Public Sector Bill 2022

Explanatory Notes

FOR

Amendments to be moved during consideration in detail by the Honourable Grace Grace MP, Minister for Education, Minister for Industrial Relations and Minister for Racing

Short title

The short title of the Bill is the *Public Sector Bill 2022* (Bill).

Policy objectives of the amendments and the reasons for them

On 14 October 2022, the Bill was introduced by the Honourable Annastacia Palaszczuk MP, Premier and Minister for the Olympics, and referred to the Economics and Governance Committee (Committee) for consideration.

On 25 November 2022, the Committee tabled Report No. 37 following its consideration of the Bill (Committee Report). The Committee Report recommended that the Bill be passed.

The proposed amendments respond to submissions and feedback by stakeholders including as part of the Committee's consideration of the Bill.

Amendments to the definition of public sector employee

An amendment to clause 12 of the Bill is required to clarify that, despite the definition of "public sector employee" in subsection (1), a person is always a public sector employee if another Act provides they are to be, may be, or are employed or appointed under the new Public Sector Act. This ensures the Bill gives effect to the intent of other Acts that contemplate the employment of employees under the new Public Sector Act.

Amendments to permanency of employment provisions

An amendment to clause 81(1) is required to clarify that the clause contemplates circumstances where another Act provides for the employment of staff but does not specify the basis of that employment (such as permanent employment).

An amendment to clause 81(2) is required to clarify that, when determining whether employment on a non-permanent basis is permitted, the focus is on the specific employee in question.

Amendments to reviews of non-permanent employment

An amendment to clause 112 of the Bill is required to clarify that if a chief executive of a public sector employee is permitted or required to offer to convert the employee's employment to a permanent basis under the Bill, the employee may be employed on a permanent basis, despite anything in another Act which provides for their basis of employment.

For example, this amendment will clarify that community visitors appointed under the *Public Guardian Act 2014* (PG Act), who will become public sector employees under the Bill, can be appointed on a permanent basis as a result of the Public Sector Act framework and despite any requirement in the PG Act.

Amendments to the public sector review framework and amendments to the Anti-Discrimination Act 1991 and Electoral Act 1992

During the Committee's consideration of the Bill, the Electoral Commission of Queensland (ECQ) and the Queensland Human Rights Commission (QHRC) submitted to the Committee that they should be excluded from the Bill's public sector review framework to preserve their independence from the executive government. The Queensland Law Society supported the QHRC's submission.

While the Committee noted the comments from the ECQ and QHRC, it did not form a view as to whether they should be excluded from the public sector review framework. However, the Committee did observe it was open to Government to enable this important review function to occur via an alternative structure.

The amendments respond to the submissions made to the Committee by including references to the ECQ and QHRC in clause 254(2) of the Bill. This has the effect of preventing the Minister or the Public Sector Governance Council from requesting a public sector review about either entity, and is consistent with the treatment of core integrity bodies such as the Crime and Corruption Commission, Ombudsman, Information Commissioner, Integrity Commissioner and Auditor-General.

To ensure the ECQ and QHRC are subject to a formal review mechanism, amendments are proposed to the *Electoral Act 1992* (Electoral Act) and the *Anti-Discrimination Act 1991* (AD Act) which will require the conducting of periodic strategic reviews of both entities. This will provide:

- for the ECQ – a review of the functions of the commission and commissioners and whether these functions are being performed economically, effectively and efficiently; and

- for the QHRC – a review of the commission's functions and whether these functions are being performed economically, effectively and efficiently.

Amendments to the Bill's civil liability provisions

Clause 268 establishes the persons who are covered by the Bill's civil liability protections. Currently, the clause specifically captures associates to Supreme Court judges, District Court judges, and Commissioners under the *Industrial Relations Act 2016* (IR Act).

The amendment extends the Bill's civil liability protections to all associates to judges or members of courts of record. This will have the effect of capturing associates to members of the Land Court.

This minor amendment responds to feedback from the Department of Justice and Attorney-General as the line agency for the Land Court and will future proof the legislation by ensuring consistency of civil liability treatment for associates to judges and members of courts record.

This consistency of treatment is also reflected in clause 12(2)(d) of the Bill which provides that a person employed as an associate to a Supreme Court judge, District Court judge, Commissioner under the IR Act, or a judge or member of another court of record is not a public sector employee.

Amendments to schedule 1

The current *Public Service Act 2008* (PS Act) generally contemplates that:
- public service offices under section 22 and mentioned in schedule 1 (schedule 1 PSOs) employ public service employees; and
- public service offices under section 23 and declared in the *Public Service Regulation 2018* (DPSOs) employ other employees.

Section 31 of the *Gasfields Commission Act 2013* (GC Act) provides that staff of the Gasfields Commission are to be employed under the PS Act, meaning they are to be public service employees under the PS Act. Consistent with the general design of the PS Act, this means the Commission should be a schedule 1 PSO. Instead, however, it is a DPSO.

The Bill continues the existing treatment of schedule 1 PSOs by classifying them as public service entities under clause 9(b). This has the effect of applying provisions specific to the public service to these entities and their employees. However, as the Gasfields Commission is not a schedule 1 PSO, it is not currently captured as such an entity. This has the potential to perpetuate the anomalous treatment of the Gasfields Commission and its employees.

The amendment overcomes this issue by amending schedule 1 of the Bill to include the Gasfields Commission as a public service entity for the purposes of clause 9(b) of the Bill and the chief executive officer under the GC Act as the Commission's head.

Achievement of policy objectives

The proposed amendments achieve the policy objectives by:

- amending clause 12 of the Bill to ensure a person is a public sector employee if another Act contemplates their employment under the new Public Sector Act;
- amending the permanency of employment provisions in clause 81 of the Bill to clarify the intended operation of those provisions;
- amending clause 112 of the Bill to clarify that if a chief executive of a public sector employee is permitted or required to offer to convert the employee's employment to a permanent basis under chapter 3, part 9, division 1 of the Bill, the employee can be employed on a permanent basis, despite anything in another Act;
- amending clause 254(2) of the Bill to include references to the ECQ and QHRC such that they are excluded from the scope of the Bill's public sector review framework;
- amending clause 268 of the Bill to ensure that civil liability protection is extended to all associates to judges and members of courts of record including the Land Court;
- amending the Electoral Act and AD Act to ensure the ECQ and QHRC respectively are subject to periodic strategic reviews; and
- amending schedule 1 of the Bill to include the Gasfields Commission as a section 9(b) public service entity.

Alternative ways of achieving policy objectives

The policy objective of excluding the ECQ and QHRC from the Bill's public sector review framework could alternatively be achieved by prescribing each entity out of the scope of the framework via a regulation made under clause 254(2)(f). However, this approach would provide less security to the ECQ and QHRC given the more limited parliamentary oversight of amendments to subordinate legislation. Moreover, excluding the ECQ and QHRC through the primary legislation is the strongest way of signalling the Government's support for protecting the independence of those entities.

The policy objective of ensuring consistent treatment of associates could alternatively be achieved by prescribing associates to Land Court members as persons to whom the civil liability protections apply via a regulation made under clause 268(1)(g). However, this approach would not future proof the application of the civil liability protections to associates to judges or members of courts of record not otherwise mentioned in or prescribed under clause 268.

There are no alternative means of achieving the remaining policy objectives other than by legislative amendment.

Estimated cost for government implementation

The introduction of periodic strategic reviews for the ECQ and QHRC will result in costs being incurred by the Department of Justice and Attorney-General at the time of these reviews, to cover the appointment and engagement costs of the reviewers. These particular costs will be managed as part of standard budgetary processes.

Consistency with fundamental legislative principles

The amendments proposed to the Bill are generally consistent with the fundamental legislative principles (FLPs) in the *Legislative Standards Act 1992* (LS Act). The amendments that raise

some concerns in relation to FLPs are the amendments related to the introduction of periodic strategic reviews of the ECQ and QHRC.

These amendments will insert periodic strategic review powers into the Electoral Act and AD Act, similar to the provisions about periodic strategic reviews in the *Ombudsman Act 2001* (Ombudsman Act), *Right to Information Act 2009*, *Integrity Act 2009* and *Auditor-General Act 2009* (AG Act).

Strategic reviews of the ECQ and QHRC will enable an appropriately qualified person to review those entities' functions, as well as whether those entities are performing their functions economically, effectively and efficiently.

For the AD Act, the timeframes for strategic reviews will be every 5 years. For the Electoral Act, the timeframes for strategic reviews will generally be every 5 years, but the Minister will have the power to postpone this period by up to another 2 years if satisfied it is necessary, having regard to the ECQ's functions in conducting a State general election or a local government quadrennial election.

Powers of reviewers for strategic reviews of ECQ and QHRC

The powers given to reviewers for strategic reviews of ECQ and QHRC give rise to consideration of whether the amendments have sufficient regard to the rights and liberties of individuals (LS Act, s 4(2)(a)), including whether the amendments:

- make rights and liberties, or obligations, dependent on administrative power only if the power is sufficiently defined and subject to appropriate review (LS Act, s 4(3)(a));
- confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer (LS Act, s 4(3)(e)); and
- provide appropriate protection against self-incrimination (LS Act, s 4(3)(f)).

New section 248 of the AD Act and new section 33B of the Electoral Act state that, in conducting a strategic review:

- the reviewer for a strategic review has the powers an authorised auditor has under the AG Act for an audit of an entity; and
- the AG Act and other Acts apply to the reviewer as if the reviewer were an authorised auditor conducting an audit of an entity.

Applying the powers under section 46 of the AG Act, for the purpose of conducting a strategic review, a reviewer may:

- enter, at any reasonable time:
  - a place occupied by the ECQ or QHRC;
  - a place occupied by a financial institution with which the ECQ or QHRC maintains an account; or
  - another place if the occupier of the place consents to the entry;
- inspect, examine, photograph or film anything in the place;
- take extracts from, and make copies of, any documents in the place;
- take into the place persons, equipment and materials that the reviewer reasonably requires; and
- require any person in the place to give to the reviewer reasonable assistance in relation to the exercise of the powers mentioned in the previous dot points.

A person must comply with such a requirement, unless the person has a reasonable excuse. The maximum penalty for this offence is 40 penalty units. However, it is not a reasonable excuse for an individual to fail to comply with such a requirement that complying with the requirement might tend to incriminate the individual.

Under the applied section 46 of the AG Act, there are the following limits on the use of answers by, or documents produced by, an individual under a requirement by a reviewer:

- an answer by the individual, or any information, document or other thing obtained as a direct or indirect consequence of the individual giving the answer, is not admissible against the individual in a criminal proceeding, other than a proceeding relating to the falsity of the answer, if the answer might in fact tend to incriminate the individual; and
- the fact that a document was produced by the individual is not admissible in evidence against the individual in a criminal proceeding, other than a proceeding relating to the falsity of the document, if producing the document might in fact tend to incriminate the individual.

The application of the powers under the AG Act seeks to ensure that a reviewer for a strategic review of the ECQ or QHRC has the power to access documents, information or evidence relevant to a review, while also protecting the interests and liberties of individuals.

The application of the powers is considered to be justified in this instance as matters related to a strategic review are peculiarly within the knowledge of the persons to whom the powers are directed, and the matters would otherwise be difficult to establish by alternative evidentiary means. Also, there are safeguards against the use of information or documents provided by an individual in criminal proceedings against the individual (other than proceedings relating to the falsity of the information or documents).

The successful performance of a reviewer for a strategic review will rely on information being provided by the ECQ and QHRC. While it is expected that strategic reviews will be conducted in collaboration between a reviewer and the ECQ or QHRC, the entry and other powers allowed by the amendments are considered necessary to enable a reviewer to be able to access all necessary information to review whether the ECQ's or QHRC's functions are being performed economically, effectively and efficiently.

Finally, it is noted that these powers are substantially the same as the powers given to strategic reviewers under the Ombudsman Act, *Right to Information Act 2009*, *Integrity Act 2009* and AG Act.

In view of the above matters, it is considered that the public interest in ensuring that thorough and accurate strategic reviews can be conducted of the ECQ and QHRC prevails over the potential infringements of the rights and liberties of individuals by the powers given to a reviewer.

Postponement by Minister of strategic reviews of ECQ

The power given to the Minister to postpone strategic reviews of ECQ gives rise to consideration of the FLPs related to whether the amendments have sufficient regard to the institution of Parliament (LS Act, s 4(2)(b)), including by:

- allowing the delegation of legislative power only in appropriate cases and to appropriate persons (LS Act, s 4(4)(a)); and
- sufficiently subjecting the exercise of a delegated legislative power to the scrutiny of the Legislative Assembly (LS Act, s 4(4)(b)).

New section 33D of the Electoral Act provides that:
- despite the usual 5 year timeframe for a strategic review of the ECQ, the Minister has the power to postpone the conducting of a strategic review by up to another 2 years (i.e., a total of 7 years);
- the Minister's power can only be exercised if—
  - the Minister is satisfied that the postponement is necessary, having regard to the ECQ's functions in conducting a State general election or a local government quadrennial election; and
  - the Minister has consulted with, and had regard to the views of, the electoral commissioner and the parliamentary committee about the postponement and its length.
- if the Minister exercises the power, the Minister must—
  - table a notice setting out the length of the postponement of the conducting of a strategic review, and the reasons for the postponement; and
  - the notice must be tabled before the end of the period within which the review would otherwise have been required to be conducted.

The delegation to the Minister of the power to postpone the legislative timeframe for a strategic review of the ECQ is considered appropriate and necessary, to ensure that the ECQ's ability to focus on its core functions in conducting statewide elections is not affected by the conduct of a strategic review. For example, if the 5 year timeframe for a strategic review would ordinarily require a strategic review to be conducted in a year in which a local government quadrennial election or State general election were due, the Minister may decide to postpone the period by a period of up to 2 years, so that the conducting of the strategic review did not conflict with the holding of the election.

The Minister will be required to consult with and have regard to the views of the electoral commissioner and the parliamentary committee.

While a notice tabled by the Minister will not be able to be overturned by a vote of the Legislative Assembly, the tabling of the notice will provide transparency about the Minister's exercise of the power.

Given the matters mentioned above, it is considered that the power given to the Minister to postpone the legislative timeframe for a strategic review of the ECQ is appropriate in the circumstances and has sufficient regard to the institution of Parliament.

Consultation

The amendments respond, in part, to issues raised in stakeholder submissions to the Committee.

In developing the amendments, consultation has occurred with the ECQ, the QHRC and the Public Guardian. Together Queensland was also consulted about relevant aspects of the amendments.

Consistency with legislation of other jurisdictions

The amendments are specific to the State of Queensland, and the extent to which they are uniform with or complementary to legislation of the Commonwealth or another State is not relevant.

Notes on provisions

Amendment 1 amends clause 12(3) of the Bill to clarify that it applies despite clauses 12(1) or (2). This acts as a safeguard and ensures a person will always be a public sector employee where another Act contemplates their employment under the new Public Sector Act.

Amendment 2 amends clause 81(1) of the Bill to ensure it contemplates circumstances where another Act is silent as to the basis of the employment of individuals employed under that Act.

Amendment 3 amends clause 81(2) of the Bill to replace the words "a person" with "the employee". This amendment clarifies the focus of the clause is on the specific employee in question.

Amendment 4 amends clause 112 of the Bill to insert a new subsection (3) to clarify that if a chief executive of a public sector employee is permitted or required to offer to convert the employee's employment to a permanent basis under chapter 3, part 9, division 1 of the Bill, the employee can be employed on a permanent basis, despite anything in another Act.

Amendment 5 amends clause 254(2) of the Bill by inserting new paragraphs (ea) and (eb) to include references to the ECQ and QHRC. This has the effect of preventing the Minister or the Public Sector Governance Council from requesting a public sector review about these entities.

Amendment 6 amends clause 268(1)(b) of the Bill by including a reference to associates to a judge or member of another court of record. This ensures associates to judges and members of courts of record, including the Land Court, are subject to the same civil liability protections under the Bill as associates to Supreme Court judges, District Court judges, and Commissioners under the IR Act. This amendment will also achieve consistency with the treatment of associates in clause 12(2)(d) of the Bill.

Amendment 7 inserts a new part 2A in chapter 10 of the Bill, containing amendments of the AD Act. These amendments will insert provisions about periodic strategic reviews to be conducted of the QHRC. The inserted provisions are based on similar provisions in the Ombudsman Act, sections 83, 84 and 85.

New *clause 336A* states that new chapter 10, part 2A of the Bill amends the AD Act.

New *clause 336B* inserts a new part 2 in chapter 9 in the AD Act, which will contain the following new provisions:

- new section 247 of the AD Act, setting out the timeframes for strategic reviews, and detailing how a reviewer for a strategic review is appointed and what a strategic review is to include;
- new section 248 of the AD Act, giving a reviewer for a strategic review the powers an authorised auditor has under the AG Act for an audit of an entity, and deeming that Act and

other Acts to apply to the reviewer as if the reviewer were an authorised auditor conducting an audit of an entity; and
- new section 249 of the AD Act, providing the process for the preparation of a proposed, and then the final, report for a strategic review.

New *clause 336C* inserts a new part 8 in chapter 11 of the AD Act, comprising a transitional provision (new section 280 of the AD Act) setting out the timeframe for the conducting of the first strategic review of the QHRC to be done after commencement of the amendments.

New *clause 336D* amends the Dictionary of the AD Act to insert a definition of the term "parliamentary committee".

Amendment 8 inserts a new part 4A in chapter 10 of the Bill, containing amendments of the Electoral Act. These amendments will insert provisions about strategic periodic reviews to be conducted of the ECQ. These inserted provisions are based on similar provisions in the Ombudsman Act, sections 83, 84 and 85.

New *clause 341A* states that new chapter 10, part 4A of the Bill amends the Electoral Act.

New *clause 341B* inserts a new division 4 in part 2 in the Electoral Act, which will contain the following new provisions:
- new section 33A of the Electoral Act, setting out the timeframes for strategic reviews, and detailing how a reviewer for a strategic review is appointed and what a strategic review is to include;
- new section 33B of the Electoral Act, giving a reviewer for a strategic review the powers an authorised auditor has under the AG Act for an audit of an entity, and deeming that Act and other Acts to apply to the reviewer as if the reviewer were an authorised auditor conducting an audit of an entity;
- new section 33C of the Electoral Act, providing the process for the preparation of a proposed, and then the final, report for a strategic review; and
- new section 33D of the Electoral Act, setting out the process for the Minister to exercise the power to postpone the conducting of a strategic review by up to another 2 years having regard to the ECQ's functions in conducting a general election or quadrennial election.

New *clause 341C* inserts a new division 12 in part 13 of the Electoral Act, comprising a transitional provision (new section 450 of the Electoral Act) setting out the timeframe for the conducting of the first strategic review of the ECQ to be done after commencement of the amendments.

Amendment 9 amends schedule 1 of the Bill by including the Gasfields Commission as a public service entity for the purpose of clause 9(b) of the Bill. The clause also amends schedule 1 of the Bill by naming the chief executive officer of the Gasfields Commission as the Commission's head.

Amendment 10 amends the long title of the Bill to include a reference to the AD Act as an Act which is to be amended by the Bill's enactment.

Amendment 11 amends the long title of the Bill to include a reference to the *Corrective Services Act 2006* as an Act which is to be amended by the Bill's enactment.

Amendment 12 amends the long title of the Bill to include a reference to the Electoral Act as an Act which is to be amended by the Bill's enactment.