

State Penalties Enforcement (Dam Safety) Amendment Regulation 2022

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, the Honourable Glenn Butcher MP, Minister for Regional Development and Manufacturing and Minister for Water, provide this Human Rights Certificate with respect to the *State Penalties Enforcement (Dam Safety) Amendment Regulation 2022* (SPE Dam Safety Regulation) made under the *State Penalties Enforcement Act 1999* (SPE Act).

In my opinion, the SPE Dam Safety 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

To support the management of dam safety, offences under the *Water Supply (Safety and Reliability) Act 2008* (Water Supply Act) were reviewed to identify additional compliance support tools to allow the Chief Executive to pursue additional non-compliance matters. The amendments to the *State Penalties Enforcement Regulation 2014* (SPE Regulation) relate to the recommendations made by the Queensland Audit Office (QAO) Report – *Regulating dam safety* (Report 9: 2021-22).

The SPE Dam Safety Regulation seeks to prescribe offences which the Department of Regional Development Manufacturing and Water (DRDMW) administer under the Water Supply Act, specifically, Chapter 4: Referable dams and flood and drought mitigation requirements. DRDMW currently regulates the referable dam safety of 111 dams in Queensland.

Dam failure can have major consequences, such as injury, loss of life and damage to the economy, property and the environment. Responsibility for dam safety rests with the dam owner and compliance is enforced by DRDMW. Risk of dam failure is usually very low and is managed by requirements stated in the Water Supply Act.

The amendments include specific Penalty Infringement Notices (PINs) for the following administrative provisions:

- Sections 352F, 352L(2), 352O(3) and 352S(2) which relate to Emergency Action Plans (EAP) and the requirement for dam owners to:
 - prepare an EAP within set timeframes;
 - comply with a notice to prepare an EAP;
 - comply with the notice and submit a new EAP; and
 - renew the approved EAP, two months before the end of the approval period.

- Sections 352T(2), 352U(3), 383(2) and 384(3) which relate to emergency events and flood events and the requirement for dam owners to:
 - prepare and submit an emergency event report within set timeframes;
 - comply with a notice to prepare and submit an emergency event interim report within set timeframes;
 - prepare and submit a flood event report within set timeframes; and
 - comply with a notice to prepare and submit a flood event interim report within set timeframes.
- Sections 353(3) and 356(4) relate to dam owners complying with notices requesting information and fees to help in determining the application of safety conditions or the changing of safety or development conditions for existing referable dams.

The amendments to SPE Regulation reflect the actions required by the QAO Report and its recommendations for both finding opportunities for improvement to the management of dam safety and increasing the effectiveness of compliance tools.

Human Rights Issues

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

In my opinion, the Human Rights that are relevant to the amendment regulation are:

- Right to life (section 16 of the HRA)
- Property rights (section 24 of the HRA)
- Fair hearing (section 31 of the HRA)
- Rights in criminal proceedings (section 32 of the HRA)

Right to life (section 16 of the HRA)

The right to life reflects that every person has the right to life and has the right to not be arbitrarily deprived of life.

Ensuring that effective measures are in place to address the safety of referable dams and those people and property at risk due to possible failure is consistent with the right to life. This right places a positive obligation on the State, to ensure that the positive measures are in place to protect life and ensure the physical safety of those at risk of harm. That is, it is incumbent on the State to put in place measures to make dams as safe as possible. The amendments are being put into place to make dams safer by ensuring mechanisms are in place to safeguard those who may be affected by a dam failure.

Property rights (section 24 of the HRA)

The right to property protects the right of all persons to own property (alone or with others) and provides that people have the 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 if a person fails to pay the amount specified in the PIN, they will be subject to the enforcement powers under the SPE Act. Such enforcement action may limit the right to property.

Fair hearing (section 31 of the HRA)

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 a person by DRDMW 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.

Rights in criminal proceedings (section 32 of the HRA)

The underlying value of the rights in criminal proceedings protected by the HRA 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 to not 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 themselves of an offence).

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

(a) the nature of the right

The human right under section 24(2) of the HRA is limited where a person is unlawfully or 'arbitrarily' deprived of the person's 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 if a person fails to pay the amount specified in the PIN, they will be subject to the enforcement power under the SPE Act. Such enforcement action may limit 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 a person by DRDMW 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.

If there is an alternative view that the power limits the property rights, I consider that the limitation would also be reasonable and demonstrably justified using the proportionality factors under section 13 of the HRA (refer to the section on 'consideration of reasonable limitations on human rights' below).

(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 DRDMW to take action to enforce the dam safety requirements under Chapter 4 of the Water Supply Act. The intention is to provide a clear deterrent that the requirements under the Water Supply Act must be complied.

The broader purpose of these requirements is to protect persons and property who are at risk as a result of a dam failure.

Ensuring that this enforcement mechanism is available to DRDMW for persons who disregard and fail to comply with these offences supports the protection of the health and safety of any person or property at risk, 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 PINs to be issued to any person who fails to comply with the lawful requirements 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 which support the protection of the health and safety of any person or property are complied.

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

There is no less restrictive or 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 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 support 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, there are protections in place to ensure that this probably would not happen for the prescribed offences. 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 statutory requirements is set at twenty 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 at risk by a possible dam failure, by providing DRDMW with an efficient enforcement mechanism to ensure compliance with its statutory requirements, outweighs any limitations on the right to property, right to a fair hearing and rights in criminal proceedings.

Conclusion

I consider that the *State Penalties Enforcement (Dam Safety) Amendment Regulation 2022* is compatible with the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The Honourable Glenn Butcher MP
Minister for Regional Development, Manufacturing and Minister for Water