

Public Service (Public Service Offices and Other Matters) Amendment Regulation 2020

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, Annastacia Palaszczuk MP, Premier and Minister for Trade provide this human rights certificate with respect to the *Public Service (Public Service Offices and Other Matters) Amendment Regulation 2020* (Amendment Regulation) made under the *Public Service Act 2008* (PS Act).

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

Overview of the Subordinate Legislation

The proposed amendments to the *Public Service Regulation 2018* (the PS Regulation) in the Amendment Regulation are to update the schedules of the PS Regulation to apply additional provision of the PS Act and rulings issued under the PS Act to a number of declared public service offices (DPSOs).

The PS Act establishes the Queensland public service and provides for the rights and responsibilities of chief executives and employees. The PS Act is supplemented by rulings issued by the commission chief executive and the industrial relations Minister under sections 53 and 54 of the Act respectively.

Section 222 of the Act authorises regulations under the PS Act.

On 14 September 2020, the *Public Service and Other Legislation Amendment Act 2020* (the Amendment Act) which contains key public sector policy changes, received assent. The amendments proposed to the PS Regulation allow these changes to formally apply to relevant DPSOs, in accordance with established practice and the expectation from both Government and key stakeholders.

Sections 21, 22, 23 and 222 of the PS Act provide that specified provisions of the PS Act and nominated rulings may be applied to public service offices declared under the PS Regulation. The provisions of the PS Act and rulings that are applied to individual DPSOs and their employees are listed in the schedules to the PS Regulation.

Following passage of the Amendment Act, five new and six amended directives were drafted by the Public Service Commission relating to:

- appeals
- appointing public service employee acting in a position at higher classification level
- casual employment
- discipline

- fixed term temporary employment
- independent medical examinations
- individual employee grievances
- investigations
- positive performance management
- recruitment and selection, and
- suspensions.

Human Rights Issues

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

In my opinion, the human rights that are relevant to the Amendment Regulation are:

- Recognition and equality before the law (section 15)
- Taking part in public life (section 23)
- Privacy and reputation (section 25).

Recognition and equality before the law

Section 15 of the HR Act provides that every person has the right to recognition as a person before the law and is entitled to equality and protection before the law without discrimination. Discrimination, in relation to a person, means discrimination within the meaning of the *Anti-Discrimination Act 1991* on the basis of certain attributes set out in section 7 of the Act.

Taking part in public life

Contained within section 23 of the HR Act (taking part in public life) is the right of every eligible person to have the opportunity without discrimination to have access, on general terms of equality, to the public service and public office.

The clauses of the PS Act and directives that are relevant to this right are those related to:

- citizenship
- employment screening
- suspension
- discipline
- independent medical examinations
- investigations.

Privacy and reputation

Section 25 of the HR Act protects the individual from interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation.

The clauses of the PS Act and directives that are relevant to this right are those related to:

- employment screening
- discipline
- suspension
- investigations
- independent medical examinations.

Consideration of reasonable limitations on human rights (section 13 HR Act)

Section 13 of the HR Act 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.

The PS Act provisions and rulings that are being applied through the Amendment Regulation to DPSOs are existing rulings that already apply to public service employees. These rulings and provisions are not incompatible with human rights and generally do not directly limit human rights. Rather, decisions made by chief executives under these provisions or directives have the potential to limit a person's human rights. All directives issued following the commencement of the Amending Act contain a clause to alert decision makers to consider the human rights implications of decisions they may make under the rulings.

It is considered that any potential human rights limitation that the Amendment Regulation makes upon the rights and liberties of individuals by applying the relevant PS Act provisions and directives are reasonable and justified given the need to uphold high standards of employment in the public service and ensure effective and efficient management of the public service, to meet community expectations.

PS Act provisions and directives that potentially limit human rights are addressed in the paragraphs below. All other provisions and directives were assessed to have no limitations on human rights.

Employment screening

Recognition and equality before the law

The application of the employment screening directive to Legal Aid Queensland (LAQ) and criminal history provisions in Chapter 5, Part 6 of the PS Act to Trade and Investment Queensland (TIQ) and LAQ will enable the chief executive to obtain (with consent) a person's criminal history report in order to assess the person's suitability for engagement to perform particular duties. A chief executive has discretion to decide whether a person is not suitable for engagement on the basis of their criminal history information.

The employment screening provisions may impose a limitation on the rights of a person to equal treatment and protection before the law without discrimination if they possess a relevant criminal record and wish to be engaged in particular duties within the public service (HR Act, section 15). However, as a criminal record is not a protected attribute in section 7 of the *Anti-Discrimination Act 1991*, these clauses do not on their own constitute discrimination.

Privacy and reputation

The privacy and reputation rights recognised in section 25 of the HR Act, are relevant to the applied employment screening provisions and employment screening directive in that they require the disclosure of personal information. Consent is obtained prior to obtaining a person's criminal history (section 154 of the PS Act).

The purpose of the employment screening provisions in Chapter 5, Part 6 of the Act is for the protection of children (where child-related duties are applied to a DPSO) and to ensure the suitability of those working in public service roles, particularly those involving public monies, positions of influence and public accountability. Protection of children and proper administration of government are pressing and substantial concerns in a free and democratic society. The potential limitations of the employment screening provisions and ruling on the human rights in section 15 of the HR Act are justified and proportionate to achieve these purposes and cannot be achieved in any other way.

Existing safeguards in place in Chapter 5, division 4 of the PS Act ensure that criminal history and other sensitive information obtained in employment screening are only accessed, disclosed and used for employment screening purposes. A penalty of 100 penalty units applies for unauthorised disclosure or access to criminal history or police information (section 172 of the PS Act).

The ruling on employment screening supports affording procedural fairness to a person in relation to employment screening, a further safeguard of the human rights of individuals impacted by these clauses.

Citizenship

Taking part in public life

The Amendment Regulation applies section 127 of the PS Act, relating to citizenship, to the TIQ. Section 127 is relevant to the right to take part in public life (section 23 of the HR Act) to the extent that it provides for a requirement of Australian citizenship to be employed in the Queensland Public Service.

The right to take part in public life affirms the right of all persons to contribute to and exercise their voice in relation to the public life of the State. It ensures that all persons have the opportunity to contribute to the political process and public governance.

This right has been interpreted by the UN Human Rights Committee as providing a right of access, on general terms of equality, to positions in the public service and in public office.

The nature of this right includes that the criteria and processes for appointment, promotion, suspension, discipline and dismissal within the public service must be objective and reasonable, and non-discriminatory.

Previously the, PS Act had included citizenship and residency requirements for employment as a public service officer. In effect, this meant that non-citizens who did not have a lawful right to remain indefinitely in Australia, but had permission to work, could only be engaged as a temporary or casual employee. In other words, it excluded classes of the Queensland community from permanent employment who have a right to work in Australia but may not have permanent residency, such as refugees and asylum seekers.

The purpose of the citizenship requirement in section 127 of the PS Act is to ensure that the Act does not limit permanent employment in the Queensland Public Service to only Australian citizens, but rather all persons who have a lawful right to work in Australia will be eligible to be employed on tenure. Section 127 also makes clear that if a person no longer has a lawful right to work in Australia, their appointment will be considered to terminate on the same day.

In this regard, it is considered that the application of section 127 to QAS by the PS Regulation furthers the objects of the HR Act by broadening the right to take part in public life by ensuring equality of eligibility and access to the public service.

Suspension, discipline and investigations

Recognition and equality before the law, taking part in public life and privacy and reputation

The Amendment Regulation applies Chapter 5, Part 4 (Termination, suspension and related matters) and Chapter 6 (Disciplinary Action for public service employees and former public service employees which may include termination of employment) to additional DPSOs to align the suspension, discipline, investigation and termination processes with those employed across the public service under the PS Act.

The Amendment Regulation applies the section of the PS Act that provides a chief executive may suspend an employee if they reasonably believe that a public service employee is liable to discipline under disciplinary law, or in the case of a public service officer, where the proper and efficient management of the agency might be prejudiced if the public service officer is not suspended (section 137 of the Act).

The suspension, discipline and investigations ruling (and decisions made under these) raise a number of potential human rights limitations including recognition and equality, taking part in public life and privacy and reputation.

The nature of the right to privacy and reputation is very broad but contains internal limitations. The protection against interference with privacy is limited to unlawful or arbitrary interference. The notion of arbitrary interference extends to those interferences which may be lawful, but are unreasonable, unnecessary and disproportionate.

Safeguards are present, both in the PS Act and the directives (as required by sections 137A and 192A of the PS Act) to ensure that natural justice is provided to employees in disciplinary matters and investigating grounds for discipline and grievances) and suspensions without pay (as provided by section 137(9)). Section 137(10) of the PS Act provides that where suspension is on normal remuneration, natural justice is not required. The requirements for natural justice include the opportunity to respond to the allegations and protection of confidential information.

Given the objective of these provisions is to govern the management of employees, it is appropriate that agencies have the ability to discipline employees where appropriate for the effective and efficient management of their offices in the public interest and to ensure worker health and safety. This requires access to relevant information about employees and the ability to take disciplinary action that may remove a person from their employment, for the protection of other employees or the public interest.

The principles in relation to disciplinary action apply equally to all employees. The principles are applied through the chief executive's decision making power under the PS Act and directive, and decisions may be subject to review by complaint to the agency by appeal to the Queensland Industrial Relations Commission.

These limitations to human rights are therefore reasonable in order to ensure an effective public service and to manage inappropriate conduct which may impact other employees, the government and the broader community.

Independent Medical Examinations

Taking part in public life and privacy and reputation

The Amendment Regulation applies the directive relating to managing employee health safety and wellbeing – independent medical examinations to TIQ, QAS, the Residential Tenancies Authority, and to fire service officers employed by the Queensland Fire and Emergency Service.

Sections 174 and 175 of the PS Act provide that if a public service employee is absent from duty or the employee's chief executive is reasonably satisfied the employee is not performing his or her duties satisfactorily, and the chief executive reasonably suspects that the employee's absence or unsatisfactory performance is caused by a mental or physical illness or disability, the chief executive may require an employee to submit to a medical examination.

These provisions allow a chief executive to seek independent medical advice which may be needed to ensure appropriate support for the employee in the workplace, and in some cases to ensure the safety of all employees and clients. Following the receipt of the report, the chief executive may transfer or redeploy the employee or retire the employee from the public service.

These provisions and the associated directive impose a limitation on the human right of privacy and reputation by requiring disclosure of medical information insofar as it relates to the employee's performance of their duties. This is a reasonable interference with the employee's privacy to ensure their wellbeing and safety, and for the effective management of the workplace. Confidentiality obligations protect the rights of the employee, and appeal rights also exist for their protection.

The ability for a chief executive to retire a public service employee may also impact on an employee's ability to take part in public life.

Limitations on the rights to privacy and reputation and to take part in public life are reasonable and justifiable as agencies have a legal obligation to ensure a safe workplace, and the rights to safety of other people in the workplace.

The directive also supports the human rights of employees by providing clarity on when a medical examination may be appropriate, how to treat the individual employee with respect and sensitivity and also provides details on appropriate supports.

Conclusion

I consider that the *Public Service (Public Service Offices and Other Matters) Amendment Regulation 2020* is compatible with the *Human Rights Act 2019* because while it does limit, restrict or interfere with human rights, the limitations are only to the extent that is reasonable and demonstrably justifiable in accordance with section 13 of the Act.

ANNASTACIA PALASZCZUK MP
PREMIER AND MINISTER FOR TRADE

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