

Legal Aid Queensland 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, Shannon Fentiman, Attorney-General and Minister for Justice, Minister for Women and Minister for the Prevention of Domestic and Family Violence, provide this human rights certificate with respect to the *Legal Aid Queensland Regulation 2023* (the Regulation) made under the *Legal Aid Queensland Act 1997*.

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

Overview of the Subordinate Legislation

The Regulation applies provisions of the *Public Sector Act 2022* (the Act) to Legal Aid Queensland (LAQ), its chief executive officer and employees, and directives issued under the Act to LAQ and its employees.

The making of the Regulation is authorised under section 42B of the *Legal Aid Queensland Act 1997* (LAQ Act), which is inserted by section 352 of the Act.

Schedule 4 of the *Public Service Regulation 2018* (PS Regulation) currently applies particular provisions of the *Public Service Act 2008* (PS Act), and particular rulings made under the PS Act, to LAQ and its employees.

The Act will repeal the PS Act and commences on 1 March 2023.

By applying provisions of the Act and directives issued under the Act, the Regulation aims to maintain existing employment conditions and entitlements for LAQ employees so far as reasonably and practically possible, without threatening LAQ's status as a public benevolent institution (PBI).

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 HR Act that are relevant to this Regulation are:

- Recognition and equality before the law (section 15);
- Freedom of thought, conscience, religion and belief (section 20);
- Freedom of expression (section 21);
- Taking part in public life (section 23);
- Privacy and reputation (section 25);
- Fair hearing (section 31).

The below consideration of reasonable limitations on human rights adopts a broad interpretation of the term ‘public service’ as it is used within the right to take part in public life (section of the 23 HR Act), notwithstanding that LAQ is neither a public service entity nor a public sector entity as defined in the Act. However, in acknowledging the functions performed by LAQ, this approach is consistent with the general principle of statutory interpretation that in beneficial legislation, any ambiguity in interpretation should be resolved in the way that is most favourable to the people it is intended to benefit.

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

Conduct in a private capacity

(a) the nature of the right

The Regulation applies section 40 of the Act to LAQ and its employees. Section 40 provides that the work performance and personal conduct of each employee should be guided by the principle of ensuring an employee’s personal conduct does not reflect adversely on the reputation of the entity in which the employee is employed.

The discipline provisions in the Act clarify the expectations of employees’ conduct in a private capacity by expressly stating that a ‘breach’ of the personal conduct principles alone cannot give rise to discipline. Rather, the misconduct threshold must be met in order to discipline an employee under the Act.

Freedom of expression

The application of section 40 of the Act means that an employee must ensure their personal conduct does not reflect adversely on the reputation of LAQ.

Section 91 of the Act provides that an employee’s chief executive may discipline the employee if the chief executive is reasonably satisfied the employee is guilty of misconduct. The definition of misconduct includes inappropriate or improper conduct in a private capacity that reflects seriously and adversely on an entity (in this case, LAQ).

These provisions could potentially limit the human right to freedom of expression by attempting to regulate the conduct of an employee in their private life, including the expression and publication of their personal views, with a risk of being disciplined by their employer.

Freedom of thought, conscience, religion and belief

Regulating an employee’s personal conduct could potentially limit the human right to freedom of thought, conscience, religion and belief. For example, if an employee holds a religious or other belief, this right protects the employee’s freedom to demonstrate their religion or belief through ways such as displaying symbols, wearing distinctive jewellery or clothing, using a particular language and preparing and distributing religious texts or publications.

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

Imposing limitations on an employee's conduct so that it does not reflect adversely on the reputation of LAQ is required to ensure that the personal views or actions of an employee that contrast with the objectives of LAQ, as their employer, are not seen to be a representation of LAQ. This is necessary to ensure that the Queensland public maintain a high level of confidence in the integrity and impartiality of LAQ.

These limitations can also prevent employees from sharing non-public information about the actions of other employees, thereby providing protection of their privacy and reputation.

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

LAQ's employees are private citizens and members of the community and have a right to engage in public discourse and demonstrate their religion or belief. However, all employees also have an obligation to ensure that their actions and behaviours do not adversely reflect on the reputation and integrity of LAQ, or an employee's ability to carry out their role, or impact public confidence in LAQ.

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

Clarifying appropriate conduct for employees in the workplace and in a private capacity is the most direct and least restrictive way of achieving this policy intent.

Section 90 of the Act clarifies that a disciplinary ground does not arise in relation to an employee only because the employee's work performance or personal conduct fails to satisfy the work performance and personal conduct principles or the public sector principles. This provision is to avoid a situation where an employee is disciplined for conduct that is not sufficiently serious to be misconduct.

Clarifying when an individual's conduct is so serious that it amounts to misconduct with associated disciplinary action is also necessary to ensure employees can be confident of what is expected of them and how any issues arising from their misconduct in a private capacity may be addressed.

(e) the balance between the importance of the purpose, which 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

Clarifying the appropriate conduct of an employee ensures that they understand their responsibility to maintain the public trust that is inherent in their employment. The risk of an employee's conduct adversely reflecting on the reputation and integrity of LAQ and affecting public confidence outweighs an employee's unfettered rights to freedom of expression and freedom of thought, conscience, religion and belief.

In applying these provisions of the Act, the aim is to ensure LAQ employees can continue to have the ability to contribute to public discussions on community and social issues in their private capacity. However, their actions and behaviours must not adversely reflect on the

reputation and integrity of LAQ, or their ability to perform the duties of their role in an independent, unbiased manner to ensure public confidence is not compromised.

The limitation on an employee's freedom of expression and freedom of thought, conscience, religion and belief is therefore reasonable and demonstrably justifiable when the rights of the individual are balanced with the rights of LAQ and the public interest.

(f) any other relevant factors

Nil.

Assessing suitability for employment

Chapter 3, Part 5 of the Act relates to assessing a person's suitability for employment to a role. The chapter covers considerations including a person's criminal and serious disciplinary history and whether they hold a working with children authority.

The application of these provisions to LAQ give the chief executive the ability, where relevant, to consider the suitability of a prospective employee before employing them to a position in LAQ.

(a) the nature of the right

Privacy and reputation

The application of section 52 of the Act means that the chief executive may ask a person for written consent to obtain the person's criminal history if they are engaged or proposed to be engaged to perform a relevant duty within LAQ under the suitability directive. The section also applies to an employee employed in LAQ who changes or is proposed to change duties to include a relevant duty.

A duty is considered a relevant duty under the suitability directive if, because of the nature of the duty, it may be necessary to have regard to a person's criminal history to ensure they are suitable to perform the duty.

Sections 58 to 62 of the Bill provide that the chief executive must ensure a person does not perform a child-related duty unless the person holds a working with children authority or a relevant exemption under the *Working with Children (Risk Management and Screening) Act 2000* (WWC (RMS) Act).

Section 66 of the Bill provides that the chief executive may ask a person for written consent to obtain the person's criminal history. The chief executive may only make this request if:

- the person is engaged, proposed to be engaged or has been engaged to perform a prescribed duty,
- the person has been issued a working with children authority, and
- the chief executive (working with children) has advised the chief executive that a further assessment of the person may be needed to decide whether the person should be engaged to perform the prescribed duty.

A prescribed duty is a child-related duty or a duty relating to regulated employment.

The application of section 71 means that the chief executive may, under a directive, require a person that LAQ proposes to employ or second into LAQ to provide details of the history of any serious disciplinary action taken against person.

Section 70 defines serious disciplinary action 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; or action taken, in accordance with part 11 of the Act, to end a person's employment or consider the person's employment has ended.

Section 73 of the Act requires an employee to disclose to the chief executive a charge or conviction for an indictable offence.

Section 74 requires the police commissioner or the director of public prosecutions to notify the chief executive if the employee is committed for trial for an indictable offence or a disqualifying offence under the WWC(RMS) Act.

The ability for the chief executive to obtain (with consent) a person's criminal history report and the requirement for an employee or prosecuting authority to notify charges of relevant offences may limit the person's right to privacy and reputation.

Right to take part in public life

These provisions could potentially limit an individual's human right to taking part in public life by providing a chief executive with discretion to decide whether a person is suitable for engagement in LAQ on the basis of their criminal or serious disciplinary history information or imposing the requirement to possess an authority to work with children or a relevant exemption.

Right to recognition and equality before the law

The criminal history 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 relevant duties within LAQ. 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.

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

The ability for the chief executive to:

- request an individual or employee to consent to obtain information about their criminal history;
- request details of any serious disciplinary history; or
- require a working with children authority or exemption when considering their suitability for employment to a position in LAQ;

enables the chief executive to effectively manage LAQ's workforce and reduces the risk of employing an unsuitable person to a position of public trust.

Protection of children and proper administration of government are pressing and substantial concerns in a free and democratic society. The risk to LAQ and the public could be significant.

For example, if a person has a relevant criminal or serious disciplinary history, or lacks the required qualifications, this would indicate a significant risk if the person was to be given responsibilities in relation to positions of public trust such as handling public finances, private and confidential information or vulnerable persons and children.

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

Limiting a person's right to privacy and reputation by seeking consent to undertake a criminal history check and details of their serious disciplinary history, and potentially limiting a person's right to take part in public life by restricting their ability to be employed in a role, including if they do not have a relevant authority or exemption, is required to ensure persons employed in LAQ are deemed suitable to undertake their roles. This is necessary to ensure a high performing workforce and supports the chief executive to maintain accountability, impartiality and integrity, while supporting the public interest and safeguarding the community.

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

Enabling the chief executive to share confidential information and consider an individual's criminal history, criminal charges or history of serious disciplinary action to assess their suitability or ongoing suitability for employment to a position is the most direct and least restrictive way of achieving the policy intent. These provisions will allow the chief executive to make informed decisions for the responsible management of public resources and service delivery.

The requirement to ensure a person holds a working with children authority or exemption complies with the obligations under the WWC(RMS) Act.

The application of section 278 of the Act to LAQ ensures that confidential information such as criminal history and other sensitive information obtained in employment screening may not be used or disclosed to anyone else, other than in accordance with the relevant legislation. A penalty of 100 penalty units applies for a breach of this section.

(e) the balance between the importance of the purpose, which 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 chief executive to consider information about an individual or employee when considering their suitability or ongoing suitability for employment to a position of public trust will ensure the responsible management of public resources and help safeguard the community.

The government identifies the safety of children as an area of lowest appetite for risk and is committed to providing safe environments for all children.

The limitations in the applied provisions balance the individual rights with public interest in proper administration of LAQ, and corruption prevention.

The risk of an employee's conduct adversely reflecting on the reputation and integrity of LAQ and affecting public confidence outweighs an employee's unfettered rights to privacy and reputation and taking part in public life.

(f) any other relevant factors

The criminal history provisions include protections for the individual as they apply only to relevant duties, information is confidential, consent is required, and impacts are considered in the context of the role.

The directive relating to 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.

Suspension

(a) the nature of the right

The Act includes the ability for the chief executive to suspend an employee, including for non-disciplinary reasons.

Right to take part in public life

Section 101 of the Act provides processes for the suspension of an employee from duty. The chief executive may suspend an employee if they reasonably believe the employee is liable to discipline under a disciplinary law or the proper and efficient management of LAQ might be prejudiced if the employee is not suspended.

An employee who is suspended from duty will have their right to take part in public life limited for a specified period of time, and potentially also have limitations to their right to privacy and reputation.

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

Suspension is an administrative action, taken for administrative necessity if the chief executive believes the employee is liable to discipline under a disciplinary law or the proper and efficient management of LAQ might be prejudiced if the employee is not suspended.

Suspension is not disciplinary action and is not to be used as a form of punishment. The Act requires that before suspending an employee, the chief executive must consider all reasonable alternatives, including alternative duties, a temporary transfer, or another alternative working arrangement, that is available to the employee.

Suspension decisions are to be made fairly and natural justice is required in relation to a suspension without remuneration. Adherence to natural justice is not required for suspension on normal remuneration as the employee retains the benefit of their remuneration as well as continuity of employment.

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

The limitation of the right to take part in public life and potential limitation to an employee's right to privacy and reputation is necessary if the chief executive determines that the proper

and efficient management of LAQ might be prejudiced if the employee continues to perform duties or if the chief executive believes the employee is liable to discipline under a disciplinary law.

The decision to suspend an employee is a last resort after the chief executive has considered the possibility to undertake all alternative duties.

An example of when the chief executive may determine it is appropriate to suspend an employee on normal remuneration is where an employee discloses a conflict of interest in relation to their employment activities and cannot be allocated elsewhere within LAQ without prejudicing the proper and efficient management of LAQ. The length of suspension cannot be more than a reasonable period in order to avoid the prejudice.

The ability to suspend an employee may also provide LAQ with the opportunity to mitigate any risks while investigating the matters prompting the suspension.

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

If reasonable alternatives to suspension, such as alternative duties, are not feasible, suspension is the most direct and least restrictive way to achieve the purpose.

(e) the balance between the importance of the purpose, which 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

The ability for the chief executive to suspend an employee applies in cases where there is a reputational risk to LAQ or risk to employees, such as where an employee is being investigated for serious allegations such as sexual harassment or assault. It can be used where other options, such as moving the employee into a different role, have been explored and are not viable. Natural justice applies to decisions to suspend an employee without pay, and confidentiality obligations apply. Balancing the rights of others against the rights of the individual, and the public interest in effective management of LAQ, the limits imposed by the suspension provisions are reasonable and demonstrably justifiable.

(f) any other relevant factors

The relevant directive relating to suspensions is applied to LAQ under this Regulation.

Independent medical examinations

Sections 103 and 104 of the Act provide that if an 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.

The application of these provisions to LAQ allow the 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 consider making reasonable adjustments, transferring or redeploying the employee or retiring the employee.

(a) the nature of the right

Privacy and reputation

These provisions impose a limitation on the human right of privacy and reputation by requiring disclosure of personal information to the examining doctor and medical information to LAQ, insofar as it relates to the employee's absence or performance of their duties. The privacy of the employee will also be limited if they are compulsorily required to attend a medical examination.

Taking part in public life

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

The right protected by this provision is for an 'eligible' person to have the right and opportunity, without discrimination, to access the public service on general terms of equality. The term 'eligible' is not defined in the *Human Rights Act 2019*. If an employee's role requires them to have a certain level of health and fitness in order to safely perform the inherent requirements of it, then it may be arguable that they are no longer 'eligible' for the role.

Recognition and equality before the law

Discrimination is defined in the *Human Rights Act 2019* as including the definition of discrimination in the *Anti-Discrimination Act 1991* (ADA). The protected attributes in the ADA include 'impairment'. Because of the direct link between an employee's perceived medical condition and the decision to direct them to attend an IME, this human right may be limited.

If the employee was retired on ill-health grounds, this would limit their right under section 23(2)(b) of the *Human Rights Act 2019* to have access, on general terms of equality, to the public service. Accordingly, a decision to direct an employee to submit to an independent medical examination may set in train a course that results in the employee being excluded from the public service on the basis of their health.

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

The purpose of the limitations of these human rights is to enable the chief executive, if satisfied under the Act that an employee is absent from duty or not performing their duties satisfactorily, and if they reasonably suspect that the absence or unsatisfactory performance is caused by a mental or physical illness or disability, to obtain expert medical advice to consider whether the employee is able to perform the inherent requirements of their position.

LAQ has a legal obligation to ensure a safe workplace, and the rights to safety of other people in the workplace.

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

The purpose of directing an employee to attend an independent medical examination is so that LAQ can obtain independent, expert medical evidence to inform considerations about whether the employee is able to perform the inherent requirements of their position, including whether reasonable adjustments are necessary to allow them to do so.

For the chief executive to have the necessary information to properly consider the impact of an employee's medical condition on their performance or current absence, it is necessary to obtain independent, expert medical advice.

If, following receipt of the medical report, the chief executive determines that reasonable adjustments to the employee's tasks or workplace or the transfer or redeployment of the employee are not viable options, the limitations to the employee's right to access the public service are necessary for the chief executive to safeguard the health and safety of the employee.

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

An employee could potentially provide medical evidence provided by their treating doctor, noting that requesting information from an employee's treating doctor (with the employee's consent) is normally a constructive first step when an employee's performance or attendance is affected by a medical condition.

In some situations, the chief executive may determine that additional independent and objective evidence is also required to fully inform any considerations. In these circumstances, directing an employee to attend an independent medical examination is the most direct and least restrictive way of obtaining the required evidence.

The confidentiality obligations contained within these obligations and other applied provisions of the Act reduce the impact of the limitation on an employee's right to privacy, and appeal rights also exist for their protection.

If alternative options such as reasonable adjustment, transfer or redeployment are not viable or appropriate, the limitation of an employee's right to access the public service is the most direct and least restrictive way of managing the health and safety of the workforce.

(e) the balance between the importance of the purpose, which 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

The ability for the chief executive to direct an employee to submit to an independent medical examination is necessary for the chief executive to have accurate specialist medical information to inform the needs of an employee in the workplace. This and the consequential sharing of the employee's personal information is a necessary and reasonable interference with the employee's right to privacy to ensure their wellbeing and safety, the potential wellbeing and safety of other employees, and for the effective management of the workplace.

Providing that the chief executive, after considering the independent medical report, may retire the employee is necessary if it is not reasonably practicable to transfer or redeploy the employee or make reasonable adjustments to support the employee's return to work. In these cases, the most appropriate option is to support the safety and health of LAQ's employees.

The purpose of these limitations is not to discriminate against an employee or to limit their human rights. On balance, the importance of the purpose of directing an employee to attend an independent medical examination and potentially retiring them from the public sector is greater than the importance of preserving the human rights which are impacted.

(f) any other relevant factors

The Act allows the public sector commissioner to make a directive about these provisions, which must also be compatible with human rights. The relevant directive is applied to LAQ under this Regulation.

The Public Service Commission has issued a directive and guideline to support best practice processes around the use of independent medical examinations under the current PS Act. These supporting documents are being retained with necessary amendments to support the provisions of the Act. The directive provides for the following measures to ensure necessary safeguards for the employee:

- The chief executive is to ensure that processes are fair and without bias, provide for impartiality and inform and involve the employee.
- A mechanism exists for an employee to appeal a requirement to submit to an independent medical examination and there is an expectation that processes under the Act will be implemented with appropriate support, sensitivity and respect.
- The letter of referral to the independent medical doctor should specify that their report is not to contain any medical or other information that is not directly or indirectly related to the effect and management of the employee's medical condition on their workplace performance or current absence.
- The chief executive must provide the employee with procedural fairness, consider any applicable statutory protections and consider all reasonably practicable options for continuing employment. Retirement of the employee should be considered as a last resort.

Appeals to the Queensland Industrial Relations Commission

(a) the nature of the right

Right to a fair hearing

The application of provisions of the Act to LAQ could potentially limit the human right to a fair hearing as section 134 provides that appeals for disputes relating to decisions made under the Act, will be heard by the Queensland Industrial Relations Commission (QIRC) where legal representation is generally not permitted.

By applying section 134 of the Act, the Regulation aims to ensure fairness, transparency, and consistency in employment and decision-making by giving LAQ employees the same access to independent adjudication processes as public service employees have under the existing legislative framework under the PS Act.

Section 140 of the Act clarifies matters that are excluded from review. For the purpose of the Act, an excluded matter, or a matter affecting or relating to an excluded matter, is not an industrial matter for the *Industrial Relations Act 2016* (IR Act).

The Act specifically includes as an excluded matter the contract of employment of, or the application of the Act, or a provision of that Act, to any of the following:

- the public sector commissioner;
- a chief executive;
- a senior executive;
- a senior officer;
- a special commissioner;
- another public service officer whose employment is on contract for a fixed term.

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

Section 134 of the Act provides that appeals for disputes relating to decisions made under the Act, will be heard by the QIRC. The QIRC is a laypersons tribunal and appeals are intended to be conducted as a simple and informal process with a practical rather than technical focus, to reduce the legal complexity in matters heard by the QIRC.

Under the IR Act, legal representation in appeals before the QIRC can only occur with consent of the other party and leave of the QIRC. These provisions could potentially limit an individual's human right to a fair hearing by denying an employee the ability to be legally represented in a matter before the QIRC.

This exclusion of certain matters as industrial matters for this cohort of employees is justified on the basis that it applies to high paid employees who are compensated in other ways for the exclusion.

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

The application of these provisions of the Act will give LAQ employees the same access as public sector employees to the independent adjudication processes of the QIRC. The QIRC is considered the appropriate forum to hear disputes in relation to employment decisions made under the Act.

The Act's policy settings relating to excluded matters only apply to high earning employees who are compensated in other ways for the exclusion.

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

Applying provisions providing that appeals about employment matters are heard by the QIRC, is considered the least restrictive way of providing LAQ employees access to impartial dispute resolution processes.

Applying the provisions relating to excluded matters is the most direct and least restrictive way of achieving the policy intent of the Act.

(e) the balance between the importance of the purpose, which 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

Giving LAQ employees access to the QIRC for disputes relating to decisions made under the Act provides these employees with a new avenue for dispute resolution and ensures a fair and consistent employment experience.

It is noted that the restriction on legal representation only extends to proceedings and parties are not precluded from seeking legal advice outside of proceedings.

The risk of not giving employees consistent access to appeals and dispute resolution processes for decisions made under the Act, despite the inability to have a legal representative at the QIRC, would outweigh the need to protect the individual's right to a fair hearing.

The exclusion of certain matters as industrial matters for the identified cohorts of employee is justified on the basis that it applies to employees who are compensated in other ways (including receipt of a high income) for the exclusion.

(f) any other relevant factors

Nil.

Termination and ending of employment

(a) the nature of the right

Right to take part in public life

The following provisions are applied to LAQ under this regulation and potentially impact an employee's right to take part in public life –

- Section 92 of the Act lists termination of employment as an example of a disciplinary action relating to employment.
- Section 145 clarifies that the Act does not limit or affect a common law right to terminate an employee's employment, including summarily, or prevent an employee's employment contract from ending by operation of law.
- Section 147 of the Act enables the chief executive to terminate an employee if they are surplus to LAQ's needs.
- Section 162 of the Act enables the chief executive to terminate the employment of an employee who refuses a transfer without establishing reasonable grounds for refusal to the satisfaction of the chief executive.

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

The purpose of providing the chief executive with the ability to terminate an employee who is surplus to LAQ's needs or who refuses a transfer without establishing reasonable grounds is necessary for the management of LAQ's workforce, and the efficient use of public resources.

Section 145 of the Act provides clarity that the chief executive may end employment or consider employment ended under the common law, where an employee has engaged in serious misconduct or has abandoned their employment (repudiation) or is imprisoned or remanded in custody (frustration).

The purpose of this provision is not to introduce a new termination right, but to strengthen LAQ's ability to rely on the common law, particularly in circumstances where an employee is imprisoned or is on remand, and the employment contract is frustrated.

The Act enables the chief executive to summarily terminate an employee's employment, including where an employee has engaged in serious misconduct. The level of public trust inherent in employment with LAQ exists to varying degrees, depending on the nature and scope of the position and duties. Serious misconduct may arise where an employee's conduct causes serious and imminent risk to the health and safety of a person, or to the reputation of LAQ.

In recognition of this notion of public trust, the provisions applied to LAQ aim to strike an appropriate balance between ensuring employees are treated fairly and provided procedural fairness in the appropriate circumstances, while also ensuring the chief executive can make decisions to protect the risk and reputation of LAQ and to ensure their accountability obligations are met.

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

The limitation on an employee's right to take part in public life if they are deemed as surplus to LAQ's need or who refuse a transfer to other duties or another location without establishing reasonable grounds is necessary for the effective management of LAQ's workforce, and the efficient use of resources.

The ability for the chief executive to terminate an employee who has engaged in serious misconduct is necessary to ensure the chief executive can make decisions to protect the risk and reputation of LAQ and its employees, and to ensure their accountability obligations are met.

The purpose of applying section 145 is to clarify that the Act does not limit or affect a common law right to terminate an employee's employment.

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

If an employee has been deemed as surplus, and alternative options such a transfer, redeployment or voluntary retirement are not available, termination is the most direct way to achieve the policy intent.

As section 145 is intended to preserve common law rights and operation, this is the most direct way to achieve the purpose. This provision does not prevent LAQ from using other discipline avenues, for example where an employee has been absent from duty without approved leave and without reasonable excuse. The provision further clarifies that nothing in the Act is intended to derogate from the State's contractual rights as an employer under the common law. As the termination provision preserves common law, it is the least restrictive way to achieve the policy intent.

(e) the balance between the importance of the purpose, which 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

There is a public expectation that the chief executive of LAQ will effectively and efficiently manage the entity's workforce.

The ability of the chief executive to make decisions to end an employee's employment to effectively manage their workforce, ensure accountability obligations are met, and to protect the risk and reputation of LAQ, outweighs the potential limitations to an individual's human rights.

(f) any other relevant factors

The public sector commissioner's directive relating to supporting employees affected by workplace change detail the steps LAQ must take to find an alternative role for an employee who has been identified as being surplus to its needs. It is intended that termination of a surplus employee only be used when all other avenues have been exhausted.

Conclusion

I consider that the Legal Aid Queensland Regulation 2023 is compatible with the *Human Rights Act 2019* because any limitations on human rights are reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

SHANNON FENTIMAN MP
Attorney-General and Minister for Justice
Minister for Women and
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