

Justice and Other Legislation (COVID-19 Emergency Response) 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, Steven Miles MP, Deputy Premier and Minister for Health and Minister for Ambulance Services make this statement of compatibility with respect to the Justice and Other Legislation (COVID-19 Emergency Response) Amendment Bill 2020 (the Justice and Other Legislation COVID-19 Emergency Response Amendment Bill).

In my opinion, the Justice and Other Legislation COVID-19 Emergency Response Amendment 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.

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 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.

As a second legislative response to the COVID-19 emergency, the *COVID-19 Emergency Response Act 2020* (COVID-19 Emergency Response Act) was urgently passed on 22 April 2020. The COVID-19 Emergency Response Act included the following key legislative amendments to respond to the COVID-19 emergency:

- a legislative modification framework to enable legislative requirements to be modified in the following areas, should that be required: statutory timeframes; proceedings of courts and tribunals; and attendance at places or meetings, making and associated use of documents, and physical presence requirements;
- a framework for the making of regulations in respect of residential tenancies and rooming accommodation;
- a framework for the making of regulations in respect of retail leases under the *Retail Shop Leases Act 1994* (and other prescribed leases) and for the establishment of a temporary Small Business Commissioner;
- a framework for the making of regulations 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; and
- amendments to the *Parliament of Queensland Act 2001* to enable meetings of the Queensland Legislative Assembly to take place, by whole or in part, via technology such as teleconferencing or videoconferencing during the COVID-19 emergency.

The Justice and Other Legislation COVID-19 Emergency Response Amendment Bill is the Queensland Government's third legislative response to the COVID-19 pandemic. It is acknowledged that each of these three legislative responses are extraordinary measures to respond to an extraordinary public health crisis.

Amendments in the Justice and Other Legislation COVID-19 Emergency Response Amendment Bill

The Justice and Other Legislation COVID-19 Emergency Response Amendment Bill proposes amendments to over 20 different Acts across the Queensland statute book. Broadly, the proposed amendments address the following issues in response to the COVID-19 emergency:

- safeguarding of the revenue streams for local governments and assisting in minimising the economic impacts of COVID-19 on the State (through amendments to the *City of Brisbane Act 2020*, *Local Government Act 2009*, , and *Disaster Management Act 2003*);
- allowing affected registered workers to apply for payment of all or part of their long service leave (through amendments to the *Building and Construction Industry (Portable Long Service Leave) Act 1991* and *Contract Cleaning Industry (Portable Long Service Leave) Act 2005*);
- providing particular measures to assist Queensland businesses and individuals suffering financial and operational stress caused by the public health emergency (through amendments to the *Body Corporate and Community Management Act 1997*, *Building*

Units and Group Titles Act 1980, Gaming Machine Act 1991, Keno Act 1996, Lotteries Act 1997, Casino Control Act 1982, Environmental Protection Act 1994, Liquor Act 1992, and Manufactured Homes (Residential Parks) Act 2003);

- assisting Queensland’s health and disability sector to operate safely and effectively (through amendments to the *Disability Services Act 2006, Forensic Disability Act 2011, Mental Health Act 2016, Private Health Facilities Act 1999, and Public Health Act 2005*);
- ensuring there is an ability for COVID-19 testing of persons suspected of committing particular offences (through amendments to the *Police Powers and Responsibilities Act 2000*);
- assisting Queensland’s adult corrective services and youth detention sectors to operate safely and effectively (through amendments to the *Corrective Services Act 2006 and Youth Justice Act 1992*);
- clarifying the operation of provisions for the modification of statutory time limits across the statute book relating to COVID-19 under the modification framework (through amendments to the *COVID-19 Emergency Response Act 2020*).

Human Rights Issues

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

The below content only addresses the amendments in the Justice and Other Legislation COVID-19 Emergency Response Amendment Bill where human rights under the *Human Rights Act 2019* (HR Act) are considered to be relevant (that is, it does not address all amendments in the Bill).

Where limitations on rights are identified as “set out below”, this discussion is found under the heading ‘*If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable*’.

Amendments to the *Body Corporate and Community Management Act 1997* relating to financial management requirements

The human right relevant to these amendments is the:

- right to property.

The right to property is considered to be protected and promoted by these amendments.

The *Body Corporate and Community Management Act 1997* (BCCM Act) and regulations make provision for a wide range of matters relevant to the governance of bodies corporate for community titles schemes, including financial management. In summary, each year most bodies corporate are required to decide on budgets for the scheme’s administrative fund and sinking fund. The administrative fund budget makes provision for recurring, non-capital expenses, while the sinking fund budget makes provision for capital expenses (and includes proportional allocation for capital expenses likely to arise in the following nine years). The budgets adopted by the body corporate are used to determine each lot owner’s (or unit owner’s) contributions for the financial year.

Similar to other parts of the community, the COVID-19 emergency has had financial impacts on the community titles sector, including both bodies corporate and individual unit owners. The amendments are therefore designed to assist bodies corporate and individual unit owners experiencing financial stress as a result of COVID-19.

The amendments to the BCCM Act to temporarily adjust particular financial management arrangements and requirements are designed to support the property rights of lot owners in the context of the financial pressures they may be experiencing as a result of the COVID-19 emergency. Rather than limiting or restricting lot owners' property rights, the amendments aim to provide increased flexibility for bodies corporate (and committees) to accommodate individual lot owners who may be experiencing difficulty paying their normal body corporate contributions due to, for example, reduced income arising from COVID-19. The amendments also aim to protect individual lot owners experiencing financial stress by preventing bodies corporate from charging penalty interest on outstanding contributions in the period from commencement of the amendments until expiry of the amendments on 31 December 2020.

Amendments to the *Building Units and Group Titles Act 1980* allowing committees to extend the due date for payment of proprietor contributions

The human right relevant to these amendments is the:

- right to property.

The right to property is considered to be protected and promoted by this amendment.

The *Building Units and Group Titles Act 1980* (BUGT Act) provides administration, governance, dispute resolution and other arrangements for a relatively small number of schemes within developments under specified Acts that were not transitioned to be regulated under the BCCM Act on its introduction. The BUGT Act includes detailed financial management arrangements for bodies corporate. In summary, bodies corporate must from time to time decide on budgets for the scheme's administrative fund and sinking fund to meet reasonable and necessary expenditure, and levy proprietors (or unit owners) to raise the amounts in the budgets adopted by the body corporate.

Similar to other parts of the community, the COVID-19 emergency has had financial impacts on schemes regulated by the BUGT Act, including both bodies corporate and individual proprietors. The amendments are therefore designed to provide relief to proprietors suffering financial stress as a result of COVID-19.

The amendments to the BUGT Act to temporarily allow committees to extend the due date for payment of body corporate contributions are designed to support the property rights of proprietors in the context of the financial pressures they may be experiencing as a result of the COVID-19 emergency. Rather than limiting or restricting proprietors' property rights, the amendments aim to provide increased flexibility for bodies corporate (and committees) to accommodate individual proprietors who may be experiencing difficulty paying their normal contributions due to, for example, reduced income arising from COVID-19.

Amendments to the *City of Brisbane Act 2010* and *Local Government Act 2009* to provide a regulation-making power to enable Local Governments to decide rates and charges outside of annual budget meetings

The human right relevant to this amendment is the:

- right to property.

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

Amendment to the *Corrective Services Act 2006* to amend the definition of ‘prison’ to ‘corrective services facility’

The human rights relevant to this amendment are the:

- protection from torture and cruel, inhuman or degrading treatment;
- freedom of movement;
- freedom of association;
- property rights;
- privacy and reputation;
- protection of families and children;
- cultural rights – Aboriginal peoples and Torres Strait Islander peoples;
- humane treatment when deprived of liberty;
- right to education; and
- right to health services.

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

Amendment to the *Corrective Services Act 2006* relating to the early release of prisoners to parole

The human rights relevant to this amendment are the:

- right to life;
- right to liberty and security of the person; and
- cultural rights – Aboriginal peoples and Torres Strait Islander peoples.

These rights are considered to be protected and promoted by this amendment.

The current Australian Government restriction of entry to remote Aboriginal and Torres Strait Islander communities in Queensland under the *Biosecurity Act 2015* (Cwlth) in an effort to slow the spread of COVID-19 creates difficulties for Queensland Corrective Services (QCS) in ensuring appropriate release arrangements for those on parole and ensuring prisoners are not released into homelessness.

The amendment ensures QCS has the flexibility to respond to the risks associated with COVID-19 by authorising the early discharge, up to seven days prior to their release date, of prisoners to parole to manage appropriate release arrangements in response to COVID-19. This flexibility protects and promotes the right to life (by ensuring the ability of QCS to release a

prisoner to parole slightly earlier which reduces the risk of exposure of the prisoners to any outbreak of COVID-19 within a correctional facility); right to liberty and security of the person (by ensuring that prisoners are able to be released to parole in a timely way and with appropriate arrangements to facilitate their re-entry into community, such as in relation to housing); and the cultural rights of Aboriginal peoples and Torres Strait Islander peoples (by ensuring that Aboriginal and Torres Strait islander prisoners are provided with appropriate release arrangements to facilitate their re-entry into their communities).

Amendment to the *Corrective Services Act 2006* relating to the appointment of acting members of the Parole Board Queensland

The human rights relevant to this amendment are the:

- right to life;
- right to liberty and security of the person; and
- right to humane treatment when deprived of liberty.

These rights are considered to be protected and promoted by this amendment.

Currently, temporary acting board members can only be appointed to the Parole Board Queensland (PBQ) by the Governor in Council for a maximum of three months, with no ability to further extend that appointment. In response to COVID-19 the PBQ is urgently establishing a temporary fourth board to assist in hearing and deciding parole matters, particularly in response to prisoners identified as vulnerable to COVID-19. To support the establishment of this temporary board to respond to the COVID-19 emergency, there is a need to ensure the Governor in Council can appoint a qualified person to act in the office of a prescribed board member for greater than three months. The amendment therefore increases the duration the Governor-in-Council may appoint a qualified person to act in the office of a prescribed board member of the PBQ from three months to one year.

The amendment supports the timely hearing of parole applications by the PBQ by ensuring the PBQ has the flexibility to respond to the increase in applications associated with COVID-19. By ensuring there is no unnecessary delay to the hearing of applications for parole by prisoners (particularly those prisoners identified as vulnerable to COVID-19), the amendment protects and promotes the right to life (where ensuring the PBQ is resourced to consider parole applications in a timely manner without unreasonable delay reduces the risk of exposure of prisoners to any outbreak of COVID-19 within a correctional facility); right to liberty and security of the person (where ensuring the PBQ is resourced to consider parole applications in a timely manner without unreasonable delay reduces the risk of arbitrary detention); and right to humane treatment when deprived of liberty (where ensuring the PBQ is resourced to consider parole applications in a timely manner without unreasonable delay ensures parole applications of prisoners are able to be considered as close to their parole eligibility date as possible).

Amendment to the *Corrective Services Act 2006* to ensure the successful transition of a correctional centre to public operation

The human rights relevant to this amendment are the:

- right to life; and
- right to humane treatment when deprived of liberty.

These rights are considered to be protected and promoted by this amendment.

Arthur Gorrie Correctional Centre is transitioning to public operation on 1 July 2020 and the Southern Queensland Correctional Centre is transitioning to public operation on 1 July 2021. This initiative is unprecedented in its complexity and COVID-19 is significantly elevating the potential risks of the transition. The amendment will provide clear authority for the QCS chief executive to direct a corrective services officer to perform duties under the *Corrective Services Act 2006* at a corrective services facility administered by an engaged service provider.

This amendment supports the security and good management of correctional centres and the safe custody and welfare of prisoners during the period of transition to public operation. This protects and promotes the rights of prisoners to humane treatment when deprived of liberty and to life.

Amendment to the *Disability Services Act 2006* to extend the immunity from civil or criminal liability to disability service providers where gates, doors or windows are locked to ensure an adult with an intellectual or cognitive disability complies with a relevant public health directive

The human rights relevant to this amendment are the:

- right to recognition and equality before the law;
- freedom of movement; and
- right to liberty and security of the person.

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

Amendment to the *Disaster Management Act 2003* to set aside the existing compensation provisions that apply to loss or damage suffered in relation to the exercise of powers in response to the COVID-19 emergency

The human right relevant to this amendment is the:

- right to property.

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

Amendment to the *Disaster Management Act 2003* to increase the period by which a regulation may extend the COVID-19 disaster situation from 14 days to 90 days

The human rights relevant to this amendment are the:

- freedom of movement;
- peaceful assembly and freedom of association
- privacy and reputation; and
- right to liberty and security.

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

Amendments to the *Environmental Protection Act 1994* relating to the granting of environmental authorities and compliance exemptions

The human right relevant to these amendments is the:

- right to life.

In my opinion, the right to life (in the context of the positive obligations the right places on the State in relation to the environment) is relevant to, but not necessarily limited by, these amendments. However, in the event that there is an alternative view that the right to life is limited, I consider the limitation to be reasonable and demonstrably justified. A discussion of the limitation on the right is set out below.

Amendments to the *Forensic Disability Act 2011* temporarily enabling the limitation of community treatment for a client where the delivery of the treatment would pose a risk to the health and safety of the client or others, and allowing for reasonable adjustments to an individual development plan

The human rights relevant to this amendment are the:

- freedom of movement;
- right to liberty and security of the person; and
- right to humane treatment when deprived of liberty.

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

Amendments to the *Forensic Disability Act 2011* clarifying that a forensic disability client within the Forensic Disability Service can be directed to isolate under the *Public Health Act 2005*, as this does not amount to the use of seclusion

The human rights relevant to this amendment are the:

- freedom of movement;
- right to liberty and security of the person; and
- right to humane treatment when deprived of liberty.

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

Amendments to the *Forensic Disability Act 2011* clarifying that the ability for persons to visit a Forensic Disability Service is subject to requirements under the Public Health Act 2005, and powers to refuse entry under the *Forensic Disability Act 2011* may be exercised to exclude particular visitors to the Forensic Disability Service that would otherwise be allowed to visit, if necessary to comply with public health directions

The human rights relevant to this amendment are the:

- right to recognition and equality before the law;
- right to humane treatment when deprived of liberty; and
- right to health services.

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

Amendments to the *Manufactured Homes (Residential Parks) Act 2003* to regulate how site rent increases or decreases may occur in residential parks during the COVID-19 emergency

The human right relevant to these amendments is the:

- right to property.

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

Amendment to the *Mental Health Act 2016* to allow the Chief Psychiatrist to grant leave from an Authorised Mental Health Service during the COVID-19 emergency

The human rights relevant to this amendment are the:

- freedom of movement;
- right to liberty and security of the person; and
- right to health services.

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

Amendments to the *Police Powers and Responsibilities Act 2000* to enable court-ordered COVID-19 testing of persons suspected of committing particular offences

The human rights relevant to this amendment are the:

- protection from torture and cruel, inhuman or degrading treatment;
- privacy and reputation;
- protection of families and children; and
- right to liberty and security.

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

Amendments to the *Public Health Act 2005* to delegate powers to authorise the disclosure of confidential information

The human right relevant to these amendments is the:

- privacy and reputation.

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

Amendments to the *Public Health Act 2005* to allow an emergency officer to give a direction to a parent of a child to keep the child isolated

The human rights relevant to these amendments are the:

- freedom of movement; and
- right to liberty and security.

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

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*)

Amendments to the *City of Brisbane Act 2010* and *Local Government Act 2009* to provide a regulation-making power to enable Local Governments to decide rates and charges outside of annual budget meetings

(a) the nature of the right

These amendments limit the right to property.

The right to property 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). The right does not provide a right to compensation.

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 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’.

The proposal to provide a regulation-making power to permit Local Governments to possibly decide rates and charges outside budget meetings could limit property rights, as Local Governments may acquire land where there are overdue rates and charges on land in a Local Government area that are unpaid for a period of time, under the *City of Brisbane Regulation 2012* and *Local Government Regulation 2012*. If rates and charges are increased, this may result in additional overdue rates and charges for ratepayers.

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

The purpose of the amendment and limitation on the identified right is to ensure Local Governments are able to respond quickly to the potential economic impacts on their financial sustainability because of COVID-19.

Local Governments have limited capacity to receive revenue and rely on revenue from either State Government funding or levying rates and charges. It is important that Local Governments have the flexibility to revisit their rates and charges decisions to adapt to changing economic conditions to maintain their financial sustainability.

This is consistent with a free and democratic society as the financial sustainability of Local Governments ensures they are able to provide important community services to their constituents and continue the representation of the will of their electors.

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

By enabling the making of a regulation under the proposed regulation-making power, the amendments will provide the required flexibility to ensure that Local Governments are able to revisit rates and charges decisions with a view to safeguarding revenue as they respond to the COVID-19 crisis, if it becomes necessary for the 2020-2021 financial year. This will help to achieve the purpose by limiting the period in which rates and charges decisions can be revisited to the upcoming financial year to safeguard revenue.

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

The enactment of the regulation-making power is necessary to provide a process for allowing Local Governments to revisit their rates and charges decisions so that they can be responsive to the changing economic conditions caused by COVID-19 and the impact on their operations. There are no reasonable alternatives available that will allow Local Governments to respond effectively to the economic impact on their financial sustainability due to their limited sources of revenue.

The regulation-making power and potential regulation made under the power are confined to the 2020-2021 financial year and will expire on 30 June 2021. A decision made under the potential regulation will only apply prospectively from the day the decision was made, to ensure decisions about rates and charges are not applied retrospectively.

The power to make a regulation and the exercise of that power must be compatible with human rights under section 58 of the HR Act. Any regulation must also be accompanied by a human rights certificate under section 41 of the HR Act which details whether and how, in the responsible Minister's opinion, the subordinate legislation is compatible with human rights.

(e) the balance between the importance of the proposed amendment, 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 financial sustainability of Local Governments in the context of the COVID-19 emergency outweighs the potential limitation on property rights that may occur if Local Governments increase rates and charges during the 2020-2021 financial year.

(f) any other relevant factors

Not applicable.

Amendment to the *Corrective Services Act 2006* to amend the definition of 'prison' to 'corrective services facility'

(a) the nature of the right

Section 268 of the *Corrective Services Act 2006* (CS Act) enables the Chief Executive to declare that an emergency exists in relation to a prison for a stated period (not more than three days, unless another declaration is made to take effect or the declaration is sooner revoked) if a situation threatens the security or good order of a prison or the safety of a prisoner or another person in a prison. The amendment to this section amends the definition of 'prison' to 'corrective services facility' to enable the extension of the declaration of emergency powers to any corrective services facility (such as the Helana Jones Centre and work camps, which are currently not captured by the definition of 'prison') to ensure the safety of facilities and to mitigate the risk of contagion in response to COVID-19.

The amendment limits the protection from torture and cruel, inhuman or degrading treatment; freedom of movement; freedom of association; property rights; privacy and reputation; protection of families and children; cultural rights – Aboriginal peoples and Torres Strait Islander peoples; humane treatment when deprived of liberty; and the right to education.

Protection from torture and cruel, inhuman and degrading treatment

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 amendment limits the right not to be treated or punished in a cruel, inhuman or degrading way to the extent that isolating prisoners to reduce the risks of COVID-19 transmission may be considered inhuman or degrading in a custodial environment.

Freedom of movement

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.

The amendment limits the freedom of movement where a corrective services facility is forced to cease or restrict movement of staff, visitors, or prisoners in response to the COVID-19 emergency, such as through quarantine periods.

Freedom of association

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

The amendment limits the freedom of association to the extent a prisoner may be unable to receive visits in circumstances where movement is restricted in a corrective services facility to manage COVID-19. The amendment may also limit the rights of a visitor whose association with a person detained in a corrective services facility will be impacted. This is consistent with the potential restrictions that may be imposed to protect prisoners, staff, and visitors during the current COVID-19 emergency, including in corrective services facilities that are not currently gazetted as a prison under the CS Act. They are also akin to existing COVID-19 restrictions and social distancing requirements imposed in the community.

Property rights

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’.¹

The amendment limits the property rights of prisoners in corrective services facilities (that is, other than prisons) to the extent that the ability to receive property from outside the facility, including mail and other items, may necessarily be limited or delayed to due to the risk of COVID-19 transmission.

Right to privacy and reputation

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 of every individual in their

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

own private sphere.² 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 United Nations Human Rights Committee (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.³

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 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).⁴ 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.⁵ 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'.⁶

The amendment limits the right to privacy to the extent that it may restrict a prisoner's private relationships through visits where a corrective services facility is required to restrict access and contact to manage the risks of COVID-19. This restriction is consistent with the potential restrictions that may be imposed to protect prisoners, staff, and visitors during a declaration of emergency currently, including where an incident necessitates visitors be removed from a facility. They are also akin to existing COVID-19 restrictions and social distancing requirements imposed in the community.

Protection of families and children

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'.

² *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).

³ *Coeriel and Aurik v The Netherlands* (Communication No 45/1991) [10.2].

⁴ United Nations Human Rights Committee, *General Comment No. 16*.

⁵ *Sunday Times v United Kingdom* [1979] ECHR 1, [49].

⁶ *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing).

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 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.

The amendment limits the protection of families and children to the extent that it may restrict a prisoner's relationship with a family member to the extent the prisoner may be unable to receive visits where a corrective services facility is required to restrict access and contact to manage the risks of COVID-19. The amendment may also limit the right for the family of a prisoner if they are prevented from accessing visits. This restriction is consistent with the potential restrictions that may be imposed to protect prisoners, staff, and visitors during a declaration of emergency currently, including where an incident necessitates visitors be removed from a facility. They are also akin to existing COVID-19 restrictions and social distancing requirements imposed in the community.

Cultural rights – Aboriginal peoples and Torres Strait Islander peoples

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.

The amendment limits the cultural rights of Aboriginal peoples and Torres Strait Islander peoples to the extent that, in responding to the COVID-19 emergency, a prisoner's access to cultural visits or the ability to transfer Aboriginal prisoners or Torres Strait Islander prisoners to a corrective services facility closer to their family may be restricted to manage the risk of COVID-19 transmission.

Humane treatment when deprived of liberty

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 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.

The amendment limits the right to humane treatment when deprived of liberty to the extent that isolating prisoners to reduce the risk of COVID-19 transmission may be considered inhumane in a corrective services facility.

Right to education

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

Relevantly, the right to education under the HR Act 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. This right is understood to go towards helping 'to achieve steady economic, social and cultural development and full and productive employment'.⁷

The right to education under the HR Act is a right to *access* education (not a right to education).⁸ Access in this context carries a particular human rights meaning, incorporating underlying principles of non-discrimination, physical accessibility and economic accessibility.⁹

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 Rights¹⁰). 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.¹¹ 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',¹² particularly where the decision involves the allocation of public resources.¹³

⁷ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 13*.

⁸ As noted in the Legal Affairs and Community Safety Committee, Parliament of Queensland, *Human Rights Bill 2018* (Report No. 26, February 2019) 51.

⁹ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 13*.

¹⁰ European Convention of Human Rights, article 2.

¹¹ 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.

¹² Aharon Barak (2012) *Proportionality: Constitutional Limits and Their Limitations* (Cambridge University Press) 431.

¹³ 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.

The amendment may limit the right to education where a corrective services facility is required to restrict movement and contact between prisoners in response to COVID-19 risks and these requirements may impact the availability of educational services to prisoners.

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

The purpose of the proposal is to ensure that the emergency declaration powers under section 268 of the CS Act are available in all corrective services facilities (and not just in prisons) to address the specific risks associated with COVID-19, including managing transmissibility and the anticipated length of the pandemic. The amendment ensures that prisoners, staff, and essential visitors remain safe during the COVID-19 emergency, ensuring a declaration of emergency can be applied to all corrective services facilities.

Protecting the health, safety and wellbeing of people in the Queensland community, including those in the State's custody, from the risk posed by COVID-19 and its spread promotes the right to life (protected under section 16 of the HR Act) in the context of the positive obligations that right places on the State in relation to protecting the health and safety of its citizens. This is a proper purpose consistent with a free and democratic society based on human dignity, equality and freedom.

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

Extending the application of the declaration of emergency powers to all corrective services facilities is essential to preventing loss of life, ensuring QCS can respond to the unique risks surrounding COVID-19, and ensuring the safety of prisoners, staff, and essential visitors. The emergency powers enable measures to be taken to prevent the introduction and spread of COVID-19 into correctional centres, including restricting and limiting movement throughout the correctional system.

These powers also enable QCS to operationalise the '*Managing vulnerable prisoner COVID-19 policy*' which has been implemented to preserve the integrity of the correctional environment and to limit the risk of COVID-19 infection amongst prisoners within QCS facilities. The policy has been made on the basis of contemporary public health advice received from Queensland Health to ensure the health and safety of all prisoners, but especially those prisoners who are identified as vulnerable to COVID-19. A vulnerable prisoner is a prisoner who falls within the category of people identified in the statement published by the Australian Health Protection Principal Committee on 30 March 2020 as being at, or likely to be at, a higher risk or serious illness if infected with COVID-19 (that is: Aboriginal and Torres Strait Islander people aged 50 or over with one or more chronic medical conditions; people aged 65 or over with chronic medical conditions; people aged 70 or over; and people with compromised immune systems). Under the policy, and through the use of the emergency powers, identified vulnerable prisoners will be accommodated and managed by QCS and Queensland Health to best prevent infection. Dependent on advice from Queensland Health, this may include

placement into single cell secure accommodation isolation, isolation within an existing residential unit or daily temperature and health checks.

The extension of these emergency powers therefore ensures that QCS is able to ensure the health and safety of prisoners in all correctional environments.

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

No less restrictive and reasonably available ways of achieving the purpose have been identified. The ability to rapidly respond to the risk associated with COVID-19 is necessary to mitigate the spread of COVID-19, prevent loss of life, and ensure the safety of prisoners, staff, and essential visitors. Ensuring a declaration of emergency can be made for any corrective services facility ensures that prisoners in facilities not otherwise gazetted as prisons are afforded the same protection and level of responsiveness.

The amendment is a temporary measure and will expire on 31 December 2020

(e) the balance between the importance of the proposed amendment, 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 purpose of the proposed amendment outweighs the potential limitations on the identified rights, noting the limitations on human rights of this amendment will be restricted to responding to the current COVID-19 pandemic and also that they are for the purpose of protecting the health, safety and wellbeing (and right to life) of prisoners, staff, and essential visitors.

(f) any other relevant factors

Not applicable.

Amendments to the *Disability Services Act 2006* to extend the immunity from civil or criminal liability to disability service providers where gates, doors or windows are locked to ensure an adult with an intellectual or cognitive disability complies with a relevant public health directive

(a) the nature of the right

The amendment extends the immunity from criminal or civil liability to disability service providers where gates, doors or windows are locked to prevent an adult with an intellectual or cognitive disability from breaching a relevant public health direction, because of that adult's disability. This immunity effectively authorises the locking of gates, doors or windows under the *Disability Services Act 2006* (DS Act) in particular circumstances, and if relevant conditions are met. This amendment is considered necessary to facilitate and ensure compliance with the COVID-19 public health directions.

These amendments to the DS Act limit the right to recognition and equality before the law; freedom of movement; and right to liberty and security of the person.

Right to recognition and equality before the law

The right to recognition and equality before the law 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’.¹⁴

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.¹⁵ The right protects individuals from discrimination and provides that every person has the right to equal and effective protection against discrimination.

The amendments limit the right to recognition and equality before the law as they may result in a person with disability being treated differently to a person without disability in order to comply with a public health directive, as a service provider will be authorised to lock doors, gates and windows to ensure that relevant adults with intellectual or cognitive disabilities comply with the Home Confinement Direction or another COVID-19 public health direction, supported by immunity from civil and criminal liability in certain circumstances.

Freedom of movement

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.

The amendments may limit a person’s right to freedom of movement as an adult with an intellectual or cognitive disability with a skills deficit may have their movement restricted where required, to comply with the Home Confinement Direction or another COVID-19 public health direction, supported by the immunity from civil and criminal liability in certain circumstances.

¹⁴ *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869, [279].

¹⁵ *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869, [108].

Right to liberty and security of the person

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’.¹⁶

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.

The amendments limit the right to liberty and security of the person, as an adult with an intellectual or cognitive disability, if doors, gates or windows are locked, may be deprived of their liberty to leave a place, and be subject to a form of confinement that is not usually authorised or required, which is supported by the immunity from civil and criminal liability in certain circumstances.

(b) the nature of the purpose of the limitation to be imposed under the proposed amendment 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 and the limitation on the identified rights is to authorise disability service providers to ensure relevant adults with intellectual or cognitive disabilities comply with public health directives issued due to the COVID-19 emergency, which aim to prevent the spread and manage impacts of the virus. This is facilitated through extending criminal and civil immunity for disability service providers (and individuals acting for providers) in certain limited circumstances, when actions are taken specifically to ensure compliance with a public health direction. This is to ensure the health, safety and wellbeing of adults with intellectual or cognitive disabilities, and the broader community, which may be impacted if an adult with an intellectual or cognitive disability does not understand, nor have the skills to learn, their obligations or reasons for those obligations. Protecting the health, safety and wellbeing of people in the Queensland community from the risk posed by COVID-19 and its spread promotes the right to life (protected under section 16 of the HR Act) in the context of the positive obligations that right places on the State in relation to protecting the health and safety of its citizens. This is a proper purpose consistent with the values of a free and democratic society based on human dignity, equality and freedom.

¹⁶ *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing).

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

Locking doors, windows and gates will help to ensure that public health directives are complied with and not inadvertently breached by adults with an intellectual or cognitive disability (and a skills deficit). This helps to achieve the purpose of ensuring the health, safety and wellbeing of the adult, disability clients and staff.

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

No less restrictive and reasonably available ways to achieve the purpose of the amendment in the context of disability services have been identified. Amendment to the existing legislative framework for authorising the locking of doors, gates and windows through providing disability service providers (and individuals acting for providers) immunity from civil and criminal liability, in certain circumstances, is the least restrictive and reasonably available way to achieve the purpose. This provides certainty to service providers about their obligations and authorisations and ensures compliance with the health directives.

The immunity from criminal and civil liability is only available to service providers (and individuals acting for providers) if relevant conditions are met. Service providers are expected to comply with certain safeguards, including that the service provider acts honestly and without negligence, and locks gates, doors or windows in compliance with the policy made by the Department of Communities, Disability Services and Seniors (DCDSS) for this specific purpose.

The amendment is also a temporary measure and will expire on 31 December 2020.

- (e) the balance between the importance of the proposed amendment, 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 preventing the spread of COVID-19 outweighs the limitations on the rights to recognition and equality before the law, freedom of movement, and right to liberty and security that may occur as a consequence of this amendment.

- (f) any other relevant factors

Not applicable.

Amendment to the *Disaster Management Act 2003* to set aside the existing compensation provisions that apply to loss or damage suffered in relation to the exercise of powers in response to the COVID-19 emergency

- (a) the nature of the right

This amendment limits the right to property.

The right to property protects the right of all persons to own property (alone or with others) and provides that people have a right not to 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). The right does not provide a right to compensation.

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 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’.

The right to property is limited by the proposed amendment to remove the existing right to compensation for damage or loss suffered as a result of the exercise of specified powers under the *Disaster Management Act 2003* (DM Act) where these powers are exercised as a result of the COVID-19 emergency. The powers available to disaster officers under a declared disaster and in other specific circumstances are broad and include destroying or removing property, vehicles, structures or animals, which can cause damage or loss and have financial impacts for the owner.

The amendment provides that the usual rights to compensation which are provided for under section 119 of the DM Act for damage or loss because of the exercise, or purported exercise, of powers under that Act, will not apply in these circumstances. The amendment will apply retrospectively, meaning no compensation will be available for damage or loss suffered on or after the date of the declared disaster situation under the DM Act on 22 March 2020.

Although, as noted above, the right to property does not provide an explicit right to compensation for the deprivation of property, the right may encompass situations such as this where an existing right to compensation is being removed, particularly where an existing right to compensation is removed with retrospective effect.

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

The purpose of the amendment and the limitation on the right to property is to avoid liability for compensation payments where relevant officers cause loss or damage to property when exercising powers under the DM Act for COVID-19 purposes. Avoiding such payments will serve to mitigate the economic impacts of the COVID-19 emergency on the Queensland Government, and will also support the Government’s ability to provide economic stimulus

packages to uphold fundamental entitlements and services for Queenslanders. This is a proper purpose consistent with a free and democratic society based on human dignity, equality and freedom.

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

The limitation on the right to property helps to achieve the purpose by limiting the economic impacts of the COVID-19 emergency on the Government. There is the potential for a significant proportion of the population to be affected by the exercise of powers under the declared disaster situation. In this environment, uncapped and unpredictable compensation claims for damage or loss suffered may place further economic pressure on the State and diminish the Government's ability to provide stimulus measures. Avoiding compensation payments will directly support the Government to implement various economic resilience measures for Queenslanders.

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

No less restrictive and reasonably available ways of achieving the purpose have been identified. The COVID-19 emergency will have severe and long-lasting economic impacts on Queensland and relevant officers need to be able to exercise the relevant powers during the declared disaster without placing the Government at risk of unknown and unpredictable compensation claims.

The amendment is limited to the exercise of powers for the purposes of the declared disaster, and various protections contained in the DM Act ensure that the relevant powers are exercised appropriately. For example, these powers may only be exercised by authorised officers in certain circumstances, such as where they are necessary for public safety and the protection of life or property. Authorised officers are limited to those with the necessary expertise or experience to exercise the powers, and authorisations may be limited or given on conditions specific to the particular circumstances of the officer or event.

Operational practice also ensures that powers are exercised appropriately. In regard to emergency and disaster situations, any assessment of expertise or experience would take into account the training framework that applies to both paid and volunteer officers. Emergency and disaster response practices includes limiting potential damage where possible in the context of operational requirements and the safety of individuals (including employees, volunteers and the community).

Further, the DM Act provides specific protections where it is proposed to give directions to the owner of any property. If the property is residential or business premises, directions may only be given with the written approval of the relevant district disaster coordinator. There are also protections around the power to enter places to exercise rescue powers, specifying that where the occupier is present a reasonable attempt must be made to seek the consent of the occupier to the entry.

Finally, having regard to the fact that the amendment is removing an existing entitlement to compensation for property damage or loss, the amendment is appropriately limited only to the

exercise of powers that are for the purpose of the declared public health emergency for COVID-19. The amendment is a temporary measure that will expire on 31 December 2020, with any application beyond 31 December 2020 limited to the COVID-19 emergency.

- (e) the balance between the importance of the proposed amendment, 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

Considering the state-wide and long-term scale of the COVID-19 emergency, imposing this potential limitation on the right to property is considered reasonable and justified to limit the potential economic impacts on Queensland. On balance, minimising the potential economic impacts on the State of unpredictable compensation payouts arising from actions of officers during the declared disaster outweighs any potential limitation imposed on property rights.

- (f) any other relevant factors

Not applicable.

Amendment to the *Disaster Management Act 2003* to increase the period by which a regulation may extend the COVID-19 disaster situation from 14 days to 90 days

- (a) the nature of the right

This amendment to the *Disaster Management Act 2003* (DM Act) limits the right to freedom of movement, the right to peaceful assembly and freedom of association, the right to privacy and reputation, and the right to liberty and security.

Freedom of movement

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.

The amendment to provide for the extension of a disaster situation limits a person's rights to freedom of movement because the COVID-19 declared disaster allows for powers to be exercised that include controlling the movement of persons into, out of, or around the declared area for the disaster situation. The exercise of these powers may result in persons being prevented from entering particular areas or the dispersal of groups of persons.

Peaceful assembly and freedom of association

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

purpose¹⁷ 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 clubs, non-government organisations and trade unions. It includes the freedom to choose between existing organisations or to form new ones.

The amendment to provide for the extension of a disaster situation limits a person's rights to peaceful assembly and freedom of association because the COVID-19 declared disaster allows for powers to be exercised that include controlling the movement of persons into, out of, or around the declared area for the disaster situation. The exercise of these powers may result in persons being prevented from entering particular areas or the dispersal of groups of persons.

Privacy and reputation

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 of every individual in their own private sphere.'¹⁸ 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.¹⁹

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 authorised by states can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the ICCPR.²⁰ 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.²¹ 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

¹⁷ Manfred Nowak (2005) *United Nations Covenant on Civil and Political Rights: CCPR Commentary*, 2nd ed (NP Engel) 484.

¹⁸ *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).

¹⁹ *Coeriel and Aurik v The Netherlands* (Communication No 45/1991) [10.2].

²⁰ United Nations Human Rights Committee, *General Comment No. 16*.

²¹ *Sunday Times v United Kingdom* [1979] ECHR 1, [49].

‘capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought’.²²

The amendment to provide for the extension of a disaster situation limits a person’s right to privacy and reputation because the COVID-19 declared disaster allows powers to be exercised that may include entering a place in the declared area or interfering with a person’s personal privacy or their home.

Liberty and security of the person

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’.²³

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.

The amendment to provide for the extension of a disaster situation limits a person’s rights to liberty and security because the COVID-19 declared disaster allows for powers to be exercised that include controlling the movement of persons into, out of, or around the declared area for the disaster situation. The exercise of these powers may result in being deprived of their liberty for a period of time.

(b) the nature of the purpose of the limitation to be imposed under the proposed amendment 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 on the identified rights through the amendment to extend the disaster declaration regulation period is to give declared disaster officers and the Queensland community greater certainty about the anticipated need for the declared disaster situation to continue.

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

²³ *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing).

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

By extending the period by which a regulation may extend the disaster declaration in relation to the COVID-19 emergency from 14 days to 90 days, the Queensland Government and declared disaster officers will have greater certainty as to the anticipated length of the declared disaster situation, and will enable communication about disaster situation arrangements up to 90 days in advance. This will also ensure the government has the adequate powers it requires to respond as necessary to the disaster situation.

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

No less restrictive and reasonably available ways to achieve the purpose have been identified. Due to the human to human transfer of the virus, restrictions need to be imposed on the movement of persons to reduce the risks of transmission of the virus. In particular the movement of persons who are identified with or suspected of having COVID-19 needs to be limited in order to prevent them from circulating freely amongst the general public and spreading the virus.

The amendment will extend the possible length of a declaration to up to 90 days, which is a significant increase from the current provision which only allows for declarations and then extensions of up to 14 days at a time. In determining the appropriate period of time for which the disaster declaration should last, consideration was given to the pandemic nature of the virus and its public health implications. As it is likely that the COVID-19 virus will remain an ongoing threat for some time, a longer period of time is considered appropriate. Further, 90 days is consistent with the length of time for which a public health emergency can be declared under the PH Act.

Consistent with public health emergency declarations, the amendment will give declared disaster officers and the Queensland community greater certainty about the anticipated need for the declared disaster situation to continue. It will also allow the Queensland Government to communicate with certainty about disaster situation arrangements up to 90 days in advance. In accordance with section 73 of the DM Act, if the need for the declaration of a disaster situation is no longer required, the Minister for Fire and Emergency Services and the Premier will declare the end of the disaster situation and the ability to exercise the suite of disaster powers will cease on the day the declaration ends.

The amendment is limited to the exercise of powers for the purposes of the declared disaster, and various protections contained in the DM Act ensure that the relevant powers are exercised appropriately. For example, these powers may only be exercised by a relevant district disaster coordinator or declared disaster officer in certain circumstances, such as where they are necessary for public safety and the protection of life or property. Authorised officers are limited to those with the necessary expertise or experience to exercise the powers, and authorisations may be limited or given on conditions specific to the particular circumstances of the officer or event.

Operational practice also ensures that powers are exercised appropriately. In regard to emergency and disaster situations, any assessment of expertise or experience would take into account the training framework that applies to both paid and volunteer officers. Emergency and disaster response practices include limiting potential damage where possible in the context of operational requirements and the safety of individuals (including employees, volunteers and the community).

Further, the DM Act provides specific protections where it is proposed to give directions to the owner of any property. If the property is residential or business premises, directions may only be given with the written approval of the relevant district disaster coordinator.

The power to make a regulation and the exercise of that power must be compatible with human rights under section 58 of the HR Act. Any regulation must also be accompanied by a human rights certificate under section 41 of the HR Act which details whether and how, in the responsible Minister's opinion, the subordinate legislation is compatible with human rights.

The amendment is also a temporary measure that will expire on 31 December 2020, with any application beyond 31 December 2020 limited to the COVID-19 emergency.

- (e) the balance between the importance of the proposed amendment, 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 the Queensland Government, declared disaster officers and the Queensland community with greater certainty about the anticipated need for the COVID-19 declared disaster situation, which in turn ensures the government has the adequate powers it requires to respond as necessary to the disaster situation, outweighs the limitation on a person's human rights, including their rights to freedom of movement, peaceful assembly and freedom of association, privacy and reputation, and liberty and security.

- (f) any other relevant factors

Not applicable.

Amendments to the *Environmental Protection Act 1994* relating to the granting of environmental authorities and compliance exemptions

As stated above, in my opinion, the right to life (in the context of the positive obligations the right places on the State in relation to the environment) is relevant to, but not necessarily limited by, these amendments. However, in the event that there is an alternative view that the right to life is limited, I consider the limitation to be reasonable and demonstrably justified having regard to the matters set out below.

- a) the nature of the right

The right to life protects the lives of all persons and includes the right not to be arbitrarily deprived of life. 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.²⁴

One of the positive obligations imposed on the State under the right to life is to take appropriate steps and adopt positive measures to protect life. The UNHRC has said that this extends to taking appropriate measures to address the general conditions in society that may give rise to direct threats to life or prevent individuals from enjoying their right to life with dignity, including measures relating to the environment. The UNHRC has said, in particular, that ‘environmental degradation, climate change and unsustainable development constitute some of the most pressing and serious threats to the ability of present and future generations to enjoy the right to life’.²⁵ Implementation of this protective obligation under the right to life requires the State to ‘develop and implement substantive environmental standards, conduct environmental impact assessments and consult with relevant States about activities likely to have a significant impact on the environment, ... provide appropriate access to information on environmental hazards and pay due regard to the precautionary approach’.

The amendments to the *Environmental Protection Act 1994* (EP Act) could be said to limit the right to life in relation to these positive obligations on the State in relation to the environment under the right.

Currently, all activities deemed an environmentally relevant activity must hold an environmental authority in order to operate in Queensland. The environmental authority is obtained through an application process and, if approved, the administering authority may require annual fees to be paid for the environmental authority. The Bill amends the EP Act to enable the administering authority to approve temporary environmental authorities, or temporary increases to thresholds of existing environmental authorities, without requiring that an application be made or that fees be paid. The proposed amendment to allow the administering authority to approve temporary authorities may thereby make an activity causing environmental harm or nuisance done under a temporary authority lawful.

The Bill also amends the EP Act to empower the Environment Minister to make a declaration that exempts environmental authority holder(s) from having to comply with certain conditions on their environmental authority (for example, conditions relating to monitoring and reporting requirements). This may result in the Minister exempting a person from complying with particular conditions of their approvals that may result in environmental harm or nuisance

In both cases, the amendments to the EP Act could be seen to give rise to a potential impact on environmental protections and standards, which may therefore be seen to limit the right to life.

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

²⁴ United Nations Human Rights Committee, *General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights*.

²⁵ United Nations Human Rights Committee, *General Comment No. 36 on article 6 of the International Covenant on Civil and Political Rights*.

The purpose of the amendments is to enable the State to provide greater flexibility to environmental authority holders who are impacted by the COVID-19 emergency (whilst still maintaining other existing protections to ensure any environmental harm can be adequately managed).

c) the relationship between the limitation to be imposed under the proposed amendment if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The amendments achieve the purpose by providing greater flexibility to environmental authority holders who are impacted by the COVID-19 emergency by reducing the process elements for an environmental authority application under the EP Act and by enabling exemptions to be granted by the Minister to persons from complying with particular conditions of their approvals that are impacted by the COVID-19 emergency.

An example of how these amendments will achieve the purpose can be seen in relation to sewage treatment plants. Different thresholds are prescribed for sewage treatment plants in Queensland based on their environmental impacts (such as design capacity). Environmental operating conditions are placed on environmental authorities based on impact to ensure environmental harm is adequately managed (for example, to ensure that contaminants from the activity cannot be released to land or water). The annual fees for environmental authorities are also determined by the 'threshold' the activity falls within. In this example, there may be an instance where a sewage treatment plant is receiving increased volumes of sewage due to the COVID-19 measures in place (such as increased working from home arrangements and other social distancing requirements). However, a sewage treatment plant's operation (namely, the quantity of waste processes) is constrained by their environmental authority. The amendments to the EP to allow these temporary measures to take effect will ensure that the operator is not operating unlawfully, and that sewage is not released untreated while the authority holder waits for the administering authority to approve their application for a higher threshold. These amendments therefore provide the necessary flexibility in the environmental authority application process and are therefore considered to protect against possible environmental harm that could occur should the amendments not be made.

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

No less restrictive and reasonably available ways to achieve the purpose of the amendments have been identified.

A number of important environmental safeguards and protections remain in place to mitigate against any potential environmental harm that may occur as a result of these amendments.

Importantly, the amendments to the EP Act will not remove the obligation of decision makers to comply with the overarching purpose of the EP Act (which is to protect Queensland's environment while allowing for development that improves the total quality of life, both now and in the future, in a way that maintains the ecological processes on which life depends), nor will they remove the strict environmental conditions placed on environmentally relevant activities to minimise environmental harm.

Further, the amendments will only provide for a temporary compliance exemption with certain conditions of an environmental authority, for example, monitoring and reporting requirements. Any compliance exemption would only be granted if it could be demonstrated that circumstances caused by COVID-19 meant it was impractical to comply with current requirements. An environmental authority would typically include conditions limiting the quantity and quality of contaminants (pollutants) that can be released. For example, an environmental authority for a sewage treatment plant would have conditions that limit the quantity of effluent released and the quality (concentrations of nutrients, suspended solids and potential pathogens). These conditions are applied to prevent or minimise environmental harm from any discharges. In addition to the contaminant release conditions, environmental authorities will also typically include conditions requiring monitoring of the effluent or the environment at a varying frequencies. It is anticipated that suspending the requirement to comply with these monitoring conditions in the short-term will not cause environmental harm, as all other environmental conditions in place to prevent the environmental harm will still apply. Additionally, a relaxation of the monitoring requirements will not limit the ability of the State to investigate and take action in relation to any report of unlawful environmental harm. If the other conditions of the environmental authority are not complied with, the operator cannot avail itself of the relevant defence to a charge of unlawful environmental harm.

The amendments are also a temporary measure and will expire on 31 December 2020.

- e) the balance between the importance of the proposed amendment, 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, having regard to the information above and in particular the safeguards and protections that will remain in place to mitigate against any potential environmental harm that may occur as a result of these amendments, the importance of enabling the State to provide greater flexibility to environmental authority holders who are impacted by the COVID-19 emergency, outweighs the limitations on the right to life to the extent that it places positive obligations on the State in relation to the environment.

- f) any other relevant factors

Not applicable.

Amendment to the *Forensic Disability Act 2011* temporarily enabling the limitation of community treatment for a client where the delivery of the treatment would pose a risk to the health and safety of the client or others, and allowing for reasonable adjustments to an individual development plan

- (a) the nature of the right

These amendments limit the freedom of movement; right to liberty and security of the person; and right to humane treatment when deprived of liberty.

Freedom of movement

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.

Whilst forensic disability clients are necessarily detained within the forensic disability service (FDS), they may be authorised or ordered to receive limited community treatment under their individual development plan, which the administrator of the FDS is to cater for. These amendments may limit a person's freedom of movement if, in order to comply with the public health directives issued due to COVID-19, community treatment is limited and there are restrictions on a person's ability to move within the community.

Right to liberty and security of the person

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'.²⁶

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.

The amendments may limit the right to liberty and security, due to the restriction on movement and because community treatment supports the client's rehabilitation and transition back into the community. A person would be subject to more restrictive detention in the FDS, without the ability to access the community, if limited community treatment is suspended and/or limited due to the public health emergency.

Humane treatment when deprived of liberty

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

²⁶ *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing).

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 which cover matters such as accommodation conditions, adequate food, personal hygiene, clothing and bedding standards, exercise, and medical services. 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.

These amendments may limit a person's right to humane treatment when deprived of liberty if community treatment which supports rehabilitation cannot be carried out for a set period of time. However, it may also be a limitation on the right to provide community treatment when it is not safe to do so, particularly if public health directions are in place to limit non-essential activities or for the health and safety of the FDS client or another person.

(b) the nature of the purpose of the limitation to be imposed under the proposed amendment 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 and the limit on the identified rights is to ensure the FDS can comply with the public health directives issued due to the COVID-19 emergency and/or to protect the health, safety or welfare of the FDS client or another person. Protecting the health, safety and wellbeing of people in the Queensland community, including clients of the FDS, from the risk posed by COVID-19 and its spread promotes the right to life (protected under section 16 of the HR Act) in the context of the positive obligations that right places on the State in relation to protecting the health and safety of its citizens. This is a proper purpose consistent with the values of a free and democratic society based on human dignity, equality and freedom.

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

Limiting community treatment, which includes movement in the broader community, to comply with public health directives helps to achieve the purpose of ensuring the health, safety and wellbeing of forensic disability clients and FDS staff, and the broader community. Temporarily placing limitations on a person's freedom of movement, right to liberty and security and right to humane treatment when deprived of liberty during the public health emergency will directly contribute to the purpose.

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

No less restrictive and reasonably available ways to achieve the purpose of the amendment have been identified. The amendments are clear that any changes to an individual development plan cannot be inconsistent with orders made by the Mental Health Review Tribunal or Mental Health Court. This maintains judicial oversight and provides an additional a safeguard to limit the impact of this amendment.

The *Forensic Disability Act 2011* (FD Act) also requires that any function or power under the Act relating to a forensic disability client must be exercised or performed so that ‘the client’s liberty and rights are adversely affected only if it is the least restrictive way to protect the client’s health and safety or to protect others’ and ‘any adverse effect on the client’s liberty and rights is the minimum necessary in the circumstances’. This provides an additional safeguard to minimise impacts on human rights.

The amendment is also a temporary measure and will expire on 31 December 2020.

- (e) the balance between the importance of the proposed amendment, 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 preventing the spread of COVID-19 outweighs the limitation the right to freedom of movement, right to humane treatment while deprived of liberty, and right to liberty and security that may occur as a result of these amendments. These amendments will ensure a client’s ability to access community treatment is only limited to the extent required to protect the health and safety of the client or others, including FDS staff.

- (f) any other relevant factors

Not applicable.

Amendments to the *Forensic Disability Act 2011* clarifying that a forensic disability client within the Forensic Disability Service can be directed to isolate under the *Public Health Act 2005*, as this does not amount to the use of seclusion

- (a) the nature of the right

These amendments limit the freedom of movement; right to liberty and security of the person; and right to humane treatment when deprived of liberty.

Freedom of movement

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.

The proposed amendments limit the right to freedom of movement and right to liberty and security as they ensure a person within the FDS can be mandatorily isolated, which will mean that some existing freedoms (such as interacting with other clients within a common space) are limited. While a person outside of the FDS would be subject to similar isolation requirements, for a forensic disability client they are already detained and confined outside of their usual home environment.

Right to liberty and security of the person

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’.²⁷

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.

Mandatory isolation impacts a person’s right to liberty. While a person outside of the FDS would be subject to similar isolation requirements, for a forensic disability client they are already detained and confined outside of their usual home environment. However, the amendments may support the right to security as the reason for the isolation is to promote the health and safety of the client and others within the FDS facility, and in particular enable compliance with a public health direction to isolate.

Humane treatment when deprived of liberty

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 UN standards which cover matters such as accommodation conditions, adequate food, personal hygiene, clothing and bedding standards, exercise, and medical services. 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.

These amendments may limit the right to humane treatment when deprived of liberty, as they will require more restrictive detention than otherwise required, and isolation from other clients while detained.

²⁷ *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing).

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

The purpose of the amendment and the limitation on the identified rights is to ensure the FDS can comply with the public health directives issued due to the COVID-19 emergency. Protecting the health, safety and wellbeing of people in the Queensland community from the risk posed by COVID-19 and its spread promotes the right to life (protected under section 16 of the HR Act) in the context of the positive obligations that right places on the State in relation to protecting the health and safety of its citizens. This is a proper purpose consistent with a free and democratic society based on human dignity, equality and freedom.

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

Ensuring that a forensic disability client can be directed to isolate at the FDS for a stated period, under the PH Act, helps to achieve the purpose of preventing the spread of COVID-19 to other people within the FDS.

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

No less restrictive and reasonably available ways to achieve the purpose of the amendment have been identified.

The FD Act requires any function or power under the Act relating to a forensic disability client to be exercised or performed so that ‘the client’s liberty and rights are adversely affected only if it is the least restrictive way to protect the client’s health and safety or to protect others’ and ‘any adverse effect on the client’s liberty and rights is the minimum necessary in the circumstances’. By clarifying that isolation powers can apply to a client within the FDS, forensic disability clients will be subject to isolation only to the extent required to respond to any risks related to COVID-19, and for a maximum period of 14 days within the FDS. This may include permission to leave the place for stated purposes or in stated circumstances.

The amendment is also a temporary measure and will expire on 31 December 2020.

- (e) the balance between the importance of the proposed amendment, 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 preventing the spread of COVID-19 outweighs the limitation on the rights to freedom of movement, humane treatment while deprived of liberty, and right to liberty and security that may occur as a result of these amendments.

- (f) any other relevant factors

Not applicable.

Amendments to the *Forensic Disability Act 2011* clarifying that the ability for persons to visit a Forensic Disability Service is subject to requirements under the *Public Health Act 2005*, and powers to refuse entry under the *Forensic Disability Act 2011* may be exercised to exclude particular visitors to the Forensic Disability Service that would otherwise be allowed to visit, if necessary to comply with public health directions

(a) the nature of the right

These amendments to the FD Act limit the right to recognition and equality before the law; right to humane treatment when deprived of liberty; and right to health services.

Right to recognition and equality before the law

The right to recognition and equality before the law 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’.²⁸

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.²⁹ The right protects individuals from discrimination and provides that every person has the right to equal and effective protection against discrimination.

The amendments limit the right to recognition and equality before the law as a person with disability who is a forensic disability client will not be able to access the same services as a person without disability in certain circumstances. However, a person without disability who is subject to a mandatory self-isolation direction may also be prevented from accessing certain in-person health services to prevent infection and spread of COVID-19.

Humane treatment when deprived of liberty

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).

²⁸ *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869, [279].

²⁹ *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869, [108].

The right is informed by a number of UN standards which cover matters such as accommodation conditions, adequate food, personal hygiene, clothing and bedding standards, exercise, and medical services. 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.

The amendments limit the right to humane treatment when deprived of liberty as a person may be subject to more isolated confinement than is usually permitted under the FD Act if permitted healthcare professional visitors or legal or other advisers are excluded from visiting the client and in turn, are unable to assess or provide advice to the client in person. However, this depends on whether the person is able to receive these visitors under an arrangement with the administrator of the FDS. The proposed amendments also do not restrict communication with clients in the FDS, or the provision of advice, through alternative means such as calling the client. In addition, any restrictions will be time limited and will expire on 31 December 2020.

Right to health services

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.³⁰ 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’.³¹ 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.³²

The amendments may limit the right to access to health services on the basis that it discriminates against a person who is a forensic disability client by preventing physical access to outside health services requested by the client. However, it will not prevent emergency medical treatment and health services being provided to clients at the FDS, or the provision of health advice, through alternative means such as calling the client or electronic means.

³⁰ United Nations Committee on Economic, Social and Cultural Rights, *General Comment No. 14*.

³¹ *Soobramoney v Minister for Health (Kwazulu-Natal)* [1998] 1 SA 765.

³² *Oppelt v Head; Health, Department of Health Provincial Administration: Western Cape* (CCT185/14) [2015] ZACC 33, [67].

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

The purpose of the amendment and the limitation on the identified rights is to ensure the FDS can comply with the public health directives issued due to the COVID-19 emergency, and which aim to prevent the spread and manage impacts of the virus. Protecting the health, safety and wellbeing of people in the Queensland community from the risk posed by COVID-19 and its spread promotes the right to life (protected under section 16 of the HR Act) in the context of the positive obligations that right places on the State in relation to protecting the health and safety of its citizens. This is a proper purpose consistent with the values of a free and democratic society based on human dignity, equality and freedom.

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

Temporarily limiting the ability for visitors identified under section 32 of the FD Act will ensure the FDS and its clients comply with public health directives to prevent the spread and manage impacts of COVID-19. The limitations on human rights resulting from an exclusion of outside persons physically visiting the FDS during the public health emergency directly help to achieve the purpose of the limitation, that is, to ensure the health, safety and wellbeing of forensic disability clients, FDS staff and others who may interact with FDS clients.

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

No less restrictive and reasonably available ways to achieve the purpose of the amendment have been identified.

The FD Act also requires any function or power under the Act relating to a forensic disability client must be exercised or performed so that ‘the client’s liberty and rights are adversely affected only if it is the least restrictive way to protect the client’s health and safety or to protect others’ and ‘any adverse effect on the client’s liberty and rights is the minimum necessary in the circumstances’. This provides an additional safeguard to minimise impacts on human rights.

The amendment is also a temporary measure and will expire on 31 December 2020.

- (e) the balance between the importance of the proposed amendment, 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 preventing the spread of COVID-19 outweighs the limitations on the rights to recognition and equality before the law, humane treatment when deprived of liberty, and right to access to health services that may result as a consequence of this amendment.

(f) any other relevant factors

Not applicable.

Amendments to the *Manufactured Homes (Residential Parks) Act 2003* to regulate how site rent increases or decreases may occur in residential parks during the COVID-19 emergency

(a) the nature of the right

This amendment limits the right to property.

The right to property protects the right of all persons to own property (alone or with others) and provides that people have a right not to 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 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). The right does not provide a right to compensation.

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 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’.

The amendments to the *Manufactured Homes (Residential Parks) Act 2003* (MHRP Act) establish a regulation-making power to regulate how site rent increases and decreases may occur in residential parks, during the COVID-19 emergency. Should it be necessary to exercise the proposed power to regulate how site rent increases or decreases may occur during the COVID-19 emergency, the park owner’s rights will potentially be altered so that additional restrictions or procedures apply to the park owner’s ability to derive profit from their property through the payment of site rent. This will not prevent a park owner from deriving profit from their property but may temporarily limit the extent of the profit or the timing for receiving it.

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

The purpose of the amendment and the limitation on the right to property is to maintain fairness and equality for consumers during a time of unprecedented disruption and uncertainty. The circumstances of the COVID-19 emergency create a range of financial and logistical issues for

manufactured home owners and park owners which potentially makes the ordinary processes for site rent increases and decreases under the MHRP Act difficult to apply.

The Department of Housing and Public Works has received feedback that due to social distancing requirements, some home owners may not be able to engage appropriately in a market review process and may experience disadvantage and stress if the ordinary processes were to be followed during COVID-19.

Home owners may face practical challenges in meeting, and discussing with each other, their concerns about proposed site rent increases and collectively seeking to challenge site rent increases which they believe to be unfair through the dispute resolution processes set out in the MHRP Act.

The combined effect is the potential for a significant imbalance in power in implementing the existing procedures relating to changes in site rent during the COVID-19 emergency. The proposed power allows this issue to be addressed by temporarily modifying the existing framework under the MHRP Act to maintain the same effective balance of rights and protections during the extraordinary period of the COVID-19 emergency.

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

The power to modify how site rent increases or decreases may occur will help to achieve the purpose of supporting older and potentially vulnerable Queenslanders and maintain a fair balance of rights and obligations during the COVID-19 emergency.

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

No less restrictive and reasonably available ways of achieving the purpose have been identified. While some park owners have implemented temporary 'work-around' processes in cooperation with their home owners to manage market rent reviews, it is recognised that other park owners and their home owners may not be able to achieve such an outcome.

The existing processes for changes to site rent are contained within the MHRP Act and the stakeholder concerns cannot be achieved through other mechanisms. The creation of a head of power allows for the progression of targeted, time-limited amendments made in consultation with industry and consumers. This method of making adjustments to the respective rights and obligations of park owners and manufactured home owners in respect of their accommodation is the least restrictive and reasonably available way to achieve the purpose of the amendments.

The power to make a regulation and the exercise of that power must be compatible with human rights under section 58 of the HR Act. Any regulation must also be accompanied by a human rights certificate under section 41 of the HR Act which details whether and how, in the responsible Minister's opinion, the subordinate legislation is compatible with human rights.

The amendment, and any regulations made under it, are temporary measures and will expire on 31 December 2020.

- (e) the balance between the importance of the proposed amendment, 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, allowing a regulation to be made to maintain fairness and equality for home owners and park owners in residential parks during a time of unprecedented disruption and uncertainty, outweighs the limitations on the park owner's right to property that may occur under a regulation.

- (f) any other relevant factors

Not applicable.

Amendment to the *Mental Health Act 2016* to allow the Chief Psychiatrist to grant leave from an Authorised Mental Health Service during the COVID-19 emergency

- (a) the nature of the right

Involuntary patients can be detained at an AMHS specified in an order made under the *Mental Health Act 2016* (MH Act) by an authorised doctor, the Mental Health Court or the Mental Health Review Tribunal. These MH Act orders cannot be overridden by a detention order or public health direction given under the PH Act. There is a risk that this may result in a conflict between a detention order or public health direction under the PH Act and a requirement to be detained at an Authorised Mental Health Service (AMHS) under a MH Act order.

These amendments therefore give the Chief Psychiatrist discretion to grant a person leave from an AMHS during the COVID-19 emergency, if the Chief Psychiatrist is satisfied that it is necessary to ensure compliance with a detention order or public health direction under the PH Act in relation to the COVID-19 emergency. In granting leave, the Chief Psychiatrist must be satisfied that the approval does not result in an unacceptable risk to a range of safety and welfare matters concerning the patient and other people

These amendments limit the freedom of movement; right to liberty and security of the person; and right to health services.

Freedom of movement

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.

The amendments may limit a person's freedom of movement by facilitating a requirement of a detention order or a public health direction given under the PH Act.

Right to liberty and security of the person

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’.³³

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.

The amendments may limit a person’s right to liberty and security of person by facilitating a detention order or a public health direction given under the PH Act.

Right to health services

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

³³ *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing).

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

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

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

The amendments may limit a person's right to health services to the extent that a person with a mental illness who is directed to stay at a place that is not an authorised mental health service may receive community treatment that is at a lower standard to inpatient care.

(b) the nature of the purpose of the limitation to be imposed under the proposed amendment 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 limitations on human rights is to ensure a person can comply with a detention order or public health direction relating to the COVID-19 emergency. The Chief Health Officer makes a public health direction to contain, or respond to, the spread of COVID-19 within the community. A detention order for a person having or suspected of having COVID-19 is made to contain the spread of the disease. Containing the spread of COVID-19 provides a direct health benefit to the broader community.

Protecting the health, safety and wellbeing of people in the Queensland community, including those in the State's care, from the risk posed by COVID-19 and its spread promotes the right to life (protected under section 16 of the HR Act) in the context of the positive obligations that right places on the State in relation to protecting the health and safety of its citizens. This is a proper purpose consistent with a free and democratic society based on human dignity, equality and freedom.

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

Containing the spread of COVID-19 within the community may be achieved through detention orders and public health directions. This is because COVID-19 is a communicable disease that may be easily transmitted between people. Quarantine and self-isolation are proven ways to slow the transmission of COVID-19, particularly to vulnerable persons who may develop complications or otherwise require emergency or life-sustaining treatment. The amendments achieve the purpose by facilitating a requirement of a detention order or public health direction under the PH Act.

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

The amendments are the least restrictive and most reasonable way to achieve the purpose of containing the spread of COVID-19 within the community because they facilitate a detention order or a public health direction. If the amendments are not made, a person who is detained at an authorised mental health service may be unable to comply with a requirement of a detention order or a public health direction under the PH Act.

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

While a person who ordinarily receives inpatient mental health care may receive a lower standard of health care in the community where the person is directed to stay at a place other than an AMHS because of a detention order or public health direction, any difference in the standard of medical care is likely to be minimal and the benefit of protecting the health of the person and broader community outweighs any reduction in standard of care. Further, the power to authorise a person to leave an AMHS will only be used as a last resort where the person cannot be transferred to another authorised mental health service.

This amendment is also a temporary measure that will expire on 31 December 2020

(e) the balance between the importance of the proposed amendment, 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 amendments ensure a person can comply with a requirement of a detention order or public health direction under the PH Act. The purpose of a detention order or public health direction is to contain the spread of COVID-19 to the benefit of the broader community. The effect of complying with a detention order or public health direction will not result in additional limitations to the freedom of movement or right to liberty for a person who is ordinarily detained in an authorised mental health facility because the person will simply have to stay at another place. The health benefits to the broader community of allowing a person to comply with a detention order or public health direction relating to COVID-19 outweighs any potential limitation on the person's freedom of movement or right to liberty and security of person.

(f) any other relevant factors

Not applicable.

Amendments to the *Police Powers and Responsibilities Act 2000* to enable court-ordered COVID-19 testing of persons suspected of committing particular offences

(a) the nature of the right

Protection from torture and cruel, inhuman or degrading treatment

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.

Relevantly, the right 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 will be limited under Queensland law in situations including, for example,

where consent is provided by another person, such as a court, doctor or a parent or guardian; in an emergency; where a person is incapable of giving consent; or where involuntary treatment is permitted under specific legislative schemes.

The right not to be subject to medical treatment without full, free and informed consent is limited by the amendments as they create capacity for medical testing of an individual for COVID-19 to be undertaken by a court order, in a situation where a person has refused to give consent for the testing.

Privacy and reputation

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.’ 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.

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 authorised by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the ICCPR. 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. 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’.

The right to privacy is limited by the amendments in two respects – firstly, the medical procedure for COVID-19 testing interferes with an individual’s bodily privacy, and secondly, the amendments allow for the release of the COVID-19 testing results to specific persons (the individual in question, the alleged victim and their health care professional or person providing counselling, and a person nominated by the Chief Executive (Health) as requiring this information). However, the amendments only provide for the release of the testing results themselves, and the released information will not disclose the identity of the person to whom they relate.

Protection of families and children

The right to protection of families and children 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 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.

The right to protection of children is limited by the amendments as they apply the COVID-19 testing regime to children.

Right to liberty and security of person

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'.

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. 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. 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 liberty is limited by the amendments as they enable a person to be detained for the purpose of this testing to be undertaken, and also to the extent that there is the potential for a person to be imprisoned for contravention of the offence relating to unlawful disclosure of the results of a COVID-19 test.

(b) the nature of the purpose of the limitation to be imposed under the proposed amendment 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 there is an ability, in a situation where an individual has spat or coughed on another person, to obtain medical confirmation as to whether the individual is carrying the COVID-19 virus and may, therefore, have transmitted it to an alleged

victim. By gaining rapid knowledge of whether a relevant individual was positive for COVID-19, the amendments enable an alleged victim to seek medical attention and tests, and also to take any necessary proactive measures (such as isolation) to protect against any potential spread of COVID-19 to their family and within the broader Queensland community.

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 places 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.³⁷

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

The limitation on the rights, which involves ensuring there is a clear lawful ability to carry out medical testing on an individual for COVID-19 in a situation where they otherwise have not provided consent for the testing and also ensures there is an ability to disclose the test results to appropriate persons, is directly related to achieving the purpose of the amendments. The ability to obtain confirmation of any positive or negative COVID-19 test result quickly is essential to enable the persons involved to take appropriate measures to prevent the spread of COVID-19. Without testing and knowledge of the outcome of those test results, appropriate treatments and any necessary proactive isolation behaviours cannot be carried out.

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

No other less restrictive reasonably available ways to achieve the purpose have been identified.

There are a number of protective safeguards provided for in the amendments which ameliorate the impact on the right not to be subjected to medical treatment without full, proper and informed consent.

Importantly, a person can only be tested for COVID-19 without their consent with the approval of a Magistrate, providing crucial judicial oversight to ensure the procedure is only carried out where appropriate and necessary. All testing for COVID-19 is undertaken by medical professionals who make every effort to ensure the testing procedure is as minimally invasive as possible.

Additionally, the amendments create an offence for disclosure of the personal testing information to persons other than those specified. A further offence is also created if persons who are in lawful receipt of this information unlawfully disclose it to others (however, this offence does not apply to an alleged victim or relevant person unless it is a public disclosure through the mass media by either the alleged victim identifying the relevant person, or the relevant person identifying the alleged victim). To further protect the relevant person's privacy

³⁷ Aharon Barak, *Proportionality: Constitutional Limits and Their Limitations* (Cambridge University Press, 2012) 255-6.

the scheme provides that the *Public Records Act 2002* does not apply to activities or records to the extent that it would otherwise enable the identity of the person in relation to whom a COVID-19 test order is made or of a victim of the relevant assault offence to be disclosed.

Further, in so far as the COVID-19 testing regime will apply to children, the amendments contain a range of safeguards that recognise the particular vulnerability of children including: that the application must be heard by the Childrens Court with as little delay as possible and in the absence of the public; and that during any testing for COVID-19 the police officer must ensure that a support person is present for the child if reasonably practicable

(e) the balance between the importance of the proposed amendment, 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, having regard to the matters set out above, the importance of ensuring testing can be undertaken for COVID-19 in a situation where exposure or transmission of the virus is possible and the testing results appropriately disclosed to relevant persons, which in turn combats the spread of COVID-19 in the Queensland community, outweighs the limitation on the right not to be subjected to medical treatment without full, proper and informed consent, the right to privacy, right to protection of children and the right to liberty.

(f) any other relevant factors

Not applicable.

Amendments to the *Public Health Act 2005* to delegate powers to authorise the disclosure of confidential information

(a) the nature of the right

COVID-19 is prescribed by regulation to be a notifiable condition under the PH Act. This requires doctors, persons in charge of hospitals and directors or pathology laboratories to notify the Chief Executive of confirmed or suspected cases of COVID-19. Once a notification is made, the details of the person to whom the condition relates are entered into the Notifiable Conditions Register.

A relevant person must not disclose confidential information relating to notifiable conditions unless permitted under the PH Act. The Chief Executive may authorise a relevant person to disclose the confidential information if the Chief Executive believes on reasonable grounds that the disclosure is in the public interest. This power can be delegated only to the Chief Health Officer or one public service officer, employee or health service employee. Under current arrangements, the Chief Health Officer has been delegated this power.

Further, a relevant person must not disclose confidential information supplied for contact tracing unless permitted under the PH Act. The Chief Executive may authorise a relevant person to disclose the confidential information if the Chief Executive believes on reasonable grounds that the disclosure is in the public interest. This power cannot be delegated to another person.

It is not practical for the Chief Executive or Chief Health Officer to authorise every instance of a disclosure of confidential information in the public interest during the COVID-19 emergency as this would unnecessarily divert critical resources from leading the State's response to the COVID-19 emergency. The amendments therefore allow the Chief Executive to delegate the powers to the Chief Health Officer and one more delegate.

These amendments limit the right to privacy and reputation.

Right to privacy and reputation

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.'³⁸ 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.³⁹

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 authorised by States can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the ICCPR.⁴⁰ 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.⁴¹ 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'.⁴²

The right to privacy and reputation could be said to be limited by the amendments to the extent they will allow the Chief Executive to delegate the power to authorise the disclosure of confidential information in the public interest to additional persons. However, the lawful disclosure of the confidential information (once the amendments are made) will not be arbitrary because it can only be made in the public interest and by a limited class of persons. The Chief Executive can only delegate the powers to authorise a disclosure to a person other than the

³⁸ *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).

³⁹ *Coeriel and Aurik v The Netherlands* (Communication No 45/1991) [10.2].

⁴⁰ United Nations Human Rights Committee, *General Comment No. 16*.

⁴¹ *Sunday Times v United Kingdom* [1979] ECHR 1, [49].

⁴² *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing).

Chief Health Officer who is a public service officer or employee, or health service employee who is an experienced public health expert.

- (b) the nature of the purpose of the limitation to be imposed under the proposed amendment 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 limitation on the right to privacy is to reduce the administrative burden on the Chief Executive and Chief Health Officer during the COVID-19 emergency. It is not practical for the Chief Executive and Chief Health Officer to authorise every disclosure of confidential information relating to notifiable conditions in the public interest. The amendment is consistent with a free and democratic society based on human dignity, equality and freedom because it facilitates the disclosure of the information in the public interest where the Chief Executive or Chief Health Officer need to focus on leading the State's response to the COVID-19 emergency.

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

The potential limitation achieves the purpose by allowing additional persons to authorise the disclosure of confidential information. This will reduce the administrative burden of the Chief Executive and Chief Health Officer during the COVID-19 emergency.

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

No less restrictive and reasonably available ways of achieving the purpose have been identified. The amendments are the best way to reduce the administrative burden of the Chief Executive and Chief Health Officer during the COVID-19 emergency. Without the amendments the Chief Executive or Chief Health Officer would need to authorise every instance of a disclosure of confidential information relating to a notifiable condition where the disclosure is in the public interest. Importantly, the delegation power is appropriately restricted to one other person in addition to the Chief Health Officer.

This amendment is also a temporary measure that will expire on 31 December 2020

- (e) the balance between the importance of the proposed amendment, 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 benefit of reducing the administrative burden on the Chief Executive and Chief Health Officer during the COVID-19 emergency outweighs the potential limitation on a person's right to privacy because a disclosure is made in the public interest and the power to authorise the disclosure can only be delegated to the Chief Health Officer and an experienced public health expert.

(f) any other relevant factors

Not applicable.

Amendments to the *Public Health Act 2005* to allow an emergency officer to give a direction to a parent of a child to keep the child isolated

(a) the nature of the right

The *Public Health Act 2005* (PH Act) currently provides that an emergency officer may give a person a direction to stay at or in a stated place (for example, the person's home) for a stated period of not more than 14 days. A child may be given a direction in circumstances where a person responsible for a child (for example, a parent) is not the subject of the same direction. The amendment supports compliance and enforcement of a direction to a child where the child may not have capacity to understand the direction by allowing an emergency officer to give a direction to a parent of a child to keep the child at or in a stated place for a stated period of not more than 14 days. This amendment limits the freedom of movement and right to liberty and security of the person.

Freedom of movement

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.

The freedom of movement is limited by the amendment as it requires a parent to ensure a child stays at or in a place for a period of not more than 14 days.

Right to liberty and security of the person

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'.⁴³

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

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

(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.

The right to liberty and security is limited by the amendment as it requires a parent to ensure a child stays at or in a place for a period of not more than 14 days.

(b) the nature of the purpose of the limitation to be imposed under the proposed amendment 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 limitations on human rights is to ensure compliance with a direction given to a child to isolate for not more than 14 days, especially where the child does not have capacity to understand the direction. This is necessary to assist in containing, or responding to, the spread of COVID-19 within the community. Protecting the health, safety and wellbeing of people in the Queensland community from the risk posed by COVID-19 and its spread promotes the right to life (protected under section 16 of the HR Act) in the context of the positive obligations that right places on the State in relation to protecting the health and safety of its citizens. This is a proper purpose consistent with a free and democratic society based on human dignity, equality and freedom.

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

Containing the spread of COVID-19 within the community may be achieved through a direction to quarantine or isolate. This is because COVID-19 is a communicable disease that may be easily transmitted between people. Quarantine and isolation are proven to slow the transmission of COVID-19 and are indispensable to the State's ability to effectively contain and limit the spread of the disease, manage and respond to outbreaks and ensure that the health system has the capacity to provide treatment to vulnerable and other persons who require urgent medical care. The amendment achieves the purpose by allowing an emergency officer to give a direction to a parent of a child to keep the child isolated for not more than 14 days. This is the only practicable way to ensure that children comply with quarantine and isolation requirements.

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

No less restrictive and reasonably available ways of achieving the purpose have been identified. The only practicable way to ensure compliance with a direction given to a child to quarantine or isolate is to impose a corresponding legal obligation on the child's parent. Ensuring compliance with these directions is essential to slowing the transmission of COVID-19 and protecting the health of the community.

The amendment is narrowly tailored. A direction issued by an emergency officer will be for a period of not more than 14 days. Further, the power can only be exercised by emergency officers who are appointed by the Chief Executive and have the necessary expertise and experience to fulfil the role. The direction can only be given if an emergency officer reasonably

believes that it is necessary to assist in containing, or responding to, the spread of COVID-19. The power to give the direction also applies to a limited class of persons (that is, it can only be given to a parent of a child).

This amendment is also a temporary measure that will expire on 19 March 2021.

(e) the balance between the importance of the proposed amendment, 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 where necessary a direction can be given to a parent of a child to ensure the child stays isolated for a period of not more than 14 days to contain any spread of COVID-19, and the broader health benefits this provides to the broader community, outweighs the limitation on the freedom of movement and right to liberty and security of person.

(f) any other relevant factors

Not applicable.

Conclusion

In my opinion, the Justice and Other Legislation (COVID-19 Emergency Response) 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.

Steven Miles MP
Deputy Premier
Minister for Health and Minister for Ambulance Services

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