

## Economics and Governance Committee

### Report No. 17, 57th Parliament

### Subordinate legislation tabled between 1 September 2021 and 2 September 2021

#### 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 1 September 2021 and 2 September 2021. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, its consistency with fundamental legislative principles (FLPs)<sup>1</sup>, its compatibility with human rights,<sup>2</sup> and its lawfulness.<sup>3</sup> It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992* (LSA)<sup>4</sup> and on the committee’s consideration of the human rights certificate tabled with the subordinate legislation.<sup>5</sup>

#### 2 Subordinate legislation examined

The committee examined the subordinate legislation listed in the table below.

| No. | Subordinate legislation         | Date tabled      | Disallowance date* |
|-----|---------------------------------|------------------|--------------------|
| 136 | Parliamentary Service Rule 2021 | 2 September 2021 | 1 December 2021    |

\*The disallowance date is 14 sitting days after the tabling date. (See section 50 of the *Statutory Instruments Act 1992*.) Disallowance dates are based on proposed sitting dates as advised by the Leader of the House. These dates are subject to change.

<sup>1</sup> Section 4 of the *Legislative Standards Act 1992* (LSA) states that FLPs are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to: a) rights and liberties of individuals, and b) the institution of Parliament.

<sup>2</sup> Section 8 of the *Human Rights Act 2019* (HRA) provides that a statutory provision is compatible with human rights if it 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 to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom. Section 13 sets out a range of factors that may be relevant in determining whether a limit on a human right is reasonable and justifiable.

<sup>3</sup> *Parliament of Queensland Act 2001*, s 93.

<sup>4</sup> *Legislative Standards Act 1992*, Part 4. Section 24 sets out the information that must be included in the explanatory note for subordinate legislation which is required to be tabled in the Legislative Assembly with the subordinate legislation (LSA, s 22).

<sup>5</sup> Section 41(4) of the HRA provides that the portfolio committee responsible for examining subordinate legislation may, in examining the legislation, also consider the human rights certificate prepared by the responsible Minister for the subordinate legislation. The human rights certificate, which must be tabled in the Legislative Assembly with the subordinate legislation, must state: a) whether, in the responsible Minister’s opinion, the subordinate legislation is compatible with human rights, and if so, how it is compatible; and b) if, in the responsible Minister’s opinion, a part of the subordinate legislation is not compatible with human rights, the nature and extent of the incompatibility (see HRA, s 41(1)-(3)).

### 3 Committee consideration of the subordinate legislation

The committee did not identify any significant issues regarding the policy, consistency with FLPs or lawfulness of the Parliamentary Service Rule 2021 ('SL No. 136 of 2021' or 'Rule'). The committee considered a potential FLP issue and 2 human rights issues raised by the subordinate legislation, but was satisfied that the provisions in question were appropriate and reasonably and demonstrably justifiable in the circumstances.

The committee considers that the explanatory notes tabled with SL No. 136 of 2021 generally comply with the requirements of part 4 of the LSA. Further, the human rights certificate tabled with the subordinate legislation provides a sufficient level of information to facilitate understanding of the Rule in relation to its compatibility with the HRA.

A brief overview of the subordinate legislation, including a summary of FLP and human rights considerations, is set out below.

### 4 Parliamentary Service Rule 2021

Section 55 of the *Parliamentary Service Act 1988* (Parliamentary Service Act) authorises the Speaker to make rules about the parliamentary service relating to:

- entitlements, responsibilities, authorities, obligations and liabilities of Parliamentary Service officers and employees
- appeals about promotional appointments and disciplinary action within the Parliamentary Service.<sup>6</sup>

The objective of SL No. 136 of 2021 is to remake the Parliamentary Service Rule 2010 (2010 Rule), which was due to expire on 1 September 2021.<sup>7</sup>

SL No. 136 of 2021 makes provision for the conduct of a variety of human resources-related activities within the Parliamentary Service, including:

- providing for the conduct of appeals against promotional appointments and disciplinary action
- identifying appealable and non-appealable positions
- identifying positions exempted from the vacancy advertising requirements of the PS Act
- providing for a number of public sector Ministerial Directives to have application within the Parliamentary Service
- providing for the direct appointment of staff, without advertising, in certain circumstances.<sup>8</sup>

The explanatory notes advise that the provisions of the new Rule are 'important for the efficient and effective operation of the Parliamentary Service' and 'will maintain contemporary human resource practices within the Parliamentary Service'.<sup>9</sup>

Consultation on SL No. 136 of 2021 was undertaken between the Parliamentary Service and the Department of the Premier and Cabinet (DPC) and between DPC and the Public Service Commission.<sup>10</sup> In addition, DPC advised that the Speaker 'also consulted with the Premier and Minister for the Olympics

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<sup>6</sup> *Parliamentary Service Act 1988* (PS Act), s 55.

<sup>7</sup> Parliamentary Service Rule 2021 (SL No. 136 of 2021), explanatory notes, p 1. The Parliamentary Service Rule 2010 (2010 Rule) was made in August 2010 and was originally due to expire on 1 September 2020. In August 2020, the 2010 Rule was exempted from expiry for 12 months on the grounds that it was in the process of being remade.

<sup>8</sup> SL No. 136 of 2021, explanatory notes, p 1.

<sup>9</sup> SL No. 136 of 2021, explanatory notes, pp 1, 2.

<sup>10</sup> SL No. 136 of 2021, explanatory notes, p 2.

on the matter, as the *Parliamentary Service Act 1988* falls within the Premier's ministerial responsibilities'.<sup>11</sup>

The explanatory notes further advise that given SL No. 136 of 2021 is about the internal management of the Parliamentary Service, 'no consultation with the Office of Best Practice Regulation was required'.<sup>12</sup>

#### **4.1 Legislative Standards Act 1992 considerations**

##### **4.1.1 Issue of fundamental legislative principle – natural justice**

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.<sup>13</sup> This includes a consideration of whether procedural fairness is afforded to a person, including through the application of fair procedures that are appropriate and adapted to the circumstances of the particular case.<sup>14</sup>

Schedule 1 of SL No. 136 of 2021 contains a list of offices or classes of office for which no appeal is available in respect of an appointment.<sup>15</sup> This includes, for example, an office designated to be in the office of the Speaker, or in the electorate office of a member of the Legislative Assembly.<sup>16</sup> It also includes officers at classification levels 1 and 2 (base grade positions), or an administrative officer at level 7 if the officer is a parliamentary policy officer.<sup>17</sup>

For these listed positions, there is therefore no avenue for an individual to appeal an appointment decision as is available for other promotional appointments made under the Parliamentary Service Act (whereby a person can appeal on the merits to the Speaker).<sup>18</sup> This may impact on a person's right to natural justice.

Whilst not addressed directly in the explanatory notes, DPC addressed the issue of the Rule's consistency with natural justice in separate correspondence to the committee. DPC advised in this respect that the view was taken by the Parliamentary Service that the Rule at clauses 1 through 14, which set out appeals procedures for those positions for which such appeals remain available, is 'consistent with this FLP in that it establishes procedures for the conduct of appeals against promotional appointments and disciplinary action', such that there are 'appropriate procedures in place to ensure procedural fairness'.<sup>19</sup>

In terms of those identified schedule 1 individuals for whom no access to the clause 1 to 14 appeal processes would be available, the human rights certificate justifies the potential limitation on individual rights on the basis that the Clerk of the Parliament requires 'some flexibility in managing promotions and appointments and flexible recruitment options available to use to meet prevailing operational requirements'.<sup>20</sup> Further, the human rights certificate states that this provision 'supports recruitment

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<sup>11</sup> Department of Premier and Cabinet (DPC), correspondence, 19 October 2021.

<sup>12</sup> SL No. 136 of 2021, explanatory notes, p 2. \*Note – the *Queensland Government Guide to Better Regulation* identifies a number of agency assessed exclusion categories for which the Office of Best Practice Regulation's advice on regulatory impacts is not required, including (c) 'Regulatory proposals for the internal management of the public sector or statutory authority'.

<sup>13</sup> LSA, s 4(3)(b).

<sup>14</sup> Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental Legislative Principles: The OQPC Notebook* (FLP Notebook), January 2008, p 25.

<sup>15</sup> SL No. 136 of 2021, s 9; schedule 1.

<sup>16</sup> SL No. 136 of 2021, schedule 1 (item 1).

<sup>17</sup> SL No. 136 of 2021, schedule 1 (item 3). See also SL No. 136 of 2021, human rights certificate, p 3.

<sup>18</sup> See PS Act, s 43.

<sup>19</sup> DPC, correspondence, 19 October 2021.

<sup>20</sup> SL No. 136 of 2021, human rights certificate, p 3.

to base grade positions without those appointments being subject to appeal processes'.<sup>21</sup> The certificate also highlights:

The exemptions provided for in Schedule 1 are reasonably consistent with the types of exemptions that generally exist within the broader Queensland public sector. These exemptions have also been in place in the Parliamentary Service since 2010.<sup>22</sup>

#### Committee comment

The committee notes that the Parliamentary Service Act specifically provides for offices or classes of office to be declared in rules made by the Speaker to be exempted from the appeals process.<sup>23</sup> Noting the explanations provided, the committee is satisfied that any potential breach of FLP is justified in the circumstances.

### **4.2 Human Rights Act 2019 considerations**

In the human rights certificate that accompanies SL 136 of 2021, the Premier and Minister for the Olympics<sup>24</sup> (Premier) states her opinion that the subordinate legislation is compatible with the HRA because, while it may serve to limit, restrict or interfere with human rights, 'any limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom'.<sup>25</sup>

#### **4.2.1 Right to a fair hearing – Human Rights Act 2019, section 31**

A party to a civil proceeding has the right to have the proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.<sup>26</sup>

SL No. 136 of 2021 potentially limits this right, to the extent that schedule 1 contains a list of offices or classes of office for which no appeal is available in respect of an appointment.<sup>27</sup>

As previously noted at 4.1.1 above, the Premier justifies this limitation as necessary to provide the Clerk of the Parliament with 'flexibility in managing promotions and appointments and flexible recruitments options available to meet prevailing operating requirements', which the Premier identifies as serving to assist in ensuring 'the efficient and economical management of the Parliamentary Service'.<sup>28</sup>

The certificate also highlights that the exemptions contained in schedule 1 are reasonably consistent with other Queensland public sector exemptions and have been in place since the 2010 Rule.<sup>29</sup>

#### **4.2.2 Right to take part in public life – Human Rights Act 2019, section 23**

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.<sup>30</sup>

SL No. 136 of 2021 could potentially serve to limit this right by permitting direct appointments of existing staff to other positions in limited circumstances<sup>31</sup> and exempting certain categories of vacancies from

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<sup>21</sup> SL No. 136 of 2021, human rights certificate, p 3.

<sup>22</sup> SL No. 136 of 2021, human rights certificate, p 3.

<sup>23</sup> PS Act, s 43(1)(b)(ii).

<sup>24</sup> At the time the human rights certificate was tabled, the Premier's ministerial title was 'Premier and Minister for Trade'. Under the *Administrative Arrangements Order (No. 2) 2021* made on 7 October 2021, the Premier became the Premier and Minister for the Olympics and the Premier's former trade portfolio was transferred to the Treasurer and Minister for Trade and Investment.

<sup>25</sup> SL No. 136 of 2021, human rights certificate, p 5.

<sup>26</sup> HRA, s 31.

<sup>27</sup> SL No. 136 of 2021, s 9, schedule 1.

<sup>28</sup> SL No. 136 of 2021, human rights certificate, p 3.

<sup>29</sup> SL No. 136 of 2021, human rights certificate, p 3.

<sup>30</sup> HRA, s 23.

<sup>31</sup> SL No. 136 of 2021, cl 17.

being advertised publicly.<sup>32</sup> This could have the effect of preventing or limiting the rights of others to access positions in the Parliamentary Service.

In the human rights certificate that accompanies SL No. 136 of 2021, the Premier states that the purpose of any limitation on human rights in this respect is to 'ensure that the Clerk of the Parliament can manage some promotions and appointments fairly and efficiently and undertake recruitment practices quickly and efficiently if required to do so ...'.<sup>33</sup>

Further:

Advertising vacancies is a time consuming and resource intensive process and is not always the most suitable method of making an appointment to a vacancy. The flexibility provided through direct appointments and exempting certain positions from advertising supports a strong Parliamentary Service to support the democratic process.<sup>34</sup>

The human rights certificate also advises that the provisions in SL No. 136 of 2021 relating to direct appointments and exemptions from advertising certain positions 'are reasonably consistent with the types of provisions and exemptions that generally exist within the broader Queensland public sector'.<sup>35</sup>

#### Committee comment

The committee is satisfied that the provisions are reasonable and appropriate in the circumstances, noting the explanations provided by the Premier. The committee notes in particular the advice that the provisions are reasonably consistent with the types of provisions and exemptions that generally exist within the broader Queensland public sector.

## 5 Recommendation

The committee recommends that the House notes this report.



Linus Power MP

**Chair**

**October 2021**

#### **Economics and Governance Committee**

**Chair**

Mr Linus Power MP, Member for Logan

**Deputy Chair**

Mr Ray Stevens MP, Member for Mermaid Beach

**Members**

Mr Michael Crandon MP, Member for Coomera

Mrs Melissa McMahon MP, Member for Macalister

Mr Daniel Purdie MP, Member for Ninderry

Mr Adrian Tantari MP, Member for Hervey Bay

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<sup>32</sup> SL No. 136 of 2021, cl 16; schedule 2.

<sup>33</sup> SL No. 136 of 2021, human rights certificate, p 4.

<sup>34</sup> SL No. 136 of 2021, human rights certificate, p 4.

<sup>35</sup> SL No. 136 of 2021, human rights certificate, p 4.