

Domestic and Family Violence Protection (COVID-19 Emergency Response) 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, Dianne Farmer, Minister for Child Safety, Youth and Women and Minister for the Prevention of Domestic and Family Violence provide this human rights certificate with respect to the *Domestic and Family Violence Protection (COVID-19 Emergency Response) Regulation 2020* (the Regulation), an extraordinary regulation made under the *Domestic and Family Violence Protection Act 2012* and *Magistrates Courts Act 1921* in reliance on sections 9 and 17 of 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

On 29 January 2020, under the *Public Health Act 2005*, the then Minister for Health and Minister for Ambulance Services made an order 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.

The Queensland Chief Health Officer's *Movement and Gathering Direction (No. 2)*, effective from 3 July 2020, provides that a person who is leaving their principal place of residence must practise physical distancing while outside their principal place of residence, to the extent reasonably practicable.

On 23 April 2020, the *COVID-19 Emergency Response Act 2020* (the COVID-19 Act) commenced. The COVID-19 Act provides for the modification of current legislation through secondary instruments for necessary responses to the COVID-19 emergency.

An extraordinary regulation may only be made under the COVID-19 Act when it is necessary to achieve a purpose of that Act. Purposes include to protect the health, safety and welfare of persons affected by the COVID-19 emergency; and to facilitate the continuance of public administration and judicial process disrupted by the COVID-19 emergency.

In line with purposes of the COVID-19 Act, the objective of the Regulation is to prescribe modified arrangements for procedures under the *Domestic and Family Violence Protection Act 2012* (the DFVPA) and the *Domestic and Family Violence Protection Rules 2014* (the DFVP Rules) to facilitate the safe continuance of court proceedings and the ongoing protection of

people who fear or experience domestic violence during the COVID-19 emergency.

Modified arrangements for domestic and family violence court proceedings

The delivery of court services and domestic and family violence Magistrates Court proceedings have been complicated by the impact of COVID-19 and social distancing, self-quarantine and self-isolation requirements under the Queensland Chief Health Officer's public health directions.

It has also become difficult for private applicants to meet existing requirements regarding statutory declarations, as social distancing requirements have impacted on the availability of witnesses. For example, the temporary closure of the Justices of the Peace (JPs) in the Community Program impacted access to JPs, although some community signing sites are now reopening following COVID safe requirements.

To respond to these impacts and support social distancing requirements, the Regulation prescribes modified arrangements to:

- allow proceedings under the DFVPA to be conducted by audio visual link or audio link;
- allow private applications for domestic violence orders (DVOs) and variations to DVOs to be verified by an applicant informing a magistrate that the application is true and correct, as an alternative to verifying by statutory declaration; and
- allow private applications for DVOs and variations to DVOs to be filed electronically.

Prescribing modified arrangements for procedures under the DFVPA and DFVP Rules that usually require physical contact between persons will mean that domestic and family violence proceedings can continue during the COVID-19 emergency, while also enabling compliance with social distancing requirements.

The modified arrangements apply retrospectively from 19 March 2020. This retrospectivity clarifies the lawfulness of COVID-19 measures that were put in place by the Magistrates Court of Queensland for domestic and family violence proceedings prior to the Regulation commencing.

No change to existing processes

Importantly, the Regulation provides alternatives to existing processes for the duration of the COVID-19 emergency, but does not invalidate or permanently amend existing processes.

Regulation expiry

The Regulation will apply for a strictly time-limited period, expiring on 31 December 2020. This is consistent with the expiry of the COVID-19 Act.

Human Rights Issues

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

In my opinion, the human rights under the *Human Rights Act 2019* that are relevant to the

Regulation are:

- Recognition and equality before the law (section 15 of the *Human Rights Act 2019*)
- Right to life (section 16 of the *Human Rights Act 2019*)
- Freedom of expression (section 21 of the *Human Rights Act 2019*)
- Privacy and reputation (section 25 of the *Human Rights Act 2019*)
- Protection of families and children (section 26 of the *Human Rights Act 2019*)
- Right to liberty and security of person (section 29 of the *Human Rights Act 2019*)
- Right to a fair hearing (section 31 of the *Human Rights Act 2019*)

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

Modified arrangements for domestic and family violence court proceedings

(a) the nature of the right

Recognition and equality before the law (*Human Rights Act 2019*, section 15): this right is a stand-alone right that also permeates all human rights. It encompasses both the right to recognition as a person before the law and the right to enjoy human rights without discrimination.

Discrimination under the *Human Rights Act 2019* includes direct and indirect discrimination as defined in the *Anti-Discrimination Act 1991* (ADA) (for example, on the basis of age, impairment, political belief or activity, race, religious belief or religious activity, sex and sexuality). However, discrimination under the *Human Rights Act 2019* is not limited to that covered by the ADA and may also include other grounds of discrimination such as language, property, nationality, citizenship, colour, ethnicity, residence, physical features, employment status and others.

The right to equality before the law may be limited by enabling electronic filing and the use of audio visual link or audio link for proceedings under the DFVPA. Although the Regulation is not intended to remove the current options for physical filing and appearances, there is the potential that electronic options may become the only option if the COVID-19 emergency impacts on the ability of courts to remain open. This situation would disproportionately impact on the rights of vulnerable individuals who may not have access to technology that is appropriate, reliable, or able to be accessed privately. Further, culturally and linguistically diverse communities and people with disability may be disproportionately impacted if assistance that would usually otherwise be available for individuals to understand and engage in court proceedings becomes less available or accessible during the COVID-19 emergency.

Freedom of expression (*Human Rights Act 2019*, section 21): this right protects the right of all persons to hold an opinion without interference, and the right of all persons to seek, receive and impart information and ideas (including verbal and non-verbal communication). The United Nations Human Rights Committee (UNHRC) has stated that the freedom of expression embraces a positive right of access to information held by government and public bodies.¹

¹ United Nations Human Rights Committee, *General Comment No. 34*

Enabling proceedings to be conducted by the use of audio visual link or audio link under the Regulation may limit this right if services that would usually be available to assist individuals to understand and engage in court proceedings become less readily available or accessible. The use of audio visual link or audio link may also present communication or transmission issues that may impact on the quality or quantity of information received by parties.

Privacy and reputation (*Human Rights Act 2019*, section 25): the right to privacy protects the individual from all interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The scope of the right to privacy is very broad, but at its most basic it is concerned with notions of personal autonomy and dignity.

Enabling proceedings via audio visual link or audio link may limit a person's right to privacy where a party is not able to participate in a way that ensures their privacy. For example, a person appearing via audio visual link or audio link may be required to give evidence from a non-soundproof place where others can hear them, such as a boarding house or other public place. The nature of audio/visual communication also increases the risk that proceedings may be intercepted or recorded without the consent of the parties.

The right to privacy may also be limited by allowing for electronic filing, depending on how electronically-filed information is stored and shared. However, noting that police officers are already able to file electronically, existing court procedures for information privacy should be sufficient.

Right to a fair hearing (*Human Rights Act 2019*, section 31): the right to a fair hearing affirms the right of all individuals to procedural fairness when coming before a court or tribunal. It applies to both criminal and civil proceedings and guarantees that such matters must be heard and decided by a competent, impartial and independent court or tribunal.

The right is concerned with the procedural fairness of a decision. What fairness requires will depend on all the circumstances of the case. Broadly, it ensures a party has a reasonable opportunity to present their case in conditions that do not place them at a substantial disadvantage compared to other parties, and also embraces principles of unimpeded access to courts, a reasonably expeditious hearing, rights to legal advice and representation, and the privilege against self-incrimination.

Enabling proceedings to be conducted by the use of audio visual link or audio link may limit this right by altering the nature of court proceedings at short notice; limiting 'physical' access to courts and potentially placing respondents at a disadvantage due to the limitations of technology, particularly if services that would usually be available to assist individuals to understand and engage in court proceedings become less readily available or accessible.

The Regulation also protects the right to a fair hearing by enabling timely court processes to continue and enabling respondents to participate in proceedings and be heard.

(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 Regulation is to ensure that proceedings under the DFVPA to protect people who fear or experience domestic violence can continue during the COVID-19 emergency, while also supporting social distancing requirements and protecting individual safety.

The purpose of the Regulation, as the purpose for any limitation on human rights, is considered to be consistent with a free and democratic society based on human dignity, equality and freedom. The continuation of proceedings under the DFVPA during the COVID-19 emergency is considered vital to ensure that people who fear or experience domestic violence can continue to seek protection through the making of a domestic violence order (DVO). Protecting the health and safety of those involved in DFV proceedings is also a key consideration.

Although the Regulation limits some human rights, the purpose of the Regulation also involves the protection and promotion of a number of other human rights, including:

- **Right to life** (*Human Rights Act 2019*, section 16):
The Regulation promotes the right to life by ensuring that domestic violence proceedings can continue to enable protections to be put in place for aggrieved persons and other named persons. The Regulation also promotes this right by supporting social distancing and reducing the risk of individuals contracting COVID-19.
- **Protection of families and children** (*Human Rights Act 2019*, section 26):
The Regulation promotes the protection of children and families by facilitating the safe continuance of court procedures to protect people, including children, who fear or experience domestic violence during the COVID-19 emergency. Proceedings enable protections to be put in place for aggrieved and other named persons, including children and other family members;
- **Right to liberty and security of person** (*Human Rights Act 2019*, section 29):
The Regulation protects the security of persons by ensuring that civil domestic and family violence proceedings can continue during the COVID-19 emergency to protect the personal safety of aggrieved and other named persons. The Regulation also protects persons witnessing documents and working in courts from the risk of infection.

Based on the above rationale, it is considered that any limitations have a proper purpose under section 13(2)(b) of the *Human Rights Act 2019*.

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

It is considered that there is a direct and rational relationship between the limitations on rights arising from the modified arrangements under the Regulation and the identified purpose of those arrangements. Current procedural requirements under the DFVPA and DFVP Rules that require a level of person-to-person contact are not consistent with social distancing requirements and may place individuals at risk of contracting COVID-19.

The modified arrangements will support social distancing requirements whilst enabling administrative and judicial proceedings under the DFVPA and DFVP Rules to continue. They will also ensure continued access to justice for both the aggrieved and respondent parties, and that protections for people who fear or experience domestic violence continue to be available through civil domestic violence proceedings.

The modified arrangements contain an express nexus to the COVID-19 emergency, and help to achieve one or more of the purposes under the COVID-19 Act.

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

The modified arrangements are considered the least restrictive reasonably available way to achieve the identified purpose. The modified arrangements proposed are necessary as there are no reasonable alternatives available that will allow for proceedings under the DFVPA to continue in a way that is safe and consistent with the Queensland Government's efforts to combat COVID-19.

The following safeguards have been incorporated into the Regulation to reduce the extent to which the modified arrangements limit human rights:

- applications verified by audio visual link or audio link must still be confirmed by the applicant to be true and correct with a magistrate, alone or sitting as part of a constituted Magistrates Court, protecting the validity and quality of applications that could not be verified by statutory declaration;
- the modified arrangements do not invalidate or replace existing procedures, meaning any limitation on human rights is optional for courts and parties, rather than automatic;
- the modified arrangements are strictly time-limited, meaning any limitations on human rights are temporary.

(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 need to provide for modified arrangements to support social distancing requirements and the importance of ensuring that domestic and family violence proceedings can continue in a safe way during the COVID-19 emergency is considered to outweigh any impact on a person's human rights. This is especially so when safeguards such as the time-limited nature of the arrangements and the continued availability of existing processes are taken into account.

(f) any other relevant factors

Nil.

Conclusion

I consider that the Regulation is compatible with the *Human Rights Act 2019* because it does 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.

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