Parliamentary Committees



Police Powers and Responsibilities and Other Legislation Amendment Bill 2021

Report No. 15, 57th Parliament
Legal Affairs and Safety Committee
November 2021

Legal Affairs and Safety Committee

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All web address references are current at the time of publishing.

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Abbreviations

AFP	Australian Federal Police
ATSILS	Aboriginal and Torres Strait Islander Legal Service (Qld) Limited
CPOROPOA	*Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004*
CSA	*Corrective Services Act 2006*
Commission	Queensland Human Rights Commission
committee	Legal Affairs and Safety Committee
Criminal Code	*Criminal Code Act 1899* (Qld)
ECtHR	European Court of Human Rights
HRA	*Human Rights Act 2019*
LSA	*Legislative Standards Act 1992*
NBNP	'No Body, No Parole'
PLS	Prisoners' Legal Service
PPRA	*Police Powers and Responsibilities Act 2000*
PPRR	Police Powers and Responsibilities Regulation 2012
PSAA	*Police Service Administration Act 1990*
QCCL	Queensland Council for Civil Liberties
QCS	Queensland Corrective Services
QLS	Queensland Law Society
QPS	Queensland Police Service
the Association	Bar Association of Queensland
the Board/Parole Board	Parole Board Queensland
Weapons Act	*Weapons Act 1990*
WWCA	*Working with Children (Risk Management and Screening) Act 2000*

Chair's foreword

This report presents a summary of the Legal Affairs and Safety Committee's examination of the Police Powers and Responsibilities and Other Legislation Amendment Bill 2021.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament. The committee also examined the Bill for compatibility with human rights in accordance with the *Human Rights Act 2019*.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank the Queensland Police Service, Queensland Corrective Services and our Parliamentary Service staff.

I thank my fellow committee members for their work during this inquiry.

I commend this report to the House.

Peter Russo MP

Chair

Recommendations

The committee recommends that the Police Powers and Responsibilities and Other Legislation Amendment Bill 2021 be passed.

1 Introduction

1.1 Role of the committee

The Legal Affairs and Safety Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 26 November 2020 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility include:

- Justice and Attorney-General
- Women and the Prevention of Domestic and Family Violence
- Police and Corrective Services
- Fire and Emergency Services.

The functions of a portfolio committee include the examination of bills and subordinate legislation in its portfolio area to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- matters arising under the *Human Rights Act 2019* (HRA)
- for subordinate legislation – its lawfulness.[2]

The Police Powers and Responsibilities and Other Legislation Amendment Bill 2021 (Bill) was introduced into the Legislative Assembly and referred to the committee on 16 September 2021. The committee is to report to the Legislative Assembly by 1 November 2021.

1.2 Inquiry process

On 20 September 2021, the committee invited stakeholders and subscribers to make written submissions on the Bill. Ten submissions were received.

The committee received a public briefing on the Bill from the Queensland Police Service (QPS) and Queensland Corrective Services (QCS) on 29 September 2021; see Appendix B for a list of officials.

The committee received written advice from QPS and QCS in response to matters raised in submissions.

The committee held a public hearing on 15 October 2021; see Appendix C for a list of witnesses.

The submissions, correspondence and transcripts of the briefing and hearing are available on the committee's webpage.

1.3 Policy objectives of the Bill

According to the explanatory notes the main objectives of the Bill are to:

- reduce knife crime by expanding the police banning notice regime to apply to a person (adult) who unlawfully possesses a knife in a relevant public place
- limit re-traumatisation of victims' families and friends by introducing a new framework for parole decisions about a life sentenced prisoner who has committed multiple murders or who has murdered a child
- strengthen the 'No Body, No Parole' (NBNP) framework to incentivise earlier prisoner co-operation to locate a homicide victim's remains

1 *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

2 *Parliament of Queensland Act 2001*, s 93; and *Human Rights Act 2019* (HRA), ss 39, 40, 41 and 57.

- provide the Parole Board Queensland (the Board) with greater flexibility to respond to increased workload and the risks different prisoners pose to community safety
- create administrative and operational efficiencies for the QPS, enhance intelligence gathering about dangerous drugs and ensure Commonwealth child sexual abuse offences are updated in Queensland legislation, and
- create indictable offences for wilfully and unlawfully killing or seriously injuring a QCS dog, or QPS dog or horse, reflecting the seriousness of the offences in line with community expectations.[3]

1.4 Government consultation on the Bill

The explanatory notes states that a consultation draft of the Bill was circulated for feedback among a range of key community stakeholders.[4] An amendment was made to the Bill as a result of a comment provided by Legal Aid Queensland. Additionally, stakeholder feedback in relation to the *Corrective Services Act 2006* (CSA) amendments were taken into account in the Bill.[5]

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

In considering all the evidence to this inquiry the committee recommends that the Bill should be passed.

Recommendation 1

The committee recommends that the Police Powers and Responsibilities and Other Legislation Amendment Bill 2021 be passed.

3 Explanatory notes, p 1.

4 Explanatory notes, pp 27-28.

5 Explanatory notes, p 28.

2 Examination of the Bill

The Bill proposes several legislative amendments, including—

1. Amending the *Police Powers and Responsibilities Act 2000* (PPRA) to:
    - expand the scope of banning notices to include persons who unlawfully possess a knife
    - permit QPS civilian employees and contracted translators to monitor surveillance devices without constant police presence
    - allow the Commissioner to dispose of forfeited drug samples to the chief executive officer of the Australian Federal Police, a police service of another State, or an entity established under the law of the Commonwealth or a State to investigate corruption or crime
    - include 5 Commonwealth child sexual abuse offences as prescribed internet offences in s 21B
    - expand the protection of police methodologies in court to include QPS staff members who provide evidence
    - clarify that an assumed identity can be used for training and administrative purposes
    - expressly provide for historical backstopping of assumed identities
    - expand the delegation to authorise assumed identities to include the Superintendent in charge of covert operations
    - extend court removal orders to apply to prisoners in police custody who wish to voluntarily assist police
    - replace references to 'Aborigine' and 'Torres Strait Islander' with 'Aboriginal peoples' and 'Torres Strait Islander peoples'.
2. Amending the *Police Powers and Responsibilities Regulation 2012* to:
    - permit QPS civilian employees and contracted translators working as monitors to monitor surveillance devices without constant police presence.
3. Amending the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* to:
    - include 9 Commonwealth child sexual abuse offences as reportable offences in Schedule 1.
4. Amending the *Corrective Services Act 2006* (CSA) to:
    - limit the traumatisation of victims' families and friends by introducing a new framework for parole decisions about a life sentenced prisoner who has committed multiple murders or murdered a child
    - strengthen the No Body, No Parole (NBNP) framework to incentivise earlier prisoner cooperation to locate the remains of homicide victims
    - provide the Parole Board Queensland (the Board) with greater flexibility to respond to an increased workload and the risks different prisoners pose to community safety.

   Amending the *Police Service Administration Act 1990* and CSA to:
    - create new indictable offences for wilfully and unlawfully killing or seriously injuring a QPS dog or horse or a QCS dog.

   Amending the *Working with Children (Risk Management and Screening) Act 2000* to:
    - prescribe Commonwealth Criminal Code child sexual abuse offences and other relevant offences as either disqualifying or serious
    - update references in Schedules 2 to 5 to take account of changes to offence titles and the repeal of certain Commonwealth Criminal Code provisions in recent years.

The following section discusses issues raised during the committee's examination of the Bill.

2.1 Amendments to the *Corrective Services Act 2006* (CSA)

2.1.1 New parole framework for life-sentenced multiple or child murderers (clause 7)

Clause 7 inserts Chapter 5 (Parole), Part 1AA (Preliminary) and 1AB (Parole declarations) Division 1 (Restricted prisoner declarations) into the CSA to introduce a new framework for parole decisions about restricted prisoners.

The Bill makes amendments that:

- Introduce a discretion for the President of the Board to declare that a restricted prisoner must not be considered for parole for up to 10 years (a restricted prisoner declaration)
- Ensure that the public interest is the primary consideration when deciding whether to make a restricted prisoner declaration
- Provide a higher threshold for exceptional circumstances parole for restricted prisoners
- Insert a presumption against parole for restricted prisoners.[6]

2.1.2 Strengthening the NBNP framework

QPS argue that these amendments do not change the overall policy for NBNP, namely, that a relevant prisoner must be refused parole unless they have cooperated satisfactorily in locating a homicide victim's remains. Rather, the Bill aims to strengthen this policy and incentivise prisoners to cooperate earlier through amendments that:

- Introduce a discretion for the Board to consider a prisoner's cooperation at any time after sentencing, instead of requiring this consideration to wait until the prisoner applies for parole
- Require the Board to make a no cooperation declaration about a prisoner, where the Board determines the prisoner has not cooperated satisfactorily
- Restrict prisoners subject to a no cooperation declaration from reapplying for parole
- Allow a no cooperation declaration to be reconsidered only where leave is first granted by the President or a Deputy President of the Board.[7]

Prisoners' Legal Service (PLS) noted:

> Clause 7 of the Bill introduces new sections 175E to 175J, which creates a new process in respect of life sentence prisoners convicted of murder where the victim is a child or where the person's conviction relates to multiple murders. These provisions provide for the President of the Board to make a "restricted prisoner declaration", which could bar a person from applying for parole for up to 10 years after the declaration takes effect (see proposed section 175I(3)).
>
> Clause 7 of the Bill also introduces new sections 175K to 175T, which create a new process in respect of people in prison who are subject to the no body, no parole legal regime. As we understand it, the Bill provides for the Board to initiate a process to make a "no cooperation declaration" for a person in prison, even before the person becomes eligible for parole. By making a "no cooperation declaration", the Board bars the person subject to it from applying for parole. The person may apply for the declaration to be reconsidered and 'lifted' for the reasons outlined in proposed section 175S.
>
> Clause 9 of the Bill introduces a new section 176A that severely restricts the ability for a person subject to a "restricted prisoner application" to access exceptional circumstances parole. Clause 8 also introduces a new section 176B that prohibits a person subject to a "no cooperation declaration" from applying for exceptional circumstances parole.

[6] QPS, correspondence, 24 September 2021, p 11.

[7] QPS, correspondence, 24 September 2021, p 11.

> Clauses 11 and 12 of the Bill create new processes for consideration of parole applications by a person who may be subject to a "no cooperation declaration" or a "restricted prisoner declaration" respectively.[8]

Queensland Law Society (QLS) noted that the 'Bill also introduces a new presumption against parole as well as a higher threshold for exceptional circumstances parole for this prisoner cohort'.[9]

Submitters were critical of the proposed amendments to the CSA. Sisters Inside stated:

> We do not support the proposed amendments to Chapter 5 of the *Corrective Services Act 2006* relating to 'restricted prisoners'. We submit that these amendments are unnecessary, disproportionate, highly punitive, and have concerning implications for human rights.[10]

PLS argued:

> PLS strongly opposes these changes. In our submission, the new processes proposed in clauses 7, 11 and 12 of the Bill are convoluted, highly punitive and onerous, for the Board/President, Queensland Corrective Services and the person subject to either declaration. They are unnecessary to protect community safety because the Board is empowered to refuse any application for parole where it considers the person poses an unacceptable risk to the community.[11]

In response, QPS advised:

> The purpose of the amendment is to reduce the adverse impact a yearly parole application by a life sentenced prisoner has on a victim/s of the offence. Providing the Board with the flexibility to decide not to consider a further parole application for up to three years aims to strike an appropriate balance between protecting victims and preserving life-sentenced prisoners' ability to seek release to parole.[12]

Stakeholders raised concerns that under the NBNP framework, individuals wrongfully convicted of homicide offences due to miscarriages of justice will be unable to ever be released.[13]

In addition, Sisters Inside indicated their concern that the proposed amendments would 'defeat the object of exceptional circumstances parole and would have the effect of unduly punishing an individual who may ordinarily qualify for exceptional circumstances parole' as 'a prisoner who develops a terminal illness with a short life expectancy would have no option but to remain in prison until their custodial end date'.[14]

In response to this issue QPS advised:

> The effect of the NBNP policy (prior to and after the proposed amendments) is that a prisoner who has not cooperated will not have access to parole. However, the Board will still be permitted to assess any future change in the prisoner's capacity to cooperate, such as where a prisoner may develop Alzheimer's disease and no longer be able to provide any cooperation.[15]

2.1.2.1 The proposed power of the President of the Parole Board to delay parole applications for life sentenced multiple murderers or child murderers indefinitely (for up to 10 years at a time)

The Bill introduces a new framework for parole decisions about life-sentenced prisoners convicted of multiple murders or the murder of a child. Under this framework, the President of the Parole Board will have the power to declare that a prisoner in this cohort is a 'restricted prisoner' and must not be

8 Submission 5, p 6.

9 Submission 2, p 3.

10 Submission 4, p 5.

11 Submission 5, p 6.

12 QPS and QCS, correspondence, 15 October 2021, p 30.

13 Submission 8, p 2; also see submissions 2, 4.

14 Submission 4, p 6.

15 QPS and QCS, correspondence, 15 October 2021, p 31.

considered for parole for a period of up to ten years. The criteria for considering whether to declare a prisoner to be a restricted prisoner under proposed s 175H is:

- the offence(s) for which the restricted prisoner was sentenced to imprisonment
- any risk the prisoner may pose to the public if the prisoner is granted parole
- the likely effect that the prisoner's release on parole may have on an eligible person or a victim
- the restricted prisoner report about the prisoner provided by QCS
- any submission from an eligible person or the prisoner
- any relevant remarks made by a court that sentenced the prisoner.[16]

Submitters argued that given the serious consequences of such a decision on an individual's liberty it is not appropriate for the power to make a restricted prisoner declaration to rest solely in the hands of the President of the Board.[17] Sisters Inside argued:

> The ability to make such a declaration is a significant power and is not appropriately the subject of the unfettered discretion of one decision-maker. This is particularly concerning in circumstances where the decision-maker is a non-judicial officer and thus not subject to the same level of scrutiny as a judicial officer.[18]

Similarly, QLS stated:

> Vesting such powers in the President of the Parole Board is particularly problematic as it stands contrary to fundamental rights to have criminal charges or proceedings decided by an open and transparent court or tribunal.[19]

Additionally QLS raised concerns that if the 'President of the Parole Board makes a restricted prisoner declaration … the Parole Board is not required to publish their decisions which undermines public accountability in circumstances where applicants for parole are not entitled to legal representation nor oral hearings.'[20]

Queensland Council for Civil Liberties (QCCL) argued that:

> … the test for deciding whether to prohibit parole applications is whether the person still represents an unacceptable risk to the community. In our view, that should be decided by a Supreme Court Judge sitting in open Court not by an official sitting in private.[21]

QLS also considered that these powers 'should only be vested in a court' to 'ensure that such decisions with serious implications for individual liberty are made in a way that ensures transparency and procedural fairness.' [22]

In response, QPS advised:

> The setting of a parole eligibility date does not create a right or entitlement for the prisoner to be granted parole. It is simply the earliest date that a prisoner may be released to serve the remaining part of their sentence in the community.
>
> The President is an independent decision maker and is considered to be appropriately qualified to make these decisions.

16 Submission 7, p 6, explanatory notes, pp 34-35.

17 See submissions 2, 4.

18 Submission 4, p 7.

19 Submission 2, p 3.

20 Submission 2, p 3.

21 Submission 8, p 1.

22 Submission 2, p 4.

> The *Corrective Services Act 2006* (CSA) requires that the President must have the qualifications, experience or standing equivalent to that of a judge of a State court, the High Court or a court constituted under a Commonwealth Act.
>
> Making the President the decision maker for restricted prisoner declarations is also consistent with the Board's function in being the only authority to release a prisoner from custody prior to the completion of their sentence.[23]

Several submitters were critical of the way the amendment reduces regular consideration of a prisoner's access to rehabilitation, creates a presumption against parole and may at some point mean a prisoner's detention becomes arbitrary.[24] QLS raised its concerns that:

> … the effect of the proposed amendments is that prisoners may be subject to rolling consecutive periods of up to 1O years additional imprisonment without parole, potentially providing for conditions of indefinite imprisonment of a prisoner who has not committed any further offence.[25]

PLS argued:

> It is a well-established principle of law that a minimum term of imprisonment represents the punitive element of a sentence because the crime committed calls for such detention. The purpose of parole is to provide mitigation for the punishment in favour of rehabilitation, through conditional freedom where appropriate… With these measures, the Bill undermines the sentencing process and a person's prospects for rehabilitation, by giving the President/Board power to extend a person's sentence at the back-end. This effectively puts the President/Board into a position to impose an "irreducible life sentence", that is a lengthy term of imprisonment from which a person has no realistic prospects of release.[26]

Similarly, the Queensland Human Rights Commission (Commission) noted its concern that 'insufficient justification has been provided for the proposed changes'.[27]

QLS argued that there are currently already substantial powers within the *Criminal Code Act 1899* (Qld) (Criminal Code), the *Penalties and Sentences Act 1992* (Qld) (PSA) and the CSA to appropriately respond to these prisoners on a case by case basis and 'such offenders are already subject to mandatory life sentences with minimum non-parole periods of 20-30 years, which can be extended if considered appropriate by a sentencing court.'[28] QLS stated:

> These provisions already ensure that prisoners convicted of serious offences will not be released unless the Parole Board is satisfied that the prisoner is suitable for parole when determining whether to grant the parole order.[29]

QLS also proposed that given the significant consequences of the restricted prisoner declaration on a prisoner's liberty, if restricted prisoner declarations are introduced, the scheme should be accompanied by additional funding to Legal Aid to specifically ensure legal representation is available to prisoners subject to these decision-making processes.[30] QPS confirmed that 'consistent with existing parole processes, representation in parole matters will not be prohibited'.[31]

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23 QPS and QCS, correspondence, 15 October 2021, p 15.

24 See submissions 2, 7.

25 Submission 2, p 3.

26 Submission 5, p 7.

27 Submission 7, p 11.

28 Submission 2, p 5.

29 Submission 2, p 5.

30 Submission 2, p 4.

31 QPS and QCS, correspondence, 15 October 2021, p 17.

Committee comment

The committee notes that the declaration of a prisoner as a 'restricted prisoner' could be made by a court rather than by the President of the Parole Board. The committee also notes that non-parole periods are often stipulated when sentencing a prisoner and the declaration could be made at this time.

2.1.2.2 175G - If restricted prisoner report given to Parole Board President

Section 175G applies where the chief executive gives the President of the Board a restricted prisoner report. In these circumstances, the President must then decide whether to make a restricted prisoner declaration (s 175G(2)) (either a declaration if none exists, or a new one to take effect from the expiry of an existing declaration). Notice of both the receipt of the report and the potential for a declaration to be made is given to the prisoner under s 175G(3)[32]

The Association noted that the Bill, as presently drafted, does not require that a prisoner be given written notice of the intended duration of any declaration, and submitted that in their view it is likely that the duration of the declaration would be the decisive factor to influence whether a prisoner makes a submission as well as the content of any submission. The Association proposed that s 175G(3) of the Bill be amended to require a prisoner to be given written notice stating the intended duration of any current or new declaration.[33]

2.1.3 Supporting the Parole Board Queensland

The Bill amends the CSA to:

- extend the maximum period (from 12 months to 3 years) that a life-sentenced prisoner can be restricted from reapplying for parole after having their parole application refused by the Board
- provide new minimum quorum requirements for the Board to hear certain parole applications
- provide a new regulation making power to prescribe certain parole decisions that must be made public on the Board's website
- temporarily extend the legislated timeframes for the Board to decide a parole application by 60 days.[34]

2.1.3.1 Extend the maximum period (from 12 months to 3 years) a life-sentenced prisoner can be restricted from reapplying for parole after having their parole application refused by the Board

Clause 11 amends s 193 which provides for deciding applications for parole. Subclause (5) amends s 193(5A)(a) to extend the period a life-sentenced prisoner can be restricted from reapplying for parole following a refusal of their application from 12 months to up to 3 years.[35]

Several submitters did not support the amendments to extend the period of time the Board have to consider a further application for parole for life sentenced individuals from 12 months to 3 years as it was argued to be punitive and considered to undermine the primary purpose of parole which is the safe reintegration of a prisoner into the community.[36]

32 Explanatory notes, p 34.

33 Submission 9, p 1.

34 QPS, correspondence, 24 September 2021, p 11.

35 Explanatory notes, p 42.

36 See submissions 2, 4 and 7.

QLS stated:

> We reiterate our concerns stated above that such measures undermine the purposes of parole to facilitate the safe reintegration of a prisoner into the community. We consider that there has not been sufficient justification advanced to support such a substantial change.[37]

The Commission highlighted the potential for the extended period of detention to become arbitrary and sought greater clarification on the decision criteria:

> Nonetheless, there is still a risk that an extended period of detention may become arbitrary, particularly as there is no clear criteria for how the Board should make its decision as to an appropriate period of delay (of this extended period of up to 3 years). The Commission recommends that the Bill be amended to at least include criteria for how the Board should assess this period.[38]

2.1.3.2 Publication of parole decisions on the Parole Board's website

Clause 17 inserts a new s 235A (Parole Board must publish particular information). Section 235A(1) provides that a regulation may prescribe information the Board is required to publish on its website.[39]

While there was support for the publication of written decisions to increase transparency and public accountability of the Board's decisions, submitters considered that decisions to publicise parole determinations should not be made lightly and should not be subject to an automatic rule. Several submitters raised concerns in relation to the need to protect personal information.

PLS outlined their concerns in relation to the release of confidential information under the proposed amendment:

> The impetus to publish decisions is not without limits. To protect the privacy and interests of participants in highly sensitive and personal matters, some legislation requires that decision-making bodies must de-identify decisions for publication… Parole matters involve highly personal and multifaceted considerations that relate to a person's whole life and their future plans, including the location, nature and type of accommodation, medical care (including in relation to substance use and mental health), the care of children, relationships with family members (including domestic and family violence considerations), and detailed information about the person's time in prison. PLS considers the nature of parole matters requires that published decisions about an application for parole, or a parole suspension or cancellation, must not include any information that identifies the applicant or any other person in connection with the application.[40]

And

> The publication of identifying information may involve disclosure of information that would otherwise be considered confidential under section 341 of the *Corrective Service Act 2006* (Qld). This section prohibits disclosure of confidential information, except in very limited circumstances. Confidential information is broadly defined and includes information that could reasonably be expected to pose a risk to the security or good order of a prison, or that could reasonably be expected to endanger anyone's life or health, including psychological health.[41]

Similarly, Sisters Inside stated:

> Releasing this information to the public would be extremely distressing to not only the individual, but also to the individual's family and support networks. We are deeply concerned that publishing this

37 Submission 2, p 6.

38 Submission 7, pp 15-16.

39 Explanatory notes, p 45.

40 Submission 5, pp 3-4.

41 Submission 5, p 5.

> material will have a serious negative impact on an individual's mental health and may undermine the person's ability to reintegrate into the community.[42]

In addition, concerns were raised that the disclosure of personal information would lead to vigilantism as information 'about a person's offences within prison can unintentionally result in violence against the person, which places them at risk of harm and also poses a risk to the good order of the relevant prison'.[43]

QLS argued that:

> … provision should be made so that published decisions remove identifying particulars. This will ensure that information that may undermine the prisoner's ability to reintegrate and sensitive information, including for example medical information, is not widely accessible.[44]

The committee also received a confidential submission providing examples of the impacts of the publication of confidential information on not only the prisoner but also on those connected to the prisoner.[45]

In response to stakeholder concerns, QPS advised:

> It is in the public interest that the community has confidence in the Board's decisions to release prisoners to parole given the need to ensure the protection of the community. The publication of certain decisions will serve this purpose while promoting the principle of open justice and the freedom to seek, receive and impart information.[46]

QPS acknowledged the possible privacy and human rights implications resulting from the publication of the parole decisions. QPS advised that a regulation will prescribe the details of the classes of decisions that are to be published and development of the regulation 'will take into account the need to balance individual privacy and safety with the purposes of publication' and will also consider human rights impacts.[47]

Submitters also argued that the requirement to publish certain decisions would create additional work for the Board and increase the Board's already significant workload.[48] Given the current delays in both making parole decisions and providing reasons in accordance with existing statutory duties, PLS contended that this would be a 'poor allocation of the Board's resources'.[49]

However, QPS advised that it is 'not anticipated that this change will have any adverse impact on the workload of the Board'.[50]

2.1.3.3 Extending the legislated timeframes for the Board to decide a parole application by 60 days

Clause 21 inserts a new Chapter 6, Part 15B (Temporary periods to decide particular parole applications). The proposed amendments will apply to both existing and new parole applications. For the temporary extension period, the Board must decide either an existing parole application (s 351I)

42 Submission 4, p 4.

43 Submission 5, p 5.

44 Submission 2, pp 7-8.

45 Submission 3.

46 QPS and QCS, correspondence, 15 October 2021, p 24.

47 QPS and QCS, correspondence, 15 October 2021, p 24.

48 See submissions 5, 6

49 Submission 5, p 6.

50 QPS and QCS, correspondence, 15 October 2021, p 34.

or a new parole application (s 351J) within 180 days of receipt, or, if the Board defers the application to seek further information in accordance with s 193(2), 210 days.[51]

The explanatory notes state that the amendments are to 'provide the Board with greater flexibility to respond to increased workload and the risks different prisoners pose to community safety.'[52] QPS also confirmed that:

> The amendment to temporarily extend the legislated timeframes for parole decisions has been included to address the immediate volume of matters before the Parole Board Queensland (the Board). This is not a permanent measure.[53]

Several submitters were critical of the amendments to increase timeframes for parole decisions given current overcrowding in Queensland's prisons.[54] Aboriginal and Torres Strait Islander Legal Services (ATSILS) highlighted that:

> … the parole system has become even more overloaded, the prisons are overcrowded due to prisoners facing extraordinary delays to get parole applications considered at all, and consequently the parole system has effectively become log jammed. Any further restrictions to applying for parole would have a disproportionate effect and introduce procedural unfairness where none need exist. For that reason alone, all the proposed changes to the Corrective Services Act should be removed from this bill.[55]

QLS stated:

> Whilst we acknowledge that the timeframes are intended to be extended temporarily, in our view, the proposal coupled with existing delays in parole applications and suspensions will mean that more prisoners will be held in custody for longer than they should otherwise. QLS has previously made submissions about the impact on human rights and the wellbeing of prisoners and the community which arise from failures to meet the existing statutory timeframes in the CSA.[56]

QLS further argued that:

> … 120 days is already a very significant amount of time for an independent Parole Board to consider someone's liberty. The Society's view is that extending that and giving them more time is an attempt to fix what are funding deficiencies in the Parole Board. The effect of it will be that people will remain in custody for longer. If we want to look at it on a cost analysis basis, it will be an enormous cost to the government to continue to detain those people for longer because the Parole Board cannot make decisions within 120 days. To give them extra time for no reason other than insufficient funding is a poor fix to this problem. The Society's position is that 120 days is more than enough to make those important decisions about people's liberty.[57]

Similarly, PLS stated:

> … this amendment will have limited effect in reducing the number of judicial review applications filed in the Supreme Court of Queensland for the Board's failure to make decisions. The extension of the statutory timeframes for parole application decisions will not address the delays associated with the consideration of parole applications and suspensions, nor will it improve efficiency in decision making processes. These temporary measures are a short sighted and cosmetic solution to an issue which has arisen due to inadequate funding of the criminal justice system and associated support services…[58]

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51 Explanatory notes, p 48.

52 Explanatory notes, p 8.

53 QPS and QCS, correspondence, 15 October 2021, p 13.

54 See submissions 4, 5, 7.

55 Submission 6, p 6.

56 Submission 2, p 7.

57 Public hearing transcript, Brisbane, 15 October 2021, p 3.

58 Submission 5, p 8.

Several submitters highlighted that the number of parole applications has increased substantially, without corresponding increases in the resources available to them.[59] The Commission stated that:

> During the public briefing for the Committee, officials suggested this change was part of a package of amendments that would have a net positive effect on the Board's workload. It was suggested this change specifically would 'assist the board by reducing some of the pressure that it is currently experiencing as a result of judicial review applications for essentially being out of time on its decision-making'. If that is the purpose, the Commission anticipates that justification must detail why less restrictive options, such as providing the board with further resources, cannot be implemented.[60]

QPS confirmed:

> The temporary amendment will also support the additional resourcing for a fourth, and soon a fifth, temporary operating team announced by the Government.[61]

LawRight did not support the amendment and submitted that:

> Increasing the timeframe in which the Board is required to make decisions will not improve the efficiency or effectiveness of the decision-making process without a contemporaneous commitment to address these structural concerns.
>
> The link to community safety is similarly unclear and unresolved by the amendment, as the Board has already acknowledged that a large portion of individuals awaiting decisions have relatively straightforward matters. Nor are we aware of any evidence or commentary to suggest that the Board is undertaking more detailed considerations of parole applications or hasn't continued to make careful decisions despite the current backlog.[62]

LawRight concluded that the 'risks to community safety and the reasons for the "increased workload" may not be cured by extended timeframes and may in fact, worsen'[63] and that 'the amendment will in fact reverse timeframe reforms made as recently as 2017, following a recommendation in the Queensland Parole System Review report (the Sofronoff Report).[64] LawRight stated:

> … the proposed extension of the timeframe for the Board to make a decision in relation to an application for parole is an ineffective, unfair and simplistic response to the current delays in decision making by the Board. We are concerned about the related impact on community safety, prisoner wellbeing, and the cost to the State of increasing the time individuals spend in prison.[65]

Sisters Inside also commented on this issue noting that clauses 11 and 21 have the effect of extending the period of time the Board has to consider a parole application by 60 days to 180 or 210 days, depending on whether the Board needs to seek further information. Sisters Inside stated:

> In the Queensland Parole System Review, one of the recommendations was to decide applications for parole within 120 days, as had been observed that the time frames allowed for decision making were too long and not always complied with. We note that these amendments would conflict with one of the recommendations made.[66]

Sisters Inside argued that the amendments will 'defer the sole avenue an imprisoned person has to have their continued imprisonment remedied by a court' and that the 'ability to seek judicial review

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59 Submission 2, 4, 5.

60 Submission 7, pp 16-17.

61 QPS and QCS, correspondence, 15 October 2021, p 13.

62 Submission 1, p 2.

63 Submission 1, p 2.

64 Submission 1, p 2.

65 Submission 1, p 2.

66 Submission 4, p 2.

is an important mechanism for public accountability where there have been failures by the Executive branch'.[67]

PLS argued that extending the timeframe for consideration of parole applications will not prevent delays or address inefficiencies and instead would result in:

- People spending additional time in prison when they have served the punitive element of their sentence and do not pose a risk to the community.
- People in prison being kept in a state of limbo about their liberty, with significant ramifications for their well-being and prospects of successful re-integration.
- Increased risk of institutionalisation…. a discernible deterioration in the mental health of many … clients due to the uncertainty they face regarding release.
- People being released at the expiration of their sentence without the benefit of community based supervision.
- Increased distress of families and children of people in prison, particularly when support with parenting and financial responsibilities is required.[68]

Stakeholders also did not support the proposed timeframes applying retrospectively to existing parole applications.[69] For example, QLS advised:

> Laws that create offences or change legal rights and obligations with retrospective application undermine the rule of law and significantly disadvantage those affected by the legislation.[70]

2.1.4 Minor and technical amendments

The Bill makes minor and technical amendments relating to the CSA that:

- provide for temporary amendments to s 234 of the CSA enacted through emergency COVID-19 legislation to permanently commence
- clarify the definition of low alcohol limit in s 306C of the CSA
- correctly reference the CSA in s 46 of the *Terrorism (Preventative Detention) Act 2005*.[71]

2.2 Amendments to the *Police Powers and Responsibilities Act 2000* (PPRA)

2.2.1 Expand the scope of banning notices to include persons who unlawfully possess a knife (clause 38)

Clause 38 will amend s 602C of the PPRA to expand the scope of banning notices by providing an additional example of what constitutes disorderly, offensive, threatening or violent behaviour, namely, possessing a knife in contravention of s 51 'Possession of a knife in a public place or a school' of the *Weapons Act 1990* (Weapons Act). The maximum penalty for a person, without reasonable excuse, to contravene a banning notice is 60 penalty units ($8,271 current as at 1 July 2021).[72]

67 Submission 4, pp 2-3.

68 Submission 5, p 9.

69 Refer submissions 1, 2, 7 and 8.

70 Submission 2, p 4.

71 QPS, correspondence, 24 September 2021, p 12.

72 QPS, correspondence, 24 September 2021, p 3.

QPS advised:

> The amendment is intended to further dissuade the unlawful carrying of a knife in these public areas. The issuing of a banning notice will be in addition to any court proceedings that may be commenced against the person for the unlawful possession of a knife.[73]

Several submitters raised concerns in relation to provisions to extend the banning notice regime to allow police to issue banning notices to an adult for an offence of unlawfully possess a knife in a relevant public place.[74]

Submitters argued that the administration of police banning notices can have unintended and undue impacts. For example, members of the public subject to bans:

- are unable to access service providers who operate in safe night precincts such as doctors and support workers or are charged for a notice breach when accessing these services[75]
- are unable to travel through a stated area to get to work, attend school or for another legitimate purpose[76]
- might be homeless and require a knife for food preparation or consumption.[77]

Submitters stated that the amendments in relation to banning notices will inevitably have a negative effect on homeless individuals and result in further criminalisation.[78] Sisters Inside argued:

> Research has unequivocally demonstrated that banning notices have a disproportionate and discriminatory effect on homeless individuals. The areas over which banning notices apply are often hubs for social and community services accessed by homeless individuals – this includes the Brisbane CBD and Fortitude Valley precincts.[79]

QLS did not support expanding the banning regime as the existing banning order regime is currently broad enough to capture the types of behaviour targeted:

> According to the explanatory notes to the Safe Night Out Legislation Amendment Bill 2014 which introduced the scheme, the types of conduct which were originally targeted by these provisions are disorderly, offensive, threatening or violent behaviours that pose a risk to the safety of persons or disrupt the reasonable enjoyment of licensed premises, events and people within a Safe Night Precinct. Section 602C(3)(a) already provides police with the power to issue an initial police banning notice where the respondent has behaved in a disorderly, offensive, threatening or violent way. In our view this provision already provides for banning orders to be issued for threatening or violent behaviours associated with knife possession in addition to any proceedings that may be commenced for the unlawful possession of a knife.[80]

QLS highlighted their concern that members of the public, subject to banning notices, may be unable to access service providers, including doctors and support workers, who operate in safe night precincts or may affect those that need to travel through these areas to 'get to work, attend school or for another legitimate purpose'.[81] QLS stated:

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73 QPS, correspondence, 24 September 2021, p 3.

74 See submissions 2, 4, 5, 6.

75 Submission 2, p 1.

76 Submission 2, p 1.

77 Submission 6, p 3.

78 See submissions 2, 4.

79 Submission 4, pp 6-7.

80 Submission 2, p 2.

81 Submission 2, p 2.

> We have been advised of instances where clients have been charged for breaching notices when they were going into the area during the day for medical or other support purposes.[82]

QPS advised that the PPRA provides a legislative mechanism to address concerns that may arise regarding undue hardship caused by the notice.[83]

Additionally, QCCL did not support banning orders, arguing:

> Our opposition to the police issuing these banning orders, is reinforced by the frank admission by the Queensland Alcohol-related violence and Night-time Economy Monitoring report, at page 694, that these bans are intended as a form of punishment. As noted above, these types of orders are usually characterised as preventive in nature. Though it has always been our view that they are in fact punitive. The frank acknowledgement that these orders are in fact punitive, means in our view that they should under no circumstances be issued by a police officer. Under our system, the infliction of punishment is the exclusive domain of the judiciary. It should not be being inflicted by police officers.[84]

QPS advised that the intent of police in issuing banning notices is to 'provide immediate protection to members of the community enjoying a safe night out by curbing and deterring alcohol and drug related violence in liquor precincts'.[85]

In respect of the issues raised in relation to possessing a knife, QPS advised that s 51 of the Weapons Act allows for a reasonable excuse for possession, including to prepare or cut food or for normal utility purposes.[86]

2.2.2 Remove the requirement for constant police supervision of QPS civilian monitors and contracted translators of surveillance devices (clauses 39 and 44)

The QPS has identified an inefficiency in police practice that does not allow QPS civilian employees and contracted translators to work independently of a police officer when monitoring a surveillance device. The Bill will amend the PPRA and the *Police Powers and Responsibilities Regulation 2012* (PPRR) to allow QPS civilian employees and translators to monitor surveillance devices without continuous police officer supervision in the surveillance device monitoring room.[87] QPS stated that:

> The amendment is expected to save significant direct police officer supervisory time and enable frontline police officers to be redeployed to perform frontline duties increasing QPS policing capacity to prevent, disrupt, investigate and respond to crime and enhance community safety.[88]

QLS stated that the Bill amends s 14 of the PPRR to the effect that an authorised monitor may enter the premises whether or not a police officer is present while 'the person' is using the monitoring equipment. While the Bill proposes to ensure that civilian QPS employees and contracted translators can monitor surveillance devices, QLS argue that the proposed amendments do not qualify who that 'person' may be (for example, by limiting it to QPS employees and/or contracted translators). QLS proposed that:

> Given the significant privacy implications for the monitored person or persons (who may have no relationship to any alleged offending or criminal activity), in our view, there should be further safeguards

82 Submission 2, p 2.

83 QPS and QCS, correspondence, 15 October 2021, p 3.

84 Submission 8, p 2.

85 QPS and QCS, correspondence, 15 October 2021, p 6.

86 QPS and QCS, correspondence, 15 October 2021, p 4.

87 QPS, correspondence, 24 September 2021, p 4.

88 QPS, correspondence, 24 September 2021, p 5.

around who can be permitted to enter premises used to monitor a person subject to a surveillance device warrant when a law enforcement officer is not present.[89]

In relation to this concern, QPS clarified that there is 'sufficient rigour' around who can be an authorised monitor of the surveillance device and consequently allowed into the monitoring premises'. QPS advised:

> … the new definition of an 'authorised monitor' in the *Police Powers and Responsibilities Regulation 2012* (PPRR) will only allow the senior officer to whom the warrant was issued to authorise a particular person to monitor the surveillance device. The senior officer is the applicant officer (police Inspector or above) who applies to the Supreme Court judge for the warrant (see s 328 'Application for surveillance device warrant' of the PPRA).[90]

2.2.3 Allow the Commissioner of Police to dispose of forfeited drug samples to the chief executive officer of the Australian Federal Police, a police service of another State, or an entity established under the law of the Commonwealth or a State to investigate corruption or crime (clause 40)

Clause 40 provides that the Commissioner of Police may dispose of forfeited drug samples to the chief executive officer of the Australian Federal Police (AFP), a police service of another State, or an entity established under the law of the Commonwealth or a State to investigate corruption or crime.[91]

QPS noted that:

> The amendment is required as the PPRA prescribes what the Commissioner of Police can do with forfeited drugs. This has meant that Queensland has been unable to participate in the Enhanced National Intelligence Picture on Illicit Drugs (ENIPID) program.
>
> Under the ENIPID program, participating police services provide samples of forfeited illicit dangerous drugs for profiling each year. The samples are provided after any police prosecution is finalised. The major benefits for Queensland in participating in the ENIPID program include:
>
> - assisting the QPS in the disruption of local drug crime by identifying seizure linkages, within Queensland, other jurisdictions and at the border;
> - chemically profiling domestic samples to assist in identifying precursor source countries including routes of manufacture; and
> - providing a holistic overview of the Australian drug market to government including to the Australian Criminal Intelligence Commission and the Illicit Drug Data Report.[92]

Further, QPS noted that the existing QPS safeguards for the receipting, control and auditing of drug exhibits will be maintained under the proposal.[93]

ATSILS expressed concern that powers for intelligence gathering should not come at the expense of fair trial guarantees and therefore:

> Drugs should not be destroyed or dispensed in another fashion until appeal avenues have been exhausted or come to an end. We are aware of the difficulties faced by incarcerated prisoners to access legal representation for appeals, frequently appeal courts have to consider whether to allow an appeal out of time as well as to consider the appeal itself. So for that reason some latitude in time should be given so that a sample of the drug should survive until the completion of the appeal process.[94]

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89 Submission 2, p 3.

90 QPS and QCS, correspondence, 15 October 2021, pp 7-8.

91 QPS, correspondence, 24 September 2021, p 5.

92 QPS, correspondence, 24 September 2021, p 5.

93 QPS, correspondence, 24 September 2021, p 5.

94 Submission 6, p 3.

QPS clarified:

> The Explanatory Notes to the amendment in s 707 (Alternative to destruction if drug matter is thing used in the commission of a drug offence) of the PPRA makes it clear that it is only a sample of a forfeited drug that is to be used for this purpose. A drug exhibit can only be disposed of after any relevant court matter is finalised and the appeal period expired. This is the case with the existing s 707(3) of the PPRA that currently allows the Commissioner to dispose of drug matter by giving it to the chief executive officer (Corrective Services) for the training of drug dogs. Consequently, the right of a person to a fair trial is not compromised.[95]

2.2.4 Include 5 Commonwealth child sexual abuse offences as prescribed internet offences in s 21B (clause 30)

The 5 *Criminal Code Act* (1995) (Cwlth) child sex offences are:

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

The QPS stated that the purpose of the amendment is to ensure that police can use existing digital device inspection powers for these particular Commonwealth sexual offences to disrupt recidivist child sex offending cycles and effectively manage reportable offenders in the community.[96] In addition, the amendments support the June 2019, Joint meeting of the Ministerial Council for Police and Emergency Management and Council of Attorneys-General, which called upon states and territories to progress legislative amendments to expand their registration and supervision schemes to apply to Commonwealth child sex offenders as soon as practicable. The QPS Child Protection Offender Registry has also requested that 9 Commonwealth child sexual offences be included in Schedule 1 of the CPOROPOA.[97]

2.2.5 Expand the protection of police methodologies in court to include QPS staff members who provide evidence (clause 41)

Section 803 'Protection of methodologies' of the PPRA provides limited protection to police officers in a court proceeding by allowing them to claim privilege and not disclose certain information about a police methodology unless directed to do so. The QPS is increasingly employing and training non-police personnel to perform this technical work and consequently these personnel require the same statutory protection as police officers in any relevant court proceeding.[98] The QPS state that:

> Clause 41 of the Bill therefore amends the PPRA to afford QPS staff members a legal protection from revealing police methodologies in a court proceeding.[99]

2.2.6 Clarify that an assumed identity can be used for training and administrative purposes (clause 31)

Clause 31 clarifies that an assumed identity can be acquired and used for training in the online and physical environment. This will allow the use of an assumed identity by an authorised person during

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95 QPS and QCS, correspondence, 15 October 2021, p 10.

96 QPS, correspondence, 24 September 2021, p 6.

97 QPS, correspondence, 24 September 2021, p 6.

98 QPS, correspondence, 24 September 2021, pp 6-7.

99 QPS, correspondence, 24 September 2021, p 7.

supervised scenario-based role playing where it is necessary to conceal the real identity of the person so as to protect covert methodologies.[100] QPS note that the amendment:

> …is increasingly important as the complexities of investigating online organised crime requires officers to gain specific skills and knowledge that will allow them to assimilate to the online environment successfully. Globally, criminal networks are increasingly using the internet as an environment to conduct organised crime such as major fraud, distributing child exploitation material and money laundering… In practice, this will ensure that the QPS can lawfully establish appropriate covert infrastructure such as bank accounts and online entities to ensure the true identity and purpose of an assumed identity is not revealed or compromised.[101]

2.2.7 Expressly provide for historical backstopping of assumed identities (clause 32)

Chapter 12, part 3, 'Evidence of assumed identities' of the PPRA currently allows for the creation of birth, death and marriage certificates in retrospect. However, QPS argued that it is essential that additional supporting evidence of an assumed identity can be created to support these certificates, particularly in the online environment.

Clause 32 will expressly provide that an authorised person can use their acquired identification documents to obtain additional evidence of their assumed identity to support operational cover.[102]

2.2.8 Expand the delegation to authorise assumed identities to include the Superintendent in charge of covert operations (clause 33)

Clause 33 amends the Commissioner's delegation power for granting and administering assumed identities from an Assistant Commissioner to also include the Superintendent responsible for covert operations. QPS note that expanding the delegation to the Superintendent in charge of covert operations acknowledges their significant experience and operational capability, whilst reducing the administrative burden and allowing a greater focus on strategic matters for the Assistant Commissioner, Operations Support Command.[103]

2.2.9 Extend court removal orders to apply to prisoners in police custody who wish to voluntarily assist police (clause 37)

Clause 37 will amend the PPRA to allow police to apply to a magistrate for a police assistance removal order to remove a sentenced or remanded prisoner from police custody to voluntarily provide information to assist police. QPS stated that:

> The need for amendment arises because sentenced prisoners are routinely being held at police watchhouses for several days pending their transfer to a correctional facility to serve their term of imprisonment. During that time the prisoner may be willing to assist police as a witness in an investigation. Police are unable to apply to remove the prisoner under section 70 of the CSA as the prisoner is in police custody and not in a corrective services facility.[104]

QLS argued that in circumstances where the prisoner withdraws consent to help the police:

> … section 411 J(2) should be strengthened to not only require the police officer to return the person to the watch house as soon as practicable, but also to cease any and all questioning of the person about any matter for which the person was removed from custody to provide information or assistance pursuant to a police assistance order, immediately upon withdrawal of consent.[105]

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100 QPS, correspondence, 24 September 2021, p 7.

101 QPS, correspondence, 24 September 2021, p 7.

102 QPS, correspondence, 24 September 2021, p 8.

103 QPS, correspondence, 24 September 2021, p 8.

104 QPS, correspondence, 24 September 2021, p 9.

105 Submission 2, p 2.

QPS advised the committee, in response to this issue, that:

> … the equivalent s 70 (Removal of prisoner for law enforcement purposes) of the *Corrective Services Act 2006* does not place a positive obligation on officers of a law enforcement agency to stop questioning a prisoner should they withdraw consent to the process.[106]

2.2.10 Replace references to 'Aborigine' and 'Torres Strait Islander' with 'Aboriginal peoples' and 'Torres Strait Islander peoples' (clause 57)

Clause 57 inserts amendments to replace references to 'Aborigine' and 'Torres Strait Islander' with the more culturally appropriate wording of 'Aboriginal peoples' and 'Torres Strait Islander peoples' in the PPRA and PPRR. QPS notes that the wording in the amendment is consistent with existing references to Aboriginal peoples and Torres Strait Islander peoples contained in s 28 'Cultural rights-Aboriginal peoples and Torres Strait Islander peoples' of the HRA.

ATSILS supported the amendments to replace references to 'Aborigine' and 'Torres Strait Islander' with the more culturally appropriate wording of 'Aboriginal peoples' and 'Torres Strait Islander peoples'. ATSILS noted:

> We welcome the proposed changes to fix the archaic language of the *Police Powers and Responsibilities Act 2000* and the Police Powers and Responsibilities Regulation 2012 to now refer to Aboriginal person, Torres Strait Islander person, and Aboriginal and Torres Strait Islander peoples. Section 15 of the *Human Rights Act 2019*, Equality before the law, draws upon Article 16 of the *International Covenant on Civil and Political Rights* that everyone shall have the right to recognition everywhere as a person before the law. The changes are also congruent with section 28 of the *Human Rights Act 2019* which affords recognition and respect for the distinct cultural identity of Aboriginal peoples and Torres Strait Islander peoples.[107]

2.3 Amendments to the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (CPOROPOA)

2.3.1 Including 9 Commonwealth child sexual abuse offences as reportable offences in Schedule 1 (clause 4)

The Bill inserts 9 offences in the *Criminal Code Act 1995* (Cwlth) into Schedule 1 of CPOROPOA:

- section 272.15A, "Grooming" person to make it easier to engage in sexual activity with a child outside Australia
- section 471.25A(1), (2) and (3), 'Using a postal or similar service to "groom" another person to make it easier to procure persons under 16'
- section 474.23A, 'Conduct for the purposes of electronic service used for child abuse material'
- section 474.25C, 'Using a carriage service to prepare or plan to cause harm to, engage in sexual activity with, or procure for sexual activity, persons under 16'
- section 474.27AA(1), (2) and (3), 'Using a carriage service to "groom" another person to make it easier to procure persons under 16 years of age'.[108]

QPS advised that:

> Including these additional offences will satisfy the position of the Council (the Ministerial Council for Police and Emergency Management and Council of Attorneys-General), and enable those convicted and sentenced to a period of imprisonment or a supervision order for these offences, to be placed on the National Child Offender System. This will ensure that those persons will be required to keep police informed of their whereabouts and other personal details, including any reportable contact they may

[106] QPS and QCS, correspondence, 15 October 2021, p 2.

[107] Submission 6, p 2.

[108] QPS, correspondence, 24 September 2021, p 10.

> have with children, for a specific period of time after they are released into the community. This will assist the QPS to effectively manage those reportable offenders in the community.[109]

2.4 Amendments to the *Police Service Administration Act 1990* (PSAA) and the *Corrective Services Act 2006* (CSA)

2.4.1 Create new indictable offences to wilfully and unlawfully kill or seriously injure a police dog or horse or a corrective services dog (clauses 6 and 49)

The Bill inserts a new offence into the PSAA and the CSA to wilfully and unlawfully kill or seriously injure a police or corrective services dog or police horse. The offence of killing or seriously injuring police or corrective services animals is focused on single acts of assault/retaliation on a police or corrective services animal (as opposed to prolonged suffering/torture), which is a risk inherent to the unique role the animals have in law enforcement.

QPS noted that:

> The new offence is intended to adequately protect police and corrective services dogs and police horses by providing parity with other like offences and to be in line with community expectations for those persons who wilfully and unlawfully kill or seriously injure a police or corrective services dog or police horse.[110]

QLS argued that the amendments were not necessary as there is already sufficient provision in the existing law to capture such behaviour in Queensland:

> … section 10.21B of the PSA already provides an offence for killing or injuring police dogs and police horses, which carries a maximum penalty of 40 penalty units or two years' imprisonment. Where the offending behaviour is serious enough to warrant a higher penalty, section 242 of the Criminal Code provides for the offence of serious animal cruelty, which proscribes unlawfully killing or causing serious injury or prolonged suffering to an animal with the intention of inflicting severe pain or suffering. Section 242 carries a maximum penalty of 7 years' imprisonment.[111]

In response to this issue, QPS advised:

> Unfortunately, the simple offence under s 10.21B of the PSAA does not offer sufficient penalty to adequately deter or punish the offender who wilfully seriously injures or kills a police dog or horse. Nor is it in line with community expectations or in parity with similar criminal offences in other jurisdictions.[112]

2.5 Amendments to the *Working with Children (Risk Management and Screening) Act 2000* (WWCA)

Under the WWCA, it is an offence for a person convicted of a disqualifying offence to apply for a blue card (s 176K). Further, a person who is charged with a disqualifying offence will have their blue card suspended, or their blue card application withdrawn (ss 199 and 295-296).

To achieve consistency with and complementary to the amendments to CPOROPOA, the Bill elevates the Commonwealth child sexual offences which have been identified for inclusion as reportable offences to the disqualifying offence framework under the WWCA (cl 55).[113]

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109 QPS, correspondence, 24 September 2021, p 10.

110 QPS, correspondence, 24 September 2021, p 13.

111 Submission 2, p 8.

112 QPS and QCS, correspondence, 15 October 2021, p 9.

113 QPS, correspondence, 24 September 2021, pp 13-14.

3 Compliance with the *Legislative Standards Act 1992*

3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that 'fundamental legislative principles' are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of Parliament.

The committee has examined the application of the fundamental legislative principles to the Bill. The committee brings the following to the attention of the Legislative Assembly.

3.1.1 Rights and liberties of individuals

3.1.1.1 Right to liberty

Fundamental legislative principles require that legislation has sufficient regard to rights and liberties of individuals and the institution of Parliament.[114] These rights and liberties include traditional common law rights and human rights.[115]

The right to personal liberty has been described as 'the most elementary and important of all common law rights'.[116] The right is also protected under human rights law.[117]

A number of the Bill's provisions are inconsistent with the right to liberty.

The new parole framework for life sentenced multiple or child murderers, for example, would set a higher threshold for the granting of exceptional circumstances parole for those prisoners.[118] In addition, the President of the Parole Board would be able to declare that life sentenced multiple or child murderers must not be considered for parole for up to 10 years.[119]

The proposed amendments to the NBNP framework enable the Parole Board (Board) to issue a no-cooperation declaration which would prevent a person applying for exceptional circumstances parole and for parole under s 180 of the CSA until the prisoner has given satisfactory cooperation or the prisoner stops being a NBNP prisoner.[120]

The proposal in the Bill to extend from 12 months to 3 years the time period within which a prisoner serving a life sentence whose application for parole has been refused must not make a further application for a parole order (other than an exceptional circumstances parole order) without the consent of the Board[121] means that a person may spend longer in prison than they would otherwise.

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114 LSA, s 4(2).

115 Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental legislative principles: the OQPC Notebook*, p 95.

116 *Trowbridge v Hardy* (1955) 94 CLR 147 at 152.

117 See *Human Rights Act 2019*, s 29; *International Covenant on Civil and Political Rights* (ratified by Australia in 1980), article 9.

118 See Bill, cls 7-14; statement of compatibility, p 7.

119 Bill, cl 7 (CSA, new s 175I).

120 See Bill, cls 7, 9 (CSA, new ss 175P, 176B). New s 175O provides for determining whether a NBNP prisoner has given satisfactory cooperation. A prisoner may become a NBNP prisoner if the victim's remains are located after a prisoner has already been given a no-cooperation declaration: explanatory notes, p 38.

121 See Bill, cl 11 (CSA, amended s 193(5A)).

Similarly, the proposed extension to the timeframes for the Board to consider applications may result in some prisoners spending longer in prison than they would otherwise.[122]

These provisions are discussed more fully below.

New parole framework for life sentenced multiple or child murderers

Key to the new parole framework for life sentenced multiple or child murderers is the definition of *restricted prisoner*.

A restricted prisoner is a prisoner who has been sentenced to life imprisonment for:

- a conviction of murder and the person killed was a child, or
- more than one conviction of murder, or
- one conviction of murder and another offence of murder was taken into account, or
- a conviction of murder and the person has on a previous occasion been sentenced for another offence of murder.[123]

The President of the Parole Board may make a *restricted prisoner declaration* about a restricted prisoner if satisfied it is in the public interest to do so.[124]

Amongst other things, a restricted prisoner declaration must state the commencement and end dates of the declaration, and that the restricted prisoner may not apply for parole under s 180 of the CSA while the declaration is in force. The declaration must end no later than 10 years after the declaration takes effect.[125]

Thus, a restricted prisoner may not be able to apply for parole as early, or as often, as currently allowed.[126]

Generally, the Board may release any prisoner on parole if the board is satisfied that exceptional circumstances exist in relation to the prisoner.[127] While a restricted prisoner subject to a restricted prisoner declaration may apply for an exceptional circumstances parole order, the Board must refuse to make the order unless the Board is satisfied the person is either close to death or is significantly incapacitated, and has demonstrated that they do not pose an unacceptable risk to the public, and that the making of the parole order is justified in the circumstances.[128]

Thus, a higher threshold for exceptional circumstances would apply to restricted prisoners.[129]

The objective of the new parole framework for restricted prisoners is 'to protect the community and reduce the re-traumatisation of victims' families, while ensuring public confidence in the parole system'.[130]

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122 Explanatory notes, p 25. See also cl 21.

123 Bill, cl 7 (CSA, new s 175D).

124 Bill, cl 7 (CSA, new ss 175E, 175H). Clause 7 (CSA, new s 175H) sets out the matters to which the President must have regard in considering the public interest and in deciding whether to make a restricted prisoner declaration.

125 See Bill, cl 7, 10 (CSA, new s 175I, amended s 180).

126 Statement of compatibility, p 22.

127 CSA, s 194.

128 Bill, cl 9 (CSA, new s 176A).

129 QPS, public briefing transcript, Brisbane, 29 September 2021, p 3.

130 Explanatory notes, pp 1, 7. At present, victims' families regularly receive notifications that the prisoner is applying for parole: explanatory notes, p 15.

The explanatory notes do not directly address the right to liberty but it is considered in the Statement of Compatibility for the Bill in the context of human rights.

The Statement of Compatibility weighs the potential lengthening of a person's imprisonment against the reduction in re-traumatisation experienced by the victim's family and friends when a restricted prisoner applies for parole.[131] It advises:

> Restricted prisoner declarations are limited to a particular cohort of prisoners that have been sentenced to life imprisonment for the most heinous of crimes. They are intended to protect vulnerable members of the community that have become victims to these extreme crimes. The amendments do not remove all hope of being granted parole but instead set a much higher threshold for a restricted prisoner being granted parole.[132]

It further states that the Bill contains a number of safeguards 'to ensure that the limits on human rights are the least necessary to achieve the purpose of protecting victims and the community'.[133] The safeguards include:

- the declaration end date must not be later than 10 years after the day the declaration takes effect 'to ensure periodic review and the prospect of eventual release'[134]
- the inclusion of guidance at s 175I(4) to assist the President in setting an appropriate length for the declaration.[135]

Amendments to the No Body, No Parole framework

The Bill would introduce a new discretion for the Board to consider a prisoner's cooperation in locating a homicide victim's remains at any time after sentencing, not just when the prisoner applies for parole.[136]

Under the Bill, if the Board is *not* satisfied a NBNP prisoner has given satisfactory cooperation, the Board must make a no-cooperation declaration about the prisoner.[137]

Amongst other things, the no-cooperation declaration must state that the prisoner may not apply for exceptional circumstances parole or parole under s 180 of the CSA unless the prisoner is given a notice stating that the Board is satisfied the prisoner has given satisfactory cooperation or the prisoner stops being a NBNP prisoner.[138]

The Statement of Compatibility acknowledges that the NBNP policy may result in some prisoners never being released from prison if they do not provide cooperation.[139]

The explanatory notes advise that restricting the prisoner from reapplying for parole where there is no new cooperation 'avoids potential re-victimisation where a prisoner may repeatedly make applications for parole despite having provided no new cooperation'.[140]

131 See statement of compatibility, pp 27-28.

132 Statement of compatibility, p 28.

133 Statement of compatibility, p 26.

134 Statement of compatibility, p 26.

135 Statement of compatibility, p 26.

136 Statement of compatibility, p 31.

137 Bill, cl 7 (CSA, new ss 175L, 175P).

138 Bill, cl 7 (CSA, new ss 175P, 175Q, 176B).

139 Statement of compatibility, p 35.

140 Explanatory notes, p 15.

As noted above, the explanatory notes do not address the right to liberty but it is discussed in the Statement of Compatibility.[141]

The Statement of Compatibility justifies the limitation on the right to liberty on the basis that it incentivises a prisoner to divulge information about the location of the victim's remains, alleviating some of the distress felt by the victim's loved ones.

> [Making parole release for homicide prisoners contingent upon the prisoner providing satisfactory cooperation in locating the victim's remains] serves the dual purposes of reducing trauma for a victim's family and incentivising prisoners to cooperate in locating a victim's remains. It sends a tough message that prisoners who choose not to cooperate should not be able to access the privilege of parole.[142]

The Statement of Compatibility notes that a prisoner may be found to have cooperated satisfactorily even though the victim's remains are not located.

> Since commencing in 2017, the NBNP policy has been applied and finalised in relation to nine prisoners, as at 31 July 2021. In five finalised matters, the Board determined the prisoner had cooperated satisfactorily in the investigation of the offence. This is despite the victim's remains in these matters not being located.[143]

In addition, the Statement of Compatibility explains that the Bill includes safeguards for prisoners:

> The Bill also includes numerous safeguards for the prisoner's rights, such as allowing the Board to consider at any time whether the prisoner has capacity to cooperate. This might include their mental capacity, for example, where a prisoner may develop Alzheimer's disease, removing the plausibility of further cooperation or their capacity to cooperate based on their role in the offending, where the circumstances of the offence are such that the prisoner does not have relevant knowledge. The process for decisions also ensures procedural fairness for the prisoner, for example ensuring the prisoner can put matters to the Board for their consideration and retaining the prisoner's right to seek judicial review of a decision by the Board.
>
> As another important safeguard to the policy, a prisoner whom the Board has considered not to have cooperated satisfactorily will continue to have the opportunity to seek to have their cooperation reconsidered. The Bill provides a broad discretion on the President or Deputy President to permit a prisoner's cooperation to be reconsidered. This includes where the prisoner has provided additional information, their capacity to provide cooperation has changed or it is otherwise in the interests of justice to consider the matter again. This approach leaves open the incentive for the prisoner to cooperate and ensures they are never permanently deprived of the prospect of parole.
>
> A further safeguard is included in new section 175P(4) to provide that a no cooperation declaration ceases where a prisoner no longer falls within the definition of a NBNP prisoner. This accounts for circumstances where a victim's remains are subsequently located after the question of the prisoner's cooperation has been considered by the Board.[144]

<u>Extension to time period in which a prisoner may not make a further application for a parole order</u>

The Bill proposes to extend from 12 months to 3 years the time period within which a prisoner serving a life sentence whose application for parole has been refused must not make a further application for a parole order (other than an exceptional circumstances parole order) without the consent of the Board.[145] This means that the prisoner may spend more of their custodial sentence in prison than otherwise.[146]

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141 See statement of compatibility, pp 32-36.

142 Statement of compatibility, p 33.

143 Statement of compatibility, p 34.

144 Statement of compatibility, pp 34-35.

145 Bill, cl 11 (CSA, amended s 193(5A)).

146 Statement of compatibility, p 39.

The Statement of Compatibility provides background to the proposal:

> The decision to set a period a life sentenced prisoner cannot reapply for parole after a parole refusal is distinct from the restricted prisoner framework. The amendments are targeting different cohorts of prisoners. While both capture life sentenced prisoners, the restricted prisoner provisions are limited to certain life sentenced prisoners, who have committed arguably the most heinous of crimes. This amendment is a less severe measure that aims to reduce harm to victims. This lies in the ability for the Board to consent to the prisoner applying for parole, the prisoner having access to the existing exceptional circumstances parole process and the ordinary parole decision making processes. That is, the presumption against parole does not apply, nor the more formal restricted prisoner declaration.[147]

The Statement of Compatibility advises that the decision on the length of the restriction 'would consider the individual circumstances of the prisoner, and likely success of a future parole application in setting an appropriate length'.[148]

As already noted above, the explanatory notes do not address the right to liberty but it is considered in the statement of compatibility.

According to the statement of compatibility, the primary purpose of the amendment is 'to limit the adverse impact a yearly parole application by a life sentenced prisoner has on a victim/s of the offence',[149] and the secondary purpose is to protect the community because it will prevent certain prisoners from applying for parole.[150]

The Statement of Compatibility sets out the safeguards to minimise any limitation on a life-sentenced prisoner's human rights:

- an upper limit of three years ensures the opportunity for review in the near future, noting that prisoners are serving a sentence of life imprisonment,
- full discretion for the Board to set a period below three years to account for the prisoner's circumstances and prospects of rehabilitation,
- the ability for the prisoner to apply for exceptional circumstances parole in that time (see s 176 CSA),
- discretion for the Board to allow another parole application before the restriction ends (s 180(2)(a)(ii) CSA), and
- retaining the Board's power to make this decision, which has the same human rights obligations as a public entity.[151]

Proposed extension to the timeframes for the Parole Board

The Bill seeks to temporarily extend the parole application consideration timeframe,[152] which may result in a prisoner being released later than they would otherwise.[153]

Currently, the Board must decide a prisoner's application for a parole order within the following period after receiving the application:

147 Statement of compatibility, p 39.

148 Statement of compatibility, p 40.

149 Statement of compatibility, p 41. Every parole application requires notice to eligible persons (these include victims and their families), who may make a submission to the Board: statement of compatibility, p 42.

150 Statement of compatibility, p 42.

151 Statement of compatibility, pp 42-43.

152 Bill, cl 21 (CSA, new chapter 6, part 15B). New part 15B would expire 390 days after the commencement of the proposed *Police Powers and Responsibilities and Other Legislation Amendment Act 2021*.

153 Explanatory notes, p 25. Prisoners who have applied for parole before the commencement will be subject to the timeframes so a decision on their application may take up to 60 days longer: explanatory notes, p 25.

- for a decision deferred to obtain additional information the Board considers necessary to make the decision - 150 days
- otherwise - 120 days.[154]

The Bill provides that the Board must decide existing and new parole applications within the following period after receiving the application:

- for a decision deferred to obtain additional information the Board considers necessary to make the decision - 210 days
- otherwise - 180 days.[155]

The explanatory notes advise that the measure is one of several in the Bill to support the Board.[156]

> The [Parole] Board is experiencing unprecedented demand to determine applications for parole. Amendments to the CSA included in this Bill will provide the Board with greater flexibility to respond to increased workload and the risks different prisoners pose to community safety.[157]

While the explanatory notes consider the temporary extension of the parole consideration timeframe with regards to retrospectivity, the comment on the justifiability of the provision is relevant to the right to liberty:

> The proposal is considered justified as a timeframe is still in place to ensure decisions are made within a reasonable period. The timeframe aligns to the earliest date a prisoner can apply for parole, that is 180 days before their parole eligibility date. In addition, a parole eligibility date is not a guarantee for release on that date. It is simply the earliest possible date that a prisoner may be released on parole.[158]

Offences and penalties

The Bill inserts a new offence in the *Police Service Administration Act 1990* (PSAA) for a person to wilfully and unlawfully kill or seriously injure a police dog or horse that is being used in the performance of a police officer's duties, or because of, or in retaliation to, its use by a police officer in their duties.[159]

The Bill also inserts a new offence into the CSA for a person, or prisoner, to wilfully and unlawfully kill or seriously injure a corrective services dog that is being used in the performance of a corrective services officer's duties, or because of, or in retaliation to, its use by a corrective services officer in their duties.[160]

These offences are both crimes and attract a maximum penalty of 5 years imprisonment. An attempt to commit these offences is also punishable by a maximum penalty of 5 years imprisonment.[161] Upon a finding of guilt, the person may also be ordered to pay a reasonable amount for the treatment, care, rehabilitation, retraining or replacement of the police or corrective services dog or police horse.[162]

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154 CSA, s 193(3).

155 Bill, cl 21 (CSA, new ss 351I, 351J).

156 Explanatory notes, p 15.

157 Explanatory notes, p 8.

158 Explanatory notes, p 25.

159 Bill, cl 49 (PSAA, new s 10.21B)

160 Bill, cl 6 (CSA, new s 131A).

161 Bill, cl 49 (PSAA, new s 10.21B), cl 6 (CSA, new s 131A).

162 Bill, cl 49 (PSAA, new s 10.21B), cl 6 (CSA, new s 131A).

Whether legislation has sufficient regard to rights and liberties of individuals[163] depends on whether, for example, penalties and other consequences imposed by legislation are proportionate and relevant to the actions to which the consequences relate. A penalty should be proportionate to the offence:

> In the context of supporting fundamental legislative principles, the desirable attitude should be to maximise the reasonableness, appropriateness and proportionality of the legislative provisions devised to give effect to policy.
>
> … Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.[164]

The explanatory notes justify the creation of the new offences on the basis that the existing simple offence provisions contained in s 10.21B of the PSAA and ss 124(f) and 131 of the CSA (each attracting a maximum penalty of 2 years imprisonment) have proven inadequate when life threatening injuries or death is wilfully inflicted upon a police or corrective services animal.[165]

Further, that other animal cruelty offences in the Criminal Code[166] (maximum penalty of 7 years imprisonment) or *Animal Care and Protection Act 2001*[167] (maximum penalty 3 years imprisonment) are designed to capture circumstances where an animal has been intentionally tortured, or do not apply to specific circumstances surrounding police and corrective services dogs and police horses.[168]

The explanatory notes further state that the simple offences in the PSAA and CSA will be retained, and will capture low level offending, 'for example, where a person, including a prisoner, kicks or hits a police or corrective services dog or police horse but does not cause severe injury.'[169]

More generally, the explanatory notes state the new offences are designed to adequately protect police and corrective services dogs and police horses, provide parity with other like offences and be in-line with community expectations,[170] and that any breach of fundamental legislative principle is balanced by the need to reflect the seriousness of the offence in line with community expectations.[171]

Committee comment

The committee is satisfied that the offences introduced by the Bill are reasonable and that the corresponding penalties are proportionate and consistent with the legislative framework.

Privacy

The right to privacy is relevant to a consideration of whether legislation has sufficient regard to the rights and liberties of the individual.[172]

A number of the Bill's provisions are inconsistent with the right to privacy. Certain of these provisions are discussed below.

Inclusion of 5 Commonwealth child sexual abuse offences as prescribed internet offences

163 LSA, s 4(2)(a).

164 OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 120.

165 Explanatory notes, pp 25-26. Under s 10.21B of the PSAA a person must not, without lawful excuse, kill, maim, wound or otherwise injure a police dog or police horse. Under s 124(f) CSA a prisoner must not kill or injure a corrective services dog and under s 131 a person must not kill or injure a corrective services dog.

166 Section 242.

167 Section 18.

168 Explanatory notes, pp 8-9; 26.

169 Explanatory notes, p 9.

170 Explanatory notes, pp 9, 27.

171 Explanatory notes, p 27.

172 LSA, s 4(2)(a); see also OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 95.

The inclusion of 5 Commonwealth child sexual abuse offences as 'prescribed internet offences' under the PPRA means that a reportable offender who has been convicted of one of these 5 offences will be subject to powers that allow police to inspect digital devices in their possession.[173]

The inspection of a person's digital device (eg. mobile phone or computer) is a breach of that person's right to privacy. Whilst the ability for police to inspect digital devices is not a new power, expanding the definition of prescribed internet offences means that offenders convicted of these offences will now be subject to digital device inspections.

The explanatory notes set out the history of these amendments, noting that in June 2019 the Ministerial Council for Police and Emergency Management and Council of Attorneys-General highlighted the need for states and territories to expand their registration and supervision schemes to apply to Commonwealth child sex offenders as soon as practicable.[174]

The Statement of Compatibility adds the purpose of the amendment 'is to ensure that police can use digital device inspection powers to disrupt recidivist child sex offending cycles and effectively manage reportable offenders in the community'.[175] Further:

> The purpose of authorising police officers to inspect devices is to identify online activity which has or may lead to offending behaviours such as accessing child related websites, searching for and viewing images of children and researching or accessing groups who endorse child exploitation including child exploitation material.
>
> …
>
> This reduces the risk of the reportable offender committing further reportable offences against children.[176]

The explanatory notes and Statement of Compatibility both reference Article 34 of the United Nations Convention on the Rights of the Child, noting the obligations on State parties to undertake to protect the child from all forms of sexual exploitation and sexual abuse.[177]

Whilst acknowledging that these amendments may breach the fundamental legislative principle regarding a person's right to privacy, the explanatory notes state that there are safeguards inherent in s 21B of the PPRA, so that:

- police are limited to the number of inspections that can be undertaken each year (inspections can only be carried out 4 times in a 12 month period)[178]
- additional inspections require a device inspection order that must be issued by a magistrate.[179]

Further, as noted by the statement of compatibility, the right to privacy of the offenders needs to be balanced against the purpose of the amendments - to provide 'enhanced community safety by ensuring that digital devices of specific child sex offenders are appropriately inspected for evidence of further offending'.[180]

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173 See s 21B PPRA for the police powers to inspect digital devices. See also Bill cl 30. The 5 Commonwealth child sexual abuse offences are set out at page 9 of the statement of compatibility and page 3 of the explanatory notes.

174 Explanatory notes, p 3.

175 Statement of compatibility, p 9.

176 Statement of compatibility, pp 9-10.

177 Explanatory notes, pp 19-20; statement of compatibility, p 9.

178 PPRA, s 21B(2); explanatory notes, p 20.

179 PPRA, s 21B(3) and (4); explanatory notes, p 20.

180 Statement of compatibility, p 10.

Inclusion of 9 Commonwealth child sexual abuse offences as prescribed offences

The inclusion of 9 Commonwealth child sexual abuse offences as 'prescribed offences' in Schedule 1 of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (CPOROPOA) means that a person will become a reportable offender (and will be placed on the National Child Offender System) if they are convicted and sentenced to a period of imprisonment or a supervision order for any of these offences.[181]

Once placed on the system, these individuals will be required to keep police informed of their whereabouts and other personal details (eg. address, nature of employment, vehicle details), including any reportable contact they may have with children, for a specified time after they are released into the community.[182] This impacts on these individual's right to privacy of their personal information and of their location.

The explanatory notes justify any limitation on individual rights and liberties on the basis that monitoring of child sexual offenders needs to keep pace with new offences and be consistent with offences recognised across Australian jurisdictions.[183] The Statement of Compatibility adds:

> The listing of these new offences in Schedule 1 of CPOROPOA ensures that offenders who employ new methods of child sex offending and previously not captured methods will be subject to reporting under CPOROPOA.
>
> …
>
> Combatting child sexual abuse requires close collaboration across all jurisdictions and consistency in each jurisdiction's offender reporting legislation is key to this.[184]

Further (as noted above) these amendments recognise Article 34 of the United Nations Convention on the Rights of the Child, and reflect the outcome of the June 2019 meeting of Ministerial Council for Police and Emergency Management and Council of Attorneys-General which highlighted the need for states and territories to expand their registration and supervision schemes to apply to Commonwealth child sex offenders as soon as practicable.[185]

Administrative power and natural justice

The Bill amends schedule 4 of the *Working with Children (Risk Management and Screening) Act 2000* (WWCA) to add a number of Commonwealth Criminal Code offences as disqualifying offences under the working with children (blue card) framework.[186] The offences include the 9 Commonwealth child sexual abuse offences (as set out above), as well as other offences such as slavery against a child, forced labour against a child and organ trafficking.[187]

This means that a person who is convicted of any of the expanded set of offences now listed in schedule 4 (a disqualified person) will automatically be excluded from holding a working with children

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181 Bill, cl 4 (CPOROPOA , amended sch 1); explanatory notes, p 7; statement of compatibility, p 17. See page 6 of the explanatory notes for the full list of offences.

182 Explanatory notes, p 7; statement of compatibility, pp 18-19.

183 Explanatory notes, p 22.

184 Statement of compatibility, pp 18-19.

185 Explanatory notes, p 6.

186 Bill, cl 55 (WWCA, sch 4).

187 Bill, cl 55 (WWCA, sch 4); explanatory notes, pp 22, 61. See clause 55 of the Bill and page 61 of the explanatory notes for a full list of the offences.

authority.[188] This limits the employment opportunities available to these individuals. Further, as a disqualified person, they will be unable to apply for review of any decisions made under the relevant chapter 8 of the WWCA.[189]

Whether legislation has sufficient regard to the rights and liberties of individuals depends on whether, for example, the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.[190] Further, legislation should be consistent with the principles of natural justice.[191]

The explanatory notes acknowledge that this provision of the Bill is a potential departure from fundamental legislative principles, however state the overall justification for these measures is to protect children from harm:

> The amendments are considered justified for the protection of children from harm, as it prevents individuals with convictions for serious specified offences from making a working with children check application or entering or continuing in regulated child-related service environments. They are also consistent with the principles for administering the WWCA, that the welfare and best interests of the child are paramount and that every child is entitled to be cared for in a way that protects the child from harm and promotes the child's wellbeing (section 6 WWCA).[192]

The statement of compatibility, in the context of the human rights analysis, adds:

> It is well established in common law that the actions of a regulatory body to dismiss, disbar, de-register or cancel a professional's right to practise in various industries and professions is not viewed as a punitive measure; it is a protective measure that operates to ensure the adequate standard of services to the public and to maintain the reputation of the profession.
>
> Although the blue card system does not strictly amount to professional registration, it does seek to prohibit individuals with certain criminal histories or other relevant history from engaging in child-related industries where it would not be in the best interests of children for them to do so.[193]

Committee comment

Given the seriousness of the offences to be added to schedule 4 of the WWCA and that the overall purpose of the provision is to protect children from harm, the committee is satisfied that the provision has sufficient regard to the rights and liberties of individuals.

The committee is also satisfied that the provisions are justified and appropriate in the circumstances.

3.2 Explanatory notes

Part 4 of the *LSA* requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed and contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

188 Explanatory notes, p 22. WWCA, s 17 (meaning of disqualified person). See also s 176K of the WWCA which makes it an offence for a disqualified person to make a working with children check application (maximum penalty of 500 penalty units or 5 years imprisonment).

189 WWCA, s 354.

190 LSA, s 4(3)(a).

191 LSA, s 4(3)(b).

192 Explanatory notes, p 22.

193 Statement of compatibility, p 45.

4 Compliance with the *Human Rights Act 2019*

The portfolio committee responsible for examining a Bill must consider and report to the Legislative Assembly about whether the Bill is not compatible with human rights, and consider and report to the Legislative Assembly about the Statement of Compatibility tabled for the Bill.[194]

A Bill is compatible with human rights if the Bill:

(a) does not limit a human right, or
(b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with s 13 of the HRA.[195]

The HRA protects fundamental human rights drawn from international human rights law.[196] Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The committee has examined the Bill for human rights compatibility. The committee brings the following to the attention of the Legislative Assembly.

4.1 Human rights compatibility

4.1.1 Clause 4 – Amendments to the CPOROPO Act to insert 9 prescribed offences contained in the Commonwealth Criminal Code

4.1.1.1 Human rights issues

The effect of the amendments will be to insert 9 Commonwealth Criminal Code offences into the list of prescribed offences in Schedule 1 of the CPOROPO Act. These offences will become "reportable offences" under the CPOROPO Act (s 9). A person sentenced for a reportable offence is a "reportable offender" under the Act and has particular reporting obligations imposed on him/her by the Act.

The Statement of Compatibility properly identifies that the clause limits the right to privacy in s 25 of the HRA. In addition, the clause may limit the right not to be tried or punished more than once, protected in s 34 of the HRA. In *Fardon v Australia*,[197] the United Nations Human Rights Committee left open the question of whether Article 14(7) of the International Covenant on Civil and Political Rights (ICCPR) (which protects the equivalent right to s 34 of the HRA) was breached by ongoing *imprisonment* of Mr Fardon after his sentence had been completed.

Under the CPOROPO Act, a person is subject to 'true penal consequences'[198] for failing to comply with reporting obligations: see s 50.

Nature of the human right

The right not to be tried or punished more than once, protected in s 34 of the HRA, is modelled on Article 14(7) of the ICCPR and reflects the basic principle of double jeopardy – that a person should not be tried or punished more than once in respect of an offence for which he or she has previously been convicted or acquitted by a court of competent jurisdiction.

194 HRA, s 39.

195 HRA, s 8.

196 The human rights protected by the HRA are set out in ss 15 to 37 of the Act. A right or freedom not included in the Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in this Act or is only partly included; HRA, s 12.

197 Communication No 1629/2007.

198 See *R v Wigglesworth* [1987] 2 SCR 51 at 552-554; *DPP v Guarde Wilson* (2006) 15 VR 640 at [17].

Nature of the purpose of the limitation

The purpose of inserting the Commonwealth Criminal Code offences into Schedule 1 of the CPOROPO Act is explained in the explanatory notes as being to answer a request from the Registry of the Ministerial Council for Police and Emergency Management and Council of Attorneys-General that Queensland do so.

The overarching purpose of the amendment is also explained in the explanatory notes – namely to enable those convicted and sentenced to a period of imprisonment or a supervision order for the Commonwealth offences to be placed on the National Child Offender System. The effect of the amendment will be to bring a further group of persons within the reporting obligations imposed by the CPOROPO Act.

The relationship between the limitation and its purpose

There is a threshold question that arises as to whether post-conviction supervision constitutes 'punishment' for the purposes of s 34 of the HRA. As mentioned above, in *Fardon v Australia*[199] the United Nations Human Rights Committee left open the question of whether Article 14(7) was breached by ongoing *imprisonment* of Mr Fardon after his sentence had been completed.

The amendment does not impose ongoing imprisonment, but reporting obligations, on a convicted person.

Under the CPOROPO Act, a person is subject to 'true penal consequences'[200] for failing to comply with reporting obligations: see s 50. This militates in favour of a finding that post-conviction supervision constitutes a form of punishment. There is a clear nexus between imposing the reporting obligations on a convicted person and the purpose of the limitation – put simply, the amendment will achieve the purpose of obliging persons convicted of the 9 Commonwealth offences to the reporting obligations under the CPOROPO Act.

Whether there are less restrictive and reasonably available ways to achieve the purpose

The reporting obligations themselves limit a number of additional rights protected by the HRA. There is no less restrictive and reasonably available way to achieve the purpose of bringing the Commonwealth offences within the ambit of the reporting scheme.

The importance of the purpose of the limitation

The limitation on the right protected in s 34 serves an important public purpose – namely the protection of the community from known child sex offenders.

The importance of preserving the human right and the balance between the importance of the purpose of the limitation and the importance of preserving the human right

There is overall proportionality between the amendment proposed and the human right protected in s 34 of the HRA. Whilst the amendment will require a convicted child sex offender to report to QPS under the CPOROPO Act, the purpose of the reporting obligations is justified to protect the community from known child sex offenders.

4.1.2 Clauses 6, 49 – Creation of new offences of wilfully and unlawfully killing or seriously injuring a police dog or police horse or corrective services dog

4.1.2.1 Human rights issues

The statement of compatibility identifies that these clauses reasonably limit the right protected in s 29 of the HRA, apparently focusing on the right not to be subjected to arbitrary arrest or detention protected in s 29(2). Arguably, there is no limitation on that right because the clauses do not amount

[199] Communication No 1629/2007

[200] See *R v Wigglesworth* [1987] 2 SCR 51 at 552-554; *DPP v Guarde Wilson* (2006) 15 VR 640 at [17].

to any form of arbitrary arrest or detention. The meaning of 'arbitrary' is examined in the statement of compatibility in respect of the proposed amendments to parole.[201] The human rights meaning of 'arbitrary' is capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim. The clauses do not expose a person to a form of arrest or detention of this nature.

However, the clauses expose a person found guilty of the offence to an order that they make a payment of money for the treatment, care, rehabilitation, retraining or replacement of a police dog or horse or corrective services dog. Prima facie, the clauses therefore expose a person convicted of the offence to a deprivation of their personal property. The right in s 24 of the HRA was not identified in the statement of compatibility. This may be because the provision was considered not to amount to an arbitrary deprivation of property.

The clauses do not arbitrarily deprive a person of his or her property. The circumstances in which a person may be ordered to pay money are carefully circumscribed in the provisions. Any deprivation of property may only occur after a finding of guilt is made, and there is a close nexus between the offending and the payment of money. As this is not an arbitrary deprivation of property, it is unnecessary to consider whether the limitation is justified in accordance with s 13 of the HRA.

4.1.3 Clause 38 – Expansion of police banning notices to possession of a knife in a public place

4.1.3.1 Human rights issues

The statement of compatibility identifies that this clause limits the rights in ss 15, 19, 25, 29 and 31 of the HRA and concludes that the limitations are reasonable and demonstrably justified. Insofar as the right to privacy is concerned, the statement of compatibility examines the impact of the provision on information privacy. A further aspect of the right to privacy that requires consideration is the reasonable expectation of privacy that may exist within a person's vehicle in which a knife may be located.

As the statement of compatibility identifies, the right to privacy protected in s 25 of the HRA is concerned not only with the retention of personal information by law enforcement agencies, but also with an individual's private life. The right is capable of being limited by measures that involve the exercise of public powers in a person's home and other private spaces. A person's vehicle is an example of a private space that engages this right. Whether the provision limits the right turns on whether the provision involves an interference and if so, whether the interference is arbitrary. Whilst the provision is not a search and seizure power, the effect of the amendment is that a police banning notice may be given to a person who possesses a knife in their car without a reasonable excuse, and their presence at the relevant place poses an unacceptable risk of causing violence at the place or impacting on the safety of other persons attending the place or disrupting or interfering with the peaceful passage or reasonable enjoyment of others at the place. To the extent that the provision limits the right to privacy by interfering with a person's private space, the limitation will be reasonable and demonstrably justified for the reasons identified in the statement of compatibility in so far as the other rights are concerned. In particular, the protection of community safety.

4.1.4 Clauses 7-16, 21 – Restricted prisoner declarations for particular life sentenced prisoners

4.1.4.1 Human rights issues

For a particular category of life sentenced prisoners – those who have been convicted of either murdering a child or for multiple murders[202] ('restricted prisoners') – the proposed amendments will affect their ability to apply for and be granted parole. Under Queensland law, the punishment for murder is a life sentence or an indefinite sentence under part 10 of the *Penalties and Sentences Act*

[201] Statement of compatibility, p 22.

[202] Conviction for multiple murders to refer to the three categories in cl 175D(b), (c) and (d).

1992.[203] A person who is sentenced for multiple murders must be subject to an order by the sentencing Court that they not be released from imprisonment for at least 30 or more specified years, unless released under the narrow circumstances prescribed for exceptional circumstances parole. The mechanism by which the Bill's amendments will alter parole eligibility is through the making of a 'restricted prisoner declaration' by the President of the Parole Board. The proposed amendment confers a discretion on the President of the Parole Board to make such a declaration upon being satisfied that it is in the public interest to do so. A list of mandatory matters is set out including any risk that the prisoner poses to the public if granted parole.

Prisoners have no right or entitlement to release on parole, nor to the continuation of a particular legislative scheme for release on parole throughout their sentence. As French CJ stated in *Crump v New South Wales* [2012] 286 ALR 658 at 670 '[t]he power of the executive government of a state to order a prisoner's release on licence or parole or in the exercise of the prerogative may be broadened or constrained or even abolished by the legislature of the state.'

Although identified in the statement of compatibility, the rights protected in ss 29, 31, 34 and 35 of the HRA are not limited by the proposed amendments (for example, as a breach of the right to liberty, a fair hearing, or against double jeopardy or retrospective increased punishment.) Whilst it is open to argue that the rights are limited – for example, a prisoner's right to be free from arbitrary detention may be claimed to be limited by a law that deprives a prisoner of parole if the requirements are disproportionate to the legitimate aim sought to be advanced, the preferred view is that the prisoner's liberty has already been deprived by the imposition of the life sentence under Queensland law and the continuation of the deprivation of liberty under lawful sentence cannot constitute arbitrary detention.

As noted above, the punishment for murder under Queensland law is a life sentence or an indefinite sentence under part 10 of the *Penalties and Sentences Act 1992*. A life prisoner's liberty has accordingly been lawfully deprived under sentence of imprisonment after conviction for a criminal offence by an independent court which must provide a fair hearing. Whilst the court is required to impose a minimum non-release period of imprisonment for a prisoner convicted of multiple murders (this category of prisoners is part of the particular subset of prisoners who will be affected by the proposed amendments, the other being persons who murder a child), the imposition of a minimum non-release period of imprisonment does not create any right to parole after the minimum period has expired.

The proposed amendments to the parole scheme effected by the Bill will not alter the position that life sentenced prisoners have been deprived of their liberty and lawfully detained for the duration of their sentence imposed by the court after conviction. Imposing further limits or altering the legal framework for parole does not alter the sentence as such. Rather than the amendments altering the sentences of imprisonment imposed by the court under which life sentenced offenders are detained, the proposed amendments will alter the circumstances in which parole may be applied for, and granted, by the Parole Board for restricted prisoners.

The HRA protects not only a person's right to liberty, and other procedural rights, but also rights concerning the humane treatment and punishment of persons deprived of their liberty in s 17(b) and s 30. Further, the HRA protects a person's right to be equal before the law.

Each of these rights is limited by the proposed amendments as discussed below.

Equality before the law and equal protection of the law without discrimination

The proposed amendment will affect a particular subset of life sentenced prisoners. The intention of the proposed amendment is plainly to treat life sentenced prisoners unequally.

[203] *Criminal Code Act 1899*, s 305(1).

The statement of compatibility does not identify the rights protected in s 15(3) of the HRA. Section 15(3) protects a person's right to be equal before the law and entitles them to the equal protection of the law without discrimination. The statement of compatibility contains the following statement:

> Restricted prisoner declarations are limited to a particular cohort of prisoners that have been sentenced to life imprisonment for the most heinous of crimes. They are intended to protect vulnerable members of the community that have become victims to these extreme crimes. The amendments do not remove all hope of being granted parole but instead set a much higher threshold for a restricted prisoner being granted parole.[204]

However, the nature, seriousness and circumstances of offending will vary for each prisoner. The statement of compatibility does not explain why it is justified to impose restricted prisoner declarations on the particular subset of prisoners as opposed to other life sentenced prisoners whose offending – having regard to its nature, seriousness and circumstances – may be more 'heinous'. The absence of analysis on this question is particularly problematic with respect to the category of restricted prisoners identified in s 175D(a). The committee notes that the statement of compatibility is silent as to why a person who murders a child as opposed to an adult commits a more heinous crime.

Cruel, inhuman or degrading punishment and the right to humane treatment when deprived of liberty

The central issue with respect to the proposed amendments is whether they are compatible with the rights protected in ss 17(b) and 30 of the HRA.

Section 17(b) states that a person must not be treated or punished in a cruel, inhuman or degrading way. Section 30 provides in sub-section (1) that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

The statement of compatibility identifies that the proposed amendments may limit s 30 but do not limit s 17(b) and states that if there are limitations on these rights, the limitations are justified. The particular aspect of the amendments that is considered in the statement of compatibility is the additional hardship by way of feelings of hopelessness that a prisoner may experience if restricted from being released when rehabilitated.

The starting position in the statement of compatibility is that for an act to be considered cruel, inhuman or degrading treatment in the context of parole restrictions, it must go beyond the inevitable suffering or humiliation that arises from detention. The statement of compatibility then states (emphasis added):

> For a life sentenced prisoner, a limitation of this right would lie in removing the prospect of ever being released on parole, even if the prisoner has rehabilitated themselves. [Footnote 21: *Vinter v United Kingdom* (2016) 63 EHRR 1, 37 [210] (***Vinter***); *Minogue v Victoria* (2018) 264 CLR 252, 272 [53], 276 [72] (***Minogue***).] A parole regime must provide for the prospect of release as well as the possibility of review. Indefinite detention without the prospect of release can amount to inhuman treatment. **For these rights to be limited under the new parole framework, it would require a restricted prisoner declaration to be made with no possibility of review.** In practice, a restricted prisoner declaration may make a review difficult, however the restricted prisoner declaration merely delays the possibility of review and the prospect of release. **A restricted prisoner declaration does not remove the possibility of either review or release.**[205]

In order words, the statement of compatibility concludes that there is no limitation on the right in s 17(b) because the amendments will not result in a prisoner having no *prospect* of release, or no *possibility* of review as to when the prisoner is released. To the extent that the statement of compatibility is suggestive of the need for wholesale removal of parole to constitute a breach of the

[204] Statement of Compatibility, p 28.

[205] Statement of Compatibility, p 29.

right, this position is not fully supported in the international and comparative human rights authorities, or by the High Court's decision in *Minogue*.

The proposed amendments limit both the right to be free from cruel, inhuman and degrading punishment and the right to humane treatment when deprived of liberty. There is a risk that the proposed amendments will be found to be incompatible with the right protected in s 17(b) of the HRA.

The particular aspects of the proposed amendments which may be incompatible with the right are:

- the potential for a declaration to be made which precludes the prospect of release despite the prisoner achieving rehabilitation during the term of the declaration, and therefore no longer being a person required to be detained for the protection of the community from the risk of reoffending
- the prospect of 'rolling' declarations being made[206] which would deny a life sentenced prisoner the possibility of ever being released, therefore removing the hope of release
- for prisoners who are currently serving life sentences, the amendments alter the conditions on which they may be released, which is incompatible with the proposition (accepted by the ECtHR) that a prisoner is entitled to know 'at the outset of [their] sentence' what they must do to be considered for release, and under what conditions, including *when* a review of their sentence would take place, or could be sought.

(i) Relevant Australian authorities

In *Minogue* the High Court considered the findings of the European Court of Human Rights (ECtHR) in *Vinter*, in the context of protection from cruel, inhuman, and degrading treatment under the Victorian *Charter of Human Rights and Responsibilities*. The plurality held that:

> '[i]n *Vinter*…the European Court of Human Rights (Grand Chamber) said that there is now clear support in European and international law for the principle that all prisoners, including those service life sentences, be offered the possibility of rehabilitation and the prospect of release if that rehabilitation is possible'. [207]

In a concurring judgment, Justice Gageler arguably went further. Citing Vinter, Justice Gageler stated:

> On a widely accepted international understanding that incarcerating a person without hope of release is an affront to the inherent dignity of that person, it is not in dispute that the right set out in s 10(b) encompasses the right of a prisoner serving a life sentence to be "offered the possibility of rehabilitation and the prospect of release if that rehabilitation is achieved".[208]

It was unnecessary for the High Court to expand on the substantive and procedural requirements to give effect to a life sentenced prisoner's 'prospect of release'. Whilst the statement of compatibility correctly refers to the removal of *any* possibility of either review or release on parole constituting a limitation of the right, the Court's statements in *Minogue* could be used to argue that the right protected in s 17(b) is limited also by the proposed amendments for the reasons identified above.

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[206] The proposed amendments clearly contemplate that a restricted prisoner declaration may be made immediately after the expiry of a current declaration: see clauses 175G(2)(a) and 175I(2)(a). There is no restriction in the proposed amendments on the number of consecutive or total declarations that may be made.

[207] *Minogue* [53].

[208] Ibid [72].

(ii) European Court of Human Rights

The decision in Vinter sits within an established line of authority developed by the ECtHR concerning the application of the right to protection from cruel and inhuman treatment (protected in Article 3 of the European Convention of Human Rights) to prisoners serving lifetime sentences.[209]

The principles that have been developed by the ECtHR may be summarised as follows. Where a life sentence is *de jure* and *de facto* reducible, it may nonetheless be served in full, without undue limitation of Article 3.[210] Therefore, the Court held in *Vinter*, there was 'no issue arising' under Article 3 where a life prisoner had a right to be released under domestic law but was refused on the ground that they posed an ongoing danger to society.[211] Further, the Court said 'where national law affords the possibility of review of a life sentence with a view to its commutation, remission, termination or the conditional release of the prisoner, this will be sufficient to satisfy Article 3'.[212] As the statement of compatibility refers[213], the Court then said: '[t]here are a number of reasons why, for a life sentence to remain compatible with Article 3, there must be both a prospect of release and a possibility of review'.[214]

The Court then proceeded to consider these various reasons. Prisoners could not continue to be detained unless there were 'legitimate penological grounds' for that detention, such as punishment, deterrence, public protection and rehabilitation.[215] Incarceration without the prospect of release could result in a risk that the prisoner could never atone for their offence, regardless of their progress towards rehabilitation, as their punishment remained fixed and unreviewable.[216] Release only for those who were infirm, or close to death, was insufficient in a system based on a respect for human dignity.[217] Ultimately, the Court in *Vinter* held that to satisfy Article 3, a prisoner must be able to access a review of their imprisonment, which required domestic authorities to consider whether any changes in the life prisoner were so significant, and/or that they had made such progress towards rehabilitation, as to mean that their continued detention could no longer be justified on legitimate penological grounds.[218] Further, a whole life prisoner was not obliged to wait and serve an indeterminate number of years before making an application for such a review.[219] The prisoner was entitled to know 'at the outset of [their] sentence' what they must do to be considered for release, and under what conditions, including *when* a review of their sentence would take place, or could be sought.[220]

Post-*Vinter*, the ECtHR has accepted that a life sentence imposed on a person convicted of an especially serious crime, such as murder, is not itself incompatible with human rights.[221] This has prompted some commentators to consider Hutchinson a 'retreat' from the findings of the Court in

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209 See, eg: *Weeks v United Kingdom* (1988) 10 EHRR 293; *Thynne, Wilson and Gunnell v United Kingdom* (1991) 13 EHRR 666; *Hurst v United Kingdom* (2001) ECHR 481; *Stafford v United Kingdom* (2002 35 EHRR 32); *Kafkaris v Cyprus* (2008) 49 EHRR 35 (Kafkaris).

210 (2008) 49 EHRR 35, [98].

211 *Vinter* [108].

212 Ibid [109].

213 Statement of compatibility, p 21.

214 Ibid [110].

215 Ibid [111]

216 Ibid [112].

217 Ibid [113].

218 Ibid [119].

219 Ibid [122].

220 Ibid [122].

221 *Hutchinson v United Kingdom* [2017] ECHR 65, [42].

Vinter.[222] Others have claimed that this simply reasserts the Court's previous findings (particularly in *Vinter*) as to the need for *de jure* and *de facto* capacity to reduce a life sentence, and nothing more.[223]

The ECtHR also considered the issue of life sentences in *Murray v Netherlands*.[224] Again, the Court recited its findings in both *Kafkaris* and *Vinter* in relation to the need for the possibility of release. The Court again emphasised that release limited to compassionate grounds relating to ill-health, incapacity, and old age did not correspond sufficiently to the notion of 'prospect of release' to alone satisfy Article 3.[225] Further, the assessment as to release was required to be made against 'objective, pre-established criteria', and required an actual assessment of the relevant information.[226] The Court further found that States had a duty to 'make it possible for such prisoners to rehabilitate themselves'.[227] Absent such a duty, prisoners could be in-effect denied the possibility of rehabilitation, meaning that even if there was a review of their sentence, they may never have a genuine capacity to satisfy the elements that would result in release.

(iii) New Zealand

Vinter has received some consideration in New Zealand, in relation to sentences termed 'life without parole'. In *R v Harrison*, the New Zealand Court of Appeal considered whether a sentence of life without parole could be the subject of a declaration of inconsistency between s 9 of the New Zealand Bill of Rights (concerning the right not to be subjected to torture or cruel treatment), and a proposed statutory provision under which a third-strike conviction could result in a life sentence.[228] The Court considered the findings of the ECtHR in *Vinter* across a number of paragraphs, before holding that it did not ultimately need to deal with the question raised.[229]

Subsequent cases in New Zealand have left open the question of whether s 9 of the Bill of Rights might limit whole of life sentences. In *R v Tarrant*, the High Court of New Zealand (the lowest intermediate appellate court in New Zealand) referred to the reasoning in *Vinter* in finding that the possibility of a whole of life sentence without the possibility of parole may breach the Bill of Rights.[230] However, the Court found that it was not in a position to definitively answer this question. Similarly, in *Smith v Attorney General* the High Court again acknowledged the reasoning in *Vinter*, but found it 'inappropriate' to find in favour of a proposed duty to provide rehabilitation to a prisoner serving a life sentence for murder.[231]

(iv) Canada

In R v *Granados-Arana*, an application was made for a declaration that consecutive periods of parole ineligibility, provided for in the Criminal Code where a prisoner had been convicted of multiple murders, was a breach of articles 7 and 12 of the *Canadian Charter of Rights and Freedoms*.[232] Article 7 provides for a right to life, liberty and security of the person, whilst Article 12 provides a freedom from being subjected to cruel or unusual treatment or punishment.

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222 See, for example, J Bild, 'Whole of Life Order: Article 3 Compliant After All?' (2017) 75 Cambridge Law Journal 230, 233; M Groves, 'A Life Without Hope – The Victorian Charter and Parole' (2018) 42 Crim LJ 353, 370.

223 A Dyer, 'Irreducible Life Sentences, Craig Minogue and the Capacity of Human Rights Charters to Make a Difference' (2020) 43(2) NSW Law Journal 484, 509.

224 [2016] ECHR 408.

225 Ibid [100].

226 Ibid [100].

227 Ibid [104].

228 [2016] NZCA 381, [112].

229 Ibid [114]-[119].

230 [2020] NZHC 2192, [139].

231 [2020] NZHC 1848, [109].

232 [2017] O.J. No. 5964, [102]-[113].

The Court undertook significant consideration of the ECtHR findings in both *Vinter* and *Hutchinson* before considering the impact of the provision in the Criminal Code on the rights in articles 7 and 12.[233] Commencing with Article 12, the Court held that the legislation permitting the imposition of life sentences with consecutive periods of parole ineligibility did *not* result in a sentence which demeaned or violated human dignity in breach of Article 12.[234] In part, this was founded on the practice in other countries (including Australia, New Zealand, the United Kingdom, and the United States of America) which permitted life-long sentences without parole,[235] however there was no consideration of the effect of human rights legislation in these jurisdictions. Additionally, it was held that there was recourse available to any prisoner in Canada under such a sentence, in the form of an application for the royal prerogative of mercy.[236]

In considering the application relating to Article 7, the Court undertook a comprehensive proportionality analysis.[237] Ultimately, it was found that there was not a 'right' to parole, and thus a discretion as to periods of parole ineligibility remained within the power of the Court.[238] The Court also approved comments suggesting that the particular issues raised fell to be considered in relation to Article 12 exclusively, rather than with Article 7 as well.[239]

Information missing from the statement of compatibility

The statement of compatibility identifies that the proposed amendments may limit s 30 but do not limit s 17(b) and states that if there are limitations on these rights, the limitations are justified. The particular aspect of the amendments that appears to be the central consideration insofar as limitations on these rights is the additional hardship by way of feelings of hopelessness that a prisoner may experience if restricted from being released when rehabilitated.

However, the statement of compatibility does not:

- provide sufficient justification for how the proposed amendments are compatible with the rights protected in ss 17(b) and s 30 in circumstances where a prisoner is rehabilitated during a period in which a restricted prisoner declaration applies and the protection of the community from risk of reoffending does not necessitate the further detention of the prisoner. Notably, the effect of a restricted prisoner declaration is to preclude any application for parole being made during the term of the declaration and there is no right to have the declaration reviewed by the Parole Board during its term
- address whether and how the prospect of "rolling" restricted prisoner declarations is compatible with these rights
- address whether and how for prisoners who are currently servicing life sentences, it is compatible to introduce the amendments which alter the conditions on which they may be released, with the proposition that a prisoner is entitled to know 'at the outset of [their] sentence' what they must do to be considered for release, and under what conditions, including when a review of their sentence would take place, or could be sought.

Further comments on the justification in the statement of compatibility

In addition to the areas not addressed in the statement of compatibility, the following additional comments may be made about the justification provided for the limitation on s 17(b) and s 30.

233 Ibid [102]-[113].
234 Ibid
235 Ibid [142].
236 Ibid [142].
237 Ibid [144]
238 Ibid [161].
239 Ibid [161]-[162].

It could be argued that the justification is insufficient to satisfy s 13 of the HRA, for these reasons:

- s 13 of the HRA sets out a limitations test and contains a number of factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.
- s 13(b) the nature of the purpose of the limitation to be imposed, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom and
- s 13(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve its purpose

The statement of compatibility identifies the following purpose of the limitation:

> The primary aim of the restricted prisoner declaration is to protect victims' families, friends and the broader community from further trauma caused by restricted prisoners being considered for parole at ongoing short intervals…
>
> A secondary aim is the protection of the community, given that a declaration will prevent certain people who present an unacceptable risk to the community from applying for parole and being released into the community.[240]

The concern over the 'stress and trauma' suffered by victims' families and friends, and possibly the wider community, is repeated across different sections of the proportionality analysis within the statement of compatibility.

However, no evidence is provided to support the assertion that victims' families, friends and the community experience trauma caused by restricted prisoners being considered for parole under the currently permitted yearly intervals. There is no evidence that restricted prisoners in fact apply for parole each year. It is not apparent how persons other than those required to be notified would find out that a life prisoner has made an application for parole. By contrast, the experiences of the courts in Europe, New Zealand, and Canada show that the harms suffered by prisoners who are denied the opportunity to seek parole are sufficiently concrete as to be the basis for challenges to the highest courts in each of those jurisdictions.

In so far as the secondary aim is concerned, the statement of compatibility[241] tellingly doubts whether it is a proper justification stating 'it might be argued that the framework is not rationally connected to that purpose because the Board already considers the risk to the community in parole applications. However, an additional barrier provides additional protection to the community.'

It could be argued that the secondary purpose is not rationally connected to the proposed amendments for the reason identified in the statement of compatibility. Nor does the statement of compatibility explain why any additional barrier is necessary. The statement of compatibility does not identify any situation in which the current parole laws would allow a prisoner to be released but for this additional barrier. It is difficult to comprehend of a scenario in which the Parole Board would first conduct a community risk assessment analysis and find in favour of the prisoner only to then conduct a second analysis and decide that the prisoner was in fact a danger to the community and that it was therefore necessary to make the prisoner subject to a declaration.

Committee comment

The Bill is compatible with the HRA other than the proposed amendments concerning the introduction of restricted prisoner declarations and no cooperation declarations, which may be incompatible with the right to be free from cruel, inhuman or degrading treatment or punishment and the right to humane treatment in detention.

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240 Statement of compatibility, p 25.

241 Statement of compatibility, pp 25-26.

The committee has identified that making an override declaration under s 43 of the HRA would alleviate the risk that these proposed amendments are found to be incompatible with rights protected by the HRA. An override declaration would remove the application of the HRA, if the Government considered that there were exceptional circumstances justifying such a declaration being made.[242]

4.1 Statement of compatibility

A statement of compatibility was tabled with the introduction of the Bill as required by s 38 of the HRA. The statement of compatibility provides a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights, other than in the following aspects. The statement of compatibility did not consider whether:

- Clause 4 is compatible with the right not to be punished more than once in s 34 of the HRA
- Clauses 6 and 49 are compatible with the right to property in s 24 of the HR;
- Clause 38 is compatible with the right to privacy in s 25 of the HRA insofar as a person may possess a knife in his or her car.

Further, insufficient information was provided in the statement of compatibility concerning the compatibility of the proposed introduction of restricted prisoner declarations and no cooperation declarations which may be incompatible with the right to equality before the law and equal protection of the law without discrimination, right to be free from cruel, inhuman or degrading treatment or punishment and the right to humane treatment in detention. In summary, the statement of compatibility does not:

- identify any limitation on the right protected in s 15(3) and explain why it is justified to make available the imposition of a restricted prisoner declaration on the particular subset of prisoners as opposed to other life sentenced prisoners whose offending – having regard to its nature, seriousness and circumstances – may be more "heinous". In particular, the statement of compatibility does not explain why a person who has murdered a child is included within the restricted prisoner category when this group falls outside of the mandatory minimum non-parole term prescribed in s 305 of the Criminal Code for the other group included in the category (ie multiple murderers).
- provide sufficient justification for how the proposed amendments are compatible with the rights protected in ss 17(b) and s 30 of the HRA both generally and in circumstances where a prisoner is rehabilitated during a period in which a restricted prisoner declaration applies and the protection of the community from risk of reoffending does not necessitate the further detention of the prisoner. Notably, the effect of a restricted prisoner declaration is to preclude any application for parole being made during the term of the declaration and there is no right to have the declaration reviewed by the Parole Board during its term;
- address whether and how the prospect of "rolling" restricted prisoner declarations is compatible with the rights in s 17(b) of s 30 of the HRA;
- address whether and if so, how, for prisoners who are currently servicing life sentences, it is compatible to introduce the amendments which alter the conditions on which they may be released, with the proposition that a prisoner is entitled to know 'at the outset of [their] sentence' what they must do to be considered for release, and under what conditions, including *when* a review of their sentence would take place, or could be sought; and
- address whether and if so, how, for a prisoner who is subject to a no cooperation declaration and maintains their innocence, the automatic refusal of parole is compatible with his/her rights to be free from cruel, inhuman or degrading treatment or punishment

[242] An override declaration was made by the Victorian Government with respect to s 74AAC of the *Corrections Amendment (Parole) Act 2016* which precludes the Victorian Parole Board from making a parole order in respect of prisoner Craig Minogue outside of the circumstances set out in in the provision.

and to humane treatment when deprived of liberty, because the provisions effectively bar the prisoner who maintains his/her innocence from any prospect of release.

Finally, with respect to the proposed changes to the presumption for exceptional circumstances parole, the statement of compatibility does not:

- explain why an additional barrier is necessary, or how the additional barrier is rationally connected to the purpose of these amendments, being to protect the community
- sufficiently explain why the present law concerning exceptional circumstances parole does not adequately protect the community
- given the already narrow circumstances in which exceptional circumstances parole may be granted, coupled with the availability of rolling restricted prisoner declarations, sufficiently justify how imposing tighter measures on the availability of exceptional circumstances parole is compatible with the rights in s 17(b) and s 30.

Appendix A – Submitters

Sub #	Submitter
001	LawRight
002	Queensland Law Society
003	Confidential
004	Sisters Inside Inc
005	Prisoners' Legal Service Inc
006	Aboriginal and Torres Strait Islander Legal Service (QLD) Ltd
007	Queensland Human Rights Commission
008	Queensland Council for Civil Liberties
009	Bar Association of Queensland
010	Australian Lawyers Alliance

Appendix B – Officials at public departmental briefing

Queensland Police Service

- Deputy Commissioner Doug Smith, Strategy and Corporate Services
- Senior Sergeant Ian Carroll, Legislation Branch, Policy and Performance Division

Queensland Corrective Services

- Chief Superintendent Tom Humphreys, Legislation Group
- Ms Annika Hutchins, Director, Legislation Group

Appendix C – Witnesses at public hearing

Queensland Law Society

- Ms Elizabeth Shearer, President
- Mr Dan Rogers, Chair, Human Rights and Public Law Committee
- Ms Binari De Saram, Manager and Solicitor, Legal Policy

Aboriginal and Torres Strait Islander Legal Service

- Ms Kate Greenwood, Barrister and Policy, Intervention and Community Legal Education Officer

Sisters Inside

- Mrs Debbie Kilroy, Chief Executive Officer
- Ms Katherine McHenry, Policy Officer

Prisoners' Legal Service

- Ms Helen Blaber, Director and Principal Solicitor

LawRight

- Mr Ben Tuckett, Managing Lawyer
- Mr Zachary Denovan, Paralegal

Bar Association of Queensland

- Ms Ruth O'Gorman, Barrister
- Mr Joseph Murphy, Lawyer

Statement of Reservation

Statement of Reservation

Introduction

Unfortunately, this legislation, to a significant extent, appears to be little more than window dressing to convince Queenslanders that the state government has a commitment to making communities safer and ensuring that those who commit crimes are subject to adequate penalties.

The proposals appear to be a disparate collection of measures bundled together to give the appearance of a concerted response to curb crime.

That the more technical measures relating to police powers were not legislated earlier suggests that they have been added simply to give the appearance of a complete policy package.

Members of the Opposition pursued questions during hearings by the Legal Affairs and Safety Committee to establish the efficacy of the government's proposals. The hearing process highlighted a number of failures of the Parole Board Queensland (the Board).

Corrective Services Act 2006 (CSA) - New parole framework for life sentenced multiple or child murderers

It is difficult to determine the impact of this proposal. While the initial view would appear to support the likelihood of this measure having a positive impact, there are real doubts as to whether it will have any discernible effect in practice.

The measures will only apply to life sentenced multiple or child murderers. Despite the monstrous nature of these offences, the number of offenders within each of these categories is relatively small. Whether there is a raft of such murderers currently gaining parole is unclear. The limiting of parole, while having an impact on a relatively small number of offenders, will have little impact on the overall safety of the community.

No empirical evidence has been presented that this proposal would achieve its policy objectives.

The Public Briefings held by the Committee failed to adduce evidence that the proposal would be particularly effective.

It appears to have little or no application in other jurisdictions.

The measure sounds tough, but there are valid doubts as to whether it will have any measurable impact on keeping the community safer and deterring future offenders.

Regrettably, it gives the appearance that the government is doing something without having to do anything.

Supporting the Parole Board Queensland

Amendments are proposed to the Corrective Services Act. According to the Explanatory Notes the amendments are designed to provide for:

> "… the temporary extension of parole consideration timeframes under section 193(3) for a period of six months. This extension will provide an additional 60 days from receipt of a parole application for the Board to decide. Commencement of the temporary extended timeframes will be by a proclamation."

The Opposition regards this proposal as little more than an admission the Parole Board is unable to keep pace with current applications for parole. It is a transparent attempt to paper over an administrative failure to comply with the recommendation from the Sofronoff Review that applications for parole should be dealt with within 120 days.

Anecdotal evidence suggests courts are discounting sentences in the expectation that the Parole Board will be unable to hear applications within the appropriate time. At the same time applications for judicial review are costing thousands of dollars and consuming valuable court time because the Board is unable to meet its obligations.

Simply extending the time for the Board to consider applications will assist neither the applicants nor the community generally.

Conclusion

The Opposition continues to be disappointed in the government's response to criminal activity. As has occurred so often in the past, the proposals will have little influence in curbing crime, punishing offenders or helping the families of victims.

This bill is yet another attempt to add to the Queensland government's narrative that this problem is being attacked, when in reality, the legislation will have little impact.

Laura Gerber MP
Deputy Chair
Member for Currumbin

Andrew Powell MP
Member for Glasshouse