

Co-operatives National Law Bill 2020

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, The Honourable Yvette D'Ath MP, Attorney-General and Minister for Justice and Leader of the House, make this statement of compatibility with respect to the Co-operatives National Law Bill 2020.

In my opinion, the Co-operatives National Law Bill 2020 (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 purposes of the Bill are to:

- apply the Co-operatives National Law (CNL) in Queensland in relation to the formation, registration and operation of co-operatives; and
- repeal the *Cooperatives Act 1997* and to make related amendments to other Acts.

Clause 4 of the Bill applies the CNL, being the appendix to the *Co-operatives (Adoption of National Law) Act 2012* (NSW), as a law of Queensland.

Section 48 of the *Human Rights Act 2019* states it is necessary to consider all statutory provisions so far as it is possible to do so. This Statement of Compatibility therefore considers the human rights impacts of the CNL as well as the provisions contained in the Bill.

Human Rights Issues

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

In my opinion, the human rights under the HR Act that are relevant to the CNL and the Bill are:

- Recognition and equality before the law (section 15 of the HR Act);
- Freedom of movement (section 19 of the HR Act);
- Freedom of expression (section 21 of the HR Act);
- Property rights (section 24 of the HR Act);
- Privacy and reputation (section 25 of the HR Act);
- Fair hearing (section 31 of the HR Act);
- Rights in criminal proceedings (section 32 of the HR Act); and
- Right not to be tried or punished more than once (section 34 of the HR Act).

Restrictions on minors

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

(a) the nature of the right

The right to recognition and equality before the law encompasses the right to recognition as a person before the law and the right to enjoy human rights without discrimination. The right reflects the essence 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.

Section 114 of the CNL deals with the eligibility of minors to participate in a co-operative. Importantly, section 114 of the CNL does not restrict minors from being a member of, or participating in, a co-operative, however it does place restrictions on their eligibility to hold office or, in some circumstances, to vote. Relevantly, subsection 114(2) provides that a minor is not competent to hold any office in a co-operative, and subsection 114(3) provides that a member of a co-operative who is a minor is not entitled to vote (however, this restriction does not apply to joint membership of a co-operative except where all the joint members are minors).

Under the CNL, minor is defined to mean 'an individual who is under the age of 18 years'.

The imposition of these restrictions on minors under section 114 of the CNL limits the right to recognition and equality before the law as it discriminates against an individual on the basis of age.

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

The purpose of limiting the right to recognition and equality before the law by imposing restrictions on minors is to ensure that the persons who hold office and who vote in co-operatives have the necessary maturity to engage in the activity and support the proper functioning of co-operatives.

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

The limitation on the right to recognition and equality before the law supports the proper functioning of co-operatives. By restricting the eligibility to hold office and vote in a co-operatives to only individuals who are of legal adult age (that is, 18 years or older), the provisions in section 114 of the CNL clearly achieve the purpose of ensuring that the persons who undertake these functions have the necessary maturity to do so.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose of the provision

It is considered that the limitations imposed by the CNL to a person's right to recognition and equality before the law is the least restrictive reasonably available way to achieve the purpose of ensuring the proper functioning of co-operatives.

Importantly, the right is limited only to the extent a person aged under 18 years of age is prohibited from holding office and voting (apart from where there is joint membership of the co-operative). A minor is not prohibited from being a member of a co-operative.

- (e) the balance between the importance of the purpose of the provision, 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, it is considered that the importance of maintaining the proper functioning of co-operatives by persons of legal adult age outweighs the negative impact on the right to recognition and equality before the law to the extent that it is limited.

- (f) any other relevant factors

The CNL is applied national law and can only be modified with agreement under *Australian Uniform Co-operatives Laws Agreement* (AUCLA).

Advertising restrictions, prohibition on misleading, deceptive, fraudulent or dishonest conduct, and prohibitions on certain other kinds of communication

Freedom of expression (section 21 of the HR Act)

- (a) the nature of the right

The freedom of expression right protects the right of all persons to hold an opinion without interference and the right of all persons to seek, receive and express information and ideas (including verbal and non-verbal communication). The forms of protected expression are also broad: expression can be oral, written, in print, art or any other medium. Means of expression may include spoken or sign language, books, newspapers, pamphlets, posters, banners, dress, legal submissions, and audio-visual, electronic and internet-based expressions. Attempts to coerce someone into holding, changing or expressing any opinion may interfere with this right.

Various provisions of both the CNL and the Bill may limit the freedom of expression:

Restrictions on advertising or publishing certain material

Sections 69 and 466 of the CNL apply the *Corporations Act 2001* with regards to restrictions on advertising and publicity for certain matters. These provisions restrict advertising, or publishing a statement that directly or indirectly refers to, an offer, or intended offer, of shares in a distributing co-operative unless a current disclosure statement relating to the shares is lodged or registered with the registrar. Sections 339 and 467 of the CNL place similar restrictions on advertisements or statements regarding an offer or intended offer of debentures or co-operative capital units. These provisions restrict the use and communication of information in a way that limits the freedom of expression.

Prohibitions on misleading, deceptive, fraudulent or dishonest conduct

The CNL (and the applied provisions of the *Corporations Act 2001*) impose prohibitions on conduct or statements that are misleading, deceptive, fraudulent or dishonest. Namely, section 377 of the CNL creates an offence for a person to make a public announcement relating to a proposed takeover of a co-operative if the person knows the announcement is false or is recklessly indifferent as to whether it is true or false. Section 538 of the CNL creates an offence for a person to make, or authorise the making of, a statement knowing it to be false or misleading in a material particular. These provisions restrict the communication of opinion or information in a way that may limit the freedom of expression.

Prohibitions on other kinds of expression

Section 537 of the CNL and clause 20 of the Bill are secrecy provisions. They provide that a person engaged in the administration of the CNL must not, other than as provided by section 537, make use of or divulge information obtained in the course of the administration.

Additionally, section 542 of the CNL enables the Supreme Court to issue injunctions in certain circumstances restraining a person from engaging in conduct that involves or relates to a contravention of the CNL. These provisions restrict the use and communication of information in a way that limits the freedom of expression.

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

Restrictions on advertising or publishing certain material

The purpose of restricting the advertising and publishing of certain material is to ensure that financial products cannot be advertised without potential investors having access to sufficient information to be able to make informed decisions. This, in turn, supports the broader public interest in a transparent and reliable market in shares and debentures.

Prohibitions on misleading, deceptive, fraudulent or dishonest conduct

The purpose of prohibiting misleading, deceptive, fraudulent or dishonest conduct is to ensure that the public interest in the proper operation and functioning of co-operatives is preserved. It also protects the rights of others by helping to ensure they are not subject to false or misleading information upon which they subsequently rely on to make a decision.

Prohibitions on other kinds of expression

The purpose of prohibiting certain other kinds of expression through the secrecy provisions is to protect the rights of those who have provided information under the regulatory scheme against inappropriate use of that information.

The purpose of enabling the Supreme Court to issue injunctions in specific circumstances is to enable the enforcement of the regulatory regime, and to protect the rights of other persons which might be compromised by a contravention of the CNL.

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

Restrictions on advertising or publishing certain material

By restricting the advertising and publishing of certain material, the provisions provide a legislative mechanism to ensure that financial products are sold in accordance with the provisions of the CNL (and the applied provisions of the *Corporations Act 2001*) and that protects the rights of potential purchasers. These restrictions achieve the purpose identified above.

Prohibitions on misleading, deceptive, fraudulent or dishonest conduct

Criminalising certain misleading, deceptive, fraudulent or dishonest conduct under the CNL will appropriately deter individuals from engaging in this type of behaviour which can compromise the ability of individuals to make informed decisions based on accurate and truthful information. The offence provisions achieve the purpose identified above.

Prohibitions on other kinds of expression

The secrecy provisions under the CNL and the Bill will help to ensure that information obtained through administration of a co-operative is not misused.

By enabling the issuing of injunctions by the Supreme Court, individuals are prevented from engaging in conduct that may contravene the CNL.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose of the provisions

Restrictions on advertising or publishing certain material

It is considered that the limitations imposed by sections 69, 339, 466 and 467 of the CNL to a person's freedom of expression is the least restrictive reasonably available way of achieving the purpose of ensuring a transparent and reliable market and enabling investors to make informed decisions. Importantly, the scope of the provisions are appropriately confined in that they do not apply to persons who publish an advertisement or statement in the ordinary course of a business of publishing a newspaper or magazine, or broadcasting by radio or television (unless that person knew or had reason to suspect that the advertisement or statement breached the CNL).

Prohibitions on misleading, deceptive, fraudulent or dishonest conduct

It is considered that the limitations imposed by sections 377 and 538 of the CNL to a person's freedom of expression is the least restrictive reasonably available way of achieving the purpose of ensuring a transparent and reliable market and enabling investors to make informed decisions.

Prohibitions on other kinds of expression

It is considered that the limitations imposed by sections 537 and 542 of the CNL and clause 20 of the Bill to a person's freedom of expression is the least restrictive reasonably available way of achieving the purposes of protecting individuals who have provided information about the administration of a co-operative and also protecting individuals whose interests may be compromised by a contravention of the CNL.

Additionally, in respect of the secrecy provisions, they are appropriately narrowed to specify in what circumstances information may be divulged and to whom, by listing the various specified persons and bodies (for example, the Minister, the Registrar, and/or a police officer).

(e) the balance between the importance of the purpose of the provisions, 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

Restrictions on advertising or publishing certain material

On balance, it is considered that the importance of ensuring that financial products cannot be advertised without potential investors having access to sufficient information to be able to make informed decisions (and, in turn, the importance of a transparent and reliable market) outweighs the negative impact on the freedom of expression (to the extent that it is limited).

Prohibitions on misleading, deceptive, fraudulent or dishonest conduct

On balance, it is considered that the importance of preserving the proper operation and functioning of a co-operative by ensuring that individuals are not subject to misleading, deceptive, fraudulent or dishonest conduct outweighs the negative impact on the freedom of expression (to the extent that it is limited).

Prohibitions on other kinds of expression

On balance, it is considered that the importance of protecting against the inappropriate use of information obtained through the administration of a co-operative outweighs the negative impact on the freedom of expression (to the extent that it is limited). Also, on balance, it is considered that the importance of preventing individuals from engaging in conduct which

amounts to a contravention of the legislation outweighs the negative impact on the freedom of expression (to the extent that it is limited).

(f) any other relevant factors

The CNL is applied national law and can only be modified with agreement under AUCLA.

Requirements to keep registers and provide certain information

Privacy and reputation (section 25 of the HR Act)

(a) the nature of the right

Section 25 of the HR Act protects individuals from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally.

The CNL contains provisions which impose requirements to keep registers and provide information. More specifically:

- under sections 212, 213 and 214 of the CNL, co-operatives are required to keep certain registers (including, for example, registers of directors, members, cancelled memberships, loans and deposits, and notifiable interests), and make such registers available for inspection by members at all reasonable hours; and
- provisions of the CNL require persons to provide specified information of relevance to the affairs and activities of co-operatives, including names and addresses of persons with relevant interest in shares and other prescribed information about relevant interests and instructions in relation to shares (section 92 of the CNL) and declaration of interests by directors of a co-operative (section 208 of the CNL). Explanatory statements which accompany notices of meetings must also include information as to the material interests of directors of a co-operative (section 427 of the CNL).

These provisions of the CNL operate to require and/or enable the disclosure of personal information as part of a co-operative, such as names and addresses and financial information, as well as making certain personal information contained on a register available for inspection by other members, therefore limiting the right to privacy.

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

The purpose of requiring the disclosure of specified personal information and making certain information available to be inspected by other members is to maintain the integrity and internal transparency of co-operatives, as well as ensuring that the interests of all members are protected. This, in turn, supports the proper operation of co-operative bodies.

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

Ensuring that specific relevant information is disclosed as part of co-operative membership, or for directors of a co-operative, in turn ensures that there is an open register of information where this information can be stored and accessed in appropriate circumstances. The information that is required to be disclosed and maintained on a register is only that of relevance

to the affairs and activities of co-operatives, and goes to ensuring the proper operation of co-operative bodies in a way that maintains transparency and integrity of members.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose of the provisions

It is considered that the limitations imposed by these provisions of the CNL to a person's privacy and reputation is the least restrictive reasonably available way of achieving the purpose, supporting the proper operation of co-operatives through transparency and integrity.

Further, safeguards that ameliorate the limitation on the right while still achieving the purpose are included in the CNL, namely:

- a person may be exempted from complying with a direction to disclose details of share interests if the direction is unjustified or if the direction is vexatious (sections 92(6) and 92(7) of the CNL);
- the use or disclosure of any register information for the purpose of contacting persons whose details are on a register is prohibited except in specified circumstances (section 215 of the CNL); and
- persons engaged in the administration of the CNL must not record, use or divulge any information obtained in the course of the administration, other than as provided by the exceptions set out in section 537, which protects the confidentiality of information and ensures that any personal information may only be used in connection with the purposes for which it was obtained.

(e) the balance between the importance of the purpose of the provisions, 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, it is considered that the importance of ensuring co-operatives maintain transparency and integrity in their operations outweighs the negative impact on the right to privacy and reputation (to the extent that it is limited).

(f) any other relevant factors

The CNL is applied national law and can only be modified with agreement under the AUCLA.

Inspection and investigation powers (entry, search and seizure)

Freedom of movement (section 19 of the HR Act); Property rights (section 24 of the HR Act); Privacy and reputation (section 25 of the HR Act)

(a) the nature of the right

Under section 19 of the HR Act, every person lawfully within Queensland has the right to move freely within Queensland, enter or leave Queensland, and choose where they live. The right places an obligation on the State not to act in a way that unduly restricts the freedom of movement, but does not go so far as to require that the State take positive steps to promote the freedom of movement.

Section 24 of the HR Act protects the right of all persons to own property (alone or with others) and provides that people have a right not be arbitrarily deprived of their property. Property is likely to include all real and personal property interests recognised under general law (for example, interests in land, contractual rights and shares) and may include some statutory rights

(especially if the right includes traditional aspects of property rights, such as to use, transfer, dispose and exclude). The right does not provide a right to compensation.

Section 25 of the HR Act protects individuals from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is broad. It protects privacy in the sense of personal information, data collection and correspondence, but also extends to an individual's private life more generally.

Part 6.4 and 6.5 of the CNL provides inspectors and investigators with a range of powers in relation to the affairs and activities of co-operatives which may limit these rights, namely:

- section 498 of the CNL, which enables inspectors and investigators to enter a place with the consent of the occupier or where authorised by warrant, but also if it is simply a place at which the affairs or activities of a co-operative are managed or conducted, may limit the right to property and the right to privacy and reputation;
- sections 500 and 521 of the CNL, which enable inspectors and investigators to require persons to attend, before the inspector, at a time and place to answer questions in relation to the affairs and activities of co-operatives, and also allows inspectors and investigators to take and retain possession of relevant documents, may limit the freedom of movement and right to property;
- sections 501, 502 and 508 of the CNL, which provide inspectors various powers upon entry to a place, including to search for and seize evidence of a contravention of the CNL and require persons to answer questions or produce documents, may limit the freedom of movement, right to property and right to privacy and reputation; and
- section 511 of the CNL, which enables an inspector to require a person to state their name and address in certain circumstances, may limit the right to privacy and reputation.

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

Under the CNL, inspectors and investigators are appointed to perform duties in connection with monitoring and enforcing compliance with the CNL (and enabling proceedings to be initiated in circumstances where there have been breaches of the CNL). The powers provided to inspectors and investigators under the legislation enable them to perform this role, and more broadly go to ensuring the functional operation and regulation of co-operatives according to the CNL.

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

The powers provided to inspectors and investigators by the provisions under Part 6.4 and 6.5 of the CNL enable inspectors and investigators to obtain critical information relating to the affairs and activities of co-operatives in order to support a robust regulatory system for co-operatives and enable effective monitoring and enforcement of compliance with the CNL.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose of the provisions

It is considered that the limitations imposed under these provisions of the CNL to a person's freedom of movement, property rights and privacy and reputation is the least restrictive reasonably available way of achieving the purpose of the ensuring the functional operation and regulation of co-operatives.

Importantly, a number of safeguards have been incorporated to lessen the negative impact on the rights of these powers during the course of inspections and investigations, namely:

- under section 495, prior to entering a place under section 498 or exercising any subsequent powers, an inspector must first (or at the first reasonable opportunity) produce their identity card or have it clearly displayed;
 - sections 499, 504, 505 and 506 set out the circumstances under which inspectors must first seek the consent of the operator, or obtain a warrant, prior to entering a place under section 498;
 - the provisions under section 500 and 521 of the CNL are narrowly construed in that it is only certain persons who can be the subject to the requirement to appear and answer questions (and, additionally, the questions they may be asked are confined to certain matters);
 - sections 502 and 521 provide that while an inspector or investigator retains possession of a relevant document, the inspector or investigator must make the document available to any person who would otherwise be entitled to inspect it, in order to inspect or copy it;
 - under section 508, an inspector may seize a thing only if the inspector reasonably believes it to be evidence of an offence against the CNL, and seizure of the thing is consistent with the purpose of entry, or if the seizure is necessary to prevent the thing being hidden, lost or destroyed, or used to continue or repeat the offence;
 - under section 510, items that are seized by an inspector during a search of a place must be returned at the end of six months or the end of any subsequent offence proceedings, and otherwise immediately upon the inspector ceasing to be satisfied that its retention as evidence is necessary; and
 - under sections 517 and 523, an Australian legal practitioner may refuse to produce a document on the basis that the document contains privileged information.
- (e) the balance between the importance of the purpose of the provisions, 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, it is considered that the importance of supporting a robust regulatory system for co-operatives and enable effective monitoring and enforcement of compliance with the CNL through appropriate regulation by inspectors and investigators outweighs the negative impact on the freedom of movement, property rights and right to privacy and reputation (to the extent that those rights are limited).

(f) any other relevant factors

The CNL is applied national law and can only be modified with agreement under AUCLA.

Inspection and investigation powers (self-incrimination)

Rights in criminal proceedings (section 32 of the HR Act)

(a) the nature of the right

Section 32(2) of the HR Act provides a specific set of minimum guarantees entitled to every person charged with a criminal offence, which include (among others) the right not to be compelled to testify against themselves or to confess guilt. This right applies to protect a charged person from the admission in subsequent criminal proceedings of incriminatory material obtained under compulsion, regardless of whether the information was obtained prior to or subsequent to the charge being laid.

The privilege against self-incrimination covers the compulsion of documents or things which might incriminate a person.

However, at common law the compelled production of pre-existing documents is considerably weaker than the protection accorded to oral testimony or to documents that are brought into existence to comply with a request for information. Any protection afforded to documentary material by the privilege is limited in scope and not as fundamental to the nature of the right as the protection against the requirement that verbal answers be provided.

The CNL contains a number of provisions that limit this right in respect of the powers of inspectors and investigators.

Powers of inspectors

- section 500(1) provides that an inspector may, by notice in the approved form, require a person involved in the activities of a co-operative to produce relevant documents related to the co-operative, or to attend before the inspector at a time and place stated in the notice and to answer questions put to the person relating to the promotion, formation, membership, control, transactions, dealings, business or property of the co-operative;
- section 501(b) provides that an inspector has the power at a place the inspector is authorised to enter, to require a person at the place to produce any relevant document in the person's custody or under the person's control;
- section 501(c) an inspector may also require a person at the place who is apparently involved in the management or conduct of the affairs or activities of a co-operative, to answer questions or provide information. While there is no offence attached to failing to comply with such requirements, it is possible that persons subject to these requirements under sections 500 and 501 would regard themselves as compelled to comply;
- section 503(1) abrogates the common law privilege against self-incrimination in relation to statements made under requirements in part 6.4 of the CNL as it provides that a person is not excused from making a statement under a requirement under this part on the ground that the statement might tend to incriminate them;
- section 503(2) provides that if the person claims before making the statement that the statement might tend to incriminate them, the statement is not admissible in evidence against them in criminal proceedings, other than proceedings under this part;
- section 503(3) provides that, except as provided for by section 503(2), a statement made by a person in compliance with a requirement under this part may be used in evidence in any criminal or civil proceedings against the person;
- section 507(3) provides that an inspector who enters a place may require a person in the place to give the inspector reasonable help unless the person has a reasonable excuse; and
- section 507(4) provides that, if the help required to be given relates to answering a question or producing a document other than a document required to be kept under the CNL, it is a reasonable excuse for the person to fail to answer the question, or produce the document, if complying with the requirement might tend to incriminate the person.

The common law privilege against self-incrimination is abrogated in relation to documents required to be kept under the CNL, as a person will be guilty of an offence if they fail to provide such documents when required, even if the production of the document would incriminate the person.

Powers of investigators

- section 520 provides for the appointment of a person to hold an inquiry into the affairs of a co-operative if the designated authority considers it is desirable to do so for the protection or otherwise in the interests of the public or of members or creditors of the co-operatives;
- section 521 provides that an investigator inquiring into the affairs of a co-operative may,

by giving an involved person a notice in the approved form, require the person to produce any document of which the person has custody or control and that relates to those affairs, or to give the investigator all reasonable help in the inquiry, or to appear before the investigator for examination on oath or affirmation;

- section 522(2) abrogates the common law privilege against self-incrimination in relation to answering questions by providing that a person is not excused from answering a question asked by the investigator even if seeking to be excused on the ground of possible self-incrimination; and
- section 522(3) provides that if a person answers a question after having claimed possible self-incrimination, neither the question or the answer is admissible in evidence in criminal proceedings other than proceedings against section 534 for giving a false or misleading answer to questions or proceedings on a charge of perjury in relation to the answer.

(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

In general, the purpose of the limits on the right is to ensure effective monitoring of compliance and the investigation of potential contraventions, which is necessary to protect consumers and clients of co-operatives from detriment resulting from non-compliance with the regulatory scheme.

The power to require documents, and require persons to provide information and answer questions, enables inspectors and investigators to monitor compliance with the CNL, investigate potential contraventions, and protect consumers and clients of co-operatives from detriment resulting from non-compliance with the regulatory scheme.

The documents required to be produced are those that are connected with an alleged contravention of the CNL. The duty to provide these documents is consistent with the reasonable expectations of these individuals as persons who operate a business within a regulated scheme. Moreover, it is necessary for regulators to have access to documents to ensure the effective administration of the regulatory scheme.

(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 rights (requirement to provide documents and answer questions) are necessary to ensure that inspectors and investigators are able to obtain the information they need to enforce compliance with the scheme, and therefore to protect consumers and clients from detriment.

Sections 503 and 522 do not apply to proceedings relating to the provision of false and misleading information. The statutory purpose underlying the limits to the right against self-incrimination in relation to the provision of false and misleading information is to enable inspectors and investigators to monitor compliance with the CNL and to investigate potential contraventions. This helps to achieve the purpose of ensuring the proper functioning of co-operatives and protecting consumers from detriment.

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

It is considered that the limitations imposed by the CNL to a person's rights in a criminal proceeding, particularly in relation to the protection against self-incrimination, is the least

restrictive reasonably available way of achieving the purpose of ensuring effective monitoring of compliance and the investigation of potential contraventions of the CNL.

Derivative use immunity

A possible less restrictive option would be to include a derivative use immunity, whereby the immunity is available against the risk of incrimination by indirect (or derivative) use of documents or answers. However, availability of a derivative use immunity would limit the ability of inspectors and investigators to monitor compliance with, and investigate contraventions of, the CNL. It would also limit the ability of the registrar to undertake its regulatory functions.

In relation to the CNL provisions, if a derivative use immunity was included, the inspector or investigator would potentially be reluctant to question people who may be suspected of breaching the regulatory scheme, in light of the possibility that they may attempt to purposely immunise themselves from prosecution by volunteering incriminating material. Derivative use immunity would also place an excessive and unreasonable burden on the prosecution to prove that evidence it sought to tender in criminal proceedings against a person claiming the immunity was not obtained either directly or indirectly from the questioning of a person under these provisions.

Although the use of derivative evidence engages one aspect of the rationale for the privilege against self-incrimination – that a person should not be required to assist the state in building a case against them – it does so to a lesser extent than the direct use of evidence.

For the reasons outlined above, the availability of derivative use immunity would not be appropriate in this regulatory context. Accordingly, there are no less restrictive means reasonably available to achieve the purpose of this limitation.

Production of documents

There are no less restrictive means available to achieve the purpose of enabling regulators to have access to relevant documents. To excuse the production of such documents where a contravention is suspected will allow persons to circumvent the record-keeping obligations of the CNL and significantly impede the ability of inspectors and investigators to investigate and enforce compliance of the scheme.

- (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, it is considered that the importance of ensuring the proper functioning of co-operatives through enforcing compliance with the scheme outweighs the negative impact on the right not to be compelled to testify against oneself.

- (f) any other relevant factors

The CNL is applied national law and can only be modified with agreement under AUCLA.

Provisions of the CNL which reverse the onus of proof

Fair hearing (section 31 of the HR Act); Rights in criminal proceedings (section 32 of the HR Act)

(a) the nature of the rights

The right to a fair hearing, under section 31 of the HR Act, affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It applies to both criminal and civil proceedings, and guarantees that such matters must be heard and decided by a competent, impartial and independent court or tribunal. What constitutes a ‘fair’ hearing will depend on the facts of the case and will require the weighing of a number of public interest factors including the rights of the accused and any victim (in criminal proceedings) or of all parties (in civil proceedings).

Section 32 of the HR Act protects the right to be presumed innocent until proven guilty. This imposes on the prosecution the onus of proving the offence, guarantees that guilt cannot be determined until the offence has been proved beyond reasonable doubt, gives the accused the benefit of doubt, and requires that accused persons be treated in accordance with this principle.

A number of provisions under the CNL reverse the onus of proof for offences under the Act. Some of these provisions relate to evidential burdens (which requires a defendant to adduce or point to evidence that suggests a reasonable possibility that a matter exists or does not exist) and others to legal burdens (which requires a defendant to prove the existence of a matter). Each of these provisions limit the right to a fair hearing and the rights in criminal proceedings in respect of the right to be presumed innocent.

Evidential burdens

A number of provisions in the CNL impose an evidential burden upon a defendant in criminal proceedings. Many of the offences in the CNL are offences of strict liability. The offences under the CNL which impose an evidential burden upon a defendant are:

- sections 69, 339, 466 and 467 of the CNL, which provide that it is an offence to advertise or publish a statement that directly or indirectly refers to specific matters (set out in each of the provisions). A person does not contravene these sections by publishing an advertisement or statement if they publish it in the ordinary course of a business of publishing a newspaper or magazine or broadcasting by radio or television, and the person did not know and had no reason to suspect that its publication would amount to a contravention of the relevant section – the defendant bears the evidential burden in relation to pointing to evidence of those matters;
- section 92 provides that a person given a direction under section 91 must disclose (amongst other things) the name of other persons who also have a relevant interest in their shares, and the names of people who have provided instructions to them about the shares or interests. Subsection (2) provides that these names only need to be disclosed to the extent to which it is known to the person required to make the disclosure – the defendant bears the evidential burden in relation to pointing to evidence of that matter;
- section 142 provides that a person who inspects books on behalf of an applicant under section 140 must not disclose information obtained during the inspection. Subsection (2) provides that the offence does not apply to the extent that the disclosure is to the registrar or the applicant – the defendant bears the evidential burden in relation to pointing to evidence of that matter;

- sections 494(3), 507(3), 511, 513(2) and 515 all provide that certain conduct constitutes an offence unless the relevant person has a reasonable excuse – the defendant bears the evidential burden in relation adducing evidence that they had a reasonable excuse; and
- section 181 provides that a person must not act as a director or directly or indirectly take part in, or be concerned with the management of, a co-operative if the person is a disqualified person in relation to the co-operative. Subsection (3) provides that it is a defence if the person had permission or leave to manage corporations or co-operatives and their conduct was within the terms of that leave – the defendant bears the evidential burden in relation to pointing to evidence of that matter.

Additionally, section 550 of the CNL provides that the defence of mistake of fact is available in relation to the offences above. In those circumstances, the evidential burden is on a defendant to point to evidence to show that the defence of mistake of fact is available to them.

Legal burdens

A number of provisions in the CNL impose a legal burden upon a defendant in criminal proceedings by requiring them to prove certain matters on the balance of probabilities in order to avoid criminal penalties:

- section 484(3) provides that it is a defence to a charge under section 484(1) (falsification of books) or section 484(2) (records or stores false or misleading material, engages in conduct that results in the destruction, removal or falsification of matter recorded or stored or fails to record or store matter) if the defendant proves that they acted honestly and that in all the circumstances the act or omission constituting the offence should be excused;
- section 524(1) provides that it is an offence to fail to comply with a lawful requirement of an investigator without showing reasonable cause for the failure. This places a legal burden on a defendant to show on the balance of probabilities that they had reasonable cause for the failure;
- section 525 provides that, if an inquiry is being held into a co-operative, a person who conceals, destroys, mutilates or alters a document relating to the co-operative, or who sends, or causes to be sent, out of the jurisdiction a document or other property belonging to, or under the control of, the co-operative commits an offence unless it is established the person charged did not intend to defeat, delay or obstruct the inquiry. This provision places a legal burden on a defendant to prove on the balance of probabilities that they did not intend to defeat, delay or obstruct the relevant inquiry; and
- section 429(1) provides that if a provision of division 2 of part 4.4 is contravened, the co-operative concerned and any other person involved in the contravention commits an offence. Section 429(2) provides that it is a defence to a prosecution for an offence under section 429(1) if it is proved the contravention was because of the failure of another person, who is a director of the co-operative or a trustee for debenture holders of the co-operative, to supply for the explanatory statement particulars of the person's interests. Where an individual is involved in the contravention by a co-operative, the defence in section 429(2) allows a person to escape liability if they prove that another person failed to supply for the explanatory statement particulars of the person's interests, thus placing a legal burden on a defendant.

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

Evidential burdens

The purpose of placing the evidential burden on the defendant for certain offences under the CNL is to ensure that the evidence will be adduced by the party best able to satisfy the requirements of the offences, to a sufficient standard.

Legal burdens

The purpose of placing the legal burden on the defendant for certain offences under the CNL is to ensure the effectiveness of enforcement and compliance with the CNL and the applied provisions of the *Corporations Act 2001* by enabling offences to be effectively prosecuted and to thus operate as effective deterrents. The defences and exceptions outlined in these provisions reflect a policy of imposing obligations upon persons who engage in activities in relation to co-operatives to ensure compliance with the CNL.

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

Evidential burdens

By placing the evidential burden on the defendant for certain offences under the CNL, the provisions ensure that the evidence will be adduced by the party best able to satisfy the requirements of the offences, to a sufficient standard.

Legal burdens

Placing the legal burden on the defendant for these discrete offences under the CNL ensures that persons are held responsible for all breaches that occur, with the exception of those breaches that are proven to have occurred in circumstances beyond a person's control, such as where they did not and could not know of the facts or where they took all reasonable steps to prevent a breach. The imposition of a burden of proof on defendants is directly related to the purpose of enabling the relevant offence to operate as an effective deterrent whilst allowing persons to escape liability for breaches which occur due to circumstances beyond a person's control.

- (d) whether there are any less restrictive and reasonably available ways to achieve the purpose of the provisions

It is considered that the limitations imposed by the CNL to a person's right to a fair hearing and rights in a criminal proceeding, particularly the presumption of innocence, by the reverse onus provisions are the least restrictive reasonably available way of achieving the purpose of the requirements of the offences, to a sufficient standard.

Importantly, in respect of the legal burdens, defendants seeking to rely on these defences and exceptions will be persons who are involved with co-operatives, and who are in the business of providing consumer goods or services or not-for-profit services. Thus, they should be well aware of the regulatory requirements relating to co-operatives and, as such, should have processes and systems in place that enable them to effectively meet these requirements. Conversely, it would be difficult and onerous for the Crown to investigate and prove beyond reasonable doubt that the relevant defence or exception did not apply.

Although an evidential burden may have a less restrictive impact on the right than a legal burden, it would not be as effective at achieving the purpose of the provisions because it could

be too easily discharged. The inclusion of a defence or an exception with a burden on the defendant to prove the matters on the balance of probabilities achieves an appropriate balance of all interests involved.

Additionally, the limitation is imposed only in respect of the defences or exceptions. The prosecution will first have to establish the elements of the relevant offence.

- (e) the balance between the importance of the purpose of the provisions, 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, it is considered that the importance of adducing evidence to establish facts, outweighs the negative impact on the right to a fair hearing and the rights in criminal proceedings, particularly the presumption of innocence (to the extent that they are limited).

- (f) any other relevant factors

The CNL is applied national law and can only be modified with agreement under AUCLA.

Declaration or certification of contravention

Fair hearing (section 31 of the HR Act)

- (a) the nature of the right

The right to a fair hearing, under section 31 of the HR Act, affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It applies to both criminal and civil proceedings, and guarantees that such matters must be heard and decided by a competent, impartial and independent court or tribunal. What constitutes a 'fair' hearing will depend on the facts of the case and will require the weighing of a number of public interest factors including the rights of the accused and any victim (in criminal proceedings) or of all parties (in civil proceedings).

The fair hearing right incorporates the principle of 'equality of arms', which requires that each party must have a reasonable opportunity to present their case to the court under conditions which do not place them at a substantial disadvantage when compared with the other party. Generally, parties should have the opportunity to test the evidence against them.

The CNL and the applied *Corporations Act 2001* contain some provisions that relate to a declaration, conviction or finding of a court which may engage the right to a fair hearing.

Under the *Corporations Act 2001*, section 588Q provides that if the registrar of a court certifies that a court has declared that a person has contravened section 588G in one of the specified ways (such as upon conviction for the offence), then unless it is proved that the declaration, conviction or finding was set aside, quashed or reversed, the certificate is conclusive evidence that the declaration was made and that the person committed the contravention.

Under the CNL, section 554 provides that if the Supreme Court is satisfied that one of the specified provisions was contravened, it must make a declaration about the civil penalty provision that was contravened, the person who contravened the provision, and the conduct that constituted the contravention. Section 555 then provides that a declaration of contravention is conclusive evidence of these matters.

However, these provisions are not considered to limit the right to a fair hearing as they are simply designed to prevent the re-litigation of matters which have already been decided by a court. Individuals would have already had a fair hearing regarding the matters contained in the

relevant certificate or declaration when they were was originally convicted of the offence or when the person was found to have contravened a relevant civil penalty provision in the CNL. Additionally, in relation to section 588Q of the *Corporations Act 2001* a person can prove that the relevant declaration, conviction or finding which is the subject of the certificate was set aside, quashed or reversed.

As I consider the right is not limited by the provisions, the remainder of the proportionality assessment has not been undertaken.

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

Not applicable.

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

Not applicable.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose of the provisions

Not applicable.

(e) the balance between the importance of the purpose of the provisions, 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

Not applicable.

(f) any other relevant factors

The CNL is applied national law and can only be modified with agreement under AUCLA.

Parallel operation of civil and criminal penalty regimes for breaches of the CNL

Right not to be tried or punished more than once (section 34 of the HR Act)

(a) the nature of the right

The right not to be tried or punished more than once upholds the rule against double jeopardy – that is, that a person should not be taken to court or punished more than once for an offence of which they have already been convicted or acquitted.

The right applies only to criminal offences (and not civil proceedings). However all criminal, quasi-criminal and regulatory offences, no matter how minor the consequences, fall within the provision, including, for example, parking offences.

The right does not prevent other non-penal consequences from flowing from the same conduct that gave rise to a criminal conviction and punishment (for example, professional regulatory sanctions or the like).

Part 7.2 of the CNL provides for the parallel operation of the civil and criminal penalty regimes for breaches of the legislation.

Relevantly, section 562 provides that civil proceedings for contravention of a civil penalty provision must be stayed if criminal proceedings are brought for an offence constituted by substantially the same conduct that is alleged to constitute the civil contravention. This protects against concurrent civil and criminal proceedings for conduct that is substantially the same. However, if a person is not convicted of the criminal offence, section 562(2) provides that civil proceedings may be resumed.

Section 563 further enables criminal proceedings to be brought against a person regardless of whether they have been subject to civil consequences for conduct that is substantially the same as the conduct constituting the offence.

However, these provisions are not considered to limit the right not to be tried or punished more than once because, although the CNL contemplates that in some circumstances a person may be subject to both civil and criminal proceedings and penalties for substantially the same conduct, the right does not extend to civil proceedings or penalties.

Although a penalty that is purportedly civil may engage the right against double punishment if it is truly penal in nature, which may be the case if it involves imprisonment or an extremely significant pecuniary penalty, this is not the case under the CNL. The civil consequences for breaching the regulatory regime may include a declaration that a person has contravened a civil penalty provision; a pecuniary penalty order of up to \$200,000; a compensation order; or disqualification from managing a co-operative under division 2 of part 3.1. There is no conviction involved, and no possibility of imprisonment, even where a person fails to pay a pecuniary penalty. While the maximum pecuniary penalty of \$200,000 is not insignificant, it is not so heavy as to constitute a truly penal consequence. The purpose of the pecuniary penalty is to encourage regulatory compliance, and it is necessary for the penalty to be sufficient to offset any financial benefit that may accrue to a person from the contravention of the regulatory regime.

As I consider the right is not limited by the provisions, the remainder of the proportionality assessment has not been undertaken.

(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

Not applicable.

(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

Not applicable.

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

Not applicable.

(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

Not applicable.

(f) any other relevant factors

The CNL is applied national law and can only be modified with agreement under AUCLA.

Conclusion

In my opinion, the Co-operatives National Law Bill 2020 is compatible with the human rights protected under the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

THE HONOURABLE YVETTE D'ATH MP
ATTORNEY-GENERAL AND MINISTER FOR JUSTICE
LEADER OF THE HOUSE

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