

Legal Affairs and Safety Committee

Report No. 12, 57th Parliament

Subordinate legislation tabled between 12 May 2021 and 13 July 2021

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 12 May 2021 and 13 July 2021. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles and lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992* (LSA).¹

In addition, the report notes any issues identified by the committee (LASC) in its 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
40	Proclamation—Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020 (commencing remaining provisions)	25 May 2021	13 October 2021
41	Evidence (Intermediaries) Amendment Regulation 2021	25 May 2021	13 October 2021
45	Proclamation No. 1—Criminal Code (Consent and Mistake of Fact) and Other Legislation Amendment Act 2021 (commencing certain provisions)	15 June 2021	27 October 2021
46	Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2021	15 June 2021	27 October 2021
55	Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Amendment Regulation (No. 2) 2021	15 June 2021	27 October 2021
56	Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) (Transitional) Regulation 2021	15 June 2021	27 October 2021
91	Professional Standards Act 2004: Professional Standards (The Australian Institute of Building Surveyors Professional Standards Scheme) Notice 2021	5 July 2021	17 November 2021

¹ LSA, Part 4.

² HRA, s 41.

Subordinate legislation tabled between 12 May 2021 and 13 July 2021

92	Professional Standards Act 2004: Professional Standards (Australian Property Institute Valuers Limited Professional Standards Scheme) Notice 2021	5 July 2021	17 November 2021
Other	Takeaway Liquor Notices 18 and 19	13 July 2021	17 November 2021

*Disallowance dates are based on proposed sitting dates as advised by the Leader of the House. These dates are subject to change.

3 Committee consideration of the subordinate legislation

The committee did not identify any significant issues regarding policy, consistency with fundamental legislative principles, the lawfulness of the subordinate legislation or non-compliance with the HRA.

Unless noted below, the committee considers the explanatory notes tabled with the subordinate legislation comply with the requirements of section 24 of the LSA.

Unless noted below, the committee also considers the human rights certificates tabled with the subordinate legislation provide a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.³

The committee noted subordinate legislation 52 – Civil Liability and Other Legislation (Prescribed Amounts) Amendment Regulation 2021 is relevant to both the Economics and Governance Committee (EGC) and the LASC as the relevant Acts are *Civil Liability Act 2003* and *Personal Injuries Proceedings Act 2002* (which are the responsibility of the LASC) and the *Motor Accident Insurance Act 1994* (which is the responsibility of the EGC). However, given the Treasurer issued the Statement of Compatibility, it was decided that the EGC would consider this regulation, which it did in its report no 10, tabled on 9 July 2021.⁴

The committee notes that the takeaway liquor notices nos 18 and 19 are issued in accordance with section 235D of the *Liquor Act 1992*. The committee has considered and reported on a number of previously granted takeaway liquor authorities. As with those previous authorities, these notices raise no concerns from a technical scrutiny perspective. Although these notices are not subordinate legislation (and do not form part of the usual numbered subordinate legislation series), they are subject to disallowance.

4 Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2021

The Penalties and Sentences (Penalty Unit Value) Amendment Regulation 2021 (Regulation) increases the monetary value of a penalty unit by 3.3% from \$133.45 to \$137.85, effective from 1 July 2021.⁵

Fundamental legislative principles

The regulation introduces a 3.3% increase in the value of a penalty unit. There was no increase in the value last financial year.

The indexation of a penalty unit is made under section 5A of the *Penalties and Sentences Act 1992*, which provides that the increase must not be more than an amount published by the Treasurer in the gazette or 3.5%. The Treasurer published the percentage increase in the gazette on 30 March 2021.

³ HRA, s 41. NB: a human rights certificate was not tabled with subordinate legislation 40, Proclamation—Criminal Code (Child Sexual Offences Reform) and Other Legislation Amendment Act 2020, as it was not required.

⁴ Economics and Governance Committee, Queensland Parliament, Report No. 10, 57th Parliament, *Subordinate legislation tabled between 12 April 2021 and 15 June 2021*, <https://www.parliament.qld.gov.au/Documents/TableOffice/TabledPapers/2021/5721T941.pdf>.

⁵ The regulation amends s 3 of the Penalties and Sentences Regulation 2015, which sets the amount.

No issues of fundamental legislative principle were identified.

Human rights issues in the regulation

In the human rights certificate accompanying the regulation, the Attorney-General and Minister for Justice, Minister for Women, and Minister for the Prevention of Domestic and Family Violence, Hon Shannon Fentiman MP (Attorney-General), states her opinion that the amendment regulation is compatible:

- with the human rights protected by the HRA⁶
- with the HRA because to the extent that it imposes any limitation on a human right, that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.⁷

***Human Rights Act 2019, section 15* – recognition and equality before the law**

***Human Rights Act 2019, section 24* – property rights**

In the certificate, the Attorney-General expresses the view that the regulation limits the right to recognition and equality before the law and also limits property rights. These human rights issues are discussed below.

Under section 15 of the HRA, every person has the right to recognition as a person before the law. The Attorney-General advises that this right may be limited by the regulation because ‘an increase in the value of a penalty unit may adversely and disproportionately impact sectors of the community such as vulnerable groups or persons of a lower socio-economic status’.⁸

Under section 24 of the HRA, a person must not be arbitrarily deprived of their property. Regarding this, the Attorney-General states: ‘The right to property may be considered limited by increasing the monetary value of a penalty unit because it results in a deprivation of property in the form of money’.⁹

The Attorney-General sets out the purpose of the increase in the monetary value of a penalty unit as being:

... to ensure the value of a penalty unit increases relative to inflation. This ensures ... that the deterrent and punishment effect of fines and [penalty infringement notices] in Queensland is maintained. This promotes community safety which is important in a free and democratic society.¹⁰

The Attorney-General addresses the right to recognition and equality:

In respect of the right to recognition and equality before the law, while the increase in the prescribed value of a penalty unit has the potential to disproportionately impact vulnerable and low socio-economic groups it is considered that the importance of maintaining the punishment and deterrent effect of penalties for applicable offences outweighs the impact on the right.¹¹

In relation to property rights, the Attorney-General states:

With respect to property rights, any deprivation of property in the form of money as a result of the increase in the value of the penalty unit is considered to be proportionate and not arbitrary, particularly given the increase follows the prescriptive legislative formula contained in section 5A of the Act [*Penalties and Sentences Act 1992*] and the dollar value of the penalty unit is set out in the Regulation.¹²

Committee comment

⁶ Human rights certificate, p 1.

⁷ Human rights certificate, p 4.

⁸ Human rights certificate, p 2.

⁹ Human rights certificate, p 2.

¹⁰ Human rights certificate, p 3.

¹¹ Human rights certificate, p 3.

¹² Human rights certificate, p 3.

The committee is satisfied that any limitations on human rights are reasonable and demonstrably justified.

5 Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Amendment Regulation (No. 2) 2021 (SL 55)

The objective of the Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) Amendment Regulation (No. 2) 2021 (Amendment Regulation) is to expire on 1 July 2021 all of the modified arrangements in relation to the making, signing or witnessing of wills and enduring documents under the Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Regulation 2020 (Documents and Oaths Regulation), except for the modified arrangements to enable nurse practitioners, in addition to doctors, to complete a certificate in an advance health directive (AHD) stating that the signatory, at the time of making the AHD, appeared to have the capacity necessary to make it.

The explanatory notes provide that the operation of the amendment regulation will mean:

- a will signed by a signatory or substitute signatory on or after 1 July 2021 will need to be made, signed and witnessed under the ordinary law
- an enduring power of attorney signed by a signatory or substitute signatory on or after 1 July 2021 will need to be made, signed and witnessed under the ordinary law
- an AHD signed by a signatory or substitute signatory on or after 1 July 2021 will need to be made, signed and witnessed under the ordinary law (but nurse practitioners can continue to complete the certificate in an AHD until the expiry of the Document and Oaths Regulation (currently 30 September 2021)).¹³

The explanatory notes advise the reason for expiring the modified arrangements:

While the Documents and Oaths Regulation allowed for modified arrangements for the making of wills and enduring documents during some periods of the COVID-19 emergency, stakeholders that were consulted were in general agreement that the modified arrangements for these documents were no longer needed in the current circumstances, particularly given these documents are associated with significant risks of fraudulent and coercive behaviour. The expiry of the modified arrangements for wills and enduring documents in the current circumstances will reduce the risk of fraudulent or coercive behaviour in the making of these important documents.¹⁴

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

The amendment regulation is made in reliance, in part, on sections 8 and 9 of the *COVID-19 Emergency Response Act 2020* (Emergency Response Act).¹⁵ 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 imports into any Act dealing with attending a place or meeting for a particular purpose or particular matter, or calling such meeting, a power to make a regulation that modifies attendance or procedural requirements.

Similarly, section 9 imports into any Act dealing with the making, signing, and witnessing of documents, a power to make a regulation to make provision about a relevant matter required or permitted under that Act, or required or permitted under a contract or common law rule, by:

- prescribing modified requirements or arrangements, or

¹³ Explanatory notes, p 3.

¹⁴ Explanatory notes, p 4.

¹⁵ The explanatory notes (at p 1) state the authorising law as being the *Oaths Act 1867* in reliance on ss 8 and 9 of the Emergency Response Act, *Powers of Attorney Act 1998* in reliance on s 9 of the Emergency Response Act, *Property Law Act 1974* in reliance on s 9 of the Emergency Response Act, and the *Succession Act 1981* in reliance on s 9 of the Emergency Response Act.

- suspending requirements or arrangements.

Such a regulation is an ‘extraordinary regulation’ and an Act to which an extraordinary regulation applies is an ‘affected Act’.¹⁶

In relation to an extraordinary regulation:

- 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 *Human Rights Act 2019*), 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.
- A 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.¹⁷
- An extraordinary regulation must be tabled within 14 days of notification (rather than the usual 14 sitting days).¹⁸

The amendment regulation was notified on 11 June 2021 and tabled on 15 June 2021.

Non-compliance with the *COVID-19 Emergency Response Act 2020*

As mentioned above, any regulation made in reliance on section 8 or section 9 (an extraordinary regulation) must declare it is made under the relevant section.¹⁹ The amendment regulation does not contain the required declaration.

The committee notes that a declaration was included in the initial regulation itself, and that under consideration is an amendment regulation.²⁰ Nonetheless, the terms of section 5 of the Emergency Response Act extend to any regulation made under an affected Act in reliance on the additional regulation-making provisions (including sections 8 and 9), and the amendment regulation itself requires its own declaration.

[Examination of a number of recent amendment regulations relying on the Emergency Response Act shows a consistent approach of not including declarations in such regulations. There is, however, nothing in either the wording of the statutory requirement in section 5 or in the nature of the various regulations to support the non-inclusion of a declaration in an amendment regulation. At the same time, there is no apparent consequence arising from non-compliance with this statutory requirement.]

Human rights certificate

A human rights certificate was tabled with the subordinate legislation, as required by section 41 of the HRA.

In the certificate, the Attorney-General states her opinion as to the regulation’s compatibility with human rights:

¹⁶ See Emergency Response Act, s 5(1)-(3).

¹⁷ See generally Emergency Response Act, s 5(4)-(8), and s 4.

¹⁸ See Emergency Response Act, s 5(9), and contrast s 49(1) of the *Statutory Instruments Act 1992*.

¹⁹ As required by Emergency Response Act, s 5(7).

²⁰ Documents and Oaths Regulation, s 2.

I consider that the Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) Amendment Regulation (No. 2) 2021 is compatible with the Human Rights Act 2019 because it promotes human rights.²¹

Section 8 of the HRA provides that a statutory provision is ‘compatible with human rights’ if the provision:

- does not limit a human right, or
- limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13.

While it might be accepted that a provision that promotes human rights will not limit human rights, best practice is that a statement of opinion as to compatibility required by the HRA should reflect the wording of the definition in section 8 of the HRA.

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

6 Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) (Transitional) Regulation 2021 (SL 56)

The objective of the Justice Legislation (COVID-19 Emergency Response—Documents and Oaths) (Transitional) Regulation 2021 (Transitional Regulation) is to provide transitional arrangements for the completion of wills and enduring documents following the expiry of relevant provisions under the Documents and Oath Regulation) on 1 July 2021 by operation of the Amendment Regulation.

The explanatory notes state:

The Transitional Regulation will allow incomplete documents (wills and enduring documents) made under the modified provisions of the Documents and Oaths Regulation to be finalised if they have been started but not finished by 1 July 2021 when the Amendment Regulation commences.²²

And, further:

The Transitional Regulation will provide that if the will or enduring document has been signed by the signatory or substitute signatory and witnessed according to the Documents and Oaths Regulation, prior to the Amendment Regulation, then the document may be completed in accordance with the provisions of the Documents and Oaths Regulation that were in existence prior to the commencement of the Amendment Regulation.²³

The Transitional Regulation will commence on 1 July 2021 and will expire after 2 years.²⁴

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

The regulation is made in reliance on section 25 of the Emergency Response Act.²⁵ That Act contains a range of regulation-making powers to deal with matters arising from the COVID-19 public health emergency.

Section 25 provides that a transitional regulation may make provision about a matter for which it is necessary to make provision to allow or facilitate the doing of anything to achieve the transition from the operation of an affected law, to the operation of the affected law after the expiry of the COVID-19 law.

²¹ Human rights certificate, p 3.

²² Explanatory notes, p 3.

²³ Explanatory notes, p 4.

²⁴ Transitional Regulation 2021, ss 2, 3; Emergency Response Act, s 25(7).

²⁵ The explanatory notes (at p 1) state the authorising law as being the *Powers of Attorney Act 1998* in reliance on s 25 of the Emergency Response Act and the *Succession Act 1981* in reliance on s 25 of the Emergency Response Act.

Any regulation made in reliance on section 25 must declare it is made under the relevant section. Section 3 of the regulation contains the required declarations.

Human rights certificate

A human rights certificate was tabled with the subordinate legislation, as required by section 41 of the HRA. In it, the Attorney-General states:

I consider that the Justice Legislation (COVID-19 Emergency Response – Documents and Oaths) (Transitional) Regulation 2021 is compatible with the *Human Rights Act 2019* because it does not raise any human rights issues.²⁶

Section 8 of the HRA provides that a statutory provision is ‘compatible with human rights’ if it does not limit a human right or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13. In this instance, while it might be accepted that a regulation that does not raise any human rights issues is compatible with human rights, best practice is that a statement of opinion as to compatibility required by the HRA should reflect the wording of the definition in section 8 of the HRA.

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

7 Professional Standards Act 2004: Professional Standards (The Australian Institute of Building Surveyors Professional Standards Scheme) Notice 2021 (SL 91)

One of the main objects of the *Professional Standards Act 2004* is to enable the creation of schemes to limit the civil liability of professionals and others.²⁷

The *Professional Standards Act 2004* requires the Attorney-General to give notice of the approval of a scheme by the Professional Standards Council or the appropriate council for the jurisdiction in which the scheme was prepared. The notice is subordinate legislation, but the scheme is not.²⁸

The Professional Standards (The Australian Institute of Building Surveyors Professional Standards Scheme) Notice 2021 gives notice of the approval by the Professional Standards Council of New South Wales of The Australian Institute of Building Surveyors Professional Standards Scheme (scheme).²⁹

The explanatory notes explain that the scheme will limit the occupational liability of members of The Australian Institute of Building Surveyors Limited (association). The scheme also provides for monetary ceilings (caps) depending on the classification of the building in relation to which building surveying functions are performed and provides a discretionary authority for the association to specify a higher cap.³⁰

The explanatory notes advise that, in compliance with the *Professional Standards Act 2004*, notice of the scheme was published in newspapers circulating throughout each state and territory.³¹

Explanatory notes comment

The explanatory notes do not include an outline of results of consultation in accordance with section 24(2)(a)(ii) of the LSA, even though the notice about the scheme that was published in a

²⁶ Human rights certificate, p 2.

²⁷ *Professional Standards Act 2004*, s 4.

²⁸ *Professional Standards Act 2004*, s 14(1)–(3). However, under s 14(4), if the notice is disallowed under, or is not tabled as required under, the *Statutory Instruments Act 1992*, s 51 of that Act applies to the scheme as if it were subordinate legislation.

²⁹ Explanatory notes, pp 1–2.

³⁰ Explanatory notes, p 2.

³¹ Explanatory notes, p 2; see *Professional Standards Act 2004*, s 9.

newspaper must invite comments and submissions within a specified period.³² The explanatory notes otherwise comply with part 4 of the LSA.

8 Professional Standards Act 2004: Professional Standards (Australian Property Institute Valuers Limited Professional Standards Scheme) Notice 2021 (SL 92)

One of the main objects of the *Professional Standards Act 2004* is to enable the creation of schemes to limit the civil liability of professionals and others.³³

The *Professional Standards Act 2004* requires the Attorney-General to give notice of the approval of a scheme by the Professional Standards Council or the appropriate council for the jurisdiction in which the scheme was prepared. The notice is subordinate legislation, but the scheme is not.³⁴

The Professional Standards (Australian Property Institute Valuers Limited Professional Standards Scheme) Notice 2021 gives notice of the approval by the Professional Standards Council of Victoria of the Australian Property Institute Valuers Limited Professional Standards Scheme (scheme).³⁵

The explanatory notes explain that the scheme will limit the occupational liability of members of the Australian Property Institute Valuers Limited (association). In relation to real property valuations, the scheme provides a hierarchy of fixed and/or formulaic monetary ceilings (caps) based on the assessed value. The scheme also specifies a lower fixed cap for certain categories of valuation, including defined low risk valuation services and plant and machinery valuations, and provides a discretionary authority for the association to specify a higher cap.³⁶

The explanatory notes advise that, in compliance with the *Professional Standards Act 2004*, notice of the scheme was published in newspapers circulating throughout each state and territory.³⁷

Explanatory notes comment

The explanatory notes do not include an outline of results of consultation in accordance with section 24(2)(a)(ii) of the LSA, even though the notice about the scheme that was published in a newspaper must invite comments and submissions within a specified period.³⁸ The explanatory notes otherwise comply with part 4 of the LSA.

9 Recommendation

The committee recommends that the House notes this report.



Peter Russo MP

Chair

September 2021

³² *Professional Standards Act 2004*, ss 9, 10. In addition, a public hearing may be held: *Professional Standards Act 2004*, s 11.

³³ *Professional Standards Act 2004*, s 4.

³⁴ *Professional Standards Act 2004*, s 14(1)–(3). However, under s 14(4), if the notice is disallowed under, or is not tabled as required under, the *Statutory Instruments Act 1992*, s 51 of that Act applies to the scheme as if it were subordinate legislation.

³⁵ Explanatory notes, pp 1–2.

³⁶ Explanatory notes, p 2.

³⁷ Explanatory notes, p 2; see *Professional Standards Act 2004*, s 9.

³⁸ *Professional Standards Act 2004*, ss 9, 10. In addition, a public hearing may be held: *Professional Standards Act 2004*, s 11.

Legal Affairs and Safety Committee

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