

Electoral (By-elections Before Next General Election) 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*, I, the Honourable Yvette D'Ath MP, Attorney-General and Minister for Justice provide this human rights certificate with respect to the *Electoral (By-elections Before Next General Election) Regulation 2020* made under the *Electoral Act 1992* (the Electoral Act) and the *State Penalties Enforcement Act 1999*.

In my opinion, the *Electoral (By-elections Before Next General Election) Regulation 2020*, 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

Section 392J of the Electoral Act was inserted by the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020*, and allows for a regulation to make provision about a matter for which it is necessary to make provision to allow or facilitate the holding of a State by-election in a way that helps minimise serious risks to the health and safety of persons caused by the public health emergency involving COVID-19.

Under section 104 of the Electoral Act, scrutineers are currently entitled to be present:

- in each ordinary polling booth, mobile polling booth and pre-poll voting office at times when electors are allowed to vote at the place, beforehand for the purpose of inspecting ballot boxes and the examination of declaration envelopes received before 6pm on the day before polling day, and afterwards;
- to observe the examination of declaration envelopes, the printing of completed ballot papers for electronically assisted votes and the counting of votes; and
- at a place to observe any part of a procedure for making an electronically assisted vote.

Each candidate is entitled to have one scrutineer present for each issuing officer during times when electors are allowed to vote and beforehand. Each candidate is entitled to have one scrutineer present for each member of the ECQ's staff at the place where examination of declaration votes and the counting of votes occurs.

In addition to section 104(6), which allows a scrutineer to object to the entitlement of a person to vote at an election or record details of electors who vote at an election, scrutineers are permitted to do certain things specified in sections 107, 108, 109, 112, 113, 117, 120, 127, 128, 129, 130A and 189 of the Electoral Act.

The Regulation makes provision for the following matters about State by-elections held before the next general election:

- allowing the Electoral Commission of Queensland (ECQ) to give a direction about the number of scrutineers each candidate may have at a polling booth or other place a scrutineer is entitled to be present under the Act, or prohibiting a scrutineer from being present at a polling booth or other place at which a scrutineer is otherwise entitled to be present under the Electoral Act, with an offence for contravention;
- allowing the returning officer or member of the ECQ's staff in charge of a polling booth to give a direction about the movement of candidates or scrutineers at the polling booth for the election, with an offence for contravention;
- allowing procedures about how an elector may make an electronically assisted vote for a by-election, without the need for the procedures to be approved by a regulation and tabled in the Legislative Assembly;
- allowing a returning officer to arrange for the counting of votes to be filmed by a member of ECQ's staff;
- allowing a returning officer to direct a member of ECQ's staff to carry out the counting of votes at a by-election at a stated place; and
- restricting the timing for the display of an election sign or setting up other items to be used for a purpose related to an election within 100 metres of a building to be used as an ordinary polling booth, the grounds in which a polling booth is located or within 100 metres of any entrance to the grounds (the signage restrictions), with an offence for contravention.

The Regulation also amends the *State Penalties Enforcement Regulation 2014* (SPE Regulation) to prescribe the new offences for contravention of a direction under the new directions powers or the signage restrictions as infringement notice offences

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 Regulation:

- right to freedom of movement (section 19 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 privacy and reputation (section 25 of the HR Act);
- right to liberty and security of the person (section 29 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).

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

Regulations under section 392J of the Electoral Act - scrutineering

(a) the nature of the right

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 right to freedom of movement protects a person's right to move freely within Queensland and to enter and leave it and choice of residence, if they are lawfully within Queensland. The right is based upon Article 12 of the International Covenant on Civil and Political Rights (ICCPR). The ICCPR states in part that the right shall not be subject to any restrictions except those which are provided by law and are necessary to protect public health. However, the United Nations Human Rights Committee (UNHRC) considers that the right for individuals to move freely should not be unnecessarily affected by legal and bureaucratic barriers.

The Regulation, by allowing the ECQ to give a direction about the number of scrutineers each candidate may have at a polling booth or other place that scrutineers are otherwise entitled to be present, or by allowing the returning officer or member of the ECQ's staff in charge of a polling booth to give a direction about the movement of candidates or scrutineers at the polling booth, may limit the right to take part in public life and freedom of movement. In particular, a direction may prevent scrutineers from doing things otherwise permitted by the Electoral Act (in particular, if scrutineers were prohibited from being present altogether) or may restrict their capacity to undertake scrutineering activities (in particular, if their movement were restricted in such a way as to not be able to perform certain actions effectively). Therefore, the Regulation impacts the right to take part in public affairs by limiting the involvement of scrutineers, which is important for the integrity of elections and ensuring that an election is perceived as free and fair. A direction may also restrict the free movement of scrutineers by imposing legal barriers on their movement in certain locations.

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.

The Regulation, by allowing a returning officer to arrange for the counting of votes to be filmed, may limit the privacy of those present by potentially filming them.

(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 limitations on human rights to be imposed by the Regulation is to protect the Queensland public from risks to health and safety caused by the public health emergency involving COVID-19, including limiting situations and public events which may result in contagion through person-to-person contact. Protecting the health and the safety of the public, including more vulnerable persons, is a fundamental responsibility of government and is consistent with a free and democratic society based on human dignity, equality and freedom.

In relation to allowing a returning officer to arrange for the counting of votes to be filmed, the purpose is to ensure that there is an additional mechanism available to support the integrity of

the election in the event that the involvement of scrutineers is limited to protect the health and safety of the public.

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

The limitations are necessary to achieve the purpose because allowing the ECQ to give a direction about the number of scrutineers each candidate may have at a polling booth or other place that scrutineers are otherwise entitled to be present, or by allowing the returning officer or member of the ECQ's staff in charge of a polling booth to give a direction about the movement of candidates or scrutineers at the polling booth, where these are considered necessary to minimise serious risks to the health and safety, will limit person-to-person contact and thereby reduce health and safety risks for individuals and the public more generally.

Allowing flexibility for a returning officer to arrange for the counting of votes to be filmed, will ensure that there is an additional mechanism available to support the integrity of the election in view of the potential for more limited involvement of scrutineers.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the Regulation. The Regulation is confined to by-elections held before the next general election, with the purpose of minimising the risks to health and safety being considered in the exercise of discretions by the ECQ or by the returning officer or member of staff in charge of the polling booth.

In the context of minimising risks to health and safety, it is acknowledged that there may be a specific need to prohibit the presence of scrutineers entirely, or restrict their movement in such a way as to not be able to perform certain actions as effectively as they otherwise could. However, in exercising the power to give directions, the purpose of minimising the risks to health and safety is required to be considered, which will effectively limit any arbitrary exercise of this discretion. The ability for a returning officer to arrange for filming is limited to the counting process, and not other processes as part of the holding of the by-election.

(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 limitation 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 public health emergency involving COVID-19 outweighs any potential limitations on taking part in public life, freedom of movement and the right to privacy and reputation.

(f) any other relevant factors

Not applicable.

Regulations under section 392J of the Electoral Act – signage restrictions

(a) the nature of the right

The Regulation provides for restrictions on the setting up of election signage before 5am on polling day within 100 metres of the building in which the voting compartments for an election are to be located, the grounds, a boundary fence or structure or within 100 metres of any entrance to the grounds, with an offence of 10 penalty units for contravention.

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 restriction limits freedom of expression and the right to take part in public life (as described above). Two classes of individuals are affected by the offences: the rights of those wishing to impart the information and ideas through signage; and the rights of those wishing to receive them.

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

The purpose of the limitations on human rights to be imposed the Regulation 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. Protecting the health and the safety of the public, including more vulnerable persons, 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 to be imposed, and its purpose, including whether the limitation helps to achieve the purpose

The signage restrictions will prevent any potential for person-to-person contact to occur at and around locations to be used as an ordinary polling booth. In particular, this will limit the scope for person-to-person contact to occur at a time where such locations may be in use for another purpose (for example, a school or community facility). This will help to achieve the purpose of minimising risks to health and public safety by reducing the scope for such contact, and limiting it occurring before 5am on polling day.

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

There are no less restrictive and reasonably available ways to achieve the purpose of the Regulation. The Regulation is confined to by-elections held before the next general election, with the purpose of minimising the risks to health and safety caused by the public health emergency involving COVID-19. The display of signs in premises used as residences and other lawfully occupied premises or used by a candidate in the election or a registered political party as an office, are excluded from the offence, which limits the restriction.

(e) the balance between the importance of the purpose, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, taking into account the nature and extent of the limitation 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 public health emergency involving COVID-19 outweighs any potential limitations on freedom of expression and taking part in public life.

Amendments to the SPE Regulation

The Regulation prescribes the following offences under the SPE Regulation:

- for any person, contravening a direction given by the ECQ about candidates or scrutineers at particular places (maximum penalty – 20 penalty units);
- for a candidate or scrutineer, contravening a direction given by the returning officer or member of the ECQ’s staff in charge of a polling booth about the movement of candidates or scrutineers (maximum penalty – 20 penalty units); and
- for a person who displays an election sign or setting up other items to be used for a purpose related to an election before 5am within 100 metres of a building to be used as an ordinary polling booth, the grounds in which a polling booth is located or within 100 metres of any entrance (maximum penalty – 10 penalty units).

(a) the nature of the right

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 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 infringement notice offences under the SPE Regulation will mean that they will be subject to the enforcement powers under the SPE Act if, for example, if an individual fails to pay the infringement notice fine. Enforcement action under the *State Penalties Enforcement Act 1999* (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 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 and security 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, criminal sanctions) and will be relevant whenever a person is placed at risk of imprisonment. 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.

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.

(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 timely action to enforce directions on-the-spot at the polling booth or other place where activities in relation to a by-election are being held, or, in respect of the signage restrictions in the area around a polling booth prior to 5am on polling day (signage restrictions). The intention is to provide a quick and clear deterrent to other individuals from engaging in similar behaviour and send a clear message to all individuals that the directions given by the ECQ, the returning officer or member of the ECQ's staff in charge of a polling booth to regulate the presence and movement of persons at relevant places and the signage restrictions, 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 and public events which may result in contagion through person-to-person contact.

Ensuring an appropriate and timely enforcement mechanism is available to the ECQ for individuals who disregard and fail to comply with these directions or the signage restrictions 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 on the spot fines to be issued to any individual, campaigner or scrutineer, who fails to comply with the lawful directions that have been given or the signage restrictions. This, in turn, facilitates an enforcement mechanism that immediately addresses the offending behaviour and provides a clear deterrent to others by showing that contraventions will be penalised. It also achieves the purpose of ensuring (as best as is possible) that arrangements that support the protection of the health and the 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 not provide an immediate or effective enforcement response to the conduct.

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 penalty infringement notices 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 an infringement notice fine.

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 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. The maximum amount of a fine that can be issued for the relevant offences for contravening directions is set at two penalty units and for not complying with the signage restrictions is five 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 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 public health emergency involving COVID-19 by providing the ECQ with an effective on-the-spot enforcement mechanism to ensure compliance with their directions and the signage restrictions outweighs any limitations on the right to property, right to liberty and security, fair hearing and rights in criminal proceedings.

(f) any other relevant factors

Not applicable.

Conclusion

I consider that the *Electoral (By-elections Before Next General Election) Regulation 2020* is compatible with the *Human Rights Act 2019* 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 due to public health considerations in the public health emergency involving COVID-19.

YVETTE D'ATH MP
Attorney-General and Minister for Justice
Leader of the House

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