

Police Powers and Responsibilities and Other Legislation Amendment Bill 2023

Statement of Compatibility

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

In accordance with section 38 of the *Human Rights Act 2019*, I, Mark Ryan, Minister for Police and Corrective Services and Minister for Fire and Emergency Services make this statement of compatibility with respect to the Police Powers and Responsibilities and Other Legislation Amendment Bill 2023.

In my opinion, the Police Powers and Responsibilities and Other Legislation Amendment Bill 2023 is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The main objective of the Bill is to improve the efficiency and effectiveness of the Queensland Police Service (QPS), and the Queensland Fire and Emergency Services (QFES) by making a range of amendments that impact on the administration and operation of these agencies.

The Bill will achieve this by making amendments to a variety of Acts including the *Drugs Misuse Act 1986* (DMA), the *Fire and Emergency Services Act 1990* (FES Act), the *Penalties and Sentences Act 1992*, the *Police Powers and Responsibilities Act 2000* (PPRA), and the *Youth Justice Act 1992* (YJA) by:

- Expanding the Police Drug Diversion Program (PDDP) which authorises the diversion of persons away from court processes for minor drug offences by:
 - introducing drug diversion warnings
 - allowing an eligible person to participate in a subsequent drug diversion assessment program; and
 - allowing more persons to be eligible for the PDDP;
- Broadening the definition of ‘minor drug offence’ to include all dangerous drugs and S4 and S8 medicines under the *Medicines and Poisons Act 2019* under a prescribed quantity and all things or utensils used for consuming those drugs;
- Clarifying that a child may be cautioned under the YJA or offered the opportunity to participate in the PDDP and confirming that the circumstances in which the relevant drug matter is forfeited to the State;
- Clarifying that the use of a drug diversion alternative under the PPRA does not exclude a person from undertaking court ordered drug diversion;

- Increasing the maximum penalty for ‘Trafficking in dangerous drugs’ to reflect the seriousness and harmful impact of the offence and to more broadly align with penalties for serious drug offences on other Australian jurisdictions; and
- Creating a circumstance of aggravation for the evasion offence under section 754 of the PPRA.

The Bill will also make amendments to the *Police Service Administration Act 1990* (PSAA) to support the efficient administration of the QPS by clarifying that the Commissioner can appoint an Executive Officer to a position, or a rank.

Finally, the Bill also includes amendments to the FES Act that will support the ongoing effectiveness of services delivered by QFES by:

- Providing for a regulation to prescribe certain matters about a request or application made under sections 64 and 65 of the FES Act; and
- Providing for an offence of ‘Assault of persons performing functions or exercising powers’ which will provide separately for the elements and penalties applying to an assault against a person performing a function or exercising a power, that are currently captured as an obstruction under section 105C ‘Obstruction of persons performing functions’ of the Act.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

This Bill makes a range of amendments that engage human rights but any limitation is reasonably justified in a free and democratic society based on human dignity, equality and freedom.

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

- section 25 ‘Privacy and reputation’ of the HR Act;
- section 29 ‘Right to liberty and security of person’ of the HR Act; and
- section 32 ‘Rights in criminal proceedings’ of the HR Act.

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

Increasing the maximum penalty for ‘Trafficking in dangerous drugs’ – Clause 4

The Bill will amend the maximum penalty in section 5 ‘Trafficking in dangerous drugs’ of the DMA from 25 years imprisonment to life imprisonment. The increased penalty for this offence ensures Queensland more closely aligns with the penalties in other Australian jurisdictions for serious drug offences. Trafficking in dangerous drugs has a significant detrimental impact to the community, both socially and economically, and is considered one of the most serious forms of drug offending in the DMA. The proposed penalty increase is proportionate to the seriousness of the offence and the devastating impact it has on individuals and the community at

large. Importantly, a serious penalty is required to provide a sufficient deterrent given the financial gains associated with committing this offence.

The criminal justice system plays a crucial role in ensuring public safety whilst balanced against protecting the rights of an individual. Consistency in penalties across the States is important to ensure that the criminal justice system operates in a fair and impartial manner. When penalties for similar offences vary greatly from one jurisdiction to another, it creates disparities in the way that crimes are punished, leading to unequal outcomes for individuals who have committed similar offences. Aligning the maximum penalty for trafficking with other State jurisdictions would ensure that individuals who commit similar crimes face similar consequences, regardless of where the crime was committed in Australia.

The consequences that may occur through the administration of the more severe penalty of life imprisonment is not arbitrary in nature. However, it may be said that the imposition of harsher sentencing ranges may raise concerns about an increase in the period of time that an offender may be imprisoned particularly in circumstances where there are allegations of wrongful conviction. Subsequently, the amendment may potentially engage the human right to liberty and security of person.

(a) the nature of the right

Section 29 of the HR Act protects a person's right to liberty and security. This provides that a person must not be subjected to arbitrary arrest or detention and must not be deprived of their liberty except on grounds, and in accordance with procedures, established by law. It also outlines procedures that should be followed subsequent to a person's arrest for a charge.

This right applies to all forms of detention where someone is deprived of their liberty and is not restricted to the criminal justice process. This can be relevant any time a person is not free to leave a place by their own choice.

Although this right seeks to protect an individual's freedom to live fully within society, it is accepted that at times infringement of an individual's liberty and security is necessary, provided the infringement is not arbitrary or unlawful. 'Arbitrary' might involve injustice, inappropriateness, unpredictability, or a lack of due legal process.

The proposal may be seen to engage this right as it increases the sentencing range preferred to the offence provision under section 5 of the DMA by increasing the maximum penalty for the offence to include a term of life imprisonment.

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

The purpose of the proposal is to establish a strong deterrence and a more nationally consistent penalty regarding trafficking in dangerous drugs and other serious drug offences given the serious nature of the offence and far-reaching ramifications of the supply and use of dangerous drugs within the community.

The social and economic harm caused to the community by trafficking of dangerous drugs is immense. The Australian Institute of Health and Welfare describes numerous harms of illicit drug use on individuals, families and the broader Australian community, including significant health impacts such as disease, death, overdose and hospitalisation; social impacts including violence, crime and trauma and economic impacts such as the cost of health care and law enforcement. Drug trafficking is at the apex of offending in the DMA and involves the carrying on of a business in illicit drugs. It is often particularised by multiple charges of supplying drugs. There is currently one offence in the DMA with a maximum penalty of life imprisonment for supply of a schedule 1 drug to a minor under 16 years. Considering the harms caused by drug trafficking as the main source of illicit drug use, an increase in the maximum penalty of ‘Trafficking in dangerous drugs’ to life imprisonment is reasonable and demonstrably justifiable.

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

While it is not possible to quantify the deterrence effect that this amendment may have, the devastating harm caused by this offending is known. Where the consequences of a crime are severe, individuals are less likely to engage in illegal activity. A strong deterrence is particularly important in the case of trafficking, where individuals may be motivated by the potential of financial gain. By increasing the maximum penalty, the criminal justice system can send a strong message that the ramifications of trafficking are severe and that individuals who engage in this illegal activity will face serious consequences. As such, creating strong disincentives for this offence is in the public interest.

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

There are no other less restrictive, reasonable available alternatives considered available to achieve the purpose of the Bill.

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

The right to liberty and security is arguably one of the most crucial rights under the HR Act. It impacts all aspects of life, as incarceration interferes with an individual’s ability to spend time with family and loved ones, to enjoy freedom of movement, to exercise the ability of self-determination, and to participate in the social aspects of public life, including religious or cultural events. Incarceration may also have an adverse impact on social connections and relationships, despite the methods of communication available.

However, the offence of trafficking in dangerous drugs involves a considered decision of the offender to carry on a business which seeks to profit from the supply of dangerous drugs to the community. Trafficking generally involves a demonstrable regularity of drug dealing sufficient

to establish it has occurred on the course of a business,¹ and the harmful impact of supplying these drugs, particularly to vulnerable members of the community, is well known. No right is inalienable, and the proposed penalty of trafficking in dangerous drugs accurately reflects the harm caused by the offence. Due to the strong financial incentive of committing the offence, a proportionately strong deterrence is required to combat the illegal trafficking in dangerous drugs within Queensland.

The objectives achieved by the amendment outweighs any limitation on the right to liberty and security that may occur as a result. The proposed amendment reflects the strong community expectation that those who engage in this illegal activity will face severe consequences. Increasing the maximum penalty for trafficking to align with penalties more broadly in other Australian jurisdictions for serious drug offences is necessary to ensure that the sentencing of offenders in Queensland operates in a fair and impartial manner. The amendment ensures individuals who commit similar crimes face similar consequences, regardless of where the crime is committed in Australia.

As such, on balance it is considered that the advantages to making this change outweigh the limitation placed on the right.

(f) any other relevant factors

Not applicable.

Introducing a circumstance of aggravation for the evasion offence – Clause 15

The proposed amendment to section 754 of the PPRA seeks to include a circumstance of aggravation for evading police which may have significant implications for human rights.

This offence currently imposes a mandatory minimum of 50 penalty units or 50 days imprisonment to be served wholly in a corrective services facility.

The current offence also includes a maximum penalty of 200 penalty units or 3 years imprisonment and a mandatory suspension of the offender's driver licence for 2 years, irrespective of the sentence they receive.

The proposal to create a circumstance of aggravation for evading police will include a maximum penalty of 300 penalty units or 5 years imprisonment, if the offence is committed in the following circumstances:

- the offence is committed at night;
- the driver of the motor vehicle uses or threatens violence;
- the driver of the motor vehicle is armed or pretends to be armed;
- the driver of the motor vehicle is in company;
- the driver of the motor vehicle damages or threatens to damage any property; or
- the driver of the motor vehicle has previously been convicted of an offence under:
 - section 754 of the PPRA;

¹ *Martin v Osborne (1936) 55 CLR 376*

- section 408A of the *Criminal Code*;
- section 427 of the *Criminal Code*; or
- section 328A of the *Criminal Code*.

(a) the nature of the right

Due to the increased penalty available under the circumstance of aggravation, the proposed amendment interferes with the right to liberty and security of a person (s 29 of the HR Act). As noted above, an individual's right to live their life freely, safe from arbitrary and unlawful detention forms one of the core protected rights under the HR Act and is generally accepted internationally as a fundamental human right, as outlined in Article 9 of the *International Covenant on Civil and Political Rights* (ICCPR).

Although the starting presumption is to promote an individual's ability to retain their liberty, infringement on this right is at times necessary to protect and promote the safety, wellbeing and best interests of the community. The right does not afford an individual freedom from any detention, only that arrest or detention is not arbitrary, and is provided for by law.

The proposal may be seen to engage this right as it seeks to introduce a new penalty involving a longer term of imprisonment.

The proposal to include a circumstance of aggravation raises concerns about the fairness and impartiality of the criminal justice system. The addition of a circumstance of aggravation may raise concerns that a disproportionate punishment could be imposed on an individual. This may contravene the principle of proportionality, as well as the right to a fair trial as protected by the *Universal Declaration of Human Rights* (UDHR) and ICCPR.

Additionally, the proposal may have implications for children who may be accused of evading police. The *Convention on the Rights of the Child* (CRC) requires that the best interests of the child be a primary consideration in all actions concerning children, and the possibility that a greater period of imprisonment may be imposed on a child which may not always be in their best interests. The CRC also requires that the punishment of children be in proportion to the offense committed and be limited to the minimum necessary.

Finally, as the evasion offence is a type 1 vehicle related offence under section 69A of the PPRA, a police officer may during an investigation issue a notice under section 755 of the PPRA to the owner of a vehicle involved in the alleged evasion offence. This notice requires the owner of the vehicle to provide a statutory declaration which includes information pertaining to the investigation, such as details regarding the driver of the vehicle at the time of the alleged offence. By requiring the owner of a vehicle to provide the requested information in compliance with the notice, the individual's right to privacy (s 25 of the HR Act) is impacted and the notice may impact upon the individual's right to not be compelled to testify against oneself or to confess guilt (s 32(2)(k) of the HR Act).

If the owner of the vehicle fails to comply with the notice within the prescribed timeframe, under section 756 of the PPRA the owner of the vehicle is presumed to have been the driver

involved in the relevant type 1 vehicle related offence. The result of the amendment coupled with the presumption, is that an owner of a vehicle may be liable to a greater penalty of five years imprisonment without direct evidence being established that the owner of the vehicle was the driver involved in the offence. This impacts upon the driver's right to be presumed innocent until proven guilty according to law (s 32(1) of the HR Act) and if found guilty of the offence, a person will be liable to a more severe penalty than the offence presently provides.

It is a defence for the owner of the vehicle to prove, on the balance of probabilities, that they were not the driver of the vehicle involved in the offence when the offence happened. However, a person cannot rely on evidence in the defence that is information they were required to include in the statutory declaration required unless notice has been given to the prosecuting authority at least 21 business days in advance of the start of the proceeding and the court grants the person leave to rely on the evidence (s 756(2) & (5) of the PPRA). However, where an evasion offence with a circumstance of aggravation is charged, s 756(8) & (9) will apply, and a court – if the interests of justice require – will be able to grant the defendant leave to rely on information the person was otherwise required to include in a statutory declaration under s 755A. Whilst these are existing provisions, the additional hurdles they present place greater limitations on the individual's right to be presumed innocent until proven guilty according to law (s 32(1) of the HR Act) in circumstances in which the offence carries a greater penalty of five years imprisonment.

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

The purpose of the limitation is to provide a stronger penalty and deterrence against offenders who evade police. In particular, the amendment seeks to target recidivist offenders and those that engage in dangerous and high-risk behaviour, placing the community at significant risk of harm. Despite the current mandatory minimum penalty of 50 penalty units or 50 days imprisonment to be served wholly in a correctional centre, the offence continues to be a concern and can result in fatal accidents involving innocent members of the community.

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

Although it is not possible to quantify or guarantee the effectiveness of increased penalties in deterring future criminal activity, the risk to the community caused by reckless driving frequently associated with offenders seeking to evade police is clear. Police evasion is a clear and deliberate attempt to disregard authority and the laws that govern our community and as such requires firm ramifications to send a clear message to offenders.

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

There is no less restrictive way to achieve the intent of this amendment.

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

Although this amendment may infringe upon an offender's right to liberty and security, the benefit to the community far outweighs the limitations placed upon this right.

The act of evading police is frequently accompanied by serious criminal behaviour, including dangerous operation of a vehicle, unlawful use or possession of a vehicle and unlawful entry of a vehicle for committing an indictable offence (per sections 328A, 408A and 427 of the Criminal Code). The availability of stricter penalties appropriately reflects the seriousness of the behaviour and has to be balanced against the public right to safely use and enjoy public areas. In this instance, the safety of the community outweighs the limitation on human rights that may be experienced by the offender.

- (f) Any other relevant factors

Nil.

Assaulting a person performing functions or exercising powers – Clause 10

The Bill will provide a new offence under section 150BA 'Assault of persons performing functions or exercising powers' of the FES Act to ensure that the warning requirement, which currently applies to the offence of obstruction in section 150C of the FES Act, is not required for an assault. A person charged with an offence under new section 150BA will not be able to argue that they have a reasonable excuse for the assault, as would have been available to them when assault was captured by section 150C. The Bill will also provide that an assault for the purposes of section 150C has the meaning given by the Criminal Code section 245. This amendment will require an amendment to the definition of 'obstruct' in section 150C to provide that it includes abuse, hinder, resist, threaten and attempt to threaten to obstruct (i.e. it does not include assault).

- (a) the nature of the right

The proposed amendment will engage the right to liberty and security of the person (section 29 of the HR Act).

Section 29 of the HR Act provides that everyone has the right to freedom and safety. The right to liberty includes the right to not be arrested or detained except in accordance with the law. The fundamental value which the right to liberty and security expresses is freedom, which is acknowledged to be a prerequisite for equal and effective participation in society. The right is directed at all deprivations of liberty (including, but not limited to, criminal sanctions) and will be relevant whenever a person is placed at risk of imprisonment.

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

Section 150C of the FES Act currently provides that a person must not obstruct another person (an authorised person) in the performance of a function under the Act unless the person has a reasonable excuse. If the person has obstructed an authorised person and the authorised person decides to proceed with the performance of the function, the authorised person must provide a warning that it is an offence to obstruct (without reasonable excuse) and that the authorised person's conduct is considered to be an obstruction. An offence under the section carries an offence of 100 penalty units or 6 months imprisonment.

Currently, the offence of obstruction includes abuse, assault, hinder, resist, threaten and attempt or threaten to obstruct. The proposed amendment will provide for a separate offence of assaulting a person who is performing a function or exercising a power under the FES Act which does not include a requirement for a warning to be given and will no longer allow for a person charged with an offence to argue reasonable excuse. The penalty currently applying under the Act for section 150C will apply to both the new assault offence and the amended obstruction offence. The purpose of providing for a penalty for these offences that includes a period of imprisonment, and thus limits the right to liberty, is to ensure that if an assault against a person performing functions or exercising powers occurs, a perpetrator who commits an assault will be subject to appropriate punishment.

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

The restriction of an individual's right to liberty will achieve the purpose in ensuring that, if a person assaults a person performing functions or exercising powers, they will be subject to appropriate punishment. Further, a warning is not required for an assault on a person performing functions or exercising powers, as it is considered that persons considering such an action will know that criminal sanction will attach to such an action regardless of whether they have been warned that it is an offence to assault a person performing functions or exercising powers. Similarly, a person will not be able to argue that they have a reasonable excuse for the assault, as would have been available to them when assault was captured by section 150C. It is considered that importing the Criminal Code definition of assault provides sufficient, and appropriate, defences or excuses for assaults (including elements relating to consent or the lack thereof).

The amendment recognises that where a person performing a function or exercising a power under the FES Act is assaulted, this conduct should be treated differently to conduct which is more appropriately categorised as obstructing the person in performing their functions or exercising powers. Therefore, providing for a penalty, including a term of imprisonment, will fulfill the purpose by ensuring that, if allegations of assault are proved, a term of imprisonment may apply, thus providing an appropriate deterrent and assisting in supporting a safe working environment for persons performing functions or exercising powers under the Act.

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

There is no less restrictive way to achieve the intent of this amendment than providing for an appropriate penalty, including a term of imprisonment for conduct warranting such punishment.

The amendment is considered limited in that the warning requirement of the offence and the argument that the person has a reasonable excuse for their conduct will not apply for an act constituting an assault but will continue to be required for an act of obstruction. In the case of an obstruction, a person may not realise that their actions are obstructing an authorised person, therefore it is considered appropriate to provide a warning. However, it is not considered necessary to provide a warning that it is an offence to assault another person, including a person performing functions or exercising powers under the Act. Similarly, allowing for an argument that there was a reasonable excuse for an obstruction continues to be appropriate. However, it is considered that the Criminal Code provides sufficient, and appropriate, defences or excuses to persons accused of assault.

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

The benefits gained by fulfilling the purpose of the amendment, if enacted, which may impose a limitation on human rights, outweigh the harm caused to the human right.

Persons (including volunteers) performing functions or exercising powers under the FES Act play a critical role in the community to safeguard life, property and the environment and need to be supported to ensure their safety and encourage continued voluntary service. The limitation on a person's liberty, which is only imposed following a conviction for an assault (with or without a warning) on a person performing functions or exercising powers under the Act is considered an appropriate balance.

On balance, the limitation on a person's property and privacy rights is considered reasonable and justifiable for the purpose of providing for an appropriate penalty, including a period of imprisonment, to assist in supporting a working environment where persons performing functions or exercising powers under the Act relating to safeguarding persons, property and the environment, can do so without fear of assault or that if such an offence does occur that the perpetrator of the offence will be subject to appropriate punishment.

(f) Any other relevant factors

Nil.

Conclusion

In my opinion, the Police Powers and Responsibilities and Other Legislation Amendment Bill 2023 is compatible with human rights under the *Human Rights Act 2019* because it limits a human right only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

Mark Ryan
Minister for Police and Corrective Services and
Minister for Fire and Emergency Services

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