

Transport Operations (Passenger Transport) Amendment Regulation (No. 2) 2020

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, the Honourable Mark Bailey MP, Minister for Transport and Main Roads provide this human rights certificate with respect to the *Transport Operations (Passenger Transport) Amendment Regulation (No. 2) 2020* made under the *Transport Operations (Passenger Transport) Act 1994*.

In my opinion, the *Transport Operations (Passenger Transport) Amendment Regulation (No. 2) 2020*, 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 main policy objectives of the *Transport Operations (Passenger Transport) Amendment Regulation (No. 2) 2020* (the amendment regulation) are to:

- ensure the Department of Transport and Main Roads (the department) has sufficient information to decide an application for a substitute vehicle authority;
- allow the department to issue certain evidentiary certificates in a proceeding for an offence against a fare evasion provision;
- clarify that a driver hire service is excluded from the application of the *Transport Operations (Passenger Transport) Act 1994* (TOPTA);
- ensure the department can give the holder of an authority or service contract, who has consented to receiving correspondence by email, important information about the authority or service contract;
- allow substitute taxis to continue to be used to provide taxi services and booked hire services during peak patronage periods until new taxi service licences are implemented; and
- ensure consistency with other legislation as a result of the *Transport and Other Legislation (Road Safety, Technology and Other Matters) Amendment Act 2020* and *Road Vehicles Standards Act 2018* (Cwlth).

Human Rights Issues

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

Privacy and reputation (section 25)

The human right under section 25(a) of the *Human Rights Act 2019* (HRA) is limited where a person's privacy, family, home or correspondence is unlawfully or arbitrarily interfered with. In the human rights context, arbitrarily is taken to mean capricious, unpredictable, unjust and unreasonable in the sense of not being proportionate to a legitimate policy objective.

The human right may be relevant to the amendments relating to the information for substitute vehicle authority application (section 4 of the amendment regulation) and notifying the department about a change of current email address (section 8 of the amendment regulation).

I consider that the human right is not limited because the provisions are authorised by law and do not interfere with a person's privacy arbitrarily.

Fair hearing (section 31) and rights in criminal proceedings (section 32)

The human right under section 31 of the HRA is limited where a person is deprived of the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. The human right under section 32 of the HRA is limited where a person charged with a criminal offence is deprived of the right to be presumed innocent until proven guilty according to law or deprived of the right to certain minimum guarantees.

The human right may be relevant to the amendments relating to the revenue protection device (section 6 of the amendment regulation), which will allow the department to issue certain evidentiary certificates in a proceeding for an offence against a fare evasion provision in accordance with section 153B of TOPTA. This provision may limit a person's right to fair hearing and rights in criminal proceedings because the evidentiary provisions it supports reverse the onus of proof and limit an individual's right to have witnesses examined. While the evidentiary provisions reduce the need for the prosecution to call witnesses about the matters contained in the certificates, the provisions do not limit a person's ability to contest the information. This may result in the witnesses being called and, for this reason, I do not consider that the provision limits the person's right in criminal proceedings.

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

Privacy and reputation (section 25)

(a) the nature of the right

Section 25 (Privacy and reputation) of the HRA protects an individual from all unlawful or arbitrary interferences and attacks upon their privacy, home, correspondence and reputation.

New section 173A (Chief executive may require information or document) will require an applicant for a substitute vehicle authority to give the chief executive further information or a document that the chief executive reasonably requires to decide the application. If the applicant does not provide the information within the stated period, the application is taken to have been withdrawn.

The amendment to section 277 (Change of name, address or postal address) requires the holder of an authority or service contract who has consented to receive correspondence by email, to notify the chief executive if the holder's email address changes.

(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 new section 173A is to ensure the chief executive can make a decision to grant a substitute vehicle authority, noting that under section 176 of the *Transport Operations (Passenger Transport) Regulation 2018* (TOPTR), the chief executive must refuse to issue a substitute vehicle authority if satisfied that the motor vehicle does not comply with the vehicle requirements for a taxi licence or if there are a sufficient number of substitute vehicles available.

If the chief executive does not have the information required to be satisfied about the requirements in section 176 of TOPTR, the application must be refused. New section 173A benefits an applicant who is given the opportunity to supply any additional information needed to allow the chief executive to make the decision in situations where the chief executive would be unable to grant the substitute vehicle authority without that additional information.

The purpose of the amendment to section 277 of TOPTR is to ensure that the department can give the holder of an authority or service contract, who has consented to receiving correspondence by email, important information about the authority or service contract. It is important that a holder of an authority or service contract under TOPTA, who has given the department consent to correspond with the holder by email, notifies the department if the holder changes their email address so the department can send any important correspondence about the authority to the new contact address. If the holder does not notify the department about the change to their email address, and the department takes administrative action against the holder's authority, the holder will not receive a regulation notice advising the holder of their rights under a show cause process. As a result, the holder may continue to provide a public passenger service unlawfully. That may also have broader safety implications for passengers if the department's action was taken for safety reasons.

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

Requiring a person to provide further information or documents under new section 173A of TOPTR will allow the chief executive to request information or documents needed to decide an application for a substitute vehicle authority, where the chief executive would be unable to grant the substitute vehicle authority without that additional information.

Amending section 277 of TOPTR, to require a person to notify the chief executive about a change to their current email address in 10 business days, ensures that the department can give the holder of an authority who has consented to receiving correspondence by email important

information about the authority. A definition of current email address has been drafted to ensure the offence only applies if a holder gives the department consent to use the holder's email address for information about the authority or service contract and the holder has not retracted the consent.

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

In relation to new section 173A, no less restrictive options have been identified to ensure the department has sufficient information to decide an application for a substitute vehicle authority. The approach taken in new section 173A is consistent with the approach relating to applications for booked hire service licences and booking entity authorisations, where the chief executive may, by written notice, require the applicant to give the chief executive further information or a document the chief executive reasonably requires to decide the application (see sections 153 and 186 of TOPTR).

While there may be less restrictive options than including an offence if a person does not notify the chief executive of a change of email address, due to the potential safety risks if a person does not receive information relating to their authority, the proposed approach is considered the most appropriate approach in balance with the potential risks. As an example, the department may decide to suspend a holder's booked hire service licence because the motor vehicle stated on the licence is not the subject of a current certificate of inspection. If the holder's email changed and the holder did not notify the department of the change, the holder will not receive the regulation notice advising the holder that the holder's licence is suspended. The holder may continue to provide a booked hire service unlawfully and in a way that risks the safety of passengers.

(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 objective of ensuring the department has sufficient information to decide an application for a substitute vehicle authority is achieved by allowing the chief executive to require further information or a document the chief executive reasonably requires to decide the application for a substitute vehicle authority. This provides a balance to ensure the vehicle meets its requirements, while providing an opportunity for the applicant to provide further information to assist the chief executive in making the decision. For example, when deciding to issue a substitute vehicle authority, the chief executive must refuse to issue the substitute vehicle authority if satisfied the motor vehicle for which the authority is sought does not comply with the vehicle requirements, which includes that the vehicle is subject of a current certificate of inspection (COI). New section 173A will provide an opportunity for the chief executive to ask the applicant to provide further information, which may be as simple as providing evidence of the COI, to satisfy the chief executive that the vehicle complies with the vehicle requirements.

The objective of requiring a person to notify the department of a change of their current email address is balanced with ensuring that the department can give the holder of an authority or service contract, who has consented to receiving correspondence by email, important information about the authority or service contract. This approach is consistent with the existing approach for section 277 of TOPTR, which requires the holder of an authority to notify the chief executive of a change to the holder's name, address or, if the holder has a current postal address, the holder's postal address.

Fair hearing (section 31) and rights in criminal proceedings (section 32)

Section 6 of the amendment regulation may limit the right to a fair hearing and rights in criminal proceedings to the extent that the evidentiary provisions it supports reverse the onus of proof and limit an individual's right to have witnesses examined. However, a person can still contest information stated on the evidentiary certificates, resulting in a witness being called so arguably the provision does not limit the human rights.

(a) the nature of the right

Section 31 (Fair hearing) of the HRA provides individuals the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing. This facilitates procedural fairness and protects natural justice.

Section 32 (Rights in criminal proceedings) of the HRA provides the right to be presumed innocent until proven guilty according to law as well as rights to certain minimum guarantees, including the right of accused persons to be informed of the nature and reason for a charge and to defend themselves personally or through legal assistance.

(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

Section 6 of the amendment regulation will support the use of certain evidentiary certificates for fare evasion. The amendment aims to support evidentiary provisions, which allow for a more efficient and cost-effective court process for all parties by removing the time and costs associated with calling witnesses for uncontested issues. By allowing the relevant certificate evidence to be used in a proceeding for an offence against a fare evasion provision, the limitation provides a practical approach for court proceedings where information on whether a person was trained and authorised in the use of a revenue protection device and a record of an electronic read or scan of a token is relevant and non-contentious. As a result, I believe the limitation is reasonable and demonstrably justifiable 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 limitation is connected to the purpose of the amendment, which is to support a more efficient and cost-effective court process for all parties. Allowing for certificate evidence removes the time and costs associated with calling witnesses about uncontested issues during court proceedings. Section 6 of the amendment regulation supports the use of certain evidentiary certificates for fare evasion. If the revenue protection devices are not prescribed, the department may have to rely on witnesses to provide evidence on whether a person was trained and authorised in the use of a revenue protection device and a record of an electronic read or scan of a token.

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

Supporting the use of certain evidentiary certificates is the least restrictive and reasonably available way of achieving the purpose. This is because the nature of the limitation posed by

certificate evidence is quite narrow, and because certificate evidence is contestable and limited to objective matters that are non-contentious.

- (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

Having regard to the nature and extent of the potential limitation on the right to a fair hearing and rights in criminal proceedings, I consider that the importance of meeting the objective of supporting the use of certain evidentiary certificates for fare evasion outweighs the potential limit on these rights.

Conclusion

I consider that the *Transport Operations (Passenger Transport) Amendment Regulation (No.2) 2020* is compatible with the *Human Rights Act 2019* because, while it does limit, restrict or interfere with a human right, that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The Honourable Mark Bailey MP
Minister for Transport and Main Roads

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