

Transport Operations (Passenger Transport) (Ticketing) and Other Legislation Amendment Regulation 2020

Human Rights Certificate

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 41 of the *Human Rights Act 2019* (HRA), I, Mark Bailey MP, Minister for Transport and Main Roads, provide this human rights certificate with respect to the *Transport Operations (Passenger Transport) (Ticketing) and Other Legislation Amendment Regulation 2020* (Amendment Regulation) to the extent that it is made under the *Transport Operations (Passenger Transport) Act 1994* (TOPTA).

In my opinion, the Amendment Regulation as tabled in the Legislative Assembly is, to the extent that it is made under TOPTA, compatible with the human rights protected by the HRA. I base my opinion on the reasons outlined in this statement.

In accordance with section 41 of the HRA, I, Yvette D'Ath MP, Attorney-General and Minister for Justice and Leader of the House, provide this human rights certificate with respect to the Amendment Regulation to the extent that it is made under the *State Penalties Enforcement Act 1999* (SPE Act).

In my opinion, the Amendment Regulation as tabled in the Legislative Assembly is, to the extent that it is made under the SPE Act, compatible with the human rights protected by the HRA. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

In June 2018, the Queensland Government announced the purchase of a new ticketing solution (Smart Ticketing) to be rolled out across Queensland. Smart Ticketing aims to make choosing public transport even easier by giving customers more options to pay for their travel. Under Smart Ticketing, customers will be able to use cash, go cards and other tokens issued by the Department of Transport and Main Roads (the Department) as well as contactless debit and credit cards, smartphones or wearable devices held by customers to pay for public transport.

The main policy objective of the Amendment Regulation is to protect fare revenue for the use or hire of public passenger vehicles. This objective supports the ongoing quality, financial sustainability and integration of public passenger transport across Queensland as customers transition to Smart Ticketing. Further detail on the Amendment Regulation is outlined in the Explanatory Notes.

Human Rights Issues

Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)

Property rights (section 24 of the HRA)

The human right under section 24(2) of the HRA is limited where a person is unlawfully or 'arbitrarily' deprived of the person's property. In the human rights context, arbitrarily is taken to mean capricious, unpredictable, unjust and unreasonable in the sense of not being proportionate to a legitimate policy objective.

Property rights may be relevant to new section 218J (Power to seize particular tickets or tokens) of the Amendment Regulation to the extent that it will allow particular tickets or tokens to be seized from individuals by specified persons.

New section 218J reduces potential fraud or misuse of tickets or tokens and, as a result, protects fare revenue by allowing drivers and authorised persons to seize particular tickets or tokens. The power applies where the driver or an authorised person suspects, on grounds that are reasonable in the circumstances, a person is using a ticket or token that is materially altered or defaced, cancelled, counterfeit, expired or is someone else's ticket or token (invalid ticket or token). The power would not permit the seizure of an electronic device used to store or display an electronic ticket or token (for example, a smartphone), a ticket or token issued by someone other than the chief executive or operator (for example, a credit card issued by a bank) or a ticket or token issued for another primary purpose (for example, a concert ticket or a driver licence). I consider that the power under new section 218J does not limit property rights under section 24 of the HRA because any deprivation of property is not arbitrary. The power to allow drivers and authorised persons to seize particular tickets or token supports the legitimate aim of protecting fare revenue by preventing fraud or continual misuse of invalid tickets or tokens. The power only applies in the limited circumstances outlined above and does not prevent a person from using public passenger transport in the future.

If there is an alternative view that the power limits the property rights, I consider that the limitation would also be reasonable and demonstrably justified using the proportionality factors under section 13 of the HRA (refer to the section on 'consideration of reasonable limitations on human rights' below).

Part 2 of the Amendment Regulation may also limit property rights to the extent that it prescribes infringement notice offences. The failure to pay an infringement notice fine may result in enforcement action taken by the registrar of the State Penalty Enforcement Registry (SPER) against the person, including among others, the seizure of the person's property and vehicle immobilisation as provided for in the SPE Act.

Privacy and reputation (section 25 of the HRA)

The human right under section 25(a) of the HRA is limited where a person's privacy, family, home or correspondence is unlawfully or arbitrarily interfered with. In the human rights context, arbitrarily is taken to mean capricious, unpredictable, unjust and unreasonable in the sense of not being proportionate to a legitimate policy objective.

The human right may be relevant to new sections 218K (Power to require evidence of concession entitlement), 218L (Power to require evidence to verify identity in particular circumstances) and 262A (Relevant entity—Act, s 148BB) of the Amendment Regulation, all of which relate to concession fares.

The purpose of concession fares is to ensure a reasonable level of mobility and access for particular classes of persons. A person's eligibility for a concession fare may change over time and will depend on the person's individual circumstances at the time the person travels.

New section 218K of the Amendment Regulation allows the driver or an authorised person to require a person travelling on a public passenger vehicle on a concession fare to produce evidence of the person's entitlement to the concession fare. A person's privacy may be interfered with if a document evidencing the person's entitlement to a concession fare includes personal information (for example, a person's name, date of birth or residential address). I consider that the power under new section 218K does not limit the right to privacy and reputation under section 25 of the HRA because any interference with the right is not arbitrary. The power to require a person travelling on a concession fare to produce evidence of the person's entitlement to the concession fare supports the legitimate aim of protecting fare revenue. The power is also consistent with the State's intention that concession fares are given to assist particular classes of persons; all other passengers should pay the full adult fare. Further, the power only requires a person travelling on a concession fare to produce evidence of the concession entitlement at the time the person is travelling and is only given to classes of persons who are responsible for verifying whether the person has paid the correct fare (that is, drivers and authorised persons).

New section 218L of the Amendment Regulation allows the driver or an authorised person to require a person to produce evidence to verify the person's identity. A person's privacy may be interfered with to the extent that evidence of identity includes personal information. I consider that the power under new section 218L does not limit the right to privacy and reputation under section 25 of the HRA because any interference with the right is not arbitrary. The power to require evidence to verify a person's identity supports the legitimate aim of protecting fare revenue consistent with the purpose of concession fares. The power only applies to a person in a limited circumstance (that is, the person is travelling on a concession fare; the person is 15 years or more; the person produces a document evidencing the person's entitlement to the concession fare; and the document does not include a photograph). Further, the power is only given to classes of persons who are responsible for verifying whether the person has paid the correct fare (that is, drivers and authorised persons).

New section 262A of the Amendment Regulation allows the chief executive to enter into an arrangement with relevant entities additional to those set out in section 148BB(3) of TOPTA, for sharing information about whether a person is entitled to a concession fare for the person's use or hire of a public passenger vehicle. A person's privacy may be interfered with to the extent that information provided to a relevant entity includes personal information. The arrangement is for the single purpose of determining whether a person is entitled to a concession fare and will only apply to a person who applies for access to a concession fare. I consider that the power under new section 262A does not limit the right to privacy and reputation under section 25 of the HRA because any interference with the right will not be arbitrary. The information-sharing arrangement supports the legitimate aim of protecting fare revenue, consistent with the purpose of concession fares. The information-sharing arrangement is for a limited purpose and limited to specific entities prescribed under legislation. In addition, the legislation prohibits the disclosure, recording and use of any information shared with a relevant entity for another purpose.

If there is an alternative view that the provisions under new sections 218K, 218L and 262A limit the right to privacy and reputation, I consider that any limitation would also be reasonable

and demonstrably justified using the proportionality factors under section 13 of the HRA (refer to the section on 'consideration of reasonable limitations on human rights' below).

Right to liberty and security of person (section 29 of the HRA)

The human right under section 29 of the HRA is limited where a person is deprived of certain protections to liberty and security or subject to arbitrary arrest or detention.

Part 2 of the Amendment Regulation may limit the right to liberty and security of person to the extent that it prescribes infringement notice offences. The failure to pay a penalty infringement fine may result in enforcement action under the SPE Act, which includes the issue of an arrest and imprisonment warrant by the registrar of SPER against a person for unpaid fines. However, the SPER Charter, provided for under section 9 of the SPE Act, preferences the use of other enforcement actions for unpaid fines over arrest and imprisonment.

Fair hearing (section 31 of the HRA) and rights in criminal proceedings (section 32 of the HRA)

The human right under section 31 of the HRA is limited where a person is deprived of 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 human right under section 32 of the HRA is limited where a person charged with a criminal offence is deprived of the right to be presumed innocent until proven guilty according to law or deprived of the right to certain minimum guarantees.

Part 2 of the Amendment Regulation may limit the right to a fair hearing and rights in criminal proceedings to the extent that it prescribes infringement notice offences. A person does not have to attend court in relation to an infringement notice offence. However, a person may elect for a matter in relation to an infringement notice offence to be heard by a court instead of paying an infringement notice fine. A person also has multiple opportunities to elect for a matter in relation to an infringement notice offence that has been referred to SPER to be heard by a court. Prescribing infringement notice offences provides several benefits to alleged offenders to the extent they accept culpability and decide not to contest the infringement notice, including they do not have to attend court, prepare their defence with or without legal representation and giving them certainty relating to their legal liability. Once a person elects for a matter in relation to an infringement notice offence to be heard by a court, the person is afforded all the rights in criminal proceedings guaranteed under the HRA. As a result, Part 2 of the Amendment Regulation arguably does not limit the human rights.

Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)

Property rights (section 24 of the HRA)

The Amendment Regulation may be relevant to the right to property by allowing particular tickets or tokens to be seized by specified persons. However, I consider that the human right is not limited because the power does not arbitrarily deprive a person of the person's property. An alternative view in relation to the human right is that a provision should be considered under section 13 of the HRA even if the provision does not deprive a person of the person's property in an arbitrary way.

The Amendment Regulation may limit the right to property to the extent that it prescribes infringement notice offences. The failure to pay an infringement notice fine may result in enforcement action relating to an unpaid fine, including among others, seizure of a person's property or vehicle immobilisation as provided for under the SPE Act.

(a) the nature of the right

Section 24 (Property rights) of the HRA protects the right of all persons to own property and provides that people have a right not be arbitrarily deprived of their property. Property includes all real and personal property interests recognised under general law and may include some statutory rights.

A ticket or token that allows a person to use or hire a public passenger vehicle is considered property for the purpose of the HRA even if it is not owned by someone else (for example, the State or an operator).

Part 2 of the Amendment Regulation omits references to the existing offences related to fare evasion in sections 143AC, 143ADA(4) and 143ADB(4) of TOPTA (existing fare evasion offences) and inserts references to the new offences in sections 218C(1), 218I(4), 218J(3), 218K(3) and 218L(3) of the *Transport Operations (Passenger Transport) Regulation 2018* (new fare evasion offences), which relate to fare evasion under Smart Ticketing. Replacing the existing infringement notice offences with the new fare evasion offences ensures the offences can continue to be enforced through the SPE Act. Enforcement action under the SPE Act in relation to an unpaid fine may include, among others, the suspension of an individual's driver licence, vehicle immobilisation or seizure and sale of property (for example, a vehicle owned by the individual).

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of new section 218J of the Amendment Regulation is to protect fare revenue for the use or hire of public passenger vehicles. Fare revenue is used to offset the direct cost to the State of providing public passenger services. This objective is consistent with a free and democratic society based on human dignity, equality and freedom.

Part 2 of the Amendment Regulation will allow the new fare evasion offences to be enforced under the SPE Act. This enforcement may limit the right to property as described above. The purpose of these amendments is to protect fare revenue for the use or hire of public passenger vehicles by ensuring that there is an effective system for issuing and enforcing fines for the new fare evasion offences. This will ensure that there continues to be a proportionate and effective enforcement response to fare evasion offences and will encourage compliance with the law. These objectives are consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

New section 218J of the Amendment Regulation will help achieve the policy objective of protecting fare revenue by allowing drivers and authorised persons to seize tokens and tickets they reasonably suspect of being invalid. Without the ability to seize an invalid ticket or token,

a person may continue to access free or discounted travel, reducing the amount of fare revenue the State or an operator receives.

Part 2 of the Amendment Regulation will protect fare revenue for the use or hire of public passenger vehicles by ensuring there is an efficient system for issuing and enforcing fines for the new fare evasion offences. This will encourage individuals to comply with the law by paying the correct fares.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

It is considered that new section 218J of the Amendment Regulation is the least restrictive reasonably available way to achieve the purpose of protecting fare revenue. The power is drafted narrowly to allow for the seizure of tokens and tickets in limited circumstances. First, the power only applies to drivers of public passenger vehicles and authorised persons, as the two classes of persons that are responsible for checking whether a person has paid the fare for the use of a public passenger vehicle. Second, the power only applies if the driver or an authorised person suspects, on grounds that are reasonable in the circumstances, that the ticket or token is invalid. Lastly, as mentioned above, the power has been drafted to protect passengers by not permitting the seizure of an electronic device used to store or display an electronic ticket or token (for example, a smartphone), a ticket or token issued by someone other than the chief executive or operator (for example, a credit card issued by a bank) or a ticket or token issued for another primary purpose (for example, a concert ticket or a driver licence).

It is considered that there is no less restrictive and reasonably available way to achieve the purpose of protecting fare revenue and ensuring there is an efficient system for issuing and enforcing fines relating to the new fare evasion offences, other than by prescribing the fare evasion offences to be infringement notice offences under the *State Penalties Enforcement Regulation 2014* (SPE Regulation). Importantly, there are several protections built into the fine enforcement system under the SPE Act which ensure seizure and sale of property or vehicle immobilisation would only occur infrequently for the new fare evasion offences. Importantly, the threshold amount which must be owed to SPER before vehicle immobilisation can occur is prescribed under the SPE Act and currently set at \$5,000. In terms of seizure and sale, SPER only undertakes this activity where it has registered an interest over the property to be seized. The SPE Act requires that the total amount owed by a debtor must be more than \$500 before SPER can register an interest over property.

Other protections include that:

- a person who considers a fine should not have been issued may elect to have the matter heard by a court instead of paying the fine;
- if a fine is not paid within the specified timeframe and the infringement notice is registered with SPER for enforcement action, the person may apply to pay their debt by instalments; and
- individuals who are experiencing hardship can apply to resolve their debt under a work and development order (which can include undertaking relevant courses, attending counselling and treatment programs or completing work with an approved hardship partner).

Authorised persons appointed to issue fines also receive significant training, in accordance with the requirements set out in chapter 11, part 2 of TOPTA, to ensure that fines are only issued in appropriate cases and circumstances.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

Fare evasion is a significant problem that is estimated to cost the State about \$25 million per year in fare revenue. The fare evasion rate is estimated to be about 6.5 per cent of all trips across the SEQ network. Fare evasion adversely impacts the State's budget, requiring increased State funding to offset any loss in fare revenue. This could result in increased fares affecting the affordability of public passenger transport for the broader community (including the most disadvantaged). Allowing an invalid ticket or token to remain in circulation adversely impacts the main objective of the Amendment Regulation, which is to protect fare revenue.

Although I am of the view that the property right under the HRA is not limited by the Amendment Regulation as the power under new section 218J does not allow for the arbitrary deprivation of property, if there were an alternative view that the right was limited then I consider any limitation to be reasonable and demonstrably justified. Importantly, the extent to which the right to property may be limited by the power is minimal as it only involves a deprivation of a suspected invalid ticket or token. To that end, I consider that the benefit of the provision in achieving the objectives protecting fare revenue outweighs any limitation on the right to property (if it was to be considered limited).

The existing fare evasion offences are already prescribed as infringement notice offences. About 17,200 infringement notice fines were issued from 1 April 2018 to 31 March 2019 for all the existing fare evasion offences. About 75 per cent of these infringement notice fines were referred to SPER. Not prescribing the new fare evasion offences as infringement notice offences is likely to reduce the threat of enforcement action against an offender due to the significant cost to the State of court proceedings relating to offences that aim to protect revenue. A decision to prosecute is made on public interest grounds (including consideration of the costs of prosecution) so it would be reasonable for some offenders to consider that the State is unlikely to issue a complaint and summons to anyone other than the most recidivist offenders thereby significantly reducing the deterrent effect of the fare evasion offences. This would directly affect the State's ability to protect fare revenue, potentially requiring increased State funding to offset any loss in fare revenue or increased fares, thereby affecting the affordability of public passenger transport for the broader community.

For the reasons outlined above, I consider the balance between the importance of protecting fare revenue and ensuring an effective enforcement system for the new fare evasion offences outweighs the potential negative impact on the right, and as a result, any limitation to be reasonable and demonstrably justified.

Privacy and reputation (section 25 of the HRA)

The Amendment Regulation may be relevant to the right to privacy by allowing the driver or an authorised person to require a person travelling on a concession fare to produce evidence of the person's entitlement to the concession fare and, in certain circumstances, produce evidence of identity. The evidence may contain personal information. The Amendment Regulation also

provides for sharing information about a person travelling on a concession fare with additional relevant entities.

I consider that the human right is not limited because the provisions are authorised by law and do not interfere with a person's privacy arbitrarily. However, an alternative view is that a provision should be considered under section 13 of the HRA even if the provision is authorised by law and does not interfere with a person's privacy in an arbitrary way.

(a) the nature of the right

Section 25 (Privacy and reputation) of the HRA protects an individual from all unlawful or arbitrary interferences and attacks upon their privacy, home, correspondence and reputation. New sections 218K (Power to require evidence of concession entitlement) and 218L (Power to require evidence to verify identity in particular circumstances) of the Amendment Regulation require a person to produce documents that may contain personal information on request of the driver or an authorised person. Section 262A (Relevant entity—Act, s 148BB) allows the chief executive to share personal information with additional relevant entities for determining whether a person is entitled to a concession fare.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of these provisions is to protect fare revenue for the use or hire of a public passenger vehicle by ensuring only a person entitled to a concession fare can receive the concession fare. The purpose of concession fares is to ensure a reasonable level of mobility and access for particular classes of persons. Requiring a person travelling on a reduced concession fare (typically a discount of between 50 to 100 per cent of the adult fare) to produce evidence of their entitlement or identity on request and providing for the sharing of information about whether a person is entitled to a concession fare with additional relevant entities, helps prevent exploitation of the concession fare system by persons who are not entitled to a concession. The objective of protecting fare revenue is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The provisions will help achieve the policy objective of protecting fare revenue for the use or hire of a public passenger vehicle by deterring persons from travelling on a reduced concession fare unless they carry evidence of their entitlement to the concession fare. The provision about sharing information with additional relevant entities will allow the Department to prevent a person from accessing a concession fare as soon as the person is no longer entitled to the concession fare.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

New section 218K of the Amendment Regulation allows the driver or an authorised person to require a person travelling on a public passenger vehicle on a concession fare to produce evidence of the person's entitlement to the concession fare. This could potentially limit a person's privacy if a document evidencing the person's entitlement to a concession fare includes personal information. However, the power to require a person to produce evidence of the

person's entitlement to the concession is limited to when the person is travelling on a concession fare. In addition, the power is only given to drivers and authorised persons who are responsible for verifying whether the person has paid the correct fare and are trained in the exercise of the existing powers in TOPTA.

New section 218L of the Amendment Regulation allows the driver or an authorised person to require a person to produce evidence to verify the person's identity. A person's privacy may be limited because a document evidencing a person's identity includes personal information. However, the power is only given to drivers and authorised persons as persons who are responsible for verifying whether the person has paid the correct fare. Further, the power can only be exercised in the following limited circumstance:

- the person is travelling on a concession fare;
- the person is 15 years or more;
- the person produces a document evidencing the person's entitlement to the concession fare (for example, the power will not apply to student wearing a school uniform); and
- the document does not include a photograph.

New section 262A of the Amendment Regulation allows the chief executive to enter into an arrangement with relevant entities, additional to those set out in section 148BB(3) of TOPTA. The arrangement is for sharing information about whether a person is entitled to a concession fare for the person's use or hire of a public passenger vehicle. A person's privacy may be interfered with to the extent that information provided to a relevant entity includes personal information. However, this information can only be shared under an arrangement for the single purpose of verifying whether a person is entitled to a concession fare. The arrangement can only be with prescribed relevant entities. Section 148C of TOPTA continues to protect the disclosure, recording and use of any information shared with relevant entities for other purposes.

It is considered that the provisions at new sections 218K, 218L and 262A of the Amendment Regulation are the least restrictive reasonably available way to achieve the purpose of protecting fare revenue.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

Misuse of the concession fare system is a significant problem for the State with about 450 penalty infringement notices being issued from 1 April 2018 to 31 March 2019 for the existing offence of failing to produce evidence of concession entitlement under section 143ADB of TOPTA. In addition, about 16,000 penalty infringement notices were issued over the same period for the main fare evasion offence under section 143AC of TOPTA (fare evasion includes the circumstance where a person travels on a concession fare without being entitled to the concession fare). About 50,000 warning notices are issued per year for fare evasion. This does not reflect the true scale of the problem because it excludes passengers who were not intercepted by authorised persons.

Allowing drivers and authorised persons to require a person travelling on a concession fare to produce evidence of the person's concession entitlement and, in a limited circumstance, identity, will help continue to deter persons from travelling on the concession fare when they are not entitled to it. The additional relevant entities prescribed for the purpose of new section

148BB (Information-sharing in relation to entitlements to concession fares) of TOPTA remain subject to the legal obligation to only use this information for the purpose for which it is shared.

The provisions will protect fare revenue, which in turn allows for the continued provision of public passenger services at a reasonable cost to the community and government, and a reasonable level of community access and mobility in support of the Government's social justice objectives consistent with the objectives of TOPTA. This supports the ability of the State to continue to provide concessions fares to relevant classes of persons who may need this support. The extent of the provisions is minimal as it only involves providing evidence of concession entitlement or identity in limited situations, can only be required by persons who are trained in the exercise of their powers and allows for the sharing of information with relevant entities that are prescribed in legislation. The powers are reasonable and necessary to allow the driver or an authorised person to fulfil their role of checking whether a person has paid the correct fare when a person uses or attempts to use a public passenger vehicle. The additional relevant entities are appropriate entities and the information will remain protected under TOPTA.

Although I am of the view that the right to property and reputation is not limited by these provisions in the Amendment Regulation as they do not allow for arbitrary interferences with the right, if there were an alternative view that the right was limited then I consider any limitation to be reasonable and demonstrably justified. Having regard to the nature and extent of the potential limitation on the right to privacy and reputation, I consider that the importance of protecting fare revenue outweighs the potential negative impact on the right.

Right to liberty and security of person (section 29 of the HRA)

The Amendment Regulation may limit the right to liberty and security of person to the extent that it prescribes infringement notice offences. The registrar of SPER may issue an arrest and imprisonment warrant to a person for failing to pay an amount stated in an enforcement order, after the person fails to pay an infringement notice fine. Importantly, however the SPER Charter, provided for under section 9 of the SPE Act, preferences the use of other enforcement actions for unpaid fines over arrest and imprisonment to reduce the use of imprisonment for fine default.

(a) the nature of the right

Section 29 (Right to liberty and security of person) of the HRA provides a person with certain protections to liberty and security, ensuring a person is not subject to arbitrary arrest or detention. Enforcement action under the SPE Act may, in rare circumstances, result in arrest and imprisonment where a person fails to pay an amount specified in an enforcement order.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Part 2 of the Amendment Regulation will allow the new fare evasion offences to be enforced under the SPE Act, which may potentially limit the right to liberty and security through arrest and imprisonment as described above. The purpose of these amendments is to protect fare revenue for the use or hire of public passenger vehicles by ensuring there is an effective system for issuing and enforcing fines to persons who commit the new fare evasion offences, which will encourage compliance with the law. Part 2 omits references to the existing fare evasion

offences and inserts references to the new fare evasion offences. Replacing the existing infringement notice offences will help maintain an effective enforcement response that is proportionate to new fare evasion offences under Smart Ticketing. These objectives are consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

Part 2 of the Amendment Regulation will protect fare revenue for the use or hire of public passenger vehicles by ensuring there is an efficient system for issuing and enforcing fines. If the new fare evasion offences were not prescribed as infringement notice offences, the threat of enforcement action against an offender would no longer be credible due to the significant cost to the State of court proceedings in relation to offences that aim to protect revenue. As previously discussed, this is likely to reduce the deterrent effect of the fare evasion offences, which would directly affect the State's ability to protect fare revenue. This could result in increased State funding to offset any loss in fare revenue or increased fares, thereby affecting the affordability of public passenger transport for the broader community.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

As discussed above, there are a number of protections built into the fine enforcement system under the SPE Act to ensure that there are supports and options available to assist persons who are experiencing hardship and unable to pay their fines. In addition, the SPE Charter ensures the powers of SPER to issue arrest and imprisonment warrants are rarely used in practice.

While there may be less restrictive options, it is considered that they would not achieve the purpose of protecting fare revenue to the same extent. For example, an option which could potentially be considered less restrictive is to prosecute these offences through a court. Under the *Penalties and Sentences Act 1992*, a court is required to take into account the financial circumstances of the offender and the nature of the burden that payment of the fine will have on the offender before imposing a fine. However, as previously discussed, the burden of prosecuting these matters in a court means that this option is not feasible and would not achieve the purpose of protecting fare revenue.

Therefore, there is no less restrictive and reasonably available way to achieve the purpose of protecting fare revenue other than through the issuing of fines for fare evasion offences.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

The existing fare evasion offences are already prescribed as infringement notice offences. About 17,200 infringement notice fines were issued from 1 April 2018 to 31 March 2019 for all the existing fare evasion offences. About 75 per cent of these infringement notice fines were referred to SPER.

As previously discussed, a person has several options in relation to an infringement notice fine. For example, the person may pay the fine in full, elect for a matter in relation to an infringement notice offence to be heard by a court or apply for approval to pay the fine by instalments. If the person does not act in relation to a fine, the registrar of SPER may take further enforcement action relating to the unpaid amount under the SPE Act. This may, as a last resort, result in the

registrar of SPER issuing an arrest and imprisonment warrant under the SPE Act. The SPER Charter makes it clear, however, that the use of other enforcement actions for unpaid fines is to be preferred over arrest and imprisonment. Other enforcement actions may include, among others, suspension of an individual's driver licence, seizure and sale of property and vehicle immobilisation.

Having regard to the nature and extent of the potential limitation on the right to liberty and security of person, I consider that the importance of meeting the purpose of protecting fare revenue for the use or hire of a public passenger vehicle by ensuring there is an efficient system for issuing and enforcing fines outweighs the potential limit on the right to liberty and security, which in practice is unlikely to ever be imposed as a result of enforcement under the SPE Act of unpaid fines for fare evasion.

Fair hearing (section 31 of the HRA) and rights in criminal proceedings (section 32 of the HRA)

The Amendment Regulation may limit the right to a fair hearing and rights in criminal proceedings to the extent that it prescribes infringement notice offences. A person does not have to attend court in relation to an infringement notice offence. However, a person may elect for a matter in relation to an infringement notice offence to be heard by a court instead of paying an infringement notice fine. If a person elects for the matter in relation to an offence to be heard by a court, the person has access to all the rights given under section 32 of the HRA so, arguably, Part 2 of the Amendment Regulation does not limit the human rights. However, it is acknowledged that there may be disincentives to persons electing to have these matters heard in court, including the time, effort and stress involved in court processes and the disincentive of the offender levy which will be imposed in any case where a court imposes a sentence, and this is in addition to any court-imposed fine. Navigating court processes can raise particular issues for vulnerable persons.

(a) the nature of the right

Section 31 (Fair hearing) of the HRA provides individuals the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. This facilitates procedural fairness and protects natural justice.

Section 32 (Rights in criminal proceedings) of the HRA provides the right to be presumed innocent until proven guilty according to law as well as rights to certain minimum guarantees, including the right of accused persons to be informed of the nature and reason for a charge and to defend themselves personally or through legal assistance.

These rights are likely to have particular significance for certain individuals. For example, individuals may have a reasonable excuse for non-compliance including because they have trouble understanding the requirements of the ticketing system or accessing it. This is particularly relevant for persons for whom English is their second language (including immigrants and tourists) or persons who suffer from disadvantage (including intellectual disabilities or mental health conditions). In addition, some persons may not have access to identity documents, including persons in crisis or suffering homelessness. These are likely matters that would be taken into account by a court before any penalty is imposed on an individual for fare evasion.

Prescribing an offence under the SPE Act enables a fine of a fixed amount to be issued to an alleged offender by an authorised officer without a charge being decided by an independent court after a fair and public hearing, and without the person having the opportunity to exercise their rights in criminal proceedings. It is possible that such a fine may be imposed where the alleged offender has a reasonable excuse for their offending behaviour or even did not commit the offence that is alleged. In addition, it is possible that the particular circumstances of the offending behaviour, or the financial circumstances of the offender, or the burden which payment of the fine would impose on the offender could mean that if the matter was heard by a court a lesser fine than the amount prescribed under the SPE Act would be imposed.

(b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Part 2 of the Amendment Regulation will enable the new fare evasion offences to be enforced under the SPE Act which includes potential limitations on rights to fair hearing and rights in criminal proceedings as described above. The purpose of these amendments is to protect fare revenue for the use or hire of public passenger vehicles by ensuring there is an effective system for issuing and enforcing fines to persons who commit the new fare evasion offences, which is likely to encourage compliance with the law. Part 2 of the Amendment Regulation omits references to the existing fare evasion offences and inserts references to the new fare evasion offences. Replacing the existing infringement notice offences will help maintain an effective enforcement response that is proportionate to fare evasion offences under Smart Ticketing. These objectives are consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

Part 2 of the Amendment Regulation will protect fare revenue for the use or hire of public passenger vehicles by ensuring there is an efficient system for issuing and enforcing fines, which encourages compliance with the law. As discussed above, if the new offences were not prescribed as infringement notice offences, the threat of enforcement action against an offender would no longer be credible due to the significant cost to the State of court proceedings and the reduced likelihood of prosecution in relation to offences that aim to protect revenue.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

As discussed above, there are various protections built into the fine enforcement system under the SPE Act, including the ability for persons to elect to have the matter heard in court at various stages of the process. In addition, the SPE enforcement system includes a number of protections to ensure that there are supports and options available to assist persons who are experiencing hardship and unable to pay their fines.

Further, authorised persons are provided with extensive training by the Department in respect of issuing fines for fare evasion offences in appropriate circumstances, including guidelines which provide information and guidance for authorised persons in respect of reasonable excuses for a person's failure to pay a fare.

There is no less restrictive and reasonably available way to protect fare revenue. The threat of enforcement action against an offender would no longer be credible if the new offences were not prescribed as infringement notice offences.

(e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

Preserving and protecting fare revenue is an important public purpose which ensures the State can provide an effective public passenger transport system. To achieve this purpose, these amendments prescribe the new fare evasion offences under the SPE Regulation which enables a set fine to be issued to an alleged offender without an independent court hearing. Although this may limit the right to fair hearing and rights in criminal proceedings, there are various protections under the SPE Act which include the option for persons to elect to have their matter heard in court at various stages of the process. In particular, section 15 of the SPE Act requires that all penalty infringement notices must indicate that the alleged offender may elect to have the matter of the offence decided by a court, which promotes awareness that persons may elect for the matter of the offence to be heard by a court at the time the person is issued with an infringement notice fine. In addition, there are various protections to assist persons who are unable to pay their fines.

Having regard to the nature and extent of the potential limitation on the right to fair hearing and rights in criminal proceedings, I consider that the importance of meeting the purposes of protecting fare revenue for the use or hire of a public passenger vehicle by ensuring there is an efficient system for imposing and enforcing fines, outweighs the potential impact on these rights.

Conclusion

I consider that the Amendment Regulation, to the extent it is made under TOPTA, is compatible with the HRA because it does not limit human rights. Alternatively, if there is another view that the Amendment Regulation does limit human rights, I consider the limitations to be reasonable and demonstrably justifiable in a free and democratic society based on human dignity, equality and freedom.

Honourable Mark Bailey MP
Minister for Transport and Main Roads

I consider that the Amendment Regulation, to the extent it is made under the SPE Act, is compatible with the HRA because it does limit, restrict or interfere with a human right, but that limitation is reasonable and demonstrably justified in in a free and democratic society based on human dignity, equality and freedom.

Honourable Yvette D'Ath MP
Attorney-General and Minister for Justice and Leader of the House

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