

# Disaster Management (Further Extension of Disaster Situation–COVID-19) Regulation (No. 6) 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, Craig Crawford, Minister for Fire and Emergency Services and Minister for Aboriginal and Torres Strait Islander Partnerships provide this human rights certificate with respect to the Disaster Management (Further Extension of Disaster Situation–COVID-19) Regulation (No. 6) 2020 made under the *Disaster Management Act 2003* (the DM Act).

In my opinion, the Disaster Management (Further Extension of Disaster Situation–COVID-19) Regulation (No. 6) 2020, 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

On 12 March 2020, the World Health Organisation declared COVID-19 a global pandemic. On 22 March 2020, a disaster situation was declared under section 69 of the DM Act for the whole of the State of Queensland.

The disaster declaration was extended by regulation on 2 April 2020 and further extended by regulation on 16 April 2020 and 30 April 2020, 14 and 28 May 2020 and 27 August 2020, pursuant to section 72 of the DM Act. Unless further extended by regulation pursuant to section 72, or declaration pursuant to section 72A, of the DM Act, the disaster situation ends on 2 October 2020, 34 days after the day it was extended.

Given the longer-term nature of the COVID-19 pandemic and the recent cases of community transmission in South East Queensland and significant ongoing cases in other Australian jurisdictions, it is proposed to further extend the period of the declared disaster situation by regulation, under section 72 of the DM Act, for a further 90 days until 31 December 2020.

## Human Rights Issues

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

In my opinion, the human rights that are relevant to this subordinate legislation include:

- Freedom of movement (section 19)
- Peaceful assembly and freedom of association (section 22)
- Property rights (section 24)
- Privacy and reputation (section 25)
- Right to liberty and security (section 29)

I note that lengthening the total period for which the disaster declaration may continue in force only applies in the context of the COVID-19 pandemic and will not have any broader application.

Although it is not possible to foresee all the possible uses of the powers under a declaration, in relation to the current COVID-19 pandemic, the powers have been used to, including:

- operationalise border restriction controls, including static vehicle check points to control the movement of persons or vehicles within, into, out of or around the declared area;
- closing roads to traffic by implementing hard border closures through road blocks;
- check vehicles at border control check points;
- direct people to quarantine before entering the Queensland community;
- prevent entry of the public to quarantine hotels;
- authorise Australian Defence Force personnel, employees of the Department of Transport and Main Roads and others as necessary, to exercise certain declared disaster powers; and
- activate the disaster management governance arrangements.

The full scope of the rights that will be engaged by the exercise of the powers can only be determined when it is known exactly how the powers will be used and implemented (at which time the decision makers will be able to give proper consideration to relevant rights in light of the precise ways in which they are limited). However, the use of the powers in the manner described above engages a number of rights. The nature and scope of each of those rights is considered below, along with an example of how the use of the powers could engage those rights.

In addition, the powers and provisions under the DM Act are complementary to the relevant powers under the *Public Health Act 2005* and have been used to give effect to the public health requirements and objectives imposed under the public health directions of the Chief Health Officer. The public health directions have imposed the limitations on human rights in terms of, for example, the quarantine requirements and entry restrictions to Queensland.

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

#### **Freedom of movement (section 19)**

##### **(a) the nature of the right**

Section 19 of the HR Act provides that every person lawfully within Queensland has the right to move freely within Queensland and to enter and leave it.

This means that a person cannot be arbitrarily forced to remain in, or move to or from, a particular place. The right also includes the freedom to choose where to live, and freedom from physical and procedural barriers, like requiring permission before entering a public park or participating in a public demonstration in a public place. It also protects the rights of individuals to enter and leave Queensland.

The regulation to extend the disaster situation may limit a person's right to freedom of movement because it allows for powers to be exercised that include controlling the movement of persons into, out of, or around the declared area for the disaster situation (s77(1)(a) of the DM Act). The exercise of these powers may result in persons being prevented from entering particular areas or the dispersal of groups of persons.

The Queensland Police Service (QPS) have relied on the general powers provided for under section 77 of the DM Act to enable the operationalisation of border restriction controls, including static vehicle check points to control the movement of persons or vehicles within, into, out of or around the declared area and closing roads to traffic by implementing hard border closures through road blocks.

Currently there are approximately 49 border control vehicle checkpoints at roads into Queensland. The QPS has coordinated confirmation checks of more than 600,000 vehicles to ensure those seeking to enter Queensland are eligible according to the relevant public health direction in place at the time. Of the vehicles checked at border control check points, more than 10,000 vehicles containing over 16,000 persons have been refused entry to Queensland and more than 17,500 persons have been directed to quarantine before entering the Queensland community.

(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 limiting freedom of movement is to protect the health and safety of the community by preventing or slowing the spread of COVID-19. Reducing the movement of persons, and thus instances of human to human contact, reduces exposure and the risk of spread of the virus.

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

The limitation helps achieve the purpose by limiting the exposure of the community to COVID-19 by preventing movement of persons. The limitation of human rights is necessary to ensure that officials can implement effective containment and mitigation measures in response to the COVID-19 pandemic. These measures will protect Queenslanders where possible from exposure to COVID-19 and, in the event of significant community exposure, slow the rate of transmission, particularly to vulnerable persons.

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

Due to the human to human transfer of the virus, there are no less restrictive and reasonably available ways to achieve the purpose.

Consistent with public health emergency declarations, the regulation will give disaster officers and the Queensland community greater certainty about the anticipated length of time the declared disaster situation will continue. It will also allow the Queensland Government to communicate with certainty about disaster situation arrangements in advance. In accordance with section 72 of the DM Act, if the declared disaster situation is no longer required, the

Premier and the Minister will declare the end of the disaster situation and the ability to exercise the suite of disaster powers will cease on the day the declaration ends.

The powers brought into effect by the regulation are for the purposes of the declared disaster only, and various protections contained in the DM Act ensure that the relevant powers are exercised appropriately. For example, these powers may only be exercised by authorised officers in certain circumstances, such as where they are necessary for public safety and the protection of life or property. Authorised officers are limited to those with the necessary expertise or experience to exercise the powers, and authorisations may be limited or given on conditions specific to the particular circumstances of the officer or event.

Operational practice also ensures that powers are exercised appropriately. In regard to emergency and disaster situations, any assessment of expertise or experience would take into account the training framework that applies to both paid and volunteer officers. Emergency and disaster response practices includes limiting potential damage where possible in the context of operational requirements and the safety of individuals (including employees, volunteers and the community).

(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 the basis of the nature of the health emergency, limiting persons identified with, or suspected of having, COVID-19 from circulating freely amongst the general public is considered reasonable and justifiable due to increased risks to vulnerable persons.

On balance, having regard to the nature and extent of the limitation on the right and the information detailed above, the importance of achieving the protection of a person's, or the public's, health outweighs the harm caused to a person's freedom of movement.

Border control check points have been a highly effective mechanism to minimise the risk of COVID-19 entering Queensland from a person travelling from another State or Territory, particularly declared COVID-19 hotspots.

### **Peaceful assembly and freedom of association (section 22)**

(a) the nature of the right

Section 22 of the HR Act provides that every person has the right of peaceful assembly.

The right to peaceful assembly upholds the rights of individuals to gather together in order to exchange, give or receive information, to express views or to conduct a protest or demonstration. The right entitles persons to gather intentionally and temporarily for a specific purpose<sup>1</sup> and is considered essential for the public expression of a person's views and opinions. The protection of the right is limited to peaceful assemblies (and does not protect violent assemblies such as riots).

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<sup>1</sup> Manfred Nowak (2005) *United Nations Covenant on Civil and Political Rights: CCPR Commentary*, 2<sup>nd</sup> ed (NP Engel) 484.

The regulation to extend the disaster situation may limit a person's right to peaceful assembly and freedom of association because it allows for powers to be exercised that include controlling the movement of persons into, out of, or around the declared area for the disaster situation (s77(1)(a) of the DM Act). The result of the exercise of this power may be dispersal of groups of persons.

(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 limiting the right to assemble peacefully is to reduce the risk of human to human transmission of COVID-19, consistent with multi-tier government requirements relating to mass gatherings during the COVID-19 response.

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

The limitation helps achieve the purpose of reducing the risk of human to human transmission of COVID-19 by providing for dispersal of groups of persons that may accelerate transmission.

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

Due to the human to human transfer of this virus, there are no less restrictive or reasonably available ways to achieve the purpose.

Consistent with public health emergency declarations, the regulation will give disaster officers and the Queensland community greater certainty about the anticipated length of time the declared disaster situation will continue. It will also allow the Queensland Government to communicate with certainty about disaster situation arrangements in advance. In accordance with section 72 of the DM Act, if the declared disaster situation is no longer required, the Premier and the Minister will declare the end of the disaster situation and the ability to exercise the suite of disaster powers will cease on the day the declaration ends.

The powers brought into effect by the regulation are for the purposes of the declared disaster only, and various protections contained in the DM Act ensure that the relevant powers are exercised appropriately. For example, these powers may only be exercised by authorised officers in certain circumstances, such as where they are necessary for public safety and the protection of life or property. Authorised officers are limited to those with the necessary expertise or experience to exercise the powers, and authorisations may be limited or given on conditions specific to the particular circumstances of the officer or event.

Operational practice also ensures that powers are exercised appropriately. In regard to emergency and disaster situations, any assessment of expertise or experience would take into account the training framework that applies to both paid and volunteer officers. Emergency and disaster response practices includes limiting potential damage where possible in the context of operational requirements and the safety of individuals (including employees, volunteers and the community).

(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, having regard to the nature and extent of the limitation on the right and the information detailed above, the importance of achieving the protection of a person's, or the public's, health outweighs the harm caused to a person's right to peaceful assembly and freedom of association.

**Property rights (section 24)**

(a) the nature of the right

Section 24(2) of the HR Act provides that a person must not be arbitrarily deprived of the person's property. The right to property protects the right of all persons to own property (alone or with others) and provides that people have a right not to be arbitrarily deprived of their property. The ability to own and protect property historically underpins many of the structures essential to maintaining a free and democratic society based on human dignity, equality and freedom. The term 'deprived' is not defined by the HR Act, however deprivation in this sense is considered to include the substantial restriction on a person's use or enjoyment of their property, to the extent that it substantially deprives a property owner of the ability to use his or her property or part of that property (including enjoying exclusive possession of it, disposing of it, transferring it or deriving profits from it).

Property is likely to include all real and personal property interests recognised under general law (for example, interests in land, contractual rights, money and shares) and may include some statutory rights (especially if the right includes traditional aspects of property rights, such as to use, transfer, dispose and exclude).

The concept of arbitrariness in the context of the right to property carries a human rights meaning of 'capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought'.

The regulation to extend the disaster situation may limit a person's property rights because it allows for the control of movement of persons, animals or vehicles within, into, out of or around the declared area for the disaster situation (s77(1)(a) of the DM Act).

The QPS have directed more than 17,500 persons to quarantine before entering the Queensland community. Those persons who have been directed to hotel quarantine are liable for the costs incurred which impacts on their right to property (money).

(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 any deprivation of a person of their property under the relevant powers is to minimise the risk of transmission of COVID-19 to vulnerable persons.

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

The limitation helps achieve the purpose by reducing the risk of transmission of COVID-19, by limiting community contact and mitigating against any means of transmission.

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

Due to the concerns relating to transmission of COVID-19, there are no less restrictive or reasonably available ways to achieve the purpose.

Consistent with public health emergency declarations, the regulation will give disaster officers and the Queensland community greater certainty about the anticipated length of time the declared disaster situation will continue. It will also allow the Queensland Government to communicate with certainty about disaster situation arrangements in advance. In accordance with section 72 of the DM Act, if the declared disaster situation is no longer required, the Premier and the Minister will declare the end of the disaster situation and the ability to exercise the suite of disaster powers will cease on the day the declaration ends.

The powers brought into effect by the regulation are for the purposes of the declared disaster only, and various protections contained in the DM Act ensure that the relevant powers are exercised appropriately. For example, these powers may only be exercised by authorised officers in certain circumstances, such as where they are necessary for public safety and the protection of life or property. Authorised officers are limited to those with the necessary expertise or experience to exercise the powers, and authorisations may be limited or given on conditions specific to the particular circumstances of the officer or event.

Operational practice also ensures that powers are exercised appropriately. In regard to emergency and disaster situations, any assessment of expertise or experience would take into account the training framework that applies to both paid and volunteer officers. Emergency and disaster response practices includes limiting potential damage where possible in the context of operational requirements and the safety of individuals (including employees, volunteers and the community).

Further, the DM Act provides specific protections where it is proposed to give directions to the owner of any property. If the property is a residential or business premises, directions may only be given with the written approval of the relevant district disaster coordinator.

(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, having regard to the nature and extent of the limitation on the right and the information detailed above, the importance of achieving the protection of a person's, or the public's, health outweighs the harm caused to person's right not to be deprived of property.

COVID-19 continues to circulate in the community at concerning levels, particularly in New South Wales and Victoria. Currently, Queensland has a low level of community transmission of COVID-19. Increased community transmission of the virus, resulting mortality rates and

pressure on the health system are a likely consequence without ongoing disaster related powers and governance framework provided for through the disaster declaration.

COVID-19 remains relatively contained in Queensland as a direct result of the multi-agency coordination possible through the disaster management governance framework and the highly effective border screening control mechanisms and hotel quarantine system which minimises the risk of COVID-19 entering Queensland from another State, Territory or Country.

### **Privacy and reputation (section 25)**

#### (a) the nature of the right

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

The underlying value of the right to privacy is the ‘protect[ion] and enhance[ment of] the liberty of the person – the existence, autonomy, security and well-being or every individual in their own private sphere.’<sup>2</sup> It 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 is concerned with notions of personal autonomy and dignity. The United Nations Human Rights Commission has said that it refers to those aspects of life in which a person can freely express his or her identity, either alone or in relationships with others.<sup>3</sup>

The right protects privacy in that personal sense (and in the sense of personal information, data collection and correspondence) but also extends to an individual’s private life more generally. For example, the right to privacy protects the individual against interference with their physical and mental integrity, freedom of thought and conscience, legal personality, sexuality, family and home, and individual identity (including appearance, clothing and gender).

The right to privacy under the HR Act protects individuals against unlawful or arbitrary interferences with their privacy. The concept of lawfulness in the context of the right to privacy means that no interference can take place except in cases envisaged by the law. Interference authorised by states can only take place on the basis of law, which itself must comply with the provisions, aims and objectives of the International Covenant on Civil and Political Rights.<sup>4</sup> The European Court of Human Rights has also said that an interference will be lawful if it is authorised by a law that is adequately accessible and formulated with sufficient precision to enable a person to regulate his or her conduct by it.<sup>5</sup> These are concepts that are consistent with the rule of law principles. The concept of arbitrariness in the context of the right to privacy carries a human rights meaning of ‘capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought’.<sup>6</sup>

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<sup>2</sup> *Director of Housing v Sudi* (2010) 33 VAR 139, 145 (Bell J). See also *Re Kracke and Mental Health Review Board* (2009) 29 VAR 1, 131 (Bell J).

<sup>3</sup> *Coeriel and Aurik v The Netherlands* (Communication No 45/1991) [10.2].

<sup>4</sup> United Nations Human Rights Committee, *General Comment No. 16*.

<sup>5</sup> *Sunday Times v United Kingdom* [1979] ECHR 1, [49].

<sup>6</sup> *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing).



The regulation to extend the disaster situation may limit a person's right not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with as it allows for powers to be exercised that include entering a place in the declared area (s77(1)(d) of the DM Act). The result of the exercise of this power may be to interfere with a person's home or privacy.

(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 limiting the right to a person's privacy is to mitigate against the risk of transmission of COVID-19 by ensuring appropriate social distancing.

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

The limitation helps achieve the purpose by reducing the risk of transmission of COVID-19, by limiting community contact and proximity to persons identified with, or suspected of having, the virus.

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

Due to the concerns relating to contact and proximity of persons identified with or suspected of having COVID-19, there are no less restrictive or reasonably available ways to achieve the purpose.

Consistent with public health emergency declarations, the regulation will give disaster officers and the Queensland community greater certainty about the anticipated length of time the declared disaster situation will continue. It will also allow the Queensland Government to communicate with certainty about disaster situation arrangements in advance. In accordance with section 72 of the DM Act, if the declared disaster situation is no longer required, the Premier and the Minister will declare the end of the disaster situation and the ability to exercise the suite of disaster powers will cease on the day the declaration ends.

The powers brought into effect by the regulation are for the purposes of the declared disaster only, and various protections contained in the DM Act ensure that the relevant powers are exercised appropriately. For example, these powers may only be exercised by authorised officers in certain circumstances, such as where they are necessary for public safety and the protection of life or property. Authorised officers are limited to those with the necessary expertise or experience to exercise the powers, and authorisations may be limited or given on conditions specific to the particular circumstances of the officer or event.

Operational practice also ensures that powers are exercised appropriately. In regard to emergency and disaster situations, any assessment of expertise or experience would take into account the training framework that applies to both paid and volunteer officers. Emergency and disaster response practices includes limiting potential damage where possible in the context of operational requirements and the safety of individuals (including employees, volunteers and the community).

(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, having regard to the nature and extent of the limitation on the right and the information detailed above, the importance of achieving the protection of a person's, or the public's, health outweighs the harm caused to person's right to privacy under these circumstances.

**Right to liberty and security (section 29)**

(a) the nature of the right

Section 29 of the HR Act protects the right to liberty and security of the person.

The right to liberty and security of the person protects the personal physical liberty of all persons, including the right not to be arrested or detained except in accordance with the law.

The fundamental value which the right to liberty expresses is freedom, which is acknowledged to be a prerequisite for equal and effective participation in society. The right is directed at all deprivations of liberty including, but not limited to, imprisonment in correctional facilities or detention in hospitals. It may also include where persons are deprived of liberty through supervision, protection, treatment, guardianship or similar orders made under various legislative schemes.

The right also protects against arbitrary arrest and detention. The concept of arbitrariness carries a human rights meaning of 'capriciousness, unpredictability, injustice and unreasonableness – in the sense of not being proportionate to the legitimate aim sought'.<sup>7</sup>

The right to security of the person also places a positive obligation on the State to take all reasonable steps to ensure the physical safety of those who are in danger of physical harm (including bodily and mental integrity, or freedom from injury to the body and mind). This obligation applies independently of the right to liberty in that it applies whether or not an individual is detained.

The regulation to extend the disaster situation may limit a person's right to liberty and security because it allows for powers to be exercised that include controlling the movement of persons into, out of, or around the declared area for the disaster situation (s77(1)(a) of the DM Act). The exercise of these powers may result in a person being deprived of their liberty for a period of time.

(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 depriving a person of their liberty is to limit persons identified with or suspected of having COVID-19 from circulating freely amongst the general public, in order to reduce the risks of transmission of the virus.

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<sup>7</sup> *WBM v Chief Commissioner of Police* (2012) 43 VR 466, 472 (Warren CJ, Hansen JA agreeing).

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

The limitation of human rights is necessary to ensure that officials can implement effective containment and mitigation measures in response to the COVID-19 pandemic. These measures will protect Queenslanders from exposure to COVID-19 and, in the event of significant community exposure, slow the rate of transmission, particularly to vulnerable persons.

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

No less restrictive and reasonably available ways to achieve the purpose have been identified. Due to the human to human transfer of the virus, restrictions need to be imposed on the movement of persons to reduce the risks of transmission of the virus. In particular, the movement of persons who are identified with or suspected of having COVID-19 needs to be limited in order to prevent them from circulating freely amongst the general public and spreading the virus.

Consistent with public health emergency declarations, the regulation will give disaster officers and the Queensland community greater certainty about the anticipated length of time the declared disaster situation will continue. It will also allow the Queensland Government to communicate with certainty about disaster situation arrangements in advance. In accordance with section 72 of the DM Act, if the declared disaster situation is no longer required, the Premier and the Minister will declare the end of the disaster situation and the ability to exercise the suite of disaster powers will cease on the day the declaration ends.

The powers brought into effect by the regulation are for the purposes of the declared disaster only, and various protections contained in the DM Act ensure that the relevant powers are exercised appropriately. For example, these powers may only be exercised by authorised officers in certain circumstances, such as where they are necessary for public safety and the protection of life or property. Authorised officers are limited to those with the necessary expertise or experience to exercise the powers, and authorisations may be limited or given on conditions specific to the particular circumstances of the officer or event.

Operational practice also ensures that powers are exercised appropriately. In regard to emergency and disaster situations, any assessment of expertise or experience would take into account the training framework that applies to both paid and volunteer officers. Emergency and disaster response practices includes limiting potential damage where possible in the context of operational requirements and the safety of individuals (including employees, volunteers and the community).

(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, having regard to the nature and extent of the limitation on the right and the information detailed above, the importance of achieving the protection of a person's, or the public's, health outweighs the harm caused to a person's liberty in these circumstances.

## Conclusion

I consider that the Disaster Management (Further Extension of Disaster Situation–COVID-19) Regulation (No. 6) 2020 is compatible with the HR Act because it limits, restricts or interferes with human rights, only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HR Act.

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