

State Penalties Enforcement (Electoral) 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, the Honourable 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 (Electoral) Amendment Regulation 2021* (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

The *COVID-19 Emergency Response and Other Legislation Amendment Act 2020* amended the *Electoral Act 1992* (Electoral Act) to 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 COVID-19 public health emergency.

Part 12C of the Electoral Act applies to by-elections for which the writ is issued on or before the COVID-19 legislation expiry day. The COVID-19 legislation expiry day is currently defined in section 4A of the *COVID-19 Emergency Response Act 2020* as the earlier of 30 September 2021, or another day prescribed by regulation.

- The Amendment Regulation amends the *State Penalties Enforcement Regulation 2014* (SPE Regulation) to prescribe the following offences in part 12C as penalty infringement notice (PIN) offences: contravening a direction by the Electoral Commission of Queensland (ECQ) about the distribution or display of how-to-vote cards or other election material at a polling booth and canvassing for votes in or near a polling booth (section 392ZL(4) of the Electoral Act) - PIN amount: one penalty unit;
- contravening a direction by the ECQ about the number of scrutineers each candidate may have at a polling booth or other place where a scrutineer is entitled to be present, or prohibiting a candidate or scrutineer from being present at a polling booth or other place they would otherwise be entitled to be present (section 392ZM(4) of the Electoral Act) - PIN amount: two penalty units; and
- contravening a direction by a returning officer or member of the electoral commissioner's staff in charge of a polling booth about the movement of candidates or scrutineers at the polling booth or other place where they may be present (section 392ZN(4) of the Electoral Act) - PIN amount: two penalty units).

Human Rights Issues

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

I consider the following human rights to be relevant to the Amendment Regulation:

- property rights (section 24 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).

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

The underlying value of the **rights in criminal proceedings** protected by the HR Act 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 not to 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 them for an offence).

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

(a) the nature of the right

Prescribing the abovementioned offences as PIN offences under the SPE Regulation will mean that they will be subject to the enforcement powers under the SPE Act if, for example, an individual does not pay the PIN fine. Enforcement action under the 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.

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 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 action to enforce directions at the polling booth or other place where activities in relation to the by-election are being held. The intention is to provide a clear deterrent that the directions given by the ECQ, the returning officer or member of the electoral commissioner's staff in charge of a polling booth to regulate the distribution and display of how-to-vote cards and the presence and movement of persons at relevant places 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 which may result in contagion through person-to-person contact.

Ensuring this enforcement mechanism is available to the ECQ for individuals who disregard and fail to comply with these directions 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 fines to be issued to any individual, campaigner or scrutineer who fails to comply with the lawful directions 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 that support the protection of the health and 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 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 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 if 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.

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 caused by the COVID-19 public health emergency by providing the ECQ with an efficient enforcement mechanism to ensure compliance with their directions at by-elections outweighs any limitations on the right to property, right to a fair hearing and rights in criminal proceedings.

Conclusion

I consider that the Amendment Regulation is compatible with the HR Act 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.

SHANNON FENTIMAN MP
Attorney-General and Minister for Justice
Minister for Women and Minister for the
Prevention of Domestic and Family Violence