

COVID-19 Emergency Response 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 COVID-19 Emergency Response Bill 2020 (the COVID-19 Bill).

In my opinion, the COVID-19 Bill 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

On 29 January 2020, the Minister for Health and Minister for Ambulance Services declared a public health emergency under section 319 of the *Public Health Act 2005* (PH Act) in relation to the outbreak of COVID-19 in China, its pandemic potential due to cases spreading to other countries, and the public health implications within Queensland resulting from recently arrived travellers from the epicentre of the outbreak (COVID-19 emergency). The COVID-19 emergency was declared for all of Queensland. A copy of the public health emergency order was published in the Queensland Government Gazette on 31 January 2020. The COVID-19 emergency declaration in Queensland has now been extended by regulation until 19 May 2020 and may need to be further extended.

On 11 March 2020, the Director-General of the World Health Organisation (WHO) declared COVID-19 a global pandemic. COVID-19 represents a significant risk to the health, safety and wellbeing of all Queenslanders.

As a first legislative response to the COVID-19 emergency, the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (Public Health Emergency Act) was urgently passed by Parliament on 18 March 2020. The Public Health Emergency Act included the following key legislative amendments to respond to the COVID-19 emergency:

- amendments to the PH Act to strengthen powers of the chief health officer and emergency officers appointed under the PH Act for the COVID-19 emergency to implement social distancing measures, including regulating mass gatherings, isolating or quarantining people suspected or known to have been exposed to COVID-19, and protecting vulnerable populations, such as the elderly;
- amendments to the PH Act to provide that the compensation provisions that apply to declared public health emergencies do not apply to the COVID-19 emergency;
- changes to the *Planning Act 2016* and *Economic Development Act 2012* to ensure important services can continue to be provided to the community;
- a raft of amendments to relevant Acts to facilitate the holding of the 2020 quadrennial local government election and State by-elections in a way that minimised serious risks to the health and safety of persons caused by the COVID-19 pandemic; and

- amendments to the *Constitution of Queensland 2001* to allow meetings of Executive Council to be held via technology, such as teleconferencing or videoconferencing.

The COVID-19 Bill represents a second legislative response to the COVID-19 pandemic. The COVID-19 Bill is an extraordinary legislative measure to respond to an extraordinary public health crisis.

Modification framework

The COVID-19 Bill establishes a legislative modification framework across the statute book (the modification framework) to ensure there is clear legal authority to make the interventions necessary to protect the health, safety and welfare of Queenslanders; mitigate the spread of COVID-19 in the community; facilitate continued functioning of Queensland institutions and economy to the extent possible in the circumstances of the pandemic; and to allow for timely and flexible responses in managing disruptions caused by COVID-19 and social distancing measures.

The modification framework provisions in the COVID-19 Bill will establish a number of empowering provisions that are broad and facilitative and that allow legislative requirements to be modified in the following areas, should that be required:

- attendance at places or meetings, making and associated use of documents, and physical presence requirements;
- statutory timeframes; and
- proceedings of courts and tribunals

These empowering provisions will enable the use of secondary instruments, should the need arise, to facilitate the modification or alteration of various existing legislative requirements. Depending on which of the above areas is being impacted, the secondary instrument will be either an extraordinary regulation or a statutory instrument or, in limited circumstances relating to statutory timeframes, notices to individuals or parties.

An explanation as to why it has been considered necessary to provide for the modification framework in these discrete areas is set out below.

Statutory timeframes

The impacts of the COVID-19 emergency on individuals and their livelihoods and on government resourcing and capacity could mean that it may not be possible to meet existing legislative timeframes for doing things. It is therefore necessary to provide the ability to modify statutory periods where necessary. Flexibility may also be required where restrictions on movement and personal interactions impact compliance with strict time limits (for example, for the lodgement of applications, giving of notices, and timeframes for response).

Proceedings of courts and tribunals

The impacts of the COVID-19 emergency in respect of social distancing requirements may mean that proceedings and procedures of courts, tribunals and other entities that have judicial

or quasi-judicial functions may need to be altered to facilitate alternative arrangements that minimise personal appearance or the physical presence of persons. The availability of resources and services of courts and tribunals and those agencies servicing them may also be impacted by the COVID-19 emergency (for example, the ability to constitute a tribunal in a certain manner or to effect personal service). It is therefore necessary to provide for the continued functioning of courts, tribunals and other entities during the COVID-19 emergency while also ensuring consistency and compliance with health advice (for example, through the use of electronic or other alternative mechanisms for matters which would otherwise be required to be carried out in person; by providing flexibility around the constitution of a court, tribunal or other entity that would otherwise require a minimum number of members or particular members; and by providing flexibility to restrict public access where proceedings would otherwise be open).

Making and associated use of documents, meetings and physical presence requirements

The impacts of the COVID-19 emergency in respect of social distancing requirements may mean that requirements for certain things that require the physical presence of persons will be impacted. It is therefore necessary to provide the ability to implement a range of measures to enable actions that are otherwise done in person to be done through other means, including by using a range of communication technologies. It may also be necessary to vary arrangements for how meetings and other actions (such as inspections) are carried out.

Amendments relating to residential tenancies and rooming accommodation

The Bill also provides empowering provisions for the making of regulations in respect of residential tenancies and rooming accommodation.

The COVID 19 emergency has had a significant impact on Queenslanders in the residential tenancy and rooming accommodation sectors. Many tenants and rooming accommodation residents face excessive hardship, which may impact their ability to maintain rent payments. Social distancing requirements may also impact obligations under tenancy law, including inspections of premises.

It is therefore necessary to provide the ability to implement measures to ensure the stability of residential tenancies and rooming accommodation in Queensland during the COVID-19 pandemic and minimise the impact of obligations under the *Residential Tenancies and Rooming Accommodation Act 2008* that may conflict with COVID 19 community health directives. This will be achieved by measures such as:

- implementing a National Cabinet decision of 29 March 2020 to impose moratorium on evictions for residential tenancies in financial distress who are unable to meet their commitments due to the impact of COVID 19 pandemic; and
- removing obligations for owners and providers to undertake routine repairs and inspections where they are incompatible with social distancing and other community health objectives.

Amendments relating to relevant leases (non-residential) and Small Business Commissioner

The Bill also provides empowering provisions for the making of regulations in respect of retail leases under the *Retail Shop Leases Act 1994* (RSL Act) (and other prescribed leases) (relevant leases (non-residential)) and for the establishment of a temporary Small Business Commissioner.

The economic impacts of the COVID-19 emergency are continuing to evolve, and while it is difficult to determine the full magnitude of these impacts, it is likely that there will be long-term effects on the Queensland economy and for the business community. It is therefore necessary to provide the ability to implement responsive measures to relieve the financial stress and anxiety for tenants under relevant leases (non-residential). Measures that respond to the commercial disruption caused by the economic impacts of industry and government responses to the COVID-19 pandemic include, for example, ensuring leasing security, preventing landlords from terminating the lease of their tenants for non-payment of rent due to COVID-19 and preventing landlords from increasing rent in certain situations.

The Bill also provides for the temporary establishment of a fulltime temporary Queensland Small Business Commissioner. The Commissioner will deliver small business advocacy functions and dispute resolution support, including administering mediation services in relation to small business tenancy disputes under the RSL Act, until the end of 2020.

Amendments relating to the expiry of subordinate legislation or commencement of laws

The COVID-19 emergency may impact government's ability to deliver legislative processes. It is therefore necessary to provide greater flexibility in relation to the expiry of subordinate legislation and commencement of laws. The Bill provides for amendments allowing regulations to be made under the *Acts Interpretation Act 1954* to extend the period of time before commencement of certain laws and the *Statutory Instruments Act 1992* to extend expiry of subordinate legislation for a stated period up to 31 December 2020 if it is necessary for a purpose of the COVID-19 Bill.

Amendments relating to the operation of the Queensland Legislative Assembly

The Bill also provides for specific amendments to the *Parliament of Queensland Act 2001* (PoQ Act) to enable meetings of the Legislative Assembly to take place, by whole or in part, via technology such as teleconferencing or videoconferencing during the current COVID-19 emergency.

The current laws, practices and procedures of the Queensland Legislative Assembly generally assume that the business of the Assembly will be conducted by members being physically present during sittings. The current COVID-19 emergency and the social distancing and other measures that have been implemented in response have necessitated consideration about how the Legislative Assembly sits, meets and makes decisions.

While the Legislative Assembly currently has the power to adopt Standing Orders for the conduct of its proceedings, amendments to the PoQ Act are required to be passed before the

Assembly can adopt Standing Orders to meet via electronic means during the COVID-19 emergency. The amendments therefore centre around how, at a meeting of the Legislative Assembly held by electronic means, a quorum is formed and how votes on questions are resolved, and also clarify that Members of Parliament may participate in parliamentary committee meetings via technological means.

Human Rights Issues

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

Modification framework, amendments relating to residential tenancies and rooming accommodation, amendments relating to relevant leases (non-residential), and the amendments relating to the expiry of subordinate legislation or commencement of laws (the modification framework and other regulation-making powers under the COVID-19 Bill)

It is difficult to assess the human rights implications that may arise as a result of the operation of the COVID-19 Bill's modification framework, the amendments relating to residential tenancies and rooming accommodation, amendments relating to relevant leases (non-residential), and the amendments relating to the expiry of subordinate legislation or commencement of laws (the modification framework and other regulation-making powers under the COVID-19 Bill). The difficulty arises because the human rights implications will not crystallise until a specific proposal (that is, a regulation, extraordinary regulation, statutory instrument or notice) has been developed and enacted under the empowering provisions.

To that end, it is possible that most, if not all, of the human rights protected by the *Human Rights Act 2019* (HR Act) may be engaged by the COVID-19 Bill and the secondary instruments that may be enacted or exercised under its empowering provisions. A brief discussion of the nature and scope of each of the protected rights that could possibly be limited is set out below.

In light of this position, the statement also identifies the main human rights which may be limited by each empowering provision but does not intend to provide an exhaustive list of how human rights may be limited by the enactment of the empowering provisions. This provides sufficient information about the potential operation of the modification framework and other regulation-making powers under the COVID-19 Bill to determine how rights may be limited and to determine whether or not the provisions of the Bill are compatible with human rights.

To that end, the statement provides some examples about how particular human rights may be limited should it be necessary to utilise the modification framework or other regulation-making powers under the COVID-19 Bill. This addresses the need to identify and consider impacts on human rights which might only arise in the future if a certain action is taken or decision is made (that is, if the modification framework or other regulation-making powers under the COVID-19 Bill are in fact used) and the need to consider and identify limitations on human rights which may be foreseeable or proximate.¹ A parallel may be drawn to 'proper consideration' of human

¹ *Certain Children v Minister for Families and Children [No 2]* (2017) 52 VR 441, 498 (Dixon J).

rights required under section 58(1)(b) of the HR Act, which ‘need not involve formally identifying the “correct” rights’.² Where limitations are reasonably foreseeable in relation to each of the empowering provisions in the modification framework and other regulation-making powers under the COVID-19 Bill, they are set out following the brief discussion of the nature and scope of the protected right.

Right to recognition and equality before the law (section 15 of the HR Act)

This right is a stand-alone right that also permeates all human rights. It encompasses both the right to recognition as a person before the law and the right to enjoy human rights without discrimination.

The right to recognition as a person before the law refers to the right to universal recognition of legal personality of the human being. A person who the law does not recognise has no way of enforcing the recognition of his or her other rights, including ‘to commence, defend and participate in legal proceedings and to be treated as a legal person in all other aspects of the operation and administration of the law’.³

This right to equality reflects the universal principle of human rights: that every person holds the same human rights by virtue of being human and not because of some particular characteristic or membership of a particular social group. The bedrock value which underpins the right is that everybody without exception has a unique human dignity which is their birthright.⁴ The right protects individuals from discrimination and provides that every person has the right to equal and effective protection against discrimination.

Discrimination under the HR Act includes (but is not limited to) direct and indirect discrimination as defined in the *Anti-Discrimination Act 1991* (ADA) (for example on the basis of age, impairment, political belief or activity, race, religious belief or religious activity, sex and sexuality). Discrimination under the HR Act is broader than the ADA, however, and may include other grounds of discrimination such as language; property; nationality; citizenship; colour; ethnicity; residence; physical features; employment status; and others.

Should it be necessary to exercise any of the powers provided under the modification framework or other regulation-making powers under the COVID-19 Bill, in my opinion, some reasonably foreseeable examples of how this may limit the right to recognition and equality before the law include:

- statutory timeframes (for example, where delays to certain decisions made under statute which would otherwise have defined statutory timeframes may indirectly discriminate against individuals with certain attributes such as race or impairment);
- proceedings of courts and tribunals (for example, where vulnerable individuals may not have ready access to technology that is appropriate and reliable to be accessed privately; or where assistance that would usually otherwise be available for individuals to understand and engage in court proceedings may be less readily available or accessible if proceedings are facilitated through audio or audio-visual mechanisms);

² *Castles v Secretary, Department of Justice* (2010) 28 VR 141, 184 (Emerton J).

³ *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869, [279].

⁴ *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869, [108].

- attendance at places or meetings, making and associated use of documents, and physical presence requirements (for example, where statutory provisions currently require personal face-to-face reporting are altered to facilitate other means of reporting, such as electronically, which may disproportionately impact vulnerable groups such as those with limited access to technology; or where language barriers are exacerbated by electronic communication without access to an interpreter; or where there may be implications for the ability of officials and service providers to physically visit certain sites and provide the same level of scrutiny and oversight in respect of protecting vulnerable persons); and
- extending the expiry of subordinate legislation or commencement of laws (for example, where postponing the commencement of an Act may include postponing the commencement of legislative measures intended to assist vulnerable groups of people and reduce discrimination).

Right to life (section 16 of the HR Act)

The right to life protects the lives of all persons and includes the right not to be arbitrarily deprived of life. The concept of arbitrariness in the context of the right to life carries a human rights meaning of ‘capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought’.⁵

The right imposes both negative and positive obligations on the State which can never be derogated under any circumstances, even in a state of emergency which threatens the life of the nation.⁶

The United Nations Human Rights Committee (UNHRC) has said that the protection of the right to life also imposes three positive obligations on the State: a protective obligation to take appropriate steps and adopt positive measures to protect life, including, for example effective criminal law and law enforcement provisions and other mechanisms to protect the health and safety of its citizens; to protect the lives of people in the State’s custody or care; and a procedural obligation to ensure safeguards and mechanisms of review are in place to investigate deaths which may have involved the deprivation of life in certain circumstances, such as people in the State’s custody or care (for example, through the coronial review mechanisms).

Should it be necessary to exercise any of the powers provided under the modification framework or other regulation-making powers under the COVID-19 Bill, in my opinion, some reasonably foreseeable examples of how this may limit the right to life include:

- attendance at places or meetings, making and associated use of documents, and physical presence requirements (for example, where there is a high risk of improper or undue influence over individuals making decisions such as those in relation to advanced health directives or other documents that affect end of life decision-making).

⁵ *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing).

⁶ *Human Rights Committee, General Comment No. 6.*

Protection from torture and cruel, inhuman and degrading treatment (section 17 of the HR Act)

The right prohibits three distinct types of conduct: torture; cruel, inhuman or degrading treatment or punishment; and medical or scientific experimentation or treatment without consent. The right imposes both negative and positive obligations on the State. The negative obligation prevents the State from carrying out acts of torture, or cruel, inhumane and degrading treatment. The positive obligation requires the State to adopt safeguards and mechanisms to ensure that torture, and cruel, inhuman or degrading treatment or punishment does not occur (or, at the very least, that there are few or no opportunities for it to occur without detection). The right is said to protect the principle of dignity – the innate value of all human beings.

Torture involves a very high degree of suffering that is intentionally inflicted. For an act to be torture under this right, it must: be intentional; inflict severe physical or mental pain or suffering; be for a prohibited purpose; and be inflicted by or with the consent or acquiescence of a public official or a person acting in an official capacity. The vulnerability of the victim, particularly where they are in detention and therefore powerless against the treatment or punishment, is also a factor to be considered. Freedom from torture is an absolute right under international human rights law, which means it may not be limited under any circumstances. It is very unlikely that any limitation on the prohibition of torture would be sanctioned under the general limitations provision in section 13 of the HR Act.

Cruel and inhuman treatment also involves a high degree of suffering, though not necessarily intentionally inflicted. Degrading treatment is focused less on severity of suffering but on humiliation (which is a subjective test). In order for conduct to amount to cruel, inhuman or degrading treatment or punishment, it need not involve physical pain and can include acts that cause both physical and mental suffering. Treatment or punishment that humiliates or debases a person, causes fear, anguish or a sense of inferiority, or is capable of possibly breaking moral or physical resistance or driving a person to act against their will or conscience, can be cruel, inhuman or degrading.

The right also prohibits ‘medical or scientific experimentation or treatment’ of a person without their ‘full, free and informed consent’. The right to protection from medical treatment without consent is already limited under Queensland law in situations including, for example, where consent is provided by another person, such as a doctor or a parent or guardian; in an emergency; where a person is incapable of giving consent; or where involuntary treatment is permitted under the *Mental Health Act 2016* or a procedure is permitted under the *Guardianship and Administration Act 2000* (where those Acts also include various safeguards and other compliance requirements).

Freedom from forced work (section 18 of the HR Act)

The right to freedom from forced work is underpinned by the notion that persons should not be subject to conditions that violate individual dignity and exploit human productivity. A person must not be held in slavery or servitude. These practices are extreme expressions of the power that human beings can possess over other human beings, representing a direct attack on bodily integrity and security, human personality and dignity.

The right also protects individuals from forced or compulsory labour. The Convention Concerning Forced or Compulsory Labour defines this as including ‘all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily’.⁷ Under subsection 18(c) of the HR Act, forced or compulsory labour does not include service required in an emergency threatening the Queensland community.

Freedom of movement (section 19 of the HR Act)

Every person lawfully within Queensland has the right to move freely within Queensland, enter or leave Queensland, and choose where they live. This means that a person cannot be arbitrarily forced to remain in, or move to or from, a particular place. The right also includes the freedom to choose where to live, and freedom from physical and procedural barriers, like requiring permission before entering a public park or participating in a public demonstration in a public place. It also protects the rights of individuals to enter and leave Queensland.

Should it be necessary to exercise any of the powers provided under the modification framework or other regulation-making powers under the COVID-19 Bill, in my opinion, a reasonably foreseeable example of how this may limit the freedom of movement is:

- proceedings of courts and tribunals (for example, where public access is restricted to court or tribunal proceedings which would otherwise be open).

Freedom of thought, conscience, religion and belief (section 20 of the HR Act)

The right to freedom of thought, conscience, religion and belief encompasses the right of all persons to develop autonomous thoughts and conscience. It protects religious belief as well as atheistic, agnostic, cultural, philosophical, academic, social or personal beliefs. It also protects the right to demonstrate religion or belief through worship, ritual, practice and teaching either individually or as part of a community, in private or in public.

The UNHRC has said that worship extends to ritual and ceremonial acts that give direct expression to a belief, as well as to a range of practices that are integral to such acts (including the building of places of worship, the use of ritual methods and objects, the display of symbols, and the observance of holidays and days of rest).⁸ The observance and practice of religion or belief includes ceremonial acts and customs such as the observance of dietary protocols, the wearing of distinctive clothing or head coverings, participation in rituals associated with certain stages of life, and the use of a particular language customarily spoken by a group, as well as the freedom to choose religious leaders, priests and teachers.⁹

⁷ International Labour Organization, *Forced Labour Convention No. 29*.

⁸ United Nations Human Rights Committee, *General Comment No. 22*.

⁹ United Nations Human Rights Committee, *General Comment No. 22*.

Freedom of expression (section 21 of the HR Act)

The right to freedom of expression is ‘one of the essential pillars of a democratic system of government, because it enables citizens to freely and effectively participate in the political, social, economic and other affairs of their community’.¹⁰

It protects the right of all persons to hold an opinion without interference, and the right of all persons to seek, receive and impart information and ideas (including verbal and non-verbal communication). The forms of protected expression are broad, and include expression that is oral, written, print, art or in any other medium. Any act that would be perceived by reasonable members of the public as trying to convey some meaning would ‘impart information and ideas’, whether or not it actually conveys a particular meaning to a specific person, and whether the meaning conveyed is objectively clear and precise or subject to individual interpretation.

The UNHRC has also stated that the freedom of expression embraces a positive right of access to information held by government and public bodies,¹¹ such as through freedom of information mechanisms. The right to freedom of expression and the free flow of information and ideas, particularly about public and political issues, is considered to be a touchstone of a democratic society.

Should it be necessary to exercise any of the powers provided under the modification framework or other regulation-making powers under the COVID-19 Bill, in my opinion, some reasonably foreseeable examples of how this may limit the freedom of expression include:

- proceedings of courts and tribunals (for example, where changes to requirements around the service of documents may not ensure consistent and reliable provision of information; or where assistance that would usually otherwise be available for individuals to understand and engage in court proceedings may be less readily available or accessible if proceedings are facilitated through audio or audio-visual mechanisms).

Peaceful assembly and freedom of association (section 22 of the HR Act)

The right to peaceful assembly upholds the rights of individuals to gather together in order to exchange, give or receive information, to express views or to conduct a protest or demonstration. The right entitles persons to gather intentionally and temporarily for a specific purpose¹² and is considered essential for the public expression of a person’s views and opinions. The protection of the right is limited to peaceful assemblies (and does not protect violent assemblies such as riots).

The freedom of association protects the rights of individuals to join together with others to formally pursue a common interest, such as political groups, sporting groups, professional

¹⁰ *Magee v Delaney* [2012] VSC 407, 181. See also *XYZ v Victoria Police* [2010] VCAT 225 where the freedom was described as ‘essential to democracy, the rule of law and the social and cultural development of the individual in society, as well as society collectively’.

¹¹ United Nations Human Rights Committee, *General Comment No. 34*.

¹² Manfred Nowak (2005) *United Nations Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed (NP Engel) 484.

clubs, non-government organisations and trade unions. It includes the freedom to choose between existing organisations or to form new ones.

Taking part in public life (section 23 of the HR Act)

The right to take part in public life affirms the right of all persons to contribute to and exercise their voices in relation to the public life of the State. It ensures all persons have the opportunity to contribute to the political process and public governance, directly or through freely chosen representatives. The UNHRC considers that the right to participate in the direct conduct of public affairs and public governance embraces both the opportunity to participate in the formulation and implementation of policy and in the exercise of public and political power. Public affairs is a broad concept that encompasses the activities of all forms of government, including local government.¹³

There is an intrinsic connection between the right to participate in public affairs and the right to freedom of expression. The UNHRC has noted that ‘citizens take part in the conduct of public affairs by exerting influence through public debate and dialogue with their representatives or through their capacity to organise themselves. This participation is supported by ensuring freedom of expression, assembly and association’.¹⁴

Property rights (section 24 of the HR Act)

This right protects the right of all persons to own property (alone or with others) and provides that people have a right not be arbitrarily deprived of their property. The ability to own and protect property historically underpins many of the structures essential to maintaining a free and democratic society based on human dignity, equality and freedom. The right includes the protection from the deprivation of property. The term ‘deprived’ is not defined by the HR Act, however deprivation in this sense is considered to include the substantial restriction on a person’s use or enjoyment of their property, to the extent that it substantially deprives a property owner of the ability to use his or her property or part of that property (including enjoying exclusive possession of it, disposing of it, transferring it or deriving profits from it).

Property is likely to include all real and personal property interests recognised under general law (for example, interests in land, contractual rights and shares) and may include some statutory rights (especially if the right includes traditional aspects of property rights, such as to use, transfer, dispose and exclude). The right does not provide a right to compensation.

The concept of arbitrariness in the context of the right to property carries a human rights meaning of ‘capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought’.¹⁵

Should it be necessary to exercise any of the powers provided under the modification framework or other regulation-making powers under the COVID-19 Bill, in my opinion, some reasonably foreseeable examples of how this may limit the right to property include:

¹³ United Nations Human Rights Committee, *General Comment No. 25*.

¹⁴ United Nations Human Rights Committee, *General Comment No. 25*.

¹⁵ *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing).

- attendance at places or meetings, making and associated use of documents, and physical presence requirements (for example, where there may be reduced safeguards or oversight processes to protect individuals from improper or undue influence when making a will or other documents that affect property interests; or where certain proceedings allow for public notice or electronic service in relation to proceedings that may impact on the property rights of individuals through confiscation or forfeiture or otherwise);
- residential tenancies and rooming accommodation (for example, where lessor rights under the *Residential Tenancies and Rooming Accommodation Act 2008* will be altered so that tenants cannot be evicted for a failure to pay rent because of excessive hardship resulting from the COVID-19 emergency; or where rooming accommodation agreements will be amended so that tenants ending their interest in a rooming accommodation agreement will not be required to repair, or compensate the lessor or provider for, damage done to the premises caused by family or domestic violence; or where there is any conferring of additional rights on tenants and residents that will limit the right to property of the lessor or provider under residential tenancy agreements and rooming accommodation agreements); and
- relevant leases (non-residential) (for example, where a regulation is made that prevents landlords from evicting tenants if they are in financial distress and unable to meet their commitments due to the impact of COVID-19, prevents landlords from increasing rent in certain situations, prevents landlords from penalising tenants who stop trading or reduce opening hours due to the impact of COVID-19, prevents landlords from charging any interest on unpaid or deferred rent that arises due to the impact of COVID-19, or prevents landlords from making a claim on a bank guarantee or security deposit for non-payment of rent that arises due to the impact of COVID-19).

Privacy and reputation (section 25 of the HR Act)

The underlying value of the right to privacy is the ‘protect[ion] and enhance[ment of] the liberty of the person – the existence, autonomy, security and well-being or every individual in their own private sphere.’¹⁶ It protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is very broad, but at its most basic is concerned with notions of personal autonomy and dignity. The UNHRC has said that it refers to those aspects of life in which a person can freely express his or her identity, either alone or in relationships with others.¹⁷

The right protects privacy in that personal sense (and in the sense of personal information, data collection and correspondence) but also extends to an individual’s private life more generally. For example, the right to privacy protects the individual against interference with their physical and mental integrity, freedom of thought and conscience, legal personality, sexuality, family and home, and individual identity (including appearance, clothing and gender).

The right to privacy under the HR Act protects individuals against unlawful or arbitrary interferences with their privacy. 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. Interference

¹⁶ *Director of Housing v Sudi* (2010) 33 VAR 139, 145 (Bell J). See also *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 131 (Bell J).

¹⁷ *Coeriel and Aurik v The Netherlands* (Communication No 45/1991) [10.2].

authorised by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the International Covenant on Civil and Political Rights (ICCPR).¹⁸ The European Court of Human Rights has also said that an interference will be lawful if it is authorised by a law that is adequately accessible and formulated with sufficient precision to enable a person to regulate his or her conduct by it.¹⁹ These are concepts that are consistent with the rule of law principles. The concept of arbitrariness in the context of the right to privacy carries a human rights meaning of ‘capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought’.²⁰

Reputation in the context of the right refers to one’s appraisal by others. The HR Act protects against unlawful attacks on reputation.

Should it be necessary to exercise any of the powers provided under the modification framework or other regulation-making powers under the COVID-19 Bill, in my opinion, some reasonably foreseeable examples of how this may limit the right to privacy and reputation include:

- proceedings of courts and tribunals (for example, where proceedings are facilitated through audio or audio-visual mechanisms involving the giving of evidence by a person from a non-soundproof place where others can hear them, such as a boarding house or other public place);
- attendance at places or meetings, making and associated use of documents, and physical presence requirements (for example, where statutory provisions currently require personal face-to-face reporting are altered to facilitate other means of reporting, such as remotely or electronically; or where some individuals may have a limited ability to maintain privacy for example, if a person is only able to remotely report from a non-soundproof place where others can hear them, such as a boarding house or other public place); and
- residential tenancies and rooming accommodation (for example, where provisions are made that relate to the safe ending of residential tenancy agreements and rooming accommodation agreements where instances of domestic or family violence have occurred and those provisions require a tenant or resident to support a notice to vacate with evidence demonstrating that domestic or family violence has occurred).

Protection of families and children (section 26 of the HR Act)

The right to the protection of families and children recognises that families are the fundamental group unit of society and entitles families to protection by the society and the State. The meaning of families is broad and recognises that families take many forms and accommodates the various social and cultural groups in Queensland whose understanding of family may differ. Cultural, religious and other traditions will be relevant when considering whether a group of persons constitute a ‘family’.

The right also protects the right of every child, without discrimination, to the protection that is needed by the child and is in the child’s best interests. This recognises the special vulnerability

¹⁸ United Nations Human Rights Committee, *General Comment No. 16*.

¹⁹ *Sunday Times v United Kingdom* [1979] ECHR 1, [49].

²⁰ *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing).

of children, and it is a right that is only held by children. The right requires the State to ensure the survival and development of every child to the maximum extent possible.

It also includes the rights of every person born in Queensland to a name and to have their birth registered.

Should it be necessary to exercise any of the powers provided under the modification framework or other regulation-making powers under the COVID-19 Bill, in my opinion, some reasonably foreseeable examples of how this may limit the right to protection of families and children include:

- attendance at places or meetings, making and associated use of documents, and physical presence requirements (for example, where there may be implications for the ability of officials and service providers to physically visit certain sites and provide the same level of scrutiny and oversight in respect of protecting vulnerable persons such as children).

Cultural rights – generally (section 27 of the HR Act)

Cultural rights are directed towards ensuring the survival and continued development of the cultural, religious and social identity of minorities. They affirm the right of all persons to enjoy their culture, to practise or declare their religion and to use their language, either alone or in community with others who share their background. The right protects persons from being denied the right to enjoy their culture, to declare and practice a religion and to use their language.

The UNHRC has said that culture has a broad meaning that may manifest in many forms²¹ such as the maintenance of traditional beliefs and practices (for example, the wearing of traditional dress), as well as social and economic activities that are part of a group's tradition (for example, traditional activities such as fishing or hunting).

Cultural rights – Aboriginal peoples and Torres Strait Islander peoples (section 28 of the HR Act)

The HR Act recognises the special importance of human rights for Aboriginal peoples and Torres Strait Islander peoples, and explicitly protects their distinct cultural rights as Australia's first people. The core value underpinning the various cultural rights protected under section 28 of the HR Act is recognition and respect for the identity of Aboriginal peoples and Torres Strait Islander peoples, both as individuals and in common with their communities. Of particular significance to Aboriginal peoples and Torres Strait Islander peoples of Queensland is the right to self-determination, as is reflected in the preamble of the HR Act.

The right recognises that spiritual, economic and material connection with traditional lands and waters is an essential component of that identity and is inextricably connected to Aboriginal peoples' and Torres Strait Islander peoples' cultural heritage, language and kinship ties.

²¹ United Nations Human Rights Committee, *General Comment No. 23*.

Should it be necessary to exercise any of the powers provided under the modification framework or other regulation-making powers under the COVID-19 Bill, in my opinion, a reasonably foreseeable example of how this may limit the right to culture for Aboriginal peoples and Torres Strait Islander peoples is:

- statutory timeframes (for example, where delays to statutory timeframes may impact requirements for service delivery to Aboriginal peoples or Torres Strait Islander peoples, particularly in their communities).

Right to liberty and security of person (section 29 of the HR Act)

The right to liberty and security of the person protects the personal physical liberty of all persons, including the right not to be arrested or detained except in accordance with the law.

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 in correctional facilities or detention in hospitals. It may also include where persons are deprived of liberty through supervision, protection, treatment, guardianship or similar orders made under various legislative schemes.

The right also protects against arbitrary arrest and detention. The concept of arbitrariness carries a human rights meaning of ‘capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought’.²²

The UNHRC has said that detention can become arbitrary if it continues beyond the period for which it can be justified, and that, where a person has initially been detained for a specific purpose, there must be an appropriate justification to continue detention once the original purpose no longer applies – the burden on the State to justify the continued detention increases with the length of the detention.²³ The UNHRC has also stated that where there are less intrusive measures than detention available that can achieve the same end, they should be used.²⁴ Importantly, detained persons should be able to challenge the lawfulness of detention at the outset, and also at regular intervals, in the case of prolonged detention.

The right to security of the person also places a positive obligation on the State to take all reasonable steps to ensure the physical safety of those who are in danger of physical harm (including bodily and mental integrity, or freedom from injury to the body and mind). This obligation applies independently of the right to liberty in that it applies whether or not an individual is detained.

Should it be necessary to exercise any of the powers provided under the modification framework or other regulation-making powers under the COVID-19 Bill, in my opinion, some reasonably foreseeable examples of how this may limit the right to liberty and security of the person include:

²² *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing).

²³ United Nations Human Rights Committee, *General Comment No. 35*.

²⁴ United Nations Human Rights Committee, *General Comment No. 35*.

- statutory timeframes (for example, where changes to statutory timeframes in relation to court or tribunal proceedings or orders could result in delays; or where statutory time periods for the presentation of indictments may be extended; or where statutory time periods in relation to appeals could be altered, which may limit the right to of liberty and security of person for individuals who have been refused bail and held on remand and may lead to arbitrary detention);
- varying the proceedings or courts and/or tribunals (for example, where being required to travel to an alternative location to attend proceedings may place an undue burden on a defendant); and
- extending the expiry of subordinate legislation or commencement of laws (for example, where postponing the commencement of an Act may include postponing the commencement of legislative protections that would make it less likely that a person's liberty would be infringed).

Humane treatment when deprived of liberty (section 30 of the HR Act)

The right to humane treatment when deprived of liberty requires that all persons must be treated with humanity and with respect for their inherent human dignity, recognising the particular vulnerability of all persons deprived of their liberty. Individuals who are detained should not be subject to any hardship or constraint that is in addition to that resulting from the deprivation of their liberty (that is, a person who is detained should retain all their human rights subject only to the restrictions that are unavoidable in a closed environment).

The right is informed by a number of United Nations (UN) standards, including the UN Standard Minimum Rules for the Treatment of Prisoners which covers matters such as accommodation conditions, adequate food, personal hygiene, clothing and bedding standards, exercise, medical services, and disciplinary procedures. Under the ICCPR, the application of the right to humane treatment when deprived of liberty cannot depend on government resources and must be applied without discrimination.

Fair hearing (section 31 of the HR Act)

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

Consideration of whether a court or tribunal is competent, independent and impartial will be informed by a range of factors, including whether it is established by law; it is independent of the executive and legislative branches of government, or has, in specific cases, judicial independence in deciding legal matters in judicial proceedings; it is free to decide the factual and legal issues in a matter without interference; it has the function of deciding matters within its competence on the basis of rules of law, following prescribed proceedings; it presents the appearance of independence; and its officers have security of tenure.

The right is concerned with the procedural fairness of a decision. What fairness requires will depend on all the circumstances of the case. Broadly, it ensures a party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to their opponent (equality of arms), and also embraces principles of unimpeded

access to courts, a reasonably expeditious hearing, rights to legal advice and representation, and the privilege against self-incrimination.

Should it be necessary to exercise any of the powers provided under the modification framework or other regulation-making powers under the COVID-19 Bill, in my opinion, some reasonably foreseeable examples of how this may limit the right to a fair hearing include:

- statutory timeframes (for example, where the extension of timeframes in court or tribunal proceedings may impact the right to a reasonably expeditious hearing; or where timeframes for the bringing of summary proceedings under various Acts may be extended, statutory time periods for the presentation of indictments may be extended, or statutory time periods in relation to appeals could be altered, which may impact on the equality of arms and the right to a reasonably expeditious hearing); and
- proceedings of courts and tribunals (for example, where changes to requirements around the service of documents may not ensure consistent and reliable provision of information; or where assistance that would usually otherwise be available for individuals to understand and engage in court proceedings may be less readily available or accessible if proceedings are facilitated through audio or audio-visual mechanisms; or where the constitution of courts, tribunals or other entities which have judicial or quasi-judicial functions is altered to enable them to be constituted by fewer members may reduce the level of scrutiny or expertise brought to the consideration of a matter).

Rights in criminal proceedings (section 32 of the HR Act)

The underlying value of the rights in criminal proceedings protected by the HR Act is the right of all persons to be presumed innocent until proven guilty according to law. The UNHRC has said this imposes on the prosecution the onus of proving the offence, guarantees that guilt cannot be determined until the offence has been proved beyond reasonable doubt, gives the accused the benefit of doubt, and requires that accused persons be treated in accordance with this principle.²⁵

The right protects a number of minimum guarantees for an accused person in criminal proceedings, including, for example, the right to be tried without unreasonable delay, the right to examine witnesses, and the right of an individual not to be compelled to testify against themselves or to confess guilt (which protects individuals from any direct or indirect undue pressure to answer questions or produce information that might tend to incriminate them for an offence). It also protects the right of a person convicted of an offence to appeal the conviction and any sentence to a higher court.

Should it be necessary to exercise any of the powers provided under the modification framework or other regulation-making powers under the COVID-19 Bill, in my opinion, some reasonably foreseeable examples of how this may limit the rights in criminal proceedings include:

- statutory timeframes (for example, where changes may impact the ability for an accused person to have adequate time and facilities to prepare a defence; or where statutory time periods for the presentation of indictments may be extended and may impact on the

²⁵ United Nations Human Rights Committee, *General Comment No. 32*.

ability to be tried without unreasonable delay; or where statutory time periods in relation to appeals could be altered).

Children in the criminal process (section 33 of the HR Act)

The rights of children in the criminal process recognises that young persons who become involved in the criminal justice system deserve special protections because of their age. The right requires that an accused child who is detained (or a child detained without charge) must be segregated from all adults; that accused children must be brought to trial as quickly as possible; and that a child who is convicted of an offence must be treated in a way that is appropriate for the child's age. The UN Convention on the Rights of the Child provides that children in the criminal process should be 'treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedom of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society'.

Should it be necessary to exercise any of the powers provided under the modification framework or other regulation-making powers under the COVID-19 Bill, in my opinion, a reasonably foreseeable example of this may limit the rights of children in the criminal process is:

- statutory timeframes (for example, where changes may impact the ability for an accused child to be brought to trial as quickly as possible).

Right to education (section 36 of the HR Act)

The right to education empowers people to realise other human rights, achieve social mobility, participate fully in the community and enjoy human existence.

The HR Act protects the right of every child to have access to primary and secondary education appropriate to the child's needs. The requirement that access to such education is appropriate to the child's needs likely places a positive obligation on the State to provide education which is broadly suitable or tailored to the needs of children generally, to children individually, as well as to different groups of children in different contexts.²⁶ What a child's needs are in respect of such education extends beyond the strictly essential educational requirements, but does not necessarily encompass every wish or desire of a student.²⁷

It also provides that every person has the right to have access, based on the person's abilities, to further vocational education and training that is equally accessible to all.

Importantly, the right to education under the HR Act is a right to *access* education (not a right to education).²⁸ Access in this context carries a particular human rights meaning, incorporating

²⁶ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 13*.

²⁷ This interpretation is consistent with the objects of the *Education (General Provisions) Act 2006* to 'provide universal access to high quality State education'; and to 'ensur[e] education programs are responsive to the individual needs of children and young people'.

²⁸ As noted in the Legal Affairs and Community Safety Committee, Parliament of Queensland, *Human Rights Bill 2018* (Report No. 26, February 2019) 51.

underlying principles of non-discrimination, physical accessibility and economic accessibility.²⁹

The right to have access to education is likely to be considered a systemic right (similar to the equivalent right under the European Convention of Human Rights³⁰). This means the right is likely only to be limited where there is a systemic breakdown of the provision of education resulting in a person not having access to a minimum level of education.

The individual's right of access to education is also limited to what the State has a progressive duty to realise and how the State elects to realise the right.³¹ It is generally accepted that the scope of the discretion granted to the executive and the legislature in how to fulfil social and economic rights such as the right to education is 'very wide',³² particularly where the decision involves the allocation of public resources.³³

Right to health services (section 37 of the HR Act)

The right to health services ensures human dignity and the enjoyment of other human rights.

Importantly, the right to health services under the HR Act is a right to *access* health services (not a right to health, or to health services). It protects the right to access health services and the right not to be discriminated against in the provision of that access, the latter being said to be a core obligation or immediately realisable right. 'Core obligations' are non-derogable, meaning that, at international law, a State cannot justify any failure to meet those obligations. Access in this context carries a particular human rights meaning, incorporating underlying principles of non-discrimination, physical accessibility, economic accessibility and information accessibility.³⁴ Health services has a broad meaning, likely including medication, mental health treatment, family planning and reproductive health.

The HR Act also protects the right not to be refused emergency medical treatment, so as to 'ensure that treatment be given in an emergency and is not frustrated by reason of bureaucratic requirements or other formalities'.³⁵ Because of the negative formulation of this right, it is considered an immediately realisable right. Emergency medical treatment must be necessary, have a requisite level of immediacy or suddenness, and be either lifesaving or preventative of serious impairment. The availability of the State's resources is a relevant factor in respect of the obligation to provide emergency health care. Within these confines, the State is under a positive obligation to provide emergency health care of an adequate standard.³⁶

²⁹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 13*.

³⁰ European Convention of Human Rights, article 2.

³¹ The concept of alternativity suggests that the State can fulfil obligations in multiple ways – see Robert Alexy, 'On Constitutional Rights to Protection' (2009) 3 *Legisprudence* 1, 5.

³² Aharon Barak (2012) *Proportionality: Constitutional Limits and Their Limitations* (Cambridge University Press) 431.

³³ See *McCloy v New South Wales* (2015) 257 CLR 178, 211-2 (French CJ, Kiefel, Bell and Keane JJ) and *Soobramoney v Minister of Health (Kwazulu-Natal)* [1998] 1 SA 765.

³⁴ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14*.

³⁵ *Soobramoney v Minister of Health (Kwazulu-Natal)* [1998] 1 SA 765.

³⁶ *Oppelt v Head; Health, Department of Health Provincial Administration: Western Cape* (CCT185/14) [2015] ZACC 33, [67].

The right to access health services under the HR Act is likely to be considered a systemic right. This means the right is likely only limited where there is a systemic breakdown of the provision of health services.

The individual's right of access to health services is also limited to what the State has a progressive duty to realise and how the State elects to realise the right.³⁷ It is generally accepted that the scope of the discretion granted to the executive and the legislature in how to fulfil social and economic rights such as the right to health services is 'very wide',³⁸ particularly where the decision involves the allocation of public resources.³⁹

Amendments to the operation of the Queensland Legislative Assembly

The human rights protected under the HR Act that are relevant to the amendments to the PoQ Act are the freedom of expression (section 21 of the HR Act) and the right to take part in public life (section 23 of the HR Act). A discussion of the general nature and scope of the human rights has been provided above.

The amendments to the PoQ Act deal with how meetings of the Legislative Assembly may take place during the COVID-19 emergency. While the decisions that the Legislative Assembly make during such meetings will have wide implications for Queenslanders, the amendments to the PoQ Act are focused on the procedural arrangements for these meetings to take place via electronic means. Importantly, the amendments to the PoQ Act facilitate the effective participation of Members of Parliament in the Legislative Assembly and ensure they are able to exercise their powers and duties as Members of Parliament (by providing them with the opportunity, via electronic means, to be present at meetings and vote on questions, and participate in parliamentary committee processes, during the COVID-19 emergency).

Having regard to these matters and to the nature and scope of the freedom of expression and right to take part in public life, while these rights are relevant to the Bill, I do not consider that they are limited by the amendments to the PoQ 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)

Modification framework, amendments relating to residential tenancies and rooming accommodation, amendments relating to relevant leases (non-residential), and the amendments relating to the expiry of subordinate legislation or commencement of laws (the modification framework and other regulation-making powers under the COVID-19 Bill)

As noted above, it is difficult to assess the limitations on human rights that may arise as a result of the operation of the COVID-19 Bill's modification framework, the amendments relating to

³⁷ The concept of alternativity suggests that the State can fulfil obligations in multiple ways – see Robert Alexy, 'On Constitutional Rights to Protection' (2009) 3 *Legisprudence* 1, 5.

³⁸ Aharon Barak (2012) *Proportionality: Constitutional Limits and Their Limitations* (Cambridge University Press) 431.

³⁹ See *McCloy v New South Wales* (2015) 257 CLR 178, 211-2 (French CJ, Kiefel, Bell and Keane JJ) and *Sobramoney v Minister of Health (Kwazulu-Natal)* [1998] 1 SA 765.

residential tenancies and rooming accommodation, amendments relating to relevant leases (non-residential), and the amendments relating to the expiry of subordinate legislation or commencement of laws (the modification framework and other regulation-making powers under the COVID-19 Bill). The difficulty arises because the limitations will not crystallise until a specific proposal (that is, a regulation, extraordinary regulation, statutory instrument or notice) has been developed and enacted under the empowering provisions. Despite this, a measure which authorises limits on human rights is itself a limit on human rights.⁴⁰ A discussion of the general nature and scope of the human rights, required under section 13(2)(a) of the HR Act, has been provided above under the heading ‘Human rights relevant to the Bill’.

In order to respond to this difficulty, and also to ensure that the COVID-19 Bill represents an appropriate response to the current declared public health emergency, a number of matters have been included in the Bill that will go towards protecting the human rights of Queenslanders. In particular, the COVID-19 Bill ensures there are appropriate safeguards in the exercise of the broad powers that have been delegated under the Bill.

These safeguards are set out below under the elements of proportionality under section 13(2)(b)-(g) of the HR Act:

(b) the nature of the purpose of the limitation to be imposed by the modification framework and other regulation-making powers under the COVID-19 Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The COVID-19 Bill sets out the main purposes of the Bill. These directly apply to empowering provisions under the modification framework and for amendments relating to the expiry of subordinate legislation or commencement of laws. The effect of this is that any instrument enacted under these empowering provisions must have a clear and precise nexus to these purposes, and the COVID-19 Bill will only authorise instruments which are necessary for these purposes.

Under clause 2 of the COVID-19 Bill, the main purposes of the Bill are:

- to protect the health, safety and welfare of persons affected by the COVID-19 emergency; and
- to facilitate the continuance of public administration, judicial process, small business and other activities disrupted by the COVID-19 emergency, including by easing regulatory requirements and establishing an office of small business commissioner; and
- to provide for matters related to residential and relevant leases (non-residential) affected by the COVID-19 emergency; and
- to support the Queensland rental sector during the COVID-19 emergency period.

⁴⁰ See for example *Certain Children v Minister for Families and Children [No 2]* (2017) 52 VR 441, 503 where Dixon J stated that ‘[a]dministrative orders permitting prison officers to [limit human rights would themselves] engage Charter rights, regardless of whether the powers are used’. See also, Serious Sex Offenders (Detention and Supervision) Amendment (Governance) Bill 2017 (Vic), Victoria, *Parliamentary Debates*, Legislative Assembly, 23 August 2017, 2437-8.

Regulations relating to relevant leases (non-residential) can only be made to respond to the COVID-19 public health emergency, while regulations for residential tenancies and rooming accommodation may be made for matters where it is necessary for responding to the COVID-19 emergency.

There is also a sunset clause (clause 25) which ensures that the COVID-19 Bill and any regulations, extraordinary regulations or statutory instruments are time limited and will expire on 31 December 2020.

Based on the information set out below in respect of the main purposes expressed in the Bill; the requirement for a nexus with the COVID-19 emergency for regulations relating to relevant leases (non-residential), and residential tenancies and rooming accommodation; the provision for the appropriate expiry of the COVID-19 Bill and any measures on 31 December 2020; and the fact that the modification framework and other regulation-making powers under the COVID-19 Bill provide government with responsive and flexible powers to address the risk posed by COVID-19 to the Queensland community, it is considered that the empowering provisions of modification framework and other regulation-making powers under the COVID-19 Bill have a proper purpose under section 13(2)(b) of the HR Act.

Protecting the health, safety and welfare of persons affected by the COVID-19 emergency

Protecting public health is a legitimate objective.⁴¹ Moreover, protecting the health, safety and wellbeing of people in the Queensland community from the risk posed by COVID-19 and its spread also promotes the right to life (protected under section 16 of the HR Act) in the context of the positive obligations that right place on the State in relation to protecting the health and safety of its citizens.

Protecting and promoting human rights is necessarily consistent with a free and democratic society based on human dignity, equality and freedom.⁴²

Facilitating the continuance of public administration, judicial process, small business and other activities disrupted by the COVID-19 emergency

The continuance of public administration arguably involves the continuance of the existence of the State as well as the continued delivery of essential services and the general running of a functioning society.

The continuance of the State (and, by extension, of State institutions) is a notion that goes towards the preservation of society. It has been recognised in international human rights law that the continued existence of the State is a proper purpose for limiting rights.⁴³

The objective of facilitating the continuance of public administration so that essential services can be delivered across the State goes to the realisation of a number of human rights that place

⁴¹ *Boffa v San Marino* (1998) 92 Eur Comm HR 27, 34.

⁴² Aharon Barak, *Proportionality: Constitutional Limits and Their Limitations* (Cambridge University Press, 2012) 255-6.

⁴³ Aharon Barak, *Proportionality: Constitutional Limits and Their Limitations* (Cambridge University Press, 2012) 267-8.

positive obligations on the State, including those in relation to the right to life, the right to take part in public life, the right to protection of families and children, the right to security of the person, fair hearings in courts and tribunals, the right to access to education and the right to access to health services. It is only by ensuring the continued delivery of essential services that the State can fulfil these human rights and, more broadly, its ‘undoubted [and] strong interest in protecting and preserving the life and health of its citizens’.⁴⁴

Importantly, a need or desire for a ‘balance of administrative convenience’ or efficiency will not necessarily outweigh the need to adhere to principles that are fundamental to human rights, such as those in respect of procedural fairness and others.⁴⁵ However, administrative efficiency considerations are matters that may be taken into account when considering the demonstrable justification for limitations on human rights.

Making provision for a temporary Queensland Small Business Commissioner also facilitates the continuance of the Queensland Government’s crucial role in the small business community. Small businesses are a major component of the Queensland economy, representing around 97 per cent of all businesses and employing over 970,000 people (or 45 per cent of the private sector workforce) in Queensland. The economic downturn as a result of COVID-19 will have a significant impact on the labour market and local communities, and the Queensland Government is providing immediate relief and assistance for small business experiencing this impact. It is therefore important that there is a single Queensland Government body for the provision of information and advice to the small business community that can also provide advocacy and dispute resolution functions to help small businesses navigate the challenges of the COVID-19 emergency. This is one discrete and important aspect of ensuring the Queensland Government can facilitate the continuance of its public administration functions during the COVID-19 emergency.

Matters relating to residential relevant leases (non-residential) affected by the COVID-19 emergency and supporting the Queensland rental sector during the COVID-19 emergency period

The COVID-19 emergency has caused, and will continue to cause, commercial and financial disruption in Queensland. Keeping businesses in their places of commercial residence will have flow-on effects for the rest of the economy, especially for those employed by small to medium businesses. Relieving the financial stress and anxiety for tenants under relevant leases (non-residential) as a result of the economic impacts of industry and government responses to the COVID-19 emergency is therefore important for the maintenance of Queensland’s small and medium business community. Ensuring leasing security, providing relief from financial hardship and promoting resilience for tenants under relevant leases (non-residential) in the face of an unprecedented global economic downturn as a result of the COVID-19 pandemic is a legitimate objective and proper purpose for limiting human rights.

Supporting the Queensland rental sector during the COVID-19 emergency period is critical. Over a third of the estimated 1.65 million households in Queensland rent. A stable home

⁴⁴ *Soobramoney v Minister of Health (Kwazulu-Natal)* [1998] 1 SA 765, [39].

⁴⁵ Aharon Barak, *Proportionality: Constitutional Limits and Their Limitations* (Cambridge University Press, 2012) 270 citing Justice Wilson in *Sing v Minister of Employment and Immigration* [1985] 1 SCR 177.

enables people to achieve positive life outcomes such as good health, quality education and secure employment. All of these things are potentially threatened by the pressures the COVID-19 emergency is placing on renters, including as a consequence of the economic impacts of industry and government responses to the COVID-19 emergency. Many renters are now facing excessive hardship. Compliance with social distancing measures and other health requirements has also impacted various obligations under tenancy laws, such as inspections of premises. Addressing these pressures to support Queensland renters to maintain a stable home environment during the COVID-19 emergency is a legitimate objective and proper purpose for limiting human rights.

(c) the relationship between the limitation to be imposed by the modification framework and other regulation-making powers under the COVID-19 Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The modification framework and other regulation-making powers under the COVID-19 Bill all contain an express nexus to COVID-19, meaning any exercise of power which is within the power allowed by the empowering provision will, by definition, help to achieve one of the purposes of the Bill or respond to the COVID-19 emergency.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the modification framework and other regulation-making powers under the COVID-19 Bill

The enactment of the empowering provisions under the modification framework and other regulation-making powers under the COVID-19 Bill are necessary as there are no reasonable alternatives available that will allow government to combat the spread of COVID-19 in a responsive manner. A global pandemic requires flexible and timely responses by government in order to combat the spread of a pandemic.

The Queensland Government needs additional mechanisms to flexibly and responsively meet the challenges that COVID-19 presents. The empowering provisions under this Bill are the additional mechanisms that allow the government to be flexible and responsive.

While the modification framework provides a number of empowering provisions that allow legislative requirements to be modified in a number of different areas, the COVID-19 Bill includes important safeguards as to when these empowering provisions may be used to make extraordinary regulations or statutory instruments (and, in limited circumstances relating to statutory timeframes, notices to individuals or parties). Before acting under one of the empowering provisions, Ministers and entities must be satisfied that an extraordinary regulation, statutory instrument or notice is necessary for one of the purposes of the COVID-19 Bill before such a regulation or instrument may be made.

In respect of the other regulation-making powers under the COVID-19 Bill, the following threshold must be met:

- regulations relating to residential tenancies and rooming accommodation must be necessary for responding to the COVID-19 emergency;

- regulations relating to relevant leases (non-residential) must be for responding to the COVID-19 emergency; and
- regulations relating to the expiry of subordinate legislation or commencement of laws must be necessary for one of the purposes of the COVID-19 Bill.

Another important safeguard around modification framework and other regulation-making powers under the COVID-19 Bill is provided by way of a sunset clause which ensures that the COVID-19 Bill and any regulation, extraordinary regulations, statutory instruments or notices are time limited and will expire on 31 December 2020.

Additionally, there is a requirement under the COVID-19 Bill that any instrument enacted under modification framework and other regulation-making powers under the COVID-19 Bill (except those notices given to a particular individual or parties in respect of statutory timeframes) be published on a relevant website (such as a government website) and tabled in Parliament. They will also be subject to disallowance processes (with the exception of those notices given to a particular individual in respect of statutory timeframes). This requirement is critical to the notion underpinning the rule of law that laws be assessable to enable members of the public to regulate their conduct and foresee the consequences of their actions.

There are a range of other safeguards provided for under existing legislative mechanisms in Queensland, including judicial oversight, constitutional limits, and the obligations and requirements under the HR Act. These safeguards will apply to modification framework and other regulation-making powers under the COVID-19 Bill .

There will necessarily be judicial oversight of any executive action that is beyond power, in that it will be subject to judicial review in the courts. Although one of the empowering provisions under the modification framework will allow for the varying of proceedings of courts and tribunals, that power cannot be exercised to oust the supervisory jurisdiction of the Supreme Court,⁴⁶ to make the exercise of that jurisdiction more difficult in practice,⁴⁷ or to impair the institutional integrity of the Supreme Court, for example, by requiring the court to depart from the requirements of procedural fairness.⁴⁸ Otherwise the regulation, subordinate legislation, or other instrument would infringe Chapter III of the *Constitution*, and be invalid.

There are also other constitutional limits in relation to modification framework and other regulation-making powers under the COVID-19 Bill. The High Court of Australia has held that ‘the notion of “unbridled discretion” has no place in the Australian universe of discourse’.⁴⁹ Even broad statutory powers must be exercised having regard to the subject-matter, scope and purpose of the statute, as well as ‘any applicable law, including the *Constitution* itself’.⁵⁰ In Queensland, that also means that any delegated legislation cannot amend legislation entrenched by a manner and form requirement.

⁴⁶ *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 581 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

⁴⁷ *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 26, 27 (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ) (albeit with respect to Commonwealth legislation).

⁴⁸ *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 71 (French CJ), 105, 110 (Gageler J).

⁴⁹ *Wotton v Queensland* (2012) 246 CLR 1, 10 (French CJ, Gummow, Hayne, Crennan and Bell JJ).

⁵⁰ *Wotton v Queensland* (2012) 246 CLR 1, 9 (French CJ, Gummow, Hayne, Crennan and Bell JJ).

The HR Act also contains important obligations and requirements which will apply to the COVID-19 Bill and modification framework and other regulation-making powers under the COVID-19 Bill. The entities exercising powers under the empowering provisions of the framework will be ‘public entities’ pursuant to section 9 of the HR Act (including, for example, Ministers, government entities, public service employees, the Queensland Police Service, courts and tribunals acting in an administrative capacity and entities performing public functions on behalf of government). This means they will be required to give proper consideration to human rights and exercise the power in a manner that is compatible with human rights under section 58 of the HR Act. It is unlawful for a public entity to fail to comply with these obligations.

The HR Act also requires that statutory provisions must, to the extent possible that is consistent with their purpose, be interpreted in a way that is compatible with human rights. Section 48(4)(b) provides that section 48 does not affect the validity of a statutory instrument (meaning in the context of the COVID-19 Bill, a regulation, extraordinary regulation, or statutory instrument) or provision of a statutory instrument that is not compatible with human rights and is empowered to be so by the Act under which it was made. The effect of this is that incompatibility with human rights will affect the validity of an instrument, if the empowering provision does not authorise the statutory instrument to be incompatible. The empowering provisions under the modification framework and other regulation-making powers under the COVID-19 Bill do not allow for the making of an instrument that is incompatible with human rights. This means that any instrument (meaning in the context of the COVID-19 Bill, a regulation, extraordinary regulation, or statutory instrument) that is incompatible with human rights will be beyond power and invalid.

This is a critically important human rights protection and safeguard in the context of modification framework and other regulation-making powers under the COVID-19 Bill, which is delegating broad powers for regulations, extraordinary regulations and statutory instruments across a range of areas.

Additionally, in so far as the empowering provisions authorise the making of a regulation or extraordinary regulation the responsible Minister(s) will need to prepare a human rights certificate under section 41 of the HR Act which details whether and how the subordinate legislation is compatible with human rights.

A further safeguard is provided in the COVID-19 Bill to ensure that regulations, extraordinary regulations, statutory instruments or notices enacted under modification framework and other regulation-making powers under the COVID-19 Bill are not able to be exercised to amend or override the HR Act, or any particular provision of the HR Act, thus preserving its important human rights protections.

(e) the balance between the importance of the purpose of modification framework and other regulation-making powers under the COVID-19 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

It is difficult to overstate the importance to society of addressing the risk posed by COVID-19. Because a pandemic may constitute a ‘public emergency which threatens the life of the nation’, at international law, the need to address it is capable of justifying derogations from all human rights except those that are absolute (such as the freedom against torture).⁵¹

The extent of the burden on human rights is greatly reduced by the requirement that the power to make subordinate legislation or other extraordinary instruments be exercised in a manner compatible with human rights under section 58 of the HR Act.

Depending on the human right at stake, it is also possible that seeking to address the risk of COVID-19 will respect the values underlying the relevant right. For example, as discussed above, the value underlying the right to privacy is the ‘protect[ion] and enhance[ment of] the liberty of the person – the existence, autonomy, security and well-being of every individual in their own private sphere.’⁵² Measures that seek to ensure the continued existence of vulnerable people is the necessary precondition for them to enjoy their existence in their own private spheres. Similarly, the value underlying the right to equality is that when we discriminate for no rational reason, we fail to see people as fellow human beings: ‘[d]iscrimination corrodes the dignity which is the essence of humanity’.⁵³ Measures which treat people differently based on their risk factors to COVID-19 do not fail to see those people as fellow human beings; rather they seek to protect those people because of their vulnerability.

The need to address the risk posed to society by COVID-19 outweighs the human rights which may be limited by regulations, extraordinary regulations, statutory instruments or notices that the empowering provisions authorise under the Bill, especially when it is taken into account that the power will need to be exercised compatibly with human rights under section 58 of the HR Act.

(f) any other relevant factors

Not applicable.

Conclusion

In my opinion, the COVID-19 Bill 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.

Yvette D’Ath MP
Attorney-General and Minister for Justice
Leader of the House

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⁵¹ *International Covenant on Civil and Political Rights*, article 4. See also Florence Shu-Acquaye, ‘The Ebola Virus Prevention and Human Rights Implications’ (2017) 12 *University of Massachusetts Law Review* 2, 26.

⁵² *Director of Housing v Sudi* (2010) 33 VAR 139, 145 (Bell J). See also *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 131 (Bell J).

⁵³ *Re Lifestyle Communities Ltd [No 3]* (2009) 31 VAR 286, 311 (Bell J).