

# Public Trustee Regulation 2023

## Human Rights Certificate

**Prepared in accordance with Part 3 of the *Human Rights Act 2019***

In accordance with section 41 of the *Human Rights Act 2019*, I, Yvette D'Ath MP, Attorney-General and Minister for Justice and Minister for the Prevention of Domestic and Family Violence, provide this human rights certificate with respect to the *Public Trustee Regulation 2023* (the Regulation) made under section 142 of the *Public Trustee Act 1978* (the Act).

In my opinion, the Regulation, as tabled in the Legislative Assembly, is compatible with the human rights protected by the *Human Rights Act 2019* (the Human Rights Act). I base my opinion on the reasons outlined in this statement.

### Overview of the Subordinate Legislation

The Act provides for the continuation of the corporation sole constituted by the public trustee under the name The Public Trustee of Queensland (the Public Trustee). The Act also establishes the Public Trust Office, which consists of the Public Trustee and the staff of the Office.

The Public Trustee has several important functions under the Act, namely acting (when appointed) as a trustee or personal representative for the administration of an estate, managing the estates of incapacitated persons, administering the property of certain prisoners and holding and administering unclaimed monies.

The Regulation will replace the expiring *Public Trustee Regulation 2012* (expiring Regulation), which supports the Act by making provision for:

- (a) interest payable on amounts held in the common fund established under section 19 of the Act;
- (b) the investment of monies credited to the unclaimed moneys fund continued under section 25 of the Act;
- (c) the remuneration of advisory trustees appointed to advise the public trustee about the administration of estates under administration;
- (d) the application of the Act, part 8, to unclaimed superannuation benefits connected with the State;
- (e) the preparation and provision of accounts;
- (f) the fixing of fees of the official solicitor;

- (g) the remission of fees for services provided under the Act;
- (h) the conduct of the Public Trust Office’s business; and
- (i) the provision of aid in legal proceedings.

The Regulation largely remakes the provisions of the expiring Regulation. However:

- the sequence of the provisions has been reordered in the Regulation so that related provisions are co-located;
- minor drafting amendments have also been made to some provisions, either to remove potential ambiguity or to reflect current drafting practice; and
- the interest rates prescribed in section 4 and schedule 1 of the Regulation for some amount classes are higher than the interest rates for those amount classes under the expiring Regulation, following a recent review by the Public Trustee to ensure that interest payments on amounts held in the common fund are appropriate having regard to comparable market returns.

The following table shows the interest rates prescribed under the expiring Regulation and the rates that will apply on commencement of the Regulation:

<b>Funds held for</b>	<b>Interest Rate under expiring Regulation (since 01/08/2023)</b>	<b>Interest Rate under Regulation (from 01/09/2023)</b>
Class 1 & Class 5 Amounts: General Trusts, Minor Beneficiaries, Life Interest Estates, Trusts and Deceased Estates	0.21%	0.21%
Class 2(c) & Class 3 amounts: Agency Deposit At Call Accounts, Financial Management Customers and Enduring Powers of Attorney Accounts	1.48%	1.68%
Term Deposit Amounts: Term Investment Accounts	1.48%	1.68%

## Human Rights Issues

### **Human rights relevant to the subordinate legislation (Part 2, Division 2 and 3 *Human Rights Act 2019*)**

In my opinion, the rights under the *Human Rights Act 2019* (the Human Rights Act) that are relevant to the Regulation are:

- recognition and equality before the law (Human Rights Act, section 15)
- freedom of expression (Human Rights Act, section 21)
- property rights (Human Rights Act, section 24)
- privacy and reputation (Human Rights Act, section 25)
- fair hearing (Human Rights Act, section 31)

### **Consideration of reasonable limitations on human rights (section 13 *Human Rights Act 2019*)**

#### ***Interest rate for amounts in common fund***

Section 4 and schedule 1 of the Regulation prescribe the annual rate of interest for amounts held in the common fund. Section 4 also states the method by which interest is calculated for amounts held in the common fund.

These provisions limit the property rights of individuals whose moneys are held in the common fund, by fixing the amount of interest generated.

#### (a) the nature of the right

Section 24 of the Human Rights Act provides that all persons have the right to own property alone or in association with others and that a person must not be arbitrarily deprived of the person's property. The ability to own and protect property historically underpins many of the structures essential to maintaining a free and democratic society based on human dignity, equality and freedom.

Money held in the common fund is held by the Public Trustee as a trustee. Property includes all real and personal property interests recognised under the general law and could include a person's interest in trust funds held by the Public Trustee.

The right includes the protection from the deprivation of property. Deprivation is not limited to situations of forced transfer or extinguishment of title or ownership but will include any 'de facto expropriation' by means of a substantial restriction in fact on a person's use or enjoyment of their property.

This may include a substantial restriction on a person's ability to derive profits from their property.

- (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Section 4 and schedule 1 give effect to section 19 of the Act. The purpose of the provisions is to set a rate of interest payable on monies held in the common fund that reflects the market rate of return of a comparative set of competitive financial products and prevailing economic conditions. This is consistent with a free and democratic society based on human dignity, equality, and freedom.

The Public Trustee reviews the interest rates payable on amounts held in the common fund against benchmarks on a monthly basis. Each review is based upon the benchmarks for setting interest rates payable as endorsed by the Public Trust Office Investment Board and approved by the Public Trustee and Chief Executive Officer that apply at the relevant time.

The Public Trust Office Investment Board is established by section 21 of the Public Trustee Act and controls and manages all investments of the common fund. Members of the Public Trust Office Investment Board are appointed by the Governor in Council and are both internal and external to the Public Trustee. All members have agreed to adopt the Queensland Government Code of Conduct.

- (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

Although the Regulation 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.

- (d) whether there are any less restrictive and reasonably available ways to achieve the purpose

The Regulation reflects section 19 and the scheme of the Act. The rates have been set by reference to the rates of return being achieved on comparative investments in the market. I am therefore satisfied that there are no less restrictive and reasonably available ways to achieve the purpose.

- (e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

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.

- (f) any other relevant factors

Nil.

### ***Investing amounts credited to unclaimed moneys fund***

Section 5 of the Regulation provides that amounts credited to the unclaimed moneys fund may be invested in investments of the kind in which a trustee may, under the *Trusts Act 1973* (the Trusts Act), invest trust funds.

The provision is relevant to the property rights of individuals on whose behalf unclaimed moneys are held in the unclaimed moneys fund. However, I am satisfied the provision does not engage those rights because any amount paid from the unclaimed moneys fund to the owner is the amount received into the fund, regardless of any investment made.

### ***Preparing and providing accounts***

Section 8 of the Regulation requires the Public Trustee to prepare accounts for estates under administration and other matters in the Public Trust Office, at such times and covering such periods as the Public Trustee considers appropriate (regular accounts).

The Public Trustee may give, free of charge, a copy of a regular account to a person who has a right to, or an interest in, the regular account. The Public Trustee may also give an interested person, on request by the interested person and subject to payment of an appropriate fee, extra copies of the regular accounts or copies of accounts other than the regular account.

Accounts prepared by the Public Trustee contain information relevant to individual's personal financial affairs and section 8 is therefore relevant to the right stated in section 25 of the Human Rights Act, not to have a person's privacy, family, home or correspondence unlawfully or arbitrarily interfered with.

However, I am satisfied that section 8 does not limit the right to privacy stated in s 25 of the Human Rights Act. The provision authorises the Public Trustee to give copies of accounts only to an 'interested person', which is defined to mean a person who the Public Trustee considers has a right to or an interest in a statement of account. This requirement ensures the Public Trustee can only give accounts either to the individuals whose moneys are held or their legally authorised representatives.

Section 8 also engages the right to freedom of expression stated in section 21 of the Human Rights Act, which includes a right to information held by the government. I consider that this right is limited by the Regulation but that the limitation is reasonable and demonstrably justifiable in accordance with section 13 of the Human Rights Act, for the following reasons.

(a) the nature of the right

The ability of an individual to obtain information held by the government, particularly information relating to the individual's financial affairs, plays a critical role in mitigating the asymmetry of power between state and individual and therefore in supporting a free and democratic society.

- (b) the nature of the purpose of the limitation, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

Section 8 limits the human right stated in section 21 of the Human Rights Act because it gives the Public Trustee discretion about the provision of the information and also about whether or not an interested person seeking financial information is required to pay a fee.

The limitations serve a practical purpose. The Public Trust Office administers a large volume of estates and other matters, including unclaimed moneys. If the Public Trustee were required to identify every interested person in each estate or other matter and provide them with copies of regular accounts free of charge, this would place the resources of the Public Trust Office under significant strain. It may also not be possible for the Public Trustee to comply with such an obligation in some cases, where the identity of interested persons is unknown.

Similarly, requiring the Public Trustee to provide copies, free of charge, of regular accounts and other accounts on the request of an interested person would strain the Public Trust Office's resources.

The Public Trustee performs an important function of managing the affairs of persons who are unable to manage their own affairs because of a disability or incapacity and of managing unclaimed moneys. The Public Trustee does not have unlimited resources and the limitations imposed by section 8 are consistent with the need to ensure the Public Trustee can continue to perform necessary functions effectively.

- (c) the relationship between the limitation and its purpose, including whether the limitation helps to achieve the purpose

The ability to recover the reasonable costs of undertaking additional work in making copies of regular accounts and other accounts is effective to manage the strain on the Public Trustee's finite resources.

- (d) whether there are any less restrictive and reasonably available ways to achieve the purpose

Section 8 gives the Public Trustee power to provide copies of regular accounts to interested persons free of charge. This means that most interested persons will be able to obtain at least the basic financial information relevant to them simply by requesting it. While an interested person will need to pay for extra copies of regular account and for copies of other accounts, the Public Trustee can only charge an 'appropriate fee', which cannot be an

amount more than the reasonable cost to the Public Trustee of providing the account. The alternative, namely the Public Trustee providing all accounts free and on demand, is not feasible. I am therefore satisfied that there is no less restrictive way reasonably available to achieve the purpose.

- (e) the balance between the importance of the purpose of the limitation and the importance of preserving the human right, taking into account the nature and extent of the limitation

Given the breadth of the Public Trustee's functions, requiring the Public Trustee to provide only regular accounts on request and free of charge and allowing the Public Trustee to recover reasonable costs for the provision of additional accounts strikes a fair balance between preserving the property rights of interested persons and achieving the purpose of managing strain on the Public Trustee's resources.

- (f) any other relevant factors

The power of the Public Trustee under section 10 of the Regulation also mitigates the limiting effect of section 8.

### ***Power to remit fees***

Section 10 of the Regulation gives the Public Trustee power (subject to a contrary direction by the Minister) to remit all or part of a fee payable under the Public Trustee Act.

The discretionary nature of the power (and of the Ministerial power of direction) engages the rights stated in section 15(3) and (4) of the Human Rights Act, to equal protection of the law without discrimination and to equal and effective protection against discrimination.

However, the Supreme Court of Queensland has held that the term 'discrimination', when used in the Human Rights Act, means discrimination of the kind prohibited under the *Anti-Discrimination Act 1991* (the Anti-Discrimination Act) or some analogous kind of discrimination.

Although section 10 gives the Public Trustee power to remit fees otherwise payable by selected individuals, the Public Trustee must exercise the discretionary power subject to the Anti-Discrimination Act and any applicable Commonwealth anti-discrimination legislation.

Therefore, I am of the opinion that section 10 does not limit the rights stated in section 15 of the Human Rights Act.

### ***Execution of documents***

Section 12 of the Public Trustee Regulation provides that a document executed by the Public Trustee must be executed in a way that shows the Public Trustee's appointment or authority to act.

The provision is relevant to the right to freedom of expression (as stated in section 21 of the Human Rights Act), insofar as the right includes a right to information held by the government. However, in my opinion the provision does not limit the right because it requires the Public Trustee to identify the authority under which the Public Trustee executes documents, ensuring transparency in the manner in which the Public Trustee undertakes transactions.

### ***Provision of legal assistance***

Section 13 of the Regulation provides that the Public Trustee may give aid to a person for a civil proceeding if the person does not meet the criteria for, or is refused, legal assistance under the *Legal Aid Queensland Act 1997*.

This provision engages the right to a fair hearing stated in section 31 of the Human Rights Act. However, in my opinion, it promotes rather than limits that right by creating an avenue for persons who may otherwise not be able to afford legal representation in civil proceedings to be represented by a legal practitioner.

## **Conclusion**

I consider that the Regulation is compatible with the Human Rights Act because while it does limit, restrict or interfere with a human right, that limitation is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

**YVETTE D'ATH MP**  
Attorney-General and Minister for Justice,  
Minister for the Prevention of Domestic and Family Violence  
and Leader of the House