

Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021

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, Mark Ryan, Minister for Police and Corrective Services and Minister for Fire and Emergency Services make this statement of compatibility with respect to the Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021.

In my opinion, the Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021 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

The objective of the Bill is to improve the delivery of policing services, reduce administrative processes, streamline police operations, increase productivity, and improve the detection, prevention and disruption of crime.

This objective is achieved through amendments that:

- enable senior police officers to witness certain affidavits;
- enable the Commissioner of Police to authorise special constables and non-state police officers to exercise powers available to Queensland police officers;
- allow police to apply for an access order to a digital device in circumstances where the device was seized under a search warrant issued by a Justice of the Peace or where the device was otherwise lawfully seized;
- improve drug and alcohol testing procedures for police officers involved in critical incidents;
- extend the permitted 'safe keeping' period under the *Weapons Act 1990* to six months;
- improve the operation of the permanent firearms amnesty in relation to firearms anonymously surrendered to approved licenced firearms dealers; and
- enable authorised civilians to use evidentiary certificates for weapons classifications.

Authorising senior police officers to witness certain affidavits

The Bill amends the *Oaths Act 1867* and creates the *Oaths Regulation 2021* to enable senior police officers to take certain affidavits. The object of the proposed amendments is to remove administrative burdens on police by including police officers as persons who are authorised to take an affidavit from another police officer for specific purposes. Currently, police officers spend a significant amount of time locating and travelling to a Justice of the Peace (JP) or a Commissioner for Declarations (Cdec) to affirm or swear the truth of a document.

The Bill prescribes the following affidavits as those that can be taken by a police officer:

- Affidavits used in bail proceedings under the *Bail Act 1980* and the *Youth Justice Act 1992*;

- Affidavits to prove the service of documents;
- Sworn applications made under section 801(4)(a) of the *Police Powers and Responsibilities Act 2000* (PPRA).

Prescribed police officers able to witness affidavits

The Bill will not enable all police officers to witness the documents delineated above. The Bill limits this function to a police officer who is:

- An officer-in-charge of a station, establishment or watchhouse or a police officer nominated to be in charge of a police station, establishment or watchhouse in the absence of the officer-in-charge;
- A watchhouse manager; or,
- A police officer of, or above the rank of sergeant.

Bail Affidavits

Affidavits used in bail proceedings are completed by arresting officers to inform the court of information relevant to determining whether a person should be bailed or remanded in custody.

In 2020, a time and motion study was completed with plain-clothes units to identify the time taken to locate an available JP to finalise bail documentation. This analysis of 6,321 bail affidavits revealed that the time taken to locate and attend a JP ranged from 30 minutes to 2 hours, with an average of 60 minutes to have a document sworn and signed. These proposed amendments would potentially save between 5,491 and 21,924 hours of officers' time annually or approximately 14.5 full time equivalent positions.

Affidavits to prove service

Police are required to serve a large number of documents as part of various court processes. Proof of service is generally required in Queensland by way of affidavit. In the affidavit police swear or affirm that they served the document and the circumstances under which it was served.

Affidavits – urgent and remote applications

Sections 800 (Obtaining warrants, order and authorities, etc., by telephone or similar facility) and 801 (Steps after issue of prescribed authority) of the PPRA, allow police to obtain a 'prescribed authority' (a warrant, approval, production notice, production order, or another authority) by telephone or similar facility.

Pursuant to section 800 of the PPRA a police officer can apply for a prescribed authority – prior to swearing the application - by phone, fax, radio, email or another similar facility if the officer considers it necessary because of urgent circumstances or the officer's remote location. Section 801 of the PPRA outlines the procedure that must be followed if the prescribed authority has been issued.

Under section 801 of the PPRA, once a prescribed authority is issued, the issuing authority (e.g. magistrate) is required to fax a copy of the prescribed authority to the police officer where it is practicable to do so. Where this is not practicable, the police officer completes the prescribed authority. Following the exercise of the powers permitted under the authority the police officer must swear the application, and at the first reasonable opportunity, must send the prescribed authority and the sworn application to the issuing authority.

The Bill amends the PPRA to enable the swearing of the grounds for the application for section 801(4)(a) of the PPRA to be witnessed by a senior police officer under the *Oaths Act*. This

amendment only allows a senior police officer to witness a prescribed authority application in circumstances where the authority has already been applied for by telephone or similar facility and issued by the issuing authority. Given that the authority has already been issued on the unsworn application made to the issuing authority and that the powers have already been exercised, the post-swearing of the application is done to affirm the truth of the application.

The Bill also amends section 801 of the PPRA to enable an issuing authority to send the prescribed authority by electronic means, including email. Currently, section 801 of the PPRA only allows this to be done by fax machine.

Audio-visual witnessing

Under the Bill, the *Oaths Regulation* will enable senior police officers to witness the aforementioned documents by audio visual link under separately proposed amendments to part 6A of the *Oaths Act 1867*. This will mean that a senior police officer will be able to take an oath or affirmation with respect to one of the aforementioned documents via AV link. In the case of affidavits for bail hearings, AV witnessing will only be available in circumstances where it is not practicable to witness the document in person.

Allowing witnessing by AV link will be of utility in remote areas of Queensland where access to a senior police officer may be limited.

Access Orders for seized digital devices

The current digital access order scheme does not permit a magistrate or Supreme Court judge to make an order where a digital device is seized under a search warrant issued by a JP or otherwise lawfully seized under the PPRA. Furthermore, if a magistrate or a Supreme Court judge makes an order in a search warrant but, for reasons beyond police control, the digital device is seized under a provision of the PPRA not the search warrant, police cannot apply for a further access order.

The Bill amends section 154A of the PPRA to enable a police officer to apply to a magistrate or Supreme Court judge for an access order where the search warrant was issued by a JP or where the digital device was lawfully seized under a provision of the PPRA.

The amendments allow an access order to be made only if the magistrate or judge is satisfied there are reasonable grounds for suspecting that device information from the digital device may be evidence of a crime scene threshold offence or an offence against sections 223 (Distributing intimate images), 227A (Observations or recordings in breach of privacy) and 227B (Distributing prohibited visual recordings) of the Criminal Code.

Queensland Police Service (QPS) alcohol and targeted substance testing

Critical incident definition

Part 5A (Alcohol and drug tests) of the *Police Service Administration Act 1990* (PSAA) provides for the alcohol and substance testing of relevant persons (police officers and certain unsworn staff), who are involved in a ‘critical incident’.

The Bill amends the definition of ‘critical incident’ in section 5A.2 (Definitions for Pt 5A) of the PSAA to include:

- deaths occurring in the course of, or as a result of, police operations (to align with the definition of reportable death in section 8(3)(h) of the *Coroners Act 2003*); and,
- incidents where a person suffers from injuries consistent with the Criminal Code definition of ‘grievous bodily harm’ while in police custody or in the course of, or as a result of, police operations; and,

- the accidental discharge of a firearm in circumstances that caused, or could have caused, injury to a person.

The Bill also amends the existing definition of a critical incident in section 5A.2 of the PSAA to exclude the use of less than lethal rounds which are currently captured by subsection (a) of that definition.

The use of saliva testing

The Bill also amends the targeted substance testing regime to include saliva testing as an alternative to urine testing, which requires nursing staff and the QPS Alcohol and Drug Testing Coordinator in Brisbane to travel to the scene of the incident. There is no reduction in the level of oversight or seniority of the officer who is authorised to make the requirement for the provision of specimens. Saliva testing, like urine testing, will still be undertaken at the direction of a commissioned officer who is of a higher rank than the officer being tested.

The use of saliva testing will also reduce impacts on covert operations in relation to the periodical testing of operatives. An operative will not have to travel to another location to provide a urine sample. An officer, authorised by the Commissioner to take saliva samples, will be able to take and test the samples discretely.

Enabling the Commissioner to authorise Special Constables and non-State police officers to exercise any powers available to Queensland police officers

The Bill amends sections 5.16 (Special Constables) and 5.17 (Authorisation of non-State police officers) of the PSAA to allow special constables and non-State police officers to exercise police powers in Queensland, subject to the limitations imposed by the Commissioner.

Section 5.16 of the PSAA, currently provides a power to appoint special constables to assist in the effectual administration of the PSAA and the efficient and proper discharge of the Commissioner's responsibilities. However, the existing provision is ambiguous as to the scope of powers that can be exercised by special constables and whether the powers, include powers under an Act other than the PSAA.

The Bill amends the PSAA to clarify that the Commissioner may authorise special constables to exercise any or all the powers available to a Queensland police officer. The powers that can be exercised remain subject to any limitations imposed by the Commissioner in their appointment as special constables.

Section 5.17 of the PSAA gives the Commissioner of Police the power to appoint police officers from other Australian jurisdictions as non-state police officers. The power to appoint non-state officers only applies in circumstances where there has been a terrorist act or, where there is an imminent threat of one, and the urgent assistance of police officers from other Australian police agencies is required. In such circumstances, due to the urgency of the situation, it may be impracticable to appoint these officers as special constables. The effect of the appointment is to give the non-state police officer the powers that Queensland police officers have under the PPRA.

However, police powers sit across a number of Acts. For example, the *Terrorist (Preventative Detention) Act 2005* and the *Disaster Management Act 2003* provide powers to Queensland police officers but could not be used by non-state police officers under the existing s 5.17 of the PSAA. The Bill amends the PSAA to enable the Commissioner to allow non-state police officers to exercise powers held by Queensland police officers that are not within the PPRA.

The amendments remove any confusion about the role of officers from other jurisdictions when they come to Queensland to assist with major events, disasters, or terrorism incidents.

Extending time period for the temporary possession of weapons to six months

Sections 35 (Acquisition of weapons) and 36 (Sale or disposal of weapons) of the *Weapons Act* enable the temporary storage of a firearm by a licence holder on behalf of another for up to three months. This commonly occurs when a person's weapons licence expires, is suspended due to court or serious health matters, or during the administration of deceased estates. The three months temporary possession limit is often insufficient, especially during the administration of deceased estates. The Bill extends the period under these sections to six months. This extension overcomes the need to unnecessarily reinstitute administrative processes.

Enabling civilian technical officer to use evidentiary certificates for the *Weapons Act 1990*

Currently, only a police officer can use the evidentiary provisions in s 163 of the *Weapons Act* to state that a thing falls within a weapons category. To enhance the management of workloads in the QPS Ballistics Section, the Bill amends s 163 (Evidentiary provisions) of the *Weapons Act* to allow a non-sworn technical officer, who is an approved officer, to prepare a document to be produced as evidence as to the category of a weapon. Section 152 (Approved officers) of the *Weapons Act* enables the Commissioner to appoint police officers and public service officers who have the necessary experience or expertise as approved officers for the *Weapons Act*.

The non-sworn officers who would be approved officers for the purposes of s 163 of the *Weapons Act* will have the same training as police officers who currently perform this function.

Enabling approved licensed firearms dealer to retain and deal with an anonymously surrendered firearm or prescribed thing under the permanent firearms amnesty

At the Ministerial Council for Police and Emergency Management (MCPEM) in November 2019, jurisdictions agreed to the establishment of a permanent national firearms amnesty.

The *Corrective Services and Other Legislation Amendment Act 2020* (the Amendment Act) amended the *Weapons Act* to give effect to the MCPEM resolution by creating a legislative framework for a permanent firearms amnesty in Queensland. These amendments commenced by proclamation on 1 July 2021, to align with the commencement of the national firearms amnesty.

The permanent firearms amnesty framework in Queensland does not allow firearms dealers, who are approved to participate in the amnesty, to retain firearms or other prescribed things, that have been surrendered anonymously.

The Bill amends the *Weapons Act* so that an approved licensed dealer can apply to an authorised officer to dispose of, or otherwise deal with an anonymously surrendered firearm or prescribed thing.

Human Rights Issues

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

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

- Freedom of movement (section 19)
- Property rights (section 24)
- Privacy and reputation (section 25)

- Fair hearing (section 31)
- Rights in criminal proceedings (section 32)

Human Rights Promoted by the Bill

Weapons Act amendments

Property rights

The *Weapons Act* allows for the temporary possession of a weapon on behalf of another in certain circumstances. Section 35 ‘Acquisition of weapons’ of the *Weapons Act* prohibits acquiring a weapon unless the person is a licensed dealer, holds a permit to acquire or acquires the weapon under some other lawful authority, justification or excuse. This section does not apply to the acquisition of a weapon on a temporary basis for not more than three months in circumstances where no consideration has been given.

Similarly, s 36 of the *Weapons Act* prohibits the sale or disposal of a weapon to a person who is not a licensed dealer or to another who is not the holder of a permit to acquire the weapon. This section also prohibits the sale or disposal of a weapon without other lawful authority, justification or excuse. This section does not apply to the disposal of a weapon to a person if the disposal is on a temporary basis for not more than three months and no consideration has been received.

The exemptions described in s 35 and s 36 of the *Weapons Act* cater for such instances where a person comes into possession of a weapon on behalf of a deceased estate or a person disposes of a weapon to another due to the person suffering from medical issues. The Bill will extend for the period for which these weapons may be held from three months to six months to more appropriately reflect that some circumstances, such as deceased estates may take a significant period of time to resolve.

Section 24 ‘Property rights’ of the HRA provides that all persons should not be arbitrarily deprived of property that they own. The Bill promotes this right through extending the period in which a person may possess a weapon before being obliged to either acquire or dispose of it.

If human rights may be subject to limitations if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 of the HRA)

Oaths Regulation amendments -Authorising senior police officers to witness certain affidavits

- (a) The nature of the right

Fair Hearing

The right to a fair hearing affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It guarantees that matters must be heard and decided by a competent, impartial and independent court or tribunal. A basic requirement of the right to a fair hearing is that there is a clear and publicly accessible legal basis for all criminal prosecutions and penalties, so that the criminal justice system can be said to be operating in a way that is predictable to the defendant. It also ensures that a defendant has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to the prosecution (as outlined in the principle of Equality of Arms). The concept of

a fair hearing is concerned with matters of procedural fairness, rather than substantive fairness in relation to the merits of a particular decision.

I am of the opinion that the amendments do not engage the right to fair hearing, as they do not alter the elements of procedural fairness that constitute the right.

However, there may be an alternative view that the amendments do limit this right because they authorise senior police to witness affidavits relating to the proof of the service of documents, bail objections, and urgent or remote applications pursuant to s 801 of the PPRA. If this resulted in less reliable evidence being put before a court, a person's right to fair hearing could be limited.

Notwithstanding this, if I am wrong, I consider that any limitation imposed by the amendments in this Bill are reasonable and demonstrably justifiable as outlined below.

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

The purpose of the amendments is to reduce the need for police time to be spent on a procedural function, that nevertheless form part of the important checks and balances in our justice system, thus alleviating demands on police resources. Those time savings will ultimately be spent performing operational public safety functions that benefit the community.

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

QPS service demands are changing. Crime types, increasingly complex social issues, disaster management support and growing community expectations are all contributing factors to changing demands. Calls for service grew by 48% between 2014-15 and 2018-19, including a 59% increase in calls to triple zero. Since 2020, the QPS has also dedicated significant resources to supporting public health emergency response to COVID19.

The demand that the QPS is facing and the pace at which it is increasing is unsustainable. For example, in 2019-20 police attended 107,518 domestic and family violence incidents, an increase of over 17,000 from 2016-17. To address demand issues and increase frontline effectiveness, the QPS is optimising existing systems and processes to free up resources.

These amendments will alleviate demands on police resources by reducing some of the circumstances in which police are required to locate a Justice of the Peace (JP) or Commissioner for Declarations (Cdec).

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

Reducing some of the circumstances in which police are required to locate a JP or Cdec to witness certain documents is the least restrictive reasonably available way to alleviate demands on operational police.

While there are different ways to achieve this purpose, it is considered that such alternatives are not reasonably available. For example, another way of achieving the purpose of the amendments would be to appoint all police officers as Cdecs. However, this option is not reasonably available because it would require: the diversion of police to attend additional training; additional costs for providing that training; and the subsequent administrative burden on the government agency responsible for maintaining the administrative needs associated with Cdecs.

A range of safeguards are included to ameliorate the impact on the rights. The Bill will not enable all police officers to witness the documents delineated above. The Bill limits this function to a police officer who is:

- An officer-in-charge of a station or establishment or a police officer nominated to be in charge of a police station or establishment in the absence of the officer-in-charge;
- A watchhouse manager; or,
- A police officer of, or above the rank of sergeant.

The QPS will develop a policy framework to guide senior officers in the performance of the new witnessing functions. The policy will address the correct procedure to be undertaken and will include a prohibition against exercising the functions in circumstances that are a conflict of interest.

The policy framework will be included in one of the Service Manuals, that are Commissioner's directions for the purposes of s 4.9 of the PSAA. A breach of a direction given by the Commissioner under s 4.9 is grounds for disciplinary action in accordance with s 7.4(1)(e)(iii) of the PSAA.

- (e) the balance between the importance of the purpose of the 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 one side of the scales is the rights of all persons to a fair hearing. Ensuring that individuals are not adversely and unjustly affected in criminal or civil proceedings is central to ensuring a fair hearing.

On the other side of the scales, there are clear and demonstrable demands for police services and a public expectation that the QPS will protect the community and respond to calls for service in a timely manner, if not immediately in an emergency situation. The proposed amendments will help the QPS to better meet service delivery expectations by making a significant and needed change to reduce the range of circumstances that divert police away from these functions.

If there is any limitation on a person's right to fair hearing it is negligible and outweighed by the overall greater benefit to public safety.

- (f) any other relevant factors

There are examples in other Australian jurisdictions of provisions that enable police officers to prove service of documents by way of a memorandum or certificate of service without any witnessing requirements:

- In South Australia, police can prove service by the completion of a certificate of service and there is no requirement to witness the document: s 28(2) of the *Criminal Procedure Act 1921 (SA)*.
- In Tasmania, police can prove service by way of a memorandum of service pursuant to s 68A of the *Justices Act 2013 (Tas)* which is not required to be witnessed.
- In Western Australia, under s 175 of the *Criminal Procedure Act 2004 (WA)*, service can be achieved by a service certificate that is not required to be witnessed.
- In New South Wales, regulation 5.12(5) of the *Local Court Rules 2009 (NSW)* provides a mechanism for police to prove service by a statement of service that is not required to be witnessed.

PPRA Amendments - Access Orders for seized digital devices

(a) the nature of the right

Property rights

Section 24(2) of the HRA protects against the arbitrary deprivation of property. This right does not provide access to compensation for property and applies to both intangibles and real property. In this context, property rights may rest in the data stored on a digital device.

In a human rights context, ‘arbitrary’ means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.¹ Because questions of proportionality arise when considering justification of limits on human rights under s 13 of the HR Act, these questions are considered further, under headings (b) – (e) below, to assist in determining whether any limitation on the right to property will be arbitrary.

Privacy and reputation

Section 25(a) of the HRA provides that a person has the right to privacy. A right to privacy is a fundamental right which acts as the foundation for many other human rights. By its nature, this right is very broad, extending beyond protections for personal information and data collection. However, this right is qualified as the right to privacy only applies to acts of interference that are unlawful or arbitrary. Information located in a digital device may be about personal information relating to an individual.

Similar to the right to property discussed above, questions of proportionality arise when considering justification of limits on human rights under s 13. For this reason these questions are considered further, under headings (b) – (e) below, to assist in determining whether any limitation on the right to privacy will be arbitrary.

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

The purpose of the amendments is to allow for the effective investigation of serious criminal offences by enhancing the ability of police to retrieve evidence that is stored on a digital device.

Pursuant to s 618 (Power to examine seized things) and s 619 (Extent of power to examine seized things) of the PPRA, where police have a power to seize a digital device, they have the authority to examine and search the digital device.

The current digital access order scheme does not permit a magistrate or Supreme Court judge to make an order where a digital device is seized under a search warrant issued by a JP or otherwise lawfully seized under the PPRA.

The inability to obtain an access order where devices are seized other than under a search warrant issued by a magistrate or Supreme Court judge adversely impacts the investigation of offences. Currently, it is irrelevant how serious the offence is, how well the grounds are addressed, or how urgent the circumstances are, a magistrate or Supreme Court judge is not empowered to issue an access order.

The effective investigation of crime is a proper purpose under s 13(2)(b) of the HR Act.

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

¹ Explanatory notes, Human Rights Bill 2018 (Qld); *PJB v Melbourne Health* (2011) 39 VR 373.

The amendments achieve the purpose by allowing police officers to apply to a magistrate or Supreme Court judge to obtain an access order in circumstances where a digital device has been seized under a warrant issued by a JP or where the device is otherwise lawfully seized under the PPRA. The expansion of the capacity to apply for an access order to these circumstances will make it more likely that police will be able to retrieve evidence of a crime scene threshold offence or a specified technology-based offence. Accordingly, the amendments will help to achieve the purpose of enhancing the effectiveness of investigations of criminal offences.

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

There is no reasonably available and less restrictive way to achieve the purpose identified.

Further, a range of safeguards are included to ameliorate the impact on the rights. For example, the Bill provides that an access information order may only be granted where the digital device has been obtained through a search warrant issued by a justice of the peace or otherwise seized lawfully under relevant provisions of the PPRA. This requires either consideration of a search warrant by a justice or the lawful application of the PPRA by a police officer. Additionally, the Bill does not allow access orders to be made in relation to any digital device. The Bill only permits the making of access orders where a magistrate or judge is satisfied that there are reasonable grounds for suspecting that there is evidence on the digital device of a crime scene threshold offence or an offence against s 223 ‘Distributing intimate images’, s 227A ‘Observations or recordings in breach of privacy’ and s 227B ‘Distributing prohibited visual recordings’ of the Criminal Code.

The information sought via an access order is limited to that sufficient to access the digital device. It should be noted that concerns about the privacy implications for information held on the digital device has to be evaluated in the context in which the information is stored. In this context, the information is held on a digital device reasonably suspected of being evidence of an offence of a serious nature.

- (e) the balance between the importance of the purpose of the 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 one side of the scales, it is recognised that digital devices can contain large volumes of private information and access to those devices would limit the right to privacy of individuals who are subject to an access order. The retention of a digital device that has been lawfully seized for the purpose of obtaining an access order could also be regarded as impacting on property rights.

On the other side of the scales is the need for police investigations not to be hampered through an offender denying police access to the information held within a digital device. It is clearly in the public interest that legitimate police enquiries are not unduly frustrated.

Concerns about a person’s human rights are also mitigated as access orders are only available for the investigation of comparatively serious offences.

Because the impact on property rights and the right to privacy is not disproportionate, the impact is therefore not arbitrary. It follows that while these amendments engage these rights, in my opinion they do not limit them. However, even if property rights and the right to property are limited, the limitations are nonetheless reasonable and demonstrably justified.

(f) any other relevant factors

It should be noted that police officers currently may seek an order from a magistrate or judge for access information. The proposed amendment is an extension of existing processes already endorsed by Parliament.

PSAA amendments - Queensland Police Service drug and alcohol testing

(a) the nature of the right

Freedom of movement

Section 19 of the HRA ensures an individual has the right to move freely within Queensland and to enter and leave it, and has the freedom to choose where to live. The right to freedom of movement is broad in nature, however for the purposes of the alcohol and drug testing amendments in the Bill, the potential limitation of the right occurs where a person is obliged to remain at a place to permit or undergo a test required under the provisions.

Privacy and reputation

Section 25(a) of the HRA outlines that a person has the right not to have the person's privacy arbitrarily or unlawfully interfered with. The amendments may limit this right as the provision of saliva for testing would reveal the bodily condition of the person. Additionally, the amended definition for critical incidents expands the range of circumstances which would allow the QPS drug and alcohol testing regime to apply.

In a human rights context, 'arbitrary' means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to a legitimate aim sought.² Because questions of proportionality arise when considering justification of limits on human rights under section 13 of the HR Act, it is advisable to consider these questions below (under headings (b) – (e)) before making a determination as to whether any limitation on the right to privacy will be arbitrary.

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

The purpose of the amendments is to allow drug and alcohol testing of police officers in a greater range of circumstances and to facilitate the use of more efficient and less invasive forms of substance testing (saliva testing).

The expansion of the critical incident definition is consistent with the public expectation that deaths occurring in custody are appropriately investigated.

A robust drug and alcohol testing regime is required as police officers are, due to their position, entrusted to protect others and are authorised to use force in the performance of their duties. Police officers with substance abuse problems are more likely to engage in poor decision-making and poor behaviour adversely impacting upon their professionalism and effectiveness. The amendments in the Bill ensures that the QPS alcohol and drug testing regime continues to:

- support the health, welfare and safety of QPS members;
- promotes the public confidence in the QPS; and
- enhances the integrity of the QPS.

² Explanatory notes, Human Rights Bill 2018 (Qld); *PJB v Melbourne Health* (2011) 39 VR 373.

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

The amendments achieve the purpose by expand the circumstances that will constitute a critical incident to more appropriately reflect recent amendments made to the definition of *reportable death* under s 8 of the *Coroners Act 2003*. This Bill will define critical incidents to include instances where a person dies or suffers injuries consistent with the definition of ‘grievous bodily harm’ while in custody or in the course of or as a result of police operations that timely action is taken to obtain the necessary samples.

The amendments further achieve the purpose by facilitating the use of saliva testing which is quicker and less invasive on an officer who has just been involved in a critical incident.

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

There is no reasonably available and less restrictive way to achieve the purpose identified.

Further, the provision of saliva testing does not significantly impact upon a subject’s human rights as it is simply an alternative testing process to that currently employed in the QPS drug and alcohol testing regime. Saliva testing will improve this regime as it is a superior method of sampling when compared to urine testing. Saliva testing is more efficient, and more convenient than urine testing and may be considered to be less invasive or stressful to the relevant person.

- (e) the balance between the importance of the purpose of the 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 one side of the scales requiring police officers to undergo substance testing in a broader range of circumstances than currently exists may impact the rights of freedom of movement and privacy. The extent of the impact on rights is minimal given the circumstances under which substance testing can be performed are still limited.

On the other side of the scales is the importance of preserving public confidence in the QPS and the ensuring the integrity of police officers is maintained.

On balance, the purpose of the proposed amendment outweighs the potential limited impact on a relevant person’s rights, noting the absence of suitable alternative testing methods and the significant risk to members of the community and other members of the QPS if police officers perform their duties when adversely affected by drugs or alcohol.

Because the impact on the right to privacy is not disproportionate, the impact is therefore not arbitrary. It follows that while these amendments engage this right, in my opinion they do not limit it. However, even if the right to privacy is limited, the limitation is nonetheless reasonable and demonstrably justified. Likewise, the limitation on the freedom of movement is reasonable and demonstrably justified.

- (f) any other relevant factors

The QPS drug and alcohol testing regime already applies to police officers, watchhouse officers and staff who work in critical areas as defined under the PSAA. The proposed amendment is an extension of existing processes already endorsed by Parliament.

Weapons Act - Amnesty provisions

(a) the nature of the right

Rights in criminal proceedings

The right under s 32 of the HRA is limited where a person charged with a criminal offence is deprived of the right to be presumed innocent until proven guilty according to law.

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

The purpose of the amendments is to ensure the effective operation of the permanent firearms amnesty provisions in the *Weapons Act* by allowing approved firearms dealers to dispose of, or otherwise deal with, an anonymously surrendered firearm or prescribed thing where they have the approval of an Authorised Officer, Weapons Licensing, QPS.

The Bill amends the existing strict liability offence under s 168B(4) of the *Weapons Act*, which requires a participating firearms dealer to give firearms or prescribed things, surrendered anonymously under the amnesty provisions, to a police officer.

To achieve the purpose, the Bill changes this offence provision so that it will not apply if the licenced dealer has been issued an authorisation for the firearm or prescribed thing. It further amends the existing strict liability offence so that the offence will not apply if the dealer has a reasonable excuse. The Bill expressly provides that a dealer will have a reasonable excuse for not surrendering the firearm in circumstances where they are seeking an authorisation from the QPS to destroy or retain the firearm or prescribed thing.

In providing a reasonable excuse exemption, the amendments place the onus on a person charged with this offence to demonstrate that they have a reasonable excuse. However, in this case, the reversal of onus operates to limit the application of the existing offence so that it does not capture circumstances where a dealer is seeking an authorisation to retain or dispose of the firearm or prescribed thing or in other circumstances where the dealer has a reasonable excuse.

As distinct from circumstances in which an approved dealer has sought and been issued an authorisation, whether a dealer is in the process of seeking an authorisation is a matter that may be solely in the knowledge of the dealer. Providing a reasonable excuse exemption operates to prevent people from being unjustly held liable for the offence and is consequently consistent with a free and democratic society based on human dignity, equality, and freedom.

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

The inclusion of a reasonable excuse defence in the offence provision under s 168B(4) of the *Weapons Act*, operates to ensure approved dealers who are seeking an authorisation to dispose of, or otherwise deal with an anonymously surrendered firearm or prescribed thing, are not captured by the offence provision.

This helps to achieve the purpose by removing the existing requirement for dealers to transport surrendered items to a police station and surrender them to a police officer. The costs associated with this requirement may be a barrier to the ongoing participation of some dealers in the permanent amnesty.

Therefore, it is considered that the proposed amendments are rationally connected to their purpose.

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

There is no reasonably available and less restrictive way to achieve the purpose identified.

- (e) the balance between the importance of the purpose of the 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 one side of the scales providing a reasonable excuse defence under s 168B(4) of the *Weapons Act* reverses the onus in criminal proceedings.

On the other side of the scales the effect of the reversal is to provide exceptions to the existing offence provision. These exceptions are regarded as necessary to allow approved dealers to dispose of or otherwise deal with anonymously surrendered firearms and prescribed things when authorised to do so.

As the reversal is directed at providing an exception to an existing offence provision, it follows that while the amendments engage rights in criminal proceedings, in my opinion they do not limit them. However, even if the right is limited, the limitation is nonetheless reasonable and demonstrably justified.

- (f) any other relevant factors

Not applicable.

Conclusion

In my opinion, the Police Legislation (Efficiencies and Effectiveness) Amendment Bill 2021 is compatible with human rights under the *Human Rights Act 2019* because it limits a human right only to the extent that is reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

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Minister for Fire and Emergency Services