

# Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020

## Statement of Compatibility

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

In accordance with section 38 of the *Human Rights Act 2019*, I, Yvette D’Ath, Attorney-General and Minister for Justice and Leader of the House, make this statement of compatibility with respect to the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 (the Bill).

In my opinion, the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 is 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 Bill

### *Amendments to the Criminal Code*

By Terms of Reference dated 2 September 2019, the Queensland Law Reform Commission (QLRC) was asked to examine the operation and practical application of both the definition of consent and the operation of mistake of fact and to provide draft legislation of any suggested reform.

The agreed Terms of Reference included a requirement for the QLRC, in making its recommendations, to have regard to the experiences of sexual assault victims and survivors in the criminal justice system. The QLRC consulted with legal stakeholders and people who had experienced sexual violence and relevant bodies that represent victims and survivors of sexual violence as well as the general public.

On 30 June 2020, the QLRC delivered its report No.78 ‘Review of consent laws and the excuse of mistake of fact’ (the QLRC report) and made five recommendations for reform; three relating to consent and two to the excuse of mistake. The QLRC report was tabled on 31 July 2020. Each of the recommendations can be implemented by amendment to the Criminal Code.

The overall effect of the amendments (which implement the recommendations of the QLRC report), will be to modernise, make accessible and update the current operation of the Criminal Code in respect of consent and the mistake of fact excuse in the context of sexual offences.

The amendments will operate to ensure consistency in the application of the law as it relates to consent and the mistake of fact excuse in the context of sexual offences in Chapter 32 of the Criminal Code.

### *Consent*

Currently, section 348 of the Criminal Code defines consent (for the purpose of the offence of rape) as being freely and voluntarily given by a person with the cognitive capacity to give it.

Consistent with the recommendations of the QLRC, the Bill (clause 8) will amend the definition of consent to explicitly reinforce a number of principles that already exist under case law, namely:

- that silence alone does not amount to consent; and
- that consent initially given can be withdrawn.

The Bill will also amend the Criminal Code (clauses 6 and 7) to address an anomaly where it is unclear whether the definition of consent in section 348 of the Criminal Code applies to the offences of assault with intent to commit rape and the first limb of the offence of sexual assault.

#### *Mistake of fact excuse*

For an offence of rape or sexual assault, the excuse of mistake of fact under section 24 of the Criminal Code is available where the defendant does an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act.

Consistent with the recommendations of the QLRC, the Bill (clause 9) amends the Criminal Code to insert new section 348A which explicitly reinforces a number of principles that already exist under case law in relation to how the mistake of fact excuse operates in respect of sexual offences, namely:

- that when deciding whether a defendant did an act under an honest and reasonable, but mistaken, belief that the complainant gave consent to the act, regard may be had to anything the defendant said or did to ascertain whether the other person was giving consent to the act; and
- that the voluntary intoxication of the defendant is irrelevant to the reasonableness of their belief about consent.

The provisions in the Bill amend the Criminal Code to reflect legal principles relating to consent and mistake of fact which currently exist in case law. In particular, in relation to the issue of the voluntary intoxication of the defendant the evidence base of Queensland trials examined by the QLRC showed those principles are not always consistently or correctly applied. Codifying these case law principles in legislation encourages and assists judges to direct the jury properly and in accordance with the law.

#### ***Amendments to the Legal Profession Act 2007***

The Legal Practitioners' Fidelity Guarantee Fund (the Fund) was established to provide a source of compensation for persons who have lost trust money or property due to a dishonest default by a solicitor law practice. The Queensland Law Society (QLS) administers the Fund pursuant to part 3.6 of the *Legal Profession Act 2007* (LPA).

Section 396(1) of the LPA provides that a regulation may:

- fix the maximum amounts, or the method of calculating maximum amounts, that may be paid from the Fund for individual claims, or classes of individual claims; and
- fix the maximum aggregate amount, or the method of calculating the maximum aggregate amount, that may be paid from the Fund for all claims in relation to individual law practices or classes of law practices.

Section 76 of the *Legal Profession Regulation 2017* provides that the maximum amount that may be paid from the Fund for a single claim is \$200,000 and the maximum aggregate amount that may be paid from the Fund for all claims made in relation to a single law practice is \$2 million (the statutory caps).

Section 396(2) of the LPA prohibits the payment from the Fund of amounts in excess of the statutory caps. However, section 396(4) of the LPA provides the QLS with a discretion to pay more. It provides that, despite subsection (2), the QLS may authorise payment of a larger amount if satisfied that it would be reasonable to do so after taking into account the position of the Fund and the circumstances of the particular case.

The statutory caps under section 396 of the LPA were introduced as protection against an extraordinary claim against the Fund which, if paid in full, would result in the Fund being exhausted to the detriment of subsequent claims.

For a period, the QLS applied the caps to all claims. As a result of this approach, a number of claimants did not have their claims against the Fund paid in full.

On 24 November 2016, the QLS adopted a new policy in relation to the statutory caps which has the effect of persuading the QLS Council to determine any application to exceed the statutory caps in favour of an applicant unless there are strong policy reasons to the contrary.

Given that the Fund currently has a substantial balance, the QLS is supportive of legislative amendments to facilitate additional payments being made to claimants who had the statutory cap applied to their claims prior to 2016.

The proposed amendments will facilitate the full payment of any claim not paid in full since the commencement of the LPA due to the application of the statutory caps and will also provide clearer guidance to the QLS as to when the statutory caps should be applied in the future.

### ***TAFV and other miscellaneous amendments***

A further purpose of the Bill is to progress the second tranche of the Government's legislative response to the independent evaluation of the *Tackling Alcohol-Fuelled Violence Policy* (TAFV Policy), undertaken by the *Queensland Alcohol-related violence and Night Time Economy Monitoring* (QUANTEM) project. The Bill amends the *Liquor Act 1992* (Liquor Act), *Gaming Machine Act 1991* (Gaming Machine Act) and *Police Powers and Responsibilities Act 2000* (PPRA) for the purpose of providing greater rigour around ID scanning and the banning regime; ensuring the ongoing effectiveness of safe night precincts; and increasing transparency around liquor and gaming machine decisions.

The Bill also makes miscellaneous amendments to the *Co-operatives National Law Act 2020*, *Liquor Act*, *Interactive Gambling (Player Protection) Act 1998* (Interactive Gambling Act), *Racing Integrity Act 2016* (Racing Integrity Act), and *Wagering Act 1998* (Wagering Act) for the purpose of codifying national standards; streamlining exemption processes; and providing flexibility for wagering operators in respect of dividends.

Section 48 of the *Human Rights Act 2019* (HR Act) states it is necessary to consider all statutory provisions so far as it is possible to do so. This Statement of Compatibility therefore considers the human rights impacts of the provisions contained in the Bill.

## Human Rights Issues

### *Amendments to the Criminal Code*

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

In my opinion, the human rights relevant to the Bill are the right to fair hearing (section 31) and retrospective criminal laws (section 35).

It is my opinion that the Bill does not engage or limit the right to a fair hearing. The intended effect of the amendments is that it will encourage consistent and correct directions being given to the jury about the legal principles relating to consent and mistake of fact. Trial judges may already provide directions to juries about these principles, but it is hoped that codifying these case law principles in legislation may make it more likely that this will happen. It is my opinion that this does not affect the requirements of procedural fairness that form the elements of the right to fair hearing.

However, as the amendments are intended to address a perceived issue with case law principles being inconsistently understood and applied, it is possible that the explicit recognition of these principles as a result of the amendments will result in trials proceeding in a way which is more favourable to victims, as it may shift the focus of the jury. This may give rise to an alternative view that the right to fair hearing is limited. For that reason, the analysis below details why, in the event that the right is taken to be limited, the limitation is reasonably and demonstrably justifiable.

It is also my opinion that the Bill does not engage or limit the right to protection from retrospective criminal laws in section 32 of the HRA. This is because the amendments will apply to anybody charged with an offence in chapter 32 after commencement. The essential elements of those offences remain the same and the amendments are merely directed at making explicit principles which already exist in case law. The scope of the right does not extend to changes to criminal procedure, so any change in directions given to a jury will not engage this right. As the case law principles are settled and able to be clearly understood, it is my opinion that any perceived ambiguity about the criminality of the relevant conduct does not meet the threshold required to engage this right.

However, it may be possible to take an alternative view that there is currently sufficient ambiguity in the law that the amendments do limit the right to protection from retrospective criminal laws. For that reason, the analysis below details why, in that event, the limitation is reasonably and demonstrably justifiable.

#### **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*)**

##### **The right to a fair hearing**

###### (a) the nature of the right

The right to a fair hearing affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It applies to both criminal and civil proceedings and

guarantees that such matters must be heard and decided by a competent, impartial and independent court or tribunal.

In the criminal law context, a basic requirement of the right to a fair hearing is that there is a clear and publicly accessible legal basis for all criminal prosecutions and penalties, so that the criminal justice system can be said to be operating in a way that is predictable to the defendant. It also ensures that a defendant has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to the prosecution (equality of arms).

What constitutes a ‘fair’ hearing will depend on the facts of the case and will require the weighing of a number of public interest factors including the rights of the accused and the victim. Relevantly, however, case law has determined that what is ‘fair’ in the context of a fair hearing will involve a triangulation of the interests of the victim, the accused, and the community.<sup>1</sup> In other words, a fair trial does not necessarily require a hearing with the most favourable procedures for the accused. It must take account of other interests, including the interests of the victim and of society generally in having a person brought to justice and preventing crime.

The concept of a fair hearing is concerned with matters of procedural fairness, rather than substantive fairness in relation to the merits of a particular decision.<sup>2</sup> For this reason I am of the opinion that the amendments do not engage the right to fair hearing, as they do not alter the elements of procedural fairness that constitute the right. However, there may be an alternative view that the amendments do limit this right, because the amendments will increase the likelihood that juries will be directed about these elements of consent and mistake of fact, which entrenches principles that are more favourable to the victim of an offence. However, as the amendments are intended only to strengthen and clarify existing law, if there is any limitation of this right it will be minimal.

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

The purpose of the amendments is to ensure that the law relating to consent and mistake of fact is consistently understood and that juries are properly directed, by enshrining case law principles relating to consent and mistake of fact in the Criminal Code. This will have the effect of modernising, making more accessible and updating the Criminal Code so it better reflects community standards in respect of sexual conduct and sexual offending. These community standards are currently reflected in the interpretation of the relevant provisions of the Criminal Code in case law, but they are not explicitly recognised in legislation. Explicit statutory recognition of these case law principles also will help to ensure that juries will be directed correctly and consistently in accordance with the law during trial proceedings.

The amendments give effect to case law principles that reflect contemporary standards about sexual behaviour – for example, that consent to sexual activity is a state of mind that must be given or communicated; and that a failure to manifest an absence of consent by words or actions is not sufficient by itself to prove that consent was given; and that consent can be withdrawn by words or conduct at any time.

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<sup>1</sup> *R v A (No 2)* [2002] 1 AC 45

<sup>2</sup> *Knight v Wise* [2014] VSC 76 at [36]

These principles are consistent with the protection of the bodily integrity and sexual autonomy of individuals. In a human rights context, the United Nations Committee on the Elimination of Discrimination Against Women has said that states must ‘ensure that sexual assault, including rape, is characterized as a crime against the right to personal security and physical, sexual and psychological integrity and that the definition of sexual crimes ... is based on the lack of freely given consent and takes into account coercive circumstances’<sup>3</sup> and that the implementation of these measures should be ‘centred around the victim/survivor, acknowledging women as rights holders and promoting their agency and autonomy’.<sup>4</sup>

In this respect, the amendments – which reinforce existing principles that reflect these standards – promote the rights of victims, who are predominantly women, to security of the person (see section 29 of the HR Act).

The amendments also ensure that there is express legislative clarity about the operation of the law in this regard (as opposed to relying upon a patchwork of principles and cases to inform the interpretation of the legislation). In doing so, the amendments will arguably also promote the right to a fair hearing by improving access to the law by making it easier to understand how it applies.

(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

Codifying the legal principles relating to consent and mistake of fact will help to achieve the purpose of making it more likely that juries are directed about the meaning of consent and mistake of fact, which goes to the broader purpose of ensuring that the law protects the bodily integrity and sexual autonomy of individuals.

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

No less restrictive reasonably available ways to achieve the purpose have been identified. It is likely that the amendments do not limit rights as they do not affect the elements of procedural fairness that constitute the right to fair hearing. However, in the event that there is a restriction on rights by shifting the focus of jurors in favour of victims, the only option to avoid this would be to maintain the status quo and make no change, which would not achieve the purpose.

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

On balance, the importance of the purpose of the amendments outweighs any limitation on rights that may occur as a result of the amendments. This is the case having regard particularly to the fact that the amendments simply ensure that the law is clear and that juries are directed

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<sup>3</sup> Committee on the Elimination of Discrimination against Women, *General recommendation No 35 on gender-based violence against women, updating general recommendation No 19*, UN Doc CEDAW/C/GC/35 (14 July 2017)

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about the meaning of consent and mistake of fact, and do not make any substantive change to the law. It is therefore considered that the benefits of having a clear, accurate, up-to-date and accessible Criminal Code that reflects both the interpretation of the law in case law and contemporary community standards outweighs any potential limitation that could be said to arise in relation to a defendant's right to a fair hearing.

(f) any other relevant factors

Not applicable.

**The right to protection from retrospective criminal laws**

(a) the nature of the right

The right to protection from retrospective criminal laws is aimed at protecting people from being unfairly and harshly penalised in situations where there has been a change in the criminal law since the time they committed an offence. It protects people from being found guilty of an offence for an action which was not an offence at the time it was committed because they could not have known it was an offence.

The right does not, however, extend to prevent retrospective changes that do not form part of the penalty or punishment of an offender, or to changes in procedural law such as shifts in trial practice or changes to the rules of evidence (for example the right does not extend to protection from a change in the law regarding the admissibility of evidence).<sup>5</sup>

The right will be engaged where there are ambiguities in the criminal law because the law does not have the required qualities of accessibility and foreseeability or lacks certainty and predictability.<sup>6</sup> However, this is a high threshold: there must be a genuine inability to ascertain that the conduct is punishable. The case law regarding mistake of fact is settled; the fact that the amendments will improve the community's understanding of the law is not in itself sufficient to engage the right. However, it may be possible to take a contrary view and argue that there is currently sufficient ambiguity that the law does not meet the requirements of accessibility and foreseeability,<sup>7</sup> and that the amendments resolve that ambiguity. On that basis, the right could be limited by the amendments because the law may not have the required accessibility, foreseeability, certainty and predictability for defendants who would not be subject to the amendments in the Bill when they commit the offence, but would be when charged.

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

The purpose of the potential limited retrospective operation of the amendments is to allow the justice system including judges and juries to have the benefit of the clarity provided by the amendments as soon as possible. A mis-direction to a jury can lead to a successful appeal and order for a re-trial where a miscarriage of justice has been occasioned. A jury that is accurately

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<sup>5</sup> *Nicholas v. Australia*, Comm. 1080/2002, U.N. Doc. A/59/40, Vol. II, at 320 (HRC 2004)

<sup>6</sup> *Kafkaris v Cyprus* (2009) 49 EHRR 35; *R v Rimmington* [2006] 1 AC 459

<sup>7</sup> *Kafkaris v Cyprus* (2009) 49 EHRR 35

directed as to the law is assisted by the judge in reaching a more informed decision applying that law to the facts of the case to reach a conclusion about the guilt or innocence of the defendant. In this way the risk of miscarriages of justice (either by wrongful conviction or acquittal) is lessened. Clear and accurate directions also reduce the basis upon which a decision of a jury to convict can be vulnerable to appeal. This goes to the broader purpose of promoting the right to fair trial, which is a proper purpose consistent with a free and democratic society.

(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 need to provide clarity as soon as possible and the application of the provisions to persons who are charged with an offence after commencement whether or not the offence was committed before commencement.

To the extent that there may be retrospective operation of the amendments, it is very limited in the sense that they are a codification of the existing case law, which already applies to trials where consent and mistake of fact are in issue, although this is not made explicit in the Criminal Code.

It is not intended to change the nature of directions that might be given in the course of a trial that has already commenced. Nor is it desirable to change the law after a person has been charged with an offence, because the way that the trial is conducted and what directions the jury is likely to be given, may inform decisions made by the defence from the commencement of proceedings.

For these reasons, the point of charge is considered to be the fairest point at which to begin the application of the amendments, whilst still balancing the desirability of the criminal justice system benefiting from them as soon as possible.

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

No less restrictive reasonably available ways to achieve the purpose have been identified. It may be less restrictive to confine the operation of the amendments prospectively from the commission of an offence. However that approach will not achieve the purpose of clarifying and making the law more accessible as soon as possible.

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

On balance, the importance of providing clarity and consistency in the law outweighs any potential limitation on the right to protection from retrospective criminal laws, that may occur as a result of the amendments.

This is the case having regard particularly to the fact that the amendments do not make substantial changes or criminalise new conduct, they simply endeavour to make the law clear, accessible and accurate. It is therefore considered that the benefits of having a clear, accurate,

up-to-date and accessible Criminal Code that reflects both the interpretation of the law in case law and contemporary community standards outweighs any potential limitation that arises because of very limited potential retrospective application.

(f) any other relevant factors

Not applicable.

### ***Amendments to the Legal Profession Act 2007***

#### **Human rights relevant to the amendments (part 2, divisions 2 and 3, HR Act)**

In my opinion, the human rights relevant to the amendments are property rights (section 24 of the HR Act).

The **right to property** protects the right of all persons to own property (alone or with others) and provides that persons have a right to not be arbitrarily deprived of their property. Property is likely to include all real and personal property interests recognised under the general law and may include some statutory rights.

#### **Amendments promoting human rights**

*Property rights (section 24 of the HR Act)*

The amendments will amend the LPA to facilitate full payment of any claim not paid in full since the commencement of the LPA due to the application of the statutory caps.

This engages and promotes property rights by promoting the rights of persons who have lost trust money or property due to a dishonest default by a solicitor law practice not to be arbitrarily deprived of their property.

#### **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, HR Act)**

(a) the nature of the right

Section 11 of the HR Act provides that only natural persons have human rights— corporations do not. While the QLS does not have human rights, the property rights of the individual solicitors who are required to contribute to the Fund may be limited.

A discussion around the nature of property rights is set out under the heading ‘Human rights relevant to the amendments (part 2, divisions 2 and 3, HR Act)’.

To protect the property rights of persons who have lost trust money or property due to a dishonest default by a solicitor law practice, the amendments will facilitate full payment of any claim not paid in full since the commencement of the LPA due to the operation of the statutory caps. The payment of additional amounts to claimants will affect the balance of the Fund, thereby limiting the property rights of the solicitors who may be required to pay additional amounts to support the balance of the Fund in the future.

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

The purpose of the limitation is to ensure that a person who has lost trust money or property is able to recover the full amount where the balance of the Fund supports full payment. Fidelity funds were established in recognition that thefts of trust money or property by a solicitor have the potential to seriously damage public confidence in the legal profession. Fidelity compensation has long been regarded as a non-negotiable obligation of the profession. This purpose is consistent with a free and democratic society based on human 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 limitation on property rights is necessary to ensure that a person who has lost trust money or property is able to recover the full amount where the balance of the Fund supports full payment.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the amendments. Therefore, I consider that the amendments are the most effective and reasonably adapted way of achieving this purpose.

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

On balance, taking into account the nature and extent of the limitation, I consider that the importance of public confidence in the legal profession and of ensuring that a person who has lost trust money or property is able to recover the full amount if the balance of the Fund supports full payment outweigh any limitation on property rights.

(f) any other relevant factors

There are no other relevant factors.

### ***TAFV and other miscellaneous amendments***

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

In my opinion, the human rights under the HR Act that are relevant to the Bill are:

- Freedom of movement (section 19 of the HR Act);
- Freedom of expression (section 21 of the HR Act);
- Right of peaceful assembly and freedom of association (section 22 of the HR Act);
- Privacy and reputation (section 25 of the HR Act); and
- Right to a fair hearing (section 31 of the HR Act).

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

## **Publication of relevant information about significant liquor and gaming decisions**

### *Privacy and reputation (section 25 of the HR Act)*

#### (a) the nature of the right

Section 25 of the HR Act provides that a person has the right not to have the person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with. Relevantly, the right protects privacy in the sense of personal information, data collection and correspondence (as well as also extending to an individual's private life more generally). The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate.

The Liquor Act and Gaming Machine Act require applicants for certain liquor and gaming machine licence applications to disclose information and personal details to the Commissioner in order for the Commissioner to determine the person's suitability for a licence. In the case of the Liquor Act, this includes details about the person's identity; reputation; associates; ability to meet their financial obligations; history of criminal convictions; non-compliance with the Liquor Act; and involvement with a business licensed under the *Prostitution Act 1999*. Similarly, under the Gaming Machine Act, applicants are required to disclose information about their financial stability, general reputation, character and suitability to be a licensee.

While applications for liquor and gaming machine licences are typically made by corporations, the legislation provides that the Commissioner may also investigate the suitability of directors and other persons associated with an applicant. This may require the person to disclose sensitive or confidential information about their criminal history, compliance history or other information of a personal nature.

The purpose for gathering this information is to allow the Commissioner to undertake sufficient investigations to determine the suitability and probity of the applicant and the applicant's associates. This ensures the integrity of the liquor and gaming industry in Queensland is maintained, and businesses are managed responsibly having regard to the main purposes of the legislation to minimise harm from alcohol and machine gaming.

The Bill amends the Liquor Act and Gaming Machine Act to require that the Commissioner must publish relevant information relating to decisions on particular liquor and gaming applications online. The requirements for these provisions include, among others, the publication of the decision for the application and a brief summary of the reasons for the decision. The fulfillment of this obligation may engage an individual's right to privacy and reputation. However, the provisions have been drafted in a way that limits the right only to the extent necessary to fulfil the purpose.

#### (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 amendments in the Bill serve to provide greater rigour and transparency around liquor and gaming machine decisions and promote public confidence in the licensing process. In turn, this provides an increased measure of community protection from potential harms arising from problem gambling and liquor abuse and misuse.

The Bill inserts provisions that seek to preserve the confidentiality of individuals in support of the right to privacy and reputation. These protections ensure that sensitive or confidential information about the applicant, or an associate of the applicant, is not published online. This includes information about the person's reputation; history of behaviour or attitude in relation to the management or discharge of the person's financial obligations; and criminal history or record of convictions. The provisions also exclude the publication of information the Commissioner reasonably considers in commercially sensitive. As a further protection, the Bill limits the period that relevant information is published online to three months.

Combined, these provisions ensure any engagement of the right by the Bill is limited only to the extent necessary to achieve the purpose. The limitations are consistent with a free and democratic society based on human 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 limitations help to achieve the purpose of the Bill of providing greater rigour and transparency around the liquor and gaming machine licensing regimes. The purpose for the limitation is consistent with the harm minimisation purposes of the Liquor Act and Gaming Machine Act, by providing greater rigour around the licensing frameworks that facilitate, regulate and ensure the suitability of persons associated with the liquor and gaming industries in Queensland.

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

There is no less restrictive way to feasibly achieve the purpose. Providing a legislative framework for the publication of relevant information about liquor and gaming machine decisions ensures the protections of an individual's privacy and reputation is regulated and controlled.

(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 provisions of the Bill reach an appropriate balance between increasing the rigour and transparency of liquor and gaming applications and ensuring the right to privacy and reputation of an applicant and their associates are sufficiently protected.

Given the importance of providing greater transparency and rigour around the licensing process, the limitation on the rights of an applicant, and their associates, is reasonable and demonstrably justifiable under section 13 of the HR Act.

(f) any other relevant factors

Not applicable.

## **Wagering inducement restrictions**

### *Freedom of expression (section 21 of the HR Act)*

#### **(a) the nature of the right**

Section 21 of the HR Act provides for the rights to freedom of expression. This section is modelled on article 19 of the International Covenant on Civil and Political Rights. The scope of the right to freedom of expression extends to the freedom to seek, receive and impart information and ideas of all kinds whether within or outside of Queensland. The right applies to all types of expression that conveys or attempts to convey as meaning, provided it would affect reasonable members of the public.

Commercial material including direct marketing in the printed form such as pamphlets, electronic and internet-based marketing would possibly qualify as an ‘expression’.

#### **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**

There has been a significant increase in the number of active online wagering accounts as online gambling has become the fastest growing form of gambling due to developments in digital technologies. Growth in online gambling is three times higher than for other forms of gambling due to its availability, accessibility, and the ease with which money can be spent online. Members of the community, consumer representatives and academia have expressed concerns about the potential harms from online wagering. This includes harm to a person’s physical and mental health as well as financial problems caused by gambling or by chasing losses; with online bettors more likely to be betting across multiple gambling platforms.

Online gambling poses significantly more risks than other gambling platforms as it allows:

- a person to gamble online, anywhere via a mobile or telecommunication device;
- gambling operators to target individual gamblers with offers and incentives to bet;
- a person to transfer large amounts electronically into online wagering or betting accounts; and
- gambling operators to offer lines of credit to gamblers.

To address these issues and reduce the harm of online wagering to Australian consumers, the Commonwealth, state and territory governments have developed the National Consumer Protection Framework for Online Wagering (NCPF). The NCPF provides strong, nationally consistent minimum protections for consumers of interactive wagering services licensed in Australia. The Bill amends the Interactive Gambling Act, Racing Integrity Act and Wagering Act, to codify the restrictions on wagering inducements set out in the NCPF National Policy Statement.

Relevant to the right of freedom of expression under the HR Act, the Bill amends the Racing Integrity Act to restrict the ability of a racing bookmaker to send direct marketing material to an interactive bettor in Queensland, in certain circumstances. Specifically, the provisions provide that:

- a racing bookmaker must not send direct promotional or advertising material directly to an interactive bettor in Queensland unless the bettor has given express and informed consent to receive that material directly.
- a racing bookmaker must provide an easy and simple to use means for that consent to be withdrawn, and once aware the consent has been withdrawn, must not send further material to the interactive bettor directly.
- if promotional or advertising materials are sent electronically, a racing bookmaker must provide a functional mechanism to allow the interactive bettor to unsubscribe, and if used by the bettor, is prohibited from offering an inducement to the bettor to not unsubscribe.

Similarly, the Bill amends the Wagering Act to restrict the ability of a licence operator to send direct marketing material to an interactive wagering customer in Queensland, in similar circumstances. Specifically, the provisions amending the Wagering Act provide that:

- a licence operator must not send promotional or advertising material directly to an interactive wagering customer in Queensland unless the customer has given express and informed consent to receive that material directly.
- a licence operator must provide an easy and simple to use means for that consent to be withdrawn, and once aware the consent has been withdrawn, must not send further material to the interactive wagering customer directly.
- if promotional or advertising materials are sent electronically, a licence operator must provide a functional mechanism to allow the interactive wagering customer to unsubscribe, and if used by the customer, is prohibited from offering an inducement to the customer to not unsubscribe.

The Bill amends the Interactive Gambling Act to impose similar restrictions on direct marketing practices of interactive wagering operators. However, as these operators are based interstate and not in Queensland, the amendments to the Interactive Gambling Act contained in the Bill do not engage human rights for the purpose of the HR Act.

The limitations provided in the Bill aim to limit the harmful impacts of online gambling by providing appropriate safeguards and consumer protections by restricting the circumstances in which advertising and promotional material can be sent to customers directly. The amendments also allow interactive bettors and interactive wagering customers to make informed decisions about their gambling, free from inducement.

The limitations are 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 limitations help to achieve the purpose of the Bill by providing a higher level of consumer protection and allow for greater consumer choice, which may improve harm minimisation outcomes for interactive bettors and interactive wagering customers in Queensland. The Bill only limits the right to freedom of expression to the extent necessary to achieve this purpose.

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

Stronger regulated consumer protections are required to provide interactive bettors and interactive wagering customers in Queensland with appropriate safeguards and choices in the management of their wagering expenditure and behaviour. These protections are necessary to reduce the potential for harm associated with problem gambling.

(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 limitation of the right to freedom of expression is marginal as the restrictions on the distribution of direct marketing material inserted by the Bill will not limit the ability of a racing bookmaker or licence operator to advertise or promote their business by other means; or to distribute this material directly to bettors or customers who give this consent, or who are located interstate. By reducing the potential harmful effects of gambling, the limitations support the human rights of protection of families and the right to privacy. On balance the limitations are reasonable and demonstrably justifiable in a free and democratic society.

(f) any other relevant factors

The amendments contained in the Bill codify the agreed principles for restrictions on wagering inducements as set out in measure 4 of the NCPF National Policy Statement, which documents the agreed policy commitments of Commonwealth, state, and territory governments for the implementation of the NCPF.

**Enhance police banning notices under the PPRA**

*Freedom of movement (section 19 of the HR Act); Right of peaceful assembly and freedom of association (section 22 of the HR Act); Right to a fair hearing (section 31 of the HR Act).*

(a) the nature of the right

**Freedom of movement** (section 19): This right provides that every person lawfully within Queensland has the right to move freely within Queensland and to enter and leave it, and has the freedom to choose where to live. The right places an obligation on the State not to act in a way that unduly restricts the freedom of movement, but does not go so far as to require the State take positive steps to promote the freedom of movement.

**Peaceful assembly and freedom of association** (section 22): This right protects the right to gather together in order to exchange, give or receive information. It also protects the right of individuals to joint together to pursue a common interest.

**Fair hearing** (section 31): This right affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It applies to both criminal and civil proceedings, and guarantees such matters must be heard and decided by a competent, impartial and independent court or tribunal.

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

The Bill will increase the initial PBN period from 10 days to up to one month. The purpose of this amendment is to enhance public safety at licensed venues and events, reduce incidences of alcohol-fuelled violence, increase accountability of those engaging in anti-social behaviour in

or around licensed venues and provide a sufficient deterrent for, and highlight the seriousness with which, anti-social behaviour in licensed venues and events will be treated.

The 10 day banning period associated with an initial police banning notice effectively only spans one weekend. Lengthening the period that an initial police banning notice is in effect will ensure that a person who has behaved in a disorderly, offensive, threatening or violent way in a relevant public place, such as a safe night precinct, is excluded from places or events stated in the police banning notice for up to one month. The increased duration of the banning period from 10 days to up to one month will reduce the risk of the respondent's presence causing violence, impacting the safety of others or disrupting or interfering with the peaceful passage or reasonable enjoyment of others at the places stated in the notice for a longer period of time.

(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

PBNs were implemented to reduce violence and improve public order in and around licensed premises, protecting the safety of patrons. A PBN can only be issued where a respondent's misbehaviour was at, or in, the vicinity of relevant licensed premises, and where the respondent's continued presence at the premises poses an unacceptable risk of causing violence, impacting on the safety of other persons or interfering with the reasonable enjoyment of others. Increasing the deterrent effect of PBNs aims to enhance the effectiveness of this policy and protecting against harm. The evaluation report noted the system of banning notices had been successful in limiting the number of people on bans trying to enter licensed venues. The relationship between the limitations imposed by the Bill and the purpose of the amendments is clear.

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

The amendments to the police banning notice scheme represent the most reasonably available way to achieve the purpose of the Bill to enhance public safety at licensed venues and events and reduce incidences of alcohol-fuelled violence. The evaluation report recommended the banning period associated with an initial police banning notice be extended from 10 days to one month and bans through extended police banning notices be extended to six months. The Bill makes no change to the extended banning period, which remains at three months. The intent of the policy objective to ban a person from licensed venues and events for longer than three months without utilising an administrative police banning scheme can be differentially achieved by leveraging existing banning mechanisms, such as, court imposed banning orders.

There are a number of safeguards within the PBN scheme to ensure a person's rights are limited to the least extent possible. These include a person's ability apply to the Police Commissioner for an internal review of the PBN under section 602N of the PPRA. To improve procedural fairness for the respondent of an initial police banning notice, the Bill increases the time period available to a respondent to apply for an internal review from five days to 15 days which is proportionate to the increased duration of the banning period for the initial police banning notice.

Other safeguards in the PBN scheme include provisions requiring a police officer to explain the conditions of a PBN, the consequence of breaching a PBN and informing the person of their ability to apply for an internal review. A PBN can also only be issued when a certain

threshold of unacceptable conduct is reached under section 602C of the PPRA, being behaviour that is disorderly, offensive, threatening or violent. In addition, a PBN only restrains a person from being present in certain locations and does not prohibit a respondent for entering or remaining in the respondent's residence, place of employment or place of education (see section 602J of the PPRA).

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

On balance, the importance of ensuring the safety of the public is not put at risk by people who have demonstrated disorderly, offensive, threatening or violent behaviour and who pose an unacceptable risk to the safety and human rights of others, outweighs the reasonable limitations imposed on the human rights of individuals by amendments to the initial police banning notice scheme in the Bill. Further, the existing safeguards included in the PPRA are enhanced by the amendments in the Bill.

(f) any other relevant factors

Nil.

## Conclusion

In my opinion, the Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Bill 2020 is compatible with human rights under the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

**THE HONOURABLE YVETTE D'ATH MP**  
ATTORNEY-GENERAL AND MINISTER FOR JUSTICE  
LEADER OF THE HOUSE

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