PUBLIC SECTOR BILL 2022

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Submissions of

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Contents

Introduction 2
Coaldrake reforms 2
Integrity agencies 2
First Nations Peoples 4
Equity and diversity 4
Recruitment and selection 4
Governance and leadership 4
Internal reviews and appeals 5
Right to raise issues and employee grievances 5
Appeals 6
Non-permanent employment 8
Permanent employment 8
Conversion reviews 8
Deemed refusals 9
Mental or physical incapacity 10
Discipline, private conduct and the right to civic participation 12
Termination 12
Surplus to the entity's needs 12
Machinery of Government Changes 12
Certified agreement conditions and entitlements 13
Accrued rights 15
Excluded matters 15
Senior Officers 15
Public sector principles 16
Technical and other amendments 16
Application of the Bill to staff members in the Queensland Police Service. 16

Introduction

1. Together is one of the largest public sector unions in Queensland, representing over 28, 000 workers from across the public sector in health, education, public service departments and statutory authorities, as well as workers in the private sector. Together has consistently advocated for a fairer industrial relations system in the state, and our members have been at the forefront of improving the conditions of Queensland public sector workers and the services they deliver.

2. Together Queensland:

    a. is an Industrial Organisation of Employees under the *Industrial Relations Act 2016* (Qld).

    b. is a counterpart of the Australian Municipal, Administrative, Clerical and Services Union, Queensland Together Branch (Queensland Together Branch of the ASU). The ASU is a registered organisation under the *Fair Work (Registered Organisations) Act 2009* (Cth).

3. Further, Together Queensland is affiliated with the peak union body, the Queensland Council of Unions ('QCU'). Together has had the benefit of seeing a draft of the submission made by the QCU to the Committee, and supports that submission unless otherwise stated.

4. Together generally welcomes the proposed *Public Sector Bill 2022* (the PS Bill), in particular the extension of public sector employment reforms to all public sector employees, the provisions supporting the reframing of the Government's to relationship with first nations peoples and recognition of the importance of their right to self-determination and the equity, diversity and inclusion provisions.

5. Together however is deeply concerned with aspects of the Bill that do not go far enough in implementing the important reforms proposed by Peter Bridgeman, or where their remain issues of injustice or unfairness in the Bill's provisions or their potential effects.

6. Together welcomes the opportunity to address these matters.

Coaldrake reforms

7. The explanatory notes to the PS Bill advise that:

    The Bill also incorporates amendments to implement and complement the recommendations and findings of the independent review of public sector culture and accountability by Professor Peter Coaldrake, titled Let the sunshine in: Review of culture and accountability in the Queensland Public Sector (the Coaldrake Report). The Bill will do this by, among other things, strengthening the independence of certain core integrity bodies by excluding them from the Bill's application.

8. The Union notes that the measures in this Bill give partial effect to some recommendations of the Coaldrake Report but that the implementation, 'lock, stock and barrel', of the report is in its infancy and that there are significant ongoing issues of culture, referenced by Professor Coaldrake that will require additional action by the state government in concert with unions to adequately address, which may require further legislative, regulatory or policy amendments.

Integrity agencies

9. The explanatory notes to the Bill provide that:

    Consistent with the Coaldrake Report, the Bill will also strengthen the independence of certain core integrity bodies that do not employ public service employees by not including them in scope of the Bill and establishing alternative mechanisms (a regulation-making power) to enable public sector employment arrangements to be applied to their staff.

The above approach is a balanced and appropriate way of meeting the objectives of the Bridgman Review and the Coaldrake Report, as it ensures that all relevant employees have the opportunity to obtain certain benefits and protections of the public sector employment framework, but in a way that does not jeopardise the independence of certain core integrity bodies.

10. Together tentatively supports this sentiment but has reservations about the specific arrangements for certain agencies.

11. Together supports the provisions of the Bill which provide for the further independence of "core" integrity agencies consistent with Coaldrake Report recommendations including to exclude these agencies from ministerial direction and public sector reviews.

12. However, the Union does not fully support the arrangements proposed for integrity agencies and the provisions for the staff of these agencies and has provided more specific submissions in respect of related matters to the enquiry into the *Integrity and Other Legislation Amendment Bill 2022*.

13. The Union's position in consultation for these Bills has supported, in principle, that an entity may be excluded from the coverage of the Act as a public sector entity where the inclusion of the agency would:

    a. create an untenable conflict with employment arrangements under establishing legislation;

    b. be inappropriate given the nature of the entity;

    c. undermine the entity's integrity functions; or

    d. undermine the entity's charity PBI status;

14. However, the Union has sought that these exclusionary principles be applied in the following way:

    a. The above exclusionary principles are applied narrowing and strictly and agencies are excluded only where that is genuinely required;

    b. That those agencies which are excluded have public sector employment conditions and standards applied through other mechanisms such as their establishing Act; or through the negotiation of an appropriate industrial instrument;

15. That the public sector conditions and standards applied are the same or equivalent to those which would be applied were they considered to be a public sector entity or public service office to the greatest extent practicable and are only reduced where this is not possible.

16. Together notes that the proposed provisions that a regulation may apply particular provisions of the *Public Sector Act 2022*, including directives made under that Act, to these entities and that before a regulation can be recommended to the Governor in Council, the Minister must consult with the relevant statutory officer about it.

17. There is no corresponding requirement for consultation with the staff or the Union in relation to this instrument which will set conditions of employment and there have been no commitments yet made about the application of provisions or directives although we acknowledge that discussion have begun with Legal-Aid Queensland and that the Ombudsman applies current public service provisions through a certified agreement.

18. Together takes a preliminary view that Industrial instruments or the Act itself would be the appropriate avenue to protect these entitlements.

19. Together very strongly recommends that the public sector conditions in this Bill be applied to the staff of the excluded entities.

First Nations Peoples

20. Together supports the focus placed in the Bill on the relationship between Government and Aboriginal peoples and Torres Strait Islander peoples and their right to self-determination in line with the consultation undertaken with those peoples.

21. Together supports the Bill's recognition of the role of the public sector in supporting the reframing of this relationship and the requirement for public sector entities to recognise the importance of the right to self-determination to Aboriginal peoples and Torres Strait Islander peoples.

22. Together supports the clear responsibility placed on chief executives to ensure that their entities fulfil this role.

Equity and diversity

Equity and diversity provisions

23. Together supports the creation of thea framework requiring chief executives of public sector entities, the police service and other entities to take steps to promote equity, diversity, respect and inclusion, and strengthening accountability for and oversight of those requirements.

24. However, Together notes and supports the submission of the Queensland Council of Unions and the Queensland Teachers Union in regard to the addition of a diversity target group for LGBTI+ public sector employees.

Recruitment and selection

25. Together also supports the provisions relating to reform of recruitment and selection processes, including the provisions in the Bill which retain the primacy of merit, while also providing for support for equity, diversity, respect and inclusion in public sector recruitment decisions.

26. Together notes however that there is significant recruitment and selection reform still required to give full effect to the Coaldrake Report and the commitment from the Government to a Review of Recruitment and Selection which has been delayed at the request of Unions, in order for the Coaldrake review to be fully considered.

27. Together seeks that the Committee note that there may be further legislative amendments, or regulatory or other policy changes required to give effect to these government commitments

Governance and leadership

28. The Union continues to believe that that the role of central agencies in the oversight and enforcement of both "Human Resources" and "Industrial Relations" issues across the public sector should be strengthened to provide for these agencies to intervene where employing agencies are not complying with the Public Sector Act, binding directives and policies, industrial instruments or government policy.

29. The Public Sector Act should codify the role of these agencies in line with the discussion in the Bridgman Report that what is required is "strengthening the authority of the central human resources agency under an authoritative Commissioner supported where needed by Special Commissioners with whole sector reach".

30. The Union continues to be concerned about the willingness of the PSC to undertake interventionist action in relation to individual or systemic failure by agencies to appropriately manage work performance matters and whether this Bill adequately empowers the PSC to do so.

31. The PSC has opined to the JAC that the PSC's role is not to "examine the quality of management decisions" and that "it would not be appropriate for an external agency to make these decisions for an employing agency, for example, whether an alternative role was suitable for a suspended employee".

32. Professor Coaldrake said in his report that the "light-touch" of the PSC has become too light and that the PSC's leadership position has weakened as a result.

33. What the Bridgeman report recommended was a system of external case management where "Case managers should have power to direct the management of the case by, for example, imposing time frames for production or exchange of documents, attendance at meetings or medical examinations lawfully required by a chief executive, require production of documents and evidence" as well as "to: require attendance at meetings in order to facilitate resolution or agreement about steps forward through mediation of other processes; mediate or otherwise attempt to resolve the matter; report to the Commissioner, chief executive or representing union about exemplary or deficient conduct of a matter before the Case Manager, to facilitate practice improvements; make a recommendation to the departmental chief executive about disposition of the matter or part of it". Importantly, "such a recommendation and material supporting it should be relevant material in any appeal to the QIRC".

34. This recommendation, while accepted by the Government, does not appear to have been implemented in this Bill.

35. Together believes more needs to be done in the Public Sector Bill to provide for intervention.

Internal reviews and appeals

Right to raise issues and employee grievances

36. The Bridgeman Report found that

> *The Public Service Act 2008 is very focused on 'back end' remediation of poor or unfair decisions through appeals to the QIRC. The review considers that fairness requires early testing of decisions and accountability through informal processes that potentially correct poor decisions, enable identification and correction of managerial inadequacy, or afford early and authoritative encouragement for the employee to accept the need for the decision.*

37. The report recommended that:

> *The Act should give employees a right to raise issues with a more senior manager of employment decisions, with certain restrictions.*

38. These restrictions were limited to: decisions made by chief executives personally; decisions already the subject of external review; decisions about whether a matter should be case managed; recommendations made by a case manager; decisions about extending suspension with pay; a decision directing a medical examination (because there is an internal review process for those decisions) and dismissal decisions.

39. Raising an issue was expressly to be the exercise of a workplace right for section 284 of the *Industrial Relations Act 2016*.

40. It is clear that what was recommended was for something new and expanded. Elsewhere the report refers to the right to raise issues as a "new, earlier testing point" of decisions before escalation to the QIRC.

41. Together submits that this Bill categorically fails to address the Bridgeman Report recommendation that there be an administrative right to raise issues in the Act, with very limited restrictions, protected as a workplace right. This recommendation is fundamental to any attempts to resolve issues of culture and accountability in the Queensland public sector raised by Professor Coaldrake.

42. The Bill relies on the existing Grievance/complaints process to provide rights of review. These rights rely heavily on a Public Service Commission Directive which, over recent years, has significantly waxed and waned in terms of the access it has provided to meaningful review.

43. Currently, decisions subject to internal review are generally defended by agencies using a standard of reasonableness test that a decision will stand unless "it is so unreasonable that a reasonable person could not have made it". This often means that it is a process to rubber stamp or provide a post hoc justification of the original decision to protect against a further appeal to the QIRC.

44. This is contrary to the discussion in the Bridgeman report which provides for a genuine review of decisions with regard to fairness and seeking to make the best decisions possible.

45. A modern public service should have a culture of accountability and excellence in decision making which champions and supports rights and obligations around genuine fairness for public servants, allows public servants to escalate their concerns (as long as they are doing so in good faith) and have those concerns heard and genuinely reviewed, based on criteria including an expansive view of fairness rather than a limited legal definition of reasonableness.

46. Together Queensland's view is that the right to fair treatment must be enshrined in primary legislation and not be subject to industrial trade off or unilateral removal by way of directive or subordinate legislation.

Appeals

47. The current appeal and external review rights for public servants which are proposed to be extended to public sector employees are a patchwork of industrial matters under the IR Act for which the QIRC has significant jurisdiction and powers, direct appeal rights from the Public Service Act to the QIRC sitting in a very limited jurisdiction with significantly limited powers and appeal rights which are provided through the application of directives.

48. The concept of a "fair treatment appeal" has been read down over the last decade and conversion appeals are severely limited in their utility by the current drafting.

49. The appeal provisions of the Public Service Act have themselves been cobbled together by successive amendments of the Public Service Act and the IR Act. Policy changes have been implemented through minimalist amendments to legislation or Directive provisions which have become increasingly unwieldy, confusing and limiting.

50. Together made submissions to "A review of the industrial relations framework in Queensland" in 2015 that:

    a. The "the transfer of public service appeals to the QIRC, and the designation of QIRC members as appeals officers under the PS Act [had not] worked."

    b. "The change of jurisdiction should have been accompanied by proper and relevant changes to the nature of the appeals".

c. "This failure to develop coherent policy, and to ensure proper support for appeals officers, resulted in a diminution of the QIRC's authority and reduction in the confidence that employees and their industrial representatives have in the system".

d. What was required was "more than a simple amendment of s.230 of the IR Act, and forms part of the fundamental re-write that Together Queensland submits is required"

51. These submissions resulted in a recommendations that:

> *That the appeal rights for employees covered by the Public Service Act 2008 (Qld) be reviewed to ensure that the Queensland Industrial Relations Commission has the jurisdiction to consider appeals where the matters have been unable to be resolved at the workplace or agency level.*
>
> *…*
>
> *Negotiations should occur between the PSC, Office of Industrial Relations and public sector unions in order to develop a framework for appeals which provides that the QIRC has the jurisdiction to hear appeals where the matters have been unable to be resolved at the agency level.*

52. However, the fundamental re-write envisioned did not occur, with the provisions from the Public Service Act dropped into the appeals provisions of the IR Act which are intended for appeals against tribunal decisions and are not fit for purpose.

53. This leaves the QIRC with severely limited jurisdiction and powers when dealing with Public Service Appeal matters compared to industrial matters and denies fair treatment to public servants and other public sector employees.

54. One clear example is the limitation on a member of the QIRC hearing an appeal, who only has the power to "stay" a decision in order to ensure the right of the appellant to have their matter heard before they are negatively impacted. A "stay" can only be issued where the appeal relates to a positive decision or action that has been decided. A "stay" cannot be made in relation to a failure to make a decision or a decision to not do something or to deny something. The QIRC member therefore has no power, in an appeal proceeding, to stop a temporary employees employment ending while they are appealing a decision to deny them permanent employment. Further, once an employee is no longer employed, the employing entity will invariably seek for the appeal to be dismissed because there is no longer any utility to the appeal as the QIRC lacks the jurisdiction to reinstate the employee.

55. In an industrial matter the QIRC member has a far wider scope of powers to ensure a fair hearing is provided to all parties.

56. There are also issues with the lack of clarity about the meaning of a "review" and what makes a decision "fair and reasonable".

57. These failings of the Appeals provisions continue to make industrial disputation appealing in lieu of the public service appeal jurisdiction, but this also has downsides in terms of time and resources for applicants and respondents.

58. Further, there are outstanding matters which may bear on appeal provisions arising from the potential "culture of bullying" identified by Professor Coaldrake and any outcomes of the Review of Recruitment Selection which, to be effective, should also consider policy positions regarding appeals.

59. While the explanatory notes to this Bill suggest that all recommendations of the Bridgeman review were accepted by Government, in fact Peter Bridgeman recommended that:

Conversion decisions should be reviewable by the Public Sector Commissioner as a merits review with no further appeal. The Commissioner should be able to make an Employment Direction about the conduct of merits reviews, including management of deemed refusals and possible remit of the matter back to the chief executive.

60. Together does not propose that the Government implement that recommendation at this time but believes that further discussion is required.

61. Together acknowledges that these are complicated and complex issues about which there is not yet a consensus and that further "tinkering around the edges" in response to these submissions may not provide the best outcome.

62. Together seeks that the Committee recommend a review of public sector reviews and appeals be undertaken through the Joint Advisory Committee to recommend any further legislative or policy amendment to Government.

Non-permanent employment

Permanent employment

63. Despite an increase in conversions as a result of the Phase one reforms, Together submits that there has not been a fundamental shift in practice at the point of engagement. Non-permanent (casual and temporary) employees continue to be employed to do work where this could and should be on a permanent basis. There is no effective avenue to address this for two years of continuous service. Despite continuing to employee staff on a temporary basis to perform ongoing work, being a breach of the provisions of the Public Service Act and the obligations on Chief-Executive and their delegates, there is also no mechanism to enforce these provisions outside of appeals for specific review decisions.

64. The Union contends that the circumstances where non-permanent employment is allowed should be further restricted or better enforced at the point of engagement or extension.

Conversion reviews

65. The review provisions and criteria should be reviewed and amended to address inconsistencies and gaps identified by the application and interpretation in the QIRC since the Phase One reforms.

66. In 2020, the higher duties provisions were drafted in a way that significantly restricts their utility and continues the unfair precarious employment arrangements which the reform was intended to address.

67. Together submits that there is no legitimate policy ground as to why an employee acting for more than a year in a higher duties role should be unable to be converted to the vacant role in the seat next to them, or where the role has been reclassified, when these avenues for permanent employment are available to temporary and casual employees.

68. The criteria for conversion of an employee temporarily on a role at a higher level should be broadly the same as for temporary employment – whether there is a continuing need for someone to be seconded to or acting at the higher level and whether there are genuine operational requirements of the agency that prevent conversion,

69. The most significant issues which need to be resolved in the drafting of HD review provisions include:

    a. The limitation on conversion to the specific position and the definition of *continuous period* in the directive.

b. The reclassification of a role precluding an employee being converted[1]. This requires the drafting to include more than one classification level in the eligibility and appointment provisions and changes to the directive.

c. The employee undertaking other higher duties or service at multiple levels and therefore being considered ineligible (despite the PSC advice)[2]. This requires the drafting to include more than one classification level in the eligibility and appointment provisions and directive amendments.

d. Inconsistent language within the review provision and between the review and appeals provisions.

70. In relation to all non-permanent employment the Bill and/or Directives should clearly determine a much higher threshold for when agencies can decline to convert an employee on the basis of operational requirements.

Deemed refusals

71. Together continues to oppose the use of deemed decisions in the architecture of the Bill.

72. The explanatory notes to this Bill suggest that all recommendations of the Bridgeman review were accepted by the Government, however in fact Peter Bridgeman recommended that:

> *If the decision being reviewed was a 'deemed refusal', the chief executive must provide detailed reasons for the refusal in writing to the employer and the Public Sector Commissioner within 14 days of the application.*

73. This recommendation was not accepted.

74. Together does not believe that this recommendation from the Bridgeman review goes far enough.

75. The Bridgeman report noted in relation to deemed refusals:

> *On appeal to the QIRC, the employee has no basis to argue their case, and the chief executive effectively has a right of ambush because the QIRC quite properly requires the necessary information to be [filed]. That systemic unfairness results in a perverse incentive for decisions not to be made, but to let them lapse*

76. The Education, Employment and Small Business Committee in considering the Phase one reform legislation recommended that:

> *… the Department of the Premier and Cabinet investigates an appropriate mechanism to provide fairness and transparency of the decision-making process to a person where the chief executive does not make a conversion decision within 28 days, pursuant to proposed new sections 149A and 149C of the Public Service Act 2008*

77. The proposed mechanism is to provide additional rights to seek a review. Together submits this is ineffective and provides an additional administrative burden on agencies without enough of an incentive to require them to make decisions as required.

78. The construction of the deeming provision is also inconsistent with the otherwise mandatory nature of the review provisions and detracts from the scheme of the Act.

[1] Muir v State of Queensland (Department of Education) [2020] QIRC 231.
[2] James v State of Queensland (Queensland Health) [2022] QIRC 209

79. A member of the QIRC described it in this way in *Singh v State of Qld*[3]:

> *[27] There is a tension in s 149B of the PS Act that is difficult to reconcile. On the one hand, s 149B(6) compels a decision maker to inter alia give the employee a notice stating the reasons for the decision if they decide not to offer to convert the person's employment. By contrast, if no decision is made, s 149B(7) provides the decision-maker is taken to have decided not to offer to convert the person's employment. Yet s 149B(7) makes no provision inter alia for providing reasons.*
>
> *[28] There is a stark contradiction between these subsections where one establishes a robust safety net to ensure natural justice to an employee whose request is refused, while the following subsection allows the employer, at their sole discretion, to be relieved of these very important protections by simply not making a decision. Nevertheless, I am unable to identify a construction of s 149B(7) that imposes an obligation to provide reasons. Further, the Directive equally appears to reinforce the contradiction.*

80. The provisions also have real world impacts where they skew appeal processes to favour the employer who already has the advantage of resources, knowledge and expertise, and is in control of all of the information. Respondents can selectively craft reasons after the fact to rebut the employees' case for conversion in an appeal. For example, it was recently held that a respondent could rely on appeal submissions about matters not before the decision maker at the time "which *would or could have* been relied on to refuse the application"[4].

81. Reversing the deeming provision to provide for a conversion where no review is undertaken would be the most effective way to ensure that Chief Executives comply with their statutory obligations and the underlying policy principles of maximising permanent employment.

82. Alternatively, there should be an appeal ground for a conversion decision including failure to make a decision (consistent with other appeal grounds) which would enable an employee to appeal on the basis of a failure to undertake a mandatory review and provide reasons etc.

Mental or physical incapacity

83. The medical retirement of a public sector employee should never be taken lightly and should be heavily constrained to ensure fairness and a high performing independent public service.

84. Together submits that the mental and physical incapacity provisions should be amended to incorporate the obligations placed on Chief Executives when exercising these powers under the *Anti-Discrimination Act* (Qld), the *Disability Discrimination Act* (Cth) and the current Directive and guideline.

85. This should include that, the Chief Executive must, after receiving the report and before taking any action consider things such as:

    a. the obligations on the public sector entity under the *Anti-Discrimination Act Qld* and the *Disability Discrimination Act (Cth)*

    b. whether any reasonable adjustment can be made to enable the employee to continue in their substantive position (e.g. provide specialised equipment, modify work tasks or the workplace, or consider other action such as retraining, if practicable).

    c. all reasonably practicable options for continuing employment including whether the employee can be transferred or redeployed;

[3] Singh v State of Queensland (Public Safety Business Agency) [2021] QIRC 311
[4] Marshall v State of Queensland (Department of Education) [2021] QIRC 230 at [25]-[26].

d. any actions sought by or proposed by the employee

86. The Bill should provide that after consideration of the report and the above matters the chief executive may take action in response to the report which may include (but not be limited to):

    a. Providing or continuing to provide an employee with paid or unpaid leave due to illness or incapacity for work;

    b. Managing work performance or absence in accordance with Chapter 3, Part 8 Division one and the Directive made in accordance with s 81;

    c. Continuing or initiating an injury management or rehabilitation and return to work program;

    d. Making adjustments to the role or the way that work is performed to person to assist the person to be able to attend work or to perform the role in accordance with provisions of the Anti-discrimination Act / Disability Discrimination Act.

    e. transferring or redeploying the employee; (noting that there needs t be facility made for sector wide transfer and deployment in these circumstances)

    f. making a temporary arrangement such as secondment or mobility arrangement;

    g. retiring the employee

        i. for a public service employee, from the public service; or

        ii. for another public sector employee—from the employee's employment

87. The Bill should provide expressly that a chief executive may only retire the employee in circumstances where all other options have been considered and there is no other reasonably practicable alternative which continues employment.

88. There needs to be provision made for sector wide transfer, deployment and redeployment of employees in the Act and/or Directive in these circumstances and with the employees consent to provide other options for an employee's continued employment.

89. The provisions relating to medical reports from the current directive should also be added to the report provisions in s106 of the Act, e.g.:

    a. The report must not contain any medical or other information that is not directly or indirectly related to the effect and management of the employee's medical condition on their workplace performance or current absence.

90. The Bill should provide that a directive must be made about Division 5 and that chief executive of a public sector entity exercising a power or performing a function under this division must comply with the directive, the Anti-Discrimination Act Qld, the Human Rights Act and relevant parts of Chapter 2.

91. The Union notes that significant material in the current guideline will need to be included or referenced in a directive to ensure they continue to be mandatory considerations.

Discipline, private conduct and the right to civic participation

92. Together notes the Approved Policy Positions by the Joint Advisory Committee in relation to Code of Conduct and Discipline.

Approved Policy Position 14 The review of the Code of Conduct should be prioritised during stage 2 and the broader review of the *Public Sector Ethics Act 1994* should be undertaken separately.
***Approved* Policy Position 15** Consideration should be given to how the new legislation describes discipline, including if it should be separated from breaches of the Code of Conduct and how it fits into the positive performance management framework.
Approved Policy Position 16 The review of the Code of Conduct and public sector ethics frameworks should align with the positive performance management framework.

93. Together also notes the references the Bridgeman Report to the need to reinforce public sector employees "rights to civic participation".

94. Together considers that more work is required in relation to these areas.

Termination

Surplus to the entity's needs

95. Together supports a legislative power regarding employees who are surplus to requirements, however, does not support the proposed provision in its current form.

96. The current provisions of the relevant directive and the employment security policy provide that where an employee is identified as surplus, the employing entity must take certain actions with redundancy or retrenchment as a "last resort". The government has committed that retrenchment will only be undertaken in exceptional circumstances where deployment or redeployment are not options, and only with the approval of the Commission Chief Executive, Public Service Commission.

97. The proposed provision provides a power to terminate without those protections (or with those protections subject to directive only) and is not supported.

98. The protective provisions of the current directive should be provided in the Act.

99. The creation of a directive should also be required.

Common law rights to dismiss

100. Together understands that the Department's position is that any preserved prerogative to dispense with services consistent with the current section 219(3) of the *Public Service Act 2008* is very significantly limited and read down by its legislative and industrial context.

101. Together seeks that this is very clearly set out in Notes on the face of the Bill and/or Explanatory notes.

Machinery of Government Changes

102. The Machinery of Government provisions in the PS Bill, as drafted, have significant detrimental impacts on public service employees and amendments are required to the PS Bill and to the *Industrial Relations Act 2016* to ensure that public servants rights and entitlements are not

deleteriously impacted by decisions of the Governor in Council, contrary to the fundamental legislative principles of the rights and liberties of individuals.

103. In the Queensland IR system where there is a transmission of business from one employer to another, the IR Act provides for continuity of service and also for bargaining instruments that apply to the former employer to continue to apply to the successor or new employer.

104. In the Queensland public sector, entities represent that State of Queensland and therefore the State of Queensland is the employer. Where there is a transmission or transfer of functions or people from one public sector entity to another, there is no corresponding change to the employer which would enliven the provisions of the IR Act relating to the "transmission of business".

105. This does not impact on the continuity of service or employment with the employer – because public sector workers continue to be employed by the same employer.

106. However, this does significantly impact on the rights and entitlements of public sector employee under an industrial instrument because the employer does not change but a public sector employee may no longer be covered by a certified agreement or an award which provides industrial rights and entitlements. This may significantly impact employees' industrial conditions and take-home pay.

107. There may also be impacts on any conditions or rights for which eligibility is based on employment or service in a particular agency or entity such as the right to a review of non-permanent employment or the handling of a grievance etc.

Certified agreement conditions and entitlements

108. In relation to the application of industrial instruments the previous *Industrial Relations Act 1999* included a deeming provision which provided that the employer was "for employees employed in a department of government—the chief executive of that department"[5].

109. Therefore, where there was a Machinery of Government Change through a decision of the Governor in Council pursuant to the PS Act 2008, the Chief Executive of the new or receiving Department (as the new employer) became bound by the certified agreement which continued to apply to the employees.

110. It was confirmed by the QIRC in The Queensland Public Sector Union of Employees v Department of Transport and Main Roads [2009] ICQ 6 that:

> *…there will be cases in which a government agency will take over the functions of another government agency without there being a succession. In some cases there will be no succession because the Commonwealth or State will be the employer before and after the shift of functions from one agency to another because both agencies are "agents" and the Commonwealth or the State is (throughout) the principal*

111. It was only through the deeming provision in that case that the certified agreement entitlements of Department of Main Roads staff carried over with them to the Department of Transport and Main Roads.

112. This provision has not been retained in the *Industrial Relations Act 2016.*

113. The Union has sought for this provision to be reinstated into the IR Act 2016 or for a new provision to specifically deal with the application of bargaining instruments to successor Government Entities.

[5] *Industrial Relations 1999*, s 167.

114. Together made these submissions through the Joint Advisory Committee in respect of this Bill but the position of government put to the Union by of the Office of Industrial Relations was that this position is not supported.

115. A possible provision is below:

"222A Application of bargaining instruments to successor Government Entities

(1) This section applies if-

(a) A bargaining instrument applies to the employer and its coverage refers to employees in a Government Department or Entity

(b) At a later time a new Government Department or Entity becomes the successor (whether or not immediate) of the whole or part of the business or functions of the Government Department or entity to whom the instrument applies

(2) From the later time-

(a) The bargaining instrument applies to the new Government Department or entity, to the extent the instrument relates to the whole or part of the business or functions of the Government Department or entity; and

(b) The bargaining instrument stops applying to the previous Government Department or entity, to the extent the instrument relates to the whole or part of the business or functions of the Government Department or entity; and

(c) A reference in this chapter to the Government Department or entity includes a reference to the new Government Department or entity, and stops referring to the previous Government Department or entity, to the extent the context relates to the whole or part of the business or functions of the Government Department or entity."

116. In addition, a provision similar to what is contained in the Fair Work Act may be appropriate which provides for the Fair Work Commission to make orders about transferring instruments.

117. This issue is no longer a theoretical scenario, employees in the Department of Transport and Main Roads performing work associated with digital camera offences are being transferred to Queensland Treasury.

118. The Department of Transport and Main Roads is covered by a different bargaining instrument to the agreement that applies to Queensland Treasury.

119. The TMR agreement provides superior conditions in respect of TOIL and organizational changes.

120. The TMR agreement has passed its expiry and is in the process of reaching an imminent in principle agreement which will include at least 6 months of backpay for work which has already been performed by these workers.

121. This accrued right to backpay for workers who have been working and bargaining in good faith will be extinguished by this Governor-in-Council decision pursuant to the *Public Service Act 2008*.

122. In the absence of an effective provision applying bargaining instruments to successor government entities, the proposed PS Bill 2022 significantly offends fundamental legal principles.

123. It is also a potential breach of the *Human Rights Act* which is not addressed in the statement of compatibility tabled in parliament relating to this Bill.

Accrued rights

124. The Bill attempts to address the issue of a Machinery of Government change extinguishing other accrued rights such as the right to a temporary employment review. This was a live issue after the passing of the current provisions relating to higher duties conversions where employees were performing the same role in the same unit but for a different department and therefore were no longer eligible for a review or conversion to permanent employment in that position.

125. However, the provision uses as an example leave entitlements, generally for employees employed by the State of Queensland, leave will accrue on the basis of employment with the same employer and therefore this is much less likely to be an issue.

126. Together recommends that the provision is redrafted and the examples amended to much more clearly identify the operation of the clause to protect these accrued rights.

Excluded matters

127. Together has significant concerns with the ongoing exclusion of employees from the operation of this Bill and the IR Act and the jurisdiction of the Supreme Court.

128. The Union notes that the Bridgeman report concluded that "the [current Public Service] Act's purported insulation of a public sector decision maker from accountability may be both legally problematic and unfair."

Senior Officers

129. In particular, the continued exclusion of Senior Officers from enterprise bargaining and access to the provisions of the IR Act in relation to what would otherwise be industrial matters is of significant concern.

130. The IR Act 2016 provided for a framework to promote collective bargaining between employees (and their representative unions) and employers, as the "primary means by which wages and employment conditions are decided".

131. the purpose of Chapter 4 of the IR Act includes to — "to facilitate collective bargaining by employees and employers, in good faith and with a view to reaching agreement, as the primary basis under this Act on which wages and employment conditions are decided"

132. Further, the explanatory notes for the IR Bill include that:

    a. the Bill will achieve its purpose by …setting the key elements for the State's industrial relations system" including "collective bargaining as the cornerstone for setting wages and conditions".

    b. the Bill "reframes the objects of the legislation around a fair and balanced system, the primacy of collective bargaining and recognising obligations of mutual trust and confidence" and "strengthens enterprise bargaining arrangements with greater emphasis on responsible representation and good faith bargaining".

    c. Further the Bill amends "other State Government employing Acts to ensure these do not impede the rights of employees, other than those on Statutory appointment, judicial officers and their associates, and employees engaged for special and specific tasks (e.g. special investigators) to have access to enterprise bargaining for their terms of employment".

133. The exclusion of Senior Officers from these provisions goes against the intent of the IR Bill and the principles that underpinned it.

Public sector principles

134. Together expresses alarm with the change in language between the management and employment principles in s 25 of the Public Service Act and the public sector principles in the Public Sector Bill. The Bill alters mandatory statutory considerations to advisory considerations.

135. The explanatory notes for the 2008 Act provided that:

> *The employment principles reflect the standards to which public service employment is to be held, reinforcing the need for fair treatment of employees, flexible working environments and a diverse and highly skilled workforce.*

136. The Bill removes the requirement for Public Service management and employment to be "directed" towards the principles set out in the Legislation to now only requiring that public entities "should be guided" by those principles. Given these principles go to the very aspects of fairness and integrity that are central to the Coaldrake report, the explicit downgrading of them in the Bill is untenable.

Technical and other amendments

Application of the Bill to staff members in the Queensland Police Service.

137. Currently a staff member mentioned in section 8.3(5) of the *Police Service Administration Act 1990* (PSA Act) (a police officer appointed to a position as a staff member due to unfitness for duty as an officer on medical grounds) is employed under the *PSAA* and not the *Public Service Act 2008 (*PS Act 2008*)*. However, these staff are provided, administratively, with the wages and conditions that apply to public servants through the Queensland Public Service Officers and Other Employees Award and occupy a public service position.

138. This creates lacunae in relation to the application of industrial and legislative provisions and instruments.

139. One way of resolving these issues is to amend section 2.5A of the PSA Act such that these staff members are employed under the PS Act 2008.

140. The drafting of the current Bill means that if this were to occur this would create a circular provision where the PSA Act provides for employees are employed under the new Public Sector Bill which then excludes them and therefore will require amendment.

141. The amendment of s 8(2) of the current Bill would avoid this issue arising in the future and have no impact on the current application of the Bill:

> (h) the police service to the extent that it ~~does not include staff members~~ includes officers ~~mentioned~~ in employed under the Police Service Administration Act 1990, section 2.5A ~~(1)(a)~~;

Authorised:

Michael Thomas
Assistant Secretary

[redacted]