

Electoral and Other Legislation Amendment 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* (the HR Act), I, Yvette D'Ath MP, Attorney-General and Minister for Justice, Leader of the House, provide this human rights certificate with respect to the *Electoral and Other Legislation Amendment Regulation 2020* (Amendment Regulation) made under the *Electoral Act 1992* (the Electoral Act); the *Referendums Act 1997* (the Referendums Act); and the *State Penalties Enforcement Act 1999* (SPE Act).

In my opinion, the 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 30 October 2019, the *Electoral and Other Legislation Amendment Act 2019* (the Amendment Act) received assent. Stated provisions of the Amendment Act commenced on 31 January 2020. Amendments in the Amendment Regulation are as a consequence of that commencement.

The Electoral Act requires disclosure returns (by candidates, registered political parties, associated entities, third parties and donors) to be given to the Electoral Commission of Queensland (ECQ) in relation to gifts or loans over a stated amount. The *Electoral Regulation 2013* (Electoral Regulation) made under the Electoral Act currently requires returns to be made within seven days of a gift being received or made. The Amendment Act amended the Electoral Act so that a regulation could be made to specify a day or time by which disclosure returns must be made. The Amendment Regulation amends the Electoral Regulation to require disclosure of gifts, loans and special reporting events by political parties and candidates, and gifts and special reporting events by associated entities, within 24 hours of receipt in the seven days prior to an election.

The Amendment Regulation:

- omits the prescribed times for the disclosure period from the Electoral Regulation which are no longer required due to amendments to section 198 of the Electoral Act which removed the need for such times to be prescribed; and
- excludes persons detained in custody from the class of electors able to make an electronically assisted vote for State elections and referendums given that section 115 of the Electoral Act has been amended to require detained electors to make a declaration vote.

The Electoral Act and the Referendums Act require certain procedures approved by ECQ to be approved by the Amendment Regulation and tabled in the Legislative Assembly. The Amendment Regulation approves:

- a) updated 'Procedure for electronic lodgement of returns' approved by ECQ on 1 November 2019;
- b) updated 'Electronically assisted voting for state elections procedure' approved by ECQ on 23 December 2019; and
- c) new 'Procedures for counting of absentee votes for State elections and referendums' approved by ECQ on 21 January 2020.

The Amendment Act amends the maximum penalties for various offences in the Referendums Act, including some prescribed as penalty infringement notice (PIN) offences in the *State Penalties Enforcement Regulation 2014* (SPE Regulation) made under the SPE Act. The Amendment Regulation makes consequential amendments to the SPE Regulation, to update the PIN amounts for prescribed PIN offences to correlate with the new penalties under the Referendums Act.

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);
- freedom of association (section 22 of the HR Act);
- right to take part in public life (section 23 of the HR Act);
- right to privacy and reputation (section 25 of the HR Act);
- rights to recognition and equality before the law (section 15 of the HR Act); and
- humane treatment when deprived of liberty (section 30 of the HR Act).

In respect of the right to take part in public life, I consider that the Amendment Regulation does not negatively limit the right. Instead, I consider that the right to take part in public life is promoted by measures within the Amendment Regulation. I base my conclusion on the following information.

The Amendment Act 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, which may be counted at that polling booth, at the discretion of ECQ, in accordance with the Procedures for counting of absentee votes for State elections and referendums (the Procedures). 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 approved the Procedures, which aim to limit the exercise of ECQ's discretion to particular circumstances and ensures scrutineers maintain their entitlement to be present for the count. The Procedures allow 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 Procedures require consideration of the rights of scrutineers to be present when the votes are handled and counted.

I also consider that the right to take part in public life is promoted by the amendments in respect of the disclosure period for gifts or loans received by registered political parties or candidates and for gifts received by associated entities, in the last seven days before an election. These amendments are discussed in further detail below.

Consideration of reasonable limitations on the rights (section 13 *Human Rights Act 2019*) – 24 hour disclosure period

a) the nature of the right

Under the Electoral Act, political parties, associated entities and candidates are required to disclose gifts or loans that are received. Third parties are also required to disclose gifts or loans that are used to incur expenditure for political purposes. The disclosure is required to be made by both the donors and recipients of the gifts or loans. Upon this disclosure, the donor's name, suburb and State (but not street address), the amount gifted and recipient's details are then required to be published on ECQ's website.

For gifts or loans that are received by registered political parties and candidates, or gifts that are received by associated entities, in the last seven days before an election, the Amendment Regulation shortens the disclosure period from seven days after receipt of a gift or loan to 24 hours after receipt.

Relevantly, these amendments may limit the right to freedom of association, the right to take part in public life and the right to privacy and reputation.

The right to freedom of association protects the rights of individuals to join together with others to formally pursue a common interest – for example, political groups, sporting groups and trade unions. It includes the freedom to choose between existing organisations or to form new ones. The changes to the disclosure period may limit the right to freedom of association by making publicly available a person's association with a registered political party, associated entity or candidate.

The right to privacy and reputation protects the right of a person not to have their privacy, family, home or correspondence unlawfully or arbitrarily interfered with. Part of the concept of privacy is also the right to personal autonomy as a human being, and to not be subjected to unwarranted and unreasonable intrusions on this. People also have the right not to have their reputation unlawfully attacked. The changes to the disclosure period may limit the right to

privacy and reputation by making publicly available a person's personal information, including information about their political associations.

The right to take part in public life provides that a person has the right to participate in the conduct of public affairs, directly or through freely chosen representatives. This also includes the right to vote at State elections that guarantee the free expression of the will of the electors. Integral to this is a fair, transparent, publicly accountable State electoral process open to scrutiny. The United Nations Human Rights Committee considers that the right to vote also 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 Amendment Regulation, in shortening the disclosure period in this way to ensure the conduct of fair and transparent elections, arguably promotes the right to take part in public life, which is not limited only to the selection of elected representatives but also includes a person's right to exercise his or her vote in an informed manner.

- 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 requirement for public disclosure of gifts or loans for political purposes is intended to improve the actual and perceived integrity and public accountability of State elections and ensure public confidence in State electoral and political processes. The purpose of shortening the disclosure period to 24 hours in the seven days prior to polling day ensures that electors are fully informed about who is influencing political parties, associated entities and candidates right up until the day that they cast their vote.

Shortening the disclosure period for gifts or loans to political parties and candidates, and for gifts to associated entities promotes the right to take part in public life as it protects the rights of persons to vote and participate in the political process in an informed way.

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

The public disclosure of gifts or loans will necessarily create a fairer and more transparent environment for voting that is sought. Queensland State elections are always held on a Saturday. Currently, any gifts or loans made from the Sunday before the election would not be required to be disclosed until the Sunday after polling day. Shortening the disclosure period to within 24 hours of a gift or loan being received by a political party or candidate or of a gifts received by an associated entity in the seven days prior to polling day will ensure that when casting their vote on Saturday, electors will be informed of any such gifts or loans made between Sunday and Friday immediately before polling day.

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

No other less restrictive or reasonably available ways to achieve the purpose have been identified. If 24 hour disclosure was imposed across a shorter period (that is, shorter than the seven day period provided for by the Amendment Regulation), such as three days before polling day, then any gifts or loans made on the Sunday, Monday and Tuesday before polling day would still not be disclosed until after the election, meaning that electors would not be fully informed when casting their vote.

The Amendment Regulation appropriately only shortens the disclosure period for registered political parties, associated entities and candidates, not donors and third parties (who will continue to be required to disclose the gift or loan within the seven days of making or receiving it (whichever applies)). While this places a higher administrative and compliance burden on registered political parties, associated entities and candidates, the burden is reasonable given it only applies to those individuals who aspire to public office, or entities that have a specifically defined relationship with those who do. These individuals and entities can be reasonably expected to comply as they are educated by ECQ about their obligations and have existing systems and processes in place to manage compliance.

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 importance of ensuring voters are fully informed when they cast their vote in State elections by shortening the disclosure period for the limited class of entities in the seven day period immediately before polling day (and, in turn, protecting the right to take part in public life of individuals participating in the voting process) outweighs the harm that may be caused to the freedom of association and the right to privacy and reputation.

Additionally, in respect of the extent of the limitation on the right to privacy and reputation, the safeguard provided for in the Electoral Act that restrict the publication by ECQ of the person's street address will continue to apply. This safeguard goes towards ensuring an appropriate balance between protecting a person's right to privacy and another person's right to take part in public life.

**Consideration of reasonable limitations on the rights (section 13 *Human Rights Act 2019*)
– Electors who are detained in lawful custody cannot use telephone voting**

a) the nature of the right

The Amendment Act amended the Electoral Act to provide that persons who are detained in lawful custody for less than three years are eligible to vote (detained electors). The Amendment Act also provided that detained electors must make a declaration vote. As a result, ECQ will post ballot papers and declaration envelopes to corrective services facilities and corrective services staff will facilitate the transmittal of this material to allow detained electors to cast their votes.

The Electoral Regulation currently provides that detained electors are eligible to use electronically assisted voting (telephone voting). Telephone voting is a voting service offered by ECQ such that certain eligible electors may call ECQ to register for telephone voting by 12pm on polling day, then wait to receive a security code via return phone call, text or email, then call again on a different phone number using the security code to cast their vote anonymously.

The Amendment Regulation amends the Electoral Regulation so that detained electors are no longer eligible to use telephone voting and is consistent with the Electoral Act which requires such electors to make a declaration vote.

Relevantly, these amendments may limit the right to recognition and equality before the law, the right to take part in public life, and the right to humane treatment when deprived of liberty.

The rights to recognition and equality before the law provide that every person: has the right to recognition as a person before the law; has the right to enjoy his or her human rights without discrimination; is equal before the law and is entitled to the equal protection of the law without discrimination; and has the right to equal and effective protection against discrimination.

The removal of the eligibility of detained electors to use telephone voting may limit the right to recognition and equality before the law by limiting the opportunity for detained electors to vote. This is because the Electoral Act requires postal voting applications to be made to ECQ by 12 days before polling day. Therefore, if an elector becomes detained in lawful custody after the postal voting cut-off and has not previously voted in the election, they will be unable to cast their vote. If the elector were eligible to cast their vote using telephone voting, they would be able to apply for telephone voting up until 12pm on polling day.

The right to take part in public life provides that every person in Queensland has the right to participate in the conduct of public affairs, directly or through freely chosen representatives. This also includes the right to vote at State elections.

The right to humane treatment when deprived of liberty says that all persons deprived of liberty must be treated with humanity and with respect for the inherent dignity of the human person. The UN Human Rights Committee has emphasised, in respect of this right, that persons who are detained retain all their rights, subject only to the restrictions that are unavoidable in a closed environment. The right means that individuals who are detained should not be subject to any hardship or constraint that is in addition to that resulting from the deprivation of their liberty.

The removal of the eligibility of detained electors to use telephone voting may limit the right to take part in public life and the right to humane treatment when deprived of liberty by depriving them of the ability to vote if they come into custody after the postal voting cut-off day (being 12 days before the election).

- 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

Detained electors do not have ready access to mobile phones, email or standard telephone services whilst in custody and would not be able to standby to receive the security code issued by ECQ in order to call back to cast their vote as an anonymous caller. Corrective services facilities also do not have compatible phone systems for this process to occur. Therefore, the requirement for eligible electors who are detained in lawful custody to make a declaration vote, and the removal of their eligibility to make a telephone vote is necessary due to the technical and operational constraints which exist in Queensland corrective services facilities.

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

The removal of the eligibility of detained electors to make a telephone vote achieves the purpose of providing electors with an opportunity to exercise their right to vote in a manner consistent with the operational capabilities of Queensland corrective services facilities. Detained electors will instead be able to exercise their right to vote by way of postal voting, and Queensland corrective services facilities are able to facilitate that process.

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

No other less restrictive or reasonably available ways to achieve the purpose have been identified. Queensland corrective service facilities do not have the technical or operational capability to facilitate the telephone voting process.

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 requirement for detained electors to make a declaration vote rather than a telephone vote provides a reasonable opportunity for such electors to exercise their right to vote while taking into account necessary operational issues associated with the deprivation of liberty.

Conclusion

I consider that the Electoral and Other Legislation Amendment Regulation 2020 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.

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Attorney-General and Minister for Justice
Leader of the House

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