

Local Government Electoral (2020 Quadrennial Election) Regulation 2020

Explanatory notes for SL 2020 No. 42

made under the

City of Brisbane Act 2010

Local Government Act 2009

Local Government Electoral Act 2011

State Penalties Enforcement Act 1999

General Outline

Short title

Local Government Electoral (2020 Quadrennial Election) Regulation 2020

Authorising law

Section 252 of the *City of Brisbane Act 2010*

Section 270 of the *Local Government Act 2009*

Sections 200L and 208 of the *Local Government Electoral Act 2011*

Section 165 of the *State Penalties Enforcement Act 1999*

Policy objectives and the reasons for them

On 29 January 2020, the Minister for Health and Minister for Ambulance Services declared a public health emergency under section 319 of the *Public Health Act 2005* due to the outbreak of a new coronavirus, COVID-19, and the public health implications for Queensland.

On 15 March 2020 the National Cabinet, comprising the Prime Minister, State Premiers and Territory Chief Ministers, asked all States and Territories to ensure they had appropriate legislative provisions in place to implement and monitor social distancing measures

2020 Quadrennial Local Government Election

The *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (the Act) was passed by the Legislative Assembly on 18 March 2020 in response to the unprecedented health crisis facing Queensland posed by COVID-19. The Act received assent on 19 March 2020.

The Act amended the *City of Brisbane Act 2010*, the *Local Government Act 2009*, the *Local Government (Dissolution of Ipswich City Council) Act 2018*, the *Local Government Electoral Act 2011* (LGEA) and the *Local Government Regulation 2012* to provide flexibility, if required, for the election date for the 2020 quadrennial local government election and the statutory processes for the conduct of the election to help minimise serious risks to the health and safety of persons caused by the COVID-19 pandemic.

The measures are temporary and will only apply to the 2020 quadrennial local government election in order to maximise public safety and minimise the public health risks associated with the COVID-19 pandemic.

Section 21 of the Act inserts new Part 9A (Provisions for quadrennial election for 2020) into the LGEA. Section 200A of the LGEA provides the purpose of Part 9A is to facilitate the holding of the quadrennial election for 2020 in a timely way that minimises serious risks to the health and safety of persons caused by the public health emergency involving COVID-19.

Section 200L of the Act provides a regulation may make provision about a matter to allow or facilitate the holding of the quadrennial election for 2020 and for which the LGEA does not make provision or sufficient provision. The regulation may have retrospective operation to a day not earlier than the day of commencement and may be inconsistent with the LGEA to the extent necessary to achieve the purpose of Part 9A. Section 200L and the regulation expire one year after the day of commencement.

The *Local Government Electoral (2020 Quadrennial Election) Regulation 2020* (the Regulation) makes provision for matters about the quadrennial election for 2020.

Local Government Meetings

The policy objective of the Regulation is to also provide for additional matters for meetings of a local government, or a committee of the local government, to minimise serious risks to the health and safety of persons caused by the public health emergency involving COVID-19.

Section 257(3) of the *Local Government Regulation 2012* (LGR) provides all meetings of a local government are to be held at one of the local government's public offices; or, for a particular meeting, at another place fixed by the local government, by resolution, for the meeting. Section 245(3) of the *City of Brisbane Regulation 2012* (CBR) also provides for similar requirements.

Section 274 of the LGR provides a meeting is open to the public unless the local government or committee has resolved the meeting is to be closed under section 275 of the LGR. Section 249 of the CBR also provides for a similar requirement.

Section 276 of the LGR provides a local government may allow a person to take part in a meeting by teleconferencing. A councillor taking part in a meeting by teleconferencing is taken to have attended the meeting if the councillor was simultaneously in audio contact with each other person at the meeting; and the local government approved the teleconferencing arrangement.

Achievement of policy objectives

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The Regulation provides for offences relating to signage at polling booths. During the period that starts on the commencement and ends at 5a.m. on the polling day for the election, a person must not do any of the following in the area around an ordinary polling booth:

- display an election sign
- set up a table, chair, umbrella, portable shade structure or other thing to be used for a purpose related to the election.

A maximum penalty of 10 penalty units applies and amendments to the *State Penalties Enforcement Regulation 2014* prescribe the offence as an infringement notice offence with a fine of 5 penalty units. The administering agency for the offence will be the electoral commission and the authorised person for service of the infringement notice will be the electoral commissioner under the *Electoral Act 1992*.

A definition of the ‘area around an ordinary polling booth’ is provided. If a member of the electoral commission’s staff considers a sign is displayed, or another thing is situated in contravention of this provisions, the staff member may remove the sign or other thing.

The Regulation provides that for the purpose of part 9A of the LGEA, the electoral commission may give directions about candidates or scrutineers at particular places. The electoral commission may give a direction:

- regulating the number of scrutineers each candidate may have at a polling booth or other place where a scrutineer is entitled to be present under the LGEA
- prohibiting a candidate or scrutineer from being present at a polling booth or other place where the candidate or scrutineer would otherwise be entitled to be present under the LGEA (for example a direction may prohibit a scrutineer from accompanying an issuing officer under section 76 of the LGEA).

The direction must be published on the electoral commission’s website.

The Regulation provides for a maximum penalty of 20 penalty units for contravention of the direction without a reasonable excuse. Amendments to the *State Penalties Enforcement Regulation 2014* prescribe the offence as an infringement notice offence with a fine of 2 penalty units. The administering agency for the offence will be the electoral commission and the authorised person for service of the infringement notice will be the electoral commissioner under the *Electoral Act 1992*.

The direction applies despite section 59 of the LGEA (Scrutineers) or another provision of the LGEA that allows a candidate or scrutineer to be present at a polling booth or other place.

Section 174(b) of the LGEA (Obstructing electoral officers etc.) does not apply to the extent a scrutineer is prevented from entering a polling booth under the direction.

The Regulation also provides for directions about movement of candidates or scrutineers. For the purpose of part 9A of the LGEA, any of the following persons may give a direction under section 8 of the Regulation:

- the returning officer
- a presiding officer for a polling booth
- a member of the electoral commission's staff who has been given a direction under section 96A of the LGEA (Re-counting of votes).

The direction may be given to a candidate or scrutineer at a place (a *relevant place*) that is a polling booth or other place the candidate or scrutineer is entitled to be present under the LGEA.

The direction may be about:

- the movement of a candidate or scrutineer at a relevant place
- an area within a relevant place at which the candidate or scrutineer may or may not be
- the maximum number of scrutineers who may be in a particular area of a relevant place.

A candidate or scrutineer must comply with the direction unless the candidate or scrutineer has a reasonable excuse. The Regulation provides for a maximum penalty of 20 penalty units for non-compliance with the direction. Amendments to the *State Penalties Enforcement Regulation 2014* prescribe the offence as an infringement notice offence with a fine of 2 penalty units. The administering agency for the offence will be the electoral commission and the authorised person for service of the infringement notice will be the electoral commissioner under the *Electoral Act 1992*. A candidate or scrutineer does not commit an offence unless the person giving the direction has warned the candidate or scrutineer that it is an offence not to comply with the direction unless the candidate or scrutineer has a reasonable excuse.

The Regulation provides that the electoral commission may make procedures under section 75A of the LGEA (Prescribed procedures for electronically assisted voting) about how an elector may cast an electronically assisted vote for the election. The procedures must state that they are made under section 9. The requirements under section 75A(3)(a) and (b) of the LGEA that procedures do not take effect until approved by a regulation and must be tabled in the Legislative Assembly do not apply. The procedures take effect when they are published on the electoral commission's website. A reference in the LGEA or another document to a procedure approved under section 75A(3) of the LGEA is taken to include a procedure under the regulation.

The Regulation provides that the returning officer may arrange for the counting of votes to be filmed by a member of the electoral commission's staff. The provision authorises filming as this may be necessary to facilitate the scrutineering of the counting of votes if candidates and scrutineers are restricted in accessing areas they would otherwise be able to access.

Under section 200L(3) of the LGEA, the Regulation expires on 19 March 2021.

Local Government Meetings

The policy objective of the Regulation is achieved by providing in the LGR for additional provisions for meetings of a local government or a committee of a local government to minimise serious risks to the health and safety of persons caused by the public health emergency involving COVID-19. Similar amendments are proposed to the CBR, however these apply only to Brisbane City Council meetings and not to committee meetings.

The Regulation provides for the following measures to be in force until 30 June 2021:

- a local government or a committee of a local government may hold a meeting by teleconference, despite section 257(3) of the LGR / section 245(4) of the CBR. A councillor taking part is taken to be present at the meeting.
- the chairperson of a local government or committee meeting may allow a person to take part in a meeting by teleconferencing. A councillor taking part in a meeting is taken to be present at the meeting.
- where a meeting of a local government or committee of a local government is held by teleconferencing or a person takes part in a meeting of a local government or committee of a local government by teleconferencing, the local government must ensure the meeting is available for real-time viewing or listening by the public at one of the local government's public offices or on the local government's website (unless the meeting is to be closed under the LGR section 275 or 277E / section 255 or 255F CBR)
- the chairperson of a meeting of a local government or committee of a local government may decide, by notice published on the local government's website, that a meeting be closed to the public if the chairperson is satisfied it is not practicable for the public to attend the meeting because of health and safety reasons associated with the public health emergency involving COVID-19. The section applies despite section 274 of the LGR / section 249 of the CBR (Meetings in public unless otherwise resolved), section 275 of LGR / section 255 of CBR (Closed meetings).

Consistency with policy objectives of authorising law

The Regulation is consistent with the policy objectives of the LGEA and with the purpose of Part 9A of the LGEA to facilitate the holding of the quadrennial election for 2020 in a timely way that minimises serious risks to the health and safety of persons caused by the public health emergency involving COVID-19.

The Regulation is consistent with the policy objectives of the LGA, the COBA and the *State Penalties Enforcement Act 1999*.

Inconsistency with policy objectives of other legislation

The Regulation is not inconsistent with the policy objectives of other legislation.

Benefits and costs of implementation

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The benefits of the amendments are to minimise serious risks to the health and safety of persons caused by the COVID-19 pandemic during the conduct of the 2020 quadrennial election.

The amendments may result in potential costs to the Electoral Commission of Queensland, candidates and local governments. These potential costs will ultimately be dependent on which measures are put in place for the 2020 quadrennial local government election, which in turn will be informed by the public health response to minimise the risks associated with the COVID-19 pandemic.

Local Government Meetings

The benefits of the amendments are to minimise serious risks to the health and safety of persons caused by the COVID-19 pandemic. The amendments provide temporary arrangements to assist local governments by providing for flexibility, if required, around the statutory processes surrounding the conduct of the council meetings, and include increased flexibilities for council meetings:

- to be conducted via teleconference
- to be closed to the public for health and safety reasons associated with COVID-19.

These measures are proposed to be temporary and will ensure local governments can continue to perform their essential role delivering services and supporting communities during an evolving public health emergency.

The amendments may result in costs to local governments. These potential costs will ultimately be dependent on which measures are put in place which in turn will be informed by the public health response to minimise the risks associated with the COVID-19 pandemic.

Consistency with fundamental legislative principles

The Regulation is generally consistent with fundamental legislative principles set out in the Legislative Standards Act 1992 (LSA). Potential breaches of the fundamental legislative principles are addressed below.

Rights and liberties of individuals

The fundamental legislative principles include requiring that legislation has sufficient regard to rights and liberties of individuals (section 4(2)(a) of the LSA).

Proportionality of penalties

Whether legislation has sufficient regard to the rights and liberties of individuals includes whether, for example, consequences imposed by legislation are proportionate and relevant to the actions to which the consequences are applied by the legislation. Legislation must impose penalties which are proportionate to the offence.

The Regulation inserts new offences that apply:

- when a person contravenes a direction of the electoral commission about the number of scrutineers each candidate may have at a polling booth or other place a scrutineer is entitled to be present under the LGEA or prohibiting a candidate or scrutineer from being present at a polling booth or other place where the candidate or scrutineer would otherwise be entitled to be present under the LGEA. The maximum penalty that applies for this offence is 20 penalty units.
- when a candidate or scrutineer, without a reasonable excuse, does not comply with a direction of a returning officer, presiding officer for a polling booth or a member of the electoral commission's staff who is re-counting ballot papers under section 96A of the LGEA about movement at a polling booth or other place where the candidate or scrutineer is entitled to be present under the Act. The maximum penalty that applies for this offence is 20 penalty units.
- when a person displays an election sign or sets up a table, chair, umbrella, portable shade structure or other thing to be used for a purpose related to the election in the area around an ordinary polling booth, during the period that starts on the commencement and ends at 5a.m. on the polling day for the election. A maximum penalty of 10 penalty units applies.

The penalty for these offences are significant to provide disincentive for non-compliance and in recognition of the significant penalties applying under both the *Public Health Act 2005* for non-compliance with public health directions and under the LGEA section 200I for contravening a direction of the electoral commission about distribution of how-to-vote cards.

Balancing individual and community or more general interests

Consideration of the effect of legislation on the rights and liberties of individuals often involves examining the balance between the rights of individuals and the rights of the community or more general rights (OQPC Notebook 3.15.1).

The Regulation provides for directions about movement of candidates or scrutineers in section 8. The direction may be about:

- the movement of a candidate or scrutineer at a relevant place
- the areas within a relevant place the candidate or scrutineer may be
- the number of scrutineers in a particular area of a relevant place.

The Regulation also provides for an offence when a person displays an election sign or sets up a table, chair, umbrella, portable shade structure or other thing to be used for a purpose related to the election in the area around an ordinary polling booth, during the period that starts on the commencement and ends at 5a.m. on the polling day for the election.

These provisions are justified as they address the purpose of Part 9A of the LGEA which is to facilitate the holding of the quadrennial election for 2020 in a timely way that minimises serious risks to the health and safety of persons caused by the public health emergency involving COVID-19.

It is also noted the measures are temporary and will only apply to the 2020 quadrennial local government election in order to maximise public safety and minimise the public health risks associated with the public health emergency involving COVID-19.

The amendments to the LGR and CBR relating to closed meetings for local government and committee meetings enable the chairperson of a local government or committee to restrict access to a meeting if they are satisfied that it is in the interest of the public to restrict access to minimise the serious risks to the health and safety of persons associated with COVID-19.

The amendments restrict individuals' ability to observe or listen to discussions and decisions that would otherwise be conducted in an open meeting. The potential breach is justified as the amendments minimise serious risks to health and safety of persons caused by the public health emergency involving COVID-19.

Abrogation of rights and liberties from any source must be justified

Legislation should not abrogate other rights, in the broadest sense of the word, from any source without sufficient justification (OQPC Notebook 3.3.1).

Privacy and confidentiality rights have been identified as relevant to consideration of whether legislation has sufficient regard to individuals' rights and liberties (OQPC Notebook 3.3.6). The Regulation provides that the returning officer may arrange for the counting of votes under the LGEA to be filmed by a member of the electoral commission's staff. The potential breach of privacy rights is justified, as it addresses the purpose of Part 9A of the LGEA which is to facilitate the holding of the quadrennial election for 2020 in a timely way that minimises serious risks to the health and safety of persons caused by the public health emergency involving COVID-19.

Institution of Parliament

The fundamental legislative principles include requiring that legislation has sufficient regard to the institution of Parliament (section 4(2)(b) of the LSA).

Amendment of Act by subordinate legislation

Whether legislation has sufficient regard to the institution of Parliament depends on whether, for example, a Bill only authorises the amendment of an Act by another Act (section 4(4)(c) of the LSA).

The Regulation provides that:

- a direction of the electoral commission under section 7 applies despite section 59 of the LGEA or another provision of the LGEA that allows a candidate or scrutineer to be present at a polling booth or other place
- section 174(b) of the LGEA does not apply to the extent a scrutineer is prevented from entering a polling booth under a direction of the electoral commission under section 7
- section 75A(3)(a) and (b) of the LGEA do not apply in relation to procedures made by the electoral commission under section 9 about how an elector may cast an electronically assisted vote for the election.

The regulation-making power for this Regulation, section 200L of the LGEA, specifically provides that the regulation may be inconsistent with the LGEA to the extent necessary to achieve the purpose of Part 9A of the LGEA. These measures are temporary and will only apply to the 2020 quadrennial local government election in order to maximise public safety and minimise the public health risks associated with the public health emergency involving COVID-19.

Consultation

The Electoral Commission of Queensland was consulted and supports the amendments.

The Office of Best Practice Regulation was also consulted. Given the urgent circumstances, regulatory impact assessment has not been conducted.