

## Legal Affairs and Safety Committee

### Report No. 6, 57th Parliament

#### Subordinate legislation tabled between 3 October 2020 and 26 November 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 3 October 2020 and 26 November 2020. 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).<sup>1</sup>

In addition, the report notes any issues identified by the committee in its consideration of compliance with the *Human Rights Act 2019* (HRA) and the human rights certificates tabled with the subordinate legislation.<sup>2</sup>

#### 2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date
191	Human Rights Regulation 2020	26 November 2020	20 April 2021
192	Liquor (Closed-circuit Television Equipment) Amendment Regulation 2020	26 November 2020	20 April 2021
211	Police Service Administration and Other Legislation Amendment Regulation 2020	26 November 2020	20 April 2021
212	Proclamation made under the Corrective Services and Other Legislation Amendment Act 2020	26 November 2020	20 April 2021
216	Legal Profession (Society Rules) Amendment Notice (No. 3) 2020	26 November 2020	20 April 2021
219	Public Trustee (Interest Rate) Amendment Regulation (No. 2) 2020	26 November 2020	20 April 2021
229	Body Corporate and Community Management (Accommodation Module) Regulation 2020	26 November 2020	20 April 2021
230	Body Corporate and Community Management (Commercial Module) Regulation 2020	26 November 2020	20 April 2021

<sup>1</sup> LSA, Part 4.

<sup>2</sup> HRA, s 41.

## Subordinate legislation tabled between 3 October 2020 and 26 November 2020

231	Body Corporate and Community Management (Small Schemes Module) Regulation 2020	26 November 2020	20 April 2021
232	Body Corporate and Community Management (Specified Two-lot Schemes Module) Amendment Regulation 2020	26 November 2020	20 April 2021
233	Body Corporate and Community Management (Standard Module) Regulation 2020	26 November 2020	20 April 2021
238	Justices (Computer Warrants) Amendment Regulation 2020	26 November 2020	20 April 2021
239	Criminal Practice Amendment Rule 2020	26 November 2020	20 April 2021
245	Disaster Management (Further Extension of Disaster Situation—COVID-19) Regulation (No. 6) 2020	26 November 2020	20 April 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

Other than as outlined below, 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 otherwise noted below, the committee considers the explanatory notes tabled with the subordinate legislation comply with the requirements of section 24 of the LSA.

Unless otherwise noted below, the committee 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.<sup>3</sup>

### 4 Human Rights Regulation 2020 (SL 191)

#### 4.1 Overview of the regulation

The Human Rights Regulation 2020 prescribes grammar schools and the boards of grammar schools as *not* being public entities under the HRA. The HRA allows for the prescription by regulation of entities that are not to be public entities for the purposes of the Act.<sup>4</sup>

According to the explanatory notes:

At present, Queensland grammar schools, and the boards that govern them, may be inadvertently captured as either a core public entity under section 9(1)(a), or as a functional public entity under section 9(1)(f) of the HR Act. ...<sup>5</sup>

Capturing grammar schools and grammar school boards as public entities is inconsistent with the position, specifically provided for in section 9(1)(h) of the HR Act, that non-state schools are not to be considered public entities.

The purpose of the Regulation is to bring the application of the HR Act to grammar schools into line with its application to other non-state schools. Non-state schools are not captured by the HR Act as it is

<sup>3</sup> HRA, s 41.

<sup>4</sup> HRA, s 9(4)(c).

<sup>5</sup> Explanatory notes, p 1.

recognised that while educating students is a public function, it is not being delivered by or on behalf of the state.<sup>6</sup>

## 4.2 Human rights issues

In the human rights certificate accompanying the regulation, the then Attorney-General and Minister for Justice, Hon Yvette D’Ath MP (Attorney-General), states her opinion that the regulation is compatible:

- with the human rights protected by the HRA<sup>7</sup>
- with the HRA because it does limit, restrict or interfere with a human right, but that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.<sup>8</sup>

In the human rights certificate, the Attorney-General states that it is possible that most of the human rights protected by the HRA may be engaged by this regulation:

... because the Regulation will limit the rights in the HR Act by excluding grammar schools from the definition of “public entity”, thereby excluding grammar schools and their boards from the obligations in section 58 of the HR Act to give proper consideration to, and act and make decisions compatibly with, human rights.<sup>9</sup>

The Attorney-General notes that as a result of this exclusion:

... people (including students and teachers) will not be able to bring complaints or legal proceedings in reliance on sections 58, 59 and 64 against grammar schools and their governing boards to seek to uphold rights set out in the HR Act.<sup>10</sup>

The Attorney-General explains the purpose of the limitation:

Capturing grammar schools and grammar school boards as public entities (and subsequently binding them to the obligations under section 58 of the HR Act) is inconsistent with the position that non-state schools not be considered public entities for the purposes of the HR Act. The Regulation is therefore amending an ambiguity in the HR Act. This is because it is recognised that while educating students is a public function, in the case of the grammar schools, it is not being delivered by or on behalf of the State.

Further, it is considered that non-state schools do not form part of the Queensland public sector and therefore it is not appropriate to bind them to an Act which has a specific purpose to build a culture of human rights in the Queensland public sector.<sup>11</sup>

In assessing the balance between the importance of the purpose of the limitation, and the importance of preserving the human right, the Attorney-General states:

On balance, taking into account the nature and extent of the limitations, I consider that the importance of ensuring that, consistent with the position in respect of non-state schools, the HR Act does not apply to Queensland grammar schools, and the boards that govern them, outweighs the need to preserve rights that are limited by the Regulation.<sup>12</sup>

### Committee comment

The committee is satisfied that the limits on human rights are reasonable and demonstrably justified.

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<sup>6</sup> Explanatory notes, p 2.

<sup>7</sup> Human rights certificate, p 1.

<sup>8</sup> Human rights certificate, p 5.

<sup>9</sup> Human rights certificate, p 2. A summary of the relevant human rights under the HRA is at pp 2-3 of the human rights certificate.

<sup>10</sup> Human rights certificate, p 3.

<sup>11</sup> Human rights certificate, p 4.

<sup>12</sup> Human rights certificate, p 4.

## **5 Police Service Administration and Other Legislation Amendment Regulation 2020 (SL 211)**

### **5.1 Overview of the regulation**

The Police Service Administration and Other Legislation Amendment Regulation 2020:

- amends section 67 of the Police Service Administration Regulation 2016 (PSAR) to prescribe all Australian police agencies as ‘approved agencies’ to facilitate efficient information sharing<sup>13</sup>
- amends the Weapons Regulation 2016 (Weapons Regulation) by inserting new section 143A ‘Prohibition on possession of detachable magazines without licence’.<sup>14</sup>

#### **5.1.1 Amendment to the Police Service Administration Regulation 2016**

Under the *Police Service Administration Act 1990* (PSAA), the Commissioner of the Queensland Police Service (QPS) may give the head of an approved agency all or any information in a QPS database to enable the approved agency to use the information for a law enforcement purpose.<sup>15</sup>

This regulation prescribes the police forces of New South Wales, Western Australia, Northern Territory, Tasmania, South Australia and Victoria as approved agencies, enabling them to access information in QPS databases – known as Self Service of Document Retrieval (SSoDR).<sup>16</sup>

According to the explanatory notes:

The information is already being shared between police agencies via NPRS [National Police Reference System] and manual requests in accordance with section 10.2J of the PSAA. Although the amendment to section 67 of the PSAR allows disclosure of any information in a QPS database, only criminal histories and initial court brief documents will be provided via the SSoDR portal. ...<sup>17</sup>

#### **5.1.2 Amendment to the Weapons Regulation 2016**

The regulation inserts two new penalty provisions in the Weapons Regulation for these offences:

- possession of a detachable magazine for a category A or B weapon without an appropriate weapons licence or without a reasonable excuse
- possession of a detachable magazine for a category C, D, H or R weapon without an appropriate weapons licence or without other lawful authority, justification or excuse.<sup>18</sup>

The maximum penalty for contravention of each of these provisions is 10 penalty units (\$1334.50).<sup>19</sup>

The explanatory notes provide the following background for this amendment:

The Weapons Regulation 2016 repealed and replaced the Weapons Regulation 1996 but, due to an administrative error, the offence in repealed section 68E ‘Prohibition on possession of certain magazines’ was not replicated in the new regulation. The policy objective of the Weapons Regulation 2016 was to replace the Weapons Regulation 1996, with no changes to the existing policy position and the omission of the section 68E offence was an oversight.

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<sup>13</sup> Explanatory notes, p 1; Police Service Administration and Other Legislation Amendment Regulation 2020, s 3.

<sup>14</sup> Explanatory notes, p 2; Police Service Administration and Other Legislation Amendment Regulation 2020, s 5.

<sup>15</sup> Explanatory notes, p 1; *Police Service Administration Act 1990*, s 10.2L.

<sup>16</sup> Explanatory notes, p 3; Police Service Administration and Other Legislation Amendment Regulation 2020, s 3.

<sup>17</sup> Explanatory notes, p 4.

<sup>18</sup> Police Service Administration and Other Legislation Amendment Regulation 2020, s 5.

<sup>19</sup> The value of a penalty unit is \$133.45.

... The omission of the section 68E offence has therefore created an anomaly where it is now an offence for the holder of a firearms licence to possess certain magazines, but it is not an offence for an unlicensed person to possess a magazine. The insertion of new section 143A will correct the anomaly.<sup>20</sup>

## **5.2 Fundamental legislative principle issues**

### **5.2.1 *Legislative Standards Act 1992, section 4(2)(a) – privacy and confidentiality***

The right to privacy and the disclosure of private or confidential information are relevant to consideration of whether legislation has sufficient regard to the rights and liberties of the individual.

As a result of this regulation, a greater number of agencies will be able to access an individual's criminal history and court brief information via SSoDR, which infringes on an individual's right to privacy and confidentiality of their personal information.<sup>21</sup>

Whilst acknowledging the regulation breaches this fundamental legislative principle, the explanatory notes provide this justification:

The breach is considered justified in the circumstances and in accordance with the purposes of the information sharing provisions in Part 10, Division 1A of the PSAA. The information can only be shared for a law enforcement purpose which is defined in section 10.2.G of the PSAA as 'a purpose for which the agency is authorised to use the information under a law of the Commonwealth or a State'. This is generally for investigative and prosecution purposes and supports national cooperative policing efforts.<sup>22</sup>

The explanatory notes set out safeguards that are in place to protect this information:

... The SSoDR portal provides for a more automated method of sharing this information and is fully auditable to ensure information is only shared with authorised members and for relevant purposes.

Current legislative safeguards that ensure that information is disclosed appropriately, including section 10.2M 'Commissioner may impose conditions' and section 10.2P 'Misuse of information given under this division' of the *Police Service Administration Act 1990*, will continue to apply to information disclosed in accordance with the amendment regulation. This further mitigates any concerns that may be held about the amendment regulation's impact upon a person's right to privacy.<sup>23</sup>

#### Committee comment

The committee is satisfied that any limitation on a person's privacy is reasonable and justified, noting the safeguards in place.

## **5.3 Human rights issues**

In the human rights certificate accompanying the regulation, the then Minister for Police and Corrective Services, Hon Mark Ryan MP (Minister), states his opinion that the regulation is compatible:

- with the human rights protected by the HRA<sup>24</sup>
- with the HRA because it does limit, restrict or interfere with a human right, but that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.<sup>25</sup>

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<sup>20</sup> Explanatory notes, p 3.

<sup>21</sup> Previously, this information could be accessed (but not printed) by other police agencies via the National Police Reference System and through manual requests submitted to the QPS (see explanatory notes, p 2).

<sup>22</sup> Explanatory notes, p 4.

<sup>23</sup> Explanatory notes, p 4.

<sup>24</sup> Human rights certificate, p 1.

<sup>25</sup> Human rights certificate, p 5.

The committee considered the following human rights issues.

### **5.3.1 Amendment to the Police Service Administration Regulation 2016**

#### Human Rights Act 2019, section 25 – right to privacy and reputation

Under section 25 of the HRA, every person in Queensland has the right not to have their privacy unlawfully or arbitrarily interfered with.

This regulation could be seen as limiting the right to privacy as it allows for police agencies in other Australian states and the Northern Territory to access an individual's criminal history and initial court brief documents from QPS's database, being the SSoDR discussed above.<sup>26</sup>

The Minister notes the purpose of the limitation is for law enforcement purposes:

The amendment to section 67 of the PSAR will allow the sharing of information via the SSoDR portal. This information is already being shared by the QPS with other police agencies via NPRS and manual requests. The amendment will create efficiencies for the QPS and other police agencies in sharing criminal history and court brief information as it will alleviate the need for manual requests and processing.<sup>27</sup>

The Minister sets out safeguards in place aimed at ensuring information is collected for proper purposes:

The information can only be shared for law enforcement purposes which is defined in section 10.2G of the PSAA as 'a purpose for which the agency is authorised to use the information under the law of the Commonwealth or a State'. This is most commonly for investigative and prosecution purposes.

Concerns about an individual's right to privacy are mitigated through limiting access to SSoDR to authorised members of the other police agencies. Further, the SSoDR portal is fully auditable to ensure information is only being shared with these authorised members and for relevant purposes.<sup>28</sup>

In assessing the balance between the importance of the purpose of the limitation and the importance of preserving the human right, the Minister states:

It is in the public interest for this information to be shared as it supports law enforcement within Queensland and nationally. The limitation of the right to privacy is therefore consistent with a free and democratic society.<sup>29</sup>

#### Committee comment

The committee is satisfied that any limit on human rights in relation to this regulation is reasonable and demonstrably justified, noting the safeguards in place.

### **5.3.2 Amendment to the Weapons Regulation 2016**

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

Under section 24 of the HRA, a person has the right to own property and must not be arbitrarily deprived of their property.

This regulation may limit a person's property rights by imposing restrictions on who can possess detachable magazines.<sup>30</sup>

In the human rights certificate, the Minister states the purpose of this limitation as being to 'limit possession of detachable magazines to those persons who are appropriately licensed under the *Weapons Act 1990*'.<sup>31</sup> The Minister states that appropriate exceptions are in place:

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<sup>26</sup> Human rights certificate, pp 2-3.

<sup>27</sup> Human rights certificate, p 3.

<sup>28</sup> Human rights certificate, pp 3-4.

<sup>29</sup> Human rights certificate, p 4.

<sup>30</sup> Human rights certificate, p 3.

<sup>31</sup> Human rights certificate, p 4.

... including a reasonable excuse for possession of a detachable magazine for a category A or B weapon (section 143A(1)(b)) and 'that the person has lawful authority, justification or excuse' for possession of a category C, D, H or R weapon (section 143A(2)(b)).<sup>32</sup>

In assessing the balance between the importance of the purpose of the limitation and the importance of preserving the human right, the Minister states:

The new section promotes the freedom and security of the community generally as it ensures magazines are only in the possession of persons appropriately licensed under the *Weapons Act 1990*. This supports the principles and objects of this Act as outlined in section 3. These include the principle that 'weapon possession and use are subordinate to the need to ensure public and individual safety' with the object of the Act being 'to prevent the misuse of weapons'. There is no need for a person to possess a detachable magazine without an appropriate licence and the new section assists with the restriction and misuse of weapons in the community.<sup>33</sup>

#### Committee comment

The committee is satisfied that any limit on human rights in relation to property rights is reasonable and demonstrably justified.

## **6 Body Corporate and Community Management (Accommodation Module) Regulation 2020 (SL 229)**

### **6.1 Overview of the regulation**

The objective of the Body Corporate and Community Management (Accommodation Module) Regulation 2020 is to provide for flexible and contemporary communally based arrangements for the use of freehold land in Queensland.

To provide for flexibility of governance arrangements for community title schemes, uses and ownership types, the *Body Corporate and Community Management Act 1997* (BCCM Act) is structured such that management processes and procedures are set out in regulation modules designed for different types of schemes.

This regulation, which relates to the accommodation module, commenced on 1 March 2021. It replaced the Body Corporate and Community Management (Accommodation Module) Regulation 2008.<sup>34</sup> (The Body Corporate and Community Management (Accommodation Module) Regulation 2008 was due to expire on 1 September 2018,<sup>35</sup> but was extended by regulations made under the *Statutory Instruments Act 1992*.<sup>36</sup>)

The accommodation module provides management processes designed for community title schemes that are used predominantly for short or long-term letting purposes with the need for accommodation management.

The accommodation module provides for:

- the body corporate committee
- general meetings of the body corporate
- proxies for committee meetings and general meetings

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<sup>32</sup> Human rights certificate, pp 4-5.

<sup>33</sup> Human rights certificate, p 5.

<sup>34</sup> Body Corporate and Community Management (Accommodation Module) Regulation 2020, ss 2, 226.

<sup>35</sup> *Statutory Instruments Act 1992*, s 54.

<sup>36</sup> Statutory Instruments (Exemptions from Expiry) Amendment Regulation 2018; Statutory Instruments (Exemptions from Expiry) Amendment Regulation 2019; Statutory Instruments (Exemptions from Expiry) Amendment Regulation 2020.

- the engagement of body corporate managers and service contractors, and the authorisation of letting agents
- financial management
- property management and insurance
- administrative matters including recordkeeping.

## 6.2 Fundamental legislative principle issues

### 6.2.1 *Legislative Standards Act 1992, section 4(2)(a) – rights and liberties of individuals*

Although the new module will largely replicate the old accommodation module, a number of issues of fundamental legislative principle arise.

The fundamental legislative principles include requiring legislation to have sufficient regard to the rights and liberties of individuals.<sup>37</sup> One aspect of this principle is that legislation should not, without sufficient justification, unduly restrict ordinary activities.<sup>38</sup>

The accommodation module prescribes requirements and restrictions relevant to a body corporate's engagement of a person as a body corporate manager or service contractor, or authorisation of a person as a letting agent.

As the explanatory notes acknowledge, these provisions restrict the capacity of parties to contract freely and establish and enforce their contractual entitlements through traditional legal means.<sup>39</sup> This invites consideration of the principle that legislation should not, without sufficient justification, unduly restrict ordinary activities.

The relevant provisions are set out below.

#### Form of engagement or authorisation

Section 127 of the accommodation module provides that an engagement or authorisation is void if it does not comply with requirements set out in that section, including being in writing and stating:

- the term of the engagement, including when it begins and ends
- the term of any right or option of extension or renewal of the engagement
- the functions the body corporate manager or service contractor is required or authorised to carry out
- the basis for calculating payment for the body corporate manager's or service contractor's services
- any powers of an executive member of the committee that a body corporate manager is authorised to exercise.

The explanatory notes provide this justification:

... This restriction is a consumer protection measure that seeks to ensure full disclosure to the body corporate about, for example, the term of the contract, the basis of payment for services and the role to be performed. This information is necessary so the body corporate can make an informed decision about whether to engage or authorise a person.<sup>40</sup>

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<sup>37</sup> LSA, s 4(2)(a).

<sup>38</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, pp 118-119.

<sup>39</sup> Explanatory notes, p 18.

<sup>40</sup> Explanatory notes, p 18.



### Term of engagement or authorisation

The accommodation module (sections 129 to 131) prescribes the maximum terms of any engagement of a person as a body corporate manager (3 years) or as a service contractor (25 years), and of any authorisation of a person as a letting agent (25 years).

The explanatory notes state that these limits were put in place to prevent such agreements from being ‘everlasting agreements’ over which the body corporate had no control, noting past experience:

Across the operation of the expiring Accommodation Module, the limits set for the engagement of a service contractor and the authorisation of a letting agent appear to have been sufficient to allow a service contractor/letting agent a reasonable prospect of obtaining a return on investment.<sup>41</sup>

### Transfer of engagement or authorisation

Section 133 of the accommodation module provides that an engagement or authorisation may be transferred only with the approval of the body corporate. This restricts the rights of a person engaged as a body corporate manager, service contractor or letting agent.

The explanatory notes state:

These transfer provisions provide flexibility to body corporate managers, service contractors and letting agents to assign their rights to another party. This provision offers protection to letting agents and service contractors, who have usually invested significant funds in purchasing the letting or caretaking rights, from significant financial loss if they are unable to continue their role.<sup>42</sup>

### Termination of engagement or authorisation

Under Part 5 of the accommodation module, a body corporate may terminate a person’s engagement as a body corporate manager or service contractor or an authorisation as a letting agent, for a number of reasons. These include a conviction for particular offences and for certain actions and behaviours in acting in the role covered by the agreement.

In relation to convictions for offences, the explanatory notes state:

It is important that body corporate managers, service contractors and letting agents act within the law and it is reasonable that serious failures to do so may be an appropriate reason for the body corporate to terminate the engagement or authorisation.<sup>43</sup>

In relation to actions in carrying out roles under an agreement:

If the relevant contractor does not provide the expected standard of service under their engagement/authorisation and does not act according to the standards set in the relevant code of conduct, it is reasonable to allow the engagement or authorisation to be terminated. The rights of a contractor are protected by a requirement that the body corporate cannot exercise its power to terminate on these grounds unless the contractor has been given a notice and the opportunity to undertake necessary action to remedy the behaviour that is the ground for the termination.<sup>44</sup>

### Lien against body corporate property

Section 224 of the module requires certain people to return assets, documents and the seal of the body corporate on being given notice requiring the return of the property. The person is prevented from claiming a lien on the body corporate records and seal. This limits the rights of that person to enforce a claim against the body corporate.

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<sup>41</sup> Explanatory notes, p 18.

<sup>42</sup> Explanatory notes, p 18.

<sup>43</sup> Explanatory notes, p 19.

<sup>44</sup> Explanatory notes, p 19.

The explanatory notes state:

... This provision is considered necessary because the records and seal are essential for the functioning of the body corporate. The provision does not extend to other body corporate property.<sup>45</sup>

Committee comment

In relation to the above provisions, the committee is satisfied the provisions have sufficient regard to the rights and liberties of individuals, considering the justifications for the provisions.

**6.2.2 Legislative Standards Act 1992, section 4(5)(c) – institution of Parliament - subordinate legislation should contain only matters appropriate to subordinate legislation**

Subordinate legislation should contain only matters appropriate to subordinate legislation.<sup>46</sup> The issue arises whether some matters dealt with in the module would more appropriately be dealt with in the BCCM Act itself. The explanatory notes refer to concerns raised by the former Scrutiny of Legislation Committee in its consideration of the Bill that became the BCCM Act.<sup>47</sup> The former Scrutiny of Legislation Committee was concerned at certain matters being dealt with in the regulation modules rather than in principal legislation, with these matters including:

- prescribing certain details about the engagement of a person as a body corporate manager or service contractor, or the authorisation of a person as a letting agent
- making specified provision for financial management arrangements applying to a scheme
- providing for making improvements to the common property of the scheme
- making provision for the conditions in an exclusive use by-law and the obligations imposed
- requiring the body corporate to put in place insurance for the scheme.<sup>48</sup>

The explanatory notes state:

The primary object of the BCCM Act is to provide flexible and contemporary communally based arrangements for the use of freehold land. To achieve flexibility in the legislative framework to accommodate the management needs of diverse types of schemes, the BCCM Act provides management processes and procedures through a set of regulation modules designed for the different types of schemes. Including management provisions tailored to different types of schemes in the BCCM Act would be impractical and cumbersome and unlikely to achieve the same level of flexibility and simplicity as the current regulatory framework.<sup>49</sup>

Committee comment

The committee is satisfied that sufficient justification has been provided for the breach of the fundamental legislative principle relating to the institution of Parliament.

**6.3 Human rights issues**

**6.3.1 Human Rights Act 2019, section 22 – peaceful assembly and freedom of association**

Under section 22 of the HRA, every person has the right to freedom of association with others.

Section 11 of the regulation may limit the right to freedom of association, as it prevents a person from being able to be elected as a voting member of a body corporate committee if the individual has an associate relationship with a body corporate manager, service contractor or letting agent for the community titles scheme, despite that person being otherwise eligible to be a voting member of the committee.

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<sup>45</sup> Explanatory notes, p 19.

<sup>46</sup> LSA, s 4(5)(c).

<sup>47</sup> Body Corporate and Community Management Bill 1997.

<sup>48</sup> See Scrutiny of Legislation Committee, Alert Digest, Issue No. 5 of 1997, p 2.

<sup>49</sup> Explanatory notes, p 20.

The Attorney-General advises:

While section 11 ... may impact on the right to freedom of association, it is important that voting members of the committee make decisions that are in the best interests of the body corporate. The provision achieves its purpose in removing any risk that a voting member of the committee will be unable to vote in the best interests of the body corporate because that person has an associate relationship with a body corporate manager, service contractor or letting agent. For this reason, it is considered the limitation imposed by section 11 of the Accommodation [Module] outweighs the importance of preserving the right, in this instance.<sup>50</sup>

Committee comment

The committee is satisfied that the limitation on the right to freedom of association is reasonable and demonstrably justified.

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

Under section 24 of the HRA, a person must not be arbitrarily deprived of their property.

Section 174 of the regulation provides that a body corporate for a community titles scheme may decide, by special resolution, to grant a lease of three years or less over the whole of the common property, or to grant a lease over part of the common property for 10 years or less. This provision may limit property rights, as a body corporate may grant such a lease, notwithstanding that some lot owners do not support granting the lease.

Section 180 also permits a body corporate for a community titles scheme to:

- authorise the disposal of a body corporate asset that is freehold land or a leasehold interest in freehold land
- grant or amend a lease over a body corporate asset that is freehold land, or another body corporate asset capable of being leased.
- sell or otherwise dispose of body corporate assets of a particular value that are personal property, including a licence or concession relating to freehold land.

Section 202 of the regulation permits the body corporate for a community titles scheme to carry out work that a lot owner or occupier is required to carry out and to recover the reasonable costs of carrying out the work from the owner of the relevant lot as a debt.

In relation to section 174, the Attorney-General advises:

As owners of lots own common property as tenants in common, the purpose of the provision is to allow a significant majority of owners to enter into a short-term lease or licence in relation to the common property.<sup>51</sup>

...

Section 174 allows bodies corporate to grant a lease or licence over common property with less than unanimous support of lot owners. However, in recognition of the fact that some lot owners may not agree with the grant of a lease or licence, the provision limits the period of time that the lease or licence may apply to the whole of the common property to a maximum of three years. Similarly, the provision limits the period of time that the lease or licence may apply to part of the common property to a maximum of 10 years.<sup>52</sup>

Regarding section 180, the Attorney-General states:

... Section 180 does not impose an arbitrary or unreasonable limit on property rights, as a decision passed by a special resolution reflects that the majority of lot owners support the grant of a lease over a body corporate asset, or the sale or disposal of particular body corporate assets. Also, in recognition of the

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<sup>50</sup> Human rights certificate, p 7.

<sup>51</sup> Human rights certificate, p 10.

<sup>52</sup> Human rights certificate, p 11.

implications of the grant of a lease, section 180 only permits the grant of a lease *for* 10 years or less if a motion is passed by special resolution. A grant of a lease or licence of more than 10 years over a body corporate asset requires a motion to be passed by resolution without dissent (where no votes may be recorded as voting against the motion).<sup>53</sup>

In relation to section 202, the Attorney-General states:

... It is not considered that section ... imposes arbitrary or unreasonable limitations on the individual property rights of owners and occupiers. It only empowers bodies corporate to carry out work that an owner or occupier would ordinarily be obligated to complete if that owner or occupier fails to comply with their obligations in relation to that work. For this reason, it is considered the purpose of the limitation outweighs the importance of preserving the right, in this instance.<sup>54</sup>

#### Committee comment

The committee is satisfied that the limitations on the right to property are reasonable and demonstrably justified.

#### **6.3.3 Human Rights Act 2019, section 25 – right to privacy and reputation**

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

A number of provisions will impact on a person's privacy. Section 58 may limit privacy rights by requiring voting members of the committee to disclose to a committee meeting a direct or indirect interest in an issue being considered by the committee. Where a voting committee member declares a direct or indirect interest, they are not permitted to vote on the issue.

The Attorney-General explains the limitation on property rights and provides this justification:

This limitation is necessary to ensure committee members adhere to their obligation to act in the best interests of the body corporate.<sup>55</sup>

Section 69 provides that a committee member may only receive a benefit from a caretaking service contractor or service for the scheme if the body corporate has authorised the receipt of the benefit by ordinary resolution at a general meeting of all owners. Members of the committee must also disclose details of benefits they intend to receive to the body corporate for authorisation. Section 69 impacts privacy rights of members of the committee by requiring them to disclose details of benefits they will receive from a caretaking service contractor or service contractor to the body corporate.

The Attorney-General states:

... the limitation is necessary to enable the body corporate to decide whether to approve any benefit the committee member may receive.<sup>56</sup>

Section 86 requires the original owner of a community titles scheme to give particular documents and information to the body corporate at the first annual general meeting for the scheme. Section 86 may limit privacy rights by requiring the original owner of a community titles scheme to provide documents and information, which may contain personal or commercial information, that are relevant to the ongoing administration and management of the scheme to the body corporate at the first annual general meeting.

The Attorney-General provides:

While some personal or commercial information may be included in the documents and information to be handed over by the original owner, these documents and information are all relevant to the ongoing administration and management of the scheme. For this reason, it is considered that the purpose of the

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<sup>53</sup> Human rights certificate, p 12.

<sup>54</sup> Human rights certificate, p 12.

<sup>55</sup> Human rights certificate, p 20.

<sup>56</sup> Human rights certificate, p 20.

limitation imposed by section 86 outweighs the importance of preserving privacy rights, in this instance.<sup>57</sup>

Section 103 impacts privacy rights by requiring the secretary to permit meeting attendees to inspect the body corporate roll, a list of individuals eligible to vote at the meeting, proxy forms and all hard copy and electronic votes.

The Attorney-General sets out this justification:

This provision serves an important role in ensuring transparency in relation to the conduct of general meetings.<sup>58</sup>

Section 144 requires the disclosure to the body corporate of commercial or personal relationships a body corporate manager or caretaking service contractor has with another person. Section 144 may impact privacy rights by requiring a body corporate manager or caretaking service contractor to disclose details of a relationship with a person the body corporate is considering engaging to provide goods or services.

The Attorney-General states:

... The provision ensures there is transparency about conflicts of interests in the nomination of a person proposed to be engaged by the body corporate, particularly in situations where the body corporate manager or caretaking service contractor has recommended the body corporate engage a person to provide goods or services where that person shares a relationship (either personal, professional or commercial) with the body corporate manager or caretaking service contractor. This is important to ensure the best interests of the body corporate are considered as part of the body corporate decision-making processes. ...<sup>59</sup>

Section 145 requires the disclosure of commercial or personal relationships a body corporate manager or caretaking service contractor has with another person. Section 145 may impact privacy rights by requiring a body corporate manager or caretaking service contractor to disclose details of a relationship with a person the body corporate has already contracted to provide goods or services to the body corporate.

The Attorney-General states:

... The provision ensures there is transparency in relation to any conflicts of interest that may arise in relation to a person engaged by the body corporate to provide goods or services after the person has been contracted by the body corporate. This is important to ensure the best interests of the body corporate are considered as part of the body corporate decision-making processes. For these reasons, it is considered the purpose of the limitation imposed by section 145 outweighs the importance of preserving the right, in this instance.<sup>60</sup>

Section 146 may impact privacy rights by requiring a body corporate manager or caretaking service contractor to disclose to the body corporate details of any commission, payment or other benefit the body corporate manager or caretaking service contractor is entitled to receive if the body corporate engages a person to provide goods or services.

Section 192 may limit privacy rights by requiring owners to disclose details of improvements, including improvements within the boundaries of their lot, if those improvements may impact on the costs of mandatory reinstatement insurance for the scheme.

The Attorney-General states:

... Failure to be adequately insured may result in costs being imposed on lot owners to reinstate the scheme if an insurable event damages the scheme land the body corporate is required to insure, including improvements made by owners of the lots. In some scenarios, an owner's failure to adequately disclose

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<sup>57</sup> Human rights certificate, p 21.

<sup>58</sup> Human rights certificate, p 21.

<sup>59</sup> Human rights certificate, p 21.

<sup>60</sup> Human rights certificate, p 22.

improvements to the body corporate may also result in mandatory insurance for the scheme being voided. For these reasons, it is considered the purpose of the limitation imposed by section 192 outweighs the importance of preserving the right, in this instance.<sup>61</sup>

Section 197 requires an owner to disclose details of activities carried out within a lot if those activities are likely to result in an increase in mandatory reinstatement or public liability insurance that the body corporate is required to maintain under the legislation.

The Attorney-General advises:

It is important for bodies corporate to know information about activities carried out within a lot if those activities impact insurance costs and availability.<sup>62</sup>

Section 212 requires particular individuals or persons to provide a notice outlining details of specified events accompanied by their contact details, including a residential or business address and address for service, within one month after the specified event occurs.

The Attorney-General states:

While section 212 requires the disclosure of personal contact details for owners and other relevant people to the body corporate, it is necessary for the body corporate to collect and maintain this information to ensure it is able to provide relevant scheme information, including notices of meetings and levy notices, to owners and other relevant people.<sup>63</sup>

Section 221 permits a member of the body corporate committee reasonable access to the records of the body corporate. Section 221 may impact on privacy rights by giving members of the committee reasonable access to body corporate records.

The Attorney-General states:

Given committee members are responsible for the day-to-day operations of the body corporate, and for putting lawful decisions of the body corporate into effect, it is important that committee members can access records of the body corporate on a reasonable basis. For these reasons, it is considered the purpose of the limitation imposed by section 221 outweighs the importance of preserving the right, in this instance.<sup>64</sup>

### Committee comment

The committee is satisfied that the limitations on the right to privacy are reasonable and demonstrably justified.

## **7 Body Corporate and Community Management (Commercial Module) Regulation 2020 (SL 230)**

### **7.1 Overview of the regulation**

The Body Corporate and Community Management (Commercial Module) Regulation 2020 provides management processes designed for commercial schemes or combined commercial and residential schemes where the residential component is small.

To provide for flexibility of governance arrangements for community title schemes, uses and ownership types, the BCCM Act is structured such that management processes and procedures are set out in regulation modules designed for different types of schemes.

The regulation commenced on 1 March 2021, replacing the Body Corporate and Community Management (Commercial Module) Regulation 2008.<sup>65</sup> (The Body Corporate and Community

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<sup>61</sup> Human rights certificate, p 22.

<sup>62</sup> Human rights certificate, p 22.

<sup>63</sup> Human rights certificate, p 23.

<sup>64</sup> Human rights certificate, p 23.

<sup>65</sup> Body Corporate and Community Management (Commercial Module) Regulation 2020, ss 2, 183.

Management (Commercial Module) Regulation 2008 was due to expire on 1 September 2018,<sup>66</sup> but was extended by regulations made under the *Statutory Instruments Act 1992*.<sup>67</sup>)

The new commercial module provides for:

- the body corporate committee
- general meetings of the body corporate
- proxies for committee meetings and general meetings
- the engagement of body corporate managers and service contractors, and the authorisation of letting agents
- financial management
- property management and insurance
- administrative matters including recordkeeping.

## **7.2 Fundamental legislative principle issues**

### **7.2.1 *Legislative Standards Act 1992*, section 4(2)(a) – rights and liberties of individuals**

Although the new module will largely replicate the old commercial module, a number of issues of fundamental legislative principle will arise.

The fundamental legislative principles include requiring legislation to have sufficient regard to the rights and liberties of individuals.<sup>68</sup> One aspect of this principle is that legislation should not, without sufficient justification, unduly restrict ordinary activities.<sup>69</sup>

The module prescribes requirements and restrictions relevant to a body corporate's engagement of a person as a body corporate manager or service contractor, or authorisation of a person as a letting agent. These provisions may restrict the capacity of parties to contract freely and establish and enforce their contractual entitlements through traditional legal means. This invites consideration of the principle that legislation should not, without sufficient justification, unduly restrict ordinary activities.

The provisions affected are set out below.

#### Form of engagement or authorisation

Sections 93 and 94 prescribe that an engagement or authorisation is void unless it is in the form required by the module.

The explanatory notes provide this justification:

This restriction is a consumer protection measure that seeks to ensure full disclosure to the body corporate about, for example, the term of the contract, the basis of payment for services and the role to be performed. This information is necessary so the body corporate can make an informed decision about whether to engage or authorise a person.<sup>70</sup>

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<sup>66</sup> *Statutory Instruments Act 1992*, s 54.

<sup>67</sup> Statutory Instruments (Exemptions from Expiry) Amendment Regulation 2018; Statutory Instruments (Exemptions from Expiry) Amendment Regulation 2019; Statutory Instruments (Exemptions from Expiry) Amendment Regulation 2020.

<sup>68</sup> LSA, s 4(2)(a).

<sup>69</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, pp 118-119.

<sup>70</sup> Explanatory notes, p 16.

### Term of engagement or authorisation

Sections 95, 96 and 97 set out the term of engagement for a body corporate manager to be not longer than 3 years, the term for a service contractor to be not longer than 25 years and the term for a letting agent to be not more than 25 years.

The explanatory notes provide:

These limits were put in place to prevent such agreements from being everlasting agreements over which the body corporate had no control. Across the operation of the expiring Commercial Module, the limits set for the engagement of a service contractor and the authorisation of a letting agent appear to have been sufficient to allow a service contractor/letting agent a reasonable prospect of obtaining a return on investment.<sup>71</sup>

### Termination of engagement or authorisation

Sections 100 and 101 make provision for the body corporate to terminate a person's engagement as a body corporate manager or service contractor, or authorisation as a letting agent, for a number of reasons including for being convicted of an indictable offence involving fraud or dishonesty or assault, engaging in misconduct or being grossly negligent, failing to carry out duties under the engagement or authorisation or contravening the relevant code of conduct.

The explanatory notes state:

It is important that body corporate managers, service contractors and letting agents act within the law and it is reasonable that serious failure to do so may be an appropriate reason for the body corporate to terminate the engagement or authorisation.<sup>72</sup>

The explanatory notes further state:

If the relevant contractor does not provide the expected standard of service under their engagement/authorisation and does not act according to the standards set [out] in the relevant code of conduct, it is reasonable to allow the engagement or authorisation to be terminated.<sup>73</sup>

### Lien against body corporate property

Section 181 requires certain people to return assets, documents and the seal of the body corporate on being given a notice requiring the return of the property. The person cannot claim a lien on the body corporate records and seal.

The explanatory notes provide:

This provision is considered necessary because the records and seal are essential for the functioning of the body corporate. The provision does not extend to other body corporate property.<sup>74</sup>

### Committee comment

In relation to all the above provisions, the committee is satisfied the provisions have sufficient regard to the rights and liberties of individuals, given the justifications for the provisions.

#### **7.2.2 Legislative Standards Act 1992, section 4(5)(c) – institution of Parliament - contains only matters appropriate to subordinate legislation**

Subsection 4(5)(c) of the LSA provides that subordinate legislation should contain only matters appropriate to that level of legislation. The explanatory notes refer to concerns raised by the former Scrutiny of Legislation Committee in its consideration of the Bill that became the BCCM Act. As noted above, the former Scrutiny of Legislation Committee was concerned at certain matters being dealt with in the regulation modules rather than in principal legislation, with these matters including:

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<sup>71</sup> Explanatory notes, p 16.

<sup>72</sup> Explanatory notes, p 16.

<sup>73</sup> Explanatory notes, p 17.

<sup>74</sup> Explanatory notes, p 17.



- prescribing certain details about the engagement of a person as a body corporate manager or service contractor, or the authorisation of a person as a letting agent
- making specified provision for financial management arrangements applying to a scheme
- providing for making improvements to the common property of the scheme
- making provision about the conditions in an exclusive use by-law and the obligations imposed
- requiring the body corporate to put in place insurance for the scheme.<sup>75</sup>

The explanatory notes provide:

The primary object of the Act is to provide flexible and contemporary communally based arrangements for the use of freehold land. To achieve flexibility in the legislative framework to accommodate the management needs of diverse types of schemes, the Act provides management processes and procedures through a set of regulation modules designed for the different types of schemes. Including management provisions tailored to different types of schemes in the Act would be impractical and cumbersome and unlikely to achieve the same level of flexibility and simplicity as the current regulatory framework.<sup>76</sup>

### Committee comment

The committee is satisfied sufficient justification has been provided for the breach of the fundamental legislative principle relating to the institution of Parliament.

## **7.3 Human rights issues**

### **7.3.1 Human Rights Act 2019, section 22 – peaceful assembly and freedom of association**

Under section 22 of the HRA, every person has the right to freedom of association with others.

Section 11 of the commercial module may limit the right to freedom of association, as it prevents a person from being able to be elected as a voting member of a body corporate committee if the individual has an associate relationship with a body corporate manager for the community title scheme, despite that person being otherwise eligible to be a voting member of the committee.

In addressing the balance between the limitation and the impact on human rights, the Attorney-General advises:

While section 11 of the Commercial Module may impact on the right to freedom of association, it is important that voting members of the committee make decisions that are in the best interests of the body corporate. The provision achieves its purpose in removing any risk that a voting member of the committee will be unable to vote in the best interests of the body corporate because that person has an associate relationship with a body corporate manager. For this reason, it is considered the limitation imposed by section 11 of the Commercial Module outweighs the importance of preserving the right, in this instance.<sup>77</sup>

### Committee comment

The committee is satisfied that the limitations on the right to freedom of association is reasonable and demonstrably justified.

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

Under section 24 of the HRA, a person must not be arbitrarily deprived of the person's property.

Section 131 of the commercial module permits the body corporate to sell or otherwise dispose of part of the common property, which is owned by all lot owners in the scheme as tenants in common.

This provision also permits the body corporate for a community titles scheme to grant a lease of 3 years or less over the whole of the common property, or to grant a lease over part of the common

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<sup>75</sup> See Scrutiny of Legislation Committee, Alert Digest, Issue No. 5 of 1997, p 2.

<sup>76</sup> Explanatory notes, p 17.

<sup>77</sup> Human rights certificate, p 7.

property for 10 years or less. The provision may limit property rights, as a body corporate may grant a lease for a period of 3 years or less over the whole of common property, or a lease over part of the common property for a period of 10 years or less, notwithstanding that some lot owners do not support the granting of the proposed lease.

The Attorney-General advises:

As owners of lots own common property as tenants in common, the purpose of the provision is to allow a significant majority of owners to enter into a short-term lease or licence in relation to the common property.<sup>78</sup>

The Attorney-General also states:

Section 131 allows bodies corporate to grant a lease or licence over common property with less than unanimous support of lot owners. However, in recognition of the fact that some lot owners may not agree with the grant of a lease or licence, the provision limits the period of time that the lease or licence may apply to the whole of the common property to a maximum of three years. Similarly, the provision limits the period of time that the lease or licence may apply to part of the common property to a maximum of 10 years. For the grant of a lease or licence for greater than three years over the whole of the common property, or greater than 10 years for part of the common property, owners must pass a motion at a general meeting by resolution without dissent (i.e. the motion will not pass if any lot owner votes against the motion).<sup>79</sup>

Section 137 of the commercial module permits the body corporate for a community titles scheme to authorise the disposal of a body corporate asset that is freehold land or a leasehold interest in freehold land. It also permits the body corporate to grant or amend a lease over a body corporate asset that is freehold land, or another body corporate asset capable of being leased. Further, section 137 allows bodies corporate to sell or otherwise dispose of certain body corporate assets that are personal property, including a licence or concession relating to freehold land.

In relation to section 137, the Attorney-General advises:

The purpose of the limitation imposed by section 137 is to enable bodies corporate to undertake particular actions with respect to body corporate assets for the scheme if a motion proposing a particular action with respect to body corporate assets is supported by the majority of owners voting on the motion. Body corporate assets are held by the body corporate beneficially (see BCCM Act, section 45). For this reason, it is considered the limitation imposed by section 137 is consistent with a free and democratic society, as it allows the body corporate to carry out actions with respect to body corporate assets that are supported by the majority of lot owners voting on the motion.<sup>80</sup>

Section 159 of the commercial module permits the body corporate for a community titles scheme to carry out work that a lot owner or occupier is required to carry out and to recover the reasonable costs of carrying out the work from the owner of the relevant lot as a debt.

The Attorney-General also commented on the limitation imposed by section 159:

The limitation imposed by section 159 is directly related to the purpose of the provision in that it gives bodies corporate rights to carry out work that a lot owner has failed to carry out in order to maintain scheme land in good condition and, in appropriate cases, to protect the right to life and security of a person in relation to other owners, occupiers and visitors on scheme land, by ensuring scheme land is maintained in good condition.<sup>81</sup>

#### Committee comment

The committee is satisfied that the limitations on the right to property are reasonable and demonstrably justified.

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<sup>78</sup> Human rights certificate, p 9.

<sup>79</sup> Human rights certificate, p 11.

<sup>80</sup> Human rights certificate, p 10.

<sup>81</sup> Human rights certificate, p 10.

### **7.3.3 Human Rights Act 2019, section 25 – right to privacy and reputation**

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

A number of provisions may impact a person's right to privacy.

Section 30 may limit privacy rights by requiring voting members of the committee to disclose to a committee meeting a direct or indirect interest in an issue being considered by the committee.

The Attorney-General provides:

Where a voting committee member declares a direct or indirect interest, they are not permitted to vote on the issue. This limitation is necessary to ensure committee members adhere to their obligation to act in the best interests of the body corporate.<sup>82</sup>

Section 36 provides that a committee member may only receive a benefit from a caretaking service contractor or service contractor for the scheme if the body corporate has authorised the receipt of the benefit by ordinary resolution at a general meeting of all owners. Members of the committee must also disclose details of benefits they intend to receive to the body corporate for authorisation. Section 36 impacts privacy rights of members of the committee by requiring them to disclose details of benefits they will receive from a caretaking service contractor or service contractor to the body corporate.

The Attorney-General advises:

... the limitation is necessary to enable the body corporate to decide whether to approve any benefit the committee member may receive.<sup>83</sup>

Section 54 may limit privacy rights by requiring the original owner of a community titles scheme to provide documents and material, which may contain personal or commercial information, that are relevant to the ongoing administration and management of the scheme to the body corporate at the first annual general meeting.

The Attorney-General provides this justification:

While some personal or commercial information may be included in the documents and information to be handed over by the original owner, these documents and material are all relevant to the ongoing administration and management of the scheme. For this reason, it is considered that the purpose of the limitation imposed by section 54 outweighs the importance of preserving privacy rights, in this instance.<sup>84</sup>

Section 71 impacts privacy rights by requiring the secretary to permit meeting attendees to inspect the body corporate roll, a list of individuals eligible to vote at the meeting, proxy forms and all hard copy and electronic votes.

The Attorney-General states:

This provision serves an important role in ensuring transparency in relation to the conduct of general meetings.<sup>85</sup>

Section 104 may impact privacy rights by requiring a body corporate manager or caretaking service contractor to disclose details of a relationship with a person the body corporate is considering engaging to provide goods or services.

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<sup>82</sup> Human rights certificate, p 20.

<sup>83</sup> Human rights certificate, p 21.

<sup>84</sup> Human rights certificate, p 21.

<sup>85</sup> Human rights certificate, p 21

The Attorney-General sets out this justification:

The provision ensures there is transparency about conflicts of interests in the nomination of a person proposed to be engaged by the body corporate, particularly in situations where the body corporate manager or caretaking service contractor has recommended the body corporate engage a person to provide goods or services where that person shares a relationship (either personal, professional or commercial) with the body corporate manager or caretaking service contractor. This is important to ensure the best interests of the body corporate are considered as part of the body corporate decision-making processes.<sup>86</sup>

Section 105 may impact privacy rights by requiring a body corporate manager or caretaking service contractor to disclose details of a relationship with a person the body corporate has already contracted to provide goods or services to the body corporate.

The Attorney-General provides:

The provision ensures there is transparency in relation to any conflicts of interest that may arise in relation to a person engaged by the body corporate to provide goods or services after the person has been contracted by the body corporate.<sup>87</sup>

Section 106 may impact privacy rights by requiring a body corporate manager or caretaking service contractor to disclose to the body corporate details of any commission, payment or other benefit the body corporate manager or caretaking service contractor is entitled to receive if the body corporate engages a person to provide goods or services.

The Attorney-General advises:

The limitation supports the best interests of the body corporate being considered as part of the body corporate decision-making processes. For these reasons, it is considered the purpose of the limitation imposed by section 106 outweighs the importance of preserving the right, in this instance.<sup>88</sup>

Section 149 may limit privacy rights by requiring owners to disclose details of improvements, including improvements within the boundaries of their lot, if those improvements may impact on the costs of mandatory reinstatement insurance for the community titles scheme.

The Attorney-General provides:

Failure to be adequately insured may result in costs being imposed on lot owners to reinstate the scheme if an insurable event damages elements of scheme land that the body corporate is required to insure, including improvements made by owners of the lots. In some scenarios, an owner's failure to adequately disclose improvements to the body corporate may also result in mandatory insurance for the scheme being voided. It is considered the purpose of the limitation imposed by section 149 outweighs the importance of preserving the right, in this instance.<sup>89</sup>

Section 154 requires an owner to disclose details of activities carried out within a lot if those activities are likely to result in an increase in mandatory reinstatement or public liability insurance that the body corporate is required to maintain under the legislation.

The Attorney-General advises:

It is important for bodies corporate to know information about activities carried out within a lot if those activities impact insurance costs and availability.<sup>90</sup>

Section 169 requires particular individuals or persons to provide a notice outlining details of specified events accompanied by their contact details, including a residential or business address and address for service, within one month after the specified event occurs.

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<sup>86</sup> Human rights certificate, p 22.

<sup>87</sup> Human rights certificate, p 22.

<sup>88</sup> Human rights certificate, p 22.

<sup>89</sup> Human rights certificate, p 22.

<sup>90</sup> Human rights certificate, p 23.

The Attorney-General states:

While section 169 requires the disclosure of personal contact details for owners and other relevant people to the body corporate, it is necessary for the body corporate to collect and maintain this information to ensure it is able to provide relevant scheme information, including notices of meetings and levy notices, to owners and other relevant people.<sup>91</sup>

Section 178 may impact on privacy rights by giving members of the committee reasonable access to body corporate records.

The Attorney-General provides the following justification:

Given committee members are responsible for the day-to-day operations of the body corporate, and for putting lawful decisions of the body corporate into effect, it is important that committee members can access records of the body corporate on a reasonable basis. For these reasons, it is considered the purpose of the limitation imposed by section 178 outweighs the importance of preserving the right, in this instance.<sup>92</sup>

### Committee comment

The committee is satisfied the limitations on the right to privacy are reasonable and demonstrably justified.

## **8 Body Corporate and Community Management (Small Schemes Module) Regulation 2020 (SL 231)**

### **8.1 Overview of the regulation**

The Body Corporate and Community Management (Small Schemes Module) Regulation 2020 provides management processes designed for small schemes.

To provide for flexibility of governance arrangements for community title schemes, uses and ownership types, the BCCM Act is structured such that management processes and procedures are set out in regulation modules designed for different types of schemes.

The regulation commenced on 1 March 2021, replacing the Body Corporate and Community Management (Small Schemes Module) Regulation 2008.<sup>93</sup> (The Body Corporate and Community Management (Small Schemes Module) Regulation 2008 was due to expire on 1 September 2018,<sup>94</sup> but was extended by regulations made under the *Statutory Instruments Act 1992*.<sup>95</sup>)

The small schemes module provides management processes designed for small schemes.

The new small schemes module provides for:

- the body corporate committee
- general meetings of the body corporate
- proxies for committee meetings and general meetings
- the engagement of body corporate managers and service contractors, and the authorisation of letting agents
- financial management

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<sup>91</sup> Human rights certificate, p 23.

<sup>92</sup> Human rights certificate, p 23.

<sup>93</sup> Body Corporate and Community Management (Commercial Module) Regulation 2020, ss 2, 152.

<sup>94</sup> *Statutory Instruments Act 1992*, s 54.

<sup>95</sup> Statutory Instruments (Exemptions from Expiry) Amendment Regulation 2018; Statutory Instruments (Exemptions from Expiry) Amendment Regulation 2019; Statutory Instruments (Exemptions from Expiry) Amendment Regulation 2020.

- property management and insurance
- administrative matters including recordkeeping.

## **8.2 Fundamental legislative principle issues**

### **8.2.1 *Legislative Standards Act 1992*, section 4(2)(a) – rights and liberties of individuals**

Although the new module will largely replicate the old small schemes module, a number of issues of fundamental legislative principle arise.

The fundamental legislative principles include requiring legislation to have sufficient regard to the rights and liberties of individuals.<sup>96</sup> One aspect of this principle is that legislation should not, without sufficient justification, unduly restrict ordinary activities.<sup>97</sup>

The module prescribes requirements and restrictions relevant to a body corporate's engagement of a person as a body corporate manager or service contractor.

As the explanatory notes acknowledge, these provisions restrict the capacity of parties to contract freely and establish and enforce their contractual entitlements through traditional legal means.<sup>98</sup> This invites consideration of the principle that legislation should not, without sufficient justification, unduly restrict ordinary activities.

The provisions affected are set out below.

#### Form of engagement or authorisation

Section 67 prescribes that an engagement or authorisation is void unless it is in the form required by the module, including being in writing and stating:

- the term of engagement, including when it begins and ends
- the term of any right or option of extension or renewal of the engagement
- the functions the body corporate manager or service contractor is required or authorised to carry out
- the basis for calculating payment for the body corporate manager's or service contractor's services
- any powers of an executive member of the committee that a body corporate manager is authorised to exercise.

The explanatory notes provide the following justification:

This restriction is a consumer protection measure that seeks to ensure full disclosure to the body corporate about, for example, the term of the contract, the basis of payment for services and the role to be performed. This information is necessary so the body corporate can make an informed decision about whether to engage a person as a body corporate manager.<sup>99</sup>

#### Term of engagement or authorisation

Sections 68 and 69 set out the term of engagement for a body corporate manager and service contractor to be not longer than one year. The explanatory notes set out the rationale:

These limits were put in place to prevent such agreements from being everlasting agreements over which the body corporate had no control.<sup>100</sup>

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<sup>96</sup> LSA, s 4(2)(a).

<sup>97</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, pp 118-119.

<sup>98</sup> Explanatory notes, p 14.

<sup>99</sup> Explanatory notes, p 14.

<sup>100</sup> Explanatory notes, p 15.

### Termination of engagement or authorisation

Sections 72, 73 and 74 make provision for the body corporate to terminate a person's engagement as a body corporate manager or service contractor, for a number of reasons including for being convicted of an indictable offence involving fraud or dishonesty or assault, engaging in misconduct or being grossly negligent, failing to carry out duties under the engagement/authorisation or contravening the relevant code of conduct.

The explanatory notes state:

It is considered important that body corporate managers and service contractors act within the law and it is reasonable that serious failure to do so may be an appropriate reason for the body corporate to terminate the engagement.<sup>101</sup>

In relation to actions in performing roles under an agreement, the explanatory notes state:

If the relevant contractor does not provide the expected standard of service under their engagement and does not act according to the standards set [out] in the relevant code of conduct, it is reasonable to allow the engagement to be terminated.<sup>102</sup>

### Lien against body corporate property

Section 150 requires certain people to return assets, documents and the seal of the body corporate on being given a notice requiring the return of the property. The person is prevented from claiming a lien on the body corporate records and seal. This limits the rights of that person to enforce a claim against the body corporate.

The explanatory notes provide:

This provision is considered necessary because the records and seal are essential for the functioning of the body corporate. The provision does not extend to other body corporate property.<sup>103</sup>

### Committee comment

In relation to all the above provisions, the committee is satisfied the provisions have sufficient regard to the rights and liberties of individuals, considering the justifications for the provisions.

### **8.2.2 *Legislative Standards Act 1992, section 4(5)(c)* – institution of Parliament - contains only matters appropriate to subordinate legislation**

Subsection 4(5)(c) of the LSA provides that subordinate legislation should contain only matters appropriate to that level of legislation. A number of matters dealt with in the modules may arguably be better dealt with in the BCCM Act. The explanatory notes refer to concerns raised by the former Scrutiny of Legislation Committee in its consideration of the Bill that became the BCCM Act. The former Scrutiny of Legislation Committee was concerned at certain matters being dealt with in the regulation modules rather than in principal legislation, with these matters including:

- prescribing certain details about the engagement of a person as a body corporate manager or service contractor, or the authorisation of a person as a letting agent
- making specified provision for financial management arrangements applying to a scheme
- providing for making improvements to the common property of the scheme
- making provision about the conditions in an exclusive use by-law and the obligations imposed
- requiring the body corporate to put in place insurance for the scheme.<sup>104</sup>

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<sup>101</sup> Explanatory notes, p 15.

<sup>102</sup> Explanatory notes, p 15.

<sup>103</sup> Explanatory notes, pp 15-16.

<sup>104</sup> See Scrutiny of Legislation Committee, Alert Digest, Issue No. 5 of 1997, p 2.

The explanatory notes provide:

The primary object of the BCCM Act is to provide flexible and contemporary communally based arrangements for the use of freehold land. To achieve flexibility in the legislative framework to accommodate the management needs of diverse types of schemes, the BCCM Act provides management processes and procedures through a set of regulation modules designed for the different types of schemes. Including management provisions tailored to different types of schemes in the BCCM Act would be impractical and cumbersome and unlikely to achieve the same level of flexibility and simplicity as the current regulatory framework.<sup>105</sup>

Committee comment

The committee is satisfied sufficient justification has been provided for the breach of the fundamental legislative principle relating to the institution of Parliament.

### **8.3 Human rights issues**

#### **8.3.1 Human Rights Act 2019, section 22 – peaceful assembly and freedom of association**

Under section 22 of the HRA, every person has the right to freedom of association with others.

Section 11 of the small schemes module may limit the right to freedom of association, as it prevents a person from being able to be elected as the secretary or treasurer if the individual has an associate relationship with a body corporate manager for the community title scheme, despite that person being otherwise eligible to be elected as the secretary or treasurer.

In addressing the balance between the limitation and the impact on human rights, the Minister advises:

While the provision impacts on the right to freedom of association, it is important that the secretary and treasurer make decisions that are in the best interests of the body corporate. The provision achieves its purpose in removing any risk that a secretary or treasurer will be unable to vote in the best interests of the body corporate because that person has an associate relationship with a body corporate manager or service contractor. For this reason, it is considered the limitation imposed by the provision is justified.<sup>106</sup>

Committee comment

The committee is satisfied that the limitation on the right to freedom of association is reasonable and demonstrably justified.

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

Under section 24 of the HRA, a person must not be arbitrarily deprived of their property.

Section 103 of the small schemes module permits the body corporate to sell or otherwise dispose of part of the common property, which is owned by all lot owners in the scheme as tenants in common.

This provision also permits the body corporate for a community titles scheme to grant a lease of 3 years or less over the whole of the common property, or to grant a lease over part of the common property for 10 years or less. The provision may limit property rights, as a body corporate may grant a lease for a period of 3 years or less over the whole of common property, or a lease over part of the common property for a period of 10 years or less, notwithstanding that some lot owners do not support the granting of the proposed lease.

In relation to section 103, the Attorney-General advises:

As owners of lots own common property as tenants in common, the purpose of the provision is to allow a significant majority of owners to enter into a short-term lease or licence in relation to the common property.<sup>107</sup>

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<sup>105</sup> Explanatory notes, p 16.

<sup>106</sup> Human rights certificate, p 7.

<sup>107</sup> Human rights certificate, p 9.



And, further:

Section 103 allows bodies corporate to grant a lease or licence over common property with less than unanimous support of lot owners. However, in recognition of the fact that some lot owners may not agree with the grant of a lease or licence, the provision limits the period of time that the lease or licence may apply to a maximum of three years. For the grant of a lease or licence for greater than three years, owners must pass a motion at a general meeting by resolution without dissent (i.e. the motion will not pass if any lot owner votes against the motion).<sup>108</sup>

Section 109 of the small schemes module permits the body corporate for a community titles scheme to authorise the disposal of a body corporate asset that is freehold land or a leasehold interest in freehold land. It also permits the body corporate to grant or amend a lease over a body corporate asset that is freehold land, or another body corporate asset capable of being leased. Further, section 109 allows bodies corporate to sell or otherwise dispose of certain body corporate assets that are personal property, including a licence or concession relating to freehold land.

In relation to section 109, the Attorney-General advises:

A provision that requires the consent of all lot owners would not be reasonable, as it is considered that the support of a significant majority of owners (rather than all) is sufficient for a short-term lease of body corporate assets, or the sale or disposal of particular body corporate assets that are personal property.<sup>109</sup>

Section 131 of the small schemes module permits the body corporate for a community titles scheme to carry out work that a lot owner or occupier is required to carry out and to recover the reasonable costs of carrying out the work from the owner of the relevant lot as a debt.

The Attorney-General also comments on the limitation imposed by section 131:

Section 131 empowers bodies corporate to carry out work that would ordinarily be the responsibility of an owner or occupier of a lot. In this respect, it imposes a limit on the rights of owners or occupiers to carry out work they are obligated to carry out (either under relevant legislation, or by order of a court, QCAT [Queensland Civil and Administrative Tribunal] or an adjudicator) within their own lot. The limitation is directly related to the purpose of the provision in that it gives bodies corporate rights to carry out work that a lot owner has failed to carry out in order to maintain scheme land in good condition and, in appropriate cases, to protect the right to life and security of a person in relation to other owners, occupiers and visitors on scheme land, by ensuring scheme land is maintained in good condition.<sup>110</sup>

### Committee comment

In relation to the above provisions, the committee is satisfied that the limitations on the right to property are reasonable and demonstrably justified.

### **8.3.3 Human Rights Act 2019, section 25 – right to privacy and reputation**

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

A number of provisions may impact a person's right to privacy.

Section 22 may limit privacy rights by preventing a secretary or treasurer who has a direct or indirect interest on an issue from making a decision in relation to the issue, unless specifically authorised to do so by the body corporate for the scheme.

The Attorney-General advises:

... This limitation is necessary to ensure the secretary and treasurer adhere to their obligation to act in the best interests of the body corporate. Holding a direct or indirect interest in an issue is likely to impact on the ability of a secretary or treasurer to vote on the issue in a way that represents the best interests of the body corporate. In most cases, a secretary or treasurer volunteers to be on the committee (except

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<sup>108</sup> Human rights certificate, p 10.

<sup>109</sup> Human rights certificate, p 10.

<sup>110</sup> Human rights certificate, p 10.

in schemes with a small number of lot owners), so the limitation is important to ensure the secretary or treasurer makes decisions in a way that may conflict with the interest of the body corporate on an issue. For these reasons, it is considered that the purpose of the limitation imposed by section 22 outweighs the importance of preserving the right, in this instance.<sup>111</sup>

Section 29 provides that a committee member may only receive a benefit from a service contractor for the scheme if the body corporate has authorised the receipt of the benefit by ordinary resolution at a general meeting of all owners. Members of the committee must also disclose details of benefits they intend to receive to the body corporate for authorisation. Section 29 impacts privacy rights of members of the committee by requiring them to disclose details of benefits they will receive from a service contractor to the body corporate.

The Attorney-General provides:

... the limitation is necessary to enable the body corporate to decide whether to approve any benefit the committee member may receive.<sup>112</sup>

Section 44 may limit privacy rights by requiring the original owner of a community titles scheme to provide documents and information. These documents and information may contain personal or commercial information that are relevant to the ongoing administration and management of the scheme to the body corporate at the first annual general meeting.<sup>113</sup>

The Attorney-General provides the following justification:

While some personal or commercial information may be included in the documents and information to be handed over by the original owner, these documents and information are all relevant to the ongoing administration and management of the scheme. For this reason, it is considered that the purpose of the limitation imposed by section 44 outweighs the importance of preserving privacy rights, in this instance.<sup>114</sup>

Section 53 impacts privacy rights by requiring the secretary to permit meeting attendees to inspect the body corporate roll, a list of individuals eligible to vote at the meeting, proxy forms and all hard copy and electronic votes.

The Attorney-General advises:

This provision serves an important role in ensuring transparency in relation to the conduct of general meetings.<sup>115</sup>

Section 75 may impact privacy rights by requiring a body corporate manager to disclose details of a relationship with a person the body corporate is considering engaging to provide goods or services.

The Attorney-General states:

The provision ensures there is transparency about conflicts of interests in the nomination of a person proposed to be engaged by the body corporate, particularly in situations where the body corporate manager has recommended the body corporate engage a person to provide goods or services where that person shares a relationship (either personal, professional or commercial) with the body corporate manager. This is important to ensure the best interests of the body corporate are considered as part of the body corporate decision-making processes.<sup>116</sup>

Section 76 may impact privacy rights by requiring a body corporate manager to disclose details of a relationship with a person the body corporate has already contracted to provide goods or services to the body corporate.

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<sup>111</sup> Human rights certificate, p 19.

<sup>112</sup> Human rights certificate, p 19.

<sup>113</sup> Human rights certificate, p 20.

<sup>114</sup> Human rights certificate, p 20.

<sup>115</sup> Human rights certificate, p 20.

<sup>116</sup> Human rights certificate, p 20.

The Attorney-General advises:

The provision ensures there is transparency in relation to any conflicts of interest that may arise in relation to a person engaged by the body corporate to provide goods or services after the person has been contracted by the body corporate.<sup>117</sup>

Section 77 may impact privacy rights by requiring a body corporate manager or caretaking service contractor to disclose to the body corporate details of any commission, payment or other benefit the body corporate manager or caretaking service contractor is entitled to receive if the body corporate engages a person to provide goods or services.

The Attorney-General advises:

The limitation supports the best interests of the body corporate being considered as part of the body corporate decision-making processes. For these reasons, it is considered the purpose of the limitation imposed by section 77 outweighs the importance of preserving the right, in this instance.<sup>118</sup>

Section 121 may limit privacy rights by requiring owners to disclose details of improvements, including improvements within the boundaries of their lot, if those improvements may impact on the costs of mandatory reinstatement insurance for the scheme.

The Attorney-General provides:

Failure to be adequately insured may result in costs being imposed on lot owners to reinstate the scheme if an insurable event damages elements of the scheme land that the body corporate is required to insure, including improvements made by owners of the lots. In some scenarios, an owner's failure to adequately disclose improvements to the body corporate may also result in mandatory insurance for the scheme being voided. It is considered the purpose of the limitation imposed by section 121 outweighs the importance of preserving the right, in this instance.<sup>119</sup>

Section 126 requires an owner to disclose details of activities carried out within a lot if those activities are likely to result in an increase in mandatory reinstatement or public liability insurance that the body corporate is required to maintain under the legislation.

The Attorney-General advises:

It is important for bodies corporate to know information about activities carried out within a lot if those activities impact insurance costs and availability.<sup>120</sup>

Section 140 requires particular individuals or persons to provide a notice outlining details of specified events accompanied by their contact details, including a residential or business address and address for service, within one month after the specified event occurs.

The Attorney-General states:

While section 140 requires the disclosure of personal contact details for owners and other relevant people to the body corporate, it is necessary for the body corporate to collect and maintain this information to ensure it is able to provide relevant scheme information, including notices of meetings and levy notices, to owners and other relevant people.<sup>121</sup>

Section 147 may impact on privacy rights by giving members of the committee reasonable access to body corporate records.

The Attorney-General provides:

Given committee members are responsible for the day-to-day operations of the body corporate, and for putting lawful decisions of the body corporate into effect, it is important that committee members can

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<sup>117</sup> Human rights certificate, p 20.

<sup>118</sup> Human rights certificate, p 21.

<sup>119</sup> Human rights certificate, p 21.

<sup>120</sup> Human rights certificate, p 21.

<sup>121</sup> Human rights certificate, p 21.

access records of the body corporate on a reasonable basis. For these reasons, it is considered the purpose of the limitation imposed by section 147 outweighs the importance of preserving the right, in this instance.<sup>122</sup>

### Committee comment

In relation to all of the above provisions, the committee is satisfied that the limitations on the right to privacy are reasonable and demonstrably justified.

## **9 Body Corporate and Community Management (Specified Two-lot Schemes Module) Amendment Regulation 2020 (SL 232)**

### **9.1 Overview of the regulation**

The objective of the Body Corporate and Community Management (Specified Two-lot Schemes Module) Amendment Regulation 2020 is to improve the day-to-day management and administration of specified two-lot community titles schemes through a number of specific measures, achieved through amendments to the Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011 (the Specified Two-lot Schemes Module).<sup>123</sup>

To provide for flexibility of governance arrangements for community title schemes, uses and ownership types, the BCCM Act is structured such that management processes and procedures are set out in regulation modules designed for different types of schemes.

Specifically, the amendment regulation contains provisions to:

- increase obligations on body corporate managers to disclose commissions, payments or other benefits
- clarify a lot owner's responsibility to maintain utility infrastructure on common property that relates only to the supply of utility services to the owner's lot
- increase flexibility to use email and other electronic means of communication for the giving of, or serving of, documents and information to lot owners
- change the time for giving of particular notices to the body corporate
- clarify the original owner's obligation to provide particular information to the body corporate when the original owner sells one or both lots included in a specified two lot scheme, and change how the information must be provided
- require a body corporate to consider the preparation of a defect assessment report for particular property it is required to insure
- at the same time a body corporate considers obtaining a defect assessment report for particular property it must insure, enable a body corporate to establish a voluntary defect assessment plan for lots established by standard format plan that do not share a common wall with another lot in the scheme.<sup>124</sup>

### **9.2 Fundamental legislative principle issues**

#### **9.2.1 *Legislative Standards Act 1992, section 4(2)(a) – penalties***

Section 21 of the Specified Two-lot Schemes Module requires that, before a body corporate enters into a contract, the body corporate manager must disclose any commissions, payments or other benefits the manager is entitled to receive in relation to that contract. The regulation amends

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<sup>122</sup> Human rights certificate, p 21.

<sup>123</sup> Explanatory notes, p 1.

<sup>124</sup> Explanatory notes, p 2.

section 21 to require that the body corporate manager disclose the *exact* monetary amount of the benefit.<sup>125</sup>

The maximum penalty for contravention of this provision is 20 penalty units.<sup>126</sup>

A penalty should be proportionate to the offence. The OQPC Notebook states:

Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.<sup>127</sup>

The former Scrutiny of Legislation Committee accepted that the legislative power to create offences and prescribe penalties may be delegated in limited circumstances, provided certain safeguards were observed. This included that maximum penalties in regulations should be limited, generally, to 20 penalty units. The OQPC Notebook states:

The principal means of creating offences should always be through the Acts of Parliament rather than delegated legislation.<sup>128</sup>

The explanatory notes do not address the issue of penalties. Rather, it was stated that the regulation was 'consistent with fundamental legislative principles'.<sup>129</sup>

Commenting more generally on the purpose of this particular amendment, the explanatory notes state:

This approach is reasonable and appropriate, as it ensures the body corporate receives clear information about the monetary amount a body corporate manager will receive if the body corporate enters into a contract with a person to provide goods or services to the body corporate.<sup>130</sup>

#### Committee comment

The committee is satisfied that the penalty imposed is reasonable and proportionate, and that any infringement on individual rights and liberties is justified.

### **9.3 Human rights issues**

In the human rights certificate accompanying the regulation, the Attorney-General states her opinion that the regulation is compatible:

- with the human rights protected by the HRA<sup>131</sup>
- with the HRA because while it does limit, restrict or interfere with human rights, those limitations are reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.<sup>132</sup>

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<sup>125</sup> Explanatory notes, p 2; Body Corporate and Community Management (Specified Two-lot Schemes Module) Amendment Regulation 2020, s 4(2).

<sup>126</sup> Body Corporate and Community Management (Specified Two-lot Schemes Module) Amendment Regulation 2020, s 4(2).

<sup>127</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 120.

<sup>128</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, pp 150-151.

<sup>129</sup> Explanatory notes, p 11.

<sup>130</sup> Explanatory notes, p 6.

<sup>131</sup> Human rights certificate, p 1.

<sup>132</sup> Human rights certificate, p 6.

The following human rights issues were considered by the committee.<sup>133</sup>

### **9.3.1 Human Rights Act 2019, section 25 – rights to privacy and reputation**

Under section 25 of the HRA, every person in Queensland has the right not to have their privacy unlawfully or arbitrarily interfered with.

The amendments which require a body corporate manager to disclose to the body corporate personal or commercial information (in the form of the monetary amount of a commission, payment or benefit the manager may receive in relation to a proposed body corporate contract) limit the right to privacy.<sup>134</sup>

The Attorney-General explains the purpose of this limitation:

The purpose of the limitation imposed by section 4 of the Amendment Regulation is to ensure that the body corporate is aware of any monetary amount the body corporate manager may be entitled to receive as a result of the body corporate engaging a person to provide goods or service. This limitation on privacy rights is consistent with a free and democratic society, as it ensures a body corporate can make a decision that is in its best interests in relation to the engagement of a person to provide goods or services to the body corporate.<sup>135</sup>

In assessing the balance between the limitation and the right to privacy, the Attorney-General states:

The amendments to section 21 ensure greater transparency about body corporate manager conflicts of interests, by ensuring the body corporate is informed of monetary amounts a body corporate manager will receive if the body corporate enters into a contract for goods or services. This enhanced disclosure is particularly important given it is common for body corporate managers to source quotations for the supply of goods and services for the body corporate and the disclosure is critical to ensuring the best interests of the body corporate are considered as part of the body corporate decision-making processes. For these reasons, it is considered the purpose of the limitation imposed by the amendments to section 21 outweighs the importance of preserving the right to privacy, in this instance.<sup>136</sup>

The amendments that clarify an original owner's obligation to provide particular information to the body corporate when the original owner sells one or both lots included in a specified two-lot scheme may also limit the right to privacy.<sup>137</sup> The Attorney-General explains:

While it is unlikely, personal or commercial information about the original owner or other people relevant to the community titles scheme may be included in some of the documents and information required to be given to the body corporate by the original owner.<sup>138</sup>

The purpose of this limitation is set out in the human rights certificate as follows:

The purpose of the limitation imposed by section 12 of the Amendment Regulation is to ensure the body corporate is provided with documents and information by the original owner that are relevant to the ongoing administration and management of the community titles scheme, after the original owner no longer owns one or both lots in the scheme. The limitation on privacy rights is consistent with a free and

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<sup>133</sup> Note that the human rights certificate also raised property rights (HRA, s 24) as a human rights issue, in the sense that the regulation generally promoted the property rights of lot owners. Whilst this regulation engages with property rights, it does not appear to limit those rights, and therefore a section 13 analysis is not required.

<sup>134</sup> These amendments are set out in section 4 of Body Corporate and Community Management (Specified Two-lot Schemes Module) Amendment Regulation 2020 and will amend section 21 of the Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011. See also human rights certificate, p 3.

<sup>135</sup> Human rights certificate, p 4.

<sup>136</sup> Human rights certificate, p 6.

<sup>137</sup> These amendments are set out in section 12 of Body Corporate and Community Management (Specified Two-lot Schemes Module) Amendment Regulation 2020 and will amend section 67 of the Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011.

<sup>138</sup> Human rights certificate, p 4.

democratic society, as it is designed to assist bodies corporate carry out their role in administering and managing the community titles scheme for the benefit of the lot owners.<sup>139</sup>

In assessing the balance between the limitation and the right to privacy, the Attorney-General states:

It is important for a body corporate to maintain records relevant to the community titles scheme, including records relating to the original owner's dealings in establishing the scheme and their dealings as the sole member of the body corporate in the early period after scheme establishment, when the original owner has sole control of the operation of the body corporate.

While some personal or commercial information may be included in the documents and information to be handed over by the original owner, these documents and information are all relevant to the ongoing administration and management of the scheme. For this reason, it is considered that the purpose of the limitation imposed by the amendments to section 67 outweighs the important of preserving privacy rights, in this instance.<sup>140</sup>

#### Committee comment

The committee is satisfied that the limitations on the right to privacy are reasonable and demonstrably justified.

## **10 Body Corporate and Community Management (Standard Module) Regulation 2020 (SL 233)**

### **10.1 Overview of the regulation**

The objective of the Body Corporate and Community Management (Standard Module) Regulation 2020 is to provide a comprehensive set of governance rules that is appropriate for a diverse range of community titles schemes. Each of the other regulation modules is designed for a specific type of community titles scheme, whereas the standard module applies to any scheme that is registered without a specific regulation module chosen.

To provide for flexibility of governance arrangements for community title schemes, uses and ownership types, the BCCM Act is structured such that management processes and procedures are set out in regulation modules designed for different types of schemes.

The regulation commenced on 1 March 2021, replacing the Body Corporate and Community Management (Standard Module) Regulation 2008.<sup>141</sup> (The Body Corporate and Community Management (Standard Module) Regulation 2008 was due to expire on 1 September 2018,<sup>142</sup> but was extended by regulations made under the *Statutory Instruments Act 1992*.<sup>143</sup>)

The new standard module is suitable for a wide variety of community titles schemes and is the default regulation module that applies to a community titles scheme if no other regulation module is applicable.

The new standard module provides for:

- the body corporate committee
- general meetings of the body corporate
- proxies for committee meetings and general meetings

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<sup>139</sup> Human rights certificate, p 5.

<sup>140</sup> Human rights certificate, p 6.

<sup>141</sup> Body Corporate and Community Management (Standard Module) Regulation 2020, ss 2, 237.

<sup>142</sup> *Statutory Instruments Act 1992*, s 54.

<sup>143</sup> Statutory Instruments (Exemptions from Expiry) Amendment Regulation 2018; Statutory Instruments (Exemptions from Expiry) Amendment Regulation 2019; Statutory Instruments (Exemptions from Expiry) Amendment Regulation 2020.

- the engagement of body corporate managers and service contractors, and the authorisation of letting agents
- financial management
- property management and insurance
- administrative matters including recordkeeping.

## 10.2 Fundamental legislative principle issues

### 10.2.1 *Legislative Standards Act 1992, section 4(2)(a)* – rights and liberties of individuals

Although the new module will largely replicate the old standard module, a number of issues of fundamental legislative principle arise.

The fundamental legislative principles include requiring legislation to have sufficient regard to the rights and liberties of individuals.<sup>144</sup> One aspect of these principles is that legislation should not, without sufficient justification, unduly restrict ordinary activities.<sup>145</sup>

The standard module prescribes requirements and restrictions relevant to a body corporate's engagement of a person as a body corporate manager or service contractor, or authorisation of a person as a letting agent.

These provisions restrict the capacity of parties to contract freely and establish and enforce their contractual entitlements through traditional legal means. This breaches the principle that legislation should not, without sufficient justification, unduly restrict ordinary activity.

The relevant provisions are set out below.

#### Form of engagement or authorisation

Sections 137 and 138 prescribe that an engagement or authorisation is void unless it is in the form required by the module, including being in writing and stating:

- the term of the engagement, including when it begins and ends
- the term of any right or option of extension or renewal of the engagement
- the functions the body corporate manager or service contractor is required or authorised to carry out
- the basis for calculating payment for the body corporate manager's or service contractor's services
- any powers of an executive member of the committee that a body corporate manager is authorised to exercise.

The explanatory notes provide the following justification:

This restriction is a consumer protection measure that seeks to ensure full disclosure to the body corporate about, for example, the term of the contract, the basis of payment for services and the role to be performed. This information is necessary so the body corporate can make an informed decision about whether to engage or authorise a person.<sup>146</sup>

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<sup>144</sup> LSA, s 4(2)(a).

<sup>145</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, pp 118-119.

<sup>146</sup> Explanatory notes, p 17.



### Term of engagement or authorisation

Sections 139, 140 and 141 respectively set out the term of engagement for a body corporate manager to be not longer than 3 years, the term for a service contractor to be not longer than 10 years and the term for a letting agent to be not more than 10 years.

The explanatory notes provide:

These limits were put in place to prevent such agreements from being everlasting agreements over which the body corporate had no control. Across the operation of the expiring Standard Module, the limits set for the engagement of a service contractor and the authorisation of a letting agent appear to have been sufficient to allow a service contractor/letting agent a reasonable prospect of obtaining a return on investment.<sup>147</sup>

### Transfer of engagement or authorisation

Section 143 prescribes that a person's rights under an engagement as a body corporate manager or service contractor, or an authorisation as a letting agent, may be transferred only if the body corporate approves the transfer. The body corporate may have regard to several factors in deciding whether to approve a proposed transfer but cannot unreasonably refuse a transfer and must not require or receive a fee or other consideration for approving the transfer.

The explanatory notes provide:

These transfer provisions provide flexibility to body corporate managers, service contractors and letting agents to assign their rights to another party. This provision offers protection to letting agents and service contractors, who have usually invested significant funds in purchasing the letting or caretaking rights, from significant financial loss if they are unable to continue their role.

However, this flexibility is balanced with provisions that protect owners from being disadvantaged by the transfer by allowing the body corporate to refuse a transfer to a particular transferee on reasonable grounds and to also seek reimbursement for costs reasonably incurred in considering the transfer.<sup>148</sup>

### Termination of engagement or authorisation

Sections 151 and 152 make provision for the body corporate to terminate a person's engagement as a body corporate manager or service contractor, or authorisation as a letting agent, for a number of reasons including for being convicted of an indictable offence involving fraud or dishonesty or assault, engaging in misconduct or being grossly negligent, failing to carry out duties under the engagement/authorisation or contravening the relevant code of conduct.

The explanatory notes state:

It is important that body corporate managers, service contractors and letting agents act within the law and it is reasonable that serious failures to do so may be an appropriate reason for the body corporate to terminate the engagement or authorisation.<sup>149</sup>

They state, in relation to actions in performing the contractual role:

If the relevant contractor does not provide the expected standard of service under their engagement/authorisation and does not act according to the standards set [out] in the relevant code of conduct, it is reasonable to allow the engagement or authorisation to be terminated.<sup>150</sup>

### Lien against body corporate property

Section 235 requires certain people to return assets, documents and the seal of the body corporate on being given a notice requiring the return of the property. The person is prevented from claiming a

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<sup>147</sup> Explanatory notes, p 17.

<sup>148</sup> Explanatory notes, p 18.

<sup>149</sup> Explanatory notes, p 18.

<sup>150</sup> Explanatory notes, p 18.

lien on the body corporate records and seal. This limits the rights of that person to enforce a claim against the body corporate.

The explanatory notes provide:

This provision is considered necessary because the records and seal are essential for the functioning of the body corporate. The provision does not extend to other body corporate property.<sup>151</sup>

#### Committee comment

In relation to all of the above provisions, the committee is satisfied the provisions have sufficient regard to the rights and liberties of individuals, given the justifications for the provisions.

#### **10.2.2 Legislative Standards Act 1992, section 4(5)(c) – institution of Parliament - contains only matters appropriate to subordinate legislation**

Subsection 4(5)(c) of the LSA provides that subordinate legislation should contain only matters appropriate to that level of legislation. A number of matters dealt with in the modules may arguably be better dealt with in the BCCM Act itself. The explanatory notes refer to concerns raised by the former Scrutiny of Legislation Committee in its consideration of the Bill that became the BCCM Act.<sup>152</sup> The former Scrutiny of Legislation Committee was concerned at certain matters being dealt with in the regulation modules rather than in principal legislation, with these matters including:

- prescribing certain details about the engagement of a person as a body corporate manager or service contractor, or the authorisation of a person as a letting agent
- making specified provision for financial management arrangements applying to a scheme
- providing for making improvements to the common property of the scheme
- making provision about the conditions in an exclusive use by-law and the obligations imposed
- requiring the body corporate to put in place insurance for the scheme.<sup>153</sup>

The explanatory notes provide:

The primary object of the BCCM Act is to provide flexible and contemporary communally based arrangements for the use of freehold land. To achieve flexibility in the legislative framework to accommodate the management needs of diverse types of schemes, the BCCM Act provides management processes and procedures through a set of regulation modules designed for the different types of schemes. Including management provisions tailored to different types of schemes in the BCCM Act would be impractical and cumbersome and unlikely to achieve the same level of flexibility and simplicity as the current regulatory framework.<sup>154</sup>

#### Committee comment

The committee is satisfied sufficient justification has been provided for the breach of the fundamental legislative principle relating to the institution of Parliament.

### **10.3 Human rights issues**

#### **10.3.1 Human Rights Act 2019, section 22 – peaceful assembly and freedom of association**

Under section 22 of the HRA, every person has the right to freedom of association with others.

Section 10 of the standard module may limit the right to freedom of association, as it prevents a person from being able to be elected as a voting member of a body corporate committee if the individual has an associate relationship with a body corporate manager, service contractor or letting agent for the

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<sup>151</sup> Explanatory notes, p 19.

<sup>152</sup> Body Corporate and Community Management Bill 1973.

<sup>153</sup> See Scrutiny of Legislation Committee, Alert Digest, Issue No. 5 of 1997, p 2.

<sup>154</sup> Explanatory notes, p 19.

community titles scheme, despite that person being otherwise eligible to be a voting member of the committee.

The Attorney-General advises:

While the provision impacts on the right to freedom of association, it is important that voting members of the committee make decisions that are in the best interests of the body corporate. The provision achieves its purpose in removing any risk that a voting member of the committee will be unable to vote in the best interests of the body corporate because that person has an associate relationship with a body corporate manager, service contractor or letting agent. For this reason, it is considered the limitation imposed by the provision is justified.<sup>155</sup>

#### Committee comment

The committee is satisfied that the limitation on the right to freedom of association is reasonable and demonstrably justified.

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

Under section 24 of the HRA, a person must not be arbitrarily deprived of their property.

Section 184 of the regulation provides that a body corporate for a community titles scheme may decide by special resolution to grant a lease of 3 years or less over the whole of the common property, or to grant a lease over part of the common property for 10 years or less. The provision may limit property rights, as a body corporate may grant a lease for a period of 3 years or less over the whole of common property, or a lease over part of the common property for a period of 10 years or less, notwithstanding that some lot owners do not support the granting of the proposed lease.

In relation to section 184, the Attorney-General advises:

... Section 184 does not impose an arbitrary or unreasonable limit on property rights, as a decision to grant a lease or licence passed by a special resolution threshold reflects that the majority of lot owners' support granting a lease or licence.

Also, in recognition of the implications of the grant of a lease or licence, the provision only permits the grant of a lease or licence for three years or less if a motion is passed by special resolution. A grant of a lease or licence of more than three years requires a motion to be passed by resolution without dissent (where no votes may be recorded as voting against the motion). For these reasons, it is considered the purpose of the limitation imposed by section 184 outweighs the importance of preserving the right, in this instance.<sup>156</sup>

Section 190 of the regulation permits the body corporate for a community titles scheme to authorise the disposal of a body corporate asset that is freehold land or a leasehold interest in freehold land. It also permits the body corporate to grant or amend a lease over a body corporate asset that is freehold land, or another body corporate asset capable of being leased. Further, section 190 allows bodies corporate to sell or otherwise dispose of body corporate assets of a particular value that are personal property, including a licence or concession relating to freehold land.

For section 190, the Attorney-General advises:

Section 190 does not impose an arbitrary or unreasonable limit on property rights, as a decision passed by a special resolution reflects that the majority of lot owners support the grant of a lease over a body corporate asset, or the sale or disposal of particular body corporate assets. Also, in recognition of the implications of the grant of a lease, the provision only permits the grant of a lease for three years or less if a motion is passed by special resolution. A grant of a lease or licence of more than three years over a body corporate asset requires a motion to be passed by resolution without dissent (where no votes may be recorded as voting against the motion).

Similarly, the provision only permits the sale or disposal of particular body corporate assets that are personal property by a special resolution threshold. For the sale or disposal of a body corporate asset that

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<sup>155</sup> Human rights certificate, p 7.

<sup>156</sup> Human rights certificate, p 12.

involves freehold land, which is likely to have a more significant impact on lot owners' property rights, a decision must be passed by a resolution without dissent. For these reasons, it is considered the purpose of the limitation outweighs the importance of preserving the right, in this instance.<sup>157</sup>

Section 212 of the regulation permits the body corporate for a community titles scheme to carry out work that a lot owner or occupier is required to carry out and to recover the reasonable costs of carrying out the work from the owner of the relevant lot as a debt.

The Attorney-General also comments on section 212:

It is not considered that section 212 of the Standard Module imposes arbitrary or unreasonable limitations on the individual property rights of owners and occupiers. It only empowers bodies corporate to carry out work that an owner or occupier would ordinarily be obligated to complete, if that owner or occupier fails to comply with their obligations in relation to that work. For this reason, it is considered the purpose of the limitation outweighs the importance of preserving the right, in this instance.<sup>158</sup>

#### Committee comment

The committee is satisfied that the limitations on the right to property are reasonable and demonstrably justified.

#### **10.3.3 Human Rights Act 2019, section 25 – right to privacy and reputation**

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

A number of provisions may impact a person's right to privacy.

Section 66 may limit privacy rights by requiring voting members of the committee to disclose to a committee meeting a direct or indirect interest in an issue being considered by the committee.

The Attorney-General provides the following justification:

This limitation is necessary to ensure committee members adhere to their obligation to act in the best interests of the body corporate.<sup>159</sup>

Section 79 provides that a committee member may only receive a benefit from a caretaking service contractor or service for the scheme if the body corporate has authorised the receipt of the benefit by ordinary resolution at a general meeting of all owners. Members of the committee must also disclose details of benefits they intend to receive to the body corporate for authorisation.

The Attorney-General provides:

While section 79 impacts privacy rights of members of the committee by requiring them to disclose details of benefits they will receive from a caretaking service contractor or service contractor to the body corporate, the limitation is necessary to enable the body corporate to decide whether to approve any benefit the committee member may receive.<sup>160</sup>

Section 96 may limit privacy rights by requiring the original owner of a community titles scheme to provide documents and information, which may contain personal or commercial information, that are relevant to the ongoing administration and management of the scheme to the body corporate at the first annual general meeting.

The Attorney-General advises:

While some personal or commercial information may be included in the documents and information to be handed over by the original owner, these documents and information are all relevant to the ongoing administration and management of the scheme. For this reason, it is considered that the purpose of the

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<sup>157</sup> Human rights certificate, p 12.

<sup>158</sup> Human rights certificate, p 12.

<sup>159</sup> Human rights certificate, p 20.

<sup>160</sup> Human rights certificate, p 21.

limitation imposed by section 96 outweighs the importance of preserving privacy rights, in this instance.<sup>161</sup>

Section 113 impacts privacy rights by requiring the secretary to permit meeting attendees to inspect the body corporate roll, a list of individuals eligible to vote at the meeting, proxy forms and all hard copy and electronic votes.

The Attorney-General states:

This provision serves an important role in ensuring transparency in relation to the conduct of general meetings.<sup>162</sup>

Section 154 may impact privacy rights by requiring a body corporate manager or caretaking service contractor to disclose details of a relationship with a person the body corporate is considering engaging to provide goods or services.

The Attorney-General provides:

The provision ensures there is transparency about conflicts of interests in the nomination of a person proposed to be engaged by the body corporate, particularly in situations where the body corporate manager or caretaking service contractor has recommended the body corporate engage a person to provide goods or services where that person shares a relationship (either personal, professional or commercial) with the body corporate manager or caretaking service contractor. This is important to ensure the best interests of the body corporate are considered as part of the body corporate decision-making processes.<sup>163</sup>

Section 155 may impact privacy rights by requiring a body corporate manager or caretaking service contractor to disclose details of a relationship with a person the body corporate has already contracted to provide goods or services to the body corporate.

The Attorney-General advises:

The provision ensures there is transparency in relation to any conflicts of interest that may arise in relation to a person engaged by the body corporate to provide goods or services after the person has been contracted by the body corporate.<sup>164</sup>

Section 156 may impact privacy rights by requiring a body corporate manager or caretaking service contractor to disclose to the body corporate details of any commission, payment or other benefit the body corporate manager or caretaking service contractor is entitled to receive if the body corporate engages a person to provide goods or services.

The Attorney-General states:

This is particularly important given it is common for body corporate managers and caretaking service contractors to source quotations for the supply of goods and services for the body corporate. The limitation supports the best interests of the body corporate being considered as part of the body corporate decision-making processes.<sup>165</sup>

Section 202 may limit privacy rights by requiring owners to disclose details of improvements, including improvements within the boundaries of their lot, if those improvements may impact on the costs of mandatory reinstatement insurance for the scheme.

The Attorney-General advises:

Failure to be adequately insured may result in costs being imposed on lot owners to reinstate the scheme if an insurable event damages elements of the scheme land that the body corporate is required to insure, including improvements made by owners of the lots. In some scenarios, an owner's failure to adequately

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<sup>161</sup> Human rights certificate, p 21.

<sup>162</sup> Human rights certificate, p 21.

<sup>163</sup> Human rights certificate, p 22.

<sup>164</sup> Human rights certificate, p 22.

<sup>165</sup> Human rights certificate, p 22.

disclose improvements to the body corporate may also result in mandatory insurance for the scheme being voided. For these reasons, it is considered the purpose of the limitation imposed by section 202 outweighs the importance of preserving the right, in this instance.<sup>166</sup>

Section 207 requires an owner to disclose details of activities carried out within a lot if those activities are likely to result in an increase in mandatory reinstatement or public liability insurance that the body corporate is required to maintain under the legislation.

The Attorney-General provides the following justification:

It is important for bodies corporate to know information about activities carried out within a lot if those activities impact insurance costs and availability.<sup>167</sup>

Section 223 requires particular individuals or persons to provide a notice outlining details of specified events accompanied by their contact details, including a residential or business address and address for service, within one month after the specified event occurs.

The Attorney-General states:

While section 223 requires the disclosure of personal contact details for owners and other relevant people to the body corporate, it is necessary for the body corporate to collect and maintain this information to ensure it is able to provide relevant scheme information, including notices of meetings and levy notices, to owners and other relevant people.<sup>168</sup>

Section 232 may impact on privacy rights by giving members of the committee reasonable access to body corporate records.

The Attorney-General states:

Given committee members are responsible for the day-to-day operations of the body corporate, and for putting lawful decisions of the body corporate into effect, it is important that committee members can access records of the body corporate on a reasonable basis. For these reasons, it is considered the purpose of the limitation imposed by section 232 outweighs the importance of preserving the right, in this instance.<sup>169</sup>

### Committee comment

In relation to all of the above provisions, the committee is satisfied that the limitations on the right to privacy are reasonable and demonstrably justified.

## **11 Disaster Management (Further Extension of Disaster Situation—COVID-19) Regulation (No. 6) 2020 (SL 245)**

### **11.1 Overview of the regulation**

The objective of the Disaster Management (Further Extension of Disaster Situation—COVID-19) Regulation (No. 6) 2020 is to further extend the period of the disaster situation declared for the whole of the State of Queensland on 22 March 2020 (and extended by regulation on 2, 16 and 30 April 2020; 14 and 28 May 2020; and 27 August 2020).

Unless extended by regulation under section 72 of the *Disaster Management Act 2003* (the Act), or by declaration pursuant to section 72A of the Act, a disaster situation ends 14 days after the day it was declared. This regulation extended the period of the disaster situation to 31 December 2020.<sup>170</sup>

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<sup>166</sup> Human rights certificate, p 22.

<sup>167</sup> Human rights certificate, p 23.

<sup>168</sup> Human rights certificate, p 23.

<sup>169</sup> Human rights certificate, p 23.

<sup>170</sup> Disaster Management (Further Extension of Disaster Situation—COVID-19) Regulation (No. 6) 2020, s 2.

The further extension of the declaration extended the duration of the availability of a number of powers under the Act. Some of these powers include:

- the control and movement of persons, animals or vehicles within the declared area
- giving a direction to a person to regulate the movement of a person, animal or vehicle into or out of a declared area
- entering a place or area
- removing, dismantling or demolishing or destroying a vehicle, or a building or other structure in the declared area.

## **11.2 Fundamental legislative principle issues**

### **11.2.1 *Legislative Standards Act 1992*, section 4(2)(a) – rights and liberties of individuals**

The reasonableness and fairness of treatment of individuals is relevant in deciding whether legislation has sufficient regard to the rights and liberties of individuals. The exercise of the powers listed above can involve quite significant restrictions on the rights and liberties of an individual.

The explanatory notes state that the regulation is consistent with fundamental legislative principles, and do not address the issues of fundamental legislative principle that arise. (This might be on the basis that the powers are contained in the principal Act itself). The explanatory notes do state:

A further extension is required due to the longer-term nature of COVID-19 and its potential impacts. Extension of the period of the disaster situation is necessary to ensure powers are available to appropriately address risk to the health of the Queensland community.<sup>171</sup>

#### Committee comment

The committee is satisfied the breaches of fundamental legislative principle which arise from the restrictions on a person's rights and liberties are justified, given the COVID-19 public health emergency.

## **11.3 Human rights issues**

In the human rights certificate accompanying the amendment regulation, the then Minister for Fire and Emergency Services and Minister for Aboriginal and Torres Strait Islander Partnerships, Hon Craig Crawford MP (Minister), states his opinion that the amendment regulation is compatible:

- with the human rights protected by the HRA<sup>172</sup>
- with the HRA because it limits, restricts or interferes with human rights, only to the extent that it is reasonable and demonstrably justifiable in accordance with section 13 of the HRA.<sup>173</sup>

The committee considered the following human rights issues.

### **11.3.1 *Human Rights Act 2019*, section 19 – freedom of movement**

Under section 19 of the HRA, every person lawfully within Queensland has the right to move freely within Queensland and to enter and leave it.

The regulation may limit a person's right of freedom of movement because it allows for the exercise of powers controlling the movement of persons into, out of, or around the declared area for the disaster situation.<sup>174</sup>

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<sup>171</sup> Explanatory notes, p 1.

<sup>172</sup> Human rights certificate, p 1.

<sup>173</sup> Human rights certificate, p 12.

<sup>174</sup> Human rights certificate, p 3.

The Minister provides the following justification:

On the basis of the nature of the health emergency, limiting persons identified with, or suspected of having, COVID-19 from circulating freely amongst the general public is considered reasonable and justifiable due to increased risks to vulnerable persons.

On balance, having regard to the nature and extent of the limitation on the right ... the importance of achieving the protection of a person's, or the public's, health outweighs the harm caused to a person's freedom of movement.<sup>175</sup>

Committee comment

The committee is satisfied the limitation on human rights is reasonable and demonstrably justified.

**11.3.2 Human Rights Act 2019, section 22 – peaceful assembly and freedom of association**

Under section 22 of the HRA, every person has the right of peaceful assembly.

The regulation may limit a person's right to peaceful assembly and freedom of association because it allows for the exercise of powers to control movement of persons (as outlined above) which may result in the dispersal of groups of persons.<sup>176</sup>

The Minister provides this justification:

The purpose of limiting the right to assemble peacefully is to reduce the risk of human to human transmission of COVID-19, consistent with multi-tier government requirements relating to mass gatherings during the COVID-19 response.<sup>177</sup>

Committee comment

The committee is satisfied the limits on human rights are reasonable and demonstrably justified, given the public health emergency and the overall objective of the regulation.

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

Under section 24 of the HRA, a person must not be arbitrarily deprived of their property.

This regulation will extend the availability of powers, which include powers to enter a place, remove things from a place, and direct a person to leave or not enter an area.

The Minister states:

The purpose of any deprivation of a person of their property under the relevant powers is to minimise the risk of transmission of COVID-19 to vulnerable persons.<sup>178</sup>

Committee comment

The committee is satisfied the limits on human rights are reasonable and demonstrably justified, given the public health emergency and the overall objective of the regulation.

**11.3.4 Human Rights Act 2019, section 25 – right to privacy and reputation**

Under section 25 of the HRA, a person has the right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

The extension of the disaster situation may limit a person's right to privacy, as it allows for powers to be exercised that include entering a place in the declared area. The exercise of this power may interfere with a person's home or privacy.<sup>179</sup>

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<sup>175</sup> Human rights certificate, p 4.

<sup>176</sup> Human rights certificate, p 5.

<sup>177</sup> Human rights certificate, p 5.

<sup>178</sup> Human rights certificate, p 6.

<sup>179</sup> Human rights certificate, p 9.



The Minister provides this justification:

Due to the concerns relating to contact and proximity of persons identified with or suspected of having COVID-19, there are no less restrictive or reasonably available ways to achieve the purpose.

...

On balance, having regard to the nature and extent of the limitation on the right and the information detailed above, the importance of achieving the protection of a person's, or the public's, health outweighs the harm caused to [a] person's right to privacy under these circumstances.<sup>180</sup>

#### Committee comment

The committee is satisfied the limits on human rights are reasonable and demonstrably justified, given the public health emergency and the overall objective of the regulation.

#### **11.3.5 Human Rights Act 2019, section 29 – right to liberty and security**

Under section 29 of the HRA, a person has the right not to be subjected to arbitrary arrest or detention or to be deprived of their liberty.

The extension of the disaster situation may limit a person's right to liberty and security because it allows for powers to be exercised that include controlling the movement of persons into, out of, or around the declared area. The exercise of these powers may result in a person being deprived of their liberty for a period of time.<sup>181</sup>

The Minister states:

Due to the human to human transfer of the virus, restrictions need to be imposed on the movement of persons to reduce the risks of transmission of the virus. In particular, the movement of persons who are identified with or suspected of having COVID-19 needs to be limited in order to prevent them from circulating freely amongst the general public and spreading the virus.<sup>182</sup>

#### Committee comment

The committee is satisfied the limits on human rights are reasonable and demonstrably justified, given the public health emergency and the overall objective of the regulation.

## **12 Recommendation**

The committee recommends that the House notes this report.



Peter Russo MP

**Chair**

**March 2021**

#### **Legal Affairs and Safety Committee**

**Chair**

**Deputy Chair**

**Members**

Mr Peter Russo MP, Member for Toohey  
Mrs Laura Gerber MP, Member for Currumbin  
Ms Sandy Bolton MP, Member for Noosa  
Ms Jonty Bush MP, Member for Cooper  
Mr Jason Hunt MP, Member for Caloundra  
Mr Andrew Powell MP, Member for Glass House

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<sup>180</sup> Human rights certificate, pp 9-10.

<sup>181</sup> Human rights certificate, p 10.

<sup>182</sup> Human rights certificate, p 11.