

Public Service and Other Legislation Amendment Bill 2020

Statement of Compatibility

FOR

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

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, Grace Grace, Minister for Education and Minister for Industrial Relations, make this statement of compatibility with respect to the amendments to be moved during consideration in detail of the *Public Service and Other Legislation Amendment Bill 2020* (the Bill).

In my opinion, the amendments to be moved to the Bill are compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the amendments

The amendments to the Bill will:

1. respond to recommendation 2 of the Education, Employment and Small Business Committee (the Committee) Report No.34 in relation to the Bill;
2. clarify conversion rights to further the intent of the Bill to drive more effective and consistent application of the existing commitment to maximise employment;
3. clarify transitional rights for fixed term temporary and casual employees and the application of administrative inquiry powers; and
4. make amendments to:
 - the *Public Service Act 2008* (PS Act) to recognise the Office of the Work Health and Safety (WHS) Prosecutor as a public service office and the WHS Prosecutor as its head, consistent with other similarly established offices;
 - to the *Work Health and Safety Act 2011* (WHS Act) to clarify the relationship between that Act and the *Electrical Safety Act 2002* (ES Act) with respect to the right of entry provisions in Part 7
 - the *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2020* (BIFOLA Act)

Committee Report

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 government's response to the Committee's report notes and accepts these recommendations. The amendments to the Bill give effect to the government's response in respect of recommendation 2. These are detailed below.

Amendments to the *Public Service Act 2008* (PS Act)

Amendments to the PS Act provisions of the Bill either respond to recommendation 2 of the Committee, respond to other issues raised in submissions to the Committee, or are of a minor or technical nature to provide for effective implementation of the Bill. This includes amendments to definitions and provisions to:

- improve fairness in decision making for conversion decisions under section 149B or 149C by:
 - requiring a chief executive to consider previous decisions (including decisions taken to have been made) at two-year reviews and reviews each year thereafter; and
 - requiring that the notice to be provided to an employee if a chief executive decides not to offer to convert an employee under section 149B or 149C must include reference to previous conversion decisions (including decisions taken to have been made) made about the employee.
- clarify:
 - the transitional arrangements for fixed term temporary and casual employment upon commencement of the amendments made to the PS Act by the Bill;
 - 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;
 - that employment of a person on tenure may not be viable or appropriate if the employment is to fill a position for which funding is unlikely or unknown,
 - the decision-making criteria for chief executives for a conversion decision under sections 149A and 149B;
 - that the decision-making criteria for chief executives for a conversion decision under section 149C for an employee acting in higher duties includes an assessment of the merit principle and whether there are genuine operational reasons not to appoint the employee to the higher classification; and
 - the meaning of '1-year continuous employment' for section 149 and '2-year continuous employment' for section 149B.
- strengthen natural justice protections by:
 - ensuring that if a chief executive proposes to make an offer to convert an employee under subsection 149B(3)(b), a directive is to provide for matters that a chief executive must consider in deciding the hours of work to be offered in

converting a person's employment. The directive will also provide guidance about the circumstances in which a person may appeal the hours offered in converting the person's employment; and

- including appeal rights for employees seconded to, or acting at, a higher classification for a decision of a chief executive, under section 149C, not to appoint the employee to a position at the higher classification after 2 years continuous employment (and each year thereafter) at the higher level.
- make technical amendments to sections 194 and 195 to allow for the new appeal rights under Chapter 5, Part 5.

Amendments to the PS Act will also recognise the Office of the WHS Prosecutor as a public service office and the WHS Prosecutor as its head, consistent with other similarly established offices.

Amendments to the *Work Health and Safety Act 2011*

The amendments to the WHS Act will clarify the relationship between that Act and the ES Act with respect to the right of entry provisions in Part 7.

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

The amendments to the Bill will make amendments to the BIFOLA Act to facilitate the introduction of a proposed new fire protection licensing framework and clarify a key fire protection definition.

Among other matters, the BIFOLA Act amends the *Queensland Building and Construction Commission Act 1991* (QBCC Act) to facilitate the introduction of a new fire protection licensing framework, including an amended definition of 'fire protection work' (i.e. work that requires a fire protection licence) and a regulation-making power to exclude certain work from the definition with appropriate parameters. Subsequent to passage of the BIFOLA Act on 15 July 2020, it was identified that a drafting error had occurred. The limitations on the regulation-making power are required to extend to the 'inspection, testing or certification' of certain aspects of fire protection equipment, as these are critical aspects of fire protection work. This is to uphold the integrity of the fire protection licensing framework and protect public safety.

Human Rights Issues

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

Amendments to the *Public Service Act 2008*

In my opinion, the new and amended clauses proposed for amendments during consideration in detail proposed in relation to amendment to the PS Act do not interact with any human right in a way that would limit or affect their operation.

I consider the analysis of the engagement with human rights in the statement of compatibility drafted for the introduction of the Bill, and the subsequent consideration by the Education,

Employment and Small Business Committee, as satisfying the requirements of sections 38 and 13 of the HR Act.

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, no human rights issues have been identified.

Amendments to the *Work Health and Safety Act 2011*

In my opinion, the human rights relevant to the amendments to the WHS Act to be moved to the Bill are:

- Peaceful assembly and freedom of association (section 22);
- Right to privacy and reputation (section 25); and
- Right to liberty and security of person (section 29).

The human rights contained in sections 22, 25 and 29 are relevant to amendments to the WHS Act to clarify the relationship between that Act and the ES Act with respect to the right of entry provisions in Part 7.

The amendments clarify the relationship between the WHS Act and the ES Act with respect to the right of entry provisions, by amending Part 7 of the WHS Act.

Part 7 of the WHS Act empowers a WHS entry permit holder to enter a workplace to inquire into suspected contraventions of workplace health and safety laws under certain circumstances, which serve as preconditions for entry (section 117). In summary, the preconditions are a reasonable suspicion of a contravention of health and safety laws at a workplace, affecting “relevant workers” working at that workplace (namely those who are or may be members of the union the WHS entry permit holder represents).

The amendment aims to make clear that Parliament intends the scope of health and safety laws for the purpose of right of entry to include electrical safety. This is considered prudent, to avoid any possible confusion that could arise, given electrical safety matters are covered in a separate Act. The intent is for WHS laws to be whole, and not to exclude from the concept of “workplace health and safety” a particular class of risks to workers, namely electrical risks. This clarification is being made out of an abundance of caution.

The human rights that are relevant to right of entry generally, are:

- Peaceful assembly and freedom of association (section 22);
- Right to privacy and reputation (section 25); and
- Right to liberty and security of person (section 29).

Peaceful assembly and freedom of association (section 22)

The HR Act section 22(3) provides: “Every person has the right to freedom of association with others, including the right to form and join trade unions”. One precondition for entry to a worksite by a WHS entry permit holder is that the suspected contravention must relate to a “relevant worker”, being a worker who is a member or is eligible to be a member of the union that the WHS entry permit holder represents (sections 116 and 117(1)). The amendments to

Part 7 do not alter the right to freedom of association. There is therefore no need to undertake further assessment under section 13 of the HR Act.

Right to privacy and reputation (section 25)

The HR Act section 25(a) provides that a person has the right “not to have the person’s privacy, family, home or correspondence unlawfully or arbitrarily interfered with”. Insofar as unauthorised entry upon private property constitutes a trespass, the right to privacy entails the right to exclude others from the relevant premises (*Coco v The Queen* (1994) 179 CLR 427 at 435-6). Part 7 of the WHS Act limits this right in certain circumstances, as noted above. This is done to further the right to security of the person (see below). The amendments do not alter the current relationship between rights to privacy and security struck by the Act; there is therefore no need to undertake further assessment under section 13 of the HR Act.

Right to liberty and security of person (section 29)

The HR Act section 29(1) provides that “every person has the right to liberty and security”. The central purpose of the WHS Act is to secure the health and safety of workers and workplaces (section 3). Part 7 gives effect to this purpose by allowing WHS entry permit holders to inquire into suspected contraventions of the WHS Act. The amendment aims to clarify the scope of this right, by making clear that electrical risks are encompassed within the scope of the contraventions giving rise to a right of entry. Since the WHS Act passed in 2011, this has been the interpretation taken and complied with by OIR’s stakeholders. The amendment aims to ensure no doubt arises into the future as to the relationship between the two Acts – the WHS Act and the ES Act.

As the right to security of the person is protected, there is no need to undertake further assessment under section 13 of the HR Act.

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

In my opinion, the human rights that are relevant to the amendments of the BIFOLA Act are:

- Right to life (section 16 of the Human Rights Act)

The right to life protects the right not to be arbitrarily deprived of life and includes an obligation on the State to take steps to protect the lives of individuals. The right to life imposes both positive and negative duties on public entities. The negative duties imposed by this right meant that public entities must not arbitrarily or intentionally deprive someone of life. The right to life also requires public entities to take positive steps to protect the right to life, such as safeguarding the lives of Queenslanders requiring authorities to put in place measures to protect an individual whose life is being placed at risk by another’s criminal activity.

Providing a high quality fire protection licensing framework ensures relevant work is carried out by suitably qualified and experienced individuals and is crucial to ensuring the safety of building occupants. The amendments will facilitate the introduction of a proposed new fire protection licensing framework which supports the right to life. The amendment to the definition of ‘fire protection work’ introduces further parameters around the regulation-making power under the QBCC Act to ensure the inspection, testing or certification of certain work

cannot be excluded by regulation from this definition. This will ensure that this work will continue to require a licence and that proper standards are maintained in the industry to protect public health and safety.

Therefore, the amendments engage human rights, specifically the right to life, but do not limit this human right.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

Nil.

Conclusion

In my opinion, the amendments to be moved during amendments during consideration in details to the *Public Service and Other Legislation Amendment Bill 2020* are compatible with human rights because they do not limit a human right in accordance with section 13 of the Act.

The Honourable Grace Grace MP
Minister for Education
Minister for Industrial Relations

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