Strengthening Community Safety Bill 2023

Statement of Compatibility

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, Mark Ryan MP, Minister for Police and Corrective Services and Minister for Fire and Emergency Services, make this statement of compatibility with respect to the Strengthening Community Safety Bill 2023.

In my opinion, part of the Strengthening Community Safety Bill 2023 is not compatible with the human rights protected by the HR Act. The nature and extent of the incompatibility is outlined in this statement. In my further opinion, the remainder of the Bill is compatible with the rights protected by the HR Act for the reasons outlined in this statement.

Overview of the Bill

The objective of the Bill is to give effect to legislative reforms announced by the Queensland Government on 29 December 2022 aimed at keeping the community safe, and to strengthen youth justice laws to respond to serious repeat offenders. The Bill will do so by amending the *Bail Act 1980* (Bail Act), Criminal Code (the Code), the *Youth Justice Act 1992* (YJ Act) and the *Police Powers and Responsibilities Act 2000* (PPR Act) to:

- increase the maximum penalty for unlawful use or possession of motor vehicles, aircraft or vessels from 7 to 10 years imprisonment;
- create new circumstances of aggravation for the offence of unlawful use or possession of motor vehicles, aircraft or vessels where:
    - the offender has published material advertising their involvement in, or of, the offending on social media;
    - where the offending occurs at night;
    - where the offender uses or threatens violence, is or pretends to be armed, is in company and damages or threatens to damage any property;
- provide that it is an offence for children to breach a condition of their bail undertaking;
- extend and expand the trial of electronic monitoring as a condition of bail for a further two years and to include eligible 15-year-olds;
- remove the requirement that police consider alternatives to arrest if they reasonably suspect a child on bail for a prescribed indictable offence or certain domestic violence offences has contravened or is contravening a bail condition;
- provide that a child's bail history must be taken into account during sentencing;

- create the ability of a sentencing court to declare that a child offender is a serious repeat offender in certain circumstances to enable considerations such as community safety to be paramount;

- enable conditional release orders to operate for a greater period of time;

- ensure certain child offenders serve their suspended term of detention if they breach their conditional release orders;

- expand the list of offences included within the definition of 'prescribed indictable offence' to facilitate greater operation of provisions in the YJ Act aimed at serious repeat offenders, including the presumption against bail provision under section 48AF and the new sentencing regime for children declared serious repeat offenders;

- enabling the transfer of persons who have turned 18 years on remand and the earlier transfer persons who have turned 18 years serving a sentence from youth detention centres to adult correctional centres; and

- ensure the continuation of multi-agency collaborative panels which provide intensive case management and holistic support for young persons identified as high risk or requiring a collaborative response through a multi-agency and multi-disciplinary approach.

Human Rights Issues

Offence for breach of bail conditions for children

Section 29(1) of the *Bail Act 1980* currently provides that it is an offence for a defendant to break any condition of the undertaking on which the defendant was granted bail requiring the defendant's appearance before a court. Section 29(1) currently does not apply to children. Clause 5(1) of the Bill will omit paragraph (a) of section 29(2) of the *Bail Act*, with the effect that s 29(1) will then apply to children.

The Government acknowledges that this proposed amendment is incompatible with the right of children to protection in their best interests in section 26(2) of the HR Act.

The amendment may make it more likely that children will be detained pending trial and for that reason is inconsistent with international standards about the best interests of the child. In particular:

- rule 13 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (known as the Beijing Rules) states that, for juveniles, '[d]etention pending trial shall be used only as a measure of last resort and for the shortest possible period of time'; and

- part III of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* states that '[d]etention before trial shall be avoided to the extent possible and limited to exceptional circumstances. Therefore, all efforts shall be made to apply alternative measures.'

The proposal may also tend to limit the ability to divert children away from formal criminal process (cf to rule 11 of the Beijing Rules).

The purpose of the proposal is to ensure that young people comply with bail conditions. That is an important and legitimate purpose. However, because it appears that less restrictive options are available to achieve the same purpose, the proposal limits human rights in a way which is not justified. Less restrictive alternatives may include, for example, providing additional bail support to young people.

However, the Government considers that this measure is needed to respond to the small cohort of serious repeat young offenders who engage in persistent and serious offending, in particular, offending which occurs while on bail.

For this reason, the Government considers that it is necessary, in this exceptional case, to override the HR Act. Accordingly, section 29 of the *Bail Act* will be amended to include a declaration which provides that it is to have effect in relation to a defendant who is a child despite being incompatible with human rights, and despite anything else in the HR Act.

Increase to maximum penalty for offence of unlawfully using or possessing a motor vehicle, aircraft or vessel in s 408A of the Criminal Code

Clause 8(1) of the Bill amends section 408A(1) of the Code to increase the maximum penalty for the offence of unlawfully using or possessing a motor vehicle, aircraft or vessel from 7 to 10 years imprisonment.

Clause 8(2) of the Bill also increases the maximum penalty for the aggravated offence set out in section 408A(1A) of the Code from 10 to 12 years imprisonment.

The amendments may increase the time that people convicted of these offences will be deprived of their liberty and thereby limit section 29(1) of the HR Act.

Although the offences apply to both adults and children, these changes will have a greater impact on children because these offences are more prevalent among young people. According to the Queensland Sentencing Advisory Council (QSAC), as at 2020, the average age of offenders sentenced for unlawful use of a motor vehicle at the time of the offence was 23.2 years and the most common age was 17 years.[1] By increasing the risk that young people convicted of these offences will be detained in custody for longer, these amendments limit the right of children to protection in their best interests in section 26(2) of the HR Act.

The amendments will also have a greater impact on Aboriginal and Torres Strait Islander peoples. According to the QSAC, Aboriginal and Torres Strait Islander peoples accounted for 35.5% of all offenders sentenced for unlawful use of a motor vehicle between 2005-06 and 2019-2020, whereas they accounted for 18.2% for all other offences over the same period.[2] Increasing the maximum penalty for these offences may mean that more Aboriginal or Torres Strait Islander offenders are incarcerated for longer periods of time. However, I do not consider

[1] Queensland Sentencing Advisory Council, *Sentencing Spotlight on unlawful use of a motor vehicle* (December 2020) 4 <https://www.sentencingcouncil.qld.gov.au/__data/assets/pdf_file/0009/661428/sentencing-spotlight-unlawful-use-of-a-motor-vehicle.pdf>.

[2] Queensland Sentencing Advisory Council, *Sentencing Spotlight on unlawful use of a motor vehicle* (December 2020) 6.

that the amendments limit the right to equal protection of the law without discrimination in section 15(3) or the right to equal and effective protection against discrimination in section 15(4) of the HR Act. That is because I am satisfied the amendments do not directly or indirectly discriminate on the basis of race.[3] The increased maximum penalties will apply equally to all offenders found guilty of an offence under section 408A(1) or (1A) of the Code. The sentencing court will also still be able to take into account that the offender is Aboriginal or Torres Strait Islander, including under section 9(2)(p) of the *Penalties and Sentences Act 1992* (PS Act).

(a) the nature of the right

The right to liberty (section 29(1)) – The right to liberty is about 'protect[ing] people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense'.[4]

The best interests of the child (section 26(2)) – 'The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the [child's human rights] and the holistic development of the child.'[5] The content of this right is informed by the *Convention on the Rights of the Child,* in which article 37(b) provides that, 'the arrest, detention or imprisonment of a child … shall be used only as a measure of last resort and for the shortest appropriate period of time'.[6]

(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 increasing the maximum penalties for section 408A(1) and (1A) of the Code is to more appropriately reflect the seriousness of these offences and send a message to offenders and the community that this conduct is viewed seriously and is not acceptable.

(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 maximum sentence for an offence is a reflection of, and a proxy for, its seriousness.[7] Increasing penalties for an offence is a suitable way of showing that the offence is considered to be more serious.

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

Less restrictive alternatives include not increasing the penalty at all, or increasing to a lesser extent the maximum penalties to apply. However, as noted above, maximum sentences are a reflection of the intended seriousness of the offence and it is the Government's intention that

[3] *R v Sharma*, 2022 SCC 39.
[4] *Re Lifestyle Communities Ltd [No 3]* (2009) 31 VAR 286, 140 [665]; *DPP (Vic) v Kaba* (2014) 44 VR 526, 558 [110].
[5] Committee on the Rights of the Child, *General Comment No 19 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013) 2.
[6] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[7] *R v Sharma*, 2022 SCC 39, [106].

the penalty levels proposed reflect the seriousness of the offence. However, in concert with the proposed amendments, the Government remains committed to additional measures that will assist in preventing crime, and addressing the causes of crime including:

- diversion and early intervention programs;
- grants programs for community-led solutions to local issues;
- Intensive Case Management, responding to underlying causes of offending behaviour;
- multi-agency responses to disadvantage that may be contributing to offending such as unmet health needs, unsuitable or insecure housing, disengagement from education, training or employment.

When young people are detained, the Department of Children, Youth Justice and Multicultural Affairs (DCYJMA) provides the services required to ensure the young person's needs are met, and when sentenced may provide services to the young person aimed at rehabilitation and improving life outcomes.

There is no less restrictive alternative which would still achieve the purpose of the amendments.

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

On one side of the scales, liberty is important and especially the liberty of children. However, the size of the impact on children is reduced by important existing safeguards:

- Children who are sentenced for contravening section 408A(1) or (1A) of the Code by a Childrens Court Magistrate can still only be sentenced to a maximum of 1 year imprisonment. For those children dealt with by a Childrens Court judge for contravening section 408A(1) or (1A), the maximum will be 5 years imprisonment.[8]
- The sentencing principles in section 150 of the YJ Act will continue to apply, including the youth justice principles. This includes the principle that a child should be detained only as a last resort and for the least time that is justified in the circumstances.
- For children between the ages of 10 and 14, section 29(2) of the Code will continue to apply. This means that the prosecution will still need to prove that a child in this age bracket charged with an offence under s 408A(1) or (1A) had the capacity to know that they should not have engaged in the offending conduct.

On the other side of the scales, offending involving the unlawful use of motor vehicles is often accompanied by dangerous, risk-taking behaviour that places both the offender and the community at risk of harm, including death. Recent data identifies that unlawful use of a motor vehicle offences represent a greater proportion of youth crime than in previous years. In terms of reported crime, in 2020-21, unlawful use of a motor vehicle became the fourth most prevalent offence committed by

[8] Section 175(1)(g) of the *Youth Justice Act 1992*.

child offenders, recording the largest increase in the proportion of all child offenders. The offending is also commonly committed by serious repeat offenders.

The increases to the maximum penalties reflects the seriousness of this type of offending and the community's denunciation of such conduct.

Taking all these factors into account, the importance of liberty and the best interests of the child are outweighed by the need to appropriately reflect the seriousness of unlawful use of a motor vehicle.

(f) any other relevant factors

Not applicable.

Aggravated offence for publishing material on social media to advertise unlawful use of a motor vehicle or the offender's involvement in the offence

Clause 8(3) of the Bill amends section 408A of the Code to create a new aggravated offence in subsection (1B) for unlawful use or possession of a motor vehicle, aircraft or vessel where the offender publishes material on a social media platform or online social network to advertise their involvement in the offence or the act or omission constituting the offence having occurred. The maximum penalty for this aggravated offence will be 12 years imprisonment.

'Advertise' means attract the notice and attention of the public or a limited section of the public. 'Material' will be defined in s 408A(3) of the Code as including anything that contains data from which text, images or sound can be generated.

This new aggravated offence may have the effect of increasing the time some people spend in custody. Accordingly, the amendment limits the right to liberty under section 29(1) of the HR Act. As the amendment increases the risk that children will be detained, it also limits the right of children to protection in their best interests in section 26(2) of the HR Act.

As the amendment creates a circumstance of aggravation focussed upon the publication of material on a social media platform or online social network, the amendment also limits freedom of expression under section 21(2) of the HR Act. Freedom of expression applies 'not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb'.[9]

The new aggravated offence in section 408A(1B) may have a greater impact on Aboriginal and Torres Strait Islander peoples. However, for the reasons outlined above in respect of clause 8(1) and (2) of the Bill, I am satisfied clause 8(3) also does not limit the rights to equality and non-discrimination in section 15 of the HR Act.

[9] *Matalas v Greece* (2021) 73 EHRR 26, 975 [38]; *Gachechiladze v Georgia* (2022) 74 EHRR 21, 761 [49].

(a) the nature of the right

The right to liberty (section 29(1)) – The right to liberty is about 'protect[ing] people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense'.[10]

The best interests of the child (section 26(2)) – 'The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the [child's human rights] and the holistic development of the child.'[11] The content of this right is informed by the *Convention on the Rights of the Child,* in which article 37(b) provides that, 'the arrest, detention or imprisonment of a child … shall be used only as a measure of last resort and for the shortest appropriate period of time'.[12]

Freedom of expression (section 21(2)) – 'Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment.'[13]

(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 aggravated offence is directed towards denouncing the advertising of the offence on social media. It is legitimate to seek to proscribe furnishing people with information about how to commit a crime and encouraging people to do so.[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

The creation of this offence will serve the purpose of denouncing the advertising of the offence on social media.

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

The following alternatives were considered:

- making advertising the offence or involvement in it on social media a factor to take into account in the sentencing principles in the PS Act and the YJ Act;
- setting the maximum penalty lower than 12 years imprisonment.

However, as the act of advertising motor vehicle offending on social media encourages criminal offending, a circumstance of aggravation was considered the most appropriate

[10] *Re Lifestyle Communities Ltd [No 3]* (2009) 31 VAR 286, 140 [665]; *DPP (Vic) v Kaba* (2014) 44 VR 526, 558 [110].
[11] Committee on the Rights of the Child, *General Comment No 19 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013) 2.
[12] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).
[13] *Matalas v Greece* (2021) 73 EHRR 26, 975 [38].
[14] *Brown v Classification Review Board* (1998) 82 FCR 225, 238, 246, 258.

response, having regard to a greater maximum penalty and the ability to reflect the offending on an offender's criminal history. A lower sentencing range was considered to not achieve the purpose of reflecting the seriousness of the offence to the same extent as a circumstance of aggravation. Accordingly, there is no less restrictive alternative which would still achieve the purpose of the amendments.

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

On one side of the scales, liberty is important and especially the liberty of children. However, the size of the impact on children is reduced by the important safeguards set out above when considering clause 8(1) and (2) of the Bill. When it comes to the impact on freedom of expression, some ideas are more important to express than others, such as political speech or debate on matters of public interest.[15] Advertising the unlawful use of a motor vehicle, or one's involvement in it, is at the lower end of the spectrum of expression worthy of protection.

On the other side of the scales, it important to reflect community's denunciation of conduct which encourages the commission of offending which places the community at risk.

The impact on liberty, the best interests of the child and freedom of expression is outweighed by the need to denounce advertising about unlawful use of a motor vehicle on social media.

(f) any other relevant factors

Not applicable.

Aggravated offence for unlawful use of a motor vehicle at night, use or threat of violence, pretending to be armed, in company or damage to property

Clause 8(3) of the Bill substitutes the existing aggravated offence in section 408A(1B) of the Code for new aggravated offences, contained within new subsection 408A(1C). These circumstances of aggravation will make an offender liable to 14 years imprisonment where the unlawful use of a motor vehicle is committed at night or the offender uses or threatens to use actual violence; pretends to be armed with a dangerous or offensive weapon, instrument, or noxious substance; is in company with one or more persons, or damages, threatens or attempts to damage any property.

Clause 9(2) of the Bill is a consequential amendment to section 552BB of the Code, which has the effect that the new circumstances of aggravation relating to threatening/using violence and whilst armed/pretending to be armed, in addition to the circumstance of aggravation relating to damage (if the damage to property is equal to or greater than the prescribed value – currently $30,000 - and the defendant does not plead guilty), must be heard on indictment.

The effect of these aggravated offences may be to increase the time that some people convicted of the relevant offence will be deprived of their liberty, thereby limiting section 29(1) of the HR Act. These amendments may increase the time in which young people, who have been

[15] *Gachechiladze v Georgia* (2022) 74 EHRR 21, 761-2 [51].

convicted of the relevant offence, will be detained in custody, thereby also limiting the best interests of the child right in section 26(2) of the HR Act.

The new aggravated offences in section 408A(1C) may have a greater impact on Aboriginal and Torres Strait Islander peoples. However, for the reasons outlined above in respect of clause 8(1) and (2) of the Bill, I am satisfied clause 8(3) also does not limit the rights to equality and non-discrimination in section 15 of the HR Act.

(a) the nature of the right

The right to liberty (section 29(1)) – The right to liberty is about 'protect[ing] people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense'.[16]

The best interests of the child (section 26(2)) – 'The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the [child's human rights] and the holistic development of the child.'[17] The content of this right is informed by the *Convention on the Rights of the Child,* in which article 37(b) provides that, 'the arrest, detention or imprisonment of a child … shall be used only as a measure of last resort and for the shortest appropriate period of time'.[18]

(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 introducing these circumstances of aggravation is to reflect that unlawful use of a motor vehicle is more serious and that greater condign punishment is warranted where the offence is committed at night, or the offender uses or threatens to use actual violence, pretends to be armed with a dangerous or offensive weapon, instrument or noxious substance, is in company with one or more persons, or damages, threatens or attempts to damage any property. A series of high-profile incidents involving deaths and serious harm associated with unlawful use of a motor vehicle have drawn media and community attention over the past four years. The penalties are intended to reflect the serious and significant risk to public safety, and real life and often fatal consequences, that this offending represents. Seeking to address this behaviour and reflect the community's denunciation is considered a proper purpose.[19]

(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

Introducing these new circumstances of aggravation is a suitable way of showing that the presence of those aggravating circumstances is considered to be more serious.

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[16] *Re Lifestyle Communities Ltd [No 3]* (2009) 31 VAR 286, 140 [665]; *DPP (Vic) v Kaba* (2014) 44 VR 526, 558 [110].

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

[18] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

[19] *Tajjour v New South Wales* (2014) 254 CLR 508, 583 [160].

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

Less restrictive alternatives include not increasing the penalty for these circumstances of aggravation, or limiting the categories of circumstances of aggravation.

As noted above, a maximum sentence is a reflection of the intended seriousness of the offence and it is the Government's intention that the penalty levels proposed reflect the seriousness of the offence with these particular circumstances of aggravation.

Further, the particular circumstances of aggravation identified reflect the Government's intention to indicate that these particular kind of offences, committed in this manner, are considered to be more serious than other offending.

(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, liberty is important and especially the liberty of children. However, the size of the impact on children is reduced by the important safeguards set out above when considering clause 8(1) and (2) of the Bill.

On the other side of the scales, it is also important that offending that places community safety at risk be appropriately denunciated.

Taking all these factors into account, the importance of liberty and the best interests of the child is outweighed by the need to appropriately reflect the seriousness of unlawful use of a motor vehicle when the offence is committed at night, or the offender uses or threatens to use actual violence, pretends to be armed with a dangerous or offensive weapon, instrument or noxious substance, is in company with one or more persons, or damages, threatens or attempts to damage any property.

(f) any other relevant factors

Not applicable.

Removal of reverse onus for defence in section 408A(1C) of the Criminal Code

Currently, section 408A(1C) of the Code sets out a defence to a charge of an offence in subsections (1) to (1B) if the accused person proves they had the lawful consent of the owner of the motor vehicle, aircraft or vessel to its use or possession. By requiring the defendant to prove the defence on the balance of probabilities, section 408A(1C) reverses the onus of proof. This limits the right to be presumed innocent in section 32(1) of the HR Act.

Clause 8(3) of the Bill inserts new subsections (1D) and (1E). These amend the defence to remove the reverse onus. Instead, the exculpatory provision will impose an evidential burden on the accused. The burden of proof will remain with the prosecution to prove the offence beyond a reasonable doubt.

This amendment ensures that the prosecution is required to make out the case against the accused and removes any risk that an accused may be convicted while a reasonable doubt

exists. Accordingly, this amendment protects and promotes the right to be presumed innocent in section 32(1) of the HR Act and is compatible with that right.[20]

Extension of electronic monitoring devices as a condition of bail for offenders aged 15, 16 and 17 years old in certain circumstances

Section 52AA of the YJ Act was introduced in 2021 to allow a court, in certain circumstances, to impose on a grant of bail to a child who is at least 16 years, has committed a prescribed indictable offence and has been previously found guilty of at least one indictable offence, a condition that the child must wear a monitoring device while released on bail.

Clause 14(2) of the Bill extends the operation of section 52AA of the YJ Act, which is currently due to expire on 30 April 2023. Clause 10(1) lowers the minimum age for which electronic monitoring can be imposed as a condition of bail from 16 to 15 years of age.

The extension of the operation of section 52AA of the YJ Act will have the same impact on human rights as first assessed when section 52AA was introduced in 2021.

Clause 14 will interfere with the right to privacy in section 25(a) of the HR Act, as well as the right of children to protection in their best interests in section 26(2) of the HR Act (noting that article 16 of the *Convention on the Rights of the Child* also protects the privacy of children, and that that Convention is relevant to determining the scope of the right in section 26(2)).

The proposal also has the potential to interfere with the relationship between children and their parents, thereby interfering with family, and engaging section 25(a) of the HR Act. The internal limitations of lawfulness and arbitrariness apply equally to the right to family as to the right to privacy. 'Arbitrary' means capricious, unpredictable, unjust or unreasonable in the sense of not being proportionate to the legitimate aim sought.[21] Non-arbitrariness and proportionality are different standards, but if the impact is proportionate under section 13 of the HR Act, it will not be arbitrary.[22] Accordingly, it is convenient to consider lawfulness and arbitrariness below when considering proportionality.

As to the distinct right to protection of families in section 26(1) of the HR Act, the UN Human Rights Committee has treated intrusions into the family home as falling within the scope of article 23 of the *International Covenant on Civil and Political Rights*, which is the equivalent to section 25 of the HR Act. However, any limit on the right to protection of families in section 26(1) would add no more to any interference with family under section 25(a) of the HR Act.

For the same reasons, allowing the court to interfere with kinship ties limits the right of Aboriginal and Torres Strait Islander peoples 'to enjoy, maintain, control, protect and develop their kinship ties' in section 28(2)(c) of the HR Act.

There may also be ancillary impacts on the freedom of movement (section 19 of the HR Act) and freedom of association (section 22 of the HR Act), given that electronic monitoring will

[20] *R v DA* (2016) 263 A Crim R 429, 443-4 [44]-[46].
[21] *Thompson v Minogue* (2021) 294 A Crim R 216, 231 [55], 269 [221]; *Attorney-General (Qld) v Grant [No 2]* [2022] QSC 252, [111].
[22] *Thompson v Minogue* (2021) 294 A Crim R 216, 232 [56], [58], 269 [221], 270 [226].

facilitate the enforcement of bail conditions which may already be imposed, and which would limit these rights.

Since section 52AA came into effect, evidence has also arisen that electronic monitoring limits the right to education in section 36(1) of the HR Act. There is at least one example of child subject to an electronic monitoring condition of bail who 'refused an education enrolment due to concerns about bullying and stigmatisation'.[23]

By expanding section 52AA to apply to younger children aged 15 or more, the limits on the above human rights will be deeper and require greater justification.

Previously, the Legal Affairs and Safety Committee (LASC) also stated that section 52AA of the YJ Act may limit the right not to be subject to retrospective criminal laws in section 35(1) of the HR Act.[24] This is because a transitional provision in section 403 of the YJ Act provides that section 52AA applies in relation to a child in custody in connection with a charge of an offence whether the offence was allegedly committed, or the child was charged, or any step in the proceeding for the offence was taken, before or after the amendment commenced. However, the right in section 35(1) of the HR Act is a right 'not to be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in'. I consider that 35(1) of the HR Act is not limited because section 52AA relates to bail and does not create a new offence.

(a) the nature of the right

The right to privacy and non-interference with family (section 25(a)) – The purpose of the right not to have one's privacy arbitrarily interfered with is 'to protect and enhance the liberty of the person – the existence, autonomy, security and well-being of every individual in their own private sphere.'[25] The right not to have one's family interfered with protects 'the intimate relations which [people] have in their family' which is indispensable 'for their personal actuation'.[26]

Freedom of movement (section 19) – 'The purpose of the right to freedom of movement in [section 19] is to protect the individual's right to liberty of movement within [Queensland] and their right to live where they wish. It is directed to restrictions on movements which fall short of physical detention coming within the right to liberty in [section 29]. The fundamental value which the right expresses is freedom, which is regarded as an indispensable condition for the free development of the person and society.'[27]

Freedom of association (section 22) – The freedom of association protects an individual 'when, for whatever reason and for whatever purpose, [they] wish to associate with others.'[28]. 'The rights to assemble and associate with other persons do not just apply in the familiar contexts of association for political and industrial purposes but also in the contexts of association for

[23] Bob Atkinson, *Youth Justice Reforms Review* (Final Report March 2022) 54.
[24] Legal Affairs and Safety Committee, Parliament of Queensland, *Youth Justice and Other Legislation Amendment Bill 2021* (Report No 7, April 2021) 99-100.
[25] *Director of Housing v Sudi* (2010) 33 VAR 139, 145 [29].
[26] *Director of Housing v Sudi* (2010) 33 VAR 139, 145 [29].
[27] *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 124 [588].
[28] William A Schabas, Nowak's CCPR Commentary (NP Engel, 3rd ed, 2019) 614 [3].

cultural, social and familial purposes. Bail conditions limiting or prohibiting contact between the accused and other persons may interfere with the exercise of these rights.'[29]

The right to protection of families (section 26(1)) – This right is 'principally concerned with the unity of the family' as the fundamental group unit of society.[30] It is a relatively weak right which readily gives way when in conflict with other human rights, and in particular, the right to equality[31] and the best interests of the child.[32]

The best interests of the child (section 26(2)) – 'The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the [child's human rights] and the holistic development of the child.'[33]

The right of Aboriginal and Torres Strait Islander peoples to maintain kinship ties (section 28(2)(c)) – This right recognises that harm to kinship ties may lead to a loss of knowledge, a loss of 'identity with one's own kin and country', and loss of emotional, physical and social support.[34]

The right to education (section 36(1)) – The right to education is modelled upon article 13 of the *International Covenant on Economic, Social and Cultural Rights*. It requires that 'functioning educational institutions and programmes' be made available 'in sufficient quantity', and that these educational institutions and programmes be 'accessible to everyone, without discrimination'.[35] The value underlying the right to education is empowerment, in the sense of empowering the realisation of other human rights, empowering social mobility, empowering full participation in the community, and empowering the full enjoyment of human existence.[36] A child who leaves school to avoid bullying and stigmatisation from wearing an electronic monitoring device misses the opportunity to be empowered by education.

(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 purposes of the proposal to allow electronic monitoring as a bail condition is to deter the child from committing further offences on bail, knowing they are being monitored, and thereby keep the community safe.

[29] *Woods v DPP (Vic)* (2014) 238 A Crim R 84, 91 [17].
[30] Alistair Pound and Kylie Evans, Annotated Victorian Charter of Rights (Lawbook Co, 2nd ed, 2019) 164 [17.40].
[31] Eg Human Rights Committee, *General Comment No 19: Article 23 (The family)*, 39th sess (1990) 1-2 [4], [6]-[9] (but in relation to aspects of art 23 which were not incorporated into s 26(1)).
[32] Eg *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221, 255 [145].
[33] Committee on the Rights of the Child, *General Comment No 19 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013) 2.
[34] *Re CP* (1997) 21 Fam LR 486, 502; *Donnell v Dovey* (2010) 42 Fam LR 559, 601-2 [220].
[35] Committee on Economic, Social and Cultural Rights, *General Comment No. 13 (1999) on the right to education (Art 13)*, UN Doc E/C.12/1999/10 (8 December 1999) [6].
[36] Committee on Economic, Social and Cultural Rights, *General Comment No. 13 (1999) on the right to education (Art 13)*, UN Doc E/C.12/1999/10 (8 December 1999) [1].

It is considered that this is a proper purpose. Seeking to prevent or reduce crime is a proper purpose consistent with the values of our society.[37]

The purpose of lowering the age eligibility to 15 years or above is to increase the potential cohort size of the trial, which in turn will better enable the Government to determine the effectiveness of the trial in achieving its objectives. The current size of the cohort as not sufficient as an evidence base.

(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

Electronic monitoring for children was introduced as a trial because the evidence of the efficacy and cost effectiveness of the use of monitoring devices on children in other jurisdictions is inconsistent.[38] When section 52AA was introduced, the LASC noted that the effectiveness of electronic monitoring at reducing the rate of reoffending on bail is not clear, and that the evidence suggests that effectiveness may be highly dependent on other contextual considerations, including rehabilitation and support services available to the person subject to electronic monitoring. The LASC stated that great care must be taken to ensure that adequate safeguards exist to protect the rights of young people who are subject to electronic monitoring conditions, given the potentially inconclusive nature of the effectiveness of this particular tool at achieving the legitimate purposes described above.[39]

It was intended that the trial would be evaluated after 12 months, to examine the impacts of electronic monitoring on bail condition compliance rates, deterrence from further offending and offender recidivism (if found guilty).[40] Only eight children were subject to electronic monitoring as a condition of bail in the trial period. A review conducted by the DCYJMA and peer reviewed by Mr Bob Atkinson AO APM concluded that while there are some benefits associated with electronic monitoring, the small sample size means its effectiveness in deterring offending behaviour cannot be confirmed, nor can the value of extending its use to other cohorts, or for other purposes.[41]

Accordingly, there is a need for further research with a larger sample size. The proposed extension of the trial is intended to provide the larger sample size required for a meaningful consideration of efficacy. It is intended that the trial will again reviewed prior to the new expiry, and will consider not only efficacy but also adherence to safeguards. It will then be possible to review whether the limits on human rights help to achieve the purposes of electronic monitoring for children.

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[37] *Re Application under the Major Crime (Investigative Powers) Act 2004* (2009) 24 VR 415, 449-50 [151]; *Tajjour v New South Wales* (2014) 254 CLR 508, 552 [41], 562 [77], 571 [111]-[112], 583 [160].

[38] Legal Affairs and Safety Committee, Parliament of Queensland, *Youth Justice and Other Legislation Amendment Bill 2021* (Report No 7, April 2021) 12.

[39] Legal Affairs and Safety Committee, Parliament of Queensland, *Youth Justice and Other Legislation Amendment Bill 2021* (Report No 7, April 2021) 101.

[40] Statement of compatibility, Youth Justice and Other Legislation Amendment Bill 2021 (Qld) 3.

[41] Department of Children, Youth Justice and Multicultural Affairs, *Electronic Monitoring Trial – Internal Review*, page 17; appendix 2, page 14.

Lowering the age will mean there are more people eligible for the trial, as evidenced by the New Zealand experience. As noted in the review report, New Zealand has electronic monitoring as an option for youths aged 12 to 17 years, though the model is different. Between October 2013 and August 2021, there were 1306 young people aged 14-17 years on electronic monitoring bail conditions.

Suitability for an electronic monitoring condition is assessed on a range of factors, and eligibility for the program is determined on a case-by-case basis with consideration of the benefits to both the community and young person. The potential negative impacts are assessed by courts to ensure concerns such as the capacity of the young person to maintain the equipment, or lack of parental support, are considered and to minimise consequences such as net widening.

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

The following alternatives were again considered:

- confining the availability of electronic monitoring to charges for more serious offences;
- making clear in the legislation that electronic monitoring is an alternative to remand, rather than an additional measure;
- providing additional supports to children on bail; and,
- extending the trial on the basis of the existing age eligibility of 16 and 17 years of age, without reducing the eligibility to 15 years of age.

The first option would not be as effective in achieving the purposes of deterrence, facilitating investigations by police and reducing reoffending rates, because it would only achieve those purposes for children charged with a smaller range of offences (that is, fewer categories of crime will be deterred). As it is, the power is already confined to bail in relation to an offence which is a prescribed indictable offence. The second option would mean releasing children who are not otherwise suitable for release and would therefore not ensure that the community is protected. As to the final option, providing additional supports alone will not prevent reoffending. In any event, there is no reason why additional supports cannot be provided alongside electronic monitoring.

Keeping the eligibility to 16- and 17-year-olds but increasing the locations (by regulation) and extending the time by two years as proposed could still achieve the policy objective of increasing the potential cohort size, but possibly not sufficiently to complete the trial. The expansion to three more sites marginally increases the potential eligible population. Expanding the age is another means of increasing the cohort size, and may also provide a stronger evidence base for the suitability or otherwise of this age group.

It is important to emphasise that the power to impose a monitoring device condition is subject to the court's discretion if it is satisfied that the condition would be appropriate in the circumstances. A note to section 52AA(1) of the YJ Act makes clear that the child's right to privacy and other human rights will be relevant to whether the condition would be appropriate

in all the circumstances. The purpose of the note is to ensure that provisions of the HR Act are considered when a monitoring device condition is imposed. The reason why the note is required is that when a court is deciding a bail application it is exercising a judicial function and therefore not a public entity under section 9(4)(b) of the HR Act. Courts are required to take into account some human rights when exercising a judicial function under section 5(2)(a) of the HR Act, but there is uncertainty about which human rights apply in which circumstances. The note clarifies that the human rights listed are relevant to the court's decision to impose an electronic monitoring condition. The inclusion of the note is not intended to make human rights irrelevant for other decisions under provisions of the YJ Act which do not contain a similar note.

Embedding human rights considerations in this way ensures that any exercise of power to impose a monitoring device condition will represent a proportionate limit on the child's human rights in the circumstances of the particular case. This represents the least curtailment of the child's human rights possible consistent with the purpose of allowing the use of electronic monitoring, namely, deterrence.

Accordingly, there are no less restrictive alternatives which would still achieve the purposes of electronic monitoring. Limiting human rights by allowing electronic monitoring for children on bail is therefore necessary to achieve its purposes.

(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

As to the impact on human rights, it is recognised that electronic monitoring represents a large intrusion into privacy, especially for children. It is also recognised that the impact is deeper for younger children, so that lowering the age to 15 years increases the burden on human rights. Monitoring devices may also be visible and therefore a source of stigma and shame for children when at school, work or in the community. However, electronic monitoring is reserved for bail in relation to offences which are prescribed indictable offences, and only where the child has already been previously convicted of at least one indictable offence. Further, the court will have a discretion in whether to set electronic monitoring as a condition of bail after determining that it is appropriate in the circumstances. The human rights of the child and others will be relevant to the question of whether the condition is appropriate in the circumstances.

On the other side of the scales, the following factors show the importance of the purpose of reducing reoffending while on bail:

- an acute problem is presented by a small cohort of serious recidivist youth offenders who engage in persistent and serious offending (17 percent of all youth offenders account for 48 per of all youth crime, up approximately seven percentage points from the previous 12-month period);[42]

- any reduction in reoffending by this cohort means reducing the costs of crime (for example, in 2018 every assault avoided represented an average of $2,969 in financial

[42] *Childrens Court of Queensland Annual Report 2021-22* (2022) 19 (figure 6) and *Childrens Court of Queensland Annual Report 2020-21* (2021) 19 (figure 5).

harm avoided, and every vehicle theft avoided represented an average of $7,269 in harm avoided, let alone non-financial harms);[43] and

- victims of crime also have human rights which must be respected, including the right to property (section 24) and the right to security of the person (section 29(1)).

Taking all these factors into account, the importance of reducing recidivism through electronic monitoring outweighs the impact on human rights. If the Bill is passed, this assessment of compatibility with human rights will be reconsidered in light of the next review of electronic monitoring, which will be conducted prior to the new expiry of the provisions.

As the impacts are proportionate, the interference with privacy and family is not arbitrary. That means the rights in section 25(a) of the HR Act are not limited. The other rights set out above are limited, but justifiably so.

(f) any other relevant factors

Not applicable.

Police consideration of alternatives to arrest for contravention of bail conditions

Section 59A of the YJ Act applies if a police officer reasonably suspects that a child has contravened or is contravening a bail condition (but the contravention is not an offence) or reasonably suspects that a child is likely to contravene a bail condition. It requires a police officer, before arresting a child, to consider whether in the circumstances it would be more appropriate to take no action, to warn the child, or to make an application to vary or revoke the child's bail. The police officer is required to take into account the seriousness of the contravention or likely contravention, whether the child has a reasonable excuse, the child's particular circumstances, and any other relevant information of which the police officer is aware.

Clause 15 of the Bill will amend section 59A so that it will not apply if the grant of bail related to 'a prescribed indictable office', contravention of a domestic violence order, or contravention of a police protection notice.

Clause 16 inserts section 59AA. It will apply in the same circumstances as section 59A, but where the grant of bail to the child relates to a prescribed indictable offence, contravention of a domestic violence order, or contravention of a police protection notice. Under section 59AA, the police office *may*, but is not required to, consider whether in all the circumstances it would be more appropriate to take no action, to warn the child, or to make an application to vary or revoke the child's bail. Further, the police office *may*, but is not required to, take into account the seriousness of the contravention or likely contravention, whether the child has a reasonable excuse, the child's particular circumstances, and any other relevant information of which the police officer is aware.

[43] Queensland Productivity Commission, *Final Report: Inquiry into Imprisonment and Recidivism* (August 2019) 88.

Police officers are public entities for the purposes of the HR Act and are bound by section 58(1) of that Act to consider human rights, and to act compatibly with human rights. These obligations will apply when a police officer is deciding whether to arrest a child for contravention of a bail condition, where the grant of bail related to a prescribed indictable offence, contravention of a domestic violence order, or contravention of a police protection notice.

For example, if a police officer knew that a child had a reasonable excuse for contravening a bail condition, the police officer would be obliged to consider taking action other than arresting the child, notwithstanding the permissive terms of section 59AA. That is because an arrest in those circumstances, without at least giving consideration to less restrictive options, would be unlawful under section 58(1) of the HR Act (because it would amount to an arbitrary deprivation of liberty, contrary to section 29(2) of the HR Act).

I am satisfied that clauses 15 and 16 are compatible with human rights.

Courts to be required to consider a child's history on bail when determining an appropriate sentence

Clause 20 of the Bill amends s 150 of the YJ Act to require courts to consider a child's bail history that is provided to the court by the prosecution or the defence when determining an appropriate sentence. This could include consideration of the child's compliance with bail conditions, their history of reoffending on bail and their level of engagement with prescribed programs or services while on bail. The information could be mitigating or aggravating.

Section 150(4A) of the YJ Act currently allows a court to receive any information or sentencing submission it considers appropriate to enable it to impose the proper sentence. This may include information about the child's bail history. Further, section 150(1)(h) of the YJ Act currently provides that in sentencing a child for an offence, a court must have regard to any information about the child, including a pre-sentence report, provided to assist the court in making a determination. This would include bail history information.

The effect of the amendment in clause 20 is to clarify that the sentencing court must have regard to any of the child's bail history that is provided to the court by the prosecution or the defence to assist it in making a determination.

To the extent this amendment may increase the risk that young offenders will be in custody for longer, the amendment limits the right to liberty in section 29(1) and the right of children to protection in their best interests in section 26(2) of the HR Act.

(a) the nature of the right

The right to liberty (section 29(1)) – The right to liberty is about 'protect[ing] people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense'.[44]

[44] *Re Lifestyle Communities Ltd [No 3]* (2009) 31 VAR 286, 140 [665]; *DPP (Vic) v Kaba* (2014) 44 VR 526, 558 [110].

The best interests of the child (section 26(2)) – 'The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the [child's human rights] and the holistic development of the child.'[45] The content of this right is informed by the *Convention on the Rights of the Child,* in which article 37(b) provides that, 'the arrest, detention or imprisonment of a child … shall be used only as a measure of last resort and for the shortest appropriate period of time'.[46]

(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 amending s 150 of the YJ Act to make clear that courts are required to consider a child's bail history, if provided. This serves to increase public confidence in the sentencing process.

(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

Requiring, rather than allowing, sentencing courts to consider a child's bail history will help to ensure courts take bail history into account when sentencing.

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

The following alternatives were considered:

- specifying the circumstances in which bail conditions should be treated as mitigating factors (such as where they have been complied with, or have been particularly onerous), not only specifying the circumstances in which they should be treated as aggravating factors (such as non-compliance); and,

- treating non-compliance with bail as a separate matter.

However, it is not considered necessary to specify the circumstances in which bail conditions should be treated as a mitigating factor. When the court takes into account the child's bail history, it is expected that a history of compliance and successful completion of programs will be taken into account as a mitigating factor.

As to treating non-compliance with bail as a separate matter, where the child has already been punished for the non-compliance (for example, where they have received a sentence order for a failure to appear, or received a harsher penalty for an offence which was committed while on bail under section 150(1)(g) of the YJ Act), it is expected that the court will take into account the rule against double punishment in section 16 of the Code as well as section 34 of the HR Act.

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

[46] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

Accordingly, there is no less restrictive alternative which would still achieve the purpose of the amendment to section 150 of the YJ Act.

(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

Taking into account that sentencing courts already can and do take into account a child's bail history, requiring sentencing courts to do so imposes only a small limit on liberty and the best interests of the child. It should also be noted that the sentencing court will be required to consider bail history where it is a mitigating factor in the child's favour.

On balance, the importance of ensuring that bail history is taken into account when sentencing children outweighs the small impact on liberty and the best interests of the child.

(f) any other relevant factors

Not applicable.

Serious repeat offender declarations

Clause 21 of the Bill will amend the YJ Act to provide a separate sentencing regime for child offenders who have been declared 'serious repeat offenders'. If a child is being sentenced for a prescribed indictable offence and has been sentenced on at least one previous occasion to detention for a prescribed indictable offence, the prosecution may apply for a 'serious repeat offender' declaration. The sentencing court will have a discretion to make such a declaration if satisfied there is a high probability that the offender would commit a further prescribed indictable offences. The effect of a declaration is that the 'primary' sentencing factors will be:

- the need to protect members of the community;
- the nature or extent of violence used or threatened to be used in the commission of the offence;
- any disregard by the child for the interest of public safety;
- the impact of the offence on public safety; and,
- the child's criminal and bail history.

The other sentencing factors in section 150(1) and (2) will still be relevant, but not as 'primary' considerations.

The declaration will continue to operate for any further sentences for offences committed within the relevant period and bind a court of like and lower jurisdiction. A relevant period is defined under new section 150B(4) as meaning 12 months from the day the declaration was made by the original court or, where the child was detained by the original court, commencing on the day the declaration is made but ending 12 months after the day the child is released from detention.

There are important safeguards built into the declaration regime. The sentencing court will be required to provide reasons for making the declaration. If the decision is made by a Childrens Court Magistrate, the child may apply for review under section 118 of the YJ Act. The child will also be able to appeal against the making of a declaration as though it were part of the sentence (that is, on the basis that the sentence is manifestly excessive in all the circumstances).

Even with those safeguards, it is acknowledged that the declaration regime is intended to authorise more punitive sentencing based on a prediction of future risk, which may involve a form of preventive detention beyond what is appropriate to punish the crime for which the child is being sentenced.

The Government acknowledges that this is incompatible with the right of children to protection in their best interests in section 26(2) of the HR Act, as well as the right to liberty in section 29(1) and the right not to be subject to retrospective increases in penalties in section 35(2).

The declaration regime is inconsistent with international standards about the best interests of the child. In particular, it is inconsistent with:

- article 37(b) of the Convention of the Rights of the Child which states that the detention of children 'shall be used only as a measure of last resort and for the shortest appropriate period of time';

- rules 5.1, 17 and 19 of the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (known as the Beijing Rules), which state, among other things, that in sentencing a child '[t]he reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society';

- rule 1 of the *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* (known as the Havana Rules), which states that '[d]eprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases'; and

- the guidance given by the UN Committee on the Rights of the Child in its *General Comment No 24*.

The effect of the declaration is that the child will be subject to a more punitive sentencing regime than otherwise would have applied as at the time they committed the offence for which they are being sentenced concurrently with the making of the declaration. Consistent with the approach of looking to the practical reality of the sentencing process and ensuring that the protection of the human right is effective in substance,[47] this retrospective effect will limit the right not to be subject to retrospective increases in penalties.

It is acknowledged that the limit on these human rights is not justified because a less restrictive option would be to allow courts to apply the existing sentencing principles, which provides for proportionate sentences having regard to protection of the community. Further, by allowing

[47] *R v Ware* [2022] ACTCA 14, [88].

potentially disproportionate sentences, the declaration regime does not strike a fair balance between the best interests of the child and the need to protect the community.

However, the Government considers that this measure is needed to respond to an acute problem presented by a small cohort of serious recidivist youth offenders who engage in persistent and serious offending. Approximately 17 percent of all youth offenders account for 48 percent of all youth crime, up approximately seven percentage points from the previous 12-month period.[48] The measures in this Bill are designed to address this serious problem. For these reasons, the Government considers that it is necessary, in this exceptional case, to override the HR Act. Accordingly, new section 150A of the YJ Act will include a subsection which provides that the HR Act does not apply to the section.

Extending program period for conditional release orders

Clauses 22 and 27(3) of the Bill amend sections 221 and 246(2)(b) of the YJ Act to increase the duration of the program period for conditional release orders from three to six months. If the child breaches a condition during that extended period, they may be required to serve the sentence of detention that had been suspended.

Increasing the risk that children will be incarcerated limits the rights to liberty and the best interests of the child in ss 29(1) and 26(2) of the HR Act.

(a) the nature of the right

The right to liberty (section 29(1)) – The right to liberty is about 'protect[ing] people from unlawful and arbitrary interference with their physical liberty, that is, deprivation of liberty in the classic sense'.[49]

The best interests of the child (section 26(2)) – 'The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the [child's human rights] and the holistic development of the child.'[50] The content of this right is informed by the *Convention on the Rights of the Child,* in which article 37(b) provides that, 'the arrest, detention or imprisonment of a child … shall be used only as a measure of last resort and for the shortest appropriate period of time'.[51]

(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 extending the program period is to facilitate rehabilitation through a longer conditional release program. A longer maximum period for conditional release orders will also mean that it is available as an alternative to a period of imprisonment in some cases.

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[48] See note 42.

[49] *Re Lifestyle Communities Ltd [No 3]* (2009) 31 VAR 286, 140 [665]; *DPP (Vic) v Kaba* (2014) 44 VR 526, 558 [110].

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

[51] *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

(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

Lengthening the program period would help to achieve those purposes.

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

There is no less restrictive alternative which would still achieve the purpose of the amendments.

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

On one side of the scales, liberty is important and especially the liberty of children. However, on the other side of the scales, the purpose of extending the maximum period for the program period is also to protect the rights of children, by providing more flexible sentencing options as an alternative to imprisonment but which still serve to rehabilitate the offender.

Ultimately, the benefits of this amendment outweigh the risk that children will be incarcerated if they fail to comply with a conditional release order over a longer period of time.

Requirement to serve suspended period of detention for conditional release orders

Clause 28 of the Bill inserts a new section 246A into the YJ Act, which addresses the court's power on breach of a conditional release order where the order was imposed for a 'prescribed indictable offence'. Where a court is dealing with a breach of an order imposed on a child for a prescribed indictable offence, the court will be required to order that the child serve the suspended period of detention unless special circumstances exist. This departs from the current position in section 246 which allows a court to either revoke the conditional release order or give the child a further opportunity to satisfy the requirements of the order.

Requiring a child convicted of a prescribed indictable offence to serve a period of imprisonment when they breach a conditional release order (subject to special circumstances) amounts to a form of discretionary minimum sentencing. The provisions apply to conditional release orders which were made before and after commencement (new section 410 inserted by clause 40).

The Government acknowledges that this is incompatible with the right of children to protection in their best interests in section 26(2) of the HR Act, as well as the right to liberty in section 29(1) and the right not to be subject to retrospective increases in penalties in section 35(2). Although the amendment pursues the legitimate aim of deterring children from failing to comply with a conditional release order, the existing powers of the sentencing court are already aimed at ensuring deterrence. Further, the international human rights standard, as reflected in the guidance of the UN Committee of the Rights of the Child, is that '[m]andatory minimum sentences are incompatible with the child justice principle of proportionality and with the requirement that detention is to be a measure of last resort and for the shortest appropriate

period of time.' Not only that, 'even discretionary minimum sentence regimes' for children go too far.[52]

However, the Government considers that this measure is needed to respond to the problem of children who continue to put the community at harm, including by repeatedly failing to comply with court orders. This amendment sends a message that there will be consequences if a child fails to comply with the conditions of their order. For these reasons, the Government considers that it is necessary, in this exceptional case, to override the HR Act. Accordingly, new section 246A of the YJ Act will include a subsection which provides that the HR Act does not apply to the section.

Transfer of 18 year olds serving detention order to adult correctional centres

Clause 30 of the Bill amends the existing powers in the YJ Act to allow for a person who is serving a period of detention to be transferred to a corrective services facility if that person turns 18 years while serving that period of detention and where they are liable to serve a remaining period of 2 months or more. The existing provisions only allow for a transfer where the person is liable to serve a period of 6 months or more detention.

These amendments will have the consequence of expanding the cohort of people who are subject to the *Dangerous Prisoners (Sexual Offenders) Act 2003* (DPSO Act) regime. Under section 5(1) of the DPSO Act, the Attorney-General may apply for an order under that Act in relation to a prisoner. The definition of prisoner under section 5(6)(i)-(iii) includes a person who is serving a period of detention, in a detention centre under the YJ Act, for a serious sexual offence, and who has been transferred to a corrective services facility, and is liable to serve a term of imprisonment for the offence equal to the period of detention.

Accordingly, currently, a child who turns 18 while in detention and has less than 6 months more to serve cannot be transferred and therefore cannot become subject to the DPSO Act regime. The change means that a child in those circumstances can be transferred and can be subject to the DPSO Act regime (provided the remaining period is more than 2 months).

Issues then arise with the compatibility of the DPSO Act with the HR Act. If the DPSO Act regime is incompatible with human rights under the HR Act, subjecting more people to it will also be incompatible with human rights.[53]

At the international level, in *Fardon v Australia*[54], the UN Human Rights Committee determined that detention pursuant to the Queensland Act breaches the right to liberty. In its General Comment on the right to liberty, the Committee has cited its decision in Fardon as the main authority for this point. According to the Committee:

> If a prisoner has fully served the sentence imposed at the time of conviction, articles 9 and 15 prohibit a retroactive increase in sentence and a State party may not circumvent

[52] Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) 13 [78].
[53] See, similarly, *Minogue v Victoria* (2018) 264 CLR 252, 273 [54]-[55].
[54] *Fardon v Australia*, Human Rights Committee, *Views: Communication No 1629/2007*, UN Doc CCPR/C/98/D/1629/2007 (10 May 2010) [7.3]-[7.4], [8].

that prohibition by imposing a detention that is equivalent to penal imprisonment under the label of civil detention

Recently, in *Garlett v Western Australia*, Edelman J also noted that the DPSO Act was 'rightly recognised as penal by both the majority and the minority of the United Nations Human Rights Committee in Fardon v Australia'.[55] Likewise, Gleeson J noted that the Human Rights Committee had found that Mr Fardon's human rights had been breached.[56]

It is acknowledged that this impact of clause 26 of the Bill limits the right to liberty in section 29 of the HR Act, and the right not to be subject to retrospective increases in penalties under section 35(2) of the HR Act, and that these limitations have the potential to be viewed as incompatible.

However, it is determined that the potential incompatibility of the DPSO Act is beyond the scope and purpose of this Statement of Compatibility. It is noted the Government has committed to referring the DPSO Act to the LASC for review in accordance with its support of Recommendation 72 arising from the Women's Safety and Justice Taskforce Hear Her Voice: Report One – Addressing coercive control and domestic and family violence in Queensland.

Establishment of Multi-agency Collaborative Panels ('MACP') system

Clause 37 of the Bill inserts a new Part 8B into the YJ Act, which provides for the establishment of a Multi-agency Collaborative Panels ('MACP') system, along with outlining its membership and responsibilities. Under proposed section 282T of the YJ Act, the chief executive must establish a MACP system.

Proposed section 282W of the YJ Act will provide that the chief executive must decide, in consultation with the core members, the classes of children charged with offences or at risk of being charged with offences who may be referred to the MACP system, and that the members of the MACP system may refer a child within an eligible category.

Clause 37 of the Bill inserts section 282X into the YJ Act, which provides that the responsibilities of the core member agencies of the MACP system will include the sharing of information about the children referred to the MACP system and accepted by the core members under an arrangement established by Part 9, Division 2A of the YJ Act. The members will also be responsible for monitoring and reviewing the effectiveness of recommendations made about assessing and responding to the needs and behaviours of these children.

As the proposal provides for the sharing of information about children deemed to fall within an eligible category, clause 37 will interfere with the right to privacy under section 25(a) of the HR Act, and the right of children to protection in their best interests in section 26(2) of the HR Act. This is because Article 16 of the Convention on the Rights of the Child, which is relevant to the interpretation of the right contained in section 26(2) of the HR Act, protects against any arbitrary or unlawful interference with the privacy of a child.

[55] *Garlett v Western Australia* [2022] HCA 30, [253] (Edelman J).
[56] Ibid [288] n 493 (Gleeson J).

Clause 38 amends section 297D, within Part 9, Division 2A of the YJ Act to include 'corrective services' within the definition of a prescribed entity, expanding the scope of persons who may share and receive information relating to a child charged with an offence. This amendment also limits the right to privacy under section 25(a) of the HR Act and the right of children to protection in their best interests in section 26(2).

An interference with the right to privacy will not be arbitrary if it is a proportionate response to the achievement of a legitimate purpose.

(a) the nature of the right

The right to privacy (section 25(a)) – The purpose of the right not to have one's privacy arbitrarily interfered with is 'to protect and enhance the liberty of the person – the existence, autonomy, security and well-being of every individual in their own private sphere.'[57]

The best interests of the child (section 26(2)) – 'The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the [child's human rights] and the holistic development of the child.'[58]

(g) 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 establishment of the MACP system is to coordinate the provision of services, including assessments and referrals, to meet the needs of particular children charged with offences or at risk of being charged with offences. More specifically, the purpose of authorising information sharing between members of the MACP system is to give the chief executive and other members of the MACP system recommendations about assessing and responding to the needs and offending behaviour of children referred to and accepted by members.

It is considered that these purposes are proper as they are directed to meeting the needs of children who fall within the scope of operation of the MACP system. This purpose is consistent with a free and democratic society based on human dignity, equality and freedom.[59]

(h) 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 establishment of the MACP and authorising it to share information between members will serve the purpose of coordinating services to meet the needs of the relevant children.

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

The MACP system was designed to be the least restrictive way to achieve the purpose. Limiting the membership of the MACP system, in order to reduce the impact on the privacy of the

[57] *Director of Housing v Sudi* (2010) 33 VAR 139, 145 [29].
[58] Committee on the Rights of the Child, *General Comment No 19 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art 3, para 1)*, UN Doc CRC/C/GC/14 (29 May 2013) 2.
[59] *Storch v Director-General, Department of Justice and Attorney-General* [2020] QCAT 152, [363]-[366].

children falling within an eligible category, will not facilitate inter-departmental coordination and information sharing to the same extent as the proposed amendment. Similarly, narrowing the scope for the chief executive to refer children to the MACP system will not be as effective in achieving the purpose of the amendments. The amendments will operate in accordance with the scheme for the sharing of information and coordination of services already provided for under Part 9, Division 2A of the YJ Act. This embeds the principle for sharing information in s 297C of the YJ Act which provides that, whenever possible and practical, a person's consent should be obtained before disclosing confidential information. Section 297G(2) of the YJ Act also only authorises a prescribed entity or service provider holding confidential information to disclose the information to another prescribed entity or service provider if the holder reasonably believes the information may help the recipient to meet one of the particular purposes set out in that section, which are each directed to providing services or referrals to a child or to otherwise help the recipient to address the child's needs. This means that information about a particular child will only be shared with a MACP member to the extent that the information will assist that member to provide services or referrals or otherwise address the child's needs. This ensures the amendments represent the least curtailment of the right to privacy possible.

(j) 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, it is acknowledged that the proposed amendments may cast a wide net in its interference with the right of children to privacy as the chief executive is empowered to determine the categories of children who may be referred to the MACP system. However, the amendments pose only an incremental burden on the right to privacy and the right of children to protection in their best interests, as the amendments will operate in accordance with Part 9, Division 2A of the YJ Act. On balance, the importance of the purpose of the amendments outweighs any incremental burden that is imposed on privacy.

(f) any other relevant factors

Not applicable.

Expanding the categories of prescribed indictable offences

Clause 41 amends the definition of 'prescribed indictable offence' in schedule 4 of the YJ Act to expand the offences caught.

Section 48AF of the YJ Act applies in relation to a child in custody in connection with a charge of a prescribed indictable offence if the offence is alleged to have been committed while at large or awaiting trial or sentencing for an indictable offence. Where section 48AF applies, a court or police officer must refuse to release a child from custody unless the child shows cause why the child's detention in custody is not justified.

By expanding the categories of offences which enliven the show cause requirement for bail, clause 41 of the Bill limits the right not to be automatically detained in custody in section 29(6) of the HR Act, because it sets a general rule in favour of detention. For similar reasons the proposal also limits the right to be presumed innocent in section 32(1) of the HR Act.

By adopting a blanket rule for children charged with certain offences alleged to have been committed while on bail, even though rebuttable, the proposal limits the best interests of the child in section 26(2) of the HR Act. In this context, the right of children to protection in their best interests includes a requirement that imprisonment of children be a measure of last resort and for the shortest possible period of time.

(a) the nature of the right

What is at stake in setting a presumption in favour of detention contrary to section 29(6) of the HR Act is liberty, and liberty is evidently important.[60] As the right of children to protection in their best interests in section 26(2) recognises, liberty is even more important when it comes to children. 'Children are especially entitled to protection from harm, and to human development.'[61]

(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 presumption against bail in certain circumstances where a child is charged with section 408A(1C) of the Code is to ensure the accused's presence at trial (recognising that the flight risk is greater for serious offences carrying severe penalties), to ensure that witnesses are not threatened or interfered with, and to protect the community as a whole from further offending.

These are proper purposes which are 'consistent with a free and democratic society' for the purposes of section 13(2)(b) of the HR Act.[62]

(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

Reversing the onus for bail means that the child will more likely be detained where they present an unacceptable risk to the community. Accordingly, reversing the onus helps to achieve its purpose of ensuring community safety.

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

When section 48AF of the YJ Act was introduced in 2021, a number of alternatives to a presumption against bail were considered. The Government took on board the dialogue between the courts and the legislature in the ACT arising from the case of *Re application for bail by Islam*, and decided to adopt the alternative of making the normal bail criteria in section 48AA(4) relevant to whether the child has shown cause. This was the intended effect of section 48AA(1)(e) of the YJ Act. This strikes a fairer balance between the human rights of children

[60] *Re application for bail by Islam* (2010) 175 ACTR 30, 94 [341].
[61] *Secretary, Department of Human Services v Sanding* (2011) 36 VR 221, 227 [11].
[62] *Re application for bail by Islam* (2010) 175 ACTR 30, 94 [342]-[343]. See also Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) 2 [3].

and the need to protect the community from the danger presented by serious recidivist youth offenders.

As there are no equally effective alternatives available which would limit human rights to a lesser extent, reversing the onus for bail for additional offences is the least restrictive way of achieving its purpose of protecting the community.

(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, it is acknowledged that a presumption in favour of depriving children of their liberty, without reference to their individual circumstances, lies at odds with the international standard that depriving children of their liberty must be reserved as a 'last resort', and 'limited to exceptional cases'.[63] It is also acknowledged that increasing the risk of detention represents a serious incursion into the right of children to protection in their best interests, given that 'the use of deprivation of liberty has very negative consequences for the child's harmonious development and seriously hampers his/her reintegration into society.'[64]

However, the reversal of the onus is confined to charges for a targeted range of offences committed while the young person is on bail for an existing indictable offence. The normal bail criteria will continue to be relevant to whether a child has shown cause. This represents the least restriction possible on the child's human rights consistent with the purpose of protecting the community.

On the other side of the scales, the need to protect the community is necessarily a weighty consideration, as it involves protecting the human rights of victims of crime, including their right to security of the person, and their right to property. Every crime avoided represents the avoidance of harm to victims and to society more broadly.

Accordingly, the Government has determined that the impacts on human rights are outweighed by the importance of protecting the community through a reversal of the onus for bail applications of children who have been charged additional offences.

(f) any other relevant factors

Not applicable.

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[63] Human Rights Committee, *General comment No 35: Article 9 (Liberty and security of the person)*, 112th sess, UN Doc CCPR/C/GC/35 (16 December 2014) 12 [38]; *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) art 37(b); Committee on the Rights of the Child, *General comment No 24 (2019) on children's rights in the child justice system*, UN Doc CRC/C/GC/24 (18 September 2019) 14 [86]-[88]; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice*, GA Res 40/33 (adopted 29 November 1985) ('the Beijing Rules') r 13; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, GA Res 45/113 (adopted 14 December 1990) ('the Havana Rules') rr 2, 17.

[64] *Certain Children v Minister for Families and Children [No 2]* (2017) 52 VR 441, 522 [262](c), quoting UN Committee on the Rights of the Child, *General Comment No 10: Children's rights in juvenile justice*, 44th sess, UN Doc No CRC/C/GC/10 (25 April 2007) 5 [11].

Conclusion

In my opinion, clauses 5, 21 and 28 of the Strengthening Community Safety Bill 2023 are not compatible with the human rights protected by the *Human Rights Act 2019* for the above reasons. In my further opinion, the remainder of the Bill is compatible with protected human rights.

MARK RYAN MP
Minister for Police and Corrective Services and
Minister for Fire and Emergency Services

Strengthening Community Safety Bill 2023

Statement about exceptional circumstances

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 44 of the *Human Rights Act 2019* (HR Act), I, Mark Ryan, Minister for Police and Corrective Services and Minister for Fire and Emergency Services, make this statement about exceptional circumstances with respect to the Strengthening Community Safety Bill 2023.

In the Bill, amended section 29 of the *Bail Act 1980* includes a subsection which provides that insofar as section 29 relates to a child, the HR Act does not apply. New sections 150A, 150B and 246A of the *Youth Justice Act 1992*, also include subsections which provide that the HR Act does not apply.

The Government accepts that these provisions are incompatible with human rights. Therefore, in this exceptional case, the HR Act is being overridden and its application is entirely excluded from the operation of these new provisions to protect community safety.

There is an acute problem presented by a small cohort of serious repeat offenders who engage in persistent and high-risk offending; the latest Childrens Court Annual Report indicates 17 percent of all youth offenders account for 48 per cent of all youth crime. There is some evidence of growth in the number of this cohort and the intensity of their offending, up approximately seven percentage points from the previous 12-month period. The measures in this Bill are designed to address this serious problem. In the Government's view, this presents an exceptional crisis situation constituting a threat to public safety.

These provisions are intended to serve as the override declaration envisaged by section 44 of the HR Act. In accordance with section 45 of the HR Act, the HR Act has no application to these provisions and, a body performing functions or exercising powers under the HR Act is not a public entity within the meaning of the HR Act in respect of its performance of those functions or exercise of those powers.

Mark Ryan MP
Minister for Police and Corrective Services and
Minister for Fire and Emergency Services