

Transport and Resources Committee

Report No. 15, 57th Parliament

Subordinate legislation tabled between 1 September 2021 and 16 November 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 1 September 2021 and 16 November 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 certificates tabled with the subordinate legislation.²

2 Subordinate legislation examined

No. of 2021	Subordinate legislation	Date tabled	Disallowance date*
	Rail Safety National Law National Regulations (Modification of FOI Act) Variation Regulations 2021 ³	11 October 2021	23 February 2022
154	Survey and Mapping Infrastructure (Survey Standards) Notice 2021	26 October 2021	17 March 2022
157	Transport Legislation Amendment Regulation (No. 2) 2021	26 October 2021	17 March 2022
	Rail Safety National Law National Regulations (Fees) Variation Regulations 2021 ⁴	12 November 2021	30 March 2022
159	Professional Engineers (Code of Practice) Amendment Regulation 2021	16 November 2021	31 March 2022
164	Queensland Building and Construction Commission Act 1991: Queensland Building and Construction Commission (Rectification of Building Work) Amendment Regulation 2021	16 November 2021	31 March 2022

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

¹ *Legislative Standards Act 1992*, Part 4.

² *Human Rights Act 2019*, s 41.

³ Please note that this item does not form part of the usual numbered subordinate legislation series.

⁴ Please note that this item does not form part of the usual numbered subordinate legislation series.

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.

The committee considers explanatory notes tabled with the subordinate legislation comply with the requirements of section 24 of the *Legislative Standards Act 1992*.

The committee is satisfied that the subordinate legislation is compatible with human rights.

The committee received advice in regards to the Rail Safety National Law National Regulations (Modification of FOI Act) Variation Regulations 2021, that it is not subject to the requirement for a human rights certificate under section 41 of the *Human Rights Act 2019* (HR Act).

4 Rail Safety National Law National Regulations (Modification of FOI Act) Variation Regulations 2021

The Rail Safety National Law National Regulations (Modification of FOI Act) Variation Regulations 2021 (variation regulations) are made pursuant to the Rail Safety National Law (National Law). The *Rail Safety National Law (Queensland) Act 2017* applies the National Law as law in Queensland and establishes the Office of the National Rail Safety Regulator (ONRSR) as the rail safety regulator in Queensland.⁵

The Rail Safety National Law (Queensland) allows the Governor of the State of South Australia to make national regulations.⁶

The objective of the variation regulations is to ensure the protection of information that a person has been compelled to provide under the Rail Safety National Law.⁷

The variation regulations clarify that a document that is required to be produced to the National Rail Safety Regulator is an exempt document in relation to freedom of information (FOI), thereby protecting a person who has provided a document to the National Rail Safety Regulator under compulsion from FOI. This provides consistency with section 155 of the Rail Safety National Law, which provides protection for compelled evidence.⁸

The variation regulations further specify that a train safety recording is an exempt document in relation to FOI.⁹

The *Transport Safety Investigation Act 2003* (Cth) (TSI Act) makes it an offence to copy or disclose on-board recordings.¹⁰ The explanatory notes advise that while not every train safety recording would meet the TSI Act definitions for on-board recordings, there is currently a risk that an accidental release of a train safety recording could expose ONRSR's FOI officer to a penalty under the TSI Act. Amending the regulations to specify that a train safety recording is an exempt document will address this.¹¹

⁵ The National Law is set out in the schedule to the *Rail Safety National Law (South Australia) Act 2012* (SA). Amendments to the Rail Safety National Law are made by the Parliament of South Australia and are automatically applied as law in Queensland, explanatory notes, p 1.

⁶ See *Rail Safety National Law (Queensland)*, s 264.

⁷ Explanatory notes, p 1.

⁸ Explanatory notes, pp 1, 2.

⁹ Explanatory notes, p 1.

¹⁰ See *Transport Safety Investigation Act 2003* (Cth), s 53.

¹¹ Explanatory notes, pp 2-3.

4.1 Fundamental legislative principle issues

No issues of fundamental legislative principle were identified.

4.2 Explanatory notes

The explanatory notes comply with part 4 of the *Legislative Standards Act 1992*.

4.3 Human rights considerations

No human rights certificate was tabled with the variation regulations. While it is clear that explanatory notes must be tabled with the variation regulations,¹² it is less clear whether there is a requirement for the Minister to prepare and table a human rights certificate.

The committee wrote to the Department regarding this issue and received the following response:

The Department of Transport and Main Roads (TMR) sought Crown Law advice which indicated the Variation Regulation is not subject to the requirement for a human rights certificate under section 41 of the *Human Rights Act 2019* (HR Act).

The advice noted the Legislative Assembly has the power to refer the Variation Regulation to a portfolio committee to consider whether it is compatible with human rights under section 40 of the HR Act.

The Crown Law advice also indicated that the deeming provision in section 14 of the *Rail Safety National Law (Queensland) Act 2017* only makes the national regulations apply as subordinate legislation for the purposes of tabling and disallowance under Sections 49 to 51 of the *Statutory Instruments Act 1992*, not for the purposes of section 41 of the HR Act. In consideration of this advice, TMR did not provide a human rights certificate with the regulation and explanatory notes for tabling.¹³

5 SL No. 154 of 2021 - Survey and Mapping Infrastructure (Survey Standards) Notice 2021

The objective of the Survey and Mapping Infrastructure (Survey Standards) Notice 2021 (the notice) is to remake updated standards (titled 'Cadastral Survey Requirements') set for cadastral surveying under the *Survey and Mapping Infrastructure Act 2003* (SMI Act).¹⁴

The updated standards outline the range of requirements that surveyors must meet, and provide the information that surveyors may require in relation to conducting cadastral surveys. This includes:

- standards and guidelines under the SMI Act
- information about requirements under other legislation, and
- specific requirements related to actions under other legislation.¹⁵

The amendments to the Cadastral Survey Requirements resulted from a review conducted by the Department of Resources. The explanatory notes state key stakeholders were consulted and involved in the drafting process through workshops and a submissions process.¹⁶

¹² See Rail Safety National Law (Queensland) Act 2017, s 14(2).

¹³ Department of Transport and Main Roads, correspondence, 8 November 2021.

¹⁴ SL No. 154, human rights certificate, p 1.

¹⁵ SL No. 154, explanatory notes, p 1.

¹⁶ SL No. 154, explanatory notes, p 5. See page 2 of the explanatory notes for a list of the key changes to the Cadastral Survey Requirements.

5.1 Fundamental legislative principle issues

This issue of fundamental legislative principle often arises in circumstances where subordinate legislation incorporates external documents, such as standards. Where these documents are not reproduced in full in subordinate legislation, and where changes to such documents can be made without the content of those changes coming to the attention of the House, it may be argued that the incorporation of these documents has insufficient regard to the institution of Parliament.

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

In considering whether it was appropriate for matters to be dealt with by an instrument that was not subordinate legislation, and therefore not subject to parliamentary scrutiny, the former Scrutiny of Legislation Committee considered the importance of the subject dealt with and matters such as the practicality or otherwise of including those matters entirely in subordinate legislation.¹⁷

Whilst this issue is not directly addressed in the explanatory notes, the notes suggest that flexibility is the justification for the incorporation of standards in this way:

...surveying standards need to be reviewed regularly to ensure they are relevant to current survey practices, legislation, technologies and departmental processes. The updated Cadastral Survey Requirements contain many amendments to address matters that have been identified by the department in the last six years.¹⁸

Whilst the Cadastral Survey Requirements are not required to be tabled, it can be practice for external documents such as these to be tabled as extrinsic material with the accompanying subordinate legislation (in this case, the notice) to provide some level of parliamentary oversight.¹⁹ It can also be noted that the notice, which gives effect to the Cadastral Survey Requirements, is subordinate legislation, thus providing an avenue for some parliamentary scrutiny.²⁰

The Cadastral Survey Requirements are freely available on the Department of Resources' webpage.²¹ The document is lengthy (189 pages) and contain detailed and technical requirements (including case examples). In these circumstances, it is understandable that the document has not been reproduced in full in the subordinate legislation.

Committee comment

The committee is satisfied that any breach of fundamental legislative principles arising from the incorporation of the standards is justified, having regard to the need for flexibility and the detailed and technical nature of the Cadastral Survey Requirements.

5.2 Explanatory notes

The explanatory notes comply with part 4 of the *Legislative Standards Act 1992 (LSA)*.

5.3 Human rights considerations

The committee is satisfied that the subordinate legislation is compatible with human rights.

¹⁷ Alert Digest 1999/04, p. 10, paras 1.65-167.

¹⁸ SL No. 154, explanatory notes, p 4.

¹⁹ See, for example, the explanatory notes to SL Nos 140, 141 and 142 of 2021 whereby external standards are intended to be tabled as extrinsic material with the accompanying subordinate legislation.

²⁰ *Survey and Mapping Infrastructure Act 2003*, s 9(4).

²¹ SL No. 154, s 4. See: https://www.resources.qld.gov.au/?a=109113:policy_registry/cadastral-survey-requirements.pdf

5.4 Human rights certificate

The human rights certificate tabled with the subordinate legislation provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

6 SL No. 157 of 2021 - Transport Legislation Amendment Regulation (No. 2) 2021

The objectives of the Transport Legislation Amendment Regulation (No. 2) 2021 are to:

- ensure that the established pilot boarding grounds in North Queensland no longer fall within compulsory pilotage areas
- provide that the term of a certificate of inspection (COI) for all COI vehicles is 12 months (with the exception of heavy primary production vehicles)
- provide that an approved examiner may approve an inspection certificate for particular COI vehicles currently required to be inspected by a Department of Transport and Main Roads (TMR) Authorised Officer, such as a transport inspector
- make a small number of minor clarifications in the Vehicle Standards Regulation
- remove the requirement for assessment and workplace training qualifications for an accredited rider trainer
- provide that the chief executive can sign a certificate stating that a document is a copy of a part of the Traffic Camera Coding Manual, and
- make consequential amendments following the commencement of certain provisions in the *Transport Legislation (Road Safety and Other Matters) Amendment Act 2019*.²²

According to the explanatory notes, the benefits of the regulation are:

- ensuring that a ship's master can comply with their requirements relating to pilot boarding grounds
- simplifying vehicle inspection requirements by providing for consistent COI currency for all public passenger vehicles
- assisting those in remote areas of Queensland by providing that vehicles that are garaged in exempt areas can be inspected by approved examiners
- simplifying the legislation by removing an obsolete assessment and workplace training requirement for accredited rider trainers, and
- assisting court efficiency by providing that the chief executive can sign evidentiary certificates for new mobile phone and seatbelt cameras.²³

6.1 Fundamental legislative principle issues

Key issues of fundamental legislative principles are discussed below.

Rights and liberties of individuals

Reversal of the onus of proof

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not reverse the onus of proof in criminal proceedings without adequate justification.²⁴

²² SL No. 157, explanatory notes, pp 1-2.

²³ SL No. 157, explanatory notes, p 5.

²⁴ LSA, s 4(3)(d).

The regulation amends the Traffic Camera Coding Manual by providing for the use of evidentiary certificates signed by the chief executive of the Department of Transport and Main Roads.²⁵ This raises this issue of fundamental legislative principle.

Background to the provisions

The camera enforcement of mobile phone and driver-related seatbelt offences has been recently introduced.²⁶ Such enforcement requires the proof of a number of elements for successful prosecution, including that information contained in the data block on an image is consistent with what appears in the Traffic Camera Coding Manual (TCCM).

The Traffic Regulation 1992 (the Traffic Regulation) already provides that, in a criminal proceeding, a certificate (known as an evidentiary certificate) purporting to be signed by the Commissioner of the Queensland Police Service (QPS), stating a document is a copy of a part of the TCCM, is evidence of that fact.²⁷

However, as the Department of Transport and Main Roads will be involved in the prosecution of the new camera detected mobile phone and seatbelt offences, the regulation provides for the chief executive to also be able to issue evidentiary certificates under the Traffic Regulation.²⁸

Evidentiary certificates

It is not uncommon for Queensland legislation to provide that a certificate signed by a person administering a law is evidence of a fact stated in the certificate. These provisions enable an administering authority to put evidence before courts about a range of basic matters relating to its activities records without the need to call witnesses.²⁹

The former Scrutiny of Legislation Committee (SLC) noted the purpose of the provisions is usually to improve administrative efficiency and reduce the workload of officials administering the legislation. The SLC generally considered provisions about evidentiary certificates as being unexceptional, provided the matters to which the certificates related were non-contentious and the certificates were treated merely as evidence and not as being conclusive proof of the fact stated or determinative of the ultimate issue in question.³⁰

The explanatory notes acknowledge that the ability of the chief executive to issue evidentiary certificates potentially breach this fundamental legislative principle, but justifies a breach on the following basis:

Evidentiary certificates are commonly used for matters that are administrative, factual in nature, non-contentious and unlikely to be disputed. This supports the efficiency of court processes by ensuring these matters can be resolved quickly and cost-efficiently, allowing the court to focus on the substantive matters required to be established by the prosecution.

Although evidentiary certificates reduce the need for the prosecution to call witnesses about the matters contained in the certificates in the first instance, the use of these certificates does not prevent a defendant challenging the information stated in the certificates.³¹

²⁵ SL No. 157, s 4.

²⁶ By the Transport Legislation (Distracted Driver and Other Matters) Amendment Regulation 2021.

²⁷ Traffic Regulation, s 212.

²⁸ SL No. 157, s 4; explanatory notes, p 4.

²⁹ Office of the Queensland Parliamentary Counsel, *Principles of Good Legislation: Reversal of the Onus of Proof*, p 15. Available: https://www.oqpc.qld.gov.au/file/Leg_Info_publications_FLP_Reversal_of_Onus1.pdf

³⁰ Office of the Queensland Parliamentary Counsel, *Principles of Good Legislation: Reversal of the Onus of Proof*, p 15.

³¹ SL No. 157, explanatory notes, p 5.

As outlined above, the use of evidentiary certificates already exists under Queensland's transport legislation. The regulation extends the power to issue these certificates (which the QPS already has) to the chief executive of the Department of Transport and Main Roads, as the department responsible for enforcing the new camera detected mobile phone and seatbelt offences.

Committee comment

The committee is satisfied that any breach of fundamental legislative principle is justified in the circumstances, having regard to the need to enforce the new camera detected mobile phone and seatbelt offences and noting that a defendant is still able to challenge the information contained in an evidentiary certificate.

6.2 Explanatory notes

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

6.3 Human rights considerations

The committee is satisfied that the subordinate legislation is compatible with human rights as it limits human rights only to an extent that is reasonable and demonstrably justifiable in accordance with section 13 of the *Human Rights Act 2019* (HRA).³²

Human rights issues raised are outlined below.

The right to a fair hearing and rights in criminal proceedings³³

The right to a fair hearing and rights in criminal proceedings affirm the rights of all individuals to procedural fairness before a court or tribunal. The reversal of the onus of proof, through the use of evidentiary certificates, may limit these human rights.

According to the human rights certificate, the purpose of the limitations on human rights is to 'increase the efficiency of court processes relating to camera enforcement for mobile phone and driver related seatbelt offences'.³⁴ Specifically, the provisions reduce:

... the need to physically call witnesses to establish the matters stated in an evidentiary certificate. The evidentiary certificate only relates to a matter that is administrative, factual in nature, non-contentious and unlikely to be disputed.³⁵

The human rights certificate also emphasises that the use of evidentiary certificates does not prevent a defendant from challenging the information stated in the certificates.³⁶ The human rights certificate concludes:

If a person challenges an evidentiary certificate, a witness may be called and, for this reason, I do not consider that the provisions will limit a person's right to fair hearing and rights in criminal proceedings.

In consideration of the relationship between the limitation and the purpose of clause 4 of the Amendment Regulation, the importance of achieving the identified purpose outweighs the potential limitation on the human rights, and the limit is reasonably and demonstrably justifiable.³⁷

³² Section 8 of the HRA relevantly provides that a statutory provision is compatible with human rights if the provision does not limit a human right or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HRA. Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

³³ These rights are at HRA, s 31 and s 32 respectively.

³⁴ SL No. 157, human rights certificate, p 2.

³⁵ SL No. 157, human rights certificate, p 3.

³⁶ SL No. 157, human rights certificate, p 3.

³⁷ SL No. 157, human rights certificate, p 3.

6.4 Human rights certificate

The human rights certificate tabled with the subordinate legislation provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

7 Rail Safety National Law National Regulations (Fees) Variation Regulations 2021

The policy objective of the Rail Safety National Law National Regulations (Fees) Variation Regulations 2021 (the Variation Regulation) is to update fees for:

- applications for accreditation for complex operations
- annual fees payable by an accredited person, and
- the project component fee payable by an accredited person in relation to major projects, such as the introduction of new rolling stock or rail infrastructure not previously used in Australia, which can increase the need for regulatory oversight in relation to the railway operations.

7.1 Fundamental legislative principle issues

No issues of fundamental legislative principle were identified.

7.2 Explanatory notes

The explanatory notes comply with part 4 of the *Legislative Standards Act 1992*.

7.3 Human rights considerations

The subordinate legislation is compatible with human rights.

7.4 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.

8 SL No. 159 of 2021 - Professional Engineers (Code of Practice) Amendment Regulation 2021

The objective of the regulation is to approve an amended Code of Practice for registered professional engineers of Queensland. A Code of Practice has no effect until approved under a regulation. The purpose of the Code of Practice is to provide guidance to Registered Professional Engineers of Queensland as to appropriate professional conduct or practice.³⁸

8.1 Fundamental legislative principle issues

No issues of fundamental legislative principle were identified.

8.2 Explanatory notes

The explanatory notes comply with part 4 of the *Legislative Standards Act 1992* (LSA).

8.3 Human rights considerations

The committee is satisfied that the subordinate legislation is compatible with human rights.³⁹

³⁸ Explanatory notes, p 1.

³⁹ Section 8 of the HRA relevantly provides that a statutory provision is compatible with human rights if the provision does not limit a human right or limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the HRA. Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

8.4 Human rights certificate

The human rights certificate tabled with the subordinate legislation provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

9 SL No. 164 of 2021 - Queensland Building and Construction Commission Act 1991: Queensland Building and Construction Commission (Rectification of Building Work) Amendment Regulation 2021

The objective of the regulation is to ‘prescribe the [35 day] timeframe that must be stated in a direction to rectify defective or incomplete building work.’⁴⁰

From 1 October 1999, the *Queensland Building and Construction Commission Act 1991* (the QBCC Act) required a minimum period of 28 days to be stated in a direction to rectify defective or incomplete building work, unless the Queensland Building and Construction Commission (QBCC) was satisfied there was a significant hazard, or a substantial loss might otherwise be incurred.

In 2017, the QBCC Act was amended to provide that a regulation may prescribe the period that must be stated in the direction as the period within which the recipient is to rectify the work.

The regulation does not state that there is a 28 day period to rectify defective or incomplete building works, but the explanatory notes advise:

- The minimum 28 day period is long established and well understood within the building and construction industry
- The QBCC has a ‘long-established practice’ of providing 35 days for a person to rectify building work, from the day the direction is issued, to allow for a minimum 28 day period for the work to be completed, while accounting for the postage and receipt of directions.⁴¹

To provide greater clarity and formalise this existing timeframe, the regulation prescribes that a direction issued by QBCC to rectify defective or incomplete building works must state that there is a minimum period of 35 days to do so.

9.1 Fundamental legislative principle issues

No issues of fundamental legislative principle were identified.

9.2 Explanatory notes

The explanatory notes comply with part 4 of the *Legislative Standards Act 1992 (LSA)*.

9.3 Human rights considerations

The committee is satisfied that the subordinate legislation is compatible with human rights.

9.4 Human rights certificate

The human rights certificate tabled with the subordinate legislation provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

⁴⁰ Explanatory notes, p 1.

⁴¹ Explanatory notes, p 1.

10 Recommendation

The committee recommends that the House notes this report.



Shane King MP

Chair

February 2022

Transport and Resources Committee

Chair

Deputy Chair

Members

Mr Shane King MP, Member for Kurwongbah

Mr Lachlan Millar MP, Member for Gregory

Mr Colin Boyce MP, Member for Callide

Mr James Martin MP, Member for Stretton

Mr Les Walker MP, Member for Mundingburra

Mr Trevor Watts MP, Member for Toowoomba North