Parliamentary Committees



Public Service and Other Legislation Amendment Bill 2020

Report No. 34, 56th Parliament
Education, Employment and Small Business Committee
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Education, Employment and Small Business Committee

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Acknowledgements

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Contents

Abbreviations

AWU	Australian Workers' Union of Employees, Queensland
Bill	Public Service and Other Legislation Amendment Bill 2020
Bridgman Report	Peter Bridgman, *A Fair and Responsive Public Service for All: Independent Review of Queensland's State Employment Laws,* May 2019
Bridgman Review	Independent review of public sector employment laws in Queensland undertaken by Peter Bridgman from September 2018 to May 2019
Coaldrake Review	*Review into the Queensland public sector workforce reporting,* undertaken by Emeritus Professor Peter Coaldrake from July 2018 to December 2018
committee	Education, Employment and Small Business Committee
department/DPC	Department of the Premier and Cabinet
FLP	fundamental legislative principle
HRA	*Human Rights Act 2019*
IR Act	*Industrial Relations Act 2016*
JAC	Joint Advisory Committee
JR Act	*Judicial Review Act 1991*
LSA	*Legislative Standards Act 1992*
Maurice Blackburn	Maurice Blackburn Lawyers
OQPC	Office of the Queensland Parliamentary Counsel
PID Act	*Public Interest Disclosure Act 2010*
PS Act	*Public Service Act 2008*
PSC	Public Service Commission
PSC Chief Executive	Public Service Commission Chief Executive
PSMC Act	*Public Sector Management Commission Act 1990* (repealed)
PSRO	Public Sector Reform Office
QCU	Queensland Council of Unions
QIRC	Queensland Industrial Relations Commission
QNMU	Queensland Nurses and Midwives' Union

Scrutiny Committee	Scrutiny of Legislation Committee (former committee of the Queensland Parliament)
Together Union	Together Queensland, Industrial Union of Employees
UWU	United Workers Union

Chair's foreword

This report presents a summary of the Education, Employment and Small Business Committee's examination of the Public Service and Other Legislation Amendment Bill 2020.

The committee's task was to consider the policy to be achieved by the legislation and the application of fundamental legislative principles – that is, to consider whether the Bill has sufficient regard to the rights and liberties of individuals, and to the institution of Parliament. The committee also examined the Bill for compatibility with human rights in accordance with the *Human Rights Act 2019*.

The Bill gives effect to the stage one public sector management reforms arising from the recommendations of the independent review of public sector employment laws by Peter Bridgman. This includes maximising employment security and promoting permanency as the default basis of employment for the public sector – objectives which were supported by a number of stakeholders who provided submissions and evidence to the committee.

Permanency in the public service is a fundamental principle of Westminster government, particularly as it relates to the provision of frank and fearless advice to government.

The committee made two recommendations: that the Bill be passed; and that the Department of the Premier and Cabinet investigates an appropriate mechanism to provide fairness and transparency of the decision-making process to a person where the chief executive does not make a conversion decision within 28 days, pursuant to proposed new sections 149A and 149C of the *Public Service Act 2008*.

On behalf of the committee, I thank those individuals and organisations who made written submissions on the Bill. I also thank our Parliamentary Service staff and the Department of the Premier and Cabinet.

I commend this report to the House.

Leanne Linard MP

Chair

Recommendations

1 Introduction

1.1 Role of the committee

The Education, Employment and Small Business Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 15 February 2018 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.[1]

The committee's primary areas of responsibility include:

- Education
- Industrial Relations
- Employment and Small Business
- Training and Skills Development.

The functions of a portfolio committee include the examination of bills and subordinate legislation in its portfolio area to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles
- matters arising under the *Human Rights Act 2019* (HRA)
- for subordinate legislation – its lawfulness.[2]

1.2 Inquiry process

The Public Service and Other Legislation Amendment Bill 2020 (Bill) was introduced into the Legislative Assembly and referred to the committee for consideration on 16 July 2020. The committee was required to report to the Legislative Assembly on the Bill by 28 August 2020.

On 17 July 2020, the committee invited stakeholders and subscribers to make written submissions on the Bill. Nine submissions were received (see Appendix A for a list of submitters).

The committee received a public briefing on the Bill from the Department of the Premier and Cabinet (department) on 27 July 2020 (see Appendix B for a list of the officials who appeared at the briefing).

The committee received written advice from the department in response to matters raised in submissions.

The committee held a public hearing on 10 August 2020 (see Appendix C for a list of witnesses).

The submissions, correspondence from the department and transcripts of the briefing and hearing are available on the committee's webpage.[3]

1.3 Policy objectives of the Bill

According to the explanatory notes, the objective of the Bill is to give effect to the stage one public sector management reforms arising from the recommendations of the independent review of public sector employment laws by Peter Bridgman (Bridgman Review), which was commissioned 'to ensure Queenslanders have the most responsive, consistent and reliable public service possible'.[4]

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1 *Parliament of Queensland Act 2001*, s 88 and Standing Order 194.

2 *Parliament of Queensland Act 2001*, s 93; and *Human Rights Act 2019* (HRA), ss 39, 40, 41 and 57.

3 https://www.parliament.qld.gov.au/work-of-committees/committees/EESBC/inquiries/current-inquiries/PSOLAB2020.

4 Explanatory notes, p 1.

The explanatory notes advise that the Bridgman Review complements the *Review into the Queensland public sector workforce reporting* undertaken by Emeritus Professor Peter Coaldrake (Coaldrake Review) and builds on the measures to restore fairness in public sector employment undertaken by the Palaszczuk Government since 2015.[5]

These stated objectives of the Bill are to be achieved by amending the *Public Service Act 2008* (PS Act), the *Industrial Relations Act 2016* (IR Act) and the *Public Interest Disclosure Act 2010* (PID Act) to:

- *drive more effective and consistent application of the existing commitment to maximise employment security by providing clear language that states that permanent employment is the default basis for public sector employment and that other non-permanent forms of employment should only be used when ongoing employment is not viable or appropriate*
- *provide for public service appeals which are currently heard under the PS Act by the Queensland Industrial Relations Commission (QIRC) to instead be heard under the IR Act to ensure transparency and increase consistency in appeal decisions*
- *establish positive performance management principles in the PS Act that will support managers and employees to work together to support optimal performance*
- *clarify the threshold for taking disciplinary action*
- *provide for new directives to guide disciplinary action and procedures, investigations and positive performance management.*[6]

1.4 Government consultation on the Bill

As set out in the explanatory notes, consultation on the Bill and stage one public sector reforms was conducted with public sector union representatives through meetings of the Joint Advisory Committee (JAC) which has met fortnightly since 14 January 2020. JAC members included:

- Together Queensland Union of Employees (Together Union)
- Queensland Council of Unions (QCU)
- Queensland Teachers' Union
- United Firefighters Union Queensland
- Queensland Nurses & Midwives' Union (QNMU)
- United Workers Union (UWU)
- Australian Workers' Union (AWU).[7]

The explanatory notes further advise:

- stakeholder consultation and workshops with union representatives occurred in April and May 2020 to obtain specific feedback on the substance of the legislative proposals
- the issues raised by JAC members and representatives during the workshops informed the drafting of the Bill

5 Explanatory notes, p 1.

6 Explanatory notes, pp 1-2.

7 Explanatory notes, p 4.

- all government departments were consulted on the Bill and senior executives were provided with regular updates.[8]

The explanatory notes state that the Bill reflects and balances feedback from stakeholders, while also giving full effect to the government's commitment to maximising employment security in the public sector workforce and providing for positive performance management of public sector employees.[9]

The department further advised that 'extensive consultation' had been conducted with 'public sector agencies, government and public sector unions' as part of the Bridgman Review.[10]

1.5 Should the Bill be passed?

Standing Order 132(1) requires the committee to determine whether or not to recommend that the Bill be passed.

Recommendation 1

The committee recommends the Public Service and Other Legislation Amendment Bill 2020 be passed.

8 Explanatory notes, p 4.

9 Explanatory notes, p 4.

10 Department of the Premier and Cabinet (DPC), public briefing transcript, Brisbane, 27 July 2020, p 4.

2 Background to the Bill

Commenced in September 2018, the Bridgman Review represents the first review of Queensland's public sector laws undertaken since the late 1980s.[11] The final report of the independent review, *A Fair and Responsive Public Service for All: Independent Review of Queensland's State Employment Laws* (Bridgman Report) was provided to the government on 3 May 2019, and subsequently released to the public on 4 March 2020.[12]

The Bridgman Review stated it was 'about managing public employment in Queensland' and recommended 'new ways to understand how and why government employs people, starting from the employee and the work they are needed for'.[13]

The Bridgman Review proposed a new model, based on the recognition that the public service can broadly be categorised as being either part of the public health system, the public education system or 'the rest', comprising other government departments and agencies.[14] The Bridgman Report acknowledged, however, that some systems are subject to different arrangements (such as TAFE Queensland, and other government owned corporations).[15]

The proposed model was informed by the following concepts:

- *employees are fundamental and central to government*
- *there is a chain of responsibility from employees to their employer, the state*
- *managers must manage well*
- *employment and management are for the purposes of government*
- *leaders are responsible for the functioning of systems for employment and management*
- *very large systems such as health and education need special management*
- *ministers, to be responsible, must be supported in their portfolios*
- *the entire public sector needs thoughtful and forward-looking governance.*[16]

The Bridgman Report made 99 recommendations. According to the Bridgman Report, some of the 'more important' recommendations included:

- *retention of merit as the central driver in selection and promotion decisions, expanded to reflect broader human rights criteria*
- *a Special Commissioner (Equity and Diversity) to drive improvements in equity, including gender pay equity, and a diverse workforce*
- *clearer, simpler language and removal of artificial distinctions and categories*

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11 Queensland Government, *Review of public employment laws,* https://www.qld.gov.au/about/how-government-works/government-structure/public-service-commission/what-we-do/review-of-public-employment-laws.

12 DPC, correspondence dated 24 July 2020, p 1.

13 Peter Bridgman, *A fair and responsive public service for all: Independent Review of Queensland's State Employment Laws*, May 2019 (Bridgman Report), p 11.

14 Bridgman Report, p 6.

15 Bridgman Report, p 6.

16 Bridgman Report, p 11.

- *recommended investment in management improvement for early and mid-career managers, to complement executive leadership programs, and to improve management consistency across the whole sector*
- *clearer criteria for engaging casual and temporary staff and for their conversion to ongoing employment, including a right to request conversion and a merits review of conversion decisions*
- *a review of senior positions to improve management and control of higher paid roles*
- *a new system for independent case management of complex, intractable or long-standing discipline and performance improvement matters*
- *an internal review of decisions to direct an employee attend an independent medical examination, and possible use of other health practitioners with an employee's agreement*
- *an employee's right to raise issues with a more senior manager*
- *realigning public sector appeals processes with the Queensland Industrial Relations Commission's industrial jurisdiction, affording greater review rights and improved transparency of decision making.*[17]

In response to the Bridgman Report, the Queensland Government established the Public Sector Reform Office within the department to consider the implementation of the Bridgman Report's proposed public sector reforms.[18] Given 'the breadth of the reforms and recommendations', the department advised that:

> *… the government decided to progress priority reforms to modernise and strengthen the administration of the Queensland Public Service as part of stage 1 public sector reforms, with stage 2 to progress further legislative reforms including a new public sector Act.*[19]

The Bill, in giving effect to the stage one priority reforms, would implement 33 of the 99 recommendations contained in the Bridgman Report.[20]

The 33 recommendations to be implemented by the Bill relate to:

- the basis of employment, security and permanency (Recommendations 3, 4, 5 and 6)
- investigations, discipline, suspensions, grievances and public service appeals (Recommendations 36, 37, 38, 40, 41 , 42, 43, 44, 45, 46, 47, 48, 49, 52, 55, 60 and 61)
- positive performance management, development and employee wellbeing (Recommendations 34, 35, 50, 51, 54, 56, 57, 58 and 59)
- public sector administration (Recommendations 20, 21, 27, 28 and 29)
- citizenship requirements and the reappointment of election candidates (Recommendations 90 and 91).[21]

17 Bridgman Report, p 12.

18 DPC, correspondence dated 27 July 2020, p 1.

19 DPC, public briefing transcript, Brisbane, 27 July 2020, p 1.

20 DPC, correspondence dated 7 August 2020, p 1.

21 DPC, correspondence dated 7 August July 2020, p 1.

The department noted that Recommendation 6 of the Bridgman Report is the only recommendation that has not been accepted by the government.[22] Recommendation 6 proposed that conversion decisions should be reviewable by the Public Sector Commissioner rather than the QIRC.[23] The department advised that this also impacted on Recommendation 60, which proposed that public service appeals, other than conversion decisions, be heard and decided by the QIRC under the framework in the IR Act.[24]

According to the department 'Feedback received from agency/union workshops was that it was preferable for all appeals be to the QIRC to ensure transparency and increase consistency in all appeal decisions'.[25]

22 DPC, correspondence dated 7 August 2020, p 1.

23 Bridgman Report, pp 14, 42.

24 DPC, correspondence dated 7 August 2020, p 1.

25 DPC, correspondence dated 7 August 2020, p 1.

3 Examination of the Bill

This section discusses issues raised during the committee's examination of the Bill.

The main objectives of the PS Act are to:

- establish a high performing apolitical public service that is responsive to government priorities and focused on the delivery of services in a professional and non-partisan way
- promote the effectiveness and efficiency of government entities
- provide for the administration of the public service and the employment and management of public service employees
- provide for the rights and obligations of public service employees
- promote equality of employment opportunity in the public service and in other particular agencies in the public sector.[26]

The Bill proposes to amend the PS Act in the following areas:

- employment security
- the application of positive performance management principles
- the making of directives and consultation
- the suspension of employees
- employee discipline and investigations
- changing of the term employee complaints to individual employee grievances
- the establishment of a Special Commissioner
- powers for conducting administrative inquiries
- citizenship requirements for the public service
- the right to reappointment for a person who held a permanent position and resigned to become a candidate in a federal or state election.

In addition, the Bill proposes to amend the IR Act so that public service appeals that are currently heard under the PS Act by the QIRC are instead heard under the IR Act.[27]

The Bill's amendments are discussed in detail in the following sections, with consideration given to stakeholder views and the department's response to the submissions. Four of the nine submissions received were supportive of the Bill but also recommended some changes;[28] five submissions recommended changes to the Bill but did not comment on the Bill as a whole;[29] and there were no submissions that recommended that the Bill should not pass.

[26] *Public Service Act 2008* (PS Act), s 3.

[27] Explanatory notes, p 2.

[28] Submissions 003, 006, 007, 008.

[29] Submissions 001, 002, 004, 005, 009.

3.1 Application of the Bill

The majority of the Bill's amendments are to the PS Act. The PS Act applies to persons employed by government entities.

A 'government entity' is defined by the PS Act, and includes departments, public service offices, and other entities established under an Act or State authorisation for a public or State purpose.[30] It does not include local government, government owned corporations, the parliamentary service, police service (for staff mentioned in the *Police Service Administration Act 1990*), or other entities listed under s 24 of the PS Act.[31]

The Bill implements the stage one public sector management reforms by amending the PS Act and the IR Act.

3.1.1 Stakeholder views

The Together Union suggested the Bill's application be expanded to include entities not captured by the PS Act.[32] It explained:

> *The Public Sector includes a range of entities not directly covered by the* Public Service Act 2008*, examples include TAFE Queensland and Work Cover. Historically, these entities have had particular provisions of the Public Service Act 2008 applied by regulation. It is Together's view that these important reforms should be applied directly to these sorts of entities and not be liable to be applied or removed without the consideration of Parliament.*[33]

The department did not respond to this issue.

The AWU disagreed with the staged approach of implementing recommendations of the Bridgman Report, stating, 'Whilst we understand further amendments to the Act may occur in the future to deal with more of the recommendations all should have been addressed as part of this Bill'.[34]

The department's rationale for the staged approach included:

> *The two-stage approach was proposed to ensure priority outcomes are implemented by the end of 2020 and to allow for sufficient time to conduct consultation and drafting of the stage two reforms which includes a new Public Sector Act.*[35]

The department acknowledged some submitters to the inquiry made suggestions to expand application of provisions in the Bill or raised other issues which fall outside the scope of the stage one reforms, but these suggestions may be considered as part of stage two reforms.[36]

30 PS Act, s 24.

31 PS Act, s 24.

32 Submission 008, p 27.

33 Submission 008, p 27.

34 Submission 005, p 1.

35 DPC, correspondence dated 7 August 2020, p 1.

36 DPC, correspondence dated 5 August 2020, p 1.

3.2 Directives

The PS Act is supported by the Public Service Regulation 2018 and directives, which are made by the Public Service Commission Chief Executive (PSC Chief Executive) or industrial relations Minister.[37]

Directives apply to general or temporary employees and can prescribe anything necessary or convenient to make the directive or for its application, or to carry out or give affect to the directive or its application.[38]

The Bill amends the PS Act by providing for new directives to be made by the PSC Chief Executive to guide:

- positive performance management
- suspension
- employment of fixed term temporary employees
- employment of casual employees
- review of employment status for fixed term temporary employees and casual employees after one year of continuous employment
- review of employment status for fixed term temporary employees and casual employees after two years of continuous employment
- appointing a public service employee acting in a position to that higher classification level
- disciplinary action and investigating grounds for discipline and grievances.[39]

The department advised it had consulted the Public Service Commission (PSC) 'on the development of policy issues underpinning directives' as well as the 'timing and implementation of directives'.[40]

The department noted the making and amending of directives will be part of the implementation activities conducted to operationalise the Bill.[41]

Under s 49A of the PS Act, the PSC Chief Executive or industrial relations Minister 'must consult with the public service agency and employee organisation about the making of the proposed directive'.[42] The Bill does not amend this requirement.

A discussion on the use of directives as a possible breach of fundamental legislative principles is located in section 4.1.2 of this report (Fundamental legislative principles – Institution of Parliament).

3.2.1 Stakeholder views and department's response

Individuals who submitted on the Bill raised concern about the reliance on directives and suggested public service employment should be regulated through legislation rather than directives.[43]

37 PS Act, ss 47-48.

38 PS Act, s 55(3).

39 Explanatory notes, pp 1-2.

40 DPC, correspondence dated 24 July 2020, p 5.

41 DPC, correspondence dated 24 July 2020, p 5.

42 PS Act, s 49A.

43 Paul Goulevitch, submission 001, p 1; Adilia Murabito, submission 002, p 1.

One of these submitters urged a reduced reliance on directives, arguing that, where possible, regulations and rules should be in the legislation, with this approach identified as offering benefits including being 'easier to understand and interpret' and 'more accountable'.[44]

Similar concerns were raised by the AWU, Together Union and Maurice Blackburn Lawyers (Maurice Blackburn).[45]

The AWU noted the implementation of the Bill's policies relies primarily on the use of directives issued by the PSC Chief Executive, and submitted:

> *The AWU disagrees with this approach and contends the changes should be made by the insertion of prescriptive directions into the Act and not prescribed in directives which are subordinate to the Act.*
>
> *Provisions in Acts are less likely to be challenged or disregarded therefore it is more likely that the Government's intentions will [be] better achieved should the provisions be contained in the Act.*
>
> *The pursuit of restoring fairness will be compromised without the changes being made to the Act.*[46]

The Together Union raised concerns about increased use of directives rather than reliance on primary legislation, and recommended some of the content in directives (including criteria for when a person can be made permanent) should be elevated to legislation 'because we think it is important that parliament determines these things rather than it be determined at a Public Service directive level'.[47]

The Together Union recommended the consultation process for the making of directives as set out in the PS Act[48] be strengthened by requiring certification of the consultation process conducted.[49] It stated:

> *Together members are alive to the expectations of their performance and conduct, matters that impact how they perform work and interpretation of their entitlements is an area where consultation in the drafting will reduce any disputation on application and allow for public servants voice[s] to be heard.*[50]

Maurice Blackburn suggested the reliance on directives 'makes it difficult to predict the potential impact of the legislation, as the content of the directives will have a significant impact on the operation of the legislation' and strongly recommended frameworks should be included in the legislation where possible.[51]

Maurice Blackburn provided the following example to highlight its concerns regarding the use of directives:

> *Protection from unfair dismissal has a particular framework where a number of principles are set out in terms of what is relevant to determining whether it is unfair. Those principles have then since been interpreted in cases… a set of principles contained within legislation will have greater force and greater impact in the way in which decision-making is made. I appreciate what*

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44 Adilia Murabito, submission 002, p 1.

45 See submissions 004, 005, 006.

46 Submission 005, p 2.

47 Together Union, public hearing transcript, Brisbane, 10 August 2020, p 3.

48 Section 49A.

49 Submission 008, p 23.

50 Submission 008, p 23.

51 Submission 006, p 3.

you say. Legislation is a blunt instrument. That is why a framework is more important than absolute specificity in terms of determining outcomes. You cannot overprescribe, but you can provide definitive guidance.[52]

In response to stakeholders' concerns, the department referred to the Bridgman Report, which considered that Acts of Parliament are not responsive to rapid change. It explained that regulations and other instruments (including directives), are 'potential vehicles for enhancing responsiveness in employment practice – in both culture and behaviour'.[53]

The department also noted that the use of directives for 'operational administration of the public service has been a long-standing practice in Queensland's public sector employment laws and in other Australian jurisdictions'.[54]

The department referred to guidance the Bill provides in relation to directives and the protection afforded by allowing appeals with respect to decisions made about individuals under directives to the QIRC.[55]

The department further noted the existing provisions under the PS Act which require consultation with relevant public service agencies and employee organisations to be undertaken in relation to the making of proposed directives.[56]

The use of directives as a potential breach of fundamental legislative principle is discussed further in section 4.1 of this report (Fundamental legislative principles).

Committee comment

The committee recognises the need for directives to support the objectives of the Bill, and to provide a timely response as issues arise relating to the operational administration of the public service.

Stakeholders outlined a number of concerns, however, in regards to reliance on directives, and that the consultation processes for directives are not as robust as the consultation involved when amending primary legislation.

In this regard, the committee considers the inclusion of broad frameworks in legislation to guide the content of directives where possible as best practice, and worthy of the department's ongoing consideration as reforms are progressed.

3.3 Employment security

3.3.1 Permanent employment

The Bill amends the PS Act to provide that permanent employment ('employment on tenure') is the default basis for public sector employment and that other non-permanent forms of employment should only be used when ongoing employment is not viable or appropriate (having regard to human resource planning).[57]

[52] Maurice Blackburn Employment and Industrial Law Service (Maurice Blackburn), public hearing transcript, Brisbane, 10 August 2020, p 10.

[53] DPC, correspondence dated 5 August 2020, p 11.

[54] DPC, correspondence dated 5 August 2020, p 11.

[55] DPC, correspondence dated 5 August 2020, p 11.

[56] DPC, correspondence dated 5 August 2020, p 11.

[57] Bill, cls 20, 37; explanatory notes, p 7.

The Bill provides the following criteria for when a person can be employed as a fixed term temporary employee when employment on tenure may not be 'viable or appropriate':

a) to fill a temporary vacancy arising because a person is absent for a known period;

b) to perform work for a particular project or purpose that has a known end date;

c) to fill a position for which funding is uncertain or unknown;

d) to fill a short-term vacancy before a person is appointed on tenure;

e) to perform work necessary to meet an unexpected short-term increase in workload.[58]

The Bill also allows a person to be employed on a casual basis 'if employment of a person on tenure or as a fixed term temporary employee is not viable or appropriate'.[59]

The department advised these changes will clarify the existing commitment to maximising employment security,[60] and will provide guidance for right to request conversions, and mandatory conversion reviews.[61]

At the public briefing, the department further outlined:

> *…in terms of the overall benefit of having a Public Service that is secured around permanent employment, Bridgman related that back to Westminster principles of government—that there is a direct and indirect benefit to the public of ensuring that those employment principles are in place and that the Public Service is effectively and efficiently managed.*[62]

The department referred to figures published by the PSC which note the majority of the workforce are permanent employees (79.66 per cent of employees), with 16.76 per cent being temporary, 2.85 per cent casual, and 0.73 per cent on contract.[63]

3.3.1.1 Stakeholder views and department's response

Stakeholders provided general support for improvement to the Queensland public sector, including through maximising employment security.[64]

The Together Union noted the current 'prevalence of precarious and insecure forms of employment in the Queensland Public Sector and the lack of determinative relief' and supported the aim to maximise employment security.[65] Alex Scott, Branch Manager, Together Union summarised:

> *We think that it goes to the fundamentals of the Westminster system to have a higher level of permanency. If someone has insecure employment they are less able to stand up to senior management and to the government of the day and give them advice that they do not want to hear. Our broad position is that, wherever possible, every position should be permanent.*[66]

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58 Clause 37, new s 148.

59 Clause 37, new s 148A.

60 DPC, correspondence dated 24 July 2020, p 2.

61 DPC, correspondence dated 24 July 2020, pp 2-3.

62 Shannon Cook, Deputy Commissioner, Public Sector Reform Office (PSRO), DPC, public briefing transcript, Brisbane, 27 July 2020, p 7.

63 DPC, public briefing transcript, Brisbane, 27 July 2020, p 4; see also, Public Service Commission, *Queensland public sector quarterly workforce profile*, June 2019, p 5.

64 See, for example, submissions 003, 004, 006, 007, 008.

65 Submission 008, pp 4, 6.

66 Public hearing transcript, Brisbane, 10 August 2020, p 2.

In particular, the Together Union reported that its members 'consistently point to the lack of secure employment as a reason why services are at risk and further their insecurity in giving the frank and fearless advice that is required in a Westminster government'.[67]

In its submission, the Together Union further noted that some workers in the education sector 'have been employed in temporary and casual arrangements for many years who are still not in secure employment or whose employment is undersecured'.[68]

To address this issue, the Together Union suggested amendments to the Bill including a definition of 'fixed term employment' and that an employer should not be able to terminate an employee's employment prior to the end of the fixed term agreement, unless for misconduct.[69]

Similarly, Maurice Blackburn suggested changes to terminology used in the Bill, including the definition for 'fixed-term temporary employee' which it submitted:

> *… should be defined to the effect that a fixed-term temporary employee is a true fixed-term employee, whose contract of employment cannot be terminated prior to the contract's end date unless for serious misconduct.*[70]

The department noted that as part of stage one public sector reforms, 'there has not been a decision to change requirements or entitlements for termination of fixed term temporary employment'.[71]

Stakeholders provided specific comment in regards to the circumstances in which the Bill provides employment on tenure may not be viable or appropriate.

The Together Union recommended the phrase 'to fill a position for which funding is uncertain or unknown,' be removed, 'as it has historically been used as a default rationale for refusal regardless of the validity of that rationale'.[72]

The UWU shared a similar view:

> *The proposed new section 148(2)(c) of the PS Act detracts from the purpose of ensuring that permanent employment is the default basis of employment and that other non-permanent forms of employment should only be used when ongoing employment is not viable or appropriate.*
>
> *If enacted, this clause will enshrine in legislation a position where the default basis of employment is non-permanent for thousands of teacher aides, despite these being ongoing roles, on the sole ground that these positions are contingent upon Commonwealth funding. These are not temporary roles.*[73]

To address this issue, the UWU suggested the Bill be amended to instead provide that temporary employment should exist only in the circumstances where it is necessary 'to fill a position for which there is no continuing need for the person to be employed in the role or a role which is substantially the same and the role is unlikely to be ongoing'.[74]

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67 Submission 008, p 6.

68 Submission 008, p 7.

69 Submission 008, p 7.

70 Submission 006, p 4.

71 DPC, correspondence dated 5 August 2020, p 3.

72 Submission 008, p 8.

73 Submission 004, p 3.

74 Rebecca Keys, Queensland Public Sector Coordinator, United Workers Union (UWU), public hearing transcript, Brisbane, 10 August 2020, p 8.

The QCU raised similar concerns with the circumstances in which employment on tenure may not be viable or appropriate and stated:

> *… the funding of any budget item is not known from one year to the next and this provision would have the potential to apply to any position, thereby defeating the primary stated purpose of the Bill to "maximise employment security in public sector employment".*[75]

The QNMU suggested the framework for providing that permanent employment is the default position should instead closer reflect the terminology use in the Nurses and Midwives (Queensland Health and Department of Education) Certified Agreement (EB10) 2018, which it believes 'more clearly articulates permanent employment as the default form of employment'.[76]

In response to these concerns, the department advised:

> *The current Temporary Employment Directive provides that funding uncertainty is a circumstance indicating that employment may be on a temporary, rather than permanent basis. That criteria have been moved to the PS Act, in accordance with the Bridgman Review's recommendation.*[77]

The department also highlighted the following amendments that support employment on tenure:

- the amendments to s 25 of the PS Act to specifically provide that employment on tenure is the default basis of employment for employees in the public service
- clarifying the criteria for fixed term temporary employment
- providing for regular reviews of temporary engagements and strengthened appeal processes
- the renaming of temporary employment as fixed term employment to better reflect the fixed term nature of these engagements.[78]

With respect to definitions, the department noted that the Bill allows for directives to outline definitions for a number of terms and phrases in the Bill and that such details were more appropriate for a directive rather than primary legislation.[79] The department also advised that the PSC is currently undertaking consultation with agencies and unions on directives and that definitions for these terms will be the subject of consultation as is required under the PS Act.[80]

3.3.2 Conversion of temporary employees to permanent employees

Under the PS Act, the chief executives of relevant government departments must review the status of a temporary employee after two years of continuous employment, and every year after, to determine whether the person's employment should continue as temporary employment or be converted to employment on tenure.[81]

If the chief executive does not make a decision within a period fixed by a directive, the chief executive 'is taken to have decided that the person's employment in the department is to continue as a temporary employee according to the terms of the existing employment'.[82]

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75 Submission 007, p 3.

76 Submission 004, p 5.

77 DPC, correspondence dated 5 August 2020, p 2.

78 DPC, correspondence dated 5 August 2020, p 2.

79 DPC, correspondence dated 5 August 2020, p 3.

80 DPC, correspondence dated 5 August 2020, p 3.

81 PS Act, s 149.

82 PS Act, s 149(4).

The existing requirement for a chief executive to review the status of a temporary employee after two years of continuous employment is maintained by the Bill.[83]

The Bill introduces a new right for a temporary employee to request conversion to permanent employment.[84] The proposed amendments would allow a fixed term temporary or casual employee, including employees who are acting on higher duties, who has completed 12 months of continuous service in the department to ask the chief executive to decide whether to continue the person's employment on a temporary basis or convert the person's employment to employment on tenure.[85]

The chief executive must consider a person's conversion request and decide within 28 days whether to offer to convert the person's employment basis to employment on tenure. If the chief executive decides not to offer to convert the person's employment, they must provide the person with a notice stating the reasons for the decision.[86]

If the chief executive does not make a decision within 28 days, the chief executive is taken to have decided not to offer to convert the person's employment.[87] In this situation, the Bill does not require the chief executive to provide the person with a notice stating reasons.

The chief executive must decide to offer to convert the employee's basis of employment to tenure unless it is not viable or appropriate to do so having regard to:

- *for a fixed term temporary employee – the matters mentioned in section 148(1) to (3) (which provide for when engagement of a person on tenure may not be viable or appropriate)*
- *for a casual employee—the matters stated in a directive under section 148A, and*
- *the genuine operational requirements of the department.*[88]

The Bill does not grant appeal rights for 12 month conversion review decisions for fixed term and casual employees and employees on higher duties. Appeals rights are discussed further in section 3.4 of this report (Appeals).

The department noted the existing requirement to review the employment status of temporary employees has been in place for many years, and suggested allowing employees to request a conversion review after 12 months of service has the primary benefit 'of driving better workforce planning'.[89] It also advised that 'by regularly reviewing the status of non-permanent employees, agencies can better plan and prepare for workforce changes'.[90]

The department also advised that these reforms are designed to ensure that employees are provided with regular reviews and communication about their employment status and conversion where appropriate.[91]

83 Bill, cl 37, new s 149B.

84 Clause 37, new s 149.

85 Clause 37, new ss 149, 149C.

86 Bill, cl 37, new s 149A.

87 Bill, cl 37, new s 149A(5).

88 Bill, cl 37; explanatory notes, p 13.

89 DPC, correspondence dated 24 July 2020, p 3.

90 DPC, correspondence dated 24 July 2020, p 3.

91 DPC, correspondence dated 5 August 2020, p 3.

3.3.2.1 Stakeholder views and department's response

Stakeholders generally expressed support for the ability of employees to make a request for a review of their employment status but raised some issues with the process proposed by the Bill.[92]

The QNMU and QCU raised concerns about the requirement that the chief executive, in making a conversion decision, have regard to genuine operational requirements. QNMU commented that the experience of its members has been that such requirements are often considered by agencies as solely financial.[93] The QCU noted in its submission that 'operational requirements remains too broad an exclusion as the Bill is currently drafted'.[94]

The Together Union suggested the Bill be amended so that the only basis for non-conversion of employment is for 'genuine operational reasons only', with examples provided in the legislation.[95]

In response to these concerns, the department advised:

> *Genuine operational requirements are a factor that currently exists as a factor for conversion under the directive. While it has been moved into the primary legislation, this is not a new change. In addition, the requirement for a statement of reasons to be given for conversion decisions and the transfer of appeals to the Queensland Industrial Relations Commission (QIRC) provide appropriate mechanisms to ensure scrutiny and review of department decisions making in conversion reviews.*[96]

Strong concern was raised by stakeholders regarding the Bill's proposal that if a chief executive does not make a conversion decision within 28 days, it is deemed the decision was made to not offer conversion.[97]

The General Secretary of the QCU told the committee that the approach:

> *…seems to us to be odd and again contrary to the objectives of the bill. If the objectives are to give tenured employment, to give people certainty and security, no decision should not lead to a person having to continue to live with that uncertainty. The bill specifies certain things that should be considered, and if those things are considered and it is deemed that you will have ongoing employment, then you must make that person permanent or give that person tenured employment. Again it seems odd that if you do not make a decision—you make no decision—then that person is disadvantaged.*[98]

Maurice Blackburn recommended the position be reversed 'such that the default position is that the person's employment will convert to tenure unless specified criteria are satisfied'.[99]

The Together Union submitted:

> *Given the default basis for public sector employment is permanent employment, Together is of the view that, where the chief executive fails to make a review within the required period, the default position should be that the person's employment shall become either a general employee or a public service officer on tenure.*[100]

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92 See, for example, submissions 003, 007, 008.

93 Submission 003, p 5.

94 Submission 007, p 4.

95 Submission 008, p 10.

96 DPC, correspondence dated 5 August 2020, p 4.

97 See, for example, submissions 005, 006, 008.

98 Queensland Council of Unions (QCU), public hearing transcript, Brisbane, 10 August 2020, p 6.

99 Submission 006, p 8.

100 Submission 008, p 9.

QNMU took a similar position and noted that if a decision is not made, there is no requirement for reasons to be provided to the person.[101]

The AWU went further by suggesting that the Bill could be amended, to provide that temporary (fixed term) and casual employees with 12 months' service automatically be converted to permanent positions.[102]

The AWU also highlighted the Bill does not provide an avenue for appeal where a decision is made by the chief executive to not convert an employee.[103]

With respect to where a conversion decision is not made by the chief executive in the required timeframe, the department noted the Bridgman Review did not propose to reverse the position so that the default where a chief executive fails to make a decision is for an offer of employment on tenure.[104]

The AWU also queried the application of the Bill in regards to conversion of part-time employees. It submitted:

> *The current provisions in the Act do not stipulate the number of part time hours that have to be offered to a converted employee which has led to the situation where employees are offered less hours [than] those they have worked on a regular and systematic basis. In some instances the number of hours is less than half the hours worked by the employee.*
>
> *The Act must provide that the average hours worked over the past twelve months must be offered to the employee.*[105]

With respect to conversion to a higher classification for a person performing higher duties, the Together Union supported the new review right, stating:

> *The introduction of this new review right is something Together's members have expressed [particular] enthusiasm about. We have heard from members engaged on higher duties for anywhere from 12 months to 10 years so the ability to seek further employment security in a role at the higher classification that they have performed successfully for lengthy periods is supported by Together.*[106]

The Together Union told the committee that persons on long-term higher duties can be 'uncomfortable taking any significant holiday leave while on long-term higher duties and, if they do, there is stress that they will be returning to their substantive position'.[107]

Maurice Blackburn submitted that the Bill should require that departments notify employees of their right to seek review of their employment status after two years of continuous service.[108] It also recommended the Bill provide for an employee to request appointment to a higher classification (as opposed to a request to the same position at the higher classification level) to allow for appointment where the position which the employee seeks to be appointed to is substantively held (though not currently performed) by another employee.

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101 Submission 003, p 6.

102 Submission 005, p 3

103 Submission 005, p 3.

104 DPC, correspondence dated 5 August 2020, p 3.

105 Submission 005, p 3.

106 Submission 008, p 13.

107 Together Union, public hearing transcript, Brisbane, 10 August 2020, p 3.

108 Submission 006, p 9.

The department advised that, 'the requirement that the right to request appointment is to a position at a higher classification level is considered appropriate to ensure that reforms can be managed within existing departmental funding and resourcing'.[109]

The Together Union suggested that that 'an employee who is converted to permanent employment status should not be subject to a probationary period'.[110]

In this regard, the department referred to the current Temporary Employment Directive, which provides:

> *…following conversion to permanency, a temporary employee could be subject to a probationary period following conversion. However, the directive states that it is expected that agencies would use probation only in exceptional circumstances'.*[111]

The department reiterated that the PSC would undertake consultation with agencies and unions on the range of directives required or affected by the Bill and that the 'criteria for appointment, including factors to mitigate displacement of employees are matters that are appropriately considered through the review of the relevant directive'.[112]

Committee comment:

The committee agrees that permanent employment should be the default basis for employment in the public sector while acknowledging the need for some flexibility to accommodate operational requirements.

The committee notes, however, that under the proposed amendments, when a chief executive does not make a decision about a conversion request within the required timeframe, the default position is that the request has been denied, which is contrary to the principle of promoting permanency:

- without any scope for extension of the required timeframe, as may befit the pressures of workload challenges and changing budgetary arrangements at different times, and
- without ensuring that the chief executive articulates the reasoning for any decision or otherwise, and thereby affording the employee the fairness of an explanation.

The committee accepts that the Bridgman Report did not make specific reference to the treatment of requests by employees for conversion review in circumstances in which the required timeframe has lapsed.

The committee notes, however, that the Bridgman Review did consider the existing process of review of temporary employment by the chief executive after two years', under existing section 149 of the PS Act. In this regard, the Bridgman Report noted:

> *…employee stakeholders noted that a significant number of decisions are not made in the timeframe, meaning that section 149(3) operates as a deemed refusal. On appeal to the QIRC, the employee has no basis to argue their case, and the chief executive effectively has a right of ambush because the QIRC quite properly requires the necessary information to be [filed]. That systemic unfairness results in a perverse incentive for decisions not to be made, but to let them lapse.*
>
> *…*
>
> *the perverse incentive for deemed refusals should be addressed by requiring the chief executive to give detailed reasons for the refusal to the employee and the Commissioner within 14 days of*

[109] DPC, correspondence dated 5 August 2020, p 4.

[110] Submission 008, p 10.

[111] DPC, correspondence dated 5 August 2020, p 4.

[112] DPC, correspondence dated 5 August 2020, p 4.

the application. There should be a positive onus on the chief executive to demonstrate how the criteria for conversion are not met. The deemed refusal is sensible and practical but the perversity of incentive should be removed: the work would still need to be done in a timely way and the applicant given time to develop their case.[113]

The committee suggests the commentary in the Bridgman Review about the existing operation of s 149(3) of the PS Act could similarly apply to the proposed amendments in the Bill under new s 149A(5).

The committee therefore suggests the department investigate an appropriate mechanism to provide fairness and transparency to a person, where the chief executive does not make a conversion decision within 28 days, pursuant to new ss 149A and 149C of the PS Act, as proposed by the Bill.

Recommendation 2

The committee recommends the Department of the Premier and Cabinet investigates an appropriate mechanism to provide fairness and transparency of the decision-making process to a person where the chief executive does not make a conversion decision within 28 days, pursuant to proposed new sections 149A and 149C of the *Public Service Act 2008*.

3.4 Appeals process

Public service appeals are currently heard by the QIRC under the provisions of the PS Act.[114]

The Bill transfers these appeals processes to the IR Act, with minor amendment.[115] It is noted that the QIRC will still hear these appeals but will follow the processes as set out in the IR Act.

According to the explanatory notes, the transfer of the appeals jurisdiction will 'ensure consistency and increase transparency in appeal decisions'.[116]

The department noted that appeals are currently heard by members of the QIRC performing functions under the PS Act.[117] The department explained that the nature of a public service appeal, including the decision to be made following a review, will be unchanged as a result of moving the jurisdiction under the IR Act. It further advised that the QIRC does not publish decisions made in the public service appeals jurisdiction; however, by moving provisions to the IR Act, these decisions will be published, which will in turn allow for greater consistency and transparency.[118]

The Bill inserts new appeal rights in relation to:

- *a decision of the Commission Chief Executive under section 88IA to give a direction about the handling of a work performance matter, to the extent the direction affects the employee the subject of the work performance matter;*
- *a decision to suspend a public service employee without entitlement to normal remuneration under s 137 (5) (i.e. a suspension without pay decision); and*
- *a decision under section 149A not to convert the basis of employment for a fixed term temporary or casual employee after 2 years of continuous employment.*[119]

113 Bridgman Report, p 41.

114 PS Act, ch 7.

115 DPC, correspondence dated 24 July 2020, p 4.

116 Explanatory notes, p 5.

117 DPC, correspondence dated 24 July 2020, p 4.

118 Explanatory notes, p 5; DPC, correspondence dated 24 July 2020, p 4.

119 Explanatory notes, pp 15-16.

Consequently, the Bill also clarifies who may appeal the new/amended decisions:

- *for a decision mentioned in section 194(1)(ba)*[sic] *(under section 88IA) the person who can appeal is the employee the subject of the work performance matter;*
- *for a suspension without pay decision, the person who can appeal the matter is the public service employee the subject of the decision; and*
- *for a conversion decision, the employee subject of the decision.*[120]

The Bill also clarifies which decisions under the PS Act cannot be appealed:

- *decisions of the Commission Chief Executive that relate to reviewing a department's handling of a work performance matter as the request of an employee under section 88IA, other than to the extent allowed under section 194*
- *a decision not to convert the employment of a fixed term temporary employee or casual employee under section 149 (following a request for conversion after 12 months continuous service)*
- *a decision by a chief executive not to appoint an employee acting in a position at a higher classification level under section 149B.*[121]

The Bill also amends the IR Act to include general provisions regarding representation of parties at proceedings, including:

- that a person can be represented by an agent for appeals against a promotion decision, only with the leave of the QIRC[122]
- legal representation provisions under the IR Act do not apply to public service appeal proceedings[123]
- a person can be represented by an agent but is not entitled to legal representation for public service appeals conducted by the QIRC.[124]

3.4.1 Stakeholder views and department's response

Several submitters raised concerns in relation to the processes for public service appeals.

Maurice Blackburn noted in relation to proposed new s 562A the QIRC may decide it will only hear an appeal against a decision if they are satisfied of matters including that 'the appellant has used the procedures required to be used under a directive under that Act'.[125] Maurice Blackburn disagreed with the precondition that employees should first exhaust other review options as it 'potentially denies employees from achieving swift external oversight of their case'.[126]

During the public hearing, representatives from Maurice Blackburn further explained:

> *The new section 562A of the Industrial Relations Act, which is sought to be introduced by this bill, imposes an additional barrier on people who would otherwise want to go to the Industrial Relations Commission to appeal a disciplinary process in relation to them. There currently exists a barrier—that is, the commission can have regard to whether or not an employee has used an*

120 Explanatory notes, p 16; Bill, cl 48.

121 Explanatory notes, p 16; Bill, cl 47.

122 Bill, cl 7.

123 Bill, cl 8.

124 Bill, cl 9.

125 Submission 006, p 4.

126 Submission 006, p 4.

employee grievances directive. Now the case would be, if this bill were to pass, that the commission would have regard to whether the employee followed any processes and any directive, so it becomes much broader in the sense of the discretion allowed to the commission to stop or not determine someone's claim.[127]

The department noted that the requirement for an appellant to use particular procedures under the employee complaints directive before an appeal is heard is unchanged.[128] The department advised:

Requiring employees to use processes for resolving matters within a department prior to lodging an external appeal is consistent with the general approach of the Bill to promote timely and proportionate resolution of matters where possible.[129]

The AWU also recommended changes to the public service appeals process, including that the Bill be amended to allow:

…public service appeals to review the entire matter and make a fresh decision, that is different and no worse to the current decision by the decision maker – in order to ensure that the Applicant's matter is completely reviewed and provided a third party decision; and the decision maker/employer provides all evidence in their position relating to the Applicant's matter, and that the Applicant is free to include further evidence, even if the employer/decision maker did not have the same in their possession.[130]

The department advised in response, that the public service appeal provisions replicate the current approach under the PS Act and that 'in deciding a public service appeal, a QIRC member's function on appeal will continue to be to review the decision appealed against and to decide whether the decision was fair and reasonable'.[131]

The Together Union suggested the ability for the QIRC to 'stay' proceedings under the PS Act, which is reflected in the Bill's amendments to the IR Act, should be extended to enable the QIRC to issue broader interlocutory orders.[132]

The department acknowledged the request for broader interlocutory orders and advised:

A key theme of the Bridgman Review was empowering agencies, including managers and executives to manage well and to manage positively and to rectify issues raised. The transfer of the appeals function to the QIRC will allow for transparency and jurisprudence to increase consistency in appeal decisions. This will have a flow on effect of assisting agencies improve primary decision making and internal review mechanisms.[133]

An individual submitter commented on the appeals process with respect to positive performance management, submitting:

I believe once the positive performance management principles have been fulfilled and the point had been reached where disciplinary action is recommended, an independent body (outside of the unit, branch or division managing the employee and also outside of the particular department's Human Resources area) should review the circumstances, make further

127 Giri Sivaraman, Principal, Maurice Blackburn, public hearing transcript, Brisbane, 10 August 2020, p 9.

128 DPC, correspondence dated 5 August 2020, p 10.

129 DPC, correspondence dated 5 August 2020, p 10.

130 Submission 005, p 4.

131 DPC, correspondence dated 5 August 2020, p 10.

132 Submission 008, p 22.

133 DPC, correspondence dated 5 August 2020, p 5.

investigations as it deems necessary, taking into consideration their assessment of the employee's point of view and make a ruling.[134]

The department disagreed with the process suggested by the submitter, explaining:

…where the new positive performance management directive provides for a decision to be made about an individual, the decision will be appealable to the Queensland Industrial Relations Commission (QIRC). Further, if a public service employee considers a decision made in relation to their employment is unfair, they have avenues to appeal the decision under the PS Act as a fair treatment appeal. The QIRC hears public service appeals as an independent, external body, outside of the relevant department. The QIRC then decides whether the decision made by the department was fair and reasonable and has the power to set aside a decision of a department and to substitute another decision. As a result of the Bill, public service appeals will be heard by the QIRC under the provisions of the Industrial Relations Act 2016*, which will provide for greater transparency and consistency of decision making.*[135]

A number of stakeholders also raised a concern that the Bill provides no avenue for appeal by a fixed term (temporary) or casual employee who requests a conversion to employment on tenure after a period of 12 months, or for a public service employee who requests appointment to a higher classification level following a continuous 12-month period of acting at the higher level.

Maurice Blackburn expressed the view that any outcome determined under new ss 149A, 149B and 149C of the PS Act, in which these 12-month conversion review provisions are set out, should be appealable by the affected employee.[136]

Similarly, the AWU submitted:

An appeal right needs to be incorporated in the Act and needs to [be] available to an employee whose application for conversion has not been successful. To not provide such a right to an employee denies the employee the ability to challenge the decision made by the Departmental employer. To provide an appeal right would be consistent with the long held principle that decisions made about public service employment need to stand the test of scrutiny.[137]

The QCU also considered that where 'there is sufficient ground to make a request after 12 months then there should also be an appeal right'.[138] The General Secretary of the QCU further explained:

The fact that people can put up their hand and ask for a conversion after 12 months is to be applauded, but if the objective is to provide tenured employment—and there are very specific arrangements that say why a person should be converted to permanent employment—we do not see why you should not be able to appeal a decision not to convert after 12 months. We think that part of the bill should be altered.[139]

Further, the Together Union submitted that, in the words of one of their members, the non-appealable nature of the 12-month review decisions:

...creates little accountability for the employer to consider and decide a request in accordance with the criteria that is to be contained within a directive.[140]

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134 Name withheld, submission 009, p 1.

135 DPC, correspondence dated 10 August 2020, p 1.

136 Submission 006, pp 8-9.

137 Submission 005, pp 2-3.

138 Submission 007, p 4.

139 Michael Clifford, General Secretary, QCU, public hearing transcript, Brisbane, 10 August 2020, p 6.

140 Submission 008, p 13.

The Together Union further submitted:

> *Individual appeal rights are imperative in public sector employment and our members feel strongly that the capacity for an external review of decisions is imperative to a fair, transparent and apolitical system.*
>
> *…*
>
> *Together seeks for the appeal rights that are available at the mandatory two-year conversion review for fixed-term temporary and casual employees to be extended to a request made under s.149C and for a new ground of appeal to be prescribed for this decision.*[141]

In response to these stakeholder comments, the department noted that the nature of a public service appeal will be unchanged as a result of moving the jurisdiction into the IR Act.[142] It explained:

> *… in deciding a public service appeal, a QIRC member's function on appeal will continue to be to review the decision appealed against and to decide whether the decision was fair and reasonable. In moving the provisions relating to the nature of the decision on review to the IR Act (from current section 201 of the PS Act), the Bill also provides that for an appeal against a promotion decision or a decision about disciplinary action under the PS Act, the commission must decide the appeal having regard to the evidence available to the decision maker when the decision was made but may allow other evidence to be taken into account if the commission considers it appropriate*.[143]

The department took the view that 'appeal rights are provided for at the two-year mandatory review and are considered appropriate at that point'.[144] It explained:

> *The primary purpose of the 12-month review is to help drive good practice in workforce and resource planning so that employees are provided with regular reviews and communication about their employment status and conversion where appropriate. This will in turn assist in more effective and efficient management of two-year reviews. The Bridgman Review also did not recommend an appeal to the QIRC following an application to request conversion after 12 months service.*[145]

The matter of appeal rights is discussed further in section 4.1 of this report (Fundamental legislative principles).

3.4.1.1 Rights to representation

A number of union groups who submitted to the inquiry commented on the provisions regarding a person's right to representation in matters before the QIRC.

The UWU supported the amendments in cls 7 to 9 of the Bill regarding industrial representation, and summarised:

> *Union representatives should have the express right to participate in any meetings/interviews connected to potential discipline. A union official's right to participate in such meetings (which means advocate on their behalf rather than speak in their place) should be made clear.*[146]

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141 Submission 008, p 13.

142 DPC, correspondence dated 5 August 2020, p 10.

143 DPC, correspondence dated 5 August 2020, p 10.

144 DPC, correspondence dated 5 August 2020, p 5.

145 DPC, correspondence dated 5 August 2020, p 5.

146 Submission 004, p 9.

Similarly, the Together Union (including support by the QCU) submitted:

> *There must be natural justice in the conduct of matters where there could be an impact on ongoing employment. Industrial Representation and a right to a Support Person of the employee's own choice must always [form] part of any performance concerns and discipline processes.*[147]

The department noted the drafting of the Bill does not prevent industrial representation and support persons.[148] The department referred to the PSC's *Managing Workplace Investigation: a practical guide for the Queensland public sector* and indicated that it outlined the role of the support persons stating:

> *… if a support person is an officer of a union to which the employee is a member, the officer also has a role to support their member's interests, including actively ensuring that natural justice and procedural fairness has been afforded to their member. The support person should not be a witness or otherwise involved (or implicated) in the investigation.*[149]

The Queensland Law Society (QLS) stated that it does not agree with the proposed amendments to s 530A of the IR Act, which prohibit legal representation in public service appeals. While acknowledging that this amendment reflects the current process in the PS Act, the QLS stated that it considers 'this is an opportunity for reform to improve the process'.[150]

The QLS explained:

> *It is our members' experience that allowing parties to be legally represented has a positive impact on a proceeding. Legal practitioners often assist a court, commission or conciliator through ensuring their own client understands the issues and in articulating their client's position concisely. Generally, legal practitioners play a positive role in and are of significant assistance in resolving matters.*
>
> *In public service appeals, it is likely that the department will be able to be represented by someone who is either legally qualified or with a significantly higher level of expertise/familiarity with the process than the employee. Prohibiting the employee from having access to the same advice and expertise creates a significant and unjustifiable imbalance of power in circumstances where this may already be a risk and where the employee is at risk of significant loss. There may also be a disparity between workers who are able to access assistance from their unions and those who are not.*
>
> *Accordingly, we submit that the current provisions of section 530 of the IR Act be applied to public service appeals.*[151]

The current s 530 of the IR Act, to which the QLS refers, allows legal representation in matters before the QIRC where all parties consent to representation, or where the QIRC grants leave for legal representation.

147 Submission 008, p 20.

148 DPC, correspondence dated 5 August 2020, p 14.

149 DPC, correspondence dated 5 August 2020, p 14.

150 Queensland Law Society (QLS), correspondence dated 12 August 2020, p 2.

151 QLS, correspondence dated 12 August 2020, p 2.

Committee comment

The committee notes the concerns raised by stakeholders in regards to public service appeals.

The committee notes in particular, the concern that no rights of appeal are provided under the new request for conversion of employment status under new s 149 of the PS Act. On balance, the committee considers the department's justification for no specific appeals process to be appropriate in the circumstances, considering:

- that the appeal rights for mandatory reviews of employment status under new s 149B of the PS Act are maintained, and
- that further appeals under the new s 149 would not support the primary purpose of the 12-month review 'to help drive good practice in workforce and resource planning so that employees are provided with regular reviews and communication about their employment status and conversion where appropriate'.[152]

The committee further discusses the appeals process in relation to potential breach of fundamental legislative principles, in section 4.1 of this report.

In regards to the argument raised by the QLS about legal representation in QIRC proceedings, the committee notes the QLS correspondence was received after the department had provided its consideration and formal response to issues raised in submissions to the inquiry.

The committee suggests the department consult with QLS, other legal bodies and any other appropriate stakeholders, about this issue as part of its consideration of stage 2 public sector reforms.

The committee also considers the human rights implications of the exclusion of legal representation from public service appeals in section 5.1.3 of this report (Human rights compatibility – Recognition and equality before the law and the right to a fair hearing).

3.5 Positive performance management

The Bill establishes a framework for positive performance management of public sector employees, through the introduction of positive performance management principles and related amendments.[153] The department explained that positive performance management principles and the establishment of a positive performance management framework:

> *…will promote regular and constructive communication between managers and employees and encourage them to work together to ensure optimal performance and the Government's productivity and quality of service delivery.*[154]

The Bill lists the positive performance management principles and provides that 'the management of public service employees must be directed towards' those principles.[155]

The Bill requires a directive be made about how the positive performance management principles are to be applied.[156]

The Bill requires that the positive performance management principles be applied before disciplinary action is taken for a performance matter.[157] The explanatory notes state that the clause '…is intended

[152] DPC, correspondence dated 5 August 2020, p 5.

[153] Explanatory notes, p 1.

[154] DPC, correspondence dated 24 July 2020, p 3.

[155] Clause 21.

[156] Clause 21, s 25A(3).

[157] Clause 38, s 186C.

to have the practical effect of promoting employee-initiated improvements, alternative dispute resolution processes or informal management intervention before taking to performance based disciplinary action being taken'.[158]

3.5.1.1 Stakeholder views and department's response:

The QCU was supportive of the inclusion of positive performance management principles and stated:

> *Performance management is intended to be used to align individual performance with broader organisational goals. It is intended to lift both individual and organisation performance. By providing employees with a clear and realistic idea of the standards that are to be expected, employees are able to meet those expectations and therefore have greater security of employment.*[159]

Similarly, the UWU supported the introduction of the principles and observed that 'these changes provide a foundation to move away from the negative, adversarial and resource intensive management approach we observe in some public sector agencies'.[160]

The Together Union also expressed its support for the introduction of positive performance management principles but suggested amendments to 'ensure that performance management is conducted as early as possible, that expectations are measurable and achievable and that principles are integrated into management practices and policies'.[161]

The Together Union raised concern that where an employee has concerns about a procedural aspect of a performance matter, the Bill does not provide an avenue for review.[162]

The department's response to submissions noted that the amendments in the Bill create a positive performance management framework to support managers and employees to work together to support optimal performance and to 'ensure the use of positive performance management for Queensland public service employees'.[163]

The department noted that the Bill requires a directive to include information on how the principles are to be applied so that performance expectations should be reasonably measurable and achievable.[164]

The department acknowledged that while the Bill does not include an express review right for an employee who has concerns about a procedural aspect of a performance matter, new s 88IA 'will apply where a procedure relating to suspension, discipline or workplace investigations is being undertaken in relation to a public service employee for a work performance matter'.[165]

3.6 Discipline and investigations

The Bill clarifies the threshold for taking disciplinary action and provides for new directives to guide disciplinary action and procedures, investigations and positive performance management.[166]

158 Explanatory notes, p 14.

159 Submission 007, p 5.

160 Submission 004, pp 4-5.

161 Submission 007, p 5; submission 008, p 15.

162 Submission 008, p 16.

163 DPC, correspondence dated 5 August 2020, pp 6-7.

164 DPC, correspondence dated 5 August 2020, pp 6-7.

165 DPC, correspondence dated 5 August 2020, p 6.

166 Explanatory notes, p 2.

The Bill amends the grounds for discipline under the PS Act, including to clarify that 'performance based [discipline] should occur when an employee has engaged in repeated unsatisfactory performance or serious under-performance of their duties'.[167]

According to the explanatory notes, the Bill also clarifies that 'disciplinary action should not be taken for minor infringements of a relevant standard of conduct and that the conduct of an employee should be sufficiently serious to warrant disciplinary action for a breach of a relevant standard of conduct'.[168]

The department advised these amendments respond to:

> *…concerns that 'trivial' and 'minor' performance and conduct transgressions can be deemed a breach of the Code of Conduct and therefore must be subject to disciplinary processes and action when they may be more appropriately dealt with by management action.*[169]

The PSC Chief Executive is required to make a directive that provides circumstances and examples of conduct that are likely to be considered sufficiently serious to warrant disciplinary action.[170]

The new directives to guide discipline, investigation and suspension matters aim to 'promote timely and proportionate resolution of matters by requiring periodic review of matters, including the timeframes within which these reviews must be conducted'.[171]

The Bill provides a new right for an employee to request that the PSC Chief Executive review a department's handling of a work performance matter in relation to suspension, discipline or an investigation, and that the chief executive should make a direction where appropriate.[172] The explanatory notes clarify a 'work performance matter' under this section does not include 'personal conduct that is the subject of the matter that if proved would constitute corrupt conduct under the *Crime and Corruption Act 2001*'.[173]

The department explains the provisions for the PSC Chief Executive to review a department's handling of work performance matters are aimed at 'promoting continuous improvement of a department's practices regarding the handling of a work performance matter, or the optimal resolution of a current work performance matter'.[174]

While the Bill allows for a request to be made by an employee, the PSC Chief Executive will retain discretion as to whether they will review the matter and whether any recommendations or directions should be made as a result.[175] The department envisages that the provisions would only be used in very limited circumstances where concerns of a very serious nature have been raised.[176]

167 Explanatory notes, p 14.

168 Explanatory notes, p 15.

169 DPC, correspondence dated 24 July 2020, pp 3-4.

170 Explanatory notes, p 15.

171 DPC, correspondence dated 24 July 2020, pp 3-4.

172 Explanatory notes, p 8.

173 Explanatory notes, p 8.

174 DPC, correspondence dated 24 July 2020, p 4.

175 Bill, cl 28; explanatory notes, p 8.

176 DPC, correspondence dated 24 July 2020, p 4.

The Bill requires the PSC Chief Executive to make a directive about procedures relating to suspension, which must make provision for:

- *the periodic review by departmental officers or the commission chief executive of suspensions being considered or undertaken by a department's chief executive, including the period within which reviews must be conducted to ensure the timely resolution of suspension matters;*
- *how natural justice requirements may be met in relation to decisions about suspensions including requirements about providing reasons for decisions about suspensions;*
- *the circumstances in which a chief executive may, under section 137(4), decide a public service employee is not entitled to normal remuneration during a suspension of the employee.*[177]

The directive may also include 'circumstances, and the way, in which a person may be reimbursed for any remuneration the person does not receive during the person's suspension after a determination is made about whether or not the employee is liable for discipline'.[178]

3.6.1 Stakeholder views and department's response

3.6.1.1 The threshold for taking disciplinary action

Some stakeholders suggested changes to the proposed threshold for taking disciplinary action.

Maurice Blackburn suggested that a definition be provided in the legislation:

> *…in order to ensure that the Government's intentions are achieved, and consistent standards are applied throughout the public service…a definition for 'sufficiently serious' be included in the Bill. The directive to be issued by the PSC may then be used to provide examples of conduct which fall within the definition of 'sufficiently serious' to warrant disciplinary action.*[179]

The Together Union took the view that the threshold is not sufficiently clear and stated:

> *Our members have felt that over time there has been a change across the sector that has given rise to an increased use of the allegation of misconduct in discipline matters even for what might reasonably be considered as a single less serious breach of the Code of Conduct or other Standard.*[180]

The department responded to these concerns by advising:

> *The Bill clarifies a threshold for taking disciplinary action for breaches of the Code of Conduct and relevant standards (that is – the conduct must be 'sufficiently serious' to warrant disciplinary action). This responds to concerns that 'trivial' and 'minor' performance and conduct transgressions can be deemed a breach of the Code of Conduct and therefore must be subject to disciplinary processes and action when they may be more appropriately dealt with by management action. The Bill also requires that the discipline directive will provide guidance and context on this provision.*[181]

The department also noted that new directives would support the implementation of the Bill to guide discipline, investigation and suspension matters. It stated, 'These directives will promote timely and

[177] Clause 36, s 137A(2).

[178] Bill, cl 36, s 137A(3).

[179] Submission 006, p 10.

[180] Submission 008, p 19.

[181] DPC, correspondence dated 5 August 2020, p 14.

proportionate resolution of matters by requiring periodic review of matters, including the timeframes within which these reviews must be conducted', and noted that the PSC was undertaking consultation with agencies and unions on directives.[182]

The Together Union also recommended that the Bill state that although the same alleged instance or instances may give rise to more than one possible ground for discipline, the most appropriate ground is to be selected (i.e. one ground per allegation).[183] It also suggested that the words 'sufficiently serious' be defined in the Act, and that the directive provide examples of conduct which falls within the definition.[184]

The department noted Together Union's concern but the department suggested that 'the amendments provide guidance that disciplinary action should not be taken for minor infringements of a relevant standard of conduct'.[185]

Maurice Blackburn also raised concern regarding the application of proposed new s 88IA of the PS Act, which relates to the PSC's functions regarding a department's handling of a work performance matter. Maurice Blackburn suggested the process under new s 88IA should not be limited, and should not exclude conduct which if proved, would constitute corrupt conduct under the *Crime and Corruption Act 2001*.[186] It further explained:

> *In our experience, people are quite regularly referred to the [Crime and Corruption Commission] for allegations that we know are not going to be dealt with by the [Crime and Corruption Commission] because they are lower level allegations. We are concerned that all of those people—and it is quite a number of people—are then going to be barred from having that particular protection.*[187]

The department did not respond to this issue.

3.6.1.2 Investigation processes

Stakeholders raised concern with investigation processes under the PS Act and suggested amendments to the Bill to address these issues.[188]

The QNMU made a number of recommendations regarding the use of external investigators under the PS Act, while acknowledging that the Bill's amendments do not specifically include provisions relating to workplace investigations.[189]

The AWU submitted that the Bill should explicitly provide that processes for managing discipline 'should be fair or extend procedural fairness to the employee under investigation' to ensure investigations are carried out in a 'fair and balanced manner with no predetermined views'.[190] The AWU submission included direct feedback from its members in relation to performance management and discipline processes and made a number of proposed amendments to disciplinary and investigation processes, including that:

182 DPC, correspondence dated 5 August 2020, p 14.

183 Submission 008, p 19.

184 Submission 008, p 19.

185 DPC, correspondence dated 5 August 2020, p 14.

186 Submission 006, p 6.

187 Paloma Cole, Lawyer, Maurice Blackburn, public hearing transcript, Brisbane, 10 August 2020, p 10.

188 See, for example, submissions 003, 004, 005, 006.

189 Submission 003, p 8.

190 Submission 005, p 4.

- *all material relied upon by a decision maker be provided to the respondent including statements, evidence, investigations reports and other findings,*
- *processes be strictly limited to a fixed timeframe especially if the respondent is suspended*
- *witnesses nominated by the respondent be interviewed and their evidence considered.*[191]

The UWU supported the objectives of amendments in the Bill to provide for periodic reviews, to ensure timely resolution of disciplinary matters.[192] It raised concern with excessive timeframes being undertaken to conduct investigations/disciplinary proceedings, suggesting they can currently take 'several years' and present 'a myriad of issues for employees, and more generally on public funds and resources'.[193]

The UWU, with the support of the QCU, proposed that a short limitation period (such as two months) should be prescribed under legislation, to resolve investigation and disciplinary processes. It suggested this could be subject to extension by an independent panel constituting relevant stakeholders, including a union representative.[194] The UWU recommended the Bill be amended to 'stress the need for short timeframes'.[195]

The UWU further suggested at the public hearing, that the Bill could be amended as follows:

> *If the word 'timely' in 'timely resolution' was replaced with 'expeditious', so it would read that 'it is to ensure that the expeditious resolution of discipline or in the case of suspension matters' to really just explain why. 'Timely' connotes that something is done at your convenience or at an opportune time. I do not think that is really what we are trying to address. As the word 'expeditious' is more about fast and efficient, I think that is much more in line with what we are trying to achieve to deal with this issue of protected time frames.*[196]

The department noted the concerns raised by stakeholders, and referred to the Bill's requirement that new directives guide discipline, investigation and suspension matters. The department stated:

> *These directives will promote timely and proportionate resolution of matters by requiring periodic review of matters, including the timeframes within which these reviews must be conducted. Proposed section 192A, which provides for the directive making power, requires that directives for discipline, investigations and suspension provide for natural justice for employees. The PSC is currently undertaking consultation with agencies and unions on directives.*[197]

In addition, the department advised that the Bill attempts to address concerns regarding timeframes for disciplinary matters, through the introduction of the positive performance management principles which include:

- *ensuring regular and constructive communication between public service managers and employees in relation to the matters stated in section*

191 Submission 005, p 5.

192 Submission 004, p 6; Bill, cl 44.

193 Submission 004, p 6.

194 Submission 004, p 8.

195 Submission 004, p 8.

196 Jared Marks, Industrial/Legal Officer, UWU, public hearing transcript, Brisbane, 10 August 2020, p 7.

197 DPC, correspondence dated 5 August 2020, p 14.

- *identifying at the earliest possible stage performance that does not meet expectations.*[198]

3.7 Suspension

The Bill consolidates provisions related to suspension under the PS Act, to 'avoid unnecessary duplication'.[199] The department advised that these provisions 'will not impact on suspensions in general and suspension powers will to continue to operate as they currently do'.[200]

Suspension of a public service officer is provided if 'the chief executive of a department reasonably believes the proper and efficient management of the department might be prejudiced if the officer is not suspended' and 'where the chief executive reasonably believes that an employee is liable to discipline under a disciplinary law'.[201]

The Bill also provides for notice requirements, including for whether a person is entitled to normal remuneration for the period of the suspension and for the effect that alternative or secondary employment may have on the suspension. The Bill amends the existing suspension framework by introducing a requirement that the chief executive considers 'all reasonable alternatives, including a temporary transfer or another alternative working arrangement that may be available to the person' prior to a suspension.[202]

A public service employee is entitled to normal remuneration during a suspension, unless an employee is suspended on the basis that a chief executive reasonably believes the employee is liable to discipline, and the chief executive considers it is not appropriate for the employee to be entitled to normal remuneration during the suspension.[203]

The Bill requires that the PSC Chief Executive make a directive about the procedure for suspension including:

- the circumstances in which a chief executive may make a decision that an employee is not entitled to normal remuneration
- the internal and external reviews of decision to suspend (and the timeframes for review to ensure timely resolution)
- how natural justice requirements may be met for these decisions including the requirements for providing reasons for decisions about suspensions
- the circumstances in which a chief executive may decide a public service employee is not entitled to normal remuneration during a suspension of the employee. [204]

3.7.1 Stakeholder views and department's response

Stakeholders raised general concern with suspension provisions under the PS Act.[205]

These concerns related primarily to the reasons for the suspension, the duration of a suspension, suspension without pay and the definition of remuneration while suspended.

198 DPC, correspondence dated 5 August 2020, p 15.

199 DPC, correspondence dated 24 July 2020, p 4.

200 DPC, correspondence dated 24 July 2020, p 4.

201 Explanatory notes, p 10.

202 Explanatory notes, p 10; Bill, cl 36, new s 137.

203 Explanatory notes, p 10; Bill, cl 36, new s 137.

204 Explanatory notes, p 11.

205 See, for example, submissions 003, 007, 008.

The QCU submitted that, in its experience, suspension of public sector employees had been used 'to create an absence from work' and recommended 'the Bill be amended to clarify the precise reasons that suspension can be used, and to prohibit its use for any other purpose', such as to create an absence or to trigger independent medical examinations.[206]

The QNMU raised similar concerns in relation to independent medical examinations.[207]

The Together Union further explained how suspension powers could lead to independent medical examinations:

> *Our members are currently experiencing a use of what was considered administrative suspension under section 137 of the current Act to commence a process in accordance with Chapter 5, Part 7 of the PS Act. In these matters, the chief executive suspends the employee in accordance with s.137 and uses that absence to enliven their authority under section 174 to direct the employee to attend an Independent Medical Examination. That was never the intent of this section and members feel under significant duress when the employer contrives the circumstance of absence through the use of this suspension provision.*[208]

The department noted the Bill amended the suspension framework under the PS Act to consolidate provisions but otherwise this issue was not within scope of the Bill's policy objectives.

The QNMU raised concerns with the existing suspension framework under the PS Act, suggesting the provisions are 'open ended' in nature.[209]

Similarly, the UWU outlined potential impacts of long suspensions:

> *Long disciplinary processes and suspensions cause employees to be isolated for extensive periods, which has social deprivation and career stunting effects. In some cases, it can prejudice an employee's income, as the amount paid during suspension can be less than the employee's normal remuneration. Further, the employee is unnervingly left in limbo while waiting for an outcome which, in some cases, can be the sudden conclusion to their employment. Ultimately, it is not in the public interest to conduct prolonged investigation/disciplinary processes, especially when they include equally long periods of suspension.*[210]

In relation to the duration of a suspension, the department referred to the Bill's requirement that a suspension notice must state when the suspension starts and ends.[211] The department also noted the Bill requires that a directive be made about procedures relating to suspension from duty.[212]

The response further explained that 'the Bill requires that mandatory timeframes be provided under directives … to promote the timely and proportionate resolution of suspension matters'.[213]

In terms of the PS Act provisions which allow for suspension without pay, the AWU submitted that suspensions should only be made with remuneration:

206 Submission 007, p 6.

207 Submission 003, p 8.

208 Submission 008, p 17.

209 Submission 003, p 7.

210 Submission 004, p 8.

211 DPC, correspondence dated 5 August 2020, p 8.

212 DPC, correspondence dated 5 August 2020, p 8; cl 37, s 137.

213 DPC, correspondence dated 5 August 2020, p 9.

> *The main reason being whilst under investigation no finding has been made that renders the employee liable to disciplinary action at that point in time and the principle of procedural fairness is ignored if the penalty of no remuneration is imposed prior to a finding being made.*[214]

Similarly, Maurice Blackburn raised concerns that enabling suspensions without pay may result in longer timeframes for processes to be completed. [215] Maurice Blackburn explained to the committee:

> *In our experience, having represented many Public Service employees, investigations can take anywhere from six months to two years which means employees can be suspended for that period of time just in the process of responding to allegations which may ultimately be found to be unsubstantiated. In fact, it is our standard practice when we see Public Service employees who we [sic] are seeking advice to tell them, 'This will take at least six months, if not longer'.*
>
> *…*
>
> *Whilst we accept that arguably the power previously existed, what has happened now is that it has been given far more prominence in the bill as it is currently drafted. We are very concerned that that will lead to an increase in suspensions without pay.*[216]

Submitters including Maurice Blackburn, QCU and the Togther Union suggested amendments to the definition of normal remuneration to ensure no detriment to the employee during the suspension.[217]

While the department acknowledged that an employee may be suspended with or without remuneration if a chief executive reasonably believes the employee is liable to discipline, it noted that the Bill reflects the current suspension framework and policy objectives of the PS Act.[218]

The department also noted:

> *Suspension without remuneration can arise prior to, or after, a finding has been made under Chapter 6 of the PS Act. Under the amended section 137, which co-locates the two current suspension powers in the PS Act, the chief executive must reasonably believe an employee is liable under a disciplinary law before suspending under proposed section 137(1)(b). If an employee is suspended in those circumstances, an employee is entitled to normal remuneration, unless the chief executive considers otherwise, having regard to the nature of the discipline to which the chief executive believes the person is liable.*[219]

In terms of the definitions of remuneration while suspended, the department stated that such definitions were outside the scope of the policy objectives of the Bill.[220]

3.8 Special Commissioner and administrative inquiries

The Bill proposes to establish a Special Commissioner to provide advice to the Minister about areas of public administration and promote the effectiveness and efficiency of government entities by facilitating the development and implementation of whole of government policies.[221]

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214 Submission 005, p 4.

215 Submission 006, p 7.

216 Giri Sivaraman, Principal, Maurice Blackburn, public hearing transcript, Brisbane, 10 August 2020, p 9.

217 Submission 007, p 6; submission 008, p 17.

218 DPC, correspondence dated 5 August 2020, p 9.

219 DPC, correspondence dated 5 August 2020, p 9.

220 DPC, correspondence dated 5 August 2020, p 8.

221 Clause 24.

The department suggested 'an example of an area of public administration that a Special Commissioner may provide advice on is gender pay equity and promoting a diverse workforce'.[222]

Shannon Cook, Deputy Commissioner, Public Sector Reform Office, further explained:

> *You will also note in the bill that Bridgman has made some recommendations that a special commissioner can facilitate and conduct inquiries with an agency. I believe his recommendation and what he is looking to establish with special commissioners is that they have an additional degree of focus and intensity distinct from the general duties of both the Public Service Commissioner—or commission chief executive as he is at the moment—and the deputy commissioners within the Public Service Commission and would have a very specific remit.*[223]

The Bill introduces provisions to allow for the special commissioner, PSC Chief Executive, or another appropriately qualified person to conduct administrative inquiries into the functions or activities of one or more public service offices.[224]

The proposed provisions provide that the Minister administering the PS Act may ask a Special Commissioner, the PSC Chief Executive or another appropriately qualified person to conduct an administrative inquiry.[225]

The person conducting the administrative inquiry will have powers including to enter official premises, require production of documents, and interview persons who can provide information relevant to the inquiry.[226]

Following an administrative inquiry, a report on the inquiry, including any findings or recommendations, must be provided to the Minister.[227]

3.8.1 Stakeholder views and department's response

The Together Union submitted that the functions of the Special Commissioner should be expanded to include facilitating consultation on areas of public administration, including whole of government policies, with stakeholders.[228]

Maurice Blackburn was of a similar view and suggested that the functions of the Special Commissioner should include consultation with unions.[229] Maurice Blackburn acknowledged the importance of consultation to provide people an opportunity for input, and 'identified unions in particular because we think that they will have valuable input into the process'.[230]

The QNMU supported the introduction of a Special Commissioner but requested that the use of the word 'Special' be reconsidered. It stated:

> *Given this position is to provide advice to the Minister about areas of public administration relating to the main purposes of the PS Act, which may include advice on gender pay equity and promoting a diverse workforce, we believe the title of 'Special' is unnecessary as these functions should not be viewed as 'special' but as common practice.*[231]

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222 DPC, correspondence dated 24 July 2020, p 5.

223 DPC, public briefing, Brisbane, 27 July 2020, p 4.

224 Clause 29.

225 Clause 29; explanatory notes, p 9.

226 Clause 29, new s 88P.

227 Bill, cl 29, new s 88Q.

228 Submission 008, p 24.

229 Submission 006, p 5.

230 Giri Sivaraman, Principal, Maurice Blackburn, public hearing transcript, Brisbane, 10 August 2020, p 10.

231 Submission 003, p 9.

The QNMU also submitted that the term of appointment for the Special Commissioner should be permanent, rather than capped, as currently provided for by the Bill.[232]

The department advised:

> *…the Bridgman Report recommended that the Queensland Governance Council should determine a five-year rolling program of reviews of agencies (or part), programs and themes… The Bill gives effect to those recommendations and is considered the most effective way of achieving the policy intent of appointing a Special Commissioner with appropriate powers to conduct their functions.*[233]

3.9 Other

The Bill makes a number of other amendments to the PS Act, IR Act and PID Act, which did not attract comment by stakeholders. These include:

- amendments to citizenship requirements for employment in the public service to provide that a person who has permission to lawfully work in Australia can be employed on a permanent basis[234]
- a new right to reappointment for a person who held a permanent office of service with the State and resigned to be a candidate at either a federal or state election[235]
- amendments to the PID Act to provide that an application for relocation of a public service employee who considers it likely a reprisal will be taken against them if they continue in their existing work location will now be heard by the QIRC under the IR Act.[236]

232 Submission 003, p 9.

233 DPC, correspondence dated 5 August 2020, p 12.

234 Clause 32, s 127.

235 Explanatory notes, p 10.

236 Clause 16; explanatory notes, p 6.

4 Compliance with the *Legislative Standards Act 1992*

4.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* (LSA) states that 'fundamental legislative principles' (FLPs) are the 'principles relating to legislation that underlie a parliamentary democracy based on the rule of law'. The FLPs include that legislation has sufficient regard to:

- the rights and liberties of individuals
- the institution of Parliament.

The committee has examined the application of the FLPs to the Bill. The committee identified that cls 9, 21, 36, 37, 44 and 47 raise potential issues of FLP. The committee's consideration of these issues is outlined below.

4.1.1 Rights and liberties of individuals

4.1.1.1 General rights and liberties and consistency with natural justice

Clause 9 of the Bill inserts new s 530A in the IR Act to provide that a party in a public service appeal before the QIRC has no right to legal representation.

This could be seen as limiting the rights and liberties of individual parties whose right to legal representation is removed and specifically raises a question as to whether the legislation is consistent with the principles of natural justice.[237]

The principles of natural justice, as noted by the Office of the Queensland Parliamentary Counsel (OQPC) in its *FLP Notebook*, require that something should not be done to a person that would 'deprive the person of some right, interest, or legitimate expectation of a benefit without the person being given an adequate opportunity to present the person's case to the decision-maker'.[238]

The Queensland Parliament's former Scrutiny of Legislation Committee (Scrutiny Committee) commented that, as a general rule, 'representation by a lawyer enhances a person's right to natural justice because it gives the person the means to most efficiently present the person's case'.[239]

The explanatory notes make no comment on this clause in the context of issues of FLPs. However, it can be noted that the stated aim of cl 9, as with the rest of part 2 of the Bill, is to preserve the current nature of the review process. As set out in the explanatory notes, the amendments:

> *… will enable public service appeals to be heard under the* Industrial Relations Act 2016 *by the QIRC to ensure consistency and increase transparency in appeal decisions. Appeals were previously heard by members of the QIRC but performing functions under the* Public Service Act 2008 *rather than the* Industrial Relations Act 2016*. The nature of the review decision and the decision on an appeal will be unchanged as a result of moving the jurisdiction into the* Industrial Relations Act 2016.[240]

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237 Section 4(2)(b) of the *Legislative Standards Act 1992* (LSA) specifies that whether legislation has sufficient regard to the rights and liberties of individuals depends on whether, for example, the legislation is consistent with principles of natural justice.

238 Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, (The OQPC Notebook), p 25.

239 The OQPC Notebook, p 29, referring to Scrutiny of Legislation Committee, *Alert Digest 4 of 2005*, p. 22, paras 88 to 92.

240 Explanatory notes, p 5.

Additionally, as highlighted in the explanatory notes, the approach in cl 9 'reflects the existing arrangements for public service appeals in the Public Service Act 2008, section 204'.[241]

In this respect, it can be noted that the exclusion of legal representation has been a longstanding feature of public service appeals, with this having been an underlying principle of both the PS Act on its commencement and its predecessor legislation in the *Public Service Act 1996*,[242] and before that, the *Public Sector Management Commission Act 1990* (PSMC Act) – both now repealed. In particular, the PSMC Act specified that the institution and conduct of an appeal shall have regard to the principles:

> *(a) that representation by counsel or solicitor shall not be permitted to a party to an appeal;*
>
> *(b) that the proceedings upon an appeal shall be as informal and simple as practicable.*[243]

The former Scrutiny Committee, in its consideration of similar provisions, identified a range of factors which it identified as affecting the extent to which the exclusion of legal representation may be appropriate.

In the first place, the Scrutiny Committee concluded that:

> *… review provisions providing that the rules of evidence do not apply, denying legal representation and precluding orders for costs or damages, may be appropriate if the decision being reviewed has short term impact, for example, exclusion from a public place for a short time. Arguably this allows reviews to be conducted quickly and at minimal expense to the applicant. Costs or damages awards might be a disincentive for a person who might be contemplating requesting a review.*[244]

In addition, the Scrutiny Committee identified that the following other factors might support an argument that the exclusion of legal representation 'promotes the effective and even-handed operation of the decision-maker':

- the nature of the particular tribunal
- the cost and lengthening of proceedings associated with legal representation
- whether all and not merely some parties can afford legal representation
- whether matters coming before the tribunal are likely to be practical rather than technical.[245]

Here, it could be argued that a decision being reviewed does not have a 'short term impact'.

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241 Explanatory notes, p 5.

242 Section 102 of the *Public Service Act 1996* (repealed), stated that '(1) A party to an appeal may appear personally or by an agent, but may not be represented by a lawyer', and: '(2) However, a party to an appeal about a promotion decision may be represented by an agent only with the commission's leave'.

243 *Public Sector Management Commission Act 1990* (repealed), s 5.6(2).

244 The OQPC Notebook, p 22, referring to Scrutiny of Legislation Committee, *Alert Digest 1 of 1996*, p 16.

245 The OQPC Notebook, p 29, referring to Scrutiny of Legislation Committee, *Alert Digest 1 of 2002*, pp 21-22; *Alert Digest 8 of 2001*, pp 18-20; *Alert Digest 9 of 2000*, p 6, para 30.

However, as previously noted, public service appeals are intended to be conducted as a simple and informal process with a practical rather than technical focus. In addition, the QIRC's guidance materials on public service appeals advise that:

- appeals are intended to be a generally 'cost free exercise' in which solicitors and barristers are not permitted to represent a party to an appeal in a legal capacity[246]
- the appeal process is often conducted via a series of conferences which 'are not adversarial', but are rather about 'helping the parties to better understand their respective positions and come to an agreeable outcome'[247]
- although legal representatives are excluded from appeal proceedings, there is nothing to present a person from seeking legal advice prior to any appeal proceedings[248]
- if an individual is unsatisfied by the outcome of an appeal, they may seek a review of the decision under the *Judicial Review Act 1991* (JR Act).[249]

It can also be noted that the Scrutiny Committee raised no concerns in relation to this particular feature of the appeals process in its consideration of the Public Sector Management Commission Bill 1990,[250] and only briefly noted this 'limitation' within the context of its consideration of the Public Service Bill 2008.[251]

As highlighted at section 3.4.1.1 of this report, the QLS has acknowledged that cl 9 is consistent with the established process in the PS Act, but also suggests that there is now 'an opportunity for reform to improve the process'.[252] The QLS suggested that an approach which may be more consistent with the principles of natural justice would be to replicate the current provisions of s 530 of the IR Act, which permit legal representation in matters to the QIRC where all parties consent to representation, or where the QIRC grants leave for legal representation in certain circumstances.[253]

Committee comment

The committee notes that the exclusion of legal representation is a longstanding principle of public service appeals which is merely preserved, rather than established, by cl 9 of the Bill, and which reflects the intention that such proceedings be conducted in a simple, informal, cost-effective, and non-adversarial manner.

The committee is satisfied that the Bill's provisions are appropriate in the circumstances, noting also that a person may still access legal advice in relation to their participation in such proceedings, and retains access to review rights under the JR Act with respect to an appeal decision.

However, noting QLS's comments, the committee considers that this may be an area for further consultation and discussion as the department continues to progress its public sector reform agenda.

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246 Queensland Industrial Relations Commission (QIRC), 'Does a public service appeal cost anything?', *Public service appeals,* https://www.qirc.qld.gov.au/public-service-appeals.

247 Registry of the QIRC under the *Public service appeals guide,* version 1, 25 June 2019, p 20.

248 QIRC, 'Does a public service appeal cost anything?', *Public service appeals*, https://www.qirc.qld.gov.au/public-service-appeals.

249 QIRC, 'How do I appeal the outcome of the Commission's decision?', *Public service appeals*, https://www.qirc.qld.gov.au/public-service-appeals.

250 See Scrutiny of Legislation Committee, *Alert Digest 6 of 1996,* pp 13-23, *Alert Digest 7 of 1996*, pp 39-40.

251 See Scrutiny of Legislation Committee, *Alert Digest 7 of 2008,* p 20 (consideration pp 11-20); *Alert Digest 8 of 2008* (consideration pp 59-63).

252 QLS, correspondence dated 12 August 2020, p 2.

253 QLS, correspondence dated 12 August 2020, p 2.

The committee also considers the human rights implications of this matter further at section 5.1.3 of this report.

4.1.1.2 *Administrative power*

Clause 47 makes amendments to s 195 of the PS Act, the effect of which is to provide that decisions by the relevant departmental chief executive in relation to requests under new ss 149 and 149C of the PS Act (inserted by cl 37 of the Bill) will not be the subject of appeal rights.

New s 149 gives the right to request conversion to tenured employment to casual and fixed term temporary employees who have completed one year of continuous employment.

New s 149C gives the right to request appointment at the higher classification level to employees acting in a position at a higher classification level for more than one year.

Section 4(3)(a) of the LSA specifies that whether legislation has sufficient regard to the rights and liberties of individuals depends on whether, for example, the legislation makes rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review.[254]

The OQPC's *FLP Notebook* further states in this regard:

> *Depending on the seriousness of a decision and its consequences, it is generally inappropriate to provide for administrative decision-making in legislation without providing for a review process. If individual rights and liberties are in jeopardy, a merits-based review is the most appropriate type of review.*[255]

In this instance, by virtue of the amendments to s 195, employees will have no access to review rights in relation to a chief executive's decision to:

- refuse a request made pursuant to proposed ss 149 and 149C
- not make a decision in relation to such a request within a 28 day period (which is to be taken as a decision to refuse such a request).[256]

An employee's rights and liberties are affected by denying them a right of appeal in these particular situations.

As noted at Section 3.4.1 of this report, stakeholders raised some concerns about the provisions, which the Together Union described as a possible breach of FLP, questioning whether 'sufficient regard' had been given to individual rights and liberties in this respect.[257]

The explanatory notes state:

> *The Bill addresses this potential issue by ensuring appeal rights are available at the mandatory two-year conversion review and giving full effect to the Government's commitment to maximise employment security in public sector employment to promote best practice workforce management. This is intended to help drive good practice in workforce and resource planning so that employees are provided with regular reviews and communication about their employment status and conversion where appropriate.*[258]

254 LSA, s 4(3)(a).

255 The OQPC Notebook, p 18.

256 Bill, cl 37, new ss 149A(5), 149C(6).

257 Submission 008, p 13.

258 Explanatory notes, p 3.

The department advised that it considered that the application of a two-year threshold for access to appeal rights, as per the current process in the PS Act, is 'appropriate at that point', as the 12-month review has a distinct and separate purpose.[259] That is:

> *The primary purpose of the 12 month review is to help drive good practice in workforce and resource planning so that employees are provided with regular reviews and communication about their employment status and conversion where appropriate. This will in turn assist in more effective and efficient management of two year reviews.*[260]

In addition, the explanatory notes advise that the Bill attempts to 'minimise the impact of this FLP', by introducing 'a requirement for reasons for decision to be issued when a conversion decision is made'.[261]

The reasons for decision:

> *... must include information about the total period the employee has been employed in the department and, for fixed term employees, how many times their engagement has been extended/rolled over. The requirement for reasons for decisions supports sound administrative decision-making, best practice workforce management, and provides transparency and accountability of agency decisions.*[262]

During the public briefing, the department further advised that while it was unable to share expected figures as to applications submitted under the review provisions:

> *… in the projections and estimations that we have done around that and all other aspects of the bill, we fully expect that to be manageable within the departments' existing resource allocation.. [T]here are resources in place at the moment that manage the existing conversion review processes.*[263]

Committee comment

The committee accepts the rationale provided by the department as to the distinction between the availability of appeal rights in relation to 12-month reviews, as per proposed new ss 149 and 149C, compared with two-year reviews. The committee notes that the proposed two-year threshold for access to such a right of appeal is consistent with the current provisions of the PS Act.

The committee also accepts the department's suggestion that the Bill's requirement for the provision of reasons for a decision may help inform reasoned decision-making processes, as well as supporting transparency and accountability on such matters.

However, the committee notes that such transparency and accountability may not be guaranteed in relation to a conversion request for which the chief executive does not make a decision within the required period, which under the proposed amendments would have the same effect as a decision not to approve a request, but without the accompanying requirement for reasons for decision to be provided.

This situation could see the employee potentially being denied the reasoned explanation that they fairly deserve, contrary to the principles of clear communication and effective workforce management the Bill seeks to promote.

The committee considers that these provisions warrant further attention to ensure they give sufficient regard to the rights and liberties of individuals and better reflect the overarching objectives of these important public sector reforms.

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259 DPC, correspondence dated 24 July 2020, p 3.

260 DPC, correspondence dated 24 July 2020, p 3.

261 Explanatory notes, p 3.

262 DPC, correspondence dated 24 July 2020, p 3.

263 DPC, public briefing transcript, Brisbane, 27 July 2020, p 7.

4.1.2 Institution of Parliament

4.1.2.1 Delegation of legislative power

Section 4(2)(b) of the LSA requires legislation to have sufficient regard to the institution of Parliament.

Whether a Bill has sufficient regard to the institution of Parliament depends on whether, for example, the Bill allows the delegation of legislative power 'only in appropriate cases and to appropriate persons'.[264]

Directives

Clauses 21, 36, 37 and 44 all provide for the delegation of legislative power in various circumstances by providing for the PSC Chief Executive to make a directive about various matters.

Specifically:

- clause 21, which inserts new s 25A in the PS Act (relating to the introduction of positive performance management principles), requires the PSC Chief Executive to make a directive about how the positive performance management principles are to be applied
- clause 36, which replaces s 137A of the PS Act (relating to suspension of a public service officer or employee), requires the PSC Chief Executive to make a directive about procedures relating to suspension from duty
- clause 37, which replaces s 148 of the PS Act (relating to employment of fixed term temporary employees), provides that the PSC Chief Executive may make a directive about employing fixed term temporary employees under the section
- clause 44 inserts new s 192A in the PS Act, which requires the PSC Chief Executive to make a directive about:
    - managing disciplinary action
    - procedures for investigating the substance of a grievance or allegation relating to a public service employee's work performance or personal conduct.

In sum, the subject matters to be covered by directives by the PSC Chief Executive are:

- positive performance management
- suspension
- employment of fixed term temporary employees
- employment of casual employees
- review of employment status for fixed term temporary employees and casual employees after one year of continuous employment
- review of employment status for fixed term temporary employees and casual employees after two years of continuous employment
- appointing a public service employee acting in a position to that higher classification level
- disciplinary action and investigating grounds for discipline and grievances.

These clauses mean a significant amount of detail regarding the administration of the matters covered by the PS Act will not be contained in the Act, nor in subordinate legislation, but rather be left to directives made by the PSC Chief Executive. This raises the issue of whether this is an appropriate delegation of legislative power.

[264] LSA, s 4(4)(a).

In considering the appropriateness of such delegations, the OQPC *FLP Notebook* advises that:

> *…the greater the level of potential interference with individual rights and liberties, or the institution of Parliament, the greater will be the likelihood that the power should be prescribed in an Act of Parliament and not delegated below Parliament.*[265]

As noted in section 3.2.1 of this report, stakeholders raised a number of concerns about the breadth of matters to be covered in directives, including citing risks that rules may be established that are contrary to principal legislation and its objectives, with implications for the rights and liberties of public sector employees. This included a concern that directives represent a less accountable approach to governance.

An individual submitter, for example, stated that:

> *A [d]irective can be changed without the level of rigour and consultation required for a legislation change. Directives are open to politically motivated manipulation. Directives can be used as a tool to implement rules which do not reflect the intent of the legislation.*
>
> *…*
>
> *Directives are difficult to enforce.*[266]

Similarly, the AWU argued:

> *… the changes should be made by the insertion of prescriptive directions into the Act and not prescribed in directives which are subordinate to the Act. Provisions in Acts are less likely to be challenged or disregarded therefore it is more likely that the Government's intentions will [be] better achieved should the provisions be contained in the Act.*[267]

The explanatory notes address this potential FLP issue as follows:

> *The delegation of legislative power to directives under the Bill is considered appropriate on the basis that:*
>
> - *it is consistent with existing arrangements under the* Public Service Act 2008*;*
> - *the provision of directives relating to the operational administration of the public service has been a long-standing practice in Queensland's public sector employment laws and Australia more broadly;*
> - *the Bill provides guidance and direction on the specific matters that should be included in directives;*
> - *consultation on new, or amended directives, will occur with all affected stakeholders, including unions representing employees in the public service; and*
> - *a balance between administrative flexibility and ensuring sufficient transparency and accountability is achieved by requiring that a directive may only be made by gazette notice and publication on the relevant agency website.*[268]

[265] The OQPC Notebook, p 145.

[266] Adilia Murabito, submission 002, p 1.

[267] Submission 005, p 2.

[268] Explanatory notes, p 4.

In addition, as noted at section 3.2.1 of this report, the department highlighted that:

> *The Bridgman Review notes that Acts of Parliament are not responsive to rapid change. That is why regulations and other instruments do a lot of important work and are potential vehicles for enhancing responsiveness in employment practice – in both culture and behaviour.*[269]

The department also emphasised that the longstanding practice of engaging directives or other binding policy documents to govern the operational administration of the public service:

> *…reflects that management practice is continually evolving and, whether it be public service directives or private sector human resource policies, these documents need to be able to be readily amended to reflect best practice management.*[270]

Further, the department emphasised that 'to safeguard this delegation from primary legislation, decisions made about individuals under directives are appealable to the QIRC, unless they are excluded through primary legislation'.[271]

Committee comment

The committee notes the Bill provides for the delegation of legislative power by providing for the PSC Chief Executive to make a directive about various matters.

On balance, the committee considers these provisions have sufficient regard for the institution of Parliament. The committee has suggested, however, that the inclusion of broad frameworks in legislation to guide the content of directives where possible is best practice, and worthy of the department's ongoing consideration as reforms are progressed (see section 3.2.1 of this report).

4.2 Explanatory notes

Part 4 of the LSA requires that an explanatory note be circulated when a Bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the Bill.

Committee comment

The committee considers that the explanatory notes are fairly detailed and generally contain the information required by Part 4 and a sufficient level of background information and commentary to facilitate understanding of the Bill's aims and origins.

[269] DPC, correspondence dated 24 July 2020, p 11.

[270] DPC, correspondence dated 24 July 2020, p 11.

[271] DPC, correspondence dated 24 July 2020, p 11.

5 Compliance with the *Human Rights Act 2019*

The portfolio committee responsible for examining a Bill must consider and report to the Legislative Assembly about whether the Bill is not compatible with human rights, and consider and report to the Legislative Assembly about the statement of compatibility tabled for the Bill.[272]

A Bill is compatible with human rights if the Bill:

(a) does not limit a human right, or
(b) limits a human right only to the extent that is reasonable and demonstrably justifiable in accordance with s 13 of the HRA.[273]

The HRA protects fundamental human rights drawn from international human rights law.[274] Section 13 of the HRA provides that a human right may be subject under law only to reasonable limits that can be demonstrably justified in a free and democratic society based on human dignity, equality and freedom.

The committee has examined the Bill for human rights compatibility. The committee brings the following to the attention of the Legislative Assembly.

5.1 Human rights compatibility

In her statement of compatibility on the Bill, the Premier and Minister for Trade identified the following human rights under the HRA as relevant to the Bill:

- taking part in public life (s 23)
- privacy and reputation (s 25).[275]

The committee also considered the Bill's interaction with the right to recognition and equality before the law (s 15), and the right to a fair hearing (s 41).

5.1.1 Taking part in public life

Section 23 of the HRA affirms the right of all persons to contribute to and exercise their voice in relation to the public life of the State, including by contributing to the political process and public governance.

This right has been interpreted by the United Nations Human Rights Commission as providing a right of access, on general terms of equality, to positions in the public service and in public office.[276]

The statement of compatibility acknowledges that cl 32 of the Bill has implications for the equality of rights of access in this respect, to the extent that it preserves some limitation on the persons who are eligible to be employed in the public sector.[277]

The statement of compatibility explains the Bill's provisions:

> *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*

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272 *Human Rights Act 2019* (HRA), s 39.

273 HRA, s 8.

274 The human rights protected by the HRA are set out in ss 15 to 37 of the Act. A right or freedom not included in the Act that arises or is recognised under another law must not be taken to be abrogated or limited only because the right or freedom is not included in the HRA or is only partly included. See HRA, s 12.

275 Statement of compatibility, p 2.

276 Statement of compatibility, p 2.

277 Statement of compatibility, p 2.

who have a right to work in Australia but may not have permanent residency, such as refuges and asylum seekers.

The purpose of the citizenship requirement in the Bill is to remove these requirements and ensure that the PS Act does not limit permanent employment to Australian citizens only. It also clarifies that those who have a lawful right to work in Australia can be employed on tenure in the Queensland Public Service.[278]

In this regard, the statement of compatibility advises that the proposed amendments can therefore be seen to reduce existing limitation and further the objects of the HRA, 'as they promote the right to take part in public life by ensuring equality of eligibility and access to the public service'.[279]

5.1.2 Privacy and reputation

Section 25 of the HRA protects the individual from interferences and attacks upon their privacy, family, home, correspondence (written and verbal) and reputation. The right to privacy is broad and may include matters such as personal information, data collection and correspondence. Only lawful and non-arbitrary intrusions may occur this right.

Clause 29 of the Bill potentially enlivens s 25 of the HRA in that:

- the powers of the Special Commissioner or PSC Chief Executive under the Bill extend to interviewing a public service employee
- the powers of the Special Commissioner or PSC Chief Executive under the Bill extend to interviewing any persons with 'relevant information'
- the chief executive of a public service office, and anyone employed in that office, are required to assist the Special Commissioner or PSC Chief Executive in their inquiry.[280]

The statement of compatibility acknowledges that these provisions may limit or otherwise affect the right to privacy and reputation, as they would empower the Special Commissioner to ask any person for information which is relevant to an inquiry regardless of the person's status in the public service, and to require public service employees to answer questions.[281]

In addition, the statement of compatibility advises that the purpose of limiting the right to privacy and reputation is to 'ensure the Special Commissioner is equipped with the appropriate powers to perform their functions independently and to report with appropriate protection and immunity'.[282] Establishing the Special Commissioner, it is noted, 'is a key recommendation of the Bridgman Review [Report]', and ensuring Special Commissioner is appropriately empowered to undertake the functions of the office, is 'integral to furthering the purposes of the Bill to ensure a responsive, consistent and reliable public service'.[283]

In particular, the limitations by the proposed powers are identified as necessary to enable the Special Commissioner to, 'gather intelligence and undertake reports into how the Queensland Public Service can be best positioned to ensure a culture of continuous improvement and responsiveness to a dynamic and changing world'.[284]

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278 Statement of compatibility, pp 2-3.

279 Statement of compatibility, p 3.

280 Statement of compatibility, p 3.

281 Statement of compatibility, p 3.

282 Statement of compatibility, p 4.

283 Statement of compatibility, p 4.

284 Statement of compatibility, p 4.

The statement also determines that the proposed amendments represent the 'least restrictive' means by which to achieve the policy intent of the providing for an appropriately empowered Special Commissioner, and states that the Bill contains 'sufficient safeguards regarding the purpose for which information can be disclosed and used':

> *For example, the Bill provides that an employee does not need to answer a question if it might incriminate the employee in regard to a criminal offence. It also makes clear that the employee would have a claim of privilege against self-incrimination in relation to a criminal office if they were asked a question during court action.*
>
> *Additionally, the risks to a person's privacy and reputation are limited given the circumstances and purposes for which the Bill permits information can be disclosed and used.*[285]

Further, the statement concludes:

> *Any potential limitation on the human right of privacy and reputation arising from the Bill is considered to be outweighed by the net benefit of having a Special Commissioner that will act independently to ensure efficient and appropriate operation of the Queensland public service.*[286]

5.1.3 Recognition and equality before the law and the right to a fair hearing

While not recognised in the statement of compatibility, the committee identified that the Bill's exclusion of legal representation from public service appeals also raises potential human rights issues.

Currently, s 529(1) of the IR Act states that a party to proceedings, or a person ordered or permitted to appear or to be represented in proceedings, may be represented by:

- an agent appointed in writing, or
- if the party is an organisation, an officer or member of that organisation.

Clause 7 of the Bill would amend s 529 of the IR Act to make it operate subject to a new s 530A(4), which states that 'a party to an appeal about a promotion decision may be represented by an agent only with the leave of the commission'.

At present, s 530 of the IR Act regulates the right to legal representation in the QIRC. Legal representation is only available where the parties consent, the court gives leave, or the proceedings are for the prosecution of an offence.

Clause 8 inserts a new subsection (1A) before s 530(1) which excludes 'public service appeals' from the operation of s 530. Further, cl 9, which inserts a new s 503A into the IR Act, confirms that a party to a public service appeal may appear personally or by an agent, but that:

- a party may not be represented by a practising and instructed lawyer (s 530A(3)(b)), and
- a party to an appeal about a promotion decision may be represented by an agent only with the leave of the QIRC (s 530A(4)).

These provisions potentially impinge on the right to equal protection of the law in s 15, and the right to a fair hearing in s 31 of the HRA.

Specifically, s 15(3) of the HRA specifies that 'every person has the right to equal and effective protection against discrimination'.

The Supreme Court of Victoria has recognised that the right to equality before the law may require a court to provide assistance to a self-represented litigant.[287]

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[285] Statement of compatibility, p 4.

[286] Statement of compatibility, p 5.

[287] *Matsoukatidou v Yarra Ranges Council* [2017] VSC 61.

Further, s 31 of the HRA states:

Fair hearing

(1) A person charged with a criminal offence or ***a party to a civil proceeding has the right to have the*** *charge or* ***proceeding decided*** *by a competent, independent and impartial court or tribunal* ***after a fair*** *and public* ***hearing****.*

(2) ***However, a court*** *or tribunal* ***may exclude*** *members of media organisations,* ***other persons*** *or the general public* ***from all or part of a hearing in the*** *public interest or the* ***interests of justice****.*

(3) All judgments or decisions made by a court or tribunal in a proceeding must be publicly available.

(Emphasis added)

The European Court of Human Rights, in its recently published Guide to Article 6, has said [37] that:

… the State cannot rely on an applicant's status as a civil servant to exclude him or her from the protection afforded by Article 6 unless two conditions are fulfilled. Firstly, domestic law must have expressly excluded access to a court for the post or category of staff in question. Secondly, the exclusion must be justified on "objective grounds in the State's interest" (Vilho Eskelinen and Others v. Finland [GC], § 62). The two conditions of the Vilho Eskelinen test must be fulfilled in order for the protection of Article 6 § 1 to be legitimately excluded (Baka v. Hungary [GC], § 118).

At paragraph [40] of the guide, the European Court of Human Rights states:

With regard to the second criterion, it is not enough for the State to establish that the civil servant in question participates in the exercise of public power or that there exists a special bond of trust and loyalty between the civil servant and the State, as employer. The State must also show that the subject matter of the dispute is linked to the exercise of State power or that it has called into question the special bond of trust and loyalty between the civil servant and the State (Vilho Eskelinen and Others v. Finland [GC (63235/00)], § 62). Thus, there can in principle be no justification for the exclusion from the guarantees of Article 6 of ordinary labour disputes, such as those relating to salaries, allowances or similar entitlements, on the basis of the special nature of the relationship between the particular civil servant and the State in question…

In *R.P. and Others v United Kingdom* (38245/08), additionally, the European Court of Human Rights stated:

61. The Court reiterates that the Convention is intended to guarantee practical and effective rights. This is particularly so of the right of access to a court in view of the prominent place held in a democratic society by the right to a fair trial (see Airey v. Ireland, 9 October 1979, § 24, Series A no. 32 and Steel and Morris v. the United Kingdom, no. 68416/01, § 59, ECHR 2005-II).

62. Article 6 § 1 leaves to the State a free choice of the means to be used in guaranteeing litigants the above rights. The institution of a legal-aid scheme constitutes one of those means but there are others, such as for example simplifying the applicable procedure (see Airey v. Ireland, cited above, pp. 14-16, § 26; and McVicar v. the United Kingdom, no. 46311/99, § 50, ECHR 2002-III).

63. However, the Court recalls that the right of access to the courts is not absolute but may be subject to limitations; these are permitted by implication since the right of access 'by its very nature calls for regulation by the State, regulation which may vary in time and in place according to the needs and resources of the community and of individuals' (Golder v. the United Kingdom, 21 February 1975, § 19, quoting the 'Belgian Linguistic' judgment of 23 July 1968, Series A no. 6, p. 32, para. 5). In laying down such regulation, the Contracting States enjoy a certain margin of appreciation. Whilst the final decision as to observance of the Convention's requirements rests

> *with the Court, it is no part of the Court's function to substitute for the assessment of the national authorities any other assessment of what might be the best policy in this field (Ashingdane v. the United Kingdom, judgment of 28 May 1985, Series A no. 93, p. 24, para. 57).*
>
> *64. Nonetheless, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (see the above-mentioned Golder and 'Belgian Linguistic' judgments, ibid., and also Winterwerp v. the Netherlands, 24 October 1979, §§ 60 and 75, Series A no. 33). Furthermore, a limitation will not be compatible with Article 6 § 1 if it does not pursue a legitimate aim and if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be achieved.*

As the United Nations (UN) Human Rights Committee observed in the *General Comment No. 32 on Article 14 (U.N. Doc. CCPR/C/GC/32)*, which provides the inspiration for s 31 of the HRA:

> *… [t]he availability or absence of legal assistance often determines whether or not a person can access the relevant proceedings or participate in them in a meaningful way.*

As previously noted, neither the statement of compatibility, nor the explanatory notes (with respect to FLPs) specifically provide the purpose of s 530A. In terms of the right to a fair hearing enshrined in s 31, further, the statement of compatibility only states generally that:

> *… it is considered that the proposed amendments to the IR Act are compatible with the HR Act as they protect the right to a fair hearing by ensuring appeals are heard by an independent tribunal established to conciliate and arbitrate industrial matters in Queensland independent of the executive and legislative branches of government.*[288]

It can be noted, however, that the restriction on the availability of legal representation in proceedings contemplated by s 530A essentially service to replicate and extend an existing limitation to this effect, as set out in s 204 of the PS Act; and equivalent provisions contained in its repealed, predecessor legislation in the *Public Service Act 1996* (and before that, in the *Public Sector Management Commission Act 1990*).[289]

Today, however, in contrast to the time at which those policies were established, the proposed s 530A needs to be appraised in light of the HRA.

5.1.3.1 The relationship between the limitation and its purpose

In contemplating the relationship between this human rights limitation and its purpose, it is necessary to consider the role and functions of the QIRC. As established by ss 447 and 448 of the IR Act, which set out the functions and jurisdiction of the QIRC, it can be noted that the QIRC is a court of record that hears and decides questions of law and questions involving the rights and duties of a person in relation to industrial matters.

Bearing this jurisdiction in mind, a legitimate question arises as to whether a person's right to a fair hearing is compromised if the opportunity of being legally represented depends on leave of the court or the consent of the other party.

[288] Statement of compatibility, p 3.

[289] *Public Sector Management Commission Act 1990* (repealed), s 5.6.

Considering this question within the context of public service appeals, people without legal representation might not reasonably be expected to:

- understand that a point of law had arisen in proceedings in the QIRC
- understand what their rights and duties are in proceedings
- know whether to seek leave or consent to have legal representation in proceedings.

In any of these circumstances, a lack of understanding may result in unfairness for the person.

The explanatory rationale for s 204 of the PS Act (and, correlatively, the proposed s 530A of the IR Act) bears reconsideration, in the context enshrined by s 31 of the HRA. For example, it could be questioned as to whether people who are legally qualified to appear as agents for parties in appeals to the commission, but exclude practising lawyers.

At present, the Bill contemplates that legal representation can be made available by consent of the parties or by leave of the QIRC. However, as noted above, parties who are not legally represented may not understand when or why consent or leave should be sought.

It is noted that judges of the QIRC can, on their own motion, advise a party to proceedings in the commission to seek leave to secure legal representation (pursuant to s 451(1) of the IRA). As an aspect of the general duty to ensure a fair trial, the courts have a responsibility to provide certain assistance to self-represented persons (*Pamamull v Albrizzi (Sales) Pty Ltd* [2011] VSCA 260, [101]-[103] (Neave, Harper and Hansen JJA); *Tomasevic v Travaglini* (2007) 17 VR 100, 129-30 [138]-[142] (Bell J). However, as the Chief Justice of Australia noted in *R v Nudd* (2006) 225 ALR 161 at 166, the capacity of the judge to intervene is limited by the obligation of neutrality:

> *… the adversarial system does not require that the adversaries be of equal ability. The system does its best to provide a level playing field, but it cannot alter the fact that some players are faster, or stronger, or more experienced than others. Opposing counsel may be mismatched, but this does not make the process relevantly unfair. Judges can do their best to minimise the effects of differences between the abilities of opposing counsel, but their capacity to intervene is limited by their own obligations of neutrality. Accreditation requirements impose basic standards of professional competence, but beyond those there are large differences in individual levels of competence.*

The obligation of neutrality, in turn, stems from the constitutional requirement that all courts must be and appear to be independent and impartial (*North Australian Aboriginal Legal Aid Service v Bradley* (2004) 218 CLR 146, 163).

In light of these issues, it is difficult to conclude that the presumptive exclusion of practising lawyers from proceedings in the commission, including in promotion appeals, could be characterised as an exclusion that is in the 'interests of justice' for the purposes of s 31(2) of the HRA.

For all of these reasons, it could be argued that the limitation on the right of a person to choose to be legally represented in the proposed s 530A could be seen as incompatible with the human rights enshrined in s 31 of the HRA, given that the commission is a court that has the power to make binding determinations of law.

Whether there are less restrictive and reasonably available ways to achieve the purpose

Judges of the QIRC have discretionary powers at their disposal to ensure that practising lawyers representing people in the commission do so in a way that is consistent with the requirement imposed on the commission to 'avoid unnecessary technicalities and facilitate … the fair and practical conduct of proceedings under this Act'.[290]

[290] *Industrial Relations Act 2016*, ss 451-456.

In addition to the power to assist self-represented litigants noted above, these powers include a power to order costs.[291]

However, ordinarily costs follow the event, and this may provide a disincentive to an appeal by an individual against a government department (*Bateman's Bay Local Aboriginal Land Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 297, 263).

The Bridgman Review was concerned with, among other things, the achievement of justice for people making public service appeals, and an approach that places an appellant at the risk of an adverse costs order if they lose may be inimical to justice in the usual case, where there is certain to be a mismatch of resources.

However, in advice received by the committee, it was highlighted that s 570(2) of the *Fair Work Act 2009* (Cth) provides a model of how the right to a fair hearing in a legal case before the QIRC can be balanced against the need to ensure that the QIRC can fulfil its functions in a way that ensures avoidance of unnecessary technicalities and facilitates the fair and practical conduct of proceedings. Under that provision, parties bear their own costs, but costs can be ordered against a party that institutes proceedings vexatiously or without reasonable cause; if the court is satisfied that the party's unreasonable act or omission caused the other party to incur the costs; or the court is satisfied of both of the following:

- that the party unreasonable refused to participate in a matter before the Fair Work Commission
- the matter arose from the same facts as the proceedings.

5.1.3.2 The importance of the purpose of the limitation

As previously noted (see section 4.1.1.1), public service appeals are intended to be conducted as a simple and informal process with a practical rather than technical focus. In addition, the QIRC's guidance materials on public service appeals advise that:

- appeals are intended to be a generally 'cost free exercise' in which solicitors and barristers are not permitted to represent a party to an appeal in a legal capacity[292]
- the appeal process is often conducted via a series of conferences which 'are not adversarial', but are rather about 'helping the parties to better understand their respective positions and come to an agreeable outcome'[293]
- although legal representatives are excluded from appeal proceedings, there is nothing to present a person from seeking legal advice prior to any appeal proceedings[294]
- if an individual is unsatisfied by the outcome of an appeal, they may seek a review of the decision under the *Judicial Review Act 1991* (JR Act).[295]

[291] See further, United Nations Human Rights Committee Communication No. 779/1997, Äärelä and Näkkäläjärvi v. Finland, para. 7.2.

[292] QIRC, 'Does a public service appeal cost anything?', *Public service appeals,* https://www.qirc.qld.gov.au/public-service-appeals.

[293] Registry of the QIRC under the *Public service appeals guide,* version 1, 25 June 2019, p 20.

[294] QIRC, 'Does a public service appeal cost anything?', *Public service appeals,* https://www.qirc.qld.gov.au/public-service-appeals.

[295] QIRC, 'How do I appeal the outcome of the Commission's decision?', *Public service appeals,* https://www.qirc.qld.gov.au/public-service-appeals.

Noting this, it could further be supposed that:

- lawyers may be to some extent responsible for the 'needless technicalities' contemplated by s 447(2)(b) of the IR Act, and that, therefore, they should be excluded in the interests of justice (as per s 31(2) of the HRA)
- the discretion of the QIRC to provide assistance to litigants in person is sufficient in the circumstances
- public service appeals are, by their nature, concerned with factual material bearing on the merit of a candidate for promotion, and therefore unlikely to give rise to legal questions, and
- legally qualified people who are not lawyers have served a valuable function under s 204 of the PS Act, and the extension of this service to public service appeals under s 530A is merely the extension of a policy that works and works well.

With respect to the first of these points, the High Court has said (albeit *obiter*) that litigation conducted by litigants-in-person 'is usually less efficiently conducted and tends to be prolonged' (*Cachia v Hanes* (1994) 179 CLR 403, 415).[296]

As to whether public service appeals, by their nature, are concerned with factual material bearing on the merit of a candidate for promotion, and therefore unlikely to give rise to legal questions, it can be identified that legal questions can and do arise in public service promotion appeals: for example, see *Public Service Board v Osmond* (1986) 159 CLR 656. Also, the power of the commission to make binding determinations of law must be borne in mind.

5.1.3.3 The importance of preserving the human right

While the right to a fair hearing does not apply in every tribunal, it certainly applies in a court that has the power to make binding determinations of law.[297]

The QIRC can be readily contrasted with, say, the Commonwealth Administrative Appeals Tribunal, which does not have power to make a binding determination of law.

5.1.3.4 Relevant precedents from Queensland or other jurisdictions

Section 31 of the HRA is similar to s 21 of the *Human Rights Act 2004* (ACT), which states:

Fair trial

(1) ***Everyone has the right to have*** *criminal charges, and* ***rights and obligations recognised by law, decided by a*** *competent, independent and impartial* ***court*** *or tribunal* ***after a fair and public hearing****.*

(2) However, the press and public may be excluded from all or part of a trial—

(a) to protect morals, public order or national security in a democratic society;

or

(b) if the interest of the private lives of the parties require the exclusion;

or

(c) if, and to the extent that, the exclusion is strictly necessary, in special circumstances of the case, because publicity would otherwise prejudice the interests of justice.

[296] See also *Chopra v Department of Education and Training (Review and Regulation)* [2019] VCAT 174.

[297] *R v Davison* (1954) 90 CLR 353, 368-70.

(3) But each judgment in a criminal or civil proceeding must be made public unless the interest of a child requires that the judgment not be made public.

In *Commonwealth v Davies Samuel Pty Ltd* [No 3] [2008] ACTSC 76, Refshauge J rejected the argument that s 21 of the *Human Rights Act 2004* (ACT) conferred a positive right to legal representation in all matters, but acknowledged that a right may arise where 'the absence of legal representation will effectively abrogate the Applicant's access to a court': [39].

In *Commissioner for Social Housing v Hutchings & Gottschalk-Krutsky* [2016] ACAT 88, [89], Senior Member Robinson explained, citing Justice Refshauge's analysis in *Commonwealth v Davies Samuel Pty Ltd* [No 3] [2008] ACTSC 76, which in turn referred to the decision of the European Court of Human Rights in *Golder v United Kingdom* (1975) 1 EHRR 524 at [28]-[36] that the key issue is 'the right to effectively participate in proceedings' which may be 'valueless without access to legal advice'.

Committee comment

The committee considers that cl 9, which inserts a new s 530A into the IR Act, is arguably incompatible with ss 31 and 15 of the HRA, to the extent that it may deprive a party of a fair hearing and the equal protection of the law by depriving that person of legal representation unless they have consent or leave.

As previously noted in section 3.4.1.1 of this report, the issue of legal representation in QIRC proceedings was raised by the QLS after the department had provided its consideration and formal response to issues raised in submissions to the inquiry.

The committee suggests the department provide further consideration to the provisions of the IR Act in regards to legal representation as part of its consideration of stage 2 public sector reforms.

5.2 Statement of compatibility

Section 38 of the HRA requires that a member who introduces a Bill in the Legislative Assembly must prepare and table a statement of the Bill's compatibility with human rights.

A statement of compatibility was tabled with the introduction of the Bill, as required by s 38 of the HRA.

Committee comment

The committee considers that the statement of compatibility generally contains a sufficient level of information to facilitate understanding of the Bill in relation to its compatibility with human rights.

However, the committee notes that the statement did not identify the human rights issue raised by the Bill with respect to its provision for the exclusion of legal representation for public service appeals.

Appendix A – Submitters

Sub #	Submitter
001	Paul Goulevitch
002	Adilia Murabito
003	Queensland Nurses and Midwives' Union
004	United Workers Union
005	Australian Workers' Union
006	Maurice Blackburn Lawyers
007	Queensland Council of Unions
008	Together Queensland Industrial Union of Employees
009	Name withheld

Appendix B – Officials at public departmental briefing

Department of the Premier and Cabinet

- Mr Shannon Cook, Deputy Commissioner, Public Sector Reform Office
- Ms Patricia Rooney, Director, Public Sector Reform Office

Appendix C – Witnesses at public hearing

Together Union

- Mr Alex Scott, Branch Secretary
- Ms Kate Flanders, Assistant Secretary
- Mr Alex Smith, Acting Director, Industrial Services
- Mr James Swan, Vice President, Public Sector Division

Queensland Council of Unions

- Mr Michael Clifford, General Secretary
- Dr John Martin, Research and Policy Officer

United Workers Union

- Ms Rebecca Keys, Public Sector Coordinator
- Mr Jared Marks, Industrial/Legal Officer

Maurice Blackburn Lawyers

- Mr Giri Sivaraman, Principal, Maurice Blackburn Employment and Industrial Law Service
- Ms Paloma Cole, Lawyer, Maurice Blackburn Employment and Industrial Law Service