

Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee

Report No. 42, 56th Parliament

Subordinate legislation tabled between 20 May and 13 July 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 20 May and 13 July 2020. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles (FLPs) and lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992* (Legislative Standards Act).¹

The report also identifies any issues identified by the committee in its consideration of the human rights certificates tabled with the subordinate legislation.²

2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date
74	Health (Drugs and Poisons) Amendment Regulation 2020	20 May 2020	1 December 2020
75	Public Health (Further Extension of Declared Public Health Emergency—COVID-19 Regulation (No. 3) 2020	20 May 2020	1 December 2020
80	Health Legislation (COVID-19 Emergency Response) Regulation 2020	8 June 2020	2 December 2020
_3	Health Practitioner Regulation National Law Amendment (Miscellaneous) Regulation 2019	9 June 2020	2 December 2020
123	Youth Justice (COVID-19 Emergency Response) Regulation 2020	13 July 2020	To be advised

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

3 Committee consideration of the subordinate legislation

SL Nos 74, 75, 80 and the Health Practitioner Regulation National Law Amendment (Miscellaneous) Regulation 2019 raise fundamental legislative principles issues as outlined below. The committee is satisfied, however, that any breaches are reasonable and justified. The committee considers

¹ *Legislative Standards Act 1992*, Part 4.

² *Human Rights Act 2019*, s 41.

³ The Health Practitioner Regulation National Law Amendment (Miscellaneous) Regulation 2019 is made under the Health Practitioner Regulation National Law and does not form part of the usual subordinate legislation series.

explanatory notes tabled with the subordinate legislation comply with the requirements of section 24 of the *Legislative Standards Act 1992*.

The committee considers that SL Nos 74 and 75 raise human rights issues as detailed below. The committee is satisfied the limitations on human rights are reasonable and justified. 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.⁴

4 SL 74 Health (Drugs and Poisons) Amendment Regulation 2020

The Health (Drugs and Poisons) Amendment Regulation 2020:

- allows for digital images of paper prescriptions to be sent to a dispenser by other types of electronic communication, such as email, and
- removes the requirement for prescribers to telephone dispensers within 24 hours after faxing a prescription.

4.1 Fundamental legislative principle issues

Section 4(3)(g) Legislative Standards Act 1992 – retrospectivity

Legislation should not adversely affect rights and liberties, or impose obligations, retrospectively.

Section 12 has retrospective effect, applying during the ‘relevant period’, meaning the period from the commencement of the Special Arrangement on 26 March 2020 to the commencement of the section.

Section 4(2)(a) Legislative Standards Act 1992 – rights and liberties of individuals – proportionality of penalties

The regulation imposes new record keeping requirements on a prescriber. There is a maximum penalty of 40 penalty units for failing to retain for two years the original paper version of any prescription that has been sent electronically.

The explanatory notes give this justification:

... The above penalty has been reviewed and the penalty is proportionate to the seriousness of the offence and is justified due to the need to limit access to controlled and restricted drugs. The retention of the records provides for monitoring and investigation of unauthorised access, such as fraudulent prescriptions and enforcement.⁵

The relevant regulation-making power (in s 180 of the *Health Act 1937*) allows for the imposition, by regulation, of a penalty up to 80 penalty units.

Committee comment

In regard to the retrospective effect of s 12, the committee notes that the impacts of the provision on an individual are beneficial, rather than adverse. The committee is also satisfied that the penalty imposed on prescribers for failing to retain original paper versions of prescriptions is proportionate and justified.

4.2 Explanatory notes

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

4.3 Human rights considerations

Section 8 of the *Human Rights Act 2019* (HRA) provides that a statutory provision is compatible with human rights if it does not limit a human right, or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with Section 13 of that Act.

⁴ *Human Rights Act 2019*, s 41.

⁵ Explanatory notes, p 5.

Section 13 of the *Human Rights Act 2019* provides that a human right may be subject to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Section 13 sets out a range of factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

In the human rights certificate accompanying the amendment regulation, the Minister states his opinion that the amendment regulation is compatible:

- with the human rights protected by the HRA, and
- with the HRA because it raises human rights issues but does not limit human rights.

The committee considers that the subordinate legislation raises two human rights issues.

4.3.1 Retrospective criminal laws – section 35 *Human Rights Act 2019*

A person must not be found guilty of a criminal offence because of conduct that was not a criminal offence when it was engaged in.

This regulation has a retrospective element, in relation to the temporary exemption for sending paper copies of prescriptions, which will apply retrospectively from 26 March 2020 and will continue to apply while the Special Arrangement remains in place.

In the human rights certificate accompanying the amendment regulation, the Minister states:

Although this amendment is retrospective, it does not criminalise or impose a penalty for any conduct that was not unlawful at the time it occurred. To the contrary, the amendment immunises persons from criminal liability that they have already incurred by breaching the existing requirement for sending paper copies of prescriptions.

...

*As the amendment does not impose criminal liability or penalties retrospectively, it does not limit any of the rights described in section 35 of the *Human Rights Act*.⁶*

4.3.2 Right to health services – section 37 *Human Rights Act 2019*

Every person has the right to access health services without discrimination.

The regulation provides prescribers with a temporary exemption from the legal requirement to send an original prescription to the dispenser. The regulation will also allow pharmacists to dispense in reliance on faxed copies and digital images of prescriptions, in addition to existing oral and paper prescriptions.

In the human rights certificate accompanying the amendment regulation, the Minister states:

The amendments streamline health service delivery and reduce physical contact for vulnerable patients during the COVID-19 response. This will expand access to health services for all Queenslanders, including those who may otherwise be unable to obtain these services due to isolation, quarantine, home confinement and any other restrictions in place to respond to the COVID-19 pandemic. The amendments therefore promote the right to access health services without discrimination.⁷

Committee comment

The committee is satisfied that the limitation of human rights by the retrospective element of the Amendment Regulation is reasonable and demonstrably justified.

⁶ Human rights certificate, p 3.

⁷ Human rights certificate, p 3.

The committee is also satisfied with the Minister's explanation regarding impact of the amendment regulation on the right to access health services without discrimination. The committee is not concerned that there are human rights impacts.

4.4 Human rights certificate

Section 41 of the *Human Rights Act 2019* requires that the responsible Minister for the subordinate legislation must prepare a human rights certificate for the legislation.

A human rights certificate was tabled with the subordinate legislation. The certificate contained a sufficient level of information to facilitate understanding of the legislation in relation to its compatibility with human rights.

5 SL 75 Public Health (Further Extension of Declared Public Health Emergency—COVID-19 Regulation (No. 3) 2020

The Public Health (Further Extension of Declared Public Health Emergency—COVID-19 Regulation (No. 3) 2020 extends the period of the declared public health emergency to allow for emergency powers to be used to reduce the risk of COVID-19 spreading. The Regulation extends the declared public health emergency for a further period of 90 days (until the end of 17 August 2020).

The declaration of the public health emergency was made by the minister on 29 January 2020, and notified in the gazette on 31 January 2020. It has previously been extended by SL 7 and SL 8.

5.1 Fundamental legislative principle issues

The further extension regulation raises the same issues, regarding impacts on the rights and liberties of individuals, as the first extension regulation (SL 7).

Section 4(2)(a) Legislative Standards Act 1992 – rights and liberties of individuals

Section 4(3)(f) Legislative Standards Act 1992 - power to enter premises

The effect of declaring (and also of extending) a public health emergency is that a number of powers in the *Public Health Act 2005* (the Act) are vested in an 'emergency officer' who is responding to the declared public health emergency.

These powers include the power to require a person to:

- not enter or not to remain within a place
- stop using a place for a stated purpose
- go to or stay in a stated place
- answer questions.⁸

An emergency officer also has the power to enter a place to save a human life, prevent or minimise serious adverse effects on human health, or do anything else to relieve suffering or distress. Reasonable force is permitted to be used to enter a place.⁹

The emergency officer must make a reasonable attempt to seek consent, but need not do so if the officer believes on reasonable grounds that immediate entry is required.¹⁰

Legislation should not, without sufficient justification, unduly restrict ordinary activities. The right to personal liberty is the most elemental and important of all common law rights.¹¹

⁸ *Public Health Act 2005*, s 345.

⁹ *Public Health Act 2005*, s 343.

¹⁰ *Public Health Act 2005*, s 344.

¹¹ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, p 96.

Entry without consent into any place where a person lives requires the highest justification.¹²

An individual would normally expect to be able to enjoy freedom of movement and any removal of this right must be fully justified and should be only done with the authority of the court.¹³

The explanatory notes provide the following advice regarding protections to limit the exercise of the powers of emergency officers:

The powers of emergency officers are discretionary and are only expected to be exercised if there are significant risks to public health. Additionally, the Act includes protections to limit the exercise of emergency officers' powers. For example:

- *emergency officers can only enter places to save human life, prevent or minimise serious adverse effects on human health, or do anything else to relieve suffering or distress. Emergency officers are also required to make a reasonable attempt to seek an occupier's consent to the entry (section 344) of the Public Health Act;*
- *certain powers can only be exercised with the written approval of the chief executive (section 345(2) of the Public Health Act);*
- *a person must be given the opportunity to voluntarily comply with a detention order before it is enforced against them (section 353 of the Public Health Act); and*
- *a person who is detained must be given the opportunity of receiving medical treatment including by a doctor chosen by the person (section 354(4) of the Public Health Act).¹⁴*

The explanatory notes also offer the following justification:

The exercise of these emergency powers is likely to impact upon the rights and liberties of individuals. However, it is considered that any potential impact that the Regulation has upon the rights and liberties of individuals in this context is justified, given the need to protect the health of the public by managing the potential spread of COVID-19.¹⁵

Committee comment

The committee is satisfied that the breaches of the rights and liberties of individuals are justified.

The powers described above are already contained within the Public Health Act, and are triggered by the declaration (and any extension) of a public health emergency, in this case due to the outbreak of COVID-19.

5.2 Explanatory notes

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

5.3 Human rights considerations

Section 8 of the *Human Rights Act 2019* (HRA) provides that a statutory provision is compatible with human rights if it does not limit a human right, or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with Section 13 of that Act.

Section 13 of the *Human Rights Act 2019* provides that a human right may be subject to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Section 13 sets out a range of factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

¹² Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, p 45.

¹³ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, p 99.

¹⁴ Explanatory notes, pp 3-4.

¹⁵ Explanatory notes, p 4.

In the human rights certificate accompanying the subordinate legislation, the Minister states his opinion that the amendment regulation is compatible:

- with the human rights protected by the HRA, and
- with the HRA because it does limit, restrict or interfere with human rights, but the limitations are reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The committee considers that the subordinate legislation raises four human rights issues.

5.3.1 Right to privacy and reputation - section 25 Human Rights Act 2019

The declaration (and extension) of a public health emergency has the effect that any emergency officer acting under a declared public health emergency will have a range of powers available under the *Public Health Act 2005* (Public Health Act), including requiring a person to state their name and residential address and to answer questions.¹⁶

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

Being compelled to provide a name and address and to answer questions affects or limits a person's human right to privacy.

In the human rights certificate accompanying the subordinate legislation, the Minister states:

The limitation of human rights under the Regulation is for the purpose of protecting the health of the public by managing the potential spread of COVID-19. It is reasonable, necessary and proportionate to limit the rights of a person in order to protect the health of the public in the context of a public health emergency. The powers ensure that Queensland Health is able to understand the epidemiology of COVID-19, which can be used to develop strategies to protect public health, and to determine other information that may be relevant to responding to a declared public health emergency. There are no other less restrictive ways to achieve this purpose.

The benefits of the Regulation associated with protecting public health are considered to outweigh the impact on the right to privacy and reputation of individual citizens.¹⁷

The powers described above are contained in the Public Health Act, and are triggered by the declaration (and extension) of a public health emergency, in this case due to the outbreak of COVID-19. The powers are not contained within the regulation itself.

The protection against interference with privacy conferred by s 25 of the HRA is limited to unlawful or arbitrary interference. As set forth in the certificate:

The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate.¹⁸

Committee comment

The committee is satisfied that limitations on human rights relating to emergency powers available under the Public Health Act to manage the spread of coronavirus, now a notifiable condition under the Public Health Act, are reasonable and demonstrably justifiable in accordance with the HRA.¹⁶

The intention of the limitation on the right to privacy and reputation is part of a broader strategy to prevent the spread of coronavirus. The benefits of the regulation in protecting public health outweigh the impact on the right to privacy and reputation of individual citizens. In light of this, the committee

¹⁶ *Public Health Act 2005*, s 345.

¹⁷ Human rights certificate, p 4.

¹⁸ Human rights certificate, p 4.

is satisfied that the limitation is reasonable and demonstrably justifiable in accordance with Section 13 of the HRA.

5.3.2 Right to freedom of movement – section 19 *Human Rights Act 2019* and Right to liberty and security of person – section 29 *Human Rights Act 2019*

The declaration (and extension) of the public health emergency allows the chief executive and magistrates, under the Public Health Act, to make orders about persons who have, or are suspected of having, COVID-19, including:

- orders for the compulsory detention and examination of persons who have or are suspected of having a controlled notifiable condition, and
- behavioural orders which can require a person to undergo counselling by a stated person/s, refrain from stated conduct, refrain from visiting stated places, or submit to supervision and monitoring by another person.

Under s 29 of the HRA, every person has the right to liberty and security, must not be subject to arbitrary detention, and must not be deprived of liberty except on grounds, and in accordance with procedures, established by law.

In the human rights certificate accompanying the subordinate legislation, the Minister states:

Restricting the liberty and freedom of movement of a person who has or is suspected of having COVID-19, or other persons for their own protection, in an emergency context is designed to lower public health risks of a virus spreading, such as through human to human contact. There are no other less restrictive or reasonably available ways to achieve this purpose.

Any potential limitation of a person's freedom of movement or right to liberty and security is undertaken under an established legislative framework and is considered to be outweighed by the need to protect public health.¹⁹

Committee comment

The committee consider the limitation of human rights is reasonable and demonstrably justifiable, given the importance of the need to ensure public health and safety.

5.3.3 Right to not be arbitrarily deprived of one's property – section 24 *Human Rights Act 2019*

Section 24 of the HRA provides that a person has the right not to be arbitrarily deprived of property.

The powers available to emergency officers under the Public Health Act once a declared public health emergency has been declared, have the potential to limit this right, given that such powers include power to:

- demolish specified structures or other property
- remove an animal, substance or thing from a place
- dispose of an animal, substance or thing at a place
- destroy animals at a place or remove animals for destruction at another place, and
- take other action in relation to property including, for example, to take control of a building for the purposes of the declared emergency.²⁰
- In the human rights certificate accompanying the subordinate legislation, the Minister states:

Emergency officers exercising their powers under a declared public health emergency (for example, by requiring the removal of a thing from a place) is only able to be undertaken in

¹⁹ Human rights certificate, p 4.

²⁰ *Public Health Act 2005*, s 345.

relation to the public health emergency and not for an arbitrary purpose. Importantly, section 345(2) of the Public Health Act provides that an emergency officer cannot demolish structures, demolish property or destroy animals without the written approval of the chief executive.

The need to protect the public and lower public health risks associated with the potential spread of COVID-19 through the extension of the public health emergency is considered to outweigh any potential impact on the property rights of a person.²¹

In relation to the powers set out above, the written approval of the chief executive is required when seeking demolish structures or property or to destroy or remove animals.

Committee comment

The committee consider the limitation of human rights is reasonable and demonstrably justifiable, given the importance of the need to ensure public health and safety.

5.4 Human rights certificate

Section 41 of the *Human Rights Act 2019* requires that the responsible Minister for the subordinate legislation must prepare a human rights certificate for the legislation.

A human rights certificate was tabled with the subordinate legislation. The certificate contained a sufficient level of information to facilitate understanding of the legislation in relation to its compatibility with human rights.

6 SL 80 Health Legislation (COVID-19 Emergency Response) Regulation 2020

The Health Legislation (COVID-19 Emergency Response) Regulation 2020 is made in reliance, in part, on s 13 of the *COVID-19 Emergency Response Act 2020* (Emergency Response Act).²² That Act contains a range of regulation-making powers to deal with matters arising from the COVID-19 public health emergency. That Act applies despite any other Act or law other than the *Human Rights Act 2019*.²³ The Act expires on 31 December 2020.²⁴

In broad terms, s 13 of the Emergency Response Act provides for a power to make a regulation to modify statutory time periods, such as a period within which an entity is authorised to do a thing or a period at the end of which a thing expires.

Regulations made in reliance on these sections are ‘extraordinary regulations’ and an Act to which an extraordinary regulation applies is an ‘affected Act’.²⁵

In relation to an extraordinary regulation:

- A Minister administering an affected Act may recommend to the Governor in Council the making of an extraordinary regulation *only if* the Minister is satisfied the regulation is necessary for a purpose of the Emergency Response Act.
- An extraordinary regulation may be inconsistent with the affected Act, and any other Act (other than the *Human Rights Act 2019*), to the extent necessary to achieve a purpose of the Emergency Response Act.
- To the extent a person’s act or omission complies with an extraordinary regulation made under an affected Act, the person does not incur civil or criminal liability under the affected Act for the act or omission.

²¹ Human rights certificate, p 5.

²² See the declaration at s 3 of the regulation.

²³ *COVID-19 Emergency Response Act 2020*, s 4(1).

²⁴ *COVID-19 Emergency Response Act 2020*, s 25.

²⁵ See *COVID-19 Emergency Response Act 2020*, s5 (1)-(3).

- An extraordinary regulation declare that it is made under the relevant additional regulation-making provision.
- An additional regulation-making provision does not limit any other regulation-making power conferred under an affected Act.²⁶

An extraordinary regulation must be tabled within 14 days of notification (rather than the usual 14 sitting days).²⁷ This regulation was notified on 29 May 2020 and tabled on 8 June 2020.

The regulation expires on 31 December 2020. It includes the declaration required under the Emergency Response Act.²⁸

The objective of the Health Legislation (COVID-19 Emergency Response) Regulation 2020 is to facilitate effective administration and minimise potential adverse impacts of the COVID-19 emergency for the food and pest control industries.

The regulation makes modifications to the statutory time limits in relation to applications under the *Food Act 2006* (Food Act) and *Pest Management Act 2001* (Pest Management Act). The regulation aims to facilitate effective administration and manage potential disruption for the food and pest control industries as a result of the COVID-19 emergency.

6.1 Fundamental legislative principle issues

Section 4(5)(c) and (d) Legislative Standards Act 1992– *Institution of Parliament*

Section 12 of the Emergency Response Act authorises an entity to modify statutory time limits by way of a statutory instrument rather than a regulation, on the basis that the extension is necessary for the purposes of the COVID Act. However, s 12 only applies where an Act already provides one or more express grounds for modification of the time limit. The Food Act and the Pest Management Act do not provide these grounds, hence this extraordinary regulation. The regulation is made under s 13 which provides an extraordinary regulation can be made to modify time limits if the relevant authority has no existing power to modify the time limits under the Act.

Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example:

- it contains only matter appropriate to subordinate legislation
- it amends statutory instruments only.²⁹

Here, the regulation amends the Food Act and the Pest Management Act, raising the issue of whether it has sufficient regard for the institution of Parliament.

The explanatory notes acknowledge the breach of fundamental legislative principle, giving this justification:

The regulation is consistent with the intent of the measures introduced by Parliament in the [Emergency Response Act]. The unusual approach of using subordinate legislation and statutory instruments to modify legislation was acknowledged when the [Emergency Response Act] was passed. Parliament deemed these measures necessary to address the challenges and urgency posed by the COVID-19 emergency and recovery period. As this regulation is consistent with Parliament's intention, is time limited, and is necessary to achieve a main purpose of the

²⁶ See generally *COVID-19 Emergency Response Act 2020*, s 5 (4)-(8), and s 4.

²⁷ See *COVID-19 Emergency Response Act 2020*, s 5 (9), and contrast s 49 (1) of the *Statutory Instruments Act 1992*.

²⁸ At s 3.

²⁹ *Legislative Standards Act 1992*, s 4(5)(c) and (d).

[Emergency Response Act], *the breach of fundamental legislative principles is considered to be justified.*³⁰

Committee comment

The committee is satisfied that the breach of fundamental legislative principles is reasonable and sufficiently justified.

6.2 Statutory instruments

Two statutory instruments related to this regulation were tabled on 8 June 2020.³¹ These instruments relate to the modification of statutory time limits under the Food Act and the Pest Management Act. The instruments state they are necessary to:

*... achieve a purpose of the COVID-19 Emergency Response Act, namely, to facilitate the continuance of public administration, judicial process, small business and other activities disrupted by the COVID-19 emergency, including by easing regulatory requirements.*³²

These instruments were not required to be accompanied by explanatory notes or a human rights certificate.

6.3 Explanatory notes

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

6.4 Human rights considerations

Section 8 of the *Human Rights Act 2019* (HRA) provides that a statutory provision is compatible with human rights if it does not limit a human right, or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with Section 13 of that Act.

Section 13 of the *Human Rights Act 2019* provides that a human right may be subject to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Section 13 sets out a range of factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

In the human rights certificate accompanying the subordinate legislation, the Minister states that in his opinion the subordinate legislation is compatible with the human rights protected by the *Human Rights Act 2019*.

Committee comment

The committee considers that the subordinate legislation raises no human rights issues.

6.5 Human rights certificate

Section 41 of the *Human Rights Act 2019* requires that the responsible Minister for the subordinate legislation must prepare a human rights certificate for the legislation.

A human rights certificate was tabled with the subordinate legislation. The certificate contained a sufficient level of information to facilitate understanding of the legislation in relation to its compatibility with human rights.

7 Health Practitioner Regulation National Law Amendment (Miscellaneous) Regulation 2019

The Health Practitioner Regulation National Law Amendment (Miscellaneous) Regulation 2019 is made under the Health Practitioner Regulation National Law (as applied by law of Queensland, in this

³⁰ Explanatory notes, p 5.

³¹ The instruments modify statutory time limits under the Food and Pest Management Acts and are made under s 12(5)(a) *COVID-19 Emergency Response Act 2020*, effective from 29 May 2020..

³² Statutory Instrument under s 12(5)(a) *COVID-19 Emergency Response Act 2020*, p 1.

case the Health Practitioner Regulation National Law (Queensland). Section 246 of the *Health Practitioner Regulation National Law (Queensland)* provides that sections 49 to 51 of the *Statutory Instruments Act 1992* apply to a national regulation as if a reference in those sections to subordinate legislation were a reference to a national regulation. Under section 246 of the National Law, a regulation made under the National Law:

- must be tabled in (or notice of its making given to) the Parliament of each participating jurisdiction
- may be disallowed by the Parliament of a participating jurisdiction, in the usual manner as applies in that jurisdiction, and
- does not cease to have effect unless and until it is disallowed in a majority of participating jurisdictions, in which it ceases to have effect in all participating jurisdictions (from the date of the last relevant disallowance).

The regulation amends the Health Practitioner Regulation National Law Regulation 2018 to provide a further two-year exemption (until 31 December 2021) to the current exemption for privately practising midwives (PPMs) who attend homebirths to comply with the requirement to hold professional indemnity insurance (PII).

Under the National Law, registered health practitioners cannot practice unless they hold PII. Up until this time, there has not been a market offering for a PII product that covers PPMs attending home births. A transition period has been extended a number of times to address this gap in the market. There is still presently no affordable commercial product available.

The explanatory notes expand on the problem:

In the absence of a commercial product, a number of policy options have been explored in an effort to identify a permanent solution that both upholds the intent of the National Law that practitioners hold PII and protects the rights of children and families. Work on these policy options is continuing and further time is required to identify a solution.

Until these issues are resolved and a permanent solution is in place, the temporary exemption from the requirement for PPMs to hold PII should be extended to avoid uncertainty and potential adverse consequences for registered health practitioners and women who have engaged PPMs to provide home birth services.³³

7.1 Issue of fundamental legislative principle

Section 4(2)(b) Legislative Standards Act 1992 – Institution of Parliament

Section 284 of the National Law allows the end date of the transition period to be set by regulation. The power is not time-limited nor subject to a sunset provision. There is also no restriction on the number of times the power can be exercised or the duration of extensions that can be made. The initial exemption was set to end on 30 June 2012. Through continuous extensions, the transition period (following this regulation) now ends on 31 December 2021.

This could be seen to be a breach of the fundamental legislative principle that legislation has sufficient regard to the institution of Parliament, as the legislation may contain matter that would more appropriately be in an Act, rather than subordinate legislation.

Additionally, as there is no sunset clause and no restriction on the number of times the power can be used, this could be seen to be having insufficient regard to the institution of Parliament, particularly given that transitional provisions have been in place since 2012 and have been extended a number of times.

The explanatory notes provide this justification:

³³ Explanatory notes, p 2.

Any fundamental legislative principle issues arising from the exercise of this power are justified by the unique policy challenges involved and the limited nature of the regulation power. Extensive policy work has been undertaken to identify a permanent solution to the failure of the market to offer a PII product that covers PPMs for home birth services, including investigations into a government funded or supported PII scheme for PPMs. Despite the extensive work undertaken to date, no feasible option has been identified that upholds the intent of the National Law and protects the rights of children and families.³⁴

The explanatory notes further explain the efforts being undertaken to address a permanent solution:

Further work is being conducted to develop options to be considered by Health Ministers with a view to permanently resolving the issue. The status quo should be preserved while this work is undertaken. Allowing the transition period to expire on 31 December 2019 would potentially affect the registration and businesses of approximately 104 PPMs who identified as providing home services in 2018. Pregnant woman (sic) who have engaged a PPM to provide home birth services may be left without a home birth option, particularly if the woman resides in a State or Territory that does not offer public home birth services.³⁵

Regarding the absence of any sunset clause, the explanatory notes state:

The former Scrutiny of Legislation Committee has commented that a transitional regulation-making power may have sufficient regard to the institution of parliament if it is subject to a sunset clause. While the relevant section of the National Law is not subject to a sunset clause, it differs from many other transitional regulation-making powers considered by the former Scrutiny of Legislation Committee because it is not broadly framed and only permits regulations to be made in respect to the end date of the transition period. The lack of any sunset provisions is justified on this basis. The special procedures for scrutinising the regulations are similarly justified by the limited scope of the regulation-making power and the need to promote consistency and predictability in the way that national scheme legislation is applied in participating jurisdictions.³⁶

Committee comment

The committee notes the extended transition period and ongoing efforts to develop a permanent solution to the failure of the market to offer a professional indemnity insurance product that covers privately practising midwives for home birth services. Taking these factors into account, the committee is satisfied the regulation has sufficient regard for the institution of Parliament.

7.2 Explanatory notes comment

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

7.3 Human rights considerations

Section 8 of the *Human Rights Act 2019* (HRA) provides that a statutory provision is compatible with human rights if it does not limit a human right, or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with Section 13 of that Act.

Section 13 of the *Human Rights Act 2019* provides that a human right may be subject to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Section 13 sets out a range of factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

³⁴ Explanatory notes, p 3.

³⁵ Explanatory notes, p 3.

³⁶ Explanatory notes, p 4.

Committee comment

The committee considers that the Health Practitioner Regulation National Law Amendment (Miscellaneous) Regulation 2019 raises no human rights issues.

7.4 Human rights certificate

A human rights certificate was tabled with the subordinate legislation (as required by s 41 of the *Human Rights Act 2019*). It provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

In the human rights certificate accompanying the subordinate legislation, the Minister states that in his opinion the Amendment Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*.

8 SL 123 Youth Justice (COVID-19 Emergency Response) Regulation 2020

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

The Youth Justice (COVID-19 Emergency Response) Regulation 2020, like the Health Legislation (COVID-19 Emergency Response) Regulation 2020 discussed above, is made in reliance, in part, on s 8 of the *COVID-19 Emergency Response Act 2020* (Emergency Response Act).³⁷ That Act contains a range of regulation-making powers to deal with matters arising from the COVID-19 public health emergency.

In broad terms, s 8 (in part) imports into any Act dealing with attending a place or meeting for a particular purpose or particular matter or and entity to call or hold a meeting for a particular purpose or matter.

Such a regulation is an ‘extraordinary regulation’ and an Act to which an extraordinary regulation applies is an ‘affected Act’.³⁸

In relation to an extraordinary regulation:

- A Minister administering an affected Act may recommend to the Governor in Council the making of an extraordinary regulation *only if* the Minister is satisfied the regulation is necessary for a purpose of the Emergency Response Act.
- An extraordinary regulation may be inconsistent with the affected Act, and any other Act (other than the *Human Rights Act 2019*), to the extent necessary to achieve a purpose of the Emergency Response Act.
- To the extent a person’s act or omission complies with an extraordinary regulation made under an affected Act, the person does not incur civil or criminal liability under the affected Act for the act or omission.
- A regulation must declare it is made under the relevant additional regulation-making provision.
- An additional regulation-making provision does not limit any other regulation-making power conferred under an affected Act.³⁹

An extraordinary regulation must be tabled within 14 days of notification (rather than the usual 14 sitting days).⁴⁰

³⁷ The explanatory notes (at p 1) state the authorising law as being s 8 of the *COVID-19 Emergency Response Act 2020* and s 314 of the *Youth Justice Act 1992*.

³⁸ See *COVID-19 Emergency Response Act 2020*, s 5(1) – (3).

³⁹ See generally *COVID-19 Emergency Response Act 2020*, s 5(4) – (8), and s 4.

⁴⁰ See *COVID-19 Emergency Response Act 2020*, s 5(9), and contrast s 49(1) of the *Statutory Instruments Act 1992*.

The regulation was notified on 1 July 2020 and tabled on 13 July 2020. Section 3 declares that the regulation is made under s 8 of the Emergency Response Act. The regulation expires on 31 December 2020.

The objective of the Youth Justice (COVID-19 Emergency Response) Regulation 2020 is to ensure that restorative justice conference agreements made during the COVID-19 health emergency period remain compliant with the *Youth Justice Act 1992* (YJA). Currently, under that Act, participants in restorative justice conferences are required to sign and immediately be given a copy of the conference agreement. Under social distancing requirements put in place in response to the COVID-19 public health emergency, it has not been possible to comply with these provisions for some conference agreements.

The regulation retrospectively and temporarily provides an alternative method to be taken as compliance with the relevant provisions of the YJA.⁴¹ The requirement for conference participants to sign a conference agreement will be taken to have been complied with if the convenor of the conference notes on the agreement that the person has agreed to the agreement.⁴²

8.2 Fundamental legislative principle issues

Committee comment

The committee identified no issues regarding the subordinate legislation's consistency with fundamental legislative principle or its lawfulness.

8.3 Explanatory notes

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

8.4 Human rights considerations

Section 8 of the *Human Rights Act 2019* (HRA) provides that a statutory provision is compatible with human rights if it does not limit a human right, or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with Section 13 of that Act.

Section 13 of the *Human Rights Act 2019* provides that a human right may be subject to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Section 13 sets out a range of factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

Committee comment

The committee considers that the Youth Justice (COVID-19 Emergency Response) Regulation 2020 raises no human rights issues.

8.5 Human rights certificate

A human rights certificate was tabled with the subordinate legislation (as required by s 41 of the *Human Rights Act 2019*). It provides a sufficient level of information to facilitate understanding of the legislation in relation to its compatibility with human rights.

In the human rights certificate accompanying the subordinate legislation, the Minister states that the Youth Justice (COVID-19 Emergency Response) Regulation 2020 is compatible with the Human Rights Act 2019 because it does not limit a human right.

⁴¹ Explanatory notes, p 1.

⁴² Section 4 of the regulation.

9 Recommendation

The committee recommends that the House notes this report.



Aaron Harper MP

Chair

September 2020

Health, Communities, Disability Services and Domestic and Family Violence Prevention Committee

Chair

Mr Aaron Harper MP, Member for Thuringowa, Chair

Deputy Chair

Mr Mark McArdle MP, Member for Caloundra, Deputy Chair

Members

Mr Michael Berkman MP, Member for Maiwar

Mr Martin (Marty) Hunt MP, Member for Nicklin

Mr Barry O'Rourke MP, Member for Rockhampton

Ms Joan Pease MP, Member for Lytton