

State Development and Regional Industries Committee

Report No. 1, 57th Parliament

Subordinate legislation tabled between 7 July 2020 and 3 August 2020

1 Aim of this report

This report summarises the committee's findings following its examination of the subordinate legislation within its portfolio areas tabled between 7 July 2020 and 3 August 2020. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles (FLPs) and lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992* (LSA).¹ The report also discusses the committee's consideration of compliance with the *Human Rights Act 2019* (HRA) and the human rights certificates tabled with the subordinate legislation.²

2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date
95	Biosecurity (Siam Weed and Other Matters) Amendment Regulation 2020	14 July 2020	3 December 2020
96	Chemical Usage (Agricultural and Veterinary) Control (Record Keeping and Training) Amendment Regulation 2020	14 July 2020	3 December 2020
101	Planning (COVID-19 Emergency Response) Regulation 2020	7 July 2020	2 December 2020
120	Rural and Regional Adjustment Amendment Regulation (No. 1) 2020	14 July 2020	3 December 2020
147	Local Government (COVID-19 Emergency Response) Regulation 2020	3 August 2020	To be advised

*Disallowance dates are based on proposed sitting dates as advised by the Leader of the House. These dates are subject to change. The disallowance date is 14 sitting days after the tabling date.

3 Committee consideration of the subordinate legislation

The committee identified no significant issues regarding the policy, consistency with FLPs or the lawfulness of the subordinate legislation. However, the committee identified minor FLP issues in relation to SL 95, 96 and 101, as outlined below.

The committee considered several potential FLP and human rights issues raised by SL 147, as outlined below. However, in each instance the committee is satisfied that the relevant provisions are appropriate in the circumstances and that any associated human rights limitations are reasonable and demonstrably justifiable.

The committee also considers that the explanatory notes and human rights certificates accompanying the subordinate legislation comply with the requirements of the LSA and the HRA respectively.³

¹ *Legislative Standards Act 1992*, Part 4.

² *Human Rights Act 2019*, section 41.

³ *Human Rights Act 2019*, section 41.

4 Biosecurity (Siam Weed and Other Matters) Amendment Regulation 2020 (SL 95)

The regulation's objectives are to:

- enable the distribution of Chromolaena Gall fly as a biological control for Siam weed, including the distribution of Gall fly infected Siam weed, without the need for a Restricted Matter Permit
- update the technical reference in the definition of 'MRL standard' (maximum residue limits) to refer to the current Federal instrument.

The Australian Pesticides and Veterinary Medicines Authority sets MRLs for agricultural and veterinary chemicals sold in Australia. These limits are in Schedule 1 of the Agricultural and Veterinary Chemicals Code (MRL Standard) Instrument 2019 (Cwlth). This 'MRL standard' is referenced in the Biosecurity Regulation 2016.

The regulation amends the Biosecurity Regulation 2016 to update this technical reference, thus correcting the present inaccuracy and providing clarity to stakeholders on the standards applicable to agricultural practices in Queensland.

4.1 Fundamental legislative principle issues

The committee identified potential FLP issues relating to the subordinate legislation. Consideration of these issues is set out below.

4.1.1 Section 4(5)(e) of the *Legislative Standards Act 1992* – Institution of Parliament – sub-delegation of a power delegated by an Act

Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether the subordinate legislation allows the sub-delegation of a power delegated by an Act only:

- if authorised by an Act
- in appropriate cases and to appropriate persons.⁴

The significance of dealing with such matters other than by subordinate legislation is that, since the relevant document is not 'subordinate legislation', it is not subject to the tabling and disallowance provisions in Part 6 of the *Statutory Instruments Act 1992*.

Where there is, incorporated into the legislative framework of the state, an extrinsic document, such as the MRL standard that is not reproduced in full in subordinate legislation, and where changes to that document can be made without the content of those changes coming to the attention of the House, it may be argued that the document (and the process by which it is incorporated into the legislative framework) has insufficient regard to the institution of Parliament.

The MRL standard is not contained in the subordinate legislation in its entirety, and as such its content does not come to the attention of the House.

The explanatory notes provide the following justification:

*... this potential breach is justified because the definition is contained in an instrument that is publicly available, and is sub-delegated as part of a standardised national arrangement in which the APVMA [Australian Pesticides and Veterinary Medicines Authority] sets maximum residue limits for agricultural and veterinary chemicals registered for use in Australia. Defining 'MRL standard' in any other way would be inconsistent with this arrangement and this approach is, therefore, the only practical way to define the term.*⁵

⁴ *Legislative Standards Act 1992*, section 4(5)(e).

⁵ Biosecurity (Siam Weed and Other Matters) Amendment Regulation 2020, explanatory notes, p 4.

Committee comment

The committee is satisfied that, in the circumstances, the potential breach of fundamental legislative principles is justified.

4.2 Explanatory notes

The explanatory notes tabled with SL 95 comply with part 4 of the *Legislative Standards Act 1992*.

4.3 Human rights considerations

The subordinate legislation raises no human rights issues.

4.4 Human rights certificate

The human rights certificate tabled with SL 95 provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

5 Chemical Usage (Agricultural and Veterinary) Control (Record Keeping and Training) Amendment Regulation 2020 (SL 96)

The regulation amends the Chemical Usage (Agricultural and Veterinary) Control Regulation 2017 (Chemical Usage Regulation), to implement the national harmonisation reforms for the use of agricultural and veterinary chemicals (AgVet chemicals) to:

- establish nationally consistent minimum record keeping requirements for users of agricultural chemical products, and
- establish nationally consistent minimum training requirements for users of AgVet chemicals that are restricted chemical products or particular chemical products containing a poison classified as a schedule 7 poison by the *Standard for the Uniform Scheduling of Drugs and Poisons* published by the Australian Health Ministers' Advisory Council.

5.1 Fundamental legislative principle issues

The committee identified potential FLP issues relating to the subordinate legislation. The committee's consideration of these issues is set out below.

5.1.1 Section 4(2)(a) of the *Legislative Standards Act 1992* – Rights and liberties of individuals

The legislation imposes additional record keeping requirements and user competency requirements for users of AgVet chemicals. This additional regulatory burden could be seen as interfering with the rights and liberties of such users in carrying out their activities without government interference.

The explanatory notes provide the following justification:

*... the need for these requirements is justified as nationally consistent competency and record keeping requirements are essential to controlling the risks associated with the use of these chemicals.*⁶

Committee comment

The committee is satisfied that this imposition on a person's rights and liberties is sufficiently justified in the circumstances.

5.2 Explanatory notes

The explanatory notes tabled with SL 96 comply with part 4 of the *Legislative Standards Act 1992*.

5.3 Human rights considerations

The subordinate legislation raises no human rights issues.

⁶ Chemical Usage (Agricultural and Veterinary) Control (Record Keeping and Training) Amendment Regulation 2020, explanatory notes, p 3.

5.4 Human rights certificate

The human rights certificate tabled with SL 96 provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

6 Planning (COVID-19 Emergency Response) Regulation 2020 (SL 101)

The COVID-19 public health emergency is affecting the ability for people to meet requirements under Queensland's planning framework, including the *Planning Act 2016* (Planning Act), the *Planning Regulation 2017*, and supporting statutory instruments (including the Development Assessment Rules) which regulate planning and development in Queensland.⁷

Under the Planning Act, a development application that is impact assessable or includes a variation request has generally been required to be publicly notified, including by 'publishing a notice at least once in a newspaper circulating generally in the locality of the premises the subject of the application'.⁸ However, the pandemic has seen several regional and community newspaper publications become digital-only or close as a result of COVID-19, making it difficult for this statutory requirement to be met.⁹

Additionally, as a result of social distancing requirements, work from home arrangements and reduced staff resourcing and capacity, local governments and other entities key to the operation of the planning framework are unable to meet statutory obligations to make certain planning and development related documents available for inspection and purchase by those who wish to comment on proposed planning and development related matters.¹⁰

The objective of SL 101 is to modify provisions in the Planning Act and in the Development Assessment Rules made by the Minister under the Act, until 31 December 2020,¹¹ to:

- provide alternative arrangements for public notification of development applications and change applications under the Planning Act, in light of social distancing measures and the closures of local newspapers (particularly in rural areas), to ensure continued public involvement in the development assessment process
- provide for alternative arrangements to existing Planning Act requirements for planning authorities to keep and make documents physically available for inspection and purchase, or inspection only, in light of health and safety restrictions in place in response to the COVID-19 public health emergency.¹²

The regulation provides for an applicant for a development application or change application to have met statutory notification requirements if, during the statutory response period, public notification of the application is made by:

- where a hard copy local newspaper is circulating in the area of the proposed development, publishing the notice at least once in the hard copy local newspaper
- where a local newspaper is only available in digital format, publishing the notice at least once in the digital version of the local newspaper, or
- where there is no hard copy or digital local newspaper for the locality, making notification of the application in one or more of the following ways:
 - publishing at least once in a hard copy state or national newspaper

⁷ *Planning (COVID-19 Emergency Response) Regulation 2020* (SL 101), explanatory notes, p 1.

⁸ This requirement has been set out under the Development Assessment Rules, version 1.2, s 17.1(a) (current to 1 September 2020, but superseded from 2 September 2020).

⁹ SL 101, explanatory notes, p 1.

¹⁰ SL 101, explanatory notes, p 2.

¹¹ SL 101, s 8 (Expiry).

¹² SL 101, explanatory notes, p 2.

- publishing at least once in an online state or national newspaper
- giving a notice to the occupier of each lot in the identified area for the application, and/or
- publishing a notice on the assessment manager's website, until at least the end of the day stated in the notice according to section 53(4)(b) of the Planning Act and no later than 18 December 2020.¹³

The ordinary requirements under the Planning Act¹⁴ and the Development Assessment Rules (DA Rules)¹⁵ to place a notice on the premises which are the subject of the development application, and give notice to owners of all lots adjoining the premises, are unchanged by the subordinate legislation.¹⁶

In relation to arrangements for planning authorities to make documents physically available for inspection and purchase, SL 101 provides that where a person asks to inspect a document and the document holder would ordinarily allow the person to inspect the document at the place where the document is held,¹⁷ the document holder may instead give the person a copy of the document (including an electronic copy), if the document holder is satisfied that it is appropriate to give a copy of the document to the person:

- to protect the health, safety and welfare of persons affected by the COVID-19 emergency, or
- to facilitate the continuance of public administration disrupted by the COVID-19 emergency.¹⁸

SL 101 provides for these modified provisions to apply from commencement (26 June 2020) until 31 December 2020, when SL 101,¹⁹ and the *COVID-19 Emergency Response Act 2020* (Emergency Response Act)²⁰ under which it is made, both expire.

The operation of SL 101 is, however, affected by amendments contained in subsequent subordinate legislation tabled on 11 September 2020. Specifically, the *Planning Legislation (Economic Recovery Measures and Other Matters) Amendment Regulation 2020* (SL 197) omits the provisions contained in SL 101 which amended certain definitions (section 3 and the Schedule) and provided for an alternative public notification process, leaving in place only the administrative provisions and the modifications to the public access to document provisions in section 7 of the regulation.²¹

SL 197 does not completely do away with these alternative public notification provisions. Rather, it provides for a separate process of regulatory amendment which retains them to some extent, and in fact provides for them to apply on a more permanent basis.

The explanatory notes to SL 197 advise:

*This recognises that even after the COVID-19 emergency, many local newspapers may not return to hard copy production. In addition, the DA Rules have been amended to improve other aspects of public notification for development applications.*²²

SL 197 will be examined in a future committee report.

¹³ SL 101, s 6.

¹⁴ Planning Act, s 53.

¹⁵ Development Assessment Rules, version 1.2, s 17.1(b) and (c). See also Development Assessment Rules, version 1.3, s 17.1(b) and (c).

¹⁶ SL 101, explanatory notes, p 4.

¹⁷ ('Whenever the place is open for business'). Planning Act, s 264(5)(a)(i) and (5(b)).

¹⁸ SL 101, s 7.

¹⁹ SL 101, s 8.

²⁰ *COVID-19 Emergency Response Act 2020* (Emergency Response Act), s 25.

²¹ *Planning Legislation (Economic Recovery Measures and Other Matters) Amendment Regulation 2020* (SL 197), Part 2.

²² SL 197, explanatory notes, p 2.

6.1 Background to regulations made in reliance on the *COVID-19 Emergency Response Act 2020*

SL 101 is made in reliance, in part, on section 9 of the Emergency Response Act.²³ That Act contains a range of regulation-making powers to deal with matters arising from the COVID-19 public health emergency, including provision, in section 9, for a regulation-making power for particular matters relating to documents. These ‘particular matters’ (each of which is identified as a ‘relevant matter’) include the production of documents by a person, the sighting of documents by a person for a particular purpose, and the publication or display of notices or advertisements for particular purposes (as well as signing and witnessing of documents, the certification of matters by signatories or witnesses, and the making of documents in a particular way and form).

Section 9 provides that a regulation may make provision about a relevant matter required or permitted under an Act or common law rule by:

- prescribing modified requirements or arrangements, or
- suspending requirements or arrangements.

Such a regulation is an ‘extraordinary regulation’ and an Act to which an extraordinary regulation applies is an ‘affected Act’.²⁴

In relation to an extraordinary regulation, the Emergency Response Act provides:

- A Minister administering an affected Act may recommend to the Governor in Council the making of an extraordinary regulation *only if* the Minister is satisfied the regulation is necessary for a purpose of the Emergency Response Act.
- An extraordinary regulation may be inconsistent with the affected Act, and any other Act (other than the HRA), to the extent necessary to achieve a purpose of the Emergency Response Act.
- To the extent a person’s act or omission complies with an extraordinary regulation made under an affected Act, the person does not incur civil or criminal liability under the affected Act for the act or omission.
- An extraordinary regulation must declare it is made under the relevant additional regulation-making provision.
- An additional regulation-making provision does not limit any other regulation-making power conferred under an affected Act.²⁵

An extraordinary regulation must be tabled within 14 days of notification (rather than the usual 14 sitting days).²⁶ This regulation was tabled within the required period, having been notified on 26 June 2020 and tabled on 7 July 2020.

6.2 Fundamental legislative principle issues

Section 4 of the LSA provides that whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether the subordinate legislation contains only matter appropriate to subordinate legislation (section 4(5)(c)), and whether the subordinate legislation amends statutory instruments only (section 4(5)(d)).

In serving to modify a section of the Planning Act, the provisions of SL 101 can be seen to operate contrary to both of these FLPs.

With respect to section 4(5)(d) specifically, the principle of Parliamentary law-making that an Act should only be amended by another Act of Parliament has long been recognised. Former committees

²³ Section 4 of SL 101 declares that the regulation is made under s 9 of the Emergency Response Act.

²⁴ Emergency Response Act, s 5(1)-(3).

²⁵ Emergency Response Act, s 5(4)-(8), and s 4.

²⁶ See Emergency Response Act, s 5(9), as compared to s 49(1) of the *Statutory Instruments Act 1992*.

have noted that a subordinate instrument that amends an Act is inconsistent with the FLP requiring that subordinate legislative has sufficient regard to the institution of Parliament.²⁷

However, as noted above, SL 101 is made in reliance, in part, on section 9 of the Emergency Response Act and is consistent with section 9, which expressly contemplates and authorises the modification of legislative requirements within primary legislation, through an 'extraordinary regulation' such as that examined here. Section 9(1)(n) in particular makes provision for such regulation-making power with specific reference to provisions which require 'the publication or display of a notice or advertisement for a particular purpose'.

The explanatory notes advise in this regard:

The modification framework [in the Emergency Response Act] ... allows for decisive executive action to be taken to facilitate the continuance of public administration and other activities disrupted by the COVID-19 emergency.

*The provisions in this extraordinary regulation override provisions in the Planning Act and its associated statutory instruments. However, these provisions are still consistent with the policy objectives and purpose of the Planning Act.*²⁸

Committee comment

The committee is satisfied that any breaches of FLP with respect to the institution of Parliament are justified given the circumstances and objectives of the regulation, which is temporary in nature and intended to improve public access to planning information during the COVID-19 pandemic.

6.3 Explanatory notes

The explanatory notes tabled with SL 101 comply with part 4 of the *Legislative Standards Act 1992*.

6.4 Human rights considerations

The subordinate legislation raises no human rights issues.

6.5 Human rights certificate

In the human rights certificate tabled with the SL 101, the then Treasurer and Minister for Infrastructure and Planning, expressed his opinion that the subordinate legislation is compatible with the human rights protected under the HRA,²⁹ and will further the human right to freedom of expression by helping to overcome barriers to public notification and to public access to documents that have arisen during the COVID-19 public health emergency.³⁰ The effect of the amendments, the Treasurer stated, is to:

- 'allow for greater public awareness and the ability to make a submission on planning and development related matters during the COVID-19 public health emergency'³¹
- 'promote and increase public awareness of planning and development related matters'.³²

Committee comment

As previously noted, the committee identified no issues regarding the compatibility of SL 101 with the HRA. The committee considers the human rights certificate tabled with SL 101 contains a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

²⁷ See Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental Legislative Principles: OQPC Notebook*, p 167, where the former Scrutiny of Legislation Committee consistently expressed a subordinate instrument that amends an Act, whether it be the body of the Act or a schedule to the Act, is inconsistent with the FLP requiring that subordinate legislation has sufficient regard to the institution of Parliament.

²⁸ SL 101, explanatory notes, p 5.

²⁹ SL 101, human rights certificate, p 1.

³⁰ SL 101, human rights certificate, p 2.

³¹ SL 101, human rights certificate, p 2.

³² SL 101, human rights certificate, p 2.

7 Rural and Regional Adjustment Amendment Regulation (No. 1) 2020 (SL 120)

The objectives of the regulation are to implement the second round of the Small Business COVID-19 Adaption Grant Scheme, enabling the provision of grants of a minimum of \$2,000 and a maximum of \$10,000 per eligible business to undertake eligible activities from 23 March 2020 onwards. The total amount for all grants under the scheme is up to \$100 million (excluding GST). The Queensland Rural and Industry Development Authority will administer the scheme.

7.1 Fundamental legislative principle issues

No issues of fundamental legislative principle were identified.

7.2 Explanatory notes

The explanatory notes tabled with SL 120 comply with part 4 of the *Legislative Standards Act 1992*.

7.3 Human rights considerations

The subordinate legislation raises no human rights issues.

7.4 Human rights certificate

The human rights certificate tabled with SL 120 provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

8 Local Government (COVID-19 Emergency Response) Regulation 2020 (SL 147)

The policy objectives of the SL 147 are to:

*... protect the health, safety and welfare of persons affected by the COVID-19 emergency and to facilitate the continuance of public administration disrupted by the COVID-19 emergency in relation to the investigation of councillor conduct and whether an offence has been committed against a 'conduct provision' of the Local Government Act 2009.*³³

In this regard, the regulation modifies section 150CJ(1) of the *Local Government Act 2009* (LGA), which currently provides that an investigator from the Office of the Independent Assessor may require a person to attend a meeting with the investigator at a stated reasonable time and place and answer questions, related to the investigation of the conduct of a councillor or an offence against a 'conduct provision', asked by the investigator.³⁴

The section is modified in light of the COVID-19 public health emergency, and particularly, the restrictions on close contact between persons.³⁵ To help accommodate the effects of these restrictions, SL 147 allows an investigator under the LGA to require a person to answer questions by way of attending by audio or audio visual link, or in person, or to provide answers to questions by email or other electronic means.³⁶

The regulation provides for these modified provisions to apply from commencement (31 July 2020) until 31 December 2020, at which time SL 147,³⁷ and the *COVID-19 Emergency Response Act 2020* (Emergency Response Act) under which it is made,³⁸ both expire.

8.1 Background to regulations made in reliance on the COVID-19 Emergency Response Act

The regulation is made in reliance, in part, on section 8 of the Emergency Response Act.³⁹ That Act contains a range of regulation-making powers to deal with matters arising from the COVID-19 public health emergency. In broad terms, section 8 (in part) provides an additional regulation-making power

³³ Explanatory notes, p 2.

³⁴ Explanatory notes, p 3.

³⁵ Explanatory notes, p 1.

³⁶ Explanatory notes, p 3.

³⁷ *Local Government (COVID-19 Emergency Response) Regulation 2020* (SL 147), s 4.

³⁸ *COVID-19 Emergency Response Act 2020* (Emergency Response Act), s 25.

³⁹ See SL 147, s 2. Section 2 declares that the regulation is made under the Emergency Response Act, s 8.

in relation to requirements or permissions under an Act for a person to physically attend a place or meeting, or for an entity to call or hold a meeting, for a particular purpose or a particular matter.⁴⁰

A regulation made in reliance on section 8 is an 'extraordinary regulation' and an Act to which an extraordinary regulation applies is an 'affected Act'.⁴¹ Such a regulation can have retrospective effect to not earlier than 19 March 2020.⁴²

Characteristics of extraordinary regulation as outlined for SL 101 (and discussed on page 6) apply also to this regulation, which was tabled in accord with requirements for extraordinary regulations.

8.2 Fundamental legislative principle issues

The committee considered the following matters in relation to compatibility of SL 147 with the LSA.

8.2.1 Rights and liberties of individuals – right to procedural fairness – Legislative Standards Act 1992, section 4(2)(a)

The regulation's modifications to investigatory meeting procedures could be seen as not having sufficient regard for the rights and liberties of individuals in relation to the right to procedural fairness, including fair and open proceedings in hearings, and fair and appropriate other procedures.⁴³

The explanatory notes suggest that the modified arrangements may disproportionately impact vulnerable groups in that the replacement of personal attendance with technology-based arrangements could be seen as limiting an attendee's right to a fair hearing for members of the community who have limited access to, or familiarity with, technology-based facilities, or who are otherwise disadvantaged by the use of such facilities:

*This may impact a person's capacity to adequately prepare documents and provide information to support their case, therefore creating a perception that the modified procedures are not appropriate or adapted to the circumstances of a particular case.*⁴⁴

The explanatory notes also state:

*Some individuals may have a limited ability to maintain privacy during an interview with an investigator, for example if a person is only able to remotely respond from a non-soundproof place where others can hear them, such as a public place. The nature of audio/visual communication also increases the risk that communication may be intercepted or recorded without the consent of a person involved.*⁴⁵

The explanatory notes offer this justification:

*It is considered that the potential breach of the fundamental legislative principle is justified. Safeguards include that the investigator has a discretion to choose from a number of options about the requirements for a person to answer questions and, in making a requirement, must act in accordance with the Human Rights Act 2019. Further, the Regulation is a temporary measure to address the COVID-19 public health emergency.*⁴⁶

Committee comment

Given the temporary nature of the modification, the discretion of the investigator to choose from a number of options as to manner in which a person may answer questions, and that the requirement from the investigator must be made in accordance with the HRA, the committee is satisfied that the provisions are appropriately defined and that any breach of FLP is justified in the circumstances.

⁴⁰ Emergency Response Act, s 8(1).

⁴¹ See Emergency Response Act, s 5(1)-(3).

⁴² Emergency Response Act, s 8(4).

⁴³ Legislative Standards Act 1992, s 4(2)(a).

⁴⁴ Explanatory notes, p 4.

⁴⁵ Explanatory notes, p 5.

⁴⁶ Explanatory notes, p 4.

8.2.1.1 Institution of Parliament – Matter appropriate to subordinate legislation and amendment of statutory instruments only – Legislative Standards Act 1992, section 4(5)(c) and 4(5)(d)

The LSA provides that whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether the subordinate legislation contains only matter appropriate to subordinate legislation (section 4(5)(c)), and whether the subordinate legislation amends statutory instruments only (section 4(5)(d)).

In serving to modify a section of the LGA, the provisions of SL 147 can be seen to operate contrary to both of these FLPs.

With respect to section 4(5)(d) specifically, the principle of Parliamentary law-making that an Act should only be amended by another Act of Parliament has long been recognised. Former committees have noted that a subordinate instrument that amends an Act is inconsistent with the FLP requiring that subordinate legislation has sufficient regard to the institution of Parliament.⁴⁷

However, as noted above, SL 147 is made in reliance, in part, on section 8 of the Emergency Response Act and is consistent with section 8, which expressly contemplates and authorises the modification of the legislative requirements within primarily legislation, through an ‘extraordinary regulation’ such as that examined here. Section 8(3)(a) and 8(3)(i), in particular, make provision for such regulation-making power with specific reference to the provision for a person to attend a place or meeting for a particular purpose or matter ‘in a way that does not involve physical attendance, including, for example, using communication technology’, and for related incidental matters such as ‘alternative ways a person may produce a stated thing required for a meeting’.⁴⁸

The explanatory notes also state of the provisions:

*Safeguards include that extraordinary regulations may only be made if the Minister is satisfied that this is necessary for a purpose of the [Emergency Response Act]. Further, the modification framework and the Regulation are time limited, expiring on 31 December 2020.*⁴⁹

Committee comment

The committee notes that the provisions are consistent with section 8 of the recently passed Emergency Response Act, which by its terms expressly contemplates provisions such as those under discussion.

The committee is satisfied that the breach of FLP is justified, given the circumstances and the objectives of the regulation.

8.3 Explanatory notes

The explanatory notes tabled with SL 147 comply with part 4 of the *Legislative Standards Act 1992*.

8.4 Human rights considerations

8.4.1 Limitations on human rights

In the human rights certificate accompanying SL 147, the then Minister for Local Government, Minister for Racing and Minister for Multicultural Affairs, acknowledges potential limitations of the subordinate legislation on:

- the right to recognition and equality before the law (section 15 of the HRA), and
- the right to privacy and reputation (section 25 of the HRA).

⁴⁷ See the discussion in the Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental Legislative Principles: the OQPC Notebook*, p 167, where it is noted that the former Scrutiny of Legislation Committee consistently expressed the view that a subordinate instrument that amends an Act, whether it be the body of the Act or a schedule to the Act, is inconsistent with the fundamental legislative principle requiring that subordinate legislation has sufficient regard to the institution of Parliament.

⁴⁸ Emergency Response Act, s 8(3)(a) and s 8(3)(i)(Note).

⁴⁹ Explanatory notes, p 5.

The certificate also identifies potential interactions of the subordinate legislation with the right to life (section 16 of the HRA), and the right to a fair hearing (section 31 of the HRA), albeit suggesting that the regulation in fact promotes these rights by:

- avoiding the need for persons, including persons at greatest risk of danger to their health from COVID-19 virus, to physically attend meetings, and thereby helping to protect their right to life
- enabling a person to provide information via an alternative means where they are unable to physically attend a meeting in person, or would have their health put at risk by a requirement to be physically present, and thereby helping to ensure they may still have a reasonable opportunity to present their case.⁵⁰

The committee's consideration of the subordinate legislation's limitations on human rights is set out below.

8.4.1.1 Right to recognition and equality before the law – Human Rights Act 2019, section 15

Section 15 of the HRA affirms that every person has the right to recognition as a person before the law, and is 'equal before the law' and 'entitled to the equal protection of the law without discrimination'.⁵¹

The modified arrangements under SL 147 could be seen to limit the right to recognition and equality before the law, as they may have a disproportionate impact on disadvantaged members of the community such as persons with limited access to technology, elderly people, people with disabilities, and other persons whose ability to understand and engage in proceedings may be adversely impacted by the use of audio visual or audio systems.

Further, a person requiring an interpreter may also have their rights limited as communication difficulties could be exacerbated.

8.4.1.2 Right to privacy – Human Rights Act 2019, section 25

Section 25 of the HRA specifies that a person has the right not to have their privacy unlawfully or arbitrarily interfered with.⁵²

The modified arrangements under SL 147 may make it more difficult to maintain the privacy of persons answering questions by attendance via audio link or audio visual link and may limit the right to privacy. For example, it may be the case that a person can only remotely respond from a place in which others can hear them such as a public place. In addition, the nature of audio visual communication increases the risk that communication may be intercepted or recorded without the consent of a person involved.⁵³

The Minister addresses these potential limitations as follows:

*The purpose of the Regulation is consistent with a free and democratic society based on human dignity, equality and freedom. It ensures that investigations can proceed safely and without delay so that complaints can be resolved and, if necessary, disciplinary action taken or offences prosecuted in accordance with community expectations and addresses the issue that existing legislative requirements are inappropriate in the context of the COVID-19 public health emergency.*⁵⁴

...

*The Regulation strikes the appropriate balance between protecting human life in the context of a global pandemic and continuing public administration disrupted by the public health emergency, on the one hand, and limiting certain human rights on the other. Flexible alternative arrangements overcome the risk to life and health, while safeguards minimise the limitations on human rights to the extent possible.*⁵⁵

⁵⁰ Human rights certificate, pp 4-5.

⁵¹ HRA, s 15(1), s 15(3).

⁵² HRA, s 25(1).

⁵³ Explanatory notes, p 5.

⁵⁴ Human rights certificate, p 5.

⁵⁵ Human rights certificate, p 6.

Committee comment

The committee considers that any limitations of the modified arrangements on a person's right to equality before the law and right to privacy are reasonable and demonstrably justified, taking into account:

- the objective of the modifications to protect public health by restricting close contact between persons due to the COVID-19 public health emergency
- that flexible alternative arrangements can be made to allow investigations to proceed safely
- the temporary nature of the modifications and any associated limitations.

8.4.2 Human rights certificate

Committee comment

The human rights certificate tabled with SL 147 contains a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

9 Recommendation

The committee recommends that the House notes this report.



Chris Whiting MP

Chair

30 November 2020

State Development and Regional Industries Committee

Chair	Mr Chris Whiting MP, Member for Bancroft
Deputy Chair	Mr Jim McDonald MP, Member for Lockyer
Members	Mr Michael Hart MP, Member for Burleigh
	Mr Robbie Katter MP, Member for Traeger
	Mr Jim Madden MP, Member for Ipswich West
	Mr Tom Smith MP, Member for Bundaberg