

Local Government (COVID-19 Emergency Response) Regulation 2020

Explanatory notes for SL 2020 No. 147

made under the

COVID-19 Emergency Response Act 2020
Local Government Act 2009

General Outline

Short title

Local Government (COVID-19 Emergency Response) Regulation 2020

Authorising law

Section 8 of the *COVID-19 Emergency Response Act 2020*
Section 270 of the *Local Government Act 2009*

Policy objectives and the reasons for them

On 29 January 2020, the then Minister for Health and Minister for Ambulance Services made an order under section 319 of the *Public Health Act 2005* declaring a public health emergency in relation to coronavirus disease (COVID-19). The public health emergency area specified in the order is for 'all of Queensland'. Its duration has been extended by regulation to 17 August 2020 and may be further extended.

Further to the declaration, the Chief Health Officer has given certain public health directions pursuant to powers under section 362B of the *Public Health Act 2005* to assist in containing, or to respond to, the spread of COVID-19 within the community. These directions have included restricting the movement of persons, requiring persons to stay at or in a stated place, and restricting contact between persons.

On 11 March 2020, the World Health Organization declared the spread of COVID-19 a pandemic.

The policy objectives of the Local Government (COVID-19 Emergency Response) Regulation 2020 (the Regulation) are to protect the health, safety and welfare of persons affected by the COVID-19 emergency and to facilitate the continuance of public administration disrupted by the COVID-19 emergency in relation to the investigation of councillor conduct and whether an offence has been committed against a ‘conduct provision’ of the *Local Government Act 2009*.

COVID-19 Emergency Response Act 2020

The *COVID-19 Emergency Response Act 2020* (the CER Act) commenced on 23 April 2020. Section 25 provides that it expires on 31 December 2020.

The CER Act establishes a legislative modification framework of general application across the statute book (the modification framework) allowing legislative requirements to be modified including in relation to attendance at places or meetings.

The main purposes of the CER Act are listed in section 2 and include protecting the health, safety and welfare of persons affected by the COVID-19 emergency and facilitating ongoing public administration, judicial process, small business and other activities disrupted by the COVID-19 emergency, including by easing regulatory requirements.

Section 5(4) of the CER Act provides that the Minister administering an affected Act may recommend to the Governor in Council the making of an extraordinary regulation under the Act only if the Minister is satisfied the regulation is necessary for a purpose of the CER Act. Section 5(5) provides that an extraordinary regulation under an affected Act may be inconsistent with the affected Act, and any other Act, to the extent necessary to achieve a purpose of the CER Act.

Part 3 of the CER Act is about reducing physical contact between persons. Section 8 provides for a regulation-making power relating to attendance at places or meetings. It applies if an Act requires or permits a person to physically attend a place or meeting for a particular purpose or particular matter. Examples provided in section 8(1)(a) include attendance before a person to answer questions. Section 8(3) provides that a regulation under the Act may make provision about how the purpose or matter can be achieved or otherwise dealt with in a modified way, including by providing the person may attend the place or meeting for the purpose or matter in a way that does not involve physical attendance, including, for example, using communication technology.

Local Government Act 2009

Chapter 5A of the *Local Government Act 2009* (the LGA) is about councillor conduct, including how complaints about the conduct of councillors are to be investigated and dealt with. Section 150T of the LGA provides the Independent Assessor must investigate the conduct of a councillor which is the subject of a complaint, notice, referral or information received by the Assessor. Part 4 of chapter 5A provides for the appointment of appropriately qualified persons as investigators to help the Assessor and gives investigators particular enforcement powers. Section 150AY of the LGA provides that the investigator’s functions include investigating the conduct of councillors as directed by the Assessor and investigating whether an offence has been committed against a ‘conduct provision’ (defined in section 150AY(b) of the LGA).

Section 150CJ(1) of the LGA provides that an investigator may require a person to attend a meeting with the investigator at a stated reasonable time and place and answer questions, related to the investigation of the conduct of a councillor or an offence against a 'conduct provision', asked by the investigator. A maximum penalty of 50 penalty units applies.

Achievement of policy objectives

To protect the health, safety and welfare of persons affected by the COVID-19 emergency and to facilitate ongoing public administration, the Regulation relies on section 8 of the CER Act to make modifications to the LGA.

The Regulation provides that section 150CJ of the LGA applies as if certain changes were made. The changes include omitting section 150CJ(1) and inserting a provision under which an investigator may, by notice given to a person, require the person to answer questions by attending before the investigator to answer the questions in person, at a stated reasonable time and place, or by audio link or audio visual link, at a stated reasonable time; or by providing answers to the questions by email or other electronic means at or before a stated reasonable time. Definitions of audio link and audio visual link are provided. The proposed Regulation expires on 31 December 2020.

Consistency with policy objectives of authorising law

The Regulation is consistent with the policy objectives of the authorising laws (the CER Act and the LGA). The purposes of the CER Act include protecting the health, safety and welfare of persons affected by the COVID-19 emergency and facilitating ongoing public administration disrupted by the COVID-19 emergency (refer section 2). The purpose of the LGA includes providing for a system of local government that is accountable, effective, efficient and sustainable (refer section 3(b)).

Inconsistency with policy objectives of other legislation

No inconsistencies with the policy objectives of other legislation have been identified.

Alternative ways of achieving policy objectives

Requirements for attendance at meetings with an investigator and answering questions asked by the investigator are imposed under section 150CJ of the LGA. The only way to modify these requirements other than by an Act of Parliament is to make an extraordinary regulation under section 8 of the CER Act.

Benefits and costs of implementation

By modifying the requirements for attendance at meetings with an investigator and answering questions asked by the investigator, as a temporary measure during the COVID-19 emergency, the Regulation will provide flexibility, reduce travel costs incurred by the Office of the Independent Assessor, protect the health, safety and welfare of persons affected by the COVID-19 emergency and facilitate the continuance of public administration. Additional

costs and resourcing are not anticipated, but if necessary would be met through the usual budget processes.

Consistency with fundamental legislative principles

Rights and liberties of individuals

Natural justice

The fundamental legislative principles include requiring that legislation has sufficient regard to rights and liberties of individuals (section 4(2)(a) of the *Legislative Standards Act 1992* (LSA)). Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice (section 4(3)(b) of the LSA).

The principles of natural justice are principles developed by the common law. The principles require that something should not be done to a person that will deprive the person of some right, interest, or legitimate expectation of a benefit without the person being given an adequate opportunity to present the person's case to the decision-maker. The principles also require procedural fairness, involving a flexible obligation to adopt fair procedures that are appropriate and adapted to the circumstances of the particular case.

The Regulation will impact persons required to attend a meeting with an investigator and answer questions, including councillors the subject of an investigation. Witnesses are interviewed by investigators for the purposes of gathering evidence either for a referral to the Councillor Conduct Tribunal about alleged misconduct by a councillor or potentially for the prosecution of statutory offences in the Magistrates Court.

The Regulation provides modified arrangements for providing information to be used by the Independent Assessor as part of gathering evidence. These arrangements may disproportionately impact vulnerable groups, for example where language and communication barriers are exacerbated by audio links or audio visual links or where access to the required technology is not available. This may impact a person's capacity to adequately prepare documents and provide information to support their case, therefore creating a perception that the modified procedures are not appropriate or adapted to the circumstances of a particular case.

It is considered that the potential breach of the fundamental legislative principle is justified. Safeguards include that the investigator has a discretion to choose from a number of options about the requirements for a person to answer questions and, in making a requirement, must act in accordance with the *Human Rights Act 2019*. Further, the Regulation is a temporary measure to address the COVID-19 public health emergency.

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. Privacy and confidentiality rights have generally been identified as relevant to consideration of whether legislation has sufficient regard to individuals' rights and liberties.

Some individuals may have a limited ability to maintain privacy during an interview with an investigator, for example if a person is only able to remotely respond from a non-soundproof place where others can hear them, such as a public place. The nature of audio/visual communication also increases the risk that communication may be intercepted or recorded without the consent of a person involved.

Safeguards include the investigator has a discretion as to the requirements imposed on a person required to answer questions and must act in accordance with the *Human Rights Act 2019*. Further, the Regulation is a temporary measure in response to COVID-19.

Institution of Parliament

Sections 4(5)(c) and (d) of the LSA require subordinate legislation to have sufficient regard to the institution of Parliament by containing only matters appropriate to subordinate legislation and only amending statutory instruments. The regulation modifies the LGA in breach of the fundamental legislative principles.

The Regulation is consistent with the CER Act passed by the Legislative Assembly. The explanatory notes accompanying the CER Act acknowledge that the modification framework enables various Acts to be amended by subordinate legislation should that be required and that ‘Henry VIII clauses’ to implement the modification framework represent a departure from the fundamental legislative principles. The justification for this breach, accepted by the Parliament, was that the COVID-19 emergency is an extraordinary, unprecedented situation requiring a commensurate response. Safeguards include that extraordinary regulations may only be made if the Minister is satisfied that this is necessary for a purpose of the CER Act. Further, the modification framework and the Regulation are time limited, expiring on 31 December 2020. Human rights protections are also preserved. The breach of fundamental legislative principles is therefore considered to be justified.

Consultation

The Office of the Independent Assessor, the Local Government Association of Queensland and Local Government Managers Australia Queensland were consulted and support the Regulation.

The Queensland Productivity Commission (Office of Best Practice Regulation (OBPR)) was consulted in accordance with *The Queensland Government Guide to Better Regulation*. OBPR assessed the proposal as excluded from further regulatory impact analysis, as it was unlikely to result in significant adverse impacts.