REVIEW OF PUBLIC SECTOR EMPLOYMENT LAWS – *A FAIR AND RESPONSIVE PUBLIC SERVICE FOR ALL*

PUBLIC SERVICE AND OTHER LEGISLATION AMENDMENT BILL 2020

SUBMISSION OF TOGETHER QUEENSLAND, INDUSTRIAL UNION OF EMPLOYEES
30 JULY 2020

Authorised for Submission by Together Branch Executive 30 July 2020

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INTRODUCTION

Together Queensland, Industrial Union of Employees (**Together**), is the leading industrial union representing the interests of Queensland public servants.

Together provides this submission regarding the *Public Service and Other Legislation Amendment Bill 2020* ('the Bill') on behalf of its members dedicated to delivering quality services to Queensland.

Within the Explanatory Notes, the stated policy objective of the Bill is 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 (the Bridgman Review) 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.

Together acknowledges the Queensland Government's commitment to continuously improving the Queensland public sector and to ensuring Queenslanders have the most responsive, consistent and reliable public service possible. We concur with the Bridgman Review that there are significant problems and issues in Queensland public sector employment laws and practices that require resolution to ensure a fair, responsive and inclusive public sector. It is expected that the Bill will address some of the issues identified by the Bridgman Review however, in order to support the achievement of the policy objectives, further work must be done.

Together welcomes this opportunity to provide this submission to the Education, Employment and Small Business Committee, addressing the *Public Service and Other Legislation Amendment Bill 2020*. In the following submission, Together seeks to raise a number of areas where the Bill does not address concerns of workers in the public sector and/or does not go far enough in its proposed resolution of those issues. We make recommendations for the consideration of the Government as to how to address these issues and to support the objectives of a fair and responsive public service.

SUMMARY OF KEY ISSUES

The key issues we raise in our submission are:

- The prevalence of precarious and insecure forms of employment in the Queensland Public Sector and the lack of determinative relief.
- The requirement for a greater delineation between positive performance management and development strategies, and disciplinary processes.
- The need for an independent umpire on certain industrial issues such as work performance matters and security of employment.
- Protections from the unilateral or ultra vires exercise of directive making power to the detriment of public servants.
- Parity across the industrial instruments with specific regard to industrial representation and consultation.
- The need to extend coverage of legislative protections to public sector entities not directly covered by the *Public Service Act 2008*, such as TAFE Queensland and Workcover.

We seek in our submission to raise areas where the Bill does not address concerns of workers in the public sector and/or does not go far enough in its proposed resolution of those issues.

EMPLOYMENT SECURITY

Permanent employment is the default basis for public sector employment

1. *A fair and responsive public service for all - Independent Review of Queensland's State Employment Laws* report by Mr Peter Bridgman notes that:

   "*Westminster style government assumes the public service endures beyond political and electoral cycle: it is a permanent service that can facilitate change of government, change of minister, change of policy direction. Employment security is crucial for this endurance.*"[1]

2. The Report notes that the *Public Service Act 2008* contemplates ongoing employment as the basis of public service employment and lists the extant constraints on temporary and casual employment contained in the Act as well as the Directives designed to facilitate conversion to permanent employment.

3. The provisions are merely the latest in a long list of mechanisms that were designed to discourage inappropriate insecure employment and promote employment security. Yet, despite those efforts, current permanency rates in the Public Sector remain well below levels achieved 15 years ago.

4. Figure 1 graphs permanency rates based Q2 data contained in the *Queensland public sector quarterly workforce profile* released by the Public Service Commission, it lists key reports or initiatives designed to improve employment security. Even where those initiatives showed success it was short lived.

Figure 1

1. 1 January 2006: Directive 22/05 **The Retrenchment of Temporary Employees Engaged on a Full Time or Part Time Basis** released providing for redundancy payments for long term temporaries
2. 11 June 2008: *Public Service Act 2008* is passed and required temporary status reviews after 3 years

[1] Bridgman, P. (2019), A fair and responsive public service for all – Independent review of Queensland's public sector employment laws – May 2019, viewed 29 July2020 https://www.qld.gov.au/__data/assets/pdf_file/0005/120020/A-fair-and-responsive-public-service-for-all.pdf p38

3. 1 November 2008: *Public Service Act 2008* is amended to require temporary status reviews after 2 years and every year thereafter.
4. 1 December 2008: Directive 15/08 **Temporary Employment** released with a purpose of maximising tenured employment
5. 1 November 2010: Directive 20/10 **Temporary Employment** released setting criteria for the review of temporary status
6. 1 January 2011: Directive 03/11 **The Retrenchment of Temporary Employees Engaged on a Full Time or Part Time Basis** released
7. 30 Mar 2015: Restoration of the Queensland Government **Employment Security Policy** by the Palaszczuk government
8. December 2015: **A review of the industrial relations framework in Queensland** Report by Mr Jim McGowan released

5. Figure 1 demonstrates that despite the clear will of Parliament, and government, being expressed in legislation and Directives, attempts to improve permanency rates have been continually frustrated by Public Service Departments.

6. Examples of such frustration can be seen in the Supreme Court decision *Katae v State of Queensland and Anor*[2] and in various judgements of Queensland Industrial Relation Commission members in temporary review appeals. Perhaps the clearest demonstration of the lack of adherence to legislative and policy direction was provided in data from the Department of Education that showed that in the month of October 2019, of the 208 new employees that commenced only eight employees were engaged on a permanent basis.

7. The Explanatory Notes for the *Public Service & Other Legislation Amendment Bill 2020* state that the Bill, among other things, aims to give “full effect to the Government’s commitment to maximise employment security in public sector employment”.

8. The Palaszczuk government should be congratulated for taking this stance. Together members consistently point to the lack of secure employment as a reason why services are at risk and further their insecurity in giving the frank and fearless advice that is required in a Westminster government.

9. That commitment was restored in the Queensland government’s *Employment Security Policy* in 2015 but existed prior to its removal by the Newman Government and was in continuous effect before then from at least 2003 when every one of the initiatives in Figure 1 was introduced.

10. If this Bill is to give “full effect” to that commitment to maximise employment security in public sector employment it must do much more than simply introduce incremental changes.

11. We suggest that the Bill as drafted will not effect the change proposed in the policy and the explanatory notes. We therefore request that the Committee review the drafting and will provide suggested changes.

12. There has been no significant change to the career element of working in the public service from Together members, and to that end there requires employer support to ensure ongoing professional development in stable and secure employment. As an employer of choice,

[2] [2018] QSC 225

government agencies can and should do more to support the principles of employment security and merit[3].

13. Over time, our members employed as casual or fixed term or 'temporary' employees have not been provided with employment security, where their service is not recognised in a consistent manner. There are workers who have been employed in temporary and casual arrangements for many years who are still not in secure employment or whose employment is under-secured. For example, AO2 officers in state schools may have only 5 permanent hours in a regular working week of 25 hours per week. These workers are more likely to be women, and are more often in lower pay levels.

14. Further, career public servants taking up opportunities for secondment or higher duties have found themselves in insecure situations for years, without capacity to seek tenure at that higher classification. These are insecure employment arrangements that are not just detrimental to the employee but can, at cessation, have a significant financial detriment to their families.

15. It is unfair that a temporary worker may be permanently appointed to an ongoing role if they have demonstrated merit and completed 2 years continuous service, but a worker who has been relieving in higher duties for 2 years, who has also demonstrated merit, cannot. This is a double standard operating now and it must be addressed.

16. The Bill, in its current form, does not go far enough. We therefore suggest changes to the legislation as drafted.

Clause 37 *– Replacement of chapter 5, part 5 (General and temporary employees)*

17. *The new section 148* provides for the employment of fixed term temporary employees, with a change of terminology to better reflect the fixed term nature of these engagements. Together recommends that a definition of fixed-term employment is provided within the Act and for this to provide that the employer cannot terminate or provide notice to terminate the employee's employment prior to the end date of the fixed-term, unless for misconduct. Or that the employer can only terminate the employment contract by paying out the balance of the contract. Without this accompanying definition the alteration will only be a cosmetic name change and do nothing to change current HR practices.

18. *Subsection (2)* provides for the circumstances in which the employment of a fixed term temporary employee may be viable or appropriate but does not limit the employment of temporary fixed term employees to those circumstances.

19. Together seeks for subsection (2) to be amended so as to limit the employment of fixed-term temporary employees to the circumstances outlined in subsection (2).

[3] McGowan, J. 2015, A *review of the industrial relations framework in Queensland,* viewed 28 July 2020 <https://www.cabinet.qld.gov.au/documents/2016/Feb/IRRev/Attachments/Report.PDF>, p. 48.

20. In considering the circumstances outlined s.148(2), Together seeks for subclause (c), *to fill a position for which funding is uncertain or unknown* to be removed as it has historically been used as a default rationale for refusal regardless of the validity of that rationale.

21. For s.148(2)(e) *to perform work necessary to meet an unexpected short-term increase in workload*, we seek for this to be limited to a period of six months.

Case Study

22. An employee of Queensland Health was refused conversion to permanent status on the grounds that her employment as a temporary employee was justified because the completion of a fixed task could not be pre-determined with any precise accuracy and the circumstances at the review date was the same as the offering of a series of short fixed-term contracts.

23. The fixed task was completing forensic tests, the normal function of the work unit, the workload had grown because of redundancies of permanent employees, leading to significant delays in processing matters for criminal trials. This employee on their third appeal became converted to permanent despite additional recurrent funding being provided in the 2017-18 budget prior to her first appeal. The budget papers showed an increase in FTEs for HSQ to meet increased demand, this was recurrent funding not one-off funding.

24. We propose an alternate clause as follows:

148 *Employment of fixed term temporary employees*

(1) A chief executive may employ a person (a fixed term temporary employee) for a fixed term to perform work of a type ordinarily performed by a public service officer, other than a chief executive or senior executive officer, if employment of a person on tenure is not viable or appropriate, having regard to human resource planning carried out by the chief executive under section 98(1)(d).

(2) Employment of a person on tenure may not be viable or appropriate if the employment is for any of the following purposes—

(a) to fill a temporary vacancy arising because a person is absent for a known period;

Examples of absences for a known period—

approved leave (including parental leave), a secondment

(b) to perform work for a particular project or purpose that has a known end date;

Examples—

employment for a set period as part of a training program or placement program

(c) to fill a short-term vacancy before a person is appointed on tenure;

(d) to perform work necessary to meet an unexpected short-term increase in workload, provided that the fixed-term is no greater than 6 months.

Example—

an unexpected increase in workload for disaster management and recovery

(3) Also, without limiting subsection (1), employment on tenure may be viable or appropriate if a person is required to be employed for a purpose mentioned in subsection (2) on a frequent or regular basis.

Example—

an ongoing requirement to backfill multiple absences because of approved leave (including parental leave) or secondments

(4) The employment may be full-time or part-time

(5) A person employed under this section does not, only because of the employment, become a public service officer.

(6) The commission chief executive may make a directive about employing fixed term temporary employees under this section.

25. The *new section 149* provides for a new right for fixed term temporary and casual employees to request a review of their employment status after 1 year of continuous employment in a department. This decision is not reviewable under the Public Service Act 2008.

26. *The new section 149A* requires the department's chief executive to 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.

27. *Section 149B* provides for a review of the basis of employment for fixed term temporary and casual employees where they have been continuously employed in the department for two years and requires further review annually thereafter. This decision is reviewable under the *Public Service Act 2008*.

28. If the department's chief executive does not make a decision on review within the required period, the chief executive is taken to have decided not to convert the person's employment as a fixed term temporary employee or casual employee according to the terms of the employee's existing employment.

29. Given the default basis for public sector employment is permanent employment, Together is of the view that, where the chief executive fails to make a review within the required period, the default position should be that the person's employment shall become either a general employee or a public service officer on tenure. Prior to 2016 even though there was a legislative requirement to do reviews of temporary employees annually we estimate from survey of members that about 4% of long term temporary employees had the correct number of reviews conducted and only 12.2% had had one section 149 review conducted. Some agencies in Public Service Appeals have actually made submissions that there is no

contravention of the Act by not doing a review because a non-review is deemed to be a negative conversion decision.

30. We also seek for there to be a restriction placed on the basis for non-conversion to be on genuine operational reasons only and for examples to be provided of these. The legislative amendment proposed is reversing the government's position back to the Newman Government's approach of allowing non-conversion if the circumstances employing a temporary employee still exist, winding back the recommendations from the McGowan Report.

31. For the review of an employee with two years and more continuous service, the agency must be required to notify the employee when a review is commenced. This notification must reflect clause 9.5 of *Temporary Employment Directive 08/17*.

32. The amendments should also state that an employee who is converted to permanent employment status should not be subject to a probationary period following conversion, unless there exist exceptional circumstances.

33. Together seeks for definitions to be provided for the following:

    a. Fixed-term temporary employment.

    b. Same role.

    c. Same department (taking into account machinery of government changes).

    d. Continuously employed.

34. Below is a suggested amendment of sections 149A and 149B.

149A Decision on review of status

(1) The department's chief executive must decide a request made under section 149 within 28 days after receiving it.

(2) The department's chief executive may offer to convert the person's employment under section 149(3)(b) only if—

(a) the department's chief executive considers—

(i) there is a continuing need for someone to be employed in the person's role, or a role that is substantially the same as the person's role; and

(ii) the person is eligible for appointment having regard to the merit principle; and

(b) any requirements of an industrial instrument are complied with in relation to the decision.

(3) If the matters in subsection (2) are satisfied, the department's chief executive must decide to offer to convert the person's employment basis to employment as a general employee on tenure or a public service officer unless there is a genuine operational reason not to.

(4) If the department's chief executive decides not to offer to convert the person's employment under subsection (3)(b), the chief executive must give the person a notice stating—

(a) the reasons for the decision; and

(b) the total period for which the person has been continuously employed in the department; and

(c) for a fixed term temporary employee—how many times the person's employment as a fixed term temporary employee has been extended.

(5) If the department's chief executive does not make the decision within the period required under subsection (1), the chief executive is taken to have decided to convert the person's employment to permanent employment.

149B Review of status after 2 years continuous employment

(1) This section applies in relation to a person who is a fixed term temporary employee or casual employee if the person has been continuously employed in the same department for 2 years or more.

(2) However, this section does not apply to a non-industrial instrument employee.

(3) The department's chief executive must decide whether to—

(a) continue the person's employment according to the terms of the person's existing employment; or

(b) offer to convert the person's employment basis to employment as a general employee on tenure or a public service officer.

(4) The department's chief executive must make the decision within the required period after—

(a) the end of 2 years after the employee has been continuously employed as a fixed term temporary employee or casual employee in the department; and

(b) each 1-year period after the end of the period mentioned in paragraph (a) during which the employee is continuously employed as a fixed term temporary employee or casual employee in the department.

(5) The Chief Executive must in writing at least 4 weeks prior to the period described under subsection (4) notify the employee of the review being undertaken and the notification must:

(a) advise the employee that they or their union on their behalf make a written submission to the review; and

(b) inform the employee when the submission needs to be received; and

(c) inform the employee who the submission must be sent to; and

(d) inform the employee when the review decision must be made by; and

(e) inform the employee of their appeal rights in respect of the review decision.

(6) Section 149A(2) and (3) applies to the department's chief executive in making the decision mentioned in subsection (3).

(7) If the department's chief executive decides not to offer to convert the person's employment under subsection (3), the chief executive must give the employee a notice stating—

(a) the reasons for the decision; and

(b) the total period for which the person has been continuously employed in the department; and

(c) for a fixed term temporary employee—how many times the person's employment as a fixed term temporary employee or casual employee has been extended.

(8) If the department's chief executive does not make the decision within the required period, the chief executive is taken to have converted the person's employment to permanent employment.

(9) In this section—

Fixed term temporary employee includes a general employee employed under section 147 on a temporary basis for a fixed term.

required period, for making a decision under subsection (3), means—

(a) the period stated in an industrial instrument within which the decision must be made; or

(b) if paragraph (a) does not apply—28 days after the end of the period mentioned in subsection (4)(a) or (b).

APPOINTMENT TO HIGHER DUTIES ROLES

35. *The new Section 149C* introduces a new non-appealable entitlement to allow an employee acting at a higher classification to make a request for appointment on tenure if they have been seconded to or are acting at the higher classification level for at least 1 year.

36. *Section 149C(1)(c)* further requires that the employee has been assessed as appropriately qualified for employment at the higher classification level according to a selection process carried out under a directive mentioned in section 29 or another relevant directive.

37. The criteria for deciding a request is to be contained within a directive.

38. If the department's chief executive does not decide the request within the required period, the chief executive is taken to have refused the request.

39. It is our understanding that, for a decision to approve the employee's application, the employee is not appointed to a position permanently but rather is converted to permanent employment status, and given employment security, at that higher classification level.

40. It is not Together's position for this provision to have application to 'replacement employees' engaged pursuant to section 92 of the *Industrial Relations Act 2016*, if doing so has the effect of displacing or diminishing the parent's right to return to their position as per s.92(1)(b) of the IR Act.

41. The introduction of this new review right is something Together's members have expressed particularly enthusiasm about. We have heard from members engaged on higher duties for anywhere from 12 months to 10 years so the ability to seek further employment security in a role at the higher classification that they have performed successfully for lengthy periods is supported by Together.

42. Our members have identified their concern that a decision made pursuant to section 149C is a non-appealable decision. In the words of one member, this creates little accountability for the employer to consider and decide a request in accordance with the criteria that is to be contained within a directive.

43. Individual appeal rights are imperative in public sector employment and our members feel strongly that the capacity for an external review of decisions is imperative to a fair, transparent and apolitical system.

44. Together is of the view that all administrative decisions must be reviewable. We are concerned that the failure to identify an appeal right for a decision made under s.147C breaches the principle of giving sufficient regard to rights and liberties of individuals as per *Legislative Standards Act 1992*, section 4(3)(a).

45. Given this, Together seeks for the appeal rights that are available at the mandatory two-year conversion review for fixed-term temporary and casual employees to be extended to a request made under s.149C and for a new ground of appeal to be prescribed for this decision.

46. Where there is a decision to refuse a request in accordance with s.149(c), there should be a right of review every 12 months thereafter.

47. Together would also submit that the criteria for conversion to permanent status for higher duties should use the same merit principle as for temporary employees.

48. There has been an increasing trend of public service managers failing to advertise higher duties positions for 'open merit'.

49. Together members have consistently sought for equity of opportunity for public servants to have higher duties and that there should be 'expressions of interest' registered at least.

50. When a worker has won an opportunity, and then successfully performed the role on merit, if the role is ongoing, and substantively vacant, they should have an opportunity to be made permanent.

51. Consistently holding the fear of "you will return to your substantive" over diligent public servants creates a culture of fear and one that is not facilitative of frank and fearless advice to senior management and to government.

52. Employment security should apply as a principle to all levels.

53. These suggested amendments will give full effect to the Government's commitment to maximise employment security in public sector employment, will support sound administrative decision-making and transparency and accountability of agency decisions.

Positive Performance Management

Clause 21 *– Insertion of new s25A Positive performance management principles*

54. The introduction of positive performance management principles within the new section 25A, to be read in conjunction with the work performance and conduct principles of section 26, will promote regular and constructive communication between managers and employees and to ensure they work together to support the Government's productivity and quality of service delivery.

55. The introduction of a positive performance management framework is imperative in ensuring a clear delineation between performance management and development from disciplinary action.

56. Together applauds an approach to positive performance management, as to date there are a number of employment actions regularly instigated that contribute to loss of employment and the conduct of those matters has been an issue. Performance improvement processes and Independent Medical Examinations have been increasingly used and misused to the detriment of workers.

57. To best strengthen the public sector capabilities and to deliver more consistency in the employment experience, more must be done to overcome the deficiencies of the existing legislative framework.

58. As it stands, there is little by way of proportionality, where the odds are evermore in the employer and indeed manager's favour. Too often have we seen Together's members face disciplinary action for matters which would have been resolved earlier and more successfully had positive performance action been taken prior to the commencement of disciplinary proceedings.

59. Within the scope of the current deficit model, corrective action takes a punishment focus where employees are expected and demanded to produce outcomes, as opposed to the empowerment of employees that a positive performance framework encourages.

60. By introducing an employee-centred approach to performance management taken in a responsive, fair and inclusive way, good work will be recognised, and employees empowered to further their own performance and development.

61. The shift in culture to be more positive about performance is something we feel will further distinguish the public service as an employer of choice.

62. In saying this, Together also acknowledges the recommendations and comments made within the Bridgman Review, specifically with regards to the investment in the role of a manager in the positive performance management framework.

63. The framework requires that management works with strengths yet understands that there may also be deficits and facilitates necessary action in a positive way[4].

64. The *new section 25A(3)* requires the commission chief executive to develop a directive about how the performance management principles are to be applied.

65. In the event that an employee has concerns about a procedural aspect of a performance matter, the amendment fails to allow some avenue for review.

66. Together believes that the failure to provide a review right for this stated policy objective, and indeed intent of stage one reforms, undermines the legislative intent of these amendments. As such, we are seeking the addition of a review right within the new section 25A.

67. We also seek an amendment to section 25A to reflect the requirement for performance expectations to be reasonably measurable and achievable:

Insert,

25A Positive performance management principles

…

(g) identifying at the earliest possible stage performance that does not meet expectations;

(h) ensuring that performance expectations are reasonably measurable and achievable;

(j) integrating the matters mentioned in paragraphs (a) to (h) into management practices and policies.

[4] Bridgman, P. (2019), A fair and responsive public service for all – Independent review of Queensland's public sector employment laws – May 2019, viewed 29 July2020 <https://www.qld.gov.au/__data/assets/pdf_file/0005/120020/A-fair-and-responsive-public-service-for-all.pdf> p.70.

Suspension

Clause 36 *– Replacement of s 137 (Suspension other than as disciplinary action)*

68. The *new section 137* consolidates the suspension provisions in the Act to sit outside the discipline framework but seeks to carry over the distinction between the application of the existing suspension provisions to public service officers and public service employees.

69. Subsection (2)(a) speaks to the notice requirements for a suspension, including *when* the suspension is to start and end. Based on *Walters v Hanson & Ors* [2020] QSC 216, we seek an inclusion to 137(2)(a) to advise that the suspension notice must include the period of suspension by date or stated term of duration.

    137 (2) (a) the date the suspension starts and ends; and

70. Subsection (3) extends the chief executive's consideration of alternative duties that may be available for the officer to perform by first considering all reasonable alternatives prior to suspension, including a temporary transfer or another alternative working arrangement that may be available to the person.

71. Subsection (4) provides that a public service employee is entitled to normal renumeration during a suspension. Together seeks a definition of normal renumeration whilst suspended to be included within the Act. Such a definition should match the definition of "normal weekly earnings" under s106 of the *Workers Compensation and Rehabilitation Act 2003* including, and no less than, aggregated shift allowances or salary, projected roster, overtime, higher duties, penalties and allowances that are of a regular nature to ensure no detriment to the employee during the suspension. This is then taken as the officer's normal remuneration during the period of the suspension. Together members who do not work a pattern of Monday to Friday day work, or regular overtime, are experiencing an unintended detriment when they are being suspended on pay as there is consistently an issue on interpretation of Normal Remuneration and we seek an inclusion into the Bill for clarity.

72. Our members are currently experiencing a use of what was considered administrative suspension under section 137 of the current Act to commence a process in accordance with Chapter 5, Part 7 of the PS Act. In these matters, the chief executive suspends the employee in accordance with s.137 and uses that absence to enliven their authority under section 174 to direct the employee to attend an Independent Medical Examination. That was never the intent of this section and members feel under significant duress when the employer contrives the circumstance of absence through the use of this suspension provision.

73. Together seeks an additional inclusion within section 137:

    Insert,

    137 Suspension

    …

    (11) Section 137(1)(a) cannot be used in the application of Chapter 5, Part 7 (ss. 174 - 179AA) of the *Public Service Act 2008*.

74. Together believes that, if an employee is unwell, there are different processes to be used to appropriately support and manage that employee, including seeking medical information from the employee.

DISCIPLINE

Clause 39 *– Amendment of s187 (Grounds for discipline)*

75. Together is concerned that the Bill has not achieved its intent of clarifying a threshold for taking disciplinary action for breaches of the Code of Conduct for the Queensland Public Service and relevant standards.

76. The current industrial framework conflates discipline and performance where minor conduct, behaviour and performance transgressions are often deemed a breach of the Code of Conduct and trigger the commencement of disciplinary proceedings. Often, these matters are more appropriately dealt with by management action.

77. Our members have felt that over time there has been a change across the sector that has given rise to an increased use of the allegation of misconduct in discipline matters even for what might reasonably be considered as a single less serious breach of the Code of Conduct or other Standard.

78. Notice to Show Cause Letters are increasingly being drafted to reflect an allegation of misconduct pursuant to section 187(1)(b) of the PS Act and then states, 'Further, or in the alternative', irrespective of the nature of the conduct alleged. There seems to be a belief that, where any allegation has arisen in the employee's official duty, misconduct as the ground for discipline applies. As a result, employers are failing to select the most appropriate ground being applied to each instance or are instead nominating more than one ground per allegation (i.e. misconduct plus another ground). An example of this is provided below,

    Having considered the information currently available to me in respect of Allegation …………I consider there may be grounds for you to be disciplined pursuant to the Public Service Act 2008:

    a) Section 187(1)(b) in that you may be guilty of misconduct, that is inappropriate or improper conduct in an official capacity within the meaning of s187 (4)(a).

    Further, or in the alternative,

    b) Section 187(1) (f) (ii) in that you may have contravened, without reasonable excuse, a standard of conduct applying under an approved code of conduct, namely the Code of Conduct for the Queensland Public Service, specifically clause 1.5……..which provides as follows

79. Together requests the inclusion within section 187(2):

    Insert,

    187 Grounds for discipline

    …

    (2) A disciplinary ground arises when the act or omission constituting the ground is done or made.

(a) Although the same alleged instance or instances may give rise to more than one possible ground for discipline, the most appropriate ground is to be selected (i.e. one ground per allegation).

80. The Bill's Explanatory Note states the following however Together does not see this stated clearly in the amendments to give its effect.

*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.** A relevant standard of conduct is further defined as a standard of conduct a applying to the employee under an approved code of conduct under the Public Sector Ethics Act 1994 or a standard of conduct, if any, applying to the employee under an approved standard of practice under the Public Sector Ethics Act 1994. The Commission Chief Executive must make a directive that provides circumstances and examples of conduct that are likely to be considered sufficiently serious to warrant disciplinary action. (emphasis added)*

81. Section 187(1)(g) provides for a new ground for discipline:

g) contravened, without reasonable excuse, a relevant standard of conduct in a way that is sufficiently serious to warrant disciplinary action.

82. The ambiguity of this new ground and the term 'sufficiently serious' will not seek to ameliorate the escalated pattern of the discipline action taken by agencies in matters that are a single incident of a breach of standard has been taken with no, or low level risk of harm to parties or reputation of the employer.

83. By way of example, Together members in state schools have alarmingly been subject to full show cause and investigation processes over the failure to fill in a timesheet accurately on one occasion. Recently another officer had the Police attend their house over alleged "fraud" which again, was due to a timesheet irregularity. There are some significant proportionality issues here. Competent and early management conversations can avert this waste of resources and allow the necessary time and attention to be spent investigating matters that are serious.

84. There is no guidance as to the assessment of these matters which further contributes to the change in perception that all actions taken whilst at work are deemed to be in their official capacity and so Misconduct.

Clause 44 *– Insertion of new 192A Commission chief executive must make directives about disciplinary action and investigating grounds for discipline and grievances.*

85. There must be natural justice in the conduct of matters where there could be an impact on ongoing employment. Industrial Representation and a right to a Support Person of the employee's own choice must always for part of any performance concerns and discipline processes.

86. Together members are consistently being challenged by a cohort of Public Sector agencies and Entities when they seek to have a Support person or Industrial Representative present in employer directed interviews or meetings about work performance matters, this denies workers who are at a significant disadvantage and who need support the access to support and advocacy when they need it.

87. Together seeks an insertion to 192A(1)(b)

Insert,

192A Commission chief executive must make directives about disciplinary action and investigating grounds for discipline and grievances

(1) The commission chief executive must make a directive about each of the following matters—

(b) procedures for investigating the substance of a grievance or allegation relating to a public service employee's work performance or personal conduct. ***The procedures must include the rights to Industrial Representation and Support Person Guidelines.***

88. The current published Guideline which speaks to the role of a support person[5] relevantly provides,

An industrial representative has a role to represent their members in accordance with, and to the extent that industrial legislation and their union rules provide. This may involve asking clarifying questions and, on occasion, advocating to ensure that procedural fairness has been afforded to their member.

The role of a support person is to provide emotional support and reassurance to an employee.

If a support person is an officer of a union to which the employee is a member, the officer also has a role to support their member's interests, including actively ensuring that natural justice and procedural fairness has been afforded to their member.

89. Together seeks the inclusion of the above text within the Act to ensure consistency between the *Industrial Relations Act 2016* and the *Public Service Act 2008*, with respect to industrial representation.

[5] The State of Queensland (Public Service Commission) (2 July 2020) *Role of a support person*, viewed on 29 July 2020 < https://www.forgov.qld.gov.au/role-support-person>.

APPEALS

90. Section 199 of the *Public Service Act 2008* enables the Industrial Relations Commissioners to issue stays of decisions to secure the effectiveness of an appeal. However, this is a limited and narrowly type of interlocutory order. It should be amended to enable the Commissioner to issue interlocutory orders to secure the effectiveness of an appeal.

91. For example, a long-term temporary employee could have their temporary appeal frustrated if the term of their current temporary employment was to expire during the appeal process. A stay is in the legislation confined to the decision being appealed. In a temporary appeal the decision being appealed is that the employee continue as a temporary employee. A stay has no practical effect or application in this instance however an action is required to ensure a fixed term temporary employee's standing in an appeal. The powers need to be extended to enable the Industrial Commission to issue any necessary interlocutory orders to secure the effectiveness of the appeal.

92. In the *Industrial Relations Act 2016* the general powers relating to interlocutory proceedings may be confined to procedural matters, wider interlocutory order powers are present within sections of the legislation in respect of industrial disputes and determination arbitrations.

93. Together seeks an amendment to section 199 of the *Public Service Act 2008* so as to widen the power of the Industrial Commission to ensure the effectiveness of the appeal beyond simple stays of the decision being appealed to interlocutory orders.

CONSULTATION

94. Working in the public sector means a commitment to a fast-paced dynamic industrial environment from all employees.

95. Frank and fearless advice can only be provided in a culture of supportive and progressive development, ethical decision making and employment practices. However the balance is also to have public servants who are entitled to a voice in matters of administrative policy, where they wish to be a party to change and can be heard on these processes, that there is a fair and reasonable approach to consultation and from representatives of their own choosing.

96. In light of the requirement for consultation for the making of directives, as set out in 49A of the *Public Service Act 2008,* Together seeks an amendment to section 50 with the insertion of a new subsection (2):

50 Criteria for making a ruling

(1) In making a ruling, the commission chief executive or the industrial relations Minister must consider any advice given to the other about improving the public service's effectiveness and efficiency.

(2) In making a ruling that is subject to section 49A, the commission chief executive or the industrial relations Minister must:

(a) consider the results of the consultation the public sector agency and employee organisation, and certify whether in that person's opinion:

(i) the requirement to consult under section 49A has been complied with in all material aspects;

(ii) the record in the certificate of the identity of entities or individuals consulted for the purpose of section 49A is accurate;

(iii) any advice given to the commission chief executive or the industrial relations Minister in the consultation has been properly considered; and

(b) publish the certificate with the ruling.

97. Together members are alive to the expectations of their performance and conduct, matters that impact how they perform work and interpretation of their entitlements is an area where consultation in the drafting will reduce any disputation on application and allow for public servants voice to be heard.

Special Commissioner

Clause 24 *– Insertion of new chapter 3, part 1A – Special Commissioner*

98. Together notes the introduction of the appointment of a Special Commissioner in accordance with Part IA of the Act.

99. In addition to the existing provisions articulated at clause 24 of the Bill, Together seeks an inclusion to section 42A:

> ***42A Functions***
>
> The main functions of the special commissioner are to—
>
> …
>
> (d) Facilitates consultation on areas of public administration, including whole of government policies with stakeholders.

100. As an employer of choice, it is imperative that the consultation provisions are seen to be done, Together members reasonably expect the Commission to lead the sector in demonstrating best practice.

ADMINISTRATIVE INQUIRIES

Clause 29 *– Insertion of new chapter 3, part 7 – Administrative inquiries.*

101. It is promising that there is now going to be an oversight option from the Public Service Commission as one of the contributing factors to the lack of adherence to current Directives by agencies is that there has been no governance of the instruments.

102. In addition to the powers prescribed for the Minister to ask for an administrative inquiry, with a systemic agency issue, there must be a review when identified and requested either by an employee or by a Registered Organisation.

103. Together seeks an amendment to this Part to ensure the statutory power for a registered industrial organisation to request an administration inquiry for the matters detailed in section 88O(1)(a).

104. To parallel the consultation obligations and Together's proposed amendment to section 50 of the Act, we seek the following addition to s.88O for administrative inquiries:

    (2) The commission chief executive or the industrial relations Minister must:

        (a) consider the results of the consultation between the public sector agency and relevant employee organisations.

105. Together recommends the inclusion of a statement in relation to section 88P(3) that if an element of criminal activity is identified, the administration inquiry is then ceased so that to avoid any conflict with the relevant authorities (i.e. crime and corruption commission or other law enforcement agency).

REVIEW OF WORK PERFORMANCE MATTERS

Clause 28 *– Insertion of new section 88IA – Review of procedural aspect of work performance matters*

106. Together considers this section favourable however to ensure procedural fairness, amendments are required. If you are the applicant seeking the review, the legislation must then ensure you and your representatives, are provided with the outcome of that review.

107. Together seeks an inclusion to s.88IA(4):

Insert,

88IA Commission may conduct review of procedural aspect of department's handling of current work performance matters

…

(4) On receiving the request, the commission may—

(a) conduct a review of a procedural aspect of the current work performance matter; and

(b) give the chief executive of the department a report about the review that includes any recommendations and directions about how any defects in the procedural aspects are to be rectified and provide a copy of this report to the employee; and

(c) advise the chief executive that further action in the work performance matter remains at status quo until the report is considered; and

(d) The Commission will advise the employee of its determination of any procedural matters requiring rectification.

108. Together seeks an inclusion to s.88IA(7):

Insert,

procedural aspect, of a current work performance matter, means an aspect of the matter relating to compliance with—

(a) a procedure under a directive applying to the matter; or
(b) principles of natural justice; and
(c) Industrial representative and role of a support person Guideline.

Application

109. The Public Sector includes a range of entities not directly covered by the *Public Service Act 2008*, examples include TAFE Queensland and Work Cover. Historically, these Entities have had particular provisions of the *Public Service Act 2008* applied by Regulation.

110. It is Together's view that these important reforms should be applied directly to these sorts of entities and not be liable to be applied or removed without the consideration of Parliament.

111. It is proposed that consideration be made to amend the Legislation to ensure these provisions are directly applied.