



2021

Parliament of Tasmania

JOINT STANDING COMMITTEE

SUBORDINATE LEGISLATION

REPORT 16

**SCRUTINY OF NOTICE ISSUED UNDER SECTION 20 OF THE
COVID-19 DISEASE EMERGENCY (MISCELLANEOUS PROVISIONS) ACT 2020
(SUPREME COURT OF TASMANIA)**

Members of the Committee:

Ms Tania Rattray MLC (*Chair*)

Ms Ruth Forrest MLC

Ms Meg Webb MLC (*Deputy Chair*)

Mr Felix Ellis MP

Ms Janie Finlay MP

Ms Madeleine Ogilvie MP

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Introduction

The Committee was appointed under the provisions of Section 3 of the *Subordinate Legislation Committee Act 1969* (No. 44 of 1969). Section 8 of the Act outlines the functions of the Committee, as follows –

- (a) to examine the provisions of every regulation, with special reference to the question whether or not –
 - (i) the regulation appears to be within the regulation-making power conferred by, or in accord with the general objects of, the Act pursuant to which it is made;
 - (ii) the form or purport of the regulation calls for elucidation;
 - (iii) the regulation unduly trespasses on personal rights and liberties;
 - (iv) the regulation unduly makes rights dependent on administrative decisions and not on judicial decisions; or
 - (v) the regulation contains matters that, in the opinion of the Committee, should properly be dealt with by an Act and not by regulation; and
- (b) to make such reports and recommendations to the Legislative Council and the House of Assembly as it thinks desirable as the result of any such examination.

COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020 — Scrutiny of Notices

The Parliament of Tasmania passed the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (the Act) on 26 March 2020. The Act prescribes a role for the Joint Standing Committee on Subordinate Legislation in the scrutiny of certain notices under the Act.

In response to this new scrutiny role, the Committee has given extensive consideration to an appropriate mechanism for it to report upon its deliberations on all notices gazetted under the Act in the interest of public transparency. The Committee will:

- Publish a list of the notices to be discussed by the Committee, and documentation relating to notices to be examined by the Committee, to be published on the Committee website prior to each meeting; and
- Present regular reports to Parliament, which will contain further information in relation to the completed examinations of notice.

Notice under section 20 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (Supreme Court of Tasmania)

At its meeting on 2 September 2021, the Committee concluded its examination of the Notice and ***RESOLVED*** the Notice be examined, noting that it was consistent with the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*.

The supporting documentation provided by the Attorney-General and relevant correspondence related to the Notice is attached to this Report for completeness.

The Minutes of Proceedings related to this Notice are not attached to this Report due to the Committee not scheduled to meet again until 14 October 2021.

Tania Rattray

Hon Tania Rattray MLC
CHAIR

2 September 2021

Attorney-General
Minister for Justice
Minister for Corrections
Minister for Building and Construction
Minister for the Arts
Minister for Heritage



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17 MAY 2021

Hon Tania Rattray MLC
Chair
Parliamentary Standing Committee on Subordinate Legislation
Parliament House
HOBART TAS 7000

By Email - tania.rattray@parliament.tas.gov.au

Dear Ms Rattray

Please find enclosed a copy of a Notice I have issued under section 20 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*. The Notice is identical to an earlier Notice (except for different paragraph order) which was gazetted on 17 April 2021 and thus recently expired. The Notice was signed on 11 May 2021 and published in the Gazette on 12 May 2021.

The Notice enables the Supreme Court of Tasmania to, where necessary, continue to:

- despite section 90(1) of the *Sentencing Act 1997*, to the extent that it provides for sentences to be imposed in open court, impose a sentence for an offence in the approved manner determined by the Chief Justice;
- despite section 12A(2) of the *Criminal Code*, hold sittings of the criminal jurisdiction of the Supreme Court and the Court of Criminal Appeal in the approved manner determined by the Chief Justice in accordance with section 20(2) of the Act;
- despite section 411(1) of the *Criminal Code*, to the extent that it entitles an appellant to be physically present at an appeal being heard by the Supreme Court, provide for an appellant to be present at the appeal in the approved manner determined by the Chief Justice; and
- despite section 14 of the *Supreme Court Civil Procedure Act 1932*, have judges sit in the approved manner determined by the Chief Justice in accordance with s20(2) of the Act.

These measures are considered to remain proportionate in the circumstances and provide adequate safeguards to protect the principle of open justice to the greatest extent possible.

I enclose a fact sheet to provide further information on the Notice and the Advice provided by the Office of Parliamentary Counsel (OPC) under section 7(2) of the *Subordinate Legislation Act 1992*.

Yours sincerely



Hon Elise Archer MP
Attorney-General

Attachments –

- Signed Notice for s20
- Fact Sheet
- OPC Advice for Notice under s20

ADVICE OF DEPUTY CHIEF PARLIAMENTARY COUNSEL***Notice under section 20 of the COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020***

I advise that this statutory rule –

- (a) appears to be within the powers conferred by the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*; and
- (b) does not appear, without clear and express authority being provided by any Act, to –
 - (i) have any retrospective effect; or
 - (ii) impose any tax, fee, fine, imprisonment or other penalty; or
 - (iii) sub-delegate powers delegated by the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*; and
- (c) appears to be within the general objectives of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020*; and
- (d) is expressed in as clear and unambiguous language as is reasonably possible.

Dated 28 April, 2021.



K Woodward
Deputy Chief Parliamentary Counsel

TASMANIA

COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020

NOTICE UNDER SECTION 20

I, ELISE ARCHER, the Attorney-General, in pursuance of section 20 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* ("the Act"), at the request of the Chief Justice of the Supreme Court of Tasmania, being of the opinion that the relevant emergency circumstances exist in relation to this notice, declare that –

- (a) despite section 411(1) of the *Criminal Code*, to the extent that it entitles an appellant to be present at an appeal being heard by the Supreme Court, an appellant is entitled to be present at the appeal by being present in the approved manner determined by the Chief Justice in accordance with section 20(2) of the Act; and
- (b) despite section 12A(2) of the *Criminal Code Act 1924*, to the extent that it requires sittings of the criminal jurisdiction of the Supreme Court of Tasmania and sittings of the Court of Criminal Appeal to be held at the places at which the registries of the Court are established and at other places determined by the Chief Justice, such sittings may be held in the approved manner determined by the Chief Justice in accordance with section 20(2) of the Act; and
- (c) despite section 90(1) of the *Sentencing Act 1997*, to the extent that it provides that a sentence may be imposed in open court, a sentence for an offence, imposed by one or more judges of the Supreme Court, may be imposed in the approved manner determined by the Chief Justice in accordance with section 20(2) of the Act; and
- (d) despite section 14 of the *Supreme Court Civil Procedure Act 1932*, to the extent that it requires a Full Court consisting of two or more judges to sit

together as one court or a single judge to sit in court as a court, such sittings may be held in the approved manner determined by the Chief Justice in accordance with section 20(2) of the Act.

Dated: 11 May 2021

Signed:  ✓

Attorney- General

MINISTERIAL NOTICE - FACT SHEET

COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020

The attached Ministerial Notice is issued pursuant to section 20 of the *COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020* (the Act). The Attorney-General has issued the Notice, being of the opinion it was necessary and desirable to do so because of the emergency circumstances set out in section 5 of the Act.

As the Notice is issued under section 20 in relation to the Supreme Court and Court of Criminal Appeal, it was not required to have the emergency manager's approval under section 6.

Reason for Notice

Section 20 of the Act allows the Attorney-General to, by notice, authorise courts, tribunals and other entities to conduct proceedings in an 'approved manner', where requested by that court, tribunal or other entity, despite any legislative instrument to the contrary. Section 20(2) provides that in this case the 'approved manner' means 'the manner determined from time to time by' the Chief Justice of the Supreme Court.

In response to the COVID-19 pandemic, the Supreme Court of Tasmania implemented measures in April 2020 to reduce the potential risk of exposure to COVID-19 through persons being present at the court. These measures included, amongst other things, most (if not all) of the judiciary working remotely from the court, by way of telephone or audio visual link.

On 16 April 2020 at the request of the Chief Justice of the Supreme Court of Tasmania, the Hon Justice Alan Blow AO, and in accordance with section 20(3)(b) of the Act, the Attorney-General issued a Notice under section 20(1) to address the issue that alternative arrangements to the requirements of section 90(1) of the *Sentencing Act 1997*, sections 12A(2) and 411(1) of the *Criminal Code*, and section 14 of the *Supreme Court Civil Procedure Act 1932* are necessary or desirable in the emergency circumstances.

The Notice issued on 16 April 2020 enabled the Court to operate in a way which reduces the risk of spread of COVID-19 in Tasmania, with regard to the principles of open justice.

Pursuant to section 8(2) of the Act, that Notice expired on 16 April 2021.

The Chief Justice has requested that a new notice be issued in the same terms as the expired Notice, to ensure that the Court has the capacity to operate safely in the event that Tasmania, or parts of it, return to further COVID restrictions or lockdown during the next 12 months. Further, the Notice allows for flexible arrangements compatible with the interests of open justice, such as electronic sessions with the consent of the parties.

The new Notice is an identical reissue of the Notice that was issued on 16 April 2020, save for reordering of the paragraphs.

Section 90(1) of the Sentencing Act 1997

This provision provides that “[t]he sentence for an offence may be imposed in open court at any time and at any place in Tasmania.”

His Honour has expressed the view that this subsection implies that a sentence may only be imposed in open court. This may not be possible in all of the circumstances identified above. The Notice provides that, despite this subsection, sentences may be imposed in accordance with the approved manner.

Sections 12A(2) and 411(1) of the Criminal Code

Section 12A(2) provides that “[s]ittings of the criminal jurisdiction of the Supreme Court and sittings of the Court of Criminal Appeal are to be held from time to time as requested at the places at which the registries of the Court are established and at such other places as may be determined by the Chief Justice from time to time.”

His Honour indicated that, when operating remotely, the Court is unlikely to sit at the places where the registries of the Court are established.

Section 411(1) provides that “[a]n appellant, notwithstanding that he is in custody, shall be entitled to be present if he so desires, on the hearing of his appeal, except where the appeal is on some ground involving a question of law alone.”

Arrangements have been made for appeals to the Court of Criminal Appeal to be held, so far as practicable and when necessary, without participants (counsel, prisoners, appellants etc.) attending Court. In the circumstances identified above it may not be possible for an appellant to present if so desired. The Notice provides that, despite this subsection, the Court of Criminal Appeal may determine an appeal without any appellant being present, in accordance with the approved manner.

Section 14 of the Supreme Court Civil Procedure Act 1932

This section provides that subject to the provisions of this Act, the jurisdiction of the Court which is subject to this Act shall be exercised by –

- (a) a Full Court consisting of two or more judges of the Court sitting together as one court, either with or without a jury or an assessor or assessors;*
- (b) single judges sitting in court as a court, either with or without a jury or an assessor or assessors;*
- (c) single judges sitting in chambers, or in court or elsewhere as in chambers, either with or without an assessor or assessors.*

His Honour noted that due to the remote working arrangements, when put in place, it is likely that judges comprising a Full Court will not be in a position to sit in one place and single judges sitting as a Court will not be present at the court (rather, they will be connected remotely).

Effect of Notice

The Notice will enable the Supreme Court of Tasmania to:

- despite section 90(1) of the *Sentencing Act 1997*, to the extent that it provides for sentences to be imposed in open court, impose a sentence for an offence in the approved manner determined by the Chief Justice;
- despite section 12A(2) of the *Criminal Code*, sittings of the criminal jurisdiction of the Supreme Court and the Court of Criminal Appeal may be held in the approved manner determined by the Chief Justice in accordance with section 20(2) of the Act;
- despite section 411(1) of the *Criminal Code*, to the extent that it entitles an appellant to be physically present at an appeal being heard by the Supreme Court, provide for an appellant to be present at the appeal in the approved manner determined by the Chief Justice; and
- despite section 14 of the *Supreme Court Civil Procedure Act 1932*, judges may sit in the approved manner determined by the Chief Justice in accordance with s20(2) of the Act.

These measures are considered proportionate in the circumstances and provide adequate safeguards to protect the principle of open justice to the greatest extent possible.



Joint Standing Committee Subordinate Legislation

5 July 2020

The Hon Elise Archer MP
Attorney-General
10th Floor
15 Murray Street
HOBART TAS 7000

Dear Attorney-General

**Notice issued under section 20 of the
COVID-19 Disease Emergency (Miscellaneous Provisions) Act 2020
(Supreme Court of Tasmania)**

The Joint Standing Committee on Subordinate Legislation is currently considering the above Notice. At the Committee's meeting on 1 July 2021, it was noted that the Notice and supporting documentation had not been received by the Committee.

It would be appreciated if you could please forward the supporting documentation at your early convenience.

If you or your staff have any questions regarding the above please contact the Committee Secretary, Ms Julie Thompson on 6212 2320 or via email.

Yours sincerely

TANIA RATTRAY MLC
CHAIR

w. 03 6212 2320 m. 0488 060 687 e. subleg@parliament.tas.gov.au

Julie Thompson

From: Cameron, Natalie <Natalie.Cameron@dpac.tas.gov.au>
Sent: Tuesday, 6 July 2021 12:27 PM
To: Tania. Rattray
Cc: Julie Thompson; Archer, Minister
Subject: FW: Letter to the Hon Tania Rattray MLA - s20 COVID-19 Notices - Supreme Court Proceedings
Attachments: Letter to the Hon Tania Rattray MLA - s20 COVID-19 Notices - Supreme Court Proceedings.PDF; Joint Standing Committee Subor~20 (Supreme Court of Tasmania).PDF

Good morning Tania

In response to the Subordinate Legislation Committee's letter of 5 July, I note that our office forwarded you a copy of the Notice and supporting documentation in May 2021 (as per below email).

I have reattached the Attorney's correspondence containing the required documents, including the Notice, OPC advice and fact sheet, and can confirm the tabling date was 23 June.

Many thanks,
 Natalie

Natalie Cameron
 Senior Adviser

Office of the Hon Elise Archer MP
 Attorney-General
 Minister for Justice
 Minister for Corrections
 Minister for Workplace Safety and Consumer Affairs
 Minister for the Arts
 Liberal Member for Clark

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-----Original Message-----

From: Archer, Minister
Sent: Monday, 17 May 2021 3:12 PM
To: 'tania.rattray@parliament.tas.gov.au' <tania.rattray@parliament.tas.gov.au>
Subject: Letter to the Hon Tania Rattray MLA - s20 COVID-19 Notices - Supreme Court Proceedings

Dear Ms Rattray

Please find attached a letter from the Hon Elise Archer MP regarding s20 COVID-19 Notices - Supreme Court Proceedings.

Regards,