

Community Support and Services Committee

Report No. 21, 57th Parliament

Subordinate legislation tabled between 16 March 2022 and 16 August 2022

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 16 March 2022 and 16 August 2022. It reports on any issues identified by the committee relating to the policy to be given effect by the legislation, fundamental legislative principles (FLPs) and lawfulness. It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992*.¹

The report outlines the committee’s 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
59	Retirement Villages (Exempt Schemes) Amendment Regulation 2022	21 June 2022	14 October 2022
62	Adoption (Fee Unit Conversion) Amendment Regulation 2022	21 June 2022	14 October 2022
66	Housing Legislation (Fee Unit Conversion) Amendment Regulation 2022	21 June 2022	14 October 2022
83	Disability Services and Other Legislation (Fees) Amendment Regulation 2022	16 August 2022	28 October 2022
94	Residential Services (Accreditation) (Exclusion of Retirement Villages) Amendment Regulation 2022	16 August 2022	28 October 2022
95	Residential Tenancies and Rooming Accommodation Amendment Regulation 2022	16 August 2022	28 October 2022
102	Forensic Disability Regulation 2022	16 August 2022	28 October 2022

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

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

² *Human Rights Act 2019*, s 41.

3 Committee consideration of the subordinate legislation

The committee identified no significant issues regarding policy, consistency with FLPs or the lawfulness of the subordinate legislation.

The committee considered potential FLP issues and human rights implications in relation to:

- Retirement Villages (Exempt Schemes) Amendment Regulation 2022
- Adoption (Fee Unit Conversion) Amendment Regulation 2022
- Disability Services and Other Legislation (Fees) Amendment Regulation 2022 (SL No. 83-2022)
- Residential Tenancies and Rooming Accommodation Amendment Regulation 2022 (SL No. 95-2022)
- Forensic Disability Regulation 2022.

However, in each instance, the committee is satisfied that the relevant provisions have sufficient regard to the rights and liberties of individuals in the circumstances, and that any associated human rights limitations are reasonable and demonstrably justifiable.

The committee considers that the explanatory notes tabled with the subordinate legislation broadly comply with the requirements of section 24 of the LSA. Further, 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 its compatibility with human rights.³

4 Retirement Villages (Exempt Schemes) Amendment Regulation 2022 (SL 59-2022)

The objective of the Retirement Villages (Exempt Schemes) Amendment Regulation 2022 (SL No. 59-2022) is to provide an exemption for the Peninsula Gardens Retirement Village and the Peninsula Park Retirement Estate from the mandatory buyback scheme under the *Retirement Villages Act 1999*.⁴

The *Retirement Villages Act 1999* (RV Act) requires an operator of a retirement village to pay a resident's exit entitlement 18 months after the resident terminates their right to reside in the retirement village.⁵ In October 2021, the RV Act was amended to provide a framework for an exemption to this mandatory buyback scheme for those retirement villages that are resident-operated.⁶ This amendment recognised that resident-operated retirement villages did not operate with profits sufficient to participate in a buyback scheme and the buyback requirements were causing stress and uncertainty to residents in these retirement villages.⁷

Under Part 3 Division 5B of the Act, the Minister may recommend to the Governor in Council the making of a regulation that declares a retirement village scheme exempt if the Minister is satisfied:

- each residence contract under the scheme is based on a freehold interest in an accommodation unit that is the resident's freehold property, and
- the exemption would be appropriate because of the extent to which:
 - the residents are in a position to control or influence the affairs of the scheme operator in relation to the operation of the scheme; and

³ *Human Rights Act 2019*, s 41.

⁴ SL No. 59-2022, explanatory notes, p 1. See also *Retirement Villages Act 1999*, s 63.

⁵ *Retirement Villages Act 1999*, s 63(1).

⁶ SL No. 59-2022, explanatory notes, p 2.

⁷ SL No. 59-2022, explanatory notes, pp 1-2.

- for any of the accommodation units, the scheme operator's assets and ability to generate income are likely to be insufficient to purchase the resident's freehold property.⁸

The Act also provides that the Minister may have regard to any relevant matter when deciding whether an exemption for a scheme would be appropriate, including:

- whether, for a scheme in which the retirement village land is land included in a community titles scheme, the common area of the retirement village is common property under the community titles scheme, or a lot owned by the body corporate under the community titles scheme
- the extent to which, other than as required by the Act, the scheme operator has any control over, or involvement in, the sale of a former resident's accommodation unit, and a former resident is required to refurbish, reinstate or renovate the former resident's accommodation unit before it may be sold
- the extent to which the scheme operator makes any profit from fees or charges payable by residents
- whether any amount is payable to the scheme operator on the sale of an accommodation unit.⁹

In October 2021, Peninsula Park Retirement Estate and Peninsula Gardens Retirement Village requested to be declared exempt from mandatory buyback requirements under the Act.¹⁰ Regarding those 2 retirement villages, the explanatory notes state:

Both retirement villages are registered and operate as a community titles scheme under the *Body Corporate and Community Management Act 1997*. Neither retirement village derives significant profit from the operation of the scheme and does not have sufficient operational income to fund mandatory buybacks. These retirement villages also do not directly involve themselves in the sale or marketing of accommodation units, and do not charge exit fees greater than is necessary to cover administrative expenses.¹¹

4.1 Fundamental legislative principle issues - rights and liberties of individuals – retrospectivity

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, it does not adversely affect rights or liberties, or impose obligations, retrospectively.¹²

The exemptions provided in SL No. 59-2022 alter the rights of former residents of the Peninsula Gardens Retirement Village and Peninsula Park Retirement Estate. Prior to this amendment, the residents of these retirement villages would have been entitled to their accommodation being purchased by the scheme operator within 18 months from terminating their right to reside in the retirement villages.

The explanatory notes provide an explanation on the purpose and intent of the exemptions:

In late 2020, a statutory review by a four-member independent panel with expertise in law, gerontology, business and finance indicated that despite protections in the [*Retirement Villages Act 1999*] seniors in resident-operated retirement villages were experiencing distress, insecurity and emotional impacts as a result of the buyback requirement. The panel recommended that resident-operated retirement villages would be granted an exemption from the mandatory buyback requirements where they met particular criteria.¹³

⁸ *Retirement Villages Act 1999*, s 70D(2).

⁹ *Retirement Villages Act 1999*, s 70D(3).

¹⁰ SL No. 59-2022, explanatory notes, p 2.

¹¹ SL No. 59-2022, explanatory notes, p 2.

¹² LSA, s 4(3)(g).

¹³ SL No. 59-2022, explanatory notes, pp 1-2.

The buyback exemption is available only if the Minister is satisfied that each residence contract under the scheme is based on a freehold interest in an accommodation unit that is the resident's freehold property. The Minister must also be satisfied that the exemption would be appropriate because:

- the residents are in a position to control or influence the affairs of the scheme operator in relation to the operation of the scheme, and
- the scheme operator's assets and ability to generate income are likely to be insufficient to purchase the resident's freehold property.¹⁴

Further, these exemptions are provided on an 'opt-in' basis. In October 2021, the Department of Communities, Housing and Digital Economy wrote to those retirement villages that had previously identified as being resident-operated. Later that month, the Peninsula Gardens Retirement Village and Peninsula Park Retirement Estate requested to be declared exempt under section 70D of the *Retirement Villages Act 1999*.¹⁵

Committee comment

The committee is satisfied that any potential retrospective impact on individual rights is justified in the circumstances, having regard to the purpose and intent of the regulation, the limited class of retirement villages that the exemption may apply to, and the fact the exemptions are 'opt-in'.

Explanatory notes for subordinate legislation are required to provide a brief assessment of the consistency of the legislation with FLPs and, if the subordinate legislation is inconsistent with FLPs, the reasons for the inconsistency.¹⁶ The notes assert that the amendment regulation 'is consistent with the fundamental legislative principles', and do not mention any issues of FLPs, including regarding the above issue relating to retrospectivity.¹⁷ The committee wrote to the Director-General of the Department of Communities, Housing and Digital Economy seeking additional information regarding the explanatory notes and the potential breach of FLPs of the amending regulation. The Director-General advised the issue of retrospectivity was noted in the explanatory notes to the primary legislation (the Housing Legislation Amendment Bill 2021). Further, the DCHDE's analysis of the two written requests for exemption indicated that 'Neither retirement village was identified as having any imminent mandatory buybacks, or contracts underway for the purchase of an accommodation unit from a former resident, that were likely to be affected by the declaration of an exception.'¹⁸

4.2 Explanatory notes

In light of the advice provided by the Director-General, the committee is satisfied that the explanatory notes broadly comply with part 4 of the *Legislative Standards Act 1992*.

4.3 Human rights considerations

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 that Act.

Section 13 of the *Human Rights Act 2019* 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 deciding whether a limit on a human right is reasonable and justifiable.

¹⁴ SL No.59-2022, human rights certificate, p 1.

¹⁵ SL No. 59-2022, explanatory notes, p 4.

¹⁶ LSA, s 24(1)(i).

¹⁷ SL No. 59-2022, explanatory notes, p 3.

¹⁸ Clare O'Connor, Director-General, DCHDE, correspondence, 26 August 2022, p 3.

4.3.1 Right to property

Everyone has the right to own property, and a person must not be arbitrarily deprived of their property.¹⁹ Amongst other things, property is likely to include interests in land, contractual rights, money and shares.²⁰

A property owner in an exempt retirement village who exits the retirement village will be deprived of the benefit of the mandatory buyback scheme. This in turn could have the effect of limiting the former resident's property right in respect of disposal of their freehold property. The human rights certificate notes:

The purpose of declaring retirement villages exempt from the mandatory buyback requirements in the Act is to reduce the financial and administrative burden on resident-operated retirement villages where residents of the village own and control the operation of the retirement village scheme.²¹

While residents in exempt retirement villages will fail to receive the benefit of the certainty of a mandatory buyback scheme, the exemption is provided to relieve the stress and uncertainty of the possibility of significant liability in requiring residents to fund the mandatory buyback of an unsold unit in their retirement village.²² The human rights certificate articulates the balancing of the limitation on the right to property with the purpose of the legislation:

Providing an exemption to resident-operated retirement villages will not arbitrarily deprive a former resident of their property. Rather, it seeks to adjust the respective rights and obligations of the scheme operator and the former resident of a resident-operated village in respect of the disposal of the former resident's freehold property. This is done on an opt-in basis at the request of the scheme operator of the resident-operated retirement village and its residents.²³

Committee comment

The committee is satisfied that any potential limitation of human rights by limiting the right to property is reasonably and demonstrably justified.

4.4 Human rights certificate

Section 41 of the *Human Rights Act 2019* requires that the responsible Minister for the subordinate legislation must prepare a human rights certificate for the legislation.

A human rights certificate was tabled with the subordinate legislation. The certificate contained a sufficient level of information to facilitate understanding of the legislation in relation to its compatibility with human rights.

5 Adoption (Fee Unit Conversion) Amendment Regulation 2022 (SL 62-2022)

The objective of the Adoption (Fee Unit Conversion) Amendment Regulation 2022 (SL No. 62-2022) is to implement the fee unit model in the Adoption Regulation 2020. It would do this by converting the fees and charges prescribed in the Adoption Regulation 2020 from dollar amounts to fee units.²⁴

SL No. 62-2022 maintains the value of prescribed fees in the Adoption Regulation 2020 by simply replacing the current dollar value with the equivalent fee unit, with the current fee unit equating to one dollar.²⁵ From 1 July 2022, the value of a fee unit will be \$1.025.²⁶

¹⁹ HRA, s 24.

²⁰ SL No. 59-2022, human rights certificate, p 3.

²¹ SL No. 59-2022, human rights certificate, p 3.

²² SL No. 59-2022, human rights certificate, p 4.

²³ SL No. 59-2022, human rights certificate, p 4.

²⁴ SL No. 62-2022, explanatory notes, p 1.

²⁵ SL No. 62-2022, explanatory notes, p 2.

²⁶ Acts Interpretation (Fee Unit) Regulation 2022, s 2.

SL No. 62-2022 is intended to reduce the administrative burden of amending multiple regulations each year when routine fee increases by the Government Indexation Rate are applied. By referencing fee units, rather than dollars, multiple instruments can be amended simultaneously by amending a single regulation that specifies the value of a fee unit.²⁷

5.1 Fundamental legislative principle issues and explanatory notes

The committee identified no issues in relation to FLPs with the subordinate legislation. The explanatory notes tabled with the subordinate legislation comply with part 4 of the LSA.

5.2 Human rights considerations

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 that Act.

Section 13 of the *Human Rights Act 2019* 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 deciding whether a limit on a human right is reasonable and justifiable.

5.2.1 Right to property

The human rights certificate states that any increase in fees due to annual indexation brought about by SL No. 62-2022 will limit the right to property because it would result in a deprivation of property in the form of money.²⁸

The human right certificate advises that the cost of providing adoption services is subsidised by the Queensland Government because full cost recovery would be prohibitive for those seeking to adopt. The human right certificate continues:

... Imposing only minimal fees in comparison to the full cost of providing the service makes adoption services in Queensland accessible to a greater number of people. Fee increases by indexation ... occur annually, are routine and are not arbitrarily applied. These increases in fees are intended to maintain the value of the fees over time relative to the anticipated increase in associated costs.²⁹

The limitation on the right to property is considered justified because the fee increases help maintain the value of fees over time and enable the Queensland Government to provide adoption services that 'serve the best interests of both prospective families and adoptive children'.³⁰

Committee comment

The committee is of the view that it is unlikely that a reasonable fee for service, regardless of the service provided, would be deemed to be depriving a person of their property under the *Human Rights Act 2019*. Accordingly, the committee is satisfied that the potential limitation of human rights by limiting property rights is reasonable and demonstrably justified.

5.3 Human rights certificate

A human rights certificate was tabled with the subordinate legislation in accordance with section 41 of the HRA. The committee considers that the certificate provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

²⁷ SL No. 62-2022, explanatory notes, p 1-2.

²⁸ SL No. 62-2022, human rights certificate, p 2.

²⁹ SL No. 62-2022, human rights certificate, p 2.

³⁰ SL No. 62-2022, human rights certificate, p 3.

6 Housing Legislation (Fee Unit Conversion) Amendment Regulation 2022 (SL No. 66-2022)

The objective of the Housing Legislation (Fee Unit Conversion) Amendment Regulation 2022 (SL No. 66-2022) amends the Housing Regulation 2015, Residential Services (Accreditation) Regulation 2018 and the Retirement Village Regulation 2018 by applying the fee unit model, changing any fees and charges from dollar amounts to fee units.³¹ It does not change any fees or charges.

6.1 Fundamental legislative principle issues and explanatory notes

The committee identified no issues in relation to FLPs in the subordinate legislation. The explanatory notes tabled with the subordinate legislation comply with part 4 of the LSA.

6.2 Human rights considerations and certificate

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

A human rights certificate was tabled with the subordinate legislation, in accordance with section 41 of the HRA. The committee considers that the certificate provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

7 Disability Services and Other Legislation (Fees) Amendment Regulation 2022 (SL No. 83-2022)

The objective of Disability Services and Other Legislation (Fees) Amendment Regulation 2022 (SL No. 83-2022) is to update certain fees payable under the Disability Services Regulation 2017 and the Working with Children (Risk Management and Screening) Regulation 2020.³²

SL No. 83-2022 includes amendments relating to fees being converted from dollars to fee units. This is intended to reduce the administrative burden of amending multiple regulations each year. By referencing fee units, rather than dollars, multiple instruments can be amended simultaneously by amending a single regulation that specifies the value of a fee unit.³³ The value of a fee unit was increased from one dollar to \$1.025 on 1 July 2022.³⁴

The application and renewal fees for an NDIS worker screening increase annually from 1 July in line with a specific approved indexation method calculated to achieve cost recovery. Because these fees are outside the scope of the fee unit model, they are retained as a dollar figure.³⁵

SL No. 83-2022 also includes an increase to the blue card component of the joint application fee under the Working with Children (Risk Management and Screening) Regulation 2020. This is a fixed fee and not subject to annual indexation.³⁶

7.1 Fundamental legislative principle issues and explanatory notes

The committee identified no issues regarding the subordinate legislation's consistency with fundamental legislative principle or its lawfulness. The explanatory notes comply with part 4 of the LSA.

³¹ SL No. 66-2022, explanatory notes, pp 1-2.

³² SL No. 83-2022, explanatory notes, p

³³ SL No. 83-2022, explanatory notes, p 2; *Acts Interpretation Act 1954*, s 48B permits the value of a fee unit to be prescribed by regulation.

³⁴ *Acts Interpretation (Fee Unit) Regulation 2022*, s 2.

³⁵ SL No. 83-2022, explanatory notes, p 2.

³⁶ SL No. 83-2022, explanatory notes, p 2.

7.2 Human rights considerations

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 that Act.

Section 13 of the *Human Rights Act 2019* 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 deciding whether a limit on a human right is reasonable and justifiable.

7.2.1 Right to property

The human rights certificate states that the increase of fees brought about by SL No. 62-2022 limits the right to property in s 24 of the HR Act because it increases NDIS worker screening application fees, and fees for the blue card component of the joint application process, ‘at rates other than the Government Indexation Rate.’³⁷

In the human rights certificate, Hon Craig Crawford MP, Minister for Seniors and Disability Services and Minister for Aboriginal and Torres Strait Islander Partnerships (the Minister) advises:

More accurately reflecting the costs associated with the operation and interaction of the two screening systems in the applicable fee structures supports the timely and effective operation of those systems. The increase in fees ensures that both the NDIS worker screening unit and the working with children screening unit are appropriately resourced to deliver the services to their customers.³⁸

Further, the Minister advises that the limitation on the right to property is considered justified because the increase in fees ‘ensures that both the NDIS worker screening unit and the working with children screening unit are appropriately resourced to deliver the services to their customers’.³⁹

Committee comment

In light of the Minister’s explanation, the committee is satisfied that any limitation on a person’s property rights is reasonable and demonstrably justified.

7.3 Human rights certificate

Section 41 of the *Human Rights Act 2019* requires that the responsible Minister for the subordinate legislation must prepare a human rights certificate for the legislation.

A human rights certificate was tabled with the subordinate legislation. The certificate contained a sufficient level of information to facilitate understanding of the legislation in relation to its compatibility with human rights.

8 Residential Services (Accreditation) (Exclusion of Retirement Villages) Amendment Regulation 2022 (SL No. 94-2022)

The objective of the Residential Services (Accreditation) (Exclusion of Retirement Villages) Amendment Regulation 2022 (SL No. 94-2022) is to exempt retirement villages from the application of the *Residential Services (Accreditation) Act 2022* (RSA Act) until 2025.⁴⁰

³⁷ SL No. 83-2022, human rights certificate, p 2-3.

³⁸ SL No. 83-2022, human rights certificate, p 3.

³⁹ SL No. 83-2022, human rights certificate, p 3.

⁴⁰ SL No. 94-2022, explanatory notes, p 1.

Retirement villages are regulated through the *Retirement Villages Act 1999*; however, retirement villages can also fall within the definition of residential services in accordance with the RSA Act.⁴¹ Without an exemption, retirement villages would be subject to dual regulation under both Acts.

Typically, this dual registration is avoided by a provision in the Residential Services (Accreditation) Regulation 2018, which exempts a retirement village scheme if the scheme is accredited by a body recognised by the Chief Executive. This body was previously Aged Care Queensland. Aged Care Queensland no longer exists.⁴²

The Australian Retirement Village Accreditation Scheme (ARVAS) was established to be a recognised accreditation body under the RSA Act; however, there has been slow uptake due to resources being focused on the COVID-19 pandemic.⁴³ Consequently ARVAS cannot yet be adequately assessed as to whether it should be a recognised accreditation body under the RSA Act.⁴⁴ As a result, SL No. 94-2022 extends the exemption for retirement villages until 2025, allowing operators time to seek accreditation with ARVAS.⁴⁵

8.1 Fundamental legislative principle issues and explanatory notes

The committee identified no issues regarding the subordinate legislation's consistency with fundamental legislative principle or its lawfulness. The explanatory notes comply with part 4 of the LSA.

8.2 Human rights considerations and certificate

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

A human rights certificate was tabled with the subordinate legislation, in accordance with section 41 of the HRA. The committee considers that the certificate provides a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

9 Residential Tenancies and Rooming Accommodation Amendment Regulation 2022 (SL No. 95-2022)

The objective of the Residential Tenancies and Rooming Accommodation Amendment Regulation 2022 (SL No. 95-2022) is to amend the Residential Tenancies and Rooming Accommodation Regulation 2009 (RTRA Regulation) to update and align the standard terms for tenancy agreements with the stage 1 rental reforms implemented by the Housing Legislation Amendment Act 2021 (HLA Act).⁴⁶

The HLA Act was passed by Parliament in October 2021 and amends the *Residential Tenancies and Rooming Accommodation Act 2008* (RTRA Act) to implement changes to Queensland's rental laws to:

- support tenants and residents to enforce their existing rights by removing the ability for lessors and providers to end tenancies without grounds
- provide an expanded suite of additional approved reasons for lessors/providers and tenants/residents to end a tenancy
- ensure all Queensland rental properties are safe, secure and functional by prescribing minimum housing standards and introducing compliance mechanisms to strengthen the ability to enforce these standards
- strengthen rental law protections for people experiencing domestic and family violence

⁴¹ SL No. 94-2022, explanatory notes, p 1.

⁴² SL No. 94-2022, explanatory notes, pp 1-2.

⁴³ SL No. 94-2022, explanatory notes, p 2.

⁴⁴ SL No. 94-2022, explanatory notes, p 2.

⁴⁵ SL No. 94-2022, explanatory notes, p 3.

⁴⁶ SL No. 95-2022, explanatory notes, p 2.

- support parties to residential leases reach agreement about renting with pets.⁴⁷

SL No. 95 amends the following schedules in the RTRA Regulation:

- schedule 1 (general tenancy agreements)
- schedule 2 (moveable dwelling tenancy agreements)
- schedule 3 (state tenancy agreements)
- schedule 3A (community housing provider tenancy agreements)
- schedule 4 (rooming accommodation agreements).⁴⁸

9.1 Fundamental legislative principle issues

9.1.1 Rights and liberties of individuals – Abrogation of common law rights: freedom of individuals to contract

Legislation should not abrogate common law rights without sufficient justification.⁴⁹ This includes the right of individuals to contract freely with each other, and to establish and enforce their contractual entitlements via traditional means.⁵⁰

SL No. 95-2022 includes specific obligations of parties to various tenancy agreements, with the obligations fixed by legislation, rather than the terms of the agreement.

It is acknowledged in the explanatory notes that fixing the terms of a tenancy or rooming accommodation agreement by legislation may be a departure from the principle that individuals should have freedom to contract and agree between themselves as to the terms of those contracts.⁵¹

The following justification is provided:

The legislation seeks to reflect community expectations in achieving a fair balance between the rights of the parties.

The RTRA Act is fundamentally consumer protection legislation and recognises that there is often unequal bargaining power between tenants and lessors, with tenants generally having less power than lessors particularly in competitive markets. The provisions of the legislation seek to strike the right balance between the competing rights of tenants and lessors in the tenancy relationship and ensure that tenants are supported to enforce their rights without fear of retaliatory action.⁵²

9.1.2 Rights and liberties of individuals – Abrogation of common law rights: right to property

Some of the provisions in SL No. 95-2022 have the potential to limit a lessor's right to deal with their property, or amount to more onerous obligations on the lessor in dealing with their property. For example, a tenant is able to change the locks of the property without the explicit consent of the lessor in specific circumstances,⁵³ and a lessor cannot refuse a tenant's request to keep pets unless one of the grounds set out in SL No. 95-2022 is met.⁵⁴

The general common law right to own and deal with property remains an important consideration when assessing whether legislation has sufficient regard to the rights and liberties of individuals.

The explanatory notes do not address how SL No. 95-2022 could impact upon the common law property rights of owners in dealing with their property, which goes to their reasonable and fair

⁴⁷ SL No. 95-2022, explanatory notes, p 1.

⁴⁸ SL No. 95-2022, explanatory notes, p 2.

⁴⁹ OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 95.

⁵⁰ OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 99.

⁵¹ SL No. 95-2022, explanatory notes, p 3.

⁵² SL No. 95-2022, explanatory notes, p 3.

⁵³ SL No. 95-2022, s 13.

⁵⁴ SL No. 95-2022, s 18.

treatment as individuals. However, the property rights of owners are addressed in the human rights certificate.⁵⁵

It is noted that for the right to property to be infringed, a person must be arbitrarily deprived of their property.⁵⁶ The justification for any limitation on an owner's property rights is to enhance the property rights of tenants, particularly where tenants are in vulnerable circumstances. Any limitations are stated as not being arbitrary, but proportionate to achieving a legitimate policy objective.⁵⁷

Committee comment

The committee is satisfied that the subordinate legislation has sufficient regard to rights and liberties of individuals, including by striking an appropriate balance between the rights of tenants and lessors.

9.2 Explanatory notes

The explanatory notes broadly comply with part 4 of the *Legislative Standards Act 1992*.

9.3 Human rights considerations

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 that Act.

Section 13 of the *Human Rights Act 2019* 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 deciding whether a limit on a human right is reasonable and justifiable.

9.3.1 Right to property

A person must not be arbitrarily deprived of their property.⁵⁸ 'Arbitrary' means capricious, unpredictable, unjust and unreasonable in the human rights context.⁵⁹

SL No. 95-2022 prescribes obligations for how a lessor must deal with their property, or how a tenant is able to deal with the lessor's property.⁶⁰ As discussed above, these obligations are fixed by legislation, rather than the terms of individual leases. To an extent, this could be seen to deprive a lessor of the ability to deal with their property in the way they see fit. However, in the statement of compatibility for the HLA Act, it states:

The changes do not arbitrarily deprive a person of their property. The changes adjust the respective rights and obligations of lessors/providers and tenants/residents in respect of rental property.⁶¹

Committee comment

The committee is satisfied that SL No. 95-2022 does not arbitrarily deprive a lessor of their property, and any limitation is only to the extent that is reasonable and justified. SL No. 95-2022 does prescribe statutory obligations on the lessor to deal with their property in a certain way; however, the committee notes the purpose of these statutory obligations is to ensure that individuals and families have access to safe and secure rental accommodation.⁶²

⁵⁵ SL No. 95-2022, human rights certificate, p 2.

⁵⁶ SL No. 95-2022, human rights certificate, p 2.

⁵⁷ HLA Act, statement of compatibility, p 8.

⁵⁸ HRA, s 24(2).

⁵⁹ SL No. 95-2022, human rights certificate, p 2.

⁶⁰ For example, a tenant can change the locks without the lessor's permission to protect a tenant or resident from domestic violence: SL No. 95, ss 13, 32, 49, 64, 82.

⁶¹ HLA Act 2021, statement of compatibility, p 6.

⁶² SL No. 95-2022, human rights certificate, p 2.

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

9.4 Human rights certificate

Section 41 of the *Human Rights Act 2019* requires that the responsible Minister for the subordinate legislation must prepare a human rights certificate for the subordinate legislation.

A human rights certificate was tabled with the subordinate legislation. The certificate contained a sufficient level of information to facilitate understanding of the subordinate legislation in relation to its compatibility with human rights.

10 Forensic Disability Regulation 2022 (SL No. 102-2022)

The *Forensic Disability Act 2011* (FD Act) provides the legislative framework for specialist involuntary detention, care and support of people on forensic orders (disability) in the forensic disability service.⁶³

The objective of the Forensic Disability Regulation 2022 (SL No. 102-2022) is to replace the Forensic Disability Regulation 2011 (existing Regulation) and maintain an effective legislative framework on the existing Regulation's automatic expiry.⁶⁴

SL No. 102-2022 commenced on 1 September 2022 and:

- prescribes the details which must be recorded in a register for the use of regulated behaviour controls
- declares the geographical location of the forensic disability service
- prescribes the records that must be kept about clients.⁶⁵

SL No. 102-2022 remakes the existing Regulation substantially in its current form, with the omission of an unnecessary provision to reduce administrative burden and record duplication.⁶⁶

10.1 Fundamental legislative principle issues

The remaking of the existing Regulation largely provides for the continuation of existing practices in which the administrator of the forensic disability service must:

- keep a register for every use of regulated behaviour control on a forensic disability client, including prescribed details, such as the client's name and date of birth, the type of regulated behaviour control used, a description of the behaviour that resulted in the use of the regulated behaviour control, the reason for the use, and the name and position of the person who prescribed or authorised the regulated behaviour control⁶⁷
- for each forensic disability client, keep a record containing for example, the client's name and date of birth, the date the client became a forensic disability client and was detained, a photograph of the client taken within the last year, and details of any decision or order made by the Mental Health Court or the Mental Health Review Tribunal about the client.⁶⁸

⁶³ SL No. 102-2022, explanatory notes, p 1.

⁶⁴ The existing Regulation was due to expire on 1 September 2021, but was exempted from expiry until 31 August 2022 by the Statutory Instruments (Exemptions from Expiry) Amendment Regulation 2021; SL No. 102, explanatory notes, p 2.

⁶⁵ SL No. 102-2022, explanatory notes, p 2.

⁶⁶ SL No. 102-2022, human rights certificate, p 1.

⁶⁷ SL No. 102-2022, s 3.

⁶⁸ SL No. 102-2022, s 5.

10.1.1 Rights and liberties of individuals – Abrogation of common law rights: right to privacy

Legislation should not abrogate common law rights without sufficient justification.⁶⁹ These rights include the right to privacy.

SL No. 102-2022 requires the administrator of the forensic disability service to record the specified information, including details about forensic disability clients, which may be considered to breach an individual's right to privacy. According to the explanatory notes, these requirements '... support the objectives of the FD Act, which include benefits such as safeguarding the rights and freedoms of forensic disability clients and maximising their opportunities for reintegration into the community'.⁷⁰

The explanatory notes do not address how SL No. 102-2022 could impact upon the common law right to privacy; however, the right to privacy is addressed in the human rights certificate.

Committee comment

The committee is satisfied that the potential breach of an individual's right to privacy is justified in the circumstances.

10.2 Explanatory notes

The explanatory notes comply with part 4 of the *Legislative Standards Act 1992*.

10.3 Human rights considerations

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 that Act.

Section 13 of the *Human Rights Act 2019* 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 deciding whether a limit on a human right is reasonable and justifiable.

10.3.1 Right to privacy

A person has the right not to have the person's privacy unlawfully or arbitrarily interfered with.⁷¹

The human rights certificate states that SL No. 102-2022 engages the right to privacy by prescribing the personal details that the forensic disability service must keep in the register for the use of regulated behaviour control⁷² and requiring that the forensic disability service maintains records about forensic disability clients.⁷³

In the human rights certificate, Hon Craig Crawford MP, Minister for Seniors and Disability Services, Minister for Aboriginal and Torres Strait Islander Partnerships acknowledges that SL No. 102-2022 limits the right to privacy, but that these limitations 'are consistent with the values of a free and democratic society'.⁷⁴

According to the human rights certificate, the purpose of keeping the register is to ensure that sufficient information about the use of regulated behaviour controls is collected to ensure these controls are used transparently and accountably, and in accordance with the requirements of the FD Act:

⁶⁹ OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 95.

⁷⁰ SL No. 102-2022, explanatory notes, p 3.

⁷¹ HRA, s 25.

⁷² SL No. 102-2022, human rights certificate, p 1; SL No. 102, s 3 (made under FD Act, s 74).

⁷³ SL No. 102-2022, s 5 (made under FD Act, s 159).

⁷⁴ SL No. 102-2022, human rights certificate, p 2.

These requirements include that the control must only be used if considered necessary and the least restrictive way to protect the health and safety of clients and other persons, and in a way which aims to reduce or eliminate the use of regulated behaviour controls.⁷⁵

In addressing the purpose of maintaining records about forensic disability clients, the human rights certificate states that it is to support the involuntary detention, care, support and protection of forensic disability clients, while at the same time ‘promoting their individual development and enhancing their opportunities for a quality life, and maximising their opportunities for reintegration into the community’.

The human rights certificate concludes that:

On balance, taking into account the nature and extent of the limitation on the right to privacy, the purpose of protecting the rights and freedoms of forensic disability clients and other people outweighs the potential negative impact that the collection of the affected information has on the right to privacy of clients of the forensic disability service.⁷⁶

Committee comment

The committee is satisfied that SL No. 102-2022 does not unreasonably, unnecessarily or disproportionately limit the right to privacy of forensic disability clients and other people. The committee considers that where it is arguable that the right to privacy has been limited, this limitation is only to the extent that is reasonable and justified.

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

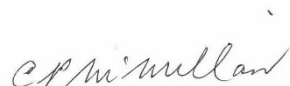
10.4 Human rights certificate

Section 41 of the *Human Rights Act 2019* requires that the responsible Minister for the subordinate legislation must prepare a human rights certificate for the legislation.

A human rights certificate was tabled with the subordinate legislation. The certificate contained a sufficient level of information to facilitate understanding of the legislation in relation to its compatibility with human rights.

11 Recommendation

The committee recommends that the House notes this report.



Ms Corrine McMillan MP

Chair

October 2022

Community Support and Services Committee

Chair	Ms Corrine McMillan MP, Member for Mansfield
Deputy Chair	Mr Stephen Bennett MP, Member for Burnett
Members	Mr Michael Berkman MP, Member for Maiwar
	Ms Cynthia Lui MP, Member for Cook
	Dr Mark Robinson MP, Member for Oodgeroo
	Mr Robert Skelton MP, Member for Nicklin

⁷⁵ SL No. 102-2022, human rights certificate, p 2.

⁷⁶ SL No. 102-2022, human rights certificate, p 3.