence is videorecorded and stored is intended to minimise the number of times a special witness has to give evidence and reduce retraumatisation through the court process. While the protection could be limited to complainants in relevant proceedings, this would not capture all victim-survivors in relevant proceedings and would not provide the protection to other vulnerable witnesses. Not implementing these amendments unless technological facilities are available in every courtroom across the State will not support victim's rights.



In addition, while existing processes may support a special witness to provide evidence, the Taskforce found that a directions hearing could support victim-survivors to provide their best evidence and to improve their experience of the court process.

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

On balance, it is considered that the limitations are justified for the legitimate purposes of supporting special witnesses to provide their best evidence, reduce traumatisation through the court process and for the efficient allocation of public funds. The limits on equal protection of the law are balanced as it is expected that there will be few cases where appropriate equipment is unavailable, and for special witness arrangements the court may make any other orders to facilitate an order.

For special witness arrangements and directions hearings, the limits on procedural fairness and the rights in criminal proceedings are balanced by not interfering with a defendant's right to cross-examine witnesses. Additionally, the amendments apply to special witnesses, which may include defendants. By enabling special witnesses to give their best evidence, the amendments appropriately balance the interests of the victim, the accused and the community.

For the requirement to videorecord, the limits on procedural fairness and the rights in criminal proceedings are balanced as the court may recall the witness at the subsequent proceeding if the special witness could ordinarily have been recalled and it is in the interests of justice to do so. Additionally, excluding the person charged from this requirement ensures that the defendant is not limited in how they choose to run their case in any subsequent proceedings.

On balance, having regard to the extent of the limitations on the right to a fair, rights in criminal proceedings, and the right to equal protection of the law without discrimination, it is considered that the importance of achieving the purpose to enable special witnesses to provide their best evidence and reduce the trauma associated with the court process, outweighs the harm caused to the limitation to the rights identified.

(f) any other relevant factors

Nil.

### ***Admissibility of recorded statements in particular committal proceedings***

The amendments in relation to the admissibility of recorded statements in particular committal proceedings are intended to clarify the existing provisions. The rights limited by the existing provisions are:

- right to privacy and reputation (section 25);
- right to a fair hearing (section 31); and
- rights in criminal proceedings (section 32).

In my opinion, the amendments in the Bill do not limit any additional rights and the Human Rights Statement of Compatibility tabled with the Evidence and Other Legislation Amendment Bill 2021 continues to apply. The scheme continues to strike an appropriate balance because it limits human rights only to the extent that is reasonable and demonstrably justifiable.

### *Expert evidence in proceedings for sexual offences*

In my opinion, the human rights limited by these amendments are:

- the right to liberty and security of person (section 29);
- the right to a fair hearing (section 31); and
- rights in criminal proceedings (section 32).

(a) the nature of the rights

The right to a fair hearing affirms the right of all individuals to procedural fairness when coming before a court or tribunal. Rights in criminal proceedings ensures fairness in criminal trials by protecting the right to minimum procedural guarantees and is related to the presumption of innocence, the right to a fair trial and due process.

The amendments limit the right to a fair hearing and rights in criminal proceedings as they alter the admissibility threshold for certain types of expert evidence relating to sexual offences. The amendments may allow more expert evidence about the nature of sexual offences and about the social, psychological and cultural factors that may affect the behaviour of a person who has been the victim, or who alleges that he or she has been the victim, of a sexual offence.

Further, the amendments may limit the right to a fair trial as they abolish certain common law rules for this specific kind of evidence, including the ultimate issue and common knowledge rules and the credibility rule if the evidence could substantially affect the assessment of the credibility of the witness and the court grants leave.

The right to liberty and security of person protects individuals against unlawful or arbitrary deprivations of their liberty. The right is relevant in any case where a person is placed at risk of imprisonment.

The Bill engages the right to liberty by creating new offences where a person who is engaged as an expert, directly or indirectly, discloses or makes use of particular information given to them other than for the purpose of giving the relevant expert evidence in the proceeding. The maximum penalty for breach of these provisions is 100 penalty units or 2 years imprisonment.

(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 amendments is to assist juries to make informed and unbiased assessments of the evidence by addressing misconceptions about the behaviour of victim-survivors. It is intended that this evidence may assist the decision-maker in determining whether an accused person is guilty or not guilty. As such, the amendments are for the proper purpose of supporting fairness in the criminal justice system.

The purpose of the offences in relation to using and disclosing particular information is to protect the rights of the persons about whom the information relates and to provide an important safeguard against unlawful use or disclosure of the information, noting that it may include highly sensitive personal information.

(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

By enabling expert evidence in relation to sexual offences to be admitted where it is relevant, including evidence that may address common rape myths, it is intended that juries will be able

to better understand the offending and the victim-survivor's evidence in its proper context. This will assist juries in determining an accused person's guilt and support them to undertake their duties to the court. The limitations will achieve the purpose by providing jurors with an appropriate lens through which to assess the evidence and guarding them from making incorrect assumptions on relevant issues.

The consultation feedback received by the Taskforce supports the view that rape myths sometimes operate within the criminal justice system to the detriment of victim-survivors. The Taskforce found that impacts of trauma on victim-survivors during and after the assault, and while being interviewed, medically examined and giving evidence, are sometimes not well understood by police, the legal profession or judicial officers. Further, the research commissioned by the Taskforce revealed some evidence of rape myths influencing participating community members' understanding and attitudes to sexual consent. The Taskforce concluded that the admission of expert evidence is likely to help address this lack of understanding of sexual offending.

The extent of the limitation is reduced as the amendments will not limit an accused person's right to cross-examine a victim-survivor, or the expert who provides evidence.

To assist experts to prepare their evidence, the Bill allows the expert to ask the prosecutor for particular documents, which may include highly sensitive personal information. The purpose of the offences in relation to using and disclosing the documents or information is to deter the unauthorised disclosure of the information and to protect the privacy of the individual to whom the information relates. In this regard, the offence promotes the right to privacy and reputation of the person whose information is protected from disclosure.

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

In making their recommendations, the Taskforce concluded that there are no less restrictive and reasonably available ways of achieving this purpose. Other measures, such as introducing the use of jury directions, may assist in addressing the concerns identified by the Taskforce. However, this is unlikely to be sufficient in all cases.

Deterring the unauthorised use or disclosure of personal information and protecting the privacy of the individual in question by creating offences is considered the least restrictive and most effective way of achieving this purpose. Similar offences are included across the Queensland statute book to provide similar protections for the unauthorised disclosure of confidential information, such as sections 282G and 288 of the *Youth Justice Act 1992* and section 189E of the *Child Protection Act 1999*.

Further, the maximum penalties imposed include a monetary penalty or a term of imprisonment, meaning that the right to liberty may not be limited in all cases where the provisions are breached.

(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

Case law has determined that what is 'fair' in the context of a criminal proceeding will involve a triangulation of the interests of the victim, the accused, and the community.<sup>3</sup> Having regard to the purpose of the limitation to promote the right to a fair trial and assist the jury to make

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<sup>3</sup> *R v A (No 2)* [2002] 1 AC 45.

informed and unbiased assessments of the evidence, any limitation on the right to a fair trial is justified.

In relation to the new offences, any limitations on a person's right to liberty are considered reasonable and proportionate, striking a fair balance between the right and the importance of ensuring an individual's right to privacy.

(f) any other relevant factors

Nil.

### ***Tendency evidence and coincidence evidence***

In my opinion, the human rights limited by these amendments are:

- the right to a fair hearing (section 31); and
- the rights in criminal proceedings (section 32).

(a) the nature of the rights

The right to a fair hearing affirms the right of all individuals to procedural fairness when coming before a court or tribunal, and guarantees that such matters must be heard and decided by a competent, impartial and independent court or tribunal after a fair and public hearing. Rights in criminal proceedings ensures fairness in criminal trials by protecting the right to minimum procedural guarantees and is related to the presumption of innocence, the right to a fair trial and due process.

The amendments limit the right to a fair hearing and rights in criminal proceedings, as they lower the admissibility threshold for certain types of evidence. The amendments may allow more tendency evidence and coincidence evidence to be admitted in criminal proceedings. This is particularly so in relation to tendency evidence that is to be adduced in child sexual abuse proceedings. This evidence may be considered prejudicial to the accused as it is considered influential in its effect upon a jury, and will typically relate to an accused's prior misconduct.

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

The amendments concerning tendency evidence and coincidence evidence have the legitimate purpose of assisting a court to arrive at the truth and facilitating fairness in the criminal justice system, by enabling relevant evidence to be admitted. In some cases, this amendment will also enable victims to provide a more fulsome account of their experiences.

The amendments are intended to increase the cross-admissibility of multiple victims' accounts and will therefore encourage more joint trials in multi-complainant cases against the same accused person. In turn, matters will be resolved more efficiently, providing earlier closure for all involved.

The amendments are also intended to support national consistency and clarity within the law by adopting the position in the Uniform Evidence Law.

(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 amendments will achieve the purposes of assisting a court to arrive at the truth of a matter, and facilitating fairness in the criminal justice system by allowing relevant evidence to be admitted in criminal proceedings.

The CJ Report examined the assumption that juries will use tendency evidence to engage in unfair reasoning, causing prejudice to the accused. The Royal Commission expressed doubt about the actual likelihood or incidence of impermissible reasoning (and resultant unfair prejudice). Research was commissioned that used mock juries to acquire evidence on the actual reasoning process undertaken by juries. The research found that, contrary to assumptions made in the common law, it is “unlikely that a defendant will be unfairly prejudiced in the form of impermissible reasoning as a consequence of joinder of counts or the admission of tendency evidence”. Instead, “jury verdicts were logically related to the probative value of the evidence”.<sup>4</sup> Accordingly, the extent of the limitations on the right to a fair trial is not significant, insofar as the Royal Commission’s findings demonstrate that the fears about unfair prejudice arising from this kind of evidence are unfounded.

The extent of the limitation is also mitigated by the protection under section 130 of the Evidence Act, which will be retained. This section provides that “nothing in this Act derogates from the power of the court in a criminal proceeding to exclude evidence if the court is satisfied that it would be unfair to the person charged to admit that evidence” and ensures an accused’s right to a fair trial is not unduly limited by the amendments. Otherwise, jury directions may be provided to ensure that a jury correctly uses any tendency evidence or coincidence evidence that is adduced.

The amendments provide that evidence adduced as tendency evidence or coincidence evidence need not be proved beyond reasonable doubt. However, any limitation on the right to a fair hearing that arises from this provision is ameliorated by providing judicial discretion to require such evidence to be proved beyond reasonable doubt if adduced as proof of an element or essential fact of a charge before the jury, or if the court is satisfied that there is a significant possibility that a jury will rely on the tendency evidence or coincidence evidence as being essential to its reasoning in reaching a finding of guilt.

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

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

The Taskforce considered alternative approaches, such as maintaining the status quo or codifying existing Queensland case law and concluded that it would neither address the problem of inconsistency between this aspect of the law in Queensland and that in other Australian jurisdictions, nor meet the recommendations of the Royal Commission.

(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

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<sup>4</sup> J Goodman-Delahunty, A Cossins and N Martschuk, Jury reasoning in joint and separate trials of institutional child sexual abuse: An empirical study, Royal Commission into Institutional Responses to Child Sexual Abuse, 2016, 36-7.

While the amendments limit the right to a fair hearing and rights in criminal proceedings, they also promote truth and fairness in the criminal justice system.

What constitutes a fair hearing will depend on the facts of the case and will require the weighing of a number of public interest factors including the rights of the accused and a victim. Relevantly, case law has determined that what is “fair” in the context of a fair hearing will involve a triangulation of the interests of the victim, the accused and the community.<sup>5</sup> It follows that a fair trial does not necessarily require procedures, or admissibility thresholds, that are most favourable for an accused person. The amendments appropriately balance the competing interests to ensure that a fair trial will still occur.

On balance, having regard to the extent of the limitation on the right to a fair hearing and rights in criminal proceedings and the importance of promoting truth and fairness in the criminal justice system, I consider the limitations on human rights imposed by these amendments are proportionate and reasonable.

(f) any other relevant factors

Nil.

### **Amendment of the *Penalties and Sentences Act 1992***

#### ***Duration of a non-contact order***

In my opinion, the human rights that are limited by these amendments are:

- freedom of movement (section 19); and
- freedom of expression (section 21).

(a) the nature of the rights

The right to freedom of movement (section 19) protects the rights of persons who are lawfully within Queensland to move freely within Queensland, as well as to enter and leave the State and choose where to live. The right places an obligation on the State not to act in a way that unduly restricts freedom of movement.

The right to freedom of expression (section 21) is a necessary condition for the realisation of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights. The right protects an individual’s ability to hold an opinion and to seek, receive and impart information and ideas of all kinds, including orally, in writing, in print, by way of art, or in any other medium. The right protects the expression of a range of information.

Extending the duration of a non-contact order will limit these rights as the restrictions a non-contact order may impose on the restrained individual can limit movement and expression.

(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 keep victim-survivors of sexual violence safe. Extending the maximum duration of a non-contact order, consistent with restraining orders, demonstrates that

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<sup>5</sup> *R v A (No 2)* [2002] 1 AC 45.

offending against the person of someone is treated seriously by the courts and that orders will be made to keep victim-survivors safe.

- (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 Taskforce considered that it was appropriate to extend the maximum duration of non-contact orders from two years to five years, noting that this would be consistent with the default period of a restraining order for section 359F of the Criminal Code (unlawful stalking, intimidation, harassment or abuse), and with the default period of a protection order under the *Domestic and Family Violence Protection Act 2012* (DFVP Act). The proposal is only to extend the maximum period of a non-contact order. The Taskforce recognised that victim-survivors of sexual violence sometimes need the same protection as victim-survivors of domestic violence and the Taskforce found that the *Penalties and Sentences Act 1992* should provide that protection.

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

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

- (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

Extending the maximum duration of a non-contact order will enable victim-survivors of sexual violence to receive ongoing protection, where necessary. The court will still be required to consider the appropriate duration of a non-contact order.

On balance, having regard to the extent of the limitation on the right to freedom of movement and freedom of expression, particularly in circumstances where there is a risk to a victim-survivor, it is considered that the importance of achieving the purpose of increased safety for victim-survivors of sexual violence outweighs the harm caused to the rights to freedom of movement and expression.

- (f) any other relevant factors

Nil.

### **Conclusion**

In my opinion, the Bill is compatible with human rights under the HR Act because it limits human rights only to the extent that is reasonable and demonstrably justifiable.

**YVETTE D'ATH MP**  
Attorney-General and Minister for Justice  
Minister for the Prevention of Domestic and Family Violence

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