Parliamentary Committees



Justice Legislation (COVID-19 Emergency Response — Permanency) Amendment Bill 2021

Report No. 14, 57th Parliament
State Development and Regional Industries Committee
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State Development and Regional Industries Committee

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Acknowledgements	The committee acknowledges the advice provided by officials from the Department of Justice and Attorney-General throughout the inquiry.

Contents

Abbreviations

AHD	Advance Health Directive
AMAQ	Australian Medical Association Queensland
AV link	Audio visual link
Bill	Justice Legislation (COVID-19 Emergency Response – Permanency) Amendment Bill 2021
CALD	Culturally and linguistically diverse
CCIQ	Chamber of Commerce and Industry Queensland
CDEC	Commissioner for Declarations
committee	State Development and Regional Industries Committee
Corporations Act	*Corporations Act 2001*
CQ	Clubs Queensland
Department / DJAG	Department of Justice and Attorney-General
DFV COVID Regulation	Domestic and Family Violence Protection (COVID-19 Emergency Response Regulation 2020
DFVP Act	*Domestic and Family Violence Protection Act 2012*
DFVP Rules	Domestic and Family Violence Protection Rules 2014
DO Regulation	Justice Legislation (COVD-19 Emergency Response – Documents and Oaths) Regulation 2020
DVOs	Domestic Violence Orders
FARE	Foundation for Alcohol Research and Education
GPA	General Powers of Attorney
HRA	*Human Rights Act 2019*
IBA	Independent Brewers Association
JP	Justice of the Peace
LGFT	Liquor, Gaming and Fair Trading division of the Department of Justice and Attorney-General
Liquor Act	*Liquor Act 1992*
LSA	*Legislative Standards Act 1992*
NHMRC	National Health and Medical Research Council

Oaths Act	*Oaths Act 1867*
OLGR	Office of Liquor and Gaming Regulation
OQPC	Office of Queensland Parliamentary Council
PLA	*Property Act 1974*
POA Act	*Powers of Attorney Act 1998*
QHA	Queensland Hotels Association
QLS	Queensland Law Society
QNMU	Queensland Nurses and Midwives' Union
QSBC	Queensland Small Business Commissioner
R&CA	Restaurant & Catering Australia
RSA	Responsible Service of Alcohol
RTD	Ready to drink
WLSQ	Women's Legal Service Queensland

Chair's foreword

This report presents a summary of the State Development and Regional Industries Committee's examination of the Justice Legislation (COVID-19 Emergency Response—Permanency) Amendment Bill 2021.

The objective of the Bill is to make permanent, certain temporary regulatory measures in the justice portfolio, introduced during the COVID-19 pandemic. The committee has recommended that the Bill be passed.

The Bill makes permanent measures to support the making, signing and witnessing of certain legal documents through electronic means. It was the view of the committee that the reforms will deliver real and practical benefits, and increase access to justice, certainty and cost savings. The committee heard from a number of legal stakeholders who put forward suggestions as to how the legislation could be further enhanced. The committee has recommended that further reforms be considered to address the execution of deeds by the State, as well as the execution of deeds by partnerships in particular circumstances.

During the COVID 19 pandemic, arrangements were put in place to reduce physical contact between persons seeking protection under the Domestic and Family Violence Protection Act, or responding to an application for a domestic violence order. The Bill makes permanent the option to use modified arrangements, in particular circumstances. The committee welcomed these reforms and was satisfied that the proposed sections of the Bill which allow for domestic and family violence matters to be heard via video or audio link were relevant and appropriate.

The Bill also contains liquor reforms which will enable restauranteurs to sell a maximum of two bottles of takeaway wine with a takeaway meal up to 10pm. The committee received strong representation from stakeholders and industry on this proposal, particularly the restaurant, catering and independent brewers representatives. Having considered the various economic, health and licensing implications associated with this reform, it was the view of the committee that there is opportunity to find a middle ground that meets the needs of all parties and supports small businesses as well as harm minimisation strategies. The committee recommends that the Minister consider amending the Bill, to provide the option of allowing 1.5 litres of either wine, beer, cider or pre-mixed drinks, to be sold with a takeaway meal.

Finally on behalf of the committee, I thank all those who made valuable contributions to the committee's inquiry, through written and oral representations. I also thank my fellow committee colleagues and Parliamentary Service staff for their collaborative and professional support throughout the inquiry.

I commend this report to the House.

Chris Whiting MP

Chair

Recommendations

1 Introduction

1.1 Role of the committee

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

The committee's primary areas of responsibility include:

- State Development, Infrastructure, Local Government and Planning
- Agricultural Industry Development, Fisheries and Rural Communities
- Regional Development, Manufacturing and Water.

The functions of the committee include the examination of bills in its portfolio area, and as otherwise referred, to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- matters arising under the *Human Rights Act 2019*.[2]

The Justice Legislation (COVID-19 Emergency Response — Permanency) Amendment Bill 2021 (Bill) was introduced into the Legislative Assembly on 15 September 2021 by the Hon Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence.

On 16 September 2021, the Committee of the Legislative Assembly referred the Bill to the State Development and Regional Industries Committee for examination and report by 1 November 2021.

1.2 Inquiry process

On 20 September 2021, the committee invited stakeholders and subscribers to make written submissions on the Bill. The committee advertised the call for submissions on the Queensland Parliament's social media channels. The committee received 26 submissions. See **Appendix A**.

The committee received a public briefing on the Bill from officials from the Department of Justice and Attorney-General (DJAG/the department) on 11 October 2021. A transcript is published on the committee's web page. See **Appendix B** for a list of officials.

The committee received two written briefings from the department relating to the Bill. This included more detailed policy analysis; and a response to issues raised in submissions. These are published on the inquiry webpage.

The committee also conducted a public hearing on 15 October 2021, hearing from witnesses from the legal, health, and hospitality sectors. See **Appendix C** for a list of witnesses.

All inquiry documents including submissions, written briefings, transcripts and questions on notice are available on the committee's webpage:

https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=172

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

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

1.3 Policy objectives of the Bill

The objective of the Bill is to make permanent, certain temporary regulatory measures in the justice portfolio, introduced during the COVID-19 pandemic.[3] The regulatory measures fall into four distinct areas as outlined below.

1.3.1 Documents reforms

The Bill proposes to make permanent particular parts of the Justice Legislation (COVID 19 Emergency Response – Documents and Oaths) Regulation 2020 (DO Regulation), which was introduced to allow certain legal documents to be signed electronically or witnessed over audio visual link.[4]

According to the explanatory notes, the purpose of the reform is to modernise the way legal documents are created, and improve accessibility:

> The Bill embraces digital technology to provide new and alternative pathways for document execution, in addition to the ordinary physical approach, which will allow individuals to choose their preferred method of document execution. The reforms will make it easier for individuals to make and sign important legal documents without the need to be physically present. The reforms will therefore improve access to justice, reduce transaction costs, and increase the efficiency of conducting private and commercial transactions.[5]

The Bill is relevant to the making, signing and witnessing of a number of legal documents including affidavits, statutory declarations, oaths, deeds, certain mortgages, and general powers of attorney.

The Bill also permanently implements arrangements introduced under the DO Regulation which allow nurse practitioners to sign a certificate which forms part of an advance health directive (AHD) stating that the person making the document appears to have capacity to make the document.[6] According to the explanatory notes, this amendment 'makes AHDs more accessible and enhances access to advance care planning support'.[7]

1.3.2 Domestic and family violence reforms

The Bill proposes to make permanent certain measures introduced by the Domestic and Family Violence Protection (COVID-19 Emergency Response) Regulation 2020 (DFV COVID Regulation).

This includes the provision of alternative options, in certain circumstances, to the traditional methods of verifying and filing applications and appearance at domestic and family violence proceedings.[8]

While measures outlined in the Bill are largely based on modified arrangements introduced by the DFV COVID Regulation, the process for alternative verification of an application for a protection order or variation of a DVO is narrower in scope.

The Bill provides that the modified verification arrangements are limited to urgent situations only for the purpose of seeking a temporary protection order, where an applicant is unable to access a Justice of the Peace (JP) or Commissioner for Declarations (Cdec) or a solicitor and before the respondent is served the application. Further, the option for electronic filing is also only with the approval of the Principal Registrar of the court. [9]

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3 Explanatory notes, p 1.

4 Explanatory notes, p 3.

5 Explanatory notes, p 4.

6 Explanatory notes, p 6.

7 Explanatory notes, p 6.

8 Explanatory notes, p 7

9 Explanatory notes, p 7

1.3.3 Liquor reforms

The Bill amends the *Liquor Act 1992* (Liquor Act) to provide a permanent ability for certain licensed restaurants (i.e. licensees holding a subsidiary on-premises licence (meals)) to be authorised to sell a limited amount of wine (1.5 litres) for a takeaway or delivery with a takeaway meal.[10]

The reforms proposed by the Bill seek to 'reduce regulatory barriers for restaurants and support the recovery of small business from the economic impacts of the pandemic'. The explanatory notes, state that the amendments 'are also anticipated to deliver tangible public benefit by reflecting contemporary food service standards and changing customer expectations'.[11]

The proposed amendments differ from the current COVID-19 temporary takeaway liquor arrangements.[12] Key changes included additional limitations to the type (beer and pre mixed drinks excluded) and quantity of liquor (reduced from 2.25 to 1.5 litres of alcohol) able to be sold with a takeaway meal.

1.3.4 Leases reforms

The Bill also amends the *COVID-19 Emergency Response Act 2020* to allow a regulation made under section 23 before the COVID-19 expiry day to remain on foot until up to 2 years after that date.

The Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 (Leases Regulation), was made pursuant to section 23 of the Act. This regulation established the 'good faith' principles under which lessee's and lessors were to negotiate new lease arrangements during the lockdown period. This followed a National Cabinet agreement that commercial tenants were not to be evicted or have their rents increased during the health emergency. The Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Amendment Regulation 2020 (SL 234 of 2020) extended the arrangements to 31 Dec 2020.

In a briefing to the committee, DJAG advised that 'as well as preserving any rent relief arrangements under the Leases Regulation, the amendment will allow the Queensland Small Business Commissioner to continue to provide mediation services in respect of eligible lease disputes until such time as the permanent statutory office of the QSBC is established'.[13]

1.4 Government consultation on the Bill

The explanatory notes provided the following information in relation to government consultation on the Bill.

1.4.1 Documents reforms

According to the explanatory notes, government consultation on the proposed documents reforms was undertaken with a wide range of legal, health and community stakeholders. This included the Queensland Law Society, the Bar Association of Queensland, the Property Council of Australia, the Australian College of Nurse Practitioners and the Australian Medical Association of Queensland.[14]

An exposure draft of the Bill was released on a confidential basis to key stakeholders in 2021 and further consultation was conducted directly with key stakeholders prior to the finalisation of the Bill.[15]

The explanatory notes state that 'overall, stakeholders expressed broad support' for the reforms. Legal stakeholders 'strongly' supported the reforms that 'modernised the way certain documents

10 Explanatory notes, p 7.

11 Explanatory notes, p 7.

12 Explanatory notes, p 7.

13 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 10.

14 Explanatory notes, p 15.

15 Explanatory notes, p 15.

were made, brought many efficiencies, reduced transaction costs and aligned with contemporary business practice'.[16]

The explanatory notes stated that given the significance of proposed changes to the way legal documents are made, some stakeholders emphasised the importance of sufficient safeguards. This included addressing concerns that the solemnity of making these important documents not be eroded by the introduction of electronic signatures and witnesses over an AV link.[17]

1.4.2 Domestic and family violence reforms

According to the explanatory notes, consultation on a draft version of the reforms was undertaken with key DFV and legal stakeholders who expressed 'general support for the reforms'.[18] The explanatory notes do not identify consultees.

The notes to the Bill explain that several stakeholders expressed discrete issues regarding the draft version of the provisions, and that these 'have been addressed in the Bill, where appropriate, to balance greater accessibility and flexibility for DFV proceedings while ensuring appropriate safeguards for DFV victims are maintained (beyond the COVID-19 emergency including access to domestic violence supports).[19]

The explanatory notes confirm that in accordance with requirements of the *Magistrates Courts Act 1921,* the Chief Magistrate has consented to the amendments to the *Domestic and Family Violence Protection Rules 2014.* [20]

1.4.3 Liquor reforms

According to the explanatory notes, DJAG initially consulted on an original proposal which allowed licensed restaurants and cafes operating under a subsidiary on-premises licence (meals) to sell takeaway liquor as of right until 10.00pm, with a takeaway food order; and in amounts not exceeding 2.25 litres of liquor (excluding straight spirits) – equivalent to three bottles of wine or either a six pack of beer, cider or pre-mixed alcoholic drinks.[21] This proposal mirrored the allowances provided under the temporary takeaway liquor authorities granted during the COVID-19 pandemic.[22]

Overall 12 stakeholders made submissions to the department's consultation. Of these four supported the original proposal, noting benefits to restaurant and café owners, as well as there being no evidence of alcohol related harm.[23]

Eight stakeholders did not support the proposal (Queensland Hotels Association, Retail Drinks Australia, RSL and Services Clubs Association Queensland Incorporated, Queensland Coalition for Action of Alcohol; Foundation for Alcohol Research and Education; Drug ARM; the Queensland Network of Alcohol and Other Drug Agencies; and the United Workers Union). Issues raised against the proposal included, among other things: a lack of community need or justification for continuing arrangements on a permanent basis; risks associated with the irresponsible supply of liquor and adverse intoxication outcomes; adverse impacts for existing liquor retailers.[24]

16 Explanatory notes, p 15.

17 Explanatory notes, p 15.

18 Explanatory notes, p 15.

19 Explanatory notes, p 15.

20 Explanatory notes, p 15.

21 Explanatory notes, pp 15-16.

22 Explanatory notes, p 16.

23 Explanatory notes, p 16.

24 Explanatory notes, pp 16-17.

In response to concerns raised by stakeholders, the explanatory notes advise that amendments were made to the Bill to 'provide for greater regulatory oversight and responsible service of alcohol practices'. This included amendments which strengthened regulatory measures to support the responsible service and delivery of takeaway alcohol; strengthened parameters around what constitutes a 'full meal'; limitations on the amount of wine able to be sold to 1.5 litres (2 bottles); and the removal of beer and pre-mixed alcoholic drinks.

The committee received strong representation from the brewing and restaurant industry in relation to the limitations included in the Bill. This is discussed further in Chapter 4.

On 20 July 2021, Liquor Gaming and Fair Trading asked stakeholders supporting the original proposal to provide feedback on the key components of the above changes.[25]

The Office of Best Practice Regulation has been consulted on the liquor reforms in the Bill. Given the proposal is primarily deregulatory in nature and preserves harm minimisation requirements, no further regulatory impact analysis is required.[26]

1.4.4 Committee comment

The committee notes the consultation processes conducted for the various parts of the Bill. The committee considers these to be relevant and appropriate.

The committee does however note that the explanatory notes provide no information on whether consultation took place for the lease reforms proposed by the Bill, and the findings of any such consultation.

1.5 Should the Bill be passed?

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

The committee recommends that the Justice Legislation (COVID-19 Emergency Response—Permanency) Amendment Bill 2021 be passed.

Recommendation 1

The committee recommends the Justice Legislation (COVID-19 Emergency Response—Permanency) Amendment Bill 2021 be passed.

[25] Explanatory notes, p 17.

[26] Explanatory notes, p 17.

2 Documents reforms

This section discusses issues raised during the committee's examination of Documents reforms within the Bill.

2.1 Background

As a result of the COVID-19 pandemic individuals, businesses and government have been required to adapt and engage with digital technology to find new ways of working without being physically together. The Justice Legislation (COVD-19 Emergency Response – Documents and Oaths) Regulation 2020 (DO Regulation) introduced temporary measures to allow certain legal documents to be signed electronically or witnessed over audio visual (AV) link.

The Bill permanently implements certain aspects of the temporary arrangements to modernise the way in which important legal documents are created, in line with contemporary business practice, and to improve accessibility. [27] According to the explanatory notes, the reforms will improve access to justice, reduce transaction costs, and increase the efficiency of conducting private and commercial transactions. [28]

The specific amendments proposed by the Bill, are discussed in more detail below.

2.2 Amendments to the *Oaths Act 1867* – Affidavits, statutory declarations and oaths

Under ordinary law, affidavits and statutory declarations must be signed on paper in the physical presence of signatories and witnesses. Counterparts cannot be used, since a single paper document is signed by both the signatory and the witness contemporaneously. Oaths must be administered in person. [29]

Under the DO Regulation, temporary arrangements were introduced which allowed affidavits and statutory declarations to be made in the form of an electronic document, electronically signed and made using counterparts if witnessed by a "special witness" over audio visual (AV) link. The DO Regulation also allowed oaths to be administered by AV link. [30]

2.2.1 What does the Bill propose

Part 6 of the Bill amends the *Oaths Act 1867* (Oaths Act) to make certain arrangements contained in the DO Regulation permanent. It also extends the reforms to paper-based documents (to ensure equal treatment of paper-based and electronic documents) with some additional safeguards.[31]

Importantly, individuals will be able to choose their preferred method of document execution, be that on paper or electronically.[32]

Specifically, the Bill makes the following amendments:

- oaths (except for oaths of office and oaths of allegiance) may be administered by AV link by persons who are ordinarily authorised to administered oaths
- affidavits and statutory declarations may be witnessed over AV link by a narrow cohort of witnesses (special witnesses or prescribed persons), with particular procedural requirements to apply

27 Explanatory notes, pp 3-4.

28 Explanatory notes, p 4.

29 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 1.

30 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 1.

31 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 1.

32 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 1.

- if witnessed in person – affidavits and statutory declarations may be made in electronic form, signed electronically and/or made using counterparts if witnessed by a special witness or a prescribed person (note counterparts cannot be used if the document is physically signed in person)
- if witnessed by AV link – affidavits and statutory declarations may be physically signed or electronically signed, and/or made using counterparts if witnessed by a special witness or prescribed person, with particular procedural requirements to apply.

Further, in relation to statutory declarations and affidavits, the Bill provides that:

- witnesses must verify the identity of the person making the document and write their full name, position, workplace and details of how they are an eligible witness (and, if applicable, that they are a special witness) on the document (regardless of whether the document is signed electronically or on paper, or witnessed in person or by AV link)
- persons making affidavits or statutory declarations must include a statement in the document that the contents are true, or true to the best of their knowledge, and acknowledge that knowingly making a false statement is an offence (regardless of whether the document is signed electronically or on paper, or witnessed in person or by AV link)
- regulations may be made about the acceptable methods of electronic signature that can be used to make these documents; and
- rules of court and practice directions can be made about particular methods of electronic signature that must be used for an affidavit or statutory declaration that is filed or admitted into evidence.[33]

A comparison of document reforms before the COVID-19 emergency, under the DO Regulations and proposed by the Bill, provided by DJAG is available on the committee's inquiry webpage.

2.2.1.1 Technology-neutral approach

The Bill adopts a technology-neutral approach in relation to electronic signatures. That is, it does not prescribe a certain type of technology that must be used in applying an electronic signature.

The Bill provides that the signature must be an 'acceptable method' which identifies the signatory and is 'as reliable as appropriate for the purpose for which the document is given'. DJAG advised that this approach is consistent with the *Electronic Transactions (Queensland) Act 2001*.[34]

DJAG also confirmed that this approach was adopted as 'technology in this area is developing at a fast pace' and that the technology-neutral approach avoids the reforms becoming quickly outdated or obsolete. [35]

The Bill inserts a regulation-making power into the Oaths Act and the Powers of Attorney Act that will allow requirements to be imposed on the use of electronic signatures. [36]

The Bill also allows rules of court and practice directions to be made about particular methods of electronic signature that must be used for affidavits or statutory declarations that are filed or admitted into evidence in court or tribunal proceedings.[37]

DJAG confirmed that this 'will enable controls or limitations to be imposed on the use of electronic signatures, whilst ensuring the legislation is sufficiently flexible to keep pace with technology and be responsive to emerging issues, including developments in other jurisdictions'.[38]

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33 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 2.

34 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, pp 6-7.

35 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 7.

36 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 7.

37 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 7.

38 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 7.

2.2.2 Stakeholder views

2.2.2.1 Broad support for documents reforms

A number of inquiry stakeholders, including the Queensland Law Society, Allens Linklaters and King & Wood Mallesons, Australian Banking Association and the Crime and Corruption Commission outlined broad support for the documents reforms.[39]

The Queensland Law Society submitted that the legal profession and community derived significant benefits from the temporary reforms, leading to increased access to justice, certainty, reliability and cost savings:

> … the legal profession and the community at large have derived significant benefit from the modernisation of legislation which has led to increased access to justice, increased certainty and reliability as well as time and cost savings.
>
> As a consequence, we strongly support the passage of this bill and the reform it achieves. We note that other jurisdictions are considering similar reform and, at a national level, there is consultation aimed at modernisation and harmonisation of execution of documents.[40]

Queensland Law Society described some of the specific benefits achieved in more detail. This included:

> There are significant savings in cost and environmental impact. Electronic processes are more convenient, more efficient and … more accessible.
>
> Regional Queensland is not as burdened by the tyranny of distance, or the paucity of services. Records are often more accessible, secure and reliable, as it is easier to store and locate documents executed electronically.
>
> In practice, often it can be easier to establish that documents and communications have been properly signed, or received and opened as there is a clear electronic forensic trail. …
>
> For individuals whose work and/or carer commitments, location or disability or other health needs would prevent or make it difficult for them to complete and sign paper documents, the ability to use digital resources to complete documents is invaluable.
>
> There will be efficiencies created in the court process and within government departments and agencies as well which will assist to ease the burden on courts and these bodies. Information sharing will be easier.[41]

Mr Andrew Shute, Chair of the Queensland Law Society Litigation Rules Committee, provided the committee with real life examples from his practice of where the temporary laws made a difference:

> The process has resulted in considerable time and cost savings for our clients and for witnesses and provides considerable efficiencies for the other parties and the judiciary.
>
> ..it is the same experience that we have encountered in relation to affidavits as to the difficulty in dealing with paper documents. It would come as no surprise that the vast bulk of documents that find their way into affidavits were created in electronic form. However, until these reforms we still had to print out all of those documents and compile them in hard copies so that wet-ink signatures could be applied. The benefits of the searchability of the electronic documents and much of the valuable content within the electronic form of the document was lost, such as details on photographs or maps, formulas in spreadsheets or bookmarks or hyperlinks that were embedded within the documents themselves.
>
> Further, given particularly the size and geographic spread within Queensland, it is not uncommon for witnesses to be located vast distances from any lawyer, let alone the lawyer that is assisting with preparation of the affidavit. This has presented yet further practical challenges that have resulted in considerable delays and costs. An example is where we might face the dilemma of having to print out the

[39] See for example: Submissions 11, 16, 20, 22 and 25.

[40] Queensland Law Society, submission 16, p 1.

[41] Queensland Law Society, submission 16, p 2.

> affidavit ourselves, send it by post or courier—that can take a period of days—then hope that the person who does not have experience with the matter compiles that properly, gets it signed and gets it sent back to you. You do not get it back for perhaps a week, and there can be errors potentially in the way it has been compiled and you have to go through that process again. The approach taken by parliament last year and now proposed to be made permanent removed all of those difficulties and I think finally brought us into the 21st century in respect of this aspect of practice. In addition, I want to emphasise that the technological neutrality approach is welcomed, noting that that is consistent with 20 years or so of experience under the Electronic Transactions (Queensland) Act, and it has proved valuable, given the differing technological capabilities and knowledge that you encounter with lawyers and witnesses. Thank you. [42]

That said, Queensland Law Society submitted that it was important that there continued to be flexibility in the use of hard copy documents, to ensure that those without access to digital resources, would not be unfairly impacted:

> [T]here should not be a prohibition on parties using hard copy documents and physical signing where appropriate. We understand that the purpose of these reforms is to provide flexibility to progress matters in the way that best suits the parties. Any reform that limits the ability to use paper documents and to physically sign these could impact vulnerable people, who may not have the same level of access to digital resources. This will ensure no unintended digital divide.[43]

Similarly, Ms Karla Fraser, Partner, Allens (a large commercial law firm) outlined support for the reforms, noting that the temporary measures adopted in Queensland were considered a best practice model of reform:

> … the proposal to make permanent the valuable and successful changes embodied in the current temporary COVID regulations in relation to the execution of documents is most welcome.
>
> During the pandemic, the very clear, comprehensive provisions of the Queensland regulations were a model of their kind. My colleagues in other offices and at other law firms have urged other jurisdictions to use these regulations as a model for their own reforms and, as the federal government is now looking to modernise the law in relation to document execution and facilitate electronic commerce, I am hopeful that this will galvanise the other states and territories to reform their laws accordingly, using the Queensland regulations or this bill, if it is passed into law, as a guide.[44]

Acknowledging their support for the reforms, some inquiry stakeholders also outlined some drafting suggestions, to give the reforms the full effect. These are discussed in the sections below.

2.2.2.2 Electronic signatures

A number of stakeholders, including the Queensland Law Society and the Crime and Corruption Commission reflected on issues relating to the use of electronic signatures.

Queensland Law Society submitted that the Oaths Act, as the primary legislation, should prescribe the accepted method for electronically signing the document, adding that the prospect of future regulations, rules or practice directions that require particular software, could limit the potential benefits of the legislation:

> Proposed section 13A(1) provides that an accepted method for electronically signing an affidavit or a declaration may be prescribed in a regulation, while subsection (2) allows a court or tribunal to make a similar rule or practice direction. This is also provided for in the proposed definition of accepted method to be inserted into section 1B of the Oaths Act.
>
> The drafting of the definition of accepted method in section 1B suggests that the policy intent for a rule to be made, or for a court or tribunal to publish a practice direction, about how an affidavit or declaration

[42] Public hearing transcript, Brisbane, 15 October 2021, pp 5-6.

[43] Queensland Law Society, submission 16, p 2.

[44] Public Hearing Transcript, Brisbane, 15 October 2021, p 7.

> can be sworn and then, only if this does not occur, should the way prescribed in the legislation be relied upon.
>
> Paragraph 2 of the definition of accepted method in section 1B reflects the requirements under the present emergency regulation1 and, in turn, is consistent with the technologically-neutral approach adopted in the Electronic Transactions (Queensland) Act 2001. QLS submits that this, method (i.e. the accepted method in paragraph 2 of section 1B) be mandated.[45]

Ms Shearer, President, Queensland Law Society, also advised the committee that an electronic signature should be the equivalent to a wet ink signature:

> I think the consistent theme is that an electronic signature should be equivalent to a wet-ink signature. As to how that is realised, there are inconsistencies in relation to deeds and then affidavits and statutory declarations, but that all goes to the nature of those documents. What we are saying is: do not interfere with the nature of those documents and what they otherwise have to do but in terms of how they can be signed and witnessed, accept electronic as equivalent to wet ink.[46]

The Mr David Caughlin, Executive Director, Legal, Risk, Compliance at the Crime and Corruption Commission noted similar reservations:

> [The Bill] contemplates other means of acceptable electronic signature pursuant to regulations, rules or practice directions for particular courts or tribunals.
>
> While the bill requires a court considering making such a practice direction to consider the need to ensure consistency with other jurisdictions, this leaves open the possibility of an inconsistent approach. That in turn is likely to lead to uncertainty and delay where documents may be created which are acceptable to one tribunal but not to another.[47]

2.2.2.3 Departmental response

In response, DJAG advised that given the risks associated with making documents electronically, the Bill provides scope for the acceptable methods to be narrowed as needed in the future if issues arise.[48]

DJAG also advised that the Bill explicitly requires Heads of Jurisdiction to consider the need to ensure consistency with the rules or practice directions of other courts.[49] If a regulation is made however, the regulation will prevail to the extent of any inconsistency. A regulation, if made, would ensure a consistent approach across all courts and tribunals.[50]

2.2.2.4 Committee comment

The committee acknowledges the views of stakeholders regarding the use of electronic signatures, specifically provisions in the Bill which allow additional requirements to be imposed relating to electronic signatures, and calls for electronic signatures to be equivalent to wet ink signatures across the board. The committee notes the explanation provided by the Department of Justice and Attorney-General that the use of regulations should assuage concerns about the inconsistent use of electronic signatures.

The committee encourages the department to maintain a close watching brief on this matter to ensure that any unintended consequences, as identified by stakeholders, do not come into effect. The committee also recommends that the Minister, in the second reading speech, explain the benefits of utilising regulations to determine standards of accepted methods of electronic signature.

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45 Queensland Law Society, submission 16, pp 3-4.

46 Public Hearing Transcript, Brisbane, 15 October 2021, p 12.

47 Public Hearing Transcript, Brisbane, 15 October 2021, p 30.

48 DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, p 5.

49 DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, p 5.

50 DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, p 6.

Recommendation 2

The committee recommends that the Minister, in the second reading speech, explain the benefits of utilising regulations to determine standards of accepted methods of electronic signature.

2.2.2.5 Official and originating versions of documents

Clause 40 of the Bill inserts new section 31Y into the Oaths Act and relates to official and originating versions of a document.

Queensland Law Society recommended that section 31Y be redrafted in order to provide clarity:

> The drafting of proposed section 31Y is confusing, although the Explanatory Notes provide some clarification of the intent of the terms *official version* and *originating version.*[51]
>
> In particular, we query the drafting of proposed section 31Y(3) which says that both the electronic document and a printout of the electronic document can be the *official version* of the document. This provision does not clarify whether the first printout of the electronic document is intended to be the *official version* or whether a subsequent printout could be the *official version.*[52]

The Crime and Corruption Commission agreed with the need to redraft 31Y, noting that in its present form, the Bill appears to allow for the possibility of multiple official versions of a document, and that it was the view of the commission that this was 'undesirable'.[53]

2.2.2.6 Departmental response

In response, DJAG confirmed that the Bill provides that both the electronic document and a printout of the electronic document are the official version, and that they have equal legal status. DJAG advised that 'this provides flexibility to persons to whom documents are given to be able to accept either the electronic document or print out for whatever purpose it is given'.[54]

DJAG confirmed that this means that 'either of those documents can be presented to a third party, including a court, to be relied upon as evidence'.[55]

2.3 Amendments to the *Powers of Attorney Act 1998* – General Powers of Attorney and Advance Health Directives

Part 7 of the Bill (Clauses 44-49) makes amendments to the *Powers of Attorney Act 1998* in two areas: general powers of attorney (GPAs) and advance health directives (AHDs).[56]

2.3.1 General powers of attorney

A GPA allows an individual to appoint someone they trust (an attorney) to make decisions about financial matters for them while they have capacity to make decisions about those matters. A GPA can be used while the individual can still make their own decisions and typically ends once the individual loses capacity to make those decisions.[57]

A GPA can also be used by corporations and other businesses to authorise an attorney to do anything that the corporation or business can lawfully do by an attorney. Section 11 of the *Powers of Attorney*

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51 Queensland Law Society, submission 16, p 4.

52 Queensland Law Society, submission 16, p 4.

53 Public Hearing Transcript, Brisbane, 15 October 2021, p 30.

54 DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, p 6.

55 DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, p 6.

56 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 2.

57 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 2.

Act 1998 provides that a GPA must be in the approved form. Form 1 (Version 3) is currently approved for this purpose.[58]

The approved form provides that a GPA must be witnessed by an adult. Further, if the GPA is used for land or water dealing, it must be witnessed in accordance with the *Land Title Act 1994* and the *Land Act 1994*.[59]

The DO Regulation provided that witnessing could take place over AV link, provided certain procedural requirements were met. The DO Regulation also permitted GPAs to be signed electronically, in counterparts and by split execution. [60]

2.3.2 What does the Bill propose

The Bill inserts a new Part 3A (General powers of attorney for businesses) into Chapter 2 of the *Powers of Attorney Act 1998*, and provides 'a new modernised framework for making, signing and witnessing GPAs for businesses including corporations, partnerships and unincorporated associations'.[61]

Specifically, the Bill:

- allows GPAs for businesses (corporations, partnerships and unincorporated associations, but not sole traders or individuals) to be signed electronically, in counterparts and by split execution and without a witness, except where the GPA will be used in relation to land or water allocation dealings; and
- provides that GPAs used for land or water allocation dealings must continue to be executed in accordance with the *Land Title Act 1994* and the *Land Act 1994*. [62]

In contrast to the DO Regulation, the Bill provides that GPAs for partnerships and unincorporated associations do not need to be witnessed. [63]

The Bill also differs from the DO Regulation as it does not provide that GPAs for individuals to be signed electronically and witnessed by AV link because of the increased risks of fraud and elder abuse associated with these documents. GPAs for individuals must continue to be signed on paper and witnessed in person.[64]

A comparison of the way that GPAs for individuals and businesses are treated under existing law, under the DO Regulation, and under the Bill, is published on the inquiry website.[65]

2.3.3 Stakeholder views

Inquiry stakeholders outlined a number of suggested amendments to this part of the Bill.

2.3.3.1 Application of the Powers of Attorney Act 1998

Clause 45 of the Bill inserts a note referring to general powers of attorney for businesses.

Queensland Law Society recommended that a cross reference to the Property Law Act be added to the Powers of Attorney Act:

58 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 2.

59 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 2.

60 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 2.

61 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 2.

62 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 3.

63 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 3.

64 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 3.

65 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 3.

> Section 12(1) of the Powers of Attorney Act 1998 (POA Act) provides that the section does not apply to a power of attorney created by and contained in another instrument, for example, a mortgage or lease, that is signed by, or by direction of, the principal.
>
> Proposed s 46A of the *Property Law Act 1974* (PLA), applies to POAs contained in documents for a commercial or arms' length transaction.
>
> QLS recommends that a cross-reference to the new section 46A of the PLA be added to section 12 of the POA Act. [66]

In response, DJAG noted that while a cross-reference may be beneficial, it is not strictly necessary for the operation of the provisions. DJAG noted that it would give further consideration to the suggested amendment.[67]

2.3.4 Advance health directives

An AHD allows an individual to give directions about their future health care. It allows their wishes to be known and gives health professionals direction about the treatment they want. A principal can also use an AHD to appoint someone they trust to make decisions about their health care on their behalf. The AHD can only be used when the principal does not have capacity to make decisions about their health care. The *Powers of Attorney Act 1998* provides that an AHD must be written and may be in the approved form (Form 4 (Version 5)).[68]

Currently, AHDs must include a certificate signed and dated by a doctor that states that the principal, appears to have the capacity necessary to make the AHD. This requires the doctor to conduct a capacity assessment. After the doctor signs the certificate, the person making the document needs to sign the document in the physical presence of a JP, Cdec, notary public or lawyer. There are therefore two separate witnesses who assess the principal's capacity at different times.[69]

The DO Regulation expanded the category of persons who could undertake a capacity assessment and sign a certificate as part of an AHD to include a nurse practitioner.

2.3.5 What does the Bill propose

The Bill amends the *Powers of Attorney Act 1998* to permanently allow nurse practitioners, in addition to doctors, to sign the certificate which forms part of an AHD stating that the person making the document appears to have capacity to make the document.[70]

DJAG advised that the purpose of the amendment is to 'increase the accessibility of making an AHD and enhance access to advance care planning support'. DJAG also advised that 'allowing nurse practitioners to undertake a capacity assessment and sign a certificate to verify capacity for the purpose of an AHD will ensure that the ability to make an AHD is not constrained by the availability of an appropriate doctor who can assess and attest to capacity'.[71]

DJAG also confirmed that the Bill clarifies that a nurse practitioner can sign an AHD even if the approved form states that it must be signed by a doctor and that 'this will ensure that AHDs are not invalidated merely because a nurse practitioner signs a version of the form that only provides for a doctor to sign'.[72]

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66 Queensland Law Society, submission 16, p 4.

67 DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, p 6.

68 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 3.

69 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 3.

70 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 3.

71 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, pp 3-4.

72 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 4.

2.3.6 Stakeholder views

2.3.6.1 Broad Support

The Queensland Nurses and Midwives' Union (QNMU) supported permanently retaining arrangements which enable nurse practitioners to carry out capacity assessments necessary for people to make an AHD:

> The QNMU has long advocated for nurse practitioner's role in undertaking such assessments. In our view, broadening the level of qualifications and skills required will increase the accessibility and access to advanced care planning and support. [73]

QNMU also suggested that there may be opportunity to expand the scope of nurse practitioner enabled assessments for certain types of documents, such as death certificates, workers compensation and enduring power of attorney documents, adding that this could facilitate greater access of care, particularly in areas with less access to medical professionals.[74]

DJAG noted this suggestion, but advised that 'at this stage it is not proposed to expand the ability for nurse practitioners to sign other types of documents'. DJAG also advised that any 'such matters would need to be considered by government in context of each document, relevant to the risks associated with the particular document, following extensive consultation with stakeholders'.[75]

2.3.6.2 Skills and training

Australian Medical Association Queensland (AMAQ) 'cautiously' supported the proposed amendments, in particular, the potential benefits for rural and remote areas. However, AMAQ did outline some reservations as to whether nurse practitioners had the appropriate skills and training to assess capacity:

> AMA Queensland wishes to state from the outset that we are in support of nurses and doctors working together to deliver better health outcomes for Queenslanders. However, AMA Queensland does not support the authorisation of role substitution and allowing health practitioners who are unqualified to perform certain tasks. … AHDs are extremely complex, and factors such as informed consent can be very complex. Therefore, AMA Queensland questions whether nurse practitioners have the adequate skills and training to assess such consent.[76]

> AMA Queensland cautiously supports the continuation of section 180. On one hand, AMA Queensland supports this, as having a nurse practitioner complete this certificate is useful in rural and remote Queensland where it may not be possible for patients to access a doctor in a timely manner to complete this task. However, AMA Queensland is concerned as to whether nurse practitioners have the necessary skills and training to assess capacity. [77]

2.3.6.3 Departmental response

In response, DJAG advised that a nurse practitioner is an advanced practice nurse endorsed by the Nursing and Midwifery Board of Australia, who has completed a Masters level program and has the equivalent of three years (5,000 hours) full time experience at a clinically advanced nursing level. Nurse practitioners can practice independently and are authorised to autonomously manage complete episodes of care for people with a variety of health needs.[78]

DJAG also confirmed that Queensland's legislative framework for making AHDs has more safeguards that other Australian jurisdictions and that AHDs also require a second capacity assessment (following

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73 Queensland Nurses and Midwives', submission 14, p 3.

74 Queensland Nurses and Midwives', submission 14, p 4.

75 DJAG, Correspondence, 13 October 2021, Response to issues raised in submission, p 7.

76 Australian Medical Association Queensland, submission 23, p 1.

77 Australian Medical Association Queensland, submission 23, p 1.

78 DJAG, Correspondence, 13 October 2021, Response to issues raised in submission, p 8.

an assessment by a doctor or nurse practitioner) by a justice of the peace, commissioner for declarations, notary public or lawyer.[79]

2.4 Amendments to the *Property Law Act 1974* – Deeds and particular mortgages

Part 8 of the Bill (Clauses 50–56) amends the provisions in Part 6, Division 1 (Deeds and covenants) and Part 7 (Mortgages) of *Property Law Act 1974* (Property Law Act). [80]

Under the common law and the Property Law Act, deeds must be executed on paper, parchment or vellum and be 'signed, sealed and delivered'. An individual's execution of deed is deemed to have been sealed and duly executed if executed in accordance with section 45 of the Property Law Act, which provides that an individual's signature needs to be witnessed by a person who is not a party to the deed.[81]

A corporation's execution of a deed is deemed to have been duly executed if executed in accordance with section 46 of the *Property Law Act 1974*. If the corporation is regulated by the *Corporations Act 2001* (Cth) (Corporations Act), it can be executed in accordance with that Act. Case law also provides that directors of a corporation must sign the same copy of a deed.[82]

In relation to particular mortgages, electronic conveyancing (eConveyancing) allows instruments and documents needed for property transactions to be digitally prepared, signed, settled and lodged. The participation rules under the Electronic Conveyancing National Law provide that when a mortgage is lodged through eConveyancing, the mortgagee must obtain and hold a duplicate of the mortgage on the same terms as the lodged mortgage signed by the mortgagor.[83]

2.4.1 What does the Bill propose

The Bill amends the *Property Law Act 1974* to modernise the way that deeds are made, signed and witnessed. Specifically, the Bill:

- allows deeds to be in electronic form, signed electronically (provided each other signatory consents to the method of electronic execution), in counterparts and by split execution (allowing directors for a corporation to sign separate counterparts);
- removes the need for deeds to be sealed or stated to be sealed, provided the deed contains a clear statement that it is executed as a deed;
- provides that a power of attorney given by an individual under a deed must be a physical document that is signed in the presence of a witness, unless:
- the document containing the power of attorney is part of a commercial or other arms-length transaction; and
- the power of attorney is given for the purpose of the commercial or other arms-length transaction.
- clarifies the way that a corporation can execute a deed, aiming for consistency with execution requirements in the Corporations Act;
- allows an individual to sign a deed on behalf of a partnership or unincorporated association without a witness;
- removes the need for witnessing of an individual's signature on deeds, except for certain deeds containing powers of attorney (discussed above); and

79 DJAG, Correspondence, 13 October 2021, Response to issues raised in submission, p 8.

80 DJAG, Correspondence, 13 October 2021, Parliamentary Committee Briefing Note, p 4.

81 DJAG, Correspondence, 13 October 2021, Parliamentary Committee Briefing Note, p 4.

82 DJAG, Correspondence, 13 October 2021, Parliamentary Committee Briefing Note, p 4.

83 DJAG, Correspondence, 13 October 2021, Parliamentary Committee Briefing Note, p 5.

- ensures that deeds used for land or water allocation dealings must continue to be executed in accordance with the Land Title Act 1994 and the Land Act 1994.[84]

Clause 54 of the Bill also amends the Property Law Act to clarify that the duplicate same terms mortgage document can be made as an electronic document and signed electronically by the mortgagor or mortgagee, without the need for any witnessing, as long as it complies with section 11 (Instruments required to be in writing) of the *Property Law Act 1974*.[85]

2.4.2 Stakeholder views

Inquiry stakeholders suggested a number of amendments to this part of the Bill.

2.4.2.1 Execution of Deeds by Corporation Sole (clause 51)

Proposed new section 46F (Execution by corporation) specifies how a corporation may execute a document that is to have effect as a deed.[86]

Queensland Law Society submitted that the definition of "corporation" in proposed section 44 of the PLA distinguishes between a corporation sole and a statutory corporation, and that this suggests that a corporation sole is not a statutory corporation.[87]

Queensland Law Society submitted that proposed section 46F, which provides for how a corporation may sign a document, contains a specific provision for how a statutory corporation will sign, but there is no equivalent provision for a corporation sole.[88] Queensland Law Society recommended that section 46F(4) be redacted to provide clarity on this matter:

> The effect of having no specific provision is that there is arguably no statutory approval for a corporation sole to sign an electronic deed in accordance with these provisions.
>
> QLS submits that proposed section 46F(4) be redrafted to provide that for a statutory corporation and corporation sole, a document may be signed as authorised by the Act under which they are established.[89]

2.4.2.2 Departmental response

In response, DJAG advised that section 46F(1)(d) would permit a lawfully authorised agent of a corporation sole to execute a deed for the corporation and that 'this would appear to negate a need for any further amendment to be made to address this issue'.[90] DJAG also noted that section 46F(8) provides that a corporation sole can execute a deed in the ordinary way even though that may not be specifically provided for in this section.[91]

DJAG queried whether all corporations sole are created by statute and stated that 'it is therefore reluctant to define corporations sole as a subset of statutory corporations.'[92] DJAG also advised that it considers 'sections 46F(1)(d) and (8) adequately ensure that corporations sole can execute deeds in accordance with the PLA but that it will give consideration as to whether this could be further clarified'.[93]

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84 DJAG, Correspondence, 13 October 2021, Parliamentary Committee Briefing Note, p 4.

85 DJAG, Correspondence, 13 October 2021, Parliamentary Committee Briefing Note, p 5.

86 Explanatory notes, p 48.

87 Queensland Law Society, submission 16, p 5.

88 Queensland Law Society, submission 16, p 5.

89 Queensland Law Society, submission 16, p 5.

90 DJAG, Correspondence, 13 October 2021, Response to issues raised in submission, p 9.

91 DJAG, Correspondence, 13 October 2021, Response to issues raised in submission, p 10.

92 DJAG, Correspondence, 13 October 2021, Response to issues raised in submission, p 10.

93 DJAG, Correspondence, 13 October 2021, Response to issues raised in submission, p 10.

2.4.2.3 Third party reliance provisions

The Queensland Law Society raised a concern that proposed section 53B of the PLA does not extend to statutory corporations or to corporations that are unable to fall within proposed section 46F(1) or (2).[94]

Queensland Law Society submitted that unless there is a similar provision in the legislation establishing the statutory corporation or the current section 227 of the PLA is retained in the new Property Law Bill, there will be no ability for third parties to rely on what appear to be due execution and further evidence will be required:[95]

> We note that under section 11C of the *Public Trustee Act 1978,* execution by the public trustee is deemed to be governed by section 227 of the PLA, which provides in section 227(2) that:
>
> > "A contract or other transaction made or effected under this section shall be effective in law, and shall bind the corporation and the corporation's successors and all other parties to the contract or other transaction."
>
> QLS submits that in the event section 227 of the PLA is not retained in the amended Property Law Act, an amendment to expand the application of proposed section 53B will be required.[96]

2.4.2.4 Departmental response

In response, the department advised that the third party reliance provision in proposed section 53B is deliberately narrow to correspond with the protection offered under section 129 of the *Corporations Act 2001* (Cth). It is not proposed to broaden the protection at this stage.[97]

DJAG also advised that 'section 53B(2) provides that the protection does not remove the need for a person to satisfy themselves of a signatory's authority to sign. This will be important for those corporations whose corporate officers or agents are not listed in a publicly searchable register (as is the case for corporations established under the Corporations Act)'.[98]

2.4.2.5 Execution of deeds by the State

Inquiry stakeholders including Allens Linklaters, King & Wood Mallesons, Queensland Law Society, Crime and Corruption Commission and the Australian Banking Association, recommended that the Bill be amended to include a provision in the PLA for the execution of a deed either in paper or electronically by the State of Queensland/governments.[99]

Queensland Law Society recommended that the Bill be amended address execution of deeds by the State:

> This has been identified as a deficiency in the existing legislation in Queensland and most other Australian States. As the legislation refers to *individuals* and *corporations* a court is unlikely to conclude that the provisions apply to execution by the State.
>
> There is an opportunity in this legislation to include a provision clarifying the position, particularly in relation to electronic deeds, and to provide a presumption of valid execution that other parties to a deed with the State can rely upon.[100]

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94 Queensland Law Society, submission 16, p 5.

95 Queensland Law Society, submission 16, p 5.

96 DJAG, Correspondence, 13 October 2021, Response to issues raised in submission, p 10.

97 DJAG, Correspondence, 13 October 2021, Response to issues raised in submission, p 10.

98 DJAG, Correspondence, 13 October 2021, Response to issues raised in submission, p 10.

99 See submissions 16, 22 and 25.

100 Queensland Law Society, submission 16, p 6.

Allens Linklaters, King & Wood Mallesons also recommended that the execution of deeds by the state be addressed by the Bill:

> … one important omission is execution by governments. In one recent transaction, while other parties were able to sign a deed electronically under the Regulations, the Queensland government did not. There is no reason why governments should not be able to sign documents electronically.
>
> This could be simply corrected —perhaps by a general provision allowing deeds to be electronic for all entities not covered by the other provisions.[101]

Talking further about this issue, Ms Fraser, Allens advised the committee that the issue with the current situation is one of uncertainty:

> I think the fix is easy ... You include a provision in these current proposed reforms which makes it clear that the state as a body can sign electronically. In fact, the Queensland Law Society's submission included examples from New Zealand, [which] actually has a very clear provision. The issue at the moment with electronic execution of documents is largely one of uncertainty. As I said in my opening remarks, the problem with uncertainty is that people default to the conservative position. In the absence of a clear statement, the view is that a government entity which does not fit the categories that are prescribed cannot sign something electronically. You need a clear statement to facilitate that going forward.[102]

2.4.2.6 Departmental response

DJAG stated that it will give further consideration to the proposed amendment.[103]

2.4.2.7 Committee comment

The committee notes the opportunity for the execution of deeds by the State to be addressed within the Document reforms proposed by the Bill. The committee recommends that further reforms be considered to address the execution of deeds by the State.

Recommendation 3

The committee recommends that further reforms be considered to address the execution of deeds by the State.

2.4.2.8 Execution of deeds by partnerships

Some inquiry stakeholders including Allens Linklaters, King & Wood Mallesons and the Australian Banking Association suggested that the Bill be amended to address the execution of deeds by a partnership.

Allens Linklaters, King & Wood Mallesons submitted:

> The express provisions relating to partnerships (s46G) are also very welcome. However, one of the difficulties relating to partnerships comes from the common law rule that a person authorised to sign a deed on behalf of another needs to be appointed by a deed. This has meant that all partners need to sign deeds, unless all partners have by deed authorised the execution by an individual partner.
>
> It should be made clear that an individual can sign for a partnership even if the individual was not appointed by deed.[104]

2.4.2.9 Departmental response

DJAG stated that it will give further consideration to the proposed amendment.[105]

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101 Allens Linklaters, King & Wood Mallesons, submission 22, pp 1-2.

102 Public hearing transcript, Brisbane, 15 October 2021, p 10.

103 DJAG, Correspondence, 13 October 2021, Response to issues in submissions, p 11.

104 Allens Linklaters, King & Wood Mallesons, submission 22, p 2.

105 DJAG, Correspondence, 13 October 2021, Response to issues in submissions, p 11.

2.4.2.10 Committee comment

The committee agrees that it would be prudent to give further consideration to addressing the execution of deeds by partnerships in cases where an individual is not appointed by a deed, and recommends that further consideration be given to addressing this matter in the Bill.

Recommendation 4

The committee recommends that further reforms be considered to address the execution of deeds by partnerships in cases where an individual is not appointed by a deed.

2.4.2.11 Execution of powers of attorney given by individuals

Allens Linklaters, King & Wood Mallesons and the Australian Banking Association submitted that they did not support section 46A of the PLA which requires power of attorney given by an individual in a deed to be signed on paper and witnessed, unless it meets certain criteria.[106]

Allens Linklaters, King & Wood Mallesons submitted that 'this has the effect of restricting access for individuals and sole traders (in the regions and elsewhere and inhibiting the ability of others to deal with them'.[107] Reasons for this position included:

- It is not clear why stopping someone doing something electronically gives any protection when they can do it by paper. It only creates difficulty.
- It retains the peculiar and arcane rule that a person can only authorise another person to sign a deed if the authorisation is itself a deed. … The effect is that an individual, no matter how sophisticated, can still only authorise another individual to sign a deed if the authorisation is itself a deed, and that authorisation that must be by paper witnessed physically.
- We have not seen any adverse consequences of permitting powers to be given electronically.
- … witnesses for deeds merely verify a signature. In this context, witnessing achieves little and can be a trap for other parties seeking to rely on the deed, as a failure to satisfy procedural requirements for witnessing can invalidate the deed, even though the other parties are not in a position to verify satisfaction. Setting procedural and other requirements for a remote witnessing link only compounds the problem.
- Witnessing and paper are not required for agreements, even though they may be of enormous significance to the parties.
- This approach means that individuals signing powers of attorney which are deeds, for which the paper and witnessing requirements apply, lose some of the benefits of electronic signatures.[108]
- A power of attorney or agency given by an individual which is not in the form of a deed will not be subject to the paper or physical witnessing requirement. We see no reason to justify a different treatment of powers of attorney in the form of a deed.
- There is an exception under s46A(2) where the document is part of a commercial or other arms' length transaction. Often, individuals sign separate powers of attorney authorising execution of deeds. Those are not part of a transaction but relate to the transaction. We suggest that at least the exception should carve out powers of attorney where they relate to specific transactions.[109]

2.4.2.12 Departmental response

In response, DJAG advised that several stakeholders had raised concerns about the increased risk of any provisions which would allow a power of attorney for an individual to be signed electronically and without a witness, particularly in the context of fraud and elder abuse and that section 46A is

106 See submissions 22 and 25.

107 Allens Linklaters, King & Wood Mallesons, submission 22, pp 2-3.

108 Allens Linklaters, King & Wood Mallesons, submission 22, pp 2-3.

109 DJAG, Correspondence, 13 October 2021, Response to issues in submissions, p 12.

designed to strike the appropriate balance by requiring higher risk transactions to be signed and witnessed in the usual way.[110]

DJAG noted that it will give further consideration to the suggestion of changing or annexing the criteria where the power of attorney *relates* to a specific arms' length transaction(s).[111]

2.4.3 Committee comment

The committee welcomes the proposed amendments in the Bill that will make permanent provisions introduced during the COVID-19 pandemic that support the making, signing and witnessing of certain legal documents through electronic means.

It is the view of the committee that the proposed document reforms will deliver real and practical benefits to the many individuals, businesses and industry stakeholders who require and work with legal documents in this state.

Notwithstanding the committee's recommendations outlined earlier in this chapter, the committee is satisfied that provisions in the Bill are relevant and appropriate, and will achieve the objective of modernising and streamlining Queensland's legislation, whilst increasing access to justice, certainty, reliability and cost savings. The committee is also satisfied that safeguards regarding the use of electronic signing and witnessing have been adequately considered and addressed, and encourages DJAG to continue giving consideration to further reform.

[110] DJAG, Correspondence, 13 October 2021, Response to issues in submissions, p 12.

[111] DJAG, Correspondence, 13 October 2021, Response to issues in submissions, p 12.

3 Domestic and family violence reforms

This section discusses the committee's examination of the domestic and family violence reforms contained in the Bill.

3.1 Background

The *Domestic and Family Violence Protection Act 2012* (DFVP Act) sets out the legislative framework for providing civil protection from domestic and family violence (DFV) through domestic violence orders (DVOs) and police protection notices. Applications for DVOs are made to a Magistrates Court by the aggrieved, a police officer or an authorised person or another person acting for an aggrieved.[112]

Ordinarily, private applicants must verify an application for a DVO by way of a signed and witnessed statutory declaration before a lawyer, JP, Cdec or other persons authorised by the Oaths Act. A private applicant may then file the application with the court by delivering the application personally, or by post, to the registry. A party to a proceeding under the DFVP Act (DFV proceeding) may appear before a Magistrate in person or be represented by a lawyer.[113]

During the COVID 19 pandemic, the Domestic and Family Violence Protection (COVID-19 Emergency Response Regulation 2020 (DFV COVID Regulation) put in place arrangements to reduce physical contact between persons who are seeking protection under the DFVP Act, or responding to an application for a domestic violence order (DVO).[114]

3.2 What does the Bill propose

The Bill amends the DFVP Act and the Domestic and Family Violence Protection Rules 2014 (DFVP Rules) to permanently retain the option to use modified arrangements introduced during the COVID pandemic, as provided by the DFV COVID Regulation, in particular circumstances.[115]

3.2.1 Amendments to the *Domestic and Family Violence Prevention Act 2012*

Specifically, the Bill amends the DFVP Act to increase the accessibility of the court for applicants in urgent situations. This is achieved by providing the option for private applications for protection orders and variations of DVOs to be verified between an applicant and a Magistrate, as an alternative to verifying the application by statutory declaration, for the purpose of the court making a temporary protection order before the respondent is served the application. [116]

The Bill also clarifies that it is at the Magistrates' discretion as to whether to conduct all or part of proceedings by AV link or audio link.[117]

While the processes outlined in the Bill largely reflect the DFV COVID Regulation, the process for alternative verification of an application for a protection order or variation of a DVO is narrower in scope than those outlined by the DFV COVID Regulation.[118] Unlike the DFV COVID Regulation, the Bill limits alternative verification arrangements to urgent situations only, for the purpose of seeking a temporary protection order, where an applicant is unable to access a relevant person for a statutory declaration, and before the respondent is served the application.[119]

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112 Explanatory notes, p 6.

113 Explanatory notes, p 7.

114 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 8.

115 Explanatory notes, p 3.

116 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 8.

117 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 8.

118 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 8.

119 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 8.

The explanatory notes, states that by limiting arrangements to only urgent situations means that 'most applicants will continue to verify the truth of their application prior to lodging their application; and that this balances greater accessibility and flexibility for DFV proceedings while ensuring appropriate safeguards to prevent potential misuse of DFV proceedings'.[120]

3.2.2 Amendments to the *Domestic and Family Violence Protection Rules 2014*

The Bill also amends the DFVP Rules which contain rules of court that provide for the practices and procedure of court registries in relation to DFV proceedings. The DFVP Rules currently provide that a private applicant may file their application with the court by delivering the application personally or by post, to the registry.[121]

The Bill amends the DFVP Rules to provide greater flexibility and accessibility to parties by extending the option of electronic filing of documents to private parties in DFV proceedings, with the approval of the Principal Registrar of the court.[122]

As above, this amendment is narrower in scope than arrangements introduced during the COVID pandemic, as the option for electronic filing is only with the approval of the Principal Registrar of the court.[123]

3.3 Stakeholder views

3.3.1 Support for reforms

Submitters including Queensland Law Society and the Women's Legal Service Queensland outlined their support for this part of the Bill.

Queensland Law Society outlined their support as follows:

> Using AV or audio links, alternative verification of private applications and electronic filing, in particular circumstances will be of significant benefit to many victims of domestic and family violence. …
>
> The ability to provide evidence virtually during the COVID-19 emergency has offered a safe way to engage with court processes in circumstances where domestic and family violence issues.[124]

Queensland Law Society also emphasised that it was important that it be at discretion of the court as to whether evidence should be heard by audio visual link or other remote means:

> In the view of many of our members who practise in domestic and family violence and criminal matters, the best evidence is obtained by witnesses appearing in person in a court room, however we acknowledge that there will be circumstances where the court may consider that justice will be better served by a vulnerable witness giving evidence by audio visual link (or other remote means).
>
> It may be that the quality of the evidence is compromised where a vulnerable witness is required to give evidence in the court room in circumstances where they do not feel safe to do so. This should always be a matter for the discretion of the court, as is presently provided for in the DFVP Act in conjunction with the special witness provisions in the *Evidence Act 1977* as well as in section 142A.[125]

Queensland Law Society also confirmed that amendments proposed by the Bill do not change existing provisions which enable vulnerable witnesses to apply to the court for special provisions to be made when giving evidence adding that 'It is important that this flexibility is retained both during the

[120] Explanatory notes, p 7.

[121] DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 8.

[122] DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 9.

[123] DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 9.

[124] Queensland Law Society, submission 16, p 2.

[125] Queensland Law Society, submission 16, pp 2-3.

emergency period and beyond, as the exercise of judicial discretion in determining these applications is most likely to achieve fairness and justice between the parties'.[126]

The Women's Legal Service Queensland (WLSQ) also outlined its support for this part of the Bill, specifically increased accessibility to justice and duty lawyer services:

> When considering overall benefits, WLSQ considers the use of audio visual or audio link (as well as electronic filing and dispensing with the need for witness requirements) will create a streamlined access to justice by providing victims with options and allow them to make the best decision for themselves.[127]

Women's Legal Service Queensland explained that for many women experiencing domestic violence, 'the thought of seeing a perpetrator face to face during a court appearance is overwhelming, extremely unsafe and a deterrent to filing applications for a protection order'.[128] WLSQ therefore considered that the ability to attend court mentions or other procedural hearings by the use of audio visual links or audio links 'will facilitate increased accessibility to court services and make the court processes safer and more convenient for women experiencing domestic violence'.[129]

3.3.2 Access to interpreters

WLSQ submitted that court processes can pose barriers to women, particularly culturally and linguistically diverse (CALD) women who may require an interpreter for legal advice and court appearances (both in person, and by video link).[130] WLSQ therefore encouraged the government to give consideration to the use of interpreters as a minimum standard for all women whose first language is not English, when they present at courts and as they navigate judicial systems more broadly.[131]

3.3.2.1 Departmental response

In response, DJAG advised that it is conscious of the needs of CALD communities, including when they are involved in a DVF proceeding. DJAG also confirmed that the DFV permanency reforms are 'in addition to, but do not replace, existing court practices' and that it is 'currently exploring options to improve the accessibility of Magistrates Courts services for diverse populations involved in DFV proceedings'.[132]

3.3.3 Committee comment

The committee is satisfied that the proposed sections of the Bill which allow for domestic and family violence matters to be heard via video or audio link are relevant and appropriate.

126 Queensland Law Society, submission 16, p 3.

127 Women's Legal Service Queensland, submission 21, p 2.

128 Women's Legal Service Queensland, submission 21, p 2.

129 Women's Legal Service Queensland, submission 21, p 2.

130 Women's Legal Service Queensland, submission 21, p 2.

131 Women's Legal Service Queensland, submission 21, p 2.

132 DJAG, Correspondence, 13 October 2021, Response to submissions, p 15.

4 Liquor reforms

This section discusses the committee's examination of the liquor reforms contained in the Bill.

4.1 Background

Ordinarily, in accordance with section 67A(2)(b) of the Liquor Act, the ability of licensed restauranteurs to sell takeaway liquor is limited to one opened and one unopened bottle of takeaway wine to adults dining on premises.[133]

In May 2020, in response to the COVID pandemic, the Justice and Other Legislation (COVID-19 Emergency Response) Amendment Act 2020 (COVID-19 ER Amendment Act) was passed which among other things, implemented temporary arrangements providing licensed restaurants and cafes operating subsidiary on-premises licence (meals) to sell takeaway liquor as of right until 10pm: with a takeaway food order; and in amounts not exceeding 2.25 litres of liquor (excluding straight spirits) – equivalent to three bottle of wine or either a six-pack of beer, cider or pre-mixed alcoholic drinks.[134]

4.2 What does the Bill propose

Part 5 of the Bill (Clauses 26–33) amends the Liquor Act to permanently retain aspects of the current temporary arrangements. The Bill amends provisions relating to the subsidiary on-premises licence (meals) (i.e. licensed restaurants to which section 67A of the Liquor Act applies) to enable restauranteurs to sell a maximum of 1.5 litres (i.e. two bottles) of takeaway wine with a takeaway meal sold during the ordinary trading hours for takeaway liquor up to 10pm with approval.[135]

The definition of a 'takeaway meal' in the Bill reflects the existing definition of 'meal' under the Liquor Act, and is defined as follows:

- takeaway food that is ordinarily eaten by a person sitting at a table with cutlery provided; and
- is of sufficient substance as to be ordinarily accepted as a meal; and
- is sold on licensed premises to be consumed off the premises.[136]

The Bill introduces an approval process for restauranteurs to apply to the Office of Liquor and Gaming Regulation for a variation of licence authorising the sale of 1.5 litres of takeaway wine with a takeaway meal. As part of the application process, restauranteurs will need to establish adequate systems for the responsible service of takeaway liquor. The Bill also provides that any approval is subject to conditions the Commissioner for Liquor and Gaming determines necessary to ensure the responsible service of alcohol. The commissioner also has the power to impose, amend or revoke conditions on a licence to minimise the risk of alcohol-related harm in the community.[137]

The Bill provides transitional arrangements that enable any restaurant operator that was eligible to use the COVID-19 temporary takeaway liquor authority, to apply for the permanent takeaway licence condition without paying the application fee for a variation of licence until 1 July 2022.[138]

The proposed amendments differ from the COVID-19 temporary takeaway liquor measures. In summary, amendments included:

- Responsible service and delivery of takeaway alcohol – licensees seeking the ability to sell takeaway liquor will be required to apply to the Office of Liquor and Gaming Regulation for

133 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 9.

134 Explanatory notes, p 16.

135 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 9.

136 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 9.

137 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 9.

138 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 9.

the approval to do so. Under that process, licensees will need to establish adequate systems to ensure the responsible service and delivery of alcohol.

- Provision of a full meal – takeaway food sold with takeaway wine must be of a substance to be accepted as a meal, and not just a snack. …
- Limitation on wine – the maximum volume of wine able to be sold with a takeaway meal has been reduced from 2.25 litres (i.e. three bottles) to 1.5 litres (i.e. two bottles). …and
- Removal beer and pre-mixed alcoholic drinks – given some beer and pre-mixed alcoholic drinks with spirits have a very high percentage of alcohol by volume, therefore posing a greater risk of adverse intoxication, these types of liquor will not be able to be sold for takeaway.[139]

4.3 Stakeholder views

Inquiry stakeholders expressed various, and often opposing views about this part of the Bill. Key issues raised are discussed below.

4.3.1 Limitations on the quantity and category of alcohol

A number of inquiry stakeholders called for amendments to the quantity and category of alcohol proposed to be permitted for sale under the Bill. These stakeholders opposed the decision to remove beer and pre-mixed alcoholic drinks and reduce the maximum volume of alcohol able to be sold.[140]

For example, Restaurant & Catering Australia submitted that this would have a 'devastating' effect on the industry:

> R&CA wishes to express its disappointment and bewilderment at the release of the Justice Legislation (COVID-19 Emergency Response – Permanency) Amendment Bill 2021, particularly changes to the quantity of alcohol allowed to be sold with a meal for takeaway at restaurants and cafés.[141]
>
> The removal of beer and RTDs from the legislation, as well as a cap at only a 1.5 litre bottle of wine, will have a devastating effect on an already hurting industry. … R&CA strongly supported following the example of other states such as South Australia and Victoria in introducing permanent laws that allowed takeaway liquor to be sold ancillary to the purchase of a meal and allowing for up to 2.25 litres of liquor to be sold.
>
> This announcement, without consultation, makes little sense as to why the sale of beer and RTDs would be removed from the current laws.[142]

Mr Wes Lambert, Chief Executive Officer, Restaurant & Catering Australia advised that in Queensland the sector represents 8,354 businesses, employing 112,000 people each year.[143]

R&CA advised that its 2020 Benchmark report indicated that the COVID-19 pandemic has 'drastically and permanently changed the face of the hospitality industry', with takeaways and delivery increasing from 9 percent of all orders pre-pandemic to nearly 30 percent afterwards.[144] Adding that the 'takeaway liquor has become an important source of revenue for operators and that this was particularly important given, 'restaurants, cafes and caterers have lost $10 billion in bookings and

139 Explanatory notes, p 17.

140 See for example: submissions 1, 2, 3, 6, 7, 10, 12, 13, 17.

141 Restaurant & Catering Australia, submission 1, p 1.

142 Restaurant & Catering Australia, submission 1, p 1.

143 Public hearing transcript, Brisbane, 15 October 2021, p 1.

144 Restaurant & Catering Australia, submission 1, p 1. See R&CA, Question on notice.

events since the start of COVID-19', and that this 'would be only amplified in regions such as Far North Queensland who are particularly hurt by staff shortages and by the loss of tourism.'[145]

Reflecting further on changing consumer expectations, Mr Lambert advised:

> The whole world has changed and going back to the way we used to do things is not good governance. The desires of consumers and the desires of businesses change over time, and COVID has accelerated both consumer behaviour and technology by a decade. Ultimately, consumers feel safer now getting takeaway and delivery and we expect that to be so for the next two to five years. Many hospitality businesses like restaurants, cafes and caterers have re-engineered their businesses in such a way where they have added new revenue channels—like takeaway, like delivery, like retail, like bespoke experiences. Ultimately, we can never go back to the way things used to be.[146]

A number of independent café/restaurant licence holders – including L'Unico Trattoria Pty Ltd, Sammy Gs Kitchen, Baseline Café, Griffith Uni Bar, outlined similar positions.[147]

Similarly, Spirits & Cocktails Australia, while welcoming steps to make the temporary measures permanent, did not support the decision to restrict permitted liquor to only wine and recommended that the temporary measures be reinstated in the Bill:

> This bill has the potential to stimulate growth for Queensland's hospitality sector, in particular its licensed restaurants, but the current drafting of the bill falls short of achieving this objective.
>
> There is simply no policy justification for restricting the sale of alcoholic beverages and takeaway meals to the wine category, from either a harm minimisation perspective or an industry and economic perspective. The current drafting of the bill allows for higher amounts of alcohol to be sold via two bottles of wine and is contained to a sixpack of premixed spirits or a sixpack of beer. … Alcohol is alcohol, as we say in the industry.
>
> Issues around harm relate to the total amount of alcohol consumed, not whether the alcohol was beer, wine or spirits. Just as the breathalyser does not discriminate between the type of alcohol consumed, nor should the bill. In fact, the current drafting of the bill hurts Queensland distillers, including the iconic Bundaberg Rum, and burgeoning craft producers as well as significant RTD, ready-to-drink, manufacturers who directly employ thousands of Queenslanders.
>
> Takeaway cocktails and RTDs offer consumers a modern and vibrant alternative and one that accords with current drinking trends, which show that Australians are choosing to drink less in terms of volume and better quality alcohol beverages that celebrate the provenance of spirits produced by our award-winning craft distilling industry. In fact, data from the Australian Bureau of Statistics confirms Australia's per capita alcohol consumption is at its lowest in 50 years.[148]

A number of representatives from the brewing industry also participated in the inquiry. The Independent Brewers Association (IBA) (a peak national body representing 600 independent brewers, 65 per cent of which are small businesses based in regional and rural Australia) submitted:

> Independent brewers in Queensland were grateful for the Bill that was introduced in May 2020, which allowed venues to temporarily sell takeaway liquor regardless of the limitations of their licence or permit. This provided a much-needed distribution channel during what was a very challenging time for small business in the state.[149]

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145 Restaurant & Catering Australia, submission 1, p 1.

146 Public hearing transcript, Brisbane, 15 October 2021, p 2.

147 See for example: Submissions 3, 6, 7, 8.

148 Public Hearing Transcript, Brisbane, 15 October 2021, pp 15-16.

149 Independent Brewers Association, submission 10, p 1.

> It is difficult to understand the exclusion [of beer] given we have seen no data that provides evidence to back claims made about adverse intoxication.[150]

A number of independent brewers in Queensland supported this position. For example, the Scenic Rim Brewery stated:

> I also oppose the legislation in its current form as it is not equitable and further entrenches the businesses that currently have a near monopoly on take-away sales while once again failing to provide the craft beer industry in Queensland with greater market access.[151]

Similarly, White Brick Brewing submitted:

> I am incredibly disappointed at how craft breweries are being treated in this situation. This does appear completely at odds with the Queensland Craft Brewing Strategy. The strategy claims to make a priority of helping craft brewers get access to markets to grow the industry and create more local jobs. Just not seeing it in this case.[152]

The Chamber of Commerce and Industry Queensland (CCIQ), also reflected on the decision to modify the limit and type of alcohol, submitting that the 'rationale for the proposed restrictions from the temporary arrangements currently in place appear disproportionality restrictive to the risk associated with the sale of takeaway alcohol with a meal'.[153]

Conversely, Mr Bernie Hogan, Chief Executive, Queensland Hotels Association (QHA) opposed the sale of any takeaway liquor by restaurants and cafes:

> QHA does not support cafes and restaurants selling any type of takeaway liquor— beer, wine or spirits— now that trading has returned essentially to full capacity. QHA suggests it is an opportunistic representation regarding the COVID-19 emergency response temporary relief measures becoming permanent. The bill is not intended to significantly expand the scope of the takeaway liquor licensing framework already operating in Queensland. It is fit-for-purpose and effectively services Queensland's community.[154]

Similarly, Clubs Queensland (the peak industry body representing 900 licensed clubs in Queensland) submitted, that the variations proposed by the Bill were more appropriate:

> CQ notes the variations made to the Bill, from what has been previously proposed and discussed with the Office of Liquor and Gaming Regulation (OLGR). Primarily, this variation relates to licensed restaurants (the holders of subsidiary on-premises licences (meals)) being limited to the sale of a maximum of 1.5 litres of wine with a takeaway meal up to 10:00pm.
>
> CQ considers that this variation reflects a better position from a harm minimisation perceptive, given the nature of the product being sold and aligns to the current purpose of the existing licence. CQ is of the view that the change is also more equitable for industry.[155]

4.3.1.1 Departmental responses

In response, DJAG advised that limitations to the sale of beer and pre-mixed alcoholic drinks were based on the determination not to extend the restaurant takeaway provisions beyond the existing takeaway allowance for on-premises diners and not on any specific study or research associated with alcohol content.[156]

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150 Independent Brewers Association, submission 10, p 2.

151 Scenic Rim Brewery, submission 13, p 1

152 White Brick Brewing, submission 17, p 1.

153 Chamber of Commerce and Industry Queensland, submission 18, p 3.

154 Public Hearing Transcript, Brisbane, 15 October 2021, p 20.

155 Clubs Queensland, submission 15, p 1.

156 DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, pp 25.

4.3.2 Committee comment

The committee acknowledges the opposing positions submitted on this matter. The committee in particular notes the strong representation from the restaurant, catering and independent brewing sectors.

Having considered the economic, health, responsible service of alcohol, and licensing implications canvassed throughout this chapter, the committee believes there is opportunity for all parties to find a middle ground that meets the needs of all parties and supports small businesses as well as harm minimisation strategies.

The committee recommends that the Minister consider amending the Bill, to provide the option of allowing 1.5 litres of either wine, beer, cider or pre-mixed drinks, to be sold with a takeaway meal.

Recommendation 5

The committee recommends that the Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence consider amending the Bill, to provide the option of allowing 1.5 litres of either wine, beer, cider or pre-mixed drinks, to be sold with a takeaway meal.

4.3.3 Potential increased risk of alcohol-related harm and harm protection measures

A number of submitters, including Queensland Hotels Association, Retail Drinks Australia, and the Foundation for Alcohol Research and Education (FARE), opposed the liquor amendments on the basis that amendments in the Bill could increase the risk of alcohol related harm in the community.

By way of example, FARE opposed making the temporary arrangements permanent 'because they will increase the availability of alcohol and increase the risk of alcohol harm to people in the home'.[157]

FARE submitted 'making these measures permanent fails to consider the public health harm that will result in the increased availability of alcoholic products'.[158]

FARE also advised the committee that 'alcoholic products are being sold and delivered to people who are intoxicated' and that 'during the pandemic there has been sharp rises in alcoholic product deliveries, particularly rapid deliveries (within two hours of ordering).'[159]

FARE advised the committee of its 2020 Annual Alcohol Poll, carried out in the January prior to the COVID-19 restrictions, that found that for Australians receiving alcohol deliveries within two hours of ordering, 70 per cent drank more than four standard drinks that day (above recommended government health guidelines), and of this group over a third (38 per cent) drank 11 or more standard drinks the day of delivery, putting themselves and those around them at heightened risk of harm.[160]

Conversely, a number of organisations disagreed with views that the Bill would result in increased intoxication and adverse impacts.

For example, the Independent Brewing Association, submitted:

> As a simple logic check, we note that the average retail beer has an ABV of 4-6%, and RTDs are between 4 and 6%, while wine sits at 12-14%, a far higher percentage of alcohol by volume. While some beers may be of a higher percentage, these are not generally available for on-premise sale.[161]

[157] Foundation for Alcohol Research & Education, submission 19, pp 2-3.

[158] Foundation for Alcohol Research & Education, submission 19, pp 2-3.

[159] Foundation for Alcohol Research & Education, submission 19, p 3.

[160] Foundation for Alcohol Research & Education, submission 19, p 3.

[161] Independent Brewers Association, submission 10, p 2.

> We also note that any person can purchase beer, spirits and wine of high ABV content at any time from bottle shops. To limit take-away sales only to bottle shops is a discriminatory decision that favours and protects certain elements of the industry, with no data to justify that decision.[162]

Mr David Kitchen, Director, Independent Brewers Association and part owner of Ballistic Beer Company told the committee:

> Beer is the only alcoholic product that provides a low-alcohol option: zero alcohol, ultra-low, light and mid-strength beers. The two biggest selling beers in Queensland are 3½ per cent and they outsell all other beverages. The average RTD sits between four and six per cent. However, every bottle of wine is 12 to 14 per cent. Wine is twice as alcoholic as RTDs and four times more alcoholic than Queensland's favourite beers. If the government is serious about harm minimisation, why are we limiting consumers to only purchasing high-ABV wines? Give them the option to purchase low-ABV beers, ciders and RTDs.[163]

4.3.4 Online sales and home delivery of liquor

A number of inquiry stakeholders discussed risks associated with the home delivery of takeaway liquor supplied with a takeaway meal.

Ms Caterina Giorgi, Chief Executive Officer, Foundation for Alcohol Research and Education said:

> We definitely see extending the availability of alcohol as exacerbating alcohol harms. What we have seen is a huge explosion in alcohol delivery from a range of companies .., and that explosion of deliveries has particularly happened in that rapid delivery category which we know is associated with increased harm. That is because people are tending to order alcohol through rapid delivery while they are intoxicated and using it to top up, and that, of course, contributes to more harm at home. We also know that more harm is more likely to happen later at night, so having alcohol sold into the home late at night is really problematic. To be completely honest, we do not have the right parameters for alcohol delivery and we cannot keep people safe with what we have in place at the moment.[164]

FARE recommended that the Queensland Government amend the Liquor Act to incorporate common sense restrictions on online sales and rapid delivery. Such measures could include:

- restricting alcohol deliveries between 10pm and 10am (to reduce the risks of family violence),
- introducing a two-hour delay between order and delivery (to stop the rapid supply of alcoholic products),
- introducing on line age verification through digital ID checks (to ensure alcohol is not sold to children)
- ensuring there are no unattended deliveries of alcohol, (to ensure alcohol is not sold to children and people who are intoxicated).[165]

Mr Steele, Queensland Hotels Association stated that it would support a requirement for delivery drivers to have a current Responsible Service of Alcohol Certificate to ensure that appropriate checks are completed for any deliveries.[166] Talking further about this, Mr Hogan, Queensland Hotel Association added:

> I think RSA is something that has been looked at across the industry when it comes to delivery. There are some sensible parts in the bill, like saying it has to be a substantial meal. What we do not want to see is a garlic bread and a sixpack delivered at two o'clock in the morning to 15- year-olds. The individual delivering needs to have an RSA. There needs to be something at stake. We talk about the RMLV—the responsible management of licensed venues—qualification. In a hotel situation, if they allow that sale their licence is at stake and their livelihood is at stake. If you have somebody who does not have an RSA,

[162] Independent Brewers Association, submission 10, p 2.

[163] Public Hearing Transcript, Brisbane, 15 October 2021, p 14.

[164] Public Hearing Transcript, Brisbane, 15 October 2021, p 25

[165] Foundation for Alcohol Research & Education, submission 19, p 4

[166] Public Hearing Transcript, Brisbane, 15 October 2021, p 14.

> who does not have any skin in the game, or a minimal investment, that impetus is removed. We believe in the responsible service of alcohol right across Queensland.[167]

4.3.4.1 Departmental response

DJAG advised that the government had committed to considering the efficacy of introducing a regulatory framework governing online alcohol sales and deliveries, in consultation with key industry and community stakeholders. [168] DJAG also confirmed that issues around online liquor sales and deliveries impact on all aspects of the takeaway liquor industry (including deliveries by bottle shops or third party delivery drivers) and that, these issues will examined across all relevant licence types, as part of a separate, dedicated process commencing in 2022.[169]

4.3.5 Committee comment

The committee welcomes the government's intentions to conduct a review into the regulatory framework relating to the online sales and delivery of alcohol and notes the broader issue of alcohol delivery regulation is a matter outside of the scope of this Bill.

4.3.6 Responsible Service of Alcohol requirements

Some inquiry stakeholders, including the Queensland Hotels Association and Independent Brewers Association reflected on specific Responsible Service of Alcohol (RSA) requirements and measures to support the responsible service of alcohol.

By way of example, Clubs Queensland submitted that the licence application process included within the Bill was an important addition to ensure the responsible service of alcohol.

> During initial consultations, CQ highlighted concerns regarding the Responsible Service of Alcohol (RSA) standards of licensed restaurants associated with the sale of take away liquor. [170] …
>
> It is noted that the new section 67AA of the Act requires that licensees holding a subsidiary on premises licence (meals), must apply to vary the conditions of the licence to sell takeaway liquor. This is of critical importance.[171]
>
> The Explanatory Memorandum (EM) to the Bill sets out that the Commissioner for Liquor and Gaming (the Commissioner) must be satisfied that the licensee has, or will have, relevant systems and procedures in place to ensure the responsible service of takeaway liquor.
>
> CQ supports this additional application requirement, but stresses that there must be stringent assessment conducted of such systems, given the potential risks associated with such liquor being supplied to minors.[172]

4.3.6.1 Departmental response

In response, DJAG advised that the licensee and all staff of the licensed premises involved in the service or supply of liquor are required to undertake RSA training and have a current training course certificate. This requirement applies to all licensed premises.[173] DJAG also advised that restaurants are considered low risk and, under the *Liquor Act 1992*, are not required to have an approved manager unless they trade after midnight. [174]

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167 Public hearing transcript, Brisbane, 15 October 2021, p 21.

168 DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, p 20.

169 DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, p 20.

170 Clubs Queensland, submission 15, p 1.

171 Clubs Queensland, submission 15, p 1.

172 Clubs Queensland, submission 15, p 2.

173 DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, p 18.

174 DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, p 18.

DJAG also confirmed that an application to vary a licence condition may be subject to a requirement for the licensee to provide a community impact statement addressing, in part, the potential infiltration or proliferation of certain venue types and their impact to the community.[175] Furthermore, provisions in the Bill, allow the Commissioner to apply conditions to an approval, to ensure that liquor is served responsibly and can also amend or revoke an authority of a restaurant licensee that has contravened licence conditions.[176]

Recommendation 6

The committee recommends that the Minister, in the second reading speech, clarify measures that will support the responsible service of alcohol by restaurants and cafes selling alcohol with takeaway meals.

4.3.7 Competition in the market

Some submitters, including Retail Drinks Australia and Queensland Hotels Association, raised concern that the increase in takeaway liquor outlets under the Bill would result in a saturation of the market that placed hotels and bottle shops at a competitive disadvantage.

Retail Drinks Australia submitted that the amendments would result in an additional 4,217 businesses being able to permanently sell takeaway liquor, thereby increasing the number of available takeaway alcohol retailers by 400 per cent. Retail Drinks Australia expressed concern about the adverse impact this proliferation of takeaway liquor suppliers would have on the existing market:

> We note that the takeaway authorisation measures originally introduced by the Queensland Government at the height of the COVID-19 pandemic were only ever intended to be temporary in order to support struggling on-premises licence (restaurants and cafés) during various lockdown and stay-at home measures.[177]
>
> We note that the policy intent of the proposal, as per the current version of the Bill, is entirely inconsistent with this objective and will significantly disadvantage existing liquor retail outlets.[178]

Similarly, Queensland Hotels Association made claims regarding the impact to the Queensland hotel industry and those small business owners who have invested in the appropriate licence type, particularly in regional areas, and whose businesses have also been impacted by COVID-19:

> The QHA concerns with the Bill are based on a further diminishment of our members' existing and potential trading entitlements and an inequitable licensing and compliance playing field. The QHA's suggested parameters to accompany this permanent change to restaurant liquor licences will not protect jobs in the hotel industry or enhance growth in the hospitality industry, but may make the proposed changes somewhat more palatable and equitable for QHA members and other affected commercial hotel and community club licensees.[179]

Mr Hogan, QHA was of the view that:

> This bill should not be used to circumvent the takeaway liquor licence framework and harm minimisation requirements at the expense and disadvantage of the existing and established retail network—businesses that have invested in the appropriate licence types, training and harm minimisation obligations for many years.[180]

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175 DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, p 17.

176 DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, p 18.

177 Retail Drinks Australia, submission 9, p 2.

178 Retail Drinks Australia, submission 9, p 2.

179 Queensland Hotels Association, submission 5, p 2.

180 Public Hearing Transcript, Brisbane, 15 October 2021, p 20.

Conversely, a number of inquiry stakeholders, including L'Unico Trattoria, Sammy Gs Kitchen, Baseline Café, Griffith Uni Bar disagreed with the view that bottle shops would be adversely impacted by allowing cafes and restaurants to sell limited amounts of alcohol:

> Since the impact of nationwide lockdowns and the onset of COVID-19 in Australia, from March 2020 to February 2021, the turnover for liquor sales was $16.06 billion, an increase of almost 30 percent from $12.43 billion the previous year. This is proof that the restaurant, café and catering sector can co-exist with bottle shops without taking their market share. This is especially the case in regional Queensland where the hospitality sector has been hit hardest.[181]

Mr David Kitchen, Independent Brewers Association advised the committee:

> In terms of the loss of revenue for bottle shops, last year takeaway liquor sales grew by 30 per cent, or $4 billion, to a total of $16 billion, despite the restaurant takeaway legislation being in action at the time. The impact of restaurant takeaways has been negligible on the massive revenues generated by bottle shops. At the same time, restaurants lost $10 billion…[182]

Mr Hugo Robinson, Restaurant and Caters Australia also outlined other market considerations including the purchasing of bespoke liquor products from local producers, rather than products typically sold in bottle shops:

> Let's say, for example, a restaurant has put a lot of time into sorting out a wine list that they believe is perfect with the meal, you cannot find any of those wines at a bottle shop or a pub. They are completely sourced by them in supporting small and local industries which do not have big deals with the bottle shops. They are going with local Queensland producers or producers around Australia and you cannot find that anywhere else. That is typically what those wine lists look like. As I said, if we are going to have 30 per cent of Australians now dining from home more often, I think it is quite a shame that we would deprive restaurants of the ability to sell that.[183]

Mr Steele, Independent Brewers Association, reiterated this point, adding:

> I would make the simple observation that these sales are happening anyway. You have had a busy day at work, you stop on the way home and you grab something from your favourite local restaurant. The voters have shown that they want to support those small businesses. Those small restaurants support other small artisan producers, not just in the liquor sector. They buy artisan cheese; they buy farm beef; they go to our local seafood producers. They do those things and they put them on your plate or in your takeaway meal container. They also favour food and drink matching. It was always food and wine matching. That is evolving because the voters' tastes are evolving. They support going to their local restaurant and buying the liquor that they would consume if they were dining in the restaurant.[184]

4.3.7.1 Departmental response

In response the DJAG provided information on a recent survey of approximately 4,000 licensed restaurant and café operators in Queensland undertaken by the Liquor, Gaming and Fair Trading Division. The survey found that a majority of the respondents using the COVID-19 temporary takeaway liquor authorities purchase some or all their liquor from hotels or bottle shops (51% in South East Queensland and 73% in regional areas). Specifically:

- 331 of the 415 complete responses received reported using takeaway liquor authorities;
- 187 licensees using the takeaway liquor authority State-wide purchased all or some of their liquor from hotels or bottle shops (approximately 56%);

[181] See for example: L'Unico Trattoria Pty Ltd, Submission 3; Sammy Gs Kitchen, submission 6, Baseline Café, submission 7 , Griffith Uni Bar, submission 8.

[182] Public Hearing Transcript, Brisbane, 15 October 20201, p 14.

[183] Public hearing transcript, Brisbane, 15 October 2021, p 7.

[184] Public hearing transcript, Brisbane, 15 October 2021, p 15.

- 65 of the 90 regional licensees that used takeaway liquor authorities purchased all or some of their liquor from hotels or bottle shops (approximately 73%); and
- 122 of the 241 South East Queensland licensees that used takeaway liquor authorities purchased all or some of their liquor from hotels or bottle shops (approximately 51%). [185]

DJAG advised that 'this indicates that, in many circumstances, holders of a subsidiary on-premises licence (meals) are purchasing from and supporting local hoteliers, rather than competing with them'.[186]

4.3.8 Administrative impacts on small business

Varying positions on the licensing process introduced in the Bill were expressed by stakeholders. The Independent Brewers Association and CCIQ, submitted that the Bill creates an unnecessary regulatory burden that disproportionately impacts small businesses, especially, given the lack of evidence of an increased risk of harm from the temporary COVID 19 takeaway liquor authorities.

Independent Brewers Association submitted:

> Currently, licensed restaurants and cafes do not have an onerous reporting requirement under the Temporary Measures Legislation. The proposed new Amendments intend to impose additional reporting requirements on restaurants and cafes that are more onerous than is required from any Hotelier and Liquor Retailer in the country for sale from their venues, bottle shops, on-line and home-delivery sales.[187]

Some submitters commented on the fee arrangements for the new permanent takeaway license condition.

For example, CCIQ was supportive of the transitional arrangements that waived the application fee until 1 July 2022, describing the measures as being 'in line with business-friendly provisions that reduce the cost and complexity of doing business.[188]

Whereas, the Queensland Hotel Association proposed that fees relating to the permanent licence condition should be higher, in line with the fees associated with hotels and bottle shops that are authorised to sell takeaway liquor:

> … there should be an appropriate application fee and annual liquor licence fee for restaurants and cafes to sell takeaway liquor. For comparison, bottle shops currently pay a $1,107 application fee and an annual liquor licence fee of $4,418. These fees should be applicable after the current 'COVID fee-waiver' period expires.[189]

Retail Drinks Australia reflected on compliance of enforcement stating:

> … there has been no indication as to how these provisions of the Bill will be enforced amongst on-premises licensees. Given that there will be over 4,200 additional businesses who will be able to conduct takeaway liquor sales, a corresponding increase in resources will be required to ensure that these businesses are compliant with the law.[190]

4.3.8.1 Departmental response

In response, DJAG advised that the Office of Liquor and Gaming Regulation (OLGR) operates risk-based liquor compliance programs which include both proactive and reactive elements. The risks associated with restaurant type liquor operations are inherently low. Accordingly, unless there are specific

185 DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, pp 23-24.

186 DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, pp 23-24.

187 Independent Brewers Association, submission 10, p 3.

188 Chamber of Commerce and Industry Queensland, submission 18, p 3.

189 Queensland Hotel Association, submission 5, p 2.

190 Retail Drinks Australia, submission 9, p 3.

indicators of risk, such as complaints from the general public, police reported incidents or conditions included on the licence that allow for the provision of live entertainment, these types of venues are generally infrequently inspected by OLGR.

DJAG also confirmed that once the restaurant takeaway provisions are in place, as part of its proactive liquor compliance program, OLGR will inspect an appropriately sized sample of restaurants that have been conditioned to allow for take-away liquor sales. These inspections will include an assessment of the systems and procedures the licensees have in place to ensure the responsible service of take-away liquor.[191]

As is the case with all liquor licensed venues, as part of its reactive liquor compliance program OLGR will also assess any complaints received from the general public or police reported incidents to determine if a compliance investigation is warranted. [192]

4.3.8.2 Committee comment

The committee is satisfied that the license application process is relevant and appropriate.

[191] DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, p 33.

[192] DJAG, Correspondence, 13 October 2021, Response to issues raised in submissions, p 33.

5 Leases Reforms

This section discusses the committee's examination of the leases reforms contained in the Bill.

5.1 Background

The Bill amends the *COVID-19 Emergency Response Act 2020* to provide that a regulation under section 23 must be made before the COVID-19 legislation expiry day (30 April 2022) and expires two years after that date, unless it is sooner repealed.[193]

The Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 (SL 79 of 2020) (Leases Regulation) was made pursuant to section 23 of the *COVID-19 Emergency Response Act 2020*.

The regulation established the 'good faith' principles under which certain lessee's and lessors were to negotiate new commercial lease arrangements during the lockdown period. This followed from a National Cabinet agreement that commercial tenants were not to be evicted or have their rents increased during the health emergency. The regulation applied for 6 months from May to October 2020. The Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Amendment Regulation 2020 (SL 234 of 2020) then extended these arrangements for another 3 months to 31 Dec 2020.

Part 6 of the *COVID-19 Emergency Response Act 2020* established the Queensland Small Business Commissioner (QSBC). Section 20 outlined the QSBC functions and powers:

> (1) The functions of the commissioner are—
>
> (a) to provide information and advisory services to the public about matters relevant to small businesses, particularly in relation to the COVID-19 response measures; and
>
> (b) to assist small businesses in reaching an informal resolution for disputes relating to small business leases; and
>
> (c) to administer a mediation process prescribed by regulation under section 23(1)(g) in relation to small business tenancy disputes.

The appointment of the QSBC was originally legislated to end on 31 December 2020.[194]

On 12 October 2021, Hon Di Farmer MP, Minister for Employment and Small Business and Minister for Training and Skills Development introduced the Small Business Commissioner Bill 2021 into the Queensland Parliament.

The Bill proposes the establishment of a permanent Small Business Commissioner and a supporting office in order to provide tailored support to business, reduce the time and costs associated with dispute resolution involving leasing and franchise issues, and provide initial advice and information to small business about any type of dispute, and connect them to assistance and report. The Bill is currently being considered by the Education, Employment and Training Committee for report by 26 November 2021.[195]

5.2 What does the Bill propose

The Leases Regulation provides for the Queensland Small Business Commissioner (QSBC) to mediate affected lease disputes, being disputes about rent relief arrangements during the period from 29

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193 DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 10.

194 *COVID-19 Emergency Response Act 2020,* Sec 19(7).

195 Education, Employment and Training Committee, Small Business Commissioner Bill 2021, https://www.parliament.qld.gov.au/Work-of-Committees/Committees/Committee-Details?cid=0&id=4122

March 2020 to 31 December 2020, and small business tenancy disputes, being disputes about a small business lease or the use or occupation of the leased premises (each, an eligible lease dispute).[196]

DJAG advised that 'as well as preserving any rent relief arrangements under the Leases Regulation, the amendment will allow the QSBC to continue to provide mediation services in respect of eligible lease disputes until such time as the permanent statutory office of the QSBC is established'.[197]

5.3 Stakeholder views

The committee did not receive any stakeholder feedback relating to this part of the Bill.

[196] DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 10.

[197] DJAG, Correspondence, 5 October 2021, Parliamentary Committee Briefing Note, p 10.

6 Compliance with the *Legislative Standards Act 1992*

6.1 Fundamental legislative principles

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

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

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

6.2 Institution of Parliament and rights and liberties of individuals

Extension of period of operation of certain regulations made under the COVID-19 Emergency Response Act 2020 and the Retail Shop Leases Act 1994

Section 23 of the *COVID-19 Emergency Response Act 2020* (Emergency Response Act) enables a regulation to be made under the Emergency Response Act or the *Retail Shop Leases Act 1994* (Retail Shop Leases Act) for responding to the COVID-19 emergency. A regulation may, for example:

- prohibit the recovery of possession of premises under a relevant lease[198] by a lessor of the premises from a lessee of the premises, or
- prohibit the termination of a relevant lease by a lessor or owner of premises, or
- regulate or prevent the exercise or enforcement of another right of a lessor of premises under a relevant lease or other agreement relating to the premises, or
- exempt a lessee, or a class of lessees, from the operation of a provision of an Act, relevant lease or other agreement relating to the leasing of premises.[199]

A regulation made under section 23 may:

- be inconsistent with an Act or law, other than the *Human Rights Act 2019* (HRA), to the extent necessary to achieve a purpose of the regulation and the Emergency Response Act
- have retrospective operation to a day not earlier than the commencement of the Emergency Response Act (ie 23 April 2020)
- provide for a maximum penalty of not more than 20 penalty units for a contravention of the regulation.[200]

At present, the Emergency Response Act provides that these regulations must be made before, and expire on, the COVID-19 legislation expiry day.[201]

The Justice Legislation (COVID-19 Emergency Response—Permanency) Amendment Bill 2021 (Bill) proposes to amend the Emergency Response Act to provide that such regulations must be made

198 A 'relevant lease' is a retail shop lease under the Retail Shop Leases Act or a lease prescribed by regulation for the definition: Emergency Response Act, s 23(8).

199 Emergency Response Act, s 23(1).

200 Emergency Response Act, s 23(2).

201 Emergency Response Act, s 23(6).

before the COVID-19 legislation expiry day (currently 30 April 2022[202]), and expire no later than 2 years after that day.[203]

This proposed extension of the period of operation of certain regulations made under the Emergency Response Act and the Retail Shop Leases Act raises issues of fundamental legislative principles relevant to both the rights and liberties of individuals and the institution of Parliament. These are outlined below.

6.3 Rights and liberties of individuals

Section 4(2)(a) of the *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals.

6.3.1 Property rights

Legislation should not abrogate the common law rights of individuals, such as property rights, without justification.[204]

The Bill provides for the extension of the operation of regulations made under section 23 of the Emergency Response Act. This means that, amongst other things, a regulation made before the COVID-19 legislation expiry day may prohibit the termination of a relevant lease by a lessor or owner of premises and the recovery of possession of premises under a relevant lease by a lessor of the premises from a lessee of the premises, for a period up to 2 years after the COVID-19 legislation expiry day.[205] These restrictions could have significant financial or other impacts on lessors or owners.

In addition, legislation should not adversely affect rights and liberties, or impose obligations, retrospectively.[206] As noted above, regulations made under section 23 of the Emergency Response Act may have retrospective operation to a day not earlier than 23 April 2020. The Office of Queensland Parliamentary Counsel (OQPC) advises that a Bill 'should not contain any provision that adversely and retrospectively affects rights or liberties, or retrospectively imposes obligations without strong justification'.[207]

Justification

The explanatory notes to the Bill do not address the potential issues of fundamental legislative principle raised by the extension of the period of operation of regulations made under section 23 of the Emergency Response Act.

The explanatory notes to the COVID-19 Emergency Response Bill 2020 (Emergency Response Bill) advise that facilitating implementation of the National Cabinet decision in relation to good faith leasing principles for relevant non-residential leases in Queensland was a policy objective of the Emergency Response Bill.[208]

The Emergency Response Bill explanatory notes provide the following justification for the initial regulation-making power:

> The regulation-making power for implementing the National Cabinet decision in relation to good faith leasing principles for relevant non-residential leases in Queensland potentially breaches the fundamental legislative principles to the extent that it may not have sufficient regard to the institution of Parliament

202 Emergency Response Act, s 4A.

203 Bill, cl 4 (Emergency Response Act, amended s 23).

204 OQPC, *Fundamental legislative principles: the OQPC notebook*, pp 95-98, 110.

205 Note too that the COVID-19 legislation expiry day may be further amended.

206 LSA, s 4(3)(g).

207 OQPC, *Fundamental legislative principles: the OQPC notebook*, p 56; LSA, s 4(2)(a).

208 Emergency Response Bill, explanatory notes, p 2.

(section 4(2)(b) Legislative Standards Act) or the rights and liberties of individuals (section 4(2)(a) Legislative Standards Act).

This is because it allows for regulations to be made that may be inconsistent with a provision of an Act or a law to the extent necessary to achieve the purpose of the regulation and this Act; and that interfere with and override the legal rights of landlords under current legislation and lease arrangements.

The wide regulation-making power is justified because there needs to be flexibility in providing for the detail of the implementation of the National Cabinet decision in relation to good faith leasing principles and this may involve overriding Acts and laws that would ordinarily apply.

Overriding landlords ordinary property rights is justified by the need to respond to the financial hardship being experienced by some tenants due to closures and restrictions on movement and social distancing which the COVID-19 emergency has caused (and will continue to cause) and to provide a fair sharing of the burden of the pandemic between landlords and tenants.[209]

Section 23 of the Emergency Response Act provides some safeguards in that a regulation made under the section must declare that it is made under the section, and any regulation made under the section must be tabled within 14 days, rather than the usual 14 sitting days.[210]

6.3.2 Administrative power

Whether legislation has sufficient regard to the rights and liberties of individuals depends on whether, for example, the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.[211]

The Bill would amend the *Oaths Act 1867* (Oaths Act) to provide that the chief executive may approve a justice or commissioner for declarations to be a special witness[212] if the chief executive is satisfied the justice or commissioner for declarations is an appropriate person for witnessing documents under part 6A (Audio visual links) of the Oaths Act.[213]

The Bill does not provide any criteria for the chief executive to make the decision about whether a justice or commissioner for declarations is an appropriate person for witnessing documents under part 6A, nor does it provide a requirement for the chief executive to provide reasons for the decision. The Bill also does not provide an avenue of review for a justice or commissioner for declarations who is dissatisfied with a decision of the chief executive.

The explanatory notes do not address the issue of administrative power.

6.4 Institution of Parliament

Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament.

6.4.1 Delegation of legislative power

Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill allows the delegation of legislative power only in appropriate cases and to appropriate

209 Emergency Response Bill, explanatory notes, p 10.

210 Emergency Response Act, s 23(4), (7). Note, however, that there is no consequence if these requirements are not complied with.

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

212 Special witness, for a document, is defined in clause 38 of the Bill (Oaths Act, new s 12(1)) as a person who is one of a number of specified persons (eg an Australian legal practitioner, a notary public).

213 Bill, cl 38 (Oaths Act, new s 12(1)(c), (2)).

persons,[214] and sufficiently subjects the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly.[215]

The Bill provides for the delegation of legislative power in numerous provisions, including by inserting a power for the Governor in Council to make regulations under the Oaths Act about the making, signing and witnessing of affidavits and declarations.[216]

Amongst other things, the Bill would also amend the Domestic and Family Violence Protection Rules 2014 (DFVP Rules) to enable the principal registrar to approve:

- the electronic filing of a document or documents of that class
- the electronic file format for a document or class of documents.[217]

The Bill would also enable the person or body for a court or tribunal who has the power to make rules of court or practice directions regulating the practice and procedure of the court or tribunal to make, give, issue or approve a rule or practice direction that states an accepted method for electronically signing an affidavit or a declaration to be filed or admitted into evidence in a proceeding in the court or tribunal.[218]

The Bill provides that when making, giving, issuing or approving a rule or practice direction, the person or body for the court or tribunal must consider the need to ensure consistency of the rule or practice direction with the rules or practice directions of other courts and tribunals. If a rule or practice direction made, given, issued or approved is inconsistent with a regulation made under proposed section 13A(1) of the Oaths Act, the regulation prevails to the extent of the inconsistency.[219]

The explanatory notes state that the delegations of legislative power in the Bill have sufficient regard to the institution of Parliament:

> It is considered consistent with this principle … because the power is consistent with the policy objectives of the Bill and contains only matters that are appropriate for subordinate legislation. It is also important that the legislation is sufficiently flexible to keep pace with technology and be responsive to emerging issues, including developments in other jurisdictions.[220]

6.4.1.1 Committee comment

The committee is satisfied that the notification, tabling and disallowance provisions that apply to subordinate legislation mean any regulations would be sufficiently subject to the scrutiny of the Legislative Assembly.

Further, despite the deficiencies in the explanatory notes to this Bill relating to the extension of the period of operation of regulations made under section 23 of the Emergency Response Act, the committee is satisfied that the matters to be prescribed by regulation are technical matters or otherwise suitable for subordinate legislation, and that the delegation of legislative power in other cases is made to appropriate persons in appropriate instances.

6.4.2 Matters to be prescribed in the proposed Oaths Regulation

Among other proposed changes to the Oaths Act, the Bill would insert sections 13E, 16C and 31S and amend and renumber section 41 (as section 16A). These provisions deal with information a witness

214 LSA, s 4(4)(a).

215 LSA, s 4(4)(b).

216 See for example Bill, cls 22, 37-42, 46.

217 Bill, cl 22 (DFVP Rules, new s 9A).

218 Bill, cl 38 (Oaths Act, new s 13A(2)).

219 Bill, cl 38 (Oaths Act, new s 13A).

220 Bill, explanatory notes, p 12.

must include on an affidavit or declaration, the kinds of witnesses able to witness electronic signatures or witness documents by audio visual link and who may witness affidavits.

The Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021 (Police Legislation Bill) proposes to make the Oaths Regulation 2021 (proposed Oaths Regulation) which would prescribe certain persons, information, condition and documents for proposed sections 13E, 16A, 16C and 31S.[221]

6.4.2.1 Committee comment

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

6.5 Institution of Parliament

Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill authorises the amendment of an Act only by another Act.[222] That is, Henry VIII clauses should not be used unless sufficiently justified.[223] ('A Henry VIII clause is a clause of an Act of Parliament which enables the Act to be expressly or impliedly amended by subordinate legislation or Executive action'.[224])

As can be seen above, the Emergency Response Act enables a regulation to be made that exempts a lessee, or a class of lessees, from the operation of a provision of an Act.[225] It also provides that a regulation made under section 23 may be inconsistent with an Act or law, other than the HRA, to the extent necessary to achieve a purpose of the regulation and the Emergency Response Act.[226]

6.5.1 Committee comment

The committee is satisfied that the Bill has sufficient regard to the rights and liberties of individuals and the institution of Parliament.

6.6 Explanatory notes

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

Explanatory notes were tabled with the introduction of the Bill. The notes are fairly detailed, and despite the deficiencies in the explanatory notes to this Bill relating to the extension of the period of operation of regulations made under section 23 of the Emergency Response Act, in main contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

221 See Police Legislation Bill, cls 4, 40, schedule 1. The Legal Affairs and Safety Committee is conducting an inquiry into the Police Legislation Bill.

222 *Legislative Standards Act 1992* (LSA), s 4(4)(c).

223 Scrutiny of Legislation Committee, *The use of "Henry VIII clauses" in Queensland legislation*, January 1997, p 57. See also Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental legislative principles: the OQPC notebook*, p 159.

224 Scrutiny of Legislation Committee, *The use of "Henry VIII clauses" in Queensland legislation*, January 1997, p 56. Underlining in original omitted.

225 See Emergency Response Act, s 23(1)(d).

226 Emergency Response Act, s 23(2)(a).

7 Compliance with the *Human Rights Act 2019*

7.1 Background

The portfolio committee responsible for examining a Bill must consider and report to the Legislative Assembly about whether the Bill is not compatible with human rights, and consider and report to the Legislative Assembly about the statement of compatibility tabled for the Bill.[227]

A Bill is compatible with human rights if the Bill:

(a) does not limit a human right, or
(b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HRA.[228]

The HRA protects fundamental human rights drawn from international human rights law.[229] Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The committee has examined the Bill for human rights compatibility. In doing so, it sought independent legal advice. Analysis below is based on this advice. The committee brings the following to the attention of the Legislative Assembly. Each of the policy areas addressed within the Bill are discussed below.

7.2 Human rights compatibility – Document Reforms

The Document Reform provisions of the Bill engage rights concerning judicial procedure, such as the right to equality before the law (HRA s 15), the right to a fair hearing (HRA s 31) and rights in criminal trials (HRA s 32). The Bill's Statement of Compatibility, prepared by the responsible minister, concludes that the Bill limits rights to property (HRA s 24) and privacy (HRA s 25), albeit in a manner that is minimal, justified within the terms of each section, and does not warrant full analysis under HRA s 13.

We agree in substance, though we think any limitation on relevant rights is justified within the terms of each section, and therefore does not necessarily even engage s 13.

7.2.1 Rights related to Judicial Procedure (HRA sections 15, 31, and 32)

The nature and importance of the rights (HRA s 13(2)(a), (f))

The relevant provisions of the HRA are as follows:

15 Recognition and equality before the law

(1) Every person has the right to recognition as a person before the law.

(2) Every person has the right to enjoy the person's rights without discrimination.

(3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.

(4) Every person has the right to equal and effective protection against discrimination.

…

31 Fair hearing

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227 HRA, s 39.

228 HRA, s 8.

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

(1) A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

…

32 Rights in criminal proceedings

(1) A person charged with a criminal offence has the right to be presumed innocent until proved guilty according to the law.

(2) A person charged with a criminal offence is entitled without discrimination to the following guarantees:

…

(b) to have adequate time and facilities to prepare the person's defence and to communicate with a lawyer or advisor chosen by the person;

(c) to be tried without unreasonable delay;

(d) to be tried in person, and to defend themselves personally or through legal assistance chosen by the person or, if eligible, through legal aid;

…

(g) to examine, or have examined, witnesses against the person;

(h) to obtain the attendance and examination of witnesses on the person's behalf under the same conditions as witnesses for the prosecution;

…

(j) to have the free assistance of specialised communication tools and technology, and assistants, if the person has communication or speech difficulties that require the assistance.

Together, these rights protect individuals in their interactions with judicial and other legal processes. Section 15 reflects the importance of equal treatment before the law, including non-discrimination on the basis of any grounds listed in the *Anti-Discrimination Act 1991*[230] as well as other irrelevant distinctions between different individuals or communities. It is modelled on articles 16 and 26 of the International Covenant on Civil and Political Rights. It includes a prohibition on discrimination against individuals and commitment to substantive equality, but also more formal rule of law commitments to equality "before the law": or, equal treatment of all persons engaged in legal processes and proceedings.

Section 31 protects the right to a fair hearing, and is framed in general terms. It reflects obligations contained in article 14(1) of the International Covenant on Civil and Political Rights.[231] It applies to both criminal trials and civil proceedings, and the reference to the "fairness" of a hearing reflects pre-existing concept of "due process of the law".[232] "Due process" principles – or the rights to a fair trial and fair hearing – are also principles recognised by the common law.[233] Section 32 likewise reflects

[230] *Justice Legislation (COVID-19 Emergency Response – Permanency) Amendment Bill 2021: Explanatory Notes ("Explanatory Notes")*, available at https://www.legislation.qld.gov.au/view/html/bill.first.exp/bill-2021-025#bill-2021-025, at 18.

[231] *Explanatory Notes*, above n 1, at 25.

[232] At 25.

[233] See e.g. *Dietrich v R* [1992] HCA 57, 177 CLR 292; *Victoria Police Toll Enforcement v Taha* [2013] VSCA 37 at [203], describing the right to a fair hearing as "so deeply rooted in our system of law and so elementary as to need no authority to support it", (Tate JA, referring to *R v McFarlane* (1923) 32 CLR 518), and cited in

notions of fairness and due process of law, and adds specific requirements that apply to criminal proceedings. Because criminal proceedings have the potential to result in severe limitations on individual liberty, they are subject to an additional set of rights and obligations. Like section 31, section 32 is modelled on article 14 of the International Covenant on Civil and Political Rights.[234]

These rights are of critical importance, and are at least minimally engaged by the relevant provisions. The Bill engages the rights protected by HRA sections 15, 31 and 32 in the following ways:[235]

- By allowing oaths, affirmations or statutory declarations to be administered over AV link, there is a risk that some individuals may not be appropriately advised on the consequences of these statements, or appreciate their legal significance. It also increases the risk that these statements could be obtained under duress or coercion, without the witness being aware of these pressures.
- Reliance on AV link also threatens to impair effective communication and case preparation for those with existing communication barriers, as well as individuals who are unable to afford effective internet connectivity, or who life in rural or isolated areas.
- The Bill only allows statutory declarations and affidavits to be witnessed via AV link by a category of "special witnesses", defined in clause 38 of the Bill. Special witnesses include Australian legal practitioners and notaries public, as well as certain other officeholders. Because some individuals (such as those who cannot afford legal services; live in remote areas; or experience language barriers) do not have easy access to legal services or notaries public, the Bill may be indirectly discriminatory in allowing some groups easier access to the legal process, while continuing to make such access difficult for other groups.

The nature, purpose and importance of the rights limitation, and the relationship between the purpose and policy measures (HRA s 13(2)(b)-(c), (e))

While these measures were originally intended to respond to a pressing public health emergency, their permanent enactment in the present Bill is designed for the purpose of "transactional economy and efficiency".[236]

The responsible minister has stated that the Bill is intended to "modernise the way in which important legal documents are created, in line with business practice, and to improve accessibility". It should be noted that this purpose may promote the values contained in HRA sections 15, 31 and 32, by improving the accessibility of the judicial process to persons who may find it hard to reach a courtroom or lawyers office; and by lessening the likelihood of "unreasonable delay" (HRA s 32(2)(c)). As the United Nations Human Rights Committee has observed, "[a]n important aspect of the fairness of a hearing is its expeditiousness".[237] And by aligning legal processes with contemporary expectations of technology use, the Bill may increase confidence in the judicial system. These are all justifiable purposes with a rational connection to the Bill's provisions.

Whether there is a fair balance between the right and the limitations (HRA s 13(2)(d), (g))

Justice Legislation (COVID-19 Emergency Response – Permanency) Amendment Bill 2021 :Statement of Compatibility ("Statement of Compatibility"), available at https://www.legislation.qld.gov.au/view/html/bill.first.hrc/bill-2021-025#bill-2021-025,at 10.

[234] Explanatory Notes, above n 1, at 26.

[235] In this sense, we endorse much of the discussion contained at 6-7 of the Statement of Compatibility, above n 5.

[236] Explanatory Notes, above n 1, at 3.

[237] *General Comment No. 32: Article 14: Right to equality before courts and tribunals and to a fair trial*, United Nations Human Rights Committee, CCPR/C/GC/32, 23 August 2007, at [27].

Independent advice received by the committee considered that each of the limitations discussed above constitutes a fair balance between the right and the Bill's purpose. Specifically:

- The risk of poor advice, misunderstanding, and coercion is alleviated by several safeguards in the Bill. First, the Bill's "special witness" regime, by restricting the category of witnesses to those with specialised knowledge and professional accountability, reduces the risk of outright fraud or misunderstanding, and ensures a minimal degree of solemnity in the signing of oaths and affidavits. Secondly, the Bill does not allow individuals to electronically execute a power of attorney, or allow electronic witnessing in respect of affidavits or statutory declarations concerning land or water rights. Thirdly, the Bill allows for further regulations to specify acceptable methods for the electronic signature of documents. Finally, the Bill still allows for documents to be witnessed in person. Nevertheless, it may be reasonable to consider the following further safeguards:
    - a training program which ensures that special witnesses are able to detect signs of fraud or duress, possess the necessary technical expertise, and are familiar with the restrictions concerning land and water dealings and non-commercial powers of attorney; and
    - ringfencing certain practices as being "acceptable methods" for witnessing per se, so as to avoid unnecessary confusion as to whether a document has been appropriately witnessed.
- Although the benefits of AV link and electronic witnessing may not be universally available to all, there may exist historically marginalised groups and individuals for whom the Bill would facilitate greater access to legal processes.
- The "special witness" regime strikes a reasonable balance between the need for a secure verification system which protects against fraud and duress, and delineating a sufficiently large category of persons able to effectively witness documents for a large proportion of the population. The legislature is entitled to significant deference in striking this balance. Nevertheless, the executive may wish to consider publicly identifying special witnesses with particular language expertise, or who are willing to provide AV and electronic witnessing services at low or no cost.

7.2.2 Property Rights (HRA section 24) and Privacy Rights (HRA section 25)

The responsible minister, Hon. Shannon Fentiman MP, in her statement of HRA compatibility, considered that the Bill's Document Reform provisions may be *prima facie* inconsistent with sections 24 and 25 of the HRA.

Electronic signatures may be more vulnerable to data breaches and fraud, including by offshore actors, threatening the right to privacy (HRA s 25). Furthermore, the Minister concluded that because the Bill might make it easier to falsify a deed of property, "it limits property rights" (HRA s 24).[238]

The Minister ultimately concluded that these limitations are justified by the factors listed in HRA s 13.

The committee considers that it could be argued that the Bill may minimally engage ss 24 and 25, and that such engagement can be justified by the terms of the rights themselves. It could therefore be concluded that a section 13 analysis is not required.

Section 24 of the HRA provides that:

> **24 Property rights**

[238] *Human Rights Bill 2018: Explanatory Notes*, available at https://www.legislation.qld.gov.au/view/html/bill.first.exp/bill-2018-076#bill-2018-076, at 5.

(1) All persons have the right to own property alone or in association with others.

(2) A person must not be arbitrarily deprived of property.

HRA s 24 create a corresponding duty on the Queensland government to refrain from "arbitrary deprivation" of property. As the European Court of Human Rights has long recognised, this duty is both negative and positive: the government has a duty not only to avoid arbitrarily depriving individuals of property, but also to protect individuals from deprivations by other private individuals.[239] Thus, it could be argued that by making it easier for parties to execute property deeds, Parliament would infringe upon its duty to protect property rights.

Section 25 of the HRA provides that:

25 Privacy and reputation

A person has the right:

(a) Not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with; and

(b) Not to have the person's reputation unlawfully attacked.

Like section 24, section 25 contains an internal limitation of arbitrariness.[240] As with property rights, the privacy right gives rise to a corresponding duty on the part of the state to affirmatively protect individuals' privacy, recognising that "a person's enjoyment of her right to respect for private and family life".[241] As the European Court of Human Rights has observed, while the "essential object" of the right "is to protect individuals against arbitrary interference by public authorities … it may also impose on the State certain positive obligations to ensure effective respect for those rights".[242] Similarly, the UN Human Rights Committee has observed that "this right is required to be guaranteed against all such interferences and attacks whether they emanate from State authorities or from natural or legal persons. The obligations imposed … require the State to adopt legislative and other measure to give effect to the prohibition against such interferences and attacks as well as to the protection of this right."[243]

The Bill allows parties to utilise electronic technologies to sign and witness documents, and therefore raises the possibility of data breaches that would capture individuals' personal information (such as

[239] See *Guide on Article 1 of Protocol No. 1 to the European Convention on Human Rights*, European Court of Human Rights, 31 August 2021, available at https://www.echr.coe.int/Documents/Guide_Art_1_Protocol_1_ENG.pdf, at [191]: "The discharge of the general duty may entail positive obligations ensuring the exercise of the rights guaranteed by the Convention. … those positive obligation may require the state to take the measures necessary to protect the right to property."

[240] We note that it also contains a limitation of lawfulness: in the current context, however, even if the Bill were to be considered a limitation of section 25 rights, it would be "lawful" by reason of section 48(4) of the Human Rights Act.

[241] *Guide on Article 8 of the European Convention on Human Rights*, European Court of Human Rights, 31 December 2020, available at https://www.echr.coe.int/Documents/Guide_Art_8_ENG.pdf, at [180].

[242] *Guide to the Case-Law of the European Court of Human Rights: Data Protection*, European Court of Human Rights, 30 April 2021, available at https://www.echr.coe.int/Documents/Guide_Data_protection_ENG.pdf,at [68], citing *Barbulescu v Romania* [2017] ECHR 754.

[243] *General Comment 16: Article 17 (Right to Privacy)*, United Nations Committee on Civil and Political Rights, 8 April 1988, available at https://www.refworld.org/docid/453883f922.html, at [1], commenting on Article 17 of the ICCPR. Section 25 is modelled on Article 17.

their signature), and leave them open to fraudulent impersonation. It could be argued that this limits section 25 of the HRA by violating the State's positive obligation to protect privacy rights.

The independent advice did not go so far as to conclude that the Bill "limits" the rights contained in sections 24 and 25.[244] The concept of "arbitrariness" contained in section 24(2) and 25(1) creates an internal limitation on the extent of the right, prior to those external limitations set out in section 13.[245] While the phrase "arbitrariness" is not defined in the HRA or by relevant case law, we consider that it conveys the idea that the right is only engaged in the face of restrictions that are clearly or manifestly, rather than arguably, disproportionate. The Bill's provisions do not reach this threshold. Rather, they are clearly connected to a rational government purpose of modernising the justice system, responding to a public health crisis, and promoting convenience in commercial relations and the administration of justice. These purposes may in fact make it easier for individuals or associations to acquire and own property via deed.

The Bill also includes safeguards that apply to electronically-signed deeds, such as identifying the signatory for the document and the signatory's intention in relation to the contents of the document, and ensuring that the method of signature is consented to by all signatories.[246] Furthermore, although the Bill arguably creates a greater risk that property rights will be violated, it does not limit or deprive persons of those rights: persons who fraudulently falsify property deeds and other documents, or violate individuals' data privacy, would remain liable to the same civil and criminal penalties as under existing law. For these reasons, we conclude that the Bill can be justified on the terms of HRA s 24 and 25, and does therefore not need to be weighed against the factors set out in HRA s 13.

Independent advice however, expressed reservations that the Bill's definition of "accepted method" of electronic signature to a deed or commercial power of attorney (at clauses 46 and 51) is vague, and includes the requirement that the method simply be "as reliable as appropriate for the purposes for which the document is made or signed, having regard to all the circumstances, including any relevant agreement", or "proven in fact" to have identified the signatory for the document and the signatory's intention in relation to the contents of the document, "by itself or together with further evidence". This standard is clearly open to conflicting interpretations, including between two parties to a deed. Furthermore, it lacks minimum technological safeguards to avoid fraud. This could cause uncertainty as to the validity of property transactions, and risks the possibility that more legally sophisticated parties may be able to abuse the legal process to deny other parties of their expected rights in property.

7.2.2.1 Committee comment

The committee is satisfied that the document reform provisions limit rights only to the extent that they "can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom".

The Document Reform provisions of the Bill engages rights concerning judicial procedure (HRA sections 15, 31, and 32), but in a manner that is justified by the factors set out at HRA s 13. The Document Reform provisions also engage rights to property and privacy (HRA sections 24 and 25), but in a minimal manner that is justified under the internal limitations of the rights themselves.

[244] Note that much of this analysis is based on advice given in our brief on the Housing Legislation Amendment Bill 2021.

[245] We note that HRA s 25(a), discussed above, also makes reference to "arbitrary" interference with a person's "privacy, family, home or correspondence". However, section 25, unlike section 24, also includes a standard of "unlawful" interference, meaning that the two rights have different standards under which they become engaged.

[246] Clause 51 of the Bill.

7.3 Human rights compatibility – Domestic and Family Violence Provisions

Clauses 5-25 of the Bill address matters related to domestic and family violence. It would make permanent measures introduced by the Domestic and Family Violence Protection (COVID-19 Emergency Response) Regulation 2020 ("the Regulation"). These measures include amendments that would:

- Allow private applications for domestic violence orders and variations to be verified between an applicant and a magistrate, rather than requiring a statutory declaration;
- Clarify that magistrates may conduct all or part of the proceedings by AV or audio link; and
- Extend the option of electronic filing of documents to private parties in domestic and family violence proceedings with the approval of the Principal Registrar of the Court.

As with the Document Reform provisions of the Bill, the DFV Provisions engage rights relating to the judicial process. Specifically, the Bill engages HRA sections 15 and 31, concerning recognition and equality before the law, and the right to a fair hearing.

The nature and importance of the rights (HRA s 13(2)(a), (f))

The Bill engages HRA sections 15 and 31 in respect of both applicant and respondent parties in domestic and family violence cases.

First, the Bill clarifies that magistrates may conduct proceedings related to domestic violence orders via AV or audio link. However, as discussed above in relation to the Bill's Document Reform provisions, access to AV or audio link may be unavailable for some persons. The Bill's benefits would therefore be experienced unevenly, engaging the right to equality before the law protected by HRA s 15. Furthermore, the Bill raises the prospect that one party may have better access to audio or AV link services than the other. This engages the right to a fair hearing under HRA section 31, which encompasses the right to impartial and even-handed judicial treatment.

Secondly, the use of audio or AV link, as well as the removal of the requirement for a statutory declaration, raise the possibility that an applicant for a domestic violence order could be coerced or threatened in the course of judicial proceedings. This risk is heightened in the domestic and family violence context: for example, someone off-screen could pressure the applicant to withdraw allegations or remain silent about certain matters in the course of an application hearing or proceeding. By removing proceedings from the physical oversight and confines of the courtroom, the Bill further engages HRA section 31.

The nature, purpose and importance of the rights limitation, and the relationship between the purpose and policy measures (HRA s 13(2)(b)-(c), (e))

The rights limitation was originally intended to serve the purpose of facilitating access to a crucial judicial service while physical access was impeded by the COVID-19 public health emergency. It should be noted that the prospect of the re-introduction of similar public health measures in the future cannot be discounted, and the permanent extension of these measures would continue to serve their original purpose.

However, it should also be noted that the Bill is intended to serve the further purpose to "modernise and streamline access to justice by providing victims with greater flexibility to participate in domestic and family violence proceedings".[247] The Bill is intended to make it easier for domestic violence victims, who may be facing severe restrictions on their ability to travel to and from a courtroom or to execute statutory declarations, to participate in judicial proceedings that could safeguard their

[247] *Queensland Parliament Record of Proceedings (Hansard), First Session of the Fifty-Seventh Parliament,* Wednesday, 15 September 2021, available at https://documents.parliament.qld.gov.au/events/han/2021/2021_09_15_WEEKLY.pdf, at 2764.

personal safety and liberty. These are undoubtedly public policy objectives of high value, and serve the purpose of safeguarding other rights contained in the HRA, such as the rights to life (HRA s 16), protection of children and families (HRA s 26), and liberty and security (HRA s 29).

Whether there is a fair balance between the right and the limitations (HRA s 13(2)(d), (g))

The Bill strikes a fair balance between the limited rights and the public policy objectives. While the Bill does increase the risk of compromised hearings in some cases, it makes it significantly easier for many domestic and family violence victims to participate in judicial proceedings. It should be noted that the Bill retains important safeguards. Verification in the absence of a statutory declaration is available only in applications for *temporary* domestic violence orders, while electronic filing is available only with the approval of the Principal Registrar of the Court.

7.3.1.1 Committee comment

The DFV provisions of the Bill engages rights concerning judicial procedure (HRA sections 15, 31, and 32), but in a manner that is justified by the factors set out at HRA s 13.

7.4 Human rights compatibility – Liquor reforms

Part 5 of the Bill (clauses 26-33) amends the Liquor Act 1992 to allow takeaway establishments to sell wine for takeaway or delivery.

The nature and importance of the rights (HRA s 13(2)(a), (f))

Alcohol remains a significant cause of family and domestic violence in Australia: the use of alcohol and other drugs accompanies around half of all family and domestic violence incidents.[248] Legislative measures which increase accessibility to alcohol, and especially alcohol usage in private homes, may therefore limit the rights of children and families (HRA s 26) and the right to security and liberty of the person.

26 Protection of families and children

(1) Families are the fundamental group unit of society and are entitled to be protected by society and the State.

(2) Every child has the right, without discrimination, to the protection that is needed by the child, and is in the child's best interests, because of being a child.

(3) Every person born in Queensland has the right to a name and to be registered, as having been born, under a law of the State as soon as practicable after being born.

HRA s 26 emphasises the importance of the family, imposes an obligation on the State to protect the interests of children. This section was intended to impose a duty "stronger than non-interference and extend to the guarantee of institutional protection of the family and positive measures for the protection of children by the society and the State … Subsection (2) provides that every child has the right, without discrimination, to protection that is needed by the child and is in their best interests as a child. … This right recognises the special protection that must be afforded to children based on their particular vulnerability."[249]

Section 29 of the HRA protects the right to liberty and security of the person. While the textual provisions of section 29 are primary concerned with a person's interaction with law enforcement, section 29(1) nevertheless sets out a general right to be secure. We consider that the notion of

[248] See e.g. Australian Institute of Health and Welfare, *Family domestic and sexual violence in Australia: continuing the national story* (2019), Cat. No., FDV 3, available online at https://www.aihw.gov.au/getmedia/b0037b2d-a651-4abf-9f7b-00a85e3de528/aihw-fdv3-FDSV-in-Australia-2019.pdf.aspx?inline=true.

[249] Human Rights Bill Explanatory Notes, above n 10, at 22.

"security of the person" has application wider than in the criminal procedure context, and includes legislative enactments which could cause physical or mental harm to individuals. For example, the Supreme Court of Canada has found in several instances that legislative measures which result in mental anxiety and anguish constitute a violation of the security of the person as protected by the Canadian Charter of Rights and Freedoms.[250] Easy access to alcohol threatens not only children and families of alcohol consumers, but also the mental and physical health and security of consumers themselves.

The nature, purpose and importance of the rights limitation, and the relationship between the purpose and policy measures (HRA s 13(2)(b)-(c), (e))

The Bill would limit the protected rights by facilitating access to a drug that is a significant driver of domestic and family violence. The Bill would make it easier for alcohol to be provided directly to private homes, by increasing the number of premises which are licensed to supply liquor directly to peoples' homes. In areas which currently lack alcohol delivery services, but which have existing takeaway establishments, the Bill may thus open up new avenues for consumers to gain access to alcohol.

The stated purpose of these measures is to support takeaway businesses and to provide greater "choice and convenience in being able to enjoy a meal with alcoholic beverages at home".[251]

Whether there is a fair balance between the right and the limitations (HRA s 13(2)(d), (g))

It can be argued that the Bill does strike a fair balance between the right and the limitations, but only by a fine margin. We reach this conclusion on the basis that many consumer markets in Queensland are already saturated with a high volume of delivery alcohol options, including many off-licence establishments which are subject to fewer regulatory restrictions than those proposed by the Bill. In particular, the Bill would:

- Allow the Commissioner for Liquor and Gaming to impose conditions on licences for the sale of takeaway liquor;
- Restrict eligible establishments to restaurant business which operate on-premises dining facilities;
- Limit the volume of liquor to 1.5 litres (or two bottles) of wine;
- Require that liquor only be sold together with a takeaway meal (which must be more than snacks or insubstantial food); and
- Require that licensees establish adequate systems and procedures for the responsible service or takeaway of alcohol in order to be granted approval.

These measures would lessen the likelihood that large quantities of alcohol would be purchased from takeaways for consumption, with the consequent risks of domestic and family violence. However, we note that many of these safeguards rely on effective implementation and enforcement by the Commissioner for Liquor and Gaming, as well as Queensland Police.

7.4.1.1 Committee comment

It could be argued that the Liquor Reform provisions of the Bill limit the rights of children and families (HRA s 26) and liberty and security of the person (HRA s 29). The limitations are justified with regard to the factors set out at HRA s 13, though suggest that this should be understood as conditional on certain protections in the Bill about the responsible service of alcohol.

[250] See e.g. *R v. Morgentaler* [1988] 1 SCR 30; *Blencoe v. British Columbia (Human Rights Commission)* 2000 SCC 44, [2000] 2 SCR 307; *Chaoulli v. Quebec (Attorney General)* 2005 SCC 35, [2005] 1 SCR 791.

[251] Introductory Speech at 2764.

7.5 Human rights compatibility – Leasing reforms

Unlike the other provisions discussed in this chapter, the Lease Reforms would not be permanent. Instead, the Bill essentially extends the operation of existing Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 ("Lease Regulation") so that it would not expire until 30 April 2024, unless explicitly repealed earlier.[252]

The Lease Regulation implemented a National Cabinet decision which sets out a method of dispute resolution in respect of certain small and medium enterprise commercial leases ("affected leases"). Among other measures, the Lease Regulation:[253]

- Requires the lessor and lessee to cooperate and act reasonably and in good faith;
- Prohibits a lessor under an affected lease from certain actions (such as eviction, termination of possession, or charging interest on unpaid rent) on grounds such as a failure to pay rent, pay outgoings, or not being open for business during the hours required under the lease;
- Prohibits a lessor under an affected lease from increasing rent payable by the lessee;
- Provides for how renegotiations of rent payable are to be initiated and conducted;
- Imposes an obligation on parties to cooperate and act reasonably and in good faith in all discussions and actions associated with resolving an eligible lease dispute; and
- Provides for the Small Business Commissioner to refer eligible lease disputes to mediation.

Arguably, the Bill amounts to a limitation on the right to property protected by HRA s 24.

What interests are protected by HRA section 24, and engaged by the Bill's Lease Reform?[254]

The Bill engages the right to property. In particular, the Bill engages section 24(2) of the HRA, the right not to be arbitrarily deprived of one's property.

The term "deprivation" is not defined in the HRA. However, it is well established in comparative jurisdictions that deprivation is not limited only to the taking of a person's title over property. Property is a "bundle of rights": some of these rights may be impaired, even if some remain unimpeded. Whether there has been a "deprivation" requires an assessment of whether the alleged rights violation prevents a person from exercising their right in a way that is "practical and effective",[255] or, for example, "the ability to use or develop [their] land".[256] The Supreme Court of Victoria has found that the term should be interpreted "liberally and beneficially to encompass economic interests and deprivation in a broad sense".[257]

Section 24(2) of the HRA contains an internal limitation: the HRA protects against only "arbitrary" deprivation of property. The Explanatory Note to the Queensland Human Rights Bill 2018 explains that:

> The right essentially protects a person from having their property unlawfully removed.

[252] Clause 4 of the Bill read together with COVID-19 Emergency Response Act 2020 s 4A.

[253] *Retail Shop Leases and Other Commercial Leases (COVID-19) Emergency Response) Regulation 2020: Explanatory notes for SL 2020 No. 79*, available at https://www.legislation.qld.gov.au/view/html/published.exp/sl-2020-0079#sl-2020-0079, at 2.

[254] Much of this analysis is taken from our earlier analysis of HRA s 24 in our brief on the Housing Legislation Amendment Bill 2021.

[255] *PJB v Melbourne Health (Patrick's Case)* [2011] VSC 327 at [89], citing *Zwierzynski v Poland* (2004) 38 EHRR 6 at [69].

[256] *Swancom Pty Ltd v Yarra CC (Red Dot)* [2009] VCAT 923 at [22].

[257] *Patrick's Case*, above n 26, at [87].

Subclause (1) provides that all persons have the right to own property alone or with others.

Subclause (2) provides that a person must not be arbitrarily deprived of their property. This clause does not provide a right to compensation. The protection against being deprived of property is internally limited to arbitrary deprivation of property.

Section 24 is modelled on Article 17 of the Universal Declaration of Human Rights. Section 24(2) closely resembles section 20 of the *Victorian Charter of Human Rights and Responsibilities Act 2006* ("Victorian Charter"). Article 1 of Protocol 1 of the *European Convention on Human Rights* ("ECHR") also contains property rights protections. Like Article 24(2), the Victoria Charter and ECHR also contain internal limitations.

The term "arbitrary" is not defined in the HRA. For the purposes of the analysis, "arbitrary" is treated as encompassing the framework applied by the European Court of Human Rights in property rights cases: a three-part framework of lawfulness, public interest, and fair balance.[258] There is no question that the Parliament of Queensland has the lawful authority to enact the legislation in question. Analysis is therefore restricted to public interest and fair balance, both of which are captured by the factors set out in section 13 of the HRA. The Bill is assessed against these factors.

However, as noted above in relation to sections 24 and 25, it has been suggested that the concept of "arbitrariness" conveys the idea that the right is only engaged in the face of restrictions that are clearly or manifestly, rather than arguably, disproportionate. Therefore the issue in terms of the factors set out in s 13, is done so with an additional margin of deference to the Parliament, and also on the assumptions that these factors apply – by analogy under s 24(2) – and if correct, the committee may not need actually to reach the question of compatibility under s 13 itself, as opposed to the "internal" limitation clause found in s 24(2).[259]

Does the Bill amount to an "arbitrary deprivation of property rights?

It could be concluded that the Bill's deprivation of rights is not arbitrary. The ongoing COVID-19 public health emergency has posed unprecedented and unforeseeable obstacles for small and medium businesses.

The measures in the Lease Regulation – such as protection from eviction, the introduction of "good faith" principles, and a system of mediation – are all rationally connected to the objectives of protecting businesses and their employees. Furthermore, given the high levels of uncertainty as to the duration and ongoing intensity of the present pandemic, the Parliament of Queensland is entitled to some flexibility in setting a date for the automatic expiration of the Lease Regulation. It is therefore considered that the Lease Reform provisions of the Bill strike an appropriate balance between this need for flexibility, and a clear end date beyond which the Lease Regulation will not operate without further legislative action.

7.5.1 Committee comment

The Lease Reform provisions of the Bill limit the right to property (HRA s 24), but in a manner that is justified by the limitations set out at HRA s 13.

7.6 Statement of Compatibility

Section 38 of the HRA requires a statement of compatibility to be tabled for a Bill.

[258] See e.g. *Beyeler v. Italy* (2001) 33 EHRR 52.

[259] This approach is common in comparative jurisdictions when evaluating limitations on rights. For discussion on the relationship between internal and external limitations on rights, see e.g. Robert Alexy, *A Theory of Constitutional Rights* (Oxford University Press, 2001) at 178-79.

The statement of compatibility tabled with the introduction of the Bill provides a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights in relation to the Document Reforms and DFV Reforms.

Appendix A – Submitters

Sub #	Submitter
001	Restaurant and Catering Australia
002	Spirits & Cocktails Australia
003	L'unico Trattoria Pty Ltd
004	Australian lawyers Alliance
005	Queensland Hotels Association
006	Sammy Gs Kitchen
007	Baseline Cafe
008	Griffith Uni Bar
009	Retail Drinks Australia
010	Independent Brewers Association
011	Crime and Corruption Commission
012	White Lies Brewing Company Pty Ltd
013	Scenic Rim Brewery
014	Queensland Nurses and Midwives Union
015	Clubs Queensland
016	Queensland Law Society
017	White Brick Brewing Pty Ltd
018	Chamber of Commerce and Industry Queensland
019	Foundation for Alcohol Research and Education
020	Australian Payments Network
021	Women's Legal Service Queensland
022	Allens Linklaters and King & Wood Mallesons
023	Australian Medical Association Queensland Limited
024	Brewers Association of Australia
025	Australian Banking Association
026	Andrew Aschman

Appendix B – Officials at public departmental briefing

Department of Justice and Attorney-General

- Ms Victoria Thomson, Deputy Director-General, Liquor, Gaming and Fair Trading
- Mrs Leanne Robertson, Assistant Director-General, Strategic Policy and Legal Services
- Mr David McKarzel, Executive Director, Office of Regulatory Policy, Liquor, Gaming and Fair Trading
- Ms Melinda Tubolec, Principal Legal Officer, Strategic Policy and Legal Services
- Mr Riccardo Rivera, Principal Legal Officer, Strategic Policy and Legal Services
- Ms Sakitha Bandaranaike, Director, Strategic Policy and Legal Services

Appendix C – Witnesses at public hearing

Allens

- Karla Fraser, Partner

Chamber of Commerce and Industry Queensland

- Gus Mandigora, Senior Policy Advisor

Crime and Corruption Commission Qld

- David Caughlin, Executive Director, Legal, Risk and Compliance

Foundation for Alcohol Research and Education

- Caterina Giorgi, Chief Executive Officer

Independent Brewers Association

- David Kitchen, Director of IBA, Part-owner of Ballistic Beer Company
- Russell Steele, Part-owner, Easy Times Brewery
- Mike Webster, Owner and Brewer, Scenic Rim Brewery

Queensland Hotels Association

- Bernie Hogan, Chief Executive
- Damian Steele, Industry Engagement Manager

Queensland Law Society

- Elizabeth Shearer, President
- Matt Dunn, General Manager - Advocacy, Guidance and Governance
- Andrew Shute, Chair of the QLS Litigation Rules Committee

Restaurant and Catering Australia

- Wes Lambert, Chief Executive Officer
- Hugo Robinson, Manager – Policy and Government

Spirits & Cocktails Australia

- Greg Holland, Chief Executive
- Tom Green, Policy Manager, Diageo Australia