

# Superannuation (State 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 Cameron Dick MP, Treasurer and Minister for Trade and Investment provide this human rights certificate with respect to the *Superannuation (State Public Sector) Regulation 2023* made under the *Superannuation (State Public Sector) Act 1990*.

In my opinion, the *Superannuation (State 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 *Superannuation (State Public Sector) Regulation 2023* (Regulation) simplifies employee and employer contribution arrangements for Queensland government employees receiving employer contributions into an accumulation account and provides for a salary definition for employer contributions consistent with that adopted under the *Superannuation Guarantee (Administration) Act 1993* (Cth). The new contribution arrangements are for police officers, other than special constables (State officer), under the age of 60 years to receive 18% of ordinary time earnings and other employees to receive 12.75% of ordinary time earnings. Consistent with current Queensland Government practice, these arrangements will extend to paid maternity leave and other paid ancillary leave.

The Regulation leaves contribution arrangements for employees of other employers listed in the *Superannuation (State Public Sector) Notice 2021* (Notice) unchanged.

The Regulation also amends the Notice to outline employers (Part 1 employers) and employees covered by the new arrangements and employers (Part 2 employers) and employees who will remain on the existing arrangements.

### Human Rights Issues

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

I have considered each of the rights protected by part 2 of the HR Act. In my opinion, the human rights that are potentially relevant to the Bill are:

- Recognition and equality before the law (section 15 of the HR Act) and
- Property rights (section 24 of the HR Act).

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

### ***Section 15 (Recognition and equality before the law)***

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

Section 15 (Recognition and equality before the law) of the HR Act reflects that every person holds the same human rights by virtue of being a human and not because of some particular characteristic or membership of a particular social group. This right encompasses the right to recognition as a person before the law and the right to enjoy human rights without discrimination. Discrimination is defined as including discrimination that is unlawful under the *Anti-Discrimination Act 1991* (AD Act), which includes discrimination on the basis of age.

The relevant provisions in the Regulation which may affect recognition and equality before the law are:

- Schedule 1 Part 1 Item 5 and Schedule 1 Part 2 Item 4 of the Regulation provide for a lower employer rate for employees aged 75 years and over, namely the charge percentage (11.0 per cent in 2023-24) of an employee's ordinary time earnings rather than 12.75 per cent
- Schedule 1 Part 1 Item 3, which provides for an employer contribution of 18 per cent for employees who are police officers under the age of 60 years and
- Schedule 1 Part 1 Item 4, which provides for an employer contribution of 14.25 per cent for employees who are fire service officers under the age of 65 years.

These provisions may limit recognition and equality before the law because they discriminate based on an employee's age.

#### (b) The nature of the purpose of the limitation

##### *Employees aged 75 years and over*

Under Commonwealth law, namely Regulation 7.04 of *Superannuation Industry (Supervision) Regulations 1994* (Cth) (SIS Regulations), a regulated superannuation fund may only accept mandated employer contributions and downsizer contributions for a member aged 75 or over. Mandated employer contributions are those that satisfy an employer's obligations under the Commonwealth's superannuation guarantee (SIS Regulation 5.01). If a superannuation fund is sent contributions that are not mandated employer contributions, they are to be returned to the sender, in this instance, the employer.

The employer contributions prescribed for employees aged 75 and over (Schedule 1 Part 1 Item 5 and Schedule 1 Part 2 Item 4) may be less than contributions received by those under age 75 but comply with an age-based limitation prescribed under Commonwealth law. Providing contributions in excess of the limitation for employees aged 75 years and over would result in excess contributions being returned to the employer.

While these provisions may be considered to limit recognition and equality before the law due to age-related discrimination, the limitation is considered justified on the basis that the limitation is necessary to comply with overriding Commonwealth legislation.

*Police officers under the age of 60 years.*

The *Police Service Administration Act 1990* requires police officers to retire at the age of 60, other than those on contract. A special constable (State officer) is an officer employed under contract. Schedule 1 Part 2 Item 3 of the Regulation provides a contribution rate of the employer contribution rate of 18 per cent of salary for police officers aged under 60 years, which is a higher rate than for other public sector employees (12.75 per cent of salary). This higher contribution rate is an age-based benefit in recognition of the compulsory retirement age and to ensure that police officers who retire at the age of 60 accrue sufficient superannuation over the course of their career.

Age-based benefits are permitted under section 49 of the AD Act.

Police officers who are on contract, including those who do not retire at the age of 60, do not continue to receive the age-based benefit but receive the same employer contributions as other public sector employees, 12.75 per cent of salary. The justification for the age-based benefit does not apply for these individuals.

While the difference in contribution rates for police officers over the age of 60 may appear to be discrimination on the basis of age, it is for the purpose of an age-based benefit, rather than less favourable treatment on the basis of age. These arrangements in the Regulation are therefore not a limitation on the human right requiring recognition and equality before the law.

*Fire service officers under the age of 65 years.*

The *Fire and Emergency Services Act 1990* (FES Act) requires fire service officers to retire at the age of 65. Schedule 1 Part 2 Item 4 of the Regulation provides a contribution rate of the employer contribution rate of 14.25 per cent of salary for fire service officers aged under 65 years, which is a higher rate than for other public sector employees (12.75 per cent of salary). This higher contribution rate is an age-based benefit in recognition of the compulsory retirement age and to ensure that fire service officers who retire at the age of 60 accrue sufficient superannuation over the course of their career. Other employees employed under the FES Act are not required to retire at an age of 65 years.

Age-based benefits are permitted under section 49 of the AD Act.

While the difference in contribution rates for other employees employed under the FES Act may appear to be discrimination on the basis of age, it is for the purpose of an age-based benefit, rather than less favourable treatment on the basis of age. These arrangements in the Regulation are therefore not a limitation on the human right requiring recognition and equality before the law.

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

*Employees aged 75 or over*

The limitation, which provides a lower employer rate for employees aged 75 years and over, namely the charge percentage (11.0 per cent in 2023-24) of an employee's ordinary time earnings rather than 12.75 per cent, is the only way to achieve the purpose of consistency with the overriding Commonwealth legislation.

*Police officers under the age of 60 years*

As discussed above, while the arrangements in the Regulation for police officers over the age of 60 years may appear to be discrimination, the arrangements reflect the provision of an age-based benefit for police officers under the age of 60, rather than a limitation on the rights of police officers over the age of 60.

*Fire service officers under the age of 65 years*

As discussed above, while the arrangements in the Regulation for other employees employed under the FES Act may appear to be discrimination, the arrangements reflect the provision of an age-based benefit for fire service officers under the age of 65, rather than a limitation on the rights of other employees.

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

*Employees aged 75 or over*

There are no less restrictive and reasonably available ways to achieve the purpose of compliance with the Commonwealth legislation.

*Police officers under the age of 60 years*

There are no less restrictive and reasonably available ways to achieve the purpose of providing sufficient superannuation for police officers required to retire at the age of 60.

*Fire service officers under the age of 65 years*

There are no less restrictive and reasonably available ways to achieve the purpose of providing sufficient superannuation for fire service officers required to retire at the age of 65.

***Section 24 Property rights***

(a) The nature of the right

Section 24 (Property rights) of the HR Act provides that all persons have a right to own property alone or in association with others and that a person must not be arbitrarily deprived of the person's property. In this context, case authority suggests that 'arbitrarily' refers to conduct that is capricious, unpredictable or unjust and also refers to inferences which are unreasonable in the sense of not being proportionate to a legitimate aim that is sought. Importantly, deprivation of property is not limited to, for example, a forced transfer or extinguishment of title of ownership, but would include any 'de facto expropriation' by means of a substantial restriction in fact of a person's use or enjoyment of their property.

The relevant provisions in the regulation which may affect property rights are:

- Schedule 1 Part 1 Items 2 and 3 sets a default rate at which employee contribution are to be made unless employees specify a rate.
- Schedule 1 Part 2 Item 3 specifies a range of rates at which employee contributions must be made.

The provisions, therefore, have the potential to limit a person's property right by restricting their use of a specified percentage of their salary by requiring them to make a superannuation contribution into their superannuation fund.

(b) The nature and purpose of the limitation

In the context of this right, the requirement to pay a contribution does not arbitrarily deprive employees of their property. The requirement to make the contribution is part of an employee's agreed remuneration arrangements which are known to employees before accepting employment as a core government employee. It also occurs in accordance with transparent and precise criteria directed towards the attainment of the legitimate objective of equal superannuation arrangements for core government employees that make appropriate provisions for their retirement.

Employees affected by Schedule 1 Part 1 Items 2, 3 and 4 may notify their employer if they wish to contribute at another rate, including nil, into their chosen fund.

Employees covered by Schedule 1 Part 2 Item 3 can elect to change their rate of contribution to a rate specified (5 per cent default, 4 per cent, 3 per cent or 2 per cent). These provisions continue the current and long-standing contribution arrangements for employees of employers which are listed in amendments made by the Regulation to Schedule 2 of the Notice to create Part 2 of Schedule 2. The entities which are listed in Part 2 of Schedule 2 are generally:

- not Queensland public sector entities or
- public sector entities which have not elected to adopt the new arrangements.

These requirements are not oppressive or capricious in that the arrangement holds part of employees' income in trust (the part that can be held is clearly limited to the amount specified) in the employee's superannuation account, which is held by a superannuation fund trustee. While the employee cannot generally use those funds until a condition of release has been met, no other person has a right to access those funds. It is considered these provisions do not arbitrarily deprive employees of property and therefore do not limit this human right.

## Conclusion

I consider that the *Superannuation (State Public Sector) Regulation 2023* is compatible with the *Human Rights Act 2019* 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.

**THE HONOURABLE CAMERON DICK MP**  
TREASURER  
MINISTER FOR TRADE AND INVESTMENT