

Justice Legislation (COVID-19 Emergency Response – Proceedings and Other Matters) 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*, I, Yvette D’Ath, Attorney-General and Minister for Justice and Leader of the House provide this human rights certificate with respect to the *Justice Legislation (COVID-19 Emergency Response – Proceedings and Other Matters) Regulation 2020* (the Regulation) made under the *Coroners Act 2003*, *Crime and Corruption Act 2001*, *Criminal Code Act 1899*, *Evidence Act 1977*, *Justices Act 1886* and *Property Law Act 1974* pursuant to the *COVID-19 Emergency Response Act 2020*.

In my opinion, the Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

Overview of the Subordinate Legislation

COVID-19 Emergency Response Act 2020

On 22 April 2020, the Legislative Assembly passed the *COVID-19 Emergency Response Act 2020* (COVID-19 Response Act). The COVID-19 Response Act received assent and commenced on 23 April 2020. Under section 2 of the COVID-19 Response Act, the main purposes of the Act include protecting the health, safety and welfare of persons affected by the COVID-19 emergency as well as facilitating the continuance of public administration and judicial process.

The COVID-19 Response Act established a legislative modification framework across the statute book to ensure there is clear legal authority to make the interventions necessary to protect the health, safety and welfare of Queenslanders; mitigate the spread of COVID-19 in the community; facilitate continued functioning of Queensland institutions and economy to the extent possible in the circumstances of the pandemic; and to allow for timely and flexible responses in managing disruptions caused by COVID-19 and social distancing measures.

The COVID-19 Response Act includes additional regulation-making provisions to make extraordinary regulations. Under section 5, a Minister may recommend to the Governor in Council the making of an extraordinary regulation if satisfied it is necessary for a purpose of the COVID-19 Response Act. The COVID-19 Response Act provides for regulations to be made under Part 3 relating to attendance at places or meetings and for particular matters relating to documents, Part 4 to modify statutory time limits and Part 5 for matters relating to proceedings.

Modifying Statutory Time Limits

Part 4 of the COVID-19 Response Act relates to modifying statutory time limits. Section 13 provides an additional regulation-making power where an Act provides for a period within which an entity is authorised to do a thing or a period at the end of which a thing expires, but the Act does not already expressly authorise an entity to modify the period.

The *Coroners Act 2003* (Coroners Act) provides the Domestic and Family Violence Death Review and Advisory Board (the DFV Board) must, within three months after the end of each financial year, give the Minister an annual report in relation to the performance of the Board's functions during the financial year. The Board is due to deliver its next annual report by 30 September 2020. The Regulation provides an extension of three months for the provision of this annual report.

Modifying proceedings

Part 5 of the COVID-19 Response Act relates to modifications to proceedings. The impacts of the COVID-19 emergency in respect of social distancing and quarantine requirements mean that proceedings and procedures of courts, tribunals and other entities that have judicial or quasi-judicial functions need to be altered to facilitate alternative arrangements that minimise personal appearance or the physical presence of persons. It is therefore necessary to provide for the continued functioning of courts, tribunals and other entities during the COVID-19 emergency while also ensuring consistency and compliance with health advice.

The Regulation contains modifications to the method of presentation of indictments (document setting out the charge or charges) and nolle prosequis (document stating the Crown will not proceed on an indictment or charge), modifications enabling the court to order prerecording of evidence and modifications to arrangements for the conduct of Crime and Corruption Commission (CCC) hearings to enable the use of audio visual links or audio links. The Regulation also contains modifications to proceedings in Magistrates Courts to allow the court to conduct a hearing by audio visual link or audio link where a person is required to appear in response to a Notice to Appear issued by a police officer under the *Police Powers and Responsibilities Act 2000* and related processes where the hearing is adjourned.

Reducing physical contact between persons

Part 3 of the COVID-19 Response Act relates to reducing physical contact between persons. The Regulation modifies the operation of section 61 of the *Property Law Act 1974* (Property Law Act) so that with respect to contracts for the sale of land, if the parties do not otherwise agree, the place of settlement is the office of the land registry at which the document relating to the conveyance may be lodged; or, if the land registry is closed, the registry of the Magistrates Court nearest to the land.

The Regulation also ensures that the CCC may issue and sign notices electronically.

Regulation expiry

The Regulation will expire on 31 December 2020.

Human Rights Issues

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

The right to life in section 16 of the *Human Rights Act 2019* (HR Act) protects the lives of all persons and includes the right not to be arbitrarily deprived of life. All the provisions of the Regulation promote this right by modifying usual processes to ensure health requirements associated with the COVID-19 emergency are met, including by avoiding the need to attend places in person.

Modification of the Coroners Act relating to extension of time for provision of the DFV Board’s annual report

The human right relevant to this provision is the right to take part in public life. A discussion of the limitation on this right is set out below.

Modification of the of methods or processes for giving and signing relevant notices under chapter 3, part 1 of the *Crime and Corruption Act 2001* (CC Act)

The human right relevant to this provision is the right to liberty and security. A discussion of the limitation on these rights is set out below.

The provision allowing the Chairperson to give a notice that is electronically signed under chapter 3, part 1 of the CC Act is not considered to engage any human rights.

Modification to enable use of audio visual links or audio links for conduct of particular proceedings under chapter 4, part 1 of the CC Act

The human rights relevant to this provision are the right to recognition and equality before the law and privacy and reputation.

A discussion of the limitation on these rights is set out below.

Modification to allow remote presentation of indictments and nolle prosequis

The human rights relevant to these provisions are the:

- right to recognition and equality before the law
- cultural rights
- fair hearing
- rights in criminal proceedings
- rights not to be subject to retrospective criminal laws

A discussion of the limitation on these rights is set out below.

Modification to expand prerecording of evidence

The human rights relevant to this provision are the:

- right to a fair hearing
- rights in criminal proceedings

A discussion of the limitation on these rights is set out below.

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

The human rights relevant to this provision are the:

- right to recognition and equality before the law
- rights in criminal proceedings
- privacy and reputation
- right to liberty and security

A discussion of the limitation on these rights is set out below.

Modification to allow an alternative place of settlement of a contract for the sale of registered land under the Property Law Act

The human right relevant to this provision is property rights.

The regulation promotes property rights by ensuring that if the land registry is closed, the risk of delay and associated costs to the parties in agreeing an alternative place of settlement, including the risk of settlement not proceeding, is avoided by providing that the place of settlement is the registry of the Magistrates Court nearest to the land. The modified arrangements which change the usual default place to settle ensures certainty for people in their dealing with property.

If human rights are limited – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Modification of the Coroners Act relating to provision of the DFV Board’s annual report

(a) the nature of the right

The right to take part in public life (section 23 of the HR Act) affirms the right of all persons to contribute to and exercise their voice in relation to the public life of the State. It ensures that all persons have the opportunity to contribute to the political process and public governance.

The provision of the DFV Board annual report provides transparency regarding the performance of the Board’s functions.

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

The purpose of the limitation is consistent with a free and democratic society as it promotes public confidence by permitting an extended timeframe to meet this requirement and ensuring that an annual report of the necessary standard is prepared and made publicly available as soon as possible.

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

The three-month extension to the timeframe for the provision of annual report will enable the DFV Board to meet its statutory obligations.

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

There are no less restrictive and reasonably available means to ensure the annual report is submitted to the required standard. The regulation provides a one-off extension and will expire on 31 December 2020.

(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

On balance, the importance of extending the statutory timeframe to allow a high-quality annual report to be produced by the DFV Board outweighs the limit on the right to take part in public life.

Modification of methods or processes for giving and signing relevant notices under chapter 3, part 1 of the CC Act

(a) the nature of the right

Right to liberty and security

Section 29 of the HR Act protects an individual's right to liberty and security of person, including protection from arbitrary arrest or detention, and that where liberty is deprived it is in accordance with procedures established under law. This right is limited by the modification that the requirement to give a notice is satisfied if the Chairperson of the CCC sends the notice by email. The right is limited as the consequence of a person not receiving the notice, or misunderstanding the notice, due to it not being personally served (as is the CCC's practice) could be their arrest if they fail to appear at a hearing in response to a notice to attend a commission hearing. The CC Act provides that a warrant may be obtained for the arrest of the person in these circumstances.

(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 the limitation is to protect the health, safety and welfare of persons affected by the COVID-19 emergency by avoiding the contact required for personal service, and as such 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 purpose of limiting the rights to liberty and security in issuing notices electronically rather than giving the notice personally is directly related to the purpose for doing so which is to avoid person to person contact and protect public health. The limitation fits the purpose of the modification to the usual process.

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

No alternative methods can be identified to achieving this same purpose. The limitation is also strictly time limited and will expire on 31 December 2020 and provides safeguards to ensure receipt of the notice by the person to whom it is addressed or by their lawyer. The Chairperson may give a notice in this way only if satisfied that it is appropriate to give the notice electronically to protect the health, safety and welfare of persons affected by the COVID-19 emergency or to facilitate the continuance of the public administration of the commission in circumstances where the commission's public administration or other activities are disrupted by the COVID-19 emergency. Further, the Chairperson must be satisfied that either the person gave the CCC the person's email address or the email address of a lawyer representing the person for the purpose of receiving a notice under the provision or a lawyer representing the person gave the CCC the lawyer's email address for the purpose of receiving a notice under the provision.

(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 importance of preserving life and health by issuing notices by email instead of risking personal contact and the handling of hard copy documents is greater than preserving the right to liberty and security. This balancing exercise takes into account that strong safeguards significantly ameliorate the extent of the limitation as they make it much less likely that anyone will not receive the notice or receive the notice and fail to understand its purpose and be subject to adverse consequences (for example, arrest for failure to attend a hearing in response to an attendance notice).

(f) any other relevant factors

Not applicable.

Modification to enable use of audio visual links or audio links for conduct of particular proceedings under chapter 4, part 1 of the CC Act

(a) the nature of the right

Right to recognition and equality before the law

This right includes recognition as a person, the right to enjoy the person's human rights, equal protection before the law, and equal protection from discrimination. The right to recognition as a person before the law refers to the right to universal recognition of legal personality of the human being. This right to equality reflects the universal principle of human rights: that every person holds the same human rights by virtue of being human and not because of some particular characteristic or membership of a particular social group.

The power to replace personal attendance with appearance by audio visual or audio link in CCC hearings limits this right, as it may have a disproportionate impact on disadvantaged members of the community, for example people with disabilities or elderly people whose ability to understand and engage in the proceedings may be adversely impacted by the use of audio visual or audio systems. This modification will also limit rights to equality if an interpreter is required, if communication difficulties are exacerbated by the audio visual or audio method of conducting the hearing.

Right to privacy

Section of the 25 HR Act provides that a person has the right not to have the person's privacy, family home or correspondence unlawfully or arbitrarily interfered with and not to have the person's reputation unlawfully attacked.

The modified arrangements under the Regulation may, in some cases, make it more difficult to maintain the privacy of persons involved in hearings before the CCC (for example, if a person is only able to link into the hearing from a non-soundproof place). The nature of this remote communication increases the risk that the communication may be intercepted or recorded without the consent of a person involved.

(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 the limitation is to protect the health, safety and welfare of persons affected by the COVID-19 emergency by ensuring social distancing measures are complied with, and as such 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 ability for the CCC to conduct hearings by audio visual or audio link limits the rights set out above and also directly achieves the purpose of the limitation, being to protect and promote the health of the public. The CCC may conduct all or part of a proceeding by the use of audio visual or audio links provided that the commission considers it is appropriate to do so, having

regard to whether it is practical for such facilities to be used for the proceeding, and that proceeding in this way is appropriate in order to protect the health, safety and welfare of persons affected by the COVID-19 emergency; or to facilitate the continuance of the public administration of the CCC in circumstances where its public administration or other activities are disrupted by the COVID-19 emergency.

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

No other ways can be identified to conduct hearings and also achieve this purpose. The Regulation includes the safeguard that the CCC may only conduct a proceeding in this way if the presiding officer considers it is appropriate having regard to whether it is practical for audio visual or audio links to be used in the proceeding. In addition, existing provisions of the CC Act applying to a hearing apply with necessary changes in relation to a proceeding conducted under this section. For example, section 180 of the CC Act will continue to require that the presiding officer for the hearing acts in such a way as to ensure a fair and proper consideration of the issues. Section 181 of the CC Act, which provides that a witness at a commission hearing may be legally represented, and section 182 of the CC Act, which requires the presiding officer at a hearing to arrange for an interpreter if necessary, will also continue to apply. The combined operation of the safeguards included in the regulation and those that already exist under the CC Act will ensure that persons who may be disadvantaged in some way by audio visual or audio attendance are protected.

The Regulation is strictly time-limited and will expire on 31 December 2020.

(a) 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

On balance, the importance of preserving life and health by modifying the conduct of hearings before the CCC is greater than preserving the rights above, taking into account the significant safeguards that apply and that the limitation is strictly time limited.

(b) any other relevant factors

Not applicable.

Modification to allow remote presentation of indictments and nolle prosequis

(a) the nature of the right

Right to recognition and equality before the law

Section 15 of the HR Act provides the individual with recognition and equality before the law. This includes recognition as a person, the right to enjoy the person's human rights, equal protection before the law, and equal protection from discrimination. The right to recognition as a person before the law refers to the right to universal recognition of legal personality of the human being. This right to equality reflects the universal principle of human rights: that every person holds the same human rights by virtue of being human and not because of some particular characteristic or membership of a particular social group.

The modification to provide for presentation of indictments and entering nolle prosequis by audio visual link or audio link limits the right to recognition and equality before the law as the modified arrangements may disproportionately impact vulnerable groups, for example where language and communication barriers are exacerbated by a process occurring electronically instead of in person in front of the defendant in a courtroom. If the defendant is also appearing by audio visual link this may also compound difficulties in understanding.

Queensland Courts have issued a number of guidelines and practice directions to facilitate the ordering of an interpreter for a proceeding in court. The guidelines and practice directions ensure persons are supported to participate in appearances through the use of a qualified interpreter. This includes all defendants appearing in court, whether in person, by audio or audio-visual link as well as witnesses who are required to give evidence in court, whether that be in person, by audio or visual links or whether their evidence is pre-recorded. However, even with an interpreter, electronic processes may disproportionately affect those who are not proficient in English, including Auslan speakers.

Cultural rights

All people with particular cultural, religion, racial and linguistic backgrounds have a right to enjoy their culture, declare and practice their religion, and use their language in community with other people of that background. Section 27 of the HR Act promotes the right to practise and maintain shared traditions and activities. It is also aimed at the survival and continued development of cultural heritage. It allows for people of particular backgrounds, among other rights, to use their own language (in private and in public). The cultural rights of all people with a particular cultural, religious, racial or linguistic background are protected. Remote presentation by electronic means or telephone limits the cultural rights of a person to use their own language, as interpretation of an electronic presentation may be more difficult than a presentation done by a prosecutor present in court.

Right to a fair hearing

The modifications to in person presentation of indictments and entering nolle prosequis have the potential to engage the right to a fair hearing by diminishing the openness and transparency of the court process given that using an audio visual link or audio link may impair the public's ability to see this aspect of a proceeding.

Right to protection against retrospective criminal laws

Section 35(1) of the HR Act states that a person must not be found guilty of an offence for conduct that was not an offence at the time it was engaged in. This prohibits retrospective criminal laws and reflects the duty of states to ensure all criminal offences are defined precisely by law. Under the International Covenant on Civil and Political Rights, the right to protection against retrospective criminal laws does not prohibit retrospective changes to criminal procedures which do not form part of the penalty for an offender, such as changes in the law of evidence.

This right is relevant to provisions that amend criminal law procedure that applies to trials for acts done before the legislation commences, which is the case with provisions modifying the

method of presenting an indictment. This amendment has retrospective application to 19 March 2020 to validate the practice in some courts in the context of COVID-19. The retrospective effect of the amendment is restricted to the discrete emergency period and validates necessary procedures in the context of protecting public health.

Rights in criminal proceedings

In section 32, the HR Act protects the right to certain minimum procedural guarantees in criminal trials. A person who is charged with an offence has a right to minimum guarantees about how they will be treated and how the criminal proceedings will be conducted. These rights are available without discrimination. Like all rights in the HR Act, rights in criminal proceedings can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom. By broadening the method by which these indictments can be presented it is possible that the Regulation could have consequences which could limit human rights, such as a defendant not understanding the nature of the charge or charges against them.

(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

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

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

The purpose of the limitation in the Regulation is to protect the health, safety and welfare of persons affected by the COVID-19 emergency. It promotes the right to life and 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

Changing the way of presenting indictments and entering nolle prosequis limits rights, but this modification that achieves the purpose of ensuring safety and preventing the spread of COVID-19 by ensuring social distancing.

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

No other ways can be identified to achieve the purpose. The Regulation is also time limited and will expire on 31 December 2020.

(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

On balance, the importance of stopping the spread of COVID-19 is greater than preserving the rights set out above. The extent of the limitation is not great because the only modification is that the process of presentation or entering a nolle prosequis is undertaken by electronic means.

(f) any other relevant factors

Not applicable.

Modification to expand prerecording of evidence

(a) the nature of the right

Right to a fair hearing

The right to a fair hearing under section 31 of the HR Act involves a person charged with a criminal offence or a party to a civil proceeding having 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 amendments expanding the circumstances in which pre-recorded evidence may be given limits the right to a fair hearing as the witness is not providing their evidence in open court.

Rights in criminal proceedings

In section 32, the HR Act protects the right to certain minimum procedural guarantees in criminal trials. A person who is charged with an offence has a right to minimum guarantees about how they will be treated and how the criminal proceedings will be conducted. These rights are available without discrimination. Like all rights in the HR Act, rights in criminal proceedings can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The expansion of prerecording of evidence limits rights in some criminal hearings where, but for the modification, the witness would be giving direct oral testimony in open court. Importantly, pre-recording is already available for the court under provisions in the Evidence Act in relation to special witnesses and affected child witnesses.

(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

To facilitate transition to the resumption of trials and provide more flexible means for the giving of evidence to reduce the persons in attendance at court, for example by the elderly and persons vulnerable to COVID-19, the Regulation allows the court to order that a person's evidence be pre-recorded where certain conditions are met. This 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 limitation on rights by providing for expanded prerecording of evidence helps achieve the purpose of social distancing as this can be easily achieved when prerecording evidence. It will

also help avoid delays in a proceeding should a witness not be able to attend court because of COVID-19.

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

No other ways can be identified to achieve the purpose. The Regulation provides flexibility for the giving of evidence to reduce the number of persons in attendance at court for trials, for example by an elderly witness who may not fall within the definition of ‘special witness’ but who may be particularly vulnerable to COVID-19. The pre-recording evidence will facilitate the continuance of the judicial process and help to avoid delay, which has benefits for defendants in particular those on remand awaiting trial. Importantly, the taking of pre-recorded evidence does not prevent the opportunity of the accused to challenge of that evidence.

Further, if evidence is given or presented, or to be given or presented, in a proceeding on indictment before a jury, the Court must instruct the jury that: they should not draw any inference as to the defendant’s guilt from the order or direction; and the probative value of the evidence is not increased or decreased because of the order or direction; and the evidence is not to be given any greater or lesser weight because of the order or direction.

The Regulation is also time-limited and will expire on 31 December 2020.

(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 benefits gained by fulfilling the purpose of the limitation outweigh the harm caused to the human rights. The limit on rights to a fair hearing and rights in criminal proceedings is not extensive and is time limited. The importance of limiting these rights in order to protect people’s health from COVID-19 outweighs the incursion on the rights.

(f) any other relevant factors

Not applicable.

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

(a) the nature of the right

Right to recognition and equality before the law

This right includes recognition as a person, the right to enjoy the person’s human rights, equal protection before the law, and equal protection from discrimination. The right to recognition as a person before the law refers to the right to universal recognition of legal personality of the human being. This right to equality reflects the universal principle of human rights: that every person holds the same human rights by virtue of being human and not because of some particular characteristic or membership of a particular social group.

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

modification also limits rights to equality if an interpreter is required and if communication via the interpreter is made difficult by the audio visual or audio method of conducting the hearing.

Right to privacy

Section 25 of the HR Act provides that a person has the right not to have the person's privacy, family home or correspondence unlawfully or arbitrarily interfered with and not to have the person's reputation unlawfully attacked.

The modified arrangements under the Regulation may, in some cases, make it more difficult to maintain the privacy of persons appearing (for example, if a person is only able to link into the hearing from a non-soundproof place where others can hear them, such as a share house, boarding house or other public place). The nature of this remote communication increases the risk that the communication may be intercepted or recorded without the consent of a person involved.

Right to liberty and security

Section 29 of the HR Act protects an individual's right to liberty and security of person, including protection from arbitrary arrest or detention, and that where a person is deprived of liberty it is in accordance with procedures established under law. This right is limited by the modification that where a proceeding has been conducted by audio visual link or audio link the clerk of the court may give the person, or a lawyer representing the person, a notice of adjournment electronically.

The consequences of a person not receiving, or misunderstanding, the notice of adjournment may be that the court proceeds to deal with the matter in their absence. There is a risk that the person may not receive or see the electronic notice of adjournment for a variety of reasons including error in the provision or spelling of the electronic address. The usual process for an unrepresented person who is given a Notice to Appear is that they appear in person in court. If the person is legally represented, appearing by audio visual link is possible. If the matter is adjourned the person is given a further court date at that time and could be placed on bail.

Rights in criminal proceedings

In section 32, the HR Act protects the right of a person charged with an offence to certain minimum guarantees about how they will be treated and how the criminal proceedings will be conducted. These guarantees are available without discrimination. One of the minimum guarantees is to be tried in person (section 32 (2)(d)). The modification to allow the court to use audio visual or audio links for an appearance on a notice to appear limits this guarantee, although it should be noted that the hearing may well be adjourned to a later date, when the appearance will be in person. Like all rights in the HR Act, rights in criminal proceedings can be limited where it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

(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 the limitation to these rights is to protect the health, safety and welfare of persons affected by the COVID-19 emergency by ensuring social distancing measures are complied with, and as such 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 ability for the court to conduct proceedings by audio visual or audio link limits the rights set out above and also directly achieves the purpose of the limitation, being to protect and promote the health of the public as well as facilitating the continuance of the public administration of the court. The modification specifies that the court may conduct the proceeding by the use of audio visual links or audio links if the court considers it is appropriate having regard to whether it is practical and the interests of justice for audio visual links or audio links to be used in the proceeding; and is satisfied it is appropriate to protect the health, safety and welfare of persons affected by the COVID-19 emergency; or to facilitate the continuance of the public administration of the court in circumstances where its public administration or other activities are disrupted by the COVID-19 emergency.

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

No other ways can be identified to achieve the purpose. The Regulation is strictly time limited, expiring on 31 December 2020. The modification only applies to adults. The Regulation includes a safeguard as the court may only conduct the proceeding in the modified way if appropriate having regard to both practical matters and the interests of justice for audio visual or audio links to be used in the proceeding. This will ensure that the court considers the defendant's capacity to comprehend the proceedings or communicate with their legal representative or interpreter where relevant as well as the suitability of the audio visual or audio facilities available and so will serve to protect those defendants who may be disadvantaged in some way by audio visual or audio attendance.

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

Also, the Regulation provides that the modification is in addition to and does not limit other provisions of the Justices Act.

(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

On balance, the importance of preserving life and health as well as facilitating the continuance of the public administration of the courts by modifying the conduct of proceedings in Magistrates Courts in this way is greater than preserving the rights above, taking into account the significant safeguards that apply and that the limitation is strictly time limited.

(f) any other relevant factors

Not applicable.

Conclusion

I consider that the Justice Legislation (COVID-19 Emergency Response – Proceedings and Other Matters) Regulation 2020 is compatible with the *Human Rights Act 2019* because it does not limit, restrict or interfere with human rights, but that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

YVETTE D'ATH
ATTORNEY-GENERAL
MINISTER FOR JUSTICE AND LEADER OF THE HOUSE

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