

# Justice and Other Legislation Amendment Bill 2023

## 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* (HR Act), I, Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence, make this statement of compatibility with respect to the Justice and Other Legislation Amendment Bill 2023 (the Bill).

In my opinion, the Bill is compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

### Overview of the Bill

The Bill clarifies, strengthens, and updates legislation concerning the administration of justice, including legislation relating to the operation of courts and tribunals, the regulation of the legal profession, the conduct of civil proceedings and electoral matters. The Bill also enables better recognition of the deaths of unborn children as a result of criminal conduct.

### Amendments to legislation concerning the administration of justice

The Bill includes amendments to:

- the *Appeal Costs Fund Act 1973* (ACF Act) to modernise the Act generally and to improve the efficiency of the current fee and administrative arrangements under the Act;
- the *Court Funds Act 1973* to replace the Act with a new, modernised court funds legislative framework under the *Civil Proceedings Act 2011*;
- the *Cremations Act 2003* to recognise interstate cremation permits issued by coroners in other jurisdictions as a permission to cremate in Queensland;
- the Criminal Code, section 319A, to provide that with regard to procuring the supply of a termination drug, an unqualified person assists in the performance of a termination if they procure the supply of the termination drug from another unqualified person, to clarify that a person who provides financial assistance to facilitate access to a termination drug supplied by a qualified person does not commit an offence;
- the *Criminal Law (Sexual Offences) Act 1978* (CLSO Act) to remove the provisions which prohibit identification of an adult defendant charged with a prescribed sexual offence prior to finalisation of committal proceedings;
- the *Electoral Act 1992* (Electoral Act) to enfranchise voters and provide operational efficiencies for the Electoral Commission of Queensland (ECQ), for example, by:
  - providing that a ballot paper secured in the reply-paid envelope supplied by the ECQ that also contains a completed declaration on a declaration envelope may be counted regardless of whether the postal vote is actually inside the declaration envelope (note corresponding amendment made to the *Referendums Act 1997* (Referendums Act));
  - expanding the definition of *special postal voter* to include electors who are patients in a hospital that is not a polling place, and electors who are ill or infirm and unable to travel to a polling place or those caring for the ill or infirm; and

- specifying the cut-off time for the close of electoral rolls as 6pm on the relevant cut-off day (with a corresponding amendment to the Referendums Act);
- the HR Act to provide that in a proceeding in the Land Court or Land Appeal Court, where a question of law arises that relates to the application of the HR Act or a question arises in relation to the interpretation of a statutory provision in accordance with the HR Act, a party to the proceeding must give notice in the approved form to the Attorney-General and the Queensland Human Rights Commission;
- the *Justices of the Peace and Commissioners for Declarations Act 1991* (JP Act) to:
  - clarify and modernise the provisions relating to qualification for, and disqualification from, office as a justice of the peace (JP) or commissioner for declarations (Cdec);
  - give legislative effect to a code of conduct for JPs and Cdecs;
  - enable the chief executive to suspend, and appoint an investigator to investigate the conduct of, JPs and Cdecs, with the investigation report to be provided to the Attorney-General for the purpose of deciding whether or not to recommend to the Governor in Council that the JP or Cdec be removed from office;
  - provide for the continuous criminal history monitoring of JPs and Cdecs post-appointment by the Queensland Police Service;
  - provide a reasonable excuse defence for persons who inadvertently breach the offence of acting as a JP or Cdec without holding such office because they did not know, and could not reasonably be expected to have known, that they did not hold the office (for example, because they are unaware that their appointment has been suspended or revoked); and
  - provide that anything done by a person in the person's purported capacity as an appointed JP or Cdec is not invalid only because, at the time the thing was done, the person was not validly appointed or the person's appointment had lapsed, had ended, or was suspended. This is to protect members of the community who utilise the services of a JP or Cdec and who are unaware the JP or Cdec is no longer authorised to provide those services;
- the *Legal Profession Act 2007* (LP Act) to:
  - allow a law practice, the Queensland Law Society and community legal centres to destroy of any client documents held by a law practice if: a period of seven years has elapsed since the completion of the matter; the law practice has been unable to obtain instructions from the client, despite making reasonable efforts to do so; and it is reasonable in the circumstances, having regard to the nature and content of the document, to destroy the document;
  - increase the prescribed amount under section 311 (which triggers cost disclosure obligations for a law practice) from \$1,500 to \$3,000; and provide that an abbreviated costs disclosure obligation will apply if the total legal costs in a matter (over \$750), excluding disbursements, are not likely to exceed the costs disclosure threshold;
  - provide that to be eligible for admission to the legal profession, applicants must have sufficient knowledge of written and spoken English to engage in legal practice; and
  - enable a judicial member of the Queensland Civil and Administrative Tribunal (QCAT) to hear and determine matters under section 328 (applications for the setting aside of costs agreements that are not fair or reasonable);
- the *Oaths Act 1867* (Oaths Act) to address issues that have arisen in the implementation of amendments made to the Act by the *Justice and Other Legislation Amendment Act 2021*,

including amendments to change the information that a witness is required to include in an affidavit or statutory declaration by:

- clarifying that a special witness is only required to include particular information when they witness an affidavit or statutory declaration that is electronically signed or signed over audio visual (AV) link;
- removing the requirement for JPs and Cdecs in any Australian jurisdiction to include their place of employment, except for certain JPs and Cdecs whose eligibility to be a special witness is tied to their employment; and
- allow other witnesses to provide their place of employment, employment address, home address, telephone number or email;
- the *Public Guardian Act 2014* (Public Guardian Act) to clarify the interaction between the Public Guardian Act and the *Public Sector Act 2022* (Public Sector Act) by:
  - making clear that the Public Sector Act applies generally to the suspension and termination of community visitors;
  - providing for the appointment of a community visitor to end automatically if the community visitor becomes ineligible to hold the position; and
  - removing unnecessary provisions about assessing the suitability of community visitors and child advocacy officers;
- the *Queensland Civil and Administrative Tribunal Act 2009* (QCAT Act) to streamline processes around the advertising and appointment of various positions within QCAT and to:
  - provide for Land Court members to be appointed as supplementary members of QCAT; and
  - provide for specific appointment arrangements for associates to QCAT senior members; and
- the *Trust Accounts Act 1973* to remove provisions from the Act relating to public accountants so as to limit the scope of the Act to funeral benefit businesses only.

### **Better recognition of the deaths of unborn children as a result of criminal conduct**

The Bill amends the Criminal Code, the *Penalties and Sentences Act 1992* (PS Act), the *Youth Justice Act 1992* (YJ Act) and the *Victims of Crime Assistance Act 2009* (VCA Act) to enable better recognition of the destruction of the life of an unborn child as a result of offences committed in relation to a pregnant person.

The Bill amends the Criminal Code to enable an indictment for an offence committed in relation to a pregnant person that allegedly resulted in destroying the life of the person's unborn child to state the name, or description, of the unborn child. The amendments do not require the inclusion of the name, or a description, of an unborn child in an indictment.

The PS Act and YJ Act are also amended by the Bill to provide that, in determining the appropriate sentence for an offender or child convicted of a relevant serious offence committed in relation to a pregnant person that resulted in destroying the life of the unborn child, the court must treat the destruction of the unborn child's life as an aggravating factor, unless the court considers it is not reasonable because of the exceptional circumstances of the case. A relevant serious offence for the purpose of the aggravating factor is defined as an offence of murder, manslaughter, grievous bodily harm, wounding, assaults occasioning bodily harm, and dangerous operation of a vehicle under the Criminal Code, and careless driving under the *Transport Operations (Road Use Management)*

*Act 1995*. In accordance with section 11 of the Criminal Code, the amendments to the PS Act and the YJ Act will apply prospectively to sentencing decisions for offences committed after commencement.

The Bill also amends the VCA Act to expand the definition of victim for the purpose of the Charter of victims' rights. The expanded definition includes a person who suffers harm because they would, if an unborn child had been born alive, have been a family member of the child, in circumstances where a crime is committed against a pregnant person and as a result of the crime the pregnant person dies or sustains a bodily injury resulting in the destruction of the life of the unborn child. The expanded definition of victim will apply prospectively in relation to crimes committed after commencement. The Bill also amends the definition of victim in the PS Act for the purpose of victim impact statements, to expressly include the new expanded definition of victim.

The VCA Act is also amended to expand eligibility for funeral expense assistance to persons who incur, or are reasonably likely to incur, funeral expenses for the funeral of an unborn child of a primary victim of an act of violence if, as a direct result of the act of violence, the life of the unborn child is destroyed. The expanded eligibility for funeral expense assistance will apply prospectively in relation to acts of violence committed after commencement.

## **Human Rights Issues**

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

I have considered each of the rights protected by part 2 of the HR Act. In my opinion, the human rights that are relevant to the Bill are:

- Recognition and equality before the law (section 15 of the HR Act)
- Freedom of expression (section 21 of the HR Act)
- Taking part in public life (section 23 of the HR Act)
- Right to property (section 24 of the HR Act)
- Privacy and reputation (section 25 of the HR Act)
- Best interests of the child (section 26(2) of the HR Act)
- Right to liberty and security of person (section 29 of the HR Act)
- Fair hearing (section 31 of the HR Act)
- Rights in criminal proceedings (section 32 of the HR Act)

### **Amendments that promote human rights**

The following amendments to the Electoral Act promote the right to freedom of expression (section 21 of the HR Act) and taking part in public life (section 23 of the HR Act):

- amendments to the Electoral Act and corresponding amendment to the Referendums Act to provide that a ballot paper secured in the reply-paid envelope supplied by the ECQ that also contains a completed declaration on a declaration envelope may be counted regardless of whether the postal vote is inside the declaration envelope;
- amendments to the Electoral Act to provide that the following electors, who constitute general postal voters under the *Commonwealth Electoral Act 1918*, fall within the definition of special postal voter and as such will be sent ballot papers by the ECQ i.e patients in a hospital that is not a polling place, electors who are ill or infirm and unable to travel to a polling place or persons caring for the ill or infirm.

These two amendments promote these rights as they will save a person's vote in the event they do not strictly adhere to the requirement for the ballot to be enclosed in the declaration envelope and will make the process of voting easier for the sick or infirm and their carers.

The proposed amendment to the LP Act, which makes English proficiency an eligibility requirement for admission into the legal profession, engages and promotes the human right of recognition and equality before the law (section 15 of the HR Act). The proposed change will clarify that English proficiency is an eligibility requirement for all applicants for admission not just those with foreign qualifications. This promotes equality before the law by ensuring all applicants are assessed against the same criteria. Conversely, the change will also engage the same human right for the public, who may be potential consumers of legal services, by ensuring that practitioners from all backgrounds are appropriately qualified for practice and able to understand their client's instructions, Queensland laws, and their professional obligations.

### **Amendments to the *Appeal Costs Fund Act 1973***

#### *Right to property (section 24 of the HR Act)*

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

All persons have the right to own property alone and in association with others and to 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 protection from the deprivation of property. Deprivation in this sense has been held to include the substantial restriction on a person's use and enjoyment of their property. Property includes money; however, the right does not provide a right to compensation.

The ACF Act provides for the Appeal Costs Fund (Fund) to assist in the payment of costs incurred by litigants through no fault of their own in certain circumstances, such as when decisions are upset on appeal or proceedings are rendered abortive.

The Bill omits sections 15 and 17 of the ACF Act. Section 15 provides for compensation from the Fund where a decision of the High Court of Australia (from the Supreme Court), or the Supreme or District Court succeeds on a question of law and the respondent is granted an indemnity certificate. If the respondent has been ordered to pay the appellant's costs, the respondent can apply for a payment from the Fund for the appellant's and respondent's costs of the appeal and any new trial as a consequence of an order in the appeal. The maximum payment from the Fund for an indemnity certificate granted under section 15 is \$15,000.

Section 17 claims apply in limited circumstances on a successful appeal from a decision of a Magistrates Court where the respondent did not appear before the Magistrates Court, or on the appeal, and the Court refuses to order the respondent pay the appellant's costs. The maximum payment from the Fund for an indemnity certificate granted under section 17 is \$750.

The Bill inserts a new section 14A which provides that the Appeal Costs Fund Board (Board) must not issue a certificate for payment from the Fund unless the application for payment is made within 1 year after the day an indemnity certificate for payment is granted, or 1 year after the day the applicant's entitlement to payment from the Fund arises (if the applicant is entitled to payment without an indemnity certificate). The Board may, however, accept an application outside of the limitation period if it is reasonable to do so.

Transitional provisions provided in the Bill allow for claims to be made, under sections 15 and 17, for matters started before the commencement and indemnity certificates granted before the commencement, and extend the time limitation on making a claim from 1 year to 2 years, where the proceedings have been finally dealt with before the commencement and the applicant has not applied to the Board before commencement.

One view is that the removal of claims on the Fund as provided by sections 15 and 17 and the imposition of a time limit on claims may remove a person's ability to claim for costs recovery, thereby limiting their right to property. However, an alternate view is that because the amendments will be applied prospectively, no legitimate expectation to the funds exist and therefore, no right to property will be engaged. It could also be argued that the removal of claims on the Fund as provided by sections 17 does not engage a human right as such claims are not made in practice.

The following analysis is conducted on the basis that the removal of sections 15 and 17 of the ACF Act and the imposition of a time limit on claims, limit the right to property to the extent that potential applicants will no longer be able to claim against the Fund in the circumstances provided for under sections 15 and 17 of the ACF Act and in circumstances where it is not reasonable to extend the timeframe to apply for payment from the Fund where an application is delayed.

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

The purpose of the limitation on property rights, by removing categories of claims under sections 15 and 17 of the Act and imposing a time limit to apply to the Board for payment from the Fund, is to modernise the ACF Act and improve its administrative arrangements.

It is necessary to modernise the ACF Act to take into account current legal aid funding priorities and to ensure that the circumstances in which payments can be made from the Fund can be justified, particularly as the Fund is substantially funded from consolidated revenue. Government is entitled to review eligibility to make claims on the Fund in terms of its funding priorities. It is necessary to improve administrative arrangements for the proper management of the Fund.

Through the transitional provisions that apply for current matters where there may have been an expectation of payment from the Fund and the proposed delayed commencement of the time limit on claims, the impact on property rights is not disproportionate or arbitrary.

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

The limitation on the right to property will achieve its purpose by reducing the number of claims on the Fund in circumstances where the category of claim does not align with current legal aid funding priorities, or there is a delay on applying to the Fund and it is not reasonable for the application to be accepted outside of the prescribed timeframe.

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

There is no less restrictive and reasonably available way of achieving the purpose of the amendments. The amendments will be applied prospectively, and transitional provisions apply for

current matters where there may have been an expectation of payment from the Fund under section 15 and 17 and the proposed delayed commencement of the time limit on claims.

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

On balance, taking into account the nature and extent of the limitation on the right to property and having regard to current legal aid funding priorities and the need to properly manage the Fund, the removal of claims on the Fund as provided by sections 15 and 17 and the imposition of a time limit to apply to the Fund, outweigh the negative impact on the right to property of affected applicants.

- (f) any other relevant factors

Nil.

### **Amendments to the *Cremations Act 2003***

#### *Right to property (section 24 of the HR Act)*

- (a) the nature of the right

The Bill amends the Cremations Act to introduce new record keeping requirements for a person in charge of a crematorium to keep a copy of the interstate permission to cremate and cremation risk certificate for 15 years after the cremation. Legislating these record keeping requirements will ensure that new subsections 5A(2)(a) and (b) are complied with. As a person in charge of a crematorium may be liable to a maximum penalty of 80 penalty units under this new provision, the right to property is limited.

The right to property is outlined above.

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

The purpose of the limitation is to impose a criminal penalty which proportionately reflects the seriousness of a person in charge of a crematorium failing to keep at the crematorium a copy of the interstate permission to cremate and cremation risk certificate for 15 years after the cremation. The imposition of the penalty seeks to ensure that new subsections 5A(2)(a) and (b) are complied with.

The right to property is limited as imposing the penalty units will result in a deprivation of property in the form of money.

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

The limitation on property rights will help to maintain appropriate safeguards in relation to cremation risks in Queensland by requiring a person in charge of a crematorium to keep full and accurate records of interstate permissions to cremate. Existing section 14 of the Cremations Act imposes other record keeping requirements on persons in charge of crematoriums (for example, a record of each cremation at the crematorium and permissions to cremate issued by independent

doctors) and provides for a maximum penalty of 80 penalty units when the legislative requirements are not complied with.

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

A less restrictive limitation (such as removing the statutory requirement) would not achieve the purpose of maintaining appropriate safeguards in relation to cremation risks in Queensland. The statutory requirement incentivises persons in charge of crematoriums to ensure that new subsections 5A(2)(a) and (b) are complied with and records are maintained. The amendment is similar to section 14 of the Cremations Act which imposes record keeping requirements on persons in charge of crematoriums and provides for a maximum penalty of 80 penalty units when the legislative requirements are not complied with.

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

On balance, having regard to the extent of the limitations on the right to property, the importance of achieving the purposes of the limitations outweighs the harm caused to the rights.

(f) any other relevant factors

Nil.

### **Amendments to the *Criminal Law (Sexual Offences) Act 1978***

In my opinion, the human rights that are limited by these amendments are:

- Right to privacy (section 25);
- Right to a fair hearing (section 31);
- Rights in criminal proceedings, the right to be presumed innocent until proven guilty (section 32).

I have also considered whether the amendments will impact the right to protection against retrospective criminal laws (section 35) on the basis that the transitional amendments will permit identification of a defendant who is charged with a prescribed sexual offence from the time of commencement of the new laws (where a non-publication order is not made); that is, the absence of any restriction on identifying a defendant will apply from the time of commencement, irrespective of when the offences occurred or when the defendant was charged. In my opinion, the amendments do not engage the right to protection against retrospective criminal laws as the amendments do not create criminality retrospectively and relate only to the ability to report the identity of the defendant, aligning the position with respect to prescribed sexual offences with the law existing in relation to other criminal offences, including child sexual offences and serious violent offences such as murder and manslaughter.

(a) the nature of the right

*Right to privacy and reputation* (section 25 of the HR Act)

The right to privacy protects individuals against unlawful or arbitrary interference with their privacy, family and home. The concept of arbitrariness in the context of the right to privacy means



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

The proposed amendments will limit the right to privacy by allowing the publication of personal information that identifies a person accused of a prescribed sexual offence before a committal order is made in the proceedings.

The right to reputation protects individuals from unlawful attacks on their reputation.

*Right to a fair hearing* (section 31 of the HR Act)

The right to a fair hearing affirms the right of all individuals to procedural fairness and natural justice when coming before a court or tribunal. It applies to both criminal and civil proceedings and guarantees that such matters must be heard and decided by a competent, impartial, and independent court or tribunal after a fair and public hearing, and that all judgments or decisions are publicly available.

The legislative amendments that are proposed to remove the restriction on publishing information that identifies an adult accused of a prescribed sexual offence before a committal order will limit the right to a fair hearing. The limitation arises in circumstances where a publication, particularly by the media outlet, identifies a defendant before the matter proceeds to trial. The public, and therefore the jury pool, may be influenced by media reporting or other publications and form a prejudicial view, either against the defendant or complainant, before the matter proceeds to trial. This would limit the right to a fair hearing as the decision maker (in most cases, the jury) could be biased prior to the hearing.

*Rights in criminal proceedings, the right to be presumed innocent until proven guilty* (section 32(1) of the HR Act)

Rights in criminal proceedings protects a range of rights for persons charged with a criminal offence. It affirms the right that any person charged with a criminal offence is to be presumed innocent until proven guilty by law (section 32(1) HR Act).

The legislative amendments that will remove the restriction on publishing information that identifies an adult accused of a prescribed sexual offence at the pre-committal stage will limit the right to be presumed innocent until proven guilty according to law. As with the right to a fair hearing, the limitation arises in circumstances where media reports are made about a particular matter that identifies the defendant before the matter proceeds to trial. The public, and therefore the jury pool, may be influenced by the media reporting and form a prejudicial view against the defendant before the matter proceeds to trial. This would limit a defendant’s rights in criminal proceedings, specifically, the right to be presumed innocent until proven guilty, as the decision maker (in most cases, the jury) may have formed a view that the defendant is guilty prior to the trial. It is important to note that the amendments will not change the fundamental presumption of innocence in criminal trials, and only limit the right to the extent that it has the potential to prejudice the jury to not properly apply the presumption of innocence.

- (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

*Right to privacy, right to a fair hearing & rights in criminal proceedings, the right to be presumed innocent until proven guilty.*

The purpose of the limitations on the right to privacy, right to a fair hearing and the rights in criminal proceedings, specifically the right to be presumed innocent until proven guilty, is to promote open justice by removing the current restriction on publishing identifying information of a person accused of a prescribed sexual offence before a committal order is made. The amendments will also ensure prescribed sexual offences are subject to the same rules regarding publication as other criminal offences in Queensland.

The historical distinction between laws relating to publication of a defendant's identity when charged with a sexual offence, as opposed to any other offence is grounded in a historical context where it was thought that scrutiny of a complainant's evidence by committal proceedings were required to confirm its reliability before any details of it could be published. This distinction is not justified. These amendments align complaints made about sexual offences with those which apply in relation to all offences, promoting the rights of victims by removing the distinction while ensuring there are safeguards in place to protect a defendant's rights, including the right to be presumed innocent until proven guilty.

Open justice is a fundamental attribute of a fair proceedings. It ensures the administration of justice takes place in an open forum where court proceedings may be subject to public and professional scrutiny. In the absence of open justice, abuses are more likely to flourish. Restrictions on publication should only occur in circumstances where it is in the interests of the proper administration of justice or where there is a public interest, which may extend to protection of vulnerable witnesses or children.

- (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

*Right to privacy*

The removal of the restriction on publication, which will enable the publication of personal information that identifies a person accused of a prescribed sexual offence before a committal order is made, will achieve the purpose of promoting open justice as it will allow for unrestricted publication of this information from the point of charge, unless the court determines it is appropriate to make a non-publication order under the non-publication regime.

*Right to a fair hearing & rights in criminal proceedings, the right to be presumed innocent until proven guilty*

The removal of the restriction on publication will achieve the purpose of promoting open justice as it will allow for publication of information about a person accused of a prescribed sexual offence, without any restrictions as to the timing of such publication. The amendments will also lead to prescribed sexual offences being treated equally to all other criminal offences in Queensland in this regard.

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

*Right to privacy, right to a fair hearing & rights in criminal proceedings, the right to be presumed innocent until proven guilty*

An alternative to the removing the restriction on publication of personal information that identifies a person accused of a sexual offence before a committal order is made would be to maintain the current restriction as contained in the CLSO Act and insert clear provision for parties in the proceedings, or persons interested in the proceedings, to make an application to the court for an order that allows publication of identifying information about the accused person before a committal order is made.

This is not a reasonably available alternative as the presumption against publication would remain and therefore, it would not achieve the purpose of promoting open justice as effectively as the proposed amendments. This approach would also not be effective in bringing prescribed sexual offences into line with all other criminal offences in Queensland, for which principles of open justice prevail and there is no comparable provision limiting publication prior to committal. Further, that alternative approach would still lead to the same limitations on the right to privacy, right to a fair hearing and rights in criminal proceedings in circumstances where the court grants an application and allows the publication of identifying information of the accused person.

Another alternative would be to have a restriction on the publication of information that would tend to identify a person accused of a sexual offence until a matter is first brought before a court and a judicial officer has an opportunity to consider whether to make a non-publication order. The restriction could be lifted only once the court has had an opportunity to consider the making of a non-publication order.

However, this alternative would not be as effective in achieving the purpose of open justice and would mean that the rules around publishing information about a person accused of a prescribed sexual offence would remain different to all other criminal offences in Queensland. Further, this is not a reasonably available alternative as this approach could create a presumption in favour of non-publication orders being made and require the court to consider this issue in each case. This alternative approach would also lead to the same limitations on the right to privacy, right to a fair hearing and rights in criminal proceedings in circumstances where the court does not make a non-publication order.

Importantly, the amendments will not remove a party's ability to make an application for a non-publication order, including an interim non-publication order. A defendant will still be able to make a temporary or permanent stay application or an application for their trial to be heard before a judge alone if it is considered the trial cannot proceed, or proceed in front of a jury, due to media reporting.

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

*Right to privacy and reputation*

The proposed amendments will make lawful the publication of identifying matters (which might include personal information) of a person accused of a prescribed sexual offence before a committal order is made. The amendments will not amount to an arbitrary interference with a person's right to privacy. Restrictions on publication of the identity of an accused person where it may identify the complainant, or where it identifies a young person, will remain in place.

The proposed amendments, removing the existing prohibition will likely result in a greater risk of the accused person's reputation being unlawfully attacked. The proposed amendments promote the administration of open justice and freedom of speech. Therefore, it is not considered that the amendments to the CLSO Act disproportionately limit the right to privacy and reputation.

On balance, having regard to the extent of the limitation on the right to privacy and reputation, the importance of promoting open justice, which is a fundamental attribute of fair trials in our society, outweighs the harm caused to the right to privacy. The amendments will also promote the right to freedom of expression by allowing persons to publish information that identifies or may lead to the identification of a person accused of a prescribed sexual offence, in circumstances where this right has been limited by the current provisions of the CLSO Act.

Therefore, the proposed amendments strike the right balance between the right to a fair hearing and the principle of open justice and the right to freedom of expression.

*Right to a fair hearing*

On balance, having regard to the extent of the limitation on the right to a fair trial and in criminal proceedings, the importance of achieving the purpose of promoting open justice, which is a fundamental attribute of fair trials in our society, and ensuring prescribed sexual offences are treated equally to all other offences in Queensland, outweighs the harm caused to the right to a fair hearing. This is particularly so in the context of available safeguards that will mitigate any limitation on this right, including a defendant's ability to make an application for a non-publication order or an application for a stay or judge alone trial.

The amendments will promote the right to freedom of expression by allowing persons to publish information that identifies or may lead to the identification of a person accused of a prescribed sexual offence, in circumstances where this right has been limited by the current provisions of the CLSO Act.

Therefore, the proposed amendments strike the right balance between the right to a fair hearing and the principle of open justice and the right to freedom of expression.

*Rights in criminal proceedings, the right to be presumed innocent until proven guilty*

Having regard to the extent of the limitation on the rights in criminal proceedings, along with the safeguards that will be in place to mitigate any limitation, the importance of achieving the purpose

to promote open justice and bring prescribed sexual offences in line with all other criminal offences in Queensland, outweighs the limitation on the right to a fair hearing.

The amendments will promote the right to freedom of expression by allowing persons to publish information that identifies or may lead to the identification of a person accused of a prescribed sexual offence.

The proposed amendments strike the right balance between the rights in criminal proceedings and the principle of open justice and the right to freedom of expression.

(f) any other relevant factors

The amendments align the position in Queensland regarding publication of the identity of a defendant accused of a prescribed sexual offence prior to committal to the position existing in most other states and territories which permit publication of a defendant's identity.

### **Amendments to the *Electoral Act 1992***

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

(a) the nature of the right

The right to take part in public life affirms the right of all persons to contribute to and exercise their voices in relation to the public life of the State. It ensures all persons have the opportunity to contribute to the political process and public governance, directly or through freely chosen representatives. The United Nations Human Rights Committee considers that the right imposes positive obligations on the State regarding the conduct of elections, including to preserve the impartiality of the electoral process and the right of citizens to choose their representatives freely.

The freedom of expression protects the right of all persons to hold an opinion without interference, and the right of all persons to seek, receive and express information and ideas (including verbal and non-verbal communication). The forms of protected expression are broad, and include expression that is oral, written, print, art or in any other medium. The right to freedom of expression and the free flow of information and ideas, particularly about public and political issues, is considered to be a touchstone of a democratic society.

The right to take part in public life and the freedom of expression are inherently linked in the context of elections.

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

The proposed amendment will specify a cut off time for the close of electoral rolls. Currently, the writ for an election or referendum must provide a cut-off date, but not a time, for the close of electoral rolls for an election or referendum.

Improving and clarifying the timeframes for the close of voter rolls is consistent with a free and democratic society and supports the integrity of the rolls.

- (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 nomination of a set time for the closing of the electoral rolls is intended to provide certainty about timing for final enrolments for both voters and the ECQ and would provide the ECQ with additional time to finalise the electoral roll.

It is noted that under the Electoral Act and *Referendum Act 1997* (as amended) persons who are not enrolled on the electoral roll for any district but are entitled to be enrolled and have given notice to the commission or an electoral registrar (in the designated way) during the period between the close of the rolls and 6p.m. on the day before the polling day, will be eligible to vote at the election or referendums.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the amendment.

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

Whilst the effect of the amendment is that people will have six less hours to ensure they are reflected on the electoral roll, the amendment will provide certainty about timing for final enrolments for voters and the ECQ. It will also provide the ECQ with additional time to finalise the electoral roll.

Improving and clarifying the process for the close of voter rolls process is consistent with a free and democratic society and supports the integrity of the rolls.

In any event, those who miss the deadline for the close of the rolls, will still be eligible to vote at the election or referendums, if they have given a notice to the commission or an electoral registrar for the district, as required under the Act.

Therefore, the proposed amendments strike the right balance between the right to to take part in public life and the freedom of expression and the need for certainty regarding the time for the close of the electoral roll.

- (f) any other relevant factors

Nil.

### **Amendments to the *Justices of the Peace and Commissioners for Declarations Act 1991***

*Taking part in public life (section 23 of the HR Act); Privacy and reputation (section 25 of the HR Act)*

- (a) the nature of the right

*Right to take part in public life*

Section 23 of the HR Act protects the right to participate in the conduct of public affairs, and the right to have access, on general terms of equality, to the public service and to public office. As the

office of JP or Cdec is a public office, and performing the duties of a JP or Cdec constitutes participation in the conduct of public affairs, the right to be appointed to the office of JP or Cdec can be considered a right to take part in public life.

A number of the amendments to the JP Act limit the right to take part in public life. The Bill prescribes new qualifications for appointment as a JP or Cdec, including that a person must ordinarily reside, or require appointment for work, in Queensland, and that the chief executive must be satisfied the person is suitable for appointment, having regard to certain criteria including the person's criminal history.

The Bill also prescribes new grounds for disqualification from appointment as a JP or Cdec, including where a person has a conviction, including a spent conviction, for one of a stated category of offences (a disqualifying conviction). However, the chief executive may exempt a person from a disqualifying conviction where special circumstances exist.

The Bill enables the chief executive to suspend, and appoint an investigator to investigate the conduct of, JPs and Cdecs, with the investigation report to be provided to the Minister for the purpose of deciding whether to recommend that the JP or Cdec be removed from office.

#### *Right to privacy*

Section 25 of the HR Act provides that a person has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

The Bill limits the right to privacy by providing for the continuous criminal history monitoring of JPs and Cdecs by the Queensland Police Service. The monitoring arrangements provide for the commissioner of the police service to notify the chief executive, by electronic transfer of information, if an appointed JP or Cdec is charged with, or convicted of, an offence.

- (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

#### *Right to take part in public life*

The purpose of the limitations on the right to take part in public life imposed by the Bill is to ensure that only suitable persons are able to be appointed, or continue in office, as JPs and Cdecs, and that JPs and Cdecs maintain appropriate standards of conduct when performing their duties. This in turn will ensure public confidence in the office of JP or Cdec and the administration of justice.

#### *Right to privacy*

The purpose of the limitation on the right to privacy through allowing for continuous criminal history monitoring is to ensure that JPs or Cdecs who are charged with, or convicted of, particular offences can be suspended, investigated, and if necessary, have their appointment revoked. This will ensure that only suitable persons are able to continue in office as JPs and Cdecs.

- (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

*Right to take part in public life*

The amendments prescribing qualifications for, and disqualifications from, appointment as a JP or Cdec limit the right to take part in public life only to the extent necessary to achieve the purpose of ensuring high standards of conduct for JPs and Cdecs, and public confidence in the office of JP or Cdec. The limitation on the right is mitigated by providing for the following matters:

- enabling the chief executive to grant an exemption to an applicant in relation to a disqualifying conviction where special circumstances exist; and
- review rights to QCAT where the chief executive decides a person is not qualified for appointment as a JP or Cdec or where the chief executive decides not to grant an exemption in relation to a disqualifying conviction.

The amendments providing for suspension, investigation and revocation of a JP or Cdec's appointment also limit this right only to the extent necessary to ensure the continuing suitability of JPs and Cdecs and public confidence in the office of JP or Cdec. The limitation on the right is mitigated by providing for the following matters:

- the circumstances in which the chief executive must end a JP or Cdec's suspension;
- the opportunity for a JP or Cdec to make representations to an investigator in the context of an investigation into the JP or Cdec's conduct; and
- a show cause process in which the Minister must give a JP or Cdec a notice, and consider any submissions received by the JP or Cdec in response, before deciding whether to recommend that the JP or Cdec's appointment be revoked.

*Right to privacy*

The amendments providing for the continuous criminal history monitoring of JPs and Cdecs limit the right to privacy only to the extent necessary to achieve the purpose of ensuring that JPs or Cdecs who are charged with, or convicted of, particular offences can be suspended, investigated, and, if necessary, have their appointment revoked.

The limitation on the right to privacy is mitigated by protecting the confidentiality of a JP or Cdec's personal information (including information about their criminal history) acquired by a person in performing functions under or relating to the administration of the Act.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the amendments.

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

On balance, the importance of the amendments in ensuring the suitability of persons to be appointed, or to continue to hold office, as JPs or Cdecs, and in maintaining appropriate standards of conduct for JPs and Cdecs, outweighs any limitations imposed on the right to take part in public life and the right to privacy.



(f) any other relevant factors

Nil.

**Amendments to the *Legal Profession Act 2007* – Destruction of client files**

*Right to property (section 24 of the HR Act)*

(a) the nature of the right

All persons have the right to own property alone and in association with others and to not be arbitrarily deprived of their property. Property includes real and personal property (for example, land, chattels, money), including contractual rights, leases, shares, patents and debts. 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. Deprivation in this sense has been held to include the substantial restriction on a person's use and enjoyment of their property.

New section 713A (Destruction of client documents) (as inserted by the Bill) allows a law practice to destroy a client document relating to a matter in certain circumstances. Similarly, new section 713A(3) allows the Queensland Law Society (QLS) to destroy a client document relating to a matter if the QLS holds the document because of the appointment of a receiver (under chapter 5, part 5.5) for the law practice.

The proposal to permit a law practice and the QLS to destroy client documents, without client instructions to do so, is a limitation on the client's property rights.

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

The purpose of the limitation on property rights, by allowing the destruction of client documents without instructions in certain circumstances, is to protect the interests of consumers of legal services against the increasing risk to client privacy and confidentiality arising from the prolonged retention of client documents (both physical and electronic) that are no longer considered to be of legal utility, and address the issue of storage costs for law practices in relation to these documents.

This is consistent with a free and democratic society based on human dignity, equality and freedom where the documents can only be destroyed if: it is at least 7 years since the completion of the matter; the law practice has been unable, despite making reasonable efforts, to obtain instructions from the client about the destruction of the document; it is reasonable in the circumstances, having regard to the nature and content of the document, to destroy the document; and there are disciplinary consequences if the provision is not complied with.

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

The limitation on the client's property rights, by allowing the destruction of client documents, will assist in protecting client privacy and confidentiality where the documents are no longer considered to be of legal utility and ensuring that law practices need not incur ongoing storage costs for these documents.

The limitation is not arbitrary applying only to the extent that is necessary having regard to the time that has passed since the completion of the client's matter, reasonable attempts having been made to obtain the client's instructions and there having been consideration of whether it is reasonable to destroy the document having regard to its nature and content.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the amendment. Safeguards provided for in the amendments mitigate the risk that the proposed amendments could be interpreted as authorising the destruction of such documents to the detriment of the client or others, by providing for disciplinary consequences for a breach of the provision.

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

On balance, the protection of the interests of consumers of legal services against the increasing risk of unauthorised access to client privacy and confidentially and freeing law practices from the storage costs of documents which are not of ongoing legal utility, outweigh the negative impact on the client's right to property.

- (f) any other relevant factors

Nil.

### **Amendments to the *Oaths Act 1867***

- (a) the nature of the right

The nature of the right to privacy and reputation under section 25 of the HR Act protects the individual from all interferences and attacks upon their privacy, family, home, correspondence and reputation. It protects privacy in the sense of personal information, data collection and correspondence, and extends to an individual's private life more generally.

The proposed amendments to section 13E of the Oaths Act in the Bill limit the right to privacy and reputation by requiring a witness for an affidavit or statutory declaration (except for particular JPs or Cdecs) to disclose their place of employment, address, telephone number or email on the document. Currently, a witness is required to disclose their place of employment.

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

The purpose of the limitation on the right to privacy and reputation is to: enable third parties (including parties to a proceeding, departments, agencies and prosecuting authorities) to make enquiries to confirm whether an affidavit or declaration is validly made by a qualified witness; ensures necessary evidence is available for relevant prosecutions (for example, in order to charge someone with knowingly making a false statement in an affidavit or statutory declaration, the prosecution must prove that it was properly executed under the Oaths Act by a qualified witness and that the oath, affirmation or declaration was taken); maintains the solemnity and integrity of evidence on which the courts rely and the reliability of statutory declarations; and provides procedural fairness by ensuring parties to a proceeding can challenge the validity of a document.

This in turn supports the functioning of courts, government, business and commerce which rely on information contained in affidavits and statutory declarations and promotes the right to a fair hearing (HR Act, section 31) by ensuring procedural fairness for parties to a proceeding.

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

The limitation on the right to privacy and reputation imposed by requiring the witness to an affidavit or statutory declaration to disclose their place of employment, address, telephone or email limits the right to the extent necessary to achieve the purpose. The limitation is mitigated by allowing the witnesses to choose the type of the information they disclose (either place of employment, address, telephone or email), so that they can choose the least problematic and least revealing information depending on the circumstances.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the amendment.

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

On balance, taking into account the nature and extent of the limitation on the right to privacy and reputation, the importance of ensuring that affidavits and statutory declarations are validly made and can be relied upon by courts, government, business and commerce outweighs the limitations on human rights.

- (f) any other relevant factors

Nil.

### **Better recognition of the deaths of unborn children as a result of criminal conduct**

- (a) the nature of the right

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

Section 25 of the HR Act provides that a person has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The scope of this right is broad and encompasses the fundamental principle of autonomy over an individual's own actions. The right to privacy protects individuals against interference with their physical and mental integrity, freedom of thought and conscience, legal personality, sexuality, family and home, and individual identity.

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,<sup>1</sup> while the concept of arbitrariness extends to interferences that may be lawful but that are capricious, unpredictable, unreasonable, and disproportionate.<sup>2</sup>

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<sup>1</sup> UN Human Rights Committee, *Views: Communication No 488/1992*, 50th sess, UN Doc CCPR/C/50/D/488/1992 (5 November 1992) [8.3] ('*Toonen v Australia*').

<sup>2</sup> *WBM v Chief Commission of Police* (2012) 43 VR 446, 472 [114].

The amendments in the Bill enabling an indictment for an offence committed in relation to a pregnant person that allegedly resulted in destroying the life of the person's unborn child to state the name or description of the unborn child will limit the pregnant person's and their family's right to privacy. However, such disclosure would not be unlawful and would not be arbitrary as the provision only allows for the name or description of the unborn child to be stated on indictments for offences that allegedly resulted in destroying the life of the unborn child.

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

The right to liberty and security protects the liberty of all persons, including protection from arbitrary arrest or detention, and the deprivation of liberty only on grounds, and in accordance with procedures, established by law.

The concept of arbitrariness carries a human rights meaning of capriciousness, unpredictability, and unreasonableness in the sense of not being proportionate to the legitimate aim sought. The concept of lawfulness in the context of the right to liberty means that no interference can take place except in cases envisaged by the law.

The introduction of the statutory aggravating factor by the Bill will limit the right to liberty to the extent that it may result in a term of imprisonment or detention, or a longer term of imprisonment or detention. However, such deprivation of liberty would not be unlawful and would not be arbitrary, as the amendment would not alter the maximum term of imprisonment or detention the person would be liable to as a result of conviction for the relevant serious offence (the sentence may be higher within the sentencing range but would not exceed the maximum period prescribed for the offence).

*Best interests of the child (section 26(2) of the HR Act)*

The best interests of the child is aimed at ensuring the full and effective enjoyment of all of the child's human rights and their holistic development.<sup>3</sup> The content of the right is informed by the *Convention on the Rights of the Child*, in which article 37(b) provides that, 'the arrest, detention or imprisonment of a child ... shall be used only as a measure of last resort and for the shortest appropriate period of time'.<sup>4</sup>

The requirement introduced by the Bill that the court must treat the destruction of the unborn child's life as an aggravating factor in sentencing decisions for children convicted of a relevant serious offence will limit the right of children to protection in their best interests to the extent the amendment increases the risk that a child convicted of relevant serious offence will be sentenced to detention or detained in custody for longer.

- (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

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

The purpose of the limitation on the right to privacy, by enabling the name or description of the unborn child to be included in the indictment, is to provide for recognition of the unborn child in the criminal justice process. Enabling the name or description of the unborn child to be included

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<sup>3</sup> Committee on the Rights of the Child, General Comment No 19 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1), UN Doc CRC/C/GC/14 (29 May 2013) 2.

<sup>4</sup> Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

in the indictment will mean the name or description will be read to the court at the beginning of the trial or sentence proceeding when the indictment is read to the court.

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

The purpose of the limitation on the right to liberty, by requiring the court to treat the destruction of the unborn child's life as an aggravating factor, is to ensure sentences imposed for relevant serious offences appropriately reflect the seriousness of these offences and the impacts of the criminal conduct, and meet community expectations in relation to sentencing. Requiring the court to treat the death of an unborn child as an aggravating factor when determining the sentence allows the court to impose sentences at the higher end of the range for offences involving the destruction of the life of an unborn child and ensures a consistent approach to sentencing for these offences, whilst preserving the court's discretion in relation to sentencing decisions.

*Best interests of the child (section 26(2) of the HR Act)*

The purpose of the limitation on the right of children to protection in their best interests, by requiring the court to treat the destruction of the unborn child's life as an aggravating factor, is to ensure sentences imposed for relevant serious offences appropriately reflect the seriousness of these offences and the impacts of the criminal conduct, and meet community expectations in relation to sentencing. Requiring the court to treat the death of an unborn child as an aggravating factor when determining the sentence allows the court to impose sentences at the higher end of the range for offences involving the destruction of the life of an unborn child and ensures a consistent approach to sentencing for these offences, whilst preserving the court's discretion in relation to sentencing decisions.

- (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

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

The limitation on the right to privacy will achieve its purpose of providing a mechanism for the recognition of the unborn child whose life has allegedly been destroyed as a result of criminal conduct by enabling the name or description of the unborn child to be included in an indictment, which is read to the court at the commencement of the trial or sentence proceeding.

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

The limitation on the right to liberty will achieve its purpose of ensuring that sentences imposed for relevant serious offences appropriately and transparently account for the impact of the criminal conduct that resulted in destroying the life of the unborn child, by requiring the court to treat the destruction of the life of an unborn child as an aggravating factor in determining the appropriate sentence.

*Best interests of the child (section 26(2) of the HR Act)*

The limitation on the right of children to protection in their best interests will achieve its purpose of ensuring that sentences imposed for children convicted of relevant serious offences appropriately and transparently account for the impact of the criminal conduct that resulted in destroying the life of the unborn child, by requiring the court to treat the destruction of the life of an unborn child as an aggravating factor in determining the appropriate sentence.

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

There are two broad alternatives to recognise the deaths of unborn children as a result of criminal acts: fetal legal personhood or the creation of a new circumstance of aggravation for relevant offences. Neither of these alternatives offer a less restrictive way to achieve the proper purpose of the limitations because:

- fetal legal personhood would also limit the right to privacy (as the name of the unborn child would mandatorily be included in an indictment related to their death) and the right to liberty and a child's right to protection (as the person whose criminal behaviour caused the death of the unborn child would be subject to a term of imprisonment), and would additionally fundamentally limit the pregnant person's rights and expose them to criminal prosecution for choices made during their pregnancy; and
- a new circumstance of aggravation would also limit the right to privacy (as the name of the unborn child or at minimum the fact that the person was pregnant would mandatorily be included in the indictment), would more substantially limit the right to liberty and a child's right to protection (as the person whose criminal conduct caused the death of the unborn child would be subject to a longer term of detention through an increased maximum penalty associated with the circumstance of aggravation), and would additionally limit rights in criminal proceedings.

The amendments in the Bill to better recognise the deaths of unborn children as a result of criminal acts are considered to appropriately balance human rights in a less restrictive manner.

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

In my opinion, having regard to the extent of the limitations on the right to privacy, the right to liberty, and the right of children to protection in their best interests, the importance of achieving the purposes of the limitations outweigh the harm caused to the rights.

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

The limitation on the right to privacy will be authorised by law and is appropriate to provide for recognition of the unborn child whose life has allegedly been destroyed as a result of an offence committed in relation to the pregnant person. The amendment in the Bill is reasonably adapted to ameliorate the impacts on human rights by not requiring the name or description of the unborn child to be included in an indictment in recognition of the fact that not all unborn children will have been named and there may be situations where a family does not wish for this to occur.

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

The limitation on the right to liberty will be authorised by law and is appropriate to ensure sentences imposed for relevant serious offences appropriately reflect the seriousness of these offences and the impacts of the criminal conduct, and meet community expectations. The amendments are reasonably adapted to ameliorate the impacts on human rights as much as possible, by limiting the offences to which the statutory aggravating factor applies, allowing the court to disapply the aggravating factor in exceptional circumstances, and retaining judicial discretion in sentencing. The new statutory aggravating factor is also not intended to restrict the court's ability to take into account any of the other matters listed in section 9 of the PS Act or section 150 of the YJ Act, including for the YJ Act the prescribed special considerations.

*Best interests of the child (section 26(2) of the HR Act)*

The limitation on the right of children to protection in their best interests will also be authorised by law and is appropriate to ensure sentences imposed for children convicted of relevant serious offences appropriately reflect the seriousness of these offences and the impacts of the criminal conduct and meet community expectations. The amendments are reasonably adapted to ameliorate the impacts on human rights as much as possible, by limiting the offences to which the statutory aggravating factor applies, allowing the court to disapply the aggravating factor in exceptional circumstances, and retaining judicial discretion in sentencing. The impact of the amendments on children is also reduced by the following important safeguards:

- for children between the ages of 10 and 14, section 29(2) of the Criminal Code will continue to apply, which means that the prosecution needs to prove the child had the capacity to know they should not have engaged in the offending conduct;
- other sentencing principles in section 150 of the YJ Act continue to apply, including the prescribed special considerations, such as the principles that age is a mitigating factor in determining whether to impose a penalty and the nature of a penalty, and that a child should be detained only as a last resort and for the shortest appropriate period; and
- maximum detention periods under the YJ Act continue to apply:
  - children convicted of wounding, assault occasioning bodily harm, dangerous operation of a vehicle (other than causing the death of or grievous bodily harm to another person with a circumstance of aggravation), or careless driving and sentenced by a Childrens Court Magistrate can be sentenced to a maximum detention period of one year, and children dealt with by a Childrens Court judge can be sentenced to a maximum detention period of either half the maximum imprisonment term an adult could be ordered to serve or five years, whichever is less;
  - children convicted of grievous bodily harm or dangerous operation of a vehicle causing death or grievous bodily harm with a circumstance of aggravation and sentenced by a Childrens Court judge can be sentenced to a maximum detention period of seven years; and
  - children convicted of manslaughter or murder and sentenced by a Childrens Court judge can be sentenced to a maximum detention period of 10 years, or, if the court considers the offence to be a particularly heinous offence having regard to all the circumstances, a period up to and including life imprisonment.

(f) any other relevant factors

Nil.

## Conclusion

In my opinion, the Justice and Other Legislation Amendment Bill 2023 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 a free and democratic society based on human dignity, equality and freedom.

**YVETTE D'ATH MP**  
**Attorney-General and Minister for Justice**  
**Minister for the Prevention of Domestic and Family Violence**

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