

Legal Affairs and Community Safety Committee

Report No. 72, 56th Parliament

Subordinate legislation tabled between 20 May 2020 and 25 June 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 2020 and 25 June 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).¹

The report 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
78	Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020	16 June 2020	3 December 2020
79	Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020	11 June 2020	2 December 2020
81	Disaster Management (Further Extension of Disaster Situation—COVID-19) Regulation (No. 4) 2020	16 June 2020	3 December 2020
82	Liquor (Kowanyama and Pormpuraaw) Amendment Regulation 2020	16 June 2020	3 December 2020
83	Liquor (Fee Relief) and Other Legislation Amendment Regulation 2020	16 June 2020	3 December 2020
84	Corrective Services (COVID-19 Emergency Response) Regulation 2020	16 June 2020	3 December 2020
85	Proclamation—Child Death Review Legislation Amendment Act 2020 (commencing remaining provisions)	16 June 2020	3 December 2020
98	Professional Standards (Western Australian Bar Association Professional Standards Scheme) Notice 2020	25 June 2020	TBC
99	Professional Standards (Association of Consulting Surveyors National Professional Standards Scheme) Notice 2020	25 June 2020	TBC

*Disallowance dates are based on proposed sitting dates as advised by the Leader of the House. These dates are subject to change. The sitting dates for the 57th Queensland Parliament have not yet been published.

¹ *Legislative Standards Act 1992*, Part 4.

² *Human Rights Act 2019*, s 41.

3 Committee consideration of the subordinate legislation

No significant issues regarding policy, consistency with fundamental legislative principles or the lawfulness of the subordinate legislation were identified, with the exception of SL 78, SL 79, SL 81, SL 83 and SL 84, as discussed below. Apart from SL 79, which is discussed below, the committee considers explanatory notes tabled with the subordinate legislation comply with the requirements of s 24 of the LSA.

The committee considers that SL 78, SL 79, SL 81, SL 82, SL 83 and SL 84 raise human rights issues. These are discussed below. The human rights certificates tabled with the subordinate legislation provide a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.³

3.1 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 s 13 of that Act.

Section 13 of the Act 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.

4 Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020 (SL 78)

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

The Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020 (Amendment Regulation) is made in reliance, in part, on ss 8 and 9 of the *COVID-19 Emergency Response Act 2020* (Emergency Response Act).⁴ That Act contains a range of regulation-making powers to deal with matters arising from the COVID-19 public health emergency.

Section 9 of the Emergency Response Act makes provision for particular matters relating to documents, including signing and witnessing of documents, the certification of matters by signatories or witnesses and the making of a document in particular way and form. Section 9 also provides that a regulation may make provision about relevant matters required or permitted under an Act or common law rule by:

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

Such a regulation is an ‘extraordinary regulation’, and an Act to which an extraordinary regulation applies is an ‘affected Act’.⁵

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.

³ *Human Rights Act 2019*, s 41.

⁴ The explanatory notes (at p 1) state the authorising law as being the *Oaths Act 1867* and the *Property Law Act 1974* in reliance on ss 8 and 9 of the *COVID-19 Emergency Response Act 2020*, the *Powers of Attorney Act 1998* and the *Succession Act 1981* in reliance on s 9 of the *COVID-19 Emergency Response Act 2020*.

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

- An extraordinary regulation may be inconsistent with the affected Act, and any other Act (other than the HRA), to the extent necessary to achieve a purpose of the Emergency Response Act.
- To the extent a person's act or omission complies with an extraordinary regulation made under an affected Act, the person does not incur civil or criminal liability under the affected Act for the act or omission.
- 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.⁶

An extraordinary regulation must be tabled within 14 days of notification (rather than the usual 14 sitting days).⁷ The Amendment Regulation was notified on 22 May 2020 and tabled on 16 June 2020.

The Amendment Regulation amends the declaration in the Justice Legislation (COVID-19 Emergency Response – Wills and Enduring Documents) Regulation 2020.⁸ However, the Amendment Regulation, as an extraordinary regulation, requires its own declaration, but does not contain one.

With respect to these matters, the committee notes that s 24A of the Emergency Response Act provides that the Amendment Regulation is taken to have been validly made, notified and tabled in the Legislative Assembly and not to have ceased having effect under the *Statutory Instruments Act 1992*.

4.2 Objective of the Justice Legislation (COVID-19 Emergency Response—Wills and Enduring Documents) Amendment Regulation 2020

The objective of the Amendment Regulation is to prescribe modified requirements or arrangements for the making, signing and witnessing of affidavits, statutory declarations, oaths, deeds, particular mortgages and general powers of attorney. This arises from impacts of the COVID-19 public health emergency. In the words of the explanatory notes:

*The making, signing and witnessing of these important documents and the taking of oaths has been impeded by the COVID-19 emergency, including the requirements for social distancing and in some cases the requirement for individuals to be in self-isolation.*⁹

The Amendment Regulation amends the Justice Legislation (COVID-19 Emergency Response – Wills and Enduring Documents) Regulation 2020, to prescribe alternative arrangements which will apply in addition to existing requirements and will not prevent a person from making these documents in compliance with existing requirements where possible.

The Amendment Regulation contains a range of modified arrangements, including:

Affidavits

- allowing a witness, signatory or other person to be present by audio visual (AV) link
- allowing an affidavit to be made in the form of an electronic document, provided other conditions are met.

Statutory declarations

- expanding the list of people who can take a statutory declaration in the normal way
- allowing a witness, signatory or other person to be present by AV link

⁶ See generally *COVID-19 Emergency Response Act 2020*, s 5(4) – (8), and s 4.

⁷ See *COVID-19 Emergency Response Act 2020*, s 5(9), and contrast s 49(1) of the *Statutory Instruments Act 1992*.

⁸ See s 4, amending s 2 of the previous regulation (SL 72).

⁹ Explanatory notes, p 3.

- allowing a statutory declaration to be made in the form of an electronic document, provided other conditions are met.

Oaths

- allowing an authorised person to be present by AV link.

Deeds

- removing the requirement for a deed to be made on paper or parchment
- allowing a deed to be made in the form of an electronic document
- removing the requirement for a deed to be sealed or stated to be sealed
- removing the requirement for a corporation to use a seal or common seal to sign a deed
- removing the requirement for a deed signed by an individual to be witnessed.

General powers of attorney

- allowing a witness, signatory or other person to be present by AV link

Particular mortgages (lodged under the Electronic Conveyancing National Law)

- allowing electronic signing of documents

4.3 Fundamental legislative principle issues

4.3.1 Rights and liberties of individuals – privacy and confidentiality – *Legislative Standards Act 1992, section 4(3)(a)*

The modified arrangements, by allowing for the absence of physical presence requirements, could arguably see an increased risk of a person's privacy and confidentiality being breached and increase the potential for fraud, undue influence and unconscionable dealing.

Additionally, it could be argued that disadvantaged individuals and others, particularly persons in remote areas, who have a lower level of access to technology, could have their rights and liberties impacted.

The explanatory notes provide this justification:

These arrangements are considered justified however given the extraordinary nature of the COVID-19 emergency and are in the interests of public health and safety. The Regulation will provide alternative arrangements which will apply in addition to existing requirements and will reduce physical contact between persons during the COVID-19 emergency.

These provisions are also considered reasonable and justified to facilitate the execution of important documents and the taking of oaths, related to a variety of important legal transactions and proceedings that need to continue even during the COVID-19 emergency.¹⁰

Committee comment

The committee is satisfied that any breach of fundamental legislative principle has been sufficiently justified. As mentioned, this regulation amends the Justice Legislation (COVID-19 Emergency Response – Wills and Enduring Documents) Regulation 2020, which expires on 31 December 2020. This sunset provision, and thus the temporary application of the provisions, gives the committee further comfort in considering breaches of fundamental legislative principle.

¹⁰ Explanatory notes, p 7.

4.4 Human rights issues

In the human rights certificate accompanying the Amendment Regulation, the then Acting Attorney-General and Minister for Justice, Hon Stirling Hinchliffe MP, 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 following issues are raised for the consideration of the House:

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

Every person has the right to recognition as a person before the law and to enjoy human rights without discrimination.

The modified arrangements for signing, witnessing and making of documents may disproportionately impact some members of society, for example where language and communication barriers are exacerbated by electronic communication or where access to an interpreter can no longer be provided.

4.4.2 Property rights – *Human Rights Act 2019*, section 24

A person must not be arbitrarily deprived of their property.

A deed which has been improperly procured could be used to deal with an adult's property or financial assets without their consent or in a way detrimental to their rights and interests.

4.4.3 Privacy and reputation – *Human Rights Act 2019*, section 25

A person has the right not to have their privacy unlawfully or arbitrarily interfered with.

The use of AV communication increases the risk that the communication may be intercepted or recorded without the consent of a person involved in the witnessing process and increase the potential for identity theft.

4.4.4 Protection of families and children – *Human Rights Act 2019*, section 26

Families are the fundamental group unit of society and are entitled to be protected by society and the State.

Certain vulnerable people may have limited access to AV communication technology.

4.4.5 Right to a fair hearing – *Human Rights Act 2019*, section 31

A person charged with a criminal offence or party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

The modified arrangements for the making of documents via AV link may in some cases be used in criminal or civil proceedings in a court or tribunal. Vulnerable groups may be affected as language and communication barriers are exacerbated by electronic communication, or access to technology is not available.

4.4.6 Rights in criminal proceedings – *Human Rights Act 2019*, section 32

A person charged with a criminal offence has the right to be presumed innocent until proved guilty.

As well as the effect on vulnerable people as mentioned above, the modified arrangements may also increase the risk that a document could be procured improperly and used in a criminal proceeding in a detrimental manner to the accused.

4.4.7 Children in the criminal process – *Human Rights Act 2019*, section 33

A child must be brought to trial as quickly as possible and where convicted of an offence must be treated in a way appropriate for the child's age.

Vulnerable persons are affected as mentioned above. An improperly procured document could also be used in a way that is detrimental to a child's rights and interests in a criminal proceeding.

4.4.8 Statement of compatibility

Addressing all the possible limitations on human rights, the Minister states:

The purpose of the Amendment Regulation is to broaden the method by which documents can be made, signed or witnessed to avoid the need for persons to be physically present and thus avoid the risks to health and life arising from COVID-19. By broadening the method by which these documents can be made it is possible that, despite the inclusion of safeguards, the Amendment Regulation could potentially have consequences which could limit the human rights, identified above.

The purpose of the Amendment Regulation is consistent with a free and democratic society based on human dignity, equality and freedom and will ensure that such matters can proceed without delays which would otherwise arise where the existing arrangements for making these documents cannot be complied with due to the COVID-19 emergency.¹¹

In addressing the balance between the importance of the purpose of the provisions which impose a limitation on human rights, and the importance of preserving the human rights (taking into account the nature and extent of the limitations), the Minister states:

On balance the need to provide flexible alternative arrangements to allow witnessing of documents via audio/visual communication is considered to outweigh any impact on a person's human rights. The Amendment Regulation will have a positive impact for some persons who would otherwise be unable or unwilling to access in person witnessing services because of health and safety concerns, including persons in quarantine, to have important documents prepared and witnessed using alternative witnessing arrangements or because they are unable to access an eligible witness before whom a statutory declaration may be made.¹²

Committee comment

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

5 Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 (SL 79)

The objective of the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 is to implement a National Cabinet decision in relation to good faith leasing principles set out in the National Code for affected leases in Queensland. The National Cabinet agreed to a moratorium on evictions over the next six months for non-payment of rent to be applied across commercial tenancies impacted by severe rental distress, due to COVID-19. An 'affected lease' is a retail shop lease or a lease where the premises are wholly or predominantly used for carrying on a business, where:

- the lease or an agreement to enter into the lease is binding on the lessee
- the lessee is a small and medium enterprise with up to \$50 million in annual turnover, and
- the lessee is eligible for the Commonwealth Government's JobKeeper assistance.

¹¹ Human rights certificate, p 10.

¹² Human rights certificate, p 11.

The regulation includes:

- a requirement for the lessor and lessee to cooperate and act reasonably and in good faith
- a prohibition on a lessor from taking a prescribed action (such as recovery, termination of possession, charging interest on unpaid rent) on the following grounds occurring during the response period: a failure to pay rent, failure to pay outgoings or the business carried on at the premises not being open for business hours required during the lease
- a prohibition on a lessor increasing the rent payable by the lessee during the response period
- provisions as to how renegotiations of rent payable and other conditions are to be initiated and conducted.

5.1 Regulations made in reliance on the *COVID-19 Emergency Response Act 2020*

The Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 is made in reliance on s 23 of the Emergency Response Act, as well as on the general regulation-making power in s 121 of the *Retail Shop Leases Act 1994* (Retail Shop Leases Act).¹³

The Emergency Response 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 HRA.¹⁴ The Act expires on 31 December 2020.¹⁵

Any regulation made in reliance on s 23:

- must declare it is made under s 23.¹⁶ (This regulation includes such a declaration at s 2.)
- may be inconsistent with an Act or law, other than the HRA, to the extent necessary to achieve a purpose of the regulation and the Emergency Response Act.¹⁷
- may have retrospective operation to a day not earlier than 23 April 2020.¹⁸
- will expire on 31 December 2020.¹⁹
- may impose a penalty of not more than 20 penalty units for a contravention of the regulation.²⁰ (By contrast, s 121 of the Retail Shop Leases Act allows for regulations to impose a penalty of no more than 50 units.)
- must be tabled within 14 days of notification (rather than the usual 14 sitting days).²¹ [This regulation was tabled within the time limit.]

Additionally:

- Section 23 does not limit the regulation-making power conferred under the Retail Shop Leases Act.²²

¹³ See s 2.

¹⁴ *COVID-19 Emergency Response Act 2020*, s 4(1).

¹⁵ *COVID-19 Emergency Response Act 2020*, s 25.

¹⁶ *COVID-19 Emergency Response Act 2020*, s 23(4).

¹⁷ *COVID-19 Emergency Response Act 2020*, s 23(2)(a).

¹⁸ *COVID-19 Emergency Response Act 2020*, s 23(2)(b).

¹⁹ *COVID-19 Emergency Response Act 2020*, s 23(6).

²⁰ *COVID-19 Emergency Response Act 2020*, s 23(2)(c).

²¹ *COVID-19 Emergency Response Act 2020*, s 23(7), and contrast s 49(1) of the *Statutory Instruments Act 1992*.

²² *COVID-19 Emergency Response Act 2020*, s 23(5).

- To the extent a person's act or omission complies with a regulation made under s 23, the person does not incur civil or criminal liability under the Retail Shop Leases Act for the act or omission.²³

5.2 Issues of fundamental legislative principle

5.2.1 Rights and liberties of individuals – property rights – *Legislative Standards Act 1992*, section 4(2)(a)

The Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 affects the rights and liberties of landlords, as the provisions override their existing rights under current legislation and in contract.

The explanatory notes offer the following justification:

*Overriding landlords' ordinary property rights is justified by the need to respond to the financial hardship being experienced by some tenants due to closures and restrictions on movement and social distancing which the COVID-19 emergency has caused (and will continue to cause) and to provide a fair sharing of the burden of the emergency between landlords and tenants.*²⁴

Committee comment

The committee considers the breach of fundamental legislative principle involved in the interference with the rights of individuals is justified.

5.3 Explanatory notes

If consultation takes place about subordinate legislation, the LSA requires an explanatory note for subordinate legislation to include:

- a brief statement of the way the consultation was carried out
- an outline of the results of the consultation, and
- a brief explanation of any changes made to the legislation because of the consultation.²⁵

Here, the explanatory notes set out a list of stakeholders consulted on a draft of the regulation and state that 'Comments made by stakeholders were taken into account in drafting of the Regulation'.²⁶ This does not amount to 'an outline of the results' of consultation, nor does it amount to 'a brief explanation of any changes made to the legislation because of the consultation', as required by the Act.

The explanatory notes otherwise comply with part 4 of the LSA.

5.4 Human rights issues

In the human rights certificate accompanying the regulation, the Attorney-General and Minister for Justice, Hon Yvette D'Ath MP, states her 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.

²³ *COVID-19 Emergency Response Act 2020*, s 23(3).

²⁴ Explanatory notes, p 4.

²⁵ *Legislative Standards Act 1992*, s 24(2)(a).

²⁶ Explanatory notes, p 4.

The following issues are raised for the consideration of the House:

5.4.1 Property rights – *Human Rights Act 2019*, section 24

A person must not be arbitrarily deprived of their property. The regulation limits a landlord's right to property as it will prevent a landlord under an affected lease from taking a prescribed action for failure by the lessee to pay rent or outgoings or to trade during the hours required under the lease if the breach happens wholly or partly during the response period.

The Minister states:

Limiting lessor rights to end tenancies and take other prescribed actions is necessary to provide lessees with more certainty about the duration of their tenancy during the COVID-19 emergency. The Regulation does not prevent parties from entering into an agreement that is inconsistent with the obligations of lessors and lessees under Part 2 of the Regulation, but preserves a party's right to negotiate a condition of an affected lease.²⁷

The Minister concludes:

I believe that the adjustments to the respective rights and obligations of lessors and lessees in respect of affected leases under the provisions of the Regulation are the least restrictive and reasonably available ways to achieve the purpose of the Regulation.

...

On balance, the need to keep businesses in their places of commercial residence and ensure leasing security for lessors in the face of an unprecedented global economic downturn as a result of the COVID-19 emergency is considered to outweigh any impact of a person's human rights identified above.²⁸

Committee comment

The committee considers the impact on human rights is reasonable and justified, given the overall objective of the regulation.

5.4.2 Right to privacy and reputation – *Human Rights Act*, section 25

A person has the right not to have their privacy unlawfully or arbitrarily interfered with.

Here, the right to privacy is limited to the extent that parties to affected leases are required to negotiate, in good faith, the terms of the lease. A party to the lease may be required to provide the other party with personal and financial information and information relating to business processes for the purposes of negotiating or resolving any dispute.

The Minister explains:

The Regulation helps to achieve the purpose by requiring the lessee to provide personal and financial information to prove that the lessee is suffering financial hardship as a result of COVID-19 response measures. In this way, the limitation is rationally connected to achieving the purpose stated above.²⁹

The Minister concludes:

No less restrictive and reasonably available ways of achieving the purpose have been identified. The limitation is required in order for negotiations between the lessor and the lessee to be conducted in good faith where the lessee is required to prove that they have suffered financial hardship as a result of COVID-19 response measures by providing sufficient information that is true, accurate, correct and not misleading.

²⁷ Human rights certificate, p 4.

²⁸ Human rights certificate, p 5.

²⁹ Human rights certificate, p 6.

...

*On balance, I consider the benefits that will result for lessees under affected leases when they prove they are suffering financial hardship outweigh the limitation on their right to privacy when having to disclose personal and financial information when proving such hardship.*³⁰

Committee comment

The committee considers the impact on human rights is reasonable and justified, given the overall objective of the regulation.

6 Disaster Management (Further Extension of Disaster Situation—COVID-19) Regulation (No. 4) 2020 (SL 81)

The objective of the Disaster Management (Further Extension of Disaster Situation—COVID-19) Regulation (No. 4) 2020 is to further extend the period of the disaster situation declared for the whole of the State of Queensland on 22 March (and extended by regulation on 2, 16 and 30 April and 14 May 2020).

Unless extended by regulation under s 72 of the *Disaster Management Act 2003* (Disaster Management Act), or by declaration pursuant to s 72A of the Act, a disaster situation ends 14 days after the day it was declared.

The committee notes that fundamental legislative principle and human rights issues arising from this further extension regulation have been set out, in virtually identical terms, in a previous report to the House, in discussing SL 49 of 2020, the Disaster Management (Extension of Disaster Situation—COVID-19) Regulation 2020.³¹

6.1 Issues of fundamental legislative principle

The further extension of the declaration extends the duration of the availability of a number of powers under the Disaster Management 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.

6.1.1 Rights and liberties of individuals - *Legislative Standards Act 1992*, section 4(2)(a)

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 use of powers under the Disaster Management Act impacts significantly on a person's rights and liberties.

The explanatory notes state that the regulation is consistent with fundamental legislative principles, and they 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.*³²

³⁰ Human rights certificate, p 6.

³¹ See Legal Affairs and Community Safety Committee, Report No. 68, 56th Parliament, *Subordinate legislation tabled between 18 March 2020 and 22 April 2020*, pp 7-9.

³² Explanatory notes, p 1.

Committee comment

The committee is satisfied that the impacts on a person's rights and liberties are justified, given the COVID-19 public health emergency.

6.2 Human rights issues

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

- with the human rights protected by the HRA, and
- with the HRA itself, because it does limit, restrict or interfere with human rights, only to the extent that is reasonable and demonstrably justifiable in accordance with s 13 of the HRA.

The following issues are raised for the consideration of the House.

6.2.1 Freedom of movement – *Human Rights Act 2019*, section 19

Every person lawfully within Queensland has the right to move freely within Queensland and to enter and leave it.

The regulation allows for powers to be exercised that include controlling the movement of persons into, out of, or around, the declared area for the disaster situation.

The Minister states:

*The limitation helps achieve the purpose by limiting the exposure of the community to COVID-19 by preventing movement of persons. The limitation on human rights is necessary to ensure that officials can implement effective containment and mitigation measures in response to the COVID-19 pandemic.*³³

Committee comment

The committee is satisfied that the limitation is reasonable and justified.

6.2.2 Peaceful assembly and freedom of association – *Human Rights Act 2019*, section 22

The declaration and the powers under the Disaster Management Act limit the peaceful assembly of people. Under the HRA, every person has the right of peaceful assembly.

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 and be in line with multi-tier government requirements relating to mass gatherings during COVID-19 response.*³⁴

Committee comment

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

6.2.3 Property rights – *Human Rights Act 2019*, section 24

The Disaster Management Act provides powers, which among other things, allow entry into a place, removal of things from a place, and directing a person to leave or not enter an area. The exercise of the powers is triggered by the declaration.

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

³³ Human rights certificate, p 2.

³⁴ Human rights certificate, p 4.

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.*³⁵

Committee comment

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

6.2.4 Privacy and reputation – Human Rights Act 2019, section 25

The Disaster Management Act provides for entry into places and other powers related to the entry, including the removal of things and directing a person to leave, or not to enter, a place.

Under the HRA, a person must not have their privacy, family or home unlawfully or arbitrarily interfered with.

The Minister gives this justification:

*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 and life outweighs the harm caused to [a] person's right to privacy under these circumstances.*³⁶

Committee comment

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

6.2.5 Right to liberty and security – Human Rights Act 2019, section 29

The Disaster Management Act provides a power to direct a person to leave, or not to enter, an area in or near a place.

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

The Minister states:

*The purpose of depriving a person of their liberty is to limit persons identified with or suspected of having COVID-19 from circulating freely amongst the general public, in order to reduce the risks of transmission of the virus.*³⁷

Committee comment

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

7 Liquor (Kowanyama and Pormpuraaw) Amendment Regulation 2020 (SL 82)

The objective of the Liquor (Kowanyama and Pormpuraaw) Amendment Regulation 2020 is to temporarily increase alcohol carriage limits and support the temporary sale of takeaway liquor in the Kowanyama and Pormpuraaw restricted areas during the declared COVID-19 health emergency.

The Kowanyama Sport & Recreation Association Incorporated and the Pormpuraaw United Brothers Sports Club Incorporated are currently authorised to sell liquor in their communities under a restricted liquor permit. Such a permit does not authorise takeaway liquor sales.

³⁵ Human rights certificate, p 5.

³⁶ Human rights certificate, p 8.

³⁷ Human rights certificate, p 9.

There are concerns that community members may attempt to leave the area to access alcohol from other areas, placing them at greater risk of contracting or spreading COVID-19. To address these concerns, the regulation provides for the sale of takeaway liquor and the subsequent granting of the appropriate licences (and exemption from licence fees). The amendments will expire on 31 December 2020.

7.1 Issues of fundamental legislative principle

The committee did not identify any issues of fundamental legislative principle.

7.2 Human rights issues

In the human rights certificate accompanying the Liquor (Kowanyama and Pormpuraaw) Amendment Regulation 2020, the Attorney-General and Minister for Justice, Hon Yvette D'Ath MP, states her opinion that the amendment regulation is compatible:

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

The following issues are raised for the consideration of the House:

7.2.1 Cultural rights – Aboriginal peoples and Torres Strait Islander peoples – *Human Rights Act 2019*, section 28

The nature of this right explicitly protects the right to live life as an Aboriginal person or Torres Strait Islander person who is free to practise their culture. These persons must not be denied certain rights in relation to traditional knowledge, spiritual practices, language, kinship ties, relationship with land and resources, and protection of the environment.

The regulation may indirectly impact on the cultural rights of Aboriginal and Torres Strait Islander persons as the measures aim to discourage travel between areas and it is argued this could affect enjoyment of identity and cultural heritage and maintenance of kinship ties.

The Minister provides the following reasoning:

*However, while this right is arguably engaged, it is considered the provisions will not limit the cultural rights of Aboriginal and Torres Strait Islander people. The measures will not prevent persons from exercising their distinct cultural rights within their communities. Further, the amendments will mitigate the risk of the spread of COVID-19 to these vulnerable communities, which in turn will support the health and wellbeing of Aboriginal and Torres Strait Islander persons and their right to enjoy and develop their identity and cultural heritage.*³⁸

Committee comment

The committee is satisfied that any impact on human rights is reasonable and justified.

8 Liquor (Fee Relief) and Other Legislation Amendment Regulation 2020 (SL 83)

The objective of the Liquor (Fee Relief) and Other Legislation Amendment Regulation 2020 is to waive 2020-21 liquor licence fees for existing licensees to reduce the financial burden on licensees directly impacted by COVID-19 related restrictions.

8.1 Issues of fundamental legislative principle

8.1.1 Institution of Parliament – matters appropriate to subordinate legislation – *Legislative Standards Act 1992*, section 4(5)(c)

Subordinate legislation should have sufficient regard to the institution of Parliament by containing only matter appropriate to subordinate legislation.

³⁸ Human rights certificate, p 4.

The waiving of liquor licence fees may be seen to be more appropriately dealt with by an Act, rather than regulation. The explanatory notes provide the following reasoning:

... as licence fees are prescribed in the Liquor Regulation under the authority of section 202 of the Liquor Act and in the Wine Industry Regulation under the authority of section 53 of the Wine Industry Act, the Amendment Regulation is not considered to be ultra vires.³⁹

Committee comment

The committee is satisfied that any breach of fundamental legislative principle is justified.

8.2 Human rights issues

In the human rights certificate accompanying the Liquor (Fee Relief) and Other Legislation Amendment Regulation 2020, the Attorney-General and Minister for Justice, Hon Yvette D’Ath MP, states her opinion that the amendment regulation is compatible:

- with the human rights protected by the HRA, and
- with the HRA itself, because it raises a human rights issue, because it potentially limits, restricts or interferes 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.

The following issues are raised for the consideration of the House:

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

A person has the right to be treated equally and have the law applied to them in a way that is not discriminatory or arbitrary.

The fee waiver applies only to licences in force immediately before 1 July 2020 and not to licences issued after this date. The law is applied differently to persons who hold licences issued after 1 July 2020, compared to its application to licence holders who held licences prior to that date.

The Attorney-General provides this justification:

The purpose of the limitation is to ensure that financial support in the form of a licence fee waiver is only provided for liquor licences whose businesses have been directly and negatively impacted by the declaration of the COVID-19 public health emergency during the 2019-20 licence period. Accordingly, only those affected licensees who have been unable to make full use of the authorities under their licence due to the COVID-19 closures will have their licence fees waived.⁴⁰

Committee comment

The committee is satisfied that any impact on human rights is reasonable and justifiable.

9 Corrective Services (COVID-19 Emergency Response) Regulation 2020 (SL 84)

The objective of the Corrective Services (COVID-19 Emergency Response) Regulation 2020 is to prescribe modified requirements or arrangements, which will apply in relation to:

- existing requirements for Parole Board Queensland meetings under the *Corrective Services Act 2006* (CSA)
- statutory time limits for a declaration of emergency under the CSA
- additional attendance requirements for corrective services facilities under the CSA
- attendance requirements for offenders in the community being managed by corrective services officers.

³⁹ Explanatory notes, p 3.

⁴⁰ Human rights certificate, p 3.

The committee notes that on 11 August 2020, Mr Dan Purdie MP moved that clause 7 of the regulation be disallowed. The motion was resolved in the negative.⁴¹

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

The Corrective Services (COVID-19 Emergency Response) Regulation 2020 is made in reliance, in part, on ss 8 and 13 of the Emergency Response Act.⁴² That Act contains a range of regulation-making powers to deal with matters arising from the COVID-19 public health emergency.

Section 13 of the Emergency Response Act makes provision for a period within which an entity is authorised to do a thing, or a period at the end of which a thing expires.

Such a regulation is an ‘extraordinary regulation’ and an Act to which an extraordinary regulation applies is an ‘affected Act’.⁴³

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 HRA), to the extent necessary to achieve a purpose of the Emergency Response Act.
- To the extent a person’s act or omission complies with an extraordinary regulation made under an affected Act, the person does not incur civil or criminal liability under the affected Act for the act or omission.
- 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.⁴⁴

An extraordinary regulation must be tabled within 14 days of notification (rather than the usual 14 sitting days).⁴⁵ The committee notes that this requirement was satisfied as the regulation was notified on 5 June 2020 and tabled on 16 June 2020.

Section 3 declares that the regulation is made under ss 8 and 13 of the Emergency Response Act.

9.2 Issues of fundamental legislative principle

9.2.1 Rights and liberties of individuals – *Legislative Standards Act 1992*, section 4(2)(a)

The Corrective Services (COVID-19 Emergency Response) Regulation 2020 includes additional procedures for entry to a corrective services facility to screen for COVID-19. This includes taking the temperature of a person and refusing entry if the person displays flu-like symptoms or their temperature is more than 38 degrees.

⁴¹ See Queensland Parliament, Record of Proceeding, 11 August 2020, pp 1905-1915.

⁴² See s 3. The explanatory notes (at p 1) state the authorising law as being the *Corrective Services Act 2006 1998* in reliance on ss 8 and 13 of the *COVID-19 Emergency Response Act 2020*, the *Dangerous Prisoners (Sexual Offenders) Act 2003*, the *Penalties and Sentences Act 1992* and the *State Penalties Enforcement Act 1999*, all in reliance on s 8 of the *COVID-19 Emergency Response Act 2020*.

⁴³ See *COVID-19 Emergency Response Act 2020*, s 5(1) – (3).

⁴⁴ See generally *COVID-19 Emergency Response Act 2020*, s 5(4) – (8), and s 4.

⁴⁵ See *COVID-19 Emergency Response Act 2020*, s 5(9), and contrast s 49(1) of the *Statutory Instruments Act 1992*.

This requirement would affect a person's rights and liberties, particularly the imposition of quasi-medical tests and the denial of entry into a corrective services facility if exhibiting flu-like symptoms or a raised temperature.

Although not addressing this issue specifically, the explanatory notes do provide the following justification:

*Given the unprecedented challenges managing the risks associated with COVID-19 in the correctional environment, these measures are aimed at protecting the health and safety of staff, prisoners, offenders and the broader community. They are therefore considered acceptable and necessary to respond to the COVID-19 public health emergency.*⁴⁶

Committee comment

Although the provision of this additional procedure will impact on a person's rights and liberties, given the overall aim to respond to the COVID-19 public health emergency, the committee is satisfied that this breach of fundamental legislative principle is justified.

9.2.2 Adversely affecting rights and liberties retrospectively – Legislative Standards Act 1992, section 4(3)(g)

The regulation has application retrospective to the date of commencement of the Emergency Response Act.

The explanatory notes state:

*Retrospective application is seen as necessary to ensure actions undertaken by QCS [Queensland Corrective Services] and the PBQ [Parole Board Queensland] in urgently responding to imposed government restrictions and to reduce the potential risk of contagion from the COVID-19 pandemic in the correctional environment. Providing for retrospective application will ensure decisions taken to ensure the health and safety of staff, prisoners, offenders and the community are lawful.*⁴⁷

Committee comment

The committee is satisfied that this breach of fundamental legislative principle is justified given the public health emergency.

9.3 Human rights issues

In the human rights certificate accompanying the Corrective Services (COVID-19 Emergency Response) Regulation 2020, the Minister for Police and Minister for Corrective Services, Hon Mark Ryan MP, states his opinion that the regulation is compatible:

- with the human rights protected by the HRA, and
- with the HRA itself, because it raises a human rights issue, in that it potentially limits, restricts or interferes 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.

The following issues are raised for the consideration of the House:

9.3.1 Extension of the declaration of emergency timeframe

The regulation extends the length of time a declaration of emergency under the CSA can be made, from three days to 90 days, or until the Queensland Minister for Health and Minister for Ambulance Services declares and publishes the end of the COVID-19 emergency pursuant to ss 324 and 325 of the *Public Health Act 2005*. This triggers the operation of a number of provisions that can impact the human rights of individuals.

⁴⁶ Explanatory notes, p 4.

⁴⁷ Explanatory notes, p 4.

9.3.1.1 Protection from torture and cruel, inhuman or degrading treatment – Human Rights Act 2019, section 17

A person must not be subjected to torture or treated or punished in a cruel, inhuman or degrading way.

Prisoners may be isolated, to reduce risk of COVID-19 transmission. This could be considered inhuman or degrading.

9.3.1.2 Freedom of movement – Human Rights Act 2019, section 19

Every person lawfully within Queensland has the right to move freely within Queensland and to enter and leave it.

A corrective services facility may be required to restrict the movement of staff, visitors or prisoners in response to the COVID-19 pandemic.

9.3.1.3 Freedom of association – Human Rights Act 2019, section 22

Every person has the right to associate with others.

A prisoner's association with other persons may be limited if a prison is restricting visitors due to COVID-19.

9.3.1.4 Property rights – Human Rights Act 2019, section 24

A person must not be arbitrarily deprived of their property.

A prisoner's right to receive property, including mail, may be limited or delayed due to COVID-19.

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

A person has the right to not have their privacy unlawfully or arbitrarily interfered with.

A prisoner's relationships may be restricted through restricted visits and contact due to the COVID-19 pandemic.

9.3.1.6 Protection of families – Human Rights Act 2019, section 26

Families are the fundamental group unit of society and are entitled to be protected by society and the state.

A prisoner may be unable to receive visits or contact may be restricted under protocols imposed under COVID-19.

9.3.1.7 Cultural rights – Aboriginal peoples and Torres Strait Islander peoples – Human Rights Act 2019, section 28

The distinct cultural rights held by Aboriginal and Torres Strait Islander peoples are protected.

Cultural visits or transfers of Aboriginal or Torres Strait Islander peoples to prisons closer to their family may be restricted.

9.3.1.8 Humane treatment when deprived of liberty – Human Rights Act 2019, section 30

All persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person.

A prisoner may be quarantined to reduce the risk of COVID-19 transmission and their privileges suspended. This may be seen to be treatment inconsistent with humanity while deprived of liberty.

9.3.1.9 Right to education – Human Rights Act 2019, section 36

Every person has the right to have access, based on the person’s abilities, to further vocational education and training that is equally accessible to all.

Movement and contact between prisoners may be restricted in response to COVID-19 risks.

Addressing all the possible limitations on human rights set out above, the Minister states:

While acknowledging that the extension of the time a declaration of emergency can be in place from 3 to 90 days is a significant alteration in time, it is necessary to respond to the unprecedented nature of the COVID-19 pandemic. In determining the appropriate period of time for which the emergency declaration should last, consideration was given to the pandemic nature of the virus and its public health implications. As it is likely that the COVID-19 virus will remain an ongoing threat for some time, a longer period of time is considered appropriate. Further, 90 days is consistent with the length of time for which a public health emergency can be declared under the PH [Public Health] Act, and the length of time emergency declarations have been extended.⁴⁸

Committee comment

The committee agrees with the Minister’s statement above and considers that the impact on human rights is reasonable and justified.

9.3.2 Requiring persons to be screened for COVID-19 prior to entering a corrective services facility

9.3.2.1 Protection from torture and cruel, inhuman or degrading treatment – Human Rights Act 2019, section 17

A person may be required to undertake a COVID-19 screening before entering a corrective services facility. This may be seen to limit the right not to be subjected to medical treatment without full, free and informed consent.

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

Staff, offenders and visitors may be required to participate in COVID-19 screening prior to entering a corrective services facility. This may affect a person’s personal relationships.

The Minister provides the following justification:

Providing for additional entry requirements into Queensland’s corrective services facilities ensures QCS can respond to the unique risks surrounding COVID-19 with as little additional intrusion as possible. The COVID-19 screen requirement aims to prevent the introduction and spread of COVID-19 into facilities in a non-invasive way, preventing loss of life, and ensuring the health and safety of prisoners and those working or engaging with the correctional environment.⁴⁹

Committee comment

The committee agrees with this justification regarding screening, given the unprecedented circumstances, and considers the impact is reasonable and justified.

⁴⁸ Human rights certificate, p 8.

⁴⁹ Human rights certificate, p 10.

10 Recommendation

The committee recommends that the House notes this report.



Peter Russo MP

Chair

August 2020

Legal Affairs and Community Safety Committee

Chair	Mr Peter Russo MP, Member for Toohey, Chair
Deputy Chair	Mr James Lister MP, Member for Southern Downs, Deputy Chair
Members	Mr Stephen Andrew MP, Member for Mirani
	Ms Laura Gerber MP, Member for Currumbin
	Mrs Melissa McMahon MP, Member for Macalister
	Ms Corrine McMillan MP, Member for Mansfield