

Public Sector 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, the Honourable Annastacia Palaszczuk MP, Premier and Minister for the Olympic and Paralympic Games provide this human rights certificate with respect to the *Public Sector Regulation 2023* made under the *Public Sector Act 2022*.

In my opinion, the *Public Sector Regulation 2023*, 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 *Public Sector Act 2022* (the Public Sector Act) has been developed to provide a modern, simplified and employee-focused legislative framework for the public sector that can further the Queensland Government's commitment to being fair, responsive and a leader in public administration. The Public Sector Act also contains core provisions, such as key employment arrangements, which will apply to all public sector employees and some specific provisions which apply to public service employees.

The Public Sector Act, which will commence on 1 March 2023, will repeal the *Public Service Act 2008* (the Public Service Act) and the *Public Service Regulation 2018* (the Public Service Regulation).

The proposed *Public Sector Regulation 2023* (the Public Sector Regulation) has been drafted to support the Public Sector Act, and as such, it is intended that this Regulation also commence on 1 March 2023.

The Public Sector Act contains a general regulation making power which permits a regulation to be made about a range of matters, including the operation of a public sector entity and specify regulation making powers.

Specific regulation making powers include those aimed at facilitating the broader application of certain Act arrangements, including in relation to:

- applying the transfer and secondment arrangements which apply to public service officers to employees of public sector entities, including with modification; and
- providing protection against civil liability to prescribed persons.

Other specific regulation making powers permit the prescription of matters including:

- prescribing external agencies for the purpose of an information exchange agreement; and
- prescribing another Act or law as a public sector disciplinary law.

Consistent with the regulation making powers, the Public Sector Regulation supports arrangements included in the Public Sector Act and/or seeks to preserve or continue certain Public Service Regulation arrangements, including in relation to:

- preserving transfer and secondment arrangements that currently apply to certain public sector entities;
- preserving appeal arrangements in relation to transfer decisions where transfer arrangements are prescribed;
- preserving appeal arrangements which permit movement decisions to be treated as transfer decisions for appeal purposes for health service employees of Queensland Health or a Hospital and Health Service;
- preserving directive arrangements that apply change of pay date for Queensland Health employees to health service employees of Hospital and Health Services;
- continuing and modernising record keeping arrangements that apply to public service and health service employees; and
- preserving prescribed persons for the purpose of application of protection against civil liability.

The Public Sector Regulation seeks to continue to prescribe the Crime and Conduct Commission and the Queensland Police Service as external agencies for the purpose of an information exchange agreement which, under the Public Service Act applies to a review into a Department's handling of work performance matters. Under the Public Sector Act, this will apply to a review into a public sector entity's handling of work performance matters.

While the entities prescribed in this Regulation as external agencies for the purpose of entering into an information exchange agreement under the Public Sector Act will remain the same, it is noted the review arrangements in the Public Sector Act will have greater application than those in the Public Service Act as reviews will now apply to public sector entities instead of departments.

The Public Sector Regulation also seeks to continue arrangements in the *Ambulance Service Act 1991* (Ambulance Service Act) and the *Fire and Emergency Services Act 1990* (Fire and Emergency Services Act) which prescribe arrangements for disclosure of serious disciplinary action under the Public Sector Act when screening potential candidates for employment with the Queensland Ambulance Service (QAS) or the Queensland Fire and Emergency Service (QFES). Under this provision a public sector disciplinary law includes a law, or related instrument, of another State that provides for the same, or substantially the same, matters as the Public Sector Act and for QAS and QFES respectively, a law of another State that provides for the discipline of persons engaged in employment that is equivalent, or substantially equivalent, to employment under the Ambulance Service Act and the Fire and Emergency Services Act.

This arrangement is included in the proposed Public Sector Regulation as, upon commencement of the Public Sector Act, the disclosure requirements of the Ambulance Service Act and Fire and Emergency Services Act will cease to apply.

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 under the *Human Rights Act 2019* (Human Rights Act) relevant to the Public Sector Regulation are:

- taking part in public life (section 23); and
- privacy and reputation (section 25).

Taking part in public life (section 23 | Article 25 ICCPR)

The human right to take part in public life specifically includes a right to have access, on general terms of equality, to the public service and to public office. 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 UN Human Rights Committee has said:

‘... affirmative measures may be taken in appropriate cases to ensure that there is equal access to public service for all citizens. Basing access to public service on equal opportunity and general principles of merit, and providing secured tenure, ensures that persons holding public service positions are free from political interference or pressures.’

The right also interacts with the general right to equality and provides that criteria and processes for appointment, promotion, suspension and termination within the public service must be objective, reasonable and non-discriminatory.

Privacy and reputation (section 25)

The human right to privacy and reputation protects the individual from unlawful or arbitrary interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation.

The scope of the right to privacy is broad. It protects privacy in the sense of personal information, data collection, and correspondence, and also extends to an individual’s private life more generally. Only lawful and non-arbitrary intrusions may occur upon privacy, family, home, correspondence, and reputation. Case authority suggests that ‘arbitrary’ in the human rights context refers to conduct that is capricious, unpredictable, or unjust, and also refers to interferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought. The human right to reputation protects the individual from unlawful and intentional attacks on their reputation, based on untrue allegations.

Provisions of the Public Sector Regulation which may be regarded as potential limitations to human rights relate to:

- Part 3 Employee records;
- Clause 15 *External agencies for exchange of information*; and
- Clause 17 *Meaning of public sector disciplinary law for particular persons*.

Part 3 Employee records

(a) the nature of the right

Privacy and reputation (also consider right to take part in public life)

Part 3 of the Regulation continues and modernises arrangements included in the Public Service Regulation for the keeping and treatment, including the sharing, of employee records for public service employees and health service employees (relevant employees).

The Regulation's employee record arrangements, which include the keeping and under certain circumstances, the sharing of such records, could be viewed as impacting upon the human right to privacy of relevant employees.

(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

It is argued that employee records and associated record keeping arrangements are necessary in ensuring public service entities and hospital and health services (relevant entities) employ 'fit and proper' people. It is further argued that it is essential that these entities employ 'fit and proper' people to ensure that Queensland communities and the Government of the day are well served.

Information permitted to be kept as an employee record under the proposed Regulation relate to matters relevant to the wellbeing and work performance of employees. Specifically, Part 3 at clause 11 of the Regulation establishes what an employee record is, as follows:

- matters relevant to an employee's work performance;
- certain medical reports but does not include a medical report about an employee indicating that disclosure of information in the report to the employee might be prejudicial to the employee's mental or physical health or wellbeing; and
- a written allegation of misconduct, within the meaning of the Public Sector Act, by the employee.

Clause 11 also identifies a number of exceptions to what an employee record is, including:

- a medical report about the employee indicating that disclosure of information in the report to the employee might be prejudicial to the employee's mental or physical health or wellbeing;
- a document created by an appropriately qualified person for the primary purpose of providing a professional counselling service to another public service employee that contains information about the employee;
- a document about the employee relating to suspected corrupt conduct under the *Crime and Corruption Act 2001* or an investigation of the conduct;
- a document about the employee relating to a suspected criminal offence or an investigation of the offence; and
- a document that is subject to legal professional privilege.

The limitations to what a record is, aim to protect the privacy of employees to whom this part applies as the Regulation does not permit proscribed documents to be kept as employee records.

Other Part 3 provisions which protect employees against misuse of employee records include, in certain circumstances, permitting an employee access to records that may be detrimental to the employee's interests and affording the employee a right to respond to such records.

Part 3 also contains arrangements which permit the sharing of employee records between chief executives where an employee record is in the possession of a chief executive who is not the chief executive of the employee. In terms of these arrangements, clause 12 provides additional safeguards for an employee seconded to another entity for a total period of less than six months, including in a requirement that information may only be provided if the employee's chief executive receives a written request for the records from the other chief executive. The other chief executive may also need to comply with requirements of a relevant directive.

Furthermore, it should also be noted that records may only be shared between public service entities and a Hospital and Health Service and not across the broader public sector.

In addition to the regulatory protections, the Public Sector Act imposes a duty of confidentiality upon those that access confidential information in the performance of their duties. Confidential information relates to personal information about an individual and as such would include employee records. These confidentiality provisions guard against misuse of employee records and include that a breach of this duty attracts a maximum penalty of 100 penalty units.

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

The purpose of the employee record provisions is to protect against the employment of inappropriate persons. To achieve this, it is argued that relevant entities must have resources, including appropriate documentation such as employee records, necessary to support the effective management of staff. The proposed employee record provisions are intended to work with other legislative provisions to achieve the overall goal of the efficient management of relevant entities and the associated protection of the Government's resources and reputation.

Matters permitted as employee records are those considered most necessary to have access to, on this basis it is argued that the Part 3 provisions are reasonable and proportionate to the need to keep records. The clear identification of documents that are not employee records guards against any unreasonable intrusion upon a person's privacy.

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

Given that it is considered necessary to have some employee record arrangements for the effective management of relevant entities, the Part 3 arrangements, including the restrictions and safeguards in the proposed Regulation and the Public Sector Act, are the most direct and least restrictive way of ensuring relevant entities have documentation aimed at assisting in ensuring only 'fit and proper' persons are employed.

(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

While keeping employee records may be seen as inconsistent with a person's human right not to have their privacy interfered with, the aim of these provisions is to assist entities in ensuring appropriate staff are employed, with a long term to ensure the effective management of these entities and their employees, which ultimately benefits the people of Queensland.

The proposed arrangements, including the restrictions and safeguards that apply in relation to the keeping and treatment of employee records, represent a balance between the need to keep records and the human right to privacy.

(f) any other relevant factors

The proposed employee record provisions continue and modernise arrangements in the Public Service Regulation. The provisions are not intended to alter or result in lesser safeguards than those provided for in that Regulation.

Clause 15 *External agencies for exchange of information*

(a) the nature of the right

Section 126 of the Public Sector Act empowers the Public Sector Commissioner (the commissioner) to enter into an information exchange agreement with a chief executive of an external agency to obtain and give information for the purpose of undertaking a review of a public sector entity's handling of work performance matters. Clause 15 of the Public Sector Regulation seeks to prescribe the Crime and Conduct Commission and Queensland Police as external agencies for this purpose.

The exchange of information could include information that relates to individual employees which could impact upon their human right to privacy.

(b) the nature of the purpose of the limitation to be imposed by the Bill if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the potential limitation of an employee's right to privacy is considered necessary to ensure the commissioner can obtain and consider all relevant information, when undertaking a review of a public sector entity's handling of work performance matters.

It is argued the potential limitation is consistent with a free and democratic society based on human dignity, equality and freedom as, in accordance with section 123 of the Public Sector Act a review of this nature should only be conducted if the commissioner considers it may be beneficial to conduct a review to promote—

- the continuous improvement of a public sector entity's practices regarding the handling of work performance matters; or
- the optimal resolution of a current work performance matter.

(c) the relationship between the limitation to be imposed by the Bill if enacted, and its purpose, including whether the limitation helps to achieve the purpose

Given that a review should only be undertaken where the commissioner reasonably considers the review may be beneficial to promote the continuous improvement of a public sector entity's practices regarding the handling of work performance matters or the optimal resolution of a current work performance matter, the ability to exchange information with prescribed entities is considered necessary to ensure the review is conducted fulsomely. As such, it is argued that the limitation helps achieve the purpose.

- (d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

The ability to exchange information with prescribed entities is necessary to ensure the review can be effectively undertaken. Prescribing only those entities likely to possess the most crucial information required to inform a review is considered the most direct and least restrictive way of obtaining such information.

- (e) the balance between the importance of the purpose of the Bill, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

Enabling the commissioner to obtain information which could include information about an employee is necessary to ensure the quality of the review, which ultimately aims to improve the efficiency and effectiveness of the public sector.

The ability to effectively undertake a review into the handling of work performance matter has not only the potential to benefit the entity that is subject to the review, but may also benefit the public sector and the broader Queensland community by ensuring a responsive and effective Government.

Any limitation on the right to privacy and reputation is balanced against the importance of ensuring the commissioner is equipped with necessary information to conduct the review.

In addition, the Public Sector Act contains safeguards to protect a person's right to privacy including through the imposition of a duty of confidentiality which applies generally to public sector employees and more specifically to any person delegated a function of the Public Sector Commission for the performance of the review. Confidential information relates to personal information about an individual.

In accordance with these provisions a person who unlawfully uses or discloses confidential information could be fined a maximum of 100 penalty units.

- (f) any other relevant factors

Clause 15 seeks to continue to prescribe the Crime and Conduct Commission and Queensland Police as external agencies for the purpose of an information exchange agreement which, under the Public Service Act applied to a review into a Department's handling of work performance matters. Under the Public Sector Act, the underpinning arrangements relate to a review into a public sector entity's handling of work performance matters.

While the entities prescribed in clause 15 of the proposed Regulation as external agencies for the purpose of entering into an information exchange agreement under the Public Sector Act will remain the same as the entities prescribed in the Public Service Regulation, the review arrangements have been extended to apply beyond departments to public sector entities.

In addition, any potential impact, including justifications, in relation to section 126 of the Public Sector Act, which empowers the commissioner to enter into an information agreement with a chief executive of an external agency, was addressed in the Statement of Compatibility with the Human Rights Act made in relation to the Public Sector Bill 2022.

Clause 17 *Meaning of public sector disciplinary law for particular persons*

(a) the nature of the right

The inclusion of disclosure requirements at clause 17 of the Public Sector Regulation may be viewed as a possible limitation to a person's right to:

- to have access, on general terms of equality, to the public service (noting that QAS and QFES may employ both public service and public sector employees, concerns over any possible limitation relate only to potential public service employment); and
- privacy.

Section 71 of the Public Sector Act provides that a chief executive of a public sector entity may, under a directive, require a person that the entity proposes to employ or second into the agency to provide details of the history of any serious disciplinary action taken against person.

Serious disciplinary action is defined in the Public Sector Act as disciplinary action taken under a public sector disciplinary law involving:

- termination of employment;
- a reduction of classification level or rank;
- transfer or redeployment;
- reduction of remuneration level;
- a disciplinary declaration under a public sector disciplinary law that states that the disciplinary action that would have been taken against a person if the person's employment had not ended; or
- action taken by a chief executive to end a person's employment as a public sector employee or consider the person's employment has ended.

Schedule 2, Dictionary, of the Public Sector Act defines public sector disciplinary law, at (g) as meaning another Act or law prescribed by regulation.

Clause 17 of the Public Sector Regulation provides that the meaning of a public sector disciplinary law for a potential employee of QAS or QFES includes:

- (a) a law of another State that provides for the same, or substantially the same, matters as the Act;
- (b) for a potential employees of QAS a law of another State that provides for discipline of persons engaged in employment that is equivalent, or substantially equivalent, to employment under the Ambulance Service Act;
- (c) for a potential employee of QFES a law of another State that provides for the discipline of persons engaged in employment that is equivalent, or substantially equivalent, to employment under the Fire and Emergency Services Act;
- (d) a code of practice or other instrument under a law mentioned in paragraph (a), (b) or (c) providing for disciplinary matters.

(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

Clause 17 seeks disclosure of serious disciplinary action where a person is seeking to be engaged by QAS or QFES. The purpose of the seeking additional disclosures is to ensure only

fit and proper people are employed by these entities. Both public service and public sector employees may be engaged by these entities.

Any potential limitation of a human right to access to public service that may be a result of increased disclosure requirements are not relevant where a person is seeking engagement as a public sector employee as the human right to access to applies to public service.

However, where a person is seeking to be engaged as a public service employee, additional disclosure requirements included at clause 17 may limit the person's access to public service.

In terms of the human right to privacy this is relevant regardless of whether the person is a potential public service or sector employee.

Given the important role QAS and QFES have in serving the community, stringent screening of potential employees and any limitation of a human right that occurs as a result of this is justified on the basis that the limitation is consistent with protecting the human dignity of those that may use the services provided by these entities.

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

The core functions of QAS and QFES involve direct contact with vulnerable members of the public and/or responding to the public during times of crisis. The limitations on human rights by requesting additional disclosures is intended to assist recruitment processes so that suitable persons are employed in these entities. The overall purpose of the limitation is intended to protect the safety and wellbeing of the public; and to ensure the reputation of the Government is not subjected to unnecessary risks.

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

Giving the chief executive of QAS or the commissioner of QFES the means to seek information, assists them in making informed decisions and is considered a necessary safeguard. Requesting disclosure of previous serious disciplinary action is considered the least restrictive way of obtaining this information.

(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 disclosure arrangements in the Regulation are intended to assist the chief executive of QAS and the commissioner of QFES in making informed decisions on appointing staff while minimising risks to the public and the Government.

It is argued that requesting disclosure of serious disciplinary action that has occurred in another jurisdiction is appropriate on the basis that failure to adequately screen potential employees could present an unacceptable risk to the public, to the relevant entity and more generally the Queensland Government.

It is noted that protections exist to prevent misuse of these arrangements, including the Public Sector Act's confidentiality protections.

On this basis, it is argued that the proposed disclosure requirements strike an appropriate balance between preserving human rights and providing safe services to the community.

It is further argued that any limitation to a person's human right to privacy or access to a position in the public service that is a result of requesting disclosure of serious disciplinary action is offset against the Government's need to protect members of the public and the reputation of Government.

(f) any other relevant factors

The ability for the chief executive of QAS or the commissioner of QFES to request disclosure of serious disciplinary action under an equivalent law, code of practice or other instrument of another jurisdiction is not intended to result in more onerous screening arrangements than that which currently applies.

Instead, these arrangements are included in the Public Sector Regulation as a consequence of the adoption of a public sector wide disciplinary framework in the Public Sector Act and subsequent omission of the disciplinary framework from the Ambulance Service Act and the Fire and Emergency Services Act, which will occur on 1 March 2023 to coincide with the commencement of the Public Sector Act.

Conclusion

I consider that the *Public Sector Regulation 2023* is compatible with the *Human Rights Act 2019* because it limits human rights only to the extent that is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

ANNASTACIA PALASZCZUK MP
PREMIER AND MINISTER FOR THE OLYMPIC AND PARALYMPIC GAMES

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