

Corrective Services and Other Legislation Amendment Bill 2020

Statement of Compatibility

FOR

Amendments during consideration in detail to be moved by the Honourable Mark Ryan MP

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

In accordance with section 38 of the *Human Rights Act 2019*, I, the Honourable Mark Ryan MP, Minister for Police and Minister for Corrective Services, make this statement of compatibility with respect to the amendments to be moved during consideration in detail for the Corrective Services and Other Legislation Amendment Bill 2020 (the Bill).

In my opinion, the amendments to be moved to the Bill are compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Amendments

Corrective Services Act 2006 amendments

In relation to the *Corrective Services Act 2006* (the CS Act), the amendments omitting clause 15 (Insertion of new s 110A) and re-locating clause 21 (Insertion of new s 173A) are required during consideration in detail to address general issues that have arisen since the Bill was introduced in the Queensland Legislative Assembly.

The amendments to clauses 36 (Amendment of s 228 (Acting appointments)), 37 (Amendment of s 234 (Meetings about particular matters relating to parole orders)), 41 (Amendment of s 268 (Declaration of emergency)), 52 (Insertion of new ch 7A, pt 14) and 53 (Amendment of sch 4 (Dictionary)) are necessary because of duplicative legislative modifications made to support the Government's response to the COVID-19 emergency. The amendments are transitional and will clarify that these sections commence after the COVID-19 emergency period ceases.

Hospital and Health Boards Act 2011 and the Public Health Act 2005 amendments

The amendments to the *Hospital and Health Boards Act 2011* (HHB Act) and the *Public Health Act 2005* (Public Health Act) to:

- create the position of Deputy Chief Health Officer (DCHO) to support the Chief Health Officer (CHO) in exercising functions under the Public Health Act and other Acts during the COVID-19 emergency and afterwards;
- allow the CHO to delegate certain powers under the Public Health Act to the DCHO or other appropriately qualified officers;
- clarify that the CHO and DCHO are protected from civil liability under the *Public Service Act 2008* when exercising their powers under the Public Health Act;
- change the maximum penalty for breaching a public health direction from 100 penalty units to 100 penalty units or 6 months imprisonment (or both); and
- allow Queensland contact tracing officers to exercise their functions under the Public Health Act outside of Queensland or in relation to persons outside Queensland.

Amendments to the *Hospital and Health Boards Act 2011*

On 29 January 2020, a public health emergency was declared under section 319 of the Public Health Act. On 19 March 2020, the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* amended the Public Health Act to include powers for the CHO to make public health directions to assist in containing, or to respond to, the spread of COVID-19 in the community. The position of the CHO is established under section 52 of the HHB Act.

The CHO's workload has increased dramatically due to the public health emergency. Since 19 March 2020, the CHO has made over 60 public health directions, considered a large number of requests for exemptions to the public health directions, approved plans and checklists and declared numerous COVID-19 hotspots. This is in addition to providing advice to the chief executive, Minister and others about the public health ramifications of, and response to, the COVID-19 emergency.

In order to support the CHO during the public health emergency and following the end of the emergency, an amendment to be moved to the Bill will create a statutory position of DCHO under the HHB Act. The creation of a statutory DCHO position will ensure there is a transparent line of accountability for decisions made under the COVID-19 emergency.

The DCHO's functions will be to support the CHO in performing her functions during and after the public health emergency; any other functions given to the DCHO by the CHO or chief executive; and any other functions under the HHB Act or another Act. The CHO will be able to delegate her functions under the HHB Act or another Act to the DCHO. Functions that are non-delegable will not be able to be delegated to the DCHO. This will allow sufficient flexibility in the DCHO's role to ensure that the DCHO can effectively support the CHO in coordinating the public health response to the COVID-19 emergency and with other functions.

Amendments to the *Public Health Act 2005*

Amendments to be moved to the Bill will amend the Public Health Act to allow the CHO to delegate some of her functions under the Act to the DCHO and to an appropriately qualified medical practitioner who is a public service officer or employee, or a health service employee.

The ability to give public health directions under Part 7A of the Public Health Act will be non-delegable. However, the CHO will have the ability to delegate functions that may arise under the public health directions, for example, granting exemptions, approving plans and checklists and declaring COVID-19 hotspots. Being able to delegate these functions will assist the CHO to manage the extraordinary workload and afford the CHO greater capacity to lead strategically.

In addition to delegating powers to the DCHO, the CHO will have the ability to delegate functions to an appropriately qualified medical practitioner who is a public service officer or employee, or an employee of a health service. These qualifications are consistent with the requirements for the appointment to the role of CHO or DCHO and will ensure that the person to whom the power is delegated has the requisite medical knowledge to undertake the required functions. Allowing delegation to appropriately qualified officers aside from the DCHO will create flexibility and allow the CHO to respond to future increases in workload if necessary.

Another amendment to be moved to the Bill will amend a note in the Public Health Act to clarify that the CHO and DCHO are protected from civil liability under the Public Service Act when performing their obligations under the Public Health Act.

A further amendment will change the maximum penalty for breaching a public health direction from 100 penalty units to 100 penalty units or 6 months imprisonment (or both).

Finally, another amendment will authorise Queensland contact tracing officers to perform their functions outside Queensland or in relation to persons outside Queensland and specify that it is the intention of Parliament that the contact tracing officers' confidentiality obligations have effect outside of Queensland and in relation to persons outside of Queensland.

Petroleum and Gas (Production and Safety) Act 2004 amendments

The amendments to the *Petroleum and Gas (Production and Safety) Act 2004* (P&G Act) reinstate and clarify the ability of the chief executive administering the Act's general provisions to appoint and manage authorised officers. These powers were incorrectly removed by the *Resources Safety and Health Queensland Act 2020*.

Summary Offences Act 2005 amendments

The amendments to the *Summary Offences Act 2005* (SOA) will clarify that trespass laws under the SOA do not prevent:

- WHS entry permit holders under the *Work Health and Safety Act 2011* (WHS Act) from entering into a workplace in accordance with that Act; and
- WHS entry permit holders acting in accordance with the WHS Act and authorised industrial officers under the SOA acting in accordance with their appointment from entering and remaining in a workplace.

The amendments do not change existing laws about trespass or the powers of entry for WHS entry permits under the WHS Act or authorised industrial officers under the SOA. These amendments will assist police officers by clarifying when trespass provisions under the SOA may apply to workplaces.

Human Rights Issues

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

In my opinion, the human rights relevant to the amendments in relation to the CS Act which will be moved to the Bill during consideration in detail are the right to privacy and reputation and the protection of families and children, which are protected by sections 25 and 26 of the *Human Rights Act 2019*, respectively.

The human rights relevant to the amendments to the Public Health Act are:

- right to life (section 16)
- freedom of movement (section 19)
- right to privacy and reputation (section 25)
- right to liberty (section 29)
- right to a fair hearing (section 31).

For the reasons outlined below, I am of the view that the amendments are compatible with each of these human rights.

The amendments to be moved to the Bill amending the HHB Act to create the DCHO position and to the Public Health Act to allow the CHO to delegate her public health powers to the DCHO or other appropriate qualified officers and to clarify the CHO and DCHO are protected from civil liability under the Public Service Act do not affect or limit human rights under the *Human Rights Act 2019*. As such, no further analysis of these amendments under the *Human Rights Act 2019* is required.

The amendments to the P&G Act are not considered to engage human rights. The amendments are minor in nature and appropriately restore administrative functions that were incorrectly removed by the *Resources Safety and Health Queensland Act 2020*. As such, no further analysis of these amendments under the *Human Rights Act 2019* is required.

Amendment to increase the maximum penalty for breaching a public health direction

Under section 362D of the Public Health Act, it is an offence to fail to comply with a public health direction. The maximum penalty for the offence is 100 penalty units. An amendment to be moved to the Bill will change the maximum penalty to 100 penalty units or six months' imprisonment or both.

The human rights relevant to this amendment are:

- right to life (section 16)
- freedom of movement (section 19)
- right to liberty (section 29)
- right to a fair hearing (section 31).

Right to life

The right to life is protected under section 16 of the *Human Rights Act 2019*. The right to life places a positive obligation on the State to take all necessary steps to protect the lives of individuals in a health emergency. This right is an absolute right which must be realised and outweighs the potential impacts on any one individual's rights. Protecting the health, safety and wellbeing of people in the Queensland community from the risks posed by the pandemic and its spread promotes the right to life.

The amendment increasing the maximum penalty for breaching a public health direction is being made for the purpose of protecting Queenslanders from the spread of COVID-19 through deterring non-compliance with public health measures. As such, the amendment protects and promotes the right to life, and no further analysis under the *Human Rights Act 2019* is required.

Right to a fair hearing

Section 31 of the *Human Rights Act 2019* affirms the right of all individuals to have criminal charges or civil proceedings decided by a competent, independent and impartial court or tribunal following a fair, public hearing. Broadly it ensures a party has a reasonable opportunity to be heard.

While the amendment will add an option of imprisonment for breaching a public health direction, this does not affect the fairness or public nature of proceedings. The amendment will not deny a person charged with breaching a direction the right to have that charge decided by a competent, independent and impartial court or tribunal. As such, the amendment does not limit the right to a fair hearing and no further analysis under the *Human Rights Act 2019* is required.

Rights to liberty and freedom of movement

The introduction of a potential term of imprisonment for breaching a public health direction will limit the right to liberty and the right to freedom of movement in the event that an individual is convicted of this offence and receives a custodial sentence. Consideration of whether the limitations on these rights is reasonable and demonstrably justified is set out below.

Amendment to authorise contact tracing officers to exercise functions outside of Queensland

Under section 89 of the Public Health Act, contact tracing officers identify persons who may have contracted a notifiable condition or who may transmit a notifiable condition, inform persons who may have contracted a notifiable condition so they may seek advice and treatment, provide information on how a person may prevent or minimise transmission of a notifiable condition and obtain information about how a person may have been exposed to a notifiable condition or exposed others to a notifiable condition. An amendment to be moved to the Bill will state that these functions may be exercised outside Queensland or in relation to persons outside Queensland.

Under section 105 of the Public Health Act, contact tracing officers must not disclose confidential information, being information that has become known to a contact tracing officer in the course of performing the relevant person's functions under the Public Health Act. If a

contact tracing officer discloses confidential information, they are liable for a penalty of 50 penalty units.

There are a number of exclusions to section 105. A contact tracing officer may disclose confidential information if the disclosure is authorised under an Act or another law (section 106); is in the performance of functions under the Public Health Act, done with consent, disclosed to the person to whom the information relates or disclosed in a de-identified form (section 107); is authorised by the chief executive to protect the health of that person or another person (section 108); is to a health practitioner, guardian, public health entity or prescribed entity for the purposes of contacting a person who may have contracted a notifiable condition to enable that person to seek treatment (section 108A); is in the public interest and authorised by the chief executive (section 109); is to the chief executive to allow the chief executive to act (section 110).

Information obtained by contact tracing cannot be accessed by court order other than an order for the purpose of the Public Health Act (section 111). An amendment to be moved to the Bill will state that it is the intention of Parliament that this division have effect outside of Queensland and in relation to persons outside of Queensland. As a result, the confidentiality provisions relevant to contact tracing officers will apply when they perform functions outside of Queensland or in relation to persons outside of Queensland.

The human rights relevant to this amendment are:

- right to life (section 16)
- right to privacy and reputation (section 25)

Right to life

The right to life is protected under section 16 of the *Human Rights Act 2019*. The right to life places a positive obligation on the State to take all necessary steps to protect the lives of individuals in a health emergency. This right is an absolute right which must be realised and outweighs the potential impacts on any one individual's rights. Protecting the health, safety and wellbeing of people in the Queensland community from the risks posed by the pandemic and its spread promotes the right to life.

The amendment authorising contact tracing officers to exercise their functions outside Queensland or in relation to persons outside Queensland is being made to prevent the further spread of COVID-19 in Queensland by allowing Queensland contact tracing officers to assist with containing the current outbreak in Victoria and any other outbreaks that may occur in other jurisdictions. The highly contagious nature of COVID-19 means that an outbreak anywhere in Australia has the potential to cause an increase in cases in Queensland and puts the Queensland public at risk. As such the amendment promotes and protects the right to life and no further analysis under the *Human Rights Act 2019* is required.

Right to privacy and reputation

Consideration of whether the limitations on the right to privacy and the right to reputation are reasonable and demonstrably justified is set out below.

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

Prohibition on intimate relationships between staff members and offenders (*Corrective Services Act 2006*)

The amendment to re-locate clause 21, which inserts a new section 173A (Prohibition on intimate relationships between staff members and offenders) of the CS Act, clarifies that the offence applies to all staff members within the meaning of schedule 4 of the CS Act. This amendment potentially limits the rights of staff working outside corrective services facilities in the same way the existing clause will potentially limit the rights of staff working in corrective services facilities. The Statement of Compatibility for the Bill provides in-depth analysis of the limitation of these rights. No other amendments were identified as affecting human rights.

(a) the nature of the rights

Refer to the Statement of Compatibility for the Bill.

(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

Refer to the Statement of Compatibility for the Bill.

(c) the relationship between the limitations to be imposed by the amendments to be moved to the Bill if enacted, and its purpose, including whether the limitations help to achieve their purpose

Refer to the Statement of Compatibility for the Bill.

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

Refer to the Statement of Compatibility for the Bill.

(e) the balance between the importance of the purpose of the amendments to be moved to the Bill, which, if enacted, would impose limitations on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitations

Refer to the Statement of Compatibility for the Bill.

(f) any other relevant factors

Refer to the Statement of Compatibility for the Bill.

Amendment to increase the maximum penalty for breaching a public health direction

(a) the nature of the right

The right to freedom of movement

Section 19 of the *Human Rights Act 2019* protects the right of people to move freely within Queensland and to enter and leave Queensland. The right to move freely within Queensland means that a person cannot be arbitrarily forced to remain in a particular place.

The scope of the right:

- extends only to those who are ‘lawfully within Queensland,’ and
- means that a person cannot be arbitrarily forced to remain in, or move to or from, a particular place.

The amendment to be moved to the Bill changing the maximum penalty for breaching a public health direction limits the right to freedom of movement by adding the option of imprisonment.

The right to liberty

Section 29 of the *Human Rights Act 2019* provides a right to liberty. The fundamental value which the right to liberty expresses is freedom, which is acknowledged to be a prerequisite for equal and effective participation in society. The right is directed at all deprivations of liberty, including, but not limited to, imprisonment. The right also protects against arbitrary arrest and detention. In this context, the concept of arbitrariness includes ‘capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought’.¹

The amendment limits the right to liberty to the extent there is the potential for an individual to be imprisoned for up to 6 months for committing the offence of contravening a public health direction.

(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 amendment is to increase compliance with public health directions in order to prevent and minimise the spread of COVID-19, thus protecting the lives and health of Queenslanders. Since the declaration of the public health emergency, Queensland has recorded 1,068 cases of COVID-19, including six deaths. Internationally and in Victoria cases are continuing to increase. As at 11 July 2020, the World Health Organisation reported more than 12.3 million cases globally.

The State has positive obligations under the *Human Rights Act 2019* to protect the lives of Queenslanders in a health emergency. Maintaining the health and safety of the community is consistent with a free and democratic society based on human dignity, equality and freedom.

¹ *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing).

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

Public health directions are made to assist in containing, or to respond to, the spread of COVID-19 within the community. Breaches of public health directions increase the risk of COVID-19 spreading in the community. Given the highly contagious nature of COVID-19, even a small number of breaches can lead to rapid transmission of the disease within the community. This has been demonstrated recently in Victoria where media reports suggest that a large part of the current exponential increase in cases may have a single source.

Queensland has already experienced instances of persons breaching public health directions, indicating a need for a stronger response for those who fail to comply.

The amendment helps to achieve its purpose by providing a strong deterrent to breaching public health directions, by providing for a penalty of up to six months' imprisonment.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

The issuance of public health directions and monitoring of compliance, as well as the implementation of robust communication strategies, have meant that Queenslanders are broadly complying with directions and public health recommendations. However, there have been numerous instances of non-compliance, which jeopardises the progress being made in Queensland to suppress COVID-19. This is despite the fact that it is already an offence, punishable by up to 100 penalty units, to contravene a public health direction.

Allowing courts the discretion to impose a term of imprisonment for serious breaches of public health directions is seen as the next reasonably available means to encourage compliance and protect Queensland from the spread of COVID-19 by those who may be disposed to violate public health directions and place vulnerable members of the community at risk of harm.

The maximum term of imprisonment for breaching a public health direction will be six months. This is proportionate to the potential harm to the community and is comparable to the penalties that apply in other jurisdictions that impose a term of imprisonment, including New South Wales and Tasmania (six months) and Western Australia (12 months). The maximum term of imprisonment is considerably less than is provided for under the *Biosecurity Act 2015* (Cth) for non-compliance with a determination or direction of the Minister in relation to a human biosecurity emergency (five years).

A term of imprisonment will only be imposed by a court with appropriate jurisdiction to decide criminal matters, and only after consideration of all relevant circumstances of the offence, including mitigating factors that may weigh against the imposition of a custodial sentence. It is expected that a term of imprisonment will only be imposed in the most serious cases of non-compliance, such as where an individual repeatedly breaches public health directions or knowingly exposes other persons to the risk of contracting the disease.

The relevant offence continues to be an infringement notice offence under the *State Penalties Enforcement Regulation 2014*. The majority of breaches of public health directions will continue to be enforced by way of penalty infringement notices, which do not impose a term of imprisonment.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The need to prevent and minimise the spread of COVID-19, a dangerous communicable disease for which there is no vaccine or cure, is compelling and outweighs the limitations on the rights to freedom of movement and liberty resulting from the imprisonment of individuals who have been convicted of serious breaches of public health directions.

Given the significant and well-known public health risks of this behaviour, any resultant deprivation of liberty after a fair and open court process would not be arbitrary and would be justified as a reasonable and proportionate means of providing effective deterrence from behaviour that poses a clear and present danger to the community. Balanced against the importance of preventing and minimising the spread of COVID-19 and protecting the right to life, any limitations on the right to freedom of movement and right to liberty are reasonable and justifiable.

Amendment to authorise contact tracing officers to exercise functions outside of Queensland

(a) the nature of the right

Section 25 of the *Human Rights Act 2019* protects the right to privacy and the right to reputation. The right to privacy protects the individual from all interferences and attacks upon their privacy, family, home and reputation. The right to privacy is very broad and it protects personal information but also an individual's private life more generally.

The right is subject to an internal limitation that a person's right to privacy not be unlawfully or arbitrarily interfered with. Arbitrary suggests conduct that is capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim that is sought.

The right to reputation is also subject to an internal limitation; a person's reputation must not be unlawfully attacked.

(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 amendment is to allow Queensland to assist Victoria (and any other jurisdictions that experience COVID-19 outbreaks) by making contact tracing officers available to assist with contact tracing in Victoria. The highly contagious nature of COVID-19 means it is in Queensland's interests to assist Victoria with containing the current COVID-19 outbreak to minimise the risk of COVID-19 again spreading in Queensland.

The State has positive obligations under the *Human Rights Act 2019* to protect the lives of Queenslanders in a health emergency. Maintaining the health and safety of the community is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The functions of contact tracing officers involve the collection and use of personal information, which engages the right to privacy and, if the information is disclosed, the right to reputation. In order for contact tracing officers to usefully assist with contact tracing in other jurisdictions, they must be authorised to collect and use personal information. The limitation on the right to privacy and right to reputation therefore helps to achieve the purpose of allowing contact tracing officers to perform their functions to assist other jurisdictions.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

There are no less restrictive and reasonably available ways to achieve the purpose. If contact tracing officers are not authorised to collect and use personal information, they cannot engage in contact tracing.

The amendment does not change the functions of contact tracing officers or authorise them to collect more or different types of information than they can currently request under the Public Health Act. The amendment does, however, authorise contact tracing officers to perform those functions in relation to a larger group of people, being people outside of Queensland.

The amendments only allow contact tracing officers to exercise their functions outside of Queensland on a voluntary basis; the people contacted will not be required to provide their information and may decline to do so without penalty.

The use of the personal information collected outside of Queensland or in relation to people outside of Queensland is governed by a strict confidentiality provision with limited exceptions. The exceptions allow the disclosure if authorised by law but otherwise only permit disclosure with consent, to protect the health of persons or with the authority of the chief executive. The use of the information is so strictly limited that the information may not be obtained under most court orders. This allows contact tracing officers to collect information to fulfil their functions but limits the use of the information collected beyond this.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

In light of the voluntary nature of the collection of the information and the strict provisions governing the use of the information, as well as the connection of the limitation to the purpose of the limitation, any interference with the right to privacy and the right to reputation is not arbitrary or unlawful and is therefore unlikely to limit the rights or only imposes a minor limitation on the rights.

On balance, the importance of providing contact tracing assistance to jurisdictions experiencing a COVID-19 outbreak and limiting the spread of COVID-19 to Queensland outweighs any minor limitations on the right to privacy and right to freedom.

Conclusion

In my opinion, the amendments to the Corrective Services and Other Legislation Amendment Bill 2020 which are to be moved during consideration in detail are compatible with human rights under the *Human Rights Act 2019* because they limit a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

The Honourable Mark Ryan MP
MINISTER FOR POLICE AND MINISTER FOR CORRECTIVE SERVICES

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