Queensland Law Society

Law Society House, 179 Ann Street, Brisbane Qld 4000, Australia
GPO Box 1785, Brisbane Qld 4001 | ABN 33 423 389 441
P 07 3842 5943 | F 07 3221 9329 | president@qls.com.au | qls.com.au

Office of the President

11 July 2022

Our ref: KB:ILC

Committee Secretary
Education, Employment and Training Committee
PARLIAMENT HOUSE QLD 4000
By email: [redacted]

Dear Committee Secretary

Industrial Relations and Other Legislation Amendment Bill 2022

Thank you for the opportunity to provide a written submission to the inquiry into the Industrial Relations and Other Legislation Amendment Bill 2022 (**Bill**).

This submission has been contributed to by Queensland Law Society's (**QLS**) Industrial Law Committee.

Executive Summary:

- QLS supports amendments aimed at preventing and eliminating sexual and sex and gender-based harassment, including listing sexual and sex and gender-based harassment as an industrial matter for dispute purposes.
- The definitions of "sexual harassment" and "sex and gender-based" should align with any amendments to the *Anti-Discrimination Act 1991* (**AD Act**) following its review.
- Additional amendments are required to section 530 of the *Industrial Relations Act 2016* (**IR Act**) so that parties are able to be legally represented in proceedings before the Queensland Industrial Relations Commission (**QIRC** or **Commission**).
- QLS supports the proposed amendments to the provisions in the IR Act relating to registered organisations.
- QLS supports the amendments to the Queensland Employment Standards (**QES**) proposed in the Bill, noting these are consistent with the Government's response to the Five-yearly Review of the IR Act.
- The employees entitled to parental leave under the IR Act should include, at least, those entitled to this leave under the *Fair Work Act 2009* (Cth) (**FW Act**). The provisions should include "de facto partner" in addition to "employee's spouse".
- The notice of termination and redundancy requirements under the QES do not apply to certain types of employees, which can result in unfair outcomes for these workers. The IR Act should be amended to address this.
- QLS generally supports the amendments to the provisions on the IR Act relating to collective bargaining.

- QLS generally supports the introduction of Chapter 10A into IR Act relating to independent courier drivers. However, there are a number of provisions which we have outlined below that requirement clarification and amendment.
- QLS generally supports the amendments to the AD Act and *Public Trustee Act 1978*.
- Finally, QLS strongly calls for further resources to be provided to the QIRC. The Commission is currently under-resourced. This legislation will increase its workload. Without additional resourcing, the objectives of the Bill will not be adequately achieved.

Preventing and eliminating sexual and sex-based harassment (clauses 4, 25, 38, 53, 63, and 65)

The explanatory notes for the Bill state these amendments are necessary to provide protections and deterrents against sexual harassment and sex or gender-based harassment connected with employment by adding key provisions to the main purpose of the IR Act and by replacing existing definitions of 'sexual harassment' and 'discrimination' in the IR Act with those contained in the AD Act. This is supported by QLS.

We note the AD Act has recently been reviewed and we look forward to the final report and government response in relation to these issues.

Definition of sex or gender-based harassment

Clause 65 of the Bill amends the Dictionary in the IR Act to insert a definition for sex or gender-based harassment. Given the review of the AD Act has considered similar issues, we query whether this amendment is premature, or alternatively, we recommend that any amendment to the AD Act adopt this new definition in the IR Act to ensure consistency.

Legal representation

QLS supports the amendment to section 530 of the IR Act to specifically allow parties to be legally represented in proceedings before commission relating to an industrial matter involving allegations of sexual harassment or sex or gender-based harassment. However, we strongly submit the right to legal representation for these matters should not require leave of the Commission. Requiring leave in these matters will likely cause additional concern and distress to parties due to the uncertainty about whether their legal representative will be able to appear, as well as lead to increases in legal costs. Allowing legal representation in these complex matters will assist parties and the commission in advancing the proceeding.

QLS has raised these concerns more generally in respect of legal representative and section 530 of the IR Act. The narrow construction of this section has led to confusion and unfair outcomes for parties in the following ways:

1. Although the bases for the granting of leave under the IR Act and the FW Act are the same, the categories of matters in respect of which leave may be granted are much narrower in the Queensland legislation. In particular, unless the parties consent, there

is no capacity for a party to be represented by a legal practitioner in a general industrial dispute or anti-bullying proceeding (among other categories of matters).

That restriction is particularly acute in circumstances where:

a. Section 529 of the IR Act enables parties to be represented by 'agents' without legal qualification who are not subject to any of the restrictions placed on members of the legal profession.
b. The right to be represented by virtue of the consent of an opposing party is rarely triggered. Indeed, this basis for legal representation does not pay sufficient regard to the adversarial nature of proceedings before the QIRC. Unrepresented parties, particularly those without prior experience with the justice system, routinely withhold consent in an attempt to gain a tactical advantage over their opponent, even where legal representation would significantly assist the Commission. Although the Commission has the right to override such an approach in some cases, it does not have the capacity to do so in respect of all matters that go before it.

2. The Commission is not presently able to grant leave for a legal representative to appear in an interlocutory matter even though the substantive proceeding is before the Full Bench where leave can be granted.

   This difficulty was observed in *Together Queensland Industrial Union of Employees v State of Queensland (Queensland Health)* [2021] ICQ 01611. We refer to comments by Davis J, President, throughout the decision and in particular at paragraphs 38 and 39 where his Honour said:

   > "[38] Section 530 of the IR Act severely restricts the right of appearance of lawyers in the QIRC. In the absence of the consent of all parties, a discretion to allow legal representation only rises in relation to a small number of matters which arise under a "relevant provision".
   >
   > [39] Where a matter heard and determined in the QIRC goes on appeal to the Court, there is a discretion in the Court to give leave to a party to be legally represented. **Any complicated issue which might have to be considered in an appeal would invariably have been raised in the QIRC so it is mysterious why the QIRC does not have a broader discretion to grant leave to the parties to be legally represented."** (our emphasis).

   His Honour noted, at paragraph 42, that despite the substantive application in this case being heard by the Full Bench, the Vice President of the Commission did not have the power under section 530 or in the rules to make a decision in respect of legal representation.

   QLS submits further amendment is required to section 530 so that the Commission (who is conducting interlocutory proceedings in Full Bench matters) has power to grant leave for legal representation in those interlocutory proceedings. Requiring parties to step in and appear in an interlocutory matter when they have representation in the full matter is bizarre and requires substantial additional work for everyone involved. It can cause distress for parties who otherwise thought they were legally represented in a proceeding.

3. The Commission does not have the power, in section 530, to grant leave for a party to be legally represented in applications under section 475 of the IR Act. Section 475 allows the Commission to order the payment of unpaid wages and other entitlements.

This restriction on the Commission's power was confirmed in *Mason v Paroo Shire Council* [2021] QIRC 316. In this matter, Industrial Commissioner Dwyer held that section 530(2) excludes legal representation in proceedings under section 475 of the IR Act:

> "[24] Section 530(2) establishes an absolute barrier to legal representation in proceedings before the commission under s 475. There is no discretion granted to me to order otherwise."

Given the focus on this area in recent years, including by way of legislative reform, we do not believe that preventing a party from accessing legal representation in these circumstances is appropriate.

4. The limited right to legal representation in section 530 excludes public service appeals. In these matters, it is likely that the department will be able to be represented by someone who is either legally qualified or with a significantly higher level of expertise/familiarity with the process than the employee. Prohibiting the employee from having access to the same advice and expertise that the department has creates a significant and unjustifiable imbalance of power in circumstances where this may already be a risk and where the employee is at risk of significant loss. There may also be a disparity between workers who are able to access assistance from their unions and those who are not. Accordingly, we submit that the exclusion of public service appeals contained in section 530(1A) the IR Act should be removed.

Registered organisations
(clauses 33 - 36, 39, 41, 42, 44, 47 - 53, 56 – 58, 64, 65 – see also Schedule 1 – Other amendments)

QLS generally supports the proposed amendments to the provisions in the IR Act relating to registered organisations. The QIRC has held a historical role in the regulation of both registered employee and employer organisations. The long-standing regulation of employee and employer representative organisations has ensured regulation and enforcement of a number of matters, including but not limited to:

a. Transparency through reporting obligations enshrined in the IR Act for registered organisations;
b. The regulation of disputes about the "coverage" by different employee organisations regarding specific callings of employees;
c. The regulation of permits for officers and officials of registered organisations; and
d. The oversight of elections and other organisational matters.

It is incongruous that unregistered organisations can operate and attempt to exercise representational and other rights without the correlative obligations that registered organisations are required to comply with to exercise those same rights. The amendments in the Bill ensure that organisations that seek to represent employees and employers are subject to the obligations of transparency and probity that their members, and the public at large, expect if they are to exercise those rights.

Employment standards
(clauses 4 – 24, 43, 62 & 65)

QLS generally supports these amendments to the IR Act, noting these are consistent with the Government's response to the Review.

These amendments are primarily focused on aligning parental leave entitlements with those in the FW Act, including by providing for parental leave and other entitlements in the event of stillbirth, removing some unnecessary gendered language, and adding in entitlements to take a period of parental leave flexibility and request to return to work part-time following parental leave.

However, some of the terms used in the Bill and the IR Act are not broad enough to cover all of the circumstances in which someone might need to access parental leave including due to a stillbirth or death of a child. For example, the provisions refer to an employee's spouse, however, this will not cover circumstances where someone is not a spouse, but otherwise the partner, or is either the biological or intended parent. In each of these circumstances, it is reasonable that this person may need to take leave. At the very least, the wording of these provisions should be commensurate with the FW Act and include "de facto partner".

Additional issues of concern in the QES: notices of termination and redundancy pay

Division 13 of Part 3 of the IR Act outlines the requirements for the provision of notices of termination and redundancy pay. However, some employees are not able to access these entitlements due to certain exclusion provisions. These produce unfair outcomes for these employees.

Section 120 of the IR Act sets out the categories of employees that are not entitled to notice of termination under section 123. Section 120(d) provides that an employee is not entitled to the minimum period of notice of termination prescribed under section 123 during their probationary period (as defined in this section and unless there is another agreement between the employer and employee).

Section 120(f) similarly excludes an employee if:

a. the employee is not subject to an applicable industrial instrument;
b. the employee is not a public service officer; and
c. the employee's annual wage is more than the FW Act remuneration threshold.

An "applicable industrial instrument" is defined in section 14 to be a modern award, certified agreement or bargaining award or an arbitration determination.

Similarly, under section 125, an employee is not entitled to the minimum prescribed redundancy entitlements under section 126 of the IR Act if there is no "applicable industrial instrument" that applies to their employment.

In relation to employees on probation, the FW Act prescribes the minimum requirement to give a week's notice for less than a year's service and this applies across the board. This is inconsistent with the IR Act. This exclusion leaves employees under the state jurisdiction worse

off than those under the federal. Section 120 should be amended to provide a similar entitlement to that in the section 117 FW Act.

As to employees not covered by an applicable industrial instrument, we are aware of situations where these employees have been ineligible for notice and redundancy pay, despite having a number of years of continuous service and being terminated in accordance with section 125(1)(b). This situation has arisen in respect of an employee of a local council. In this particular matter, the council was willing to pay the employee redundancy pay, but only if the employee executed a deed of release.

During consultation on the 2016 legislation, QLS, along with others, submitted that a broad compulsory requirement for minimum redundancy pay should be provided for. This was not taken up.

In our submission on this legislation, we stated that:

> "3. Termination of employment
>
> 22. The IR Act sets minimum redundancy entitlements for State system employees covered by awards or enterprise agreements. However, there appears to be no legislative entitlement to redundancy pay for State employees not covered by an award or enterprise agreement.
>
> 23. In contrast, the NES provides for minimum redundancy payments for all Federal system employees (with scope for awards, enterprise agreements and employment contracts to provide more generous entitlements if desired). For employees that had no entitlement to redundancy pay prior to 1 January 2010 (which is when the NES came into operation), their service for redundancy purposes is only counted from 1 January 2010.
>
> 24. The Society considers that award and enterprise agreement "free" employees in the State system should also enjoy the protection of a legislative minimum entitlement to redundancy pay. We recommend that the scale to be applied to such employees should be consistent with the QES.
>
> 25. To minimise the cost to business associated with the introduction of this new entitlement, it would be appropriate to consider similar transitional provisions to those contained in the FW Act (ie. That is, whilst the new entitlement would apply to all employees, for those employees who did not have an entitlement to redundancy pay prior to the date that the new provisions come into operation, their service for redundancy purposes would be limited to the period after the provisions come into operation). We submit that section 125 of the IR Act should be amended to remove the requirement that an employee be covered by an applicable industrial instrument in order to be eligible for redundancy entitlements."

QLS submits that sections 120 and 125 be amended to remove these exclusions. Such amendments will create consistency across employment sectors and ensure that workers are appropriately able to access these entitlements.

We would be pleased if the Committee would consider addressing these issues in its report on the Bill, which represents an important and timely opportunity to address inconsistencies in the IR Act and ensure fairness for workers.

Collective bargaining (clauses 26 – 31)

The amendments to Chapter 4 of the IR Act will require parties to obtain, and disclose as soon as practicable after the start of negotiations, information relevant to the gender pay gap under the proposed instrument.

The amendments also permit arbitration of disputes in bargaining negotiations by a single member of the Commission on referral from the Full Bench on application of all of the parties. QLS believes these amendments may provide greater efficiency in the resolution of bargaining disputes. Further, the requirement that an application must be made by all negotiating parties is appropriate.

Independent courier drivers (clause 66 Insertion of new ch 10A)

We note the following in relation to proposed Chapter 10A.

1. This proposed chapter will allow the QIRC to make determinations covering particular groups of couriers and contractors. In doing so, the Commission must ensure a contract instrument provides for remuneration and working conditions for independent couriers that are fair and just, comparable to the remuneration and working conditions an employee would receive under an industrial instrument or the IR Act and generally reflect the prevailing minimum remuneration and working conditions of independent couriers covered, or to be covered, by the instrument.

   We support the list of factors in proposed section 406F(2) setting out the matters that must be considered by the Commission in exercising its powers in relation to a contract instrument.

   We also generally support the ability for collective bargaining for independent couriers.

2. The provisions give broad powers to the QIRC to determine "classes" of independent couriers but give no guidance as to how that decision should be made. A general definition of the term "class" is "a category that has some attribute in common". It may be helpful for the legislation to provide some guidance to the Commission on this topic.

3. Under proposed section 406O, 2 or more principal contractors may apply for a contract determination for a class of courier service contracts but not independent couriers (unless represented by an employee organisation). The nature of a contract determination is different to an employee industrial award with the capacity for application to a much narrower group of people. It is unclear why the application of the section should be limited in this way, particularly when those persons can be heard on the application for a contract determination hearing.

4. Under proposed section 406V, a negotiated agreement (which is a form of collective agreement) is made between the party/s representing 1 or more principal contractors and the party/s representing a class of courier service contracts, being:

> "a group of the independent couriers at the time the agreement is made, whether all or a category of the independent couriers, who are collectively taken to be 1 party to the negotiated agreement".

It is unclear whether the only potential parties are "all or a category" of the independent couriers or whether some smaller "group" may be eligible. The term "group" is not defined and presumably, means 2 or more independent couriers. If this is the case, then the provision should simply refer to 2 or more of the applicable class of independent couriers.

5. Proposed section 406ZT makes provision for parties to apply to the QIRC for discharge of an agreement after its termination. The process outlined in the provision seems cumbersome and given the issues that have existed federally with "zombie" collective agreements, we query whether there should be a default "sunset" clause included unless an application for renewal or replacement is made. Such a provision should be subject to at least equivalent terms and conditions existing in a contract determination or equivalent industrial safety net protection.

6. The proposed chapter allows individual couriers to make an unfair dismissal application. There does not appear to be any probationary or minimum qualifying period to be able to make the application and access the remedies of reinstatement and/or up to 6 months loss of income (as well as the 21 day time limit for making an application).

   It may be that a probationary or minimum qualifying period is not necessary as a form of probation is not generally a feature of contractor agreements and it could be expected that the shorter a period of service, the less likely the QIRC is to order a significant remedy. However, these issues should be considered.

7. Given that ownership of a vehicle is not a pre-requisite to being defined as a "courier" under the legislation, there may be some confusion for unfairly terminated couriers who are ABN sole traders as to whether they should commence an unfair dismissal claim in the federal jurisdiction as an employee or in the state jurisdiction as an "independent courier". It may be worth considering whether the fact that a claim as an employee has been discontinued or dismissed should be included as a specific matter for the QIRC to consider in any extension of time application.

8. Given these are novel provisions, it would be worthwhile for a review of their operation to take place after an appropriate time, say, 4 years.

Amendment of the *Anti-Discrimination Act 1991*

We generally support the amendment to the AD Act to insert section 190 which allows the Tribunal to make an interim order prohibiting a person from doing an act that might prejudice an order the Tribunal might make after a hearing. Given the transitional provision allows a party to apply under this section in respect of an existing complaint, appropriate education should be undertaken to ensure parties are aware of the consequences of this new power.

Amendment of *Public Trustee Act 1978*

QLS generally supports the amendments to the *Public Trustee Act 1978*.

We are aware that the Public Trustee generally charges administration fees in respect of moneys it holds. We would be pleased know whether these fees will be incurred in these circumstances.

Additional resources for the QIRC

The explanatory notes provide an estimate of the costs of implementation of these reforms, noting:

- the expansion of the QIRC's jurisdiction to deal with workplace sexual harassment and workplace sex or gender-based harassment will require the development of subject matter specific guidance material for staff and members of the Commission; and
- the QIRC's expanded jurisdiction in setting minimum standards of work for independent couriers can be expected to draw on the QIRC's resources particularly in the initial determination-making phase and to a lesser extent over time in the agreement-making processes and in relation to disputes that arise.

However, the notes advise that these costs "will be accommodated within existing agency resources". This is insufficient. The QIRC is currently under-resourced and there is an urgent need for more members. This need will only be exacerbated when these reforms commence, creating further delays for parties and further work for members and Commission staff.

QLS calls on the Government to urgently appoint more members to the Commission and review and provide other resources that are required.

We strongly urge the Committee to make this a specific recommendation of this inquiry's report.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via [redacted].

Yours faithfully

[redacted]

Kara Thomson
President