

Legal Affairs and Community Safety Committee

Report No. 67, 56th Parliament

Subordinate legislation tabled between 5 February 2020 and 17 March 2020

1 Aim of this report

This report summarises the Legal Affairs and Community Safety Committee’s findings following its examination of the subordinate legislation within its portfolio areas tabled between 5 February 2020 and 17 March 2020. It reports on any issues identified by the committee relating to:

- the policy to be given effect by the subordinate legislation
- the application of fundamental legislative principles to the subordinate legislation
- the lawfulness of the subordinate legislation.¹

It also reports on the committee’s consideration of the compliance of the explanatory notes with the *Legislative Standards Act 1992* and on any issues identified by the committee in its consideration of the human rights certificates tabled with the subordinate legislation.²

2 Subordinate legislation examined

The committee examined the subordinate legislation listed in the table below.

No.	Subordinate legislation	Date tabled	Disallowance date*
10	Electoral and Other Legislation Amendment Regulation 2020	18 February 2020	16 July 2020
20	State Penalties Enforcement (Heavy Vehicle National Law) Amendment Regulation 2020	17 March 2020	13 August 2020

* 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

No significant issues regarding policy, consistency with fundamental legislative principles, or the lawfulness of the subordinate legislation were identified.

The committee considers that the explanatory notes tabled with the regulations comply with the requirements of section 24 of the *Legislative Standards Act 1992*. Also that 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.

Issues regarding compatibility of the subordinate legislation with human rights are discussed below.

¹ *Parliament of Queensland Act 2001*, s 93.

² *Legislative Standards Act 1992*, Part 4; *Human Rights Act 2019*, s 41.

4 Electoral and Other Legislation Amendment Regulation 2020 (SL 10)

The objective of the Electoral and Other Legislation Amendment Regulation 2020 (Amendment Regulation) is to make amendments to the Electoral Regulation 2013, the Referendums Regulation 2016, and the State Penalties Enforcement Regulation 2014, consequential upon the passing of the *Electoral and Other Legislation Amendment Act 2019* (Amendment Act). The amendments:

- omit from the Electoral Regulation the prescribed times for the disclosure period (which are no longer required as the Amendment Act removed the need for such times to be prescribed)
- exclude persons detained in custody from the class of electors able to make an electronically assisted vote for State elections and referendums (as following the Amendment Act, detained electors are required to make a declaration vote)
- make consequential amendments to the State Penalties Enforcement Regulation 2014 (as the Amendment Act amended the maximum penalties for various offences in the *Referendums Act 1997*, including some prescribed as penalty infringement notice offences in the State Penalties Enforcement Regulation 2014), and
- approve certain updated or new procedures approved by the Electoral Commission of Queensland (ECQ), which are required to be approved by regulation and tabled in the Legislative Assembly:
 - ‘Procedure for electronic lodgement of returns’ approved by the ECQ on 1 November 2019
 - ‘Electronically assisted voting for state elections procedure’ approved by the ECQ on 23 December 2019, and
 - ‘Procedures for counting of absentee votes for State elections and referendums’ approved by the ECQ on 21 January 2020.

4.1 Human rights considerations

Section 8 of the *Human Rights Act 2019* (Human Rights Act) 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 that 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.

4.2 Human rights issues in the Electoral and Other Legislation Amendment Regulation 2020

In the human rights certificate accompanying the Amendment Regulation, the Honourable Yvette D'Ath MP, Attorney General and Minister for Justice states her opinion that the amendment regulation is compatible:

- with the human rights protected by the Human Rights Act, and
- with the Human Rights Act 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 considered the following issues.

4.2.1 24 hour disclosure period

Right to freedom of association – section 22 Human Rights Act

Right to take part in public life – section 23 Human Rights Act

Right to privacy and reputation – section 25 Human Rights Act

Section 266B of the *Electoral Act 1992* sets out the requirement for disclosures of large gifts, to be made in a period provided for in the regulation. For gifts and loans that are received by registered political parties and candidates, or gifts that are received by associated entities, section 8E of the Electoral Regulation 2013 provides that for amounts received in the last seven days before an election, the disclosure period is 24 hours from receipt.

The right to freedom of association protects the rights of individuals to join together with others to formally pursue a common interest. The changes to the disclosure period could be seen as limiting the right to freedom of association, by making publicly available a person's association with a registered political party, associated entity or candidate.

The right to privacy and reputation protects the right of a person not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. The changes to the disclosure period may limit the right to privacy and reputation by making publicly available a person's personal information, including information about their political associations.

The right to take part in public life provides that a person has the right to participate in the conduct of public affairs, directly or through freely chosen representatives. The Attorney-General considers that this human right is not adversely affected, and states:

*The Amendment Regulation, in shortening the disclosure period in this way to ensure the conduct of fair and transparent elections, arguably promotes the right to take part in public life, which is not limited only to the selection of elected representatives but also includes a person's right to exercise his or her vote in an informed manner.*³

In relation to limiting the rights set out above, the Attorney-General states:

*The requirement for public disclosure of gifts or loans for political purposes is intended to improve the actual and perceived integrity and public accountability of State elections and ensure public confidence in State electoral and political processes. The purpose of shortening the disclosure period to 24 hours in the seven days prior to polling day ensures that electors are fully informed about who is influencing political parties, associated entities and candidates right up until the day that they cast their vote.*⁴

The Attorney-General further states:

*On balance, the importance of ensuring voters are fully informed when they cast their vote in State elections by shortening the disclosure period for the limited class of entities in the seven day period immediately before polling day (and, in turn, protecting the right to take part in public life of individuals participating in the voting process) outweighs the harm that may be caused to the freedom of association and the right to privacy and reputation.*⁵

Conclusion

The committee is satisfied that the limitation of human rights is reasonable and demonstrably justified in this instance.

Electors who are detained in lawful custody cannot use telephone voting

Equality before the law – section 15 Human Rights Act

Right to take part in public life – section 23 Human Rights Act

Right to humane treatment when deprived of liberty – section 30 Human Rights Act

³ Human rights certificate, p 4.

⁴ Human rights certificate, p 4.

⁵ Human rights certificate, p 5.

Persons who are detained in lawful custody for less than three years are eligible to vote. These persons are 'detained electors'. Under the *Electoral Act 1992*, detained electors must make a declaration vote. The Amendment Regulation provides that detained electors are no longer eligible to use telephone voting. This is consistent with the Electoral Act which requires such electors to make a declaration vote.

The right to recognition and equality before the law means that every person has the right to recognition as a person before the law and to enjoy their human rights without discrimination. The removal of the eligibility of detained electors to use telephone voting may limit the right to recognition and equality before the law by limiting the opportunity for detained electors to vote.

The right to take part in public life contemplates that every person in Queensland has the right to participate in the conduct of public affairs, directly or through freely chosen representatives.

The right to humane treatment when deprived of liberty means that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. The right means that individuals who are detained should not be subject to any hardship or constraint that is in addition to that resulting from the deprivation of their liberty.

The removal of the eligibility of detained electors to use telephone voting may limit their right to take part in public life and the right to humane treatment when deprived of liberty by depriving them of another means by which to vote.

In relation to the limitation of human rights, the Attorney-General states:

*The removal of the eligibility of detained electors to make a telephone vote achieves the purpose of providing electors with an opportunity to exercise their right to vote in a manner consistent with the operational capabilities of Queensland corrective services facilities. Detained electors will instead be able to exercise their right to vote by way of postal voting, and Queensland corrective services facilities are able to facilitate that process.*⁶

The Attorney-General further went on to state:

*On balance, the requirement for detained electors to make a declaration vote rather than a telephone vote provides a reasonable opportunity for such electors to exercise their right to vote while taking into account necessary operational issues associated with the deprivation of liberty.*⁷

Conclusion

The committee is satisfied that the limitation on human rights is reasonable and demonstrably justified in this instance.

4.3 Human rights certificate

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

5 State Penalties Enforcement (Heavy Vehicle National Law) Amendment Regulation 2020 (SL 20)

The State Penalties Enforcement (Heavy Vehicle National Law) Amendment Regulation 2020 amends the State Penalties Enforcement Regulation 2014, so that four matters that must currently be heard by a court are each made an infringement notice offence that can be dealt with by a fine. These matters relate to a driver's work and rest hours where the breach is either reducing a major rest break, or increasing a driving period, by 30 minutes or less.

⁶ Human rights certificate, p 6.

⁷ Human rights certificate, p 7.

The changes are effected by inserting the following into Schedule 1 Heavy Vehicle National Law (Queensland), Column 1 'Infringement notice offence':

- s 250(1): a penalty of \$1,000 for a severe risk breach where the driver is operating as a solo driver under standard hours
- s 251(1): a penalty of \$1,000 for a severe risk breach where the driver is operating as a two-up driver under Basic Fatigue Management hours
- s 254(1): a penalty of \$1,000 for a severe risk breach where the driver is operating in a solo driving arrangement under standard hours, and
- s 256(1): a penalty of \$1,000 for a severe risk breach where the driver is operating in a two-up driving arrangement under Basic Fatigue Management hours.

5.1 Human rights considerations

Section 8 of the Human Rights Act 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 that 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.

5.2 Human rights issues in the State Penalties Enforcement (Heavy Vehicle National Law) Amendment Regulation 2020

In the human rights certificate accompanying the amendment regulation, the Honourable Yvette D'Ath MP, Attorney-General and Minister for Justice, states her opinion that the amendment regulation is compatible:

- with the human rights protected by the Human Rights Act, and
- with the Human Rights Act because, to the extent it does impose any limitation on a human right, the limitations are reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

Fair hearing – section 31 Human Rights Act

Property rights – section 24 Human Rights Act

A person charged with a criminal offence or a 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.

A person must not be arbitrarily deprived of their property.

The regulation arguably affects the right to a fair hearing by amending existing driver fatigue laws to remove the requirement to attend court for a severe risk breach and creating offences that can be dealt with by the issuing of a penalty infringement notice.

The certificate also suggests that a person's property rights may be affected because a driver of a heavy vehicle may be fined and the use of privately-owned heavy vehicles is regulated.

The Attorney-General states in relation to the effect on a person's right to a fair hearing:

... it is considered that the importance of implementing effective enforcement responses that are proportionate to the risk created by the offending behaviour and help manage demand in the criminal courts in Queensland outweighs any potential limitations imposed on the right to a fair hearing or rights in criminal proceedings.⁸

⁸ Human rights certificate, p 4.

And further:

Any potential limitation would not represent a complete restriction on an individual's right to a fair hearing or rights in criminal proceedings as individuals retain the capacity to elect to have the matter heard in court instead of paying the penalty amount.⁹

In relation to any impact on a person's property rights, as noted in the certificate:

On one view, the scope of this right is unlikely to be limited by the Regulation. However, in the alternative, if the right is limited, any potential limit is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.¹⁰

The Attorney-General states:

... it is considered that the importance of implementing effective enforcement responses that are proportionate to the risk created by the offending behaviour and help manage demand in the criminal courts in Queensland outweighs any potential limitations imposed on property rights.¹¹

5.3 Conclusion

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

5.4 Human rights certificate

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

6 Recommendation

The committee recommends that the House notes this report.



Peter Russo MP

June 2020

Legal Affairs and Community Safety Committee

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Members	Mr Stephen Andrew MP, Member for Mirani
	Ms Laura Gerber MP, Member for Currumbin
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⁹ Human rights certificate, p 4.

¹⁰ Human rights certificate, p 4.

¹¹ Human rights certificate, p 5.