Youth Justice and Other Legislation Amendment Bill 2021

Statement of Compatibility

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

In accordance with section 38 of the *Human Rights Act 2019*, I, Mark Ryan MP, Minister for Police and Corrective Services and Minister for Fire and Emergency Services, make this statement of compatibility with respect to the Youth Justice and Other Legislation Amendment Bill 2021.

In my opinion, clauses 1 to 4, and 7 to 34 of the Youth Justice and Other Legislation Amendment Bill 2021 are compatible with the human rights protected by the *Human Rights Act 2019*. In my opinion, clauses 5 and 6 of the Bill may also be compatible with the human rights protected by the *Human Rights Act 2019*. The nature and extent of potential incompatibility is outlined in this statement. However, the government has determined that the need to protect the community from knife crime in safe night precincts outweighs the impacts on an individual's human rights.

Overview of the Bill

The objective of the Bill is to address offending by serious recidivist youth offenders. The Bill will do so by amending the *Youth Justice Act 1992* ('Youth Justice Act') and the *Police Powers and Responsibilities Act 2000* ('PPR Act') to:

- provide courts, when dealing with recidivist youth offenders aged 16 years or 17 years for certain offences, a discretion to impose on a grant of bail, a condition the child must wear a GPS electronic monitoring device (with a 12-month location-based trial);

- provide a discretion for a court or police officer to take into consideration any indication of willingness from a parent or another person to support a child on bail to comply with bail conditions and provide further guidance to the courts on existing bail laws;

- create a presumption against bail for youth offenders arrested for allegedly committing further 'prescribed indictable offences' while on bail, requiring the offender to demonstrate why their remand in custody is not justified;

- codify the common law position that committing an offence on bail is an aggravating factor taken into consideration when determining an appropriate sentence for offences committed;

- include a reference to the community being protected from recidivist youth offenders in the charter of youth justice principles in the Youth Justice Act;

- enable police, within existing boundaries of declared safe night precincts on the Gold Coast, to use hand held scanners to detect knives on the person, noting a 12-month trial of this power will be conducted (with a review at the conclusion of the trial); and

- enhancing the enforcement regime against dangerous hooning behaviour by strengthening existing owner onus deeming provisions for hooning offences.

Human Rights Issues

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

Electronic monitoring devices as a condition of bail for offenders aged 16 and 17 years old in certain circumstances

Clause 26 of the Bill amends the Youth Justice Act by inserting a new s 52AA to allow a court, in certain circumstances, to impose on a grant of bail to a child who is at least 16 years, has committed a prescribed indictable offence and has been previously found guilty of at least one indictable offence, a condition that the child must wear a tracking device while released on bail.

This will interfere with the right to privacy (s 25(a) of the *Human Rights Act 2019* ('HR Act')), as well as the right of children to protection in their best interests (s 26(2) of the HR Act) (noting that Article 16 of the *Convention on the Rights of the Child* also protects the privacy of children, and that that Convention is relevant to determining the scope of the right in s 26(2) of the HR Act).

The proposal also has the potential to interfere with the relationship between children and their parents, thereby interfering with family, and engaging s 25(a) of the HR Act. The internal limitations of lawfulness and arbitrariness apply equally to the right to family as to the right to privacy. In a human rights context, 'arbitrary' means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.[1] Because questions of lawfulness and proportionality arise when considering justification of limits on human rights under s 13, it is convenient to consider these questions below.[2]

As to the distinct right to protection of families (s 26(1) of the HR Act), the United Nations Human Rights Committee has treated intrusions into the family home as falling within the scope of Article 23 of the *International Covenant on Civil and Political Rights*, which is the equivalent to s 25 of the HR Act. However, any limit on the right to protection of families in s 26(1) would add no more to any interference with family under s 25(a) of the HR Act.

For the same reasons, allowing the court to interfere with kinship ties limits the right of Indigenous peoples 'to enjoy, maintain, control, protect and develop their kinship ties' in s 28(2)(c) of the HR Act.

There may also be ancillary impacts on the freedom of movement (s 19 of the HR Act) and freedom of association (s 22 of the HR Act), given that electronic monitoring will facilitate the enforcement of bail conditions which may already be imposed, and which would limit these rights.

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1 Explanatory note, Human Rights Bill 2018 (Qld) 22; *PJB v Melbourne Health* (2011) 39 VR 373, 395 [85].
2 Following the approach in *Minogue v Thompson* [2021] VSC 56, [86], [140].

The option of imposing electronic monitoring as a condition of bail will only apply to courts located in, and youths living in, in specific locations, which are to be prescribed by regulation. In the first 12 months, the intention is that only Townsville, North Brisbane/Moreton and Logan/Gold Coast will be prescribed in order to trial electronic monitoring. It is intended that the trial will be independently evaluated after 12 months, to examine the impacts of electronic monitoring on bail condition compliance rates, deterrence from further offending and offender recidivism (if found guilty).

This means that the law will apply differently in different places. However, this will not limit the right to equality and non-discrimination in s 15 of the HR Act, because residency in a particular area is not a ground of discrimination.[3]

Parental or other support associated with youth bail

Clause 21 amends s 48AA of the Youth Justice Act, and clause 26 inserts new section 52AA into the Youth Justice Act to implement this measure.

This proposal would limit the right to equality and non-discrimination in s 15 of the HR Act, given that it would allow a court to treat people differently on the basis of:

a) their parental status;

b) family responsibilities; or,

c) their association with, or relation to, a person identified with parental status or family responsibilities.

This proposal may increase the risk that children will lose their liberty. For that reason, the proposal would limit the right to liberty, generally, in s 29(1) of the HR Act. However, it would not limit the right not to be automatically detained under s 29(6) of the HR Act, because the proposal would leave the grant of bail within the court's discretion, without setting a general rule.

By increasing the risk that children will be detained, the proposal also limits the right of children to protection in their best interests under s 26(2) of the HR Act.

The proposal allows courts to interfere with the relationship between children and their parents or other family members, thereby limiting the right to non-interference with family under s 25(a) of the HR Act. For the same reasons, allowing the court to interfere with kinship ties limits the right of Indigenous peoples 'to enjoy, maintain, control, protect and develop their kinship ties' in s 28(2)(c) of the HR Act. Intrusions into the family home may also limit the right to protection of families under s 26(1) of the HR Act. Again, any limit on s 26(1) of the HR Act would add no more to the interference with family under s 25(a) of the HR Act.

Presumption against bail

Clause 24 inserts a new s 48AF into the Youth Justice Act. Section 48AF will apply in relation to a child in custody in connection with a charge of a prescribed indictable offence if the offence is alleged to have been committed while at large or awaiting trial or sentencing for an indictable offence. Where s 48AF applies, it will provide that a court or police officer must refuse to

[3] *Magee v United Kingdom* (2000) 31 EHRR 822, [50]; *R v Turpin* [1989] 1 SCR 1296, 1332-3; *Siemens v Manitoba (Attorney General)* [2003] 1 SCR 6, 32-3 [48].

release a child from custody unless the child shows cause why the child's detention in custody is not justified.

This proposal primarily limits the right not to be automatically detained in custody in s 29(6) of the HR Act, because it sets a general rule in favour of detention. For similar reasons the proposal also limits the right to be presumed innocent (s 32(1) of the HR Act).

By adopting a blanket rule for children charged with certain offences alleged to have been committed while on bail, even though rebuttable, the proposal limits the best interests of the child in s 26(2) of the HR Act. In this context, the right of children to protection in their best interests may include a requirement that imprisonment of children be a measure of last resort and for the shortest possible period of time.

Aggravating factor when determining the appropriate sentence

Clause 29 amends s 150 of the Youth Justice Act to insert new principles to which a court must have regard in sentencing a child for an offence, being the presence of any aggravating or mitigating factor concerning the child and whether the child committed the offence while released into the custody of a parent, or at large without bail, after being committed for trial, or awaiting trial or sentencing, for another offence.

Arguably, requiring a court to take into account aggravating factors may limit the human right not to be deprived of liberty (s 29(3) of the HR Act), in the sense that it may increase the likelihood of a court imposing a stricter sentence including a custodial sentence. However, any such limit will be easily justified given the legitimate purpose of such a requirement in protecting the community and the fact that any such impact on human rights will be minimal as the aggravating factor is only one factor to which a court must have regard and is balanced against any mitigating factors that may also be present.

Amending the Charter of Youth Justice Principles

Clause 33 amends schedule 1 of the Youth Justice Act, the charter of youth justice principles, to clarify that principle 1, which states that the community should be protected from offences, includes, in particular, recidivist high-risk offenders.

For similar reasons to those set out above in relation to the proposal to include committing an offence on bail as an aggravating circumstance, including this clarification in the charter of youth justice principles does not limit human rights (or any limit is small and readily justified) and is therefore compatible with human rights.

Providing powers for police to stop a person and use a hand held scanner to scan for knives

Clauses 5 and 6 of the Bill insert provisions in the PPR Act concerning the use of hand held scanners in safe night precincts.

The proposed amendment will give police a power to stop and scan people. That will interfere with people's freedom of movement (s 19 of the HR Act). It might be thought that a person who is stopped will also be deprived of their liberty (s 29 of the HR Act), but in human rights discourse the relevant right is more likely to be characterised as the right to freedom of movement. Accordingly, the proposal limits freedom of movement, but not the right to liberty.

The power to scan a person interferes with their dignity and bodily integrity, and therefore limits the right to privacy (s 25(a) of the HR Act).

Section 15(3) of the HR Act protects 'equality before the law'. That right guards against arbitrary application of the law. The proposal would allow police officers to randomly select people to stop and scan without any basis, such as a reasonable suspicion. Accordingly, the right in s 15(3) is engaged. Under the proposal, a police officer will only be able to exercise that power if authorised by a senior police officer (under s 39E of the PPR Act to be inserted by the Bill). There are no criteria that the senior police officer must be satisfied of before giving that authorisation, again engaging the right in s 15(3) of the HR Act.

Because the power to stop and scan people includes a power to stop and scan children, clauses 5 and 6 of the Bill increase the risk that children will have interactions with police. It therefore limits the right of children to protection in their best interests in s 26(2) of the HR Act.

Because the scan may lead to the detection of a metal object, and potentially the confiscation of a knife, the proposal may limit the right to property in s 24 of the HR Act, which arguably includes a right to possess chattels.

Knives are an important religious symbol for some faiths. For example, baptised Sikhs are required to carry a kirpan, which is generally a small blunted object resembling a dagger. The proposal may have a particularly intrusive impact on devout Sikhs and therefore interfere with freedom of religion (s 20 of the HR Act), and potentially cultural rights (s 27 of the HR Act).

However, the offence of possessing a knife in a public place in s 51 of the *Weapons Act 1990* ('Weapons Act') has a carve out for people who 'possess a knife for genuine religious purposes' (in s 51(4)). Police would take that into account when considering whether to charge a person with an offence under s 51 of the Weapons Act following use of a hand held scanner.

Enhancing the existing owner onus deeming provisions for hooning offences

Clauses 7 to 17 of the Bill amend existing provisions in ch 22 of the PPR Act to expand existing powers to provide an evasion offence notice to apply to all 'type 1 vehicle related offences' (hooning offences). The amended provisions will apply to allow police to issue a 'type 1 vehicle related offence notice' to the owner of a motor vehicle requiring the owner to state certain information in a statutory declaration responding to the notice.

By requiring the provision of information when a notice is given, the proposed amendment will limit the right to privacy (s 25 of the HR Act), and possibly the right not to be compelled to testify against oneself or to confess guilt (s 32(2)(k)).

Additionally, a person who does not respond to a type 1 vehicle related offence notice is taken to have been the driver of the vehicle involved in the type 1 vehicle related offence and may be prosecuted for the offence even though the actual offender may have been someone else. However, it is a defence for the person to prove, on the balance of probabilities, that the person was not the driver of the motor vehicle involved in the offence when the offence happened. Deeming that a person has committed an offence will limit the right to be presumed innocent until proven guilty according to law (s 32(1) of the HR Act).

A further result of the amendments is that if a person does not respond to a type 1 vehicle related offence notice, they will not be able to rely upon the information that would have been

provided in such a notice in their defence, unless they provide 21 business days' notice to the prosecuting authority and the court grants the person leave to rely on the evidence (existing s 756(5) of the PPR Act). If the person is defending a charge of dangerous operation of a vehicle contrary to s 328A of the Criminal Code, an amendment will allow the information to be used by a defendant in their defence without giving 21 business days' notice, provided the court grants leave on the basis that the interests of justice require that the person be able to rely on the evidence. These additional hurdles applying to type 1 offences (apart from offences against s 328A of the Criminal Code), increase the risk that a person will be found guilty of an offence notwithstanding a reasonable doubt or the existence of exculpatory evidence. It represents an additional limit on the right to be presumed innocent until proven guilty according to law (s 32(1) of the HR Act).

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Electronic monitoring devices as a condition of bail for offenders aged 16 and 17 years old in certain circumstances

(a) the nature of the right

The right to privacy and non-interference with family (s 25(a)) – The purpose of the right not to have one's privacy arbitrarily interfered with is 'to protect and enhance the liberty of the person – the existence, autonomy, security and well-being or every individual in their own private sphere.'[4] The right to privacy protects 'personal inviolability' in the sense of 'the freedom of all persons not to be subjected to physical or psychological interference, including medical treatment, without consent.'[5]

The right not to have one's family interfered with protects 'the intimate relations which [people] have in their family' which is indispensable 'for their personal actuation'.[6]

Freedom of movement (s 19) – 'The purpose of the right to freedom of movement in s [19] is to protect the individual's right to liberty of movement within [Queensland] and their right to live where they wish. It is directed to restrictions on movements which fall short of physical detention coming within the right to liberty in s [29]. The fundamental value which the right expresses is freedom, which is regarded as an indispensable condition for the free development of the person and society.'[7]

Freedom of association (s 22) – The freedom of association protects an individual 'when, for whatever reason and for whatever purpose, [they] wish to associate with others.'[8] Association is indispensable to a functioning democracy and the pursuit of other rights and freedoms. 'The rights to assemble and associate with other persons do not just apply in the familiar contexts of association for political and industrial purposes but also in the contexts of association for

4 *Director of Housing v Sudi* (2010) 33 VAR 139, 145 [29]. See also *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 131 [619]-[620].
5 *PBU v Mental Health Tribunal* (2018) 56 VR 141, 180-1 [128].
6 *Re Director of Housing and Sudi* (2010) 33 VAR 139, 145 [29].
7 *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 124 [588].
8 William A Schabas, *Nowak's CCPR Commentary* (NP Engel, 3rd ed, 2019) 614 [3].

cultural, social and familial purposes. Bail conditions limiting or prohibiting contact between the accused and other persons may interfere with the exercise of these rights.'[9]

The right to protection of families (s 26(1)) – This right is 'principally concerned with the unity of the family' as the fundamental group unit of society.[10] It is a relatively weak right which readily gives way when in conflict with other human rights, and in particular, the right to equality[11] and the best interests of the child.[12]

The best interests of the child (s 26(2)) – 'The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the [child's human rights] and the holistic development of the child.'[13]

The right of Indigenous peoples to maintain kinship ties (s 28(2)(c)) – This right recognises that Indigenous '[c]hildren are born into a world of kin which is so vast they will probably be meeting new kin when they are old men and women. For an Aboriginal child, this network will become one of the two key ways in which their identity as a person is constructed. The other is through relations to country. Both are able to link the child to its ancestors and thus, by implication, to its descendants…'[14] Harm to kinship ties may lead to a loss of knowledge, a loss of 'identity with one's own kin and country', and loss of emotional, physical and social support.[15]

The right to equality and non-discrimination (s 15) – The value underlying this right is that when we discriminate for no rational reason, we fail to see people as fellow human beings. 'To treat somebody differently because of an attribute, such as gender, age or political or religious belief, is to make stereotypical assumptions about them personally and their behaviour. When a difference in treatment is not rationally based on individual worth and merit, but on the basis of such an attribute, the individual is not treated because of who they are. They are treated because of the stigma attached to the attribute. The individual can experience emotional pain, distress and a grievous loss of personal dignity and self-worth. It makes the individual feel less than the valuable human being they are. It undermines their sense of personal autonomy and their capacity for self-realisation. Depending on its nature, unequal treatment can also have serious, and even traumatic, physical, social or economic consequences for the individual and their families. Most of all, it corrodes the dignity which is the essence of their humanity…'[16]

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

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9 *Woods v DPP (Vic)* (2014) 238 A Crim R 84, 91 [17].
10 Alistair Pound and Kylie Evans, *Annotated Victorian Charter of Rights* (Lawbook Co, 2nd ed, 2019) 164 [17.40].
11 Eg Human Rights Committee, *General Comment No 19: Article 23 (The family)*, 39th sess (1990) 1-2 [4], [6]-[9] (but in relation to aspects of art 23 which were not incorporated into s 26(1)).
12 Eg *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221, 255 [145].
13 Committee on the Rights of the Child, *General Comment No 19 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013) 2.
14 *Re CP* (1997) 21 Fam LR 486, 502; *Donnell v Dovey* (2010) 42 Fam LR 559, 601-2 [220].
15 Ibid.
16 *Re Lifestyle Communities Ltd [No 3]* (2009) 31 VAR 286, 311 [109].

The purposes of the proposal to allow electronic tracking as a bail condition are:

a) to deter the child from committing further offences on bail, knowing they are being monitored, and thereby keep the community safe;

b) to allow police to investigate whether the child has or has not complied with their bail conditions and/or committed a crime, if an alert is reported to them; and

c) overall, to lower rates of reoffending of children while on bail.

It is considered that those purposes are proper. Seeking to prevent or reduce crime is a proper purpose consistent with the values of our society.[17]

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

Studies have shown that electronic tracking may help to reduce rates of reoffending while on bail.[18] In New Zealand, electronic monitoring for bail is an option for children aged between 12 and 17. An evaluation found that the rate of reoffending was 19 percent for those detained at home with electronic monitoring, compared to 42 percent for those imprisoned (within 12 months of date of release).[19]

This shows that there is a rational connection between the limitation to be imposed and its purpose, especially in circumstances where electronic monitoring is to be run as a trial in only some areas and the efficacy of electronic monitoring is to be reviewed after 12 months.

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

The following alternatives were considered:

- confining the availability of electronic tracking to charges for more serious offences;
- making clear in the legislation that electronic tracking is an alternative to remand, rather than an additional measure; and,
- providing additional supports to children on bail.

The first option would not be as effective in achieving the purposes of deterrence, facilitating investigations by police and reducing reoffending rates, because it would only achieve those purposes for children charged with a smaller range of offences (that is, fewer categories of crime will be deterred). As it is, the power is already confined to bail in relation to an offence

[17] *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 449-50 [151]; *Tajjour v New South Wales* (2014) 254 CLR 508, 552 [41], 562 [77], 571 [111]-[112], 583 [160].

[18] Eg D Cassidy, G Harper and S Brown, *Understanding electronic monitoring of juveniles on bail or remand to local authority accommodation: Report for the Home Office* (2005); Melvyn Raider, 'Juvenile Electronic Monitoring: A Community Based Program to Augment Residential Treatment' (1994) 12(2) *Residential Treatment of Children and Youth* 37, 42; Office of Program Policy Analysis & Government Accountability (an office of the Florida Legislature), *Electronic monitoring should be better targeted to the most dangerous offenders* (Report No 05-19, April 2005) <https://oppaga.fl.gov/Documents/Reports/05-19.pdf>.

[19] Martinovic, Dr, *New Zealand's extensive electronic monitoring application: "Out on a limb" or "leading the world?* (2017) Practice: The New Zealand Corrections Journal. <https://www.corrections.govt.nz/resources/newsletters_and_brochures/journal/volume_5_issue_1_july_2017/new_zealands_extensive_electronic_monitoring_application_out_on_a_limb_or_leading_the_world>.

which is a prescribed indictable offence. The second option would mean releasing children who are not otherwise suitable for release and would therefore not ensure that the community is protected. As to the final option, providing additional supports alone will not prevent reoffending. In any event, there is no reason why additional supports cannot be provided alongside electronic monitoring.

It is important to emphasise that the power to impose a tracking device condition is subject to the court's discretion if it is satisfied that the condition would be appropriate in the circumstances. A note to s 52AA(1) of the Youth Justice Act (to be inserted by clause 26) will make clear that the child's right to privacy and other human rights will be relevant to whether the condition would be appropriate in all the circumstances. The purpose of the note is to ensure that provisions of the HR Act are considered when a tracking device condition is imposed. The reason why the note is required is that when a court is deciding a bail application it is exercising a judicial function and therefore not a public entity under s 9(4)(b) of the HR Act. Courts are required to take into account some human rights when exercising a judicial function under s 5(2)(a) of the HR Act, but there is uncertainty about which human rights apply in which circumstances. The note clarifies that the human rights listed are relevant to the court's decision to impose an electronic tracking condition. The inclusion of the note is not intended to make human rights irrelevant for other decisions under provisions of the Youth Justice Act which do not contain a similar note.

Embedding human rights considerations in this way ensures that any exercise of power to impose a tracking device condition will represent a proportionate limit on the child's human rights in the circumstances of the particular case. This represents the least curtailment of the child's human rights possible consistent with the purposes of allowing the use of electronic monitoring, namely: deterrence, facilitating police investigations and lowering rates of reoffending.

Accordingly, there are no less restrictive alternatives which would still achieve the purposes of electronic monitoring. Limiting human rights by allowing electronic monitoring for children on bail is therefore necessary to achieve its purposes.

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

As to the impact on human rights (s 13(2)(f)), it is recognised that electronic monitoring represents a large intrusion into privacy, especially for children. Monitoring devices may also be visible and therefore a source of stigma and shame for children when at school, work or in the community. However, electronic tracking is reserved for older children aged 16 or 17, for bail in relation to offences which are prescribed indictable offences, and only where the child has already been previously found guilty of at least one indictable offence. Further, the court will have a discretion in whether to set electronic monitoring as a condition of bail after determining that it is appropriate in the circumstances. The human rights of the child and others will be relevant to the question of whether the condition is appropriate in the circumstances.

On the other side of the scales (s 13(2)(e)), the following factors show the importance of the purpose of reducing reoffending while on bail:

- an acute problem is presented by a small cohort of serious recidivist youth offenders who engage in persistent and serious offending (10 percent of all youth offenders (in the order of 390 individuals) account for 48 per of all youth crime, up four per cent from the previous 12-month period);[20]
- any reduction in reoffending by this cohort means reducing the costs of crime (for example, every assault avoided represents an average of $2,969 in financial harm avoided, and every vehicle theft avoided represents an average of $7,269 in harm avoided, let alone non-financial harms);[21] and
- victims of crime also have human rights which must be respected, including the right to property (s 24) and the right to security of the person (s 29(1)).

Taking all these factors into account, the importance of reducing recidivism through electronic monitoring outweighs the impact on human rights.

(f) any other relevant factors

Not applicable.

Parental or other support associated with youth bail

(a) the nature of the right

The values underlying the right to equality and non-discrimination in s 15 of the HR Act, right to non-interference with family in s 25(a) of the HR Act, the right to protection of family in 26(1) of the HR Act, the right to protection in the best interest of the child in 26(2) of the HR Act and the right of Indigenous peoples to maintain kinship ties in 28(2)(c) of the HR Act are set out above in relation to the proposal for electronic monitoring devices.

As to the right to liberty in s 29 of the HR Act, the fundamental value that this right expresses is 'freedom', which is 'a prerequisite for individual and social actuation and for equal and effective participation in democracy'. The right to liberty is about 'protect[ing] people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense.'[22]

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

The purpose of the proposal is to increase involvement of parents, guardians or other persons in the child's life to support the youth on bail, assist the court or police in bail decision-making and compliance with bail conditions.

This will complement the requirement that parents, guardians or support persons must be notified when a young person is involved in an alleged criminal offence (ss 392 and 421 of the

[20] *Children's Court of Queensland Annual Report 2019-20* (2020) 1 [3], 19 (figure 5).
[21] Queensland Productivity Commission, *Final Report: Inquiry into Imprisonment and Recidivism* (August 2019) 88.
[22] *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 140 [665]; *DPP (Vic) v Kaba* (2014) 44 VR 526, 558 [110].

PPR Act; s 29 of the Youth Justice Act), as well as a court's ability to require a parent to attend court (s 70 of the Youth Justice Act).

Ultimately, ensuring compliance with bail conditions is about rehabilitating offenders and reducing reoffending. Those are proper purposes consistent with the values of our society.[23]

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

It is considered that greater participation by parents, guardians or other persons will lead to greater compliance by the child with their bail conditions. The Youth Justice Strategy recognises family dysfunction as a risk factor, and good parenting and positive role models as protective factors.[24] Further, a 2018 survey of young people in contact with the justice system showed young people wanted more support, particularly emotional support, from caseworkers and family.[25]

It is therefore considered that the proposal will help to achieve its purpose. It is acknowledged that the proposal may not help to reduce reoffending where the child's family is so dysfunctional that they will not engage no matter the risk to the child's liberty. In recognition of this, the proposal allows bail decision-makers the discretion to take into consideration any indications of willingness to support the child by 'another person.' This is a deliberately broad term, intended to capture any other person that may be in a position to support the child, including extended family, kinship ties, friends, neighbours, employers, or support workers.

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

The following alternatives were considered:

- relying upon existing non-coercive ways of engaging family, such as notice requirements under ss 392 and 421 of the PPR Act;
- relying upon the existing power of the court under s 70 of the Youth Justice Act to require a parent to attend court, which carries criminal sanctions for non-compliance;
- relying upon restorative justice programmes; and
- providing additional supports to children who do not have family supports.

As to the first and second option, notwithstanding the existing ways of engaging the families of children under the PPR Act and the Youth Justice Act, there are some parents who remain disengaged despite being notified by police or required to attend by court. Accordingly, these options are not as effective as the proposal to allow the court to take into consideration, in determining whether to grant bail, any indication of willingness to support the young offender from another person who is not a parent to the child. As to the third option, restorative justice

[23] *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 449-50 [151]; *Tajjour v New South Wales* (2014) 254 CLR 508, 552 [41], 562 [77], 571 [111]-[112], 583 [160].

[24] *Review of Effective Practice in Juvenile Justice: Report for the Minister for Juvenile Justice* (January 2010) iv.

[25] Create Foundation, *Youth Justice Report: Consultation with young people in out-of-home care about their experiences with police, courts and detention* (2018) 11.

conferencing is currently available and is having positive impacts, but it is not suitable in all circumstances, and it requires the child to admit to committing the offence. The final option of investing in additional services alone would not be as effective, if parents are choosing not to engage with those services. Moreover, the strategy of providing additional supports is complementary rather than an alternative.

It follows that there are no less restrictive alternatives reasonably available which would still achieve the purpose of increasing the involvement of parents, guardians or other persons to support bail decision-making and compliance with bail conditions.

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

On one side of the scales (s 13(2)(f)), adding an additional consideration bail decision-makers may choose to take into account may increase the risk that children will be detained, which is a serious limit on the rights of children to their liberty and to protection in their best interests. In some circumstances, it may compound the disadvantage faced by a child with a dysfunctional family or home environment. However, the extension of the proposal to persons other than parents of the child, coupled with the protections in s 48AA(7) of the Youth Justice Act, and the fact that this consideration would be balanced by bail-decision makers against all other factors and is not decisive in and of itself, minimises the extent of the limitation.

On the other side of the scales (s 13(2)(e)), ensuring that children comply with their bail conditions and do not reoffend is important for all of society. It is a weighty consideration as it involves protecting the human rights of victims of crime, including their right to security of person and their right to property.

The government has determined that the need to ensure that children comply with their bail conditions and stop reoffending outweighs the impacts on their human rights.

(f) any other relevant factors

Not applicable.

Presumption against bail

(a) the nature of the right

What is at stake in setting a presumption in favour of detention contrary to s 29(6) of the HR Act is liberty, and liberty is evidently important.[26] As the right of children to protection in their best interests in s 26(2) recognises, liberty is even more important when it comes to children. 'Children are especially entitled to protection from harm, and to human development.'[27]

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

[26] *Re application for bail by Islam* (2010) 175 ACTR 30, 94 [341].
[27] *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221, 227 [11].

The purposes of the proposed presumption against bail are to ensure the accused's presence at trial (recognising that the flight risk is greater for serious offences carrying severe penalties), to ensure that witnesses are not threatened or interfered with, and to protect the community as a whole from further offending.

These are proper purposes which are 'consistent with a free and democratic society' for the purposes of s 13(2)(b) of the HR Act.[28]

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

Reversing the onus for bail means that the child will more likely be detained where they present an unacceptable risk to the community. Accordingly, reversing the onus helps to achieve its purpose of ensuring community safety.

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

The following alternatives were considered:

- continuing to allow the courts to determine whether bail is appropriate in the circumstances of individual cases taking into account all relevant factors in s 48AA(4) of the Youth Justice Act, including that the person is charged with a serious indictable offence while on bail;
- inserting into s 48AA(4) of the Youth Justice Act a more specific consideration regarding whether the child is charged with having committed a serious offence while on bail;
- requiring, rather than permitting, the court to have regard to the matters set out in s 48AA(4) of the Youth Justice Act;
- prohibiting the court from granting bail unless it is satisfied that the grant is justified after considering the matters mentioned in s 48AA(4) of the Youth Justice Act;
- requiring the court to specifically state its conclusions about each of the matters set out in s 48AA(4) of the Youth Justice Act;
- allowing the court to consider the normal bail criteria in s 48AA(4) of the Youth Justice Act in determining whether the child has shown cause as to why their detention is unjustified; and,
- allocating more resources to prevention and early intervention.

The existing bail regime has not prevented the small cohort of serious recidivist youth offenders from engaging in persistent and serious offending and from driving much of the youth offending incidents. The overall number of unique offenders committing new offences whilst on bail decreased for the period 1 January 2018 to 31 December 2020. However, the number of unique young offenders committing more than 20 new offences whilst on bail increased from 133 in 2018 to 194 in 2020. Further, from 1 January 2018 to 31 December 2020, 40,948 distinct reported offences were allegedly committed by young people whilst they were already

[28] *Re application for bail by Islam* (2010) 175 ACTR 30, 94 [342]-[343]. See also Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) 2 [3].

on bail for other alleged offences. The number of offences committed each year has increased steadily from 2018 to 2020, up 17 percent.

This shows that the existing regime of allowing the court to take into account relevant factors under s 48AA(4) of the Youth Justice Act has not been effective in reducing reoffending among this cohort of children. Careful consideration was given to alternatives to a reverse onus for bail put forward in the ACT case of *Re application for bail by Islam*[29] (which are included above). It was considered that slight variations of the existing bail regime would do no more than formalise the existing operation of s 48AA(4) in practice. These alternatives would therefore not be as effective in protecting the community as a reverse onus for bail.

However, the government has taken on board the dialogue between the courts and the legislature in the ACT arising from the case of *Re application for bail by Islam*, and has decided to adopt the alternative of making the normal bail criteria in s 48AA(4) relevant to whether the child has shown cause. This is the intended effect of s 48AA(1)(d), to be inserted by clause 21 of the Bill. This strikes a fairer balance between the human rights of children and the need to protect the community from the danger presented by serious recidivist youth offenders.

The final alternative of allocating more resources to prevention and diversion is not a true alternative because this can be undertaken alongside a presumption against bail.

As there are no equally effective alternatives available which would limit human rights to a lesser extent, reversing the onus for bail is the least restrictive way of achieving its purpose of protecting the community.

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

On one side of the scales, it is acknowledged that a presumption in favour of depriving children of their liberty, without reference to their individual circumstances, lies at odds with the international standard that depriving children of their liberty must be reserved as a 'last resort', and 'limited to exceptional cases'.[30] It is also acknowledged that increasing the risk of detention represents a serious incursion into the right of children to protection in their best interests, given that 'the use of deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers his/her reintegration into society.'[31]

However, the reversal of the onus is confined to charges for a targeted range of offences committed while the young person is on bail for an existing indictable offence. The normal bail

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29 (2010) 175 ACTR 30.

30 Human Rights Committee, *General comment No 35: Article 9 (Liberty and security of the person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 12 [38]; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37(b); Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) 14 [86]-[88]; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33 (adopted 29 November 1985) ('the Beijing Rules') r 13; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113 (adopted 14 December 1990) ('the Havana Rules') rr 2, 17.

31 *Certain Children v Minister for Families and Children [No 2]* (2017) 52 VR 441, 522 [262](c), quoting UN Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc No CRC/C/GC/10 (25 April 2007) 5 [11].

criteria will continue to be relevant to whether a child has shown cause. This represents the least restriction possible on the child's human rights consistent with the purpose of protecting the community.

On the other side of the scales, the need to protect the community is necessarily a weighty consideration, as it involves protecting the human rights of victims of crime, including their right to security of the person, and their right to property. As identified above, every crime avoided represents the avoidance of harm to victims and to society more broadly.

Accordingly, the government has determined that the impacts on human rights are outweighed by the importance of protecting the community through a reversal of the onus for bail applications of children who have been charged with committing a prescribed indictable offence while on bail for an indictable offence.

(f) any other relevant factors

Not applicable.

Providing powers for police to stop a person and use a hand held scanner to scan for knives

(a) the nature of the right

The nature of the rights to freedom of movement (s 19 of the HR Act), privacy (s 25 of the HR Act), and the best interests of the child (s 26(2) of the HR Act) have been considered above in relation to electronic monitoring devices.

As to the other rights engaged:

Equality before the law (s 15(3)) – The value underpinning equality before the law is non-arbitrariness, which is a general principle of the rule of law.

Right to property (s 24) – The right to property encompasses 'free use, enjoyment and disposal of all [one's] acquisitions.'[32]

Freedom of thought, conscience, religion and belief (s 20) – Freedom of religion recognises that people are entitled to have differing beliefs in a pluralistic society. 'The essence of the concept of freedom of religion is the right to entertain such religious beliefs as a person chooses, the right to declare religious beliefs openly and without fear of hindrance or reprisal, and the right to manifest religious belief by worship and practice or by teaching and dissemination. But the concept means more than that … Freedom means that, subject to such limitations as are necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others, no one is to be forced to act in a way contrary to his beliefs or his conscience.'[33] Freedom of religion has been recognised as being 'of the essence of a free society'.[34]

[32] *PJB v Melbourne Health* (2011) 39 VR 373, 397 [93].
[33] *R v Big M Drug Mart Ltd* [1985] 1 SCR 295, 336-7, 351.
[34] *Church of the New Faith v Commissioner of Pay-roll Tax (Vic)* (1983) 154 CLR 120, 130.

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

The purpose of the proposed amendments includes the following:

a) minimise the risk of physical harm caused by knife crime in safe night precincts by removing knives from individuals in these areas; and,

b) ensuring the safety of others in the community by reducing knife crime.

It is clear that those purposes are proper purposes under s 13(2)(b) of the HR Act.

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

The proposed action of screening individuals for knives in areas which have been identified as having an increased rate of knife crime will operate to both remove knives from the environment and dissuade individuals from entering this area while carrying a knife. As such, it is likely to achieve the purpose of reducing the prevalence of knife crime in these areas and consequently ensure the safety of other individuals in the community.

The proposed amendment is rationally connected to the legitimate ends identified above and therefore satisfies s 13(2)(c) of the HR Act.

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

The following alternatives were considered:

- requiring a police officer to hold a suspicion or reasonable suspicion before stopping and scanning a person;
- requiring a police officer to be satisfied of some lower state of satisfaction before stopping and scanning a person;
- requiring a police officer to seek a person's consent before scanning a person;
- excluding children from the persons who may be subject to use of a hand held scanner; and,
- requiring a senior police officer to reasonably believe that serious violence may take place in a safe night precinct, or that persons are carrying knives in a safe night precinct, before giving an authorisation under s 39E of the PPR Act (to be inserted by the Bill).

Each of these alternatives would increase the risk that knives will not be detected until they have placed the community at risk. As such, while these would be less restrictive measures, they would not be as effective in achieving the purpose. It is recognised that the requirement a senior police officer give authorisation (under s 39E of the PPR Act to be inserted by the Bill) does not depend on any criteria at all, and in particular no criteria which would target the authorisation to a reasonable belief or suspicion that knives are being carried in a particular area at a particular time. However, it is considered that requiring any criteria for an authorisation would reduce the ability to stop and scan people and therefore detect knives in safe night precincts.

Part 3A of chapter 2 which is proposed to be inserted into the PPR Act is otherwise narrowly tailored to only limit human rights to the extent necessary to deal with the prevalence of knives. Screening is intended to be quick and non-invasive. It is not proposed to require the names of individuals who are screened to be provided, thus reducing any limitation of an individual's privacy and reducing the time during which an individual's movement is limited. Further, screening will be confined to specified areas which will be well-known to the public as safe night precincts.

A new section 39F also inserts additional safeguards into the PPR Act with respect to these additional powers. These are:

- requiring the police officer to exercise the power in the least invasive way that is practicable in the circumstances;
- allowing the police officer to detain the person for only so long as is reasonably necessary to exercise the power;
- requiring the police officer to provide their name, rank and station if requested and other evidence of their identity;
- requiring the police officer to inform the person to be scanned that they are required to submit to the use of a hand held scanner;
- requiring the police officer to offer to give the person to be scanned a notice (and to give that notice if that offer is accepted) that states:
    - the person is in a public place in a prescribed area;
    - the police officer is empowered to require the person to:
        - stop and submit, or resubmit, to the use of a hand held scanner; and
        - produce a thing that may be causing the scanner to indicate the presence or likely presence of metal; and
    - it is an offence for the person not to comply with the requirement unless the person has a reasonable excuse; and
- requiring the police officer to be, if reasonably practicable, the same sex as the person to be scanned.

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

The use of hand held scanners in safe night precincts would limit a number of human rights, and in particular the right to equality before the law, freedom of movement and the right to privacy. The real gravamen of the impact on human rights is that police can arbitrarily stop and scan a person, in the absence of any reason, provided only that a senior police officer has provided authorisation, which again may be given arbitrarily, in the absence of any reason. Without further safeguards, the impact of these provisions may not be compatible with human rights. However, it is noted that the limits on freedom of movement and the right to privacy are 'perhaps not at the gravest end of such interferences'.[35] The power is also designed to be exercised non-intrusively and for the shortest period possible, with no ancillary power to request the person's name. The government has determined that the need to detect knives in safe night precincts through a power to stop and scan people at random outweighs the human rights of the individuals screened.

[35] *R (Roberts) v Commissioner of Police of the Metropolis* [2015] UKSC 79; [2016] 1 WLR 210, 213 [3].

(f) any other relevant factors

Not applicable.

Enhancing the existing owner onus deeming provisions for hooning offences

(a) the nature of the right

As already outlined, the requirement to provide information in response to a type 1 vehicle related offence notice limits the right to privacy (s 25) and the right not to incriminate oneself (s 32(2)(k)). The nature of the right to privacy has been discussed in relation to electronic monitoring devices. As to the nature of the right not to incriminate oneself, it is a right which defines the relationship between the individual and the state and protects people against aggressive behaviour of those in authority. It reflects the philosophy that the prosecution must prove its case without recourse to the suspect.[36] The right not to incriminate oneself may extend to suspects who have not yet been formally charged.[37]

Failure to respond to a type 1 vehicle related offence notice will result in a person being taken to have been the driver of the vehicle, as well as certain impediments to relying on exculpatory evidence in the person's defence. Both of these limit the presumption of innocence. Section 32(1) of the HR Act provides that 'a person charged with a criminal offence has the right to be presumed innocent until proved guilty according to law'. The gravamen of a limit on the right to be presumed innocent is the possibility that 'an accused may be convicted whilst a reasonable doubt exists'.[38]

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

The purpose of the proposed amendments is to be able to issue type 1 vehicle related offence notices as an investigatory tool, allowing police to identify and charge offenders, in the same way that evasion offence notices are currently issued under Chapter 22, Part 2 of the PPR Act. Section 755 of the PPR Act makes this clear by only permitting a notice to be issued if 'it appears to a police officer investigating the offence that giving the owner of the motor vehicle involved in the offence a notice under this section may help in the investigation.' It is also reinforced by the purposes of chapter 22 of the PPR Act (as amended by clause 9 of the Bill).

The same investigatory purposes are involved when it comes to impediments to using exculpatory evidence in the event that a person does not respond to a type 1 vehicle related offence notice or omits information in their response. The requirement to give notice to the prosecuting authority is to allow sufficient time to investigate the new information. The requirement of a grant of leave from the court is to encourage people issued with a type 1 vehicle related offence notice to respond.

[36] *Re Application under Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, 448 [146].
[37] *Re Application under Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415, 452 [161]-[163]; *Beghal v Director of Public Prosecutions* [2016] AC 88, 120 [68], 120-1 [72].
[38] *R v Whyte* [1988] 2 SCR 3, 18 [31]-[32].

The extension of this ability to issue notices to type 1 vehicle related offences is to target 'hooning' offences which are considered to put the community at significant risk. As such, the purpose of the amendments is to allow the effective investigation of type 1 vehicle related offences, leading to the reduction of hooning offences and improving community safety. It is clear that investigating crime and improving community safety are proper purposes under s 13(2)(b) of the HR Act.

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

The proposed amendments will be useful in circumstances where vehicles are being taken from family members or other persons who may wish to protect juvenile offenders or where registered owners were passengers in the vehicle.

It is clear that requiring a person to provide information about the circumstances of the offence may assist police in investigating the offence. In fact, the ability to issue a notice is only triggered if it appears to the police officer investigating the offence that giving the notice will assist in investigating the offence.

The connection between the reversal of the onus of proof and the legitimate purpose of community safety is less clear.

Section 755 of the PPR Act, as amended, will only allow the police officer to give notice to the owner of the vehicle involved in the offence. The fact that the person is the owner of the vehicle involved in the offence gives rise to a logical inference that the person was involved in the type 1 vehicle related offence, because most vehicles are usually driven by their owners.

Therefore, it is considered that the proposed amendments are rationally connected to their purpose.

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

The following alternatives were considered:

- reversing the evidentiary burden, and not the legal burden of proof (that is, allowing the owner of the vehicle to displace the presumption by pointing to sufficient evidence that he or she was not involved in the offence rather than being required to prove this on the balance of probabilities);
- not placing any impediments on the owner of the vehicle relying on evidence in their defence in the event that they do not include that information in the statutory declaration (that is, also amending the existing s 756(5)-(7) of the PPR Act); and
- making the requirements in s 756(5) of the PPR Act alternative requirements rather than cumulative requirements in all cases (that is, allowing the owner to rely on exculpatory evidence they did not provide in a response to the notice if they give notice to the prosecuting authority without also requiring the court's leave).

As to the first option, merely placing an evidential burden on the owner of the vehicle would undermine the purpose of investigating type 1 vehicle related offences. Rather than respond to the notice, owners may instead simply elect to provide testimony in a proceeding, the veracity

of which the police will not have had an opportunity to investigate, and which will be impracticable and impossibly onerous for the prosecuting authorities to disprove.[39] For these reasons, a reverse legal burden is necessary to achieve the purpose of allowing the effective investigation and prosecution of type 1 vehicle related offences.

As to the remaining alternatives, any alternative which would decrease the incentive to provide a full and accurate response to a type 1 vehicle related offence notice would undermine the purpose of effectively investigating and prosecuting type 1 vehicle related offences.

It should also be pointed out that when a court is considering whether it would be in the interests of justice to grant leave to rely on exculpatory evidence, the rights to a fair hearing and rights in criminal proceedings under ss 31 and 32 of the HR Act will be relevant.[40]

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

The reverse onus strikes a fair balance between the right to be presumed innocent and the need to effectively investigate and prosecute type 1 vehicle related offences, taking into account:

- the importance of preventing the harm associated with hooning and other type 1 vehicle related offences (noting that that there were 287 road fatalities in Queensland in the 12 months to 31 January 2021, which is 73 more fatalities than occurred in the preceding 12 months);
- that it would be relatively easy for the defendant to discharge the reverse onus given that the owner of the vehicle is best placed to know who drove it (putting aside the exceptions where the vehicle is stolen);
- the difficulty in investigating type 1 vehicle related offences, given that they are often committed in large groups or involves dangerous driving behaviour such as very high speeds, making it difficult to intercept and identify the driver of the vehicle involved; and,
- the difficulty in effectively investigating and prosecuting type 1 vehicle related offences if the prosecution were required to prove beyond a reasonable doubt that the owner of the vehicle was the driver.

(f) any other relevant factors

Not applicable.

Conclusion

In my opinion, clauses 5 and 6 of the Youth Justice and Other Legislation Amendment Bill 2021 may not be compatible with the human rights protected by the *Human Rights Act 2019*. In my further opinion, the remainder of the Bill is compatible with protected human rights.

[39] *R v Whyte* [1988] 2 SCR 3, 27 [50]; *R v Keegan* [1990] 3 SCR 697, 795; *R v Chaulk* [1990] 3 SCR 1303, 1337; *R v Lambert* [2002] 2 AC 545, 622 [191]-[192].

[40] *AB v CD & EF* [2017] VSCA 338, [170]; *De Simone v Bevnol Constructions and Developments Pty Ltd* (2009) 25 VR 237, 247 [51]-[52].

The reason why clauses 5 and 6 of the Bill may not be compatible with human rights is that the power to stop and scan a person in a safe night precinct is not based on any criteria. Further, the power of a senior police officer to authorise the use of hand held scanners is not based on any criteria, unlike similar laws in other jurisdictions. However, the government has determined that the need to uncover knives in safe night precincts outweighs the impacts on the human rights of people stopped and scanned by police.

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