

Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022

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* (Qld) (HR Act), I, Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, make this statement of compatibility with respect to the Domestic and Family Violence Protection (Combating Coercive Control) and Other Legislation Amendment Bill 2022 (the Bill).

In my opinion, the Bill is compatible with human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The Bill will amend the *Coroners Act 2003* (Coroners Act); the Criminal Code; the *Domestic and Family Violence Protection Act 2012* (DFVP Act); the *Evidence Act 1977* (Evidence Act); the *Penalties and Sentences Act 1992* (Penalties and Sentences Act), the *Youth Justice Act 1992* (Youth Justice Act), the *Oaths Act 1867* (Oaths Act), and the *Telecommunications Interception Act 2009* (TI Act). The Bill makes consequential amendments as set out in Schedule 1 to the Bill.

The main purpose of the Bill is to implement immediate legislative reforms addressing coercive control as recommended by the Women's Safety and Justice Taskforce (Taskforce) in its report, *Hear her Voice – Report one – Addressing coercive control and domestic and family violence in Queensland* (first report). Specifically, the Bill implements recommendations 52 to 60 and 63 to 66 of the first report.

In addition to addressing these recommendations, the Bill will amend the Criminal Code and Evidence Act to modernise and update sexual offence terminology and to provide standing to counsellors and alleged victims of sexual assault offences ('counselled persons') throughout sexual assault counselling privilege proceedings. These amendments respond to stakeholder advocacy.

The Bill will also amend the Youth Justice Act to address implications arising from the recommendations in Chapter 3.8 of the first report, for children and child offenders.

Further, the Bill will amend the Coroners Act to remove the limitation upon the re-appointment of the State Coroner and the Deputy State Coroner.

The Bill will also amend the Oaths Act to address issues that have arisen in the implementation of the *Justice and Other Legislation Amendment Act 2021* (JOLA Act).

Amendments to the TI Act will enable the Public Interest Monitor (PIM) to perform the role intended under the International Production Order (IPO) scheme in relation to applications for interception IPOs.

A. Amendments in response to the Taskforce

On 2 December 2021, the Taskforce released its first report, and made 89 recommendations to strengthen responses to coercive control and domestic and family violence. All recommendations were supported or supported-in-principle by the Queensland Government.

In Chapter 3.8 of the first report, the Taskforce made recommendations for immediate legislative reforms addressing coercive control. The Bill makes the legislative amendments in recommendations 52 to 60 and 63 to 66 of the first report. These amendments are outlined below.

Amendments to the Criminal Code

Amendments to Chapter 33A of the Criminal Code

The Bill will rename, modernise and strengthen the offence of unlawful stalking in Chapter 33A of the Criminal Code.

The amendments in the Bill seek to:

- reflect the association between stalking and domestic and family violence;
- ensure that traditional attitudes, practices and misconceptions do not impede the offence being utilised, where appropriate, to hold perpetrators to account;
- modernise the offence so that it reflects criminal behaviour including the interaction between stalking and coercive control;
- increase the maximum penalty for stalking that occurs in the context of a domestic relationship to reflect the nature of, and damage caused by, that behaviour; and
- encourage greater use of the offence by police and prosecutors.

The amendments to Chapter 33A of the Criminal Code will broaden the type of offending captured by the offence and better reflect the way an offender might use technology to facilitate unlawful stalking, intimidation, harassment or abuse. The additional conduct that will be captured by the offence will include:

1. contacting a person in any way using any technology and over any distance;
2. monitoring, surveilling or tracking a person's movements, activities or interpersonal associations without the person's consent, including through the use of technology;
3. publishing offensive material on a website, social media platform or online social network in a way that will be found by, or brought to the attention of, a person;
4. giving offensive material either directly or indirectly to a person, including by using a website, social media platform or online social network; and
5. a threatening, humiliating or abusive act against a person whether or not involving violence or the threat of violence (where the offence currently captures intimidating and harassing acts of that nature).

The other elements of unlawful stalking are unchanged by the Bill, including the requirements relating to causing the stalked person apprehension or fear of violence, or detriment, reasonably arising in all the circumstances.

The Bill will introduce a new circumstance of aggravation with a maximum penalty of 7 years imprisonment for the offence of unlawful stalking, intimidation, harassment or abuse, if a domestic relationship exists or has existed between the offender and the stalked person.

Section 359F of the Criminal Code currently permits a court to make a restraining order in relation to a charge of stalking regardless of whether the person is convicted or the prosecution ends in another way. It is an offence to contravene a restraining order, the maximum penalty for which is 40 penalty units or 1 year imprisonment.

The Bill will increase the maximum penalty for the offence of contravening a restraining order to 120 penalty units or 3 years imprisonment. The Bill also provides for a circumstance of aggravation if the person has been convicted of a domestic violence offence in the 5 years before the contravention of the restraining order. The maximum penalty for contravening a restraining order with a circumstance of aggravation will be 5 years imprisonment or 240 penalty units. That maximum penalty will apply regardless of whether the domestic violence offence was committed before or after commencement of the Bill.

Under section 359F of the Criminal Code there is no limitation or prescription about the length of the restraining order that can be imposed by the court. The Bill provides that when a court makes a restraining order, the default period is 5 years unless the court is satisfied that the safety of a person in relation to whom the restraining order is made is not compromised by a shorter period.

Amendment to section 590AH of the Criminal Code (Disclosure that must always be made)

The Bill amends section 590AH of the Criminal Code to require the prosecution to provide that for a relevant proceeding (as defined in section 590AD of the Criminal Code) or a summary proceeding under the *Justices Act 1886* for an accused person who is charged with a domestic violence offence, the prosecution must give the accused person a copy of the person's domestic violence history.

The obligation to disclose a domestic violence history arises where the domestic violence history is in the possession of the prosecution as defined in section 590AE of the Criminal Code.

Amendments to the Domestic and Family Violence Protection Act 2012

Definition of domestic violence

The Bill amends the definitions of 'domestic violence' (section 8), 'emotional or psychological abuse' (section 11) and 'economic abuse' (section 12) in the DFVP Act to include a reference to a 'pattern of behaviour'.

Particularly, the definition of 'domestic violence' will be amended to make it clear that domestic violence includes behaviour that occurs over a period of time and includes individual acts that, when considered cumulatively, are abusive, threatening, coercive or cause fear. The amendment will also outline that domestic violence behaviour is to be considered in the context of the relationship as a whole.

Cross applications

The Bill amends the DFVP Act to require applications and cross applications for protection orders to be heard together. When an application and cross application are heard in court, the amendments will require the court to consider whether to make arrangements for the safety, protection or wellbeing of the person most in need of protection. These arrangements may include arrangements under sections 150 and 151 of the DFVP Act, such as allowing the person most in need of protection to give evidence outside the courtroom.

The Bill amends the DFVP Act to require the court to determine the person most in need of protection in the context of a relationship as a whole, in situations where both parties have applied for a protection order or variation of a domestic violence order against the other party. The court will only be able to make one order to protect the person most in need of protection, unless there are exceptional circumstances where there is clear evidence that each party in the relationship is in need of protection from each other. The Bill amends section 4 (Principles for administering the Act) and Part 3, Division 1A of the DFVP Act to reflect this.

The Bill also amends the DFVP Act to include a provision that provides legislative guidance for magistrates when determining the person most in need of protection.

Costs

The Bill amends section 157 of the DFVP Act to expand the court's ability to award costs. The amendments allow the court to award costs against an applicant if the court decides to dismiss an application and, in doing so, determines that the applicant, in making the application, intentionally engaged in behaviour or a continued pattern of behaviour that is domestic violence towards the respondent to the application. The amendments include a note which outlines that this behaviour is systems abuse or legal abuse.

The court will continue to be able to award costs against an applicant under the current grounds in section 157 of the DFVP Act, which is where the court dismisses an application on the grounds that it is malicious, deliberately false, frivolous or vexatious.

Criminal history and domestic violence history in civil proceedings

The Bill amends the DFVP Act to insert new sections 36A and 90A which require the police commissioner to provide the court with the criminal history and domestic violence history of the respondent in all applications for protection orders and applications to vary domestic violence orders.

The amendments require the court to consider the criminal history and domestic violence history of a respondent when making a protection order under section 37 of the DFVP Act. The court may consider the histories when making a temporary protection order under section 45 of the DFVP Act, an order by consent under section 51 of the DFVP Act, or varying a domestic violence order under section 91 of the DFVP Act.

The Bill amends section 42 and 43 of the DFVP Act to allow the court to consider the criminal history and domestic violence history of an offender or parent when making or varying an order under those sections.

A domestic violence history will include current and expired domestic violence orders and police protection notices against the respondent and any other person. A criminal history, for the purposes of the DFVP Act, will include a charge or conviction for an offence in Queensland or elsewhere, regardless of when the conviction occurred.

The Bill also provides the court with the ability to make an order in relation to the use and disclosure of a respondent's domestic violence and criminal history by parties to an application.

Substituted service

The Bill amends the DFVP Act to allow a court to make a substituted service order for documents ordinarily required to be personally served by a police officer, in limited circumstances.

The court will be able to make a substituted service order if it is satisfied that: reasonable attempts have been made to personally serve the document; and, serving the document in another way is necessary or desirable to protect the aggrieved and reasonably likely to bring the document to the attention of the respondent.

A police officer will be required to serve the document in the substituted way and must, unless it is not reasonable in the circumstances, give the respondent a copy of the document in the manner ordered and explain what the document is and the nature and effect of the document.

The court must specify in the substituted service order the circumstances in which the document is taken to have been served on the respondent.

Reopening proceedings

The Bill amends the DFVP Act to allow a respondent to apply to the court to reopen a proceeding if a court makes or varies a protection order and (a) the application for the order was served on the respondent under a substituted service order; and (b) the application was not, and could not reasonably have been brought to the attention of the respondent despite being served in a way stated under the substituted service order; and (c) the respondent was not present in court when the application was heard and decided.

Amendments to the Evidence Act 1977

Expanding class of protected witnesses for cross-examination

The Evidence Act provides a scheme for the giving of evidence by a protected witness. If a person is a protected witness, the defendant may not cross-examine them, if the defendant is not represented by a lawyer. In this instance, the court may organise, or make an order, for the defendant to be given free legal assistance by Legal Aid to undertake cross-examination, unless the defendant does not want to cross-examine the protected witness or the defendant arranges their own legal representation.

The Bill amends the Evidence Act to create a new category of protected witness with respect to any domestic violence offence, including any offences in Part 7 of the DFVP Act (which includes an offence of contravening a domestic violence order). The prohibition on direct cross-examination is extended to this new category of protected witness, thereby bringing the complainant of a domestic violence offence within the protected witness scheme. This means that where a defendant is unrepresented, the complainant cannot be cross-examined directly by them. If cross-examination is to occur, it will be undertaken by a lawyer.

The amendments will also include persons other than the complainant but there are some additional requirements for protected witnesses who are not the complainant - the witness: (1) must be named in a domestic violence order as an aggrieved, or a relative or associate of the aggrieved, (2) the offence must be a contravention of a domestic violence order or an offence for an act or omission that also constitutes that offence; and (3) the court must consider that the person would be likely to be disadvantaged as a witness, or to suffer severe emotional trauma, unless treated as a protected witness. The last of these requirements reflects some of the limbs of the existing definition for a special witness in section 21A of the Evidence Act.

This protected witness status will apply to witnesses in criminal proceedings conducted in the Magistrates Court and, proceedings conducted on indictment in the Supreme and District Court. The provisions will not, however, apply to civil proceedings under the DFVP Act, in these circumstances, section 151 of the DFVP Act will continue to apply to restrict the cross-examination of protected witnesses.

Admission of evidence of domestic violence

Currently, section 132B of the Evidence Act allows for relevant evidence of the history of the domestic relationship between a defendant and complainant to be admitted in criminal proceedings. The operation of section 132B is limited, however, to offences in Chapters 28 to 30 of the Criminal Code. Chapters 28 to 30 contain offences including homicide, suicide, concealment of birth, unlawful striking or death, endangering life or health and assaults. The Bill will therefore remove restrictions on section 132B applying only to offences in Chapters 28 to 30 of the Criminal Code.

The Bill also makes evidence of domestic violence admissible whether that evidence relates to the defendant, the person against whom the offence was committed, or another person connected with the proceeding.

Expert evidence

The Bill facilitates the admission of expert evidence in criminal proceedings about the nature and effects of domestic and family violence. This expert evidence may include evidence about the effects of domestic violence on any person or on a particular person.

Jury directions

The Bill amends the Evidence Act to provide the court with a discretion to give jury directions that address misconceptions and common stereotypes about domestic violence. The amendments seek to enable juries and judicial officers to be better informed and able to consider evidence of domestic violence that has been raised during a trial.

Amendments to the Penalties and Sentences Act 1992 and Youth Justice Act 1992

Mitigating factor in sentencing

The Bill amends the Penalties and Sentences Act to require a court, when sentencing an offender who is a victim of domestic violence, to treat the effect of the domestic violence on the offender and the extent to which the commission of the offence is attributable to the effect of the violence, as a mitigating factor, unless the court considers it is not reasonable to do so because of exceptional circumstances.

The Youth Justice Act is similarly amended to provide a mitigating factor for child offenders who are victims of domestic violence in addition to those who have been exposed to domestic violence. Unlike the Penalties and Sentences Act, the amendment to the Youth Justice Act does not exclude the operation of the mitigating factor in any circumstance, including exceptional circumstances.

Matters to be considered in determining an offender's character

The Bill also amends section 11 of the Penalties and Sentences Act to provide that the history of domestic violence orders made or issued against an offender, other than orders made or issued when the offender was a child, may be considered by a sentencing court when determining an offender's character. The Bill provides that if oral submissions are to be made to, or evidence is to be brought before, the court about the history of domestic violence orders made or issued against the offender, the sentencing judge or Magistrate may close the court for that purpose.

B. Other amendments not related to the Taskforce

Amendments to the Criminal Code - sexual offence terminology

The Bill amends the Criminal Code to change the offence title of section 229B from 'Maintaining a sexual relationship with a child' to 'Repeated sexual conduct with a child'; and replace references to the term 'carnal knowledge' with 'penile intercourse'.

Amendments to the Evidence Act 1977 - sexual assault counselling privilege

The Bill amends the Evidence Act to provide that a counsellor and counselled person have standing to appear in sexual assault counselling privilege proceedings when the court is deciding whether a document or evidence relating to the counselled person or counsellor is a protected counselling communication and when the court is deciding an application for leave in relation to accessing, inspecting, copying, disclosing, or using protected counselling communication.

Amendments to the Coroners Act 2003 - appointments

The Bill amends the Coroners Act to remove the limitation upon the number of terms of re-appointment of the State Coroner and the Deputy State Coroner.

Amendments to the Oaths Act 1867

Part 6 of the JOLA Act amended the Oaths Act to modernise the way that affidavits and statutory declarations can be made. The JOLA Act allows affidavits and statutory declarations to:

- be made in electronic form and signed electronically;
- witnessed over audio visual (AV) link, as an alternative to the ordinary physical approach; and
- be made in counterparts and signed by substitute signatories.

The JOLA Act also introduced new requirements for information to be included in affidavits and statutory declarations – these requirements apply to all affidavits and statutory declarations, regardless of how they are made.

The Bill amends the Oaths Act to resolve a number of issues that have arisen in the implementation of the JOLA Act.

The amendments to the Oaths Act contained in the Bill deal with the following matters:

- *Scope clarification:* Part 6A of the Oaths Act provides for the use of AV links for the making of affidavits, statutory declarations or particular oaths. The Bill clarifies that nothing in Part 6A limits a provision of another Act or law about the way in which, or by whom, a document is sworn, or taken or received on oath or made as a statutory declaration, and clarifies that Part 6A, Division 5 only applies to affidavits and statutory declarations; and
- *Minor non-compliance:* The Bill amends the Oaths Act to provide that an affidavit or statutory declaration is not invalid only because it does not comply with a requirement under sections 13B, 13C or 13E of the Oaths Act that does not materially affect the nature of the affidavit or declaration. The Bill also retrospectively validates any affidavits or statutory declarations that were made since 30 April 2022 that were invalid due to minor non-compliance with those requirements.

Amendments to the Telecommunication Interception Act 2009

Law enforcement agencies, including the Crime and Corruption Commission (CCC) and the Queensland Police Service (QPS), can seek an interception IPO under the *Telecommunications (Interception and Access) Act 1979* (Cth) (Commonwealth TI Act) where a person is using or is likely to use the communications service and the information gathered under the IPO would be likely to assist in the detection, prevention, investigation or prosecution of a range of serious offences (IPO (investigate) application). Law enforcement agencies with a declaration under section 38A of the Commonwealth TI Act can seek an interception IPO for the monitoring of a person subject to a supervisory order (which relates to terrorism) (IPO (supervisory) application).

The Bill amends the TI Act to ensure the PIM is notified of, and can appear at and make submissions in, an application for an interception IPO brought by Queensland law enforcement authorities consistent with the Commonwealth IPO scheme.

While the PIM is not appearing to represent the target in the application, their role is imperative in ensuring the proceedings occur in a fair and transparent manner. The inclusion of the PIM as part of the application process is a safeguard by providing appropriate ‘front-end’ accountability.

The Bill also makes related consequential and transitional provisions.

Human Rights Issues

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

A. Amendments in response to the Taskforce

In my opinion, the human rights that are relevant to the amendments in the Bill in response to the Taskforce recommendations are:

- Recognition and equality before the law (section 15);
- Right to life (section 16);
- Protection from torture and cruel, inhuman or degrading treatment (section 17);
- Freedom of movement (section 19);
- Freedom of expression (section 21);
- Peaceful assembly and freedom of association (section 22);
- Privacy and reputation (section 25);
- Protection of families and children (section 26);
- Right to liberty and security of person (section 29);
- Fair hearing (section 31); and,
- Rights in criminal proceedings (section 32).

The amendment to the Penalties and Sentences Act to require a court to treat the effect of domestic violence on an offender as a mitigating factor engages and promotes the right to recognition and equality before the law (section 15) and protection of families and children (section 26). Similar amendments made to the Youth Justice Act engage and promote the protection of families and children (section 26) and the rights of children in the criminal process (section 33).

The amendment to section 590AH of the Criminal Code which provides that the prosecution must give the accused person a copy of their domestic violence history (in certain proceedings), promotes the right to recognition and equality before the law (section 15), the right to life (section 16), the protection from torture and cruel, inhuman or degrading treatment (section 17), the protection of families and children (section 26), the right to liberty and security (section 29) and the right to a fair hearing (section 31).

B. Other amendments not related to the Taskforce

Amendments to the Oaths Act

In relation to affidavits and declarations used in proceedings, the Bill engages and promotes the right to a fair hearing (section 31) and promotes procedural fairness by ensuring that a person can continue to participate in a court or tribunal process regardless of whether the statutory declaration or affidavit contains all the relevant information required under sections 13B, 13C or 13E of the Oaths Act.

In relation to statutory declarations used in transactions, the Bill engages and promotes property rights (section 24) as it ensures and preserves any rights, interests and obligations accrued by persons relying on the statutory declaration being validly made.

Amendments to the Telecommunications Interception Act

In my opinion, the right to privacy and reputation (section 25) is relevant to the amendments to the TI Act in the Bill.

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*)

A. Amendments in response to the Taskforce

Amendments to the Criminal Code

Amendments to Chapter 33A of the Criminal Code

The human rights relevant to this amendment are:

- freedom of expression;
- freedom of movement;
- freedom of association; and
- right to liberty.

A discussion of the limitation on these rights is set out below.

(a) the nature of the right

Freedom of expression in section 21 of the HR Act has intrinsic value to individual self-fulfilment. It also has instrumental importance for society as a whole. There cannot be democracy or the rule of law without freedom of expression. The right protects an individual's ability to hold an opinion and to seek, receive and impart information and ideas of all kinds, including orally, in writing or in another way. The right protects the expression of a range of information.

The right to ***freedom of movement*** protects the right of every person within Queensland to move freely within Queensland, enter or leave Queensland and choose where they will live. This right means that public entities cannot act in a way that would unduly restrict freedom of movement.

The right to ***freedom of association*** protects an individual's right to associate with others. It applies to the right to association for political and industrial purposes as well as for cultural, social and familial purposes.

Section 29(1) of the HR Act states that every person has the ***right to liberty***. This right to liberty means that people must not be arrested and detained, unless provided for by law. Their arrest and the detention must also not be arbitrary.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Clause 19(3) to (7) of the Bill expand the offence of unlawful stalking through amendments to capture a wider range of behaviours which may constitute the offence. The amendments will enable the offence to apply to technology facilitated abuse that includes using any technology over any distance (including by telephone, mail, fax, SMS message, email, an app on a computer, smart phone or other electronic device or online social network) and publishing offensive material on a website, social media platform or online social network in a way that will be found by, or brought to the attention of, a person. This means that these methods of communication or expression will be captured within the offence of unlawful stalking, intimidation, harassment or abuse.

However, the amendments will only restrict an individual's ability to express information where that behaviour otherwise falls within the elements of the offence. This includes the requirement that the behaviour causes the stalked person or another person detriment, reasonably arising in the circumstances, or apprehension or fear of violence to or against property of the stalked person or another person, reasonably arising in the circumstances.

The purpose of the limitation is to ensure that the offence captures modern technology facilitated abuse.

Clause 23 of the Bill will limit the ***right to freedom of expression*** through amendments to the default period for restraining orders where there have been charges of unlawful stalking, intimidation, harassment or abuse. The court already has the power to impose a restraining order. That power is subject to the requirement that the person has been charged with (though not necessarily convicted of) the offence and it is considered desirable by the court to make the order. The court can impose any condition on that order that is considered appropriate for the purpose of prohibiting particular conduct.

The amendments in the Bill will provide that a person might be subject to such conditions for a longer default period of time and to that extent the amendments limit freedom of expression. The imposition of the default five-year period is itself subject to the limitation that the court must consider whether it is necessary for the safety of the person whom the order is made to protect. The purpose of the limitation is to increase the protection provided by restraining orders for victims of stalking, intimidation, harassment or abuse.

Similar to the discussion above, the amendments in clause 23 which provide for the imposition of restraining orders with a default five-year period, limit the right to *freedom of movement*. This is because such restraining orders might include conditions which restrict a defendant's freedom of movement, such as that the defendant not approach a complainant or their property.

Similar to the discussion above, the amendments in clause 23 which provide for the imposition of restraining orders with a default five-year period, limit the right to *freedom of association*. This is because such restraining orders might include conditions which restrict a defendant's freedom of association, such as that the defendant not contact particular people.

Arguably, the amendments to increase the maximum penalties for an aggravated offence of unlawful stalking, intimidation, harassment or abuse and contraventions of restraining orders, limits a defendant's *right to liberty* by increasing the period of the time they may be detained in custody. However, a defendant will still be protected by the rights in subsections 29(4) to (7) of the HR Act which provide several procedural rights once a person has been arrested or detained. The purpose of the limitation is to promote the protection of victims.

(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

There is a rational connection between the limitation on the rights to freedom of expression, freedom of movement, freedom of association and personal liberty.

The purpose of the limitation of *freedom of expression* is to ensure that the offence captures modern technology facilitated abuse. It is not possible to adequately capture modern methods of communication without some limitation on freedom of expression.

The purpose of the limitation of *freedom of expression, freedom of movement and freedom of association* is to ensure that the offence captures modern technology facilitated abuse. It is not possible to adequately capture modern methods of communication without some limitation on freedom of expression.

The purpose of increasing the default period for a restraining order is to provide increased protection to victims of unlawful stalking, intimidation, harassment and abuse. The amendments do this by increasing the default period of restraining orders but retaining the court's discretion to impose some lesser period where it would not compromise the safety of the person in relation to whom the restraining order is made.

It is not possible to achieve this purpose without limiting the rights to freedom of expression, freedom of movement and freedom of association of the person against whom the restraining order is made.

The purpose of the limitation of the *right to liberty* brought about by the amendments which increase the maximum penalty for an aggravated offence of unlawful stalking, intimidation, harassment or abuse and contraventions of restraining orders is to provide greater protection for victims and their children from coercive and controlling abuse. The amendments promote this protection by capturing a wider scope of abusive behaviours and holding perpetrators to account for this behaviour.

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

There are no reasonable alternatives available that will offer victims of, and children exposed to, domestic and family violence the same level of protection. As the Taskforce found, the application of

the current offence of unlawful stalking has not consistently provided victims of coercive control and their children with appropriate protection. The amendments in the Bill are the least restrictive and reasonably available way to achieve the identified purpose.

With respect to the amendments to the default period for restraining orders, the discretion of the court to impose a period less than 5 years where that would not compromise the safety of the complainant (or any person in relation to whom the restraining order is made), operates as a safeguard. The amendment in that way limits the right to freedom of expression, freedom of movement and freedom of association, no further than is necessary to promote victim safety.

- (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 Taskforce received overwhelming feedback from victims of coercive control about the prevalence of stalking and harassing behaviour, particularly electronic surveillance of them and their children. The majority of victims who made submissions to the Taskforce described ongoing stalking, monitoring and demands to know where they were and who they were with, sometimes hiring private investigators, using third parties such as family or friends and/or using electronic surveillance in the form of cameras, spyware and tracking devices to monitor or locate victims. The Taskforce heard that the unlawful stalking provisions were not being applied in a way that provides victims of coercive control and their children with appropriate protection.

To the extent that a person's freedom of expression, freedom of movement, freedom of association and right to liberty may be limited by the amendments, any limitation is appropriate to provide greater protection for victims of, and children exposed to, domestic and family violence.

- (f) any other relevant factors

Nil.

Amendments to the Domestic and Family Violence Protection Act 2012

Definition of domestic violence

The human rights relevant to this amendment are:

- freedom of expression; and,
- right to liberty and security.

A discussion of the limitation on this right is set out below.

- (a) the nature of the right

Every person has the right to ***freedom of expression***, which includes freedom to impart an opinion, information and ideas of all kinds in any way chosen by the person, such as verbally, online or in print. The right protects freedom from state intervention when expressing an opinion, except where expressing the opinion interferes with the rights of others or is an obvious, direct threat to life.

The ***right to liberty and security*** (section 29, HR Act) outlines that every person has the right to liberty, which includes that a person must not be arrested and detained unless provided for by law. A person's arrest and the detention must also not be arbitrary. The right may only be limited where such limitation is proportionate and not capricious, unpredictable, unjust and unreasonable.

The amendments will clarify the behaviour that is considered to be domestic violence, including by amending the definition to include a reference to a 'pattern of behaviour'. This, in turn, will limit the right to freedom of expression where an individual expresses an opinion that is considered domestic

violence and subsequently draws state intervention in the form of a protection order or a breach of a protection order. Similarly, the right to liberty and security will be limited where an individual's behaviour that is domestic violence leads to the individual being arrested and detained.

- (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the amendments is to provide greater protection for victims and their children from coercive and controlling abuse, particularly victims of non-physical abuse. The purpose is also to reduce the risk of victims of coercive control being misidentified as a perpetrator, and to promote greater awareness about coercive control amongst lawyers and judicial officials.

This purpose is consistent with a free and democratic society in that it provides greater protection to victims of, and children exposed to, domestic and family violence, including coercive control.

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

The limitations on the right to freedom of expression and right to liberty and security will help achieve the purpose of providing greater protection for victims of domestic violence by ensuring courts are able to accurately identify behaviour that is domestic violence and subsequently make a protection order or find that a respondent has breached a domestic violence order.

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

There are no less restrictive ways to achieve the purpose of the amendments.

- (e) the balance between the importance of the purpose of the amendments, 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 Taskforce heard that the current definition of domestic violence does not provide clear protection for victims of coercive control and their children. The rights of victims of domestic and family violence, including a victim's right to life, the right to protection of children and families, the right to be protected from torture and cruel, inhuman and degrading treatment, and the right to enjoy human rights without discrimination, are limited by the continuing perpetration of this violence. The amendments to the definition of domestic violence are intended to provide victims of domestic and family violence with greater protection by better reflecting what is known about the ongoing nature of coercive control and the range of behaviours it encompasses. While the expansion of the definition will limit the rights of individuals who behave in a way that is domestic violence, these limitations are justified as the human rights of victims will be promoted by the amendments.

- (f) any other relevant factors

Nil.

Cross applications

The human right relevant to this amendment is the right to a fair hearing.

A discussion of the limitation on this right is set out below.

- (a) the nature of the right

The ***right to a fair hearing*** provides a party to a civil proceeding with the right to have the proceeding decided after a fair and public hearing. The right encompasses the 'equality of arms' principle, which requires all parties to a proceeding to have a reasonable opportunity to present their case under

conditions that do not disadvantage them against other parties to the proceeding¹. The principle outlines that the same procedural rights are to be provided to all parties unless distinctions are based on law and can be justified on objective and reasonable grounds.²

The amendments will limit the right to a fair hearing for individuals where an application and cross application are heard together and arrangements are made for the safety, protection or wellbeing of the person most in need of protection. This will limit the right of the other party as different procedural rules will be applied in a proceeding depending on whether the court considers such arrangements are necessary for the person most in need. This may include procedures around giving evidence outside of the court and restrictions on cross examination.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the amendments and subsequent limitations on human rights is to: provide greater protection for victims and their children from coercive and controlling abuse; reduce the risk of victims of coercive control being misidentified as a perpetrator; and assist in ensuring that the domestic violence order made is reflective of who is really the person most in need of protection.

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

The amendments are intended to address issues that the Taskforce heard about cross applications and cross orders being used by perpetrators of domestic and family violence to continue their abuse against victims. The limitations on a party's right to a fair hearing that provide for different procedures depending on who is the person most in need of protection will achieve the purpose by protecting the safety and wellbeing of that person.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the amendments.

(e) the balance between the importance of the purpose of the amendments, 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 limitations on the right to a fair hearing imposed by the amendments will achieve the purpose of protecting the safety and wellbeing of the person the court identifies as most in need of protection in cross applications. The Taskforce heard repeatedly from victims and those who support them that cross applications and cross orders are being used by perpetrators as a means of continuing to control, intimidate and terrify victims. The amendments will in turn promote the human rights of these individuals, including the right to life, protection from torture and cruel, inhumane and or degrading treatment, and the right to freedom of expression. The limitations imposed by the amendments are therefore considered to be justified and reasonable.

(f) any other relevant factors

Nil.

Criminal history and domestic violence history in civil proceedings

The human rights relevant to this amendment are:

¹ *Ragg v Magistrates' Court of Victoria & Corcoris* [2008] VSC 1, [46].

² Human Rights Committee, *General Comment No 32: Right to equality before courts and tribunals and to fair trial*, 90th sess, UN Doc CCPR/C/GC/32 (27 July 2007) [13].

- right to privacy; and,
- fair hearing.

A discussion of the limitation on these rights is set out below.

(a) the nature of the right

The **right to privacy** protects an individual from unlawful or arbitrary interferences and attacks on their privacy. An arbitrary interference is conduct that is capricious, unpredictable or unjust, or an interference that is unreasonable in that it is disproportionate to the aim³. Accordingly, any limitation on the right to privacy must be proportionate.

The right is broad and encompasses an individual's information privacy, including personal information. The *Information Privacy Act 2009* (Qld) identifies personal information as being information or an opinion about an individual whose identity is apparent, or can reasonably be ascertained, from the information or opinion. Information can be considered private if the individual has a reasonable expectation of privacy when considering all relevant circumstances⁴.

New sections 36A and 90A (clauses 35 and 44) will limit the right to privacy of a respondent by requiring the QPS to provide a respondent's domestic violence history and criminal history to the court for all applications for or to vary a protection order. The relevant information is personal information of the respondent and the amendments will allow QPS to collect and disclose this information to the court without the consent of the respondent.

If the respondent has a domestic violence history, the information may also be personal information of another individual who is an aggrieved or named person in a domestic violence order against the respondent. In this circumstance, the right to privacy of that individual will be limited by disclosure of the respondent's domestic violence history to the court.

The **right to a fair hearing** provides a party to a civil proceeding with the right to have the proceeding decided after a fair and public hearing. The right is considered to encompass the 'equality of arms' principle, which requires all parties to a proceeding to have a reasonable opportunity to present their case under conditions that do not disadvantage them against other parties to the proceeding⁵.

The amendments to require a respondent's domestic violence history and criminal history be provided to the court for all applications for or to vary a protection order will limit the right to a fair hearing for the respondent in that the same information about the aggrieved will not be provided to the court. A respondent's criminal history may also include charges or convictions that are not directly relevant to the proceeding.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitation is to achieve protection for the person most in need of protection from domestic and family violence and to prevent the perpetration of further violence against the victim. The amendments will ensure the court has all relevant information available to it when considering whether to make a protection order and necessary conditions for the order to protect the aggrieved.

This purpose is consistent with a free and democratic society in that it provides greater protection to victims of domestic and family violence.

³ *WBM v Chief Commission of Police* (2012) 43 VR 446, 472 [114].

⁴ *Australian Broadcasting Corporation v Lenah Game Metas Pty Ltd* [2001] HCA 63, [42].

⁵ *Ragg v Magistrates' Court of Victoria & Corcoris* [2008] VSC 1, [46].

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

The limitation achieves the purpose of the amendments by assisting the court in considering the risk a respondent poses to an aggrieved by providing the court with the full criminal and domestic violence history of a respondent. The Taskforce found that magistrates had heard domestic violence applications without being made aware of a respondent's criminal and/or domestic violence history, which results in magistrates not being able to give due consideration to an aggrieved's need for protection. The Taskforce considered that there is a need for courts to be able to take both criminal and domestic violence histories into account when hearing applications to help them decide whether an order is needed and to assist in best tailoring the conditions to keep the victim safe.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the amendments.

In relation to the right to privacy, the only less restrictive alternative on a respondent's right is to not provide the history to the court. However, this does not achieve the purpose of the amendments, which is to provide the court with all relevant information.

The limitation on the right to privacy is considered reasonable as there are safeguards in place to prevent further disclosure of a respondent's criminal or domestic violence history. In particular, section 158 of the DFVP Act outlines that a hearing of a protection order application must not be open to the public except in limited circumstances. In addition, section 160 of the DFVP Act prevents the general public from obtaining copies of a record of a proceeding or document used or tendered in a proceeding. While this section allows particular people to access documents used in a proceeding, section 159 of the DFVP Act prohibits the publication of this information and makes it an offence to do so. These provisions provide necessary safeguards to mitigate the limitation on an individual's right to privacy. The Bill will also amend the DFVP Act to allow the court to make an order that a person must not disclose information contained in a respondent's criminal or domestic violence history to another person if the court considers such an order is appropriate.

In relation to the right to a fair hearing, it will be a matter for the court to determine the relevant information in a respondent's criminal history in the circumstances of the proceeding. A respondent will also be able to view and make submissions on their criminal and domestic violence history to the court.

The limitation on the right to a fair hearing is justified as the respondent will have the opportunity to view and make submissions on the criminal and domestic violence history provided to the court. Provision of a respondent's full criminal history is necessary as the court will be able to properly consider relevant information and, if a protection order is made, make an informed decision on conditions of an order to properly protect the aggrieved from domestic and family violence.

(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 outlined by the Taskforce in Chapter 2.1 of its first report, the rights of victims of domestic and family violence, including a victim's right to life, the right to protection of children and families, the right to be protected from torture and cruel, inhuman and degrading treatment, and the right to enjoy human rights without discrimination, are limited by the continuing perpetration of this violence. The purpose of the amendments, which is to provide greater protection to an aggrieved by allowing the court to consider all relevant information in determining whether to make a protection order and any

necessary conditions, outweighs the limitation on a respondent or another named person's right to privacy.

(f) any other relevant factors

Nil.

Substituted service

The human rights relevant to this amendment are:

- right to liberty and security; and,
- right to a fair hearing.

A discussion of the limitation on these rights is set out below.

(a) the nature of the right

The ***right to a fair hearing*** (section 31, HR Act) provides that a person who is a party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court after a fair and public hearing. The right encompasses the right of all individuals to procedural fairness when coming before a court. A principle of the right is that each party must be given a reasonable opportunity to present their case, which involves being informed of the case being made by the opposing party and having the opportunity to respond⁶.

The ***right to liberty and security*** (section 29, HR Act) outlines that every person has the right to liberty, which includes that a person must not be arrested and detained unless provided for by law. A person's arrest and the detention must also not be arbitrary. The right may only be limited where such limitation is proportionate and not capricious, unpredictable, unjust and unreasonable.

The amendments may impact the effectiveness of service in circumstances where a respondent genuinely does not become aware of a document despite it being served in an approved manner under a substituted service order.

This will limit the right to a fair hearing in that a respondent may not have the opportunity to respond to the case made by the aggrieved in situations where a respondent genuinely does not become aware of a document served under a substituted service order. This could result in a respondent failing to appear at a proceeding for a protection order and having a protection order made in their absence or breaching a condition of a protection order without being aware of the condition. The right will also be limited where a respondent may not receive a detailed or appropriate explanation of a document via the substituted method of service. This may result in a respondent not fully understanding the nature of the document and consequences of failing to take appropriate actions.

Similarly, the right to liberty will be limited where a respondent genuinely does not become aware of a protection order that has been served under a substituted service order, and subsequently breaches the order which may result in their arrest and/or detention.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitations are to ensure that respondents, including those who are deliberately evading service, are expeditiously served in order to keep victims of domestic and family violence safe and to stop the perpetration of domestic and family violence. This purpose is consistent with a free and democratic society in that it provides greater protection to victims of domestic and family violence.

⁶ *Roberts v Harkness* [2018] VSCA 215 [48].

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

The limitation on the right to a fair hearing and on the right to security and liberty of the respondent achieve the purpose by providing an avenue for the court to order substituted service in situations where police have made reasonable attempts to serve the respondent and have not been successful. The amendments are intended to address situations where a respondent is deliberately evading service to frustrate the court process.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the amendment.

The amendments include a safeguard to mitigate the risk that the document may not come to the attention of the respondent. To make a substituted service order, the court must be satisfied that the substituted method of service is reasonably likely to bring the document to the attention of the respondent.

The Bill also makes amendments to mitigate the limitation to a respondent's right to a fair hearing. Clause 50 inserts a new division in the DFVP Act that allows a respondent to apply to the court to reopen a proceeding if the application was not, and could not, reasonably have been brought to the respondent's attention, despite being served in a way stated in the substituted service order.

In relation to the limitation to a respondent's right to liberty in circumstances where the respondent genuinely does not become aware of an order and subsequently breaches the order, the respondent has an avenue to appeal a breach of an order under section 45 of the *Magistrates Courts Act 1921*.

- (e) the balance between the importance of the purpose of the amendments, 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 recommendation to allow for substituted service in limited circumstances arises from evidence heard by the Taskforce that perpetrators are able to evade service and frustrate the court process at the application and/or order stage.

- (f) any other relevant factors

Nil.

Amendments to the Evidence Act 1977

Expanding the class of protected witnesses for cross-examinations

The human rights relevant to this amendment are the rights in criminal proceedings.

A discussion of the limitation on these rights is set out below.

- (a) the nature of the right

Section 32(2) of the HR Act affirms the ***right of all individuals to procedural fairness*** when before a court and sets out a number of minimum guarantees for persons charged with criminal offences. This includes, pursuant to section 32(2)(g), the right to examine, or have examined, witnesses against the person.

Section 616 of the Criminal Code provides that every person charged with an offence is entitled to make their defence at their trial and have witnesses examined and cross-examined by their counsel. Counsel includes any person entitled to an audience as an advocate.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Clauses 59 and 60 of the Bill provide that a defendant, without legal representation, will not be permitted to cross-examine, in person, the complainant of a domestic violence offence in criminal proceedings. It will also extend that protection to other witnesses to domestic violence offences who are named as an aggrieved or a relative of the aggrieved in a domestic violence order where there has been a contravention of that order (or an offence that would amount to a contravention), with the additional requirement that the court considers that the person would be likely to be disadvantaged as a witness or to suffer severe emotional trauma, unless treated as a protected witness.

The protected witness scheme in the Evidence Act already provides for the provision of free legal assistance by Legal Aid Queensland so that the cross-examination can be conducted by a lawyer. The Evidence Act also provides, pursuant to section 21Q of the Evidence Act, that, where a defendant refuses that legal assistance, they may lose the right to cross-examine the witness. In that sense, the existing scheme only limits the right to cross-examination of a protected witness to the extent that a defendant refuses legal assistance to conduct that cross-examination.

The amendments to the Bill do not alter these facets of the operation of the scheme but merely bring some further categories of victims and witnesses within those protections. To the extent that this is an expansion of the protected witness scheme, it limits the right in section 32(2)(g) of the HR Act.

The purpose of the limitation of the right is to provide greater protection to complainants of domestic violence offences and other witnesses in proceedings for a domestic violence offence. The reason for this is to minimise their potential re-traumatisation by being subjected to a direct, in person cross-examination by a perpetrator of abuse, and to allow for their best evidence to be given. That purpose is consistent with a free and democratic society based on dignity, equality and freedom.

(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 amendments will achieve the purpose of providing greater protection to complainants of domestic violence offences and other associated witnesses in criminal proceedings. The prospect of being cross-examined by a perpetrator may be so frightening and intimidating for a victim or witness that they may not be able to give their best evidence or may feel they are unable to give evidence altogether. Preventing perpetrators of domestic violence from being able to directly cross-examine victims and other witnesses, without legal representation, in these circumstances will help to ensure that they feel safe and supported to participate fully in legal proceedings.

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

The only less restrictive alternative is to not extend the protected witness scheme to victims of domestic violence or other associated witnesses. This, however, would not achieve the purpose of providing greater protection for victims and witnesses.

The existence of additional requirements in respect of witnesses who are not the complainant but who are named as an aggrieved or a relative of the aggrieved in a domestic violence order means that the amendments in respect of these witnesses are less restrictive on a defendant's right to cross-examine that witness than if additional requirements were absent in respect of that category of witness.

Any risk to a defendant's interests is also significantly mitigated by the fact that the amendments entitle an accused to cross-examine the protected witness through a lawyer (whether by way of free legal assistance or private representation).

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

The right to examine witnesses is considered an integral part of a defendant's right to a fair trial. Noting amendments to extend the protected witness scheme limit this right, it is important to consider several public interest factors, as well as the interests of the complainant, defendant and community. The rights to a fair hearing and rights in criminal proceedings do not necessarily require a hearing with the most favourable procedures for the defendant. Procedures must take account of other interests, including the interests of the victim and of society generally in having a person brought to justice and preventing crime. The Taskforce found that there is scope for a perpetrator of domestic violence to use court proceedings as a form of systems abuse to terrorise their victim by direct in person cross-examination and this should not be allowed to occur. It is therefore considered that the amendments appropriately balance the relevant interests by ameliorating the impact on the defendant's right to cross-examine their accuser through the appointment of a free legal representative to conduct the cross-examination.

- (f) any other relevant factors

Nil.

Admission of evidence of domestic violence

The human rights relevant to this amendment are the rights in criminal proceedings.

A discussion of the limitation on these rights is set out below.

- (a) the nature of the right

Section 32(1) of the HR Act upholds the presumption of innocence and provides that a person charged with a criminal offence has the *right to be presumed innocent until proved guilty according to law*.

Arguably, the expansion of section 132B of the Evidence Act through clause 64 of the Bill will limit the presumption of innocence by removing the restriction on section 132B as only applying to offences in Chapters 28 to 30 of the Criminal Code. The amendments will provide that relevant evidence of domestic violence is admissible as evidence in proceedings for all offences operating under Queensland law. The Bill also makes evidence of domestic violence admissible whether that evidence relates to the defendant, the person against whom the offence was committed or another person connected with the offence. The amendment will enable the provision to operate effectively with the expert evidence provision also in clause 64 of the Bill.

- (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Because evidence of domestic violence can be relevant to all types of criminal offences, the purpose of the amendments is to broaden the admissibility of evidence of domestic violence in criminal proceedings and ensure that a finder of fact in a criminal trial does not determine factual matters in a vacuum without relevant evidence of domestic violence.

- (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

There is a rational relationship between the limitation on the rights in criminal proceedings and the identified purposes. The amendments will help to ensure that relevant evidence of domestic violence between the defendant and complainant is able to be admitted in respect of all offences contained in Queensland law.

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

The amendments are the least restrictive and reasonably available way to achieve the identified purposes. The amendments will not alter a defendant's right to test evidence, or affect the court's general overriding discretion to exclude evidence. The admissibility of the evidence will remain subject to the requirement for relevance.

- (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 Taskforce said that the purpose of the expansion of section 132B of the Evidence Act is to offer better protection to victims including women and children from domestic and family violence through the application of the section to all offences .

Arguably, a person's right to be presumed innocent in section 32(1) of the HR Act will be limited by the expansion of section 132B, however, whilst rights in criminal proceedings are important, the importance of improving the human rights of victims of domestic and family violence outweighs any potential limitation on those rights.

- (f) any other relevant factors

Nil.

Expert evidence and jury directions

The human rights relevant to these amendments are the:

- right to a fair hearing; and
- rights in criminal proceedings.

A discussion of the limitation on these rights is set out below.

- (a) nature of the right

The ***right to a fair hearing*** in section 31(1) of the HR Act affirms the right of all individuals to procedural fairness when coming before a court. The right guarantees that criminal (and civil) proceedings must be heard and decided by a competent, impartial and independent court or tribunal. The underlying value of the right to a fair hearing is said to be in relation to defining the relationship between the individual and the state and protecting people against aggressive behaviour of those in authority, both of which reflect the philosophy that the state must prove its case without recourse to the suspect.⁷ Under section 32(2) of the HR Act, a person charged with an offence has ***minimum rights in criminal proceedings*** reflecting how they will be treated and how the proceedings will be conducted.

Arguably, clauses 64 and 67 of the Bill will limit the right to a fair hearing and rights in criminal proceedings by allowing relevant expert evidence about domestic and family violence to be admitted in criminal proceedings and jury directions to be made in proceedings for domestic violence related offences. Depending on the individual circumstances of the case, the admission of expert domestic violence evidence and giving of directions to the jury could be prejudicial to the defendant. For example, the provision of a jury direction regarding self-defence under new section 103ZA may not be prejudicial to the defendant and, may instead promote the defendant's right to a fair trial and rights in criminal proceedings.

- (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

⁷ Re an Application under Major Crimes (Investigative Powers) Act 2004 (2009) 24 VR 415, 448 [146] (Warren CJ)

The purpose of the limitation is to enable jurors and judges to have a more accurate understanding of evidence of domestic violence and the context in which the offending subject to the proceeding has occurred. The provisions are intended to proactively address common stereotypes, myths and other misconceptions about domestic violence and to inform jurors and judges of the factors impacting victims of domestic and family violence.

The use of directions about domestic and family violence has a legitimate purpose in that it enables jury members to have a more accurate understanding of the evidence and the context in which the offending has occurred.

(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

Expert evidence and jury directions can be particularly vital for a court or jury to properly understand the issues at trial. The amendments will ensure that the entire context of victim's experiences of coercive control can be routinely admitted in court proceedings in Queensland.

There is a rational relationship between the limitation on the right to a fair hearing and rights in criminal proceedings and this purpose.

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

The purpose of the amendments is to make clear that relevant evidence from an expert in domestic violence is admissible, where the expert can demonstrate specialised knowledge, gained by training, study or experience, of domestic violence. The amendments provide that domestic violence can be a field of "specialised knowledge" and that expert evidence of domestic violence may be led in criminal proceedings.

A defendant's right to a fair hearing is safeguarded as the normal rules of evidence will continue to operate and apply (except to the extent that the common law rules in new section 103CD are abrogated), including the right to challenge the expert evidence.

The amendments are not intended to derogate from the overriding judicial obligation to ensure a fair trial. Rather, the legislation is intended to emphasise and give guidance to facilitate a trial judge's obligation.

There is no less restrictive means of achieving the legitimate purpose of these amendments.

(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

Arguably, a person's right to a fair trial will be limited by the amendments in clauses 64 and 67, however, the need to ensure a fair trial must be balanced against the rights of victims to have evidence of domestic violence accurately represented and understood in criminal proceedings.

A fair trial does not require a hearing with the most favourable procedures for the accused; what is 'fair' in the context of a criminal proceeding will involve a triangulation of the interests of the victim, the accused, and the community.⁸

On balance, any limitation is justified as the amendments improve the quality of information that is put before the decision maker to assist them to make a well-informed assessment of the facts, the defendant retains their right to challenge the evidence in accordance with the normal rules of evidence and, the giving of jury directions remains at the discretion of the court.

(f) any other relevant factors

⁸ R v A (No 2) [2002] 1 AC 45

Nil.

Amendments to the Penalties and Sentences Act

Matters to be considered in determining an offender's character

The human right relevant to this amendment is the right to a fair hearing.

A discussion of the limitation on this right is set out below.

(a) the nature of the right

The ***right to a fair hearing*** in section 31(1) of the HR Act affirms the right of all individuals to procedural fairness and natural justice when coming before a court or tribunal. It guarantees that such matters must be heard and decided by a competent, impartial, and independent court or tribunal after a fair and public hearing, and that all judgements or decisions are publicly available. Clause 81(3) of the Bill will limit this right if a court considers the history of domestic violence made or issued against the offender in a closed court.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Clause 81(1) of the Bill amends section 11 of the Penalties and Sentences Act and will provide that a defendant's domestic violence history (more broadly defined) is a matter which the court may consider in determining an offender's character. Clause 81(3) of the Bill also provides that if oral submissions are to be made to, or evidence is to be brought before, the court about the history of domestic violence orders made or issued against the offender, the sentencing judge or Magistrate may close the court for that purpose.

The purpose of these amendments is for a sentencing court to be aware of a relevant domestic violence history and to be able to take it into account.

Arguably, the power to close a court limits a defendant's right to a fair trial in that the right to a fair trial extends to a fair and public hearing. However, the HR Act also contemplates in section 31(2) that a court or tribunal may exclude members of media organisations, other persons or the general public from all or part of a hearing in the public interest or the interests of justice. The amendment to provide the court with the power to close is consistent with similar powers under the DFVP Act. The amendment does not provide for a public interest or other test but vests the court with a broad discretion.

(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 purpose of the limitation on a right to a fair trial is to protect the identity and right to privacy of an individual not subject to the court proceedings by allowing the court to consider matters of prior domestic violence in a closed court.

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

The amendments are the least restrictive and reasonably available way to achieve the identified purposes. The amendments are reasonably adapted to ameliorate the impact on a defendant's right to a fair trial. A sentencing court can only be closed as determined by the court where matters about a defendant's domestic violence history are raised. The provision does not otherwise impact upon the usual rules in relation to the admissibility of evidence and the discretion to close the court is retained by the sentencing judge or magistrate.

- (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 limitation on a defendant's right to a fair hearing is appropriate to protect other human rights and ensure a sentencing court is aware of all relevant factors.

The human rights promoted by the proposed amendment include the right to recognition and equality before the law (section 15), the right to life (section 16), the protection from torture and cruel, inhumane or degrading treatment (section 17), the protection of families and children (section 26), the right to liberty and security (section 29) and the right to a fair hearing (section 31).

The amendment in clause 81(3) of the Bill allows the court to balance relevant considerations on a case-by-case basis and close the court when appropriate. The amendment will also ensure consistency with similar provisions in the DFVP Act.

- (f) any other relevant factors

Nil.

B. Other amendments not related to the Taskforce

Amendments to the Telecommunications Interception Act 2009

The human right relevant to these amendments is the right to privacy and reputation.

A discussion of the limitation on this right is set out below.

- (a) the nature of the right

The **right to privacy** protects individuals against unlawful or arbitrary interference with their privacy, family, home or correspondence (written and verbal). Privacy is generally understood to comprise freedom from unwarranted and unreasonable intrusions into activities that society recognises as falling within the sphere of individual autonomy. The concept of lawfulness in the context of the right to privacy means that no interference can take place except in cases envisaged by the law, while the concept of arbitrariness extends to interferences that may be lawful but that are capricious, unpredictable, unreasonable and disproportionate. The right to reputation protects against unlawful attacks on reputation. Reputation in the context of the right refers to one's appraisal by others. This captures attacks which are intentional and based on untrue allegations.

Clauses 84 and 86 will limit the right to privacy by requiring the disclosure of necessary information pertaining to the application for an IPO to the PIM. This information must include personal information identifying the target, the facts surrounding the alleged offending/anticipated offending, as well as any matters which are favourable or adverse to the application. However, the PIM will not receive the intercepted material if the application is successful.

- (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 PIM represents the public interest by being notified of, appearing at, and making submissions in the applications for interception IPOs brought by Queensland law enforcement authorities. While the PIM is not appearing to represent the target in the application, their role is imperative in ensuring the proceedings occur in a fair and transparent manner. The 'front-end' accountability role for the PIM in Queensland applications for interception IPOs, which operates in addition to the oversight of the Commonwealth Ombudsman, provides an important safeguard.

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

The limitation on the right to privacy will achieve its purpose by ensuring the PIM can assess the interception IPO application (including affidavit material) and provide appropriate submissions to the decision maker. The PIM is only in receipt of the information sought to be relied upon by the QPS or CCC in seeking the interception IPO. The contents of the intercepted material will not be received by the PIM which will contain intercepted material between the target and other persons.

The role of the PIM in these applications is imperative as there is no ability for the person to whom the application for an IPO relates to be notified of the application, nor are they able to appear at the application. The PIM therefore appears as a neutral party to represent the public interest and test the validity of the applications. Further, the PIM may in submissions raise any concerns as to the validity or appropriateness of an application.

The PIM is currently provided the same information for the purposes of part 2-5 warrants under the TI Act. The involvement in the PIM in these applications has been continuing since inception in 2009. The role proposed for the PIM in interception IPO applications is directly comparable.

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

The only alternative is to not provide a role for the PIM in the application to avoid the disclosure of personal information. However, this would defeat the purpose of having the PIM present and would remove the front-end safeguard. Telecommunications interception is highly intrusive on the privacy rights of individuals. Given the importance that the target of the interception does not become aware of the proposed interception, the best alternative is to have the PIM present at these applications. This is a feature of Queensland's law enforcement legislation that distinguishes it from other states' legislation.

Additional safeguards are proposed to limit any infringement on the right to privacy. The provisions in clause 84 provides that officers must provide a copy of the affidavit material to the PIM which would include personal details of the target, and police intelligence to support the application. The provision of this material to the PIM may be perceived as a breach of privacy and confidentiality, however the effect of the departure is mitigated by important safeguards. The PIM is compelled by confidentiality provisions in clause 92 and the Cth TI Act which prohibits the use, recording or disclosure of protection information provided in the application. Further, section 10 of the TI Act already requires the PIM to return to the officer any documents given to the PIM for the purposes of appearing and making submissions in an application for the IPO.

The Commonwealth IPO scheme also provides safeguards. Most notably, applications for IPO interception orders must be made to an independent issuing authority, namely an eligible Judge or nominated member of the Administrative Appeals Tribunal. In determining an application, the issuing authority must consider matters set out in the Cth TI Act which include matters pertaining to the extent of interference with the target's privacy, the gravity of offending, other alternative methods of investigation which are available, and, any submissions made by the PIM. Further, an IPO can only be issued in relation to interception activities for a period of no longer than 90 days.

(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

A person's right to privacy will be limited by the Commonwealth IPO scheme and, subsequently, the TI Act amendments. However, the involvement of the PIM in the applications for the interception of communication is an appropriate front-end safeguard which strikes a fair balance. In addition, the ability to apply for an IPO does have limitations, including the nature of the offence leading to the request for interception, the involvement of the PIM at any application to provide submissions based on the public interest; and, requires the issuing authority give consideration to all other alternatives before issuing the

IPO interception order On balance, the safeguards in place are significant and are likely to limit the amount of interference in the person's privacy where possible.

(f) any other relevant factors

Nil.

Conclusion

In my opinion, the Bill is compatible with human rights under the HR Act because it limits human rights only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

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