

Electoral (By-elections Before Next General Election) Regulation 2020

Explanatory notes for SL 2020 No. 43

Made under the

Electoral Act 1992

State Penalties Enforcement Act 1999

General Outline

Short Title

Electoral (By-elections Before Next General Election) Regulation 2020

Authorising law

Section 392J of the *Electoral Act 1992*

Section 165 of the *State Penalties Enforcement Act 1999*

Policy objectives and the reasons for them

The *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (the Public Health Emergency Act) was assented to on 19 March 2020.

The Public Health Emergency Act inserted section 392J into the *Electoral Act 1992* (the Electoral Act) which allows for a regulation to make provision about a matter for which it is necessary to make provision to allow or facilitate the holding of a State by-election in a way that helps minimise serious risks to the health and safety of persons caused by the public health emergency involving COVID-19.

The policy objective of the *Electoral (By-elections Before Next General Election) Regulation 2020* (the Regulation) is to make provision about matters for which it is necessary to make provision to allow or facilitate the holding of a by-election in a way that helps minimise serious risks to the health and safety of persons caused by the public health emergency involving COVID-19. These measures are temporary and will only apply in relation to by-elections held before the next general election.

Achievement of policy objectives

The Regulation makes provision under section 392J of the Electoral Act, for the following matters about State by-elections held before the next general election:

- allowing the Electoral Commission of Queensland (ECQ) to give a direction about the number of scrutineers each candidate may have at a polling booth or other place at which a scrutineer is entitled to be present under the Electoral Act, or prohibiting a scrutineer from being present at a polling booth or other place at which a scrutineer is otherwise entitled to be present under the Electoral Act, with an offence applying to a contravention;
- allowing a returning officer or member of the ECQ's staff in charge of a polling booth to give a direction about the movement of candidates or scrutineers at the polling booth for the election, and areas where they may be, with an offence applying to a contravention;
- allowing procedures about how an elector may make an electronically assisted vote for a by-election, without the need for the procedures to be approved by a regulation and tabled in the Legislative Assembly;
- allowing a returning officer to arrange for the counting of votes to be filmed by a member of the ECQ's staff;
- allowing a returning officer to direct a member of the ECQ's staff to carry out the counting of votes at a by-election at a stated place; and
- creating an offence for the display of an election sign or setting up other items to be used for a purpose related to an election before 5am within 100 metres of a building to be used as an ordinary polling booth, the grounds in which a polling booth is located or within 100 metres of any entrance to the grounds.

The Regulation also amends the *State Penalties Enforcement Regulation 2014* to prescribe the new offences for contravention of a direction under the new directions powers or the setting up of signage restrictions as infringement notice offences.

Consistency with policy objectives of authorising law

The Regulation is consistent with the policy objective of section 392J of the Electoral Act, making provision about matters for which it is necessary to make provision to allow or facilitate the holding of a by-election in a way that helps minimise serious risks to the health and safety of persons caused by the public health emergency involving COVID-19.

Inconsistency with policy objectives of other legislation

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

Benefits and costs of implementation

The Regulation will make provision about matters for which it is necessary to make provision to allow or facilitate the holding of a by-election in a way that helps minimise serious risks to the health and safety of persons caused by the public health emergency involving COVID-19.

The offence for the display of an election sign or setting up other items to be used for a purpose related to an election may involve additional staffing costs for the ECQ to monitor compliance. While there are no direct costs arising from other aspects the Regulation, the Regulation enables directions to be made by the ECQ, returning officers and the members of staff in charge of polling booths that may involve additional costs. Any costs for the ECQ in making such directions will be determined through normal budgetary processes.

Consistency with fundamental legislative principles

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

The Regulation allows the ECQ to give a direction about the number of scrutineers each candidate may have at a polling booth or other place that scrutineers are otherwise entitled to be present. It also allows the returning officer or member of the ECQ's staff in charge of a polling booth to give a direction about the movement of candidates or scrutineers at the polling booth. This raises a potential inconsistency with the fundamental legislative principle that legislation should not adversely affect the rights and liberties of individuals (section 4(2)(a) of the LSA). The right to take part in public life may be impacted because a direction may prevent scrutineers, who play an important role for the integrity of elections in ensuring that an election is perceived as free and fair, from doing things otherwise permitted by the Electoral Act. The Regulation also impacts on other human rights including freedom of expression in relation to the offence for display of election material or setting up other items to be used for a purpose related to an election.

The impacts on human rights are justified on the basis that the flexibility to modify the presence or movement of scrutineers is necessary to minimise risks to health and safety caused by the public health emergency involving COVID-19, including limiting situations and public events which may result in contagion through person-to-person contact. These measures are temporary and will only apply in relation to by-elections held before the next general election.

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 provides for new offences for contravening a direction given by the ECQ, a returning officer or member of the ECQ's staff in charge of a polling booth, without reasonable excuse, with maximum penalty of 20 penalty units. It also provides for a new offence for the display of an election sign or setting up other items to be used for a purpose related to an election with a maximum penalty of 10 penalty units. The penalties for these offences are commensurate with the penalties applying for similar offences in the Electoral Act.

The Regulation allows procedures about how an elector may make an electronically assisted vote for a by-election, without the need for the procedures to be approved by a regulation and tabled in the Legislative Assembly. This raises a potential inconsistency with the fundamental legislative principle that legislation must have sufficient regard to the rights and liberties of individuals and institution of Parliament (section 4(2)(a) and (b) of the LSA). Whether subordinate legislation has sufficient regard to the institution of Parliament depends on whether, for example, the subordinate legislation allows the sub-delegation of a power delegated by an Act only, in appropriate cases and to appropriate persons, and if authorised by an Act.

Allowing procedures to be made for how an elector may make an electronically assisted vote for a by-election potentially impacts on how, and in certain circumstances whether, a particular individual votes by such means (for example, by specifying when electronically assisted voting is available). Allowing the procedures to be made without being approved by regulation and tabled in the Legislative Assembly, would limit the parliamentary scrutiny of the procedures, and this delegation is authorised by a regulation and not an Act. These arrangements are justified on the basis that allowing procedures to be made in this way is necessary for expediency in the circumstances, in order to minimise risks to health and safety caused by the public health emergency involving COVID-19. The ECQ is an appropriate body for managing this as a temporary measure, which will only apply in relation to by-elections held before the next general election.

The Regulation will modify the application of the Act in relation to certain matters, namely: section 104 of the Electoral Act concerning entitlements of scrutineers and other sections that allow a candidate or a scrutineer to be present at a polling place; section 121B(3) which requires procedures for electronically assisted voting to be approved by regulation and tabled in the Legislative Assembly; and references in the Electoral Act to requiring votes to be counted at a polling place or other place. This raises a potential inconsistency with the fundamental legislative principle that legislation must have sufficient regard to institution of Parliament (section 4(2)(b) of the LSA), which depends on whether, for example, a Bill only authorises the amendment of an Act by another Act (LSA section 4(4)(c)). This is justified on the basis that allowing procedures to be made in this way is necessary for expediency in the circumstances, in order to minimise risks to health and safety caused by the public health emergency involving COVID-19, noting that these arrangements will only apply in relation to by-elections held before the next general election.

Consultation

The Electoral Commission of Queensland has been consulted and supports the Regulation.

The Queensland Productivity Commission was consulted regarding the Regulation. In the urgent circumstances, a regulatory impact assessment has not been conducted.