

Respect at Work and Other Matters 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*, I, Yvette D’Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence, make this statement of compatibility with respect to the Respect at Work and Other Matters Amendment Bill 2024.

In my opinion, the Respect at Work and Other Matters Amendment Bill 2024 is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Bill

The **key objectives** of the Respect at Work and Other Matters Amendment Bill 2024 (the Bill) are to:

- amend the *Anti-Discrimination Act 1991* (AD Act) to:
 - implement key reforms recommended by the Australian Human Rights Commission (AHRC) in *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces Report* (Respect@Work Report) (adjusted for Queensland);
 - implement key reforms recommended by the Legal Affairs and Safety Committee (LASC) Reports - *Inquiry into serious vilification and hate crimes and Inquiry into the Criminal Code (Serious Vilification and Hate Crimes) and Other Legislation Amendment Bill 2023*;
 - introduce a positive duty to eliminate all forms of unlawful discrimination, sexual harassment, vilification and other associated objectionable conduct as far as possible (as recommended by the Queensland Human Rights Commission’s (QHRC) Report *Building Belonging – Review of Queensland’s Anti-Discrimination Act 1991* (Building Belonging Report));
 - update and expand the attributes protected by the AD Act in line with certain recommendations made by the Building Belonging Report; and
- amend the *Magistrates Act 1991* (Magistrates Act) to provide magistrates with an entitlement to access unpaid parental leave under the Magistrate Entitlements Booklet;
- clarify the legislative immunity and protections provided to magistrates, District Court judges, and certain officers of the Queensland Civil and Administrative Tribunal (QCAT) so that they have the same immunity as a Supreme Court judge;
- amend the *Penalties and Sentences Act 1992* (Penalties and Sentences Act) to implement an aggravating sentencing factor as recommended by the Queensland Sentencing Advisory Council *Final Report on Penalties for assaults on public officers* (QSAC Report); and
- amend the Penalties and Sentences and *Youth Justice Act 1992* to reflect current court practices with respect to the recording of reasons for imprisonment or detention orders.

Amendments to the *Anti-Discrimination Act 1991*

The Bill makes a number of amendments to the AD Act in order to implement certain recommendations of the Respect@Work Report, the Building Belonging Report, and the LASC reports on vilification and serious vilification.

Broadly, the Respect@Work Report found that workplace sexual harassment and other unlawful behaviour based on sex remained prevalent, and that the current legal framework to address this was complex and confusing for victims and employers to understand. The AHRC recommended a number of improvements to the *Sex Discrimination Act 1984* (Cth) (SD Act), including the introduction of a positive duty on employers to take reasonable and proportionate measures to eliminate unlawful sex discrimination, including sexual harassment and sex-based harassment, as far as possible, along with new regulatory powers for the AHRC to enforce that positive duty.

The Bill implements these recommendations by introducing two new prohibitions on harassment on the basis of sex in the area of work and creating a hostile work environment.

With respect to the positive duty, however, the Bill introduces a broader duty which is consistent with the recommendations of the Building Belonging Report. As the positive duty in the Bill incorporates all protected attributes and areas of public life, it will complement the positive duty in the SD Act, but provide a greater impetus for change.

The positive duty in the Bill will require persons who have an obligation not to engage in unlawful conduct under the AD Act to eliminate, as far as possible, discrimination, sexual harassment, harassment on the basis of sex and certain other objectionable conduct by taking reasonable and proportionate measures. The Bill will also provide for accompanying enforcement powers to the QHRC in relation to the positive duty. A number of consequential amendments to the AD Act are included to ensure the amendments are appropriately adapted for the Queensland context.

The Bill will also make amendments to the vilification provisions in both the AD Act and the Criminal Code to expand the list of attributes covered by vilification, update the definition of public act to ensure it captures electronic communications and social media as well as closed environments, and for the AD Act only, introduce a new ‘harm-based’ provision for public acts which are hateful, reviling, seriously contemptuous or seriously ridiculing.

Finally, the Bill will expand and update the list of attributes in section 7 of the AD Act, and the certain definitions of those attributes, on which discrimination is prohibited.

Magistrates’ entitlement to unpaid parental leave

The Bill includes amendments to provide magistrates with an entitlement to access unpaid parental leave.

Currently, magistrates are unable to take a period of unpaid parental leave due to the operation of section 24(1) of the *Judicial Remuneration Act 2007* (JR Act) and section 47(1) of the Magistrates Act. Pursuant to those provisions, there is a statutory entitlement for a person who

holds the office of a magistrate to be paid a salary and specified allowances which is not conditional upon the magistrate performing the duties of the office.

Under section 47(3) of the Magistrates Act, a magistrate holds office on such terms and conditions (not provided for by the Magistrates Act) as are decided by the Governor in Council. However, whilst a period of unpaid leave may be contemplated in the terms and conditions, they do not override the statutory entitlement that a magistrate must be paid.

The Bill amends section 47 of the Magistrates Act to provide that, despite section 47(1) and (2) of the Magistrates Act and the JR Act, the terms and conditions approved by the Government in Council under section 47(3) may include an entitlement to paid and unpaid parental leave.

Judicial Immunity

The Bill includes amendments to clarify the protections and immunity which apply to magistrates, District Court judges and certain officers of QCAT.

A recent decision of the Federal Court of Australia (*Stradford (a pseudonym) v Judge Vasta* [2023] FCA 1020) has cast into doubt the scope of the common law judicial immunity granted to inferior court judicial officers.

Ensuring that the protection and immunity granted to Queensland magistrates, District Court judges and certain officers of QCAT is clear, and equivalent to that of a Supreme Court judge, promotes an independent and impartial judiciary and justice system, and ensures that the right to a fair trial is protected.

Insertion of an aggravating sentencing factor in the *Penalties and Sentences Act 1992*

The Bill amends section 9 (Sentencing guidelines) of the Penalties and Sentences Act to require that when determining the appropriate sentence for an offender convicted of an offence involving violence against, or that resulted in physical harm to, a person in their workplace, a court must treat as an aggravating factor the fact that the offence occurred in the performance of the functions of the victim's office or employment, or because of the performance of those functions or employment. The aggravating factor is not limited to public sector employees and is available irrespective of the victim's employment arrangements, including volunteers. The aggravated sentencing factor is to apply to contractors, agency workers and all other forms of working arrangements, including whether that work is performed for reward. The aggravated sentencing factor is to also apply to sexual assaults.

Amendment to section 10 of the *Penalties and Sentences Act 1992* and section 209 of the *Youth Justice Act 1992*

The Bill also contains amendments to ensure that court practices align with the requirements under section 10 of the Penalties and Sentences Act and section 209 of the Youth Justice Act. Under the existing provisions there is a requirement to cause the reasons for the imposition of an order of detention or imprisonment to be reduced/recorded in writing and kept with the court file. Current practice across each of the criminal courts in Queensland does not accord with these requirements. These provisions pre-date the digitalisation of court recordings and requirements relating to the provision of written reasons.

The amendments provide that where a proceeding is recorded under the *Recording of Evidence Act 1962*, courts will not be required to comply with section 10(1)(b) of the Penalties and Sentences Act or section 209(1)(b) of the Youth Justice Act. The requirement contained in both Acts for the reasons for the making of an order for imprisonment or detention to be stated in court remain.

Human Rights Issues

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

I have considered each of the rights protected by part 2 of the *Human Rights Act 2019* (HR Act). In my opinion, the human rights relevant to the Bill are:

- right to recognition and equality before the law (section 15);
- right to freedom of movement (section 19)
- right to freedom of expression (section 21);
- right to property (section 24);
- right to privacy (section 25);
- right to liberty and security of person (section 29); and
- right to fair hearing (section 31).

Rights promoted

Section 15 enshrines a number of distinct rights relating to equality and non-discrimination as follows:

15 Recognition and equality before the law

- (1) Every person has the right to recognition as a person before the law.
- (2) Every person has the right to enjoy the person's human rights without discrimination.
- (3) Every person is equal before the law and is entitled to the equal protection of the law without discrimination.
- (4) Every person has the right to equal and effective protection against discrimination.
- (5) Measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination do not constitute discrimination.

These equality rights, modelled on various articles of the International Covenant on Civil and Political Rights (ICCPR), are 'of fundamental importance to individuals, society and democracy'.¹ As set out in section 15(2), the right to non-discrimination is of such import that all other human rights are implicitly subject to the requirement that they are enjoyed without discrimination.² The values protected by section 15(2) include 'equal dignity and non-discrimination and the importance of everybody being able to enjoy equally their human rights.'³ Further, the principle of non-discrimination protects the 'equal dignity of every

¹ *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [107] (Bell J).

² This 'accessory' right is similar to art 2(1) of the ICCPR.

³ *Lifestyle Communities Ltd (No 3) (Anti-Discrimination)* [2009] VCAT 1869 [218] (Bell J).

person’, because treating somebody differently because of a protected attribute can ‘undermine their sense of personal autonomy and their capacity for self-realisation’.⁴

Related to this, sections 15(3) and (4) provide for the equal protection of the law and equal and effective protection against discrimination. These rights place both positive and negative obligations on the State to ‘refrain from any discrimination when enacting laws’ and to ‘prohibit discrimination by enacting special laws and afford effective protection against discrimination’.⁵ Section 15(5) recognises that not all differential treatment amounts to discrimination, and that special measures will often be required to achieve equality for some groups in the community.⁶

The AD Act, along with the HR Act, form the foundational legislative instruments which fulfil the State’s positive duty to prohibit discrimination and ensure effective protection against discrimination. However, the Respect@Work Report has made it apparent that despite the protections afforded by the AD Act, sexual and sex-based conduct in the workplace remains prevalent. To combat this, the Bill provides targeted amendments which supplement and boost the existing protections in the AD Act in order to ensure that every person is able to be free from sexual or sex-based harassment and discrimination in the workplace. Further, the Bill aims to bring about systemic and cultural change by imposing a positive duty to take reasonable and proportionate measures to eliminate unlawful conduct under the AD Act as far as possible, along with necessary powers to ensure the positive duty is enforced. In this way, the Bill protects and promotes equality and non-discrimination rights, and the underlying values of respect and dignity which inheres in every person.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Amendments to the Anti-Discrimination Act 1991

Prohibition of vilification

Clause 21 replaces chapter 4, part 4 of the AD Act, with a number of new provisions relating to vilification as follows:

- Section 124A provides that a reference to a relevant attribute in this part includes a reference to: a characteristic that a person with the relevant attribute generally has; a characteristic that is often imputed to a person with the relevant attribute; a relevant attribute that a person is presumed to have or to have had at any time; or a relevant attribute that a person had even if they did not have it at the time of the conduct.
- Section 124B defines a public act for the purposes of chapter 4, part 4 of the AD Act. A public act captures a wide range of communications, whether electronic or otherwise, as well as conduct that is either ‘to the public’ or ‘observable by the public’. It does not include dissemination of any matter where the person does not know, and could not reasonably be expected to know, the content of the matter. Further, it does

⁴ Ibid, [109] (Bell J).

⁵ William Schabas, *UN International Covenant on Civil and Political Rights: Nowak’s CCPR Commentary* (3rd ed, 2019) 749 [21]. See also *Lifestyle Communities Ltd [No 3]* (2009) 31 VAR 286, 344 [287]-[288] (Bell J); *Matsoukatidou v Yarra Ranges Council* (2017) 51 VR 624, 641 [53], 657 [105] (Bell J).

⁶ Explanatory Notes, Human Rights Bill 2018, 18.

not matter whether the conduct occurs on private land or in a place not ordinarily accessed by the general public.

- Section 124C prohibits a person from engaging, on the basis of relevant attributes, in a public act that a reasonable person would consider hateful towards, reviling, seriously contemptuous of, or seriously ridiculing the other person or members of the group. The objective standard of a reasonable person is a person who has the particular attribute or attributes on which the conduct is based. A number of exceptions apply. This section is referred to as the ‘harm-based’ prohibition, as it is directed towards the harm that the conduct causes to the other person or persons.
- Section 124D prohibits a person from engaging in a public act that is likely to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the basis of particular protected attributes. A number of exceptions apply. This section is referred to as the ‘incitement’ prohibition, as it is directed towards the objective likelihood of the conduct to incite.

The vilification prohibitions impose limits on:

- right to freedom of expression (section 21(2));
- right to freedom of assembly and association (section 22); and
- right to take part in public life (section 23).

(a) *nature of the right(s) limited*

Freedom of expression (section 21(2))

The right to freedom of expression under section 21(2) of the HR Act is drawn from Article 19 of the ICCPR, and is protected alongside the related, but distinct, freedom to hold an opinion under section 21(1) of the HR Act. These rights in combination are ‘a necessary condition for the realization of the principles of transparency and accountability that are, in turn, essential for the promotion and protection of human rights,’ and accordingly, they form ‘a basis for the full enjoyment of a wide range of other human rights.’⁷

The right to freedom of expression protects the conveyance of meaning in a multitude of formats, including through verbal, written, printed, or artistic expression, or through conduct.⁸ The right to freedom of expression protects a similarly wide scope of meaning, including the expression of ideas and information that may ‘offend, shock or disturb the state or any sector of the population.’⁹ However unlike the right to freedom of opinion (protected in section 21(1) of the HR Act), which is an absolute right, limits on the right to freedom of expression can be justified when expression is ‘unquestionably antithetical to freedom, democracy and the rule

⁷ Human Rights Committee, *General Comment No 34: Freedoms of opinion and expression (Article 19 of the International Covenant on Civil and Political Rights)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011), [9]; See also *İ.A. v Turkey* (European Court of Human Rights, Chamber, Application No. 42571/98, 13 September 2005) at [26].

⁸ See, eg. *Magee v Delaney* (2012) 39 VR 50; [2012] VSC 407 [62] finding that ‘any act which is capable of conveying some kind of meaning falls within [the scope of the equivalent right in the Victorian Charter] without the need to prove that it actually conveyed a particular meaning to a specific person.’

⁹ *Handyside v United Kingdom* (1976) 1 EHRR 737; (1976) Eur Court HR 5, [49].

of law that sustain our society,’ or when the restriction is required ‘for the respect of rights and reputations of others.’¹⁰

As the prohibitions are directed towards public expressions or conduct, they limit the freedom of expression.

Right to peaceful assembly and freedom of association (section 22)

The right to peaceful assembly and freedom of association in section 22 of the HR Act upholds the rights of individuals to gather together in order to exchange, give or receive information, to express views or to conduct a protest or demonstration. Peaceful assembly in particular entitles persons to gather intentionally and temporarily for a specific purpose and is considered essential for the public expression of a person’s views and opinions. Freedom of association is concerned with allowing people, in association with each other, to form groups (such as clubs) under a common interest.

This right is limited because certain public expressions are made unlawful, and therefore may discourage persons gathering or associating in public to express hateful or inciting speech or conduct.

Right to freedom of take part in public life (section 23)

The right to take part in public life in section 23 of the HR Act affirms the right of all persons to contribute to and exercise their voices in relation to the public life of the State. It ensures all persons have the opportunity to contribute to the political process and public governance, directly or through freely chosen representatives.

Where conduct or speech may relate to political matters but otherwise contravenes the harm based or incitement vilification provisions, this will limit the right in section 23 of the HR Act.

(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 prohibiting vilification is to promote social cohesion, enhance public discourse, and promote the rights of those who are targeted by the conduct, including the right to equality and non-discrimination (sections 15(2)-(4) of the HR Act) and the right to life (section 16 of the HR Act). It has long been recognised that laws against hate speech, while imposing limits on expression and other rights, are nonetheless readily justified in pursuit of these proper purposes.¹¹

¹⁰ Human Rights Committee, *General Comment No 34: Freedoms of opinion and expression (Article 19 of the International Covenant on Civil and Political Rights)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011), [9], [11]; *Magee v Delaney* (2012) 39 VR 50; [2012] VSC 407, [89]. See also *International Covenant on Civil and Political Rights* opened for signature 16 December 1966, (entered into force 23 March 1976) 999 UNTS 171, Art 19(3)(a).

¹¹ See *Cottrel v Ross* [2019] VCC 2142; *R v Keegstra* [1990] 3 SCR 697; *Canada (Human Rights Commission) v Taylor* [1990] 3 SCR 892.

(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 vilification provisions help achieve the purpose in a number of ways. First, by prohibiting vilification, there is a strong disincentive for people to publicly express sentiments which are of such seriousness that they can cause significant harm, either directly or indirectly, to other people on the basis of protected attributes. This protects against the destructive effects that such expressions have on social cohesion, particularly where these expressions may incite violence or hatred, and allows for a public discourse that respects the dignity and worth of all people as fellow citizens. Second, the prohibitions perform an educative function, signalling clear boundaries for public expressions which are conducive to a robust democracy, and those which are not. Finally, they serve to enhance the standard of public discourse as the type of expressions which are prohibited can produce a chilling effect on participation in public life for those who are targeted.

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

With respect to vilification, alternative approaches in law might include:

- retaining the incitement-based vilification provision in section 124A of the current AD Act, which prohibits vilification on the grounds of race, religion, sexual orientation, sex characteristics or gender identity, and therefore is more limited in scope;
- not including a ‘harm-based’ provision; or
- not including any vilification provisions in the Bill and only relying on the protections in the Criminal Code against serious vilification, which has a higher threshold.

Of these alternatives, none are as effective in achieving the purpose because they would allow for more conduct which incites hatred, serious contempt, or severe ridicule, or which is hateful, reviling, seriously contemptuous or seriously ridiculing of people with protected attributes. Further, by allowing more of this conduct, it may impose less limitations on the rights identified, but deeper limitations on the rights of people with particular protected attributes, and therefore would not be less restrictive.

Another alternative would be to remove prohibitions on vilification entirely, and instead rely on public education campaigns to curtail conduct of this sort. However, reliance on education only would not be as effective in achieving the purpose as making it unlawful.

These conclusions are supported by the LASC report (*Inquiry into serious vilification and hate crimes*), which noted that there was evidence that the current laws did not effectively prevent vilification, either by way of lack of coverage for particular disadvantaged groups, or by setting such a high threshold as to be ineffective. The difficulty in reaching this threshold is apparent in recent decisions under the Anti-Discrimination Act which have also demonstrated that protection may otherwise have been afforded under a ‘harm-based’ provision (such as section 18C of the *Racial Discrimination Act 1975* (Cth)).¹²

¹² *Ms RA v Mr NC* [2018] QCAT 94, [61]-[62]. See also *Gitau & Ng’ang’a v De Soysa Walsh Pty Ltd, Walsh & Boles* [2023] QCAT 189, [124]-[127].

Another alternative means of achieving the purpose would be to either reduce the exceptions which apply, or to apply the prohibition for all protected attributes. However, as above, this may result in a far greater limitation on the rights to freedom of expression in a manner which undermines the purposes identified.

Accordingly, it is considered that the approach in the Bill is appropriately tailored to achieving the purpose, and does not impose limitations beyond those which are necessary to achieve the purpose. The Bill contains a number of safeguards to ensure it does not disproportionately limit the freedom of expression. These include the requirement that the relevant conduct be a ‘public act’; the requirement that the conduct still meet a minimum threshold of being ‘hateful, reviling, seriously contemptuous, or seriously ridiculing’; a requirement that the threshold be judged not by reference to the question of whether or not a person subjected to the relevant conduct considered that the conduct met the threshold, but rather whether reasonable members of the group of individuals with a protected attribute would consider the threshold to be met; and the inclusion of exceptions for the publication of fair reports of public acts, publications subject to a defence of qualified privilege under defamation laws and public acts done reasonably and in good faith, for example for artistic, scientific or other public interest purposes, including public discussions and debate. Indeed, these exceptions are essential in ensuring there is no undue burden on the constitutional implied freedom of communication about government and political matters.¹³

(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, then, is the limit on the right to freedom of expression, freedom of association, and the right to take part in public life. The foundational nature of the right to freedom of expression to the functioning of a healthy democratic society requires that limits on that right are not imposed lightly. However, the type of expression that is targeted by the prohibitions is antithetical to freedom, democracy and the rule of law that sustain our society. The provisions do not prevent the holding of an opinion, nor rigorous public discussion and debate of ideas and issues, but instead target the types of communication that actually serve to stifle public debate and in turn result in an undermining of the freedom of expression of others.

On the other side of the scales, promoting social cohesion and protecting the human rights of vulnerable groups is of critical importance to a modern democratic society. The type of expression that is targeted by the prohibition is that which is destructive to the principle of equality and non-discrimination, which is equally fundamental not only to the rights mentioned above, but to the realisation of all other human rights. At its most extreme, the unchecked proliferation of vilifying conduct can contribute to a culture that normalises dehumanising attitudes, which can manifest in risks to fundamental human rights such as the right to life, and the right to security of person. It is therefore important that the government take steps to dissuade conduct which could lead to such a state of affairs.

¹³ *Owen v Menzies* [2013] 2 Qd R 327, 352 [72] (McMurdo P).

On this basis, the limitations which are imposed by the prohibitions on vilification are proportionate measures for achieving the important purposes identified above. They are therefore justified under section 13 of the HR Act.

(f) any other relevant factors

Nil.

Amendments to serious vilification provisions in Criminal Code

The Bill will also expand the attributes which are captured by the serious vilification provision at section 52A of the Criminal Code, and the circumstances of aggravation for particular offences at section 52B of the Criminal Code. It also introduces an updated definition of public act. As expanding these sections to capture the additional attributes of age, impairment, and sex would result in more circumstances in which a person may be prosecuted for serious vilification, or in which a circumstance of aggravation may apply, the Criminal Code amendments will also impose a limit on the right to liberty and security in section 29(1) of the HR Act (in addition to the limitations on expression discussed above in relation to amendments to the AD Act).

While the additional limitation on the right to liberty is very serious, it also relates to conduct which is more serious in nature, as it involves conduct that threatens physical harm, or incite others to physical harm, towards other persons or property, or relates to the motivations in the commission of other serious offences. Such conduct is even more destructive to social cohesion, and presents a greater threat to the rights of those who are subject to it, particularly their right to life. Accordingly, on the basis of the reasons set out above, and the increased seriousness of the conduct caught by the Criminal Code provisions, the additional limitation on the right to liberty and security in section 29(1) of the HR Act is considered justified.

Prohibition of harassment on the basis of sex and prohibition on hostile work environments

Clause 18 inserts a new part into chapter 3 of the AD Act which defines the meaning of harassment on the basis of sex and introduces a prohibition on harassment on the basis of sex in work or work-related areas. The definition and prohibitions make it unlawful for a person to engage in unwelcome conduct of a demeaning nature in relation to another person where the conduct was engaged in on the basis of the other person's sex (or characteristic or imputed characteristic of the person's sex, or the sex a person is presumed to have or the sex a person had in the past), and where the conduct was engaged in with the intention of offending, humiliating or intimidating the other person or in circumstances where a reasonable person would have anticipated the possibility that the other person would be offended, humiliated or intimidated by the conduct.

Clause 22 inserts a new part into chapter 4 of the AD Act which prohibits subjecting another person to a work environment that is hostile on the basis of sex. The new provision will make it unlawful for a person to engage in conduct in a place of work where a reasonable person would have anticipated the conduct would result in a work environment being offensive, intimidating or humiliating on the basis of the other person's sex.

As both of these clauses are directed towards prohibiting conduct, they impose limits on the right to freedom of expression (section 21(2)).

(a) nature of the right(s) limited

Freedom of expression (section 21(2))

The nature of the right is set out in detail above.

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

The purpose of the amendments is to protect people in the workplace from being subject to harassment or a hostile work environment on the basis of sex.

Ultimately, by protecting workers, the prohibitions also have a purpose of promoting equality and non-discrimination rights of workers in the workplace, and the right to privacy in section 25(a) of the HR Act, which encompasses a person's mental and physical integrity, as well as the elements of the right to privacy which encompass the right to form and develop professional relationships with others.¹⁴

(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 making the relevant conduct explicitly unlawful, the Bill provides certainty about the coverage of the AD Act and disincentives people engaging in the conduct. The prohibitions make certain expressions and conduct unlawful, which discourages persons from engaging in that conduct, or where it does occur, allows the person who is subject to the harassment to vindicate their rights by way of a complaint or proceeding. This helps achieve the elimination of this conduct.

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

An alternative to combat this kind of conduct, which is already covered by the protections in the AD Act, is not to make any amendments but instead rely on non-legislative measures, such as focussed education campaigns, to clarify the coverage of the law and what is acceptable conduct in the workplace. However, this would not necessarily be a less restrictive alternative, as any effective education campaign would also have the effect of disincentivising the conduct targeted by the amendments and the limit on expression may still eventuate. To the extent an education campaign was not as effective as a legislative response, it would not achieve the purpose of the provisions to the same extent.

The prohibitions only go as far as necessary to achieve the purpose as they are limited to the area of work, which has been identified as an area in which existing protections are not having the desired effect, and to the kinds of expressions which are destructive to the human rights of workers.

¹⁴ *ZZ v Secretary, Department of Justice* [2013] VSC 267, [89] (Bell J)

(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 limitations on the freedom of expression are minor, in that they are targeted at well-defined forms of conduct which are known to cause harm to workers who experience them. The new prohibitions do not restrict any person from communicating ideas or expressing themselves in a manner which does not result in that harm or undermine workers' safety and human rights in the workplace.

Balanced against the limitation are the weighty considerations of promoting the rights of workers, and indeed all people in the workplace, to be free from harassment or hostile work environments. The benefits of ensuring that workplaces are not hostile are manifold, and outweigh any restrictions on the freedom of expression.

(f) any other relevant factors

Nil.

Expanded and updated attributes for discrimination

The Bill will insert new protected attributes on which discrimination may be based, and update the definitions and terms used in existing attributes to reflect modern anti-discrimination law. As a result of these changes, the prohibitions on discrimination will apply to a greater range of conduct in areas of public life which would otherwise not have been unlawful.

The purpose of updating and expanding the protected attributes on which discrimination is prohibited is to promote the right to equality and non-discrimination in section 15 of the HR Act. As the inclusion of new attributes, or the updates to existing attributes, may prohibit certain conduct where it amounts to direct or indirect discrimination in a public area of life, this will potentially limit the right to freedom of expression. However, for the reasons set out above, it is considered that any limitations occasioned by the inclusion of additional or expanded attributes are justified because it pursues the legitimate purpose of protecting equality and non-discrimination rights and are targeted at well-defined forms of conduct. Where the prohibition intersects with the human rights of others, the AD Act contains relevant exemptions which appropriately balance between the competing interests in a manner which is consistent with the HR Act.

Introduction of positive duty

The positive duty is generally directed towards the promotion of equality and non-discrimination rights in section 15 of the HR Act. In particular, by reframing existing obligations not to engage in certain unlawful conduct into a positive duty to take action to prevent and eliminate that conduct before it occurs, it better achieves substantive equality in areas of public life. The action which is required to comply with the positive duty is dependent on relevant factors which relate to the individual circumstances of the duty holder, including the size, nature and circumstances of the person's business or undertaking or operations, the duty holder's resources, the practicability and cost of measures to eliminate the conduct, the person's business and operational proprieties, and any other relevant matter.

As such, the extent of the impact on duty holders will be varied. However, generally, it will require certain proactive measures which may result in the need for expenditure, and therefore may impose a limit on the right to property in section 24 of the HR Act, which encompasses money. This limit would only lie where it required a natural person to spend their money, as only individuals have human rights (section 11(2) of the HR Act).

Any limitation on property, however, is eminently justifiable in pursuit of the purpose of achieving substantive equality, and thereby promoting equality and non-discrimination rights. The ‘reasonable and proportionate’ requirement for measures which are required under the duty ensures that any limitation is sufficiently tailored to the individual circumstances of the duty holder, and therefore only requires measures which are proportionate to achieving substantive equality.

Exemption for compliance with other laws

The Bill updates the current general exemption in section 106 of the AD Act to provide a general exemption for a person to do an act that is necessary to comply with another law of the State or Commonwealth, or a court or tribunal order. This applies prospectively, in contrast to the current exemption which applied only to provisions in force at the time the AD Act commenced.

(a) nature of the right(s) limited

This exemption limits the equality and non-discrimination rights under section 15 of the HR Act. The nature of these rights are discussed above.

Other human rights may be limited depending on the circumstances in which the exemption is relied upon with respect to the kind of conduct that is necessary to comply with other legislation or orders. Generally, however, the primary limitation will be to equality and non-discrimination rights.

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

The purpose of these exceptions is to ensure that a person cannot be held liable for complying with a duty or obligation which the law imposes on them. Requiring compliance with legislative duties is necessary to upholding the rule of law.¹⁵ The preservation of the rule of law is a proper purpose that is 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

Limiting non-discrimination and equality rights by providing for these exceptions achieves the identified purpose by providing certainty to persons who are subject to other lawful obligations which are inconsistent with discrimination prohibitions in the AD Act.

¹⁵ *Enfield City v Development Assessment Commission* (2000) 199 CLR 135, 157 [56] (Gaudron J).

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

An alternative way to frame the exemption could be to include specific reference to potentially conflicting laws as opposed to creating a general exception. However, this alternative is not considered to be reasonably available as it is not practicable to comprehensively identify all relevant statutory provisions across the statute book in Queensland, as well as at the Commonwealth level, and to ensure that these references remain current in the future.

In the absence of these exceptions, people who are subject to laws, enactments or orders that are inconsistent with discrimination prohibitions would be required to have recourse to the application of statutory interpretation principles to understand how to resolve competing obligations. This would not be as effective in facilitating compliance with lawful obligations as it would not provide persons subject to obligations or duties under other Acts with sufficient certainty.

Accordingly, there are no less restrictive and reasonably available alternative ways 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

On the one hand, the right to be protected against discrimination is a fundamental human right – one that is necessary for the realisation of many of the other human rights protected under both the HR Act and other human rights instruments. Making discrimination lawful in certain circumstances can have significant consequences that range from inflicting emotional and mental injury on persons affected by the discrimination, to normalising discriminatory behaviour in the community more generally.

On the other hand, ensuring compliance with lawful obligations is necessary to uphold the rule of law, which is of fundamental importance in a free and democratic society. Indeed, the Queensland Parliament has already recognised the importance of this balance in enacting similar exceptions in the obligations to act and make decisions compatibly with human rights under section 58(2) of the HR Act. The exceptions are appropriately tailored to ensure that discrimination is only permitted to the extent that it is necessary to comply with another law, or a court or tribunal order. It is also relevant to note that the requirements in the HR Act that all laws be subjected to scrutiny as to their compatibility with human rights provide a significant safeguard against disproportionate limitations on rights that may arise under other legislation.

For these reasons, on balance, the importance of ensuring compliance with lawful obligations is more significant than the limitation on rights resulting from these exceptions.

(f) any other relevant factors

Nil.

Investigations – compliance with positive duty and systemic contraventions

The impact of these provisions on rights will depend on the nature of the contraventions that are being investigated, and the type and nature of undertakings or compliance notices that are made. However, generally, these powers engage the right to a fair hearing under section 31 of the HR Act, and the right to privacy under section 25 of the HR Act. Fair hearing rights extend beyond proceedings of a judicial character and may apply to ‘civil proceedings which are of an administrative character’, such as ‘proceedings of many boards, tribunals and administrative decision-makers’.¹⁶ Nevertheless, while fair hearing rights are engaged, the provisions do not limit the right to a fair hearing as they provide for adequate procedural fairness for the subjects of the investigation, particularly where the Human Rights Commissioner (commissioner) is a public entity under the HR Act in performing these functions. With respect to privacy, the provisions contain safeguards to ensure that personal information that is not otherwise available is not published, and in this way engage the right but do not limit it.

Investigations – power to require information or document

Clause 39 inserts section 173F into the AD Act, which provides that if the commissioner believes that a person may have information relevant to an investigation, the commissioner may, by written notice, direct the person to give the commissioner the information within a stated reasonable time, or attend before the commissioner at a stated reasonable time and place to give the information to the commissioner. The person must comply with the direction unless the person has a reasonable excuse, such as those reasonable excuses stated as examples. Failure to comply is an offence with a maximum penalty of 100 penalty units. A person who attends before the commissioner is entitled to be paid by the commission an amount equivalent to the amount the person would receive under the *Supreme Court of Queensland Act 1991* if the person’s attendance before the commissioner were in attendance in a Magistrates Court as a witness.

This imposes limits on:

- freedom of movement (section 19);
- freedom of expression (section 21(2));
- right to property (section 24); and
- right to privacy (section 25).

(a) nature of the right(s) limited

Freedom of movement (section 19)

The right to freedom of movement is concerned with any restrictions on a person’s ability to move freely within the State of Queensland. It protects the fundamental value of freedom.¹⁷

The requirement to attend before the commissioner limits this right by requiring attendance at a certain place, where a failure to do so is an offence punishable by a fine.

¹⁶ *Kracke v Mental Health Review Board* [2009] VCAT 646, [415], [417].

¹⁷ *Antunovic v Dawson* (2020) 30 VR 355; [2010] VSC 377 [72].

Freedom of expression (section 21(2))

The scope of the freedom of expression ‘necessarily includes freedom not to express one’s opinion.’¹⁸

Requiring a person to give information limits this right.

Right to property (section 24)

The protection of property rights underpins many of the structures essential to maintaining a free and democratic society based on human dignity, equality and freedom. Property covers real and personal property, which includes money.

The particular element of the property rights which is engaged is the right not to be arbitrarily deprived of property. The right is limited to deprivations which are arbitrary, in the sense that they are disproportionate, and therefore it is convenient to assume there is a limit and determine whether it is proportionate in the next stage of the analysis.

A failure to comply with a direction to give information is an offence which has a maximum penalty of 100 penalty units. As a result, a person may be liable to pay a penalty where they fail to comply without a reasonable excuse.

Right to privacy (section 25)

The right to privacy and reputation under section 25 of the HR Act protects the individual from all interferences and attacks upon their privacy, family, home, correspondence and reputation. The right to privacy reflects the underlying value of human beings as autonomous individuals.¹⁹ The relevant powers for the Commission engage a person’s right not to have their privacy unlawfully or arbitrarily interfered with because the information or documents required to be given to the Commission may include personal information.

As with the right to property, the right only protects against interferences which are either unlawful or arbitrary. As such, a limit has been assumed and the arbitrariness will be determined under section 13 of the HR Act.

(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 power to direct a person to provide information relevant to an investigation is directed towards ensuring the commissioner can discharge its investigation functions under the AD Act, as amended by the Bill. This purpose is consistent with a free and democratic society because it concerns the effective operation of the AD Act which promotes the right to equal and effective protection against discrimination under section 15(4) of the HR Act. The AD Act is not able to protect against discrimination and promote the achievement of substantive equality

¹⁸ Human Rights Committee, *General Comment No 34: Freedoms of opinion and expression (Article 19 of the International Covenant on Civil and Political Rights)*, 102nd sess, UN Doc CCPR/C/GC/34 (12 September 2011), [10].

¹⁹ William A Schabas, *U.N. International Covenant on Civil and Political Rights: Nowak’s CCPR Commentary* (3rd rev ed, 2019) 459.

if the commissioner lacks the powers necessary to investigate breaches. The purpose of making it an offence not to comply is to ensure a person complies with the order.

(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

Allowing for all relevant information to be obtained by the commissioner will help the commissioner investigate whether there have been serious contraventions of the Act.

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

An alternative is to rely on voluntary provision of information only, which would be less restrictive on rights as a person could simply refuse to comply. This would not be effective in achieving the purpose. Another alternative is to provide for the commissioner to apply to the tribunal to compel the production, which may be less restrictive on the basis that there would be additional safeguards against any unjustified intrusions on privacy rights, and a person would not be subject to an offence if they did not comply. However, this is not a reasonably available alternative as it would carry with it significant resource impacts on the Commission as well as the tribunal, without any clear evidence it would provide greater protection for those subject to investigation.

In any case, the limitations are appropriately tailored to ensure they only go as far as necessary by allowing a person to withhold relevant information where they have a reasonable excuse. Further, it is unlikely a person would be asked to attend where they were otherwise able to provide the information in another manner, and therefore it is unlikely that the limitations on movement would be significant.

(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

While the amendments do impose limitations on a number of rights as identified above, they are outweighed by the importance of ensuring the commissioner is able to discharge their functions effectively. Given the powers of the commissioner are appropriately defined, with suitable thresholds and the allowance for a reasonable excuse for non-compliance, it is considered the amendments achieve an appropriate balance between the importance of the purpose and the human rights of those who may be subject to directions.

(f) any other relevant factors

Nil.

Amendments to Magistrates Act 1991, District Court of Queensland Act 1967, and Queensland Civil and Administrative Tribunal Act 2009

Parts 5, 7 and 9 of the Bill make a number of amendments which are directed towards providing magistrates with access to unpaid parental leave as well as clarifying legislative immunity and protections provided to magistrates, District Court judges, and certain officers of QCAT so that they have the same immunity as a Supreme Court judge.

Judicial immunity

With respect to the amendments which clarify judicial immunity for inferior courts in Queensland, these engage fair hearing rights under section 31 of the HR Act. However, by ensuring that judicial officers and other court and tribunal officers are protected from civil liability to the same degree as a Supreme Court judge, the amendments promote fair hearing rights by promoting the independence and impartiality of a court or tribunal, as mentioned in section 31 of the HR Act. Accordingly, as the amendments do not limit human rights, they are compatible with human rights within the meaning of section 8 of the HR Act.

Magistrates' entitlement to unpaid parental leave

The Bill amends section 47 of the Magistrates Act to provide that, despite section 47(1) and (2) of the Magistrates Act and the *Judicial Remuneration Act 2007*, the terms and conditions approved by the Government in Council under section 47(3) may include an entitlement to paid and unpaid parental leave.

As it provides access to unpaid parental leave, this may limit the right to property in section 24 of the HR Act if it amounts to an arbitrary deprivation. It is convenient to assume the limit and justify it under section 13 of the HR Act to determine whether it is arbitrary.

(a) the nature of the right

All persons have the right to own property alone and in association with others and to not be arbitrarily deprived of their property. Property includes money, however, the right does not provide a right to compensation.

The amendments to section 47 of the Magistrates Act will limit property rights by reducing a magistrate's entitlement to receive salary. However, the reduction would only occur in circumstances where the magistrate has taken a period of unpaid parental leave and in doing so is not performing functions of the office or accessing their paid leave entitlements.

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

The purpose of the limitation on property rights is to provide magistrates with an entitlement to access unpaid parental leave and ensure they are remunerated appropriately when not performing the functions of their office.

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

The limitation on the right to property will achieve its purpose of preventing public funds being expended to remunerate a magistrate who is electing not to perform the functions of that office or access their paid leave entitlements by providing magistrates with an entitlement to access unpaid parental leave.

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

As the current legislative scheme does not allow for unpaid parental leave to be taken, the amendments are necessary to facilitate this. Any alternative which would be less restrictive on property rights could not be as effective in achieving the purpose as the provision of unpaid parental leave, and therefore there are no reasonably available alternatives to the proposed amendments. The limits only go as far as necessary, given their narrow application to circumstances where a magistrate is taking a period of parental leave.

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

On balance, taking into account the nature and extent of the limitation and having regard to the information and analysis detailed above, I consider the importance of providing magistrates with an entitlement to access unpaid parental leave (consistent with conditions that apply widely in workplaces in the community), outweighs any limitation on property rights imposed by the amendments.

(f) any other relevant factors

Nil.

Insertion of an aggravating sentencing factor in the *Penalties and Sentences Act 1992*

The Bill amends section 9 of the Penalties and Sentences Act to require a sentencing court to treat as an aggravating factor the fact that an offence involving violence against, or that resulted in physical harm to, a person was committed against that person while that person was performing functions of the victim's office or employment, or because of the performance of those functions or employment.

The introduction of the proposed new factor may limit the right not to be deprived of liberty in section 29 of the HR Act. This is because it *may* increase the likelihood of a court imposing a more severe sentence.

(a) the nature of the right

Section 29 of the HR Act protects the liberty of a person, including the right to not be arrested or detained except in accordance with the law. The right sets out a number of matters which are also protected, including a protection from arbitrary arrest or 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

As noted in the QSAC Report, the insertion of the aggravating sentencing factor is considered justified as 'it will make clear to the community that offences involving violence, or threatened violence, against these workers will be treated by courts in sentencing as more serious, thereby serving an important communicative function'.

(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 amendment may enable the limitation upon section 29 of the HR Act because a more severe sentence may be imposed. However, courts can currently consider offending against persons in their workplace when considering the nature and seriousness of an offence and the harm caused by the offender during sentencing. The amendment seeks to enshrine this aggravating sentencing factor.

Further, the aggravated sentencing factor is one of many considerations that will be relevant in any given sentence proceeding. The amendment proposes that the aggravated sentencing factor will not apply where exceptional circumstances exist. The sentencing process ensures that the many relevant factors in a sentencing proceeding are applied appropriately.

(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 ways to achieve the purpose of the amendment.

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

I consider that the above strikes an appropriate balance between a limitation upon a human right and achieving the policy objective. The limitation upon the relevant human right is expressed as an occurrence which might occur and, on balance, I consider that the importance of ensuring that harm done to another is recognised appropriately during sentencing is significant and that it outweighs the extent of the limitation upon the right in section 29 of the HR Act.

(f) any other relevant factors

Nil.

Amendment to section 10 of the *Penalties and Sentences Act 1992* and section 209 of the *Youth Justice Act 1992*

The amendments provide that where a proceeding is recorded under the *Recording of Evidence Act 1962*, courts will not be required to comply with section 10(1)(b) of the *Penalties and Sentences Act* or section 209(1)(b) of the *Youth Justice Act*.

The amendments to section 10 of the *Penalties and Sentences Act* and section 209 of the *Youth Justice Act* do not limit any human rights. That is because the amendments deal only with how the reasons for making an order, once pronounced in court, are kept.

Conclusion

In my opinion, the Respect at Work and Other Matters Amendment Bill 2024 is compatible with human rights under the *Human Rights Act 2019* because it limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

YVETTE D'ATH MP
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Minister for the Prevention of Domestic and Family Violence

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