

Corrective Services (Promoting Safety) and Other Legislation Amendment Bill 2024

Statement of Compatibility

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

In accordance with section 38 of the HRA, I, Nikki Boyd, Minister for Fire and Disaster Recovery and Minister for Corrective Services make this statement of compatibility with respect to the Corrective Services (Promoting Safety) and Other Legislation Amendment Bill 2024.

In my opinion, the Corrective Services (Promoting Safety) and Other Legislation Amendment Bill 2024 (the Bill) is compatible with the human rights protected by the HRA. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The Bill amends the *Corrective Services Act 2006* (CSA) and other legislation to promote the safety of victims of crime, frontline corrective services officers, offenders and the broader community through amendments that will:

- enhance the legislative framework for the Queensland Corrective Services (QCS) Victims Register to promote the safety and wellbeing of victims engaging with the service;
- require representation for victims on the Parole Board Queensland (the Board) to increase victims' input into parole decisions;
- strengthen powers to respond to abuse of prisoner communication channels to protect the community from prisoners who seek to inflict harm from behind bars;
- enable the use of certain police powers for reportable child sex offenders being supervised under the *Dangerous Prisoners (Sexual Offenders) Act 2003* (DPSOA) to strengthen community safety;
- increase the penalty for possession of a gel blaster on corrective services land in response to evolving behaviour putting safety at risk;
- protect the use of victim and intelligence information to support effective decision making;
- clarify the authority for corrective services officers to use body-worn cameras while in the community to promote the safety of frontline corrective services officers;
- provide greater flexibility for prescribing protections and requirements around how invasive prisoner searches are conducted to accommodate diverse prisoner needs;
- update legislative requirements to support the independence, diversity and efficient administration of the Board;
- enable QCS to lawfully detain prisoners from Norfolk Island in line with the Queensland Government's commitments under the *Intergovernmental Partnership Agreement on State Service Delivery to Norfolk Island*; and
- address a number of other minor and technical issues to support the continued safe operations of corrective services.

Human Rights Issues

Relevant human rights

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

Human rights engaged under the HRA (including rights that are promoted and/or limited) by amendments to the CSA, the Corrective Services Regulation 2017 (CSR), the *Police Powers and Responsibilities Act 2000* (the PPRA), the *Parole Orders (Transfer) Act 1984* (the Transfer Act) and the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (the CPOROPA) include:

- the right to freedom of movement (section 19),
- the right to freedom of expression (section 21(2)),
- the right to not be arbitrarily deprived of property (section 24(2)),
- the right to privacy (section 25(a)),
- the right to protection of families and children (section 26),
- the right to cultural rights (generally) (section 27),
- the right to cultural rights of Aboriginal peoples and Torres Strait Islander peoples (section 28),
- the right to liberty (section 29),
- the right to security of person (section 29(1)),
- the right to humane treatment when deprived of liberty (section 30(1)),
- the right to a fair hearing (section 31),
- the right to be presumed innocent until proved guilty (section 32(1)), and
- the right to health services (section 37(1)).

Right to freedom of movement (section 19)

The right to freedom of movement protects the fundamental value of freedom:¹ ‘liberty of movement is an indispensable condition for the free development of a person’.² The right places an obligation on the State not to act in a way that unduly restricts the freedom of movement.

The right should be protected through government restraint, rather than through taking positive steps to promote the freedom of movement. This right contains an internal qualifier or modifier, which limits when the right may be engaged. Section 19 refers to ‘every person lawfully within Queensland.’ The right to freedom of movement is not protected for people who are not ‘lawfully’ within Queensland.

Right to freedom of expression (section 21(2))

The right to freedom of opinion and expression is often described as foundational to the *International Covenant on Civil and Political Rights* (ICCPR).³ The right to freedom of

¹ *Antunovic v Dawson* (2020) 30 VR 355; [2010] VSC 377 [72].

² Human Rights Committee, General Comment No 27: Freedom of Movement (*Article 12 of the International Covenant on Civil and Political Rights*), 67th sess, UN Doc CCPR/C/21/Rev.1/Add.9 (2 November 1999).

³ Human Rights Committee, General Comment No 34: *Freedoms of opinion and expression (Article 19 of the International Covenant on Civil and Political Rights)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [2]-[3].

expression protected by section 21(2) is important both to individuals as well as the rule of law.⁴

The right has a wide scope, protecting almost all forms of expression, including verbal (oral, writing, print), or through art or conduct.

The right protects the expression of ideas and information that may ‘offend, shock or disturb the State or any sector of the population’.⁵ However, the right can be limited, and may be when expression is ‘unquestionably antithetical to freedom, democracy and the rule of law that sustain our society’ (for example, hate speech).⁶

The right to freedom of expression includes the right to seek and receive information. This may include a right of access to information held by government, and an obligation on government to disclose information. The United Nations Human Rights Committee (the Human Rights Committee) states that Article 19 ‘embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production’.⁷ Freedom of expression has an important relationship to economic, social and cultural rights. For example, illiteracy is an obstacle both to the exercise of freedom of expression and the right to receive information.⁸

Right to freedom of association (section 22(2))

The right to freedom of association is critical for democracy.⁹ As a civil right, individuals are protected from arbitrary interference (by both the State and private parties) when associating with others for any reason or purpose.¹⁰ The freedom of association allows people to pursue common interests (e.g. sporting, politics, trade) in formal groups,¹¹ and protects the economic right to join trade unions. The legal form of an association is unrestricted – except for those founded by law or an administrative act (e.g. public corporations, institutions). The freedom of association may also protect the right of individuals to carry out the activities of the association, but the extent to which it does so is unclear.¹² Individuals have the right to choose which associations to be part of, or to form new ones.

Right to not be arbitrarily deprived of property (section 24(2))

The ability to own and protect property historically underpins many of the structures essential to maintaining a free and democratic society based on human dignity, equality and freedom.

The right includes the protection from the deprivation of property. The term ‘deprived’ is not defined by the HRA. However, deprivation in this sense is considered to include the substantial restriction on a person’s use or enjoyment of their property, to the extent that it substantially

⁴ Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 139-140.

⁵ *Handyside v United Kingdom* (1976) 1 EHRR 737; (1976) Eur Court HR 5 [49].

⁶ *Magee v Delaney* (2012) 39 VR 50; [2012] VSC 407 [89].

⁷ Human Rights Committee, *General Comment No 34: Freedoms of opinion and expression (Article 19 of the International Covenant on Civil and Political Rights)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011) [18].

⁸ William A Schabas, U.N. ICCPR: Nowak’s CCPR Commentary (N. P. Engel, Publisher, 3rd rev ed, 2019) 543.

⁹ William A Schabas, U.N. ICCPR: Nowak’s CCPR Commentary (N. P. Engel, Publisher, 3rd rev ed, 2019) 614.

¹⁰ William A Schabas, U.N. ICCPR: Nowak’s CCPR Commentary (N. P. Engel, Publisher, 3rd rev ed, 2019) 614.

¹¹ Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 162.

¹² William A Schabas, U.N. International Covenant on Civil and Political Rights: Nowak’s CCPR Commentary (N. P. Engel, Publisher, 3rd rev ed, 2019) 616; Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 162.

deprives a property owner of the ability to use their property or part of that property (including enjoying exclusive possession of it, disposing of it, transferring it or deriving profits from it).¹³ There is no right to compensation for a person deprived of their property.¹⁴

Right to privacy (section 25(a))

The right to privacy protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The right to privacy manifests the underlying value of human beings as autonomous individuals with power over their actions.¹⁵ The scope of the right to privacy is very broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally. The right protects individuals' rights against interference with physical and mental integrity, freedom of thought and conscience, legal personality, sexuality, family and home and individual identity (including appearance, clothing and gender).

The scope of this right is limited by an internal limitation that a person has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. This can be understood as an internal limitation, which means that it is relevant to whether a limitation on a right can be justified.

Right to protection of families and children (section 26)

At international law, this right requires the State to recognise and protect marriage and the family as special institutions.¹⁶ Section 26(1) entitles families to protection by both the State and society. 'Family' is not to be 'narrowly interpreted or confined',¹⁷ but should be 'given a broad interpretation to include all those comprising the family as understood in the society of the State party concerned'.¹⁸ This includes taking cultural traditions into consideration when defining the term family.¹⁹ Families take many forms and the right accommodates the various social and cultural groups in Queensland whose understanding of family may differ.

At international law, the State has a duty to protect children by preventing interference by authorities and private parties (including parents e.g. in situations of child abuse and neglect), but also must enact positive measures for when children require special protection (e.g. death or disappearance of parents, poverty and hunger, physical or mental disability).²⁰

¹³ *Alistair Pound and Kylie Evans*, Annotated Victorian Charter of Rights (Lawbook, 2nd ed, 2019) 184.

¹⁴ Explanatory Notes, Human Rights Bill 2018 (Qld) 22. See also *Halwood Corp (in liq) v Roads Corp* [2008] VSC 28.

¹⁵ William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 459.

¹⁶ William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 634.

¹⁷ *Director of Housing v Sudi* (2010) 33 VAR 139; [2010] VCAT 328 [33].

¹⁸ Human Rights Committee, *General Comment No 16 (1988): The Right to Respect of Privacy, Family, Home and Correspondence, and Protection of Honour and Reputation (Article 17 of the International Covenant on Civil and Political Rights)*, UNHRC, 32nd sess (8 April 1988).

¹⁹ Human Rights Committee, *Views: Communication No 549/1993*, 55th sess, UN Doc CCPR/C/51/D/549/1993 (30 October 1995) [10/3] ('*Hopu et al v France*').

²⁰ William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak's CCPR Commentary* (N. P. Engel, Publisher, 3rd rev ed, 2019) 669.

Right to cultural rights generally (section 27)

Cultural rights are directed towards ensuring the survival and continued development of the cultural, religious and social identity of minorities. Section 27 affirms the right of all persons to enjoy their culture, to practise or declare their religion and to use their language, either alone or with others who share their background. It is a negative right which protects a person from being denied the right to enjoy their culture, religion or language. A person may have been denied the right in this section if their enjoyment of the right is substantially restricted.

The cultural rights of Aboriginal peoples and Torres Strait Islander peoples (section 28)

This right recognises that Aboriginal peoples and Torres Strait Islander peoples have a rich and diverse culture. There are many hundreds of distinct Aboriginal groups and Torres Strait Islander groups in Australia, each with geographical boundaries and an intimate association with those areas. Many of these groups have their own languages, customs, laws and cultural practices. Section 28 explicitly protects the right to live life as an Aboriginal or Torres Strait Islander person who is free to practise their culture and gives rights to individuals as part of a cultural group. Subsection 28(2) may be seen as an internal limitation; this means that it is relevant to whether a limitation on a right can be justified. Prior consultation with First Nations people may be relevant to whether a person has been ‘denied’ their rights under section 28.

First Nations peoples hold the rights ‘as individuals,’ though the rights should be seen through a collective prism in the sense that they are rights held in common by a people. The Human Rights Committee has stated that the right is said to be exercised both individually and ‘in community with others.’²¹

Some of the rights in section 28 include verbs such as ‘maintain,’ ‘control,’ ‘protect’ and ‘develop.’ While these words carry different meanings, they may all be considered to have a common element of agency or control.²² The HRA does not protect the right to self-determination as part of section 28. However, the HRA preamble recognises that the right to self-determination is of ‘particular significance to Aboriginal peoples and Torres Strait Islander peoples of Queensland.’ This means that in interpreting this right it may be necessary to interpret some terms in light of the right to self-determination.²³

Right to liberty and security of person (section 29)

This right entitles all persons to liberty of the person, including the right not to be arrested or detained except in accordance with the law. The scope of the right is limited by an internal limitation that a person has the right not to be subject to arbitrary arrest or detention. The Explanatory Notes to the HRA state when it comes to the right to liberty the ‘concept of arbitrariness includes elements of inappropriateness, injustice, lack of predictability and due process of the law.’

²¹ Human Rights Committee, General Comment No 23: Rights of minorities (*Article 27 of the International Covenant on Civil and Political Rights*), 50th sess, UN Doc CCPR/C/21/Rev.1/Add.5 (8 April 1994) [3.1].

²² Tobias Stoll, ‘*Intellectual Property and Technologies: Article 31*’ in Jessie Hohmann and Marc Weller (eds), *The UN Declaration on the Rights of Indigenous Peoples: A Commentary* (Oxford University Press, 2018) 299, 307 [3.3].

²³ *Acts Interpretation Act 1954* (Qld) schedule 1 (definition of ‘provision’); *Certain Lloyd’s Underwriters Subscribing to Contract No IH00AQS v Cross* (2012) 248 CLR 378, 389 [24]; *Wacando v Commonwealth* [1981] HCA 60; (1981) 148 CLR 1, 381 [69] (McHugh, Gummow, Kirby and Hayne JJ).

The concept of detention includes not only detention in a prison but all forms of detention, including detention for the purposes of mental illness or medical treatment. A temporary restriction of movement not involving any significant restraint, will not amount to a deprivation of liberty: ‘The difference between a deprivation of liberty and a restriction on freedom of movement is one of degree or intensity, not one of nature and substance.’²⁴ The right to security means that all reasonable steps must be taken to ensure the physical safety of those who are in danger of physical harm. The right to security applies independently of the right to liberty and applies whether or not the individual is detained. It includes bodily and mental integrity, or freedom from injury to the body and mind. The Human Rights Committee has said that the right to security of person is intended to protect persons against intentional infliction of bodily and mental injury, regardless of whether the person is arrested or detained.

Right to humane treatment when deprived of liberty (section 30(1))

The right recognises the particular vulnerability of persons in detention and intends to ensure that they are treated humanely. The underlying value of the right to humane treatment is respect of the inherent dignity that people should be afforded as human beings. The right to humane treatment when deprived of liberty is concerned with protecting people in detention and avoiding unreasonable interference with other rights. The right places a positive obligation on the State to ensure persons deprived of liberty are treated with dignity and humanity.

People deprived of their liberty will inevitably have other rights limited because of their detention. The right to humane treatment in section 30 means that individuals who are detained should not be subject to any hardship or constraint that is in addition to those inevitable constraints resulting from the deprivation of their liberty (that is, a person who is detained should retain all their human rights subject only to the restrictions that are unavoidable in a closed environment).²⁵ The right also places an obligation on the State to ensure all detention facilities are sufficiently resourced and kept to an appropriate standard.

Right to a fair hearing (section 31)

The right affirms the right of all individuals to procedural fairness when coming before a court or tribunal. The concept of a fair hearing is concerned with procedural fairness,²⁶ it applies to both criminal and civil proceedings and guarantees that such matters must be heard and decided by a competent, impartial and independent court or tribunal. The underlying value of the right is said to be in relation to defining the relationship between the individual and the State and protecting people against aggressive behaviour of those in authority, both of which reflect the philosophy that the State must prove its case without recourse to the suspect.²⁷

What constitutes a ‘fair’ hearing will depend on the facts of the case and will require the weighing of a number of public interest factors, including the rights of the accused and the victim (in criminal proceedings) or of all parties (in civil proceedings). Case law has determined that what is ‘fair’ in the context of a criminal proceeding will involve a triangulation

²⁴ *Kracke v Mental Health Review Board* [2009] VCAT 646 [664]; *Director of Public Prosecutions v Kaba* (2014) 44 VR 526; [2014] VSC 52 [110].

²⁵ Human Rights Committee, *General Comment No 21: Humane treatment of persons deprived of their liberty* (Article 10 of the *International Covenant on Civil and Political Rights*), 44th sess (10 April 1992) [3]. See also *Alistair Pound and Kylie Evans*, *Annotated Victorian Charter of Rights* (Lawbook, 2nd ed, 2019) 200.

²⁶ *Knight v Wise* [2014] VSC 76 [36].

²⁷ *Re Application under Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, 448 [146] (Warren CJ).

of the interests of the victim, the accused, and the community.²⁸ In other words, a fair trial does not require a hearing with the most favourable procedures for the accused. It must take account of other interests, including the interests of the victim and of society generally in having a person brought to justice and preventing crime.

Case law suggests that one of the essential requirements for a fair hearing is the principle of ‘equality of arms,’ meaning that each party must be given a reasonable opportunity to present its case.²⁹ This will ordinarily involve being informed of the case to be advanced by the opposing party and having an opportunity to respond.³⁰ The Human Rights Committee has stated equality of arms means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.³¹

Right to be presumed innocent until proved guilty (section 32(1))

Section 32 safeguards a number of rights for people charged with a criminal offence. In criminal law, as a general rule, it is for the prosecution to prove a defendant’s guilt, not for the defendant to prove their innocence. The right to be presumed innocent until proved guilty imposes on the prosecution the onus of proving the offence, guarantees that guilt cannot be determined until the offence has been proved beyond reasonable doubt, gives the accused the benefit of doubt, and requires that accused persons be treated in accordance with this principle.

However, sometimes Parliament will depart from this general rule and impose either an evidential or a legal burden of proof on an accused person. This is known as reversing the onus of proof. Reverse onus provisions by their nature limit the right but are not necessarily incompatible. Whether reverse burden of proof constitutes a reasonable limitation on the presumption of innocence will depend on the circumstances of the case. An evidential burden may not limit the right at all.³² However, the High Court has considered that an evidential burden would reduce, not eliminate, the limit on the right.³³ Therefore, while the position remains uncertain, placing an evidential burden on the accused may be seen as limiting the right to be presumed innocent. However, this will be a substantially less significant limitation, meaning it will be more easily justified than placing a legal burden on the accused.

Right to health services (section 37(1))

The right comprises two rights: a right to access health services, and a right not to be discriminated against in the provision of that access. ‘Access’ likely carries a human rights meaning, incorporating non-discrimination and accessibility principles discussed above (for example, physical accessibility, economic accessibility [affordability], and information accessibility).

²⁸ *R v A* (No 2) [2002] 1 AC 45.

²⁹ *Roberts v Harkness* [2018] VSCA 215 [48].

³⁰ *Roberts v Harkness* [2018] VSCA 215 [48].

³¹ Human Rights Committee, General Comment No 32: *Right to equality before courts and tribunals and to fair trial*, 90th sess, UN Doc CCPR/C/GC/32 (27 July 2007) [13]; *Human Rights Committee, Views: Communication No 1347/2005*, 90th sess, UN Doc CCPR/C/90/D/1347/2005 (27 July 2005) [7.4] (*‘Dudko v. Australia’*).

³² *R v DA* (2016) 263 A Crim R 429, 444 [48] (Ashley, Redlich and McLeish JJA).

³³ *Momcilovic v The Queen* (2011) 245 CLR 1, 220 [577] (Crennan and Kiefel JJ).

Amendments in the Bill

The human rights implications for amendments in the Bill that engage human rights are considered with respect to each amendment as follows.

Enhancing the QCS Victims Register

Amendments to enhance QCS' Victims Register (the Register) framework aim to promote the safety and wellbeing of eligible persons.

The Bill streamlines the registration process for the Victims Register to reduce re-traumatisation that can occur where information is required to be re-disclosed by a victim.

The Bill also extends the eligibility criteria for the Victims Register to ensure the service can be accessed by those who need it to support their safety and wellbeing. The Bill will:

- extend the eligibility criteria for victims of homicide offences to register if the offender returns to QCS custody or supervision for other offending,
- clarify that victims, or others impacted by a homicide offence, can register,
- ensure that an 'immediate family member' who may register on behalf of a deceased victim includes equivalent First Nations family or kinship relationships, and
- remove any doubt about eligibility to register against prisoners on DPSOA orders.

Finally, the Bill will clarify what information is to be provided to an eligible person by the Victims Register to ensure eligible persons can receive all necessary information to support their safety and wellbeing. The Bill will:

- insert a new ability to refuse to release particular information if giving the information is likely to endanger the safety or security of a corrective services facility, the safe custody or welfare of a prisoner, or the safety or welfare of someone else,
- update the information an eligible person is entitled to receive to include a prisoner's change of name and remove the date of death if the prisoner did not die in custody,
- clarify that to the extent the information is known and appropriate, an eligible person may be advised of other parole matters (including suspension or cancellation), a prisoner's change of sex record, and the prisoner's deportation or removal status under the *Migration Act 1958* (Cth), and
- clarify that to the extent the information is known and is appropriate, an eligible person may receive information about a homicide offender on a community-based sentence including the offender's general location and that supervision has ceased.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

Human rights engaged by the amendments include:

- the right to privacy (section 25(a) of the HRA), and
- the right to security of person (section 29(1)) (promoted only).

Right to privacy (section 25(a) of the HRA)

Amendments to the Victims Register framework extend eligibility to register to people that otherwise may not have registered and expand the private information that can be disclosed to eligible persons about a prisoner they are registered against. These amendments interfere with

the right to privacy because by being registered, a prisoner's private information, including when they apply for parole, can be disclosed to an eligible person. The Bill further increases the extent of this interference with the right to privacy by extending registration against a homicide offender on a community-based sentence and expanding the types of information that can be disclose during community-based supervision.

The right to privacy includes internal limitations. The right to privacy is only limited if the interference is unlawful or arbitrary. The Bill ensures the lawfulness of the interference with privacy. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate to the aim sought.

Because questions of proportionality arise when considering justification of limits on human rights under section 13 of the HRA, it is convenient to consider these questions below before making a determination as to whether any limitation on the right to privacy will be arbitrary.

Consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 of the HRA)

(a) the nature of the right

The right to privacy protects individuals from arbitrary interference with their privacy, family, home or correspondence, particularly with respect to the inherent dignity of the human person.

(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 limitations imposed by the amendments aim to support the safety and wellbeing of eligible persons by providing access to register against a relevant prisoner and receive critical information that can assist in safety planning and provide the opportunity to participate in the parole process. This purpose in turn promotes the right to security for those people that are registered to receive the information. This purpose is consistent with a free and democratic society that prioritises support for victims of crime and acknowledges the ongoing impacts of those crimes, and continued safety risks over the course of a prisoner's sentence or homicide offender's supervision by QCS.

(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 provision of private information about a prisoner, including their release date, that they have applied for parole, or that they have changed their name, to an eligible person is necessary to support the person's safety and wellbeing. Providing this information allows an eligible person to conduct any necessary safety planning, and have the opportunity to provide a submission in relation to a prisoner's parole application. In turn a submission can inform the Board's decision about parole having regard to the safety and wellbeing of the victim, for example, by considering any appropriate parole conditions. Without this necessary interference with a prisoner's privacy, the Victims Register could not fulfill its purpose.

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

A number of safeguards ensure that the interferences with human rights are the least necessary to achieve the purpose of supporting the safety and wellbeing of eligible persons. These safeguards include:

- the eligibility criteria for the Victims Register is narrowly prescribed to ensure that only those people that need access to the information can register. Legislative criteria is based on continued safety risks stemming from violent or sexual offending, including domestic and family violence or ongoing trauma for those impacted by homicide offences,
- the chief executive must be satisfied that a person is eligible to register,
- the chief executive must be satisfied that the person consents to being registered,
- a person seeking to be registered must apply in the approved form, or on a referral in the approved form, ensuring the chief executive can be satisfied of the relevant detail,
- the chief executive has discretion to refuse to register a person that would otherwise be eligible if the registration may endanger the security of a corrective services facility, the safe custody or welfare of a prisoner or the safety or welfare of someone else,
- the chief executive has discretion to refuse to accept a nomination on behalf of an eligible person, including where it is not reasonably suitable in the circumstances,
- a new discretion for the chief executive to refuse to give an eligible person a notice or information if they reasonably believe doing so will endanger a facility or person,
- only specific prescribed information that is critical to safety is required to be provided to an eligible person, including a prisoner's release date, date of death or escape,
- other information may only be disclosed about a prisoner where it is appropriate to do so,
- ensuring that if the person is registered against a homicide offender on a community-based order, more narrowly prescribed information may be released about the offender if appropriate, than if they were a prisoner,
- the chief executive cannot provide information to an eligible person (or nominated person) unless they have signed a declaration that the person will not disclose, for public dissemination, any information given to them about a prisoner. This protects against the eligible person on-sharing the information,
- further, once in receipt of the information about the prisoner, the eligible person (or nominee) becomes an informed person under section 341 of the CSA, which makes it an offence to disclose the confidential information,
- section 324 of the CSA requires an eligible person to be removed from the register in prescribed circumstances, such as once the prisoner is discharged, and
- any discretion exercised by the chief executive must be compatible with the HRA.

In developing the amendments in the Bill, consideration was given to a number of alternatives. However, none of these alternatives would limit human rights to a lesser extent while still achieving the purposes of supporting the safety and wellbeing of those accessing the service for the following reasons:

- narrower scope or orders – consideration was given to not capturing community-based orders in relation to the ability for an eligible person to register against a homicide offender. This is a less restrictive option because the ability to disclose information would not continue if the offender was not a prisoner, but was subject to community-based supervision. However, so narrowing the amendment may limit opportunities to support the

ongoing safety and wellbeing of those registered. As such, a narrower scope than what is prescribed would not be as effective at achieving the purpose, and

- narrower scope of offenders – consideration was given to narrowing the offence from homicide offences to murder and manslaughter offences only. However, this alternative removes other related offences, including by co-offenders to murder or manslaughter offences where victims and their families still need to ensure their safety and wellbeing. This alternative would not enable that to occur and so would not be as effective at achieving the purpose.
- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On one side of the scales, it is accepted that expanding the cohort of people who may be eligible to receive information from the Register interferes with a prisoner's, or homicide offender's, right to privacy. The interference occurs where private information about the prisoner is released, as opposed to the registration itself. It is important to ensure such private information is appropriately safeguarded and only disclosed where necessary.

On the other side, ensuring the Register can be accessed by those that need it supports a victim to safety plan and promotes the eligible person's right to security. Without the interference with a prisoner's privacy, the Register could not support the safety or wellbeing of these people. The Bill also ensures that the extent of any interference with the prisoner's right to privacy inherent in the Register's operations is limited, with appropriate legislative safeguards, including legislative eligibility criteria and guidance around the types of information that can be disclosed, to ensure the Register is only accessible to those that need it, and only the necessary information is disclosed.

For these reasons, the impact on a person's privacy enabled by the amendment is not considered to be arbitrary, and so it is not considered to limit human rights. However, even if it was considered to limit the human right, the limitations are considered justified. As such, the amendments are considered to be compatible with human rights.

(f) any other relevant factors

N/A.

Increasing flexibility for how an eligible person can engage with the parole process

The Bill increases flexibility for how an eligible person can engage with the register and the parole process. The Bill will allow the Board discretion to accept a non-written submission from an eligible person about a prisoner's parole.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

Human rights engaged by the amendments include:

- the right to freedom of expression (section 21(2) of the HRA), and
- the right to privacy (section 25(a) of the HRA).

As human rights are not considered to be limited by the amendment further analysis of the factors set out in section 13 of the HRA is not required.

Right to freedom of expression (section 21(2) of the HRA)

The amendment to provide flexibility for an eligible person to make a submission to the Board, other than in writing, promotes the right to freedom of expression by providing greater flexibility for eligible persons to express their opinions about parole through alternative modes.

Right to privacy (section 25(a) of the HRA)

The amendment to provide flexibility for an eligible person to make a submission to the Board, other than in writing, promotes the right to privacy, which includes a person's physical and mental integrity. It does this by affording people an opportunity to engage with the parole process where they may otherwise be unable to do so through a written submission.

Definition of 'immediate family member'

The Bill amends the CSA to ensure that an 'immediate family member' who may register with the Victims Register on behalf of a deceased victim includes equivalent First Nations family or kinship relationships.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

Human rights promoted by the amendments include:

- the right to protection of families (section 26(1) of the HRA), and
- the right to cultural rights of Aboriginal peoples and Torres Strait Islander peoples (section 28 of the HRA).

As human rights are not considered to be limited by the amendment further analysis of the factors set out in section 13 of the HRA is not required.

Right to protection of families (section 26(1) of the HRA)

The right to protection of families accepts that the term 'family' is understood broadly in international law, extending to *different cultural understandings* of family. Therefore, the amendment to the definition of an immediate family member to acknowledge First Nations concepts of family and kinship promotes this right by expanding access to the Victims Register for the immediate family of a deceased victim.

Right to cultural rights of Aboriginal peoples and Torres Strait Islander peoples (section 28)

This amendment also promotes the cultural rights of Aboriginal peoples and Torres Strait Islander peoples as it promotes the ability of First Nations peoples to enjoy, maintain, control, protect and develop kinship ties.

Requiring victim representation on the Parole Board Queensland

The Bill amends section 221 of the CSA to require the appointment of at least one community board member that is a victims' representative. Victims' representative is defined as someone with expertise or experience relevant to the impact of crime on victims and victims interacting with the criminal justice system.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

The amendment promotes the right to freedom of expression (section 21(2) of the HRA). As human rights are not considered to be limited by the amendment further analysis of the factors set out in section 13 of the HRA is not required.

Right to freedom of expression (section 21(2) of the HRA)

The amendment promotes this right by allowing a victims' representative to express and impart information and ideas relevant to victims to inform parole decisions.

Responding to abuse of prisoner communications

The Bill strengthens powers to respond to abuse of prisoner communication channels to protect the community from prisoners seeking to inflict harm from behind bars.

The Bill provides discretion to approve and revoke a contact for a prisoner's personal calls, for example if the proposed contact details are not suitable, or if the personal call is likely to be a prohibited prisoner communication. The Bill defines prohibited prisoner communications to include an offence, breach of a court order, domestic violence, a threat to a person's safety or welfare, an incitement to commit violence or destroy property, gambling or a threat to the safety and security of a corrective services facility.

The Bill enables the chief executive to suspend the approval of an individual while investigating whether the approval should be revoked. The Bill provides that the suspension of an approval ceases to have effect six months after it was imposed if no decision has been made.

The provisions in the Bill do not affect a prisoner's ability to communicate with their lawyer or other prescribed entities (such as with the ombudsman). The Bill also ensures that other entities may be approved for all or a class of prisoners to contact.

The Bill ensures that limitations on the length and frequency of personal calls can be increased or decreased to address levels of risk. This is achieved by clarifying that the chief executive may determine the terms and conditions for the making of personal calls, including when and how (for example by audio or audio visual means) calls can be made. The chief executive may also limit the amount a prisoner may spend on personal phone calls within a specified period.

The Bill provides for different terms and conditions to be made according to a prisoner's security classification (including any risk sub-category), the special need of prisoners (as defined in schedule 4 of the CSA), or another factor prescribed by regulation.

The Bill provides that more restrictive terms and conditions, or restrictions on how often prisoners can top up their phone accounts may be applied to an individual prisoner if the

prisoner is likely to use personal calls to engage in prohibited prisoner communication. The Bill prescribes matters that may be taken into account in making a decision to apply for restrictive limitations.

A safeguard has been included to provide that the restrictions must not limit a prisoner to fewer than seven calls within a seven day period. Other safeguards include that the terms and conditions, other than for an individual prisoner, must be included within the administrative procedures made and published in accordance with section 265 of the CSA.

The Bill expands powers to end calls involving violence, coercion, harassment or threats by clarifying the chief executive's power to end a prisoner's personal call if there has been a contravention of the terms and conditions applicable to the call or the call is being used for a prohibited prisoner communication. The Bill expands powers to suspend prisoner communications while the commission of an offence is being investigated.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

Human rights engaged by the amendments to respond to abuse of prisoner communications include:

- the right to freedom of expression (section 21(2) of the HRA),
- the right to freedom of association (section 22(2) of the HRA),
- the right to privacy (section 25(a) of the HRA),
- the right to protection of families and children (section 26(1) and (2)),
- the right to cultural rights (generally) (section 27 of the HRA),
- the right to cultural rights of Aboriginal and Torres Strait Islander peoples (section 28 of the HRA).
- the right to security of person (29(2) of the HRA), and
- the right to humane treatment when deprived of liberty (section 30(1) of the HRA).

Right to freedom of expression (section 21(2) of the HRA)

Amendments to strengthen powers to respond to abuse of prisoner communication channels limit the right to freedom of expression to the extent that, in certain circumstances, the chief executive sets the terms and conditions for prisoner communications, including the means for communication and may impose additional limitations on the length and frequency of personal calls, suspend or revoke approved contacts, and end calls that involve prohibited prisoner communications. This may include because a prisoner has used threatening language or incited violence through communications.

Right to freedom of association (section 22(2) of the HRA)

Amendments to strengthen powers to respond to abuse of prisoner communication channels limit the right to freedom of association to the extent that the framework provides for the chief executive to approve personal contacts for a prisoner.

Right to privacy (section 25(a) of the HRA)

Amendments to strengthen powers to respond to abuse of prisoner communication channels impact the right to privacy by providing for a prisoner's personal calls to be monitored or recorded, and for the prisoner's contacts to be screened.

The right to privacy includes internal limitations. The right to privacy is only limited if the interference is unlawful or arbitrary. The Bill ensures the lawfulness of the interference with privacy. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate to the aim sought.

Because questions of proportionality arise when considering justification of limits on human rights under section 13 of the HRA, it is convenient to consider these questions below before making a determination as to whether any interference on the right to privacy will be arbitrary, and subsequently whether the right is limited.

Right to protection of families and children (section 26(1) and (2) of the HRA)

Amendments to strengthen powers to respond to abuse of prisoner communication channels limit the right to protection of families and children to the extent that a prisoner may be restricted from contact with family or children in line with the provisions, such as where there was a domestic and family violence order in place or threats to safety.

The right to cultural rights (generally) (section 27 of the HRA)

This right is only impacted to the extent that ending, suspending, revoking contacts or limiting the length and frequency of personal calls inadvertently removes a prisoner's ability to enjoy their culture, and to declare and practice their religion or use their language with other persons of that background in the community, such as friends or family members.

Right to cultural rights of Aboriginal peoples and Torres Strait Islander peoples (section 28)

Amendments to strengthen powers to respond to abuse of prisoner communication channels impact the right to cultural rights of Aboriginal peoples and Torres Strait Islander peoples in so far as any terms and conditions, contact approvals or other restrictions limit a First Nations prisoner from contact with their family and community, or regulate the way they are able to continue to connect with their culture from custody.

Right to humane treatment when deprived of liberty (section 30(1) of the HRA)

Generally, the regulation of prisoner communications to the external community is an inherent part of the custodial environment, as part of the purpose for imprisonment is to remove the prisoner from the community. As such, the amendments in the Bill do not generally limit this right. However, the provisions provide a framework for individual restrictions to be put in place beyond those for the general prisoner population that engage this right.

Consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 of the HRA)

(a) the nature of the right

Freedom of expression is an essential part of an individual's privacy, requiring protection against external interference.

The right to freedom of association protects individuals from arbitrary interference (by both the State and private parties) when associating with others for any reason or purpose.

The right to privacy protects individuals from arbitrary interference with their privacy, family, home or correspondence, particularly with respect to the inherent dignity of the human person.

The right to protection of families entitles families to protection by both the State and society.

The right to protection of children recognises that children have the same rights as adults, but with additional protections because they are children.

Cultural rights are directed towards ensuring the survival and continued development of the cultural, religious and social identity of minorities by protecting a person from being denied the right to enjoy their culture, religion or language.

The right to cultural rights of Aboriginal and Torres Strait Islander peoples explicitly protects the right to live life as an Aboriginal or Torres Strait Islander person who is free to practise their culture.

The underlying value of the right to humane treatment is respect of the inherent dignity that people should be afforded as human beings.

(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 regulation of a prisoner's communications with external persons aims to ensure prisoners cannot inflict harm from behind bars. This purpose goes to one of the core reasons behind custodial imprisonment that is the protection of the community, and so limitations on communications are also essential to ensure public confidence in the correctional system. These limitations themselves promote the right to privacy and security for persons outside of a facility that wish to be protected from potential harm.

Other purposes for imposing limitations include ensuring the continued safety and security of corrective services facilities, such as where prisoner communications are used to facilitate the introduction of contraband that puts facilities, frontline corrective services officers and other prisoners at risk.

(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

Despite being physically removed from the community, technology provides an opportunity for prisoners to perpetrate harm from custody. For example, coercion, threats, instructions to outside parties can all be delivered via phone or other instant communication means. This

potential for harm in the context of domestic and family violence has been observed in The Queensland Audit Office in *Keeping people safe from domestic and family violence Report 5: 2022-23*, The *Domestic and Family Violence Death Review and Advisory Board Annual Report 2019-20* and the Women's Safety and Justice Taskforce reports. Regulation and limitation on who, how and when prisoners can make calls therefore provides tools to prevent and respond to abuse of prisoner communication channels that can cause harm.

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

A number of safeguards have been built into the Bill to ensure that the limits on human rights are the least necessary to achieve the purpose of ensuring prisoners in a corrective services facility cannot continue to inflict harm while they are incarcerated. These safeguards include:

- limitations are restricted to personal contacts, the amendments do not apply to communication with a prisoner's lawyer, an officer of a law enforcement agency, the Board, the ombudsman or inspector of detention services,
- retaining existing safeguards, including that the chief executive must pay for one personal call on a prisoner's admission to a corrective services facility,
- ensuring that terms and conditions cannot limit a prisoner to fewer than seven phone calls in a seven-day period,
- retaining the requirement for a person to be notified that they are being monitored or recorded,
- requiring the terms and conditions, other than for an individual prisoner, to be set out in administrative procedures which are published in accordance with section 265 of the CSA,
- requiring an individualised assessment, including legislated criteria to apply more restrictive terms and conditions to an individual prisoner,
- requiring terms and conditions for a group of prisoners to be based on security classification (itself an individualised risk assessment), to account for a special need of the prisoner (such as because of a prisoner's disability) or other factors prescribed by regulation,
- that a suspension ceases to have effect six months after it was imposed if not revoked sooner,
- QCS will remain bound by the *Information Privacy Act 2009*, including the information privacy principles regarding the recording and monitoring of calls, and
- any decision made in accordance with the provisions, such as a decision to approve or revoke a contact, must be compatible with the HRA.

Consideration was given to a number of alternatives. However, none would limit human rights to a lesser extent while still achieving the purposes of the amendment, including:

- providing a higher minimum for personal calls than seven within a seven-day period – a higher minimum would not be as effective at preventing harm in the most extreme individual cases, where a prisoner may have a serious history of engaging in prohibited prisoner communications.
- not providing for terms and conditions to apply to groups of prisoners – this approach would not provide flexibility for conditions to be based around a prisoner's institutional risk or to address special needs, perhaps resulting in restrictions for groups that were not fit-for-purpose.

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

On one side of the scales, it is accepted that amendments to the prisoner communication framework to ensure prisoners in a corrective services facility cannot continue to inflict harm while they are incarcerated limit the human rights of prisoners, including those who are attempting to maintain connection with their family, community and culture.

On the other side, preventing prisoners from inflicting further harm from custody, and protecting the community from which the prisoner has been removed is an important feature of any system for prisoners to communicate beyond the walls of a corrective services facility. It is necessary for this purpose, and to ensure the safety of corrective services facilities, that the chief executive is able to regulate who, how and when a prisoner can make personal contact, and to act when a prisoner seeks to abuse the system. Limiting the opportunity for harm to be inflicted from behind bars also serves the purpose of upholding community confidence in the correctional system. Significant safeguards have been built into the framework to ensure the mechanisms in place are the least restrictive available to achieve those purposes.

For these reasons, the impact on a person's right to privacy presented by this amendment is considered to not be arbitrary, so it is considered that this amendment does not limit the right to privacy. However, even if the right is considered limited, the limitation is considered justified for the above reasons. Any limitations on other human rights are also considered justified.

- (f) any other relevant factors

N/A.

Enabling the use of police powers in relation to reportable child sex offenders on post-sentence supervision

Amendments will enable the Queensland Police Service to use certain police powers in relation to reportable child sex offenders supervised under the DPSOA.

The Bill amends section 21A of the PPRA to expand the ability for police to enter a premise where a reportable offender generally resides to verify the offender's personal details reported by the offender under the CPOROPOA to include equivalent reporting under the DPSOA order. Consistent with the existing power to enter in relation to reportable offenders not supervised under the DPSOA, the power is limited to verifying personal details, as defined under the CPOROPOA.

The Bill also amends section 31 of the CPOROPOA to clarify that police may photograph a thing that is required to be reported by the offender under their DPSOA order, and amends section 67FC of the CPOROPOA to enable police to require production of, and expand police discretion to inspect devices, in accordance with that section to circumstances where the officer forms a reasonable suspicion that the offender has committed an indictable offence against the DPSOA (such as contravention of their DPSOA order).

These amendments are not intended to enliven an offender's reporting requirements under the CPOROPOA, nor affect the purpose of section 4, being to eliminate any duplication of

reporting. The amendments will ensure police powers remain in place, irrespective of whether the offender is reporting personal details to police or QCS.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

Human rights engaged by the amendments include:

- the right to freedom of movement (section 19 of the HRA),
- the right to freedom of association (section 22(2) of the HRA),
- the right to not be arbitrarily deprived of property (section 24(2) of the HRA),
- the right to privacy (section 25(a) of the HRA),
- the right to protection of children (section 26(2)), and
- the right to security of person (29(1) of the HRA).

Right to freedom of movement (section 19 of the HRA)

The amendments limit the right to freedom of movement by expanding monitoring of a DPSOA reportable offender's reported personal details to include police verification. This right would only be limited by the amendment if the personal details the offender is required to report include their movements.

Right to freedom of association (section 22(2) of the HRA)

The amendments limit the right to freedom of association by expanding monitoring of a DPSOA reportable offender's reported personal details to include police verification. This right would only be limited by the amendment if the personal details the offender is required to report included their association with others. This cohort of offender is often required under the conditions of their DPSOA order to report contact with children as this is a risk factor for their offending.

Right to not be arbitrarily deprived of property (section 24(2) of the HRA)

The amendments enable the use of police powers for reportable child sex offenders, including to enter the offender's private residence to verify reported details, search devices and take photographs as required. The right for the individual to use and enjoy their property would be limited while a police officer is exercising these powers. The amendments do not otherwise impact the right of an individual to obtain or use their property, including digital devices such as a computer, tablet or mobile phone. This does *not* extend to the seizure of property which is an existing and separate police power.

Right to privacy (section 25(a) of the HRA)

The amendments to enable use of certain police powers interfere with an individual's right to privacy where police exercise the powers to access the premises, search devices or take photographs. In particular, the extent of this interference is greater where police can enter the offender's private residence to verify reported personal details.

The right to privacy includes internal limitations. The right to privacy is only limited if the interference is unlawful or arbitrary. The Bill ensures the lawfulness of the interference with

privacy. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate to the aim sought.

Because questions of proportionality arise when considering justification of limits on human rights under section 13 of the HRA, it is convenient to consider these questions below before making a determination as to whether any limitation on the right to privacy will be arbitrary.

Consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 of the HRA)

(a) the nature of the right

The right to privacy protects individuals from arbitrary interference with their privacy, family, home or correspondence, particularly with respect to the inherent dignity of the human person.

(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 interferences with human rights enlivened by these amendments is the prevention of sexual offending against children and the resulting harm from those actions. As some of the highest harm offending that exists in our society, it is essential that strong measures are put in place to deter, prevent and detect such offending so that it can be swiftly dealt with by the criminal justice system. This purpose further promotes the right to security for the community and the right to protection of children who, as some of society's most vulnerable, should be protected from harm.

(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 offenders in scope for these amendments have a history of sexual offending involving children that captures them as a reportable child sex offender under the CPORPOA. Further, they have been placed onto a post-sentence supervision order under the DPSOA by the Supreme Court because the court is satisfied the offender is 'a serious danger to the community.'

As part of their supervision, conditions are put in place to mitigate their risks of re-offending. These conditions may include the reporting of personal details, including contact with children, and limitations on the use of devices, such as access to certain websites or accounts.

The amendments provide additional mechanisms for police to verify these matters, and to search devices on a reasonable suspicion that their DPSOA order has been contravened. The availability of these powers may deter offenders from offending against children, or may reveal information that enables police or corrections to take steps to prevent offending against children. There is therefore a rational connection between the limitations imposed and their purpose.

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

A number of safeguards have been built into the Bill to ensure that the limits on human rights are the least necessary to achieve the purpose of preventing sexual offending against children. These safeguards include:

- the use of the powers is limited to child sex offenders subject to both the CPOROPOA and who are subject to supervision under the DPSOA,
- relevant offenders are subject to orders on the basis that they are ‘a serious danger to the community,’
- relevant offenders have been placed on supervision orders via a robust court process,
- the powers have been designed to apply consistently as if the offender were a reportable child sex offender who is not concurrently supervised under the DPSOA,
- the power to enter an offender’s residence is limited to verifying ‘personal details’ that are reported by the offender,
- personal details are prescribed in legislation,
- there is a high threshold for search of a device, noting that the officer must have a reasonable suspicion that the offender has committed an indictable offence against the DPSOA,
- the threshold for search of a device is limited to offences against the CPOROPOA or DPSOA, not other offences, and
- any discretion exercised must be compatible with the HRA.

Consideration was given to a number of alternatives. However, none would limit human rights to a lesser extent while still achieving the purposes of the amendment, including:

- require that use of the power to enter and verify details is reasonably necessary to comply with the order – while an additional threshold for use of the powers could have been included, limiting the power in such a way may unintentionally limit opportunities to deter offenders from reporting false personal details, and would apply inconsistently with how the powers are enacted for other reportable child sex offenders.
- require that use of the power to search the devices is reasonably necessary to investigate the offence – while less restrictive, limiting the power in this way may jeopardise opportunities to deter or prevent harm and would be less effective at achieving the purpose of the amendment. The threshold provided for in the Bill also ensures consistency with the threshold for police to use the power for other reportable child sex offenders.

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

On one side of the scales, it is accepted that enabling the use of police powers for child sex offenders limits the prisoner’s right to privacy, only to the extent that it enables police to verify reported details, search devices and take photographs as required. It is further acknowledged that given the extent of these limitations and interferences beyond what another member of the public would experience, including for police to enter a private residence and search devices without any warrant process, the checks and balances to justify such limitations must be significant.

On the other side, as some of the highest harm offending, all efforts should be made to prevent and detect sexual offending against children. The limitations on human rights imposed by the amendments enable tools that can assist in the deterrence, prevention and detection of such harm, in line with the purposes of both the DPSOA and CPOROPOA schemes. There are also significant safeguards in place that ensure the powers are appropriately limited to achieving that purpose in line with the existing operation of the powers for reportable offenders that are not concurrently supervised under DPSOA.

For these reasons, the interferences with human rights presented by this amendment are considered not to be arbitrary, so it is considered that this amendment does not limit the right to privacy, or the right not to be arbitrarily deprived of property. Further the limitations on other human rights are justified, and the amendment is compatible with human rights.

(f) any other relevant factors

N/A.

Gel blaster offence

The Bill creates a new offence in the CSA for any person who enters or attempts to enter corrective services land while in possession of a restricted item, including a gel blaster, punishable by up to two years' imprisonment.

The offence will not have been committed if the person did not know and could not, by the exercise of reasonable diligence, have known they were on corrective services land. However, as an additional safeguard, the prosecution must first establish that there was appropriate signage at the corrective services land at the time of the alleged offence.

Other exceptions will apply where the possession is approved by the chief executive or the person is an officer of, or assisting an officer of, a law enforcement agency, protective service or emergency service. *Corrective services land* and *appropriate signage* are defined exhaustively for the purpose of the new offence. Amendments to the CSR are included to prescribe the *restricted items* for this offence, including gel blasters and inoperable firearms.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

Human rights engaged by the amendments include:

- the right to a fair hearing (section 31 of the HRA), and
- the right to be presumed innocent until proved guilty (section 32(1) of the HRA).

Right to a fair hearing (section 31 of the HRA)

The creation of the new gel blaster offence limits the right to a fair hearing only to the extent that it places an evidential burden on the defendant to adduce evidence that they were not aware they were on corrective services land. This approach limits the right by interfering with the principle that it is for the state to prove its case without recourse to the subject. However, the extent of this limitation is narrow. The defendant only bears an evidential burden once the prosecution has proved the corrective services land was adequately signed. This creates the opportunity for the defendant to adduce evidence that, despite the signage, they were unaware and could not have been aware that the land was corrective services land.

Right to be presumed innocent until proved guilty (section 32(1) of the HRA)

The creation of the new gel blaster offence limits the right to be presumed innocent until proved guilty to the extent that it places an evidential burden on the defendant to adduce evidence they were not aware they were on corrective services land. Placing an evidential burden on the defendant limits the right by not requiring the prosecution to negate this possibility unless evidence of it is first adduced. Provisions of this nature may limit the right in section 32(1) of the HRA but are not necessarily incompatible. Whether placing the evidential burden on the defendant constitutes a reasonable limitation on the presumption of innocence will depend on the circumstances of the case.

In this instance the extent of the limitation is narrow. The defendant only bears an evidential burden, not a legal burden, and this only occurs once the prosecution has proved the corrective services land was adequately signed. This creates the opportunity for the defendant to adduce evidence that, despite the signage, they were unaware and could not have been aware that the land was corrective services land.

Consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 HRA)

(a) the nature of the right

The underlying value of the right to a fair hearing is said to be in relation to defining the relationship between the individual and the state and protecting people against aggressive behaviour of those in authority, both of which reflect the philosophy that the state must prove its case without recourse to the suspect.

The underlying value of the right to be presumed innocent until proved guilty is the principle that in criminal law, as a general rule, it is for the prosecution to prove a defendant's guilt, not for the defendant to prove their innocence.

(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 presence of a gel blaster or other restricted item on corrective services land can cause significant disruption and distress to frontline corrective services officers and impact on the safe delivery of corrective services, particularly where the item is mistaken for a firearm. The purpose of the limitation is to protect and maintain the safety and wellbeing of frontline corrective services officers, visitors and other people on corrective services land by increasing existing penalties to act as a deterrent to this behaviour.

(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

Requiring a person to adduce evidence to demonstrate they did not know they were on corrective services land, therefore placing an evidential burden on the defendant, will ensure a stronger deterrent exists in the first place for people bringing these items into these locations. This deterrent in turn aims to reduce these incidents from occurring and maintain the safety and wellbeing of frontline corrective services officers, visitors and other people on corrective services land.

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

A number of safeguards have been built into the Bill to ensure that the limits on human rights are the least necessary to achieve the purpose to protect and maintain the safety and wellbeing of frontline corrective services officers, visitors and other people on corrective services land by increasing existing penalties to act as a deterrent to this behaviour. These safeguards include:

- requiring the prosecution to establish that appropriate signage was in place for the offence to be applicable at that location and for the evidential burden to apply,
- having the defendant bear the evidentiary burden is itself a safeguard providing an opportunity for the defendant to establish they could not have reasonably known that the land was corrective services land,
- limiting the extent of the burden placed on the defendant to an evidential burden only, not a legal burden,
- ensuring that if a defendant satisfies the evidential burden, the prosecution must then disprove the evidence beyond a reasonable doubt,
- other exceptions for possession exist for certain professions, such as law enforcement officers, and where the possession is approved by the chief executive,
- restricted items are prescribed in regulation for this offence, to ensure it applies only to gel blasters and inoperable firearms,
- corrective services land is defined exhaustively for the purposes of the offence,
- appropriate signage is defined exhaustively for the purposes of the offence,
- corrective services land is clearly signed, fenced, or otherwise clearly marked due to the nature of it either being a corrective services facility, community corrections office or a place for another corrective services purpose, and
- section 350 of the CSA will apply, meaning any proceeding must start within one year after the offence was committed or six months after the offence comes to the complainant's knowledge, but within two years after the offence was committed.

There are no reasonably available alternatives that would limit human rights to a lesser extent while still achieving the purposes of the amendment. One alternative considered included limiting the application of the offence to corrective services facilities, and not capturing other types of corrective services land. While this would limit the scope of the provision, this would fail to protect frontline corrective services officers performing other essential corrective services functions where the potential for a restricted item to cause distress is significant. This includes community facing community corrections offices, and the QCS Academy. As such, it would not be equally as effective at achieving the purpose.

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

On one side of the scales, it is accepted that placing an evidential burden on the defendant limits the person's right to a fair hearing and the right to be innocent until proved guilty only to the extent that they are required to adduce evidence they did not reasonably know they were on corrective services land.

On the other side, the offence protects and maintains the safety and wellbeing of frontline corrective services officers, visitors and other people on corrective services land by including a strong deterrent to this behaviour. Placing the evidential burden on the defendant for the offence ensures that the evidence will be adduced by the party best able to satisfy the requirements of this element of the offence. The onus is only enlivened where the prosecution has first established there was appropriate signage for the corrective services facility. Additionally, having the defendant bear an evidential burden provides them with an appropriate ability to respond to the allegations, along with other significant safeguards included in the offence provision to limit its interference with these human rights.

For these reasons, the limitations are considered justified, and the amendments are compatible with human rights.

(f) any other relevant factors

N/A.

Protecting victim and intelligence information in decision making

Allowing a decision maker to withhold the detail of information for prescribed reasons

The Bill inserts a new section 340AA to clarify that when a decision maker is required to provide reasons for a decision under the CSA, the decision maker may withhold the detail of information that informed the decision for prescribed reasons.

The Bill limits use of the discretion to situations where the decision maker is reasonably satisfied that disclosure of the information could be expected to:

- enable the existence or identity of a confidential source of information, in relation to the enforcement or administration of the law, to be ascertained, or
- endanger a person's life or physical safety, or
- seriously threaten a person's welfare, or
- prejudice public safety or national security, or
- prejudice the detection, investigation, or prosecution by a law enforcement agency of a terrorism offence, an offence with a maximum penalty of 14 years or more, or another offence prescribed by regulation for this section, or
- be prohibited under a law of this or any other State or the Commonwealth.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

Human rights engaged by the amendments include:

- the right to freedom of expression (section 19(2) of the HRA),
- the right to privacy (section 25(a) of the HRA),
- the right to security of person (section 29(1) of the HRA), and
- the right to a fair hearing (section 31 of the HRA).

Right to freedom of expression (section 19(2) of the HRA)

The amendment limits the right to freedom of expression, which includes a right to seek and receive information, by restricting a person's access to certain information used in relation to a decision made about them.

Right to a fair hearing (section 31 of the HRA)

The amendment limits the right to a fair hearing by providing that in certain circumstances, a decision maker is not required to disclose information used to make a decision, thereby not affording the prisoner the opportunity to respond to all of the allegations made against them and potentially impairing their defence.

Consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 of the HRA)

(a) the nature of the right

Freedom of expression is an essential part of an individual's privacy, requiring protection against external interference.

The underlying value of the right to a fair hearing is said to be in relation to defining the relationship between the individual and the state and protecting people against aggressive behaviour of those in authority, both of which reflect the philosophy that the state must prove its case without recourse to the suspect.

(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 protect the safety of individuals and the community from any threats of harm or actual harm, or further serious offending which may result from certain information being disclosed to a prisoner. Secondary purposes of the limitation are to ensure the effectiveness and integrity of the criminal justice system and to uphold national security as relevant to decisions made under the CSA.

The amendment promotes the right to privacy as it empowers a decision maker not to disclose information where it would divulge the existence or identity of a confidential source of information, thereby protecting a victim or informant's right to privacy. This is particularly relevant where a source of intelligence information, which may be used to inform a decision to amend, suspend or cancel a prisoner's parole order, is easily discernible to the prisoner.

The amendment also promotes the right to security of person as it empowers a decision maker not to disclose information where it could reasonably be expected to endanger or cause a serious threat to a person's life or health and where it could prejudice the maintenance or enforcement of a lawful method or procedure for protecting public safety. By enabling this to occur, the amendment will prevent threats of harm or actual harm from being perpetrated against an individual or members of the community as reprisal.

(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

To ensure sound decision making, a range of information is used to inform decisions made under the CSA. This includes victim and intelligence information from a range of sources. The ability to allow a decision maker to not release this information in certain circumstances will protect people who provide this information from threats or actual harm from the prisoner, as the information will not be provided to the prisoner in certain circumstances.

Alternatively, if the chief executive or Board were required to disclose the full extent of the sensitive information to an offender, this would undermine law enforcement activity, endanger people and ultimately limit any disclosure of such information to the decision makers.

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

A number of safeguards have been built into the Bill to ensure that the limits on human rights are the least necessary to achieve the purpose to protect the safety of individuals and the community from any threats of harm or actual harm which may result from certain information being disclosed to a prisoner. These safeguards include:

- the discretion is limited to decisions made under the CSA,
- a high threshold for when a decision maker is not required to disclose information, such as where it may endanger a person's life or physical safety or seriously threaten a person's welfare,
- a high threshold for protecting the prevention, detection or prosecution of an offence has been limited to terrorism offences, offences punishable by 14 years' imprisonment or other offences prescribed by regulation, ensuring the withholding of information does not occur in relation to less serious offending,
- European case law³⁴ regarding the interpretation of the right to a fair hearing suggests that a decision maker is still required to provide the 'gist' of the non-disclosed information,
- the decision is subject to judicial review, and
- any decision to not disclose information must be consistent with the provisions and will remain subject to the HRA.

Consideration was given to a number of alternatives. However, none would limit human rights to a lesser extent while still achieving the purposes of to protect the safety of individuals and the community, for the following reasons:

- narrower scope of reasons – consideration was given to narrowing the scope to only not require disclosure of information where it could endanger a person's life or physical safety or be prohibited under a law of this or any other state or the Commonwealth. This alternative did not protect information provided by a law enforcement agency or consider serious threats to a person welfare, or the prevention of other serious crimes. As such, it was not as effective due to the range of information that would be able to be released and therefore not protect informants of this information and it would not uphold national security, and
- narrow the decision maker to only include the Board – similar to the above alternative, this approach left a gap in protection of information in other correctional decision making and

³⁴*Home Secretary v AF [No 3]* [2010] 2 AC 269, 354 [59] Lord Phillips.

would have resulted in an inconsistent approach to procedural fairness under the CSA, as such this alternative is not as effective.

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

On one side of the scales, it is accepted that allowing a decision maker to not release information in certain circumstances limits a prisoner's right to a fair hearing and the right to freedom of expression only to the extent that they are not privy to the full reasoning for the outcome of the decision made against them, including where allegations are made. It is accepted that there must be strong justifications for so impacting on this right, particularly in relation to decisions made under the CSA which relate to parole or prisoner management.

On the other side, ensuring the protection of the safety of individuals and the community from any threats of harm or actual harm which may result from certain information being disclosed to a prisoner promotes the right to privacy and the right to security of person. The Bill ensures there is a high threshold for non-disclosure that links closely to these purposes, thereby ensuring only information that on balance should be withheld is not disclosed.

For these reasons, the limitations are considered justified and the amendments are compatible with human rights.

- (f) any other relevant factors

N/A.

Protecting past decisions to withhold information

The Bill protects past decisions made in reliance on information of the kind protected by new section 340AA from potentially being set aside if that information was not disclosed. The Bill achieves this by providing that a decision is, and is taken to have always been, as valid as it would have been if, at the time the decision was made, section 340AA had applied.

However, the Bill ensures that if a decision to which section 340AA applies has, before its commencement, been found to be invalid by a court or set aside by court order, the finding or order stands.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

Human rights engaged by the amendments include:

- the right to security of person (section 29(1) of the HRA), and
- the right to a fair hearing (section 31 of the HRA).

Right to a fair hearing (section 31 of the HRA)

The amendments limit the right to a fair hearing by validating any decision that was found to be invalid, however, only on the basis that the decision was invalid because confidential information was not disclosed and a gist was not provided. In these limited circumstances, a prisoner may be subject to a decision made and not have been provided with confidential information used to make that decision. This impacts a person's right to procedural fairness by

removing the right to a judicial review on the basis that a gist was not provided. A judicial review on another basis is not removed.

Consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 of the HRA)

(a) the nature of the right

The underlying value of the right to a fair hearing is said to be in relation to defining the relationship between the individual and the state and protecting people against aggressive behaviour of those in authority, both of which reflect the philosophy that the state must prove its case without recourse to the suspect.

(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 enhance public confidence in the correctional system by protecting victim and intelligence information from being released for past decisions. This also promotes previous informants' right to security of person by upholding their safety where they have previously provided information.

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

The limitation helps to achieve the purpose by ensuring past decisions made under the CSA, are not found to be invalid because sensitive or confidential information was not disclosed.

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

A number of safeguards have been built into the Bill to ensure that the limitations on human rights are the least necessary to achieve the purpose of validating any decision that was found to be invalid merely because confidential information was not disclosed. These safeguards include:

- ensuring the scope of the validating provision aligns with the high threshold for the new amendments, such as where it may pose a risk to the life of an individual,
- where a decision has been set aside by order, prior to commencement of the provision, the finding or order stands, and
- the ability to seek a judicial review on other grounds is maintained, the right to a judicial review is only extinguished where the decision was invalid because the decision maker did not refer to information captured by the amendment.

Consideration was given to a number of alternatives. However, none would limit human rights to a lesser extent while still achieving the purpose of ensuring past decisions made under the CSA are not found to be invalid because sensitive or confidential information was not disclosed, for the following reason.

A narrower scope of validation was considered to not capture a decision that was remade after commencement however, this may result in a large number of requests for decisions to be

remade to enable the disclosure of sensitive information. As such, this would not protect information and fulfil the purpose as effectively.

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

On one hand, the amendment limits a prisoner's right to a fair hearing to the extent a decision which may have otherwise been invalid is now valid. Removing this avenue for judicial review retrospectively therefore requires a strong justification.

On the other hand, the amendment achieves its purpose by ensuring that past decisions made in good faith are not overturned and protected information is not required to be released. The provision ensures to only validate decisions on the grounds of information being withheld and leaves open all other avenues for judicial review.

For these reasons, the limitations are considered justified and the amendments are compatible with human rights.

(f) any other relevant factors

N/A.

Using body-worn cameras outside of corrective services facilities

The Bill authorises a corrective services officer to use a body-worn camera issued to the officer while acting in the performance of the officer's duties outside a corrective services facility. The provision ensures that use is not unlawful only because that use is incidental to an authorised use, or is inadvertent or unexpected.

The Bill provides that an officer may use the body-worn camera when the officer has a prisoner under their control (such as during an escort), is responding to an incident (as defined in the CSA), is using or considering using force, believes there is an imminent and significant risk to the life, health or safety of an individual, or believes that an offence or breach of discipline is being or has been committed.

The Bill also ensures that use of a body-worn camera in a sensitive location, such as a private residence, changeroom, shower or toilet, is only permitted if the officer believes there is an imminent and significant risk to the life, health or safety of an individual.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

Human rights engaged by the amendments include:

- the right to privacy (section 25(a) of the HRA),
- the right to security of person (section 29(1) of the HRA) (promoted only), and
- the right to humane treatment while deprived of liberty (section 30(1) of the HRA).

Right to privacy (section 25(a) of the HRA)

The use of a body-worn camera outside of a corrective services facility interferes with an individual's right to privacy by capturing audio and/or visual footage of the person's dealings,

such as their conversations and actions. This impact includes all people who may be captured in the footage, including staff, prisoners and members of the community.

The right to privacy includes internal limitations. The right to privacy is only limited if the interference is unlawful or arbitrary. The Bill ensures the lawfulness of the interference with privacy. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate to the aim sought.

Because questions of proportionality arise when considering justification of limits on human rights under section 13 of the HRA, it is convenient to consider these questions below before making a determination as to whether any limitation on the right to privacy will be arbitrary.

Right to humane treatment when deprived of liberty (section 30(1) of the HRA)

It is considered that generally, surveillance is inherent as a part of the safe and secure detention of individuals, including during any escorts of prisoners outside of a corrective services facility. The general use of a body-worn camera on escorts therefore is not considered to limit this right.

However, the Bill provides for the use of a body-worn camera in a range of contexts outside of a corrective services facility. This includes where the use could limit a prisoner's inherent dignity, for example if used in a sensitive location. Therefore, the provision limits this right only to the extent that it provides for the capture of footage in those circumstances.

Consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 of the HRA)

(a) the nature of the right

The right to privacy protects individuals from arbitrary interference with their privacy, family, home or correspondence, particularly with respect to the inherent dignity of the human person.

The right to humane treatment when deprived of liberty recognises the particular vulnerability of persons in detention and intends to ensure that they are treated humanely. The underlying value of the right to humane treatment is respect of the inherent dignity that people should be afforded as human beings.

(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

Use of body-worn cameras outside of a corrective services facility aims to increase safety for staff and prisoners and deter anti-social behaviour as a proactive safety measure. The use of body-worn cameras outside of a corrective services facility also promotes the right to security of person for all people captured, including staff.

A second and equal purpose for the use is to drive accountability in the correctional system through the capture, storage and retention of objective evidence about incidences. This purpose in turn promotes the right to humane treatment while deprived of liberty.

(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 nature of a corrective services officer conducting an escort or providing community services in a remote location presents varying risks from staff assaults to an attempted escape. Authorising corrective services officers to use body-worn cameras will act as a deterrent for prisoners, offenders and other individuals to commit an offence or otherwise behave in a way that may increase risk, as they will be aware their actions are being recorded.

If a person proceeds to engage in certain behaviour, the recording of this relevant activity will help to achieve the proper purpose by ensuring there is objective audio and visual evidence. This evidence can then be used to inform any investigation or oversight review.

It is accepted that the absence of body-worn cameras, particularly where there is no or limited closed-circuit television coverage, can delay complaint investigation and resolutions, require extensive resourcing and cause additional stress for complainants and officers subject to complaints.³⁵ Additionally, the use of these devices, including by corrections, is acknowledged as a protection for both parties, especially when early activation is implemented by staff.

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

A number of safeguards have been built into the Bill to ensure that the limits on human rights are the least necessary to achieve the purpose of safety, deterrence and accountability. These safeguards include:

- restricting the use of body-worn cameras to an authorised corrective services officer who has possession of a device issued to them by the chief executive and is acting in the performance of their duties,
- restricting the monitoring or recording to when conducting an escort, responding to an incident, using or considering using force, when capturing evidence of a breach of discipline or offence, or when there is an imminent and significant risk to the life, health or safety of an individual,
- creating a higher threshold for use in a sensitive location, including in a private residence or private place, by restricting activation in these locations to circumstances where there is an imminent and significant risk to the life, health or safety of an individual,
- providing a clear definition for 'sensitive location' including a place where a court is sitting, a place where someone is receiving medical or mental health treatment or assessment, a place a worship, a private residence. a shower and a toilet,
- requiring the chief executive to include requirements in administrative procedures made under section 265 of the CSA about the use, storage and destruction of recordings made by corrective services officers outside of a corrective services facility,
- prohibiting any covert use by a corrective services officer,
- ensuring any decision to activate a device, authorise use and create administrative procedures will remain subject to the HRA, and
- that QCS will remain subject to the *Information Privacy Act 2009*, including the information privacy principles regarding audio and visual recordings.

³⁵ Crime and Corruption Commission (CCC) 2018, Body worn cameras — their role in complaint resolution, CCC, Brisbane, <https://www.ccc.qld.gov.au/sites/default/files/Docs/Publications/CCC/Prevention-in-Focus-Body-worn-cameras-2018.pdf>.

Consideration was given to a number of alternatives. However, none would limit human rights to a lesser extent while still achieving the purposes of safety, deterrence and accountability, for the following reasons:

- limiting use to a corrective services officer conducting an escort – failure to include certain functions of frontline corrective services officers, such as community corrections, would result in an inconsistent application and ability to capture and deescalate safety risks and control accountability risks. As such, this alternative would not be as effective in achieving the purpose, and
- not allowing any use in a sensitive location – this alternative would not provide any increased safety for staff or prisoners in these locations where significant risks can be present. Additionally, not including these locations would not enable the use of this as a de-escalation technique and may inadvertently increase risk. As such, this alternative is not as effective in achieving the purpose.

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

On one side of the scales, it is accepted that the use of body-worn cameras outside of a corrective services facility interferes with a person's right to privacy by capturing audio and or video recording of their dealings. Additionally, it limits a prisoner's humane treatment when deprived of liberty only when the device is used in a sensitive location as it impacts the person's dignity in these locations where they expect an additional level of privacy.

On the other side, ensuring the safety and accountability of community facing corrective services functions through objective evidence promotes the right to security of persons and the right to humane treatment when deprived of liberty for prisoners. Secondly, the framework includes specified safeguards and protections, in particular prescribing the limited circumstances where use is authorised and ensuring a higher threshold for situations where the limitations on rights would be greater.

For these reasons, the impact on a person's right to privacy presented by this amendment is considered to not be arbitrary, so it is considered that this amendment does not limit human rights. However, even if the right is considered limited, the limitation is considered justified for the above reasons. Any limitations on other human rights are also considered justified.

(f) any other relevant factors

N/A.

Prescribing search requirements to accommodate diverse prisoner needs

The Bill provides authority to prescribe in regulation how invasive searches are to be conducted. The Bill replaces current requirements in the CSA for officers or health practitioners conducting invasive searches (personal searches, searches requiring the removal of clothing and body searches of prisoners) with a clear head of power to prescribe requirements and procedures in the regulation for the effective carrying out of the search, respecting a prisoner's dignity and addressing the special or diverse needs of a prisoner.

Future regulation amendments will be progressed in line with this head of power to retain the general protection for officers or health practitioners to search prisoners of the same gender and include discretion to allow a different approach where safe and appropriate.

The amendments in the Bill relating to existing search protections will not commence until a regulation made under new section 39A commences. This is intended to ensure that there is no gap in the legislative safeguards and protections for prisoners and corrective services officers conducting the searches.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

Human rights engaged by the amendments include:

- the right to privacy (section 25(a) of the HRA) (promoted only), and
- the right to humane treatment while deprived of liberty (section 30(1) of the HRA).

Right to humane treatment when deprived of liberty (section 30(1) of the HRA)

It is acknowledged that invasive search practices in prison, including personal, body and removal of clothing searches, engage the right to humane treatment when deprived of liberty due to the nature of the search itself and the vulnerability of the person being searched.

This Bill creates a more flexible framework for requirements and protections for the conduct of these searches to be contained within subordinate legislation, acknowledging the need for diverse prisoner needs to be taken into account. These needs include providing for adjustments to requirements on the basis of the sex, sex characteristics, disability, age or culture.

The amendments are considered to limit the right only to the extent that the Bill lowers the level of legislative protection for prisoners to be searched by an officer of the same sex by removing the binary requirements from the Act and providing for more flexible requirements to be prescribed in subordinate legislation.

Consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 of the HRA)

(a) the nature of the right

The underlying value of the right to humane treatment is respect of the inherent dignity that people should be afforded as human beings.

(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 greater opportunity to better accommodate diverse prisoner needs, including in relation to trans and gender diverse or intersex prisoners, with search requirements in the regulation that maintain safety and dignity for prisoners, officers or health practitioners involved in the searches.

In this respect, the amendments promote the right to humane treatment while deprived of liberty by providing a framework for more flexible practice that will safeguard a prisoner's dignity and can be updated when practice improves.

The amendments promote the right to privacy as this right protects an individual against interference with their physical and mental integrity, freedom of thought and conscience, legal personality, sexuality and individual identity, which includes appearance, clothing and gender.

(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

Removing binary requirements from the CSA and replacing these with more flexible provisions in the regulation allows greater flexibility for a broader range of diverse needs to be protected, while still ensuring legislative protections are in place. As practice matures, provisions in the regulation are able to be adapted more swiftly and can provide more flexible detail than provisions in the Act. This provides a greater opportunity to meet the diverse needs of the prisoner cohort.

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

A number of safeguards have been built into the Bill to ensure that the limits on human rights are the least necessary to achieve the purpose of increasing safety and flexibility. These safeguards include:

- the amendments will not commence until the Regulation has prescribed the additional considerations, ensuring there is no gap in legislative protection for prisoners to, generally, be searched by an officer or practitioner of the same sex,
- the Regulation amendments that will prescribe new search requirements are disallowable, ensuring parliamentary oversight,
- the Regulation amendments that will prescribe the new search requirements must be accompanied by a human rights certificate ensuring compatibility with human rights,
- the amendments will be complemented by operational policies and procedures, and
- decisions to make procedures and conduct a search are themselves decisions that will remain subject to the HRA.

Consideration was given to a number of alternatives. However, none would limit human rights to a lesser extent while still achieving the purposes of the amendment, for the following reasons.

One alternative was to prescribe the provisions in the CSA, rather than the Regulation. This alternative did not ensure the provisions could be swiftly updated and incorporated as required. Failure to do this does not allow all prisoners' special and diverse needs to be considered in a timely manner and may lead to unintentional discrimination. As such, this alternative would not be as effective in achieving the purpose.

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

On one side of the scales, it is accepted that removing these provisions from the CSA limits a prisoner's right to humane treatment when deprived of liberty only to the extent that the safeguards will be moved to the Regulation.

On the other side, ensuring ongoing flexibility to accommodate the diverse needs of prisoners while maintaining safety and dignity for prisoners and frontline corrective services officers with protections in regulation, promotes the right to humane treatment while deprived of liberty and the right to privacy. Key to this approach is the delayed commencement of amendments to the CSA to commence alongside the Regulation amendments and ensure there is no gap in legislative protections. As a regulation, amendments are disallowable and must be accompanied by a human rights certificate ensuring compatibility of the new provisions with human rights.

For these reasons, the limitations on human rights are considered justifiable and the amendments are compatible with human rights.

(f) any other relevant factors

N/A.

Requiring representation for First Nations people on the Parole Board Queensland

The Bill amends the CSA to require the appointment of at least one professional board member who is a First Nations person to provide greater opportunity for the prisoner population, where First Nations people are overrepresented, to be adequately represented in the make-up of the Board.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

The amendment promotes the right to cultural rights of Aboriginal and Torres Strait Islander peoples (section 28(2)(a) of the HRA). This right recognises that Aboriginal peoples and Torres Strait Islander peoples have a rich and diverse culture. The amendment promotes the right to enjoy, maintain, control, protect and develop their cultural identity with other members of the community.

No other right is considered to be engaged by the amendment and further analysis of the factors set out in section 13 of the HRA is therefore not required.

Lawful detention of Norfolk Island prisoners

The Bill provides clear authority for QCS to take lawful custody of a Norfolk Island prisoner sentenced or remanded by a court of Norfolk Island, in line with the *Removal of Prisoners Act 2004* (NI) and the *Sentencing Act 2007* (NI). The Bill allows provisions of the CSA to support the management of Norfolk Island prisoners as if they were a Queensland prisoner, subject to other provisions in the Bill.

The Bill excludes the application of the Queensland parole framework under the CSA to Norfolk Island prisoners, noting parole is provided for under the *Sentencing Act 2007* (NI), unless a regulation provides for the Queensland parole framework to apply to Norfolk Island prisoners. The Bill provides future flexibility to exclude or modify the application of sections of the CSA, including the parole provisions, for Norfolk Island prisoners where there are incompatibilities.

Finally, the Bill excludes Norfolk Island prisoners from the application of the DPSOA and any other acts in the future via a regulation. The purpose of these exclusions is to limit the

unintentional exposure of Norfolk Island prisoners to other Queensland legislation by virtue of the prisoner being in the chief executive's custody in Queensland, unless this is appropriate.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

Human rights engaged by the amendments include:

- the right to protection of families and children (sections 26(1) and (2)),
- the right to liberty (section 29), and
- the right to humane treatment while deprived of liberty (section 30(1)).

Right to protection of families and children (sections 26(1) and (2) of the HRA)

The amendments may limit the right to protection of families and children by virtue of providing for a Norfolk Island prisoner to be detained in any corrective services facility in Queensland, away from potential support networks on Norfolk Island. This will inherently limit contact that the prisoner may have with their family. However, the extent of this limitation is narrow, especially if the prisoner is detained in South-East Queensland. Norfolk Island prisoners will enjoy the same ability of other prisoners to make personal calls to or receive visits from their families.

Right to liberty (section 29 of the HRA)

The Bill provides clear legislative authority for the lawful transport, detention and management of prisoners from Norfolk Island in Queensland. For prisoners to be detained, a fair hearing has occurred prior to the prisoner being sentenced to a term of imprisonment, or the decision made to remand them in custody. As such, the right to liberty is promoted through the amendment through the creation of a legislative framework for this lawful detention to occur.

It is also accepted that the amendments provide for the detention of prisoners from Norfolk Island and that detention inherently limits the right to liberty, although only to the extent that is inherent in the nature of lawful detention.

Right to humane treatment when deprived of liberty (section 30(1) of the HRA)

Due to the unique nature of the correctional environment, it is acknowledged that human rights are limited by virtue of the delivery of correctional services to Norfolk Island prisoners to be detained in Queensland. However, generally, the amendments do not impose any additional limit on Norfolk Island prisoners than would already be expected for a prisoner who has been sentenced to a period of imprisonment. For these reasons, the amendments promote and do not generally limit the right to human treatment while deprived of liberty by ensuring that the limitations inherent in custody within Queensland are not exceeded for these Norfolk Island prisoners. There is the potential for the right to be limited where a regulation is made in accordance with the new provisions to modify application of the CSA.

While Norfolk Island prisoners will be excluded from the Queensland parole framework, the Norfolk Island parole framework remains available. Therefore, the amendments do not impose any harsher restrictions or limitations on these prisoners, other than those designed to protect prisoners. This includes exclusion from other provisions and Acts, such as the DPSOA.

Consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 of the HRA)

(a) the nature of the right

The right to liberty entitles all persons to liberty of the person, including protecting individuals against unlawful or arbitrary deprivations of their liberty, such as being arrested or detained except in accordance with the law.

The right to humane treatment when deprived of liberty recognises the particular vulnerability of persons in detention and intends to ensure that they are treated humanely. The underlying value of the right to humane treatment is respect of the inherent dignity that people should be afforded as human beings.

(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 limitations presented by the Bill on the individual rights of Norfolk Island prisoners aim to ensure detention is delivered lawfully, safely and humanely in accordance with the requirements of Queensland legislation, including the CSA and the HRA. By being accommodated in a corrective services facility in Queensland, Norfolk Island prisoners will be able to access the supports and services provided to all prisoners in support of their rehabilitation. The limitations imposed concurrently promote the right not to be detained arbitrarily and the right to humane treatment while deprived of liberty for these individuals.

(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 Norfolk Island has a judicial system, it does not have any long-term facilities suitable to hold a prisoner while they are serving a sentence of imprisonment or a period of detention on remand. The provision of custodial services to Norfolk Island prisoners by QCS will ensure prisoners are held lawfully and humanely in corrective services facilities that provide a range of supports and programs to support their humane containment, supervision and rehabilitation.

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

A number of safeguards ensure that the limits on human rights are the least necessary to achieve the purpose of lawfully and humanely detaining a Norfolk Island prisoner in Queensland. These safeguards include:

- the amendments ensure that protections for prisoners throughout the CSA, including minimum standards and processes for the management of prisoners will apply consistently to Norfolk Island prisoners, in line with the purpose of the CSA,
- the HRA provides protection for the treatment of Norfolk Island prisoners in QCS' custody, ensuring that management of these prisoners is compatible with human rights,
- there are significant independent oversight mechanisms in place to safeguard the treatment of those in QCS custody, including the official visitor scheme and the independent inspector of detention services,

- the amendments ensure flexibility to exclude or adapt the provisions of the CSA to be tailored if required to support the effective management of Norfolk Island prisoners,
- the amendments provide for the application of the DPSOA and other acts to be excluded by regulation to limit the impact of Queensland legislation from applying to a Norfolk Island prisoner unless it is appropriate, and
- any regulation amendments made in accordance with the new provisions would be disallowable and subject to sufficient parliamentary scrutiny.

There are no reasonably available alternatives that would limit human rights to a lesser extent while still achieving the purposes of ensuring lawful and humane detention for Norfolk Island prisoners. While it is acknowledged that detaining prisoners on Norfolk Island may be less restrictive in some respects, there are no facilities available on Norfolk Island to humanely detain an individual for any extended period of time. This option therefore would not effectively achieve the purpose of ensuring lawful and humane detention of Norfolk Island prisoners.

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

On one side of the scales the amendments impose a framework for the lawful detention of Norfolk Island prisoners. By virtue of providing for custody, these amendments engage the right to liberty and the right to humane treatment while deprived of liberty, however the framework generally provides no limitations beyond those inherent in the nature of detention in Queensland. It is acknowledged that prisoners may have difficulty in maintaining contact with family on Norfolk Island or that the framework may require tailoring to meet the needs of Norfolk Island prisoners that could further limit these human rights. As significant human rights that are fundamental to a free and democratic society, it is essential that any such limitations be adequately justified.

On the other side, the limitations concurrently promote the right not to be arbitrarily detained, by ensuring detention is lawful and the right to humane treatment while deprived of liberty, by ensuring minimum standards and strict requirements set out in the CSA apply to the detention of a Norfolk Island prisoner. The provision of this framework is necessary to provide for detention of these prisoners, who cannot be lawfully and humanely detained anywhere else in Australia. There are also other significant safeguards in place to further protect against limitations on human rights including that the HRA applies to QCS' management of Norfolk Island prisoners in custody in Queensland, the existence of other significant oversight mechanisms for detention of adults in Queensland's corrective services facilities, including through the Official Visitor process and by the Independent Inspector of Detention Services. Lastly the Bill itself includes a safeguard by providing flexibility to adapt the CSA to provide any necessary tailoring of the provisions to meet the needs of Norfolk Island prisoners into the future.

For these reasons, the limitations are considered justified and the amendments are considered to be compatible with human rights.

(f) any other relevant factors

The proposed legislative framework in the Bill to provide for the lawful detention of Norfolk Island prisoners in Queensland is based on similar provisions in part 2, division 5 of the *Crimes (Administration of Sentences) Act 1999* (NSW).

Confirming arrangements for assisting the proper officer of a court

The Bill requires the proper officer of a court to request assistance in writing from the QCS chief executive to delegate proper officer functions to corrective services officers or watch house officers.

The Bill clarifies that the chief executive must make administrative procedures to facilitate corrective services officers performing functions and exercising powers delegated to corrective services officers by the proper officer of a court. The Bill requires the chief executive to consult with the proper officer of a court before making the administrative procedures.

The Bill authorises the inspection of services provided by corrective services officers on behalf of the proper officer of a court. With consent of the proper officer, the Bill authorises an inspector to enter the facilities to perform certain functions. Functions may include interviewing any prisoner, corrective services officer or court officer present, having access to a place in the facilities where the inspector may conduct an interview, and inspecting and copying relevant documents.

The Bill does not impose an obligation on the proper officer of a court to provide the requested information, but if the request is refused, the proper officer must give the inspector written reasons.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

The amendments promote the right to humane treatment when deprived of liberty (section 30(1)). The amendments promote this right by providing additional oversight and governance over the performance of the functions performed by corrective officers in court cells where individuals are deprived of their liberty. These arrangements strengthen accountability and opportunities to identify and remedy issues with the provision of functions and services.

No other right is considered to be engaged by the amendment and further analysis of the factors set out in section 13 of the HRA is therefore not required.

Enabling prisoner transfers for palliative or personal care

In line with existing practice, the Bill amends section 68 of the CSA to clarify that a prisoner may be lawfully transferred to a place for ongoing palliative or personal care to support flexibility for prisoners to access vital services in support of their wellbeing.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

Human rights promoted by the amendment include:

- the right to a fair hearing (section 30(1) of the HRA), and
- the right to health services (section 37(1) of the HRA).

No other right is considered to be engaged by the amendment and further analysis of the factors set out in section 13 of the HRA is therefore not required.

Right to humane treatment when deprived of liberty (section 30(1) of the HRA)

The amendment promotes the right to humane treatment when deprived of liberty by facilitating access to critical supports and ensuring prisoners are not barred from such support by virtue only of their being in custody.

Right to health services (section 37(1) of the HRA)

The amendment promotes the right to health services by facilitating prisoner access to ongoing palliative or personal care in support of their health treatment needs and keeps pace with support available to members of the community.

Ensuring the validity of past parole transfer decisions

The Bill amends the *Parole Orders (Transfer) Act 1984* (Qld) (Transfer Act) to ensure the validity of decisions made to transfer and register parole orders between Queensland and other states and territories since commencement of the Act in 1984.

Human rights relevant to the Bill (Part 2, Division 2 and 3 of the HRA)

Human rights engaged by the amendments include:

- the right to freedom of movement (section 19 of the HRA) (promoted only),
- the right to liberty (section 29(3) of the HRA) (promoted only), and
- the right to a fair hearing (section 31 of the HRA).

Right to a fair hearing (section 31 of the HRA)

The right to a fair hearing is limited by the amendment, so far as the amendment removes a person's ability to seek a judicial review on the basis that a historical transfer decision may have been invalid, but for the validating amendment that applies to all previous transfer decisions from commencement. The extent of any limitations is narrowed only to decisions made to transfer parolees from jurisdictions that were not validly declared as corresponding laws.

Consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 of the HRA)

(a) the nature of the right

The right to a fair hearing affirms the right of all individuals to procedural fairness when coming before a court or tribunal.

(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

Retrospectively removing the right for a person to raise a judicial review by validating historical transfer decisions aims to protect the proper functioning of the interstate parole

transfer scheme. This in turn ensures the Transfer Act operates in line with its original intent to establish a national scheme under which prisoners released on parole can lawfully move between jurisdictions without breaching the order conditions of their parole.

The amendments maximise the protection of the community through ensuring the lawfulness of the supervision of these prisoners released to parole in the community, and supports the rehabilitation of these offenders.

The amendments promote the right to freedom of movement for a prisoner released on parole, particularly where a parolee has requested and been approved to transfer to be closer to family. The right to liberty is also promoted as the provisions validate historical instances where a parolee was inadvertently in breach of their parole order conditions by moving to Queensland.

(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

Validating the past parole decisions made under the Transfer Act inherently requires the removal of one avenue for judicial review. Without this limitation, the decisions cannot be made lawful, undermining the proper functioning of the Transfer Act and its support of offender rehabilitation.

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

A number of safeguards have been built into the Bill to ensure that the limits on human rights are the least necessary to achieve the purpose of a national scheme under which prisoners released on parole can lawfully move between jurisdictions without breaching the order conditions of their parole. These safeguards include:

- the past decisions made under the Transfer Act were made with the consent of the relevant offender and for their benefit,
- the amendment is limited to validating aspects of the decision that relate to whether there was a corresponding law, leaving open all other grounds for review,
- the amendment provides a benefit for offenders who would otherwise be inadvertently in breach of their parole conditions by acting under an unlawfully made parole order,
- the amendment clearly limits the scope of corresponding laws to those about parole transfers, and
- the amendment avoids the need for future declarations to be made, eliminating the potential for any further oversight.

There are no other reasonably available alternatives that would limit human rights to a lesser extent while still achieving the purposes of the 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

On one side of the scales, it is accepted that historically validating a parole transfer decision removes the right of the person to request a judicial review that the decision was invalid and the right to a fair hearing. It is further acknowledged that such a limitation must be strongly justified to uphold fair processes for individuals subject to administrative decision-making.

On the other side, the amendments will ensure the historical validity of a national scheme under which prisoners released on parole can lawfully move between jurisdictions without breaching the order conditions of their parole while also promoting the right to freedom of movement and the right to liberty. The amendment ensures that provision is appropriately limited so as to only limit the right to a fair hearing so far as was necessary to achieve the purpose. There are also other safeguards included in the amendment to further narrow these limitations.

For these reasons, the limitations are considered justified and the amendments are compatible with human rights.

(f) any other relevant factors

N/A.

Conclusion

In my opinion, the Corrective Services (Promoting Safety) and Other Legislation Amendment Bill 2024 is compatible with human rights under the HRA because it limits human rights only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

NIKKI BOYD
MINISTER FOR FIRE AND DISASTER RECOVERY
AND MINISTER FOR CORRECTIVE SERVICES

© The State of Queensland 2024