

Building (Queensland Development Code) Amendment Regulation 2023

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 (Queensland Development Code) Amendment Regulation 2023* (Amendment Regulation) made under the *Building Act 1975* (the Building Act).

In my opinion, the Amendment 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

The National Construction Code 2022 (NCC 2022) Volumes One and Two, also known as the Building Code of Australia (BCA), and NCC Volume Three, also known as the Plumbing Code of Australia, set out the minimum technical design and construction requirements for buildings, including plumbing and drainage, across Australia. The NCC sets minimum requirements for the safety, health, amenity, accessibility and sustainability of class 1 buildings (houses, guesthouses, hostels), and sole-occupancy units in class 2 buildings (apartments).

The NCC is given legal effect in Queensland through the Building Act, *Plumbing and Drainage Act 2018*, and associated subordinate legislation, including the *Building Regulation 2021* (Building Regulation). The NCC may also be varied in Queensland through statutory instruments, such as the Queensland Development Code and Queensland Plumbing and Wastewater Code.

The NCC 2022 generally took effect from 1 May 2023, except for provisions relating to livable housing design, including the Livable Housing Design Standard, and the residential energy efficiency provisions which will commence from 1 October 2023.

Section 261(2)(a) of the Building Act provides that the Governor in Council may make regulations under the Building Act with respect to building work.

The Amendment Regulation supports the objectives of the Building Act and makes the following amendments.

Queensland Development Code Mandatory Part 4.1 – Sustainable Buildings

It will enable an updated Queensland Development Code Mandatory Part 4.1 (QDC 4.1) to:

1. change Queensland’s date of adoption of the residential energy efficiency provisions in NCC 2022 from 1 October 2023 to 1 May 2024;
2. provide an additional deemed-to-satisfy compliance pathway to achieve residential energy efficiency; and
3. remove existing variations and therefore require new homes in Queensland to comply with the following in the NCC 2022:
 - a. a 7-star rating (out of 10) for the building shell (i.e. roof, walls, windows and floors); and
 - b. a new whole-of-home energy budget that will assess the energy efficiency of the home’s major appliances and any on-site renewable energy system, such as solar photovoltaic (PV).

QDC 4.1 will also retain and expand the optional credit of up to 1 star statewide where an outdoor living area is included with new houses and new units in apartment buildings.

Queensland Development Code Mandatory Part 4.5 – Livable dwellings and grading to floor wastes

The Amendment Regulation introduces Queensland Development Code Mandatory Part 4.5 (QDC 4.5) to provide transitional arrangements necessary for the introduction of NCC 2022. This includes:

1. a time-limited (18-month) exemption from 1 October 2023 from the Livable Housing Design Standard (LHDS) for:
 - a. narrow lots (i.e. lots with a frontage measuring 12.5 metres wide and less) where the lots were created prior to 1 October 2023, or created after 1 October 2023 and on or before 31 March 2025 but only if:
 - i. a properly made application for a development permit for reconfiguring of a lot to create the lot was made prior to 1 October 2023; or
 - ii. the lot is identified in a disclosure plan under the *Land Sales Act 1984* prior to 1 October 2023.
 - b. small pre-built houses (i.e. class 1a buildings that are 55m² or less in floor area) that have been wholly or predominantly manufactured off-site, completed prior to 1 October 2023, and installed on a lot on or prior to 31 March 2025.
2. vary the NCC 2022:
 - a. to provide additional compliance solutions for:
 - i. grading to floor wastes for class 1 buildings and sole-occupancy units on the ground or entry level of class 2 buildings, and
 - ii. enclosed showers in class 1a buildings and sole-occupancy units in class 2 buildings.

- b. to exempt repair and maintenance to a class 1a building or sole-occupancy unit in a class 2 building to comply with the LHDS where the part of the building or unit being repaired and maintained did not comply with the LHDS prior to the repair or maintenance being undertaken.
- c. to exempt renovations to sanitary compartments (i.e. toilets) and bathrooms in existing class 1a buildings and sole-occupancy units in class 2 buildings from complying with the following LHDS in NCC 2022:
 - i. Part 3.1 (clear opening width) for wider doorways unless the renovation involves demolition of the existing doorway;
 - ii. Part 3.2 (threshold);
 - iii. Part 4.2 (circulation space) where the renovation does not increase the size of the sanitary compartment; and
 - iv. Part 6 (reinforcement of bathroom and sanitary compartment walls) unless the wall framing of the sanitary compartment or bathroom is exposed.
- d. to exempt sanitary compartments from complying with the LHDS requirement to have at least one compliant sanitary compartment on the ground or entry level of an existing class 1a building if there is no habitable room on the ground or entry level of the building. Instead, it will require the compliant sanitary compartment to be located on the ground or entry level, or on the lowest level of a class 1a building that has a habitable room.

Human Rights Issues

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

During the development of the Amendment Regulation, due regard was given to its compatibility with the HR Act.

The Amendment Regulation is not considered to engage or promote human rights through the amendments to QDC 4.1 and introduction of QDC 4.5.

While the Amendment Regulation does not limit any human rights through QDC 4.1, it does, however, potentially limit the right to equality through QDC 4.5 as explored below.

Consideration of reasonable limitations on human rights (section 13 HR Act)

(a) the nature of the right

Sections 15(3) and (4) of the HR Act require all laws and policies to be applied equally and not have a discriminatory effect on particular groups, such as persons with a disability.

Section 15(5) allows positive measures, or differential treatment, to be taken for particular groups to ensure equality in law.

The livable housing design provisions, including the LHDS, in the NCC 2022 engage and promote the right to equality under section 15 of the HR Act.

The right is engaged and promoted as the livable housing design provisions in the NCC are enabled by the Building Act and are a positive measure to ensure equality in law.

Vulnerable persons, such as persons with disability or the elderly, will be better able to access dwellings with features appropriate to their needs, as more new dwellings comply with the LHDS.

Accessible dwellings include a one step-free entry into the home, wider internal doorways and corridors, and an accessible sanitary compartment on ground (or entry) level, and reinforcing for future adaptations, such as grabrails in sanitary compartments and bathrooms.

(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

QDC 4.5 potentially limits the right to equality as it provides various exemptions to the application of the livable housing design provisions in the NCC 2022.

18-month delay to commencement

QDC 4.5 provides an 18-month exemption from 1 October 2023 to the commencement of the livable housing design provisions in the NCC 2022 to narrow lots and small pre-built houses.

The exemption will only apply to:

- narrow lots created prior to 1 October 2023, or created after 1 October 2023 and on or before 31 March 2025 but only if:
 - a properly made application for a development permit for reconfiguring of a lot to create the lot was made prior to 1 October 2023; or
 - the lot is identified in a disclosure plan under the *Land Sales Act 1984* prior to 1 October 2023.
- small pre-built houses that have been wholly or predominantly manufactured off-site, completed prior to 1 October 2023, and installed on a lot prior to 31 March 2025.

The purpose of the delay is to:

- provide industry stakeholders additional time to understand the complexities of and be able to comply with the livable housing design provisions.
- remove any incentive for developers applying to Local Government to amend subdivision plans to remove lots with a frontage less than 12.5 metres wide and in doing so reduce housing supply and exacerbate Queensland's current housing affordability crisis.
- ensure small prebuilt homes (less than 55m² in floor area) completed on or prior to 1 October 2023 can be supplied into the market.

Livable housing design provisions

QDC 4.5 exempts:

- repair and maintenance to a class 1a building or sole-occupancy unit in a class 2 building to comply with the LHDS where the part of the building or unit being repaired and maintained did not comply with the LHDS prior to the repair or maintenance being undertaken.

- sanitary compartments or bathrooms subject to a renovation in a class 1a building or a sole-occupancy unit in a class 2 building to comply with Part:
 - 3.1 (clear opening width) of the LHDS unless the renovation involves demolition of the existing doorway;
 - 3.2 (threshold) of the LHDS;
 - 4.2 (circulation space) of the LHDS where the renovation does not increase the size of the sanitary compartment; and
 - 6 (reinforcement of bathroom and sanitary compartment walls) of the LHDS unless wall framing is exposed.

QDC 4.5 also varies the requirement to have an accessible sanitary compartment on the ground or entry level of a class 1a building if there is no habitable room on that floor and instead requires an accessible sanitary compartment to be located on the ground or entry level or on the lowest level of a dwelling that has a habitable room. However, where a sanitary compartment is installed on the ground or entry level which does not have a habitable room, it must comply with the LHDS requirements.

The purpose of these exemptions is to:

- relieve the considerable additional costs which industry and Queensland residents may incur where cosmetic renovations are made to sanitary compartments or bathrooms in houses or units
- overcome practical challenges likely to be encountered through adoption of the LHDS requirements, such as insufficient space for a larger sanitary compartment or bathroom doors to be widened.

The right to equality is potentially limited by the 18-month exemption period for narrow lots and small pre-built houses, and exemptions relating to the repair and maintenance of existing dwellings, and renovations to sanitary compartments and bathrooms.

Persons seeking accessible housing may experience reduced supply of small pre-built houses, or houses or units on narrow lots until 31 March 2025.

The exemptions for repair, maintenance, renovations acknowledges that due to space constraints it may not be possible for a new or existing dwelling or sanitary compartment or bathroom to comply with the LHDS requirements.

The exemption from the requirement to have at least one complying toilet on the ground or entry level where there is no habitable room on that floor recognises practical issues with this provision. Requiring a complying toilet on first floor with a habitable room addresses this issue and ensures that the building provides an appropriate level of accessibility.

The proposed limitations are consistent with a free and democratic society based on human dignity, equality and freedom. They do not arbitrarily impose limitations on the right to equality without sufficient or warranted reason.

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

18-month delay to commencement

On 26 August 2022, Building Ministers agreed to introduce the Modern Homes standards, which include the residential energy efficiency provisions and livable housing design provisions in the NCC 2022. At this time, industry peak bodies raised concerns regarding the impacts of the Modern Homes standards and sought additional delays in implementation.

In response to industry concerns, Building Ministers approved an additional five month transition period for the standards and scheduled them to commence on 1 October 2023.

Although the transitional arrangements for the NCC 2022 allowed a 5 month timeframe for industry to implement the livable housing design provisions from 1 May to 1 October 2023, industry stakeholders still hold concerns that the short time period until the provisions apply in Queensland is insufficient for their implementation, particularly for narrow lots and small pre-built houses.

By extension, a lack of understanding and inability to comply with the livable housing design provisions will impede the right to equality for persons seeking accessible housing. Industry will not be able to provide appropriate and tailored housing to suit the needs of these potential purchasers.

Given concerns around industry's ability to comply with the LHDS on narrow lots if the provisions were to apply on 1 October 2023, developers may apply to Local Government to amend existing subdivision plans to remove all narrow lots. This could affect adjacent lots and result in delays to housing supply. The proposed exemption addresses this concern by removing any reason for developers to change existing subdivision plans.

The proposed exemption for small pre-built homes, will ensure that dwellings substantially completed prior to 1 October 2023, are able to be supplied into the Queensland market.

Livable housing design provisions

Industry stakeholders hold concerns that compliance with the LHDS may be impractical in certain circumstances.

These include where:

- repair and maintenance of a class 1a building or sole-occupancy unit that did not comply with the LHDS prior to the repair or maintenance being undertaken.
- renovations to sanitary compartments and bathrooms that are essentially cosmetic in nature or where there is insufficient space to comply with the LHDS.
- there is no habitable room on the ground or entry level of a class 1a building which would be serviced by a complying sanitary compartment.

The proposed exemptions address these concerns, by ensuring the standard required reflects the nature of the repair, maintenance or renovation being undertaken.

The habitable room exemption reflects the limited utility of having a toilet on the ground floor. Requiring an accessible toilet on the first floor of a dwelling that has a habitable room ensures an appropriate minimum standard is maintained.

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

18-month delay to commencement

The 18-month delay to the commencement of the livable housing design provisions for narrow lots and small pre-built houses is proportionate as it only affects this defined type of lots and houses.

The delay will also be in line with best practice which allows a greater period for implementation of any significant changes to building laws in Queensland, particularly where industry stakeholders hold serious concerns.

There is no less restrictive way to achieve the purpose of the limitation. A shorter delay will not allow industry time to understand and comply with the livable housing design provisions in the design, construction, maintenance, repair or renovation of class 1a buildings and sole-occupancy units in class 2 buildings. The current delays mean developers will be placed on notice that future lots and houses need to comply with the livable housing design provisions, and, as the exemption will only apply for 18-months, developers will have incentive to bring affected narrow lots and small pre-built houses to market.

Some Australian jurisdictions have either delayed commencement of the LHDS, (e.g. Victoria, South Australia, and Tasmania) or will not be adopting at all (New South Wales and Western Australia).

Livable housing design provisions

The exemptions are proportionate as:

- for repairs and maintenance – they only apply where an existing dwelling is being repaired and maintained did not comply with the LHDS prior to the repair or maintenance being undertaken.
- for sanitary compartments and bathrooms – they only apply in limited circumstances, i.e. during renovations, to certain rooms, i.e. sanitary compartments and bathrooms, and in some cases where particular building work is taken during the renovation, i.e. demolition the room's existing doorway, exposure of the wall framing, and sanitary compartment and wall framing.
- for a toilet on the ground or entry level of a class 1a building – it only applies where there is no habitable room on the ground or entry level. A requirement is further imposed that there be at least one toilet that complies with Part 4 LHDS on the ground or entry level, or on the lowest level of a class 1a building with a habitable room, if there is no habitable room on the ground or entry level.

No additional exemptions to the livable housing design provisions or the LHDS are contemplated, and there is also no less restrictive way to achieve the purpose of the limitation.

(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

18-month delay to commencement

The purpose of the limitation is to provide industry additional time to understand and cater for the changes in the livable housing design requirements. It is to also remove any incentive for developers to apply to Local Government to amend subdivision plans to remove lots with a frontage of less than 12.5 metres wide. These scenarios will cause delays to the provision of housing supply during the current housing affordability crisis.

Preservation of the right to equality without any limitation means persons with disability, for example, may have immediate access to housing or units designed to account their needs.

On balance, the importance of increasing housing supply in the short-term outweighs the importance of preserving the human right on a temporary basis. Industry may not have appropriate designs in place for accessible houses for narrow lots and small pre-built houses.

Livable housing design provisions

The purpose of the limitation is to remove any practical challenges and significant cost-burden associated with compliance with the LHDS for repairs, maintenance and renovations of existing dwellings.

On balance, the importance of the purpose of the limitation outweighs the importance of preserving the human right. It may be impossible or cost prohibitive to adopt the LHDS in all circumstances.

Not imposing the limitations would provide a strong disincentive for small scale renovations or could encourage unlawful building work.

(f) any other relevant factors

There are no other factors considered relevant.

Conclusion

I consider that the *Building (Queensland Development Code) Amendment Regulation 2023* is compatible with the *Human Rights Act 2019* because it limits human rights only to the extent that 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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