

# Public Service and Other Legislation Amendment Bill 2020

## Explanatory Notes

### FOR

## Amendments to be moved during consideration in detail by The Honourable Grace Grace MP

### Title of the Bill

The short title of the Bill is the *Public Service and Other Legislation Amendment Bill 2020*.

### Policy objectives of the Amendments and the reasons for them

On Friday 28 August 2020, the Education, Employment and Small Business Committee (the Committee) released Report No.34 following its consideration of the *Public Service and Other Legislation Amendment Bill 2020* (the Bill).

The Committee recommended:

1. the Bill be passed; and
2. 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*.

The proposed amendments respond directly to Recommendation 2 of the Committee. Additionally, amendments of a minor and technical nature are proposed to provide for effective implementation of the Bill. Ongoing consultation with public sector employment stakeholders also identified amendments required to further enhance fairness and accountability in the legislation. These are contained in the proposed amendments.

The objectives of these amendments are outlined below.

#### Amendment of the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020*

The objectives of the amendments are to:

- clarify certain aspects of fire protection work that cannot be excluded by regulation.

### *Definition of 'fire protection work'*

The Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020 (BIFOLA Act) was passed by the Legislative Assembly on 15 July 2020 and received assent on 23 July 2020. The BIFOLA Act amends several Acts, including the Queensland Building and Construction Commission Act 1991 (QBCC Act).

In an amendment made during consideration in detail of the BIFOLA Act, the definition of 'fire protection work' under the QBCC Act was amended to reflect recommendations of the Transport and Public Works Parliamentary Committee and facilitate the introduction of a new modernised and streamlined fire protection licensing framework. This amendment is to commence on 1 May 2021.

As part of the changes to this definition, a regulation-making power was introduced to allow certain aspects of fire protection work to be excluded from requiring a Queensland Building and Construction Commission licence. These types of exclusions are considered necessary to prevent duplication in licensing, for example work performed by licensed electricians and registered professional engineers, and address low risk or minor work.

Parameters were placed around this regulation-making power to ensure certain aspects of fire protection work cannot be excluded by regulation. They include the installation, restoration, repair and maintenance of certain aspects of fire protection equipment. However, the inspection, testing or certification of certain aspects of fire protection equipment was inadvertently omitted during drafting.

The independent inspection, testing and certification of fire protection work is critical to ensure that the work has been undertaken in accordance with relevant legislation, codes and standards, and to protect public safety. As a result, it is important that this work be carried out by appropriately qualified and licensed individuals.

### Amendment of the *Public Service Act 2008*

The Bill amends the *Public Service Act 2008* (the PS Act) 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 Mr Peter Bridgman, which was commissioned 'to ensure Queenslanders have the most responsive, consistent and reliable public service possible'.

Amendments to the Bill are required to address Recommendation 2 of the Committee to enhance accountability and fairness in decision making for conversion reviews under new section 149A and 149C. The Committee noted that where a chief executive does not make a decision about a conversion review in the required timeframe, the default position is that the request has been denied and suggested that fairness and transparency should be improved in such circumstances.

In response to these concerns, amendments are proposed to require that in making a decision in relation to conversion reviews, a chief executive must have regard to previous conversion decisions made about the employee, including the reasons for those decisions. This will also include where a decision has not been made in the time period and is taken to be a decision not to convert (a deemed decision). Consideration of previous conversion decisions will be required to be included in the notice provided to an employee in relation to a conversion review where a decision has been made not to convert their employment.

These amendments are supported by policy changes to the temporary, casual and higher duties directives which will enable the Public Service Commission to request agencies to report on the number of known deemed decisions in relation to conversion reviews, including under proposed new sections 149A and 149C.

Together, these changes will improve fairness and transparency in relation to decision making for conversion reviews under new section 149A and 149C by promoting accountability in decision making and encouraging chief executives to actively track and review the number of deemed decisions in their agency and the effectiveness of workforce and resource planning in respect of conversion reviews.

A primary objective of the Bill is to drive more effective and consistent application of the existing commitment to maximise employment security. Consultation with public sector employment stakeholders, including through the Committee process, has identified provisions of the Bill which should be clarified to further this intent of the legislation and ensure it is successfully achieved. This includes amendments to definitions and provisions to:

- clarify transitional arrangements for conversion of casual employees;
- clarify that the application of the new administrative inquiry provisions in the Bill which relate to the Minister's power to inquire into the functions of public service offices, mirror the application of previous provisions relating to management reviews;
- clarify that the only matter a chief executive can have regard to when determining if the conversion review is viable or appropriate is the 'genuine operational requirements' of a department;
- clarify the funding criteria for when engagement of a permanent employee is not viable or appropriate;
- provide consistency in application of the merit principle as an eligibility requirement in conversion reviews; and
- provide that higher duties conversion review decisions after two years are appealable.

The PS Act will also be amended to ensure the Office of the Work Health and Safety (WHS) Prosecutor is recognised as a Public Service Office and the WHS Prosecutor as its head. This will ensure the WHS Prosecutor has clear chief executive powers under the PS Act, consistent with other similarly established offices.

#### Amendment of the *Work Health and Safety Act 2011*

It is proposed to amend the *Work Health and Safety Act 2011* (WHS Act) to ensure the WHS Act expresses a clear legislative intent for right of entry provisions in the WHS Act to encompass entry to inquire into suspected electrical safety contraventions under the *Electrical Safety Act 2002* (ES Act). This will ensure the WHS Act clearly reflects the government's original and ongoing policy intention to allow WHS entry permit holders to inquire into suspected contraventions relating to health and safety that include matters pertaining to electrical safety. A transitional provision will clarify that this applies to all electrical safety right of entry events since the WHS Act commenced.

## **Achievement of policy objectives**

### Amendment of the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020*

Amendments in the Bill will ensure that the inspection, testing and certification of certain aspects of fire protection work may only be prescribed by regulation under section 30CA of the QBCC Act under certain circumstances. This will improve the clarity of licensing requirements in Queensland and further strengthen and uphold the integrity of the fire protection licensing framework.

### Amendment of the *Public Service Act 2008*

The amendments support the Bill to achieve its policy objectives of providing an effective and proportionate legislative foundation that will foster a responsive, consistent, and reliable public service. The amendments achieve this by:

- enhancing the fairness and transparency of provisions which relate to the decision making of a chief executive in conversion reviews;
- improving the clarity of the provisions and their intended operation, for example by confirming what matters a chief executive must have regard to in making a conversion decision;
- improving the accountability of decision making under the legislation, for example by confirming appeal rights for higher duties conversion reviews after 2 years of continuous employment; and
- clarifying transitional arrangements to ensure effective implementation of the Bill.

Amending Schedule 1 of the PS Act (Public Service Offices and their heads) will enable the PS Act and other relevant Acts to apply to the Office of the WHS Prosecutor as if the office were a department and the head of the office were its chief executive. This will formalise the WHS Prosecutor's chief executive functions and powers under the PS Act.

### Amendment of the *Work Health and Safety Act 2011*

Amendment of the WHS Act, Part 7 will clarify the relationship between the WHS Act and the ES Act. The amendment to the WHS Act will insert explicit reference to the ES Act, to remove any ambiguity that may have arisen as to the relationship between the WHS Act provisions on right of entry and the ES Act.

## **Alternative ways of achieving policy objectives**

There are no alternative ways of achieving the policy objectives than through legislative amendment.

## **Estimated cost for government implementation**

There are no anticipated additional costs to government in implementing the amendments.

## Consistency with fundamental legislative principles

### Amendment of the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020*

This amendment is consistent with fundamental legislative principles.

### Amendment of the *Public Service Act 2008*

The proposed amendments to the PS Act, including those that formalise the establishment of the Office of the WHS Prosecutor are consistent with fundamental legislative principle.

### Amendment of the *Work Health and Safety Act 2011*

The amendment to the WHS Act regarding right of entry is consistent with Fundamental Legislative Principles (FLPs). The legislative amendment clarifies the relationship between the WHS Act and the ES Act in relation to right of entry. While the content of the provision being amended confers power to enter premises, that power is subject to strict requirements, including a permit issued by an industrial registrar as well as various preconditions being met under the WHS Act (WHS Act sections 116-137; Legislative Standards Act 1992, section 4(3)(e)). The amendment intends to remove any possible doubt as to whether the basis for entry – namely, suspected work health and safety contraventions – encompasses electrical safety contraventions. This aim advances the FLP of ensuring that legislation is unambiguous and drafted in a sufficiently clear and precise way (Legislative Standards Act 1992, section 4(3)(k)).

The transitional provision included in the amendments to the WHS Act ensures that the presumed interpretation to date applies “at the relevant time”. That is to say, it is applied retrospectively. The Legislative Standards Act 1992, section 4(3)(g) provides an example of an FLP in legislation having sufficient regard to “adversely affect[ing] rights and liberties, or impos[ing] obligations, retrospectively”. Given that stakeholders have always proceeded on the basis of the interpretation that the amendment now makes explicit in the WHS Act to avoid confusion, it is considered that the transitional provision does not adversely impacts on rights and liberties.

## Consultation

### Amendment of the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020*

Industry stakeholders, such as the National Fire Industry Association, have advocated for the amendment to this definition to protect the integrity of the proposed new fire protection licensing framework.

### Amendment of the *Public Service Act 2008*

The amendments respond to the recommendation of the Committee and to issues identified by submissions during the Committee process. In particular, stakeholders provided input through written feedback and the public hearing on the Bill.

The amendment to the PS Act to recognise the Office of the WHS Prosecutor as a public service office and the WHS Prosecutor as its head is an internal public sector management matter. As such, consultation outside the public service is not required.

#### Amendment of the *Work Health and Safety Act 2011*

Community consultation was not considered necessary given the nature of the changes.

There has been extensive industry consultation, including with the Ministerial Construction Council (MCC), throughout the development of legislative changes relating to the new licensing framework.

## **Consistency with legislation of other jurisdictions**

#### Amendment of the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020*

The amendment is specific to Queensland and, while complementary to building and construction legislation of other jurisdictions, do not form part of a nationally harmonised legislative scheme.

#### Amendment of the *Public Service Act 2008*

The amendments to the Bill in respect of the PS Act are specific to the State of Queensland, and the extent to which it is uniform with or complementary to the Commonwealth or another state is not relevant in this context. However, approaches in other jurisdictions were taken into consideration in the development of amendments to the Bill.

The amendment to the PS Act in relation to the Work Health and Safety Prosecutor is not inconsistent with legislation in other jurisdictions.

#### Amendment of the *Work Health and Safety Act 2011*

Queensland's WHS Act was passed in 2011 following a detailed process of national harmonisation that led to the creation of a national model WHS Act. However, Queensland's legislative framework is unique among Australian jurisdictions in having a standalone Act that deals with electrical safety, the ES Act.

The existence of this separate Act for electrical safety can present challenges in terms of ensuring legislative duplication is avoided and gaps in coverage are not inadvertently created. For this reason, it can be necessary for Queensland's WHS Act to make minor departures from the national model WHS laws. In the case of the present amendment, this is to ensure that Queensland's laws have the same substantive effect as the laws of other jurisdictions, by ensuring that there is no real or perceived gap in coverage of right of entry laws in the case of electrical safety matters.

# Notes on provisions

*Amendment 1* inserts new Part 1A after clause 1. Section 1A provides that this part amends the BIFOLA Act, which ultimately amends the QBCC Act.

Section 1B amends section 110A of the BIFOLA Act, which inserted new 30CA of the QBCC Act. The definition of 'fire protection work' is amended to further limit the regulation-making power in relation to the inspection, testing or certification of certain fire protection equipment. This will correct a drafting error and give effect to the original intent of the provision.

*Amendment 2* amends clause 29 of the Bill to provide for the application of new Chapter 3, Part 7 (Administrative Inquiries) to public service offices. The amendment provides that 'public service office' has the meaning provided for in section 35 of the Act, thereby aligning the application of the new administrative inquiry powers with the management review powers that they supersede.

*Amendment 3* amends clause 37 of the Bill (Replacement of Chapter 5, Part 5 (General and temporary employees)) to provide that employment of a person on tenure may not be viable or appropriate if the employment is for the purpose of filling a position for which funding is unlikely or unknown.

*Amendment 4* amends clause 37 of the Bill (Replacement of Chapter 5, Part 5 (General and temporary employees)) to amend the example provided in the Bill of when employment of a person on tenure may not be viable or appropriate if the employment is for the purposes of filling a position for which funding is unlikely or unknown. The clause provides an example that employment may not be viable or appropriate where it relates to performing work for which funding is subject to change or is not expected to be renewed.

*Amendment 5* amends clause 37 of the Bill (Replacement of Chapter 5, Part 5 (General and temporary employees)) to provide for how the continuous employment of an employee is to be worked out for the purposes of determining whether an employee has been continuously employed in a department for more than 1 year. In working out continuous employment, all periods of authorised leave are to be included and the person is to be regarded as continuously employed even if there are periods during which the person is not employed in the department, if the periods of non-employment in the department total 6 weeks or less in the year occurring immediately before the time when the person's continuous employment is being worked out.

*Amendment 6* amends Clause 37 of the Bill (Replacement of Chapter 5, Part 5 (General and temporary employees)) to omit, as criteria for considering whether to convert an employee to tenure, the factors set out in section 148 of the Bill that indicate that employment on tenure may not be viable or appropriate. The effect of the amendment is that for a conversion decision under section 149A or 149B, a department's chief executive must consider

- whether there is a continuing need for someone to be employed in the person's role, or a role which is substantially the same as the persons role, and
- whether the person is eligible for appointment having regard to the merit principle, and
- any requirements in an industrial instrument.

If these matters are satisfied, the chief executive must decide to offer to convert the person's employment unless it is not viable or appropriate having regard to the genuine operational requirements of the department.

*Amendment 7* amends clause 37 of the Bill (Replacement of Chapter 5, Part 5 (General and temporary employees)) and is a minor administrative amendment to correct a cross reference in section 149A.

*Amendment 8* amends clause 37 of the Bill (Replacement of Chapter 5, Part 5 (General and temporary employees)) to make a minor amendment consequential on *Amendment 4* to cross reference to section 149 (Fixed term temporary employees and casual employees may ask for review of status after 1 year of continuous employment), which will provide for how continuous employment is to be worked out for an employee.

*Amendment 9* amends clause 37 of the Bill (Replacement of Chapter 5, Part 5 (General and temporary employees)) to require that in making a decision under section 149B (Review of status after 2 years continuous employment), a chief executive must have regard to the reasons for each decision previously made, or taken to have been made, under section 149A (Decision on review of status) or 149B in relation to the person during the person's period of continuous employment. This is to enhance transparency in decision making and ensure fairness in relation to decisions taken to have been made where a decision was not made within the period of time required.

*Amendment 10* amends clause 37 of the Bill (Replacement of Chapter 5, Part 5 (General and temporary employees)) to make a minor grammatical change to allow for the addition of additional notice requirements in amendment 10.

*Amendment 11* amends clause 37 of the Bill (Replacement of Chapter 5, Part 5 (General and temporary employees)) to require that in making a decision under section 149B, not to offer to convert a person's employment to permanent, a notice required to be provided by the chief executive must include each decision previously made, or taken to have been made, under section 149B or 149A in relation to the person during the person's period of continuous employment.

*Amendment 12* amends clause 37 of the Bill (Replacement of Chapter 5, Part 5 (General and temporary employees)) to provide for how the continuous employment of an employee is to be worked out for the purposes of determining whether an employee has been continuously employed in a department for more than 2 years. In working out continuous employment, all periods of authorised leave are to be included and the person is to be regarded as continuously employed even if there are periods during which the person is not employed in the department, if the periods of non-employment in the department total 12 weeks or less in the year occurring immediately before the time when the person's continuous employment is being worked out.

*Amendment 13* amends clause 37 of the Bill (Replacement of Chapter 5, Part 5 (General and temporary employees)) to provide that the directive required to be made under section 149B include the matters a department's chief executive must consider in deciding the hours of work to be offered in converting a person's employment under the section. The directive must also include the circumstances in which a person may appeal against the decision about the hours of work offered in converting the person's employment.

*Amendment 14* amends clause 37 of the Bill (Replacement of Chapter 5, Part 5 (General and

temporary employees)) to ensure that an appointment to a position at a higher classification level is subject to the employee being eligible for appointment to the position having regard to the merit principle. This amendment aligns the application of the merit principle to higher duties appointment with provisions relating to fixed term and casual conversion.

*Amendment 15* amends clause 37 of the Bill (Replacement of Chapter 5, Part 5 (General and temporary employees)) to require that in making a decision on request from an employee, about an appointment to a position at a higher classification level, the department's chief executive must have regard to the genuine operational requirements of the department. This aligns with the considerations that apply to fixed term temporary and casual conversion provisions. A chief executive is also required to have regard to the reasons for any decision previously made (or taken to have been made) following an application for appointment to a position at a higher classification level during the person's continuous period of employment at the higher classification.

*Amendment 16* amends clause 37 of the Bill (Replacement of Chapter 5, Part 5 (General and temporary employees)) to make a minor grammatical change to allow for additional notice requirements in Amendment 16.

*Amendment 17* amends clause 37 of the Bill (Replacement of Chapter 5, Part 5 (General and temporary employees)) to provide that in making a decision under section 149C to refuse a request to appoint the employee to a higher classification, a notice required to be provided by the chief executive must include each decision previously made, or taken to have been made, under this section in relation to the person during the person's period of continuous employment at the higher classification.

*Amendment 18* amends clause 46 of the Bill (Amendment of s 194 (Decisions against which appeals may be made)) to provide that each of the following are conversion decisions that can be the subject of an appeal:

- a decision under section 149B (review of status after 2 years continuous employment) not to convert the basis of employment of an employee,
- a decision under section 149B to convert the basis of employment of an employee in a circumstance provided for under a directive made under that section, or
- under section 149C (Appointing public service employee acting in position at higher classification level) not to appoint an employee to a position at a higher classification level, if the employee has been seconded to, or acting at, the higher level for a continuous period of at least 2 years.

This amendment will further enhance fairness and accountability by ensuring an employee can appeal in relation to hours of work matters as provided for in a directive and for a refusal of a request to appoint an employee to a higher classification level after being appointed to that level for 2 or more.

*Amendment 19* amends clause 47 (Amendment of s 195 (Decisions against which appeals can not be made)) consequential on the amendment at Amendment 18 to clarify that an appeal can not be made if an employee has been seconded to or acting at a higher classification level for less than 2 years.

*Amendment 20* modifies clause 58 of the Bill to include the term 'validation' in the heading for new Chapter 9, Part 14.

*Amendment 21* amends clause 58 (Insertion of new Chapter 9, Part 14) to ensure that new section 293 (Application of section 149 for existing temporary employees) also applies to

casual employees. This amendment will facilitate the transition to new conversion arrangements applying to casual employees, consistent with those already provided in the Bill for fixed term temporary employees.

*Amendment 22* amends clause 58 (Insertion of new Chapter 9, Part 14) to ensure that new section 293 (Application of section 149 for existing temporary employees) also applies to casual employees (which will be included in the definition of relevant employee). This amendment will facilitate the transition to new conversion arrangements applying to casual employees, consistent with those already provided in the Bill for fixed term temporary employees.

*Amendment 23* amends clause 58 (Insertion of new Chapter 9, Part 14) to ensure that new section 293 (Application of section 149 for existing temporary employees) also applies to casual employees (which will be included in the definition of relevant employee). This amendment will facilitate the transition to new conversion arrangements applying to casual employees, consistent with those already provided in the Bill for fixed term temporary employees.

*Amendment 24* amends clause 58 (Insertion of new Chapter 9, Part 14) to ensure that new section 293 (Application of section 149 for existing temporary employees) also applies to casual employees (which will be included in the definition of relevant employee). This amendment will facilitate the transition to new conversion arrangements applying to casual employees, consistent with those already provided in the Bill for fixed term temporary employees.

*Amendment 25* amends clause 58 (Insertion of new Chapter 9, Part 14) to ensure that new section 293 (Application of section 149 for existing temporary employees) also applies to casual employees (which will be included in the definition of relevant employee). This amendment will facilitate the transition to new conversion arrangements applying to casual employees, consistent with those already provided in the Bill for fixed term temporary employees.

*Amendment 26* amends clause 58 (Insertion of new Chapter 9, Part 14) to ensure that new section 293 (Application of section 149 for existing temporary employees) also applies to casual employees. Clause 24 provides for a definition of relevant employee as meaning a person employed on a temporary or casual basis under the Act as in force before commencement. This amendment will facilitate the transition to new conversion arrangements applying to casual employees, consistent with those already provided in the Bill for fixed term temporary employees.

*Amendment 27* amends clause 58 (Insertion of new Chapter 9, Part 14) to insert a new transitional provision to provide for the application of new section 149B, which provides fixed term temporary and casual employees with a right to have a review of their employment status after 2 years continuous employment. The transitional provision provides that after commencement, section 149B will apply to existing fixed term temporary and casual employees and the continuous service of those employees prior to commencement will be taken into account under section 149B.

The provision also allows for a 4-month period, extendable in certain circumstances, during which departments will be able to prepare for the transition to the new requirement for employer-initiated reviews of casual employees. However, the provision ensures existing casual employees are not disadvantaged by ensuring the continued application of provisions

and directives that provide for an eligible existing casual employee to make a request for conversion during the transition period.

*Amendment 28* modifies clause 58 of the Bill to include a new section. New section 301 validates acts or omissions by the Work Health and Safety Prosecutor, or a delegate, undertaken prior to the commencement of new clause 58A.

*Amendment 29* modifies Part 4 of the Bill to include new clause 58A. Clause 58A amends Schedule 1 of the *Public Service Act 2008* to list the Office of the WHS Prosecutor under the *Work Health and Safety Act 2011* as a public service office, and the Work Health and Safety Prosecutor as its head.

*Amendment 30* amends Clause 59 (Amendment of sch 4 (Dictionary)) to provide for a definition of *continuously employed*.

*Amendment 31* inserts a new Part 5 into the Bill.

Clause 60 notes that Part 5 amends the *Work Health and Safety Act 2011*.

Clause 61 amends *Work Health and Safety Act 2011* section 117 by inserting reference to the *Electrical Safety Act 2002*.

Clause 62 amends *Work Health and Safety Act 2011* section 118 by inserting reference to the *Electrical Safety Act 2002*.

Clause 63 amends *Work Health and Safety Act 2011* section 120 by inserting reference to the *Electrical Safety Act 2002*.

Clause 64 amends *Work Health and Safety Act 2011* section 132 by inserting reference to the *Electrical Safety Act 2002*.

Clause 65 amends *Work Health and Safety Act 2011* section 140 by inserting reference to the *Electrical Safety Act 2002*.

Clause 66 allows for transitional provisions for the amendments to the *Work Health and Safety Act 2011*, by inserting into Part 16, Division 7 of the *Work Health and Safety Act 2011*, a new section (sections 325). This new section contains sub-sections (1)-(6).

New section 325 concerns the validation of entries in relation to electrical safety contraventions that occurred before commencement.

New sub-section 325(1) notes the context of sub-sections 325(2) and 325(3) is entry to a workplace by a WHS entry permit holder before commencement purportedly under section 117 to inquire into an electrical safety contravention.

New sub-section 325(2) provides that entry under section 117(1) (in the context referred to in section 325(1)) is taken to be and always have been lawful.

New sub-section 325(3) provides that exercising a right under section 118(1) (in the context referred to in section 325(1)) is taken to be and always have been lawful.

New sub-section 325(4) notes the context of sub-section 325(5) is entry to a workplace by a WHS entry permit holder, made before commencement purportedly under section 120, to inspect or make copies of employee records or other documents relevant to an electrical safety contravention.

New sub-section 325(5) provides that entry under section 120 (in the context referred to in section 325(4)) is taken to be and always to have been lawful.

New sub-section 325(6) provides that in section 325 “electrical safety contravention” means a suspected contravention of the Electrical Safety Act 2002 that occurred on or after 1 January 2012.

*Amendment 32 and 33* amends the long title.