

Police Powers and Responsibilities and Other Legislation Amendment Bill 2024

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, Mark Ryan, Minister for Police and Community Safety make this statement of compatibility with respect to the Police Powers and Responsibilities and Other Legislation Amendment Bill 2024 (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 Queensland Government is committed to recognising the rights of trans and gender diverse Queenslanders. This reflects the protected human right to recognition and equality before the law through effective protection against discrimination, including in the delivery of government services.

The *Births, Deaths and Marriages Registration Act 2023* (the BDMR Act) will, upon commencement, strengthen the legal recognition of trans and gender diverse people by establishing a new framework so that a person can register an alteration of record of sex and a sex descriptor that is most appropriate and meaningful to them. This replaces the requirement for a person to undergo sex reassignment surgery before they can be legally recognised.

The Queensland Police Service, the Department of Justice and Attorney-General and Queensland Health reviewed portfolio legislation and identified the need to amend several provisions to ensure the continued lawfulness of personal searches and promote the rights of trans and gender diverse people.

The Bill enacts a range of amendments to the following legislation to ensure that all Queenslanders are afforded the same protections:

- the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004*;
- the *Crime and Corruption Act 2001*;
- the *Mental Health Act 2016*;
- the *Police Powers and Responsibilities Act 2000*;
- the *Public Health Act 2005*;
- the *Summary Offences Act 2005*; and
- the *Terrorism (Preventative Detention) Act 2005*.

Several key safeguards will be modernised to recognise gender and provide responsive protection to people against whom powers are exercised.

Additionally, the Bill removes unnecessary gendered language by using gender neutral language across several statutes. The provisions will continue to apply in the same way as there is no change to the underlying policy intention.

The Bill includes amendments to the *Corrective Services Act 2006* (CSA) and other legislation to support an efficient and effective parole process that limits further trauma for victims, promote the ongoing safe management of prisoners at risk of self-harm or suicide and ensure the development of infrastructure to support the safe delivery of corrective services is subject to appropriate approval processes.

Human Rights Issues

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

The amendments in the Bill engage a range of rights protected by the HR Act, namely:

- recognition and equality before the law (section 15)
- protection from torture and cruel, inhuman or degrading treatment (section 17)
- freedom of thought, conscience, religion, and belief (section 20)
- freedom of expression (section 21)
- take part in public life (section 23)
- privacy and reputation (section 25)
- protection of families and children (section 26)
- cultural rights generally (section 27)
- liberty and security of person (section 29)
- right to humane treatment when deprived of liberty (section 30)
- access to health services (section 37).

The rights protected by the HR Act are to be read alongside other supplementary means of interpretation, including the *Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity* (Yogyakarta Principles) and the *Yogyakarta Principles plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement the Yogyakarta Principles* (YP+10).

The *right to recognition and equality before the law* under section 15 of the HR Act provides that everyone has the right to enjoy their human rights without discrimination and is entitled to the equal protection of the law without discrimination. This right places both a negative obligation on states not to discriminate when enacting legislation, and a positive obligation to enact legislation to protect against discrimination.

Schedule 1 of the HR Act defines “discrimination” as including direct and indirect discrimination under the *Anti-Discrimination Act 1991* (AD Act). The AD Act prescribes a list of attributes that are protected from discrimination, such as age, impairment, political belief or activity, race, religious belief or religious activity, sex and sexuality.

Section 7 of the AD Act prohibits discrimination on the basis of gender identity. The BDMR Act will amend Schedule 1 of the AD Act to define gender identity to include:

- a. the person's internal and individual experience of gender, whether or not it corresponds with the sex assigned to the person at birth; and
- b. the person's personal sense of the body; and
 - i. if freely chosen—modification of the person's bodily appearance or functions by medical, surgical or other means; and
 - ii. other expressions of the person's gender, including name, dress, speech and behaviour.

International human rights law also suggests that the right to recognition before the law extends to the right to have a person's gender identity recognised without being required to undergo a medical procedure.¹

Broadly, the amendments in the Bill will promote the right to recognition and equality before the law. Where the amendments replace references to sex with gender, this enables officers to consider a person's gender when exercising particular powers. Some amendments will equalise the position between people of all genders. This is discussed in further detail below.

Amendments to various provisions will remove unnecessary gendered language or replace gendered language with gender neutral language. This reflects contemporary drafting practice. These amendments have no effect on how the provisions operate and do not change the underlying policy intention.

The *right to liberty and security of person* provides that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. The right to security includes bodily integrity and freedom from injury to the body. This means that all reasonable steps must be taken to ensure the physical safety of those who are in danger of physical harm.

The amendments in the Bill promote the right to liberty and security of person by ensuring that public officials can take immediate action where their bodily integrity is placed at risk.

Body piercing of children

The right to *protection of families and children* under section 26 of the HR Act provides that every child has the right to protection that is needed by the child, and in the child's best interests, because of being a child.

Section 18 of the *Summary Offences Act 2005* prohibits a person performing body piercing on the external genitalia of a female who is a minor, the penis or scrotal skin of a male who is a minor and the nipples of a minor.

The Bill removes references to the sex of a child and makes the language gender neutral. There is no change to the existing policy and the provision will continue to apply in the same way. It is considered that continuing to apply the provision in the same way promotes the protection of the child from a high risk personal appearance service being applied to sensitive parts of the body where the child may not be fully capable of consenting to the service.

¹ Yogyakarta Principles principle 6.

Other amendments to remove unnecessary gendered language

The Bill contains a range of amendments that remove unnecessary gendered language. These amendments replace gendered language with gender neutral language, reflecting a contemporary approach in a manner that accords with the principles of plain language drafting. These amendments are not intended to change the underlying policy of the provisions. Therefore, there is no human rights impact from these amendments.

Human rights that are limited by the proposals (Part 2, Divisions 2 and 3 HR Act)

The amendments in the Bill limit some rights protected by the HR Act, namely:

- freedom of thought, conscience, religion, and belief (section 20)
- freedom of expression (section 21)
- take part in public life (section 23)
- privacy and reputation (section 25)
- cultural rights generally (section 27)
- right to humane treatment when deprived of liberty (section 30).

Where the Bill limits rights, it does so in a way that is designed to minimise those limitations and is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Searching people and inspecting entrants' belongings

In the course of their duties, police officers and watchhouse officers under the *Police Powers and Responsibilities Act 2000* (PPRA), and authorised commission officers under the *Crime and Corruption Act 2001* (CC Act) (each a **searching officer**) can conduct a search of a person. A police officer, watchhouse officer and protective services officer under the PPRA (each also a **searching officer**) can touch the clothing of a person entering particular buildings to inspect their belongings. These are existing powers.

The Bill removes the requirement that a searching officer must be of the same sex as the person to be searched or whose belongings are to be inspected. The amendments replace this with the starting point that a search must be conducted by a searching officer of the same gender as the person to be searched, if reasonably practicable (the **same-gender starting point**). The same-gender starting point enables searching officers to consider a person's gender identity and promote the person's right to equal treatment.

The Bill provides that the searching officer must explain the process to the subject and give the subject a reasonable opportunity to express a preference about the gender of the searching officer (the **dialogue model safeguard**). Any person may be directed by the searching officer to conduct the search or inspect the belongings, including someone who is not a member of the Queensland Police Service or an authorised commission officer, if reasonably necessary to:

- accommodate a preference expressed by the subject
- to ensure that the searching officer and the subject are of the same gender
- address a concern related to gender in a way that minimises embarrassment and offence.

There will be no requirement for the subject to disclose their gender to the searching officer. Rather, after the searching officer has explained how the search or inspection is to be conducted, the subject can express a preference (if any) about the gender of the person who is to conduct the search or inspection. This allows the person to volunteer their gender if they wish, or to raise concerns more broadly. Likewise, there will be no requirement for a searching officer to disclose their gender.

(a) the nature of the right

The *right to privacy and reputation* under section 25 of the HR Act protects a person's privacy and reputation and provides that a person has the right not to have the person's privacy unlawfully and arbitrarily interfered with. This right protects both the privacy of the person's personal information and interference with their physical or mental integrity. Only lawful and non-arbitrary intrusions may occur upon privacy and reputation.

International law suggests that the right to privacy includes the right to choose when, to whom and how to disclose information about a person's gender identity.²

The Bill provides limited scope for the searching officer to not accommodate the person's preference. This can happen where there are reasonable grounds to believe the preference is made for an improper purpose or it is not reasonably practicable to accommodate the preference. Enabling a search to be conducted contrary to the person's preference limits the right to privacy, as it may impact on a person's mental integrity.

The *right to freedom of thought, conscience, religion, and belief* under section 20 of the HR Act protects a person's freedom to demonstrate their religion or belief, which may include demonstration of their religion or belief through worship, observance, practice and teaching including ritual and ceremonial acts, and practices integral to those acts. This may include (among other things) wearing distinctive clothing or head coverings.³

Cultural rights – generally under section 27 of the HR Act is a negative right which protects a person from being denied the right to enjoy their culture, religion or language. Culture is broadly interpreted to include things such as the wearing of traditional dress.

Cultural rights and the right to freedom of religion may reasonably be extended to include not undressing in front of someone of a different gender, for example where the wearing of particular clothes or modesty generally is a part of a person's religious or cultural beliefs. These rights are limited by the provisions that enable an officer to search a person or inspect their belongings (including their clothing), particularly where this occurs contrary to the person's preferences about the gender of the searching officer.

The *right to humane treatment when deprived of liberty* under section 30 of the HR Act requires all persons deprived of liberty to be treated with respect for the inherent dignity of the human being. The right is concerned with avoiding unreasonable interference with other rights.

Allowing persons who have been detained to be searched contrary to their preferences limits this right as some people may feel that being searched by a person of a different gender or contrary to the person's preference impacts their inherent dignity as a human person.

² Yogyakarta Principles principle 6.

³ Human Rights Committee, General Comment No 22: Freedom of Thought, Conscience or Religion (Article 18 of the International Covenant on Civil and Political Rights), 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) 4.

The right to humane treatment when deprived of liberty is complementary to the *right to protection from torture and cruel, inhuman or degrading treatment* under section 17 of the HR Act. Section 17 of the HR Act prohibits bad conduct towards any person (imprisoned or not) while the right in section 30 to humane treatment mandates good conduct towards people who are incarcerated.⁴ Cruel, inhuman or degrading treatment does not have to be intentionally inflicted or involve physical pain, but most cases will involve some deliberate intent to harm, humiliate or debase a victim. It is considered that the conduct authorised by the amendments does not rise to the level of limiting the rights protected under section 17. Legislative safeguards will apply to require searches to be conducted with due regard to the dignity of the person, including in circumstances where preferences in relation to the gender of the searching person cannot be accommodated.

(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 enabling a searching officer to conduct a search or inspection without accommodating a subject's preference is to ensure that the searching officers can continue to conduct lawful searches to protect the community, while also protecting searching officers.

A personal search can be conducted for a range of reasons, including to find weapons on a person and prevent them from harming a member of the public or a searching officer. It can also be conducted to find things on a person that a searching officer believes the person unlawfully possesses or to find evidence.

Inspections conducted at state buildings and watchhouses prevent people entering with weapons or other dangerous items. In watchhouses, inspections prevent the introduction of drugs or other contraband.

There is a strong public interest in ensuring that searches and inspections are conducted in a timely and effective manner, provided an appropriate balance is struck with promoting the human rights of a subject as far as possible.

The retention of the searching officer's discretion about who conducts the search in these limited circumstances also protects searching officers from potential physical harm or degradation by a person being searched. This protects the searching officer's right to security of the person and their right to privacy and reputation. The protection of searching officers from harm and the protection of their dignity in performing their duties is consistent with the values of a free and democratic society.

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

In some situations, it may not be appropriate for the searching officer to accommodate a person's preference about who conducts a search. For example, a subject might:

- make lewd comments or gestures about the particular officer they prefer to conduct the search

⁴ *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273.

- express an offensive preference to be searched by a person of a gender they do not identify as, including where the person holds beliefs inconsistent with the legal recognition of trans and gender diverse people
- not genuinely have a preference to be searched by a person of a particular gender and express a preference solely to frustrate the public official from performing their duties.

The retention of the searching officer's discretion about who conducts the search helps to protect searching officers from potential physical harm or degradation by a person being searched by allowing the searching officer to not accommodate a preference which is made in bad faith or for ulterior or nefarious reasons.

There are also situations where a subject's preference cannot reasonably be accommodated. Particularly in remote areas or late at night in regional or rural areas, there may be no searching officers or helpers who match the subject's gender preference who could attend within a reasonable time to conduct the search or inspection.

The Bill also retains the ability for any searching officer to conduct a search where the emergent nature of the situation warrants immediate action.

Providing that a searching officer retains the limited discretion about who conducts the search ensures that in emergent circumstances, or where it is not reasonably practicable to accommodate a preference expressed by a person, searching officers can still perform their statutory function and promote community safety.

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

An alternative option to the amendments contained in the Bill is to remove any discretion from the searching officer about who can conduct a search or inspection, other than for an immediate search, and provide that all searches or inspections must be performed by a person of the same gender as the subject person. For trans and gender diverse people, there may not be any searching officer of the same gender as the subject person. Therefore, there may be occasions where the requirement for a searching officer to be of the same gender as the subject person cannot reasonably apply.

The proposed amendment has been carefully drafted to enable a subject person to express a preference about the gender of the person to conduct the search or inspection while not expressly requiring that any person involved disclose their gender. This alternative approach would require both the subject person and the searching officer to disclose their gender, which would further limit both parties' rights to privacy unnecessarily.

Further, this alternative approach does not recognise that a subject person may have a genuine reason for preferring that the same-gender starting point is not followed. This may be, for example, because of previous traumatic experiences. The safeguard in the Bill is intended to operate flexibly to accommodate the diverse needs of people, where appropriate and practical.

Another alternative approach is for searching officers to require a subject person to provide information about their gender identity to a searching officer, or for a searching officer to disclose their gender identity to a subject person as routine before conducting a search. This could occur as part of the searching officer's explanation of the search, including how it will be conducted and by whom. This could mitigate the risk of a person being searched by an officer who does not identify as the same gender as the person or contrary to a person's preference.

The requirement to provide information about their gender identity limits a person's (including a searching officer's) right to privacy in relation to personal information. The proposed amendments allow a person to volunteer information about their gender to minimise any embarrassment and promote the person's autonomy in relation to their privacy. Such a limitation applying broadly to all subject persons and searching officers is considered to outweigh any promotion of other rights. When a subject person is asked if they have a preference about who will conduct the search or inspection, the person has a choice to disclose their gender identity or raise more broadly why they would rather have another person, or a person of a particular gender, conduct the search or inspection.

Another alternative approach is to require searching officers to always accommodate a subject person's preference. This would mean that a searching officer would have no discretion about who conducts the search or inspection if a subject person expresses a preference. For trans and gender diverse people, there may not be any searching officer of the gender for which the subject person expresses a preference. Therefore, there may be occasions where the requirement to accommodate a preference cannot reasonably be met and, if this alternative approach was taken, a search could not be conducted. And, for the reasons stated above, there are situations where it may not be appropriate or reasonably practicable to accommodate a preference.

In circumstances where no one of the person's preferred gender is reasonably available to conduct the search, the model provides that a split search can be conducted. This enables two officers (or helpers) of different genders to conduct the search depending on the area of the body to be searched, allowing flexibility to address preferences a person may have about exposing parts of their body to, or having parts of their body touched by, someone of a particular gender.

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

The amendments in the Bill ensure that searches and inspections are overwhelmingly conducted in accordance with the same-gender starting position or by accommodating a person's preference about the gender of the person through the dialogue model safeguard. The amendments will have the effect of promoting the dignity of the subject person by acknowledging that there may be circumstances where they may prefer to be searched by a person of a different gender and ensuring they have a legislative right to express this preference, while acknowledging that in some situations the person's preference cannot or need not be met. This will allow searching officers to protect the Queensland community whilst ensuring that the rights and safety of individual searching officers are also protected in the course of their duties.

While the limitations on rights resulting from a subject person being searched or inspected by a person of a different gender or contrary to their preference may be significant—particularly in relation to unclothed searches—the amendments ensure that the dignity of the subject person is paramount. Searches or inspections are only conducted by a person of a different gender or contrary to a person's preference in circumstances where this is necessary to achieve legitimate aims.

Existing safeguards in the legislation will continue to apply to searches involving the removal of clothing. Section 630 of the PPRA and 106 of the CC Act require a searching officer to give the subject person the opportunity to remain partly clothed during the search. The sections also require the search to be conducted as quickly as reasonably practicable and the searching officer to allow the subject person to dress as soon as the search is finished. Further, for police officers the provision prohibits the officer making physical contact with the genital and anal areas of the subject person.

On balance, the retention of the searching officer's discretion for who conducts a search, where a preference is not able to be complied with because it is not considered reasonably practicable, is reasonable and justified. The amendments in the Bill provide an appropriate balance between the rights of the person to be searched while protecting the human rights of both the public and the searching officers conducting the search.

Amendments to the *Mental Health Act 2016* and *Public Health Act 2005*

Chapter 11, Part 7 of the *Mental Health Act 2016* deals with security of Authorised Mental Health Services (AMHSs) and 'treatment and care places' such as public sector health service facilities, including searches of patients and visitors. The primary purpose of the search provisions is to reduce the risk of harm to patients, staff and visitors.

Under these provisions, searches may be conducted for involuntary patients and voluntary classified patients in AMHSs and for persons detained in public sector health service facilities pending a recommendation for assessment being made. A search may also occur for involuntary patients, to detect whether any harmful things are in their possession, on admission or entry into a high security unit or other AMHSs approved by the Chief Psychiatrist as a place where a search on admission or entry may be required. Searches of visitors can also be carried out, to detect whether the person may have a harmful thing, on admission or entry into a high security unit or other AMHSs approved by the Chief Psychiatrist as a place where a visitor may be asked to participate in a search or submit their possessions to a search.

Chapter 4A of the *Public Health Act 2005* provides powers for dealing with the health of persons with major disturbances in mental capacity, caused, for example, by mental illness, disability, injury or intoxication by drugs or alcohol. If a person appears to be at immediate risk of serious harm because of this major disturbance, and appears to require urgent examination, or treatment and care, an ambulance officer or police officer may take the person to a treatment or care place such as a public sector health service facility. Under these provisions, searches may be conducted to detect or remove a harmful thing.

Under both Acts, personal searches that require the searcher to touch the clothing worn by the person in order to detect things in their possession, and searches requiring the removal of clothing, must be carried out by a person or persons of the same gender as the person being searched (sections 399 and 400 of the *Mental Health Act* and sections 157Z and 157ZA of the *Public Health Act*).

This existing strict 'same-gender' search requirement does not reflect modern understandings of gender or recognise the transgender and gender diverse community. If a person identifies with a gender other than male or female (for example, non-binary, agender, or genderqueer), it may not be possible or practicable to have a person of the same gender conduct the search. However, the search may be essential for the safety of the person being searched, other patients of the facility and staff. There are also circumstances in which the person being searched may prefer that a person of a different gender conducts the search – for example, a transgender man may feel more comfortable being searched by a woman than a man.

The Bill amends sections 399 and 400 of the Mental Health Act and sections 157Z and 157ZA of the Public Health Act to update requirements so that certain searches under those Acts may only be carried out if, to the extent reasonably practicable, the person being searched has been given an opportunity to express, and has expressed, their preference about the gender of someone carrying out the search (the *gender preferred* by the person) and the gender of the searcher is the gender preferred by, or otherwise the same gender as, the person. These amendments reflect a contemporary understanding of gender identity, promote a person-centred approach and ensure that searches necessary for safety can be lawfully carried out in circumstances where it is not reasonably practicable for the searcher to be of the gender preferred by, or the same gender as, the person being searched.

(a) the nature of the right

The *right to privacy and reputation* under section 25 of the HR Act protects a person's privacy and reputation and provides that a person has the right not to have the person's privacy unlawfully and arbitrarily interfered with. This right protects both the privacy of the person's personal information and interference with their physical or mental integrity. Only lawful and non-arbitrary intrusions may occur upon privacy and reputation. International law suggests that the right to privacy includes the right to choose when, to whom and how to disclose information about a person's gender identity.⁵

This right may be limited by the amendments to the Public Health Act and Mental Health Act because it will provide lawful authority for a person, in the circumstances outlined above, to be searched by person or persons of a gender that is different to the gender the person has expressed a preference for, or different to their own gender. This may limit the right to privacy, as it may impact on a person's mental integrity.

The *right to freedom of thought, conscience, religion, and belief* under section 20 of the HR Act protects a person's freedom to demonstrate their religion or belief, which may include demonstration of their religion or belief through worship, observance, practice and teaching including ritual and ceremonial acts, and practices integral to those acts. This may include (among other things) wearing distinctive clothing or head coverings.⁶

Cultural rights – generally under section 27 of the HR Act is a negative right which protects a person from being denied the right to enjoy their culture, religion or language. Culture is broadly interpreted to include things such as the wearing of traditional dress.

Cultural rights and the right to freedom of religion may reasonably be extended to include not undressing in front of someone of a different gender, for example where the wearing of particular clothes or modesty generally is a part of a person's religious or cultural beliefs. These rights are limited by the provisions that enable a person to be searched, particularly where this occurs contrary to the person's preferences about the gender of the searcher.

The *right to humane treatment when deprived of liberty* under section 30 of the HR Act requires all persons deprived of liberty to be treated with respect for the inherent dignity of the human being. The right is concerned with avoiding unreasonable interference with other rights.

⁵ Yogyakarta Principles principle 6.

⁶ Human Rights Committee, General Comment No 22: Freedom of Thought, Conscience or Religion (Article 18 of the International Covenant on Civil and Political Rights), 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) 4.

Allowing persons to be searched contrary to their preferences limits this right as some people may feel that being searched by a person of a different gender or contrary to the person's preference impacts their inherent dignity as a human person.

The right to humane treatment when deprived of liberty is complementary to the *right to protection from torture and cruel, inhuman or degrading treatment* under section 17 of the HR Act. Section 17 of the HR Act prohibits bad conduct towards any person (imprisoned or not) while the right in section 30 to humane treatment mandates good conduct towards people who are incarcerated.⁷ Cruel, inhuman or degrading treatment does not have to be intentionally inflicted or involve physical pain, but most cases will involve some deliberate intent to harm, humiliate or debase a victim. It is considered that the conduct authorised by the amendments does not rise to the level of limiting the rights protected under section 17. Legislative safeguards will apply to require searches to be conducted with due regard to the dignity of the person, including in circumstances where preferences in relation to the gender of the searching person cannot be accommodated.

(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 enabling some searches under the Mental Health Act and Public Health Act, in limited circumstances where it is practicable neither to accommodate the person's preferred gender nor the 'same-gender' requirement, is to ensure the safety of patients, visitors, staff and others at AMHSs and public sector health service facilities.

There is a strong public interest in ensuring that searches are conducted in a timely and effective manner, provided an appropriate balance is struck with promoting the human rights of the person being searched, as far as possible.

The amendments provide that the search requirements must be complied with to the extent reasonably practicable. This also protects the safety and dignity of staff, promoting staff members' rights to security of the person (section 29(1) of the HR Act) and their right to privacy and reputation. The protection of staff from harm and the protection of their dignity in performing their duties is consistent with the values of a free and democratic society.

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

Personal searches requiring the searcher to touch the clothing worn by the person being searched in order to detect things in their possession, and searches requiring the removal of clothing, are carried out to detect or remove a harmful thing. Harmful thing means anything that may be used to threaten a person's health or safety, or the security or good order of the service, or anything that, if used by a patient in the service is likely to adversely affect their treatment and care. These searches are conducted to keep patients, visitors, staff and others at AMHSs and public sector health service facilities safe.

In some situations, it will not be reasonably practicable to accommodate a person's preference about who conducts a search. For example:

- a person may be undergoing a disturbance in mental capacity that prevents them from expressing a preference in the first instance

⁷ *Owen-D'Arcy v Chief Executive, Queensland Corrective Services* [2021] QSC 273.

- an acutely unwell, disinhibited patient may make a request that presents a risk to a staff member's safety and dignity
- there may be no staff member available to conduct the search who is known to be of the gender requested.

Providing that the search requirements relating to gender must be complied with to the extent reasonably practicable ensures that in emergent circumstances, or where it is not reasonably practicable to accommodate a preference expressed by a person or have the person searched by a person of the same gender, staff at AMHSs and public sector health service facilities can still perform their statutory functions and ensure the safety of patients, visitors and other staff of the relevant facility.

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

An alternative option to the amendments contained in the Bill is to retain the current strict 'same-gender' requirement with no flexibility. For gender diverse people, there may not be a person of the same gender who can conduct the search. Therefore, there may be occasions where the requirement for a searcher to be of the same gender as the person being searched cannot be met. This means that the person will not be able to be lawfully searched, even though they are believed to be in possession of a harmful object. Staff at AMHSs and public sector health service facilities would then need to choose between carrying out the search without lawful authority, to ensure the safety of patients, visitors and staff, or not carrying out the search, putting the safety of everyone in the facility at risk. This would not achieve the purpose of the amendments and may, if the search is not carried out, infringe on the right to life of the patient or visitor being searched, and others, if the concealed harmful item is used to hurt somebody (section 16, Human Rights Act).

Further, retaining the current 'same-gender' requirement would not necessarily be less restrictive on human rights, as it would require both the person being searched and the searcher to disclose their gender which would arguably impose an equal or greater limit on the right to privacy of both persons, and does not provide for any consideration of the genuine reasons a person may have in preferring a person of a different gender to carry out the search.

Another alternative approach would be to require individuals being searched to provide information about their gender identity, or for staff members to disclose their gender identity to as routine before conducting a search. This could occur as part of the staff member's explanation of the search, including how it will be conducted and by whom. This could mitigate the risk of a person being searched by a person who does not identify as the same gender as the person or contrary to a person's preference.

However, this alternative would not be less restrictive on human rights because the requirement to provide information about their gender identity limits a person's (including a staff member's) right to privacy in relation to personal information. The proposed amendments allow a person to volunteer information about their gender to minimise any embarrassment and promote the person's autonomy in relation to their privacy. Such a limitation applying broadly to all subject persons and searching officers is considered to outweigh any promotion of other rights. When a person is asked if they have a preference about the gender of the person who will conduct the search, the person has a choice to disclose their gender identity or raise more broadly why they would rather have a person of a particular gender carry out the search.

Another alternative approach is to require preferences to always be accommodated. However, this would not be effective in achieving the purpose because there may not be a staff member in the facility who is known to be of the gender for which the person has expressed a preference. Therefore, there may be occasions where the requirement to accommodate a preference cannot be met. There may also be situations where it is not clinically or otherwise appropriate to obtain or accommodate a preference (for example, where a person is acutely unwell and is unable to express a preference, or where accommodating a preference would present a risk to the safety or dignity of a staff member). If this alternative approach was taken, a search could not be conducted and the safety of patients, staff and visitors of relevant facilities would be at risk.

As drafted, the limits imposed by the amendments only go as far as necessary to achieve the purpose. That is, that the amendments are tailored so as to not impose a greater limitation than required. Existing safeguards in the legislation will continue to apply. This includes a requirement for the searcher to carry out the search in a way that respects the person's dignity to the greatest possible extent and causes as little inconvenience to the person as is practicable in the circumstances. The search must also be carried out in a part of a building that ensures the person's privacy. A search requiring the removal of clothing may only occur if approved by the person in charge of the public sector health service facility, and the person carrying out the search must, before carrying out a search under this section, tell the person the reasons for the search and how it is to be carried out. These safeguards ensure the search provisions are the least restrictive as possible to achieve the purpose. Searches carried out on patients under the Mental Health Act must also comply with the principles in section 5 of that Act, including that a person's gender-related, religious, cultural and other special needs must be recognised and taken into account.

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

The amendments in the Bill to the Mental Health Act and Public Health Act ensure that searches are, to the extent practicable, conducted in accordance with a person's preference about the gender of the person conducting the search, or otherwise, in accordance with the 'same-gender' requirement.

The amendments will have the effect of promoting the dignity and gender-related needs of the person being searched by acknowledging that there may be circumstances where they may prefer to be searched by a person of a different gender and ensuring they have a legislative right to express this preference.

The amendments also acknowledge that in some situations the person's preference may not be able to be accommodated. This will ensure that the safety of patients, visitors and others at AMHSs and public sector health service facilities is protected whilst ensuring that the rights and safety of staff are also protected in the course of their duties.

While the limitations on rights resulting from a person being searched or inspected by a person of a different gender or contrary to their preference may be significant, the amendments have been prepared to ensure that the dignity of the subject person is paramount. Searches will only be conducted by a person of a different gender or contrary to a person's preference in circumstances where this is necessary to achieve legitimate aims. Further, a number of existing safeguards in the legislation will continue to apply.

On balance, the retention of the ability to conduct a search, where a preference is not able to be complied with, or the same gender requirement otherwise cannot be met, because it is not considered reasonably practicable, is reasonable and justified. The amendments in the Bill provide an appropriate balance between the rights of the person to be searched while protecting the human rights of both the public and the persons conducting the search.

Photographing the breasts of reportable offenders

Part 4 of the *Child Protection (Offender Reporting and Offender Prohibition Order) Act 2004* (CPOROPOA) creates a set of requirements for a reportable offender to report to the police commissioner their personal details. Schedule 2 defines personal details to include any tattoos or permanent distinguishing marks that the reportable offender has. The obligation extends to reporting the details of any tattoos or marks that have been acquired, removed or changed.

Section 31 of the CPOROPOA empowers police officers, in the context of a reportable offender's personal details, to require a reportable offender to be photographed. Section 32 provides that a photograph may be retained for law enforcement, crime prevention or child protection purposes. Section 31(2) prohibits a police officer from requiring a reportable offender to expose particular parts of their body, including their breasts if they are a female or a transgender person who identifies as a female.

The Bill repeals that prohibition and enables a police officer to require a reportable offender of any gender to expose their breasts for a photograph.

The Bill inserts a new safeguard with the starting point that the photography must be taken by someone of the same gender as the reportable offender (the *same-gender starting point*). The same-gender starting point enables police officers to consider a person's gender identity and promote the person's right to equal treatment.

The Bill provides that the police officer must explain the process to the reportable offender and give the offender a reasonable opportunity to express a preference about the gender of the person taking the photograph (the *dialogue model safeguard*). Any person may be authorised by the police officer to take the photograph, including someone who is not a member of the Queensland Police Service.

There will be no requirement for the reportable offender to disclose their gender to the police officer. Rather, after the police officer has explained how the process is to be conducted, the reportable offender can express a preference (if any) about the gender of the photographer. This allows the reportable offender to volunteer their gender if they wish, or to raise concerns more broadly. Likewise, there will be no requirement for a photographer to disclose their gender.

(a) the nature of the right

The *right to privacy and reputation* under section 25 of the HR Act protects a person's right to privacy and reputation and provides that a person has the right not to have the person's privacy unlawfully and arbitrarily interfered with. This right protects both the privacy of the person's personal information and interference with their physical and mental integrity, sexuality and individual identity (including appearance and gender), among other things. This reflects the fundamental value of the inherent dignity of the person and places a positive obligation on states to adopt provisions that prohibit interference with a person's privacy and reputation.

Removing the current limitation means that the right to privacy of a woman will be limited when a police officer requires them to expose their breasts for a photograph.

The Bill provides limited scope for the police officer to not accommodate the reportable offender's preference in relation to the gender of the person taking the photograph. This can happen where there are reasonable grounds to believe the preference is made for an improper purpose or it is not reasonably practicable to accommodate the preference. If a police officer does not accommodate the preference, this further limits the right to privacy.

The *right to recognition and equality before the law* under section 15 of the HR Act provides that everyone has the right to enjoy their human rights without discrimination and is entitled to the equal protection of the law without discrimination. This right places both a negative obligation on states not to discriminate when enacting legislation, and a positive obligation to enact legislation to protect against discrimination.

The *right to freedom of thought, conscience, religion, and belief* under section 20 of the HR Act protects a person's freedom to demonstrate their religion or belief, which may include demonstration of their religion or belief through worship, observance, practice and teaching including ritual and ceremonial acts, and practices integral to those acts. This may include (among other things) wearing distinctive clothing or head coverings.⁸

Cultural rights – generally under section 27 of the HR Act is a negative right which protects a person from being denied the right to enjoy their culture, religion or language. Culture is broadly interpreted to include things such as the wearing of traditional dress.

Cultural rights and the right to freedom of religion may reasonably be extended to include not undressing in front of someone of a different gender, for example where the wearing of particular clothes or modesty generally is a part of a person's religious or cultural beliefs. These rights are limited by the provisions that enable a police officer to require a reportable offender to expose their breasts for photography, particularly where this occurs contrary to the person's preferences about the gender of the photographer.

The *right to humane treatment when deprived of liberty* requires all persons deprived of liberty to be treated with respect for the inherent dignity of the human being. The right is concerned with avoiding unreasonable interference with other rights.

Where a person is required to expose their breasts to be photographed, or photographed by a person contrary to their preference, the right is limited. A number of people, including many women, may feel that exposing their breasts to any extent to a person of another gender or contrary to their preference for the purpose of photographing a tattoo or mark impacts their inherent dignity as a human being.

Although the right to humane treatment when deprived of liberty is complementary to the *right to protection from torture and cruel, inhuman or degrading treatment*, the limitation does not rise to the level of limiting the latter.

⁸ Human Rights Committee, General Comment No 22: Freedom of Thought, Conscience or Religion (Article 18 of the International Covenant on Civil and Political Rights), 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) 4.

(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 amendment is to ensure that, where necessary, a photograph of a tattoo or mark can be taken where the tattoo or mark is on the breasts of a person of any gender. As acknowledged above, a number of people, including many women, may experience negative impacts in being subjected to this kind of procedure, and it is important to ensure that the dignity of all persons is respected and upheld where a photograph of their breasts is required. This includes, for example, a non-binary person who was assigned female at birth and has not undergone reconstructive chest surgery. Because of the diversity of genders, it is not possible to constrain the application of the safeguard in a meaningful way. Therefore, the existing safeguard which prohibits photographs of the breasts of people of particular genders is proposed to be replaced by the dialogue model safeguard.

Because of the various stylistic ways an element can be rendered in a tattoo, it is not always possible to appropriately and accurately describe the tattoo in writing. This is particularly the case where the tattoo is intricate or features an object that can take many appearances. There are similar issues for describing permanent distinguishing marks (such as birth marks). Therefore, it may be necessary to photograph the tattoo or mark.

There is a public interest in ensuring that the Queensland Police Service maintains a clear visual record of information which is required to be reported by a reportable offender, even when it is a tattoo or mark on the offender's breasts. These photographs are used to reduce the likelihood that the offender will re-offend and to facilitate the investigation and prosecution of any future offences that the offender may commit.

(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 rights to privacy and reputation, recognition and equality, cultural rights and freedom of religion, and humane treatment when deprived of liberty will achieve the purpose of enabling the Queensland Police Service to protect children by monitoring a reportable offender's compliance with their reporting obligations.

Without the power to require a reportable offender to expose their breasts for a photograph, police officers cannot capture valuable information that can be used to identify whether a reportable offender has been involved in further offending. A written description of a tattoo or mark may not be sufficiently probative when attempting to use it to match a reportable offender to a fresh offence under investigation. The ability to rely on a clear visual record of information will ensure that police officers can effectively protect the lives of children and their sexual safety.

(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 or reasonably available alternatives to enabling a police officer to require any reportable offender to expose their breasts to photograph a reportable thing located on that part of the body.

However, the Bill will include new safeguards to ensure the right is only limited to the extent necessary. The Bill will provide that:

- the police officer must not require the reportable offender to remove more clothing than is necessary for the photograph to be taken; and
- if reasonably practicable, the police officer must ensure the photograph is not taken in the presence of someone whose presence is not required while the photograph is taken or where someone not involved in taking the photograph can see the photograph being taken.

The inclusion of these requirements will further preserve the dignity and privacy of the person to be searched through the process.

An alternative option is to maintain gendered language in the safeguard. This could involve inserting a definition that only prohibits requiring a reportable offender of a particular gender to expose their breasts for photography. Because the social understanding of gender continues to evolve, it is not possible to determine with any certainty to which specific genders the prohibition should apply. There are many people of a variety of genders, including women, who may take offence if required to expose their breasts and it is important to protect the dignity of all persons if a photograph of their breasts is required.

Another option is to omit in its entirety the provision that a police officer cannot require a reportable offender to expose their breasts if the offender is a female or a transgender person who identifies as a female. In this way an officer would be able to take photographs of the breasts of any reportable offender, where required. This option is considered unfavourable as it would not afford all reportable offenders with reasonable opportunity to express a preference as to the gender of the photographing officer. This is a key safeguard contained in the Bill that is intended to facilitate flexibility required to recognise and promote the rights of trans, intersex and gender diverse people.

Another alternative option is to extend the provision that a police officer cannot require a reportable offender to expose their breasts if the offender is a female or a transgender person who identifies as a female to apply to all people. In this way, a police officer would be prohibited from requiring any reportable offender to expose their breasts for the purposes of photographing a tattoo or mark located on that part of the body. This option would frustrate the Queensland Police Service's ability to maintain a clear visual record of information which is required to be reported by a reportable offender and relied upon to monitor these offenders and keep children safe. Without these identifying photographs, there may be limited information available to police to investigate and prosecute any future offences that the offender may commit. As above, a written description of a tattoo or mark may not be sufficiently probative when attempting to use it to match a reportable offender to a fresh offence under investigation. Accordingly, this option does not achieve the purpose of the Bill.

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

The limitation of the right is reasonable and demonstrably justified as the photographing of a reportable thing, such as a tattoo or permanent mark on the body of a reportable offender, is not considered to impose arbitrary requirements and is consistent with an offender's reporting obligations under CPOROPOA.

It is acknowledged that the breasts are considered a sensitive area by some community members and the limitation on rights resulting from enabling police officers to photograph the breasts of a reportable offender of any gender is accordingly significant. However, the purpose of these limitations is crucial in enabling police to maintain an accurate and comprehensive record of reportable offenders, including photographs of any identifying features. These photographs ensure that police can match a reportable offender to a fresh offence under investigation and facilitate the successful prosecution of these offences and protect children. The limitation achieves an appropriate balance by enabling a reportable offender to express a preference as to the gender of the person taking the photograph. This applies equally to people of all genders and expanding the protections recognises this. This amendment supports the right to recognition and equality before the law.

Police officers who require a reportable offender to expose their breasts for photography can still take steps to ensure that the right is limited in a minimal way. This includes only requiring the person to expose as much of the breasts as is necessary to photograph the tattoo or mark (for example, where a tattoo on a woman's breast is visible while wearing a low-cut top there is no need to require the woman to further expose the breast).

(f) any other relevant factors.

There are no other relevant factors.

Use of hand held scanners

In prescribed circumstances, a police officer may, without a warrant, require a person to stop and submit to the use of a hand held scanner. A police officer does not need reasonable suspicion that the person is carrying a knife or doing anything unlawful.

A police officer uses a hand held scanner by passing the hand held scanner in close proximity to the person or the person's belongings. A person is not touched by the police officer using the hand held scanner.

Under section 39H of the PPRA, the default position is that a police officer should be of the same sex as the person to be scanned. However, where this is not reasonably practicable, the police officer can be of a different sex to the person.

The Bill removes the requirement that, where reasonably practicable, a police officer must be of the same sex as the person to be scanned.

If the scanner indicates that metal is, or is likely to be, present, the police officer may require the person to produce the thing that may be causing the hand held scanner to indicate that.

(a) the nature of the right

The *right to privacy and reputation* under section 25 of the HR Act protects a person's right not to have their privacy and reputation unlawfully or arbitrarily interfered with. The nature of the right to privacy and reputation is very broad. Protection against a person's privacy is limited to unlawful or arbitrary interference. The notion of arbitrary interference extends to lawful interferences, which are also unreasonable, unnecessary, or disproportionate.

Cultural rights – generally under section 27 of the HR Act is a negative right which protects a person from being denied the right to enjoy their culture, religion or language. Culture is broadly interpreted to include things such as the wearing of traditional dress.

These rights may reasonably be extended to include not undressing in front of someone of a different gender, for example where the wearing of particular clothes or modesty generally is a part of a person's religious or cultural beliefs.

Where a person is required to produce an item that is detected by a scanner, a person's right to religion or cultural rights may be limited. For example, where a person wearing cultural or religious dress is required to produce an item detected by a scanner from under the garment, there is a chance that doing so would require the person to remove or partially remove the garment in front of a person of a gender who, under cultural or religious requirements, is not permitted to see the part of the person covered by the garment, the requirement to produce the item would limit the right.

(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

As stated in the human rights statement of compatibility for the *Police Powers and Responsibilities (Jack's Law) Amendment Bill 2022*, the purpose of the limitation includes:

- minimising the risk of physical harm caused by knife crime in Safe Night Precincts and public transport stations and public transport vehicles by removing knives from individuals in these areas; and
- ensuring the safety of others in the community by reducing knife crime.

Hand held scanning promotes the detection of knives in the community to reduce the risk of unlawful and harmful activity. As at 26 February 2024, since the commencement of the provisions 47,876 individuals have been scanned resulting in 471 knives and similar weapons being removed from public places, ensuring the community is safer through a reduction in knife crime.⁹

(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 rights to privacy and culture will achieve the purpose of ensuring the Queensland Police Service can promote community safety by reducing knife crime through the effective detection of knives and similar weapons on individuals in public places.

The removal of the same-sex safeguard helps advance this purpose by enabling a police officer to use a hand held scanner on any person, within the existing provisions of the PPRA.

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

While there are less restrictive approaches, they will not achieve the purpose of the Bill.

An alternative approach is to apply a safeguard similar to those proposed in the Bill in relation to searches and inspections. This is not considered necessary for the use of hand held scanners because the nature of the procedure does not involve touching the person or requiring them to remove any of their clothing. The procedure is quick and non-invasive. It is similar to other security processes that citizens regularly undergo, such as metal detection at an airport or before entering a large event, which do not attract legislative protection on the basis of gender.

⁹ These figures are in relation to the expansion of Jack's Law through the Police Powers and Responsibilities (Jack's Law) Amendment Bill 2022, and do not include the original Gold Coast trial.

Another alternative approach is to change the language in the existing safeguard under section 39H of the PPRA from ‘sex’ to ‘gender’. For gender diverse people, there may not be any police officer of the same gender as the subject person. Therefore, there may be occasions where the requirement for a police officer to be the same gender as the person to be search cannot reasonably apply.

The police officer will not come into contact with the person being inspected. It is also unlikely that the person would need to expose a part of their body to produce an item detected by a scanner.

Should a more invasive search need to be conducted because the person either failed to comply with a requirement to submit to the use of a hand held scanner or failed to produce the thing that may be causing the hand held scanner to indicate that metal is likely to be present, the new safeguards for searching the person would likely apply.¹⁰ These include a same gender starting point and the dialogue model safeguard.

However, as for all searches, if the police officer has reasonable suspicion that the person may have a concealed firearm or knife, the police officer may conduct an immediate search. In these circumstances, the police officer does not need to comply with the new safeguard.

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

The provisions in Chapter 2, part 3A of the PPRA are tailored to only limit human rights to the extent necessary to deal with the prevalence of knives. Scanning for knives is intended to be quick and non-invasive. Enabling a police officer to conduct a scan of any person, regardless of gender, strengthens the ability to detect knives and other relevant objects. Removing the ‘same sex’ safeguard further promotes community safety with minimal impact on relevant human rights beyond that already considered.

(f) any other relevant factors

There are no other relevant factors.

Forensic procedures

Under schedule 6 of the PPRA, there are several definitions that refer to the breasts of a female. Namely, the terms “DNA sample”, “identifying particulars” and “intimate forensic procedure”. The Bill removes explicit references to sex in relation to breasts. In this way, the Bill extends several safeguards including:

- the prohibition on taking a DNA sample (a hair sample) from a woman’s breast to people of all genders
- the prohibition on taking a measurement of any person’s breasts as an identifying particular
- some of the existing safeguards for women to everyone by ensuring that a forensic procedure performed on any person’s breasts, other than photography, is considered an intimate forensic procedure.

¹⁰ If the police officer has reasonable suspicion that the person may have a concealed firearm or knife, the police officer may conduct an immediate search. In these circumstances, the police officer does not need to comply with the new safeguard.

These amendments ensure the safeguards for procedures performed on breasts that require a forensic officer to in any way touch this part of a person's body are applied equally to all people. It is acknowledged that the breasts are considered a sensitive area by some community members and having them touched during a procedure is invasive. This can apply to people of all genders and expanding the protections recognises this.

Under section 447 of the PPRA, a forensic procedure may be performed on a person (the *subject person*) where there is forensic procedure consent, a forensic procedure order (FPO) or a qualified person is otherwise authorised to perform the procedure (such as where they are asked to help under section 517 of the PPRA).

Usually, a qualified person is a doctor, dentist or a forensic nurse examiner (each a *forensic examiner*). Section 502 of the PPRA requires the forensic examiner, if they are a forensic nurse examiner, to be the same sex as the subject of the procedure where reasonably practicable.

The Bill will remove the requirement for a forensic nurse examiner to be of the same sex as the subject of the procedure. This is to achieve consistency with the position in section 517 of the PPRA that a forensic nurse examiner, as a forensic examiner, need not be of the same sex as the person to undergo the procedure. This is because the conduct of a forensic nurse examiner, as a health practitioner, is governed by existing ethical obligations.

Some police officers and watchhouse officers are qualified persons to take DNA samples. Some police officers who have been authorised by the police commissioner (*authorised examiners*) are qualified persons to take identifying particulars and to perform a non-intimate forensic procedure that is a non-medical examination.

Section 517 of the PPRA enables a qualified person to ask another person to give reasonably necessary help in performing a forensic procedure on a person. However, that person must be a person of the same sex as the person who is to undergo the procedure unless they are also a qualified person. The Bill will remove the requirement that a person helping to perform a forensic procedure must be of the same sex as the subject person and replaces this with a dialogue model safeguard consistent with the amendments to searches, inspections of person's belongings and photography of reportable offenders.

Photography of breasts

Schedule 6 of the PPRA currently defines *intimate forensic procedure* to include the photography of the breasts of a female or a transgender person who identifies as a female. To conduct an intimate forensic procedure, a qualified person needs forensic procedure consent or an FPO.

The Bill will exclude the photography of breasts (of a person of any gender) from the definition of intimate forensic procedure. Instead, this will be re-categorised as a *non-intimate forensic procedure*. Section 448 of the PPRA provides that consent is not required to perform a forensic procedure unless specifically required.

The definition of a *non-medical examination* includes a non-intimate forensic procedure that does not involve touching, other than a list of procedures not including photography. Chapter 17, part 6 of the PPRA provides that an authorised examiner may, with the approval of an authorised police officer, perform a non-medical examination on a subject person. This means that photographs will be able to be taken of the breasts of some women without consent.

If the non-medical examination provisions do not apply, a qualified person will still need to obtain forensic procedure consent or seek an FPO.

The Bill will also enable a police officer to photograph identifying particulars on a woman's breasts where they are in custody for an identifying particulars offence the charge of which has not been decided.

The Bill inserts a new safeguard with the starting point that photographs must be taken by someone of the same gender as the subject person (the *same-gender starting point*). The same-gender starting point enables qualified persons to consider a person's gender identity and promote the person's right to equal treatment.

The Bill provides that the qualified person must explain the process to the subject and give the subject a reasonable opportunity to express a preference about the gender of the photographer (the *dialogue model safeguard*). Any person may be directed by the qualified person to take the photograph, including someone who is not a qualified person, if reasonably necessary to:

- accommodate a preference expressed by the subject
- to ensure that the searching officer and the subject are of the same gender
- address a concern related to gender in a way that minimises embarrassment and offence.

There will be no requirement for the subject to disclose their gender to the qualified person. Rather, after the qualified person has explained the process for taking the photograph, the subject can express a preference (if any) about the gender of the person taking the photograph. This allows the person to volunteer their gender if they wish, or to raise concerns more broadly. Likewise, there will be no requirement for a qualified person to disclose their gender.

The same-gender starting point and dialogue model safeguard do not apply where the person taking the photograph is a doctor or forensic nurse examiner.

Photographs of victims do not come within the legislative framework (section 448(4) of the PPRA).

(a) the nature of the right

The *right to privacy and reputation* under section 25 of the HR Act protects a person's privacy and reputation and provides that a person has the right not to have the person's privacy unlawfully and arbitrarily interfered with. This right protects both the privacy of the person's personal information and interference with their physical integrity.

The Bill enables a qualified person to take photographs of the breasts of an offender or accused person, if required for forensic evidence as part of an investigation, without requiring consent. By removing the safeguard requiring an FPO approved by a magistrate for a qualified person to photograph the breasts of women, the right to privacy for women is limited.

This right to privacy is also limited by enabling a person's preference in relation to the gender of a person helping with a forensic procedure or taking a photograph of the breasts of an offender or accused person to not be accommodated in certain circumstances.

The *right to freedom of thought, conscience, religion, and belief* under section 20 of the HR Act protects a person's freedom to demonstrate their religion or belief, which may include demonstration of their religion or belief through worship, observance, practice and teaching including ritual and ceremonial acts, and practices integral to those acts. This may include (among other things) wearing distinctive clothing or head coverings.¹¹

Cultural rights – generally under section 27 of the HR Act is a negative right which protects a person from being denied the right to enjoy their culture, religion or language. Culture is broadly interpreted to include things such as the wearing of traditional dress.

Cultural rights and the right to freedom of religion may reasonably be extended to include not undressing in front of someone of a different gender, for example where the wearing of particular clothes or modesty generally is a part of a person's religious or cultural beliefs. These rights could be limited where a qualified person requires a subject person to expose their breasts for photography, particularly where this occurs contrary to the person's preferences about the gender of the photographer. Further, these rights may be limited where a person's preference about the gender of a person assisting with a forensic procedure is not accommodated.

The *right to humane treatment when deprived of liberty* requires all persons deprived of liberty to be treated with respect for the inherent dignity of the human being. The right is concerned with avoiding unreasonable interference with other rights.

Allowing persons to be subject to a forensic procedure conducted by a person assisting contrary to their preference limits this right. Further, requiring a person's breasts to be photographed without a person's consent, or by a person contrary to their preference, limits this right.

Although the right to humane treatment when deprived of liberty is complementary to the *right to protection from torture and cruel, inhuman or degrading treatment*, conduct authorised by the amendments does not rise to the level of limiting the latter.

(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

Photography of breasts

The purpose of enabling qualified persons to take photographs of any person's breasts without an FPO is to ensure that, where necessary, a photograph of an identifying feature (such as a tattoo, scar or distinguishing mark), a bruise or an injury can be taken where the mark is on the breasts of a person of any gender. These photos have significant value for evidentiary purposes and ensure the detection and successful prosecution of offences.

Because of the various stylistic ways an element can be rendered in a tattoo, it is not always possible to appropriately and accurately describe the tattoo in writing. This is particularly the case where the tattoo is intricate or features an object that can take many appearances. There are similar issues for describing permanent distinguishing marks (such as birth marks). There may also be difficulty in describing the appearance of an injury or bruise on a person. Therefore, it may be necessary to photograph the tattoo or mark.

¹¹ Human Rights Committee, General Comment No 22: Freedom of Thought, Conscience or Religion (Article 18 of the International Covenant on Civil and Political Rights), 48th sess, UN Doc CCPR/C/21/Rev.1/Add.4 (30 July 1993) 4.

Failure to accurately record these features places significant risk on the ability to collect admissible, substantial, and reliable evidence that an offence known to law has been committed by the alleged offender. It may also mean that police officers are unable to detect other offences that have been committed by a person who has previously come to the attention of police.

There is a strong public interest in ensuring that the Queensland Police Service maintains a clear visual record of information which may be an identifying particular or evidence relating to the investigation of an offence, such as injuries. The successful conduct of these procedures ensures the delivery of the Queensland Police Service's statutory functions under the *Police Service Administration Act 1990*, including to protect the community, and detect and bring offenders to justice.

Help performing a forensic procedure

The purpose of enabling a qualified person to ask another person to give reasonably necessary help in performing a forensic procedure without accommodating a subject person's preference is to ensure that the Queensland Police Service can continue to keep the community safe and bring offenders to justice. A qualified person may require help from another person to ensure that they are able to safely and accurately collect evidence required for an investigation.

The retention of the qualified person's discretion about who can help perform a forensic procedure in these limited circumstances is necessary to mitigate risk of forensic evidence being lost or destroyed due to delay associated with accommodating a preference. This ensures that forensic evidence crucial to the successful investigation and prosecution of crime can be collected, bringing offenders to justice and keeping the community safe.

This discretion also protects the qualified person or helper from potential physical harm or degradation by a subject person by allowing the qualified person to refuse to accommodate a preference which is made in bad faith or for ulterior or nefarious reasons. This protects the qualified person or helper's right to security of the person and their right to privacy and reputation. The protection of qualified persons and helpers from harm and the protection of their dignity in performing their duties is consistent with the values of a free and democratic society.

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

The limitation on the rights in respect of enabling qualified persons to take photographs of any person's breasts without an FPO will achieve its purpose of capturing evidence and identifying particulars that are located on a woman's breasts.

Without the power, police officers cannot capture evidence or valuable information that can be used to investigate, prosecute or detect offences. A written description of a tattoo or mark may not be sufficiently probative when attempting to use it to match a person to a fresh offence under investigation. The ability to rely on a clear visual record of information will ensure that police officers can effectively detect offences, bring offenders to justice and prosecute offences.

The limitation on the rights in respect of allowing a qualified person to not accommodate a subject person's preference as to the gender of the person performing the procedure will achieve its purpose of enabling the qualified person to capture evidence and identifying particulars or protecting the qualified person or helper from harm.

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

Photography of breasts

There are no less restrictive or reasonably available alternatives to re-categorising the photography of breasts.

An alternative approach is to maintain gendered language in relation to breasts. This could involve only capturing people of a particular gender within the definition of an “intimate forensic procedure” where a photograph is taken of the person’s breasts. Because the social understanding of gender continues to evolve, it is not possible to determine with any certainty to which specific genders the prohibition should apply. A number of people, including many women, may feel that exposing their breasts to any extent to a person of another gender or contrary to their preference for the purpose of a forensic procedure impacts their inherent dignity as a human being. Another option is to retain photography of breasts as an intimate forensic procedure and expand the existing safeguards to people of any gender. This would require a police officer to obtain an FPO where this was previously unnecessary. Men are frequently taken into custody who have tattoos or other identifying marks on their chests, which can cover the breasts. To take a photograph of these marks, for identifying particulars or for evidence, would require an FPO. This would have a significant impact on policing operations. The extra time to do so would create significant risk for the community as it may reduce the availability of police officers to respond to calls for service in a timely manner. Accordingly, this option would not be as effective in achieving the purpose of capturing evidence and identifying particulars that are located on a woman’s breasts.

Existing safeguards in the legislation will continue to apply to procedures involving the removal of clothing. Section 519 of the PPRA prohibits a police officer from requiring a subject person to remove more clothing (other than outer garments) than is necessary for the procedure to be performed. The police officer must also ensure, if reasonably practicable, that the procedure is not performed in the presence of someone whose presence is not required or where someone not involved can see the procedure.

A qualified person requiring a subject person to expose their breasts for photography can still take steps to ensure that the right to privacy is limited in a minimal way. This includes only requiring the person to expose as much of the breasts as is necessary to photograph the tattoo or mark (for example, where a tattoo on a woman's breast is visible while wearing a low-cut top there is no need to require the woman to further expose the breast).

Help performing a procedure

There are no less restrictive or reasonably available alternatives to applying the dialogue model safeguard where a person is required by an authorised person to help perform a forensic procedure. The amendments establish a consistent application of the dialogue model safeguard throughout the PPRA, in place of existing same-sex safeguards that apply to circumstances where a person may be required to remove items of clothing.

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

The limitation of the right by enabling qualified persons to take photographs of any person's breasts without an FPO is reasonable and demonstrably justified as photographing an identifying particular, such as a tattoo or permanent mark on the body of a suspect, is not considered to impose arbitrary requirements and enables police officers to capture evidence and detect offences. It is acknowledged that the breasts are considered a sensitive area by some community members and the limitation, while significant, achieves an appropriate balance by enabling a subject person to express a preference as to the gender of the person taking the photograph. This applies equally to people of all genders and expanding the protections recognises this. This amendment supports the right to recognition and equality before the law.

While the amendments will mean consent or an FPO is no longer required to photograph the breasts of women, the limitation is appropriately balanced through the insertion of the new gender safeguard and the operation of existing safeguards.

The amendments in the Bill ensure that photography of breasts and help performing forensic procedures are overwhelmingly conducted in accordance with the same-gender starting position or by accommodating a person's preference about the gender of the person through the dialogue model safeguard. The amendments will have the effect of promoting the dignity of the subject person by acknowledging that there may be circumstances where they may prefer to have the procedure performed by a person of a different gender and ensuring they have a legislative right to express this preference, while acknowledging that in some situations the person's preference cannot or need not be met. This will allow qualified persons to protect the Queensland community whilst ensuring that the rights and safety of individual qualified persons are also protected in the course of their duties.

While the limitations on rights resulting from a subject person having a procedure performed on them without their consent, and by a person of a different gender or contrary to their preference may be significant—particularly where the subject person needs to expose their breasts for the procedure—the amendments have been prepared to ensure that the dignity of the subject person is paramount. Procedures are only performed by a person of a different gender or contrary to a person's preference in circumstances where this is necessary to achieve legitimate aims.

On balance, the limitations are reasonable and justified. The amendments in the Bill ensure the limits on a person's privacy only go as far as necessary to achieve the purpose.

- (f) any other relevant factors

There are no other relevant factors.

Validation of watchhouse entrant inspections

The Bill includes an amendment to insert a power to allow a watchhouse officer or an assistant to touch the garments an entrant to a watchhouse is wearing to inspect the entrant's belongings.

This amendment is necessary because the broad definition of "inspect" in the section applies only in relation to "articles". Because of the framing of the section, it may be considered that a "garment" is not an "article". This could lead to an interpretation that it is not within power to touch a garment the entrant is wearing. This becomes more likely because of the later insertion of section 552 of the PPRA in substantially similar words.

It is possible that watchhouse officers may have touched an entrant's garments during an inspection. This may create a potential liability for watchhouse officers who have acted on the previous interpretation to maintain the security and good order of the watchhouse. To address this risk, the amendments retrospectively validate any inspection involving the touching of a garment.

(a) the nature of the right

The *right to recognition and equality before the law* under section 15 of the HR Act provides that a person has the right to the equal protection of the law without discrimination. This places a negative obligation on the state not to discriminate when enacting legislation.

The Bill limits this right by removing the right for a person to seek legal redress for acts or omissions arising from an inspection of a person's belongings involving the touching by a watchhouse officer of a garment the person was wearing.

(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 amendment is to provide appropriate protections to watchhouse officers by validating any action taken on the assumption that the watchhouse officer had the power to touch the garments. It is necessary for a watchhouse officer to have that power to properly ensure the security and good order of the watchhouse.

This is considered 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

Validating past actions will achieve the 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 less restrictive alternative which would still 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

It is acknowledged that the amendment will limit a person's right to seek legal redress for actions taken by a watchhouse officer in particular circumstances. However, it is considered that, on balance, these limitations are outweighed by the need to provide adequate protections for those watchhouse officers who have acted in good faith to maintain the security and good order of a watchhouse.

(f) any other relevant factors

There are no other relevant factors.

Amendments to *Corrective Services Act 2006*

Restricting prisoners from reapplying for parole after being refused

The Bill extends the maximum periods that the Parole Board Queensland (Board) has discretion to limit a prisoner from reapplying for parole after a parole refusal from three years to five years for life sentenced prisoners, six months to three years for prisoners sentenced to 10 years or more imprisonment and from six months to 12 months for all other prisoners.

The Bill provides criteria that the Board must consider when deciding a period of time a prisoner is restricted from reapplying for parole. This includes the nature of the offending and the reasons the prisoner has been refused parole. The Board may also have regard to the likely effect of the prisoner making a subsequent parole application will have on a victim or whether delaying a prisoner from re-applying for parole is in the public interest.

The amendments in the Bill do not impact on a prisoner's ability to apply for exceptional circumstances parole or apply for judicial review of the initial decision refusing the parole application. The Board also has discretion to allow an application from the prisoner within the restricted period with consent.

(a) the nature of the right

The *right to liberty* under section 29(2) of the HR Act includes that a person has a right to not be arrested or detained except in accordance with the law.

The right to liberty entitles all persons to liberty of the person, including protecting individuals against unlawful or arbitrary deprivations of their liberty.

The *right to humane treatment when deprived of liberty* under section 30(1) of the HR Act provides that a person has a right to be treated with humanity if they are accused of breaking the law and are detained. This right recognises the particular vulnerability of persons in detention and intends to ensure that they are treated humanely. The underlying value of the right to humane treatment is respect of the inherent dignity that people should be afforded as human beings.

It is not accepted that a prisoner who is refused parole and restricted from reapplying for a period generally has a limitation on their rights. Parole release is not a right. Where a sentence of imprisonment is imposed by a court, there is always the possibility that a prisoner will be required to spend the full time in custody. Parole release is meant to assist the prisoner in their rehabilitation but is not always appropriate if the prisoner continues to pose an unacceptable risk to the safety of the community. Therefore generally, refusing parole and requiring a prisoner to spend a further period in custody before reapplying does not limit human rights.

However, the amendments do provide for a period of up to 12 months, three years or five years depending on the prisoner's sentence length. Whether these rights are actually limited by the amendment depends on whether the detention is arbitrary and/or whether the length of the period imposed would extend so far as to create a sense of hopelessness in the prisoner that they will never be released.

Further consideration is therefore required to determine whether these periods would extend to an arbitrary or disproportionate period, or render the prisoner with a sense of hopelessness that they could never be released to ensure the amendments are compatible with human rights.

The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate to the aim sought.

Because questions of proportionality arise when considering justification of limits on human rights under section 13 of the HR Act, it is convenient to consider these questions below before making a determination as to whether any limitation on the right to liberty 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 first aim of the amendment is to protect victims from further trauma caused by being notified of a prisoner's application for parole relatively soon after being notified of a parole refusal. The amendment not only protects a victim's physical safety by delaying the consideration of the prisoner's release, but also protects the victim from the psychological trauma of being notified about a subsequent parole application, or being unsure when a further application could be made. Greater security of person is afforded by providing a clear period of time where the risk of prisoner being released into the community is diminished. This also promotes the right to security of the person for victims as per section 29(1) of the HR Act.

A second purpose of the amendment is to ensure the efficient operation of the parole system, including the swift consideration of applications and release of suitable prisoners to parole. This in turn promotes the right not to be detained arbitrarily (section 29(2) of HR Act) for prisoners who are suitable for parole release and awaiting a decision.

These purposes are legitimate. They are consistent with the values of a free and democratic society.

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

The amendments in the Bill provide the Board with discretion to set longer periods in which a prisoner may not apply for parole after a parole refusal. During this time, victims can be assured they will not experience the stress and trauma of being notified of a parole application and being asked to provide a submission to the Board. They will also not have to worry about their personal safety in the context of the possibility the prisoner is granted parole.

Accordingly, the amendment assists to achieve its purpose by protecting victims from the trauma associated with knowing a prisoner is being considered for release on parole during the period the prisoner is restricted from making a parole application.

Secondly, the Bill will enable the Board to focus on parole applications for prisoners where there are greater prospects of parole suitability, rather than considering applications from prisoners that reapply despite having taken no further steps towards rehabilitation or addressing any of their risk factors in that period.

Accordingly, the amendment is rationally connected to its purposes.

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

A number of safeguards ensure that the interferences with human rights are the least necessary to achieve the purpose of protecting victims from further trauma and supporting the efficient and effective administration of parole decisions. These safeguards include:

- legislating maximum periods allows the board to set a lesser period that better reflects the individual prisoner's prospects of release and to reserve the maximum period for only the most extreme cases

- legislating different maximum periods based on the length of a prisoner's sentence further allows a period to be set that is proportionate to the prisoner's sentence
- legislative guidance for the decision is included to ensure the Board takes into account relevant information in deciding an appropriate period. The only factors the Board must consider are the nature and seriousness of the offending and the reasons parole was refused. The Board may have regard to the impact on a victim and the public interest, reflecting that these factors may not always be relevant to the considerations
- the prisoner retains the right to apply for exceptional circumstances parole during this period under section 176 of the CSA, and the Board may provide consent for the prisoner to apply earlier under section 180 of the CSA, ensuring the prisoner's opportunity to seek parole is never extinguished
- the Board itself, in setting a period, must make a decision that is compatible with human rights
- a prisoner retains the right to seek judicial review of the decision.

Consideration was given to several alternatives. However, none would be as effective at achieving the purpose.

Shorter timeframes have been considered but would not be as effective at achieving the purpose. This is because a shorter timeframe does not provide as much discretion for the board to set an appropriate period in the most extreme cases particularly where there may be an opportunity to provide greater security for a victim, or the prisoner has taken no steps toward rehabilitation and continually seeks to reapply.

(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 one side of the scales, the right not to be detained arbitrarily and the right to humane treatment while deprived of liberty are fundamental human rights designed to protect people in custody. Accordingly, any limitations to these rights must be strongly justified. The amendments in the Bill however, do not generally limit these rights. Refusing a prisoner's parole application and providing a period of time before they can reapply for parole is a necessary part of the parole process. Detention for this period is not arbitrary or disproportionate so long as the period set in the individual case is necessary and proportionate to the purpose of the limitation.

On the other side, the framework allows the Board to assist in reducing further trauma to victims by providing a longer period of time where they can be assured the prisoner cannot trigger the process. The Board can also set a period that reflects the prisoner's prospects of release, reducing the need to consider reapplications from prisoners at regular intervals when the prisoner has taken no steps towards rehabilitation. This aims to contribute to a more efficient parole process. Safeguards further limit the extent of any interferences with human rights by limiting the period that can be set to a legislated maximum allowing the Board to tailor the period to balance the individual circumstances. The framework retains opportunities for the prisoner to seek parole during the restricted period, either where there are exceptional circumstances, or the Board consents to hear the application early. It is therefore considered that setting these periods does not rise to the level of arbitrary detention or engage a sense of hopelessness that the prisoner may never be released.

For these reasons the amendment is not considered to limit human rights. Even if the amendments did amount to limitations on human rights, these are considered to be justified for the above reasons and the amendment is compatible with human rights.

Promoting timely prisoner safety order decisions

The Bill amends the CSA to enable a suitably qualified professional to be appointed and employed by Queensland Corrective Services (QCS) as an authorised practitioner to assess prisoners that are at risk of self-harm or suicide and advise QCS on the making of a safety order. Existing requirements permit only doctors and psychologists to make these assessments. The Bill expands this list of suitable qualifications to include social workers, occupational therapists, nurses and speech pathologists. The flexibility to appoint professions outside of doctors and psychologists responds to the national critical psychology workforce shortage. Efficient clinical assessments result in decision makers issuing timely safety orders for prisoners at risk of harming themselves or others.

The Bill provides safeguards to ensure that no practitioner without the clinical capacity to provide these assessments can be approved for this function. In addition to being one of the practitioners listed, the individual must also meet specific capability, training and accreditation requirements to perform the functions of an authorised practitioner set out in an accompanying policy which will exclude those not suitable for this role.

(a) the nature of the right

The *right to humane treatment when deprived of liberty* under section 30(1) of the HR Act provides a person has the right to be treated with humanity if they are accused of breaking the law and are detained.

The underlying value of the right to humane treatment is respect of the inherent dignity that people should be afforded as human beings. The persons who are detained must not be subject to hardship or constraint other than that which results from the deprivation of their liberty.

The imposition of a safety order generally limits this right because a safety order places additional restrictions on an individual than those generally in custody to ensure their safety and wellbeing. This may be considered to subject the prisoner to hardship beyond that experienced by virtue of detention.

(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 amendment is to promote the ongoing safe management of prisoners at risk of self-harm or suicide.

Enabling a broader variety of professionals to make clinical assessments of a prisoner's risk of self-harm or suicide will promote the right to humane treatment when deprived of liberty because it will enable more timely assessments of the prisoner's mental health and consideration as to whether they should be managed on a safety order. This in turn promotes the right to humane treatment while deprived of liberty (section 30 of the HR Act) and the right to access health services (section 37(1) of the HR Act).

The purpose is legitimate. It is consistent with the values of our free and democratic society.

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

Presently, QCS relies on psychologists to provide professional advice about the risks and needs of individual prisoners in relation to safety orders. QCS has experienced significant difficulty in attracting and retaining psychologists to corrective services facilities. This has serious implications for the safety and security of corrective services facilities and the health and wellbeing of prisoners because psychologists are increasingly unavailable to undertake timely assessments of prisoners who may be at risk of suicide or self-harm.

Allowing the chief executive to authorise practitioners with more diverse professional qualifications will enable risk assessments to be completed in a timely manner.

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

A number of safeguards ensure that the interferences with human rights are the least necessary to safely manage prisoners at risk of self-harm or suicide. These safeguards include:

- prescribing the additional professionals that may be appointed as authorised practitioners;
- an authorised practitioner is required hold appropriate professional registration, licencing or authorisation for them to provide a health service;
- prescribing that to appoint one of the professionals, the chief executive must also be satisfied the individual meets the qualification, training and competency standards set out in a policy for authorised practitioners to fulfill their functions under the CSA;
- requiring the policy to be published on the department's website;
- retaining requirements for a health practitioner that is not an authorised practitioner to examine the prisoner during the safety order for any health concerns;
- existing safeguards in the safety order framework in the CSA such as the requirement for reviews, time limits on safety orders, and the discretionary powers of the chief executive to amend or cancel the safety order at any stage; and
- operationally, the assessment completed by the authorised practitioners is subject to review by a multi-disciplinary panel which includes, at a minimum, a psychologist, a correctional supervisor and if appropriate, a cultural liaison officer.

Consideration was also given to a number of alternatives. However, none would limit human rights to a lesser extent while still achieving the purpose of the amendment as effectively.

It is possible to continue the current practice where only doctors and psychologists are authorised to assess a prisoner's risk of self-harm and make a recommendation about how they should be managed in the correctional environment. This has significant limitations and will continue to undermine QCS' ability to safely and securely manage these vulnerable individuals and may not result in a less restrictive limitation on human rights.

There is no less restrictive, but equally effective, way to achieve the purpose.

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

It is considered that enabling a broader variety of professionals to make a clinical assessment on a prisoner's risk of self-harm or suicide will promote the right to humane treatment when deprived of liberty because it enables more timely assessments of a prisoner's mental health and consideration as to whether they should be managed on a safety order.

While prisoners placed on a safety order can have conditions imposed, including separate confinement, that may affect their psychological integrity, this is not the purpose or impact of the amendment.

Allowing the chief executive to authorise practitioners with more diverse professional qualifications will enable at-risk assessments to be completed in a timely manner. Therefore, it is not considered that the Bill imposes any further limitations on human rights beyond those already within the safety order decision framework.

Even if the amendment is considered to limit human rights, the purpose of any limitations imposed by a safety order is to manage the risk certain prisoners pose to themselves. This in turn promotes the right to access health services (section 37(1) of the HR Act) as a prisoner subject to a safety order must be promptly assessed by a health practitioner. Management under a safety order ensures prisoners are provided with the necessary treatment in a secure and separate environment.

Further, there are several safeguards included to minimise these impacts, including strict criteria for appointment to these roles, ensuring that only those professionals with the clinical experience to make these assessments can be appointed.

For these reasons the limitations on human rights are considered justified.

Clarifying the application of planning legislation to corrective services infrastructure

The Bill includes a technical amendment to clarify that infrastructure on prescribed lots of land established by QCS to support its functions under the CSA or other legislation is 'accepted development' that cannot be categorised as assessable development for the purposes of the *Planning Act 2016* and *Planning Regulation 2017* (Planning Regulation).

This amendment will ensure the development of infrastructure on prescribed lots of land owned by QCS on behalf of the State, such as the QCS Academy or Electronic Monitoring and Surveillance Unit, is subject to appropriate development approval processes that reflect the need for the continued safe delivery of these services.

(a) the nature of the right

The *right to freedom of expression* under section 21 of the HR Act provides that a person has the right to hold an opinion without interference and have the right to find, receive and share that opinion. This right is one of the essential pillars of a democratic system of government, because it enables citizens to freely and effectively participate in the political, social, economic and other affairs of their community.

The *right to take part in public life* under section 23(1) of the HR Act provides a person has the right to participate in the conduct of public affairs, directly or through freely chosen representatives. This right is an integral component of the democracy, which relies on the participation of all persons in governance. Every person in Queensland has the right, and is to have the opportunity, without discrimination, to participate in the conduct of public affairs, directly or through freely chosen representatives.

The amendment to clarify the application of planning legislation to corrective services development limits these rights. This is because by deeming further development of the land as ‘accepted development’, this limits local government planning approval processes, which may include public consultation on a proposed development from applying, thereby removing an opportunity for the community to be heard on this development.

(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 amendment is to support the safe delivery of corrective services in line with QCS’ functions under the CSA and other legislation. The purpose of corrective services is community safety and crime prevention through the humane containment, supervision and rehabilitation of offenders. Enabling QCS to establish functions such as the QCS Academy, escort and security branch and provide staff accommodation promotes the right to security for 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

By ensuring the development of this land is accepted for the purposes of planning, QCS can continue to deliver these services and perform works on the land consistently with the process for development of QCS land for custodial services. Protracted or repeated community consultation would undermine the security that is required to deliver corrective services outside of a corrective services facility.

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

The Bill includes safeguards to limit the amendment to specific lots of land currently owned by QCS and not any future land purchases. Aspects of the development will also remain subject to code assessment under the Planning Regulation schedule 9 or 10, and only exempt from impact assessment, ensuring the protective features of assessment in line with other State interests, including environmental interests, continues.

No appropriate alternatives would reasonably achieve the purpose of the Bill.

(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 the one side of the scales, appropriate public involvement and expression about government processes is a cornerstone of a free and democratic society and so limitations must be strongly justified.

On the other side, the safe delivery of corrective services is essential to community safety. Protracted or repeated community consultation would undermine the security that is required to deliver corrective services outside of a corrective services facility. Limiting development approval on prescribed lots of land for these purposes will therefore assist in ensuring the continued safe delivery of corrective services. There are also several safeguards that ensure the limitations are only those that are necessary, including limiting the application of the planning amendments to specific lots of land owned by QCS.

For these reasons the limitations on human rights are considered to be justified and the amendment is compatible with human rights.

Conclusion

In my opinion, the Police Powers and Responsibilities and Other Legislation Amendment Bill 2024 is compatible with human rights under the HR Act because it limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HR Act.

MARK RYAN MP
Minister for Police and Community Safety

© The State of Queensland 2024