

Planning (Battery Storage Facilities) and Other Legislation Amendment Regulation 2025

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*, I, Jarrod Bleijie, Deputy Premier, Minister for State Development, Infrastructure and Planning and Minister for Industrial Relations provide this human rights certificate with respect to the *Planning (Battery Storage Facilities) and Other Legislation Amendment Regulation 2025* made under the *Economic Development Act 2012* and the *Planning Act 2016*.

In my opinion, the *Planning (Battery Storage Facilities) and Other Legislation Amendment Regulation 2025*, 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

The policy objectives of the *Planning (Battery Storage Facilities) and Other Legislation Amendment Regulation 2025* (Amendment Regulation) made under the *Economic Development Act 2012* (ED Act) and the *Planning Act 2016* (Planning Act) are to:

- prescribe the community benefit system, including that the requirements for social impact assessment and a community benefit agreement applies to development for a material change of use of premises for a battery storage facility (BSF) that has a maximum instantaneous electricity output of 50MW or more,
- establish the chief executive (i.e. the State Assessment and Referral Agency or SARA) as the assessment manager for BSF development,
- make BSF development assessable development that is subject to impact assessment, other than small scale BSF development that is identified as accepted development,
- give effect to the updated State Development Assessment Provisions (SDAP) to include new State Code 27 – Battery storage facility,
- introduce a new fee for BSF development assessed by the SARA,
- provide transitional provisions for pre-existing development applications for specified BSF development above an identified threshold (being BSF development 50MW or more) are taken not to be properly made,
- make consequential amendments to the Economic Development Regulation 2023 (ED Regulation) to reflect that BSF in a Priority Development Area (PDA) will be subject to impact assessment by SARA, and assessed against the relevant PDA development instrument as well as SDAP during development assessment.

Human Rights Issues

Human rights relevant to the subordinate legislation

(Part 2, Division 2 and 3 *Human Rights Act 2019*)

I have considered each of the rights protected by Part 2 of the *Human Rights Act 2019* (HR Act).

In my opinion, the human rights that are relevant to the subordinate legislation are:

- recognition and equality before the law (section 15)
- taking part in public life (section 23)
- property rights (section 24)

Consideration of reasonable limitations on human rights

(Section 13 *Human Rights Act 2019*)

The subordinate legislation will potentially limit (or interfere with) the identified human rights:

- recognition and equality before the law (section 15)
- property rights (section 24)

Recognition and equality before the law (section 15)

(a) the nature of the right

The rights to equal protection of the law without discrimination and to equal and effective protection against discrimination in section 15 of the HR Act embody the notion that all laws and policies should be applied equally and must not result in discriminatory treatment or effects (i.e. human dignity).

Section 15 of the HR Act is concerned with ‘discrimination’ (direct or indirect) based on a relevant attribute as defined in the *Anti-Discrimination Act 1991* (Anti-Discrimination Act), or an additional characteristic not covered by the Anti-Discrimination Act.

A development or change application for specified BSF development (i.e. BSF development 50MW or more) will be subject to the community benefit system, meaning a proponent will need to undertake a social impact assessment and enter into a community benefit agreement before a development application can be made under the Planning Act. Such development may also be subject to additional development conditions in relation social impacts or community benefit. Therefore, it may be argued that proponents for development requiring social impact assessment will be treated differently from other development proponents and applicants.

(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

The purpose of the limitation is to ensure that specified BSF development occur in a way that, at minimum, mitigates or appropriately accounts for negative impacts on host communities (e.g. landholders, business operators, and local governments) – or preferably, in a way that yields tangible, net-positive legacy benefits for host communities as well as the state at large.

The amendments ensure the social impacts and development impacts of BSF developments are being adequately identified, considered and managed through the community benefit system and the development assessment system under the Planning Act.

The proposed amendments to the Planning Regulation will apply equally to all applicants for development subject to social impact assessment. There is no direct or indirect discrimination in relation to applicants for development subject to social impact assessment, opposed to other development applicants, based on a protected attribute under the Anti-Discrimination Act (or any additional characteristic). Applicants of pre-existing applications are also afforded the right to seek from the chief executive a notice under section 106ZE(1) of the Planning Act to allow an application to be lodged without a social impact assessment or a community benefit agreement.

As such, the amendments and the proposed limitation are considered to be consistent with a free and democratic society based on human dignity, equality and freedom.

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

The potential limitation on the rights to equal protection of the law without discrimination, and to equal and effective protection against discrimination, is directly connected to achieving the purpose of the amendments. By requiring specified BSF development to mitigate or appropriately account for negative impacts on host communities and ensuring these communities are consulted early and meaningfully, the limitation supports the policy objective of amending the subordinate legislation. This approach also aligns with previous reforms for wind farm and solar farm developments, which established similar community engagement requirements.

(d) whether there are any less restrictive and reasonably available ways to achieve the purpose
There are no less restrictive ways to achieve the purpose of the amendment.

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

The right to equal protection before the law is a fundamental right which underpins procedural fairness. While the amendments engage this right, its extent is narrow and proportionate. It applies to all proponents of specified BSF development and does not discriminate based on any protected attributes.

The additional requirements of the community benefit system may impose additional costs and steps for proponents however, these are necessary to achieve the amendments' purpose to protect community interests, ensure benefits are received for communities impacted by BSF development and promote greater transparency in process and decision making. These amendments are not considered to be arbitrary or excessive, and on balance, it is considered that the amendments support a free and democratic society based on human dignity, freedom and equality.

Taking part in public life (section 23)

Section 23 of the HR Act recognises that every person has the right to participate in the conduct of public affairs, including at elections, and to have equal access to the public service, including through the formulation and implementation of policy. This right is concerned about decisions that include taking part in public life, such as where public consultation is required before a statutory decision is made and where the decision-maker is required to consider submissions received during the public consultation.

This Amendment Regulation relates to the right to take part in public life by enhancing opportunities for individuals to participate in the conduct of public affairs by implementing the impact assessment process for all assessable BSF development, which involves mandatory public consultation as a part of social impact assessment and also introducing the community benefit framework for specified BSF development. This process ensures that all persons, without discrimination, can engage in decision-making that affects their environment and communities, thereby directly participating in public affairs.

By allowing third-party appeal rights, this Amendment Regulation also provides a legal avenue for individuals to challenge development assessment decisions, further reinforcing their ability to influence public affairs and hold decision-makers accountable. The rights of land owners to consent to development applications being made and the right of applicants to make and be afforded due process in the assessment of development applications is not altered by this Amendment Regulation.

The Amendment Regulation therefore promotes this human right by providing for broader access to the decision-making process, aligning with the principle that every person should have the opportunity to participate in public life on equal terms, ensuring that the governance of public matters is inclusive and representative.

Property rights (section 24)

(a) the nature of the right

Section 24(2) of the HR Act provides that a person must not be arbitrarily deprived of the person's property. Limitations on section 24(2) property rights must not be 'arbitrary' and must be proportionate and not capricious, unpredictable, unjust, or unreasonable.

Under the Amendment Regulation, on commencement a pre-existing application for specified BSF development (i.e. BSF development 50MW or more) is taken to be not properly made under the Planning Act. Additionally, these applications will become:

- subject to the community benefit system,
- assessable by the chief executive (i.e. SARA) as assessment manager,
- impact assessable (if they are not already as categorised by local government planning schemes), and
- subject to assessment against the new State code 27 – Battery storage facilities in the new SDAP

Applications for BSF development that are not subject to the community benefit system on commencement of the Amendment Regulation (i.e. BSF development 50MW or more) will not be affected by the pre-existing application provisions under section 51IA of the Amendment Regulation.

The requirements for pre-existing application for specified BSF development means a proponent's statutory entitlement under the Planning Act to have their development application considered and determined by the relevant decision maker (by virtue of making a 'properly made' application) has been removed until the social impact assessment and community benefit agreement requirements are complied with. This will likely require additional cost and time to a proponent. I consider this may amount to a 'deprivation' of property for the purposes of section 24(2) of the HR Act as it encompasses the proponents' economic interests in terms of developing real property.

However, whether the deprivation is arbitrary will depend on whether making a pre-existing application subject to social impact assessment under the Planning Act is capricious, unjust, or unreasonable in the sense of being disproportionate to a legitimate aim sought. If an interference is proportionate under section 13 of the HR Act, it will not be arbitrary. Accordingly, whether any deprivation of property is arbitrary will be addressed below when considering the factors in section 13.

(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

The purpose of making all applications, new or pre-existing, for specified BSF development (i.e. BSF development 50MW or more) subject to consistent regulation through the community benefit system is a proper purpose and compatible with a free and democratic society.

Under section 106T of the Planning Act I, as the Minister for the Planning Act, have determined to my satisfaction that specified BSF development has the potential to impact on the social environment of a community in the locality of that development. I am satisfied that specified BSF development can potentially have significant social impacts, both immediate and cumulative, on proximate communities.

Ensuring that specified BSF developments are subject to the community benefit system and are subject to impact assessment under the development assessment system allows for the identification, management, and mitigation of both social and development impacts. It also provides an opportunity for the community to derive tangible benefits from such development.

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

By making pre-existing applications for specified BSF not properly made under the Planning Act, the Amendment Regulation achieves the purpose of specified BSF being subject to the community benefit system and subject to impact assessment by the chief executive (i.e. SARA) against a new state code in SDAP where assessable development.

This will respond to the objectives of subordinate legislation including ensuring the social impacts and development impacts of specified BSF developments are adequately identified, considered and managed.

As only pre-existing applications for specified BSF (i.e. BSF development 50MW or more) will be considered not properly made, pre-existing applications under this threshold will continue under the same development assessment process as when it was lodged, and have the same assessment manager. Having these smaller scale BSF applications continue as if the amendment had not occurred is also appropriate for achieving the objectives of the Amendment Regulation as the requirements are consistent, clear and proportional to impacts and risk.

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

The amendments to the Planning Regulation proposed by the subordinate legislation are the most effective way of achieving the purpose of BSF being subject to a consistent social impact and community benefit system.

Amendment to the Planning Regulation is the only way to establish a mandatory minimum requirement for specified BSF development to comply with an identified community benefit system for prescribed development. I am therefore satisfied there are no less restrictive ways reasonably available to achieve the purposes.

(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

The purpose of the amendments for specified BSF development is to ensure BSF development that have the potential for social impacts is subject to the community benefit system. The Amendment Regulation allow for the identification, management, and mitigation of social impacts incurred as a result of specified BSF development, and for the community to derive tangible benefits from such development.

The Amendment Regulation may affect the property rights of proponents with specified BSF development applications under assessment by making these applications no longer ‘properly made’ and requiring that these applications be subject to the community benefit system and new assessment parameters under the development assessment system. This may involve additional steps and costs for proponents. However, its scope is narrow and proportionate. Proponents will still be provided with the flexibility to demonstrate grounds and seek a notice under section 106ZE(1) of the Planning Act from the Chief Executive, allowing an application to proceed without these requirements.

To minimise impacts on rights, small scale BSF development (i.e. BSF development less than 50MW) will not be subject to the new community benefit system, or pre-existing application requirements (i.e. transitional provisions). This provides a proportionate outcome for BSF development of lesser scale.

On balance, the benefits of a consistent and transparent planning framework for managing social impacts under the community benefit system, and development impacts under the development assessment system, outweighs the limited interference with property rights. The interference with property rights is considered to be proportionate, and not arbitrary or excessive, and is necessary to achieve the Amendment Regulation’s purpose. As such, the right to property in section 24(2) of the HR Act is considered to be engaged but not limited.

Conclusion

I consider that the *Planning (Battery Storage Facilities) and Other Legislation Amendment Regulation 2025* is compatible with the *Human Rights Act 2019* because it does not limit human rights.

JARROD BLEIJIE MP

Deputy Premier, Minister for State Development, Infrastructure and Planning
and Minister for Industrial Relations

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