

## Legal Affairs and Safety Committee

### Report No. 5, 57th Parliament

#### Subordinate legislation tabled between 15 July 2020 and 2 October 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 15 July 2020 and 2 October 2020. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles and lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992* (LSA).<sup>1</sup>

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

#### 2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date
140	Legal Profession (Society Rules) Amendment Notice (No. 2) 2020	11 August 2020	24 February 2021
141	Guardianship and Administration and Other Legislation Amendment (Postponement) Regulation (No. 2) 2020	11 August 2020	24 February 2021
142	Proclamation No. 2— <i>Justice and Other Legislation Amendment Act 2020</i> (commencing remaining provisions)	11 August 2020	24 February 2021
143	Justice Legislation (Fees, Allowances and Other Amounts) Amendment Regulation 2020	11 August 2020	24 February 2021
144	Electoral Amendment Regulation 2020	11 August 2020	24 February 2021
145	State Buildings Protective Security Amendment Regulation 2020	11 August 2020	24 February 2021
153	Domestic and Family Violence Protection (COVID-19 Emergency Response) Regulation 2020	26 August 2020	9 March 2021
155	Weapons Legislation (Replica Firearms) Amendment Regulation 2020	8 September 2020	10 March 2021

<sup>1</sup> *Legislative Standards Act 1992*, Part 4.

<sup>2</sup> *Human Rights Act 2019*, s 41.

Subordinate legislation tabled between 15 July 2020 and 2 October 2020

165	Criminal Proceeds Confiscation (Corresponding Laws and Serious Criminal Offences) Amendment Regulation 2020	8 September 2020	10 March 2021
166	Peace and Good Behaviour Regulation 2020	8 September 2020	10 March 2021
175	Disaster Management (Further Extension of Disaster Situation—COVID-19) Regulation (No. 5) 2020	8 September 2020	10 March 2021
177	Gaming Tax Notice (No. 2) 2020	8 September 2020	10 March 2021
179	Proclamation— <i>Co-operatives National Law Act 2020</i> (commencing remaining provisions)	8 September 2020	10 March 2021
180	Co-operatives National Law Regulation 2020	8 September 2020	10 March 2021
181	Proclamation— <i>Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Act 2020</i> (commencing certain provisions)	8 September 2020	10 March 2021
215	Electoral and Other Legislation Amendment Regulation (No. 2) 2020	22 September 2020	23 March 2021
Exempt	Public Trustee (Fees and Charges Notice) (No. 1) 2020	23 September 2020	23 March 2021
234	Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Amendment Regulation	2 October 2020	23 March 2021
250	Justice Legislation (COVID-19 Emergency Response—Community Titles Schemes and Other Matters) Regulation 2020	2 October 2020	23 March 2021

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

### 3 Committee consideration of the subordinate legislation

Other than as outlined below, no significant issues regarding policy, consistency with fundamental legislative principles, the lawfulness of the subordinate legislation or non-compliance with the HRA were identified.

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

### 4 Justice Legislation (Fees, Allowances and Other Amounts) Amendment Regulation 2020 (SL 143)

The Justice Legislation (Fees, Allowances and Other Amounts) Amendment Regulation 2020 increases a range of fees and charges, which are administered by the Department of Justice and Attorney-General (DJAG), by the government indexation rate for 2020-21 of 1.8%.

All the increases are within the 1.8% amount (apart from some higher increases which are due to rounding).

#### **4.1 Human rights issues in the Justice Legislation (Fees, Allowances and Other Amounts) Amendment Regulation 2020**

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

- with the human rights protected by the HRA
- 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 were considered by the committee.

##### **4.1.1 Recognition and equality before the law – HRA, s 15 and Property rights – HRA, s 24**

Under s 15 of the HRA, every person is equal before the law and is entitled to the equal protection of the law.

The certificate canvasses the possibilities that a person might not be able to:

- obtain a copy of a register or document because they cannot afford the access fees
- obtain a licence to deliver certain services because they cannot afford the application or licence fees
- seek to apply to be appointed as a justice of the peace or commissioner for declarations, through inability to pay the application fees.

Under s 24 of the HRA, a person must not be arbitrarily deprived of their property. The certificate posits that an increase in fees will deprive a person of money (property) that they would otherwise have.

In relation to these human rights impacts, the then Attorney-General stated:

The limitation on the right to recognition and equality before the law and the right to property is for the purpose of retaining the value of the fees and charges prescribed by the relevant regulations. Increasing the fees and charges in accordance with the GIR [government indexation rate] ensures they continue to reflect the cost of providing these government services. The provision of important government services in a fiscally responsible way is a proper purpose consistent with a free and democratic society.<sup>3</sup>

The then Attorney-General also sets out exemptions available to alleviate any human rights impacts:

Where the increase in the fee and charges may impact access to justice (in respect of the limitation on the right to recognition and equality before the law), these are mitigated by a range of exemptions from the payment of fees and charges where it is in the interests of justice. For example, fees to obtain access to documents, exhibits and other items relevant to a criminal proceeding are exempt for defendants in the proceeding. Similarly, fees payable under the Appeal Costs Fund Regulation 2010 may be exempt if it is in the interests of justice to do so. These exemptions are intended to ameliorate the impact on the right to recognition and equality before the law for sectors of the community of a lower socio-economic status.<sup>4</sup>

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<sup>3</sup> Human rights certificate, p 2.

<sup>4</sup> Human rights certificate, p 3.

Additionally, it is clear that any deprivation of property here is not arbitrary.

Committee comment

The committee is satisfied that any limitations on human rights that might arise from these fee increases are reasonable and demonstrably justified, as well as ameliorated by the available fee exemption categories.

## 5 Electoral Amendment Regulation 2020 (SL 144)

The objectives of the Electoral Amendment Regulation 2020 are to:

- amend the provision prescribing the amount of policy development funding to refer to the amended section providing entitlement under the *Electoral Act 1992* (Electoral Act)
- amend the provision prescribing the days and times by which a return must be made about a gift received by an associated entity so that it is expanded to include a loan received in addition to a gift received, and applies to an associated entity of a candidate in an election in addition to an associated entity of a registered political party
- amend the prescribed qualifications of auditors to update a reference to the Institute of Chartered Accountants in Australia to Chartered Accountants Australia and New Zealand
- prescribe the information and particulars that must be included in:
  - an election participant's register of non-monetary gifts for s 305F of the Electoral Act
  - a registered political party's register of subscribed members and affiliates for s 305G of the Electoral Act
  - a record made by or for an election participant about a stated matter for s 305AB of the Electoral Act.<sup>5</sup>

### 5.1 Issue of fundamental legislative principle in the Electoral Amendment Regulation 2020

#### 5.1.1 Rights and liberties of individuals – privacy and confidentiality – LSA, s 4(2)(a)

The right to privacy is relevant to a consideration of whether legislation has sufficient regard to the rights and liberties of individuals.

The disclosure requirements in relation to associated entities may impact on an individual's right to privacy. Personal information about those who give gifts or make loans of \$1,000 or above to an associated entity of a registered political party or candidate will be made publicly available on the Electoral Commission of Queensland (ECQ) website.

The explanatory notes state that the amendment expanding disclosure requirements is justified:

... on the basis that it is necessary to provide transparency and inform the public, including voters, about the financial dealings of associated entities of registered political parties and candidates in an election. This will assist voters to form judgements about registered political parties and candidates with a defined relationship with those associated entities, as financial dealings of associated entities may involve potential for improper, corrupting or undue influence.<sup>6</sup>

Committee comment

The committee is satisfied that sufficient regard has been given to the rights and liberties of individuals.

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<sup>5</sup> Explanatory notes, p 2.

<sup>6</sup> Explanatory notes, p 3.

## 5.2 Human rights issues in the regulation

In the human rights certificate accompanying the Electoral Amendment Regulation 2020, the then Attorney-General stated her opinion that the amendment regulation is compatible:

- with the human rights protected by the HRA
- 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 were considered by the committee.

### 5.2.1 Right to privacy and reputation – HRA, s 25 and Freedom of association – HRA, s 22

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

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

The Electoral Regulation 2013 currently requires the associated entity of a registered political party to provide a return about a gift received within the timeframes prescribed. This amendment regulation will expand this requirement so returns must be provided about loans received and must also be provided by an associated entity of a candidate in an election in relation to both gifts and loans. The return will be published on the ECQ website.

These expanded disclosure requirements could be seen as limiting the rights to privacy and to freedom of association, by making publicly available personal information about those who give gifts or make loans to an associated entity of a registered political party or candidate, and information about their association with political entities.

These rights could also be seen as limited by the amendments prescribing information and particulars that must be kept in registers and records.

The then Attorney-General provided this justification for any limitations on human rights:

The purpose of the limitation imposed by the expansion of disclosure requirements for associated entities is to provide transparency and inform the public, including voters, about the financial dealings of associated entities of registered political parties and candidates in an election. This will assist voters to form judgements about registered political parties and candidates with a defined relationship with their associated entities, as the financial dealings of those associated entities may involve potential for improper, corrupting or undue influence. It will also assist the ECQ in ensuring electoral participants are complying with the donation caps.<sup>7</sup>

...

On balance, taking into account the nature and extent of the limitation on the right to freedom of association and the right to privacy and reputation, I consider that the purpose of allowing compliance with part 11 of the Electoral Act to be ascertained through audit and compliance activity outweighs the negative impact that the requirements to be kept as records and in registers has on freedom of association and the right to privacy and reputation.<sup>8</sup>

### Committee comment

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

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<sup>7</sup> Human rights certificate, p 3.

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

## 6 State Buildings Protective Security Amendment Regulation 2020 (SL 145)

The objective of the State Buildings Protective Security Amendment Regulation 2020 is to declare the Legal Aid Queensland offices and the Queensland Cultural Centre as state buildings until 31 August 2021.

The declaration of these buildings as state buildings ensures that the *State Buildings Protective Security Act 1983* applies, so that security officers may exercise certain powers for these areas.

### 6.1 Human rights issues in the State Buildings Protective Security Amendment Regulation 2020

In the human rights certificate accompanying the amendment regulation, the Minister for Police and Minister for Corrective Services, Hon Mark Ryan MP, stated his opinion that the State Buildings Protective Security Amendment Regulation 2020 is compatible:

- with the human rights protected by the HRA
- 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 were considered by the committee.

#### 6.1.1 Privacy and reputation – HRA, s 25

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

Under the *State Buildings Protective Security Act 1983*, senior protective security officers have a number of powers for a state building. These include requiring persons entering a state building to provide their name and address and reasons for entering. A refusal may amount to an offence. Further, a security officer or police officer may ask a person to pass their belongings through an X-ray scanner and pass through a metal detector. A person may also be asked to produce their belongings for inspection, remove outer garments, and remove articles from their clothing. These can be inspected by a senior protective security officer.

These powers of senior protective security officers and police involve limitations on a person's right to privacy. The Minister for Police provided the following justification:

The purpose of the Amendment Regulation is to ensure that appropriate security measures are applied to the Queensland Cultural Centre and Legal Aid Queensland offices located in the Brisbane CBD. This is achieved in part through authorising a senior protective security officer to require an entrant to the Queensland Cultural Centre and Legal Aid Queensland offices in the Brisbane CBD to provide the person's name and address. The Amendment Regulation also authorises these officers and police officers to demand from an entrant their reason for being in or entering these areas. This power is required to ensure that entrants into state buildings may be identified and are at this location for a lawful purpose. This is a security measure that has been universally adopted for state buildings by all Australian jurisdictions.<sup>9</sup>

#### Committee comment

The committee is satisfied that any limitation on a person's privacy is reasonable and justified.

#### 6.1.2 Freedom of movement – HRA, s 19

Under s 19 of the HRA, every person lawfully within Queensland has the right to move freely within Queensland.

A senior protective security officer has power to prevent a person from entering a state building and to remove a person with force if they have failed to comply with a direction. The exercise of these powers impacts a person's right to move freely.

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<sup>9</sup> Human rights certificate, p 6.

The Minister for Police stated:

This power is appropriate and necessary as it allows the senior protective security officer or police officer to resolve a potential risk to the security and safety of the area and no other reasonable security measures would be effective.<sup>10</sup>

Committee comment

The committee is satisfied that the limitation on a person's right to freedom of movement is reasonable and justified.

**6.1.3 Property rights – HRA, s 24**

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

A senior protective security officer and police have the power to seize certain property ('proscribed matter') for state buildings. Proscribed matter is defined to mean an explosive substance, a firearm, a noxious or offensive substance or an offensive weapon.<sup>11</sup>

The power to seize a person's property can be seen as limiting a person's property rights.

The Minister for Police stated the power of seizure is justified:

... given the paramount importance of ensuring the safety of visitors and employees at the Queensland Cultural Centre and Legal Aid Queensland offices located in the Brisbane CBD. Concerns about this power's impact upon a person's property rights are mitigated through the restriction of this power to a clearly defined area, the limitation of the application of this power to property that is inherently dangerous if inappropriately used and the existence of an avenue for the return of seized property.<sup>12</sup>

Committee comment

The committee is satisfied that the impact on a person's property rights is reasonable and justified.

**7 Domestic and Family Violence Protection (COVID-19 Emergency Response) Regulation 2020 (SL 153)**

**Background**

The regulation is made in part in reliance on ss 9 and 17 of the *COVID-19 Emergency Response Act 2020* (Emergency Response Act). 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 provides a regulation-making power in relation to requirements or permissions under an Act relating to documents, including the filing, lodgement, giving or service of a notice or other document.

Section 9 also provides an additional regulation-making power for making provision about a relevant matter required or permitted under an Act or common law rule by:

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

Section 17 provides a regulation-making power for a matter mentioned in s 16 of the Emergency Response Act, for particular purposes related to the proceedings of courts and tribunals (and other entities with judicial or quasi-judicial functions) including:

- alternative processes or methods for making, signing, filing, giving or verifying documents
- alternative methods for presenting indictments

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<sup>10</sup> Human rights certificate, p 8.

<sup>11</sup> Human rights certificate, p 9.

<sup>12</sup> Human rights certificate, p 10.

- the use of audio visual links or audio links, and
- the restriction of access to the proceedings by members of the public.

Section 17 also provides a regulation-making power for regulations to be made under an enabling Act for other matters related to proceedings, namely:

- altering the constitution of the relevant entity for conducting the proceeding
- an alternative method of service to satisfy a requirement about personal service of a document in the proceeding
- videorecording of a witness's evidence to be viewed and heard in the proceeding instead of direct testimony
- the proceeding to be conducted in an alternative location
- other procedural arrangements in relation to the proceeding.

A regulation made in reliance on those sections is an 'extraordinary regulation' and an Act to which an extraordinary regulation applies is an 'affected Act'.<sup>13</sup>

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.<sup>14</sup>

An extraordinary regulation must be tabled within 14 days of notification (rather than the usual 14 sitting days).<sup>15</sup> That timetable has been met here, with the regulation being notified on 14 August 2020 and tabled on 26 August 2020.

The regulation contains a declaration that it is made under ss 9 and 17 of the Emergency Response Act.<sup>16</sup>

Sections 6 to 8 and 10 are deemed to have commenced on 19 March 2020.<sup>17</sup> Sections 7 and 8 (which modify verification requirements for protection order applications and variations of domestic violence order applications) expire on 3 December 2020. The remainder of the regulation is provided to expire on 31 December 2020.<sup>18</sup>

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<sup>13</sup> See *COVID-19 Emergency Response Act 2020*, s 5(1)-(3).

<sup>14</sup> See generally *COVID-19 Emergency Response Act 2020*, s 5(4)-(8), and s 4.

<sup>15</sup> See *COVID-19 Emergency Response Act 2020*, s 5(9), and contrast s 49(1) of the *Statutory Instruments Act 1992*.

<sup>16</sup> Section 3.

<sup>17</sup> Section 2.

<sup>18</sup> Section 11.



## Objective

The regulation prescribes modified arrangements for procedures under the *Domestic and Family Violence Protection Act 2012* (DFVPA) and the Domestic and Family Violence Protection Rules 2014 (the rules) to enable proceedings to continue during the COVID-19 emergency, while also enabling social distancing requirements to be met with the objective of:

... facilitating the safe continuance of court proceedings and the ongoing protection of people who fear or experience domestic violence during the COVID-19 emergency.<sup>19</sup>

The regulation provides for modified arrangements for court proceedings for verification of private applications for domestic violence orders and variations to such orders under the DFVPA, and for modified filing requirements under the rules.<sup>20</sup> These are alternatives to existing processes, intended to be in place for the duration of the COVID-19 public health emergency.

### 7.1 Issue of fundamental legislative principle in the Domestic and Family Violence Protection (COVID-19 Emergency Response) Regulation 2020

#### 7.1.1 Rights and liberties of individuals – LSA, s 4(2)(a)

The regulation allows the use of audio visual links or audio links for all or part of proceedings under the DFVPA before a Magistrates Court.<sup>21</sup> The modifications to arrangements for proceedings could be seen as not having sufficient regard for the rights and liberties of individuals, in relation to the right to procedural fairness, including fair and open proceedings in hearings.<sup>22</sup>

Replacement of personal attendance with technology-based arrangements could be seen as limiting an attendee's right to a fair hearing, for members of the community who have limited access to, or familiarity with, technology-based facilities, or are otherwise disadvantaged by the use of such facilities. The explanatory notes justify the breach of fundamental legislative principle:

The modified arrangements are considered reasonable and justified given the extraordinary nature of the COVID-19 emergency and are in the interests of public health and safety. Safeguards have been incorporated to limit impacts on individuals' rights and liberties, including that the Regulation provides time-limited alternatives to existing processes for the duration of the COVID-19 emergency. The Regulation does not invalidate or permanently amend existing procedures.<sup>23</sup>

#### Committee comment

The committee is satisfied that in the circumstances the breaches of fundamental legislative principle are justified.

#### 7.1.2 Rights and liberties of individuals – LSA, s 4(2)(g) - retrospectivity

The modification of the Act and the rules has some retrospective application, in that it operates to validate procedures that have been adopted since March 2020 in the context of COVID-19. This raises consideration of the fundamental legislative principle that whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.<sup>24</sup>

The explanatory notes state:

While the Regulation does not impose retrospective obligations, it will operate retrospectively to protect the legal standing of measures that have already been taken by the Magistrates Court of Queensland. The retrospectivity is considered to be beneficial, as it ensures the protection of aggrieved parties with

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<sup>19</sup> Explanatory notes, p 1.

<sup>20</sup> Explanatory notes, pp 2-3.

<sup>21</sup> Section 6.

<sup>22</sup> *Legislative Standards Act 1992*, s 4(2)(a).

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

<sup>24</sup> *Legislative Standards Act 1992*, s 4(3)(g).

DVOs [Domestic Violence Orders] made during proceedings which used modified arrangements between 19 March 2020 and the commencement of the Regulation.<sup>25</sup>

*Committee comment*

The committee is satisfied that, in the circumstances, no breach of this fundamental legislative principle arises in relation to the retrospective operation of the regulation.

**7.2 Human rights issues in the Domestic and Family Violence Protection (COVID-19 Emergency Response) Regulation 2020**

**7.2.1 Human rights considerations**

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

Section 13 of the HRA 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.

**7.2.2 Human rights issues in the amendment regulation**

In the human rights certificate accompanying the amendment regulation, the then Minister for Child Safety, Youth and Women and Minister for the Prevention of Domestic and Family Violence, Hon Dianne Farmer MP, stated 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 limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The following issues were considered by the committee.

**7.2.3 Human rights comment**

**Section 15 HRA – *Right to recognition and equality before the law***

Modification to arrangements for proceedings, including enabling use of audio visual links or audio links for conduct of particular proceedings

Under s 15 of the HRA, every person is equal before the law and is entitled to the equal protection of the law without discrimination.

Arguably, conducting proceedings by the use of audio visual link or audio link might limit this right by disproportionately impacting on vulnerable or disadvantaged individuals who may not have familiarity with technology, or appropriate, discreet and reliable access to technology.

**Section 27 HRA – *Cultural rights***

All persons with a particular cultural, religious, racial or linguistic background must not be denied the right to enjoy their culture, to declare and practise their religion and to use their language.

The use of audio visual or audio links limits the cultural rights of a person to use their own language, as it may prove to be difficult to have an interpreter involved, compared to when there is a physical appearance in an open court. A person requiring an interpreter could have their rights limited as communication difficulties may be exacerbated.

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<sup>25</sup> Explanatory notes, p 5.

### **Section 25 HRA – Right to privacy**

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

The modified arrangements enabling proceedings via audio visual link or audio link might make it more difficult to maintain the privacy of persons involved in proceedings, including where a party is unable to secure a private or soundproof place from which to participate. The use of audio or audio visual communication might lead to an increased risk of proceedings being intercepted or recorded without consent.

### **Section 31 HRA – Right to a fair hearing**

Under s 31 of the HRA, 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 court or tribunal after a fair and public hearing.

Arguably, the openness and transparency of the court process may be diminished through the use of audio visual or audio link. Use of such means could also limit this right by placing a respondent at a disadvantage, due to limitations of technology, particularly if services that would usually be available to assist individuals to understand and participate in court proceedings are less available.

#### *Are the limitations justified?*

In addressing all these limitations, the then Minister stated:

The continuation of proceedings under the DFVPA during the COVID-19 emergency is considered vital to ensure that people who fear or experience domestic violence can continue to seek protection through the making of a domestic violence order.

...

Current procedural requirements under the [Act and rules] that require a level of person-to-person contact are not consistent with social distancing requirements and may place individuals at risk of contracting COVID-19.

The modified arrangements will support social distancing requirements whilst enabling administrative and judicial proceedings under the DFVPA and DFVP Rules to continue. They will also ensure continued access to justice for both the aggrieved and respondent parties, and that protections for people who fear or experience domestic violence continue to be available through civil domestic violence proceedings. The modified arrangements contain an express nexus to the COVID-19 emergency, and help to achieve one or more of the purposes under the COVID-19 Act.<sup>26</sup>

In summary, the then Minister stated:

On balance, the need to provide for modified arrangements to support social distancing requirements and the importance of ensuring that domestic and family violence proceedings can continue in a safe way during the COVID-19 emergency is considered to outweigh any impact on a person's human rights. This is especially so when safeguards such as the time limited nature of the arrangements and the continued availability of existing processes are taken into account.<sup>27</sup>

#### Committee comment

The committee is satisfied that the extent of any limitations on various human rights are not great, and such limitations are reasonable and demonstrably justified.

#### **7.2.4 Human rights certificate**

A human rights certificate was tabled with the subordinate legislation, as required by s 41 of the HRA. It provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

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<sup>26</sup> Human rights certificate, p 5.

<sup>27</sup> Human rights certificate, p 6.

## **8 Weapons Legislation (Replica Firearms) Amendment Regulation 2020 (SL 155)**

The objectives of the Weapons Legislation (Replica Firearms) Amendment Regulation 2020 are to:

- categorise replica firearms as restricted items under the Weapons Categories Regulation 1997, thereby regulating their possession and placing storage requirements on owners
- clarify that permanently inoperable firearms, of a type belonging to category R, are category R weapons
- categorise permanently inoperable category A, B and C firearms as restricted items.

As a restricted item under s 67 of the *Weapons Act 1990* (Weapons Act), a restricted item must not be possessed or acquired without a reasonable excuse. Under s 142 of the Weapons Act, restricted items must be stored in a locked container when not in physical possession, and owners must take reasonable precautions to ensure the item is not accessible to persons who are not lawfully entitled to possess it.

### **8.1 Issue of fundamental legislative principle in the Weapons Legislation (Replica Firearms) Amendment Regulation 2020**

#### **8.1.1 Rights and liberties of individuals – LSA, s 4(2)(a)**

Legislation should not, without sufficient justification, unduly restrict ordinary activities.

As acknowledged in the explanatory notes:

As the acquisition and possession of replica firearms has not previously been regulated, a large number of people have lawfully acquired such items, believing their ongoing possession would be uninterrupted.<sup>28</sup>

The regulation affects the rights and liberties of individuals who are current owners of replica firearms, as it limits possession of such items to certain classes of persons and imposes new obligations regarding storage of such items and to take reasonable measures to ensure persons who are not lawfully entitled to possess such items cannot access the items.

The explanatory notes provide the following justification:

Any concerns about the infringement of individual rights is outweighed by the public interest in protecting the community from the fear and alarm caused by the inappropriate use of replica firearms, coupled with the need to minimise the risk of a critical incident occurring.<sup>29</sup>

#### Committee comment

The committee is satisfied that restrictions on a person's ordinary activities are justified.

### **8.2 Human rights issues in the Weapons Legislation (Replica Firearms) Amendment Regulation 2020**

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

- with the human rights protected by the HRA<sup>30</sup>
- with the HRA because it does limit, restrict or interfere with a human right, but that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.<sup>31</sup>

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<sup>28</sup> Explanatory notes, p 5.

<sup>29</sup> Explanatory notes, p 6.

<sup>30</sup> Human rights certificate, p 1.

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

The following issues were considered by the committee.

### **8.2.1 Property rights – HRA, s 24**

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

Under the regulation, the possession of replica firearms is largely made unlawful, being restricted to individuals who have a reasonable excuse to possess them. The regulation interferes with personal property rights, as it limits possession of this property to certain classes of persons. Moreover, persons who currently lawfully possess a replica firearm will no longer be able to lawfully possess it.

The Minister for Police stated:

While the Amendment Regulation may limit the property rights of some current and prospective owners of replica firearms, the community benefits of limiting the number of such items and thereby bolstering community rights to liberty and security and the rights of families and children, outweigh the impact of the limitation on the right.<sup>32</sup>

...

Furthermore, the amendments do not prevent ownership of replica firearms altogether, but rather they operate to restrict such ownership to those with a reasonable excuse to do so (for example, individuals who hold collector's licences).<sup>33</sup>

#### Committee comment

The committee is satisfied that the impact on people's property rights is reasonable and demonstrably justified.

## **9 Criminal Proceeds Confiscation (Corresponding Laws and Serious Criminal Offences) Amendment Regulation 2020 (SL 165)**

The Criminal Proceeds Confiscation (Corresponding Laws and Serious Criminal Offences) Amendment Regulation 2020:

- expands the non-conviction based forfeiture scheme in the *Criminal Proceeds Confiscation Act 2002* (CPCA) to tainted property, by prescribing the tainted property offences in s 252 of that Act and in s 10A of the *Drugs Misuse Act 1986* as 'serious criminal offences' in Schedule 1 of the Criminal Proceeds Confiscation Regulation 2013 (CPCR).<sup>34</sup>
- ensures orders of other States restraining or forfeiting property under corresponding laws can be enforced in Queensland, by updating the orders of other jurisdictions that are recognised in Queensland for that purpose.<sup>35</sup>

### **9.1 Issue of fundamental legislative principle in the Criminal Proceeds Confiscation (Corresponding Laws and Serious Criminal Offences) Amendment Regulation 2020**

#### **9.1.1 Rights and liberties of individuals – Reversal of the onus of proof - LSA, s 4(3)(d)**

Certain provisions of the CPCA reverse the burden of proof, requiring the respondent, their dependants, or a third party, to satisfy the court that property was lawfully acquired or that they had no knowledge of the relevant illegal activity.

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<sup>32</sup> Human rights certificate, p 3.

<sup>33</sup> Human rights certificate, p 4.

<sup>34</sup> Explanatory notes, p 2.

<sup>35</sup> Explanatory notes, pp 1-2.

Whether legislation has sufficient regard for the rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.<sup>36</sup>

Generally, for a reversal to be justified, the relevant fact must be something inherently impractical to test by alternative evidential means and the defendant would be particularly well positioned to disprove guilt.

For example, if legislation prohibits a person from doing something 'without reasonable excuse', it is generally appropriate for a defendant to provide the necessary evidence of the reasonable excuse if evidence of the reasonable excuse does not appear in the case for the prosecution.<sup>37</sup>

It should be noted that the principle prohibiting the reversal of onus of proof is expressly directed towards criminal proceedings.

The explanatory notes state:

Confiscation proceedings are civil in nature and are not punitive. The reversal of the burden of proof, requiring the respondent to satisfy the court that property was not unlawfully acquired, is a key element of effective confiscation regimes. The reversal is appropriate as information about the lawful source of an asset is peculiarly within the knowledge of the respondent. Accordingly, it would be significantly more difficult and costly for the State to establish this information. The importance of depriving persons of illegally acquired property and deterring future criminal activity by removing the incentive to engage in criminal activity, justifies the imposition of a burden on the respondent, their dependants or a third party to prove that the property was lawfully acquired.<sup>38</sup>

In the context of the civil confiscation of proceeds of crime, the previous Scrutiny of Legislation Committee noted:

... there is nothing unfair or contrary to the natural justice rule of equality of parties in transferring the onus shifting in a civil matter once reasonable suspicion has been established. It is quite reasonable in a context where it appears to a court that the goods are likely to be the proceeds of crime that a person in possession of them be asked to account for their source. He or she is in a unique position to do so.

Although contentious in the criminal law context, reverse onus mechanisms are central to the capacity of civil based forfeiture schemes to achieve their basic objectives.

They are arguably justified, not only by logic, legal tradition and the force of common sense reasoning but by important practical considerations as well.

In this context it is easier generally speaking for a person to prove the origin of his assets or means by which he lives than it is for the State to prove that he obtained them by illegal means.

Without provisions of this kind, criminals are able to insulate themselves from law enforcement penetration and protect their illicit profits against their capture by distancing themselves from the illegal activity from which their wealth is accumulated.<sup>39</sup>

#### Committee comment

The committee is satisfied that the amendment regulation has sufficient regard to the rights and liberties of individuals in this respect.

#### **9.1.2 Rights and liberties of individuals – Compulsory acquisition of property - LSA, s 4(3)(i)**

In providing for the confiscation of property without conviction in relation to tainted property offences, the regulation extends the current scheme, which involves the compulsory acquisition of property without compensation, to a broader range of offences.

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<sup>36</sup> *Legislative Standards Act 1992, s 4(3)(d)*.

<sup>37</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 36.

<sup>38</sup> Explanatory notes, p 5.

<sup>39</sup> Scrutiny of Legislation Committee, *Alert Digest 6 of 2002*, p 21, paras 98-102.

Whether legislation has sufficient regard for the rights and liberties of individuals depends on whether, for example, the legislation provides for the compulsory acquisition of property only with fair compensation.<sup>40</sup>

The explanatory notes state that the breach of fundamental legislative principles is considered justified and necessary:

... to further the main objective of the CPCA to remove the financial gain and increase the financial loss associated with illegal activity ... [and] ensure those involved in criminal activity are not unjustly enriched at the expense of the Queensland community.<sup>41</sup>

#### Committee comment

The committee is satisfied that the amendment regulation has sufficient regard to the rights and liberties of individuals in this respect.

### **9.2 Human rights issues in the Criminal Proceeds Confiscation (Corresponding Laws and Serious Criminal Offences) Amendment Regulation 2020**

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

- with the human rights protected by the HRA<sup>42</sup>
- with the HRA because it does limit, restrict or interfere with a human right, but that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.<sup>43</sup>

The following issues were considered by the committee.

#### **9.2.1 Property rights – HRA, s 24**

Under s 24 of the HRA, a person has the right not to be arbitrarily deprived of their property.

Property rights may be limited by the inclusion of tainted property offences as ‘serious criminal offences’ under the CPCA and by the recognition of equivalent interstate orders under the Criminal Proceeds Confiscation Regulation 2013, as this will allow the seizure of property derived from serious criminal offences and allow Queensland courts to enforce an interstate order which requires the seizure or forfeiture of property held within the jurisdiction of Queensland.

#### **9.2.1 Protection of families and children – HRA, s 26**

Section 26 of the HRA declares that families are the fundamental group unit of society and are entitled to be protected by society and the State. Further, a child has the right, without discrimination, to the protection that is needed by the child.

The confiscation of property may impact a family or child, where a family home or other assets are taken.

#### **9.2.2 Right to a fair hearing – HRA, s 31**

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.

Property may be confiscated without conviction, meaning that a person’s property may be subject to forfeiture, without the person being convicted in a criminal court. Further, under the civil confiscation

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<sup>40</sup> *Legislative Standards Act 1992*, s 4(3)(i).

<sup>41</sup> Explanatory notes, p 4.

<sup>42</sup> Human rights certificate, p 1.

<sup>43</sup> Human rights certificate, p 6.

scheme, findings of fact in relation to offending behaviour can be made based on the civil standard of proof (rather than the higher criminal standard).

A person contesting an application for confiscation of property bears the onus of showing that they lawfully acquired the property or that they had no knowledge of the relevant illegal activity, for example in the case of an unexplained wealth order, hardship order or exclusion order. This involves a reversal of the onus of proof, which can be seen as limiting the right to a fair hearing.

The then Attorney-General noted that the main objective of the CPCA (and the extension of that scheme to the tainted property offences) is to deny profiteering from illegal activity and to increase the financial loss associated with illegal activity, whether or not a particular person is convicted of an offence because of the activity.<sup>44</sup>

Addressing the impacts of the tainted property offences on all of the human rights set out above, the then Attorney-General concluded:

On balance, it is considered that the importance of the inclusion of the tainted property offences in the CPCA outweighs the harm caused to the rights to property, protection of families and children and fair hearing.

In the context of the right to property in particular ... I am of the view that any interference is lawful and not arbitrary. Importantly, the provisions of the CPCA are set out sufficiently clearly and, having regard to the matters noted above, operate in a way that is proportionate, so that any deprivation of property occurs in accordance with the law and is not arbitrary. For example, the person would ordinarily have been charged with possessing tainted property under section 252 of the CPCA or section 10A of the DMA and had the relevant tainted property (i.e. cash) seized, then an application under the CPCA would need to be filed and served on the respondent, thereby providing the respondent the opportunity to be heard and, ultimately, for a competent independent court to decide the application. To that end, I consider that the benefit of the provision in achieving the objective of confiscating ill-gotten property outweighs any limitation on the right to property.<sup>45</sup>

In relation to the amendments recognising interstate orders, the certificate stated:

The amendments recognising interstate orders under the CPR may also potentially limit the right to property in that it will allow Queensland courts to enforce an interstate order which requires the seizure or forfeiture of property held within the jurisdiction of Queensland.<sup>46</sup>

This view is expressed in the certificate:

However, the act undertaken by the Queensland courts in this procedure is to enforce an interstate court's order, rather than determining the matter. Any process in determining the property to be seized or forfeited has been previously determined by an interstate court. As a result, section 4 of the Amendment Regulation arguably does not limit the human rights.<sup>47</sup>

And, elsewhere in the certificate:

*I am of the view that the recognition of interstate orders does not limit human rights.*<sup>48</sup>

The impact of any human rights limitation arising from the recognition provisions is not further considered in the certificate.

Given that the effect of these legislative amendments is to allow the confiscation of property in Queensland, and addressing the application of the HRA provisions to the legislation (regardless of the

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<sup>44</sup> Human rights certificate, p 4.

<sup>45</sup> Human rights certificate, p 6.

<sup>46</sup> Human rights certificate, p 3.

<sup>47</sup> Human rights certificate, p 3.

<sup>48</sup> Human rights certificate, p 2. The impact of any human rights limitation regarding the recognition provisions is not further considered in the certificate.



nature of the actions undertaken by the court in the enforcement process), it is possible to consider that these provisions *do* involve a limitation on the right to property in the HRA.

If this view is taken, this limitation needs to be considered in light of the matters in ss 8 and 13 of the HRA. Much of the analysis (regarding the tainted property provisions) set out above can be applied to the recognition provisions, including consideration of the purpose of the legislative scheme in denying ‘profiteering from illegal activity’, while noting that any interference here with the right to property is, in any event, lawful, and not arbitrary.

#### Committee comment

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

### **10 Peace and Good Behaviour Regulation 2020 (SL 166)**

The objective of the Peace and Good Behaviour Regulation 2020 is to remake the Peace and Good Behaviour Regulation 2010, which expired on 1 September 2020.<sup>49</sup> The regulation:

... support[s] the main object of the Peace and Good Behaviour Act 1982 to protect the safety, welfare, security, and peace and good order of the community from risks presented by people engaging in antisocial, disorderly or criminal conduct.<sup>50</sup>

The Act provides that a Justice of the Peace may, in certain circumstances, issue a summons for a person to appear, or a warrant for the person to be apprehended and brought before a Magistrates Court. The court may then make an order requiring the person to keep the peace and be of good behaviour for a period (‘a peace and good behaviour order’).

According to the explanatory notes, the regulation provides ‘operational support and procedural certainty’ for the Act by providing for:

- filing requirements if a summons or warrant is issued
- requirements if a summons or warrant is not issued
- filing requirements if mediation is ordered
- service requirements for complaints and summonses
- providing discretion to the Justice of the Peace for the time period of a warrant
- matters to be included in a warrant issued by the Justice of the Peace
- complaints and summonses under the Act to be in the approved form
- the matters to be included in an approved form.<sup>51</sup>

The regulation is remade in unchanged form, apart from some minor and technical amendments.

#### **10.1 Human rights issues in the Peace and Good Behaviour Regulation 2020**

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

- with the human rights protected by the HRA<sup>52</sup>

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<sup>49</sup> Under s 54 of the *Statutory Instruments Act 1992*, subordinate legislation expires on 1 September 2020 after the 10th anniversary of being made.

<sup>50</sup> Explanatory notes, p 1.

<sup>51</sup> Explanatory notes, pp 1-2.

<sup>52</sup> Human rights certificate, p 1.

- with the HRA because it does limit, restrict or interfere with a human right, but that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.<sup>53</sup>

The following issues were considered by the committee.

#### **10.1.1 Right to privacy – HRA, s 25**

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

The human rights certificate notes that ss 8, 9, 10 and 11 require the inclusion of personal information either in an approved form or in a warrant or order. This has some impact on a person's right to privacy.

The then Attorney-General offered this justification:

The purpose of limiting the right to privacy and reputation by requiring the name and address of the complainant and defendant is to ensure any summons, warrant or mediation order subsequently issued by the Justice of the Peace is served upon or executed with respect to the correct person, thereby providing the person with the opportunity to appear before the court and respond to the allegations made against them. Including the complainant's personal details is important to let the defendant know who is making the allegations against them and, similarly, provide them with the opportunity to respond.<sup>54</sup>

#### Committee comment

The committee is satisfied that any impact on a person's privacy is minor, reasonable and demonstrably justified.

## **11 Disaster Management (Further Extension of Disaster Situation—COVID-19) Regulation (No. 5) 2020 (SL 175)**

The objective of the Disaster Management (Further Extension of Disaster Situation—COVID-19) Regulation (No. 5) 2020 is to further extend the period of the disaster situation declared for the whole of the State of Queensland on 22 March 2020 (and extended by regulation on 2, 16 and 30 April, and 14 and 28 May 2020).

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

### **11.1 Issues of fundamental legislative principle in the Disaster Management (Further Extension of Disaster Situation—COVID-19) Regulation (No. 5) 2020**

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, demolishing or destroying a vehicle, or a building or other structure in the declared area.

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<sup>53</sup> Human rights certificate, p 6.

<sup>54</sup> Human rights certificate, p 3.

### **11.1.1 Rights and liberties of individuals - LSA, s 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; however, they do not address fundamental legislative principle issues that arise, presumably because the powers are contained in the principal Act itself. The explanatory notes state:

A further extension is required due to the longer-term nature of COVID-19 and its potential impacts. Extension of the period of the disaster situation is necessary to ensure powers are available to appropriately address risk to the health of the Queensland community.<sup>55</sup>

#### 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.

### **11.2 Human rights issues in the Disaster Management (Further Extension of Disaster Situation—COVID-19) Regulation (No. 5) 2020**

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

- with the human rights protected by the HRA<sup>56</sup>
- with the HRA because it does limit, restrict or interfere with a human right, but that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.<sup>57</sup>

The following issues were considered by the committee.

#### **11.2.1 Freedom of movement – HRA, s 19**

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

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

The then Minister for Fire and Emergency Services provided the following justification:

On the basis of the nature of the health emergency, limiting persons identified with, or suspected of having, COVID-19 from circulating freely amongst the general public is considered reasonable and justifiable due to increased risks to vulnerable persons.<sup>58</sup>

#### Committee comment

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

#### **11.2.2 Peaceful assembly and freedom of association – HRA, s 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.

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<sup>55</sup> Explanatory notes, p 1.

<sup>56</sup> Human rights certificate, p 1.

<sup>57</sup> Human rights certificate, p 6.

<sup>58</sup> Human rights certificate, p 3.

The then Minister for Fire and Emergency Services provided this justification:

The purpose of limiting the right to assemble peacefully is to reduce the risk of human to human transmission of COVID-19, consistent with multi-tier government requirements relating to mass gatherings during the COVID-19 response.<sup>59</sup>

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.

**11.2.3 Property rights – HRA, s 24**

The Disaster Management Act provides powers, which among other things, allow entry into a place, the removal of things (personal property) 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 s 24 of the HRA, a person must not be arbitrarily deprived of their property.

The then Minister for Fire and Emergency Services stated:

The purpose of any deprivation of a person of their property under the relevant powers is to minimise the risk of transmission of COVID-19 to vulnerable persons.<sup>60</sup>

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.

**11.2.4 Privacy and reputation – HRA, s 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 to not enter a place.

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

The then Minister for Fire and Emergency Services provided this justification:

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

...

On balance, having regard to the nature and extent of the limitation on the right and the information detailed above, the importance of achieving the protection of a person's, or the public's, health outweighs the harm caused to [a] person's right to privacy under these circumstances.<sup>61</sup>

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.

**11.2.5 Right to liberty and security – HRA, s 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.

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<sup>59</sup> Human rights certificate, p 4.

<sup>60</sup> Human rights certificate, p 5.

<sup>61</sup> Human rights certificate, p 8.

The then Minister for Fire and Emergency Services stated:

Due to the human to human transfer of the virus, restrictions need to be imposed on the movement of persons to reduce the risks of transmission of the virus. In particular, the movement of persons who are identified with or suspected of having COVID-19 needs to be limited in order to prevent them from circulating freely amongst the general public and spreading the virus.<sup>62</sup>

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.

## 12 Electoral and Other Legislation Amendment Regulation (No. 2) 2020 (SL 215)

The objectives of the Electoral and Other Legislation Amendment Regulation (No. 2) 2020 include:

- facilitating the holding of the 2020 State election in a way that helps minimise serious risks to the health and safety of persons caused by the COVID-19 public health emergency
- approving various procedures of the ECQ
- amending the State Penalties Enforcement Regulation 2014 to prescribe as penalty infringement notice offences, the contravention of various directions which ECQ staff issue about the distribution or display of how-to-vote cards and other election material, or the presence and movement of persons at relevant places, if deemed necessary to help minimise serious risks to the health and safety of persons caused by the public health emergency.

### *2020 State election*

Under part 6A of the amendment regulation, electors who are general postal voters under the *Commonwealth Electoral Act 1918* (Cth), who due to being hospitalised or unable to travel from their homes to a polling place, or due to serious illness or infirmity or caring for someone who is seriously ill or infirm, automatically have their ballot papers posted to them. This is aimed at assisting these vulnerable electors to vote without needing to attend a polling booth to minimise their risk of exposure to COVID-19.

### *Approval of procedures*

The *Electoral Act 2016* (Electoral Act) and the *Referendums Act 1997* require certain procedures made by the ECQ to be given effect by approval by regulation and the procedures to be tabled in the Legislative Assembly.

The Electoral and Other Legislation Amendment Regulation (No. 2) 2020 replaces current sections of the Electoral Regulation 2013 and the Referendums Regulation 2016, which approve procedures for electronically assisted voting for State elections, counting of absentee votes for State elections and referendums and the electronic lodgement of returns. The explanatory notes advise:

These amendments are required to allow for the correction of an oversight in relation to the tabling of the procedures, as previously approved, and to approve updated procedures.<sup>63</sup>

On 22 September 2020, the then Attorney-General tabled these ECQ procedures:

- Procedure for electronic lodgement of returns (version 2.0)
- Procedure for electronically assisted voting for state elections (version 3.0)
- Procedures for counting of absentee votes for state elections and referendums (version 1.0).

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<sup>62</sup> Human rights certificate, pp 9-10.

<sup>63</sup> Explanatory notes, p 2.

### 12.1 Issues of fundamental legislative principle and comment

No issues of fundamental legislative principle were identified.

The regulation is made in reliance in part on s 392Y of the Electoral Act. Section 392Y sits within part 12B of the Electoral Act, which was inserted by the *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Act 2020* (the Amendment Act), which was enacted on 30 June 2020. Section 392Y provides that a regulation may make provision about a matter to facilitate the holding of the 2020 election in a way that helps minimise serious risks to the health and safety of persons caused by the COVID-19 public health emergency.

The Minister may recommend to the Governor in Council the making of such a regulation only if the Minister is satisfied the regulation is necessary to achieve the purpose of facilitating the holding of the 2020 general election in a way that helps minimise serious risks to the health and safety of persons caused by the COVID-19 public health emergency.<sup>64</sup> The regulation must declare that it is made under part 12B.<sup>65</sup>

The explanatory notes state:

The Attorney-General and Minister for Justice is satisfied ... that the insertion of part 6A is necessary to facilitate the holding of the 2020 election in a way that helps minimise serious risks to the health and safety of persons caused by the COVID-19 public health emergency.<sup>66</sup>

### 12.2 Human rights issues in the Electoral and Other Legislation Amendment Regulation (No. 2) 2020

In the human rights certificate accompanying the Electoral and Other Legislation Amendment Regulation (No. 2) 2020, the then Attorney-General stated her opinion that the amendment regulation is compatible:

- with the human rights protected by the HRA<sup>67</sup>
- with the HRA because it does limit, restrict or interfere with human rights, but the limitations are reasonable and demonstrably justified.<sup>68</sup>

The following issues, canvassed in the certificate, were considered by the committee. These relate to the provisions which prescribe certain offences as penalty infringement notice (PIN) offences. These offences are for contravention of directions by ECQ officials:

- directions about the distribution or display of how-to-vote cards or other election material at a polling booth and canvassing for votes in or near a polling booth<sup>69</sup>
- directions about the number of scrutineers each candidate may have at a polling booth or other place where a scrutineer is entitled to be present, or prohibiting a candidate or scrutineer from being present at a polling booth or other place they would otherwise be entitled to be present<sup>70</sup>
- directions about the movement of candidates or scrutineers at the polling booth or other place where they may be present.<sup>71</sup>

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<sup>64</sup> *Electoral Act 1992*, ss 392Z(3) and 392K.

<sup>65</sup> *Electoral Act 1992*, s 392Z(5). The required declaration can be found in section 6 of the Amendment Regulation.

<sup>66</sup> Explanatory notes, p 2.

<sup>67</sup> Human rights certificate, p 1.

<sup>68</sup> Human rights certificate, p 7.

<sup>69</sup> See *Electoral Act 1992*, s 392T. PIN amount of 1 penalty unit applies. The value of one penalty unit is \$133.45.

<sup>70</sup> See *Electoral Act 1992*, s 392U. PIN amount of 2 penalty units applies.

<sup>71</sup> See *Electoral Act 1992*, s 392V. PIN amount of 2 penalty units applies.

### 12.2.1 Fair hearing – HRA, s 31 and property rights – HRA, s 24

Under s 31 of the HRA, 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.

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

Prescribing the offences as PIN offences arguably affects the right to a fair hearing by enabling a fine of a fixed amount to be issued to an individual by the ECQ without a charge being decided by an independent court after a fair and public hearing, and without the person having the opportunity to exercise their rights in criminal proceedings.<sup>72</sup>

The certificate also suggests that a person's property rights may be affected because prescribing the offences as PIN offences will make a person subject to enforcement powers in the case of failure to pay the fine. These powers include, for example, the suspension of an individual's driver licence, vehicle immobilisation, or seizure and sale of property, for example a vehicle owned by the individual. Such enforcement action limits the right to property.<sup>73</sup>

The then Attorney-General stated:

... the broader purpose of these directions is to protect the Queensland public from risks to health and safety caused by the public health emergency involving COVID-19, including limiting situations which may result in contagion through person-to-person contact.<sup>74</sup>

...

Prescribing these offences [as PIN offences] allows fines to be issued ... This, in turn, facilitates an efficient enforcement mechanism that addresses the offending behaviour. It also achieves the purpose of ensuring (as best as is possible) that arrangements that support the protection of the health and safety of the public are complied with.<sup>75</sup>

...

Prosecuting the offences through the courts would involve delays and would be less efficient as an enforcement response, taking into account the nature of the offending.<sup>76</sup>

The then Attorney-General concluded:

On balance, taking into account the nature and extent of the limitations and having regard to the information and analysis detailed above, I consider that the importance of helping to minimise the serious risks to the health and safety of persons caused by the COVID-19 public health emergency by providing the ECQ with an efficient enforcement mechanism to ensure compliance with their directions outweighs any limitations on the right to property, right to liberty and security, fair hearing and rights in criminal proceedings.<sup>77</sup>

In relation to the effect on a person's right to a fair hearing, individuals retain the capacity to elect to have the matter heard in court instead of paying the penalty amount; thus there is no complete restriction on an individual's right to a fair hearing.

In relation to any impact on a person's property rights, on one view, the scope of this right is unlikely to be limited by the amendment regulation. In any event, as noted in the certificate, enforcement through the seizure and sale of property or vehicle immobilisation would only occur infrequently for

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<sup>72</sup> Human rights certificate, pp 3-4.

<sup>73</sup> Human rights certificate, p 3.

<sup>74</sup> Human rights certificate, p 6.

<sup>75</sup> Human rights certificate, p 6.

<sup>76</sup> Human rights certificate, p 6.

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

the prescribed offences, given the low amount of the PIN fines for these offences compared to the relatively high threshold amounts of debt that trigger such enforcement action.<sup>78</sup>

Committee comment

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

### 13 Public Trustee (Fees and Charges Notice) (No. 1) 2020 (exempt)

Exempt subordinate legislation consists of statutory rules, other than regulations, declared to be exempt subordinate legislation either by an Act or by a regulation made under the LSA.<sup>79</sup>

Rather than being notified by publication on the Office of the Queensland Parliamentary Counsel legislation website, exempt subordinate legislation is required to be notified by being published in the Queensland Government Gazette.<sup>80</sup> As with other subordinate legislation, exempt subordinate legislation:

- must be tabled within 14 sitting days of being notified<sup>81</sup>
- is subject to disallowance<sup>82</sup>
- is able to be considered and reported on by a committee.

#### 13.1 Objective of the Public Trustee (Fees and Charges Notice) (No. 1) 2020

The Public Trustee may, by gazette notice, fix fees and charges for services that the Public Trustee performs or provides.<sup>83</sup> Examples of such services include the administration of deceased estates, trustee services, acting as attorney under the *Powers of Attorney Act 1998*, and administration under the *Guardianship and Administration Act 2000*. This kind of fees and charges notice is set out in s 17(6) of the *Public Trustee Act 1978* as subordinate legislation and exempt subordinate legislation.<sup>84</sup>

The Public Trustee (Fees and Charges Notice) (No. 1) 2020 (Notice) fixes the fees and charges for services performed or provided by the Public Trustee, effective 1 July 2020. According to the explanatory notes, the fees and charges have been increased in line with the government indexation rate applicable from 1 July 2020 of 1.8%.

#### 13.2 Fundamental legislative principle issues in the Public Trustee (Fees and Charges Notice) (No. 1) 2020

No issues of fundamental legislative principle were identified in the Notice.

The fee increases are mostly within the 1.8% range set by government policy. One exception relates to the minimum fee under s 44(2) of the Notice, which sets out fees for certain exercises of the power under ss 61 or 62 of the *Public Trustee Act 1978*. This minimum fee was increased by 2.2% to \$544.90.

#### 13.3 Human rights considerations in the Public Trustee (Fees and Charges Notice) (No. 1) 2020

Section 8 of the HRA provides that a statutory provision is compatible with human rights if it does not limit a human right, or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with s 13 of that Act. Section 13 provides that a human right may be subject to reasonable limits that can be demonstrably justified in a free and democratic society based on

<sup>78</sup> Human rights certificate, pp 6-7.

<sup>79</sup> See s 27 and schedule 1 (dictionary), LSA.

<sup>80</sup> *Statutory Instruments Act 1992*, s 47(4).

<sup>81</sup> *Statutory Instruments Act 1992*, s 49. This notice was published in Queensland Government Gazette No. 56, 26 June 2020, p 443, and tabled on 23 September 2020.

<sup>82</sup> *Statutory Instruments Act 1992*, s 50.

<sup>83</sup> *Public Trustee Act 1978*, s 17(1).

<sup>84</sup> *Public Trustee Act 1978*, s 17(6).



human dignity, equality and freedom and sets out a range of factors that are relevant to determining whether a limit on a human right is reasonable and justifiable.

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

- with the human rights protected by the HRA
- 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.<sup>85</sup>

The following issues were considered by the committee.

### **13.3.1 Recognition and equality before the law – HRA, s 15 and property rights – HRA, s 24**

Under s 15 of the HRA, every person is equal before the law and is entitled to the equal protection of the law.

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

The certificate canvasses the possibilities that the setting of fees and charges:

- may result in some individuals (including where the Public Trustee is appointed in a fiduciary capacity such as an administrator or attorney) being unable to access the Public Trustee's services, thus limiting the person's right to recognition as a person before the law
- may impact the right to property (money) under s 24 of the HRA, which is of particular relevance where individuals do not have the option of engaging with the Public Trustee (such as certain prisoners<sup>86</sup>).<sup>87</sup>

In relation to these possible human rights impacts, the then Attorney-General stated:

Increasing the fees and charges for services provided and performed by the Public Trustee is rationally connected to the purpose of ensuring sufficient resources for their ongoing delivery.

Pursuant to section 8 of the Public Trustee Regulation 2012, the Public Trustee may remit any or all of the fees in any particular estate or matter otherwise payable. The power to remit fees ensures that any limitation on human rights arising from the increase of fees and charges under the Notice is the least restrictive upon human rights.

The potential limitations which have been identified are based on specific circumstances of individuals who may be impacted by the Notice, as opposed to all persons to whom the Notice applies.

While the right to equality before the law and property rights are of significant importance to a free and democratic society, the impact on those rights is offset by section 8 of the Public Trustee Regulation 2012, and ultimately outweighed by the importance of ensuring adequate resourcing of the Public Trustee.<sup>88</sup>

Additionally, it is clear that any deprivation of property in such circumstances is not arbitrary.

#### Committee comment

The committee is satisfied that any limitations on human rights that might arise from these fee increases are reasonable and demonstrably justified.

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<sup>85</sup> Human rights certificate, pp 1-2.

<sup>86</sup> See part 7 of the *Public Trustee Act 1978*.

<sup>87</sup> Human rights certificate, p 2.

<sup>88</sup> Human rights certificate, pp 2-3.

## **14 Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Amendment Regulation 2020 (SL 234)**

The Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Amendment Regulation 2020 (the amendment regulation) amends the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020 (the regulation).<sup>89</sup> The regulation gave effect to a moratorium (agreed to by National Cabinet) on evictions for the non-payment of rent for commercial tenancies in response to the financial hardship being experienced by some tenants due to business disruption and other impacts of the COVID-19 emergency.

Under the regulation, which applies to an 'affected lease', a lessor:

- cannot take prescribed action (eg eviction of the lessee, recovery of possession, termination of the lease) for a lessee's failure to pay rent or outgoings or trade for specified hours during the 'response period'
- must not increase rent during the response period
- must make an offer of rent relief that:
  - relates to any or all of the rent payable under the lease during the response period
  - has regard to stated factors such as reduction in turnover
  - provides for at least 50% of the rent reduction offered to be in the form of a waiver of rent
- subject to some exceptions, must offer the lessee an extension of the lease for the period that the rent has been waived or deferred.

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
- the lessee is eligible for the Commonwealth Government's JobKeeper assistance.

The initial 'response period' was 29 March 2020 to 30 September 2020. The regulation was provided to expire on 31 December 2020.

The amendment regulation extends the response period to 31 December 2020. In the extended period, lessors and lessees will have rights and obligations that broadly mirror those in the initial period, with these modifications for the extension period:

- removal of the requirement that 50% of an offered rent reduction is to be by way of waiver
- recognition of negotiations that have already been agreed in respect of reductions in rent payable or other stated conditions of an affected lease in respect of the extension period
- provision that a rent increase arising as a result of a review of rent under the lease during the response period or the extended period cannot be given effect until after the end of the extension period.<sup>90</sup>

The amendment regulation also ensures that provisions regarding dispute resolution and regarding confidentiality obligations in respect of protected information continue to apply.

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<sup>89</sup> SL 79 of 2020.

<sup>90</sup> Explanatory notes, p 2.

### **A note regarding regulations made in reliance on the *COVID-19 Emergency Response Act 2020***

The regulation, and this amendment regulation, are 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).<sup>91</sup>

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.<sup>92</sup> The Act was provided to expire on 31 December 2020.<sup>93</sup>

Any regulation made in reliance on s 23 of the Emergency Response Act:

- must declare it is made under s 23<sup>94</sup>
- 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<sup>95</sup>
- may have retrospective operation to a day not earlier than 23 April 2020<sup>96</sup>
- will expire on 31 December 2020<sup>97</sup>
- may impose a penalty of not more than 20 penalty units for a contravention of the regulation<sup>98</sup>
- must be tabled within 14 days of notification rather than the usual 14 sitting days.<sup>99</sup>

Additionally:

- s 23 does not limit the regulation-making power conferred under the Retail Shop Leases Act.<sup>100</sup>
- 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.<sup>101</sup>

### **Issue of non-compliance with the *COVID-19 Emergency Response Act 2020***

As mentioned above, any regulation made in reliance on s 23 must declare it is made under s 23. It would appear that the terms of s 23(4) extend to *any* regulation made in reliance on s 23, and the amendment regulation itself requires its own declaration. While a declaration was included in the initial regulation itself, the amendment regulation does *not* contain the required declaration.<sup>102</sup>

Examination of a number of recent amendment regulations relying on the Emergency Response Act shows a consistent approach of not including declarations in such regulations. There is nothing in either the wording of the statutory requirement or in the nature of the various regulations to support

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<sup>91</sup> See s 2 of the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020.

<sup>92</sup> *COVID-19 Emergency Response Act 2020*, s 4(1).

<sup>93</sup> *COVID-19 Emergency Response Act 2020*, s 25.

<sup>94</sup> *COVID-19 Emergency Response Act 2020*, s 23(4).

<sup>95</sup> *COVID-19 Emergency Response Act 2020*, s 23(2)(a).

<sup>96</sup> *COVID-19 Emergency Response Act 2020*, s 23(2)(b).

<sup>97</sup> *COVID-19 Emergency Response Act 2020*, s 23(6).

<sup>98</sup> *COVID-19 Emergency Response Act 2020*, s 23(2)(c). By contrast, s 121 of the *Retail Shop Leases Act 1994* allows for regulations to impose a penalty of no more than 50 units.

<sup>99</sup> *COVID-19 Emergency Response Act 2020*, s 23(7), and contrast s 49(1) of the *Statutory Instruments Act 1992*. This regulation was notified within the time limit.

<sup>100</sup> *COVID-19 Emergency Response Act 2020*, s 23(5).

<sup>101</sup> *COVID-19 Emergency Response Act 2020*, s 23(3).

<sup>102</sup> As required by *COVID-19 Emergency Response Act 2020*, s 23(4); see also Residential Tenancies and Rooming Accommodation (COVID-19 Emergency Response) Amendment Regulation 2020, s 3.

the non-inclusion of a declaration. While it is considered that such declarations are in fact required, there is no apparent consequence arising from this non-compliance with the statutory requirement.

The committee wrote to DJAG on 30 November 2020 seeking further information regarding why the regulation does not meet the requirement of s 23 of the Emergency Response Act concerning declaring that the amendment regulation is made under s 23 of that Act.

DJAG responded on 9 December 2020 as follows:

As the Committee has noted, the Amendment Regulation does not include a declaration under section 23 of the Act. The Office of the Queensland Parliamentary Counsel has been consulted in this matter. I am advised that a stand-alone declaration has not been included in the Amendment Regulation where it is provided in the Principal Regulation.<sup>103</sup>

#### **14.1 Issue of fundamental legislative principle in the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Amendment Regulation 2020**

##### **14.1.1 Rights and liberties of individuals – property and contractual rights – LSA, s 4(2)(a)**

The regulation, and the amendment regulation, affect the rights and liberties of landlords, as the provisions override their existing rights under current legislation and in contract. The explanatory notes for the initial regulation put forward this justification for the interference with those rights and liberties:

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.<sup>104</sup>

The explanatory notes for the amendment regulation refer to this justification and state:

Extending the response period for a further three months can be similarly justified in the prevailing economic conditions.<sup>105</sup>

#### Committee comment

In the circumstances, the committee is satisfied that the breach of fundamental legislative principle occasioned by the interference with the rights of individuals is justified.<sup>106</sup>

#### **14.2 Explanatory notes**

The LSA requires an explanatory note for subordinate legislation to include the following if consultation took place about the subordinate legislation:

- a brief statement of the way the consultation was carried out
- an outline of the results of the consultation
- a brief explanation of any changes made to the legislation because of the consultation.<sup>107</sup>

The same criticism can be made of the explanatory notes for the amendment regulation as was made for the regulation itself. In each case, the explanatory notes set out a list of stakeholders consulted on

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<sup>103</sup> DJAG, correspondence, 9 December 2020, p 1.

<sup>104</sup> Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Regulation 2020, explanatory notes, p 4.

<sup>105</sup> Explanatory notes, p 3.

<sup>106</sup> See Legal Affairs and Community Safety Committee, *Subordinate legislation tabled between 20 May 2020 and 25 June 2020*, Report No. 72, 56th Parliament, p 8.

<sup>107</sup> *Legislative Standards Act 1992*, s 24(2)(a).

a draft of the regulation and the amendment regulation and state that ‘*Comments made by stakeholders were taken into account in the drafting of the (Amendment) Regulation*’.<sup>108</sup>

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.

Note that the Legal Affairs and Community Safety Committee of the 56th Parliament set out these deficiencies in its report on the Regulation.<sup>109</sup> (That report was tabled on 24 September 2020, shortly prior to the notification of the amendment regulation on 29 September 2020.)

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

The committee wrote to DJAG on 30 November 2020 advising the explanatory notes to the regulation do not meet the requirements of the LSA concerning outlining the results of consultation and any changes made to the regulation due to consultation, and sought further information in this regard. DJAG responded on 9 December 2020 as follows:

The explanatory notes for the Amendment Regulation advise that listed stakeholders were consulted on a draft version of the Amendment Regulation (draft). For the most part, stakeholders raised the need to clarify aspects of the draft and these comments were taken into account in drafting the Amendment Regulation.

Stakeholders also raised the practical implications of recognising agreements already entered into in relation to the extension period and whether any rent increases during the response and extension periods should be deferred until after the end of the extension period, except for rent increases during the response and extension periods, which are deferred until after the end of the extension period.

Other stakeholder comments raised transitional issues about the period following the end of the extension period. These issues have now been addressed through amendments to the Principal Regulation in the COVID-19 Emergency Response and Other Legislation Amendment Act 2020.<sup>110</sup>

### **14.3 Human rights issues in the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Amendment Regulation 2020**

In the human rights certificate accompanying the Retail Shop Leases and Other Commercial Leases (COVID-19 Emergency Response) Amendment Regulation 2020, the then Attorney-General stated her opinion that the amendment regulation is compatible:

- with the human rights protected by the HRA
- 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 were considered by the committee.

#### **14.3.1 Property rights – HRA, s 24**

Under s 24 of the HRA, a person must not be arbitrarily deprived of their property. The amendment regulation limits a landlord’s right to property as it will prevent a landlord under an affected lease 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 extended response period.

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<sup>108</sup> For both the regulation and the amendment regulation, the relevant statement can be found at p 4 of the corresponding explanatory notes.

<sup>109</sup> Legal Affairs and Community Safety Committee, *Subordinate legislation tabled between 20 May 2020 and 25 June 2020*, Report No. 72, 56th Parliament, p 8.

<sup>110</sup> DJAG, correspondence, 9 December 2020, pp 1-2.

The then Attorney-General stated:

Limiting lessor rights to end tenancies and take other prescribed actions in respect of the extension period is necessary to provide lessees with certainty about the duration of their tenancy as the COVID-19 emergency continues.

The Amendment 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.<sup>111</sup>

The then Attorney-General stated:

As a result of the speed and severity of the impacts of the COVID-19 emergency and the associated community health measures, there are no practicable alternatives to the Amendment Regulation ...

I believe that extending the response period under the Regulation to 31 December 2020 is the least restrictive way to achieve the purpose of the Amendment Regulation.<sup>112</sup>

The then Attorney-General concluded:

On balance, the continuing 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 public health emergency is considered to outweigh any impact on a person's human rights as identified above.<sup>113</sup>

#### Committee comment

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

#### **14.3.2 Right to privacy and reputation – HRA, s 25**

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

A party to an affected 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. This process was established under the regulation and is continued by the amendment regulation for an extended period (1 October to 31 December 2020).

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.

The then Attorney-General explained:

The limitation on the right to privacy is required so that negotiations can be conducted in good faith between the lessor and the lessee under an affected lease. The disclosure of an individual's personal information is required so that both parties can negotiate affected leases based on the financial evidence that the lessee has suffered financial hardship and is unable to meet their lease commitments due to COVID-19 impacts. The information must be true, accurate, correct and not misleading. In this way, the purpose of the limitation helps achieve the overall purpose of the Amendment Regulation which is to extend the response period under the Regulation in order to mitigate the effect of the COVID-19 emergency on lessors and lessees under affected leases.<sup>114</sup>

The then Attorney-General concluded:

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-

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<sup>111</sup> Human rights certificate, p 3.

<sup>112</sup> Human rights certificate, p 4.

<sup>113</sup> Human rights certificate, p 4.

<sup>114</sup> Human rights certificate, p 5.

19 response measures by providing sufficient information that is true, accurate, correct and not misleading.

...

On balance, I consider the benefits that will result for lessees under affected leases who can prove they are suffering financial hardship outweigh the limitation on their right to privacy by having to disclose personal and financial information when proving such hardship.<sup>115</sup>

#### Committee comment

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

## **15 Justice Legislation (COVID-19 Emergency Response—Community Titles Schemes and Other Matters) Regulation 2020 (SL 250)**

### **15.1 A note on regulations made in reliance on the COVID-19 Emergency Response Act 2020**

The Justice Legislation (COVID-19 Emergency Response—Community Titles Schemes and Other Matters) Regulation 2020 is also made in reliance, in part, on sections of the Emergency Response Act.

Specifically, this regulation relies on ss 8, 9 and 13 of the Emergency Response Act.

In broad terms, s 8 (in part) provides an additional regulation-making power in relation to requirements or permissions under an Act for a person to physically attend a place or meeting, or for an entity to call or hold a meeting, for a particular purpose or a particular matter, including by allowing a meeting to be conducted using communication technology. Such a regulation can have retrospective effect to not earlier than 19 March 2020.<sup>116</sup>

Section 9 provides a regulation-making power in relation to requirements or permissions under an Act related to documents.

Section 13 provides an additional regulation-making power to modify a statutory time limit under an Act where an Act does not expressly authorise an entity to modify the period.

The regulation contains a declaration that it is made under ss 8, 9 and 13 of the Emergency Response Act.<sup>117</sup>

As mentioned, an extraordinary regulation must be tabled within 14 days of notification (rather than the usual 14 sitting days).<sup>118</sup> The regulation was both notified and tabled on 2 October 2020.

The regulation provides for expiry on 31 December 2020.<sup>119</sup>

### **Objectives of the Justice Legislation (COVID-19 Emergency Response—Community Titles Schemes and Other Matters) Regulation 2020**

The stated policy objectives of the Justice Legislation (COVID-19 Emergency Response—Community Titles Schemes and Other Matters) Regulation 2020 are to:

- protect the health, safety and welfare of persons in the community titles sector during the COVID-19 emergency by facilitating alternative arrangements that minimise the physical

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<sup>115</sup> Human rights certificate, p 5.

<sup>116</sup> *COVID-19 Emergency Response Act 2020*, s 8(4).

<sup>117</sup> Justice Legislation (COVID-19 Emergency Response—Community Titles Schemes and Other Matters) Regulation 2020, s 3.

<sup>118</sup> See *COVID-19 Emergency Response Act 2020*, s 5(9), and contrast s 49(1) of the *Statutory Instruments Act 1992*.

<sup>119</sup> Justice Legislation (COVID-19 Emergency Response—Community Titles Schemes and Other Matters) Regulation 2020, s 15.

presence of persons at committee and general meetings required for community titles schemes and for the inspection of documents<sup>120</sup>

- validate past actions that body corporate committees may have taken in relation to general meetings and committee meetings to protect the safety and welfare of persons in the community titles sector during the COVID-19 emergency (given that because of social distance and quarantine requirements, bodies corporate may have held general meetings and committee meetings that are not strictly in compliance with the statutory requirements)<sup>121</sup>
- ensure continued access to dispute resolution provided under the *Body Corporate and Community Management Act 1997* and the *Building Units and Group Titles Act 1980* during the COVID-19 emergency
- validate the waiver of fees associated with certain liquor licensing applications made between 1 February 2020 and 31 July 2020 inclusive
- provide financial relief for inbound tour operators by waiving registration renewal fees for 12 months
- provide the chief executive with the ability to extend the timeframes for the preparation and lodgement of financial statements and returns under the *Collections Act 1996* during the COVID-19 emergency.<sup>122</sup>

## **15.2 Issues of fundamental legislative principle in the Justice Legislation (COVID-19 Emergency Response—Community Titles Schemes and Other Matters) Regulation 2020**

### **15.2.1 General rights and liberties of individuals – LSA, s 4(2)(a)**

This issue arises in two respects.

Firstly, the provisions allowing the suspension of a requirement or entitlement regarding the holding of a body corporate general meeting or committee meeting if the committee for a body corporate believes a public health direction would be contravened, raise an issue of fundamental legislative principle, requiring that legislation has sufficient regard to rights and liberties of individuals, in that the right of a lot owner to attend a meeting and to vote on matters affecting them is suspended.

The explanatory notes justify the provisions this way:

The measures are aimed at providing bodies corporate, via their committees, with flexibility to support the public health response to COVID-19 by enabling the body corporate to undertake its statutory functions, such as making decisions at body corporate general meetings and committee meetings, in a way that complies with relevant public health directions and reduces the threat to public health during the COVID-19 emergency period. It is considered that any potential breach of the principle that legislation have sufficient regard to the rights and liberties of individuals ... is justified to protect the health, safety and welfare of persons affected by the COVID-19 emergency in the community titles sector.<sup>123</sup>

As set out in the explanatory notes, existing alternative methods of voting that do not require in-person attendance will continue, and remote attendance and electronic voting are facilitated by s 8 of the regulation.<sup>124</sup>

Secondly, the issue arises in respect of the provisions allowing body corporate committees to make decisions changing the rights of lot owners in relation to access to, or the use of, common property or body corporate assets, if necessary to ensure compliance with a public health direction. The explanatory notes give the example of a committee placing restrictions on using a common property

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<sup>120</sup> Explanatory notes, pp 2, 4.

<sup>121</sup> Explanatory notes, pp 2, 5.

<sup>122</sup> Explanatory notes, p 2.

<sup>123</sup> Explanatory notes, p 15.

<sup>124</sup> Explanatory notes, p 15.



swimming pool if a public health direction relevant to the use of the pool is in force.<sup>125</sup> The explanatory notes state:

... this amendment is designed to support the public health response to the COVID-19 emergency to ensure bodies corporate are able to manage the common property and body corporate assets in a way that complies with relevant public health directions and reduces the threat to public health during the COVID-19 emergency period. Accordingly, it is considered that any potential inconsistencies with fundamental legislative principles arising from these temporary measures are justified to protect the health, safety and welfare of persons affected by the COVID-19 emergency in the community titles sector.<sup>126</sup>

Committee comment

The committee is satisfied that these breaches of fundamental legislative principle are justified.

**15.2.2 Rights and liberties of individuals – retrospectivity – LSA, s 4(3)(g)**

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.

The provisions in the regulation allowing the suspension of requirements and entitlements relating to meetings and modifying the way a meeting can be held apply retrospectively from 19 March 2020.

The explanatory notes state:

This potential breach of fundamental legislative principles is considered justified, as these provisions will provide certainty in relation to the validity of decisions made at body corporate general meetings and committee meetings conducted from 19 March 2020 where bodies corporate or committees have taken reasonable actions to protect the health and safety of members of the community titles sector affected by COVID-19 emergency.<sup>127</sup>

Committee comment

The committee is satisfied that the breach of fundamental legislative principle is justified in the circumstances.

**15.2.3 Rights and liberties of individuals – sufficient regard to the institution of Parliament – sub-delegation of a power – LSA, s 4(5)(e)**

The regulation modifies the *Collections Act 1966* to give the chief executive the ability to extend the timeframes for the preparation and lodgement of financial statements and returns under that Act.<sup>128</sup>

Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation allows the sub-delegation of power delegated by an Act only:

- in appropriate cases and to appropriate persons
- if authorised by an Act.<sup>129</sup>

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<sup>125</sup> Explanatory notes, p 16.

<sup>126</sup> Explanatory notes, p 16.

<sup>127</sup> Explanatory notes, p 16.

<sup>128</sup> Justice Legislation (COVID-19 Emergency Response—Community Titles Schemes and Other Matters) Regulation 2020, s 14.

<sup>129</sup> Section 4(5)(e) *Legislative Standards Act 1992*.

Part of the rationale for this issue is to ensure sufficient parliamentary scrutiny of a delegated legislative power. Relevant factors to take into account include the importance of the subject dealt with and the practicality or otherwise of including those matters entirely in subordinate legislation.<sup>130</sup>

The explanatory notes do not refer to any issues of fundamental legislative principle regarding the institution of Parliament. The explanatory notes do, however, include this general statement in relation to the amendments relating to the *Collections Act 1966*:

The modification of the *Collections Act* is considered consistent with fundamental legislative principles.<sup>131</sup>

It can be noted that the chief executive's power is limited:

- to circumstances where the chief executive is satisfied the extension is necessary for a purpose of the Emergency Response Act, and
- to a specified time period, ending on 31 December 2020.

As mentioned, the regulation is made in reliance, in part, on s 13 of the Emergency Response Act. That section expressly contemplates such provisions, in providing that an extraordinary regulation may be made to alter a statutory time limit or authorise an entity having a function under the relevant statute to modify the time period. The provision in the regulation is consistent with that section.

#### Committee comment

The committee is satisfied that, in the circumstances, the breach of fundamental legislative principle is justified.

#### **15.2.4 Sufficient regard to the institution of Parliament – contains only matter appropriate to subordinate legislation – LSA, s 4(5)(c) and amends statutory instrument only – LSA, s 4(5)(d)**

A number of sections in the regulation modify provisions in an Act.<sup>132</sup> In doing so, the regulation breaches the fundamental legislative principle that whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example:

- the subordinate legislation contains only matters appropriate to subordinate legislation
- the subordinate legislation amends statutory instruments only.<sup>133</sup>

The principle of Parliamentary law-making that an Act should only be amended by another Act of Parliament has long been recognised. Former committees have noted that a subordinate instrument that amends an Act is inconsistent with the fundamental legislative principle requiring that subordinate legislation has sufficient regard to the institution of Parliament.<sup>134</sup>

The explanatory notes do not refer to any issues of fundamental legislative principle regarding the institution of Parliament. As noted above, the explanatory notes contain a general assertion that the modification of the *Collections Act 1966* is considered consistent with fundamental legislative principles.<sup>135</sup>

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<sup>130</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, p 170.

<sup>131</sup> Explanatory notes, p 17.

<sup>132</sup> Part 2 modifies the operation of the *Body Corporate and Community Management Act 1997*, and part 3 modifies the operation of the *Collections Act 1966*.

<sup>133</sup> Sections 4(5)(c) and 4(5)(d) of the *Legislative Standards Act 1992*.

<sup>134</sup> See the discussion in the Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, p 167, where it is noted that the former Scrutiny of Legislation Committee consistently expressed the view that a subordinate instrument that amends an Act, whether it be the body of the Act or a schedule to the Act, is inconsistent with the fundamental legislative principle requiring that subordinate legislation has sufficient regard to the institution of Parliament.

<sup>135</sup> Explanatory notes, p 17.

As mentioned, the regulation is made in reliance, in part, on ss 8, 9 and 13 of the Emergency Response Act.

Committee comment

Noting that the regulation is consistent with Parliament's intention, is time limited (provided to expire on 31 December 2020), and accords with the purposes of the Emergency Response Act, the committee concludes that the breaches of fundamental legislative principle are justified.

**15.3 Human rights issues in the Justice Legislation (COVID-19 Emergency Response—Community Titles Schemes and Other Matters) Regulation 2020**

In the human rights certificate accompanying the Justice Legislation (COVID-19 Emergency Response—Community Titles Schemes and Other Matters) Regulation 2020, the then Attorney-General stated her opinion that the amendment regulation is compatible:

- with the human rights protected by the HRA
- with the HRA because it does limit, restrict or interfere with human rights, but the limitations are reasonable and demonstrably justified.<sup>136</sup>

The following issues were considered by the committee.

**15.3.1 Property rights – HRA, s 24**

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

In the certificate, it is suggested the provisions which temporarily permit a body corporate committee to make decisions to change the rights, privileges or obligations of lot owners about access to, or the use of, common property, may limit the property rights of owners and occupiers of lots included in a community titles scheme.<sup>137</sup>

The certificate stated:

Relevantly, in the context of the Regulation and the temporary amendments it makes to regulation modules under the BCCM Act [Body Corporate and Community Management Act 1997], property has been held as the right to use common property equally with other lot owners. However, it is said to be a 'lesser right' than that of the right to property.<sup>138</sup>

In relation to this last statement, the certificate refers to the Victorian case of *Owners Corporation No. 1 SP37133 v J and Investments Pty Ltd (Owners Corporation)*.<sup>139</sup> In that case, the Victorian Civil and Administrative Tribunal (VCAT) considered a similar provision in Victoria's *Charter of Human Rights and Responsibilities Act 2006* which provides:

A person must not be deprived of his or her property other than in accordance with law.<sup>140</sup>

That case involved consideration of allocation of car parking spaces on common property. The case concluded that the right for a lot owner to use common property equally with other lot owners, although a valuable right, is *not* a 'right of property'.<sup>141</sup>

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<sup>136</sup> Human rights certificate, p 9.

<sup>137</sup> Human rights certificate, p 6.

<sup>138</sup> Human rights certificate, p 6.

<sup>139</sup> *Owners Corporation No. 1 SP37133 v J and Investments Pty Ltd (Owners Corporation)* [2012] VCAT 1164; see also Human rights certificate, footnote 2, p 6.

<sup>140</sup> *Charter of Human Rights and Responsibilities Act 2006* (Vic), s 20.

<sup>141</sup> The reasons of VCAT include the following: ... *the District Court of Queensland in Independent Finance Group Pty Ltd v Mytan Pty Ltd* (2001) QCA 306 found that the right to exclusive use of part of the common property "is a valuable right." But "It is not a right of property". That case referred to the exclusive use of an allocated parking space and is applicable to the lesser right in this instance of a right to use common property. (See [2012] VCAT 1164, at paragraph 16.) The District Court decision in the Queensland case was

The then Attorney-General stated:

The purpose of any limitation on property rights that may be imposed by the Regulation is to ensure body corporate committees are able to make decisions to change the rights, privileges or obligations of owners of lots relating to the access or use of common property or body corporate assets for a community titles scheme, if the committee considers the change is reasonably necessary to ensure compliance with relevant public health directions.<sup>142</sup>

The then Attorney-General concluded:

... it is considered the purpose of the limitation on the property rights of owners and occupiers of lots imposed by the Regulation appropriately balances the importance of preserving owners' and occupiers' property rights, in this instance.<sup>143</sup>

#### Committee comment

The decisions facilitated were limited to decisions reasonably necessary to ensure compliance with public health directions, in light of the COVID-19 public health emergency. In any event, the provisions in the regulation were provided as a temporary measure until 31 December 2020.

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

## **16 Recommendation**

The committee recommends that the House notes this report.



Peter Russo MP

**Chair**

**February 2021**

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

<b>Chair</b>	Mr Peter Russo MP, Member for Toohey
<b>Deputy Chair</b>	Mrs Laura Gerber MP, Member for Currumbin
<b>Members</b>	Ms Sandy Bolton MP, Member for Noosa
	Ms Jonty Bush MP, Member for Cooper
	Mr Jason Hunt MP, Member for Caloundra
	Mr Andrew Powell MP, Member for Glass House

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upheld on appeal to the Court of Appeal, which stated: *An exclusive use by-law is not a common law interest in land but rather a statutory right. ... The statutory rights created are not proprietary rights.* (See [2003] 1 Qd R 374, at paragraphs 86 and 87.)

<sup>142</sup> Human rights certificate, p 7.

<sup>143</sup> Human rights certificate, p 9.