

Legal Affairs and Safety Committee

Report No. 47, 57th Parliament

Subordinate legislation tabled between 14 March 2023 and 28 March 2023

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 14 March 2023 and 28 March 2023. 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* (LSA).¹

The report also notes any issues identified by the committee in its consideration of compliance with the *Human Rights Act 2019* (HRA) and the human rights certificates tabled with the subordinate legislation.²

2 Subordinate legislation examined

No.	Subordinate legislation	Date tabled	Disallowance date
7	Public Trustee (Interest Rate) Amendment Regulation (No. 2) 2023	14 March 2023	25 May 2023
8	Proclamation - Police Service Administration and Other Legislation Amendment Act 2022	14 March 2023	25 May 2023
11	Legal Aid Queensland Regulation 2023	14 March 2023	25 May 2023
18	Recording of Evidence Amendment Regulation 2023	28 March 2023	15 June 2023

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

3 Committee consideration of the subordinate legislation

Unless noted below, the committee did not identify any significant issues regarding the policy, consistency with fundamental legislative principles, the lawfulness of the subordinate legislation or non-compliance with the HRA.

The committee considers that the explanatory notes tabled with the subordinate legislation noted in this report comply with the requirements of section 24 of the LSA and that the human rights certificates tabled with the subordinate legislation provide a sufficient level of information to facilitate understanding of the subordinate legislation in relation to their compatibility with the HRA.

¹ *Legislative Standards Act 1992*, Part 4 (LSA).

² *Human Rights Act 2019*, s 41 (HRA).

4 Public Trustee (Interest Rate) Amendment Regulation (No. 2) 2023 (SL No. 7)

4.1 Policy objective

The objective of the Public Trustee (Interest Rate) Amendment Regulation (No. 2) 2023 (SL No. 7) is to amend the *Public Trustee Regulation 2012* (PT Regulation) to increase the interest rates payable on amounts held in the Public Trustee's common fund from 1 March 2023, as follows:

- Class 2(c) and Class 3 amounts: Financial Management Customers and Enduring Powers of Attorney Accounts - from 0.73% to 0.8%.³

The interest rates are determined by the Public Trustee through an analysis of 'the market return of a comparative set of competitive financial products and prevailing economic conditions'.⁴ In the review of the interest rates payable under the PT Regulation, the Public Trustee applied the methodology endorsed by the Public Trust Office Investment Board.⁵

4.2 Consistency with fundamental legislative principles

No issues of fundamental legislative principle were identified.

4.3 Explanatory notes

The explanatory notes comply with part 4 of the LSA.

4.4 Compatibility with human rights

The committee is satisfied that the subordinate legislation is compatible with human rights.⁶ The right to property is discussed further below.

4.4.1 Property rights

All persons have the right to own property alone or in association with others. A person must not be arbitrarily deprived of property.⁷

The human rights certificate notes that property could include a person's interest in trust funds held by the Public Trustee and that although SL No. 7 'restrains the ability of a person beneficially interested in the money in the common fund to derive profits from their property, the interest rate that is set reflects the market rate of return of a comparative set of competitive financial products and prevailing economic conditions'.⁸

In the view expressed in the human rights certificate, although SL No. 7 limits property rights, that limitation is reasonable and demonstrably justified:

The Regulation strikes the appropriate balance between management of the common fund, on the one hand, and limiting certain human rights on the other. Although people with an interest in monies in the common fund are not free to invest the monies as they choose, they receive a comparable market rate of return.⁹

³ SL No. 7, explanatory notes, p 1.

⁴ SL No. 7, explanatory notes, p 1.

⁵ SL No. 7, explanatory notes, p 2.

⁶ Section 8 of the *Human Rights Act 2019* (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.

⁷ HRA, s 24.

⁸ SL No. 7, human rights certificate, p 2.

⁹ SL No. 7, human rights certificate, p 3.

4.5 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.

Committee comment

The committee is satisfied that the subordinate legislation is compatible with human rights. The committee is pleased to note that a person with monies in the common fund, although not free to invest their monies as they choose, still receive comparable market interest rates.

5 Proclamation - Police Service Administration and Other Legislation Amendment Act 2022 (SL No. 8)

5.1 Policy objective

The objective of the Proclamation made under the *Police Service Administration and Other Legislation Amendment Act 2022* (SL No. 8) is to fix a commencement date of 6 March 2023 for remaining uncommenced provisions of the *Police Service Administration and Other Legislation Amendment Act 2022*.

5.2 Consistency with fundamental legislative principles

No issues of fundamental legislative principle were identified.

5.3 Explanatory notes

The explanatory notes comply with part 4 of the LSA.

5.4 Human rights certificate

No human rights certificate was required to be tabled with the proclamation.¹⁰

Committee comment

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

6 Legal Aid Queensland Regulation 2023 (SL No. 11)

6.1 Policy objective

The objective of the Legal Aid Queensland Regulation 2023 (SL No. 11) is to apply particular provisions of the *Public Sector Act* (PS Act) and directives issued under the PS Act that maintain existing employment conditions and entitlements for Legal Aid Queensland (LAQ) employees.¹¹

According to the explanatory notes, SL No. 11 applies the provisions and directives 'so far as reasonably and practically possible,' without threatening LAQ's public benevolent institution (PBI) status.¹² These provisions and directives apply from 1 March 2023, being the date the PS Act repeals the *Public Service Regulation 2018*.¹³

¹⁰ See HRA, s 41(4A).

¹¹ SL No. 11, explanatory notes, p 2.

¹² SL No. 11, explanatory notes, p 2. The explanatory notes, p 1, advise: 'PBI status enables LAQ to maintain its deductible gift recipient status with the Australian Taxation Office and confers other tax benefits at an institutional and employee level, ultimately enhancing LAQ's ability to provide legal services for vulnerable clients'.

¹³ Schedule 4 of the repealed *Public Service Regulation 2018* applied provisions of (and particular rulings made under) the repealed *Public Service Act 2008* to LAQ and its employees: SL No. 11, explanatory notes, p 2.

6.2 Consistency with fundamental legislative principles

6.2.1 Rights and liberties of individuals

6.2.1.1 Privacy

The right to privacy and the disclosure of confidential information are relevant to a consideration of whether legislation has sufficient regard to the rights and liberties of individuals. These matters are discussed below under the heading of 'Compatibility with human rights'. The committee is satisfied that any inconsistency with fundamental legislative principles is sufficiently justified.

6.3 Explanatory notes

The explanatory notes comply with part 4 of the LSA.

6.4 Compatibility with human rights

The committee is satisfied that the subordinate legislation is compatible with human rights. The rights to a fair hearing, freedom of expression, privacy and equality before the law and the right to take part in public life are discussed further below.

6.4.1 Freedom of expression

Every person has the right to hold an opinion without interference, and to freedom of expression, including the freedom to seek, receive and impart information and ideas of all kinds.¹⁴

Every person has the right to freedom of thought, conscience, religion and belief. A person must not be coerced or restrained in a way that limits the person's freedom to have or adopt a religion or belief.¹⁵

6.4.1.1 Conduct in a private capacity

In applying section 40 of the PS Act to LAQ and its employees, SL No. 11 provides that the work performance and personal conduct of each employee should be guided by the principle of ensuring an employee's personal conduct does not reflect adversely on the reputation of the entity in which the employee is employed.¹⁶

The human rights certificate observes that the provisions could potentially limit the human right to freedom of expression by 'attempting to regulate the conduct of an employee in their private life, including the expression and publication of their personal views, with a risk of being disciplined by their employer'.¹⁷

Additionally, the human rights certificate states that regulating an employee's personal conduct could potentially limit the human right to freedom of thought, conscience, religion and belief:

For example, if an employee holds a religious or other belief, this right protects the employee's freedom to demonstrate their religion or belief through ways such as displaying symbols, wearing distinctive jewellery or clothing, using a particular language and preparing and distributing religious texts or publications.¹⁸

According to the human rights certificate, SL No. 11's limitation on these freedoms of an employee is reasonable and demonstrably justifiable when the rights of the individual are balanced with the rights of LAQ and the public interest:

Clarifying the appropriate conduct of an employee ensures that they understand their responsibility to maintain the public trust that is inherent in their employment. The risk of an employee's conduct adversely

¹⁴ HRA, s 21.

¹⁵ HRA, s 20.

¹⁶ SL No. 11, human rights certificate, p 2.

¹⁷ SL No. 11, human rights certificate, p 2.

¹⁸ SL No. 11, human rights certificate, p 2.

reflecting on the reputation and integrity of LAQ and affecting public confidence outweighs an employee's unfettered rights to freedom of expression and freedom of thought, conscience, religion and belief.

In applying these provisions of the Act, the aim is to ensure LAQ employees can continue to have the ability to contribute to public discussions on community and social issues in their private capacity. However, their actions and behaviours must not adversely reflect on the reputation and integrity of LAQ, or their ability to perform the duties of their role in an independent, unbiased manner to ensure public confidence is not compromised.¹⁹

6.4.2 Privacy and reputation, right to take part in public life and right to recognition and equality before the law

A person has the right not to have their privacy unlawfully or arbitrarily interfered with.²⁰

Every eligible person has the right, and is to have the opportunity, without discrimination, to have access, on general terms of equality, to the public service and to public office.²¹

Every person is equal before the law and is entitled to the equal protection of the law without discrimination.²²

6.4.2.1 Assessing suitability for employment

SL No. 11 applies chapter 3, part 5 of the Act²³ to the LAQ and its employees. These provisions, which relate to assessing a person's suitability for employment to a role (including a person's criminal and serious disciplinary history and whether they hold a working with children authority), give the chief executive the ability, where relevant, to consider the suitability of a prospective employee before employing them to a position in LAQ.²⁴

SL No. 11 applies a range of these provisions,²⁵ including those listed in the table below.

Section	Description
52	Providing that the chief executive may ask a person for written consent to obtain the person's criminal history if they are engaged or proposed to be engaged to perform a relevant duty within LAQ under the suitability directive ²⁶
58 - 62	Providing that the chief executive must ensure a person does not perform a child-related duty unless the person holds a working with children authority or a relevant exemption ²⁷
66	Providing that the chief executive may ask a person for written consent to obtain the person's criminal history, in the specified circumstances
71	Providing that the chief executive may, under a directive, require a person that LAQ proposes to employ (or second into LAQ) to provide details of the history of any serious disciplinary action taken against person
73	Requiring an employee to disclose to the chief executive a charge or conviction for an indictable offence

¹⁹ SL No. 11, human rights certificate, pp 3-4.

²⁰ HRA, s 25(a).

²¹ HRA, s 23(2)(b).

²² HRA, s 15(3).

²³ Other than Act, s 80; SL No. 11, s 3(g).

²⁴ SL No. 11, human rights certificate, p 4.

²⁵ SL No. 11, human rights certificate, pp 4-5.

²⁶ The section also applies to an employee employed in LAQ who changes or is proposed to change duties to include a relevant duty; SL No. 11, human rights certificate, p 4.

²⁷ Being a relevant exemption under the *Working with Children (Risk Management and Screening) Act 2000*; SL No. 11, human rights certificate, p 4.

In contemplation of these applied provisions and their relationship with the aforementioned human rights, the human rights certificate states that:

- the ability for the chief executive to obtain (with consent) a person's criminal history report and the requirement for an employee or prosecuting authority to notify charges of relevant offences may limit the person's right to privacy and reputation²⁸
- the provisions could potentially limit an individual's human right to take part in public life by providing a chief executive with discretion to decide whether a person is suitable for engagement in LAQ on the basis of their criminal or serious disciplinary history information or imposing the requirement to possess an authority to work with children or a relevant exemption²⁹
- the criminal history provisions may impose a limitation on the rights of a person to equal treatment and protection before the law without discrimination if they possess a relevant criminal record and wish to be engaged in relevant duties within LAQ.³⁰

According to the human rights certificate, these provisions are justified to ensure persons employed by LAQ are deemed suitable to undertake their roles: 'This is necessary to ensure a high performing workforce and supports the chief executive to maintain accountability, impartiality and integrity, while supporting the public interest and safeguarding the community'.³¹

The human rights certificate concludes that the limitations in the applied provisions balance the individual rights with public interest in proper administration of LAQ, and corruption prevention:

The risk of an employee's conduct adversely reflecting on the reputation and integrity of LAQ and affecting public confidence outweighs an employee's unfettered rights to privacy and reputation and taking part in public life.

...

The criminal history provisions include protections for the individual as they apply only to relevant duties, information is confidential, consent is required, and impacts are considered in the context of the role.

The directive relating to employment screening supports affording procedural fairness to a person in relation to employment screening, a further safeguard of the human rights of individuals impacted by these clauses.³²

6.4.3 Right to take part in public life

Every eligible person has the right, and is to have the opportunity, without discrimination, to have access, on general terms of equality, to the public service and to public office.³³

6.4.3.1 Suspension

SL No. 11 applies section 101 of the PS Act, which provides that the chief executive may suspend an employee from duty if they reasonably believe the employee is liable to discipline under a disciplinary law, or the proper and efficient management of LAQ might be prejudiced if the employee is not suspended.³⁴

²⁸ SL No. 11, human rights certificate, p 5.

²⁹ SL No. 11, human rights certificate, p 5.

³⁰ SL No. 11, human rights certificate, p 5.

³¹ SL No. 11, human rights certificate, p 6.

³² SL No. 11, human rights certificate, p 6-7.

³³ HRA, s 23(2)(b).

³⁴ SL No. 11, human rights certificate, p 7.

The human rights certificate acknowledges that an employee who is suspended from duty will have their right to take part in public life limited for a specified period of time, however contends that such a limitation:

... is necessary if the chief executive determines that the proper and efficient management of LAQ might be prejudiced if the employee continues to perform duties or if the chief executive believes the employee is liable to discipline under a disciplinary law.

The decision to suspend an employee is a last resort after the chief executive has considered the possibility to undertake all alternative duties.³⁵

According to the human rights certificate, the ability for the chief executive to suspend an employee applies in cases where there is a reputational risk to LAQ or risk to employees, such as where an employee is being investigated for serious allegations such as sexual harassment or assault:

It can be used where other options, such as moving the employee into a different role, have been explored and are not viable. Natural justice applies to decisions to suspend an employee without pay, and confidentiality obligations apply.³⁶

The human rights certificate concludes that the limits imposed by the suspension provisions are reasonable and demonstrably justifiable, and balance 'the rights of others against the rights of the individual, and the public interest in effective management of LAQ'.³⁷

6.4.4 Privacy and reputation, right to take part in public life and right to recognition and equality before the law

A person has the right not to have their privacy unlawfully or arbitrarily interfered with.³⁸

Every eligible person has the right, and is to have the opportunity, without discrimination, to have access, on general terms of equality, to the public service and to public office.³⁹

Every person is equal before the law and is entitled to the equal protection of the law without discrimination.⁴⁰

6.4.4.1 *Independent medical examinations (IMEs)*

SL No. 11 applies sections 103 and 104 of the PS Act, which provide that, if an employee is absent from duty,⁴¹ and the chief executive reasonably suspects that the employee's absence or unsatisfactory performance is caused by a mental or physical illness or disability, the chief executive may require an employee to submit to a medical examination.⁴²

In contemplation of these applied provisions and their relationship with the aforementioned human rights, the human rights certificate states that:

- these provisions impose a limitation on the human right of privacy and reputation by requiring disclosure of personal information to the examining doctor and medical information to LAQ, insofar as it relates to the employee's absence or performance of their duties⁴³

³⁵ SL No. 11, human rights certificate, pp 7-8.

³⁶ SL No. 11, human rights certificate, p 8.

³⁷ SL No. 11, human rights certificate, p 8.

³⁸ HRA, s 25(a).

³⁹ HRA, s 23(2)(b).

⁴⁰ HRA, s 15(3).

⁴¹ Or the employee's chief executive is reasonably satisfied the employee is not performing his or her duties satisfactorily.

⁴² SL No. 11, human rights certificate, p 8.

⁴³ The privacy of the employee will also be limited if they are compulsorily required to attend a medical examination; SL No. 11, human rights certificate, p 9.

- the ability for a chief executive to retire an employee may impact on an employee's ability to take part in public life⁴⁴
- the right to recognition and equality before the law may be limited because of the link between an employee's perceived medical condition and the decision to direct them to attend an IME.⁴⁵

The human rights certificate states that the ability for the chief executive to direct an employee to submit to an IME is necessary for the chief executive to have accurate specialist medical information to inform the needs of an employee in the workplace:

This and the consequential sharing of the employee's personal information is a necessary and reasonable interference with the employee's right to privacy to ensure their wellbeing and safety, the potential wellbeing and safety of other employees, and for the effective management of the workplace.⁴⁶

The human rights certificate concludes that, on balance, the importance of the purpose of directing an employee to attend an IME (and potentially retiring them from the public sector) is greater than the importance of preserving the human rights which are impacted.⁴⁷

6.4.5 Right to a fair hearing

A person charged with a criminal offence or a party to a civil proceeding has the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.⁴⁸

6.4.5.1 Appeals to the Queensland Industrial Relations Commission

SL No. 11 applies section 134 of the PS Act, which provides that appeals for disputes, relating to decisions made under the Act, will be heard by the Queensland Industrial Relations Commission (QIRC), where legal representation is generally not permitted.⁴⁹

The application of this provision could potentially limit the right to a fair hearing by denying an employee the ability to be legally represented in a matter before the QIRC. However, according to the human rights certificate, SL No. 11 'aims to ensure fairness, transparency, and consistency in employment and decision-making' by giving LAQ employees 'the same access to independent adjudication processes as public service employees have under the existing legislative framework under the [*Public Service Act 2008*]'.⁵⁰

The human rights certificate concludes that giving LAQ employees access to the QIRC for disputes relating to decisions made under the Act 'provides these employees with a new avenue for dispute resolution and ensures a fair and consistent employment experience'.⁵¹

6.4.6 Right to take part in public life

Every eligible person has the right, and is to have the opportunity, without discrimination, to have access, on general terms of equality, to the public service and to public office.⁵²

⁴⁴ SL No. 11, human rights certificate, p 9.

⁴⁵ The protected attributes in the *Anti-Discrimination Act 1991*, s 7, include 'impairment'.

⁴⁶ SL No. 11, human rights certificate, p 10.

⁴⁷ SL No. 11, human rights certificate, p 11.

⁴⁸ HRA, s 31(1).

⁴⁹ Additionally, SL No. 11 applies section 140 of the Act, which specifies matters that are excluded from review, but which apply to high earning employees who are compensated in other ways for the exclusion; SL No. 11, human rights certificate, pp 11, 12.

⁵⁰ SL No. 11, human rights certificate, p 11.

⁵¹ SL No. 11, human rights certificate, p 13.

⁵² HRA, s 23(2)(b).

6.4.6.1 *Termination and ending of employment*

SL No. 11 applies the Act's provisions as listed in the table below to the LAQ and its employees, which may impact an employee's right to take part in public life.

Section	Description
92	Lists termination of employment as an example of a disciplinary action relating to employment
145	Clarifies that the Act does not limit or affect a common law right to terminate an employee's employment, including summarily, or prevent an employee's employment contract from ending by operation of law
147	Enables the chief executive to terminate an employee if they are surplus to LAQ's needs
162	Enables the chief executive to terminate the employment of an employee who refuses a transfer without establishing reasonable grounds for refusal to the satisfaction of the chief executive

The human rights certificate states that:

- the purpose of providing the chief executive with the ability to terminate an employee who is surplus to LAQ's needs or who refuses a transfer without establishing reasonable grounds is necessary for the management of LAQ's workforce, and the efficient use of public resources
- the purpose of section 145 is not to introduce a new termination right, but to strengthen LAQ's ability to rely on the common law to end employment where an employee has engaged in serious misconduct, abandoned their employment (repudiation) or is imprisoned or remanded in custody (frustration).⁵³

According to the human right certificate, in recognition of the notion of public trust, the provisions applied to LAQ aim to:

... strike an appropriate balance between ensuring employees are treated fairly and provided procedural fairness in the appropriate circumstances, while also ensuring the chief executive can make decisions to protect the risk and reputation of LAQ and to ensure their accountability obligations are met.⁵⁴

In relation to the limitation on an employee's right to take part in public life if they are deemed as surplus to LAQ's need or refuse a transfer to other duties or another location without establishing reasonable grounds, the human rights certificate contends that it 'is necessary for the effective management of LAQ's workforce, and the efficient use of resources'.⁵⁵

The human rights certificate concludes that:

The ability of the chief executive to make decisions to end an employee's employment to effectively manage their workforce, ensure accountability obligations are met, and to protect the risk and reputation of LAQ, outweighs the potential limitations to an individual's human rights.⁵⁶

6.5 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.

⁵³ SL No. 11, human rights certificate, p 13.

⁵⁴ SL No. 11, human rights certificate, p 14.

⁵⁵ SL No. 11, human rights certificate, p 14.

⁵⁶ SL No. 11, human rights certificate, p 15.

Committee comment

The committee is satisfied that the subordinate legislation has sufficient regard to rights and liberties of individuals and is compatible with human rights.

The committee notes it is important that the LAQ must hold public trust and confidence given it represents some of the most vulnerable Queenslanders in court. The chief executive must also have confidence that the employees of LAQ will carry out their role professionally and ethically. The committee notes that consideration has been given to the rights of the individual along with the broader public interests regarding LAQ.

7 Recording of Evidence Amendment Regulation 2023 (SL No. 18)

7.1 Policy objective

The Recording of Evidence Amendment Regulation 2023 (SL No. 18) provides for a new fee structure for copies of audio recordings and transcriptions of legal proceedings.⁵⁷ Under the new fee structure:

- the fees prescribed by the *Recording of Evidence Regulation 2018* apply to all copies of audio recordings
- there are different fees for copies of transcriptions based on whether it is the first request for a transcription or a second or subsequent request
- a commercial price will be paid to a transcription service provider for the first copy of a transcription
- parties to a proceeding who collectively request the first copy of a transcription will pay a discounted commercial price
- prescribed fees will apply to second or subsequent requests for copies of a transcription of a proceeding or part of a proceeding.⁵⁸

SL No. 18 also expands the categories of persons entitled to a fee exemption. SL No. 18 provides that if legal proceedings before a coroner or industrial magistrate relate to the death of a person, that person's family is entitled to a free copy of an existing transcription of a record or audio record of the proceeding.⁵⁹

7.2 Consistency with fundamental legislative principles

No issues of fundamental legislative principle were identified.

7.3 Explanatory notes

The explanatory notes comply with part 4 of the LSA.

7.4 Compatibility with human rights

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

⁵⁷ SL No. 18, human rights certificate, p 1. SL No. 18 will commence on 18 April 2023: SL No. 18, s 2.

⁵⁸ SL No. 18, s 4 (Recording of Evidence Regulation 2018, new ss 4 – 4H); SL No. 18, human rights certificate, p 1.

⁵⁹ SL No. 18, s 6 (Recording of Evidence Regulation 2018, new s 9A); SL No. 18, explanatory notes, p 2.

7.5 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.

8 Recommendation

The committee recommends that the House notes this report.



Peter Russo MP

Chair

May 2023

Legal Affairs and Safety Committee

Chair

Deputy Chair

Members

Mr Peter Russo MP, Member for Toohey

Mrs Laura Gerber MP, Member for Currumbin

Ms Sandy Bolton MP, Member for Noosa

Ms Jonty Bush MP, Member for Cooper

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