

Justice Legislation (COVID-19 Emergency Response—Proceedings and Other Matters) Regulation 2020

Explanatory notes for SL 2020 No. 103

Made under the

Coroners Act 2003

COVID-19 Emergency Response Act 2020

Crime and Corruption Act 2001

Criminal Code Act 1899

Evidence Act 1977

Justices Act 1886

Property Law Act 1974

General Outline

Short Title

Justice Legislation (COVID-19 Emergency Response—Proceedings and Other Matters)
Regulation 2020

Authorising law

Section 99 of the *Coroners Act 2003* and Part 4 of the *COVID-19 Emergency Response Act 2020*

Section 348 of the *Crime and Corruption Act 2001* and Parts 3 and 5 of the *COVID-19 Emergency Response Act 2020*

Section 708 of the Criminal Code under the *Criminal Code Act 1899* and Part 5 of the *COVID-19 Emergency Response Act 2020*

Section 135 of the *Evidence Act 1977* and Part 5 of the *COVID-19 Emergency Response Act 2020*

Section 266 of the *Justices Act 1886* and Part 5 of the *COVID-19 Emergency Response Act 2020*

Section 351 of the *Property Law Act 1974* and Part 3 of the *COVID-19 Emergency Response Act 2020*

Policy objectives and the reasons for them

On 29 January 2020, the Minister for Health and Minister for Ambulance Services declared a public health emergency under section 319 of the *Public Health Act 2005* due to the outbreak of COVID-19 (COVID-19 emergency).

The *COVID-19 Emergency Response Act 2020* (COVID-19 Response Act) commenced on 23 April 2020. Under section 2 of the COVID-19 Response Act the main purposes of the Act include to protect the health, safety and welfare of persons affected by the COVID-19 emergency and to facilitate the continuance of public administration, judicial process, small business and other activities disrupted by the COVID-19 emergency.

The COVID-19 Response Act includes power to make extraordinary regulations. Under section 5, a Minister may recommend to the Governor in Council the making of an extraordinary regulation only if satisfied it is necessary for a purpose of the COVID-19 Response Act.

Part 3 of the COVID-19 Response Act relates to reducing physical contact between persons. Section 8, in part 3, of the COVID-19 Response Act provides an additional regulation-making power in relation to requirements or permissions under an Act for a person to physically attend a place or meeting or for an entity to call or hold a meeting for a particular purpose or a particular matter. Section 9, in part 3, of the COVID-19 Response Act provides a regulation-making power in relation to requirements or permissions under an Act related to documents.

Part 4 of the COVID-19 Response Act relates to modifying statutory time limits. Section 13, in part 4, provides an additional regulation-making power to modify a statutory time limit under an Act where an Act does not expressly authorise an entity to modify the period.

Part 5 of the COVID-19 Response Act relates to proceedings. Section 16, in part 5, provides a regulation-making power to allow a regulation to be made under the COVID-19 Response Act for particular purposes including:

- alternative processes or methods for making, signing, filing, giving or verifying documents;
- alternative methods for presenting indictments;
- the use of audio visual links or audio links; and
- the restriction of access to the proceedings by members of the public.

Section 17, in part 5, provides an additional regulation-making power for regulations to be made under an enabling Act for a matter mentioned above in section 16 and also provisions for:

- altering the constitution of the relevant entity for conducting the proceeding;
- an alternative method of service to satisfy a requirement about personal service of a document in the proceeding;
- videorecording of a witness's evidence to be viewed and heard in the proceeding instead of direct testimony;
- the proceeding to be conducted in an alternative location; and
- other procedural arrangements in relation to the proceeding.

The COVID-19 emergency has had a significant impact on all of Queensland, including the justice system and justice agencies. The policy objectives of the *Justice Legislation (COVID-19 Emergency Response—Proceedings and Other Matters) Regulation 2020*

(the Regulation) are to ensure the continuance of public administration of justice agencies and judicial process and to protect the health, safety and welfare of persons affected by the COVID-19 emergency involved in the justice system.

Annual Report of the Domestic and Family Violence Death Review and Advisory Board

Section 91ZB of the *Coroners Act 2003* (the Coroners Act) provides that the Domestic and Family Violence Death Review and Advisory Board (the DFV Board) must, within 3 months after the end of each financial year, give the Minister an annual report in relation to the performance of the Board's functions during the financial year. The DFV Board is due to deliver its fourth annual report by 30 September 2020.

The COVID-19 emergency has impacted on the functioning of the DFV Board in a variety of ways which is likely to impede their capacity to deliver the next annual report in the requisite timeframe. This has included impacts on the convening of meetings and the availability of DFV Board members and secretariat resourcing.

Indictments

Section 560 of the Criminal Code provides for the signing and presentation to the court of an indictment (i.e. a written charge preferred against an accused person in order to the person's trial before the District or Supreme Courts) by a Crown Law Officer, a Crown prosecutor or some other person appointed in that behalf by the Governor in Council. Section 560 further provides that if a person has been committed for trial for an indictable offence that may be tried in the District Court, the indictment may be presented in either the Supreme or District Court.

Section 561 of the Criminal Code provides for the signing and presentation of ex-officio indictments (i.e. where there has been no committal).

The requirement to present an indictment has always been taken to require the presence in a courtroom of a person authorised to present an indictment who physically hands up, to the court, an indictment with an original signature upon it.

Section 563 of the Criminal Code allows specified persons to enter a nolle prosequi. Pursuant to section 563(1), a Crown Law Officer must convey this information to the court in writing under the officer's hand. Section 563(2) also provides that a Crown prosecutor or a person appointed by the Governor in Council to present indictments in any court of criminal jurisdiction may inform that court, by signed writing, that the Crown will not further proceed upon any indictment, or in relation to any charge contained in any indictment, then pending in that court.

Nolle prosequis (for all or part of an indictment) are similarly currently entered by the Crown through the physical endorsing of the indictment in court or handing up a document with a copy of the replacement indictment attached.

In the context of COVID-19, there is a need to enable alternative means of indictment presentation and entering of nolle prosequis to limit person to person contact and reduce the need for in-court presence of persons.

Appearances in response to a Notice to Appear

Under Chapter 14, part 5 of the *Police Powers and Responsibilities Act 2000*, a police officer may commence a proceeding for any offence by the issuing of a Notice to Appear (NTA) which must set out a range of matters, including the date and time in which the person is obliged to appear in court.

Part 6A of the *Justices Act 1886* (Justices Act) provides for the use of video link facilities or audio link facilities. However, Part 6A limits the use of such facilities particularly to where the person is:

- in custody at a correctional institution that has video link facilities or audio link facilities linking it and the primary court; or
- represented by a lawyer and present at another place that the presiding magistrate considers suitable for the conduct of a proceeding under this part and has video link facilities or audio link facilities linking it and the primary court.

A number of defendants on their first appearance in response to an NTA will therefore not fall under Part 6A.

The impacts of the COVID-19 emergency in respect of social distancing and quarantine requirements means there is a need to facilitate alternative arrangements that minimise personal appearance or the physical presence of persons in response to an NTA.

Prerecording of evidence

Section 21A of the *Evidence Act 1977* (Evidence Act) allows the court to make a range of orders and directions for special witnesses to give evidence via alternative means, including through the pre-recording of their evidence rather than direct oral testimony in court. However, a 'special witness' is exhaustively defined to include certain vulnerable persons, including a child under 16 years and a person who, in the court's opinion, would as a result of a mental, intellectual or physical impairment or a relevant matter, be likely to be disadvantaged as a witness if required to give evidence in accordance with the usual rules and practice of the court.

More flexible means for the giving of evidence are required in the context of the COVID-19 emergency, including reducing the need for vulnerable persons to attend court to give evidence in a courtroom during a trial.

Crime and Corruption Commission – issuing and signing of notices and hearings

Under Chapter 3, part 1 of the *Crime and Corruption Act 2001* (the CC Act) the Chairperson may issue a range of investigation-related hearing notices. For example, under section 82, the Chairperson of the Crime and Corruption Commission (CCC) may issue an attendance notice requiring a person to attend at a hearing at a stated time and place for various purposes, including for example for a hearing in relation to a crime investigation or corruption investigation: to give evidence; or to produce a stated document or thing; or to establish a reasonable excuse or claim of privilege under section 72 or 74. These notices are currently 'wet' signed by the Chairperson and served personally on the respondent.

Also, while the CCC has wide powers in relation to the holding of hearings in relation to the performance of its functions (except for confiscation related investigations), there is no specific provision allowing hearings to be undertaken remotely by way of video link or audio link (including telephone).

The impacts of the COVID-19 emergency in respect of social distancing requirements has meant that there is a need to facilitate alternative arrangements that minimise personal appearance or the physical presence of persons at CCC hearings and contact between persons in relation to the exercise of its functions and powers.

Places of settlement for land contracts

Section 61(2)(c) of the *Property Law Act 1974* (the Property Law Act) provides under any contract for the sale of any land there shall be implied a term so that, if the parties do not otherwise agree on a place of settlement, then settlement must take place at the land registry. This section provides an important default position if the parties do not (or cannot) agree on a place of settlement.

The COVID-19 emergency has meant that a number of land registry offices are closed to titles lodgements. While, in the majority of cases the seller will be able to nominate a place for settlement to occur, which should avoid the need to hold it at the land registry, if the land registry is closed, then there is a risk of delay and associated costs to the parties in debating and agreeing an alternative place of settlement, including the risk of settlement not proceeding.

Achievement of policy objectives

The Regulation achieves the policy objectives through modifications to the Coroners Act, Criminal Code, CC Act, Evidence Act, Justices Act and Property Law Act.

The Regulation will expire at the same time of the COVID-19 Response Act on 31 December 2020.

Modification of Coroners Act

The Regulation contains a modification to the Coroners Act to extend by three months (from 30 September 2020 to 31 December 2020) the statutory deadline for provision of the annual report of the DFV Board. This modification will provide sufficient time, in the context of COVID-19, for the DFV Board to meet its statutory obligations to deliver an annual report of the performance of the DFV Board's functions.

Modification of the CC Act

To ensure that the CCC investigations, operations and activities are able to continue despite social distancing restrictions or other impacts associated with the COVID-19 emergency, the Regulation modifies the CC Act to ensure that technology-based arrangements may be used for the giving of notices and the conduct of CCC hearings where appropriate.

Notices under Chapter 3, part 1 of the CC Act will be able to be given by email to a person or the person's lawyer provided that an email address has been provided to the CCC for this purpose. The Chairperson will also need to be satisfied that giving the notice

electronically is appropriate either to protect the health, safety and welfare of persons affected by the COVID-19 emergency or to facilitate the continuance of the public administration of the commission in circumstances where its public administration or other activities are disrupted by the COVID-19 emergency. The Chairperson of the CCC will also be able to give a notice that is electronically signed.

Part or all of a proceeding under Chapter 4, part 1 of the CC Act will be able to be conducted by the use of audio visual links or audio links where the presiding officer considers this is appropriate having regard to practical considerations and the need to protect the health, safety and welfare of persons affected by the COVID-19 emergency or to facilitate the continuance of the public administration of the commission in circumstances where its public administration or other activities are disrupted by the COVID-19 emergency.

The Regulation clarifies that the provisions of the CC Act applying to hearings will continue to apply with necessary changes to hearings conducted via audio visual or audio link.

Modification of the Criminal Code

The Regulation modifies the Criminal Code to enable presentation of an indictment by audio visual link or audio link to limit personal contact and reduce the need for in-court presence.

Similarly, the Regulation enables alternative means of entering a nolle prosequi. The Regulation enables the appearance by video or telephone to 'effect' the discontinuance of a filed electronic notification of discontinuance.

Modification of the Evidence Act

The Regulation modifies the Evidence Act to allow the court to order the videorecording of all, or a portion, of a person's evidence, be made under any conditions stated in the order and that the videorecorded evidence be viewed and heard in the proceeding instead of the person's direct testimony if:

- (a) the person would be at significantly greater risk from COVID-19 than members of the public generally, including because of the person's age or health; or
- (b) the person would pose a risk to other persons because the person is affected by COVID-19; or
- (c) it is necessary to protect the health, safety and welfare of persons affected by the COVID-19 emergency (for example to limit the number of persons in physical attendance in a courtroom).

Sections 21A(5) to (8) and 21AAA of the Evidence Act apply to ensure the videorecorded evidence made under the Regulation is used following the procedures that currently exist.

The Regulation also makes it clear that the videorecording can be presented in a proceeding after the regulation expires on 31 December 2020 if this is in the interests of justice. This will ensure the court considers whether the videorecorded evidence is the best evidence of the witness at the time of the proceeding.

Modification of the Justices Act

Where a person is required to appear in response to an NTA, the Regulation modifies the Justices Act to allow a Magistrates Court to conduct a hearing by way of audio video link or audio link where the Court considers this is appropriate having regard to practical considerations, the interests of justice and the need to either protect the health, safety and welfare of persons affected by the COVID-19 emergency or to facilitate the continuance of the public administration of the court in circumstances where its public administration or other activities are disrupted by the COVID-19 emergency.

Where the Court adjourns the hearing under the above provision, written notice must be provided by the clerk of the court to the defendant or their legal representative as soon as practicable. An adjournment notice will be able to be given electronically provided certain conditions are met. The Regulation clarifies that it is not intended to affect the provisions of the Justices Act for the giving of an adjournment notice in other ways.

Modification of the Property Law Act

The Regulation modifies section 61 of the Property Law Act to provide an alternative default place of settlement for contracts for the sale of land given the impacts of COVID-19. The Regulation provides that, if the parties do not otherwise agree, the place of settlement is the office of the land registry nearest to the land at which the document relating to the conveyance may be lodged; or if the land registry is closed, the registry of the Magistrates Court nearest to the land.

Consistency with policy objectives of authorising law

The Regulation is consistent with the policy objectives of the authorising laws. Section 4 of the COVID-19 Response Act provides that the Act applies despite any other Act or law other than the *Human Rights Act 2019*.

Inconsistency with policy objectives of other legislation

The Regulation is not inconsistent with the policy objectives of other legislation.

Alternative ways of achieving policy objectives

There is no alternative way of achieving the policy objectives.

Benefits and costs of implementation

The Regulation will, in the context of COVID-19, help ensure justice agencies and Queensland Courts operate according to health advice and directions, including social distancing, and provide flexibility so that they can continue to perform their functions. The Regulation will also ensure that the settlement of contracts for the sale of land are not disrupted by the impacts of COVID-19.

Any costs associated with the Regulation will be met from existing agency resources.

Consistency with fundamental legislative principles

Breaches of fundamental legislative principles raised by the amendments in the Regulation are addressed below.

Whether legislation has sufficient regard to rights and liberties of individuals (Legislative Standards Act 1992, section 4(2)(a))

Modification of the CC Act

The Regulation represents a potential departure from the fundamental legislative principle that requires that legislation has sufficient regard to the rights and liberties of individuals, including adherence to obligations to provide procedural fairness. The method of giving a notice by email may compromise the understanding of its recipient of the effect of the notice, and their corresponding rights and obligations, thereby diminishing the adequacy of the notice with respect to any consequent action the CCC may be entitled to take.

Nevertheless, the safeguard requiring the Chairperson to be satisfied that the person or their lawyer has given the CCC an email address for the purpose of receiving the notice, significantly reduces the likelihood that the person might fail to appreciate the significance of the notice. In addition, the requirement that notices may only be given by email in circumstances where the Chairperson is satisfied this is appropriate either to protect the health, safety and welfare of persons affected by the COVID-19 emergency or to facilitate the continued functioning of the commission where this has been disrupted by the COVID-19 emergency, will act to ensure that potential limitations on the rights and liberties of individuals are minimised.

The alternative process for giving notices is considered reasonable and justified to enable the continuation of the CCC's investigations, operations and other activities during the COVID-19 emergency whilst also ensuring consistency and compliance with health advice, particularly in relation to social distancing.

The power to replace personal attendance with technology-based arrangements may potentially infringe an individual's right to receive a fair hearing to the extent that the modifications may negatively impact members of the community who have limited access to, or familiarity with, technology-based facilities or who may be otherwise disadvantaged by the use of such facilities.

The potential for any infringement of this right is minimised by the requirement in the Regulation which allows for proceedings to be conducted by the use of audio visual links or audio links only where the presiding officer considers this is appropriate having regard to whether it is practical for such technology to be used in the proceeding. In addition, the Regulation specifically preserves, with necessary changes, the operation of all other provisions in the CC Act relating to hearings. For example, section 180 of the CC Act will continue to require that the presiding officer for the hearing act in such a way as to ensure a fair and proper consideration of the issues. Section 181 of the CC Act, which provides that a witness at a commission hearing may be legally represented, and section 182 of the CC Act, which requires the presiding officer at a hearing to arrange for an interpreter if necessary, will also continue to apply. These safeguards will ensure that matters such as an individual's access to suitable audio-visual or audio facilities, as well as an

individual's capacity to understand and engage in the proceedings, are considered for each decision to hold a hearing in reliance on the modified arrangements provided for by the Regulation.

This provision is considered reasonable and justified to enable the CCC to continue to use its hearing power during the COVID-19 emergency.

Modification of the Criminal Code

The modifications to the Criminal Code to allow for electronic presentation of indictments and nolle prosequis have the potential to diminish the openness and transparency of the court process given that the utilisation of electronic means to present indictments and nolle prosequis may impair the public's ability to see this aspect of a proceeding. This breach of the principle of open justice is however considered justified given the paramount need to employ measures to obviate the threat to public health caused by the COVID-19 emergency.

Modification of Evidence Act

The modifications to the Evidence Act may not be consistent with rights relating to a fair hearing. In the context of a criminal trial, fair and appropriate procedures include ensuring that witnesses give their best evidence. To ensure that witnesses understand the critical importance of giving accurate evidence in a criminal trial, this has long been achieved by requiring the witnesses to give direct oral testimony in open court. However, there are already some exceptions to this requirement for certain witnesses (generally based on vulnerability, such as age or exposure to sexual or violent crimes) which enable them to give evidence in alternative ways, including away from the courtrooms.

The Regulation extends the availability of prerecording evidence to other persons provided the court is satisfied certain requirements are met. It is considered that any potential breach of fundamental legislative principles is justified to protect the health, safety and welfare of persons during the COVID-19 emergency.

Modification of Justices Act

The modifications to the Justices Act allowing the clerk of the court to give notice of an adjournment electronically in relation to a proceeding conducted via audio-visual or audio link under the Regulation potentially infringes the fundamental legislative principle that legislation must have sufficient regard to the rights and liberties of individuals, including adherence to obligations to adopt fair and appropriate procedures.

The method of giving the notice of adjournment electronically may compromise the understanding of its recipient of the effect of the notice of adjournment, and their corresponding rights and obligations, including consequences for failure to appear at the adjourned hearing. However, this is minimised by the appearance of the person by audio visual link or audio link at the time the Court adjourns the proceeding to a later date where they will have been made aware of their rights and obligations and consequences for failing to appear. In addition, the requirement that notices may only be given by email in circumstances where the clerk of the court is satisfied this is appropriate either to protect the health, safety and welfare of persons affected by the COVID-19 emergency or to facilitate the continuance of the public administration of the court where this has been

disrupted by the COVID-19 emergency, will also act to ensure that potential limitations on the rights and liberties of individuals are minimised.

The modification of the Justices Act to provide an additional power to hear certain matters by audio link or audio visual link may potentially infringe an individual's right to receive a fair hearing to the extent that the modifications may have a disproportionate impact on disadvantaged members of the community who have limited access to information technology. However, as this is an additional power, magistrates may still hear matters in person where this is necessary.

The potential for any infringement of this right is also minimised by the requirement in the Regulation which allows for proceedings to be conducted by the use of audio visual link or audio link only where the court considers this is appropriate having regard to whether it is practical and in the interests of justice for such technology to be used in the proceeding. This will ensure that the court will consider matters such as an individual's capacity to comprehend the proceedings or communicate with their legal representative or interpreter where relevant as well as the suitability and individual's access to the audio visual or audio facilities.

Any potential breach of fundamental legislative principles is considered reasonable and justified to enable the continued functioning of the courts during the COVID-19 emergency whilst also ensuring consistency and compliance with health advice.

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not adversely affect rights and liberties, or impose obligations, retrospectively (section 4(3)(g) of the Legislative Standards Act 1992)

Modification of Criminal Code

The modification of the Criminal Code to allow for electronic presentation of indictments breaches the fundamental legislative principle that requires that legislation should not adversely affect rights and liberties, or impose obligations, retrospectively, as it has some retrospective application. This provision seeks to validate appropriate and necessary processes that have been adopted for the presentation of indictments since March 2020 in the context of COVID-19. The breach of this fundamental legislative principle is justified given that the retrospective effect of the amendment is restricted to the discreet emergency period and validates efforts that have been made only in the context of protecting public health and is unlikely to have a significant detrimental impact given it relates to procedural processes.

Consultation

Key legal stakeholders, including the Queensland Law Society and Bar Association of Queensland, the Chief Magistrate, Chief Judge and Chief Justice of Queensland, and relevant industry stakeholders, including the Real Estate Institute of Queensland, were consulted on a draft of the Regulation.

Comments made by stakeholders were taken into account in finalising the Regulation.

The Department of Justice and Attorney-General has self-assessed the Regulation to be excluded from further regulatory impact analysis under exclusion category (g) or (j) of the Queensland Government Guide to Better Regulation as it is a regulatory proposal that is of a machinery nature or related to police powers, general criminal laws, the administration of courts and tribunals and corrective services.