Submission in Response to the Public Service and Other Legislation Amendment Bill 2020

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Introduction

Maurice Blackburn Pty Ltd is a plaintiff law firm with 33 permanent offices and 30 visiting offices throughout all mainland States and Territories.

Our Queensland practice has 13 offices spread across both regional and metropolitan parts of the State, with these offices offering legal services across the firm's primary practice areas of personal injuries, medical negligence, employment and industrial law, dust diseases, superannuation, negligent financial and other advice, and consumer and commercial class actions. The Queensland arm of Maurice Blackburn has also contributed to recent parliamentary inquiries into labour hire, the gig economy and workers' compensation, and has appeared at numerous parliamentary hearings to advocate for vulnerable workers on a range of issues including wage theft and conditions.

Our Submission

Maurice Blackburn applauds the Government for the introduction of this timely Bill.

We believe that it highlights the Government's genuine commitment to ensuring that the Queensland Public Service is founded on the principles of secure work, proper worker entitlements and fair performance management systems. In this way, the Government is providing its Public Service with the ability to role model good employment processes, setting an example for all Queensland businesses to follow.

We share the Premier's objectives and expectations for the Bill, expressed as part of her explanatory speech for the Bill[1]:

> *We want the Queensland Public Service to be an employer of choice and a leader in public administration…… We want the Queensland Public Service to be empowered to be fair and responsive and to visibly demonstrate a culture that values high ethical standards and behaviour.*

We believe that, across the board, the Bill represents a highly practical and principled initial response to the Bridgman and Coaldrake reviews. Whilst we applaud the Government's commitment to responding to these reports, there are some areas where we believe that some of the choices made in the drafting of the Bill could be improved.

These areas, along with suggestions for improvement, appear below.

For ease of readership, we present our input in three sections:

i. General comments about the Bill
ii. Comments about the proposed amendments to the *Industrial Relations Act 2016* (IR Act)
iii. Comments about the proposed amendments to the *Public Service Act 2008* (PS Act)

Maurice Blackburn is grateful to the Committee for the opportunity to provide this input.

[1] https://www.parliament.qld.gov.au/documents/hansard/2020/2020_07_16_WEEKLY.pdf#page=31

General comments about the Bill

Maurice Blackburn applauds the Government for the introduction of this Bill. We believe that many of its provisions will go some way toward achieving the Bill's stated policy objective, to give effect to the stage one public sector management reforms[2]. These are described in the Explanatory notes as:

> *The Bill seeks to progress the priority stage one reforms in two main areas:*
>
> *1. giving full effect to the Government's commitment to maximise employment security in public sector employment; and*
>
> *2. providing for positive performance management of public sector employees*[3]

We are concerned, however, that in the drafting of the Bill, there has been a significant reliance on processes being set out in directives which are to be prepared by the Public Service Commission (PSC), rather than having those key processes enshrined within the legislation.

This makes it difficult to predict the potential impact of the legislation, as the content of the directives will have a significant impact on the operation of the legislation.

As a general theme, Maurice Blackburn urges the Committee to strongly recommend that where possible, frameworks should be included in the legislation, to be fleshed out by the PSC, instead of leaving the framework itself to be determined by the PSC.

We believe that this will enable the legislation to operate as intended, and fully achieve its policy intent.

Where it is determined that it is appropriate for certain directives to be prepared the PSC, we believe there should be an accompanying requirement that the PSC consults with unions and other relevant stakeholders in relation to the terms of those directives.

[2] From Explanatory Notes; p.1: https://www.parliament.qld.gov.au/documents/tableOffice/TabledPapers/2020/5620T1192.pdf
[3] Ibid.

Comments about the proposed amendments to the *Industrial Relations Act 2016*

In relation to new section 562A, we note that the commission may decide it will only hear an appeal against a decision if they are satisfied that:

> *the appellant has used the procedures required to be used by the employee in relation to the decision under a directive under that Act, including the individual employee grievances directive*[4]

We believe that preventing employees from making an appeal without first exhausting other review options potentially denies employees from achieving swift external oversight of their case.

The proposed changes to the IR Act introduce some concepts which we believe require definition in the Act:

- "the person's role, or a role that is substantially the same as the person's role", as mentioned in s.149A (2)(a)(i)

- "same department", as mentioned in s.149 (1) and s.149B (1). This should take into account machinery of government changes.

- "fixed-term temporary employee", as mentioned in a number of clauses. This term should be defined to the effect that a fixed-term temporary employee is a true fixed-term employee, whose contract of employment cannot be terminated prior to the contract's end date unless for serious misconduct.

[4] Ref S.562A (1)(a)

Comments about the proposed amendments to *Public Service Act 2008*

The Explanatory Notes tell us that[5]:

> *Clause 20 amends section 25 to provide for two key reforms: the positive performance management of public sector employees and that the default basis for public service employment is employment on tenure.*

Maurice Blackburn welcomes these amendments. We believe that they reflect the Queensland Labor government's commitment to ensuring that the public service is a source of stable, secure employment.

In relation to performance management principles, the Explanatory Notes tell us that[6]:

> *Clause 21 inserts a new section 25A to introduce the positive performance management principles. The positive performance management principles are to support managers and employees to work together to support optimal performance. The principles are intended to ensure the use of positive performance management for Queensland public service employees.*
>
> *The clause also requires that the Commission Chief Executive make a directive about how the positive performance management principles are to be applied.*

Maurice Blackburn welcomes the creation of positive performance management principles.

However, we strongly recommend that the framework for how those principles might be applied should be set out in the legislation, not left to the Public Service Commission Chief Executive to set out in directives.

Instead, we believe that the legislation should set out a framework describing the bare minimums of good process, which can then be further fleshed out via directives.

The Explanatory Notes tell us that[7]:

> *Clause 24 inserts a new Chapter 3, Part 1A to establish a Special Commissioner.*

Section 42A of the Bill tells us that the main functions of the Special Commissioner are to provide advice to the Minister about areas of public administration, promote the effectiveness and efficiency of government entities by facilitating the development and implementation of whole of government policies and to conduct administrative inquiries.

Maurice Blackburn recommends that in performing their functions, the Special Commissioner be required to consult with relevant unions.

The wording in the Bill, in s.42B (1) tells us that:

> *The Governor in Council may, on the recommendation of the Minister, appoint an appropriately qualified person as the special commissioner*

[5] Ibid; p.7
[6] Ibid; p.7
[7] Ibid; p.7

Maurice Blackburn submits that this section should be amended to set out what would constitute "an appropriately qualified person".

Clause 26 of the Explanatory Notes[8] describe new section 88IA, which provides the process for an employee to request a review of a procedural aspect of department's handling of a procedure under a suspension or discipline directive, but only in relation to a current work performance matter.

Maurice Blackburn believes that this process should not be limited in this way. Instead, the process should be available to anyone subject to a procedure under a suspension or discipline directive.

Further, we believe this process should not exclude conduct which if proved, would constitute corrupt conduct under *Crime and Corruption Act 2001* (Qld).

Maurice Blackburn regularly sees employees referred to the Crime and Corruption Commission with allegations that the Commission then refers straight back to the Department. We are concerned that employees under these circumstances would be unfairly barred from accessing this review process.

We also recommend that a new subsection be inserted that the status quo is to be maintained while a review pursuant to section 88IA is conducted.

The Explanatory Notes tell us that[9]:

> *New section 88O provides that the Minister may, by signed notice, ask the Special Commissioner, the Commission Chief Executive or an appropriately qualified person to conduct an administrative inquiry into the functions or activities of one or more public service offices (including in relation to the administration of a particular scheme or program, the effectiveness and efficiency of public service office interactions), an area of existing or proposed government policy or another area of public administration relation to a main purpose of this Act. It excludes inquiries about an individual employee.*

Maurice Blackburn submits that a new subsection should be added to s.88O which provides that, where an administrative inquiry is to be conducted pursuant to s.88O, the relevant commissioner or appropriately qualified person must consult with unions in conducting the inquiry.

We have a number of concerns in relation to adjustments to s.137 and the introduction of the new s.137A:

New section 137(4) states:

> *(4) A public service employee is entitled to normal remuneration during a suspension, unless—*
>
> *(a) the person is suspended under subsection (1)(b); and*
>
> *(b) the chief executive considers it is not appropriate for the employee to be entitled to normal remuneration during the suspension, having regard to the*

[8] Ibid; p.8
[9] Ibid; p. 9

> *nature of the discipline to which the chief executive believes the person is liable.*

We note that this wording is different to that in the current s.187 of the PS Act which sets out the criteria by which the Chief Executive must be reasonably satisfied in order to take disciplinary action.

As such, the intent of this section appears to be to allow for the introduction of unpaid suspension before findings have been made pursuant to Chapter 6 of the Act.

In our experience representing public sector employees, it is common for disciplinary processes to take over 6 months, sometimes up to 2 years, and we are happy to provide the Committee with case study examples. For employees to be suspended without pay for such an extended period of time, while they are still in the process of responding to allegations which may ultimately be found to be unsubstantiated, is very concerning. Further, without an obligation to pay suspended employees, a key motivator on departments to conduct and complete disciplinary processes in a timely manner will be lost, and we are concerned that this may result in even longer timeframes for the processes to be completed.

As such, Maurice Blackburn recommends that

- subsections (a) and (b) of proposed s.137(4) be removed, and
- "unless" should be removed from s.137(4).

We believe that "normal remuneration" – a phrase used in a number of the new sections – should be defined in the Act to include:

- a person's average normal weekly wage, inclusive of shift loadings, allowances etc, and
- higher duties pay, if the employee was receiving it prior to the suspension.

In our experience, departments often treat 'normal remuneration' as a person's base rate of pay, which is significantly lower than their actual normal remuneration. To this end, we believe that clarity on this point should be provided in the Act by way of a definition, as described above.

The Explanatory Notes tell us that[10]:

> *New section 137A provides that the Commission Chief Executive **must make a directive** about the procedure for suspending a person under section 137 and sets out that the directive must provide for the internal and external reviews of decision to suspend (and the timeframes for review to ensure timely resolution), how natural justice requirements may be met for these decisions including the requirements for providing reasons for decisions about suspensions, and the circumstances in which a chief executive may decide a public service employee is not entitled to normal remuneration during a suspension of the employee.*

Maurice Blackburn submits that this should be addressed in the Act, rather than as a directive. This will help ensure that the Government's intentions are achieved, and are not subject to unintended change.

[10] Ibid; p.11. Our emphasis.

Similarly, s.147(4) tells us that the employment of general employees are subject to directive. Once again, Maurice Blackburn submits that this should be addressed in the Act, rather than as a directive.

The Explanatory Notes tell us that[11]:

> *New section 148 provides for the employment of fixed term temporary employees. The name given to these employees has changed from 'temporary employees' to 'fixed-term temporary'.*

Maurice Blackburn believes that the wording of s.148/148(2) should be amended so as to limit the employment of fixed-term temporary employees to those situations outlined in s.148(2).

In addition, we recommend removing s.148(2)(c), which provides the ability to employ fixed-term temporary employees for filling a position when funding is unknown or uncertain. We are unsure as to how a position would be approved in those circumstances.

We also recommend that in S148(2)(e), 'short-term' be time capped. We would suggest defining 'short term' as for a maximum of six months.

We note that in new s.148A(3):

> *The commission chief executive must make a directive about the employment of casual employees employed under this section or section 147*

Once again, we would rather see this detailed in the legislation, rather than as a directive.

The Explanatory Notes tell us that[12]:

> *Section 149A provides that the chief executive must decide the request within 28 days of receiving it or the decision will be taken to be a decision to refuse to offer to convert the person's employment to tenure.*

In order to support the Government's intended outcome of maximising employment security, Maurice Blackburn submits that the framing of this section should be reversed, such that the default position is that the person's employment will convert to tenure unless specified criteria are satisfied. As a result, a failure to decide the request within the 28 day timeframe would result in a person's employment being converted to tenure.

To that end, we recommend that this section restrict the basis for non-conversion to 'genuine operational reason' and provide an example of what this might be.

Maurice Blackburn is concerned that the proposed amendment in s.149A winds back the recommendations of the McGowan report, and reverts the position back to the Newman Government's approach of allowing non-conversion if the reasons for employing a temporary employee still exist, instead of imposing a positive obligation to convert to tenure except in circumstances where genuine operational reasons exist not to convert.

Maurice Blackburn further submits that any outcome determined under s.149A should be appealable by the affected employee.

[11] Ibid; p.11
[12] Ibid; p.13

The Explanatory Notes tell us that[13]:

> *Section 149B provides for a review of the basis of employment for fixed term temporary and casual employees (other than non-industrial instrument employees) by the chief executive if they have been continuously employed in the department for two years or more. The chief executive must decide whether to offer to convert the person's basis of employment to employment as a general employee on tenure or a public service officer within the period required by the section.*

Maurice Blackburn submits that a new subsection should be inserted in s.149B which requires that the department notify an employee of their right to seek review of their employment status.

Once again, as with our comments in relation to 149A, we believe that the framing of this should be reversed such that a non-decision results in employment being made permanent, not deemed rejection.

Maurice Blackburn further submits that any outcome determined under s.149B should be appealable.

The Explanatory Notes tell us that[14]:

> *Section 149C provides a new entitlement to allow an employee acting at a higher classification to an annual request for appointment on tenure if they have been seconded to or are acting at the higher classification level.*

In circumstances where a request pursuant to section 149C might be denied on the basis that the position which the employee seeks to be appointed to is substantively held (though not currently performed) by another employee, Maurice Blackburn submits that s.149C(3) be amended to read:

> *The employee may ask the department's chief executive to appoint the employee to the higher classification level as a general employee on tenure or a public service officer, after—*
>
> > *(a) the end of 1 year of being seconded to or acting at the higher classification level; and*
> >
> > *(b) each 1-year period after the end of the period mentioned in paragraph (a).*

Maurice Blackburn submits that a new subsection should be inserted in s.149C which requires that the department notify an employee of their right to seek review of their employment status.

Maurice Blackburn further submits that any outcome determined under s.149C should also be appealable.

[13] Ibid; p.13
[14] Ibid; p. 14

The Explanatory Notes tell us that[15]:

> *Clause 38 introduces a new section 186C, which introduces a new requirement for the positive performance management principles to be applied before disciplinary action is taken for a performance matter.*

Maurice Blackburn believes that the process described in 186C is missing a step – that a formal performance management process (that is, the formal notification to an employee that they are not meeting performance expectations, and the provision of an opportunity to improve) should be conducted after positive performance management and before the taking of disciplinary action.

The Explanatory Notes tell us that[16]:

> *Clause 39 also amends section 187(1)(f) and introduces a new section 187(1)(g). The amendments provide guidance that disciplinary action should not be taken for minor infringements of a relevant standard of conduct and introduces a new threshold that the conduct of an employee should be sufficiently serious to warrant disciplinary action for a breach of a relevant standard of conduct.*

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

[15] Ibid; p.14
[16] Ibid; p. 15