Justice and Other Legislation Amendment Bill 2019

Statement of Compatibility

FOR

Amendments to Be Moved During Consideration in Detail by The Honourable Stirling Hinchcliffe MP

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, Stirling Hinchliffe, Acting Attorney-General and Minister Justice, Acting Leader of the House, Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs, make this statement of compatibility with respect to the amendments moved during consideration in detail (ACiDS) of the Justice and Other Legislation Amendment Bill 2019 (the Bill).

In my opinion, the amendments to be moved during the consideration in detail of the Bill are 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 following is an overview of the original amendments which the ACiDS will amend.

Clause 28 of the Bill inserts a new section 11AA into the *Coroners Act 2003* (Coroners Act) to allow certain suitably qualified persons other than coroners (including doctors approved by the State Coroner) to perform preliminary examinations upon a death being reported to a coroner. The ACiDS clarify that the types of preliminary examinations able to be performed are limited to those exhaustively listed in the Coroners Act.

Clauses 40 to 41 of the Bill amend the Coroners Act to give coroners the ability to hear inquests under that Act that were previously heard and concluded, or are part-heard, under the repealed *Coroners Act 1958*, if certain circumstances are met. The ACiDS ensure the amendments apply to all inquests into deaths heard or part-heard under the repealed Act, regardless of whether a fire was involved.

Subclause 51(1) of the Bill amends section 552BB (Excluded offences) of the Criminal Code to replace the current definition of 'prescribed value' which means $30,000 with the amount of $80,000 to expand the summary disposition of indictable offences relating to property. The

ACiDS will remove this amendment in response to concerns raised during the Legal Affairs and Community Safety Committee's examination of the Bill. In light of the submissions of key stakeholders further engagement will be undertaken on this issue.

Clause 141 of the Bill amends section 263(3) of the *Legal Profession Act 2007* (LPA) to clarify that the Queensland Law Society's (QLS) existing power to investigate the affairs of a law practice may be exercised routinely. The ACiDS, to replace the defined term 'trust account investigation' in section 263(5) with 'part 3.3 investigation', is in response to concerns raised by the profession. The ACiDS will complement the change in clause 141 and clarify the regulatory requirements under the LPA.

Clauses 148 and 150 of the Bill amend the *Magistrates Courts Act 1921* (Magistrates Court Act) to clarify that the jurisdiction of the Magistrates Courts, under section 4 of that Act, includes actions for the recovery of chattels. This change was intended to address conflicting decisions as to whether the Magistrates Courts had jurisdictions to hear such matters, such as those relating to the recovery of motor vehicles under section 123 of the *Personal Property Securities Act 2009* (Cth). In response to concerns expressed by stakeholders during the Committee process, the ACiDS contain further refinements to section 4 (as well as some additional consequential amendments) to ensure the amendment achieves its policy intent.

The ACiDS contain an additional amendment to the HR Act to allow for one Minister to prepare a human rights certificate for subordinate legislation that has more than one responsible Minister and a regulation-making power that facilitates an exemption for certain types of subordinate legislation from the requirement for a human rights certificate (where they do not directly or indirectly limit any human rights).

Human Rights Issues

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

In my opinion, the human rights relevant to the ACiDS are:

- right to recognition and equality before the law (section 15 of the HR Act);
- freedom of thought, conscience, religion and belief (section 20 of the HR Act);
- property rights (section 24 of the HR Act);
- right to privacy and reputation (section 25 of the HR Act);
- cultural rights (section 27 of the HR Act); and
- right to a fair hearing (section 31 of the HR Act).

It is considered that the proposed ACiDS to the Coroners Act are compatible with the HR Act as, although they limit human rights, the limits are reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom, as set out below.

It is considered the proposed ACiDS to remove the amendment to section 552BB of the Criminal Code, which will preserve the existing provision without amendment, are compatible with the HR Act as they do not limit human rights.

It is considered that the proposed ACiDS for the HR Act are compatible with the HR Act as they do not limit human rights.

It is considered that the proposed ACiDS for the MC Act are compatible with the HR Act as they will promote property rights by clarifying that people can apply to the Magistrates Court to seek orders to recover their property. The amendment does not limit human rights.

It is considered that the proposed ACiDS for the LPA, which are of a technical drafting nature and do not expand or limit the existing investigation powers of the QLS with respect to trust moneys and trust accounts, are compatible with the HR Act as they do not limit human rights.

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

ACiDS to clause 28 of the Bill – preliminary examinations

(a) the nature of the right

Recognition and equality before the law (section 15 of the HR Act)

The right to recognition and equality before the law is a stand-alone right that also permeates all human rights. It encompasses both the right to recognition as a person before the law and the right to enjoy human rights without discrimination. This right to equality reflects the universal principle of human rights: that every person holds the same human rights by virtue of being human and not because of some particular characteristic or membership of a particular social group.

It is possible that certain individuals may be disproportionately affected by the proposed provisions, where conducting preliminary examinations may be contrary to their ability to adhere with or carry out particular religious and cultural practices and/or beliefs surrounding death.

Freedom of thought, conscience, religion and belief (section 20 of the HR Act)

The right to freedom of thought, conscience, religion and belief encompasses the right of all persons to develop autonomous thoughts and conscience. It protects religious belief as well as atheistic, agnostic, cultural, philosophical, academic, social or personal beliefs. It also protects the right to demonstrate religion or belief through worship, ritual, practice and teaching either individually or as part of a community, in private or in public. The observance and practice of religion or belief includes ceremonial acts and customs such as the participation in rituals associated with certain stages of life.[1]

A preliminary examination under the proposed new provisions may limit a person's ability to carry out religious and cultural practices and beliefs in relation to a deceased. For example, certain procedures (such as taking blood or tissue samples) may be contrary to some faiths and may mean that the family does not immediately have access to the body for religious ceremonies or rituals.

[1] United Nations Human Rights Committee, General Comment No. 22.

Cultural rights – generally (section 27 of the HR Act)

Cultural rights are directed towards ensuring the survival and continued development of the cultural, religious and social identity of minorities. They affirm the right of all persons to enjoy their culture, to practise or declare their religion and to use their language, either alone or in community with others who share their background. The right protects persons from being denied the right to enjoy their culture and to declare and practice a religion.

As with the right to freedom of thought, conscience, religion and belief, a preliminary examination conducted under the new provisions may limit cultural rights as it may interfere with a person's ability to carry out religious and cultural beliefs in relation to the deceased.

Cultural rights – Aboriginal peoples and Torres Strait Islander peoples (section 28 of the HR Act)

The HR Act recognises the special importance of human rights for Aboriginal peoples and Torres Strait Islander peoples and explicitly protects their distinct cultural rights as Australia's first people. The core value underpinning the various cultural rights protected under section 28 of the HR Act is recognition and respect for the identity of Aboriginal peoples and Torres Strait Islander peoples, both as individuals and in common with their communities.

Relevantly, pursuant to section 28(a) of the HR Act, Aboriginal peoples and Torres Strait Islander peoples must not be denied the right, with other members of their community, to enjoy, maintain, control, protect and develop their identity and cultural heritage, including their traditional knowledge, distinctive spiritual practices, observances, beliefs and teachings.

The proposed provisions in relation to preliminary examinations may limit the distinct cultural rights of Aboriginal peoples and Torres Strait Islander peoples if the performing of any procedures pursuant to those provisions conflict with spiritual and cultural practices and beliefs in connection with the deceased.

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

The purpose of the proposed provisions is to ensure that after a police officer reports a person's death to a coroner, certain approved persons can then immediately perform preliminary examinations for the deceased person's body without first needing to seek approval from the coroner. Ensuring timely preliminary examinations is important for an effective investigation into a death, as they may often involve tests that are only viable if they are performed very close to the time of death. Further, obtaining the results of a preliminary examination in a timely manner may be sufficient for a coroner to be satisfied about the cause of death of the individual and subsequently determine that no further investigation is not required. This then ensures that coronial resources are able to be allocated to other investigations and bodies will be able to be released earlier to families and loved ones for burial or cremation.

Furthermore, these amendments also give effect to the wider public interest in effectively investigating deaths. This is consistent with the positive obligation the right to life (protected under section 16 of the HR Act) places on the State to ensure safeguards and mechanisms of review are in place to investigate deaths which may have involved the deprivation of life in

certain circumstances, such as people in the State's custody or care. As the most significant investigative mechanism into reportable deaths, the coronial system gives effect to and promotes this right in Queensland.

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

The limitation achieves the purpose of the amendments by providing examiners with the ability to perform the necessary preliminary examinations and procedures at a time close to the death of an individual so as to ensure the examinations can be carried out in a way that is medically viable and also so that the coroner can perform his or her functions in relation to making a decision about cause of death and the need for any further investigation in an efficient and timely manner.

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

No less restrictive or reasonably available ways to achieve the purpose of the provision have been identified.

A number of safeguards are provided in the provisions to ensure they are exercised appropriately, including:

- requiring that a person performing a preliminary examination must either be a doctor approved by the State Coroner, or a suitably qualified person acting under the supervision of an approved doctor;
- ensuring that the purpose of any preliminary examination undertaken is to assist the coroner in performing his or her functions under the Coroners Act relating to the person's death; and
- requiring the doctor, including the doctor supervising a suitably qualified person, must, whenever practicable, to give consideration the following matters: that in some cases a deceased person's family may be distressed by the procedures to be performed in the examination, including, for example, because of cultural traditions or spiritual beliefs; and any concerns raised by a family member, or another person with a sufficient interest, in relation to the procedures to be performed for the examination.

In addition to the above safeguards, and as clarified by the proposed ACiDS to clause 28 of the Bill, the types of preliminary examinations able to be performed are limited to an exhaustive list (as set out in the proposed new provision). No other type of test can be performed other than those listed in the legislation.

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

On balance, the importance of conducting investigations at a time where the testing is medically viable and to facilitate coronial decision-making in an efficient and timely manner, and in turn giving effect to the positive obligations on the State under the right to life, outweighs the limitation on the rights.

(f) any other relevant factors

Not applicable.

ACiDS to clause 40 of the Bill – *pre-commencement fires*

(a) the nature of the right

Privacy and reputation (section 25 of the HR Act)

The underlying value of the right to privacy is the 'protect[ion] and enhance[ment of] the liberty of the person – the existence, autonomy, security and well-being or every individual in their own private sphere.'[2] It protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is very broad, but at its most basic is concerned with notions of personal autonomy and dignity. The United Nations Human Rights Council has said that it refers to those aspects of life in which a person can freely express his or her identity, either alone or in relationships with others.[3]

The right protects privacy in that personal sense (and in the sense of personal information, data collection and correspondence) but also extends to an individual's private life more generally. For example, the right to privacy protects the individual against interference with their physical and mental integrity, freedom of thought and conscience, legal personality, sexuality, family and home, and individual identity (including appearance, clothing and gender).

The proposed ACiDS to clause 40 of the Bill will ensure that coroners can reopen, under the current Coroners Act, all inquests into deaths heard or part-heard under the repealed *Coroners Act 1958* (repealed Act), regardless of whether a fire was involved. A person may therefore become subject to section 39 of the Coroners Act which gives a coroner the power to require a person to give self-incriminating evidence if he or she is satisfied it is in the public interest to do so. This power does not exist under the repealed Act. The right to privacy and reputation is therefore limited because a person may be compelled to give evidence which may include personal or private information.

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

The right affirms the right of all individuals to procedural fairness when coming before a court or tribunal and applies to both criminal and civil proceedings. Broadly, it ensures a party has a reasonable opportunity to put their case in conditions that do not place them at a substantial disadvantage compared to their opponent and also embraces principles of unimpeded access to courts, a reasonably expeditious hearing, rights to legal advice and representation, and, relevantly, the privilege against self-incrimination.

As noted above, the proposed ACiDS may mean that an individual is compelled to give evidence in a coronial inquest that may incriminate them. As a result of the ACiDS, if an

[2] *Director of Housing v Sudi* (2010) 33 VAR 139, 145 (Bell J). See also *Re Kracke and Mental Health Review Board* (2009) VAR 1, 131 (Bell J).
[3] *Coeriel and Aurik v The Netherlands* (Communication No 45/1991) [10.2].

inquest is reopened under the Coroners Act and the coroner utilises his or her power under section 39 to require a person to give self-incriminating evidence if he or she is satisfied it is in the public interest to do so, a person will no longer be able to claim privilege against self-incrimination. This will place the individual who is compelled to testify in this regard at a substantial disadvantage as a result, and limits their right to a fair hearing.

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

The purpose of the ACiDS is to clarify that the provisions under the Coroners Act which enable a coroner to require a witness to give potentially self-incriminating evidence (if the coroner is satisfied that it is in the public interest to do so) applies to inquests into deaths involving fires, even if the death was reported prior to the commencement of the Coroners Act. This is in the context of the amendments contained in the Bill more broadly which remove provisions in the Coroners Act that preserve the application of the repealed *Coroners Act 1958* and allow coroners to reopen, under the current Act, inquests into deaths heard or part-heard under the repealed Act. This will support coroners in finding the truth in these cases.

These amendments also give effect to the wider public interest in effectively investigating deaths. This is consistent with the positive obligation the right to life (protected under section 16 of the HR Act) places on the State to ensure safeguards and mechanisms of review are in place to investigate deaths which may have involved the deprivation of life in certain circumstances, such as people in the State's custody or care. As the most significant investigative mechanism into reportable deaths, the coronial system gives effect to and promotes this right.

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

The limitation achieves the purpose of the amendment by ensuring that coroners, in respect of all inquests (regardless of when a death was reported), have the ability to obtain all evidence necessary to make the relevant findings under the Coroners Act.

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

No less restrictive or reasonably available ways to achieve this purpose have been identified.

Importantly, the amendment has appropriate safeguards in that under the Coroners Act a coroner can only compel evidence if satisfied it is in the public interest to do so, and compelled evidence that would tend to incriminate a person is not admissible in any other proceeding against the person, other than a proceeding for perjury. Further, any information, document or other evidence obtained as a direct or indirect result of the evidence given at the inquest is not admissible against the person in a criminal proceeding. The inclusion of a derivative use immunity is also a significant safeguard.

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

On balance, the importance of giving coroners the ability to obtain all relevant evidence to inform coronial findings regardless of when a death was reported, and in turn giving effect to the positive obligations on the State under the right to life, outweighs the limitation on the right to a fair hearing and the right to privacy and reputation.

(f) any other relevant factors

Not applicable.

Conclusion

In my opinion, the amendments to be moved during the consideration in detail of the Bill are compatible with the human rights protected by the HR Act because it limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

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