
State Penalties Enforcement (Public Health) Amendment Regulation 2021

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, Shannon Fentiman MP, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence provide this human rights certificate with respect to the State Penalties Enforcement (Public Health) Amendment Regulation 2021 (the Amendment Regulation) made under 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

On 29 January 2020, a public health emergency was declared under section 319 of the *Public Health Act 2005* (PH Act) due to the outbreak of COVID-19 in China, its pandemic potential due to cases spreading to other countries and the public health implications within Queensland resulting from recently arrived travellers from the epicentre of the outbreak. Under section 323 of the PH Act, the declared public health emergency has been extended until 31 March 2021 through the making of several regulations and may need to be further extended.

Further to this declaration, on 8 January 2021, Dr Jeannette Young, Chief Health Officer, made the *Restrictions on Impacted Areas Direction* pursuant to the powers under section 362B of the PH Act to assist in containing, and responding to, the potential spread of COVID-19 in Queensland. Several public health measures were introduced through this Direction, including requirements for an individual to wear or carry face mask in particular circumstances, primarily when the person was outside their principal place of residence in the impacted area.

On 11 January 2021, these restrictions were amended by the making of the *Restrictions on Impacted Areas Direction (No. 2)*, which required people to wear face masks in particular settings, such as shopping centres, on public transport and when entering and exiting major sports facilities. On 12 January 2021, the Chief Health Officer also made the *Mandatory Face Masks Direction*, which requires a person at a Queensland airport to wear a face mask in all areas of the airport, unless an exception applies.

The benefits of wearing face masks in reducing the spread of COVID-19, especially in closed or confined environments, is well documented. With new strains of the virus being identified and a growing recognition it can be transmitted even without symptoms, numerous health advisory bodies, including the World Health Organisation recommends the wearing of face masks for the general public.

Under section 362D of the PH Act, a person who fails to comply with a public health direction without a reasonable excuse commits an offence with a maximum penalty of 100 penalty units or 6 months imprisonment. The offence under section 362D is an infringement notice offence under Schedule 1 of the *State Penalties Enforcement Regulation 2014* (SPE Regulation). Under the *State Penalties Enforcement Act 1999*, an on-the-spot fine, known as an infringement notice, can be served where an infringement notice offence is detected. The infringement notice fine for breaching section 362D of the PH Act, is currently 10 penalty units for an individual (\$1,334) and 50 penalty units for a corporation (\$6,672) unless the breach relates to a failure to comply with a public health direction restricting entry into Queensland from another State.

The Amendment Regulation will amend the SPE Regulation to provide a specific infringement notice fine for the failure to wear or carry a face mask as required under any public health direction. The amount of the specific fine will be 1.5 penalty units (which will be \$200 when rounded down in accordance with section 5(2A) of the *Penalties and Sentences Act 1992*). A specific penalty amount of 1.5 penalty units (\$200) for a failure to carry or wear a mask, compared to the general requirements to comply with a public health direction, is considered appropriate to meet the required compliance outcome and align with the approach in other jurisdictions. The penalty aligns with the penalty for failing to wear a face mask in certain settings in Victoria and New South Wales, which also attracts a fine of \$200.

Inserting a specific infringement notice fine for failing to wear or carry a face mask will ensure the penalty aligns more closely with community standards and that there is a proportionate and effective enforcement response to the failure to comply with a requirement in a public health direction to wear or carry a face mask.

The Amendment Regulation ensures that the specific infringement notice fine of 1.5 penalty units applies:

- (a) to all public health directions which include a requirement to wear or carry a face mask; and
- (b) only to the failure to wear or carry a face mask and not any other aspect of a public health direction.

Accordingly, a person who fails to comply with a face mask requirement under a public health direction will be liable to a 1.5 penalty unit infringement notice fine, however, if they fail to comply with any other aspect of a public health direction, they will be liable to the higher 10 penalty unit infringement notice, as currently prescribed under Schedule 1 of the SPE Regulation.

Human Rights Issues

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

The following human rights may be engaged by the provision of a specific penalty infringement fine:

- *Property rights (section 24 of the HR Act)*

This right protects the right of all persons to own property (alone or with others) and provides that people have a right not be arbitrarily deprived of their property. 'Arbitrary' in the human rights context refers to conduct that is capricious, unpredictable or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought.

The right does not provide a right to compensation.

Property is likely to include all real and personal property interests recognised under general law (e.g. interests in land, contractual rights 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).

Public entities may be obliged to take steps to prevent the unlawful deprivation of property occurring.

The mandatory enforcement of wearing or carrying a face mask does not engage this right. However, the right to property is engaged by the purpose of the Amendment Regulation, that is, the provision of a specific penalty amount for the failure to comply with a public health direction requiring a person to wear or carry a face mask. While the Amendment Regulation simply seeks to provide a specific penalty amount, it nevertheless stipulates that the fine for failing to comply with the health direction requiring a person to wear a or carry a mask is \$200. This amounts to a limitation of a person's rights under section 24 of the HR Act.

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

Property rights (section 24 of the HRA)

(a) the nature of the right

Property rights may be relevant to the provision of a specific penalty for the failure to wear or carry a face mask pursuant to section 362D of the PHA (Failure to comply with a public health direction) to the extent that it will allow persons to be financially penalised for the failure to comply. The failure to pay an infringement notice fine may also result in enforcement action taken by the registrar of the State Penalty Enforcement Registry (SPER) against the person, including among others, the seizure of the person's property and vehicle immobilisation as provided for in the SPE Act.

The power of an authorised person to issue an infringement notice applies where the authorised person suspects, on grounds that are reasonable in the circumstances, a person to whom the Direction applies must comply unless the person has a reasonable excuse.

The power would not permit the seizure of a face mask or any other item from a person.

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

Property rights may be relevant to the Amendment Regulation to the extent that it will allow an authorised person to issue a fine for the failure to wear or carry a face mask in certain circumstances.

The Amendment Regulation provides a specific penalty amount for the failure to comply with a public health direction requiring the wearing or carrying of a face mask in certain circumstances.

Enforcement action under the SPE Act in relation to an unpaid fine may include, among others, the suspension of an individual's driver licence, vehicle immobilisation or seizure and sale of property (for example, a vehicle owned by the individual).

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

The purpose of the Amendment Regulation is to provide a specific penalty amount for the particular act of failing to wear or carry a face mask in certain circumstances for the ultimate purpose of combatting the widespread community transmission of COVID-19.

The wearing of face masks has been proven to reduce the risk of widespread community transmission of COVID-19, including highly infectious strains of the virus. Given this risk, it is considered appropriate to require the wearing of face masks in a range of situations where physical distancing may not be possible. Face mask wearing, along with physical distancing and hand hygiene will enable the community to limit their exposure and transmission of any respiratory droplets when leaving the home and around other people. A specific penalty amount of 1.5 penalty units (\$200) for a failure to wear or carry a face mask, compared to the general requirements to comply with a public health direction, is considered appropriate to meet the required compliance outcome and align with the approach in other jurisdictions. Providing a specific infringement notice fine will ensure the penalty aligns more closely with community standards and that there continues to be a proportionate and effective enforcement response to the failure to comply with a requirement in a public health direction to wear or carry a face mask. This will ensure that there continues to be a proportionate and effective enforcement response to the failure to comply with a public health direction. These objectives are consistent with a free and democratic society based on human dignity, equality and freedom.

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

The Amendment Regulation is rationally connected to achieve its policy objective which is ensuring compliance with a public health direction and therefore preserve an effective health care response to widespread community transmission of COVID-19. The Amendment Regulation provides a specific penalty for the failure to wear or carry a face mask as required under any public health direction, which will encourage individuals to comply with the law by wearing or carrying a mask and thus help achieve the overall purpose of combatting the spread of COVID-19 in the community.

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

It is considered that the Amendment Regulation effects the least restrictive and reasonably available way to achieve the purpose of providing a specific penalty for a failure to wear or carry a face mask thereby ensuring the penalty aligns more closely with community standards.

Due to the rapidly changing nature of the COVID-19 emergency, public health directions are frequently revoked and replaced. The specific penalty for the infringement notice offence for the failure to wear or carry a face mask is therefore drafted widely to be responsive in these circumstances. There are several protections built into public health directions where the requirement to wear a face mask does not apply.

Importantly, the fine enforcement system under the SPE Act will ensure the seizure and sale of property or vehicle immobilisation only occurs infrequently for the failure to comply with a public health direction. Importantly, the threshold amount which must be owed to SPER before vehicle immobilisation can occur is prescribed under the SPE Act and is currently set at \$5,000. In terms of seizure and sale, SPER only undertakes this activity where it has registered an interest over the property to be seized. The SPE Act requires that the total amount owed by a debtor must be more than \$500 before SPER can register an interest over property.

Other protections include that:

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

Authorised persons appointed to issue fines also receive significant training, in accordance with the requirements set out in the PHA or are a police officer to ensure that fines are only issued in appropriate cases and circumstances.

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

The social and economic impact of the COVID-19 pandemic is significant. Evidence from jurisdictions around the world that have been able to successfully suppress the virus shows that a proactive approach to restrictions is the best way to combat the spread of the virus. Failure to do so often results in larger outbreaks – such an outbreak could very quickly put extreme pressure on Queensland’s COVID-19 response system through a sharp increase in testing and contact tracing activities and the health system’s capacity to provide care for patients if hospitalisation rates rapidly spike.

Maintaining the capacity of Queensland’s health system has been a key focus of the Queensland response to the COVID-19 pandemic as evidence from around the world unequivocally indicates that when numbers of COVID-19 cases are high in a certain area, the mortality rate dramatically increases. In addition, lengthier lockdowns required to contain larger outbreaks have deep social and economic consequences to the community.

I consider that the benefit of the preservation of an effective health care response to widespread community transmission of COVID-19 in achieving the objective of providing a specific penalty for the failure to wear or carry a face mask justifies any limitation on the right to property.

The failure to comply with a public health direction is already prescribed as infringement notice offence carrying a penalty of 10 penalty units. Not providing a specific penalty for this discrete failure to comply with a public health direction is likely to reduce the threat of enforcement action against an offender due to the significant cost to the State of court proceedings relating to offences that aim to protect revenue. A decision to prosecute is made on public interest grounds (including consideration of the costs of prosecution) so it would be reasonable for some offenders to consider that the State is unlikely to issue a complaint and summons to anyone other than the most recidivist offenders thereby significantly reducing the deterrent effect of a failure to comply with a public health direction. This would directly affect the State's ability to preserve an effective health care response to widespread community transmission of COVID-19. For the reasons outlined above, I consider the balance between the importance of protecting the State's ability to respond to widespread community transmission of COVID-19 and ensuring an effective enforcement system for the failure to comply with a public health direction, in particular, the requirement to wear or carry a face mask, outweighs the limitation on a person's right to property.

Conclusion

I consider that the Amendment Regulation is compatible with the *Human Rights Act 2019* because it does limit, restrict or interfere with a human right, but that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

SHANNON FENTIMAN
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Minister for Women and Minister for the
Prevention of Domestic and Family Violence