

# Building 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 Mick de Brenni MP, Minister for Energy, Renewables and Hydrogen and Minister for Public Works and Procurement, provide this human rights certificate with respect to the Building Regulation 2021 (BR 2021) made under the following –

Section 261 of the *Building Act 1975* (Building Act)  
Section 154E of the *Fire and Emergency Services Act 1990*  
Section 33 of the *Major Sports Facilities Act 2001*  
Section 284 of the *Planning Act 2016*  
Section 116 of the *Queensland Building and Construction Commission Act 1991*  
Section 165 of the *State Penalties Enforcement Act 1999*

In my opinion, this Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019*. I base my opinion on the reasons outlined in this statement.

### Overview of the Subordinate Legislation

Under section 54 of the *Statutory Instruments Act 1992* the *Building Regulation 2006* (BR 2006) will automatically expire on 31 August 2021.

The BR 2021 replaces the BR 2006, which supports the objectives of the Building Act with respect to the following:

- building work regulated under the Act
- the occupation of buildings
- the performance of building certifying functions and private certifying functions
- the licensing of building certifiers
- the performance of pool safety inspection functions
- the licensing of pool safety inspectors
- the fees payable under the Act
- flammable and combustible liquids
- the records required for this Act
- fixing a penalty for an offence against a regulation (including different penalties for successive offences against a regulation) of a fine of not more than 165 penalty units.

The BR 2021 generally preserves the matters prescribed through the BR 2006, except for the following changes to:

- consider human rights in line with the *Human Rights Act 2019*
- renumber sections
- reorder parts of the regulation to improve useability
- make administrative and drafting style updates

- make clarifying amendments
- remove redundant transitional provisions
- provide for necessary transitional arrangements, including for the administration of the obligations for private building owners to complete the cladding checklist under the BR 2006 to ensure fire safety for building occupants
- increase the maximum penalty for giving false or misleading documents/certificates from 20 penalty units to 100 penalty units, to strengthen the certification inspection framework
- enhance the integrity of documents relied on by the certifier to certify a building meets all the necessary requirements by aligning the level of accountability with the seriousness of the offence
- splitting one offence provision for record keeping into two to improve compliance
- restate the delegated legislated powers for a local government to manage any fire prone areas, areas with flood risks and simple building work in their local areas that are remote
- make consequential amendments to other legislation where necessary, including consequential amendments to the *State Penalties Enforcement Regulation 2014* to prescribe infringement notice offences.

## Human Rights Issues

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

The BR 2021 engages the following human rights protected by the HR Act:

- Section 24 - Property rights
- Section 25 - Privacy and reputation
- Section 31 - Right to a fair hearing

### **Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)**

#### **Property rights**

(a) the nature of the right

Section 24 of the HR Act provides that a person has a right to own property alone or with others. Further a person must not be arbitrarily deprived of their property. The right to property is subject to an internal limitation because the deprivation of property must not be arbitrary in the sense that it must not be capricious, unpredictable or unjust or otherwise disproportionate to the legitimate aim that is sought.

The regulation enables the issuing of a penalty infringement notice (PIN), which by virtue of the monetary fine deprives a person of their monies.

(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

Protecting the health and safety of the public is a fundamental responsibility of government and is consistent with a free and democratic society based on human dignity, equality and freedom. The purpose of the limitations on human rights to be imposed by the regulation, if enacted, is to protect the Queensland public from risks to health and safety.

The regulation limits the right to property by prescribing offence provisions, including the separation of one offence provision into two separate offence provisions. The two offence provisions relate to a building certifiers record keeping obligations when relying on another person to assess that building work complies with a building development approval.

Participants in the building industry range from multinational building companies, large building certification companies to small family businesses and sole traders. For the purpose of the offence provisions for the combustible cladding building owners can be individuals, large corporations or a body corporate. All participants have a different varying ability to pay a maximum penalty unit applied. The SPE Regulation sets discrete PIN amounts with no discretion for regulators to recognise particular circumstances of an individual who has committed an offence.

This may result in an unfair outcome for the imposition of a PIN on a small building certification or construction business or sole trader licensed builder or private certifier or a pool safety inspector as opposed to a large construction or building certification firm with a high level of industry sophistication and means to pay.

A person's right to property may be limited if a person fails to pay a PIN issued for an offence, they may be subject to enforcement action under the SPE Act. This may include, among other things, suspension of a person's driver licence, vehicle immobilisation or seizure and sale of property. However, the offence provisions exist to deter people from behaving or acting in a way that endangers the health and safety of building occupants or from undermining the building inspection and certification process.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

Regulation of building work under the Building Act is critical to the health and safety of industry and building occupants. The BR 2021 supports the Building Act by prescribing matters such as a certification inspection framework, which ensures buildings and structures comply with the relevant standards and codes and are fit for purpose. For example, requiring buildings to have certain fire safety measures in effect dependent upon its use.

The PIN offences prescribed contribute to a fair and reasonable compliance framework to ensure public safety and consumer confidence. The fine amounts prescribed for the BR 2021 are considered proportionate to the risk created by the offending behaviour. Importantly, once a PIN has been issued to a person, there are several protections built into the SPE Act, including the ability for persons to elect to have the matter heard in court at various stages of the process.

It is also relevant that, in respect of the issuing of a PIN, a person has multiple opportunities to elect for a matter in relation to an infringement notice offence that has been referred to the Registry to be heard by a court instead of paying the infringement notice fine.

Further, there are supports and options available to assist persons who are experiencing hardship and unable to pay their fines. These protections ensure enforcement action such as the immobilisation of vehicles or seizure and sale of property would only occur infrequently.

Accordingly, the limitation of imposing a fine through the issuing a PIN is considered minor in nature and does not arbitrarily deprive a person of their property.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

For some of the penalties under the BR 2021, an alternative option would be to reduce the penalty unit amount associated with each offence. However, the amounts would be insufficient to deter all industry participants and homeowners from behaving or acting in a way likely to endanger the health and safety of building occupants and industry. The fine amounts prescribed for the BR 2021 are considered proportionate to the risk created by the offending behaviour.

Importantly, once a PIN has been issued to a person, there are several protections built into the *State Penalties Enforcement Act 1999* (SPE Act), including the ability for persons to elect to have the matter heard in court at various stages of the process.

(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, it is considered that the importance of implementing effective enforcement responses that are proportionate to the risk created by the offending behaviour and help manage demand in the courts in Queensland outweighs the limitations imposed on the right to property and right to a fair hearing and as a result, any limitation to be reasonable and demonstrably justified.

(f) any other relevant factors

Nil.

### **Fair hearing**

(a) the nature of the right

Section 31 of the HR Act provides that a person charged with a criminal offence or party to a civil proceeding has a right to have a charge heard by a competent person, independent and impartial court or tribunal after a fair public hearing.

The Regulation includes offence provisions and amends the *State Penalties Enforcement Regulation 2014* (SPE Regulation) to enable the issuing of a PIN for prescribed offences. Prescribed offence provisions under the remade BR 2021 apply to building certifiers, builders, appointed competent persons, pool safety inspectors and building owners and results in a monetary fine being imposed.

(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

Fines are a viable punitive option for responding to minor or first offences and complement a flexible, facilitative regulatory approach. The limitation is consistent with a free and democratic society based on human dignity, equality and freedom.

The purpose of an offence provision is to protect the Queensland public from risks to health and safety. Enabling the Queensland Building and Construction Commission (QBCC), QCAT and relevant local governments to issue a PIN instead of a complaint and summons, gives the regulators greater flexibility in how they enforce regulatory compliance with the legislation.

The regulation will support compliance with the building legislation by ensuring there is an efficient system for issuing and enforcement of fines. If the offences were not prescribed as infringement notice offences, commission of an offence would require the matter to always be heard in a court, imposing additional pressures on the judicial system and result in debate about the benefits of the costs of a court appearance versus the need to deter people from endangering the health and safety of Queenslanders.

The BR 2021 amends an existing offence provision that a person must not give a certifier a document or certificate that the person knows, or reasonable suspects is false or misleading. It is critical the building certifiers have confidence that the information and documentation provided to them is accurate, as it is used to inform compliance of building work with the building development approval. BR 2021 amends the current maximum penalty from 20 units to 100 for this offence. This increase recognises the seriousness of the offence and aligns the maximum penalty for this type of offence with other offence provisions regulated by other statutory bodies.

The offence provision is intended to act as a deterrent for individuals acting recklessly or deliberately in a way that could undermine the certification process and potentially endanger health and safety. The BR 2021 maintains the objective of the offence provision, however, rather than requiring proof that the person knew the document or certificate was false or misleading, it will suffice to prove that the person knew or reasonably suspected the document or certificate was false or misleading. This amendment is necessary to improve accountability and public confidence in the integrity of the inspection and certification process. These maximum penalty units are not prescribed PIN offences due to the subjective nature and any penalty will be determined by the courts.

Under section 261 of the Building Act a regulation may make a provision fixing a penalty for an offence against a regulation of a fine of not more than 165 penalty units.

The BR 2021 clarifies the right of appeal for the applicant (builder or owner) for a decision made by the building certifier for building work under a building development approval to the Development Tribunals under Table 3, Schedule 1, of the *Planning Act 2016*. The regulation clarifies that when a noncompliance notice (a decision) is issued under the BR 2021 it is the building certifier that must issue a noncompliance notice for a stage of work, rather than an appointed competent person.

If the noncompliant work is not rectified by the builder then an enforcement notice must be issued to the builder and the building certifier is also required to notify the QBCC and if the certifier is a private certifier, the local government. The BR 2021 affords the builder (applicant) a right to a fair hearing for the building certifier's decision of issuing a noncompliance notice, otherwise the builder would not have appeal rights under the Planning Act until an enforcement notice is issued. Decisions of the Development Tribunal can be appealed on a matter of law to the Planning and Environment Court. Only allowing the building certifier to issue a noncompliance notice further recognises and supports the purpose of their statutory function for taking enforcement action.

The purpose of the BR 2021 is to implement effective enforcement responses that are proportionate to the risk created by the offending behaviour and help manage demand in QCAT and the courts while maintaining the right to a fair hearing.

(c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The fine amounts prescribed for the BR 2021 are considered proportionate to the risk created by the offending behaviour. Importantly, once a PIN has been issued to a person, there are several protections built into the SPE Act, including the ability for persons to elect to have the matter heard in court at various stages of the process.

It is also relevant that, in respect of the issuing of a PIN, a person has multiple opportunities to elect for a matter in relation to an infringement notice offence that has been referred to the Registry to be heard by a court instead of paying the infringement notice fine.

Further, there are supports and options available to assist persons who are experiencing hardship and unable to pay their fines. These protections ensure enforcement action such as the immobilisation of vehicles or seizure and sale of property would only occur infrequently.

Accordingly, issuing a PIN does not limit a person's access to a fair hearing.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose

An offence provision is a critical part of regulating the industry to ensure health and safety standards are maintained. Non punitive measures are also an important part of the regulatory framework, however, are not effective in all circumstances and with all people.

Issuing a PIN avoids the need to attend court and may be less than a court imposed fine. Lowering the maximum penalty for offence provisions may result in some individuals factoring potential fines into the cost of doing business, which would not provide a sufficient disincentive to achieve the purpose of the ensuing compliance with the building legislation.

(e) any other relevant factors

On balance, it is considered that the importance of implementing effective enforcement responses that are proportionate to the risk created by the offending behaviour and help manage demand in the courts in Queensland outweighs the limitations imposed on the right to property and right to a fair hearing and as a result, any limitation to be reasonable and demonstrably justified.

## **Privacy and reputation**

(a) the nature of the right

Under section 25 of the HR Act the right to privacy and reputation protects a person's right to not have their privacy and reputation unlawfully or arbitrarily interfered with. The nature of the right to privacy and reputation is very broad but contains internal limitations. The protection against interference with privacy is limited to unlawful or arbitrary interference. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate.

The BR 2021 continues the obligations prescribed through the BR 2006 relating to the collection of personal information, keeping records and sharing personal information relevant to building work compliance with the relevant standards, codes and statutory requirements and enforcement action. The collection and management of this information limits this right. For

example, this right is limited for prescribed matters such as pool safety and pool safety inspectors (Part 5), assessment and appointment of competent persons and building certifier cadets and record keeping (Parts 6, 7), the building certification inspection framework including the issuing of compliance certificates and record keeping (Parts 8 & 9) and associated with the transitioning of Part 4A of the BR 2006 for the combustible cladding checklist process.

A person's privacy may be interfered with to the extent that information shared between building contractors the competent person and building certifier and with building regulators includes personal information.

(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

A person's privacy may be limited however, the purpose of the Regulation is to ensure the building work regulated under the Building Act is compliant with the building standards and codes and fit for purpose.

Information collected under the BR 2021 will be used for administering compliance by building owners and by contracted individuals from the construction and certification sectors, as well as the building regulator for the ongoing evaluation of the effectiveness of building and pool safety laws. Information disclosed to the building regulators – the QBCC, local governments and to third parties is for purposes related to administering and enforcement of compliance under the BR 2021 pursuant to the Building Act.

All buildings and structures, such as regulated pools must be constructed fit for purpose and ensure the safety of occupiers and the general public of Queensland. The building certifier, owner, pool safety inspector, building contractors, QBCC or the relevant local government cannot achieve their statutory obligations and role to ensure building work is compliant or take enforcement actions to rectify noncompliant building work without the necessary and essential personal information required to be collected under the BR 2021.

Pursuant to the Building Act, once engaged as the assessment manager (by the owner or the builder for the work), the building certifier must assess compliance of building work that is part of a building development application. The obligations, compliance and inspection processes prescribed under the BR 2021 rely on the collection and provision of personal information about the assessable building work.

All compliance and inspection documentation (i.e. compliance certificates, noncompliance and enforcement notices, final certificates, pool safety certificates collected under the BR 2021 by a builder, appointed competent person, contractor, pool safety inspector, owner, fire engineer or building certifier is necessary for the assessment and compliance of building work regulated under the Building Act.

For instance, all regulated swimming pools must be compliant with the relevant standards to prevent young children entering a pool and suffering a fatal or long-term brain injury from an immersion incident. It is necessary for personal information about the owner and their property and the details of the building contractor and building certifier or pool safety inspector be recorded as it is relevant for the assessment of compliance of a regulated pool fence and the issuing of a pool safety certificate or final certificate.

To ensure the intent of the combustible cladding checklist requirements under Part 4A of the BR 2006 can continue to be administered by the QBCC, the BR 2021 provides transitional arrangements to preserve this Part to ensure private buildings registered on the checklist will continue to complete the process after 1 September 2021. It is essential to the ongoing compliance and fire safety of building occupiers to collect the fire engineer details, including name and registration number. Once collected the information must be given to the QBCC. Where relevant, an agent must provide evidence to the QBCC that they have the body corporate manager's authority to act for the owner. Transitional arrangements under the BR 2021 are essential to ensure regulated buildings in Queensland have been constructed fit for purpose and are not a fire hazard due to the use of a highly flammable external building material.

Building certifiers and building regulators rely on the collection of information and evidence about building work compliance to fulfil their role to promote safety for building occupants and achieves the required compliance of building work constructed in Queensland. The collection and sharing of personal information for the purposes prescribed under the BR 2021 does not arbitrarily interfere with privacy and is essential and necessary for ensuring the safety of building occupants and for public safety.

The requisite collection and sharing of personal information under the BR 2021 is not unlawful and is consistent with a free and democratic society based on human dignity, equality and freedom.

(c) the balance between the importance of the purpose of the limitation and the importance of preserving human right, taking into account the nature and extent of the limitation

The collection of personal information is lawful and not considered arbitrary and outweighs the potential limitation of the right to privacy in facilitating collection and sharing of essential personal information relevant to the compliance and safety matters prescribed and therefore, considered reasonable and is demonstrably justified.

(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 identified.

Information obtained under the BR 2021 in the performance of its functions is unlikely to be available through other sources other than the bodies authorised to collect and receive information or the person (i.e. owner, building contractor, building certifier, fire engineers, owner) to whom the information relates.

Collection of personal information is critical to the decision making of a building certifier and other building regulators as it supports the BR 2021 to achieve the purpose of Building Act for the overall compliance of all building work constructed in Queensland.

The BR 2021 prescribes the requisite authority for the collection of personal information, keeping this information as part of compliance and decision making records and the forwarding of relevant information to the owner, fire engineer, the builder, building certifier, appointed competent person and to the building regulators - the QBCC and the relevant local government. The building certifier is required under the BR 2021 and the Building Act to keep records of the decision making and inspection documents for at least 7 years.



The QBCC Act provides safeguards to restrict the impact of the limitation, in that an information-sharing arrangement may relate only to information that helps the QBCC or the other agency to perform its functions, or information the disclosure of which is reasonably necessary for protecting the health or safety of a person or property. Information held by a local government is protected in accordance with section 27 of the *Information Privacy Act 2009*.

(e) any other relevant factors

Nil

## Conclusion

I consider that the *Building Regulation 2021* is compatible with the *Human Rights Act 2019* because to the extent that it imposes any limitation on a human right, that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

**MICK DE BRENNI MP**  
MINISTER FOR ENERGY, RENEWABLES AND HYDROGEN AND  
MINISTER FOR PUBLIC WORKS AND PROCUREMENT

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