

Transport and Resources Committee

Report No. 5, 57th Parliament

Subordinate legislation tabled between 27 November 2020 and 23 February 2021

1 Aim of this report

This report summarises the committee’s findings following its examination of the subordinate legislation within its portfolio areas tabled between 27 November 2020 and 23 February 2021. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles and lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992*.¹

The report identifies any issues identified by the committee in its consideration of the human rights certificate[s] tabled with the subordinate legislation.²

2 Subordinate legislation examined

No. of 2020	Subordinate legislation	Date tabled	Disallowance date*
261	Building (Approval of Amendment of QDC) Amendment Regulation 2020	23 February 2021	13 May 2021
No. of 2021	Subordinate legislation	Date tabled	Disallowance date*
6	Transport Operations (Road Use Management—Driver Licensing) (Hazard Perception Test) Amendment Regulation 2021	23 February 2021	13 May 2021
9	Heavy Vehicle National Legislation Amendment Regulation 2021	23 February 2021	13 May 2021

*Disallowance dates are based on proposed sitting dates as advised by the Leader of the House. These dates are subject to change.

3 Committee consideration of the subordinate legislation

No significant issues regarding policy, consistency with fundamental legislative principles or the lawfulness of the subordinate legislation were identified.

¹ *Legislative Standards Act 1992*, Part 4.

² *Human Rights Act 2019*, s 41.

The committee considers explanatory notes tabled with the subordinate legislation comply with the requirements of section 24 of the *Legislative Standards Act 1992*, with the exception of SL 261 of 2020 as is outlined below.

The committee considers that the subordinate legislation raise no human rights issues. The human rights certificates tabled with the subordinate legislation provide a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.³

4 SL No. 261 of 2020 - Building (Approval of Amendment of QDC) Amendment Regulation 2020

The regulation adopts the amended Queensland Development Code (QDC) Part 2.5, which relates to the use of external cladding.

Part 2.5 of the QDC was introduced to ban two materials from being used as external cladding on new buildings. In relation to rectification work on existing buildings, the amendments will recognise expanded polystyrene (EPS) cladding may be retained on a building as part of an alternative (performance-based) solution developed by a registered fire engineer.

The QDC makes it clear that:

- where expanded polystyrene (EPS) is proposed to be retained on a building as part of a performance-based solution developed by a registered fire engineer, the EPS ban does not apply, and
- the EPS ban does not apply to any Class 2-9 buildings of Type C construction or to Class 1 and 10 buildings/structures.

4.1 Fundamental legislative principle issues

4.1.1 *Legislative Standards Act 1992*, section 4(5)(e) – institution of Parliament

The regulation adopts the amended QDC part 2.5 – use of external cladding.

Whether subordinate legislation has sufficient regard to the institution of parliament depends on whether the subordinate legislation allows the sub-delegation of a power delegated by an Act only:

- if authorised by an Act, and
- in appropriate cases and to appropriate persons.⁴

Part of the rationale for this principle is to ensure sufficient parliamentary scrutiny of a delegated legislative power.⁵

The significance of dealing with such matters other than by subordinate legislation is that, since the relevant document is not ‘subordinate legislation’, it is not subject to the tabling and disallowance provisions in Part 6 of the *Statutory Instruments Act 1992*.

Where there is, incorporated into the legislative framework of the state, an extrinsic document (such as the code) that is not reproduced in full in subordinate legislation, and where changes to that document can be made without the content of those changes coming to the attention of the Legislative Assembly, it may be argued that the document (and the process by which it is incorporated into the legislative framework) has insufficient regard to the institution of Parliament.

³ *Human Rights Act 2019*, s 41.

⁴ *Legislative Standards Act 1992*, s 4(5)(e).

⁵ Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, p 170.

Authorised by an Act

Section 13 of the *Building Act 1975* provides that the chief executive may amend the QDC by adding another part to it or amending or replacing a part. The amendment has no effect until the chief executive publishes the amendment on the department's website and a regulation approves the amendment.⁶

The sub-delegation is authorised. Further, any concerns that the Parliament might have about the content might be met by the ability to move disallowance of the subordinate legislation.

Appropriate cases and to appropriate persons

In considering whether it is appropriate for matters to be dealt with by an instrument that is not subordinate legislation, and therefore not subject to parliamentary scrutiny, committees have considered the importance of the subject matter dealt with, the commercial or technical nature of the subject-matter, and the practicality or otherwise of including those matters entirely in subordinate legislation.⁷

Part 2.5 of the code itself is only five pages long. However, it is but one part of the code which is a large document containing detailed information.

The committee could accept that it is appropriate for practical reasons for its content to be set out in a document other than in subordinate legislation.

Availability of document and parliamentary scrutiny

Concerns about sub-delegation are reduced where the document in question could only be incorporated under subordinate legislation (which could be disallowed) and was attached to the subordinate legislation, or required to be tabled with the subordinate legislation and made available for inspection. Neither of these features are present here.

Section 13(3) requires the chief executive to ensure that the amendment is published on the department's website. The entire code is available on the former Department of Housing and Public Works website.⁸

Further, as mentioned above, the approval of an amendment to the QDC Code has no effect unless the chief executive publishes the amendment on the department's website and a regulation approves the amendment.⁹ Any concerns that the Parliament might have about the content might be met by the ability to move disallowance of the notice.

It can also be noted that under consideration here is an amendment to an existing code.

4.2 Explanatory notes

The issue of fundamental legislative principle relating to the institution of Parliament above was not canvassed in the explanatory notes. Otherwise, the explanatory notes comply with part 4 of the *Legislative Standards Act 1992 (LSA)*.

The committee wrote to the Department of Energy and Public Works regarding the QDC Code Part 2.5 being a potential issue of sub-delegation, and seeking an explanation about why this issue was not canvassed in the Explanatory Notes of the Regulation.

The department advised:

⁶ *Building Act 1975*, s 13.

⁷ See the Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: the OQPC Notebook*, pp 155-156, and Scrutiny of Legislation Committee, *Alert Digest 1999/04*, p 10, paras 1.65-1.67.

⁸ https://www.hpw.qld.gov.au/__data/assets/pdf_file/0030/9867/QDCUseOfExternalCladding.pdf, current as of 4 March 2021

⁹ See s 13(3) of the *Building Act 1975*.

Under section 13 of the *Building Act 1975*, the aspects and parts of the Queensland Development Code (QDC) are to be prescribed by regulation. While the parts of the QDC are prescribed in Schedule 2E of the Building Regulation 2006, the QDC parts and code requirements are published online.

It is necessary to prescribe the QDC through subordinate legislation to provide a more rapid means than Act amendments to create new technical standards to address building problems that arise without notice.

Officers from the Department of Energy and Public Works (DEPW) had understood that the sub-delegation and amendment to the QDC through the Building Regulation 2006 was already authorised.

While the sub-delegation is authorised, I agree with the Transport and Resources Committee's assessment that the Explanatory Notes of the Amendment Regulation should have canvassed the issue of sub-delegation.

The Director General has assured the committee that future Explanatory Notes will provide full regard to the fundamental legislative principles.

4.3 Human rights considerations

The subordinate legislation is compatible with human rights.

4.4 Human rights certificate

A human rights certificate was tabled with the subordinate legislation, as required by section 41 of the *Human Rights Act 2019* (HRA). It provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

5 SL No. 6 of 2021 - Transport Operations (Road Use Management—Driver Licensing) (Hazard Perception Test) Amendment Regulation 2021

The objective of the regulation is to introduce new Hazard Perception Test (HPT) requirements for drivers of cars and motorbikes.

Car Hazard Perception Test

Prior to the regulation, a person holding a P1 licence was required to take a HPT to progress to a P2 licence or open licence. The regulation will amend the licensing framework to require that a person holding a learner licence must pass a HPT before they can take the practical driving test for a P1 licence.¹⁰

The regulation also provides that holders of P1 licences prior to the commencement of the regulation must still complete the HPT before progression to a P2 licence or an open licence.¹¹

Motorbike Hazard Perception Test

Prior to the regulation, motorbike riders were not required to take a HPT as part of the licensing requirements. The regulation will amend the licensing framework to require that a person holding a learner licence for a motorbike must pass a HPT before they can take the practical driving test for a motorbike licence or obtain a competency declaration for the relevant class of motorbike.¹²

¹⁰ Explanatory notes, p 2. See also Transport Operations (Road Use Management—Driver Licensing) (Hazard Perception Test) Amendment Regulation 2021, ss 4-5.

¹¹ Explanatory notes, p 1. See also Transport Operations (Road Use Management—Driver Licensing) (Hazard Perception Test) Amendment Regulation 2021, s 8.

¹² Explanatory notes, p 3. See also Transport Operations (Road Use Management—Driver Licensing) (Hazard Perception Test) Amendment Regulation 2021, ss 4, 8.

5.1 Fundamental legislative principle issues

No issues of fundamental legislative principle were identified.

The committee noted that the fee for the HPT is being increased from \$21.30 to \$37.05 (an increase of approximately 74%). The explanatory notes state that the fees are to support the improvements in new HPT test clips.¹³ The explanatory notes also highlight that applicants 'will only have to pay this fee once and will have access to the test until they pass, for up to a maximum of 12 months.'¹⁴

5.2 Explanatory notes

The explanatory notes comply with part 4 of the *LSA*.

5.3 Human rights considerations

The subordinate legislation is compatible with human rights.

5.4 Human rights certificate

A human rights certificate was tabled with the subordinate legislation, as required by section 41 of the HRA. It provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

6 SL No. 9 of 2021 Heavy Vehicle National Legislation Amendment Regulation 2021

The regulation introduces amendments to the Heavy Vehicle (Vehicle Standards) National Regulation and the Heavy Vehicle (Mass, Dimension and Loading) National Regulation, which are made under the Heavy Vehicle National Law. The amendments have been endorsed by the Infrastructure and Transport Ministers' Meeting, which is responsible for overseeing national heavy vehicle reform.¹⁵

The regulation:

- makes changes to allow a heavy vehicle to be fitted with a Blind Spot Information System or an Indirect Vision Device without infringing prescribed heavy vehicle width and length requirements.¹⁶
- extends, to apply to 'heavy trailers', the requirement that tyres fitted to a heavy motor vehicle must not have cleats or other gripping devices that could damage road safety surfaces.¹⁷
- makes consequential amendments to replace references to class 1 and class 2 reflective material to class 400 and class 100 respectively (to align with the revised national standard).¹⁸
- makes consequential amendments to ensure that the regulation of heavy vehicles aligns with the *Road Vehicle Standards Act 2018* (Cth) (RVSA) and to ensure continued application of Australian Design Rules to heavy vehicles.¹⁹

¹³ Explanatory notes, p 2.

¹⁴ Explanatory notes, p 2.

¹⁵ Explanatory notes, p 1.

¹⁶ Explanatory notes, pp 2-3.

¹⁷ Explanatory notes, p 3.

¹⁸ Explanatory notes, p 3.

¹⁹ Explanatory notes, pp 3-4. According to the explanatory notes, the RVSA will modernise the regulation of road vehicles that are entering the Australian marketplace for the first time and replace the current arrangements for road vehicles at the national level that exist under the Motor Vehicle Standards Act 1989 (Cth). As a result, this regulation makes a number of consequential amendments to the Heavy Vehicle (Vehicle Standards) National Regulation, including changes to definitions and terminology to align with the new arrangements.

The regulation commences on 22 February 2021, except for Part 3, Division 3 (consequential amendments relating to the RVSA) which commences on the commencement of section 15 of the RVSA. The explanatory notes state that section 15 of the RVSA will commence on a date once proclaimed, or on 1 July 2021.²⁰

6.1 Fundamental legislative principle issues

No issues of fundamental legislative principle were identified.

6.2 Explanatory notes

The explanatory notes comply with part 4 of the *LSA*.

6.3 Human rights considerations

The subordinate legislation is compatible with human rights.

6.4 Human rights certificate

A human rights certificate was tabled with the subordinate legislation, as required by section 41 of the HRA. It provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

7 Recommendation

The committee recommends that the House notes this report.



Shane King MP

Chair

April 2021

Transport and Resources Committee

Chair	Mr Shane King MP, Member for Kurwongbah
Deputy Chair	Mr Lachlan Millar MP, Member for Gregory
Members	Mr Colin Boyce MP, Member for Callide
	Ms Jess Pugh MP, Member for Mt Ommaney
	Mr Les Walker MP, Member for Mundingburra
	Mr Trevor Watts MP, Member for Toowoomba North

²⁰ Explanatory notes, p 4.