UNITED
WORKERS UNION

# Submission to the Education, Employment and Small Business Committee:

## *Inquiry into the proposed Public Service & Other Legislation Amendment Bill 2020*

## Introduction

United Workers Union[1] makes this submission to the Education, Employment and Small Business Committee regarding the proposed *Public Service & Other Legislation Amendment Bill 2020*.

## Overview of United Workers Union

United Workers Union represents almost 30,000 workers in Queensland across a range of public and private sector employers who are engaged in a diverse range of industries and occupations, and who remain under both the State and Federal industrial relations jurisdiction.

Our membership includes ambulance officers, health professionals and operational staff, school cleaners, teacher aides, early childhood educators, those employed in the contracting industries, including but not limited to cleaning, security and hospitality, private prisons and detention centres, aged care workers, logistics and supply chain and farm workers.

United Workers Union has a long and proud history of advocating for and representing the industrial interests of our members in the public sector.

## The statutory framework must change

In broad terms, the principal issues for our members are:

- the ongoing prevalence of temporary and casual engagements;
- the grossly excessive timeframes to conduct investigation and disciplinary processes including the connected periods employees are suspended;
- the overly cumbersome, punitive and at times vindictive way those processes are conducted; and
- the highly prejudicial effects these issues have on employee wellbeing and career development.

## Policy objectives of the Bill

We note the Bill aims to maximise employment security by providing 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.

[1] United Voice, Industrial Union of Employees, Queensland is now known as United Workers Union.

The Bill transfers public sector appeals rights heard under the PS Act by the Queensland Industrial Relations Commission to instead be heard under the *Industrial Relations Act 2016* (Qld). The rationale is to ensure transparency and increase consistency in appeal decisions.

The Bill seeks to 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; and
- providing for new directives to guide disciplinary action and procedures, investigations and positive performance management.

**Employment security**

Employees are being engaged as temporary and casual employees despite there being an ongoing requirement for the work they perform. In these instances, their permanency could be determined at engagement, but instead is deferred for two years or more.

The Bill seeks to ensure 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*".

The Bill seeks to limit fixed term employment to particular circumstances. We support this approach however one of those circumstances may have the unintended consequence of thousands of ongoing roles being filled temporarily, contrary to the purpose of the legislation.

In particular, the proposed new s.148(2)(c) of the PS Act, at clause 37 of the Bill, provides for engagement on a non-permanent basis "*to fill a position for which funding is uncertain or unknown".* This reflects the indicators for temporary employment in clause 7.2 of the Temporary employment (Directive 08/17), which states "*where funding for a project or program after a specific date is uncertain"*.

This proposed amendment also provides for temporary employment for "*employment relating to a short-term project or to perform work relating to an unplanned priority*".

The Explanatory Notes (**ENs**) state:

*"The example provided for uncertain or unknown funding (new section 148(2)(c)), is intended to reflect that while specific instances of uncertain funding is an appropriate reason [to] employ someone on a fixed term temporary engagement, general funding uncertainty may not be. This reflects of the purpose of the Bill which is to give full effect to the Government's commitment to maximise employment security in public sector employment." (sic)*

For example, there is an ongoing issue across our public sector membership, particularly in schools where teacher aides are engaged in ongoing roles funded by Commonwealth Investing for Success (I4S) funding. Data from the Department of Education (**DOE**) shows the following number of teacher aides who are temporarily or casually employed at June 2020; and their length of service:

| **Length of service** | **Temporary** | **Casual** |
|---|---|---|
| 20+ years service | 116 | 84 |
| 10 – 20 years service | 398 | 200 |
| 5 – 10 years service | 1008 | 354 |
| 2 – 5 years service | 2056 | 767 |
| 0 – 2 years service | 1840 | 1673 |
| Total | 5418 | 3078 |

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. Further, clause 5.1 of the *Department of Education Teacher Aides' Certified Agreement 2018* provides for reduction of hours for teacher aides if school enrolments drop in a particular school, enabling the DOE and individual schools to manage any risk associated with changing staffing requirements in a particular school.

The example provided in the ENs in relation to proposed section 148(2)(c) is presumably an attempt to ameliorate the issue raised above, however in our view it does not achieve this and alternative drafting consistent with the conversion criteria in the Temporary employment (Directive 08/17) would better achieve the stated purpose of the Bill, without causing unintended consequences.

Whilst Recommendation 4 in the Bridgman Report is consistent with our position, there is some discussion in the body of the report on this point that does not contemplate the unintended consequences described above.

The conversion provisions in the current temporary employment directive provide for conversion to permanency "*if there is a continuing need for the person to be employed in the role or a role which is substantially the same, and the role is likely to be ongoing*" (clause 9.6 (a)). Consideration of funding source and ongoing funding is not in itself a ground for refusing conversion to permanency under the directive, although it may form part of the considerations that determine whether a position is ongoing.

We propose that new section 148(2)(c) of the PS Act be amended to replace:

*"to fill a position for which funding is uncertain or unknown"*

with words to the effect of,

"*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."*

Clause 37 of the Bill provides at new section 148A of the PS Act, that a directive must be made setting out the circumstances in which a prospective employee may be engaged as a casual. We anticipate the directive will reflect the criteria set out in the legislation for temporary engagements, which would further undermine the intent of the legislation to provide for permanent engagement as the default position, by enabling the appointment and ongoing engagement of casual staff to ongoing roles.

We support the various amendments in the Bill that count both casual and temporary periods of service for the purposes of eligibility for conversion to permanency.

**Positive performance management principles**

We support the amendments in clauses 20 and 21 of the Bill that provide best practice positive performance management principles (**PPMP**) that focus on fostering constructive, positive and consultative relationships between managers and employees. These changes provide a

foundation to move away from the negative, adversarial and resource intensive management approach we observe in some public sector agencies.

In our view, much of that detrimental management approach can be attributed to the construction of the *Public Service Act 2008* (Qld) (**PS Act**), which provides a negative and cumbersome framework aimed at punishing employees for misconduct. The introduction of PPMP and their integration into management practices will assist in mitigating against such approach.

The following case study illustrates how the current disciplinary framework has fostered a vindictive ,adversarial and cumbersome approach to employee misconduct, that needlessly wasted public resources.

Case study 1

The DOE sought to discipline a former employee for alleged misconduct through issuing a disciplinary declaration. A 'disciplinary declaration' is a mechanism under s.188A of the PS Act that allows a public sector agency to take disciplinary action against a former public sector employee.

In this case, the UWU requested that the DOE withdraw the allegations and discontinue its pursuit of the former employee on the basis the complainant had admitted the allegations were false.

Despite the complainant recanting his evidence, the DOE continued to pursue the former employee based on the complainant's original allegations and issued a disciplinary declaration. The declaration would have remained on the former employee's employment file indefinitely, preventing her from working for a public sector agency in the future.

The former employee, represented by the UWU, appealed the decision. In the appeal, the UWU sought to adduce evidence from the complainant to confirm in evidence that the complainant's initial complaint was false and recanted. The DOE objected to the complainant giving evidence and the parties were directed to file written submissions on this interlocutory point.

In the Decision of the interlocutory point, the QIRC determined that, given the complainant had subsequently admitted the allegations were false, hearing evidence from the complainant was crucial to deciding whether the disciplinary declaration should be upheld. Shortly after the interlocutory point was decided the DOE

contacted the UWU offering to withdraw the disciplinary declaration. The offer was accepted.

This case highlights the dogmatic approach taken by a department to punish a former employee, in circumstances where the complainant had admitted the allegations were false. It is difficult to understand why this agency was so intent on punishing a former employee, so much so that it was willing to overlook that the evidence it relied on had no probative value.

* Public service appeal Decisions are not made publicly available.[2]

There are many more examples (including case study 2 that follows) where agencies have used mechanisms in the current PS Act to needlessly pursue employees at the taxpayer's expense, wasting public resources and causing unnecessary harm. We are hopeful that the inclusion of PPMP in the PS Act, and the integration of those principles into directives, will dissuade further needless waste of public resources.

**Excessive timeframes**

We support the notion behind the amendments proposed in clause 44 of the Bill, in particular the amendments to s.192A(2) that provide for periodic reviews to ensure the timely resolution of disciplinary matters and natural justice.

In our experience, it is not unusual for an investigation/disciplinary process to be conducted by an agency over several years. During those overly protracted periods, affected employees are, in most cases, suspended from their workplace. In some cases, without pay. The excessive timeframes present a myriad of issues for employees, and more generally on public funds and resources.

Agencies attribute some delays to a lack of resources. We accept resourcing may be at issue, however we consider this less about the availability of resources, and more about the inefficient use of those resources, such as with overusing formal investigations.

Public sector agencies commence most disciplinary matters thorough a formal investigation. Formal investigations are undertaken either by an agency department or through independent investigators, many of which have a former career in law enforcement. In either case a

[2] QIRC Public Service Appeal Guide, at para 7.1.

detailed written investigation report is produced for the delegate who ultimately determines the disciplinary matter.

Whilst we endorse the use of formal investigations, it is not a necessary step in all disciplinary matters. In some cases, it is completely unnecessary, such as in the example below.

Case study 2

A member of UWU employed as a Teacher Aide by the DOE was accused of breaching a policy of the school by accessing her son's departmental school record for a non-work-related purpose. The employee admitted to the conduct and undertook not to repeat it. The behaviour was not repeated. This should have been the end of the matter.

Circa 6 months later, the DOE commenced a formal investigation into the employee's already determined conduct.

Circa a further 12 months later, the DOE issued a letter directing the employee to show cause why she should not receive formal discipline.

UWU, represented the employee, and raised concerns with the DOE about re-enlivening an already determined behavioural issue. UWU's concerns went ignored. The DOE proceeded to needlessly subject the employee to an extensive and protracted disciplinary investigation and show cause process despite the employee admitting that she accessed her son's record 18 months prior.

The DOE determined that the employee had engaged in inappropriate or improper conduct in an official capacity under s187(1) of the PS Act and imposed a penalty of a disciplinary reprimand two years after the event had occurred.

The employee assisted by the UWU appealed the disciplinary decision to the QIRC.

In response to the appeal, the DOE cited criminal sentencing guidelines in support of its assertion that employees who misbehave should be subject to a punitive process that included scolding and condemnation.

The decision was set aside on appeal.

In the reasons for the Decision, the QIRC Member cited case law informing that the object and purpose of the public sector misconduct regime should be construed as protective, rather than punitive.

This case study highlights the way in which at least one agency has construed the current disciplinary regime under the PS Act; and demonstrates that department's willingness to needlessly waste public funds and resources over a protracted period of time.

* Public service appeal Decisions are not made publicly available.[3]

The negative effects of protracted disciplinary processes are extensive. 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.

The imposition of timeframes to resolve investigation and disciplinary processes is necessary. The inclusion of reviews assists that purpose, but is less effective. This issue would be better served by strict timeframes that include scope to apply for additional time subject to application to an independent party, such as a panel constituting relevant stakeholders including a union representative.

We have observed significantly shorter timeframes in the private sector, with investigations completed in a few weeks and disciplinary processes in the same or less time. There is no excuse for the public sector to not perform in a manner equal to the less resourced private sector.

The imposition of long review timeframes is problematic in that it sets a negative precedent. Long review timeframes can have the effect of endorsing the period as being acceptable up until the review period. There would be greater benefit in imposing shorter review timeframes, such as after one month, to message the importance of timely resolution of performance issues. It would assist if the amendments proposed in clause 44 of the Bill stressed the need for short timeframes. Wording stronger than "timely resolution" is needed to be effective.

[3] QIRC Public Service Appeal Guide, at para 7.1.

**Independent review**

As indicated above, there needs to be sufficient distance between the issue and the person tasked with evaluation. Further, the person(s) or body which conducts the review must have the power to direct the agency.

**Representation**

UWU supports the amendments proposed in clauses 7 to 9 of the Bill.

We submit that the inclusion of a proper definition of union representation/advocacy rights (i.e. elevated rights compared to a support person) should be added to the PS Act. 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.

There is also a systemic issue whereby agencies conflate 'submissions made by the union on behalf of a member' with the 'views of the member'. This conflation is used by agencies to make the case that the employee lacks insight, is not showing contrition and is being combative. This conflation is unwarranted and prejudicial to our members.

In most cases agencies cite complex legislation and ask employees to respond, whereas many employees are not able to properly address the legislative questions. Employees might reasonably be able to respond to questions of fact, but not questions of law. The inclusion of a proper definition of a 'union representative' would assist in differentiating and clarifying the union's role in employee disciplinary matters.

**Recommendations**

<u>Recommendation 1</u>

Amend proposed new section 148(2)(c) of the PS Act to replace:

*"to fill a position for which funding is uncertain or unknown"*

with words to the effect of,

"*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.*

Recommendation 2

Prescribe a short limitation period to resolve investigation and disciplinary processes (such as two months), subject to extension by application to an independent panel constituting relevant stakeholders, including a union representative. Failure to complete the process within the limitation period, or the extended period (should an extension be granted), causes the process to conclude.

Recommendation 3

Prescribe short review timeframes (such as monthly) to emphasise the importance of efficient resolution of performance/conduct issues; and the importance of efficient and effective use of public resources.

In clause 44 of the Bill include amendments to s.192(2)(a) of the PS Act that stress the need for short and efficient timeframes (i.e. stronger wording than "*timely resolution*").

Recommendation 4

Prescribe that the person/body tasked with reviewing timeframes must be independent from the relevant agency, including broad powers to direct the relevant agency to ensure investigation and disciplinary matters are justified, and run in a cost effective and efficient manner.

Recommendation 5

Prescribe a proper definition of union representation/advocacy rights in the PS Act. Define that union representatives have the express right to participate in any meetings/interviews connected to potential discipline.

Include in the definition wording that differentiates the union's advocacy from the affected employee's own response, to avoid conflation of their respective responses in disciplinary matters and allow for representations on questions of law.

Authorised by [redacted] – Public Sector Director, National Executive member, United Workers Union. Telephone: [redacted]; Email: [redacted].