

12 August 2020

Our ref: LP-MC

Committee Secretary
Education, Employment and Small Business Committee
Parliament House
George Street
Brisbane Qld 4000

By email: [REDACTED]

Dear Committee Secretary

Public Service and Other Legislation Amendment Bill 2020

Thank you for the opportunity to provide this submission to the Inquiry into the Public Service and Other Legislation Amendment Bill 2020. The Queensland Law Society (QLS) appreciates the Committee's consideration of this submission outside of the timeframes published on the Inquiry page

This submission has been prepared with the assistance of QLS Occupational Discipline Law and Industrial Law legal policy committees, whose members have substantial expertise in this area.

Disciplinary issues

This bill makes several amendments to the disciplinary processes in the *Public Service Act 2008 (PSA)*. QLS is generally supportive of the amendments, but considers the following should be addressed by the Department before the legislation is passed by Parliament.

First, QLS has concerns that a person can be suspended without pay while a disciplinary process is taking place pursuant to clause 36, proposed section 137.

Under section 137(4)(b), the chief executive can decide that it is not appropriate for the employee to be entitled to normal remuneration during the suspension, having regard to the nature of the discipline to which the chief executive believes the person is liable. In this instance, the chief executive will essentially be making a judicial determination about the liability of the employee. Most concerningly the effect of that determination will impact on the employee's pay.

We draw the Committee's attention to the fact that a suspended worker is still employed by the Department and so is unable to access unemployment benefits during the period of their

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suspension. This can create circumstances of severe financial hardship which will have flow on effects to the workers' family and even the broader economy.

As discussed, below, a directive may be made about this issue pursuant to proposed section 137A(2)(c), however, such a directive may not provide any further certainty to an employee.

In addition to the obvious impacts on an individual from not receiving their normal pay, in circumstances where they are still employed and have not yet had an adverse finding against them, members' experience is that the requirement to pay workers during the period of suspension and while a disciplinary process is undertaken, encourages this process to be progressed expeditiously. Currently, even with that pressure, the experience of members is that disciplinary processes often take a number of months and, in some cases, years during which time subject employees may be suspended for the duration. The prospect of individuals not being paid for years while suspended from employment is of grave concern to the Society and removes one of the key incentives for the public service to conduct disciplinary investigations and proceedings efficiently.

The material provided by the Department with respect to these provisions to date does not provide a rationale as to why such a decision should be made, nor the circumstances where it is anticipated such a decision may be made. This position must be appropriately justified, particularly in light of the above arguments.

Secondly, a number of clauses in the bill insert provisions into the PSA to allow directives to be made about a number of substantive matters including with respect to guides for disciplinary actions and procedures, investigations and positive performance management.¹ QLS has concerns with this information being placed in a directive, which is able to be made by the commission at any time, as decisions made in reliance on such directives can significantly impact upon the rights, liberties and obligations of individual employees, departments and the State. Certainty for all parties about the process should be a primary objective.

Certainty would be provided by including this information in the primary legislation which, would also allow for greater Parliamentary scrutiny.

In the absence of this information being placed in the PSA, it would be beneficial if, at minimum, there was consultation on any directives before they are made and, that there be sufficient notice and education provided for relevant parties. We note some consultation is already required under section 49A of the PSA.

Amendments to the right to legal representation in public sector appeals

QLS generally supports the objectives of the bill in amending the *Industrial Relations Act 2016* (**IR Act**). However, we do not agree with the insertion of a new section 530A which prohibits legal representation in public service appeals. While we note this amendment reflects the current process in the PSA, we consider this is an opportunity for reform to improve the process.

¹ See for example section 137A, in clause 26, section 192A in clause 44, section 214B in clause 54 and section 218A in clause 56. We note a similar amendment is proposed to be made to the *Industrial Relations Act 2016*.

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It is our members' experience that allowing parties to be legally represented has a positive impact on a proceeding. Legal practitioners often assist a court, commission or conciliator through ensuring their own client understands the issues and in articulating their client's position concisely. Generally, legal practitioners play a positive role in and are of significant assistance in resolving matters.

In public service appeals, 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 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 current provisions of section 530 of the IR Act be applied to public service appeals.

If you have any queries regarding the contents of this letter, please do not hesitate to contact our Legal Policy team via policy@qls.com.au or by phone on (07) 3842 5930.

Yours faithfully



Luke Murphy
President