

Legal Affairs and Community Safety Committee

Report No. 77, 56th Parliament

Subordinate legislation tabled between 26 June 2020 and 14 July 2020

1 Aim of this report

This report summarises the committee’s findings following its examination of the subordinate legislation within its portfolio areas tabled between 26 June 2020 and 14 July 2020. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles and lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992*.¹

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

2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date
103	Justice Legislation (COVID-19 Emergency Response—Proceedings and Other Matters) Regulation 2020	1 July 2020	TBC
112	Weapons and Other Legislation (Fees) Amendment Regulation 2020	14 July 2020	TBC
117	Civil Liability and Other Legislation (Prescribed Amounts) Amendment Regulation 2020	14 July 2020	TBC
124	Fire and Emergency Services Legislation (Fees) Amendment Regulation 2020	14 July 2020	TBC
125	State Penalties Enforcement Amendment Regulation (No. 1) 2020	14 July 2020	TBC
126	Gaming Tax Notice 2020	14 July 2020	TBC
127	Proclamation No. 1—Justice and Other Legislation Amendment Act 2020 (commencing certain provisions)	14 July 2020	TBC
130	Proclamation No. 3—Working with Children (Risk Management and Screening) and Other Legislation Amendment Act 2019 (commencing remaining provisions)	14 July 2020	TBC
131	Working with Children (Risk Management and Screening) Regulation 2020	14 July 2020	TBC

¹ *Legislative Standards Act 1992*, Part 4.

² *Human Rights Act 2019*, s 41.

* The disallowance date is 14 sitting days after the tabling date. Disallowance dates are based on proposed sitting dates as advised by the Leader of the House. Those dates are subject to change.³

3 Committee consideration of the subordinate legislation

No significant issues regarding policy, consistency with fundamental legislative principles or the lawfulness of the subordinate legislation were identified, with the exception of SL 125 and SL 126 as outlined below. The committee considers explanatory notes tabled with each piece of subordinate legislation comply with the requirements of section 24 of the *Legislative Standards Act 1992*.

The committee considers that SL 124, SL 125 and SL 131 raise human rights issues. These are detailed below. The human rights certificate tabled with each piece of subordinate legislation provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.⁴

Human rights considerations

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

Section 13 of the 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. It sets out a range of factors that may be relevant in deciding whether a limit on a human right is reasonable and justifiable.

4 Justice Legislation (COVID-19 Emergency Response—Proceedings and Other Matters) Regulation 2020 (SL 103)

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

The Justice Legislation (COVID-19 Emergency Response—Proceedings and Other Matters) Regulation 2020 is made in reliance, in part, on sections 8, 9, 13, 16 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.

In broad terms, section 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. Such a regulation can have retrospective effect to not earlier than 19 March 2020.⁵

Section 9 provides a regulation-making power in relation to requirements or permissions under an Act relating to documents. 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 13 of the Emergency Response Act provides an additional regulation-making power for the modification by regulation of statutory time limits in certain circumstances. Such a regulation can:

- extend a period up to 31 December 2020⁶

³ *Statutory Instruments Act 1992*, s 50.

⁴ *Human Rights Act 2019*, s 41.

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

⁶ *COVID-19 Emergency Response Act 2020*, s 13(4).

- have retrospective effect to not earlier than 19 March 2020.⁷

Section 16 provides a regulation-making power to allow a regulation to be made under 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
- the use of audio visual links or audio links
- the restriction of access to the proceedings by members of the public.

Section 17 of the Emergency Response Act provides an additional regulation-making power for regulations to be made under an enabling Act for a matter mentioned in section 16 and also provisions for:

- 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
- video-recording 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'.⁸

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.⁹

An extraordinary regulation must be tabled within 14 days of notification (rather than the usual 14 sitting days).¹⁰ The regulation was notified on 26 June 2020 and tabled on 1 July 2020.

The regulation contains a declaration that it is made under sections 8, 9, 13 and 17 of the Emergency Response Act.¹¹ The declaration makes no reference to section 16 of that Act. A reference in the

⁷ COVID-19 Emergency Response Act 2020, s 13(5).

⁸ See COVID-19 Emergency Response Act 2020, s 5(1) – (3).

⁹ See generally COVID-19 Emergency Response Act 2020, s 5(4) – (8), and s 4.

¹⁰ See COVID-19 Emergency Response Act 2020, s 5(9), and contrast s 49(1) of the *Statutory Instruments Act 1992*.

¹¹ Section 3.

declaration to section 16 would be preferable, as it is clear that some of the regulation relates to subject matters falling within section 16(1).¹² At the same time, a reference to section 16 is probably not strictly necessary in light of the wording of section 17(1(a)), and noting section 17 is referenced in the declaration.

The regulation is deemed to have commenced on 19 March 2019.¹³ It expires on 31 December 2020.¹⁴

4.2 Objective of the Justice Legislation (COVID-19 Emergency Response—Proceedings and Other Matters) Regulation 2020

The Justice Legislation (COVID-19 Emergency Response—Proceedings and Other Matters) Regulation 2020 makes modifications to various provisions across a range of Acts to address impacts on Queensland's justice system and justice agencies by the COVID-19 public health emergency:

*... to ensure the continuance of public administration of justice agencies and judicial process and to protect the health, safety and welfare of persons affected by the COVID-19 emergency involved in the justice system.*¹⁵

The modifications made include to the following Acts:

- *Coroners Act 2003* to extend the statutory deadline for provision of the annual report of the Domestic and Family Violence Death Review and Advisory Board (DFV Board) by three months, to 31 December 2020
- *Crime and Corruption Act 2001* to allow for service of Crime and Corruption Commission notices other than personally, and to allow hearings by way of video link or audio link
- Criminal Code to allow for electronic presentation of indictments and entering of *nolle prosequis*
- *Evidence Act 1977* to extend the situations in which evidence can be given by alternative means other than by being physically present in a courtroom
- *Justices Act 1886* to provide an additional power to hear certain Magistrates Court matters by audio link or audio visual link, and to allow the clerk of the court to give notice of an adjournment electronically in relation to such a proceeding
- *Property Law Act 1974* to provide an alternative default place of settlement for contracts for the sale of land.

4.3 Issues of fundamental legislative principle

4.3.1 Whether legislation has sufficient regard to rights and liberties of individuals – general rights and liberties – *Legislative Standards Act 1992, section 4(2)(a)*

A number of the modifications to procedures 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, and fair and appropriate other procedures.¹⁶

These various breaches of fundamental legislative principle are summarised below, with a brief extract (in italics) from the explanatory notes as to the justification for the breach in each case:

- *Crime and Corruption Act 2001* to allow for service of Crime and Corruption Commission (CCC) notices other than personally:

¹² See for example sections 12, 18 and 19 of the regulation.

¹³ Section 2.

¹⁴ Section 22.

¹⁵ Explanatory notes, p 1.

¹⁶ *Legislative Standards Act 1992, s 4(2)(a)*.

Arguably, the giving of a notice by email could compromise the recipient's understanding of its effect, and their ensuing rights and obligations, reducing the adequacy of the notice regarding any consequent action the CCC is entitled to take.

... the safeguard requiring the Chairperson to be satisfied that the person or their lawyer has given the CCC an email address for the purpose of receiving the notice, significantly reduces the likelihood that the person might fail to appreciate the significance of the notice. In addition, the requirement that notices may only be given by email in circumstances where the Chairperson is satisfied this is appropriate either to protect the health, safety and welfare of persons affected by the COVID-19 emergency or to facilitate the continued functioning of the commission where this has been disrupted by the COVID-19 emergency, will act to ensure that potential limitations on the rights and liberties of individuals are minimised.

The alternative process for giving notices is considered reasonable and justified to enable the continuation of the CCC's investigations, operations and other activities during the COVID-19 emergency whilst also ensuring consistency and compliance with health advice, particularly in relation to social distancing.¹⁷

- *Crime and Corruption Act 2001* to allow CCC hearings by way of video link or audio link:

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 potential for any infringement of this right is minimised by the requirement ... for proceedings to be conducted by the use of audio visual links or audio links only where the presiding officer considers this is appropriate having regard to whether it is practical for such technology to be used in the proceeding. In addition, the Regulation specifically preserves, with necessary changes, the operation of all other provisions in the CC Act relating to hearings ... [including that] the presiding officer for the hearing act in such a way as to ensure a fair and proper consideration of the issues ... a witness at a commission hearing may be legally represented, and ... [requiring] the presiding officer ... to arrange for an interpreter if necessary.

These safeguards will ensure that matters such as an individual's access to suitable audio-visual or audio facilities, as well as an individual's capacity to understand and engage in the proceedings, are considered for each decision to hold a hearing in reliance on the modified arrangements This provision is considered reasonable and justified to enable the CCC to continue to use its hearing power during the COVID-19 emergency.¹⁸

- *Criminal Code* to allow for electronic presentation of indictments and *nolle prosequis*:

This modification could be seen as reducing the openness and transparency of the court process.

This breach of the principle of open justice is however considered justified given the paramount need to employ measures to obviate the threat to public health caused by the COVID-19 emergency.¹⁹

- *Evidence Act 1977* to extend the situations in which evidence can be given by alternative means other than by being physically present in a courtroom:

¹⁷ Explanatory notes, p 9.

¹⁸ Explanatory notes, p 9.

¹⁹ Explanatory notes, p 10.

This modification could limit the right to a fair hearing, particularly in the context of a criminal trial.

However, there are already some exceptions to this requirement [for witnesses to give direct oral testimony in open court] for certain witnesses (generally based on vulnerability, such as age or exposure to sexual or violent crimes) which enable them to give evidence in alternative ways, including away from the courtrooms.

The Regulation extends the availability of prerecording evidence to other persons provided the court is satisfied certain requirements are met. It is considered that any potential breach of fundamental legislative principles is justified to protect the health, safety and welfare of persons during the COVID-19 emergency.²⁰

- *Justices Act 1886* to provide an additional power to hear matters by audio link or audio visual link, and to allow the clerk of the court to give notice of an adjournment electronically in relation to such a proceeding:

As with the provisions regarding CCC hearings (see above), providing additional power to hear certain matters/Magistrates Court matters by audio link or audio visual link could be seen as limiting a party'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.

However, as this is an additional power, magistrates may still hear matters in person where this is necessary.

The potential for any infringement of this right is also minimised by the requirement in the Regulation which allows for proceedings to be conducted by the use of audio visual link or audio link only where the court considers this is appropriate having regard to whether it is practical and in the interests of justice for such technology to be used in the proceeding. This will ensure that the court will consider matters such as an individual's capacity to comprehend the proceedings or communicate with their legal representative or interpreter where relevant as well as the suitability and individual's access to the audio visual or audio facilities.

Any potential breach of fundamental legislative principles is considered reasonable and justified to enable the continued functioning of the courts during the COVID-19 emergency whilst also ensuring consistency and compliance with health advice.²¹

Committee comment

The committee is satisfied that in the circumstances these various breaches of fundamental legislative principles are justified.

4.3.2 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 – *Legislative Standards Act 1992, section 4(3)(g)*

The modification of the Criminal Code to allow for electronic presentation of indictments has some retrospective application, in that it operates to validate processes that have been adopted for the presentation of indictments since March 2020 in the context of COVID-19. This breaches the fundamental legislative principle that requires that legislation should not adversely affect rights and liberties, or impose obligations, retrospectively.²²

²⁰ Explanatory notes, p 10.

²¹ Explanatory notes, p 10.

²² *Legislative Standards Act 1992, s 4(3)(g)*.

The explanatory notes state that the processes that have been adopted are ‘appropriate and necessary’ and the breach of fundamental legislative principle is justified:

... given that the retrospective effect of the amendment is restricted to the discreet emergency period and validates efforts that have been made only in the context of protecting public health and is unlikely to have a significant detrimental impact given it relates to procedural processes.²³

Committee comment

The committee agrees with this last statement, and is satisfied that in the circumstances the breach of fundamental legislative principle is justified.

4.4 Human rights issues

In the human rights certificate accompanying the Justice Legislation (COVID-19 Emergency Response—Proceedings and Other Matters) Regulation 2020, the Attorney-General and Minister for Justice, Hon Yvette D’Ath MP, states her opinion that the amendment regulation is compatible:

- with the human rights protected by the HRA
- 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.

4.4.1 Modification of the Coroners Act relating to provision of the Domestic and Family Violence Death Review and Advisory Board’s annual report

Under the *Coroners Act 2003*, the DFV Board must give the Minister an annual report in relation to the performance of the DFV Board’s functions during the financial year, within three months after the end of each financial year. The Justice Legislation (COVID-19 Emergency Response—Proceedings and Other Matters) Regulation 2020 provides for an extension of three months for the provision of this annual report.

4.4.1.1 Right to take part in public life – Human Rights Act 2019, section 23

Every person in Queensland has the right to participate in the conduct of public affairs, including public governance.

The delay of the DFV Board’s annual report arguably could be seen to reduce transparency and deny a person access to the annual report.

The Minister gives this justification:

The purpose of the modification in the Regulation and the limitation on the right is to provide sufficient time, in the context of COVID-19, for the DFV Board to meet its statutory obligations to deliver an annual report of the performance of the DFV Board’s functions during the financial year. COVID-19 has impacted on the functioning of the DFV Board in a variety of ways which is likely to impede their capacity to deliver the next annual report in the requisite timeframe. This has included impacts on the convening of meetings and the availability of DFV Board members and secretariat resourcing.²⁴

Committee comment

Given the minor nature of any limitation on the right, and given that the modification is for a specific time and for a specific purpose (to address issues arising from the COVID-19 public health emergency), the committee is satisfied that the impact on a person’s right to take part in public life is reasonable and demonstrably justified.

²³ Explanatory notes, p 10.

²⁴ Human rights certificate, p 5.

4.4.2 Modification of methods or processes for giving and signing relevant notices

Certain notices under the *Crime and Corruption Act 2001* will be able to be served electronically and signed electronically by the chairperson.

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

Every person has the right to liberty and security, and where arrested or detained, it is in accordance with procedures established under law.

The consequence of a person not receiving or understanding the notice, due to the different method of service, could lead to a failure to appear and eventually a warrant for arrest. This would impact on the person's right to liberty.

The Minister states:

The purpose of limiting the rights to liberty and security in issuing notices electronically rather than giving the notice personally is directly related to the purpose for doing so which is to avoid person to person contact and protect public health. The limitation fits the purpose of the modification to the usual process.²⁵

Committee comment

The committee finds the impact of this modified arrangement is reasonable and demonstrably justified.

4.4.3 Modification to enable use of audio visual links or audio links for conduct of particular proceedings

The Justice Legislation (COVID-19 Emergency Response—Proceedings and Other Matters) Regulation 2020 provides for amendments to the *Crime and Corruption Act 2001* to ensure that technology-based arrangements may be used for the giving of notices and the conduct of CCC hearings where appropriate.

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

Every person has the right to recognition as a person before the law.

The power to replace personal attendance with appearance by audio visual or audio link in CCC hearings limits this right, as it may have a disproportionate impact on disadvantaged members of the community. Further, a person requiring an interpreter may also have their rights limited as communication difficulties may be exacerbated.

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

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

The modified arrangements may make it more difficult to maintain the privacy of persons involved in hearings in the CCC.

The Minister states:

The ability for the CCC to conduct hearings by audio visual or audio link limits the rights set out above and also directly achieves the purpose of the limitation, being to protect and promote the health of the public. The CCC may conduct all or part of a proceeding by the use of audio visual or audio links provided that the commission considers it is appropriate to do so, having regard to whether it is practical for such facilities to be used for the proceeding, and that proceeding in this way is appropriate in order to protect the health, safety and welfare of persons affected by the COVID-19 emergency; or to facilitate the continuance of the public administration of the CCC

²⁵ Human rights certificate, p 6.

*in circumstances where its public administration or other activities are disrupted by the COVID-19 emergency.*²⁶

Committee comment

The committee considers that the impact on a person's right to equality before the law and privacy caused by the modified arrangements is reasonable and demonstrably justified, taking into account the Minister's explanation above.

4.4.4 Modification to allow remote presentation of indictments and *nolle prosequis*

The regulation provides for an alternative method or process for presenting indictments by audio visual link or audio link. The regulation also provides for an alternative method for informing the court of a *nolle prosequis* by audio visual link or audio link. The human rights certificate sets out a number of human rights considered to be affected. These are set out below.

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

Every person has the right to recognition as a person before the law.

The presentation of indictments and entering *nolle prosequis* by audio visual link or audio link limits the right to recognition and equality before the law, as the modified arrangements may disproportionately impact vulnerable groups.

4.4.4.2 Cultural rights – Human Rights Act 2019, section 27

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.

4.4.4.3 Right to a fair hearing – Human Rights Act 2019, section 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 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 as the public may be impaired in viewing the proceeding.

4.4.4.4 Right to protection against retrospective criminal laws – Human Rights Act 2019, section 35

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

These provisions have retrospective application to 19 March 2020 and apply to trials for acts done before the legislation commences.

4.4.4.5 Rights in criminal proceedings – Human Rights Act 2019, section 32

Section 32 sets out a number of rights a person is entitled to in criminal proceedings.

The modification of arrangements could disadvantage a person in the criminal process, due to misunderstandings of the process.

The Minister gives the following collective justification for any limitations on these human rights arising from changing the way of presenting indictments and entering *nolle prosequis*:

Under the Criminal Code, an indictment must be presented to the court. This has always been taken to require the presence in a courtroom of a person authorised to present an indictment who physically hands up to the Court an indictment with an original signature upon it. In the current health emergency, there is a need to enable electronic indictment presentation to limit

²⁶ Human rights certificate, p 7.

person to person contact, reduce the need for in-court presence of persons and ensure social distancing.

Nolle prosequis (for all or part of an indictment) are also currently entered by appropriately authorised Crown Law officers and prosecutors through the physical endorsement of the indictment in court. The Regulation allows the appearance by audio visual link or audio link video to 'effect' the discontinuance of a filed electronic notification of discontinuance.

The purpose of the limitation in the Regulation is to protect the health, safety and welfare of persons affected by the COVID-19 emergency. It promotes the right of life and is consistent with a free and democratic society based on human dignity, equality and freedom.²⁷

Committee comment

As noted in the certificate, the extent of any limitation on rights 'is not great'.²⁸ The committee is satisfied in this instance that such impact on human rights is reasonable and justified.

4.4.5 Modification to expand prerecording of evidence

A court may allow a video-recording of witness evidence to be viewed and heard in a proceeding in certain circumstances, rather than direct oral testimony in court.

4.4.5.1 Right to a fair hearing – Human Rights Act 2019, section 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 court after a fair and public hearing.

As a person may be providing evidence by recording, rather than in open court, this right may be impacted.

4.4.5.2 Rights in criminal proceedings – Human Rights Act 2019, section 32

A number of rights in criminal proceedings are protected under section 32 of the HRA.

The Minister states:

... The Regulation provides flexibility for the giving of evidence to reduce the number of persons in attendance at court for trials, for example by an elderly witness who may not fall within the definition of 'special witness' but who may be particularly vulnerable to COVID-19. The pre-recording of evidence will facilitate the continuance of the judicial process and help to avoid delay, which has benefits for defendants in particular those on remand awaiting trial. Importantly, the taking of pre-recorded evidence does not prevent the opportunity of the accused to challenge that evidence.²⁹

Committee comment

Given the COVID-19 public health emergency, the committee is satisfied that the impact on human rights is reasonable and demonstrably justified.

4.4.6 Modification to allow use of audio visual links or audio links for particular proceedings and provide an alternative method or process for giving notice of adjournment

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

The ability for a court to conduct the proceeding by the use of audio visual links or audio links limits this right as it may have a disproportionate impact on those members of the community who have limited access to, or lack familiarity with, information technology.

²⁷ Human rights certificate, p 10.

²⁸ Human rights certificate, p 10.

²⁹ Human rights certificate, p 12.

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

These arrangements might make it more difficult to maintain the privacy of persons appearing.

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

Every person has the right to liberty and security, including protection from arbitrary arrest or detention and that where a person is deprived of liberty it is in accordance with procedures established under law.

Under the modified arrangements, a person may be given a notice of adjournment electronically. A person may be disadvantaged by not receiving the notice through that process.

4.4.6.4 Rights in criminal proceedings – Human Rights Act 2019, section 32

Section 32 protects a number of rights of an individual in criminal proceedings, including the right to be tried in person.

The use of audio visual or audio links limits this right.

The Minister highlights a number of restrictions on the arrangements:

... The Regulation is strictly time limited, expiring on 31 December 2020. The modification only applies to adults. The Regulation includes a safeguard as the court may only conduct the proceeding in the modified way if appropriate having regard to both practical matters and the interests of justice for audio visual or audio links to be used in the proceeding. This will ensure that the court considers the defendant's capacity to comprehend the proceedings or communicate with their legal representative or interpreter where relevant as well as the suitability of the audio visual or audio facilities available and so will serve to protect those defendants who may be disadvantaged in some way by audio visual or audio attendance.³⁰

Further, in relation to notices of adjournment:

The electronic provision of notices of adjournment (for example by email or SMS) contains a safeguard that the clerk of the court may give the notice of adjournment only if satisfied it is appropriate to do so in order to protect the health, safety and welfare of persons affected by the COVID-19 emergency or to facilitate the continuance of the public administration of the court in circumstances where the court's public administration or other activities are disrupted by the COVID-19 emergency. A further safeguard is that the person or their lawyer must give their electronic address or their lawyer's, for the purpose of receiving the notice of adjournment.³¹

Committee comment

The committee is satisfied that the impact on human rights is reasonable and demonstrably justified, given the COVID-19 emergency.

5 Civil Liability and Other Legislation (Prescribed Amounts) Amendment Regulation 2020 (SL 117)

5.1 Objective of the Civil Liability and Other Legislation (Prescribed Amounts) Amendment Regulation 2020

The objective of the Civil Liability and Other Legislation (Prescribed Amounts) Amendment Regulation 2020 is to increase the costs and offer limits, monetary caps and thresholds under the Motor Accident Insurance Regulation 2014, the Motor Accident Insurance Regulation 2018 and the Personal Injuries Proceedings Regulation 2014, for injuries occurring on or after 1 July 2020.

³⁰ Human rights certificate, p 14.

³¹ Human rights certificate, p 14.

The increase in fees is based on the Queensland full-time adult ordinary time earnings declared by the Australian Statistician. This results in an increase of 2.24%.

All the fee increases come within the 2.24% amount (some are slightly higher, due to rounding).

6 Fire and Emergency Services Legislation (Fees) Amendment Regulation 2020 (SL 124)

6.1 Objective of the Fire and Emergency Services Legislation (Fees) Amendment Regulation 2020

The objective of the Fire and Emergency Services Legislation (Fees) Amendment Regulation 2020 is to increase fees in the following regulations, by the government indexation amount for 2020-21 of 1.8%:

- Building Fire Safety Regulation 2008
- Fire and Emergency Services Regulation 2011.

All the increases are within 1.8%.

6.2 Human rights issues in the Fire and Emergency Services Legislation (Fees) Amendment Regulation 2020

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

6.2.1 Right to property – *Human Rights Act 2019*, section 24

A person must not be arbitrarily deprived of their property.

The increase in fees will deprive a person of additional money, as this will be expended on the increased fees.

The Minister provided the following justification:

*On balance, increasing fees, charges and levies based on the Government Index Rate of 1.8% is seen as striking a fair balance between the limitation on the right to property and the purpose of ensuring that the urban and rural fire services are adequately resourced to fulfil their mandate of protecting the Queensland community.*³²

Committee comment

The committee is satisfied in this instance that any impact on a person's right to property is reasonable and demonstrably justified.

7 State Penalties Enforcement Amendment Regulation 2020 (SL 125)

7.1 Objective of the State Penalties Enforcement Amendment Regulation 2020

The objective of the State Penalties Enforcement Amendment Regulation 2020 is to increase the amount of the infringement notice fine for breaching the Border Restrictions Public Health Directions.

The infringement notice fine for an individual increases to 30 penalty units (\$4004.00). The previous fine for an individual was 10 penalty units (\$1335.00). The corresponding penalty for a corporation remains at 50 penalty units.

³² Human rights certificate, p 3.

7.2 Fundamental legislative principle issues

7.2.1 Rights and liberties of individuals – proportionality of penalties - *Legislative Standards Act 1992, section 4(2)(a)*

Whether legislation has sufficient regard for rights and liberties of individuals depends on whether, for example, penalties in the legislation are proportionate.

A penalty should be proportionate to the offence:

*Legislation should provide a higher penalty for an offence of greater seriousness than for a lesser offence. Penalties within legislation should be consistent with each other.*³³

The OQPC Notebook states:

*The principal means of creating offences should always be through Acts of Parliament rather than delegated legislation.*³⁴

Former committees have stated that maximum penalties in regulations should be limited, generally, to 20 penalty units.

The explanatory notes provide this justification:

*The increased fines for breaches of the Border Restrictions Public Health Directions are considered appropriate and reasonable in light of the unique public health risks and practical enforcement challenges posed by persons who provide false information to border officials or who do not comply with quarantine requirements at the border. To effectively prevent people from bringing COVID-19 into Queensland, emergency officers must be able to obtain accurate information about where individuals have travelled outside of Queensland, who they have been in contact with and whether they have symptoms or are otherwise at greater risk of having COVID-19. The only practical and timely way to obtain this information is to require that persons entering Queensland provide it and to create a strong deterrent to providing information that is false, inaccurate or incomplete, which could increase the risk of COVID-19 being re-introduced into Queensland and new outbreaks occurring.*³⁵

Committee comment

For context, the committee notes that the maximum penalty for failing to comply with a public health direction without a reasonable excuse is 100 penalty units (\$13,345).³⁶

The committee considers the penalties in the State Penalties Enforcement Amendment Regulation 2020 are proportionate to the offences and that it is appropriate, in this instance, to have these penalties contained in subordinate legislation, rather than in primary legislation.

7.3 Human rights issues in the State Penalties Enforcement Amendment Regulation (No. 1) 2020

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

- with the human rights protected by the HRA
- with the HRA because to the extent that it imposes any limitation on a human right, that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

³³ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, pp 150-151.

³⁴ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, pp 150-151.

³⁵ Explanatory notes, p 4.

³⁶ See section 362D of the *Public Health Act 2005*.

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

Human rights

The State Penalties Enforcement Amendment Regulation 2020 increases the infringement notice fine for breaching the Border Restrictions Public Health Directions from a maximum of \$1335 to a maximum of \$4004.

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

Section 24 of the HRA provides that a person must not be arbitrarily deprived of their property. The increase in the fine amount might be argued to deprive a person of their property (in the form of money).

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

Under section 31 of the HRA, a person charged with a criminal offence has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. The infringement notice fine, in this case, 10 penalty units (\$1335) could arguably be seen as impacting a person's human rights, as the fine will be imposed without a public hearing.

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

Under section 32 of the HRA, a person charged with a criminal offence has the right to be presumed innocent until proven guilty according to law. Under the new section 362D of the *Public Health Act 2005*, a person who fails to comply with a public health direction *without a reasonable excuse* commits an offence with a maximum penalty of 100 penalty units. This provision could arguably be seen to be reversing the onus of proof, requiring the person to be able to prove their innocence, rather than be presumed innocent.

In relation to all of the issues mentioned above, the Attorney-General provides the following justification for any adverse impact on a person's rights:

The purpose of the Regulation is to provide a penalty that would deter a person from giving untrue or incorrect information about their potential exposure to COVID-19 or similarly untrue information about any diagnosis they may have received in relation to COVID-19. This is necessary to ensure that the spread of COVID-19 is limited to the greatest extent possible for the health of the greater Queensland community.

Protecting public health is a legitimate objective.

...

While the penalty provided for under the Regulation is significant, on balance, it is considered that the importance of maintaining effective enforcement mechanisms that are proportionate to the risk created by the offending behaviour outweighs any potential limitations imposed on property rights.³⁷

In relation to a fair hearing, the Attorney-General states:

Individuals retain the capacity to elect to have the matter heard in court instead of paying the penalty amount. On one view, the right to a fair hearing and rights in criminal proceedings are facilitated through the availability of the [State Penalties Enforcement Act 1999] framework. This is particularly so if, there is an increase in the number of alleged offenders seeking to have the charge determined in a Magistrates Court.³⁸

It can be noted that section 24 talks of arbitrary deprivation of property. There is nothing arbitrary here.

³⁷ Human rights certificate, p 6.

³⁸ Human rights certificate, p 5.

Committee comment

The committee is satisfied that any limits on human rights are reasonable and demonstrably justifiable.

8 Gaming Tax Notice 2020 (SL 126)

8.1 Objective of the Gaming Tax Notice 2020

The objective of the Gaming Tax Notice 2020 is to provide for the deferral of the payment of a gaming machine tax under the *Gaming Machine Act 1991*. Payment of the portion of the casino tax related to gaming machine revenue under the *Casino Control Act 1982* is also deferred.

8.2 Fundamental legislative principle issues

8.2.1 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 – *Legislative Standards Act 1992*, section 4(3)(g)

The Gaming Tax Notice 2020 applies retrospectively to give effect to the administrative arrangement of 2 April 2020.

Whether legislation has sufficient regard for rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect rights and liberties, or impose obligations, retrospectively.³⁹ Strong argument is required to justify an adverse effect on rights and liberties, or imposition of obligations, retrospectively.

The explanatory notes provide:

The retrospective nature of the Gaming Tax Notice is necessary to confirm actions that have already been undertaken to support businesses negatively impacted by mandated closures as a result of the COVID-19 emergency. As the Gaming Tax Notice will assist impacted businesses, it is considered it will not adversely affect rights and liberties retrospectively, and will instead provide a benefit, thereby negating any breach of fundamental legislative principles.⁴⁰

Committee comment

Given that the impacts are beneficial, rather than adverse, the committee is satisfied that the retrospective operation of the notice does not breach fundamental legislative principles.

9 Working with Children (Risk Management and Screening) Regulation 2020 (SL 131)

9.1 Objective of the Working with Children (Risk Management and Screening) Regulation 2020

The objective of the Working with Children (Risk Management and Screening) Regulation 2020 is to repeal and replace the Working with Children (Risk Management) Regulation 2011 (2011 Regulation) as a result of amendments made to the *Working with Children (Risk Management and Screening) Act 2000* by the *Working with Children (Risk Management and Screening) and Other Legislation Amendment Act 2019*.

The current regulation provides for substantially the same matters contained in the 2011 Regulation, with minor changes to reflect new terminology and current drafting practice.⁴¹

The regulation also increases various fees in line with the Government indexation rate for 2020-21 of 1.8%.

³⁹ *Legislative Standards Act 1992*, s 4(3)(g).

⁴⁰ Explanatory notes, p 3.

⁴¹ Explanatory notes, p 2.

9.2 Human rights issues

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

- with the human rights protected by the HRA
- with the HRA because it does limit human rights only to the extent that is reasonable and demonstrably justifiable.

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

9.2.1 Privacy – Human Rights Act 2019, section 25

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

A person's right to privacy may be impacted by:

- enabling the use of a person's digital photo for a working with children card, obtained from the Department of Transport and Main Road's (DTMR) photo library
- re-stating the scope of regulated employment captured by the blue card system to include persons engaged in a risk assessed role by a NDIS service provider
- allowing a person to advise another person whether or not another person's working with children authority is in force.

The Attorney-General provides these justifications for the limitations:

- use of photos:

Limiting the right to privacy by allowing BCS [Blue Card Services] to leverage off DTMR's photo library to include a photo on a person's working with children card achieves the purpose of providing stronger identity verification, reducing the chance of a person fraudulently using another person's card and ultimately, providing stronger safeguards for children.⁴²

- blue card checks:

Limiting the right to privacy by requiring certain persons engaged by NDIS service providers to undergo a 'blue card' check achieves the purposes of protecting children with disability by requiring persons to have their criminal history assessed and a determination made as to whether issuing a blue card to the person would be in the interests of children.⁴³

- disclosure of information:

Limiting the right to privacy by enabling persons under section 385(4)(d) of the WWC Act, to make a record of, or disclose information about whether a person has a working with children authority in force, facilitates the provision of information to interested persons (for example, parents engaging in a regulated business such as a personal tutor for their child) to ensure that the person they are engaging has a valid working with children authority.⁴⁴

Committee comment

The committee considers the impacts on human rights are reasonable and demonstrably justified.

⁴² Human rights certificate, p 3.

⁴³ Human rights certificate, p 4.

⁴⁴ Human rights certificate, p 4.

10 Recommendation

The committee recommends that the House notes this report.



Peter Russo MP

Chair

October 2020

Legal Affairs and Community Safety Committee

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