

Electoral and Other Legislation Amendment Regulation (No. 2) 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* (HR Act), I, Yvette D’Ath MP, Attorney-General and Minister for Justice, Leader of the House, provide this human rights certificate for the *Electoral and Other Legislation Amendment Regulation (No. 2) 2020* (Amendment Regulation) made under the *Electoral Act 1992* (Electoral Act), the *Referendums Act 1997* (Referendums Act) and the *State Penalties Enforcement Act 1999* (SPE Act).

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

Overview of the Subordinate Legislation

The *Electoral and Other Legislation (Accountability, Integrity and Other Matters) Amendment Act 2020* (Amendment Act) was enacted on 30 June 2020. The Amendment Act inserted new part 12B into the Electoral Act to provide flexibility, if required, to facilitate the holding of the 2020 State general election (2020 general election) in a way that helps minimise serious risks to the health and safety of persons caused by the COVID-19 public health emergency.

Section 392Y, as inserted by the Amendment Act, provides that a regulation may make provision about a matter to facilitate the holding of the 2020 general election in a way that helps minimise serious risks to the health and safety of persons caused by the COVID-19 public health emergency.

The Amendment Regulation provides, pursuant to section 392Y of the Electoral Act, for new part 6A (2020 general election) of the *Electoral Regulation 2013* (Electoral Regulation) (part 6A).

Part 6A provides that the Electoral Commission of Queensland (ECQ) must, as soon as practicable after the issue of the writ for the 2020 general election, post, deliver or otherwise send a ballot paper and declaration envelope to an elector registered as a general postal voter under section 184A(2)(b), (c) or (ca) of the *Commonwealth Electoral Act 1918* (Cwlth) (Commonwealth Act). The Amendment Regulation further clarifies that an elector registered as a general postal voter under these provisions of the Commonwealth Act may vote using another procedure under the Electoral Act.

Further, the Amendment Act creates new offences which will apply to the 2020 general election where the ECQ, or a returning officer or a member of the electoral commissioner’s staff, deems it necessary to issue directions about the distribution or display of how-to-vote cards and other election material and the presence and movement of persons at relevant places to help minimise serious risks to the health and safety of persons caused by the COVID-19 public health emergency.

The Amendment Regulation amends the *State Penalties Enforcement Regulation 2014* (SPE Regulation) to prescribe the following offences as penalty infringement notice (PIN) offences:

- contravening a direction by the ECQ about the distribution or display of how-to-vote cards or other election material at a polling booth and canvassing for votes in or near a polling booth (section 392T of the Electoral Act) - PIN amount: 1 penalty unit;
- contravening a direction by the ECQ about the number of scrutineers each candidate may have at a polling booth or other place where a scrutineer is entitled to be present, or prohibiting a candidate or scrutineer from being present at a polling booth or other place they would otherwise be entitled to be present (section 392U of the Electoral Act) - PIN amount: 2 penalty units; and
- contravening a direction by a returning officer or member of the electoral commissioner's staff in charge of a polling booth about the movement of candidates or scrutineers at the polling booth or other place where they may be present (section 392V of the Electoral Act) - PIN amount: 2 penalty units).

The Electoral Act and the Referendums Act require certain procedures made by the ECQ to be given effect by approval by regulation and the procedures to be tabled in the Legislative Assembly. The Amendment Regulation will replace current sections of the Electoral Regulation and the *Referendums Regulation 2016* (Referendums Regulation) which approve procedures for electronically assisted voting for State elections, counting of absentee votes for State elections and referendums and the electronic lodgement of returns. These amendments are required to allow for the correction of an oversight in relation to the tabling of the procedures, as previously approved, and to approve updated procedures.

The Amendment Regulation will also omit section 3 of the Referendums Regulation, which approved electronically assisted voting procedures for referendums, as those procedures are no longer current.

Human Rights Issues

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

I consider the following human rights to be relevant to the Amendment Regulation:

- recognition and equality before the law (section 15 of the HR Act);
- right to life (section 16 of the HR Act);
- freedom of expression (section 21 of the HR Act);
- right to take part in public life (section 23 of the HR Act);
- property rights (section 24 of the HR Act);
- right to a fair hearing (section 31 of the HR Act); and
- rights in criminal proceedings (section 32 of the HR Act).

The right to **recognition and equality before the law** encompasses the right to recognition as a person before the law and the right to enjoy human rights without discrimination. This right reflects the essence of human rights: that every person holds the same rights by virtue of being human and not because of some particular characteristic or membership of a particular group. Discrimination includes direct and indirect discrimination, as is defined in the *Anti-Discrimination Act 1991* (e.g. on the basis of age, impairment, race, religious belief, sex etc), as well as discrimination in a broader sense such as language; property; nationality; citizenship; colour; ethnicity; residence; physical features; employment status; and others. The right recognises, however, that measures taken for the purpose of assisting or advancing persons or groups of persons disadvantaged because of discrimination does not constitute discrimination.

Everyone has the **right to life** and has the right not to be arbitrarily deprived of life (section 16). The right imposes substantive and procedural obligations on the State to take appropriate steps and adopt positive measures to protect the health and safety of its citizens. Protecting the health, safety and wellbeing of people in the Queensland community from the risk posed by COVID-19 and its spread promotes the right to life.

The right to **freedom of expression** protects the right of all persons to hold an opinion without interference, and the right of all persons to seek, receive and express information and ideas (including verbal and non-verbal communication). The forms of protected expression are broad, and include expression that is oral, written, print, art or in any other medium. The right to freedom of expression and the free flow of information and ideas, particularly about public and political issues, is considered to be a touchstone of a democratic society.

The **right to take part in public life** affirms the right of all persons to contribute to and exercise their voices in relation to the public life of the State. It ensures all persons have the opportunity to contribute to the political process and public governance, directly or through freely chosen representatives. The United Nations Human Rights Committee (UNHRC) considers that the right imposes positive obligations on the State regarding the conduct of elections, including to preserve the impartiality of the electoral process and the right of citizens to choose their representatives freely.

The **right to property** protects the right of all persons to own property (alone or with others) and provides that people have a right to not be arbitrarily deprived of their property. Property is likely to include all real and personal property interests recognised under general law and may include some statutory rights. Prescribing the offences as PIN offences under the SPE Regulation will mean that they will be subject to the enforcement powers under the SPE Act if, for example, an individual fails to pay the PIN fine. Enforcement action under the SPE Act in relation to an unpaid fine may include, among other things, the suspension of an individual's driver licence, vehicle immobilisation or seizure and sale of property (for example, a vehicle owned by the individual). Such enforcement action limits the right to property.

The **right to a fair hearing** provides individuals with the right to have a 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. Similarly, the rights in criminal proceedings provide 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. Prescribing the offences under the SPE Regulation enables a fine of a fixed amount to be issued to an individual by the ECQ 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.

The underlying value of the **rights in criminal proceedings** protected by the HR Act is the right of all persons to be presumed innocent until proven guilty according to law. The right protects a number of minimum guarantees for an accused person in criminal proceedings, including, for example, the right to be tried without unreasonable delay, the right to examine witnesses, and the right of an individual not to be compelled to testify against themselves or to confess guilt (which protects individuals from any direct or indirect undue pressure to answer questions or produce information that might tend to incriminate them for an offence).

Amendments promoting human rights

Amendments relating to postal voting

I consider that the right to recognition and equality before the law, right to life, freedom of expression and the right to take part in public life are engaged and promoted by the measures within the Amendment Regulation that facilitate the increased use of postal voting for the 2020 general election. I base my conclusion on the following information.

The UNHRC has said that the State has a positive obligation to take measures to ensure that all persons entitled to vote are able to exercise that right without discrimination and positive measures “should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty, or impediments to freedom of movement which prevent persons entitled to vote from exercising their rights effectively”.

The ECQ, by automatically sending ballot papers and declaration envelopes to those who are seriously ill or infirm and the people who care for them, will overcome barriers which may otherwise make it difficult, or impossible, for them to freely and effectively exercise their right to vote.

Further, facilitating the increased use of postal voting for the seriously ill or infirm and the people who care for them will reduce the need for such persons to attend a polling booth to exercise their right to take part in public life. This will reduce the potential for person-to-person contact and protect the health and safety of individuals, and the public more generally.

COVID-19 is a global health pandemic threatening the Queensland community. The primary purpose of the amendments is to protect public health, which is a legitimate objective.¹ Moreover, protecting the health, safety and wellbeing of people in the Queensland community from the risk posed by the COVID-19 public health emergency and the spread of COVID-19 also promotes the right to life in the context of the positive obligations placed on the State in relation to protecting the health and safety of its citizens.

Given that postal voting is optional under the amendments, the amendments engage and promote human rights by supporting vulnerable electors to take part in public life and choose their elected representatives freely.

There are existing safeguards in the Electoral Act to protect the privacy of electors for postal voting, as supplemented by existing criminal law. In particular, it is a statutory requirement that the prescribed procedures for processing postal votes ensure that the secrecy of postal votes is maintained.

¹ Boffa v San Marino (1998) 92 Eur Comm HR 27, 34

Amendments relating to procedures

The *Electoral and Other Legislation Amendment Act 2019* amended the Electoral Act and Referendums Act so that a person can attend a polling booth located outside of their electoral district to cast an ordinary vote. Those amendments increase the potential for the secrecy of the vote to be compromised in circumstances where few ballot papers are cast for particular electoral districts such that the voter's identity might be reasonably ascertained by ECQ staff when conducting the count.

In order to maintain the secrecy of the vote, the Amendment Regulation approves procedures for the counting of absentee votes (absentee procedures), which aim to limit the exercise of the ECQ's discretion to particular circumstances and ensures scrutineers maintain their entitlement to be present for the count. The absentee procedures allow the ECQ to count votes for a particular electoral district if:

- there are a minimum number of 50 ballot papers for that district;
- all candidates for the electoral district have been afforded the opportunity to scrutinise the count; and
- there has been a minimum of three ECQ staff working at the polling booth during voting hours.

If the above criteria are not met, the absentee ballot paper must be returned to its relevant electoral district, to be mixed with other ballot papers (and maintain anonymity) before being counted.

This amendment will also engage and promote the right to take part in public life because the absentee procedures require consideration of the rights of scrutineers to be present when the votes are handled and counted.

Consideration of reasonable limitations on the rights (section 13 *Human Rights Act 2019*) – prescription of penalty infringement notice offences

(a) the nature of the right

Prescribing the abovementioned offences as PIN offences under the SPE Regulation will mean that they will be subject to the enforcement powers under the SPE Act if, for example, an individual does not pay the PIN fine. Enforcement action under the SPE Act in relation to an unpaid fine may include, among other things, the suspension of an individual's driver licence, vehicle immobilisation or seizure and sale of property (for example, a vehicle owned by the individual). Such enforcement action limits the right to property.

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, which limits the right.

Prescribing the offences under the SPE Regulation enables a fine of a fixed amount to be issued to an individual by the ECQ 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.

(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 prescribing these offences under the SPE Regulation is to enable the ECQ to take action to enforce directions at the polling booth or other place where activities in relation to the election are being held. The intention is to provide a clear deterrent that the directions given by the ECQ, the returning officer or member of the electoral commissioner's staff in charge of a polling booth to regulate the distribution and display of how-to-vote cards and the presence and movement of persons at relevant places must be complied with.

As noted above, the broader purpose of these directions is to protect the Queensland public from risks to health and safety caused by the public health emergency involving COVID-19, including limiting situations which may result in contagion through person-to-person contact.

Ensuring this enforcement mechanism is available to the ECQ for individuals who disregard and fail to comply with these directions supports the protection of the health and the safety of the public, including more vulnerable persons, which is a fundamental responsibility of government 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

Prescribing these offences under the SPE Regulation allows fines to be issued to any individual, campaigner or scrutineer who fails to comply with the lawful directions that have been given. This, in turn, facilitates an efficient enforcement mechanism that addresses the offending behaviour. It also achieves the purpose of ensuring (as best as is possible) that arrangements that support the protection of the health and safety of the public are complied with.

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

There is no less restrictive reasonably available way to achieve the purpose of prescribing the offences under the SPE Regulation. Prosecuting the offences through the courts would involve delays and would be less efficient as an enforcement response, taking into account the nature of the nature of the offending.

Once an infringement notice has been issued to an individual, there are various protections built into the 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 particular, section 15 of the SPE Act requires that all PINs must indicate that the individual may elect to have the matter of the offence decided by a court. This 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 the PIN.

The State Penalties Enforcement Registry (SPER) enforcement system also 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 (such as through paying by instalments, or through a work and development order which can include undertaking relevant courses, attending counselling and treatment programs or completing work with an approved hardship partner).

It is also important to note that, insofar as the enforcement mechanisms relating to the seizure of property and imprisonment under the SPE Act are concerned, there are several protections built into the fine enforcement system.

In respect of the limitation on the right to property through the seizure and sale of property or vehicle immobilisation, there are protections in place to ensure that this would only occur infrequently for the prescribed 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 if 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.

The maximum amount of a fine that can be issued for the relevant offences for contravening directions is set at two penalty units.

In respect of the limitation on the right to liberty through the possible fine enforcement mechanism of arrest and imprisonment, there are protections in place to ensure this is an action of a last resort. The SPER Charter (provided for under section 9 of the SPE Act) makes it clear that the use of other enforcement actions for unpaid fines must be preferred over arrest and imprisonment.

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, taking into account the nature and extent of the limitations and having regard to the information and analysis detailed above, I consider that the importance of helping to minimise the serious risks to the health and safety of persons caused by the COVID-19 public health emergency by providing the ECQ with an efficient enforcement mechanism to ensure compliance with their directions outweighs any limitations on the right to property, right to liberty and security, fair hearing and rights in criminal proceedings.

Conclusion

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

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