

Education, Employment and Training Committee

Report No. 20, 57th Parliament

Subordinate legislation tabled between 30 March 2022 and 21 June 2022

1 Aim of this report

This report summarises the findings of the Education, Employment and Training Committee (the committee) following its examination of the subordinate legislation within its portfolio areas tabled between 30 March 2022 and 21 June 2022. 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,¹ its compatibility with human rights,² and its lawfulness.³ It also reports on the compliance of the explanatory notes with the *Legislative Standards Act 1992* (LSA),⁴ and the compliance of the human rights certificates with the *Human Rights Act 2019* (HRA).⁵

2 Subordinate legislation examined

| No. | Subordinate legislation | Date tabled | Disallowance date |
|-----|---|--------------|-------------------|
| 46 | Small Business Commissioner Regulation 2022 | 10 May 2022 | 31 August 2022 |
| 67 | Further Education and Training (Fee Unit Conversion) Amendment Regulation 2022 | 21 June 2022 | 12 October 2022 |
| 71 | Education and Other Legislation (Fee Unit Conversion) Amendment Regulation 2022 | 21 June 2022 | 12 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 Section 4 of the *Legislative Standards Act 1992* (LSA) states that fundamental legislative principles 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) the rights and liberties of individuals, and b) the institution of Parliament.

² 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 s 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.

³ *Parliament of Queensland Act 2001*, s 93.

⁴ The LSA, part 4. Section 24 sets out the information that must be included in the explanatory notes for subordinate legislation which is required to be tabled in the Legislative Assembly with the subordinate legislation (LSA, s 22).

⁵ 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

No significant issues were identified by the committee regarding the policy, human rights compatibility, or lawfulness of the legislation.

The committee considered that the explanatory notes tabled with the subordinate legislation comply with the requirements of part 4 of the LSA. 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.

A brief overview of the subordinate legislation, including fundamental legislative principles issues, is provided below.

4 SL No. 46 – Small Business Commissioner Regulation 2022

4.1 Objectives

The *Small Business Commissioner Act 2022* (SBC Act) established a Small Business Commissioner (commissioner) and a voluntary mediation process for small business lease disputes and small business franchise disputes to be administered by the commissioner. The SBC Act also amended the mediation process in Part 8 of the *Retail Shop Leases Act 1994* (RSL Act) to provide that the commissioner administers the mandatory mediation process for retail tenancy disputes.

The objective of SL No. 46 is to prescribe:

- the fee⁶ for applying for mediation under the SBC Act and the *Retail Shop Leases Act 1994*
- the circumstances in which the fee can be waived by the commissioner
- practices and procedures that apply to mediation conferences, including the processes for a request to change the time and date of a mediation conference, for a request for related disputes to be mediated together, and for the mediation to be held using technology such as teleconferencing or videoconferencing.⁷

4.2 Fundamental legislative principles considerations

The committee considered the following issues in regard to the subordinate legislation's consistency with fundamental legislative principles.

4.2.1 Rights and liberties of individuals

4.2.1.1 *Administrative power and natural justice*

SL No. 46 enables the commissioner to waive all or part of the fee payable by a party to a dispute if the commissioner is satisfied the payment of the fee would cause, or would be likely to cause, the party financial hardship. The commissioner may also waive all or part of the fee for a class of parties if the commissioner is satisfied the waiver will promote access to mediation by the parties.⁸

While enabling the commissioner to waive fees will benefit certain applicants, it nevertheless potentially raises issues of fundamental legislative principle relating to administrative power and natural justice.

⁶ Section 6 of the regulation prescribes a fee of 350 fee units (\$358.75 using the 2022-23 fee value prescribed in the *Acts Interpretation Act 1954*) payable by the parties to the dispute in equal share.

⁷ SL No. 46, explanatory notes, p 1.

⁸ SL No. 46, s 6.

Fundamental Legislative Principles: The OQPC Notebook states:

Depending on the seriousness of a decision made in the exercise of administrative power and the consequences that follow, it is generally inappropriate to provide for administrative decision-making in legislation without providing criteria or other guidance for making the decision.⁹

...

Natural justice includes a person's right to know the criteria necessary to satisfy an entity's requirements in a particular subject area.¹⁰

In this instance, there are no criteria prescribed in SL No. 46 for the commissioner to make the decision about whether a person is suffering financial hardship. This means applicants cannot rely on the Small Business Commissioner Regulation 2022 to know the grounds on which the decision will be made. It may also lead to inconsistency in waiver decisions between applicants.

The explanatory notes do not consider this matter but comment on the benefit to be derived from the power to waive fees for certain applicants, stating that it 'will ensure that this fee does not preclude parties who are unable to pay the fee from seeking mediation'.¹¹

The committee sought the advice of the Department of Employment, Small Business and Training (department) about how parties will be made aware of the commissioner's scope to waive mediation fees and how the commissioner would determine that the payment of the fee would cause, or would be likely to cause, the party financial hardship.

In its correspondence to the committee¹² the department clarified the following 4 points:

How parties will be made aware of the Commissioner's scope to waive mediation fees:

- *The Commissioner publishes information regarding scope to waive mediation fees on its webpage. The information is hosted on the Business Queensland website at <https://www.business.qld.gov.au/running-business/support-assistance/qsbc/resources> and in the resource: *Mediation and fees policy*.¹³*
- *The Commissioner has communicated the fee waiver option to its small business support partners, such as the Small Business Financial Counselling Service.*
- *The Commissioner provides parties with this information using a template email called 'Preparing for mediation' per the Commissioner Services Procedure (internal Commissioner's office document).*

Whether parties will need to apply to the Commissioner for the full or partial waiver of fees, and what evidence of financial hardship they will be required to provide to support their application

- *In relation to Section 6(2) of the Regulation – individuals: a party must apply for a waiver as per the Commissioner's Mediation and fees policy. The Mediation and fees policy states that:*
"To apply for a waiver based on financial hardship, the party must:
 - *Be currently receiving support from the Small Business Financial Counselling Service and request the counsellor to email the QSBC officer directly stating that you are receiving*

⁹ Office of the Queensland Parliamentary Counsel (OQPC), *Fundamental Legislative Principles: the OQPC Notebook*, p 15.

¹⁰ OQPC, *Fundamental Legislative Principles: the OQPC Notebook*, p 28.

¹¹ SL No. 46, explanatory notes, p 3.

¹² Department of Employment, Small Business and Training, Correspondence received 4 July 2022.

¹³ https://www.publications.qld.gov.au/dataset/70e6e946-2bb2-4a90-93d7-d9ecd53c8586/resource/ac74b529-8ec5-4038-aa77-d2eb325c2362/download/qsbc_mediation-and-fees-policy-v3.pdf.

financial counselling and that the payment of the fee would cause, or would be likely to cause, the party financial hardship. OR

- *Have an independent certified practising accountant or certified bookkeeper provide a signed letter (including their full name, contact information and certification) stating that they have no conflict of interest, are aware of your current financial position and that the payment of the fee would cause, or would be likely to cause, you financial hardship.*
- *The email or signed letter must be received by the QSBC officer assisting with your dispute at least 7 days before the due date for your share of the mediation fee.*
- *If your application is properly made, the commissioner or authorised officer will then consider your application against the eligibility criteria. A decision will be made within 2 business days of your application and you will be advised of the outcome by email.”*
- *In relation to Section 6(3) of the Regulation – a class of parties: the Commissioner makes a decision and no application is required.*

What process will apply for the waiver of fees for a class of parties

- *If the Commissioner is satisfied that an unforeseeable business disruption has occurred which is reasonably preventing either of the parties from fulfilling their obligations under a small business lease or retail shop lease, the Commissioner may publish a waiver of all or part of the mediation fee on the Commissioner’s webpage.*
- *The waiver will state the class of parties to which it applies and the period for which the waiver exists. The waiver will be automatically applied to relevant parties; however, the parties will be asked to confirm by email that they wish to apply for and participate in a mediation conference. No application for a mediation fee waiver would be required in this instance.*

The criteria the Commissioner will apply in determining whether to waive all or part of the mediation fees for individual parties or classes of parties in these circumstances

- *In relation to Section 6(2) of the Regulation - individuals: the criteria are set out in the Commissioner’s Mediation and fees policy and parties must either:*
 - *Be currently receiving support from the Small Business Financial Counselling Service and request the counsellor to email the QSBC officer directly stating that you are receiving financial counselling and that the payment of the fee would cause, or would be likely to cause, the party financial hardship. OR*
 - *Have an independent certified practising accountant or certified bookkeeper provide a signed letter (including their full name, contact information and certification) stating that they have no conflict of interest, are aware of your current financial position and that the payment of the fee would cause, or would be likely to cause, you financial hardship.*
- *In relation to Section 6(3) of the Regulation – a class of parties: the situations are vast and varied and it is not considered possible to narrow the criteria further from the Regulation which states: “if the commissioner is satisfied the waiver will promote access to the mediation by the parties during the period.”*
- *Examples of a class of parties could include a region or sector that is experiencing hardship due to the impacts of a natural disaster or pandemic.*

4.2.2 Institution of Parliament

4.2.2.1 Subdelegation of a power

The explanatory notes advise that SL No. 46 engages the fundamental legislative principle that subordinate legislation should have sufficient regard to the institution of Parliament by allowing the

commissioner to waive fees without oversight by the Parliament.¹⁴ The explanatory notes provide that this engagement is justified:

... as the waiving of fees can only be performed by the Commissioner, who is an appropriate person that must have been appointed under the SBC Act and holds office in accordance with the provisions of the SBC Act. Moreover, the subdelegation is consistent with one of the main objects of the SBC Act, which is to reduce the time and costs associated with resolving disputes involving small businesses.¹⁵

Committee comment

The committee is satisfied that any inconsistency with fundamental legislative principles is acceptable in this instance. While it would have been appropriate for criteria or other guidance for making a decision about a waiver of fees to be included in the regulation given the requirements of the LSA and the guidance of the OQPC on the exercise of administrative power, the committee notes that:

- the purpose of the waiver is to ensure inability to pay the fee does not preclude parties who are unable to pay the fee from seeking mediation
- the fee is relatively low
- the commissioner has developed and publishes a mediation and fees policy including information regarding the commissioner's scope to waive mediation fees and the process for a party to apply for a waiver of fees
- the commissioner's mediation and fee policy states that a certified financial professional must verify that payment of the fee would cause, or would be likely to cause, a party financial hardship.

5 SL 67 Further Education and Training (Fee Unit Conversion) Amendment Regulation 2022

5.1 Objectives

The objective of SL No. 67 is to change regulatory fees for the department from being prescribed in dollars to being prescribed as a number of fee units.¹⁶

SL No. 67 changes the fees prescribed in the Further Education and Training Regulation 2014 (Regulation)¹⁷ to fee units.¹⁸ SL No. 67 maintains the value of prescribed fees in the Regulation by replacing the current dollar value with the equivalent fee unit (\$1 = 1 fee unit). Therefore, all fees in the Regulation will change from being prescribed as \$20.45 to being prescribed as 20.45 fee units. From 1 July 2022, the value of a fee unit increases to \$1.025,¹⁹ meaning that the prescribed fees will calculate to \$20.96.

SL No. 67 is intended to streamline the administrative process for how indexation is applied and will negate the need for annual amendments to the Regulation. According to the explanatory notes, this will create cost savings and administrative efficiencies.²⁰

5.2 Fundamental legislative principles considerations

No issues of fundamental legislative principle were identified by the committee.

¹⁴ SL No. 46, explanatory notes, p 4.

¹⁵ SL No. 46, explanatory notes, p 4.

¹⁶ SL No. 67, explanatory notes, p 1. See also

¹⁷ SL No. 67 amends Further Education and Training Regulation 2014, Schedule 1 (Prescribed documents and fees).

¹⁸ In accordance with *Acts Interpretation Act 1954* and Queensland Treasury's Principles for Fees and Charges Policy.

¹⁹ Acts Interpretation (Fee Unit) Regulation 2022, s 2.

²⁰ SL No. 67, explanatory notes, p 2.

6 SL No. 71 Education and Other Legislation (Fee Unit Conversion) Amendment Regulation 2022

6.1 Objectives

The objective of SL No. 71 is to convert fees that are subject to the government indexation rate and prescribed in the following regulations to fee units:

- Education (General Provisions) Regulation 2017
- Education (Overseas Students) Regulation 2018
- Education (Queensland College of Teachers) Regulation 2016
- Education (Queensland Curriculum and Assessment Authority) Regulation 2014
- Electrical Safety Regulation 2013
- Industrial Relations (Tribunals) Rules 2011
- Labour Hire Licensing Regulation 2018
- Racing Regulation 2013
- Workers' Compensation and Rehabilitation Regulation 2014
- Work Health and Safety Regulation 2011.²¹

The fees retain their current value because they are converted from the amount in dollars to the equivalent fee unit (\$1 = 1 fee unit), with fees rounded to 2 decimal places.²²

The value of a fee unit will be \$1.025 from 1 July 2022 for each regulation, except for the education fees.²³

The fee unit value for the Education (General Provisions) Regulation 2017, the Education (Overseas Students) Regulation 2018 and the Education (Queensland Curriculum and Assessment Authority) Regulation 2014 will rise from \$1 to \$1.025 on 1 January 2023²⁴ and will be indexed from 1 January each year to coincide with the school year.²⁵

The value of a fee unit for the Education (Queensland College of Teachers) Regulation 2016 will rise from \$1 to \$1.025 on 1 October 2022. The explanatory notes state that this is 'to allow the Queensland College of Teachers to finalise and publish printing materials outlining the registration fees required to be paid by teachers for the following school year'.²⁶

6.2 Fundamental legislative principles considerations

No issues of fundamental legislative principle were identified by the committee.

²¹ SL No. 71, explanatory notes, p 2.

²² SL No. 71, explanatory notes, p 2.

²³ SL No. 71, explanatory notes, p 2.

²⁴ Acts Interpretation (Fee Unit) Regulation 2022, s 3, sch 1.

²⁵ SL No. 71, explanatory notes, p 2.

²⁶ SL No. 71, explanatory notes, p 2.

7 Recommendation

The committee recommends that the Legislative Assembly notes this report.



Kim Richards MP
Chair

July 2022

Education, Employment and Training Committee

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