

## Legal Affairs and Safety Committee

### Report No. 51, 57th Parliament

#### Subordinate legislation tabled between 29 March 2023 and 28 April 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 29 March 2023 and 28 April 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).<sup>1</sup>

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.<sup>2</sup>

#### 2 Subordinate legislation examined

| No. | Subordinate legislation  | Date tabled   | Disallowance date |
|-----|--|---------------|-------------------|
| 20  | <i>Police Service Administration (Transfer of Executive Officer) Amendment Regulation 2023</i> | 18 April 2023 | 23 August 2023    |
| 23  | <i>Public Trustee (Interest Rate) Amendment Regulation (No. 3) 2023</i>                        | 18 April 2023 | 23 August 2023    |
| 27  | <i>Proclamation – Inspector of Detention Services Act 2022</i>                                 | 18 April 2023 | 23 August 2023    |
| 28  | <i>Inspector of Detention Services Regulation 2023</i>   | 18 April 2023 | 23 August 2023    |

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

#### 2.1 Forms notified in the Queensland Government Gazette examined

| Form no.         | Version No. | Form heading   | Authorising Law  | Date published  |
|------------------|-------------|--|--|-----------------|
| 13               | 4           | Work Order   | <i>Corrective Services Act 2006</i>  | 3 February 2023 |
| 16               | 3           | Leave of Absence   | <i>Corrective Services Act 2006</i>  | 3 February 2023 |
| QLS Form 2 (LPA) | 17          | Individual Membership Practising Certificate Renewal Application   | <i>Legal Profession Act 2007</i>   | 28 April 2023   |
| QLS Form 1 (LPA) | 20          | Application for grant of practising certificate  | <i>Legal Profession Act 2007</i>   | 28 April 2023   |
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<sup>1</sup> LSA, Part 4.

<sup>2</sup> HRA, s 41.

### 3 Committee consideration of the subordinate legislation



The committee did not identify any significant issues regarding the policy, consistency with fundamental legislative principles, human rights compatibility, or lawfulness of the subordinate legislation.

The committee considers that:

- the explanatory notes tabled with the subordinate legislation noted in this report comply with the requirements of s 24 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.

The following sections provide a brief overview of the subordinate legislation and any relevant considerations of fundamental legislative principles and human rights.

## 4 Police Service Administration (Transfer of Executive Officer) Amendment Regulation 2023

### 4.1 Policy objective

A decision to appoint a person to a Queensland Police Service (QPS) officer position must be made by fair and equitable procedures. These procedures generally include inviting applications and selection on the basis of the merit of applicants. However, it is not necessary to invite applications and select on the basis of merit where the decision to appoint relates to a transfer of a police officer on a basis prescribed by regulation.<sup>3</sup>

The Police Service Administration (Transfer of Executive Officer) Amendment Regulation 2023 (SL No. 20) amends s 13 of the *Police Service Administration Regulation 2016* (PSAR) to extend the categories of transfers that do not need to be on the basis of merit to include transfers of officers which are conducted under a contract of employment between the Crown and an executive officer.

The explanatory notes explain which officers would be affected by the amendment:

Executive Officers are a small cohort of police officers that hold the rank of Deputy Commissioner or Assistant Commissioner. These officers are responsible for management and leadership of significant components of the QPS, or major operations or projects conducted by the QPS. The nature of their position requires a degree of flexibility and responsiveness to the strategic and operational needs of the QPS. This is reflected within Executive Officers' contracts of employment which include, as a condition of appointment, that the Executive Officer accepts that they may be transferred to another position at the same classification level which may involve a change in location.

The organisational efficiency of the QPS may be compromised if there is a delay in Executive Officers assuming their position on transfer through a need to satisfy procedures demonstrating that the transfer was merit based.<sup>4</sup>

### 4.2 Compatibility with human rights

The committee is satisfied that the subordinate legislation is compatible with human rights.<sup>5</sup> The right to a fair hearing is discussed further in the section below.

<sup>3</sup> *Police Service Administration Act 1990*, s 5.2; *Police Service Administration Regulation 2016*, s 13.

<sup>4</sup> SL No. 20, explanatory notes, p 1.

<sup>5</sup> Section 8 of the 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

#### 4.2.1 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 proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.<sup>6</sup>

The human rights certificate states that, while the transfer process outlined in Part 5 of the *Police Service Administration Act 1990* (PSAA) does not constitute either a court or tribunal, the principles of supporting a fair hearing in an administrative context may still be in scope of the intent of the HRA.<sup>7</sup>

Although the human rights certificate acknowledges that SL No. 20 may potentially limit an individual's right to a fair hearing and procedural fairness, it considers that such limitation is mitigated by legislative safeguards, including that a decision to appoint a person to a police officer position must be made by fair and equitable procedures, and the person has a right to seek a review of the decision under the PSAA.<sup>8</sup> The human rights certificate states:

[T]he purpose of the proposed amendment is to ensure the organisational efficiency of the QPS is maintained across the State through removing any potential delay that could prevent an Executive Officer from taking up a position on transfer.<sup>9</sup>

The human rights certificate observes that SL No. 20 will only apply to a small cohort of officers and the nature of executive officers' roles requires a degree of flexibility and responsiveness to the strategic and operational needs of the QPS.<sup>10</sup>

On this basis, the certificate concludes that the extent to which any limitation is applied on an individual's right is appropriately mitigated by the legislative safeguards in the PSAA which provides an individual with the right to object or seek a review.<sup>11</sup>

## 5 Public Trustee (Interest Rate) Amendment Regulation (No. 3) 2023

### 5.1 Policy objective

The objective of the Public Trustee (Interest Rate) Amendment Regulation (No. 3) 2023 (SL No. 23) is to amend the *Public Trustee Regulation 2012* to increase the interest rates payable on amounts held in the Public Trustee's common fund from 1 April 2023,<sup>12</sup> as follows:

| Funds held for   | Current Interest Rate from 1 March 2023 | Proposed Interest Rate from 1 April 2023 |
|--|---|--|
| Class 2(c) and Class 3 amounts:<br>Financial Management Customers and Enduring Powers of Attorney Accounts | 0.80%                                   | 0.86%                                    |

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'.<sup>13</sup> In the review

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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.

<sup>6</sup> HRA, s 31(1).

<sup>7</sup> SL No. 20, human rights certificate, p 2.

<sup>8</sup> SL No. 20, human rights certificate, p 3.

<sup>9</sup> SL No. 20, human rights certificate, p 3.

<sup>10</sup> SL No. 20, human rights certificate, p 3.

<sup>11</sup> SL No. 20, human rights certificate, p 3.

<sup>12</sup> SL No. 23, explanatory notes, p 1.

<sup>13</sup> SL No. 23, explanatory notes, p 1.

of the interest rates payable under the *Public Trustee Regulation 2012*, the Public Trustee applied the methodology endorsed by the Public Trust Office Investment Board.<sup>14</sup>

## 5.2 Compatibility with human rights

The committee is satisfied that the subordinate legislation is compatible with human rights.<sup>15</sup> Property rights are discussed further in the section below.

### 5.2.1 Property rights

All persons have the right to own property alone or in association with others. A person must not be arbitrarily deprived of the person's property.<sup>16</sup>

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. 23 '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'.<sup>17</sup>

The human rights certificate stated that, although SL No. 23 limits property rights, the limitation is reasonably 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.<sup>18</sup>

## 6 Proclamation – Inspector of Detention Services Act 2022

### 6.1 Policy objective

A Proclamation on 9 December 2022 (SL No. 185 of 2022) commenced some provisions of the *Inspector of Detention Services Act 2022* (Inspector Act).<sup>19</sup> The Proclamation made under the Inspector Act (SL No. 27) fixes 1 July 2023 as the commencement date for the remaining non-commenced provisions of the Inspector Act including the commencement of the operations of the Inspector (on 1 July 2023).

## 7 Inspector of Detention Services Regulation 2023

### 7.1 Policy objective

An objective of the Inspector of Detention Services Regulation 2023 (SL No. 28) is to prescribe the Brisbane City Watch-house and the Southport Watch-house as places of detention that the Inspector must inspect at least once every 5 years under the Inspector Act.<sup>20</sup>

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<sup>14</sup> SL No. 23, explanatory notes, p 2.

<sup>15</sup> Section 8 of the 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.

<sup>16</sup> HRA, s 24.

<sup>17</sup> SL No. 23, human rights certificate, p 2.

<sup>18</sup> SL No. 23, human rights certificate, p 3.

<sup>19</sup> SL No. 27, explanatory notes, p 1.

<sup>20</sup> SL No. 28, explanatory notes, pp 1, 2, 3.

A further objective of SL No. 28 is to amend the *Corrective Services Regulation 2017* to:

- allow the Inspector to view a recording of a search of a prisoner where the prisoner is required to remove their clothing
- classify mail between the Inspector and a prisoner as privileged
- provide that phone calls between the Inspector and a prisoner are not classified as privileges for a prisoner.<sup>21</sup>

Additionally, SL No. 28 amends the *Public Sector Regulation 2023* to include the Inspector as a prescribed person for the purposes of the *Public Sector Act 2022* to protect the Inspector (and officers of the Office of the Ombudsman who exercise delegated functions under the Inspector Act) from civil liability for engaging in conduct in an official capacity.<sup>22</sup>

## 7.2 Consistency with fundamental legislative principles

The committee is satisfied that sufficient regard has been given to the rights and liberties of individuals.<sup>23</sup> Relevant considerations by the committee are discussed further in the section below.

### 7.2.1 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'.

### 7.2.2 Immunity from proceedings

Whether legislation has sufficient regard to rights and liberties of individuals depends on whether, for example, the legislation does not confer immunity from proceeding or prosecution without adequate justification.<sup>24</sup> The Office of Queensland Parliamentary Counsel (OQPC) elaborates:

A person who commits a wrong when acting without authority should not be granted immunity. Generally a provision attempting to protect an entity from liability should not extend to liability for dishonesty or negligence. The entity should remain liable for damage caused by the dishonesty or negligence of itself, its officers and employees. The preferred provision provides immunity for action done honestly and without negligence ... and if liability is removed it is usually shifted to the State.<sup>25</sup>

By amending the *Public Sector Regulation 2023* to include the Inspector as a prescribed person for the purposes of the *Public Sector Act 2022*,<sup>26</sup> SL No. 28 has the effect that the Inspector (as well as an officer of the Office of the Ombudsman exercising a delegated function under the Inspector Act) will be exempt from civil liability when engaging (or as a result of engaging) in conduct in an official capacity.<sup>27</sup>

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<sup>21</sup> SL No. 28, explanatory notes, p 2.

<sup>22</sup> SL No. 28, explanatory notes, pp 2, 3.

<sup>23</sup> Section 8 of the 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.

<sup>24</sup> LSA, s 4(3)(h).

<sup>25</sup> OQPC, *Fundamental Legislative Principles: The OQPC Notebook*, p 64.

<sup>26</sup> SL No. 28, s 11 amends *Public Sector Regulation 2023*, Sch 1.

<sup>27</sup> As provided for in *Public Sector Act 2022*, s 269; SL No. 28, explanatory notes, p 6.

The explanatory notes seek to justify the immunity from civil liability as follows:

The purpose of this is to ensure the Inspector and officers are able to carry out functions and powers under the Inspector Act without risk of civil liability. This is in the public interest, as it will allow for the effective and efficient operation of the Inspector Act.<sup>28</sup>

Under the *Public Sector Act 2022*, liability will instead attach to the State.<sup>29</sup> The State may recover contribution from the prescribed person if the conduct was engaged in other than in good faith, and with gross negligence.<sup>30</sup>

Given that liability passes to the State,<sup>31</sup> an Inspector (or officer) may still be financially liable in the specified circumstances, and the provisions are intended to allow for the effective and efficient operation of the Inspector Act<sup>32</sup>.

### **7.3 Compatibility with human rights**

The committee is satisfied that the subordinate legislation is compatible with human rights.<sup>33</sup> The right to privacy is discussed further in the section below.

#### **7.3.1 Right to privacy**

A person has the right not to have their privacy unlawfully or arbitrarily interfered with.<sup>34</sup>

SL No. 28 amends the *Corrective Services Regulation 2017* to allow the Chief Executive to show the Inspector a recording of a search of a prisoner where a prisoner is required to remove their clothing. The human rights certificate acknowledges that this will limit the right to privacy of the person being searched 'with regard to bodily autonomy as the Inspector will be able to view sensitive footage of the person, without the consent of the person'.<sup>35</sup>

The human rights certificate states that the limitations on the right to privacy will support the operation of the Inspector Act by ensuring the Inspector has access to relevant information to develop a full and accurate understanding of how a place of detention operates:

Free unfettered access to a wide range of information that relates to the treatment of people in places of detention, including footage of searches, will allow the Inspector to make assessments about the adequacy of services being provided to detainees, and the general care being provided to people being detained. This will assist the Inspector to identify systemic issues that may need to be addressed in order to improve detention environments.<sup>36</sup>

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<sup>28</sup> SL No. 28, explanatory notes, p 6.

<sup>29</sup> Unless, if, at the time the prescribed person engaged in the conduct, the person did so as a member of a body corporate or the governing body of a body corporate, or as a person who was employed or appointed by, or a delegate of, a body corporate, in which case liability will attach to the body corporate: *Public Sector Act*, s 269(2).

<sup>30</sup> *Public Sector Act 2022*, s 269(3).

<sup>31</sup> Or a body corporate, if relevant.

<sup>32</sup> SL No. 28, explanatory notes, p 6.

<sup>33</sup> Section 8 of the 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.

<sup>34</sup> HRA, s 25(a).

<sup>35</sup> SL No. 28, human rights certificate, p 3.

<sup>36</sup> SL No. 28, human rights certificate, pp 2, 3.

The human rights certificate identifies the following safeguards in the Inspector Act, which mitigate the limitation of the right to privacy:<sup>37</sup>

- any person who has acquired or has had access to confidential information through the administration of the Inspector Act must not disclose or use the information, except in limited circumstances which are explicitly defined in the Inspector Act<sup>38</sup>
- a penalty applies where information is disclosed unlawfully<sup>39</sup>
- where the Inspector discloses confidential information to an entity to be dealt with as a complainant, the Inspector must first seek the consent of the individual who would be the complainant prior to disclosing any information to the entity and cannot disclose the information if the individual does not consent<sup>40</sup>
- the Inspector must take into consideration a number of factors when deciding to disclose confidential information if it is in the interests of an individual or the public interest<sup>41</sup>
- there is specific criteria for the Inspector to take into consideration when determining whether there is a public interest against disclosing information, including that there is public interest against disclosure of confidential information if its release may lead to the identification of an individual or pose a risk to the health and safety of an individual.<sup>42</sup>

On balance, the human rights certificate concludes that the importance of the purpose of the limitation on the right to privacy and the purpose of SL No. 28, which is 'to support the effective operation of the Inspector Act and fulfilment of the Inspector's preventative, proactive and independent mandate', outweigh the preservation of the right to privacy.<sup>43</sup>

## 8 Forms published in the Queensland Government Gazette



The committee did not identify any issues with the forms examined and is satisfied they comply with section 48 of the *Acts Interpretation Act 1954*.

The committee considered the following forms published in the Queensland Government Gazette.

| Form no.         | Version No. | Form heading   | Authorising Law  | Date published  |
|------------------|-------------|--|--|-----------------|
| 13               | 4           | Work Order   | <i>Corrective Services Act 2006</i>  | 3 February 2023 |
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<sup>37</sup> SL No. 28, human rights certificate, p 3.

<sup>38</sup> *Inspector of Detention Services Act 2022*, ss 30, 31.

<sup>39</sup> *Inspector of Detention Services Act 2022*, s 30.

<sup>40</sup> *Inspector of Detention Services Act 2022*, s 20(5).

<sup>41</sup> *Inspector of Detention Services Act 2022*, s 31.

<sup>42</sup> *Inspector of Detention Services Act 2022*, s 23(2).

<sup>43</sup> SL No. 28, human rights certificate, p 4.

## 9 Recommendation

The committee recommends that the House notes this report.



Peter Russo MP

**Chair**  
**August 2023**

### **Legal Affairs and Safety Committee**

|                     |   |
|---------------------|---|
| <b>Chair</b>        | Mr Peter Russo MP, Member for Toohey      |
| <b>Deputy Chair</b> | Mrs Laura Gerber MP, Member for Currumbin |
| <b>Members</b>      | Ms Sandy Bolton MP, Member for Noosa      |
|                     | Ms Jonty Bush MP, Member for Cooper       |
|                     | Mr Jason Hunt MP, Member for Caloundra    |
|                     | Mr Jon Krause MP, Member for Scenic Rim   |