



A review of the industrial relations framework in Queensland

A report of the Industrial Relations
Legislative Reform Reference Group

December 2015

23 December 2015

The Hon Grace MP,
Minister for Employment and Industrial Relations,
Minister for Racing,
Minister for Multicultural Affairs,
100 George St,
Brisbane QLD 4000

Dear Minister

On behalf of the Industrial Relations Legislative Reform Reference Group, I am pleased to present you with 'A review of the industrial relations framework in Queensland'.

I express my thanks to all stakeholders who contributed to this Review and to the officers of your Department who provided secretariat support to the Reference Group.

Yours sincerely

A handwritten signature in black ink, appearing to read 'J.M.G.', with a long horizontal flourish extending to the right.

Jim McGowan AM

Chair

Industrial Relations Legislative Reform Reference Group



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Glossary

ABS	Australian Bureau of Statistics
ACTU	Australian Council of Trade Unions
ADFVC	Australian Domestic & Family Violence Clearinghouse
AHRC	Australian Human Rights Commission
AiG	Australian Industry Group
ALA	Australian Lawyers Alliance
AMWU	Australian Manufacturing Workers' Union
ASIC	Australian Securities and Investments Commission
AWU	Australian Workers' Union
BCC	Brisbane City Council
BEMS	Building, Engineering and Maintenance Service (CFMEU, ETU, PGEU and AMWU)
CCIQ	Chamber of Commerce and Industry Queensland
CEDA	Committee for Economic Development Australia
CEO	Chief Executive Officer
CFMEU	Construction, Forestry, Mining, and Energy Union
DFV	Domestic and Family Violence
DFVP Act	<i>Domestic and Family Violence Protection Act 2012</i> (Qld)
ECQ	Electoral Commission of Queensland
ERP	Equal Remuneration Principle
ETQ Act	<i>Electronic Transactions (Queensland) Act 2001</i> (Qld)
ETU	Electrical Trade Union
FET Act	<i>Further Education and Training Act 2014</i> (Qld)
FW Act	<i>Fair Work Act 2009</i> (Cth)
FWC	Fair Work Commission
FW(RO) Act	<i>Fair Work (Registered Organisations) Act 2009</i> (Cth)
GFB	Good Faith Bargaining
HHB Act	<i>Hospital and Health Boards Act 2011</i> (Qld)
ICQ	Industrial Court of Queensland
ILO	International Labour Organisation
IO Act	<i>Industrial Organisations Act 1997</i> (Qld)
IR Act	<i>Industrial Relations Act 1999</i> (Qld)
LG Act	<i>Local Government Act 2009</i> (Qld)
LGAQ	Local Government Association of Queensland
LGE	Local Government Enterprise
LNP	Liberal National Party
NAB	National Australia Bank
NDVW Survey	National Domestic Violence and the Workplace Survey
NES	National Employment Standards
PAH	Princess Alexandra Hospital
PCBU	Person Conducting a Business or Undertaking
PGEU	Plumbers and Gasfitters Employees Union Queensland
PS Act	<i>Public Service Act 2008</i> (Qld)
PSC	Public Service Commission

QAO	Queensland Audit Office
QCAT	Queensland Civil and Administrative Tribunal
QCU	Queensland Council of Unions
QES	Queensland Employment Standards
QIRC	Queensland Industrial Relations Commission
QLS	Queensland Law Society
QNU	Queensland Nurses' Union
QPS	Queensland public sector
QPU	Queensland Police Union
QTU	Queensland Teachers' Union
RF Bill	Industrial Relations (Restoring Fairness) and Other Legislation Amendment Bill 2015 (Qld)
TQ	Together Queensland
UFUQ	United Firefighters' Union Queensland
UV	United Voice
WWQ	Working Women Queensland

Executive Summary

On 20 August 2015 the Honourable Curtis Pitt, Treasurer, Minister for Employment and Industrial Relations and Minister for Aboriginal and Torres Strait Islander Partnerships, announced a Review of Queensland's industrial relations jurisdiction. The Terms of Reference for the review require the consideration of, and recommendations for Queensland's industrial relations framework, laws and tribunals including the structure, functions and powers of those tribunals.

The Government appointed the Industrial Relations Legislative Reform Reference Group (the Reference Group) to undertake the review. The Reference Group was chaired by Jim McGowan AM and comprised key industrial relations stakeholders. Tim Lyons who has extensive industrial relations knowledge and experience and Professor Gillian Whitehouse from the University of Queensland were appointed to assist the Reference Group in its deliberations. Secretariat support for the review was provided by a dedicated team from the Office of Industrial Relations, Queensland Treasury.

Queensland's industrial relations laws were last systematically reviewed in 1998.¹ The recommendations of that Review provided the impetus for the drafting of the *Industrial Relations Act 1999* (Qld) (IR Act).

Since that time, the scope of the Queensland industrial relations system has reduced markedly. Through the use of its constitutional powers, the Commonwealth expanded its industrial relations jurisdiction in 2005 to cover all trading corporations in the private sector. To provide greater clarity and certainty about private sector coverage, in 2010 the Queensland Government referred to the Commonwealth the power to cover non-incorporated entities in the private sector. Queensland's industrial relations jurisdiction now comprises state and local government sectors and some statutory entities specifically excluded from the national system.

The current IR Act is much amended, complex and in need of renewal. Since 1999, there have been 74 amending acts to the industrial relations laws in Queensland. New legislation is recommended.

To guide the development of the new Act, the Reference Group recommends that the 'principal object' in the new Act specifically promote a fair and balanced industrial relations framework. The principal object should provide a clear and simple statement which describes the fundamental principles on which the legislation is predicated. Other provisions in the Act should be able to be tested against these principles to ensure conformity and consistency with them. The principal object should provide the explicit point of reference for all stakeholders, especially practitioners whose operations are affected by the industrial relations framework.

While acknowledging that elected governments in Queensland cannot be constrained from making and/or amending legislation through the Parliamentary process, the inclusion of fundamental principles of fairness and balance in the objects can help inform legislators who

¹ Industrial Relations Taskforce (1998) *Review of Industrial Relations Legislation in Queensland*, *Industrial*

are contemplating amendments to the new Act about the underpinning principles on which the legislation is based.

The inclusion of concepts of 'balance' and 'fairness' in the principal object of the Act are not merely cosmetic or symbolic. They should guide the decision making processes of institutions and individuals who operate under the framework of the IR Act and the actions and behaviours of those who participate in the system. They also reinforce the fundamental requirement of 'independence' for the institutions which are established by the legislation.

The report discusses the many changes which have affected the local government sector over recent years, and outlines the arguments in favour of and against including local government in the Queensland industrial relations system. On balance, it recommends that local government continue as a vital part of Queensland's industrial relations jurisdiction.

A new Act would reflect better its more limited jurisdiction of state and local government employees. Additionally that also provides the opportunity to promote the values of independent and apolitical public employment. The Reference Group proposes to recognise both these important and pivotal concepts in the objects of the new Act.

While there was considerable debate concerning the detailed arrangements which might be included in the Act, there was general agreement within the Reference Group as to the core architecture of the system. It was accepted that the key elements of this are a set of minimum standards, collective bargaining, a set of individual rights to fair treatment and an independent commission and court. The recommendations reflect an evolutionary approach to the existing arrangements, adapting the core arrangements and institutions to the contemporary industrial relations environment in the Queensland jurisdiction.

The cornerstone of any industrial relations system is the mechanism to determine wages and conditions of employment. All members of the Reference Group strongly supported that collective bargaining continue to be the basis of establishing wages and conditions of employment of local and state government employees, with maximum pressure on the parties to reach agreement. Certified agreements and a new concept of 'bargaining awards' would provide some flexibility in the nature of the industrial instrument which could arise from collective bargaining. However, conditions for the making, and the requirements for both of these instruments, are to be identical.

Arbitration should be seen as a last resort and only if the independent industrial tribunal determines that there is no reasonable prospect that further conciliation or negotiation will result in agreement being reached.

The Reference Group supports the primacy of awards and agreements over other industrial instruments including directives of the Minister for Industrial Relations

The importance of consultation and consultative mechanisms is apparent throughout the report. A high level consultative committee of key stakeholders, chaired by the Minister for Industrial Relations would provide a forum to consider any proposed changes to industrial relations laws and other broader policy matters. Meaningful and relevant engagement with employees and their representative organisations aids the bargaining processes and the effective implementation of agency priorities and bargaining outcomes. The stronger good

faith bargaining provisions, and provisions related to more proactive strategies to improve workplace relations and cultures, complement the recommendations on consultation.

The Reference Group considered a range of important, contemporary and sometimes controversial workplace issues including domestic and family violence (DFV), workplace bullying, equal remuneration for work of equal and comparable value and new and flexible work arrangements. The report makes recommendations to give effect to the industrial relations recommendations of the February 2015 'Not Now Not Ever' report (DFV Taskforce Report).² The inclusion of 10 days of paid leave for victims of DFV combined with the measures taken by the Queensland Government, as an employer, will provide a comprehensive workplace response to DFV. The final chapter of the report canvasses the workplace implications of digital and other disruptive technologies, the 'sharing' economy and other new patterns of work on the industrial relations system. Precarious employment and changing skill requirements also challenge the current models of workplace regulations, which have implications well beyond Queensland. To that end, the Reference Group supports national research into new and future work.

When the IR Act was enacted in 1999, it covered both the private and public sectors. One clear implication of the changed industrial relations jurisdiction is that the Queensland Government is in the position of holding roles as legislator, regulator, executive, policy maker, funder and employer. Such multiple and sometimes conflicting responsibilities carries greater obligations of 'independence' in the system. State government and its agencies should provide leadership and model workplace policies and actions for other employers.

The recommendations in relation to registered industrial organisations are intended to promote democratic control of organisations and good governance, by ensuring that reporting, training and other obligations are directed at ensuring accountability to members, while reducing duplication and red tape. It promotes concepts of equity and consistency between employer and employee organisations.

The Reference Group recommends retaining the current jurisdiction of the Queensland Industrial Relations Commission (QIRC) with additional powers in relation to anti-bullying and workplace discrimination. However, the over-riding objectives of the proposals in relation to the QIRC are to improve the accountability, performance and independence of the Commission.

Acknowledgements

As Chair of the Reference Group, I would like to acknowledge the contribution of all members of the Group to the task of overseeing this review of Queensland's industrial relations jurisdiction. While in the hotly contested public policy area of industrial relations, consensus is an unlikely outcome, all members participated in good faith and with open minds. Points of view were able to be shared respectfully, even if members held diametrically different positions. Not all members of the Reference Group will agree with all of the recommendations in this Report. That is inevitable. However, there was a

² Special Taskforce on Domestic and Family Violence in Queensland (2015) *'Not Now, Not Ever' – Putting an End to Domestic and Family Violence in Queensland*, February 2015.

considerable level of agreement on most of the recommendations. Where disagreement did exist, it is hoped that that the report properly reflects those positions.

I would like to thank Ms Tricia Rooney and all members of the Secretariat within the Office of Industrial Relations, Queensland Treasury, who worked diligently to develop the Issues Papers, explore ideas and draft the contents of the final Report. I would also acknowledge the support of Dr Simon Blackwood and Mr Tony James from the Office of Industrial Relations during the review.

Professor Gillian Whitehouse from the University of Queensland provided valuable input particularly around the contemporary and future workplace issues. The important input from other academics with an interest in industrial relations and workplace issues was made possible through Professor Whitehouse's contacts and organisation.

Finally, the support from Mr Tim Lyons was exceptional. His knowledge of industrial relations legislation and systems across the country is without peer. This expertise, together with his extensive practical experience in the field and his problem solving approach was of extraordinary assistance.

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Jim McGowan AM

Chair

Industrial Relations Legislative Reform Reference Group

Recommendations

The Review recommends:

1. That a new industrial relations Act be drafted due to the significant changes in the jurisdiction covered by the provisions of the *Industrial Relations Act 1999* (Qld).
2. That the State industrial relations system maintain jurisdiction over state and local government employment matters.
3. That the principal object of the Act promote a fair and balanced industrial relations framework that is contemporary and comprehensive and reflects the needs of the current Queensland jurisdiction. The new principal object should reflect the role of the system in supporting the delivery of public services, and important principles concerning public sector and local government workplace arrangements. The principal object should address the issues set out in section 2.3 of this report.
4. That the industrial relations legislation provide for a high level industrial relations consultative forum chaired by the Minister to discuss matters related to the operation of the Act and other industrial relations issues.
5. That, as a general principle, awards and agreements should be instruments which regulate terms and conditions of employment, and directives should be utilised only where there is a compelling reason to depart from this principle. The Office of Industrial Relations should lead a process involving public sector agencies and unions to identify those Ministerial directives which would be best placed in awards or agreements and determine the most appropriate mechanism to transition them into the agreements or awards in a manner which ensures employees are not disadvantaged during the transition.
6. That the legislation provide that directives of the Minister for Industrial Relations cannot be used to reduce or provide for wages and conditions of employment which are less favourable than those contained in awards or agreements (as currently provided for in the *Hospital and Health Boards Act 2011* (Qld)).
7. That the Act require that consultation occur with public sector agencies and unions before the directives are issued. Similar provisions should be provided in the *Hospital and Health Boards Act 2011* (Qld).
8. That the provisions in the *Public Service Act 2008* (Qld) which enable the Public Service Commissioner to issue industrial relations directives be removed.
9. That the *Public Service Act 2008* (Qld) and the new legislation ensure that heads of power between the Minister for Industrial Relations and Public Service Commission be clearly articulated so that there are no circumstances in which those powers overlap.

10. That, in drafting the new Act, any provisions of other Acts which impact on public sector employment be amended also to ensure that the industrial rights of employees are protected.
11. 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.
12. That the provisions currently contained in Schedule 4A of the *Industrial Relations Act 1999* (Qld) be clarified in the new Act in order to ensure that the Director-General of Queensland Health is a party to any industrial matter in the Department of Health and the Health and Hospital Services unless delegated by the Director-General.
13. That the directive on the conversion of temporary staff to permanency be amended to provide the default position be to approve the conversion where the qualifying conditions are met, unless there are operational reasons not to do so.
14. That the Public Service Commission develop a mechanism to enable casuals who have been employed on a long-term or systematic basis to be converted to permanent employment on a similar basis to that provided for in relation to long term temporary employees.
15. That the Office of Industrial Relations, in conjunction with the Public Service Commission, develop a training program to enhance the negotiation and advocacy capacity and capability of senior industrial relations and human resource staff. Further, such programs should be available to public sector unions.
16. That a charter be developed around the role, responsibilities and rights of the Queensland public sector unions and their representatives, including the consultative processes with government agencies on industrial relations matters.
17. That appropriate consultative processes be included in agreements and bargaining awards, negotiated as part of the bargaining process. Consultation should be focused around the issues that are of most importance to employees, and be genuine; that is, be undertaken prior to any final decision being made and before the implementation of any changes. Consultation arrangements should include mechanisms to allow the agencies and the Government to understand and properly consider the views of employees and their representative organisations.
18. That a provision be included for the content of awards to ensure that awards do not contain discriminatory provisions, are easy to understand, remain contemporary and relevant, provide for equal remuneration of men and women for work of equal or comparable value, provide for flexible work arrangements, and contain facilitative provisions and dispute resolution procedures.
19. That the legislation specify that awards are designed to supplement the minimum standards set out in the Queensland Employment Standards, and that the Queensland Industrial Relations Commission, in exercising its award making powers

- is required to provide for terms and conditions that generally reflect the prevailing employment arrangements that have developed in relation to the work covered by the award.
20. That the current requirements for four yearly cyclical reviews be abolished. The legislation should reinforce the principle that awards need to be maintained as contemporary documents, with appropriate application, consultation, dispute resolution and flexibility provisions. Once updated, awards should remain in place for a minimum period of 12 months before they can be amended. Variations inside that period should only occur if the Queensland Industrial Relations Commission determines that extraordinary circumstances exist.
 21. That collective bargaining with the objective of reaching 'agreement' continue to be the basis of determining wages and conditions in the Queensland jurisdiction. The system should be flexible enough to allow for agency or council, occupational and organisational or work unit bargaining as appropriate.
 22. That the Good Faith Bargaining provisions in the Act include the following minimum requirements:
 - a) attending, and participating in, bargaining meetings
 - b) disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner
 - c) responding to proposals made by other bargaining representatives for the agreement in a timely manner
 - d) giving genuine consideration to the proposals of other bargaining representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals
 - e) refraining from capricious or unfair conduct that undermines freedom of association provisions or collective bargaining.
 23. That the Office of Industrial Relations and the public sector unions jointly develop Good Faith Bargaining guidelines for the Queensland public sector with a view to creating greater ownership of their collective bargaining obligations.
 24. That the legislation be drafted to facilitate the modified collective bargaining model. The key elements of the model should include:
 - a) the objective of bargaining is to reach agreement
 - b) negotiations can commence no earlier than six months from the end of the current agreement
 - c) flexibility in the instrument which is the outcome of bargaining (the instrument can be a certified agreement or bargaining award, provided that the requirements for certification or approval are consistent)
 - d) protected action is prohibited during the life of the agreement but can be taken upon the nominal expiry date of the agreement or bargaining award
 - e) conciliation is to be aimed at assisting the parties to reach agreement
 - f) arbitration as a last resort and only if it is found that there is no

reasonable prospect that further conciliation or negotiation will result in agreement being reached.

25. That, when the Queensland Industrial Relations Commission has determined that an agreement cannot be reached in relation to wage increases, the parties may agree, or the full bench hearing the arbitration may order an interim wage increase, providing that that increase forms part of the formal arbitrated decision.
26. That the current provisions in relation to the requirement for ballots for protected action to be conducted by the Electoral Commission Queensland be replaced by a requirement that unions demonstrate to the Queensland Industrial Relations Commission/Registrar that the proposed process allows members who are likely to be impacted by the action to express their democratic views in relation to that proposed protected action.
27. That the provisions which enable the Minister for Industrial Relations to order that protected industrial action cease be removed.
28. That the provisions which prevent payroll deductions for union fees be removed.
29. That the legislation adopt a definition of domestic family violence consistent with the definition contained in the *Domestic and Family Violence Protection Act 2012* (Qld).
30. That, in accordance with recommendations 33 and 34 of the Domestic Family Violence Taskforce Report a new clause in the Queensland Employment Standards be inserted to provide up to 10 days paid domestic family violence (DFV) related leave annually for employees other than casual employees. Such leave is to be non-cumulative. An employee may access up to 10 days paid leave in each year for DFV related purposes for reasons including but not limited to:
 - a) injury recovery
 - b) attending medical, legal, police, counselling and other DFV related appointments
 - c) court preparation
 - d) attending court
 - e) obtaining safe housing
 - f) organising child care or education matters
 - g) undertaking other DFV related activities.

If required by the employer, the employee may have to provide supporting information to demonstrate that leave for the purpose of attending to a DFV related matter is necessary. Acceptable forms of proof include but are not limited to:

- a) police, legal, medical, or counsellor documents or reports
- b) statutory declaration
- c) written advice.

Information disclosed by an employee in relation to DFV will be kept confidential except to the extent that disclosure is required or permitted by law.

31. That long term casual employees be entitled to 10 days unpaid domestic family violence (DFV) leave each year for DFV related reasons.
32. That employees covered by the Act be given access to a similar anti-bullying jurisdiction through the Queensland Industrial Relations Commission as that provided through the Fair Work Commission.
33. That the Minister negotiate with the Federal Minister for a further referral which would enable employees in unincorporated bodies, and other entities which are not constitutional corporations to be covered by the anti-bullying jurisdiction of the Fair Work Commission. In the event that is not possible or inappropriate, the Queensland anti-bullying jurisdiction coverage should include this group of employees.
34. That the provisions in relation to pay equity (and the Equal Remuneration Principle) ensure that applications under the section are not prevented or otherwise inadvertently impacted by the award review, or because of the existence of a collective agreement.
35. That the legislative requirement for awards (including bargaining awards) and certified agreements to provide for equal remuneration for work of equal or comparable value be strengthened by requiring on certification, information and data on the distribution of employees by gender and the gender pay gap and, where appropriate, the projected effect of the award or agreement on the gender pay gap.
36. That the Public Service Commissioner initiate a general review of pay equity in the public sector, including analysing the impact of gender concentration in particular agencies and occupations. As an ongoing measure, the Public Service Commissioner should conduct an annual gender pay equity audit process to identify and address gender pay gap issues in the public sector.
37. That, consistent with the proposed principal object (e), in relation to productive and cooperative workplace relations, the legislation provide that the Queensland Industrial Relations Commission, in exercising a power or function, give effect to the need to observe mutual obligations of trust and confidence.
38. That the Queensland Industrial Relations Commission be given explicit powers to promote cooperative workplace relations.
39. That the legislation continue to include the following Queensland Employment Standards:
 - a) a minimum wage
 - b) annual leave
 - c) sick leave and cultural leave
 - d) long service leave
 - e) paid public holidays
 - f) jury service
 - g) notice of termination and redundancy pay.

40. That the legislation amend the Queensland Employment Standards (QES) to provide as part of the new QES:
 - a) compassionate leave to reflect provisions of the National Employment Standards (NES), and which are to be incorporated into the existing bereavement leave provisions
 - b) parental leave and related entitlements based upon the NES, providing that surrogacy entitlements are retained.
41. That the legislation include additional Queensland Employment Standards, to provide:
 - a) an information statement to any new employee setting out workplace rights and basic entitlements, including the industrial instruments that apply to the employee
 - b) maximum periods of work consistent with the entitlements currently contained in section 9A of the *Industrial Relations Act 1999* (Qld)
 - c) a right to request flexible working arrangements for all employees
 - d) emergency service leave.
42. That the Act make clear that the Queensland Industrial Relations Commission has jurisdiction (by conciliation and, if necessary, arbitration) to deal with disputes over the application or operation of the Queensland Employment Standards, awards and agreements.
43. That carer's leave be available for a person to care for any person affected by domestic and family violence (i.e. need not be immediate family or household member).
44. That the Act provide for a consolidated mechanism in relation to proceedings dealing with 'general protections' matters including where the outcome is dismissal, and for 'adverse action' which does not lead to the dismissal of an employee.
45. That a separate clause be inserted prohibiting the dismissal of an employee because the employee is a victim of domestic violence and a reference to outcomes of domestic family violence victims as a prohibited reason for dismissal. Further, the general protections and adverse action provisions are to apply to victims of domestic and family violence.
46. That the income threshold for unfair dismissal (and for employment claims under Part 5A of the *Magistrates Court Act 1921* (Qld)) be increased to \$136, 700 and adjusted annually to maintain consistency with the threshold of the *Fair Work Act 2009* (Cth).
47. That the legislation ensure that the list of anti-discrimination attributes include those contained in the *Anti-Discrimination Act 1991* (Qld).
48. That the legislation provide for any record or document to be maintained, provided or transmitted electronically.
49. That the Act ensure that the provisions in relation to registered industrial

- organisations apply equally to both employer and employee organisations in relation to reporting, including financial reporting and other obligations.
50. That the Act provide for reporting, accountability and training requirements that are consistent with the reporting and training requirements (including financial reporting) of the *Fair Work (Registered Organisations) Act 2009* (Cth).
 51. That the Act allow for reporting, including financial reporting, training and elections conducted for the purpose of the *Fair Work (Registered Organisations) Act 2009* (Cth) to be deemed to be compliant with the equivalent provisions of the *Industrial Relations Act 1999* (Qld), on the basis that the Registrar is provided with all relevant documentation under the *Fair Work (Registered Organisations) Act 2009* (Cth). The Registrar be given discretion to approve other reporting, including financial arrangements provided that they meet the minimum standards required by the *Industrial Relations Act 1999* (Qld).
 52. That the legislation increase the maximum penalty for breaches of financial accountability arrangements from 40 penalty units to 100 penalty units.
 53. That the Act remove the powers for the Chief Executive of the Department in favour of vesting relevant powers with the Registrar. In relation to the appointment of an administrator to an industrial organisation, the legislation should provide that such an appointment can only be made by order of the Industrial Court on application of the Registrar or Minister.
 54. That the legislation remove training, disclosure and election requirements in respect of local and sub-branch officers of unions where such roles do not involve management of the affairs of the organisation or control of finances, and that the Registrar be granted power to exempt specific offices from these requirements on application by an organisation on these grounds.
 55. That reporting and disclosure thresholds for political donations be aligned with section 149 of the *Fair Work (Registered Organisations) Act 2009* (Cth) and the requirements of the Electoral Commission of Queensland under state legislation.
 56. That the *Public Service Act 2008* (Qld) should be amended to formally recognise the transfer of the Public Service Appeals functions to the Queensland Industrial Relations Commission.
 57. That the Queensland Industrial Relations Commission retain jurisdiction for industrial relations matters affecting state and local governments, appeals against decisions of the Workers' Compensation Regulator, public sector appeals, employment claims under the *Magistrates Court Act 1921* (Qld) and right of entry issues under *the Work Health and Safety Act 2011* (Qld).
 58. That the Queensland Industrial Relations Commission have exclusive jurisdiction for workplace/employment related anti-discrimination matters.
 59. That similar protocols to those which the Government introduces for the court system

be developed to guide future appointments to the Industrial Court of Queensland and the Queensland Industrial Relations Commission.

60. That the administrative responsibility for the Industrial Court of Queensland and Queensland Industrial Relations Commission be transferred to the Department of Justice and Attorney-General.
61. That a provision be inserted under the powers of the President enabling the President to develop and issue performance measures for the Commission.
62. That a provision be inserted under the powers of the President enabling the President to develop and issue a 'code of conduct/behaviour' for users of the Queensland Industrial Relations Commission and the members of the Commission.
63. That the processes and procedures for dealing with appeals against decisions of the Workers' Compensation Regulator be streamlined, in consultation with user groups and including consideration of greater use of early intervention and alternative dispute resolution techniques.
64. That the legislation allow for the legal representation, by leave, of parties in a proceeding before a full bench (other than a full bench established to arbitrate when collective bargaining has failed to result in an agreement) where it would allow the matter to be dealt with more efficiently (having regard to the subject matter of the proceeding), or it would be unfair not to allow the party to be represented because the person is unable to represent themselves effectively.
65. That the Act ensure that only the President of the Industrial Court of Queensland can hear an appeal from a full bench. The Act should allow an interlocutory matter such as stay applications to be heard by a Deputy President of the Court.
66. That the Act provide for appeals from decisions of the Industrial Court of Queensland to the Queensland Court of Appeal.
67. That the provisions in relation to the awarding of costs apply to any party who caused costs to be incurred because of an unreasonable act or omission in connection with the conduct or continuation of the matter.
68. That the Minister support national research through the relevant ministerial council into the policy implications of the impact of demographic and technological changes (and digital disruption) on future workplaces.

Chapter 1: Introduction

This chapter provides a brief introduction to the report. It describes the rationale for the establishment of the Industrial Relations Legislative Review and outlines the Terms of Reference. The chapter explains the principles that have guided the conduct of the review and informed the development of recommendations, which should lead to outcomes of practical benefit. This chapter also lists the members of the Reference Group and the stakeholders who have contributed to the review.

1.1 Establishment of the industrial relations legislative review

On 20 August 2015 the Honourable Curtis Pitt, Treasurer, Minister for Employment and Industrial Relations and Minister for Aboriginal and Torres Strait Islander Partnerships, announced a Review of Queensland's industrial relations laws. This Review gives effect to a 2014 Queensland Labor Government commitment to:

commence a comprehensive review of the state's industrial relations laws and tribunals, including the structure, functions and powers of those tribunals, and ... ensure the independence of industrial tribunals.³

Queensland's industrial relations laws were last systematically reviewed in 1998.⁴ The recommendations of that Review provided the impetus for the drafting of new legislation, the *Industrial Relations Act 1999* (IR Act).

Since that time, the scope of the Queensland industrial relations system has reduced markedly. Through the use of constitutional powers, the Commonwealth expanded their industrial relations jurisdiction in 2005 to cover all corporations in the private sector. To provide greater clarity and certainty about private sector coverage, in 2010 the Queensland Government referred to the Commonwealth the power to regulate non-incorporated entities in the private sector. Queensland's industrial relations jurisdiction now comprises state and local government sectors and some statutory entities specifically excluded from the national system. The Queensland industrial relations system now regulates approximately 14 per cent of the state's employed workforce.⁵

Since 1999, there have been 74 amending acts to the industrial relations laws in Queensland. Given the substantial changes to industrial relations arrangements since 1999, this Review provides an opportunity to assess the suitability of the current industrial relations laws and provide recommendations for improvement.

The Government appointed the Industrial Relations Legislative Reform Reference Group (the Reference Group) to undertake the Review of Queensland's industrial relations laws and tribunals. The Reference Group was chaired by Mr Jim McGowan AM and comprised key industrial relations stakeholders. Membership of the Reference Group is shown in

³ Queensland Labor (2014) *Queensland Labor State Policy Platform, 2014*, 51st State Conference of the Queensland Branch of the Australian Labor Party 23 and 24 August 2014, Mercure Brisbane.

⁴ Industrial Relations Taskforce (1998) *Review of Industrial Relations Legislation in Queensland, Industrial Relations Taskforce Report*, December 1998.

⁵ Australian Bureau of Statistics (2014) *Employment and Earnings, Public Sector, Australia, 2014-15*, Cat. No. 6248.0.

Appendix 1. Secretariat support for the Review was provided by the Office of Industrial Relations.

The Queensland Government set the following Terms of Reference for the Review.

1.2 Terms of Reference

The Terms of Reference of the Review were to examine:

- 1) The best arrangements for the regulation of industrial relations in Queensland which better reflect Queensland's reduced industrial relations jurisdiction; and support and balance the sustainable achievement of job security and fair wages and conditions; workplace productivity improvement and best practice service delivery.
- 2) Whether local government industrial relations needs are better served within the State or Federal industrial relations jurisdiction.
- 3) Any potential benefits of further harmonising the state's industrial relations legislation with the *Fair Work Act 2009* (Cth) (FW Act) and where such harmonisation could occur.
- 4) The appropriate structure, role, functions, powers and independence of tribunals in the State industrial relations system.
- 5) How best to provide statutory support for a Westminster-style model of public sector employment which promotes permanent employment and preserves the independent determination of wages and employment conditions.
- 6) The most suitable model for the regulation of industrial organisations in the State industrial relations system.
- 7) How best to deal with contemporary and emerging industrial relations matters in the State jurisdiction (for example, workplace bullying, domestic and family violence, gender equality, work-life balance, changes in standard working arrangements such as telecommuting/working from home).
- 8) Any other matter the Reference Group considers relevant to reform in the State's industrial relations jurisdiction.

1.3 Guiding principles

Acting within the Terms of Reference, and having due regard to the submissions made both through the written submission process and in consultation, the Review developed a set of guiding principles intended to inform the recommendations and to help lead to outcomes of practical benefit. These principles were endorsed by the Reference Group.

The Guiding Principles informing this Review were as follows:

- 1) The industrial relations system should be modern, simple to use, accessible, user-friendly and cost effective.
- 2) Fairness and balance should be central considerations of the industrial relations framework.
- 3) The legislation should provide basic protections for all who are covered by it, with particular attention to the more vulnerable, marginalised and disadvantaged members of the workforce.
- 4) Provisions of the FW Act and other state legislation are a useful reference point for considering what should be in the IR Act.

- 5) The legislation should provide for independent tribunals and courts, which can deal with matters effectively, and in a balanced and timely manner including through informal assistance, mediation, conciliation and arbitration.
- 6) The system should be flexible and provide appropriate mechanisms to deal with emerging issues including domestic and family violence, workplace bullying, flexible working arrangements and work-life balance.
- 7) The system should promote secure employment as well as provide mechanisms to protect workers who are in atypical or precarious employment.
- 8) The legislation should promote strong governance and accountability mechanisms for those who operate in the system and effective mechanisms for enforcement and compliance.
- 9) The system should have an appropriate balance that recognises the protection of both individual rights and collective rights, including the right to collective bargaining.
- 10) The system needs to be cognisant of other legislation impacting on the workforce covered by the IR Act.

1.4 Conduct of the Review

The Treasurer and then Minister for Industrial Relations announced a Review of the State's industrial relations laws and tribunals on 23 April 2015 (see Appendix 2). The establishment of the Reference Group was formally announced on 7 August 2015 (see Appendix 3).

The Reference Group had their first meeting on 8 September 2015. An Industrial Relations Legislative Review webpage was established. Issues papers were produced and posted on the webpage to assist parties frame their submissions to the Review.

Consultation with stakeholders took place from August through December 2015 (see Appendix 4). Some 25 persons or organisations provided written submissions (see Appendix 5). Submissions were posted on the Review website, unless confidential.

The Reference Group considered the submissions and draft recommendations at meetings on 29 October, 11 November and 2 December 2015.



Chapter 2: Queensland Industrial Relations Framework

This chapter examines the broader framework for regulating industrial relations in Queensland. The chapter notes that the *Industrial Relations Act 1999* (Qld) (IR Act) has been amended many times in recent years. It still has provisions which are more relevant to its wider jurisdiction which existed at the time of its development. The IR Act is complex and in need of renewal. New legislation is recommended. To guide the new Act, the Reference Group recommends revising the objects to ensure that the principal object be to promote a fair and balanced industrial relations framework. This chapter argues that the jurisdiction of the new legislation should include local government, although this issue is canvassed in more detail in Chapter 4. Finally, this chapter recommends establishing a high-level consultative committee where future changes to legislation can be considered by stakeholders.

2.1 Changes to the *Industrial Relations Act 1999* (Qld) since 1999

Development of a national workplace relations system

Since the enactment of the IR Act in August 1999, the industrial relations landscape in Queensland has changed significantly.⁶ In 2005, the Coalition Federal Government used the corporations' power as the first step in developing a national workplace relations system by making major amendments to the (now repealed) *Workplace Relations Act 1996* (Cth) (the WR Act) via the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) (Work Choices). The amendments resulted in the majority of the private sector falling under federal industrial relations jurisdiction. The Work Choices legislation was controversial and also created confusion around appropriate industrial relations jurisdiction for some businesses and organisations.

The WR Act was replaced by the *Fair Work Act 2009* (Cth) (the FW Act) from 1 July 2009. The FW Act continued the WR Act's use of the corporations' power. Subsequently, all states, except Western Australia, referred their residual private sectors powers to the Commonwealth as part of the Intergovernmental Agreement for a National Workplace Relations System for the Private Sector (the IGA), from 1 January 2010.

The *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Qld) (Queensland Referral Act) enabled the Commonwealth to make laws about industrial relations matters for non-constitutional corporations in Queensland's private sector that would otherwise be outside the Commonwealth's legislative reach. The referral of industrial powers resulted in the national workplace relations system covering most of the Australian workforce.

As a consequence, the Queensland state jurisdiction for industrial relations was reduced to the public sector, local government and nominated statutory authorities representing approximately 14 per cent of the employed Qld workforce.

LNP Government legislative reforms to the *Industrial Relations Act 1999* (Qld)

⁶ Industrial Relations Taskforce (1998) *Review of Industrial Relations Legislation in Queensland*, Industrial Relations Taskforce Report.

Over a period from May 2012 to late 2013, under the previous LNP Government, the IR Act was amended significantly and frequently. These changes illustrate the extent to which legislation can override existing, long-established and broadly accepted industrial relations arrangements, including content of existing awards and even agreements made between parties and certified at the Queensland Industrial Relations Commission (QIRC).

Some of the key changes during this period are set out below.

Under the *Industrial Relations (Fair Work Act Harmonisation) and other Legislation Amendment Act 2012* (Qld):

- new requirement for the QIRC to consider the prevailing economic conditions when determining wages and employment conditions. This included a provision for the Treasury Chief Executive to, at any time, brief the QIRC about the state's financial position, fiscal strategy, and related matters.
- new requirement for unions to hold a ballot of members before industrial action could be protected under law. Although ostensibly similar to provisions under the FW Act, key differences were that the ballot could only be undertaken by the Electoral Commission Queensland and that the balloting had to be by post.
- new provision enabling employers to directly ballot its employees if unable to reach agreement with union/s.
- the amendments also empowered the Minister for Industrial Relations to make a declaration to terminate industrial action if satisfied that the action threatened the safety and welfare of the community or threatened to damage the economy.

The Public Service and Other Legislation Amendment Bill 2012 (Qld), tabled in July 2012:

- expanded the right of a party to access legal representation in the QIRC.
- transferred responsibility for administration of the QIRC from the President to the Vice-President.
- section 691C changes rendered existing award and agreement content of no effect. Additional significant changes to the IR Act were introduced during consideration in detail of the Bill and included the introduction of a provision which provided that a clause in a public sector industrial instrument which dealt with 'contracting' and 'employment security' was of no effect. Provisions dealing with 'organisational change' in industrial agreements were also deemed of no effect. An employer was only required to consult over organisational change after a decision had been made to implement change. The amendments to the IR Act effectively gave legislative effect to two similar Public Service Commissioner directives which were challenged in court by public sector unions.

Under the *Industrial Relations (Transparency and Accountability of Industrial Organisations) and other Acts Amendment Bill 2013* (Qld), introduced to parliament on 30 April 2013:

- Extensive changes including new requirements for authorisation for industrial organisations to spend money for a political purpose. The 'expenditure for a political purpose' changes were later repealed before a union challenge to the provisions were heard by the High Court.

Under the Industrial Relations (Fair Work Act Harmonisation No. 2) and other Legislation Amendment Bill 2013 (Qld), introduced into parliament in October 2013 and passed in November 2013:

- introduced the Queensland Employment Standards
- the award modernisation process
- new highly prescriptive requirements for award and agreement content
- new bargaining arrangements including the imposition of timeframes around conciliation and arbitration
- individual contracts for high-income employees.

Changes to the *Industrial Relations Act 1999 (Qld)* under the current Queensland Government

The Industrial Relations (Restoring Fairness) and Other Legislation Amendment Bill 2015 (Qld) (the RF Bill), introduced 7 May 2015, to achieve the urgent industrial relations election commitments of the ALP Government. The Bill was passed by the Queensland Parliament on 4 June 2015 and commenced on 11 June 2015. The amendments:

- removed restrictions on award and agreement content and repealed sections of the IR Act which made certain provisions in existing awards and agreements applying to employers and employees in Government entities to be of no effect
- re-established the independence of the QIRC in wage setting by repealing provisions relating to the QIRC's consideration of the financial position and fiscal strategy of the State
- re-established the long-standing status of the QIRC as a layperson's tribunal
- removed right of entry notice requirements introduced by the previous LNP Government
- restored rights and entitlements for employees who had been placed on high income guarantee contracts; in particular the rights of high income senior employees to bargain collectively and access unfair dismissal (by restoring award coverage).

Submissions raised some issues in relation to the RF Bill amendments. In particular, there were concerns about the legislative imposition of an early 'nominal expiry date' on certified agreements which had been made after the underpinning awards had been modernised.

The above discussion highlights that the scope of and the jurisdiction covered by the IR Act has reduced substantially since the Act came into effect in 1999. The original IR Act was drafted for an industrial relations system encompassing both the private and public sectors. Given that the scope of the IR Act is now restricted to the broader public sector, there are grounds for drafting an entirely new Act to better reflect its current coverage and intent.

Further, the above discussion also documents the significant number of changes to industrial relations legislation in recent years. Indeed, since 1999, the IR Act has been amended on 74 occasions resulting in complex numbering and a lack of overall coherence.

Due to the plethora of amendments made to the IR Act since its enactment, both the Queensland Council of Unions (QCU) and Queensland Teachers' Union (QTU) submitted that new legislation should be drafted rather than amending the current IR Act.⁷

Industrial relations laws in Queensland were last reviewed comprehensively in 1998 by the Industrial Relations Taskforce. That Taskforce recommended 'a new single act with a clear structure and an index to assist accessibility'.⁸ Given the comprehensive nature of this Review and the substantial recommendations made, it is proposed that new legislation be enacted to provide principled, coherent and workable industrial relations laws.

Recommendation 1

That a new industrial relations Act be drafted due to the significant changes in the jurisdiction covered by the provisions of the Industrial Relations Act 1999 (Qld).

2.2 Jurisdictional issues

Chapter 4 provides a detailed discussion of the characteristics of local government, the many changes which have affected the local government sector over recent years and outlines the arguments in favour of including local government within the jurisdiction of Queensland's industrial relations system. This section offers a summary of that discussion.

When the residual (unincorporated) private sector was referred to the federal jurisdiction, the Queensland Government made a policy decision to include local governments within the state industrial relations system. This arrangement was consented to by local government stakeholders (unions and the Local Government Association Queensland (LGAQ)). There are strong arguments for retaining that arrangement.

Local governments are created by state laws and operate solely within state boundaries. As the Federal Court stated in the decision in the Etheridge Shire Council case: 'local government ... is a body politic of a State government'.⁹

The inclusion of local government within the state industrial relations system is the most common arrangement across states in Australia. New South Wales, South Australia, Western Australia and Queensland all include local government within the state system.

Local and state governments are much alike as their primary function is to provide services to the community. In many locations, local government is the only level of government present in the community.

There are positive benefits that arise from certainty and continuity in industrial relations for all stakeholders, including local government.

It must be noted that the preference of the LGAQ is to operate in a stable industrial relations environment not subject to frequent and substantial legislative change. LGAQ is concerned

⁷ QCU and QTU submissions.

⁸ Industrial Relations Taskforce (1998) *Review of Industrial Relations Legislation in Queensland, Industrial Relations Taskforce Report*, December, p 5.

⁹ *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* [2008] FCA 1268.

that recent and upcoming legislative changes in state industrial relations laws perpetuate a pattern of change and uncertainty. In the absence of stability, the LGAQ said that serious consideration should be given to transferring local government to the federal system.

While the Review acknowledges the views of the LGAQ, the balance of arguments supports the status quo and the retention local government within the state industrial relations system. Accordingly, the Review makes the following recommendation.

Recommendation 2

That the State industrial relations system maintain jurisdiction over state and local government employment matters.

2.3 Objects of the state industrial relations legislation

The 'principal object' of the IR Act - or any piece of legislation - should by definition provide a clear and simple statement which describes the fundamental principles on which the legislation is predicated. Other provisions in the Act should be able to be tested against these principles to ensure conformity and consistency with them. In the case of the IR Act, it should provide the principal and explicit reference point for all stakeholders, especially practitioners whose operations are affected by the framework that it provides. Chapter 1, Section 3 prescribes the principal object of the legislation in the following terms.

Principal object of this Act

The principal object of this Act is to provide a framework for industrial relations that supports economic prosperity and social justice by—

(a) providing for rights and responsibilities that ensure economic advancement and social justice for all employees and employers; and

(b) providing for an effective and efficient economy, with strong economic growth, high employment, employment security, improved living standards, low inflation and national and international competitiveness; and

(c) preventing and eliminating discrimination in employment; and

(d) ensuring equal remuneration for men and women employees for work of equal or comparable value; and

(e) helping balance work and family life; and

(f) promoting the effective and efficient operation of enterprises and industries; and

(g) ensuring wages and employment conditions provide fair standards in relation to living standards prevailing in the community; and

(h) promoting participation in industrial relations by employees and employers; and

(i) encouraging responsible representation of employees and employers by democratically run organisations and associations; and

- (j) promoting and facilitating the regulation of employment by awards and agreements; and*
- (k) meeting the needs of emerging labour markets and work patterns; and*
- (l) promoting and facilitating jobs growth, skills acquisition and vocational training through apprenticeships, traineeships and labour market programs; and*
- (m) providing for effective, responsive and accessible support for negotiations and resolution of industrial disputes; and*
- (n) assisting in giving effect to Australia's international obligations in relation to labour standards; and*
- (o) promoting collective bargaining and establishing the primacy of collective agreement over individual agreements.*

The Reference Group is of the view that the objects of the IR Act are deficient in that they do not articulate a fundamental principle of an industrial relations framework related to imperatives such as balance, fairness and justice. This is in contrast to the FW Act which prescribes the object of the Act:

to provide a balanced framework for cooperative and productive workplace relations.

The subclauses which describe how that object is to be achieved contains words such as 'fair', 'balance' and 'fairness'.

The *Industrial Relations Act 1996* (NSW) has as the first object:

*(a) to provide a framework for the conduct of industrial relations that is fair and just.*¹⁰

Similarly, the *Fair Work Act 1994* (SA) includes an object:

*to provide a framework for making enterprise agreements, awards and determinations affecting industrial matters that is fair and equitable to both employers and employees.*¹¹

The object of fairness is included in the *Industrial Relations Act 1979* (WA):

*to provide a system of fair wages and conditions of employment.*¹²

The concept of fairness is articulated in the Queensland Labor State Policy Platform 2015 of industrial relations titled '*Making our workplaces, safe, productive and fair*'.¹³

The Terms of Reference for this Review of the industrial relations system in Queensland requires the Review to address:

[h]ow best to provide statutory support for a Westminster-style model of public sector employment which promotes permanent employment and preserves the independent determination of wages and employment conditions.

¹⁰ *Industrial Relations Act 1996* (NSW) s 3.

¹¹ *Industrial Relations Act 1996* (NSW) s 3 (f).

¹² *Industrial Relations Act 1979* (Qld) s 6 (ca).

¹³ Queensland Labor (2015) *Queensland Labor State Policy Platform*, 52nd State Conference of the Queensland Branch of the Australia Labor Party, 29 and 30 August 2015, Brisbane Convention Centre South Brisbane.

While acknowledging that elected governments in Queensland cannot be constrained from making and/or amending legislation through the Parliamentary process, the inclusion of fundamental principles of fairness and balance in the objectives can help inform legislators who are contemplating amendments to the IR Act about the underpinning principles on which the legislation is based. As such, they may cause a future Government seeking to make amendments which are contrary to the principles of ‘fairness’, ‘equal treatment’ and/or ‘balance’ in the industrial relations system to give more serious consideration to the implications of their proposals. Such checks are consistent with good public policy objectives. Accordingly, the Reference Group recommends that the principal object of the IR Act be to promote a fair and balanced industrial relations framework.

The inclusion of notions of ‘balance’ or ‘fairness’ in the principal object of the Act are not merely cosmetic or symbolic. These are important concepts which should guide the decision making processes of institutions and individuals who operate under the framework of the IR Act and the behaviours of those who participate in the system. They also reinforce the fundamental requirement of ‘independence’ for the institutions which are established by the Act.

The Review developed the following provisions for inclusion in the principal object of the Act.

The principal object of this Act is to provide a fair and balanced framework for co- operative industrial relations that supports the delivery of high-quality services to Queenslanders, economic prosperity, and social justice by—

- (a) supporting a productive, competitive and inclusive economy, with strong economic growth, high employment, employment security, improved living standards, and low inflation; and*
- (b) promoting high performing apolitical State and Local Government sectors that are responsive to democratically determined priorities and focused on the delivery of public services in a professional and non-partisan way; and*
- (c) promoting and facilitating security in employment and consultation about employment matters and technological and organisational change; and*
- (d) providing for a framework of employment standards, awards, determinations, orders and agreements that is fair and equitable; and*
- (e) promoting productive and cooperative workplace relations, including through mutual obligations of trust and confidence; and*
- (f) promoting collective bargaining including through bargaining in good faith and by establishing the primacy of collective agreements over individual agreements; and*
- (g) ensuring a guaranteed safety net of fair, relevant and enforceable minimum terms and conditions through the Queensland Employment Standards, and modern awards; and*
- (h) ensuring wages and employment conditions provide fair standards in relation to living standards prevailing in the community; and*

- (i) *preventing and eliminating discrimination, bullying and other forms of unfair treatment in employment; and*
- (j) *ensuring equal remuneration for men and women employees for work of equal or comparable value; and*
- (k) *promoting diversity and inclusion in the workforce including, by assisting employees to balance their work and family responsibilities through flexible working arrangements; and*
- (l) *providing a framework to support employees experiencing domestic and family violence; and*
- (m) *encouraging fairness and representation at work and the prevention of discrimination by recognising the right to freedom of association, the right to organise and the right to be represented; and*
- (n) *encouraging responsible representation of employees and employers by accountable and democratically run organisations and associations; and*
- (o) *being responsive to emerging labour market trends and work patterns; and*
- (p) *providing for effective, responsive and accessible mechanisms to facilitate negotiations and to resolve industrial disputes; and*
- (q) *establishing a tribunal and court independent of government to facilitate fair, balanced and productive industrial relations; and*
- (r) *assisting in giving effect to Australia's international obligations including under:*
 - (i) *Convention 87 on Freedom of Association;*
 - (ii) *Convention 98 on the Right to Organise and Bargain Collectively;*
 - (iii) *Convention 100 on Equal Remuneration;*
 - (iv) *Convention 111 on Discrimination (Employment and Occupation);*
 - (v) *Convention 122 on Employment Policy;*
 - (vi) *Convention 158 on Termination of Employment and*
 - (vii) *Convention 175 on Part Time Work.*

While there was general agreement on the proposed principal object of the new IR Act, the Chamber of Commerce and Industry Queensland (CCIQ), Australian Industry Group (AiG) and the LGAQ did not support the inclusion of 'through mutual obligations of trust and confidence' in proposed subclause (e) of the principal object of the Act as it was argued that it seeks to reverse the position of the High Court in the case of the *Commonwealth Bank of Australia v Barker*.¹⁴ This matter is further explored in Chapter 9 of this report.

¹⁴ *Commonwealth Bank of Australia v Barker* [2014] HCA 32.

They also expressed opposition to subclause (l) ‘providing a framework to support employees experiencing domestic and family violence’, arguing that it is not about the employment relationship. This position is discussed in greater detail in Chapter 6.

The LGAQ did not support the inclusion of ‘employment security’ in subclause (a) of the principal object because of concerns that it could be used to unduly restrict the operations of some employers in local government.

Recommendation 3

That the principal object of the Act promote a fair and balanced industrial relations framework that is contemporary and comprehensive and reflects the needs of the current Queensland jurisdiction. The new principal object should reflect the role of the system in supporting the delivery of public services, and important principles concerning public sector and local government workplace arrangements. The principal object should address the issues set out in section 2.3 of this report.

Chapter 9 includes a further discussion and recommendations about the object of promoting productive and cooperative workplace relations, including through mutual obligations of trust and confidence.

2.4 Consultation

The attainment of a fair and balanced industrial relations framework rests on an effective dialogue between the Government, agencies and employees and their unions. Communication between parties about challenges and proposed changes engenders trust and leads to improved labour relations and performance outcomes.

Genuine consultation promotes productive and cooperative workplace relations. It also improves fairness by giving employees a representative voice in matters that directly affect them. As Together Queensland (TQ) submitted, ‘consultation is essential to robust and effective industrial relations’.¹⁵

At a national level, the National Workplace Relations Consultative Council has existed as a ministerial forum with employer organisations and unions for many years.

The Reference Group supports the idea of a high level consultative committee that can consider any proposed changes to industrial relations laws and other matters. United Voice noted that such a high level committee could be beneficial in, ‘ensuring the early identification, discussion and resolution of issues around the practical operation, application and variation of the legislation’.¹⁶ The suggested composition of this committee could include the Public Service Commissioner, the CEO of the LGAQ and two departmental heads, three nominees of the QCU and a nominee of the Australian Workers’ Union. It could meet twice a year and as necessary to consider any proposed legislative changes.

¹⁵ TQ submission.

¹⁶ UV submission.

Importantly, though, this body should not be a forum for collective bargaining or negotiations over government wages policy. Instead, it should focus solely on issues pertaining to the industrial relations regulatory framework. Accordingly, the Reference Group makes the following recommendation.

Recommendation 4

That the industrial relations legislation provide for a high level industrial relations consultative forum chaired by the Minister to discuss matters related to the operation of the Act and other industrial relations issues.

Chapter 3: Queensland Public Sector Employment Arrangements

The previous chapter proposed that the framework for Queensland industrial relations system comprise a new Act, a new principal object and the continued inclusion of local government within the Queensland jurisdiction. This chapter provides an overview of the Queensland public service and the importance of a Westminster-style model of public sector employment. This chapter recommends that conditions of employment in awards and agreements should not be reduced by directives of the Minister for Industrial Relations. To promote greater stakeholder engagement, the chapter recommends public sector agencies and unions be consulted before directives are issued. To achieve greater role clarity, it is recommended that there be no overlap in the heads of power between the Minister for Industrial Relations and Public Service Commission (PSC). Consequentially, it is recommended the Public Service Commissioner no longer be empowered to issue industrial relations directives. Recommendations are also offered on several matters to improve public sector employment practices.

3.1 The Queensland public service

The Queensland Government is the largest employer in Queensland. In the *Queensland Public Sector Quarterly Workforce Profile* Queensland had 243,163 public sector employees as at June 2015.¹⁷

Queensland public sector employees work in a wide range of occupations including urban and regional planners, engineers and geologists as well as teachers, doctors, nurses, child safety officers, police officers and emergency service workers. These public sector workers are employed in 20 government departments and 15 other government entities. The biggest employers (by far) are Queensland Health and the Department of Education and Training, followed by the Queensland Police Service. Table 3.1 highlights the dispersion of employees across the Queensland public sector.

Queensland public sector employees are distributed across the state, with approximately 37 per cent of the Queensland public sector working in Brisbane inner city or defined Brisbane (North, East, South, and West) areas. Two-thirds of the Queensland public sector workforce (66 per cent) are women. More than one quarter of the workforce (29 per cent) works part-time. Most part-timers (nearly 90 per cent) are women.¹⁸ The public sector generally has a higher union density than the private sector (ABS data suggests approximately 34 per cent union membership among public sector workers in Australia, compared to approximately 12.5 per cent of private sector workers).

¹⁷ Public Service Commission (2015) *Queensland Public Sector Quarterly Workforce Profile as at June 2015*.

¹⁸ *Ibid.*

Table 3.1: Number of Headcount Type and Agency, June 2015

Agency	Permanent	Temporary	Casual	Contract	Total
Department of Aboriginal and Torres Strait Islander Partnerships	222	40	4	6	272
Department of Agriculture and Fisheries	1,735	304	27	20	2,087
Department of Communities, Child Safety and Disability Services	5,200	908	313	38	6,459
Department of Education and Training	59,888	17,198	7,549	149	83,984
Department of Energy and Water Supply	192	15	1	8	216
Department of Environment and Heritage Protection	861	206	2	17	1,086
Department of Housing and Public Works	2,507	447	5	49	3,008
Department of Infrastructure, Local Government and Planning	280	125	2	19	426
Department of Justice and Attorney General	7,495	1,140	520	141	9,296
Department of National Parks, Sport and Racing	1,69	157	34	37	1,397
Department of Natural Resources and Mines	2,217	135	15	83	2,450
Department of Science, Information Technology and Innovation	2,295	409	13	60	2,777
Department of State Development	463	101	-	35	599
Department of Premier and Cabinet	467	153	41	35	696
Department of Tourism, Major Events, Small Business and Commonwealth Games	101	27	-	9	137
Department of Transport and Main Roads	6,311	388	1,908	99	8,706
Queensland Fire and Emergency Services	2,653	192	2,129	12	4,986
Queensland Health	62,120	18,291	5,063	4,153	89,627
Queensland Police Service	13,798	307	5	322	14,432
Queensland Treasury	894	72	-	40	1,006
Anti-Discrimination Commission Queensland	31	5	-	1	37
Electoral Commission Queensland	33	16	11	3	63
Legal Aid Queensland	416	48	1	9	474
Office of the Health Ombudsman	87	10	-	3	100
Office of the Inspector-General of Emergency Management	20	2	-	1	23
Public Safety Business Agency	1,618	359	14	49	2,040
Public Service Commission	52	12	-	9	73
Public Trustee	451	105	-	3	559
Queensland Art Gallery	184	57	143	5	389
Queensland Audit Office	169	18	-	9	196
Queensland Family and Child Commission	33	10	-	1	44
Queensland Museum	176	65	64	10	315
State Library of Queensland	238	66	37	5	346
TAFE Queensland	2,463	1,450	720	124	4,757
Trade and Investment Queensland	81	9	-	10	100
Queensland Public Sector	176,121	42,847	18,621	5,574	243,163

3.2 The Westminster model of public sector employment

The Terms of Reference for the Review require the Reference Group to consider:

how best to provide statutory support for a Westminster-style of public sector employment which promotes permanent employment and preserves the independent determination of wages and employment conditions.

A Westminster model in this context consists of a set of shared concepts or values rather than a fixed model of government and public sector employment. In practical terms, the Westminster system is a descriptor regarding the structure and organisation of government and related inherent difficulties between the relationship of the public service and government. According to Colley, the perennial problem of public services is the need to balance respect for independence of the public service with ensuring that it is responsive to government priorities.¹⁹

The stability and functionality of the current model of Westminster-based parliamentary government is dependent on three central, relational compacts. Firstly, representative democracy as the compact between the public and elected officials (parliamentarians). Secondly, ministerial accountability as the compact between elected officials and the government, on the one hand, and the appointed public service, on the other. Thirdly, hierarchy and loyalty as the main organising principles within the public service for assuring that government plans and policies are executed and implemented.²⁰

A number of still commonly accepted tenets of public sector employment were established in the Northcote–Trevelyan report on the Organisation of the Permanent Civil Service in 1854 which prescribed a career service model administered by an independent personnel agency. The career service model consists of:

- a permanent and impartial civil service
- accountable to Ministers who are in turn accountable to Parliament
- recruitment and promotion on merit
- based on self-sufficiency – that is, largely developing its own talent with a presumption of one employer for a whole career
- providing services from within with little outsourcing
- highly federal, organised into departments each of whom has a Minister accountable to Parliament.²¹

These principles are broadly reflected in the *Public Service Act 2008* (Qld) (PS Act). Section 3 of the PS Act sets out its main purpose to ‘establish a high performing apolitical public service’ that ‘is responsive to Government priorities’. The PSC has goals to be a high performing, impartial and productive workforce which puts first the people of Queensland

¹⁹ Colley L. (2009) ‘The Politics of an Apolitical Public Service’ in Bowden B. et al. (eds) *Work and Strife in Paradise*, The Federation Press, pp 163-182.

²⁰ Roy J. (2008) ‘Beyond Westminster Governance: Bringing Politics and Public Service into the Networked Era’, *Canadian Public Administration*, 51(4): p 541.

²¹ Rhodes, R. A. W., Wanna J. and Weller P. (2009) *Comparing Westminster*, Oxford University Press, Scholarship Online.

and which are articulated in five organisational values: customers first; ideas into action; unleash potential; be courageous; and empower people.²²

Similarly, a publication of the New South Wales Public Service Commission for government employees highlights that ‘employees are under the direction of their Secretary or agency head, they have a clear duty to respond promptly and professionally to Ministers’ requests for advice or information’ and ‘advice to Ministers must also be ‘frank and fearless’: this means laying out all the options and dealing honestly with all the issues, including those that are difficult, complicated and problematic.’²³

In its submission to the Review, Together Queensland (TQ), the union representing public servants, argued:

In the Westminster tradition, public servants should be able to perform their duties without fear or favour, and in giving advice, to be able to do so frankly and fearlessly. Their career, promotional prospects and reputation should be defended from the prospects of fear or favour by an industrial relations system that:

- *creates the environment of permanence, impartiality, service, and the rule of law*
- *protects and nurtures merit, as the foundation for expertise and high levels of competence*
- *ensures decision makers are accountable to independent tribunals for their decisions*
- *protects individual employees from interference in the proper discharge of their duties through employment action of more senior officials, elected or appointed*²⁴

Similar views were contained in submissions from Queensland Council of Unions (QCU), the Queensland Nurses’ Union (QNU), the Queensland Law Society (QLS) and the Australian Lawyers Alliance (ALA).

The Reference Group concurs with those sentiments. A new Act provides an opportunity to recognise the importance of the values of the ‘Westminster model’.

When the IR Act was enacted in 1999, it covered both the private and public sectors. One clear implication of the changed industrial relations jurisdiction is that the Queensland Government (along with other referring State Governments) is in the position of holding roles as legislator, regulator, executive, policy maker, funder and employer in relation to the State public service. Previously the need to also consider and accommodate the needs of private sector employers and employees mediated this position. Arguably, Queensland’s unicameral parliament exacerbates this position as the checks and balances of a Westminster system of Government are reduced. This creates particular challenges in terms of ensuring a strong and independent public sector and also in ensuring appropriate employment protections for public sector employees.

²² Public Service Commission (2015) *About the Public Sector*, <http://www.psc.qld.gov.au/about-us/about-the-public-sector.aspx> accessed 30 November 2015.

²³ NSW Public Service Commission (2014) *Behaving Ethically: A Guide for NSW Government Sector Employees*, NSW Government.

²⁴ TQ submission.

A new Act provides an opportunity to reflect the more limited jurisdiction of state and local government employees. Additionally this also provides the opportunity to promote the values of independent and apolitical public employment. The Reference Group proposes to recognise both these important concepts in the principal object of the new Act.

As outlined in Chapter 2, the Reference Group is recommending that the principal object of the Act include the need to provide a fair and balanced framework for co-operative industrial relations that supports the delivery of high-quality services to Queenslanders, economic prosperity, and social justice

Further provisions to provide statutory support to strengthen the 'Westminster-style' aspirations include:

- promoting high performing apolitical state and local government sectors that are responsive to democratically determined priorities and focused on the delivery of public services in a professional and non-partisan way
- promoting and facilitating security in employment and consultation about employment matters and technological and organisational change
- establishing a tribunal and court independent of government to facilitate fair, balanced and productive industrial relations

International Labour Organisation (ILO) conventions and supporting materials provide specific guidance for public service industrial relations regulations. Of particular relevance are the *Freedom of Association and Protection of the Right to Organize Convention, 1948 (No. 87)*, the *Right to Organise and Collective Bargaining Convention, 1949 (No. 98)*, which guarantee government workers the rights to organise and bargain collectively.

The proposed principal object of the new legislation would include support to meet Australia's obligations under these ILO conventions.

Although Australia has not ratified the *Labour Relations (Public Service) Convention, 1978 (No. 151)*, which establishes that disputes related to the determination of the terms and conditions of employment should be resolved through negotiations or through impartial and independent machinery, the recommendations in this report are consistent with that standard.

3.3 The State Government as an employer

The Queensland Government's position on retaining state legislative control of public sector industrial relations is unchanged. In its initial submission to the Productivity Commission Review of the National Workplace Relations System in March 2015 (the PC Review), the Queensland Government submitted that it is appropriate for states to retain control over the industrial relations environment within which government policies are carried out and government services are delivered.²⁵ This included being able to regulate the ethical conduct of employees, matters of discipline, terms and conditions of employment and the mechanism around industrial action.

²⁵ Queensland Government (2015) *Queensland Government Submission to the Productivity Commission Inquiry into the Workplace Relations Framework*.

In addition to the IR Act, the Queensland public sector workforce is also regulated by the PS Act which covers a range of matters relating to public sector employment and government policies and directives. For some departments or groups, work arrangements may also be further regulated by specific Acts such as *Hospital and Health Boards Act 2011* (Qld) (the HHB Act) which gives the Director-General of Health significant employment and industrial relations powers. It is estimated that around 60 per cent of the public sector workforce are employed under the PS Act, and approximately another 33 per cent are employed under the HHB Act. According to TQ's submission, there are over 70 statutes which can impact on employment matters in the public sector.

Regulations and directives derived particularly from the IR Act and the PS Act are also important determinants of some conditions of employment. Further the government can issue employment-related policies which employees are required to follow. The 'Employment Security Policy' is an important example.²⁶

State governments have a unique position of power in relation to industrial relations in their jurisdictions. This has the potential to make state public sector employees particularly vulnerable as a result of the legislative capacity to unilaterally overrule the wages and employment conditions contained in public sector, awards, agreements and other industrial instruments.

The numerous changes to the IR Act in 2012 and 2013 are detailed in the previous chapter. These changes illustrate the extent to which legislation can override existing, long-established, and broadly accepted industrial relations arrangements, including content of existing awards and even agreements made between parties and certified at the Queensland Industrial Relations Commission (QIRC).

The amendments also enabled the Minister for Industrial Relations to make a declaration to terminate industrial action if satisfied that the action threatened the safety and welfare of the community or threatened to damage the economy. This power had traditionally been available only to the "independent umpire", the QIRC.

During that period, amendments to the PS Act provided the Public Service Commissioner with a head of power to make directives on industrial relations matters, which had previously been available only to the Minister.

The Industrial Relations (Restoring Fairness) and Other Legislation Amendment Bill 2015 (Qld) was designed to achieve many of the urgent industrial relations election commitments of the new Government. The amendments removed many of restrictions on the content of awards and agreements.

The Reference Group expressed concern that legislation should not be able to override agreements struck between parties and certified under existing legislated arrangements. This is also a relevant consideration for the agreement making arrangements which are discussed in Chapter 5. However undesirable this is, there is no way to prevent this from occurring in the future.

²⁶ Department of Premier and Cabinet (2015) *Employment Security Policy*, approved by Cabinet 30 March 2015, Queensland Government.

Recent New South Wales legislation requires the New South Wales Industrial Relations Commission to 'give effect to', rather than 'take account of', the government's policy on industrial or employment matters including the 2.5 per cent limit on increases in wages and conditions. Ministerial directives under the IR Act and directives of the Public Service Commissioner also provide a mechanism to unilaterally determine wages and conditions of employment of its employees.

The government in its role as a major and influential employer has obligations to provide leadership, direction and guidance to employers in other sectors of the economy. Government objectives of greater efficiency and improved service delivery, which are important given the current financial constraints, are unlikely to be advanced effectively by unilateral actions by government.

All the public sector unions stressed the importance of the government as a model employer. That was acknowledged by the other members of the Reference Group. Being a model employer does not mean that there will not be conflicts with the workforce and their representative bodies but it does mean the government acknowledges the importance of a cooperative industrial relations framework in which consultation and problem solving are key themes.

Ministerial directives

The PS Act provides a mechanism by which the Minister for Industrial Relations can issue directives to regulate certain conditions of employment for public sector employees. Currently, directives relate to conditions such as overtime, higher duties, travelling allowances, motor vehicle allowances and locality allowances. The Public Service Commissioner has a similar power under the PS Act. The Commissioner's directives have generally covered matters including merit protection, recruitment and selection, deployment of staff, appeals and the conditions for senior executives.

Submissions from TQ and the QCU sought to remove the directive-making power from the IR Act and have the provisions of those directives incorporated into awards or agreements. The objective of incorporating the content of directives into awards and agreements can be achieved through the bargaining process. It could also be done by references to the directives as part of those industrial instruments.

The inclusion of the Ministerial directives in a different instrument is matter for consideration during bargaining.

It should be acknowledged that the directives have the advantage of providing consistent conditions covering a large number of public sector workers. To not have a similar instrument, would have the potential for fragmentation of some very important employment conditions as a consequence of the differential timing of negotiations and strengths of the bargaining parties. Additionally, there are some sector-wide matters such as the conditions for public sector employees deployed to assist with the response to and recovery from natural disasters or other critical incidents which might not be priorities for specific agencies but are of critical importance for the sector, which are best achieved through the directive-making process.

Further, the recommendations in this report in relation to consultation requirements and the inability to use directives to reduce conditions should serve to alleviate other concerns in relation to the use of Ministerial directives.

Recommendation 5

That, as a general principle, awards and agreements should be instruments which regulate terms and conditions of employment, and directives should be utilised only where there is a compelling reason to depart from this principle. The Office of Industrial Relations should lead a process involving public sector agencies and unions to identify those Ministerial directives which would be best placed in awards or agreements and determine the most appropriate mechanism to transition them into the agreements or awards in a manner which ensures employees are not disadvantaged during the transition.

As directives can be used to override other industrial instruments, the potential for Ministerial directives to be used to unilaterally reduce or remove conditions of employment is an area of concern. This was a significant issue in the long running dispute of the arrangements for Visiting Medical Officers in 2012. As a result, the HHB Act was amended to prevent the directives of the Director-General of Health being used to override or reduce conditions contained in other industrial instruments.²⁷ The Reference Group believes that the legislation should contain provisions similar to those in the HHB Act.

Recommendation 6

That the legislation provide that directives of the Minister for Industrial Relations cannot be used to reduce or provide for wages and conditions of employment which are less favourable than those contained in awards or agreements (as currently provided for in the Hospital and Health Boards Act 2011 (Qld)).

Consultation about directives

The commitment to consultation is a central component of a cooperative industrial relations environment. TQ stated: '[c]onsultation lies at the heart of effective and robust industrial relations'.²⁸

The proposed Object of the Act contains a new provision:

(e) promoting productive and cooperative workplace relations, including through mutual obligations of trust and confidence.

The government needs to be seen to model behaviours and actions which are consistent with the aspiration of productive and cooperative employment relationships in which trust is important.

²⁷ Hospital and Health Boards Act 2011 (Qld) s 51A, 51C(1A).

²⁸ TQ submission.

There are requirements around consultation on organisational change. Bargaining is premised on the concept of bargaining in good faith. Consultation and dispute settlement mechanisms are typically contained in certified agreements and many awards. Given the importance of Ministerial directives as a determinant of employment conditions in the public sector, it would seem appropriate that statutory support for consultation as part of this process should be included in the new Act and consequently in the HHB Act. The Reference Group recommends the new legislation contain a requirement to consult prior to the issuing of a new or amended directive.

Recommendation 7

That the Act require that consultation occur with public sector agencies and unions before the directives are issued. Similar provisions should be provided in the Hospital and Health Boards Act 2011 (Qld).

Rescind powers of Public Service Commissioner to issue industrial relations directives

Recent amendments to the IR Act and PS Act have blurred the responsibilities between the Minister for Industrial Relations and the Public Service Commissioner. This is most obviously referenced by changes to the PS Act (section 52(2)) that enable the Public Service Commissioner to issue directives on industrial relations matters. This adds a layer of complexity and uncertainty, which would be most apparent where they had conflicting intentions. To have public servants and Ministers of government with the same head of power is both inappropriate and poor public policy. If it was the intention of government that they are always to be consistent, then no purpose is served by the dual heads of power. The Reference Group recommends that this issue be resolved with the new industrial relations Act and amendments to the PS Act. The PSC supports this proposition.

Recommendation 8

That the provisions in the Public Service Act 2008 (Qld) which enable the Public Service Commissioner to issue industrial relations directives be removed.

Remove overlapping heads of powers

The functions of the PS Act and its interface with the IR Act should be clarified as part of the process for the development of new legislation. The PS Act should focus on the mechanisms for the creation and administration of government departments and agencies, the management of CEOs and senior executives, the recruitment, selection and deployment of public sector workers, capability development and workforce performance. In particular, the promotion and protection of merit and equity as the basis for employment in the public sector should be sacrosanct. The PSC has a strong obligation to gather data on the public sector workforce to improve government policy and to monitor adherence by agencies to the priorities of government, and in particular merit and equity outcomes.

The Reference Group is of the view that industrial matters such as wages and conditions should be dealt with through industrial relations legislation.

Recommendation 9

That the Public Service Act 2008 (Qld) and the new legislation ensure that heads of power between the Minister for Industrial Relations and Public Service Commission be clearly articulated so that there are no circumstances in which those powers overlap.

TQ raised the issue of other pieces of legislation limiting the industrial rights of some employees in the Queensland Public Sector. This includes legislation for a range of statutory bodies such as the Office of Adult Guardian, the Information Commissioner and the Ombudsman Office. In some cases the conditions employment of staff are determined by the Governor-in-Council. In drafting the new Act, the provisions should ensure the protection of the industrial rights of all employees in public sector other than senior officers and members of senior executive service or equivalent classifications. This should include access to the QIRC. Acts which restrict or limit the industrial rights of groups of public sector employees should be identified and any offending sections or provisions of those Acts amended or removed as appropriate.

Recommendation 10

That, in drafting the new Act, any provisions of other Acts which impact on public sector employment be amended also to ensure that the industrial rights of employees are protected.

Individual public sector appeal rights

The nature of public sector employment is characterised by administrative and industrial decision making within a legislative environment which is framed particularly by PS Act and the IR Act and their interaction. Individual appeal rights are important in the public sector employment, and are detailed in Chapter 7 of the PS Act, 'Appeals and Review'. The main basis for appeals relates to 'a decision to take, or not take, action under a directive'.

However TQ has argued that the ability to take such appeals has been significantly reduced over a number of years and culminated in the repeal of the 'Complaints' directive in 2013. The ability of the QIRC to determine some appeals has been also been limited by provisions relating to employment which are reserved for Directors-General under the PS Act.

Consistent with the values of an apolitical public service, an important principle of public employment should be the capacity for an external review (of decisions) where local and agency processes have failed to satisfactorily resolve the issues in dispute. This avenue should be available across the range of employment issues including promotion, transfer, deployment and performance management as well as those which are already provided for in the IR Act as industrial matters.

It is important to note here that recommendations in Chapter 9 of this Report would extend the concept of workplace rights into the jurisdictions covered by a new Act.

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.

Recommendation 11

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.

Current IR Act Provisions for Queensland Health

The regulation of industrial relations arrangements within the Queensland state public sector has been rendered more complex through the implementation of distributed public sector organisational models. Under such arrangements, centralised bureaucracies may play a strategic and tactical role in setting terms and conditions of employment and taking responsibility for industrial relations, while separate entities may be responsible for the operationalisation of employment arrangements and industrial relations. For example, under the HHB Act, the Director-General is responsible for industrial relations while Hospital and Health Services which are prescribed employers are wholly responsible as employers for both interpreting and applying employment and industrial arrangements. These arrangements present challenges with respect to role clarity.

Queensland Health (QH) and the Queensland Nurses Union (QNU) have raised the benefits of clarifying the role of the Director-General in industrial relations matters before the QIRC. It is proposed that the provisions currently contained in schedule 4A (section 13) of the IR Act be amended so that the Health and Hospital Services are a party in conciliation when the Director-General so authorises. Section 22A should be amended to provide that Director-General (or Chief Executive) is taken as the negotiating party for the purpose of taking industrial action in response to industrial action by another negotiating party. In the case of section 24, it is proposed that it is clarified that the Chief Executive is taken to be a party to proceedings for industrial matters unless the Chief Executive or authorised delegate gives written notice to the Health and Hospital Service that it is to be a party to a proceeding.

Recommendation 12

That the provisions currently contained in Schedule 4A of the Industrial Relations Act 1999 (Qld) be clarified in the new Act in order to ensure that the Director-General of Queensland Health is a party to any industrial matter in the Department of Health and the Health and Hospital Services unless delegated by the Director-General.

The arrangements to recover salary overpayments in QH are different from those applying across the rest of the sector and are specifically provided for in sections 396A-396D of the IR Act.

Most of these overpayments and loans relate to either loans made to employees to facilitate the change of QH pay periods or pay dates (1999 to 2002 and again in 2012) or the introduction of the new payroll system in 2010. These sections also facilitate the recovery of historical overpayments.

Pay date, loan and interim cash payments were provided to support staff in various transition processes and these sections effectively provide for the recovery of overpaid amounts on termination.

Submissions from the QNU and the AWU argued to remove these provisions.

QH has advised that the overall impact of repealing these sections would significantly increase the complexity and cost of overpayment recovery and likely lead to an increase in the outstanding overpayment balance.

While sympathetic to the position of the health unions, the Review does not recommend the abolition of these provisions at this time. These arrangements should continue to be monitored.

3.4 Public sector employment practices

'Westminster' aspirations in public sector employment include the maximisation of permanent employment (section 2.3 of this report). Temporary and casual employment are legitimate forms of employment. However, the traditional use of casual employment in the public sector has been to replace critical front-line service staff such as nurses, teachers, cleaners and custodial officers for short periods of time, such as sick leave. Temporary employment's predominant use, historically, was to replace people who are on leave for longer periods, time limited projects or where future funding is uncertain.

The data in Table 3.2 suggests that - except for the impact of significant downsizing of the sector during the previous LNP Government - both the number and proportion of temporary and contract employees has increased markedly over the last decade. Permanent employment has fallen from 77 per cent of the Queensland public sector workforce in 2004 to 72.4 per cent in 2015. Over the same period, temporary employment grew from 13.0 to 17.6 per cent. Contract employment has quadrupled from 1,403 persons in 2014 to 5,574 persons in 2015.

Table 3.2: Queensland Public Sector Employment, 2004 to 2015 (2nd Quarter)

NUMBER					
Year	Permanent	Temporary	Casual	Contract	Total
2004	144,794	26,146	15,088	1,945	187,973
2005	148,055	27,368	16,206	2,027	193,656
2006	153,397	29,545	15,920	2,149	201,011
2007	160,668	32,713	16,216	2,032	211,629
2008	169,083	33,534	16,773	1,450	220,840
2009	177,424	34,549	16,878	1,351	230,202
2010	180,450	35,603	17,840	1,381	235,274
2011	185,311	39,229	16,409	1,709	242,658
2012	187,370	35,744	18,410	1,726	243,250
2013	177,039	33,002	16,935	1,621	228,789
2014	176,050	38,581	17,755	1,403	233,789
2015	176,121	42,847	18,621	5,574	243,163
DISTRIBUTION					
Year	Permanent	Temporary	Casual	Contract	Total
2004	77.0%	13.9%	8.0%	1.0%	100%
2005	76.5%	14.1%	8.4%	1.1%	100%
2006	76.3%	14.7%	7.9%	1.1%	100%
2007	75.9%	15.5%	7.7%	1.0%	100%
2008	76.6%	15.2%	7.6%	0.7%	100%
2009	77.1%	15.0%	7.3%	0.6%	100%
2010	76.7%	15.0%	7.6%	0.6%	100%
2011	76.4%	16.2%	6.8%	0.7%	100%
2012	77.0%	14.7%	7.6%	0.7%	100%
2013	77.5%	14.4%	7.4%	0.7%	100%
2014	75.3%	16.5%	7.6%	0.6%	100%
2015	72.4%	17.6%	7.7%	2.3%	100%

Source: Public Service Commission, unpublished MOHRI data

In the context of government as a model employer, government agencies can and should do more to support the principles of employment security and merit. Anecdotally, casual and temporary employment are used as *de facto* probationary arrangements; ‘a try before you buy’ approach.

Currently, there is a Public Service Commissioners’ Directive which enables the conversion of temporary employees to permanency under conditions such as a qualifying period of two years of continuous service in the same role in an agency, the original appointment following a ‘merit’ process and subject to ongoing funding for the position.

Temporary employment arrangements provide a safeguard for employees, particularly women returning from maternity leave and opting for more flexible return to work arrangements. That is a relevant and important consideration but it is not the only one. A risk management approach would involve longer term perspectives considering such things as staff turnover in the agency and the size of the agency’s workforce in that area of expertise. People seeking conversion to permanent employment may have to be flexible as to their work placement, provided that travel requirements are not unreasonable.

It is recommended that the Directive in relation to the conversion of temporary to permanent employment should encourage the conversion, unless there are reasons not to.

Recommendation 13

That the directive on the conversion of temporary staff to permanency be amended to provide the default position be to approve the conversion where the qualifying conditions are met, unless there are operational reasons not to do so.

The current Directive facilitates the conversion of temporary employees to permanency under certain conditions. However, the use of long-term casuals, sometimes also referred to as 'permanent' casuals, is increasing. Long-term temporaries and long-term casuals are similar in all senses, except for the loading which casuals receive in lieu of some types of leave. There is no avenue for conversion for casuals. The Review supports a mechanism to enable this conversion to be possible on the same or similar terms to those applicable to long-term temporary employees.

Recommendation 14

That the Public Service Commission develop a mechanism to enable casuals who have been employed on a long-term or systematic basis to be converted to permanent employment on a similar basis to that provided for in relation to long term temporary employees.

The AIG, CCIQ and LGAQ did not support the recommendations in relation to the conversion of temporary and casual employees in the public sector to permanency as it would constitute additional costs for the sector and consequently to the taxpayers and indirectly to business.

3.5 Capability/capacity issue

The effectiveness of the industrial relations system is dependent upon the capability and capacity of not only designated industrial relations and human resources practitioners but also managers in the Queensland public sector. It is equally important that officials of the unions representing public sector workers, who are involved in negotiations, are skilled in the area and have knowledge of public administration in a contemporary context. Knowledge, experience and quality advice are necessary to ensure that the intentions of the legislation and related employment policies governing public sector employment are not compromised and that the objectives of bargaining can be realised for all parties.

While this provides significant challenges for public sector agencies, it is important for all participants to be well prepared and have the capacity to either make decisions or to have ready access to decision makers.

Relationships between all parties can be assisted through genuine consultative processes and mechanisms that occur not only during formal negotiations but on an ongoing basis.

A training program should be developed to improve the negotiation skills of senior industrial relations and human resources practitioners across government. It should be developed in consultation with public sector unions and made available to them in the form of training materials or through attendance at the agency training programs.

While there was general agreement from the Reference Group for the recommendation below, the employers' associations did not support the use of public monies for the development and delivery of training programs to industrial organisations.

Recommendation 15

That the Office of Industrial Relations, in conjunction with the Public Service Commission, develop a training program to enhance the negotiation and advocacy capacity and capability of senior industrial relations and human resources staff. Further, such programs should be available to public sector unions.

3.6 Engagement with public sector unions

Generally, government agencies have provided access to union representatives to discuss a broad range of issues with their members provided that they did not unduly disrupt work. The proposed Act will encourage 'productive and cooperative workplace relations' and 'responsible representation of employees' through the principal object, (e) and (n) respectively. The Act will also introduce the concept of 'mutual trust and confidence'. This is discussed in more detail in Chapter 9.

The government has already recognised the importance of effective engagement through its reinstatement of union encouragement clauses into public sector awards and agreements and a range of other changes in the *Industrial Relations (Restoring Fairness) and Other Legislation Amendment Act 2015* (Qld).

These intentions along with requirements on consultation could be further advanced by the development of a more formal charter which could include paid leave for union representatives for training and other authorised union duties, reasonable access to members, facilities and equipment and right of entry protocols.

Recommendation 16

That a charter be developed around the role, responsibilities and rights of the Queensland public sector unions and their representatives, including the consultative processes with government agencies on industrial relations matters.

During the negotiations for a new agreement to cover 'core' public service employees, the heads of agreement provided for the development of agreed consultative arrangements for those covered by that agreement. Agencies and unions covered by other agreements can be expected to include similar consultative arrangements.

To be effective, consultative arrangements must be ongoing and must engage employees and their representatives on issues which are important to them and the agency. There is some experience across the sector where the consultation forums arising from agreements have focused on the less important matters, with key organisational matters dealt with outside of the process. ‘Eleventh hour’ meetings to inform employees of decisions are often counter-productive to the achievement of their strategic objectives.

Consultative arrangements are best developed by those who are directly involved. A single model is unlikely to meet the disparate needs of agencies and their workforce. As a consequence, the Reference Group is of the view that arrangements tailored to the specific needs of agencies, particularly the “core” public service and their workforces is appropriately a matter for the bargaining process.

Recommendation 17

That appropriate consultative processes be included in agreements and bargaining awards, negotiated as part of the bargaining process. Consultation should be focused around the issues that are of most importance to employees, and be genuine; that is, be undertaken prior to any final decision being made and before the implementation of any changes. Consultation arrangements should include mechanisms to allow the agencies and the Government to understand and properly consider the views of employees and their representative organisations.

Chapter 4: Local Government

As set out in Chapter 2, the Review recommends that the Queensland industrial relations jurisdiction continue to include the Queensland local government sector. This chapter highlights some of the characteristics of local government, provides a discussion of the many changes that have affected the local government sector over recent years and outlines the arguments in favour of maintaining local government in the Queensland industrial relations system. In doing so, the chapter considers the views of the Local Government Association of Queensland (LGAQ) and discusses some policy issues to better align employment arrangements between the local and state government sectors.

4.1 Background

The Queensland local government sector comprises 77 local councils including the Brisbane City Council (BCC). Approximately 42,000 workers are employed in local government in Queensland.²⁹ Councils vary enormously in geographical size, number of residents, number of employees and the range of services provided.

Local governments fill important roles in their communities as service providers and employers of the local workforce, particularly in rural and regional areas. In many locations, local government is the only level of government present in the community.³⁰

Local government faces a range of broader labour market issues such as ageing workforce, transition to retirement, technological change and outsourcing. However, the Queensland local government sector has also been affected by a range of changes and challenges such as the amalgamation of Queensland councils from 157 to 73 councils in 2008; the subsequent de-amalgamation of some councils from 1 January 2014; de-corporatisation and re-corporatisation; and jurisdictional uncertainty in relation to its industrial relations arrangements. These changes and issues are discussed below.

De-corporatisation and amalgamation

Council amalgamations took place across Queensland from 15 March 2008, arising from recommendations of the *Report of the Local Government Reform Commission* in 2007. The changes to the structure of councils in Queensland had major industrial relations implications. The council mergers constituted a transmission of business under industrial law.

This created issues including the need to preserve continuity of service as employees moved between the merging and new local government, so that accrued and accruing employee rights (such as annual leave and long service leave) were transferred to the new employer. In addition, industrial instruments, which determine terms and conditions of employment, had to be transmitted from the old employer to the new employer as the

²⁹ Australian Bureau of Statistics (2014) *Employment and Earnings, Public Sector, Australia, 2014-15*, Cat. No. 6248.0.

³⁰ Hastings C., Ryan R., Gibbs M. and Lawrie A. (2015) *Profile of the Australian Local Government Workforce 2015 Report*, Australian Centre of Excellence for Local Government, University of Technology, Sydney, p 7.

employment of the employees of the merging local governments was theoretically terminated by the transmission of business.

De-corporatisation of local councils took place immediately before amalgamation³¹ to deal with uncertainty in relation to the industrial relations of local councils, and more urgently, specific issues related to the council amalgamations, including those set out above. BCC was not part of this process as it had not been considered by the Reform Commission.

De-corporatisation clarified that local governments were in the state industrial relations system and not in the federal system because employees of 'trading corporations' are covered exclusively by the federal industrial relations system.

Prior to de-corporatisation, local councils in Queensland were bodies corporate with perpetual succession. The LGAQ sought de-corporatisation as an interim measure. When the Commonwealth Act excluded local government, the Queensland Government repealed the legislation reinstating the corporate status of local government.

As mentioned above, the BCC did not undergo de-corporatisation like other Queensland local governments (and considered itself to be a trading corporation). Therefore, it did not fall within the Queensland industrial relations jurisdiction until changes were made to the *Industrial Relations Act 1999* (Qld) (IR Act) (effective 1 January 2010) which declared the BCC to be 'not a national system employer'.³²

Re-corporatisation and de-amalgamation

Re-corporatisation was an election commitment in the 2012 election by Liberal National Party (LNP) Government and had been sought by local governments to ensure certainty when entering into contracts and to provide protection to councillors by limiting personal liability.

All previously de-corporatised Queensland councils have since been re-corporatised under the Local Government and Other Legislation Amendment Bill 2012 which amended the *Local Government Act 2009* (Qld) (LG Act) to restore the 'body corporate' status to local councils. This was to occur after the same Act amended the IR Act and introduced regulations declaring local councils were not national system employers.

De-amalgamation was also an LNP election promise, subject to proposals and community votes. From 1 January 2014, the four newly de-amalgamated councils of Douglas, Livingstone, Noosa and Mareeba commenced operation.

These amalgamation and de-amalgamation changes created industrial relations uncertainty. When making certified agreements, both amalgamated and de-amalgamated councils have had to consider the different conditions, entitlements, classifications and, in some cases, pay rates across the amalgamating councils to ensure no loss of conditions, protections or fairness to employees. These changes in some cases have resulted in complex administrative and industrial relations arrangements for these councils.

³¹ This took place on 13 March 2008.

³² Under s 692(2) of the IR Act as amended by the *Fair Work (Commonwealth Powers) and Other Provisions Act 2009* (Cth), and is subject to s 14(2) of the FW Act.

Queensland councils declared ‘not to be national system employers’

At the time of the referral of the residual (unincorporated) private sector to the federal jurisdiction, the Queensland Government considered it appropriate that local governments fall within the state industrial relations system. This jurisdictional arrangement was agreed or consented to by local government stakeholders (unions and the LGAQ). This remains the preferred position of the Queensland Government. The jurisdictional uncertainties around the local government sector were resolved at this time when Queensland local councils were declared (and endorsed) ‘not to be national system employers’ under Queensland and Commonwealth legislation.³³

This resulted in jurisdictional change for some local councils (moving from the federal system to Queensland industrial relations system) and, for these councils, necessitated other changes such as federal local government awards and agreements being taken to be state instruments. Transitional arrangements protected employees’ existing rights and entitlements but created additional administrative burden for employers. The processes of de-corporatisation and local councils being declared not to be national system employers also allowed some unions to ‘follow their members’ back into the state system when relevant federal awards or agreements became state instruments under transitional provisions.

Without these declarations, local councils and their employees would fall under either the state or federal jurisdiction depending on the trading activities of each local government such as whether or not the local government is a ‘constitutional corporation’ for the purposes of the *Fair Work Act 2009* (Cth) (FW Act) as is the case in Western Australia. Indeed, it is possible that without these declarations, a council might move from one jurisdiction to the other from time to time if its trading activities changed, creating jurisdictional uncertainty.

The breadth of local government operations continues to evolve and expand. On occasions, these expansions involve councils establishing fully-owned enterprises or jointly-owned enterprises with other councils (local government enterprises or LGEs). These organisations may or may not be covered by the (Queensland) modern local government award, depending on whether the organisation has been declared a non-national system employer. Accordingly, employees of these organisations may in some cases be covered by federal industrial relations legislation. This may have implications for entitlements of employees moving from being directly employed by a local government to these organisations. While the Review notes the potential issues for some local councils in relation to issues around local government enterprises, the test as to whether these LGEs should be in the Queensland or federal industrial relations system should continue to be on the basis of their trading status or if the local council considers that the relevant LGE would most appropriately operate under the Queensland industrial relations system (by declaration and endorsement).

In addition to the changes set out above that have particularly affected the local government sector, other legislative changes (particularly to the IR Act) over recent years have had major

³³ Chapter 16, Part 1, IR Act provides for declarations that particular employers are not national system employers (consistent with the provisions of the FW Act ss 14, 14A). The BCC was brought into the Queensland industrial relations jurisdiction in this manner by being declared not to be a national system employer under section 692(2) of the IR Act. Declarations for a number of other employers have been made at section 692(3) of the IR Act. The local governments declared not to be national system employers are listed in Schedule 5B of the *Industrial Relations Regulation 2011*.

impacts on the industrial relations arrangements of local governments in Queensland. The Review acknowledges this and recognises the benefits of industrial relations stability for all stakeholders.

4.2 Local government industrial relations jurisdiction

One of the Terms of Reference to this Review was to establish whether local government industrial relations needs are better served within the State or Federal industrial relations jurisdiction.

If the local government sector was not part of the Queensland industrial relations jurisdiction, the IR Act would be almost solely an Act covering state employees in the Queensland public sector. Provisions with broader application, such as long service leave, could remain in the IR Act or, potentially, be put into separate legislation.

The presence of the local government sector in the Queensland industrial relations jurisdiction theoretically mitigates any legislative change a government of the day might seek to make to the IR Act to manage its public sector. However, because of its presence (and in the absence of the private sector), the local government sector has in recent times been affected by major legislative changes arising from changes of government as discussed above. The State Government needs to remain cognisant of the positive benefits arising from stable and certain industrial relations for all stakeholders, including local government.

The Review acknowledges it remains the position of the Queensland Government that local government should be in the state industrial relations system. The Federal Court decision in the Etheridge Shire Council matter supports this arrangement. In the decision, Federal Court Justice Spender commented that it was:

*inconceivable that the framers of the Constitution intended that the Commonwealth should have the powers to regulate the activities, functions, relationships and the business of the Etheridge Shire Council in respect of a local government, which is a body politic of a State government, having legislative and executive functions.*³⁴

The LGAQ in its submission to the Review indicated that its position in relation to the preferred industrial relations jurisdiction for local councils in Queensland had recently changed, given a number of factors including the number and extent of changes to the industrial relations system under recent and successive state governments, and submitted that it was:

*concerned the state has at times confused its role as an employer of the public service and regulator of the Industrial relations system that services the public service. Unfortunately, Local Government as the other major stakeholder in the state IR system has been caught up in this conundrum.*³⁵

The LGAQ also raised the issue about the Queensland Government attempting to restrict the independence of the QIRC generally and in relation to awards. The LGAQ noted the potential for significant reforms arising from this Review and the:

³⁴ *Australian Workers' Union of Employees, Queensland v Etheridge Shire Council* [2008] FCA 1268.

³⁵ LGAQ submission.

residual concern that the next state government of a different political persuasion will introduce its own reforms, thus further exposing Local Government to operations disruption and industrial uncertainty.

The LGAQ also stated that state governments have ‘deliberately acted to cut short and/or amend certified agreements made between employers and employees/unions’.³⁶ The concerns expressed by the LGAQ in this regard are acknowledged.

On the basis of these matters, the LGAQ indicates:

[i]t is for these reasons that the LGAQ requests the Taskforce, unless it can offer solutions that will redress these concerns raised above for local government, seriously consider the referral of local government to the federal jurisdiction. While this would signal a fresh round of reform for local government, at this time it seems a more preferred option than the current state system which threatens an ongoing maelstrom of legislative changes and reform as the State government changes without the safety net of an upper house to restrict this pattern of change and uncertainty. In these extremely challenging times for Local Government, Councils need certainty in industrial relations to allow them and their workers to get on with their core business of servicing their community; councils need certainty in order to be sustainable to achieve their aims of maintaining a local workforce; Councils need certainty that the current industrial relations systems recognises its interests as a major employer in many of the communities throughout Queensland. That certainty no longer exists.

Councils also need to operate in an industrial system that does not diminish its capacity to compete for talent in its workforce and able to compete commercially in its capacity to deliver services to their communities. Without an independent tribunal, and a modern and contemporary industrial relations system, that capacity is compromised.

Shifting local government out of the state system would allow the State to regulate for itself the treatment of its public service employees without regard for how that regulation might impact on another sector. viz. local government.³⁷

4.3 Local government arrangements in other jurisdictions

Under the federal award modernisation process conducted by the Fair Work Commission (FWC), one local government award was created from a large number of awards including transitional state local government awards. The federal *Local Government Industry Award 2010* operates in Victoria and Tasmania and the Northern Territory. Certain local councils in Western Australia which are, or which consider themselves to be, trading corporations would also operate under or in accordance with the federal award.

The New South Wales and South Australian local government sectors are the most comparable with the Queensland local government sector in that they fall within their respective state industrial relations systems and operate under an arrangement including awards, agreements and industrial relations legislation. However, there are significant differences.

³⁶ Ibid.

³⁷ Ibid.

In New South Wales, the local government sector remains within the state industrial relations jurisdiction and there is one award for local government, the *Local Government (State) Award 2010*.

In New South Wales, a state-based peak body for local councils has only recently been formed (Local Government NSW). The 2013 final report of the NSW Independent Local Government Review Panel recommended that Local Government NSW strengthen its role. Having strong peak bodies can make it possible for the 'state to reduce considerably its activities in oversighting and regulating the sector'. The final report noted that this was 'already evident in other states, including South Australia, Queensland and Victoria'.³⁸

South Australia retained coverage of the local government sector and the South Australian public sector, including Government Business Enterprises (except those operating in areas where national competition policy applied). Local councils in South Australia mainly employ staff under either the *South Australian Municipal Salaried Officers Award* or the *Local Government Employees Award (SA)*. Both these state awards are maintained by the Industrial Relations Commission of South Australia.

As a result of Western Australia not referring its industrial powers for the unincorporated private sector, employees and employers in Western Australia are covered either by the national or State industrial relations system depending on whether or not the employer is a constitutional corporation.

The Western Australian Government has not taken steps to specify the jurisdiction of local governments. Some local governments are therefore in the state system and subject to state awards (if they are not trading corporations) and others in the federal system and subject to the federal *Local Government Industry Award 2010* and the FW Act. Although the 2009 Review of the Western Australian industrial relations system highlighted the problem of jurisdictional uncertainty for the private sector, no similar observation was made for local government.

The Tasmanian local government sector industrial relations fall entirely within the national system, and from 1 January 2014, all Tasmanian Council employees (except General Managers – CEO equivalent) were covered by the federal *Local Government Industry Award 2010* and the awards which had applied previously were terminated. General Managers became award free as of 1 January 2015.³⁹

The Victorian Government referred almost all industrial relations powers, excluding matters such as long service leave, to the federal government in 1996, therefore the local government sector in Victoria has been covered by federal awards and agreements since this time.

The history of the local government sector in Victoria is quite unique and the arrangements may not be particularly comparable with other states or territories.

³⁸ NSW Independent Local Government Review Panel (2013) *Final Report of the NSW Independent Local Government Review Panel*, October 2013, p 127.

³⁹ Local Government Association of Tasmania (2014) *Award Modernisation Finalised for Local Government in Tasmania*, www.lgat.tas.gov.au/.../Award%20Modernisation%20completed%20for%20Local%20Government%20in%20Tasmania accessed 30 November 2015.

Separate provisions for the local government sector.

The Review deliberated about whether some separate provisions should apply to the Queensland local government sector. Consideration along these lines would go against some generally held principles that the overarching arrangements should be the same for all. However, it is acknowledged that the industrial relations needs of the local government sector may from time to time diverge from the needs of the State public sector.

While it would be legislatively possible to create separate arrangements for local government sector and state public sector, this is not desirable as it could lead to different levels of entitlements and protections for the two groups. Separate provisions for local government and Queensland public service could also lead to differing approaches to bargaining and wage settlement.

Also, consistency in general leads to more equitable outcomes and can have benefits where employees move between state and local governments or from one council to another in terms of recognition of prior service, dealing with accrued entitlements and so forth.

Local government should remain in the Queensland industrial relations jurisdiction

Given the recommendation that local government remain within the Queensland industrial relations jurisdiction, the Review has taken into consideration the potential impact of any recommendations or policy comments on local government.

Some recommendations and commentary within this Report set out minimum standards proposed to apply to the whole jurisdiction. Where the Review considers that it is appropriate for the Queensland Government to adopt a superior provision in relation to its own workforce, this report sets out where and how this ought to be done by way of policy or directive. These higher level provisions would not automatically affect local government in Queensland. Nevertheless, this Review would suggest that each local government consider these policies on a case-by-case basis, as to whether the superior measure could be appropriately and effectively applied to their workforce as part of their enterprise bargaining arrangements or other workplace policies.

Chapter 2 of this Report recommends that legislation provide for a high-level consultative forum chaired by the Minister to discuss matters related to the operation of the IR Act and other industrial relations issues. The Reference Group suggested that the CEO of the LGAQ could appropriately be included in such a body.



Chapter 5: Awards, Collective Bargaining and Agreement Making

This chapter makes recommendations about the role of awards, collective bargaining and agreement making.

Awards have been a fundamental element of the Queensland industrial relations system for a century. This chapter makes several recommendations about how best to ensure that awards remain up-to-date and relevant.

Collective bargaining is strongly supported by stakeholders as the primary means of setting wages and conditions of employment. This chapter outlines a model for how collective bargaining should be conducted in the Queensland system including the use of awards, agreements and conciliation and arbitration where appropriate. The chapter proposes that jointly developed good faith bargaining guidelines be used to assist the negotiation process. Some further recommendations are made about simplifying the protected action ballot process.

5.1 Contemporary awards

Following the award modernisation process in the federal arena, Queensland has been modernising and simplifying awards to provide a fair safety net of employment conditions (in conjunction with Queensland Employment Standards (QES)) which promote flexible workplace practices and efficient and productive performance at work. The award modernisation process is due to be completed by 30 June 2016.

Submissions to the Review stated that the scope of awards should be comprehensive and include outcomes of bargaining and/or directives/policies.⁴⁰ The narrowing of the scope of awards as a result of the award modernisation process was questioned by some submissions.

The previous LNP Government removed from the *Industrial Relations Act 1999* (Qld) (IR Act) provisions which outlined the main matters to be included in awards. Section 126 stated that the Queensland Industrial Relations Commission (QIRC) must ensure awards did not contain discriminatory or obsolete provisions and should contain simple language and structure, provide for fair employment standards suited to the efficient and flexible performance of work and take into account employee's family responsibilities. Section 127 stipulated that awards should include a dispute resolution procedure.

The Review considers that the Act should state that the awards must contain certain matters; similar to sections 126 and 127 of the 2011 IR Act. The Review is of the view that it is essential that awards do not contain any discriminatory provisions and provide for equal remuneration of men and women for work of equal or comparable value. This is particularly important in light of the Chapter 8 discussion about the efficacy of the Equal Remuneration Principle. Awards must be useable documents, easy for workers to understand and devoid of obtuse or unclear provisions. To meet the needs of employers and employees, awards should provide for flexible work arrangements and contain facilitative provisions that allow

⁴⁰ QCU, QNU, QTU, TQ, UFUQ and UV submissions.

certain clauses of the award to be varied by consent of the parties. To ensure that disputes are resolved quickly and at source, awards must contain dispute resolution procedures. Overall, it is important for the parties to ensure awards remain contemporary and relevant documents.

The Review makes the following recommendation:

Recommendation 18

That a provision be included for the content of awards to ensure awards do not contain discriminatory provisions, are easy to understand, remain contemporary and relevant, provide for equal remuneration of men and women for work of equal or comparable value, provide for flexible work arrangements, and contain facilitative provisions and dispute resolution procedures.

It is appropriate, consistent with the approach in the *Fair Work Act 2009* (Cth) (FW Act), for the Act to set out the statutory purpose and intention of awards and their relationship with the QES.

The QCU and AWU expressed concerns that the QES provisions had been used during the award modernisation process to argue to reduce existing award provisions.

To clarify the intent of the QES in this report, the Review recommends the inclusion of a provision which will ensure that awards supplement the minimum standards in the QES.

Recommendation 19

That the legislation specify that awards are designed to supplement the minimum standards set out in the Queensland Employment Standards, and that the Queensland Industrial Relations Commission, in exercising its award making powers is required to provide for terms and conditions that generally reflect the prevailing employment arrangements that have developed in relation to the work covered by the award.

The employer organisations opposed this recommendation due to their concern that the role of awards is as part of the safety net of *minimum* conditions, rather than as a mechanism to reflect prevailing conditions of employments.

5.2 Review cycle

Prior to the implementation of the modern award-making process, the QIRC was required to review awards three years after the making of the award, and then again a further three years later. Currently, the requirement to review modern awards in the IR Act is similar to the FW Act in that modern awards can be varied by application and are reviewed every four years.

The Productivity Commission Workplace Relations Framework Draft Report (PC Draft Report) recommended that the mandated four-yearly review of awards in the federal system cease after the conclusion of the current review.⁴¹ Similarly, several submissions to this review did not support fixed four yearly reviews. Stakeholders recommended updating and maintaining awards on an ongoing basis, rather than as a function of a prescribed timetable.

As a result, the Reference Group recommends that the current requirement for four yearly cyclical reviews be abolished. The review of existing awards should not be a vehicle to remove or reduce conditions but rather to ensure that awards are maintained as contemporary documents, with appropriate application and flexibility but without any obsolete provisions.

Parties should have the flexibility to apply to the QIRC to have an award reviewed either by way of a separate application or as an outcome of the bargaining process. It is proposed that after the completion of the award modernisation process, no changes be allowed to modern awards for a period of 12 months, except in the case of awards arising from the bargaining process and where the QIRC believes exceptional circumstances exist.

Recommendation 20

That the current requirements for four yearly cyclical reviews be abolished. The legislation should reinforce the principle that awards need to be maintained as contemporary documents, with appropriate application, consultation, dispute resolution and flexibility provisions. Once updated, awards should remain in place for a minimum period of 12 months before they can be amended. Variations inside that period should only occur if the Queensland Industrial Relations Commission determines that extraordinary circumstances exist.

5.3 Collective bargaining

It was unanimously agreed by the Reference Group that the industrial relations system should encourage collective bargaining as the main method of setting wages and conditions. The system should be effective and efficient and should operate to encourage, and if necessary put pressure on, the parties to reach agreement in a timely manner.

The Review acknowledges that collective bargaining in the Queensland public sector has been problematic for some parties from both the government side and the public sector unions. The complexity also reflects the role of government as both the regulator of the industrial relations system and the major employer. Current financial constraints on the Queensland government (and governments more generally) have exposed other tensions in the existing collective bargaining arrangements. As the QCU has noted:

[c]urrent practice is for Government to determine a wages policy and present it to its workforce as a 'fait accompli'. This diminishes the opportunity for employees to have an

⁴¹ Productivity Commission (2015) *Workplace Relations Framework, Draft Report*, August 2015, Commonwealth of Australia, p 436.

*impact on wage outcomes and belies the commitments made to collective bargaining elsewhere.*⁴²

Further, there is not one consistent approach to the nature of certified agreements across the sector. They range from discrete workplace agreements (e.g. *Maritime Safety Queensland Gladstone Pilot Transfer Crew Certified Agreement 2009-2012*) to agency agreements (e.g. *Queensland Public Health Sector Certified Agreement 2011*) to occupationally based agreements (e.g. *Department of Education and Training (Education Cleaners' Certified Agreement 2011)*).

The agency agreements, of which the Queensland Health agreement is the largest and most complex, typically involve multiple occupational groups with multiple unions.

More numerous in the sector are occupationally-based agreements with a single occupation group and one dominant union. Such agreements include teachers, police, teacher aides, school cleaners, ambulance officers, firefighters and correctional officers. Despite this diversity, these agreements reflect collectively bargained outcomes that meet the needs of parties.

In the case of local government, there are a large number of separate employers. The traditional arrangements of single or multiple agreements covering the employees of each council are expected to continue to be the norm. The system needs to be flexible to recognise desirability for some local governments to have certified agreements covering particular organisational groups or work units.

All members of the Reference Group strongly supported the principle that collective bargaining should be the basis of determining wages and conditions for Queensland government and local Government employees. That said, the Reference Group, was cognisant of difficulties in reaching agreement which had been previously experienced, particularly in the state public sector.

The overwhelming objective will continue to be for parties to reach agreement. However, where agreement proves difficult, it is proposed that a more deliberative conciliation process be used to facilitate agreement or, as a minimum, to limit and narrow matters which might be referred to arbitration. Arbitration is to be a last resort, available only when all other avenues for reaching agreement have been exhausted.

Recommendation 21

That collective bargaining with the objective of reaching 'agreement' continue to be the basis of determining wages and conditions in the Queensland jurisdiction. The system should be flexible enough to allow for agency or council, occupational and organisational or work unit bargaining as appropriate.

⁴² QCU submission.

Good faith bargaining

An essential element of collective bargaining is the requirement for parties to bargain in good faith.

The Review received numerous submissions endorsing good faith bargaining. Accordingly, to facilitate a consistent and best practice approach to collective bargaining in the jurisdiction, the collective bargaining arrangements should be underpinned by good faith bargaining (GFB) principles at every step. Section 146 of the IR Act currently sets out principles for good faith negotiations:

When negotiating the terms of a proposed agreement, the proposed parties to the agreement must negotiate in good faith.

Examples of good faith in negotiating—

- *agreeing to meet at reasonable times proposed by another party*
- *attending meetings that the party had agreed to attend*
- *complying with negotiation procedures agreed to by the parties*
- *not capriciously adding or withdrawing items for negotiation*
- *disclosing relevant information as appropriate for the negotiations*
- *negotiating with all of the parties*

However these provisions provide limited detail and establish only basic safeguards.

The Reference Group discussed the need to have more specific details about the attributes of GFB in the IR Act. The FW Act includes more extensive provisions about GFB than does the Queensland IR Act. The Productivity Commission Workplace Relations Framework Draft Report (PC Draft Report) concluded that the good faith bargaining principles in the FW Act were working well.⁴³

The QCU was of the view that there should be access to the QIRC when information sought during bargaining is withheld because it is deemed to be ‘confidential or commercially sensitive information’. If information is deemed to be critical to the negotiations, the QIRC should be empowered to resolve any impasse.

Accordingly, the Review proposes that the IR Act contain GFB principles that are modelled on the GFB principles in the FW Act.

Recommendation 22

That the Good Faith Bargaining provisions in the Act include the following minimum requirements:

- a) *attending, and participating in, bargaining meetings*
 - b) *disclosing relevant information (other than confidential or commercially sensitive information) in a timely manner*
 - c) *responding to proposals made by other bargaining representatives for the agreement in a timely manner*
 - d) *giving genuine consideration to the proposals of other bargaining*
-

⁴³ Productivity Commission (2015) *Workplace Relations Framework, Draft Report*, August 2015, Commonwealth of Australia, p 533.

-
- representatives for the agreement, and giving reasons for the bargaining representative's responses to those proposals*
- e) *refraining from capricious or unfair conduct that undermines freedom of association provisions or collective bargaining.*
-

GFB guidelines

To further institutionalise the good faith bargaining principle in the Queensland government, there is value in the parties developing detailed guidelines which support the broader objective of encouraging - and where appropriate pressuring - the parties to reach agreement and which reflect the unique characteristics of public sector bargaining.

Indeed, the GFB codes of practice developed in New Zealand have been highlighted as a suitable alternative. Those New Zealand provisions and GFB arrangements in other jurisdictions should be considered in discussions between the Office of Industrial Relations and the public sector unions to develop GFB guidelines for application across the sector.

The local government sector should give consideration to the benefits of similar guidelines for that sector. However, it is recognised that there are 77 local governments which vary significantly in terms of size, resources and capability to develop such guidelines.

Prior to the formal commencement of bargaining, the parties should meet to discuss the process for the conduct of negotiations. Agreed procedural requirements could be formally documented and may include approaches such as interest-based bargaining which have been endorsed by stakeholders in health and education.⁴⁴

Recommendation 23

That the Office of Industrial Relations and the public sector unions jointly develop Good Faith Bargaining guidelines for the Queensland public sector with a view to creating greater ownership of their collective bargaining obligations.

5.4 A possible collective bargaining model

The Review proposes a modified collective bargaining model to provide greater flexibility in the instruments of bargaining. In this new model, while certified agreements are likely to remain common, there will be potential for the creation of awards arising from the bargaining process. The proposed model is displayed in Diagram 5.1.

As already observed, many of the certified agreements in the state government agencies are occupationally based agreements which have followed the traditional occupational awards rather than being agency or enterprise wide agreements. In that context, there was considerable interest within the Reference Group and in submissions from the Queensland Teachers' Union (QTU) and QCU in enabling the outcome of bargaining to be a new award. The employer's agreement would be required, creating a 'consent award', in effect. The proposal would involve an award which outlined the scheduled wage increases over the

⁴⁴ QNU and QTU submissions.

period of the award and the nominal expiry date of the award in a manner similar to a certified agreement.

The Reference Group considered the mechanics of such an option. The award arising from the bargaining processes would need to involve similar requirements as for a certified agreement.

Traditionally, awards have been made by the relevant industrial tribunal (the QIRC in the Queensland system) following applications from one or more of the parties to that award. In the era of collective bargaining, awards have assumed the role of a safety net. Provisions of certified agreements override award provisions which are inconsistent with the award. More recently in most jurisdictions, there has been a process to modernise awards. The current requirement in the IR Act and the FW Act is to review the awards on a four year cycle. The Review seeks to retain the principles which support maintaining awards as contemporary industrial instruments but not necessarily on a regular review cycle (see Recommendation 20).

It was argued at the Reference Group that the option of a ‘bargaining award’ as a consequence of bargaining could simplify the procedural arrangements of maintaining two documents containing the wages and conditions of employment of the same employees.

The employer associations identified a risk that having raised the safety net provisions to those contained in a bargaining outcome, this could act as a disincentive to future bargaining. This is mitigated by two factors. Firstly, wage rates and conditions of employment could not be increased at the expiry of the term of the bargained award without further bargaining. Secondly other elements of the model including GFB principles put collective bargaining at the cornerstone of the industrial relations jurisdiction in the Queensland system.

The argument that it would limit opportunities by one party to negotiate for a reduction in entitlements which is theoretically an outcome of the certified agreement process belies the reality that this happens very infrequently generally and certainly rarely in the public sector.

This model would reflect the unique circumstances of bargaining in the public sector, where there is one employer under a relevant award, rather than the large multi-employer industry of occupational awards that apply in the national system for the private sector.

In the model proposed in this Review, the same requirements to have a certified agreement approved would apply to ‘bargained’ awards including the requirement that the workforce covered by the instrument would have the opportunity to approve its content through an approved voting mechanism conducted by the employer.

The model proposed by the Review would involve the following elements which would need to be provided for in the new Act.

1. Initiation of bargaining

The bargaining period will commence when one party formally initiates the bargaining process by way of written notice (notice of intention). This can occur six months prior to the

nominal expiry date of the agreement or award, unless otherwise provided for in the agreement.

In the drafting of the new provisions the QIRC should be given the power to make 'scope orders' to deal with circumstances where negotiating parties are unable to agree on the coverage of a proposed agreement. The provision could be modelled on the similar provisions of the FW Act.

2. Negotiations

The objective of negotiation is to reach agreement on a replacement agreement.

Negotiations are to occur in accordance with the GFB provisions of the IR Act and other GFB principles which have been agreed by the parties, from the commencement of the bargaining period (See Recommendation 24).

3. Protected action

Protected action is a legitimate strategy upon the expiry of an agreement or award. The mechanisms for authorising protected action needs to be flexible provided that the unions can demonstrate to the QIRC/Registrar that the proposed process allows members who are likely to be impacted by the action to express their democratic views in relation to that proposed protected action. There should be no restriction on unions gauging membership support for protected action during the bargaining period provided that the action cannot occur until the expiry of the agreement or bargaining award.

Protected action must cease when the QIRC has determined the issues in dispute should be referred for arbitration.

4. Agreement

Where there is agreement, parties can pursue one of two avenues. The first option is consistent with existing arrangements for certified agreements. Once an affirmative majority vote of affected employees is recorded, an application for certification can then be made to the QIRC under the relevant provisions.⁴⁵ Certified agreements will not extinguish awards but will apply to the extent of any inconsistency.

The second option would apply if the employees covered by the bargaining award are identical to those covered by the existing award. It would allow parties to seek to make a bargaining award instead of a certified agreement. Given the limited nature of the jurisdiction of the Queensland system, it is appropriate to allow parties this flexibility where they agree that a single consolidated document is appropriate. The newly made award when approved would also function as the new safety net and be deemed to have met the requirements of the award review process. Where a bargaining award is made, it would entirely replace the pre-existing award, which would be cancelled by the QIRC as part of approving a bargaining award.

⁴⁵ *Industrial Relations Act 1999* (Qld) Chapter 6 Division 2.

The procedural and content requirements in relation to the making and approving both instruments would be identical. Both would require the agreement of the employer and the relevant union(s), the endorsement of a valid majority of employees, and must meet the no disadvantage test.

A bargaining award would have a term no longer than would be available if it was an agreement, by specifying a nominal expiry date. The content of bargaining awards would include the provisions normally included in an agreement including dispute settlement and consultation provisions, and specify a schedule of wage increases.

Similarly, the operation of a bargaining award would be the same as an agreement: variation with its nominal life would be by agreement only, protected industrial action would be prohibited during its nominal term, and the 'no extra claims' principle would apply.

As is currently required for the certified agreements, the QIRC would need to ensure that the statutory requirements of certification of agreements and the approval of the bargaining award have been met. The QIRC would have no discretion to refuse to make this form of award if the statutory requirements had been met.

The award would continue in force until replaced by an agreement or new bargaining award in terms of the existing certified agreement provisions.

5. No agreement

The real dilemma in the public sector, however, is when agreement cannot be reached by the parties themselves - for whatever reason. In these circumstances, it is proposed there be a second stage in the collective bargaining process where the QIRC could assist parties with conciliation and arbitration. Encouraging parties to reach agreement of their own accord will remain the overall objective of the model. However, if bargaining stalls, one or both parties may make an application to the QIRC for conciliation.

6. Conciliation

The QIRC's objective at conciliation will be to assist the parties to reach agreement on all or as many matters as possible. This needs to be a rigorous process in which the behaviour of the parties is assessed against the agreed GFB principles.

Protected action can continue during conciliation unless the conciliating Commissioner determines otherwise.

If agreement is reached with the assistance of the conciliation process, the usual processes of balloting and agreement certification or award approval would follow.

If full agreement cannot be reached, the requirement of the conciliation process and all of the parties is to narrow the scope of matters in dispute.

Conciliation should be 'without prejudice' (i.e. positions put and/or concessions made during conciliation cannot be used in any other proceedings).

7. Triggers for arbitration

Where full agreement cannot be reached, a party or parties may apply to the Commissioner managing the conciliation process for arbitration. The triggers for arbitration could include:

- a period of six months from the nominal expiry date of the agreement or award, or after three months of conciliation which has failed to result in agreement, whichever is the greater
- the parties have bargained in good faith
- the parties have genuinely endeavoured to minimise the matters in dispute
- the Commissioner is of the view that there is no reasonable prospect that further conciliation or negotiation will result in agreement being reached.

Alternatively, the Commissioner may refer the matter to arbitration if the parties consent. The obligations to reduce the number and scope of disagreement would still apply. To concede in relation to a matter contingent on agreement on another matter is not to be misinterpreted or misconstrued by the QIRC as not bargaining in good faith.

The application for arbitration will have to specify the matters agreed and the outstanding matters to be arbitrated.

There are three possible responses to an application for arbitration.

Firstly, the Commissioner could reject the application and require further conciliation to take place. The basis for a rejection would include factors such as the range of outstanding matters and/or the behaviour of a party or parties.

Alternatively, the QIRC may accept the application for arbitration 'in principle' but require further negotiations to reduce the matters in dispute.

The third option involves the Commissioner accepting the application for arbitration.

8. Arbitration

Arbitration will be before a full bench of the QIRC. Protected industrial action will be prohibited during arbitration. The referral to arbitration should be accompanied by a report on the conciliation process by the presiding member, which will include the range of outstanding issues and a discussion of the behaviour of the parties and their adherence to GFB principles, including any guidelines and/or principles agreed by the parties.

When the QIRC has determined that agreement cannot be reached in relation to wage increases, the parties may agree, or the full bench hearing the arbitration may order an interim wage increase, providing that that increase forms part of the formal arbitrated decision.

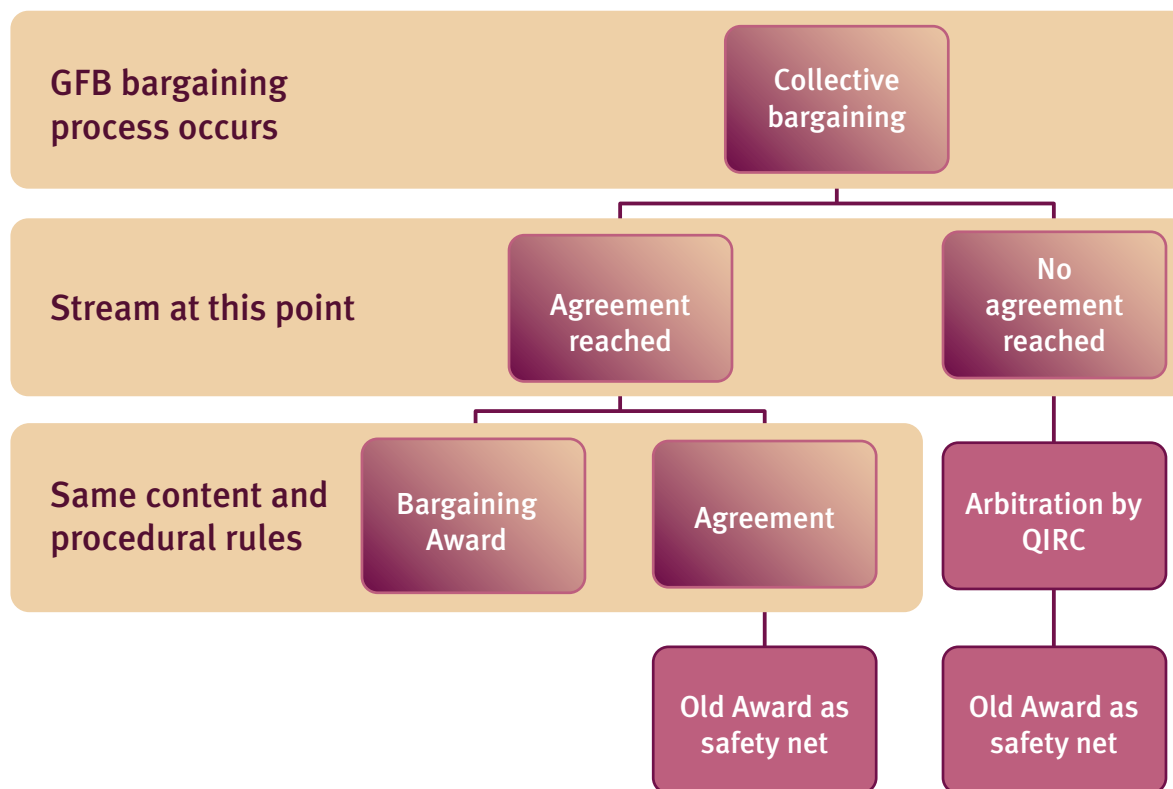
To support the arbitral process, the full bench would direct the parties to prepare the draft determination (instead of an agreement).

At the conclusion of an arbitration process, the QIRC will decide on the matter or matters and require their insertion into the draft determination or order. The formal

order/determination would be issued by the QIRC and apply for a period agreed by the parties or for a maximum period of four years.

The proposed model is summarised in the diagram below.

Diagram 5.1: Proposed public sector bargaining model



While the members of the Reference Group were generally supportive of the proposed model the Australian Industry Group (AiG), Chamber of Commerce and Industry Queensland (CCIQ) and Local Government Association of Queensland (LGAQ) did not support the arrangements for moving to arbitration, arguing that they would support arbitration only by consent of the parties. However, other members of the Reference Group supported the model on the basis of arbitration being a last resort.

Recommendation 24

That the legislation be drafted to facilitate the modified collective bargaining model. The key elements of the model should include :

- a) *the objective of bargaining is to reach agreement*
- b) *negotiations can commence no earlier than six months from the end of the current agreement*
- c) *flexibility in the instrument which is the outcome of bargaining (the instrument can be a certified agreement or bargaining award, provided that the requirements for certification or approval are consistent)*
- d) *protected action is prohibited during the life of the agreement but can be taken upon the nominal expiry date of the*

-
- agreement or bargaining award*
- e) *conciliation is to be aimed at assisting the parties to reach agreement*
 - f) *arbitration as a last resort and only if it is found that there is no reasonable prospect that further conciliation or negotiation will result in agreement being reached.*
-

As a result of recent experiences in the Queensland public sector in which negotiations have been prolonged and arbitration has been ordered, the question of interim wage increases has been raised and interim increases have been agreed or awarded. The employers represented on the Reference Group have argued that any such increases should be by agreement only. However other members believed that, consistent with the other bargaining provisions, there should be scope for the ‘independent umpire’ to decide.

The Review recommends that interim wages increases can be agreed or awarded by a full bench of the QIRC as part of arbitration, provided such increases form part of the formal outcome of the arbitration process.

Recommendation 25

That, when the Queensland Industrial Relations Commission has determined that an agreement cannot be reached in relation to wage increases, the parties may agree, or the full bench hearing the arbitration may order an interim wage increase, providing that that increase forms part of the formal arbitrated decision.

5.5 Protected industrial action ballots

In Queensland, industrial organisations can, in certain circumstances, take protected industrial action, immune from common law liabilities. Procedural requirements must be met and the industrial organisation must apply for and be issued with a protected action ballot order from the QIRC. For unions, the industrial action must be endorsed by a majority of affected employees in a postal ballot conducted by the Electoral Commission Queensland (ECQ).⁴⁶ The Queensland provisions are similar to the protected action provisions in the FW Act.

The PC Draft Report found the FW Act protected action ballot procedures and rules overly prescriptive and complex. It recommended considering further methods to streamline the procedure to reduce complexity and compliance costs.⁴⁷

In a similar vein, this Review received a number of submissions highlighting the restrictive and costly nature of the Queensland provisions for protected industrial action ballots. The QCU for instance stated:

⁴⁶ *Industrial Relations Act 1999* (Qld) s 176 and Schedule 4

⁴⁷ Productivity Commission (2015) *Workplace Relations Framework, Draft Report*, August 2015, Commonwealth of Australia, p 680.

PABOs proved to be an unnecessary burden placed on unions but also created an inordinate amount of unnecessary work for Queensland Government agencies.⁴⁸

The Australian Workers' Union (AWU) noted that:

the ballot process is overly complex and does not assist in the resolution of impasses between the parties. It stretches out the bargaining timeframes and re-enforces the parties' positions.⁴⁹

Overall, the Review considers that the rules and procedures around accessing protected industrial action should not be overly complex, onerous or costly and should not impede the ability of unions to canvas the views of their members or restrict access to protected industrial action.

To facilitate employee participation and to reduce compliance costs the Review recommends that voting mechanism to take protected industrial action be flexible, appropriate to the circumstances and subject to the approval of the QIRC.

The AiG opposes this recommendation as it believes that, while it is not essential that a protected action ballot be conducted by the ECQ, it is essential that ballots on such a sensitive issue be conducted by an independent third party with the competencies required to conduct such a ballot and that the independence and competency of such third parties be considered by the QIRC.

Recommendation 26

That the current provisions in relation to the requirement for ballots for protected action to be conducted by the Electoral Commission Queensland be replaced by a requirement that unions demonstrate to the Queensland Industrial Relations Commission/Registrar that the proposed process allows members who are likely to be impacted by the action to express their democratic views in relation to that proposed protected action.

5.6 Ministerial power to cease industrial action

The *Industrial Relations (Fair Work Harmonisation) and Other Legislation Amendment Act 2012* (Qld) introduced Division 6A to the IR Act which allows the Minister to make a declaration terminating protected industrial action if satisfied the action threatens the safety and welfare of the community or threatens to cause significant damages to the economy. These provisions mirror the FW Act.

As discussed in Chapter 3, the Queensland Government is in the position of holding multiple roles as legislator, regulator, executive, policy maker, funder and employer in relation to the state public service. This gives the state government a unique position of power in relation to industrial relations. While the government has responsibility to ensure the welfare of the Queensland community and economy, the essence of collective bargaining is that parties

⁴⁸ QCU submission.

⁴⁹ AWU submission.

themselves are responsible for resolving matters in dispute. Further, a party to industrial action or an industrial dispute is able to seek an order from the QIRC that the protected industrial action cease.⁵⁰ The relevant employer is able to seek an injunction, as a party to the proceeding, rather than direct interference by the executive in a quasi-judicial process in which the Executive may be a party to the proceedings. This strengthens the separation of powers which is an inherent feature of the Westminster system. The Review recommends that the power of the Minister for Industrial Relations to order that protected action cease be removed in the new Act.

The AiG expressed their opposition to the removal of such provisions as it believes that there ought to be some high level office which has the function and ability to issue protected industrial action orders promptly, when such an order is desirable in the public interest.

Recommendation 27

That the provisions which enable the Minister for Industrial Relations to order that protected industrial action cease be removed.

5.7 Payroll deductions

The Review is of the view that parties should be able to make arrangements to their mutual agreement. The current IR Act places specific prohibitions on payroll deductions. Section 391A provides that '[a]n employer must not deduct from an employee's wages an amount for paying the employee's membership subscription for an industrial association'... and '[a] contract or other instrument is void to the extent it provides for a deduction to be made from wages in contravention of this section'.

The Act does not prohibit the employer making any deduction that is authorised by the employee, except union fees. There is no basis for this exclusion, particularly as union membership is related to employment, and many other deductions which an employer may agree to facilitate are not.

The Review considers that such payroll deduction prohibitions in the Act should be repealed. This would allow an employer to agree to facilitate payroll deductions, in an industrial instrument or otherwise.

Recommendation 28

That the provisions which prevent payroll deductions for union fees be removed.

⁵⁰ *Industrial Relations Act 1999* (Qld) s 277(2)(a).

Chapter 6: Domestic and Family Violence

In February 2015, the *'Not Now Not Ever'* report of the Special Taskforce on Domestic and Family Violence in Queensland (Domestic and Family Violence Taskforce Report) was tabled.⁵¹ The Queensland Government has accepted all 140 report recommendations.

The recommended legislative measures combined with measures taken by the Queensland Government, as an employer, will provide a comprehensive workplace response to domestic and family violence (DFV) that may serve as a best practice model for governments and employers in other jurisdictions.

The Review recommendations on DFV are covered in this chapter and Chapter 9 on minimum employment standards.

6.1 What is domestic and family violence?

Domestic and family violence is not limited to physical abuse. Other forms of controlling and coercive behaviour such as economic abuse are also recognised as DFV. For instance, the *Domestic and Family Violence Protection Act 2012* (Qld) (DFVP Act) cites preventing a person from seeking or keeping employment as an example of economic abuse.

It is widely accepted that the lack of financial independence can contribute to a person remaining in a violent domestic situation. The National Domestic Violence and the Workplace Survey (2011) (NDVW Survey) notes evidence by Patton and cited by the Australian Domestic & Family Violence Clearinghouse (ADFVC) regarding the importance of employment when leaving a violent relationship.⁵²

Just as economic independence can assist a victim in leaving an abusive situation, many DFV victims are prevented from gaining and/or maintaining employment. Research both within Australia and overseas cite a range of behaviours that perpetrators engage in aimed at sabotaging employment for victims.⁵³

While both genders can be victims of DFV, victims are more likely to be women. The majority of research concentrates on female victims of DFV. Research indicates a variety of ways in which DFV can impact negatively upon the employment of victims and, as a consequence, on the workplace. This includes decreased performance and productivity, increased absenteeism, job loss and disrupted work history.⁵⁴

⁵¹ Special Taskforce on Domestic and Family Violence in Queensland (2015) *'Not Now, Not Ever' – Putting an End to Domestic and Family Violence in Queensland*, February 2015.

⁵² McFerran L. (2011) *Safe at Home, Safe at Work - National Domestic Violence and the Workplace Survey*, Australian Domestic and Family Violence Clearinghouse: A Project of the Centre for Gender Related Violence Studies and Micromex Research, December 2011, p 2.

⁵³ Ibid, pp 8-11; Swanberg J. E. and Logan T. K. (2005) 'Domestic Violence and Employment: A Qualitative Study', *Journal of Occupational Health Psychology*, Vol 10.

⁵⁴ Franzway S., Zufferey C. and Chung D. (2010) 'Domestic Violence and Multidimensional Factors: Investigating the Impact of Domestic Violence on Women's Employment, Health and Housing', *Our Work Our Lives, National Conference*, Darwin, 12-13 August 2010; Australian Human Rights Commission (2011) *Submission to the Australian Law Reform Commission (ALRC) Family Violence and Commonwealth Laws: Employment and Superannuation*, 21 April 2011, pp 7, 8.

Research also indicates that women who are victims of DFV are less likely to have a stable employment history and more likely to be employed on a casual or part-time basis than women who are not DFV victims.⁵⁵

Despite the hindrances to gaining and maintaining employment, Australian Bureau of Statistics (ABS) data released in 2006 (and referred to in a submission by the Australian Human Rights Commission (AHRC)) estimated 'almost two-thirds of women affected by domestic violence are in paid employment'.⁵⁶ Given the high numbers of employees who are victims of DFV, the impact on the workforce is likely to be significant. This cost to employers has been estimated at \$175 to \$235 million per annum.^{57,58}

In recent years there has been increased awareness both within Australia and internationally of the need to introduce measures to prevent and eliminate DFV. This heightened awareness has seen a shift in the way that many governments now address this issue. Current trends recognise the benefits of a multi-faceted approach to the prevention and elimination of DFV, including adopting measures designed to assist victims gain and maintain employment.

In addition to the tangible benefits of providing employment protections and entitlements to victims, introducing a workplace response demonstrates the Government's commitment to eliminating DFV. The response could also serve as an educative tool to change attitudes by raising awareness of the need to provide support to victims, the legitimacy of their right to employment and by sending a clear message to perpetrators that DFV is not to be tolerated. It also brings DFV to the fore as a societal issue, rather than one that is kept private.⁵⁹

6.2 Background into the development of a workplace response to domestic and family violence

The DFV Taskforce Report highlighted that Queensland's workplace response to DFV matters is less comprehensive than other jurisdictions.⁶⁰ The DFV Taskforce made three recommendations specifically targeting industrial relations legislative reform in Queensland. Recommendations 33 and 34 involve amending the *Industrial Relations Act* 1999 (Qld) (IR Act) to provide leave for victims of DFV. Recommendation 35 is aimed at preventing dismissal of employees on the grounds of DFV. Recommendations 33 to 35 are listed below:

(33) *The Queensland Government amends the Industrial Relations Act 1999 to create a new category of leave for the public sector for victims of domestic and family*

⁵⁵ Australian Human Rights Commission (AHRC) submission of 21 April 2011 to the Australian Law Reform Commission (ALRC) *Family Violence and Commonwealth Laws: Employment and Superannuation*.

⁵⁶ Australian Bureau of Statistics (2006) *Personal Safety, Australia, 2005* (Reissue), Cat. No. 4906.0, p 35.

⁵⁷ Special Taskforce on Domestic and Family Violence in Queensland (2015) *'Not Now, Not Ever' – Putting an End to Domestic and Family Violence in Queensland*, February 2015.

⁵⁸ Australian Human Rights Commission (2011) *Submission to the Australian Law Reform Commission (ALRC) Family Violence and Commonwealth Laws: Employment and Superannuation*, 21 April 2011, p 8.

⁵⁹ Australian Council of Trade Unions (2014) *Family and Domestic Violence Submission to the Fair Work Commission, Moderns Awards Four Yearly Review*, D No. 132/2014 dated 28 October 2014, p 3.

⁶⁰ Special Taskforce on Domestic and Family Violence in Queensland (2015) *'Not Now, Not Ever' – Putting an End to Domestic and Family Violence in Queensland*, February 2015.

violence that may be taken for any purpose related to the violence (such as for injury recovery, finding accommodation, court preparation and court appearance);

(34) The Queensland Government ensures the amendment provide for 10 days a year of leave, non-accumulative, to be taken in conjunction with other leave and incorporating sensitivity as to the proof requirements for approval of the leave;

(35) The Queensland Government amends the Industrial Relations Act to specify outcomes of domestic and family violence (i.e. injury, application for leave, taking of leave) are not grounds for fair dismissal (similar to parental leave).⁶¹

In accepting these DFV Taskforce Report recommendations, the Queensland Government noted that recommendations 33, 34 and 35 will be considered as part of its Review into Queensland's industrial relations laws. Chapter 9 addresses recommendations for DFV provisions in the Queensland Employment Standards (QES).

Section 6.3 below addresses DFV Taskforce recommendations that have led to action by the Public Service Commission (PSC) and other public sector agencies.

6.3 Queensland context

Currently in Queensland there is no legislated employment/industrial response to DFV matters. In early 2015, the DFV Taskforce Report noted that a scan of DFV leave arrangements across Australian jurisdictions indicated that the Queensland Government 'provides the least amount of paid leave (five days per year) of all Australian jurisdictions and the leave provided is not dedicated leave.'

The DFV Taskforce made recommendations for workplace reform where the Queensland Government, as an employer, can take a leading role. These recommendations are as follows:

(31) As the largest employer in Queensland, the Queensland Government takes the lead in developing and modelling workplaces that foster equality, and educates employees on unacceptable behaviour in the home and the workplace, with direct emphasis on domestic and family violence.

(37) The Queensland Public Service Commission Chief Executive develops Public Service Directives specifically for management of victims of domestic and family violence in the workplace.

(38) The Queensland Public Service Commission Chief Executive develops training for managers and supervisors on implementing these directives and supporting victims of domestic and family violence.⁶²

Since the release of the DFV Taskforce Report and the Queensland Government's acceptance of all recommendations, the workplace response to DFV matters for the public service has strengthened significantly. The Queensland Government is now positioned as a leading public sector model employer nationally.

⁶¹ Special Taskforce on Domestic and Family Violence in Queensland (2015) 'Not Now, Not Ever' – Putting an End to Domestic and Family Violence in Queensland, February 2015.p 187.

⁶² Ibid p 24.

In November 2015, the PSC issued a new specific whole-of-government directive - *Support for Employees Affected by Domestic and Family Violence*. It includes the provision of a minimum of ten days of paid leave and other support options, such as flexible working arrangements, workplace and role adjustments, and counselling services via employee assistance programs. The directive defines domestic and family violence and notes that employees may access leave for reasons such as attending medical, legal, police or counselling appointments; attending court and other legal proceedings; and organising alternative accommodation, care or education arrangements for themselves or in support of the person affected.

The directive states that an employee does not have to use other leave entitlements before accessing this paid leave, and further leave (including special leave, sick leave and carers leave) is also accessible. It notes that an employee's access to leave and other support should not be denied in the absence of supporting documentation. This acknowledges that employees are often not in a position to provide evidence to substantiate requests for support. Employees also have the right to choose whether, when and to whom they disclose information about being affected, and confidentiality is considered paramount (except to the extent that disclosure is required or permitted by law). The directive mandates that Queensland Government agencies put a specific domestic and family violence support policy in place, and provide employee access to the Recognise, Respond, Refer e-learning awareness-raising program, jointly developed by the Queensland Government and Australia's CEO Challenge.

The directive forms part of a new Workforce Support Package that also includes a model policy template and related resources to support employees, managers and human resources practitioners. The state government is encouraging local governments, business and non-government organisations to adopt and/or tailor the package to suit the needs of their workplaces.

More broadly, the Queensland Government, as an employer, is promoting a focus on creating a 'constructive workplace culture' across the public sector. All workplaces are encouraged to foster a supportive and collaborative working environment that promotes prevention of domestic and family violence.

6.4 Other jurisdictions

Federal

The only DFV related provision in the *Fair Work Act 2009* (Cth) (FW Act) is the right to request a change in working arrangements where an employee is experiencing violence from a member of the employee's family (section 65(1A)).

All other DFV related arrangements are negotiated between the relevant parties, either through enterprise agreements or workplace policy. According to the Australian Unions website '[o]ver 1.6 million workers now have access to paid domestic violence leave in union negotiated workplace agreements.'⁶³ While a significant portion of these 1.6 million workers would be public sector employees, a number of large corporations such as Telstra, Virgin

⁶³ Australian Council of Trade Unions (2014) *Unions Push for the Right to Domestic Violence Leave*, Media Release, 28 October 2014.

Australia and the National Australia Bank (NAB) have also introduced DFV arrangements. Generally these have been introduced through workplace policies rather than through more enforceable instruments such as awards or enterprise agreements.

The Australian Council of Trade Unions (ACTU) is currently seeking the introduction of DFV leave, 10 paid days per annum for full-time permanent employees and 10 days unpaid leave for casual employees, and flexible work arrangements in all federal modern awards; this is subject to approval by the Fair Work Commission (FWC).

Other states and territories

Public sector DFV leave arrangements are treated differently across jurisdictions. While no jurisdiction has legislated a DFV leave provision, avenues by which an employee may access leave for DFV purposes are through policies, enterprise agreements and awards. The majority of jurisdictions allow employees access to special or personal leave for DFV purposes rather than expressly providing for DFV leave. The Australian Capital Territory (ACT) and New South Wales (NSW) have express DFV leave provisions, however in NSW this leave cannot be used until all other leave is exhausted.⁶⁴

International

A number of jurisdictions in the USA have implemented workplace responses to DFV. The US Federal Government's *Guidance for Agency-Specific Domestic Violence, Sexual Assault and Stalking Policies* requires Federal Agencies to develop workplace responses/policies to address DFV matters including prohibiting discrimination on DFV grounds, establishing leave policies and considering the provision of flexible work arrangements. Certain states including New York, Illinois and Oregon have also legislated to prohibit workplace discrimination on domestic violence grounds.⁶⁵

Legislation exists in the Philippines which provides an express entitlement to paid leave for DFV purposes and prohibits workplace discrimination on the grounds of domestic violence.⁶⁶

Campaigns for the adoption of DFV related matters are underway in Canada and across northern Europe.

6.5 Workplace-related domestic and family violence matters to be addressed through legislative reform

DFV Taskforce Recommendations 33, 34 and 35 specifically target industrial relations reform in Queensland.⁶⁷

Definition

⁶⁴ NSW Premier and Cabinet (2011) *C2011-08 Support for Employees Experiencing Domestic Violence*, NSW Department of Premier and Cabinet Circular.

⁶⁵ Heffernan A. and Matahaere L. (2010) 'Domestic Violence Discrimination in the Workplace: Is Statutory Protection Necessary?' *Our Work Our Lives, National Conference*, Darwin, 12-13 August 2010.

⁶⁶ Ibid.

⁶⁷ Special Taskforce on Domestic and Family Violence in Queensland (2015) *'Not Now, Not Ever' – Putting an End to Domestic and Family Violence in Queensland*, February 2015, p 24.

It is necessary to provide a consistent approach to domestic and family violence in Queensland legislation and to provide a sufficiently broad definition of domestic violence to cover the different types of domestic violence.

In developing a legislative response to the DFV Taskforce recommendations, the Review recognises the need to define 'domestic and family violence'. Research conducted through the DFV Taskforce found widespread agreement that definitions in the DFVP Act are 'thorough and comprehensive'.⁶⁸ The definition in section 8 of the DFVP Act states:

- (1) *Domestic violence means behaviour by a person (the first person) towards another person (the second person) with whom the first person is in a relevant relationship that—*
- (a) *is physically or sexually abusive; or*
 - (b) *is emotionally or psychologically abusive; or*
 - (c) *is economically abusive; or*
 - (d) *is threatening; or*
 - (e) *is coercive; or*
 - (f) *in any other way controls or dominates the second person and causes the second person to fear for the second person's safety or wellbeing or that of someone else.*

The DFVP Act then sets out behaviours that could be considered to be domestic violence. The Taskforce has not recommended any change to that definition for any purpose.

While a definition for the recommended industrial relations legislative reform was not specifically addressed, the Reference Group accepts that it is assumed the Taskforce intended a definition consistent with that contained in the DFVP Act be adopted.

Recommendation 29

That the legislation adopt a definition of domestic family violence consistent with the definition contained in the Domestic and Family Violence Protection Act 2012 (Qld).

6.6 Domestic and family violence leave

Recommendations 33 and 34 of the DFV Taskforce Report involve amending the IR Act to provide leave for victims of DFV.

Jurisdiction

DFV Taskforce Recommendation 33 sought DFV leave to apply the public sector. 'Public sector' was not defined. The Review supports extending its applicability to the entire Queensland jurisdiction including local government.

Domestic and family violence leave entitlements

⁶⁸ Ibid p 94.

DFV Taskforce Recommendation 33 proposes the creation of a new category of leave in the IR Act for victims of DFV who are public sector employees. However, it does not specify if leave is to be paid or non-paid.

Recommendation 34 provides that the leave is limited to 10 days per year, that it is non-accumulative and to be used in conjunction with 'other types of leave', but does not clarify to which 'other types of leave' this applies.

A number of submissions addressed including paid domestic and family violence leave. Queensland Teachers' Union (QTU) submission stated that paid domestic and family violence leave was a serious matter that required inclusion in the legislation, and which should not be addressed in an 'ad hoc' manner as it was under current arrangements.⁶⁹ Together Queensland (TQ) considered that violence outside the workplace should be 'addressed systematically in industrial bargaining'.⁷⁰

In contrast, the Australian Industry Group's (AiG) submission does not support the inclusion of paid domestic and family violence leave. The AiG acknowledges that domestic violence is a problem, however it considers the creation of a statutory entitlement to paid domestic violence leave is unnecessary. The AiG considers that the problem is best addressed through measures agreed by the Council of Australian Governments at its meeting held in April 2015 and through voluntary programs, including education programs for employers.

The Local Government Association of Queensland (LGAQ) position on the proposed statutory provision for DFV leave is:

The LGAQ has never supported the adoption of this leave as an entitlement as it considers that rendering it as an industrial entitlement will not deliver the sustainable cultural change that is required. The LGAQ has been a staunch advocate behind the principle that responding to domestic violence is everyone's responsibility. The LGAQ response has been to promote to Councils the adoption of a comprehensive policy for dealing with employee victims of family and domestic violence in order to more holistically/more sustainably effect the cultural change that is needed. This policy should be all-encompassing and include formal policies and procedures, dedicated staff, training, development and provision of supporting information and resources for victims as well as access to whatever leave is necessary on full pay and other reasonable support to resolve the matter for the employee. This approach empowers Councils as employers and community leaders to own the change agenda/share responsibility in responding to DFV rather than being compelled into a red tape response/entitlement.

The LGAQ is aware of the state government's commitment to implement the recommendations of the Bryce report but maintains this resistance to making this issue an industrial entitlement for the reasons mentioned above.⁷¹

The AiG, CCIQ and LGAQ expressed their strong opposition to all the recommendations on DFV. While acknowledging the seriousness of DFV as a social issue, they opposed, as a matter of principle, provisions on DFV being included in the IR Act. The employer organisations argued that DFV is not an industrial matter as it is not a matter about the

⁶⁹ QTU submission.

⁷⁰ TQ Submission.

⁷¹ LGAQ submission.

employment relationship between an employer and the workforce of that employer. It should be noted that this opposition is also relevant to Chapter 9 which canvasses the insertion of the DFV provisions in the Queensland Employment Standards.

Despite this opposition and in response to DFV Taskforce Recommendations 33 and 34, the Review proposes to insert a new clause in the QES for a leave entitlement for victims of DFV for DFV related matters. It is proposed that DFV related leave be 10 days paid leave per year, non-cumulative, and in addition to all other types of leave. Where an employee has exhausted his or her existing entitlement to paid leave, the employee may, subject to employer agreement, access unpaid leave for DFV related matters.

Purpose of domestic and family violence leave

Consistent with Recommendation 33 of the DFV Taskforce Report, and the general trend across jurisdictions, it is proposed to clarify the purposes for which DFV leave may be used. It is further proposed that a broad scope be applied with regard to acceptable reasons. Matters listed below are not exhaustive, but provide examples of reasons that warrant access to DFV leave:

- injury recovery
- attending medical, legal, police, counselling and other DFV related appointments
- court preparation
- attending court
- obtaining safe housing
- organising child care or education matters
- undertaking other DFV related activities.

There is no intention to restrict an employee who is a victim of DFV from accessing any other form of leave which is available to them.

Evidentiary and confidentiality requirements

Every application for DFV leave or leave to care for a victim of DFV should be treated with sensitivity. The Review has identified documentation considered appropriate when making a DFV related application including formal/independent forms of documentation such as police and medical reports and, in acknowledgement of the difficulties of obtaining third party documentation under some circumstances, written advice and statutory declarations.

While members of the Reference Group acknowledge the need to ensure an employee's confidentiality is protected, it also recognises employers have obligations with regard to receiving certain DFV related information, including a requirement to report certain acts of DFV to another authority or to take further action where the disclosure indicates a threat to the safety of employees or others at the workplace. In recognition of employer obligations, the Reference Group proposes disclosures will be kept confidential except to the extent that disclosure is required or permitted by law.

Recommendation 30

That, in accordance with recommendations 33 and 34 of the Domestic Family Violence Taskforce Report a new clause in the Queensland Employment Standards be inserted to provide up to 10 days paid domestic family violence (DFV) related leave annually for employees other than casual employees. Such leave is to be non-cumulative. An employee may access up to 10 days paid leave in each year for DFV related purposes for reasons including but not limited to:

- a) injury recovery*
- b) attending medical, legal, police, counselling and other DFV related appointments*
- c) court preparation*
- d) attending court*
- e) obtaining safe housing*
- f) organising child care or education matters*
- g) undertaking other DFV related activities.*

If required by the employer, the employee may have to provide supporting information to demonstrate that leave for the purpose of attending to a DFV related matter is necessary. Acceptable forms of proof include but are not limited to:

- a) police, legal, medical, or counsellor documents or reports*
- b) statutory declaration*
- c) written advice.*

Information disclosed by an employee in relation to DFV will be kept confidential except to the extent that disclosure is required or permitted by law.

Recommendation 30 is also addressed in Chapter 9 on IR Act Provisions.

Casual employees

Recommendations 33 and 34 do not address leave for DFV related matters for casual employees. However, for consistency, the Review concluded that DFV related leave be treated in a manner similar to carer's leave, in that casual employees also be afforded an entitlement to unpaid leave of 10 days per year.

In responding to DFV Taskforce Recommendations 33 and 34, the Reference Group makes the following recommendation.

Recommendation 31

That long term casual employees be entitled to 10 days unpaid domestic family violence (DFV) leave each year for DFV related reasons.

Recommendation 31 is also addressed in Chapter 9 on IR Act Provisions.

6.7 Protection against dismissal

DFV Taskforce Recommendation 35 is aimed at preventing dismissal of employees on the grounds of DFV. The DFV Taskforce recommends that the amendment takes a similar approach to the current IR Act prohibition of dismissal because of pregnancy or parental leave. Currently the protections exist under both parental leave provisions, in the QES and in the dismissal provisions. The protections under the parental leave provisions of Chapter 2 of the IR Act and the QES prohibit dismissal of employees for a matter related to parental leave.

The IR Act also provides protection for certain employees if dismissal is unfair, is harsh, unjust or unreasonable or for an invalid reason. The legislation lists a number of specific reasons that constitute invalid reasons including parental leave.

DFV Taskforce Recommendation 35 does not specify which employees should be afforded this protection. In implementing this Recommendation it is proposed that the protection only apply to victims, and that this be clarified in the legislation to ensure that the protection is not inadvertently extended to perpetrators of DFV.

DFV Taskforce Recommendation 35 is addressed in Chapter 9 of this Report under section 9.5 'General protections, adverse actions and unfair dismissals', where it is recommended that a separate clause be inserted prohibiting the dismissal of an employee because the employee is a victim of domestic violence, a reference to outcomes of DFV for victims as an invalid/unlawful reason for dismissal and that the general protections and adverse action provisions are to apply to victims of DFV.

6.8 Carer's leave and flexible working arrangements

Additionally, other measures aimed at assisting DFV victims proposed through this Review of the IR Act include creating an entitlement to carer's leave for an employee to provide care to a DFV victim and providing an employee with a right to request flexible working arrangements.

These measures can be found at Recommendations 43 and 45 of Chapter 9 of this report.

Chapter 7: Anti-workplace Bullying

Bullying is a persistent and significant problem in Australian workplaces.⁷² New anti-bullying provisions have been introduced into the *Fair Work Act 2009* (Cth) (FW Act) to help resolve workplace bullying complaints at the source. These provisions appear to be working well. This Review recommends adopting a similar anti-workplace bullying jurisdiction in Queensland. This chapter also highlights that persons working in the unincorporated sector are currently excluded from the federal system. Recommendations are made to provide coverage for these workers.

7.1 Anti-bullying jurisdiction

Workers in the Queensland industrial relations jurisdictions have access to protections from workplace bullying through the *Work Health and Safety Act 2011* (Qld) (WHS Act) which applies to all Queensland workplaces except for mine sites, petroleum and gas tenures and employers covered by the ComCare scheme. Under the WHS Act, a Person Conducting a Business or Undertaking (a PCBU) has the primary duty of care to ensure, so far as is reasonably practicable, that workers and other people are not exposed to health and safety risks arising from the conduct of the business or undertaking. These duties include assessing the health and safety risks of workplace bullying and providing and maintaining safe systems of work.

In the Queensland public sector, bullying is addressed through an internal complaint resolution process. Currently, individual government departments are responsible for managing their own workplace bullying complaint processes with no overarching directive determining the procedure. In terms of local government, while there is no specific directive for dealing with workplace bullying complaints, certain councils, such as Brisbane City Council, are committed to reviewing and improving work health and safety in their certified agreements.⁷³

From July 2011 to June 2015, a total of 46 workplace bullying complaints from the public sector were lodged with Workplace Health and Safety Queensland (WHSQ) under the WHS Act representing approximately 4.1 per cent of all complaints.⁷⁴ In the same period, there were a total of 32 workplace bullying complaints from local councils to WHSQ representing 2.8 per cent of all complaints⁷⁵

Since January 2014, workers in the national workplace relations system who are employed in constitutional corporations have been given access to an anti-bullying jurisdiction through the FW Act (section 789FA) which allows workers in constitutional corporations who reasonably believe they have been bullied at work to apply to the Fair Work Commission (FWC) for an order to stop the bullying behaviour.

⁷² Johnstone R., Quinlan M., and McNamara M. (2011) 'OHS Inspectors and Psychosocial Risk Factors: Evidence from Australia', *Safety Science*, 49, 547-557, cited in Dollard M., Bailey T., McLinton S., Richards P., McTernan, W., Taylor A. and Bond S. (2012) *The Australian Workplace Barometer Report*, December 2012, Safe Work Australia, p.60.

⁷³ *Brisbane City Council Certified Agreement 2013*, clause 18; *Somerset Regional Council Certified Agreement 2015*, clause 2.4.

⁷⁴ Workplace Health and Safety Queensland, 'Compliance and Investigation System Refresh (CISr)' database, accessed 17 November 2015.

⁷⁵ *Ibid.*

Both the FW Act and the WHS Act define workplace bullying as repeated and unreasonable behaviour directed towards a worker or a group of workers that creates a risk to health and safety. In both cases, reasonable management action conducted in a reasonable manner does not constitute workplace bullying.

The main difference between the two jurisdictions is that Queensland's WHS laws aim to ensure safe systems of work in order to eliminate or reduce workplace bullying while the FWC conciliates individual complaints.

Because the FWC anti-bullying jurisdiction is limited to constitutional corporations, employees of the Queensland Government, local government, nominated statutory authorities, sole traders and partnerships and organisations such as not-for-profit or voluntary associations are exempt from FWC's anti-bullying jurisdiction.

7.2 The Fair Work Commission anti-bullying model

The federal anti-bullying jurisdiction is considered to have a number of advantages. Chief among these is that the FWC can make any order that it considers appropriate. However, it cannot make orders for compensation, which prevents it from becoming an alternative forum to prosecute compensation claims that have failed elsewhere. In addition, its focus is on persons who are still employed rather than those that have been bullied in the past but have since left their employer. At the same time, the provisions apply regardless of the size of business, salary level or tenure of the worker.

Since January 2014, the FWC received 1,037 complaints of bullying of which 244 (23.5 per cent) were withdrawn prior to substantive proceedings.⁷⁶ The FWC has issued only two 'stop bullying' orders as at August 2015.⁷⁷ However, it has resolved approximately 29 per cent of claims through mediation between the complainant and the other party/employer.⁷⁸ The FWC's ability to contact both parties on receipt of a complaint is considered to have resulted in a timely complaint handling process which is an important element in resolving workplace bullying complaints at the source.

The FWC's process allows a person who considers that they have been bullied at work to apply to the FWC for an order to 'stop bullying.' There is no requirement placed on the applicant to have sought internal resolution of the complaint at the workplace prior to lodging their application. A copy of the application is sent to the employer/other party with an opportunity to respond. The employer/other party may then dispute the claim on a number of grounds including that the alleged behaviour does not meet the definition of workplace bullying or that the complainant is not covered by the national anti-bullying jurisdiction. If the FWC decides not to dismiss the complaint for lack of jurisdiction, it will then decide to deal with it by mediation, conference or hearing, depending on the circumstances of each case.

⁷⁶ Fair Work Commission, 'Anti-bullying Quarterly Reports 1 July – 30 September 2015', <https://www.fwc.gov.au/about-us/reports-publications/quarterly-reports>, accessed 30 November 2015.

⁷⁷ CFJ Company A [2015] FWL 5272; Applicant x Respondent (AB2014/1052).

⁷⁸ Unpublished data.

The matter may be resolved by agreement between the parties, or the FWC may issue a decision and/or an order to stop the workplace bullying⁷⁹.

According to the Productivity Commission Workplace Relations Framework Draft Report (PC Draft Report), the FWC has implemented effective and evidence-based systems and processes for dealing with bullying cases. The FWC has not been overwhelmed by anti-bullying complaints and to some extent this has allayed employers' concerns about the impact of the jurisdiction on business.⁸⁰

On the basis of this evidence, the Review is of the view that there is considerable merit in adopting an anti-workplace bullying jurisdiction in the Queensland industrial relations system. An anticipated flow-on effect of the new jurisdiction will be to encourage those organisations captured by the jurisdiction to review and upgrade their dispute resolution processes to better manage complaints of workplace bullying internally.

The Local Government Association of Queensland (LGAQ) in its submission expressed its opposition to the need for a new anti-bullying jurisdiction for public sector and local government employees. It preferred that workplace bullying complaints continue to be addressed through current Workplace Health and Safety laws. However, in the event that a new anti-bullying jurisdiction is established, the LGAQ prefers it to be based with the Queensland Industrial Relations Commission (QIRC).

The Australian Industry Group (AiG) and Chamber of Commerce and Industry Queensland (CCIQ) do not support workplace bullying being included in federal or state industrial relations jurisdiction.

Recommendation 32

That employees covered by the Act be given access to a similar anti-bullying jurisdiction through the Queensland Industrial Relations Commission as that provided through the Fair Work Commission.

Unincorporated bodies

The proposal to adopt an anti-workplace bullying jurisdiction in the Queensland industrial relations system raises the question of the appropriate coverage of private sector employees in non-constitutional enterprises and in not-for-profit or voluntary associations who are currently exempt from the FWC anti-bullying jurisdiction. To leave this very small sector of the Queensland workforce without access to an anti-bullying jurisdiction seems arbitrary and inequitable. In addition, to do so would further contribute to the existing confusion around jurisdiction for this group of employees and employers.

Submissions from organisations representing private sector employers, such as the CCIQ and AiG, were strongly opposed to an anti-bullying jurisdiction for this sector of employees. They preferred using non-legislative measures to deal with workplace bullying complaints.

⁷⁹ Fair Work Commission, *Resolving Issues, Disputes and Dismissals*, <<https://www.fwc.gov.au/resolving-issues-disputes-and-dismissals/workplace-issues-disputes/anti-bullying/what-the-process>> accessed 30 November 2015.

⁸⁰ Productivity Commission (2015) *Workplace Relations Framework, Draft Report*, August 2015, p 282.

However, in the event that an anti-bullying jurisdiction is established, they preferred that it be based with the FWC rather than the QIRC to prevent confusion for their members about jurisdictional coverage given that they currently access the FWC for all industrial relations matters. On the other hand, the Australian Workers Union (AWU) expressed a preference for the anti-bullying jurisdiction for these employees to be based through the QIRC.⁸¹

Working Women Queensland (WWQ) in their submission indicated that they believed ‘there would be benefit in extending a similar anti-bullying jurisdiction to ALL Queensland employees who are not covered by the Fair Work Act.’⁸² The WWQ submission highlighted the high rate of workplace bullying in certain sectors where a high proportion of employers in the sector are not constitutional corporations and therefore not covered by the FW Act anti-bullying jurisdiction.⁸³

After consideration, it is proposed that efforts be made by the Queensland Government to effect a referral of this private sector group to the Commonwealth which would streamline their access to the FWC’s jurisdiction both for industrial relations matters and for workplace bullying complaints.

In the event that this approach proves not to be feasible or possible, it is proposed that the new Queensland anti-bullying jurisdiction cover this group of employees.

Recommendation 33

That the Minister negotiate with the Federal Minister for a further referral which would enable employees in unincorporated bodies, and other entities which are not constitutional corporations to be covered by the anti-bullying jurisdiction of the Fair Work Commission. In the event that is not possible or inappropriate, the Queensland anti-bullying jurisdiction coverage should include this group of employees.

⁸¹ AWU submission.

⁸² WWQ submission.

⁸³ Ibid.

Chapter 8: Equal Remuneration

Equal remuneration for work of equal and comparable value is an important concept. Pay equity objectives must not only be enshrined in legislation but also protected through any variations to awards and outcomes of the bargaining process.

8.1 Equal remuneration

The equal remuneration principle

Queensland has been a pace-setter in the area of pay equity. The *Industrial Relations Act 1999* (Qld) (IR Act) has provisions for 'equal remuneration for work of equal or comparable value'. A comprehensive Equal Remuneration Principle (ERP) was established in 2002 following the Pay Equity Inquiry of 2000. The ERP has widely-recognised advantages including:

- not requiring a comparator to proceed with a case
- a broad definition of what comprises undervaluation
- recognition that proper work value assessment may not have taken place in the past.

In comparison with New South Wales - which also ran a similar Pay Equity Inquiry - an important advantage in Queensland has been that the Queensland Industrial Relations Commission (QIRC) has not been restricted to considering award rates in assessing an equal remuneration case. This is particularly important given the tendency for the gender pay gap to widen under a system of enterprise bargaining. The Reference Group agreed to the importance of the superior Queensland provisions regarding equal remuneration and the ERP.

8.2 Awards, agreements and equal remuneration

The IR Act currently provides that awards, modern awards, the award modernisation process and certified agreements ensure equal remuneration for work of equal or comparable value. These provisions recognise the fundamental importance of awards and minimum rates of pay to the achievement of pay equity as well as of the tendency of pay inequity to widen under enterprise bargaining. Thus it is crucial to maintain the ERP's capacity to enable comparisons across agreements rather than just awards, and to address inequities arising from uneven access to bargaining across occupational groups.

Despite these provisions, it is not clear that the QIRC and the parties have systemically addressed these requirements. There is little evidence that the current award modernisation process has effectively addressed gender undervaluation within and between award classifications. This has potential implications for any future equal remuneration case in which it might be argued that the modern award objective provided for the need to ensure equal remuneration for work of equal or comparable value. It should not be assumed that the relevant modern award does provide for pay equity. The ERP already provides recognition that proper work value assessment may not have taken place in the past but the Reference Group considered that this needs to be made explicit with regard to the recent award modernisation process.

Recommendation 34

That the provisions in relation to pay equity (and the Equal Remuneration Principle) ensure that applications under the section are not prevented or otherwise inadvertently impacted by the award review, or because of the existence of a collective agreement.

Although the above recommendation is designed to provide some protection for undertaking future pay equity cases, it does not address ongoing concerns in relation to award and agreement making in respect of pay equity.

The IR Act currently provides (at section 140D (2)(d)) that a modern award needs to ensure equal remuneration. The Review considers it necessary to strengthen this provision to ensure that it is effectively addressed by the parties and by the QIRC. Equally, the provisions for certifying agreements, which currently require (at section 157) that the QIRC must refuse to certify an agreement if it considers that a provision of the agreement is inconsistent with (among other things) equal remuneration, require strengthening.

The 2001 Pay Equity Inquiry recommended (Recommendation 8) that section 9 of the *Industrial Relations Regulation 2000* (Qld) (IR Reg) be amended to require an affidavit to provide information about the steps taken to ensure that the agreement ensures equal remuneration for men and women employees of the same employer for work of equal or comparable value. This recommendation was not adopted in its entirety and a more limited version was pursued instead which required an affidavit including 'a statement that the requirement for equal remuneration of employees under section 156(1)(l) or (m) of the Act is met'. This provision in the IR Reg was removed in December 2013. To date there is limited evidence that the requirement had been effective in ensuring that agreements provide for equal remuneration.

While the Review does not have a firm view on the potential for the inclusion of steps taken by the parties to ensure that an agreement provides for equal remuneration, there is substantial evidence that the measurement of the gender pay gap and assessment of the potential factors contributing to any gap identified are critical parts of the process of understanding and addressing gender pay inequity. There was general acceptance by the Reference Group that current equal remuneration provisions with regard to awards and agreements required strengthening to ensure the measurement of pay equity had taken place.

The Local Government Association Queensland noted that some local councils, especially small regional councils with a limited human resources function, may find compliance with such reporting requirements challenging. Further research and consultation with the local government sector should be undertaken to determine if it is appropriate to consider that the legislation in respect of Recommendation 35 apply differently by organisation size or that additional time to comply is provided for some organisations.

Recommendation 35

That the legislative requirement for awards (including bargaining awards) and certified agreements to provide for equal remuneration for work of equal or comparable value be strengthened by requiring on certification, information and data on the distribution of employees by gender and the gender pay gap and, where appropriate, the projected effect of the award or agreement on the gender pay gap.

8.3 Pay Equity in the Queensland public sector

The Public Service Commission (PSC) has recently released a whole of government Inclusion and Diversity Strategy for 2015 – 2020, supported by an action plan.⁸⁴ The Inclusion and Diversity Strategy not only applies in respect of the traditional diversity groupings (such as gender, age, race etc) but a broader notion encompassing diversity of, for example, experience, education and working styles. The strategy, while reflecting best practice, is also a tool to support the public sector to meet its existing legislative obligation for a diverse workforce.

The Inclusion and Diversity Strategy is one aspect of broader piece of work being led out of the PSC on the development and implementation of a Five Year Workforce Strategy. The Workforce Strategy will be supported by a Workforce Investment Plan (under development) which sets out a number of initiatives and key action areas that ultimately contribute to a more inclusive and diverse workforce.

Part of this workforce strategy is a gender equity strategy 2015-2020.⁸⁵ The equity strategy identifies that the average annual salary (full-time equivalent) of women is \$7,556 less than for men. Further, the percentage of women in SES level positions was 34 per cent in 2014. The number of women CEOs in the sector has varied considerably reducing to one of 20 CEOs in 2014. The recent round of CEO appointments has seen more women appointed to CEO positions. The gender equity strategy seeks to synthesise existing arrangements and activities, illustrate best practices that Queensland public sector agencies can consider and establish a number of sector-wide actions to advance improved gender equity outcomes.

If adopted, Recommendation 35 will require Queensland Government agencies to measure and report on the gender pay gap and the potential factors contributing to any gap identified. The PSC currently collects a range of workforce statistics for the Queensland Public Service and a coordinated approach to support the above data collection requirements is likely to be warranted. There is also an opportunity for the Queensland Government to continue to play a leading role in the advancement of pay equity.

Currently, under the *Workplace Gender Equality Act 2012* (Cth) (WGEA), private sector employers employing more than 100 employees are required to report annually on gender equality in their organisations including the gender composition of the workforce and equal remuneration. These reports have been instrumental in providing the impetus for change in

⁸⁴ Public Service Commission (2015) *Different Backgrounds, Shared Values, One Government*, Queensland Public Sector Inclusion and Diversity Strategy, 2015-2020, Queensland Government.

⁸⁵ Public Service Commission (2015) *On Equal Footing 50/50*, Queensland Gender Pay Equity Strategy, 2015-2020, Queensland Government.

some workplaces. Public sector organisations are not subject to the WGEA. Although other state governments have undertaken limited pay equity audits, there has as yet been no coordinated approach to addressing pay equity in the federal or state public services.

The New Zealand model is a useful point of reference. A Pay and Employment Equity Unit was established in 2004. It was responsible for developing and implementing a five-year action plan aimed at addressing pay equity in the New Zealand public service. Importantly, the plan was undertaken on a 'no fault no blame' basis accepting that any inequities found were products of tradition and historical approaches to the valuing of work. A further important consideration in New Zealand was that pay equity was a policy issue given importance and driven by the national government. Although pay equity reviews were not legislated, it was a Cabinet decision that key agencies be required to conduct reviews. The Pay and Employment Equity Unit provided the assistance and resources to conduct these mandatory reviews.

Recommendation 36

That the Public Service Commissioner initiate a general review of pay equity in the public sector, including analysing the impact of gender concentration in particular agencies and occupations. As an ongoing measure, the Public Service Commissioner should conduct an annual gender pay equity audit process to identify and address gender pay gap issues in the public sector.

The conduct of pay equity audits will present particular challenges to the local government sector especially given the small size and limited human resources expertise of some regional councils. The Review notes that the former Victorian state government assisted a number of local councils in that state to undertake pay equity audits. As a result, there are a number of tools and resources available to assist local councils. The Review proposes that the Office of Industrial Relations investigate the assistance they may be able to provide local government addressing gender pay equity.

Chapter 9: *Industrial Relations Act 1999 (Qld)* Provisions

This chapter deals with a range of important legislative matters not addressed in other chapters of this report. Consistent with the recommended object of the Act to promote productive and cooperative workplace relations, this chapter recommends that the legislation provide that the Queensland Industrial Relations Commission (QIRC), in exercising a power or function, give effect to the need to observe mutual obligations of trust and confidence. Further, it is recommended that the QIRC be given explicit powers to promote cooperative workplace practices.

To provide a comprehensive safety net for employees in the Queensland industrial relations system, this chapter recommends the key legislative entitlements that should form the Queensland Employment Standards (QES). The chapter seeks to retain some existing employment standards, enhance several other existing entitlements and introduce five new entitlements. The most important new entitlements are the right for all employees to request flexible working arrangements and domestic and family violence (DFV) leave.

This chapter also outlines the case for adopting the general protections and adverse action provisions as contained in the *Fair Work Act 2009* (Cth) (FW Act). The unfair dismissal provisions were found to be working effectively.

The Review has made several recommendations regarding the keeping and provision of notices and records to be by way of electronic means to ensure that parties can avail themselves of technological benefits of efficiencies in time and resources.

There are several amendments required to current provisions of the *Industrial Relations Act 1999* (Qld) (IR Act) as a consequence of the changing nature of the state jurisdiction and the passage of time since its original implementation. These procedural amendments are dealt with by general recommendation for review as the requisite level of detail is beyond the scope of this Review.

9.1 Productive and cooperative workplace relations

Many members of the Reference Group believed that a framework for productive and cooperative workplace relations would be an important initiative in the legislation. For this reason, the Review has recommended the inclusion of this objective in the new Act.⁸⁶ It has informed recommendations in a range of other areas.

The recent decision of the High Court, in *Commonwealth Bank of Australia v Barker*, has seen the implied term of mutual trust and confidence struck out of employment contracts.

This decision has particular relevance in the public system due to the nature of public sector employment. The Review is concerned that this High Court decision has the potential to have a deleterious effect on the employment relationship in the Queensland industrial relations system.

⁸⁶ See Recommendation 3 and the proposed principal object at (e) in Chapter 2.

The previously understood obligation operated to protect employees and employers from inappropriate conduct by the other party that may not be in contravention of an industrial instrument, but nevertheless was undesirable from a view of maintaining cooperative relationships. It created a general obligation on parties to conduct themselves in a way that did not unnecessarily damage the relationship of trust and confidence between the parties. As noted by Professor Joellen Riley, if:

*employers are not constrained by any obligation of mutual trust and can capriciously ignore their own policy commitments without legal consequences, then employment regulation in Australia will no longer be underpinned by contract law. Employment will become an 'at will' relationship, partially regulated by a patchwork of statutes.*⁸⁷

For this reason, and noting that the High Court decision (at paragraph 38) stated that 'creating a term of mutual trust and confidence into employment contracts is in the province of the legislature', the Review recommends that the new legislation should create this obligation. Professor Riley has also supported Australian employment law statute recognising a duty of good faith performance in employment contracts and notes that the New Zealand parliament has legislated a norm of 'good faith' in employment.

There was strong opposition to this proposal from the Local Government Association of Queensland (LGAQ), Australian Industry Group (AiG) and the Chamber of Commerce and Industry Queensland (CCIQ) because it seeks to overturn the interpretation by the High Court. That opposition is noted.⁸⁸

Recommendation 37

That, consistent with the proposed principal object (e), in relation to productive and cooperative workplace relations, the legislation provide that the Queensland Industrial Relations Commission, in exercising a power or function, give effect to the need to observe mutual obligations of trust and confidence.

The FW Act was amended in 2013 to provide that the Fair Work Commission (FWC) promote cooperative and productive workplace relations as one of its objects. This statutory objective supplements the other functions of the FWC. Members of the FWC can facilitate and mentor workplace negotiations. Members are provided with professional development and training in conciliation and facilitation skills to achieve this objective. Other steps taken by the FWC to promote cooperative and productive workplace relations include delivering training workshops to practitioners and the development of other guidance materials.

This provision has been well-received. To give practical capacity for the QIRC to promote productive and cooperative workplace relations, as set out in the draft principal objects proposed by this Review, it is considered that the legislation should explicitly provide this.

The functions of the FWC (under sections 576(2) and 577 of the FW Act) include promoting cooperative and productive workplace relations and preventing disputes. The FWC must

⁸⁷ Joellen Riley, 'Mutual Trust and Confidence' on Trial: At Last, Sydney Law Review Vol 36:151 at p 165.

⁸⁸ AiG submission.

perform its functions and exercise its powers in a manner that (amongst other things) promotes harmonious and cooperative workplace relations.

In a recent submission in response to the release of the Productivity Commissions' Workplace Relations Framework Draft Report (PC Draft Report), Bray, Macneil, Stewart, and Oxenbridge highlighted that:

there is nothing new about Australian industrial tribunals being expected to help promote cooperation at work and prevent disputes. Historically, however, tribunals were not expected (or in the case of the federal tribunal empowered) to take a proactive role in pursuing this objective. Their role was generally confined to resolving existing disputes, even if in helping to settle those disputes (whether by conciliation or arbitration) they might hope and intend to minimise the prospect of further disagreement.⁸⁹

Further, their submission noted that:

the FWC is committed to expanding its work in this area, and that its efforts have the potential to deliver significant benefits to the productivity and success of the organisations it assists. The legislative initiative that has allowed this to happen represents a genuinely novel development in Australian employment relations that is so far not widely known or appreciated. The further development of appropriate skills within the FWC and the 'roll out' of the program in a wider range of organisations could be greatly assisted by its recognition in the Productivity Commission's final report, and by recommendations that support the allocation of resources to it.⁹⁰

Given the benefits that could be achieved through an approach designed to promote more cooperative workplaces, and in keeping with the guiding principles and draft principal object of this review, it is recommended that the QIRC be given powers to promote cooperative workplace relations.

Recommendation 38

That the Queensland Industrial Relations Commission be given explicit powers to promote cooperative workplace relations.

9.2 Minimum employment standards

Minimum employment standards are a feature of the national and state industrial relations systems in Australia. Generally, they operate to provide a safety set of minimum employment standards, which are improved upon by conditions contained in awards or agreements.⁹¹

Minimum employment standards provide workers in the Queensland industrial relations system with a legislated safety net of wages and conditions which cannot be diminished through collective bargaining.

⁸⁹ Bray M., Macneil J., Stewart A. and Oxenbridge S. (2015) *Submission to the Productivity Commission on the Workplace Relations Framework Draft Report*, p 1.

⁹⁰ *Ibid* p 2 and 3.

⁹¹ See for example the National Employment Standards (NES) contained in the FW Act. Section 55 of the FW Act states that the NES must not be excluded by a modern award or enterprise agreement, although the award or agreement may improve on the entitlements in the NES [s 55(4) and (6)].

Minimum employment standards can be a useful way to set and enforce a benchmark upon which all awards and agreements are negotiated. The standards:

- provide a safety net of provisions enshrined in legislation of entitlements even if amendments are made to legislation underpinning the content of awards or agreements.
- guarantee a statutory minimum entitlement for all employees covered under the system. Minimum standards ensure that any provision of an award or agreement which deals with the matters included in the minimum employment standards are no less favourable than those contained in the IR Act.⁹²
- support negotiations above the lowest level that support those minimum entitlements.

Federally, the FW Act includes a set of minimum standards called the National Employment Standards (NES) applying to all national system employees. The NES have become well-known and operate as a safety net providing basic, well-established entitlements.

In the IR Act, the minimum employment standards are called the Queensland Employment Standards (QES) and are similar to the NES. As a transitional arrangement, Queensland has two sets of minimum employment standards:

- 1) The pre-modernisation employment conditions apply to employees for particular employment who are covered by an award made under Chapter 5, a certified agreement and a determination that have not been modernised.⁹³
- 2) The (QES) otherwise apply.⁹⁴

The Review considers that there should only be one set of statutory minimum employment standards for all employees covered by the legislation, supplemented by awards and bargaining. The standards should be called the QES and be based on the current QES.

The current QES are summarised below:

- 1) *Minimum wage*: an employee is entitled to a wage not less than the Queensland minimum wage.⁹⁵ Currently, the minimum wage is set at \$668.80 per week as at 1 September 2015.⁹⁶
- 2) *Annual leave*: an employee is entitled to four weeks per year, five weeks for shift workers.⁹⁷ There are additional provisions dealing with taking leave and payment, including annual leave loading and cashing out of entitlements.⁹⁸
- 3) *Personal leave*: an employee is entitled to:
 - a) Ten days sick leave per year.⁹⁹ The entitlement does not extend to particular employees, including casual employees.¹⁰⁰

⁹² For the QES see *Industrial Relations Act 1999* (Qld) s 71NA.

⁹³ *Industrial Relations Act 1999* (Qld) s 8AA and definition of pre-modern industrial instrument under s 71BA.

⁹⁴ *Ibid* s 71B

⁹⁵ *Ibid* s 71D.

⁹⁶ The minimum wage is set by the Full Bench under the IR Act, s 287. The current minimum wage was set in the *Application for Declaration of General Ruling (State Wage Case 2015)* [2015] QIRC 154.

⁹⁷ *Industrial Relations Act 1999* (Qld) s 71EA.

⁹⁸ *Ibid* chapter 2A, part 2, division 4, subdivisions 3 and 4.

⁹⁹ *Ibid* s 71FA.

- b) Carer's leave to care for an immediate family member or a member of the household if they are ill or an unexpected emergency arises, which can be taken from sick leave plus an additional two days of unpaid carer's leave if sick leave is exhausted.¹⁰¹ Long-term casual employees are entitled to ten days unpaid carer's leave.¹⁰² Casual employees also are entitled to carer's leave for the birth of a child.¹⁰³
 - c) Two days paid bereavement leave, with additional leave for reasonable travel time to attend the funeral, plus additional reasonable unpaid leave if required if a member of a non-casual employee's immediate family or household dies¹⁰⁴ (a casual employee is entitled to unpaid leave on a similar basis).¹⁰⁵
 - d) Five days unpaid cultural leave.¹⁰⁶
- 4) *Parental leave*: an employee who is the primary carer is entitled to up to 52 weeks unpaid maternity and adoption leave (including surrogacy leave), which is split into a shorter and longer period of leave depending on whether the person will be the primary or secondary carer of the child. An employee who is a secondary carer is entitled to one week unpaid leave after the birth of a child of the employee's spouse, three weeks unpaid short adoption leave and one week of unpaid short surrogacy leave.¹⁰⁷ Spouses are not entitled to take long parental leave at the same time.¹⁰⁸ By agreement, parental leave can be extended to an unbroken period of 104 weeks. Parties are required to consult about workplace changes or changes in circumstances that may affect the leave or the return to work.

When a pregnancy ends in a way other than by live birth, the position on entitlements in the QES is unclear. A pregnant person's spouse is entitled to 1 week of unpaid leave for the birth or 'other termination of the pregnancy'.¹⁰⁹ It could be assumed that a birth referred to in section 71GD IR Act refers to the birth of a child other than when the child is alive.

Employees have an entitlement to return to work on a part-time basis and to be transferred to safe work if available.¹¹⁰

- 5) *Long service leave*: an employee is entitled to 8.6667 weeks of long service leave after ten years' service.¹¹¹ After a further five years' service, an employee is further entitled to a proportion of the 8.6667 weeks long service leave that reflects the amount of additional time spent with the employer.¹¹² In certain circumstances, such as illness, a pro rata payment is available after seven years.¹¹³

¹⁰⁰ *Industrial Relations Act 1999* (Qld) s 71F.

¹⁰¹ *Ibid* s 71FC.

¹⁰² *Ibid* s 71FD.

¹⁰³ *Ibid* s 71FE.

¹⁰⁴ *Ibid* s 71FH.

¹⁰⁵ *Ibid* s 71FI.

¹⁰⁶ *Ibid* s 71FL.

¹⁰⁷ *Ibid* ss 71GD(2), 71GE(a) and 71GF(a).

¹⁰⁸ *Ibid* s 71GV.

¹⁰⁹ *Ibid* s 71GB definition *short birth-related leave*.

¹¹⁰ *Ibid* s 71GS and 71GZG.

¹¹¹ *Ibid* s 71HB(2)(a).

¹¹² *Ibid* s 71HB(2)(b).

¹¹³ *Ibid* ss 71HB(3) and (4).

- 6) *Public holidays*: an employee is entitled to paid public holidays as defined in schedule 5 of the IR Act, which include holidays declared under the *Holidays Act 1983* (Qld) and a show day.¹¹⁴ An employer may ask an employee to work on a public holiday, but the employee may refuse to work if the request is unreasonable or the refusal is reasonable.¹¹⁵
- 7) *Jury service leave*: an employee is entitled to take jury service leave to perform jury service.¹¹⁶ If there is a difference between jury attendance payments and their ordinary rate of payment, an employer must pay an employee the difference.¹¹⁷
- 8) *Notice of termination and redundancy pay*: an employee must provide up to four weeks' notice (depending on years of service) plus one extra week if an employee is 45 years of age or over and has been employed for at least two years.¹¹⁸ An employee is entitled to redundancy pay on the scale in section 71KF of the IR Act.

Certain QES provisions to remain the same

The Review considers that there are a number of QES provisions currently contained in the IR Act that should remain the same in the legislation. The Review recommends that no changes be made to the following provisions because these entitlements are equivalent to, or better than, the standards contained in the NES.

Recommendation 39

That the legislation continue to include the following Queensland Employment Standards:

- a) *a minimum wage*
 - b) *annual leave*
 - c) *sick leave and cultural leave*
 - d) *long service leave*
 - e) *paid public holidays*
 - f) *jury service*
 - g) *notice of termination and redundancy pay.*
-

Amendments to existing QES provisions

The QES does not currently include the full range of provisions included under the NES. The Review proposes that QES be made similar to the NES in the following ways:

Expanding bereavement leave to include compassionate leave

As explained above, the QES provides for two days of bereavement leave only if a member of an employee's immediate family or household dies. The NES provides for two days of

¹¹⁴ *Industrial Relations Act 1999* (Qld) s 71IA and schedule 5, definition *public holiday*.

¹¹⁵ *Ibid* ss 71IA(3) and (4).

¹¹⁶ *Ibid* s 71J(1).

¹¹⁷ *Ibid* s 71J(3).

¹¹⁸ *Ibid* s 71KC.

compassionate leave to an employee if a member of the employee's family or household's life is threatened by illness or injury or dies.¹¹⁹

While being aware of Local Government Association of Queensland's (LGAQ) concern about the entitlement to take bereavement leave incorporating compassionate leave, the Review considers that the entitlement to bereavement leave should be changed to take into account the expanded entitlement to compassionate leave under the NES.

Amendments to parental leave

In the QES, a secondary caregiver is entitled to less parental leave than a primary caregiver.

In contrast, the NES provides that an employee with a responsibility for the care of a child have an entitlement to 12 months unpaid parental leave with both employee parents entitled to eight weeks concurrent leave.¹²⁰ However, if one of the employees who has taken concurrent leave applies for an extension of unpaid parental leave, the leave taken by the other spouse is taken into consideration.¹²¹

The Review recommends that the QES reflect the NES entitlement so that there is no longer a distinction between a primary and secondary caregiver and that employees may take up to eight weeks of concurrent leave.

As also stated above, an employee's entitlement to take leave if a pregnancy ends other than by live birth under the QES is unclear. A pregnant employee is entitled to one week birth-related leave, and a pregnant person's spouse is entitled to one week of unpaid leave for the birth or 'other termination of the pregnancy'.¹²² Under the NES however the position is clearer: if a pregnancy ends by way other than birth of a live child, or child subsequently dies, the employee is entitled to unpaid special parental leave.¹²³

Consistent with the NES, the Review recommends that if a pregnancy ends other than by live birth the employees are entitled to two days paid bereavement leave, followed by a period of unpaid special parental leave.

Recommendation 40

That the legislation amend the Queensland Employment Standards (QES) to provide as part of the new QES:

- a) *compassionate leave to reflect provisions of the National Employment Standards (NES), and which are to be incorporated into the existing bereavement leave provisions*
 - b) *parental leave and related entitlements based upon the NES, providing that surrogacy entitlements are retained.*
-

¹¹⁹ *Fair Work Act 2009* (Cth) s 104.

¹²⁰ *Ibid* (Cth) s 70 and 72(5).

¹²¹ *Ibid* s 76(6).

¹²² *Industrial Relations Act 1999* (Qld) s 71GB, definition *short birth-related leave* and s 71GD.

¹²³ *Fair Work Act 2009* (Cth) s 80.

New provisions

In addition to the amendments to be made to the existing QES, the Review considers that a number of additional QES should be included in the legislation.

Information statement

New employees under the federal jurisdiction are must be given a 'Fair Work Information Statement', which explains their minimum entitlements.¹²⁴

The 2012 report, *Towards more productive and equitable workplaces: An evaluation of the Fair Work legislation* (the 2012 FW Act Review), found that '[w]hile there may be some minor administrative costs for meeting this NES requirement, the Panel believes the benefits of improving employees' understanding of their rights under the FW Act clearly outweigh these costs'.¹²⁵

Consequently, the Review recommends that the QES should include a similar requirement to provide an information statement to new employees. The Office of Industrial Relations would be the appropriate body to develop such a statement relevant to the QES for state and local government workers.

Further, the information statement should state the industrial instruments that apply to the employee.

Maximum periods of work

Historically, workers in the Queensland system were protected by work time provisions covering matters such as maximum periods of work, overtime, rest breaks and penalty rates (currently either section 9 or 9A, depending on whether the industrial instrument was made before or after 1 September 2005). The QES, introduced in 2013, does not include work time provisions. The Federal NES contains working time provisions.¹²⁶

The Review recommends that the historical section 9A working time provisions be inserted into the QES (see Recommendation 41 below).

Section 9A(2) of the IR Act states that the periods for which a person is required to work must not exceed:

- six days in any seven consecutive days
- 38 hours in any six consecutive days
- 7.6 hours in a day.

The provision includes a requirement for a rest time of 10 minutes every four hours and an unpaid 30 minute break for an employee required to work more than five hours.

¹²⁴ *Fair Work Act 2009* (Cth), ss 124-5.

¹²⁵ Fair Work Act Review (2012) *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work*, Review Paper, June 2012, p 104.

¹²⁶ Note that as part of the transitional arrangements for award modernisation, persons covered by awards that have not been modernised are still protected by legacy work time provision in s 9A(2). However, once an award has been modernised, the legislative working time provisions no longer apply.

An employee is also entitled to overtime pay of at least 150 per cent or 200 per cent for shift workers and shift and weekend penalty rates under the provision.

Both the Queensland Council of Unions (QCU) and United Firefighters' Union, Queensland (UFUQ) submissions sought the restoration of the maximum periods of work entitlement in the QES, including the reinstatement of penalty rates and leave loading. The LGAQ however considered that it was not necessary to include the maximum hours of work provision as these conditions are generally already included in awards.

The Review acknowledges these views, but considers that the QES should include a provision about maximum hours of work that provides for the same rights as those currently included in section 9A of the IR Act.

Right to request flexible working arrangements

The right to request flexible working arrangements under the FW Act provides for employees to manage their careers with their carer responsibilities, which assists employees, and also employers, in that skills are not lost to the workforce when an employee takes on carer responsibilities, and in other situations. The right to request provisions under the FW Act are available where:

- a) the employee is the parent, or has responsibility for the care, of a child who is of school age or younger
- b) the employee is a carer (within the meaning of the *Carer Recognition Act 2010* (Cth))
- c) the employee has a disability
- d) the employee is 55 or older
- e) the employee is experiencing violence from a member of the employee's family
- f) the employee provides care or support to a member of the employee's immediate family, or a member of the employee's household, who requires care or support because the member is experiencing violence from the member's family.¹²⁷

The NES provides that an employer may refuse the request only on reasonable business grounds.¹²⁸ Reasonable business grounds include:

- matters relating to the costliness of the flexible working arrangements for the employer
- that there is no capacity or it is impractical to change working arrangements for other employees or to hire new employees
- the new arrangements would result in a significant loss in efficiency and productivity
- there would be a significant negative impact on customer service.¹²⁹

The NES does not include a capacity to seek a review of a decision to refuse to grant flexible working hours. This can be contrasted with the position in the United Kingdom, where a

¹²⁷ *Fair Work Act 2009* (Cth) s 65(1A).

¹²⁸ *Ibid* s 65(5).

¹²⁹ *Ibid* s 65(5A).

refusal to a request for flexible working hours can result in an application to review the decision.¹³⁰

A number of submissions addressed the incorporation of the right to flexible working arrangements in the QES.¹³¹ While the Australian Lawyers Alliance (ALA) submission supported the right to request, the ALA preferred the inclusion of a right to flexible working arrangements. The Queensland Nurses' Union (QNU) submitted that a right to request along with an appeals mechanism was required. The Queensland Teachers' Union (QTU) submission highlighted the importance of flexible working arrangements, to allow for the increasing participation of women and to ensure that employees are able to support and care for elderly parents as Australia's population ages.

AiG's submission stated that the intention of the right to request flexible working arrangements provisions in the FW Act should not be lost on its introduction into the IR Act. In particular, AiG identified the purpose of the right to request flexible working arrangements was to promote discussion between an employer and employee about flexible work. It was not intended to extend to a right to have flexible working arrangements nor be a matter that would be arbitrated by the FWC under the FW Act. LGAQ and Chamber of Commerce and Industry Queensland (CCIQ) also expressed opposition to an expanded right to request flexible working arrangements during consultation.

This Review considers that by applying any restriction around the right to request, employees who might need to utilise such arrangements may be prevented from doing so. Employers should give full and strong consideration to flexible working arrangements at all stages of the employment relationship, including at recruitment, so that suitable employees are not excluded from the workplace because of their workplace flexibility preferences or needs. Employers may benefit in multiple ways from allowing flexible work arrangements wherever these can be accommodated in the workplace. There are financial benefits where an employer finds that they can manage their workload with an employee working fewer hours. Studies show productivity benefits for employers through the use of both flexible working arrangements and part time work.¹³² Many private sector employers now utilise flexible arrangements. For example, Telstra has an 'all roles flex' policy which extends to recruitment.¹³³ Similarly, Westpac Group's use of flexible workplace arrangements provided an 84 per cent return rate in the number of women who were able to return to work from maternity leave.¹³⁴ Flexible working arrangements have also become important for employees when considering which employers they would like to work for.¹³⁵

¹³⁰ See 'Flexible Working, <https://www.gov.uk/flexible-working/overview>, accessed 1 December 2015.

¹³¹ AiG, QTU, QNU, QLS, and ALA submissions.

¹³² See, for example, Shockley K.M. and Allen T.D. (2012) 'Motives for Flexible Work Arrangement Use' *Community Work and Family*, 15(2) pp219-220; 'The Business Case for Flexibility' *Australian Human Resources Management Database*, ¶65-310, CCH; CIPD (2012) *Flexible Working Provision and Uptake*, CIPD Survey Report, May 2012

¹³³ Telstra 'Case Study – All Roles Flex' https://careers.telstra.com/Why-Work-Here#page=/Why-Work-Here/Flexibility-and-Choice/ALL-ROLES-FLEX-%e2%80%93-CASE-STUDY&filter=* accessed 2 December 2015.

¹³⁴ McMahon C. and Pocock B. (2011) *Doing Things Differently: Case Studies of Work-Life Innovation in Six Australian Workplaces*, University of South Australia Centre for Work + Life, p25

¹³⁵ Casper W. and Buffardi L. (2004) 'Work-Life Benefits and Job Pursuit Intentions: The Role of Anticipated Organizational Support', *Journal of Vocational Behaviour*, 65(3), p 404.

The Review recommends that a right to request flexible working arrangements be included in the new legislation. Further, it considers that the capacity to request those arrangements should not be limited to statutorily prescribed circumstances as occurs under the NES, as the potential enhancement to productivity and an employee's work/life balance should be extended to all employees. The Review considers that the right to request flexible work arrangements should be sufficiently broad to cover a request for reasonable adjustments to a person's work environment as a result of an injury, illness or disability.

As stated below, employees aggrieved by the outcome of a request will have access to the disputes procedure under the Act that will apply to all QES provisions as industrial matters. However, providing a right to request flexible working arrangements with a right to seek a determination from the QIRC is not the same as providing a right to flexible work arrangements. The capacity to review the decision is intended to ensure that where flexible work arrangements are refused, there are reasonable grounds for making that refusal. If an employer is able to establish reasonable grounds for refusing to grant flexible working conditions, there will not be a right to claim flexible working arrangements. The United Kingdom experience in this regard suggests that there is unlikely to be a large number of reviews of a decision of an employer not to provide flexible working arrangements.¹³⁶

The Review considers that an employer should be able to refuse a request for flexible working arrangements only on reasonable grounds, so there is an objective test for refusing a request. Unlike in the NES, however, the Review considers that there should not be specific reasons included in the Act, so that the refusal must reflect the particular circumstances of the person requesting the flexible working arrangements. Also, the Review is of the view that the decision on the flexible working arrangements should be provided in writing, and if the decision is to refuse the request, the reasonable grounds must be stated in the written notice.

The Review also considers a person who works under flexible working arrangements should not be disadvantaged in promotional opportunities. Consideration should be given to specifically including a policy ensuring that there is no discrimination in recruitment processes for persons working under flexible working arrangements and that flexible working arrangements are available to employees at all levels.

Emergency service leave

The NES entitles employees to emergency management leave to deal with a natural disaster as a member of an emergency body.¹³⁷

The inclusion of the right to time away from work to attend to activities for a recognised emergency management body would allow state system employees to assist and contribute to the organisations that support their communities and their employers should facilitate and encourage this. Such a provision would assist employee contribute to the organisations that support their communities.

¹³⁶ CIPD (2012) *Flexible Working Provision and Uptake*, CIPD Survey Report, May 2012, p 14 <http://www.cipd.co.uk/hr-resources/survey-reports/flexible-working-provision-uptake.aspx> accessed 8 December 2015.

¹³⁷ *Fair Work Act 2009* (Cth) s 108 and 109.

The Queensland Law Society (QLS) submission supported including unpaid leave for voluntary emergency management activities because it would improve participation in those activities and provide support for those employees who already engage in them. The LGAQ has raised a concern about including this entitlement in the QES because local government employees are often needed in their work roles in emergency situations, even if they are members of 'recognised emergency management bodies'. LGAQ's concern should be able to be managed at a local level.

Recommendation 41

That the legislation include additional Queensland Employment Standards, to provide:

- a) *an information statement to any new employee setting out workplace rights and basic entitlements, including the industrial instruments that apply to the employee*
 - b) *maximum periods of work consistent with the entitlements currently contained in section 9A of the Industrial Relations Act 1999 (Qld)*
 - c) *a right to request flexible working arrangements for all employees*
 - d) *emergency service leave.*
-

Long service leave

Currently the long service leave provisions of the IR Act also apply to many Queensland employees in the federal industrial relations jurisdiction.¹³⁸ In relation to long service leave, the Reference Group noted the intention of the federal, state and territory industrial relations ministers to consider a nationally consistent approach to long service leave entitlements.

9.3 Disputes over the application or operation of the Queensland Employment Standards, awards and agreements

A number of submissions have raised concerns about whether the minimum standards to be included in the new Act would be matters over which the QIRC has jurisdiction.

The Review considers that the QES are currently industrial matters under section 7 of the IR Act. The IR Act defines an industrial matter as a matter that affects or relates to, among other things, the privileges, rights and functions of employees.¹³⁹ As the QES amount to minimum guarantees, it appears that the QES provisions would be rights of employees, and consequently industrial matters. A matter under an award or agreement would also be an industrial matter. Currently the Commission may hear and decide all questions arising out of an industrial matter and decide the rights and duties of a person in relation to an industrial matter.¹⁴⁰

To provide certainty, the Review recommends that the legislation make clear that the QIRC has jurisdiction (by conciliation and, if necessary, arbitration) to deal with disputes over the application or operation of the QES, awards and agreements. The Review considers that

¹³⁸ *Fair Work Act 2009(Cth)* s 113.

¹³⁹ *Industrial Relations Act 1999 (Qld)* s 7(1)(b)(i).

¹⁴⁰ *Ibid* s 265(1)(b)(i) and (ii).

the legislation should note this and, if considered necessary, make specific provision for this. For example, the legislation could include the QES, or a matter arising under an award or agreement, in a list of industrial matters or use another means of achieving this objective.¹⁴¹

The AiG, CCIQ, and LGAQ opposed the QIRC having the power to arbitrate in respect of the right to request flexible work arrangements.

Recommendation 42

That the Act make clear that the Queensland Industrial Relations Commission has jurisdiction (by conciliation and, if necessary, arbitration) to deal with disputes over the application or operation of the Queensland Employment Standards, awards and agreements.

9.4 Domestic and family violence leave and minimum entitlement standards

Currently neither the NES nor the QES includes an entitlement for an employee to take specific leave related to the effects of domestic and family violence. The NES does make family violence a circumstance allowing an employee to request flexible working arrangements under the FW Act section 65.

The Report '*Not Now, Not Ever: Putting an End to Domestic Violence in Queensland*', the Special Taskforce on Domestic and Family Violence in Queensland (the DFV Taskforce Report) state that domestic violence is a workplace issue because many female employees who are experiencing domestic and family violence are harassed or abused in the workplace.¹⁴² The Report also explains that it is beneficial for the worker who is a victim of domestic and family violence to remain in the workplace and for the employer to engage in policies that target domestic and family violence, including increasing productivity and reducing costs associated with losing staff.¹⁴³

The DFV Taskforce highlighted the importance of work-based programs addressing domestic and family violence, including the capacity to take leave.¹⁴⁴ The DFV Taskforce recommended that the government amend the IR Act to provide for 10 days of non-accumulative domestic and family violence paid leave for any purpose relating to the violence, including for 'injury recovery, finding accommodation, court preparation and court appearance'.¹⁴⁵ The DFV Taskforce also recommended that there be sensitivity around the required proof for approving the leave.¹⁴⁶

As explained in Chapter 6, the Queensland Government has moved to address how domestic violence affects the workplace. For example, the PSC Chief Executive made

¹⁴¹ Section 7(3) states that a matter related to a matter listed in the IR Act, Schedule 1 is an industrial matter.

¹⁴² Special Taskforce on Domestic and Family Violence in Queensland (2015) '*Not Now, Not Ever*' – *Putting an End to Domestic and Family Violence in Queensland*, February 2015, p 180.

¹⁴³ Special Taskforce on Domestic and Family Violence in Queensland (2015) '*Not Now, Not Ever*' – *Putting an End to Domestic and Family Violence in Queensland*, February 2015, p 180 and 182.

¹⁴⁴ Ibid p 183.

¹⁴⁵ Ibid p 187 and recommendations 33 and 34.

¹⁴⁶ Ibid recommendation 34.

Directive 4/15, *Support for employees affected by domestic and family violence*, which provides entitlements to support employees affected by domestic and family violence, including a minimum of ten days domestic and family violence leave.

In order to implement the recommendations of the DFV Taskforce Report, this Review recommends that the domestic and family violence leave be able to be taken for a broad number of purposes associated with domestic violence and without requiring a heavy burden on an employee to provide proof of the domestic violence.

A more detailed discussion of domestic and family violence and the associated recommendations is contained in Chapter 6 of this report.

Recommendation 30¹⁴⁷

That, in accordance with recommendations 33 and 34 of the Domestic Family Violence Taskforce Report a new clause in the Queensland Employment Standards be inserted to provide up to 10 days paid domestic family violence (DFV) related leave annually for employees other than casual employees. Such leave is to be non-cumulative. An employee may access up to 10 days paid leave in each year for DFV related purposes for reasons including but not limited to:

- a) injury recovery*
- b) attending medical, legal, police, counselling and other DFV related appointments*
- c) court preparation*
- d) attending court*
- e) obtaining safe housing*
- f) organising child care or education matters*
- g) undertaking other DFV related activities.*

If required by the employer, the employee may have to provide supporting information to demonstrate that leave for the purpose of attending to a DFV related matter is necessary. Acceptable forms of proof include but are not limited to:

- a. police, legal, medical, or counsellor documents or reports*
- b. statutory declaration*
- c. written advice.*

Information disclosed by an employee in relation to domestic and/or family violence will be kept confidential except to the extent that disclosure is required or permitted by law.

Unpaid domestic and family violence leave for long-term casual employees

The DFV Taskforce recommended that the IR Act be amended to create domestic and family violence leave for the public sector. The recommendation and the report do not make a distinction between the types of employee who are able to access DFV leave. Further, the report states that:

¹⁴⁷ This recommendation is also featured in the domestic family violence discussion in Chapter 6 of this report.

[w]orkplace entitlements are the most effective way to encourage women to disclose, to provide safety to individuals and ensure a safe and productive work environment for all staff.¹⁴⁸

The Reference Group recommends that, for these reasons, the entitlement to leave should be made available to long-term casual staff so that they are able to access leave in order to address domestic violence. The legislative provision for this leave is to be unpaid, which reflects the entitlements provided to long-term casual staff.

Recommendation 31¹⁴⁹

That long-term casual employees be entitled to 10 days unpaid domestic family violence (DFV) leave each year for DFV related reasons.

Amendments to carer's leave

The QES does not currently provide an entitlement to take carer's leave to care for a person who is the victim of domestic and family violence. To give full effect to the recommendations and intent of the DFV Taskforce Report, and on the basis that it is possible (and indeed probable in many cases) that a person experiencing domestic violence may not have an immediate family member or household member available to care for them, the Review consider it appropriate to extend the scope of carer's leave so that an employee could take carer's leave to care for a person (who is not necessarily a member of the employee's immediate family or household as occurs with other carer's leave provisions) who is the victim of domestic violence.

The Review notes that the LGAQ, the CCIQ and AiG expressed opposition to extending carer's leave for domestic and family violence to persons beyond the family or household.

The Review considers that the entitlement to carer's leave be amended to provide for an entitlement to take carer's leave to care for a person who is the victim of domestic violence. The Review considers that the entitlement should extend to casual employees (on an unpaid basis).

The legislative provision may take the following form:

An employee may use up to 10 days of sick leave on full pay (*carer's leave*) in each year to care for and support—

- (a) members of the employee's immediate family or household—
 - (i) when they are ill; or
 - (ii) because an unexpected emergency arises; or

Example for paragraph (ii)—

unexpected failure of child care arrangements, or school close down

- (b) a person experiencing domestic and family violence.

¹⁴⁸ Special Taskforce on Domestic and Family Violence in Queensland (2015) *'Not Now, Not Ever' – Putting an End to Domestic and Family Violence in Queensland*, February 2015, p 184.

¹⁴⁹ This recommendation is also featured in the domestic family violence discussion in Chapter 6 of this report.

Recommendation 43

That carer's leave be available for a person to care for any person affected by domestic and family violence (i.e. need not be immediate family or household member).

9.5 General protections, adverse action and unfair dismissals

The IR Act currently provides a remedy for unfair dismissal which covers where a dismissal is 'harsh, unjust or unreasonable' or 'for an invalid reason'.¹⁵⁰ Invalid reasons include: temporary absence due to illness or injury, certain freedom of association provisions, filing a complaint to a competent administrative authority, pregnancy-related reasons, discrimination and other specified grounds.

The IR Act provisions only provide redress in relation to dismissal. Other than industrial dispute mechanisms, the IR Act does not provide a remedy for where an employee considers they have been treated detrimentally in their employment (but not dismissed) as a result of one of the reasons included under invalid reasons, or similar 'rights' or fairness related grounds, with the exception of the freedom of association provisions (see below).

The FW Act sets out arrangements called 'general workplace protections', which protect the right to exercise 'workplace rights':

- the rights to engage in industrial activities
- the right to be free from unlawful discrimination
- the right to be free from undue influence or pressure in negotiating agreements, amongst others.

However under the federal system, these rights extend protection and a remedy in relation to certain unlawful actions which do not result in dismissal, including (but not limited to) adverse action, coercion, misrepresentations, and undue pressure.

To practically achieve these protections, the FW Act sets out a broad definition of a 'workplace right' as well as defining a range of freedom of association protections and specified 'industrial activities' which include lawful participation in an industrial organisation and representing the views of an industrial organisation.

Freedom of association

Queensland's freedom of association protections ensure that employees can become, or not become, members of an industrial association 'without fear of discrimination'.¹⁵¹ The federal jurisdiction has similar protections for employees against discrimination.¹⁵²

¹⁵⁰ *Industrial Relations Act 1999* (Qld) Chapter 3, Part 2, s 73 (2).

¹⁵¹ *Ibid* s 101.

¹⁵² *Fair Work Act 2009*(Cth) s 346, 347.

The IR Act at Chapter 4 provides protection to employees, and employers, against discrimination based on union activity, or non-activity. These protections are similar to those in the FW Act at sections 346 and 347.

However, the FW Act goes further to provide ‘general protections’ to employees and employers against discrimination based on exercise, or non-exercise, of workplace rights, including making a complaint or enquiry in relation to employment¹⁵³, as well as general anti-discrimination matters.¹⁵⁴

These general protections do not currently exist in the IR Act.

General protections

Submissions to this Review generally submitted that the broader protections provided by the FW Act general protections provisions provide a more suitable raft of protections to participants in a modern industrial relations system.

The 2012 FW Act Review endorsed the idea that the FW Act gives effect to ‘important workplace rights that are essential to a functioning democracy’. Part of this would ‘recognise that freedom of association is vital for the proper functioning of a fair industrial relations system built on the concept of democracy in the workplace’.¹⁵⁵

The PC Draft Report supported the fairness provided by the FW Act provisions, although it recommended that ‘complaint’ at section 341(1)(c) of the FW Act be better defined.

The Review supported the expanded raft of protections in the FW Act. These would provide a course of action where an employee had a workplace right or had exercised a workplace right, including those protections provided by other legislation (for example, anti-discrimination legislation) or in an industrial instrument, or made a complaint or enquiry in relation to their employment, and believed they had been treated detrimentally or had their employment terminated as a result.

The Review recommends that general protections provisions in the FW Act in relation to dismissal and adverse action not leading to dismissal, including the notion of a broad and identified notion of ‘workplace rights’, be adopted in the IR Act. If this recommendation is adopted, the current ‘invalid reasons’ provisions will become unnecessary.

Submissions have noted that recent judicial decisions, and in particular the High Court decision in *Board of Bendigo Regional Institute of Technical and Further Education v Barclay*, have weakened the effectiveness of the FW Act provisions, in that respondents are too-readily able to discharge their onus of proof (see section 361 FW Act and section 12A IR Act).¹⁵⁶ Some submissions posited that the test for discharging the onus of proof proposed by Gray and Bloomberg JJ in *Barclay v Board of Bendigo Regional Institute of Technical and*

¹⁵³ *Fair Work Act 2009* (Cth) s 340, 341

¹⁵⁴ *Ibid* ss 351, 352.

¹⁵⁵ Fair Work Act Review (2012) *Towards More Productive and Equitable Workplaces: An Evaluation of the Fair Work*, Review Paper, June 2012, p 105.

¹⁵⁶ *Board of Bendigo Regional Institute of Technical and Further Education v Barclay* [2012] HCA 32, Gummow and Hayne JJ at [121]; *Fair Work Act 2009* (Cth) s 324(1) (c).

Further Education [2011] FCAFC 14 at [28] provides more appropriate protections for participants in the industrial relations system.¹⁵⁷

During discussions at the Reference Group, the employer organisations expressed strong opposition to any proposals to change the test arising from the High Court's decision.

General protections applications and jurisdiction

In the federal system, the FWC does not have jurisdiction to determine a 'general protections' or 'adverse action' application, and can conduct conciliation only. The exception to this is in a matter involving dismissal where the parties consent (and in this case the FWC can potentially order compensation). Otherwise, to have a matter determined, an applicant must then file an application with the Federal Circuit Court (FCC), or the Federal Court (FC).¹⁵⁸ The FWC does not have jurisdiction to issue pecuniary penalties.

An applicant can also elect to file an application with the FWC for conciliation prior to proceeding to the FCC or FC.¹⁵⁹ This step is required where the matter involves dismissal.¹⁶⁰ This process is complex, costly and can take significant time to resolve.

In keeping with the guiding principles, and given that the Queensland system is not restricted by the constitutional limitations in the federal system regarding the exercise of judicial power, it is recommended that the Queensland jurisdiction provide a 'one stop shop' jurisdiction at the QIRC to hear and determine applications (including the issuing of pecuniary penalties) for alleged contraventions of the general protections provisions. Appeals are to be heard at the Industrial Court of Queensland (ICQ).

This would result in a single application process for any employee alleging dismissal, or adverse action not resulting in dismissal, for reason of a contravention of the general protections provisions.

The recommendation to include similar provisions around 'general protections' and 'workplace rights' as included in the FW Act into a new Queensland IR Act was not supported by the CCIQ, AiG or the LGAQ.

Recommendation 44

That the Act provide for a consolidated mechanism in relation to proceedings dealing with 'general protections' matters including where the outcome is dismissal, and for 'adverse action' which does not lead to the dismissal of an employee.

Employment protections related to domestic and family violence

To give full effect to Recommendation 35 made in the DFV Taskforce Report, two new provisions are proposed. Recommendation 35 of the DFV Taskforce states:

¹⁵⁷ QCU and QNU submissions; *Barclay v Board of Bendigo Regional Institute of Technical and Further Education* [2011] FCAFC 14 at [28].

¹⁵⁸ *Fair Work Act 2009*(Cth) s 539

¹⁵⁹ *Ibid* s 372

¹⁶⁰ *Ibid* s 368

(35) The Queensland Government amends the Industrial Relations Act to specify outcomes of domestic and family violence (i.e. injury, application for leave, taking of leave) are not grounds for fair dismissal (similar to parental leave).¹⁶¹

This recommendation is aimed at preventing dismissal of employees on the grounds of DFV. The DFV Taskforce recommended that the legislation adopt a similar approach to the current IR Act prohibition of dismissal because of pregnancy or parental leave. Currently the protections exist under both parental leave provisions (see section 34 and in the QES) and the dismissal provisions.

It is proposed that the legislation ensure that employees who are the victims of DFV are also protected from dismissal or adverse action.

Additionally, by providing a specific entitlement for DFV leave, employees who seek to apply for or take this leave would be protected by general protections provisions, including for adverse action not leading to dismissal. This would recognise the importance of accessing such leave to assist in the prevention of domestic and family violence.

This recommendation was not supported by the employer organisations on the Reference Group.

Recommendation 45

That a separate clause be inserted prohibiting the dismissal of an employee because the employee is a victim of domestic violence and a reference to outcomes of domestic family violence victims as a prohibited reason for dismissal. Further, the general protections and adverse action provisions are to apply to victims of domestic and family violence.

Unfair dismissals

Currently the QIRC has jurisdiction to hear and determine unfair dismissal applications as is the case in the FWC in the federal jurisdiction. This should be maintained. However as discussed above, the 'invalid reasons' will no longer be provided for in the legislation, if the broader raft of 'general protections' arrangements are adopted, covering dismissals and adverse action not leading to dismissal.

Long-term casual employees should continue to be protected from unfair dismissal.

Income threshold

The IR Act provides a category of unfair dismissal exemptions, including providing a high income threshold which (if combined with other factors) renders certain employees ineligible to seek an unfair dismissal remedy.

The IR Act still indicates the original threshold of \$68,000 (from the introduction of the IR Act), however, the industrial relations regulations provide the amended threshold (currently \$118,000). When this threshold was established, the intention was that it be maintained in

¹⁶¹ Special Taskforce on Domestic and Family Violence in Queensland (2015) *'Not Now, Not Ever' – Putting an End to Domestic and Family Violence in Queensland*, February 2015, p 187.

line with the federal jurisdiction. To avoid confusion, and to ensure that this threshold is regularly updated, the Review recommends:

Recommendation 46

That the income threshold for unfair dismissal (and for employment claims under Part 5A of the Magistrates Court Act 1921 (Qld)) be increased to \$136,700 and adjusted annually to maintain consistency with the threshold of the Fair Work Act 2009 (Cth).

Anti-discrimination

Federal system employees are also protected against adverse action taken against them because of race, religion, political opinion and other personal attributes (see FW Act section 351(1)). Action will not contravene the FW Act if it is lawful under a state anti-discrimination Act, including the *Anti-Discrimination Act 1991* (Qld). The attributes for which a person cannot be discriminated against pursuant to the *Anti-Discrimination Act 1991* (Qld) (section 8) are broader than those found in the FW Act. These protections are not currently in the IR Act.

To ensure simplicity and ease of use, it is recommended that the list of attributes from the *Anti-Discrimination Act 1991* (Qld) be adopted by the IR Act.

Recommendation 47

That the legislation ensure that the list of anti-discrimination attributes include those contained in the Anti-Discrimination Act 1991 (Qld).

Application forms and Queensland Industrial Relations Commission documents

The guiding principles of the Review provide that the industrial relations system should be modern, simple to use, accessible, user-friendly, and fairness and balance should be central considerations. The complexity of the existing forms and other requirements in relation to unfair dismissal provisions was raised during the consultation for this Review.

This matter should be considered by the QIRC Registrar, as part of the review of registry processes, to ensure that application forms and other documents are user-friendly and accessible.

9.6 Apprentices and trainees

Apprentices and trainees are a unique group of workers as they have their employment affected by separate tripartite training plans, which makes them arguably more vulnerable than non-apprentices or non-trainees. The provision of training and qualifications has benefits to productivity that extend beyond the entity employing the apprentice or trainee.

In 2012 the LNP Government referred vocational training powers to the Commonwealth.¹⁶² The *National Vocational Education and Training Regulator Act 2011* (Cth) now applies to apprentices and trainees in Queensland. The previous LNP Government also passed the *Further Education and Training Act 2014* (Qld) (the FET Act) which governs the training arrangements for apprentices and trainees.

The employer and apprentice or trainee are required to sign a training contract within 14 days of the commencement of the apprenticeship or traineeship. This training contract must then be provided to an Australian Apprenticeship Support Network (AASN) provider within 28 days of commencement. Within three months of commencement, the employer, apprentice or trainee and the supervising registered training organisation are required to negotiate a training plan. Currently, an employer of an apprentice or trainee is required to notify the Department of Education and Training or the AASN, if, amongst other things:

- the employment of the apprentice or trainee has ceased;
- the employer does not believe that the apprentice or trainee will meet the requirements of the training plan; or
- an extension to the training contract is required.

Any termination of employment, or an assessment by the employer that the apprentice or trainee is unlikely to meet the requirements of the training plan, may see the apprentice or trainee's training contract terminated. An apprentice or trainee may seek a reinstatement order (IR Act) or application for remedy for unfair dismissal (FW Act). The QIRC and FWC have the power to order reinstatement of employment which in turn can reinstate the training contract. Since the passage of the FET Act, the QIRC has jurisdiction to deal with disputes regarding training contracts in accordance with section 168 of the FET Act.

The Queensland Government has recently re-established the office of the Training Ombudsman. The powers and functions of the Ombudsman are to:

- refer complaints to the relevant agency and monitor the complaints;
- review the complaint only after DET has not commenced an investigation within four weeks of receiving the complaint;
- request information from DET, request information from an employer, and request that a DET Inspector enter a workplace; and
- make recommendations to the Director General of the Department of Education and Training (DET) regarding apprenticeships and traineeships.

The Ombudsman also has a range of other functions relating to vocational education and training (including apprenticeships and traineeships) in Queensland. This new avenue will address some of the concerns raised in submissions.

To ensure that disputes regarding apprentices and trainees in the state jurisdiction are resolved in a timely manner, parties should also have recourse to the QIRC. Under the current provisions of the IR Act, apprentices and trainees within the Queensland industrial

¹⁶² *Vocational Education and Training (Commonwealth Powers) Act 2012* (Qld).

relations jurisdiction have recourse to the QIRC for disputes for anything related to an industrial matter.¹⁶³

The Review considers this is an appropriate arrangement. The Queensland Government may wish to review the effectiveness of the Training Ombudsman in protecting the interest of apprentices and trainees after the new arrangements have been operating for a period of time.

9.7 Other provisions

Electronic record keeping under the *Industrial Relations Act 1999* (Qld)

An issue was raised in submissions about whether records required to be kept under the Act should be able to be kept electronically. United Voice (UV) considered that time and wage records should be able to be accessed electronically by the union.

Currently under the IR Act, the definition of record and records encompasses some form of electronic record-keeping and communication. However, the approach is not consistent.

Schedule 5 of the IR Act defines records for the Act as any document containing data. A document is defined in the *Acts Interpretation Act 1954* (Qld) broadly by stating that a document includes 'any disc, tape or other article or any material from which sounds, images, writings or messages are capable of being produced or reproduced'.¹⁶⁴ Writing is defined to include 'any mode of representing or reproducing words in a visible form'.¹⁶⁵ These two definitions would operate to allow 'records' to be stored electronically under the IR Act.

Further, the *Electronic Transactions Act 2001* (Qld) (ET Act) provides that a legislative requirement to give information in writing, produce a document, record information and keep written documents may be given or produced by electronic communication or recorded or given in an electronic way in accordance with that Act.¹⁶⁶ For example, if a document is required to be kept in writing in a Queensland Act, the ET Act provides that the document may be kept in an electronic form that is a reliable way of maintaining the integrity of the information in the document, is readily accessible and kept in a way required under a regulation (no regulations have been made under the IR Act).¹⁶⁷

'Records' under the IR Act generally could be kept and communicated electronically unless a specific provision excluded the general operation of those definitions.

The capacity to electronically keep a record required under Chapter 11, Part 1 of the current IR Act, including employer records for time and wages, is more restricted. A record is defined in section 363 to include a computer record if the print-out or disk is separate from all other material and covers all of the information required and in a way that can easily be inspected. It is arguable that the definition of record in section 363 would exclude the

¹⁶³ Because of the provisions of section 5(h) – definition of an employee includes apprentices and trainees and section 7 of the *Industrial Relations Act 1999* (Qld) (industrial matters)

¹⁶⁴ *Acts Interpretation Act 1954*, Schedule 1, definition *document*, paragraph (c).

¹⁶⁵ *Ibid.*

¹⁶⁶ *Electronic Transactions Act 2001* (Qld), ss 11, 16, 19, 20 and 21.

¹⁶⁷ *Ibid* s 20(2).

operation of the ET Act by specifically providing for the way electronic records are maintained and the *Acts Interpretation Act 1954* (Qld) definition of document would not apply because it is not referred to in the definition.

The definition of 'record' in section 363 appears to be more limited than the definition of 'records' in schedule 5 of the IR Act. There is a capacity to retain documents electronically but only on a disk as stated in section 363. This requirement would not allow for evolving technology, including the use of cloud computing.

The provisions in Chapter 11, Part 1, do not allow for time and wages records to be accessed remotely. The time and wages records of employees are also required to be kept at or accessible from the premises of the employer.¹⁶⁸ Similarly, the power of an inspector appointed under Chapter 11 to access and inspect those records at a workplace during the employer's business hours.¹⁶⁹ Requiring access to the documents at the premises is cumbersome, inefficient and does not reflect advances in technology.

To reflect the widely accepted arrangements with respect to the types of documents which employers and employees keep and which are provided for other reasons - for example for registered industrial organisations to meet reporting requirements - the Review recommends that the legislation be amended to ensure that all records can be maintained, provided or transmitted electronically. Provision should also be made for the electronic transmission of those documents required to be held by a person under the IR Act to reflect technological advances.

Recommendation 48

That the legislation provide for any record or document to be maintained, provided or transmitted electronically.

The Review considers that this recommendation should also be applied to the processes of the ICQ and QIRC.

Industrial action not related to bargaining

The QTU and QCU argued for the extension of the concept of protected action beyond bargaining disputes. They cited the changes and proposed changes to employment conditions outside of bargaining processes made by the previous LNP government as an example of circumstances where additional provisions around protected action should be available. The Review proposes to retain the current scope of protected action to bargaining disputes, and for the existing provisions regarding industrial action other than protected action (under Chapter 7 of the current IR) Act to remain.

¹⁶⁸ *Industrial Relations Act 1999* (Qld) ss 366(2) and 367(2).

¹⁶⁹ *Ibid* s 371.

9.8 Obsolete provisions, transitional arrangements, anomalies and other amendments

The IR Act as it stands includes a range of obsolete provisions (for example, reference to the now rescinded Outworkers Code remain), as well as terms in definitions and other sections which may not be up-to-date or accurately reflect society, and therefore potentially risk unintentional consequences (including unintentionally excluding a group of people from having a provision or condition or protection apply to them). It is important that in any work arising from this Review, that any existing provisions which are no longer required are removed, or amended to ensure that the policy intent of the legislation is able to be properly implemented.

The creation of new legislation should also be used to address a range of technical amendments identified over the course of this Review.

Where appropriate existing transitional arrangements should not be carried forward into new legislation.

There are a number of provisions in the IR Act which have not been raised in submissions or addressed at the Reference Group. For completeness, the Reference Group is of the view that, where matters have not been addressed in the report, the status quo should continue in the new Act.

Chapter 10: Regulation of Industrial Organisations

Employer and employee industrial organisations play an important role in the Australian industrial relations system and are regulated accordingly. Most industrial organisations registered in the state industrial relations system are also registered in the federal system. This chapter recognises the fundamental imperative of strong, effective and transparent governance, accountability and reporting obligations for all registered industrial organisations.

The recommendations in this chapter are intended to promote democratic control of organisations and good governance by ensuring that reporting, training and other obligations are directed at ensuring accountability to members. Noting the role and status of registered organisations in the system, there is a public interest in ensuring that registered organisations are well-governed.

The recommendations are intended to improve accountability to members, including by the provision of timely, accurate and understandable disclosures.

Currently, the governance, accountability and reporting requirements in the state industrial relations system differ from the federal jurisdiction, leading to complexity, duplication and increase in the potential for errors without any substantive increase in accountability to members. Differential reporting from the same entity also risks reducing the effectiveness of reporting. Its purpose is to provide information to members as an accountability measure, and the use of different standards is likely to cause confusion and uncertainty. Accordingly, the chapter recommends several matters where alignment between the state and federal regimes would improve compliance and the effectiveness of reporting to members, while reducing compliance costs.

This chapter also recommends equal treatment of employee and employer organisations in terms of reporting.

10.1 The regulation of industrial organisations

As at 19 June 2015, there were 45 industrial organisations registered in Queensland: 27 employee and 18 employer organisations.¹⁷⁰ Fifteen of the employee industrial organisations have federally registered counterpart bodies.¹⁷¹

Strong and transparent governance and accountability arrangements cannot be compromised. Registered industrial organisations and their officials must operate in ways which reflect their obligations to their members. Decisions must be taken in accordance with the legislative framework and the organisation's rules. The finances of all registered industrial organisations belong to their members and must be used to protect and advance the interests of those members.

¹⁷⁰ Queensland Industrial Relations Commission (2015) *Registered Industrial Organisations*, <http://www.qirc.qld.gov.au/qirc/organisations/index.htm> accessed 30 November 2015.

¹⁷¹ Ibid.

Principles relating to the governance of organisations ought to have universal application. There is no basis in sound policy for the differential treatment of unions and employer organisations in relation to governance and accountability (including in relation to finances).

The Reference Group acknowledges that governance and accountability issues have caused serious concerns, and supports the consistent application of governance and accountability principles, and particularly in relation to members' financial dues.

One of the Terms of Reference for this Review is to consider the most suitable model for the regulation of industrial organisations in the State industrial relations system. The last systematic review of laws pertaining to industrial organisations in Queensland was undertaken by the Industrial Relations Taskforce in the 1998 as part of its Review of Industrial Relations Legislation in Queensland.¹⁷²

The *Industrial Organisations Act 1997 (Qld)* (IO Act), which preceded the *Industrial Relations Act 1999 (Qld)* (IR Act), was a response to some of the recommendations of the 1989 inquiry by Mr. Marshall Cooke QC into allegations of misconduct in trade unions. The objects of the IO Act clearly outlined the purpose of the Act and are worth restating.

The objects of this Act are—

(a) to encourage the democratic control of industrial organisations ('organisations') and participation by their members in the affairs of organisations; and

(b) to encourage the efficient management of organisations; and

(c) to ensure freedom of association, including the rights of employees and employers to join an organisation or association of their choice, or not to join an organisation or association; and

(d) to ensure employee and employer organisations registered under this Act are representative of, and accountable to, their members and are capable of operating effectively.

The reforms influenced related provisions in the IR Act which did not undergo substantial change between 1999 and 2012.

However, the Liberal National Party (LNP) Government (2012 to 2015) undertook wide-ranging amendments which introduced new provisions or amended existing provisions in Chapter 12 of the IR Act through *the Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Acts Amendment Act 2013 (Qld)* (the transparency and accountability amendments).

These amendments sought to increase the financial accountability and transparency of industrial organisations and their office holders and provide a proper deterrent for officers abusing their position.¹⁷³ Many industrial organisations - both employer and employee - considered that the amendments simply imposed extensive reporting conditions on registered organisations, which were unrelated to the stated policy objectives. Consequently, six employer associations and three employee associations voluntarily

¹⁷² Industrial Relations Taskforce (1998) *Review of Industrial Relations Legislation in Queensland: Issues Paper*, September 1998, Department of Employment, Training and Industrial Relations.

¹⁷³ Explanatory Memorandum, *Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Acts Amendment Bill 2013 (Qld)*, p 1.

deregistered in Queensland and registered solely in the federal jurisdiction.¹⁷⁴ Further, the transparency and accountability amendments had no application to the Master Builders Association of Queensland or to the Local Government Association of Queensland (LGAQ) as a result of these organisations meeting the definitions of a corporation under the IR Act.¹⁷⁵

In addition, extra regulatory burdens was placed solely on employee organisations. Notably, only employee groups must register credit card and 'Cab Charge' account spending for officers of the organisation.¹⁷⁶ This requirement was retrospective and required a register of credit card and cab charge account spending for the period between 1 July 2012 and 30 June 2013 to be provided within one month of the commencement of the transparency and accountability amendments.¹⁷⁷

10.2 The regulatory framework

In Queensland, Chapter 12 of the IR Act deals with industrial organisations and associated entities. It covers the registration of industrial organisations, rules of industrial organisations, the conduct of elections, election inquiries, officers and officers' duties, the register of material personal interest disclosures, the statement of interests of officers holding management offices and membership arrangements.

The Regulation and Compliance Branch within the Office of Industrial Relations (OIR), and the Registrar's Office in the Queensland Industrial Relations Commission (QIRC) have responsibility for the conduct of a range of compliance and enforcement activities and officers' duties provisions in the IR Act. Broadly, industrial inspectors are empowered to investigate and monitor the Chapter 12 provisions of the IR Act, both independently and by referral from the Industrial Registrar or the Chief Executive.

The IR Act also sets out the compliance functions of the Registrar including the ability to engage an auditor to examine an organisation's accounting records. The Registrar may also report suspected offences of other state or commonwealth laws to the Chief Executive.

Finance and accountability

The current financial and accountability requirements of Chapter 12 of the IR Act are prescriptive and onerous, in some respects, particularly as most organisations are also required to separately comply with provisions of the *Fair Work (Registered Organisations) Act 2009* (Cth) (FW(RO) Act). These standards exceed those which apply to most companies, and to other membership based organisations like incorporated associations. The extra financial reporting obligations include the creation and publication of an Initial Financial Disclosure Statement, Mid-Year Financial Disclosure Statement and an Annual Financial Disclosure Statement. Section 557 also provides that financial registers include the registration of gifts, hospitality, benefits given and received, political spending and credit

¹⁷⁴ Industrial Court of Queensland, Queensland Industrial Relations Commission (2015) *2014 – 2015, Annual Report of the President of the Industrial Court of Queensland*, Queensland Industrial Registry.

¹⁷⁵ *Industrial Relations Act* (Qld) s 410.

¹⁷⁶ *Ibid*, s 557C.

¹⁷⁷ *Ibid*, s 557D.

card and cab charge account spending (which applies to employee organisations only). It covers the registration of loans, grants and donations, the publication of financial registers, the updating of financial registers, the inspection of financial registers and that financial registers must be kept for seven years. Amendments were also made regarding enhanced disclosure to the Registrar of interests held by managing officers (and their spouses) as well as increased audit and complaint investigation processes.

Political party affiliation

The transparency and accountability amendments also require industrial organisations and associated entities to state any political party affiliation in political advertising.

Governance and financial management

Provisions regarding enhanced mandatory governance and financial management training for officers were also introduced. The transparency and accountability amendments included mandatory financial policies on matters such as authorisations and delegations relating to the organisation's spending, decision making about reporting of financial matters and the handling of complaints about financial matters, as well as compulsory financial management training for officers of organisations who perform functions or exercise powers relating to financial management.

Industrial organisation rules

The transparency and accountability amendments further expanded pre-existing provisions in Chapter 12 governing the integrity of industrial organisations and officials, such as the prescription of general content for industrial organisations' rules. An organisation's rules must include the functions and powers of its committees, branch committees, office holders and branch office holders, how its committees are controlled by its members, how its property is controlled and its funds are invested, conditions for spending its funds and how the rules may be amended.

An industrial organisation's rules must also include a statement that the organisation and/or a branch of the organisation must not make a donation, grant or loan totalling more than \$1,000 to the same person unless the management committee has approved such payments and is satisfied the payment is not otherwise prohibited under the rules of the organisation. The rules governing elections for all elected offices in the organisation are to ensure that the processes under which elections are conducted are transparent and that no irregularities occur.

Compliance and enforcement

The scope of compliance and enforcement responsibilities exercised by the Regulation and Compliance Branch within OIR and the Industrial Registrar were expanded as a result of the transparency and accountability amendments. As a result, monitoring and compliance activities include a program to monitor the financial registers of industrial organisations, an inspection program and investigations of any areas of non-compliance.

The Registry is responsible for overseeing registered organisation's elections. These are conducted by the Electoral Commission of Queensland in accordance with each organisation's rules. This is arranged by the Registrar when the organisation notifies the Registry that it is seeking to hold an election. The Registrar must be satisfied that the election is required under the rules. The cost is borne by the State.

Penalties

The 2013 amendments also increased civil penalties and introduced criminal penalties for offences relating to officers' duties to act honestly, in good faith and for a proper purpose, to exercise reasonable care and diligence in the performance of their role; and to disclose material personal interests and absent themselves from management decisions on such matters. The new criminal penalties for non-compliance apply to officers in industrial organisations who fail to act honestly, in good faith, in the best interests of the organisation, and for a proper purpose. These sections all carry maximum penalties of five years imprisonment and/or a fine of up to \$340,000.

Legal cases

There has been only one prosecution undertaken under the transparency and accountability amendments. A prosecution was brought in 2014 against the Electrical Trades Union of Employees (ETU) for breaching a number of the provisions introduced in the transparency and accountability amendments. The charges included failing to ensure a copy of a financial register was published in the approved way and failing to ensure a copy of an Initial Financial Disclosure Statement was published in the approved way. In the first instance, the Magistrate found the ETU not guilty on all charges.¹⁷⁸ An appeal was heard by the Industrial Court of Queensland (ICQ) on 6 November 2014. The appeal has since been withdrawn as a result of the announcement of this Review of the IR Act.

Shortly after the introduction of the transparency and accountability amendments, the Queensland Police Union of Employees (QPU), Queensland Teachers' Union (QTU) and Queensland Nurses' Union (QNU) filed proceedings in the High Court of Australia challenging the constitutionality of section 553F of the IR Act (balloting of members) on the ground that it infringed the implied constitutional right to freedom of political communication. On 18 December 2013, the High Court decision in relation in the matter of *Unions NSW v New South Wales* impacted on the transparency and accountability amendments.¹⁷⁹ New South Wales unions sought a declaration by the Court regarding 'like provisions' in relation to:

- 'political donations' from persons or entities that do not appear on a federal, State or local electoral roll
- the aggregation of 'electoral communication expenditures' of political parties and

¹⁷⁸ *Gibbons v The Electrical Trades Union of Employees* (Unreported, Magistrates Court of Brisbane, Magistrate Callaghan, 2014).

¹⁷⁹ *Unions NSW v New South Wales* [2013] HCA 58.

affiliated organisations to limit the amount of campaign spending.¹⁸⁰

The High Court unanimously held that those sections were invalid on the grounds that they impermissibly burdened the implied freedom of communication on governmental and political matters, contrary to the *Australian Constitution*. As a result of the High Court decision, the former Queensland Government amended the IR Act to omit provisions relating to ‘associated entities’ (although Chapter 12 retains the phrase in its title) and provisions relating to balloting of members to authorise political expenditure.¹⁸¹ The provision was abolished in July 2014.

Whistleblowers protections

In relation to protections for members and employees of industrial organisations wishing to report unlawful behaviour and corruption in an organisation, neither the Queensland nor the federal legislation provides explicit general protections for whistle-blowers. The IR Act does, however, provide for a wide category of parties who may make complaints about the functioning of industrial organisations and the misconduct of officers of industrial organisations.

Provisions were inserted as part of the transparency and accountability amendments which enable complaints to be made to the Chief Executive, who is empowered to refer the complaint to the Industrial Registrar, an Industrial Inspector for investigation and/or the relevant Minister. Complaints may also be referred to the police and/or relevant Federal authorities where the conduct alleged does not fall within the jurisdiction of the Industrial Registrar or the Industrial Inspectorate.

10.3 Reporting requirements/administrative burden

Most industrial organisations operate across the Federal and State jurisdictions. Governance and accountability concerns are unlikely to be effectively addressed by having differential requirements and reporting arrangements. In fact differential requirements add an unnecessary administrative burden and may serve only to confuse members as to the state of their organisation’s affairs. The recommendations in this section are premised upon equal treatment of registered employer and employee industrial organisations and consistency between the state requirements and those under the FW Act. This approach was supported by all members of the Reference Group.

Identical reporting requirements

Currently, there are different reporting requirements for employer and employee industrial organisations. Under the IR Act, a register must be kept of credit cards and cab card account spending for ‘employee organisations only.’ While the issue of inappropriate or fraudulent use of a credit or cab charge is a serious matter, these concerns apply equally to both employer and employee organisations.¹⁸² As a matter of principle, the Reference

¹⁸⁰ It should be noted that W Sofronoff QC, Solicitor-General of the State of Queensland with G J D del Villar for the former Attorney-General of the State of Queensland, appeared as an intervener (instructed by Crown Law Qld).

¹⁸¹ Sustainable Planning (Infrastructure Charges) and Other Legislation Amendment Bill 2014 (Qld), cl 55O - 55U.

¹⁸² *Industrial Relations Act 1999* (Qld) s 557C.

Group considers that there should be equal treatment of organisations relating to employers and employees. In practice, the legislation should remove provisions that have the effect of burdening employee organisations beyond the requirements that apply to employer organisations. Accordingly, the Reference Group makes the following recommendation.

Recommendation 49

That the Act ensure that the provisions in relation to registered industrial organisations apply equally to both employer and employee organisations in relation to reporting, including financial reporting and other obligations.

Reducing compliance costs

Submissions from both employer and employee organisations noted the increased administrative burden and ongoing red tape associated with reporting obligations following the introduction of the transparency and accountability amendments.

To reduce compliance costs and complexity, the Reference Group recommends amending the provisions around financial reporting requirements to reflect the requirements of the FW(RO) Act. This recommendation is consistent with a principles-based regulative approach to reporting requirements to ensure strong governance, financial integrity, accountability and transparency.

The Review also notes the onerous Queensland requirements for officers of industrial organisations with financial management duties to undertake financial training.¹⁸³ Training in Queensland must be completed within three months after the Registrar approves training and at least once every two year period the officer performs financial management functions. In comparison, the FW(RO) Act requires the relevant officer to complete the training within six months after holding office, with no requirement to repeat the training.¹⁸⁴ Further, under the current arrangements, training is being delivered to people with professional qualifications higher than those providing the training modules. This juxtaposition was addressed in the LGAQ submissions, noting that:

*this is a nonsense situation where organisations who employ Finance Officers who are chartered accountants and/or have tertiary qualifications in finance are required to attend training by people who are far less qualified than themselves and on matters routine to their occupation.*¹⁸⁵

As a further simplification measure, the Reference Group proposes that the Queensland training obligations be aligned with the federal jurisdiction.

Recommendation 50

That the Act provide for reporting, accountability and training requirements that are consistent with the reporting and training requirements (including financial reporting)

¹⁸³Industrial Relations Act 1999 (Qld) s 553B.

¹⁸⁴Fair Work (Registered Organisations) Act 2009 (Cth) s 154D.

¹⁸⁵ LGAQ submission.

As noted above, most industrial organisations operate across the federal and state jurisdictions. Aligning reporting, accountability and training requirements of industrial organisations with the FW(RO) Act potentially leads to the duplication of reporting obligations. In those cases, it is sensible that where a state registered industrial organisation is compliant with the equivalent federal provisions, they are able to be deemed to be in compliance with the equivalent provisions of the IR Act, on the basis that the Registrar is provided with all relevant documentation required under the FW(RO) Act. This would further assist in reducing red tape and the compliance burden.

The Local Government Association of Queensland (LGAQ) raised specific concerns in relation to its financial reporting obligations. Following the state government's removal of the statutory corporate status of LGAQ in 2009, the LGAQ is a company limited by guarantee and registered with Australian Securities and Investments Commission (ASIC). Accordingly, the LGAQ is required under the *Corporations Act 2001 (Cth)* (Corporations Act) to have a financial audit conducted each year. The LGAQ is also audited by the Queensland Audit Office (QAO) for reasons not to do with its ASIC registration, but its local government responsibilities.

The LGAQ has been granted an exemption from the QIRC to be audited in recognition of the audit obligations to ASIC and QAO, which ensures that the LGAQ complies with the industrial relations legislation relating to financial statement audits without having to undertake a separate process. However, the LGAQ is still required to undergo an additional audit of the Financial Disclosure Statements. The LGAQ argues that this creates a significant additional financial cost.

The Corporations Act requires that the LGAQ members are provided with the signed financial statements at the Annual General Meeting (AGM) of the organisation. However, the industrial relations legislation requires for the same disclosure statements, including audited financial statements to be provided to all members (in hard copy) and after a period of 28 days, the Board of the LGAQ is required to hold a presentation meeting to complete the signing of the documents prior to submission to the QIRC. The timing of the AGM and the timing of the presentation of the material to QIRC are currently such that the LGAQ is required to comply separately with both and unable to perform the requirement in a single occasion that can satisfy both requirements. It argues that this provides no additional value to members who query why their resources are being wasted on this duplication of the reports.

The Review supports a possible exemption for the LGAQ from the IR Act requirements provided that the Registrar is satisfied that the financial reporting meets the threshold requirements for other registered organisations. The mechanics for this potential exemption will require further consultation particularly with the LGAQ during the drafting of the new legislation.

Recommendation 51

That the Act allow for reporting, including financial reporting, training and elections conducted for the purpose of the Fair Work (Registered Organisations) Act 2009 (Cth) to be deemed to be compliant with the equivalent provisions of the Industrial Relations Act 1999 (Qld), on the basis that the Registrar is provided with all relevant documentation under the Fair Work (Registered Organisations) Act 2009 (Cth). The Registrar be given discretion to approve other reporting, including financial arrangements provided that they meet the minimum standards required by the Industrial Relations Act 1999 (Qld).

10.4 Breaches of finance and accountability provisions

The use of penalty units as a pecuniary penalty is common in both criminal and civil jurisdictions for breaches of statutory law. Civil pecuniary penalties seek to protect the public by encouraging compliance and penalising offenders.¹⁸⁶

For finance and accountability breaches under both the IR Act and under the FW(RO) Act, offences attract penalties within a minimum to maximum range.¹⁸⁷ The value of the penalty unit is higher in the Commonwealth jurisdiction at \$180.00 compared to \$117.80 in Queensland.¹⁸⁸¹⁸⁹

Imposing greater penalties for non-compliance is a valid deterrent and is consistent with community expectations around punishment for regulatory offending.¹⁹⁰ As such, the Review recommends an increase from the current maximum of 40 penalty units to 100 penalty units where applicable in the provisions contained in Part 12, Chapter 12 of the IR Act. In addition, the Review is aware that as a result of accord with the penalty regime with the FW(RO) Act, there is a potential for non-compliant industrial organisations to be effectively punished twice for the same offending. The Review has considered this issue and noted that strict penalties for non-compliance are consistent with societal views on the credibility and accountability of the relevant industrial organisations.

Recommendation 52

That the legislation increase the maximum penalty for breaches of financial accountability arrangements from 40 penalty units to 100 penalty units.

¹⁸⁶ New Zealand Law Commission (2012) *Civil Pecuniary Penalties*, Issues Paper 33, Law Reform Commission, Wellington New Zealand.

¹⁸⁷ The range is between 20 and 100 penalty units for an offence, with a large proportion of the offences attracting a maximum penalty of 30 penalty units.

¹⁸⁸ *Crimes Act 1914* (Cth) s 4 AA

¹⁸⁹ *Penalties and Sentences Regulations 2015* (Qld) s 3.

¹⁹⁰ Ford C. (2008) *Principles-Based Securities Regulation*, A Research Study Prepared for the Expert Panel on Securities Regulation.

10.5 Appropriate arrangements for monitoring registered organisations

Currently, under chapter 12 of the IR Act, the Chief Executive of the relevant government department is the ultimate decision maker when it comes to potential criminal offences being referred to the appropriate investigative body.¹⁹¹ The doctrine of the separation of powers is fundamental to the Westminster model of government. It holds that prosecutorial or policing functions are best conferred on someone who is not a senior public servant reporting to the Minister. The Reference Group therefore recommends removing the power of the Chief Executive of the department to refer potential criminal matters to an investigative body and vesting those powers with the Registrar. The Review notes that the Registrar has similar functions in other jurisdictions and is best placed to hold such a role in the Queensland industrial relations system.

Recommendation 53

That the Act remove the powers for the Chief Executive of the Department in favour of vesting relevant powers with the Registrar. In relation to the appointment of an administrator to an industrial organisation, the legislation should provide that such an appointment can only be made by order of the Industrial Court on application of the Registrar or Minister.

10.6 Specific issues raised in submissions

Auditor standards

Stakeholders raised concerns regarding the relationship between section 560 of the IR Act and audit requirements. In general terms, an audit report should communicate the results of such a process to best reflect the auditor's state of knowledge at the time the audit report is dated.¹⁹² Further, Smieliauskas et al. argue that 'truth in auditing may be defined as conformity with reality as the auditor can determine reality at the time of his examination and with the evidence available'.¹⁹³

On one interpretation the legislative requirement for absolute compliance can, in effect, never be met as a result of the disconnect between section 560 of the IR Act outlining the audit requirements and the practical application of conducting the audits and the subsequent language used in audit reports. The recommendation to align the financial reporting obligations of industrial organisations under the IR Act with those under the FW(RO) Act addresses this concern. Like any Act requiring an organisation to use the services of an auditor, care must be taken to ensure that the legislation does not require an organisation to produce a report in a form which a qualified auditor will not, or cannot prepare because of audit standards or professional obligations.

¹⁹¹ See for example, s 574 A of the *Industrial Relations Act 1999* (Qld).

¹⁹² Smieliauskas W., Craig R. and Amernic J. (2008) 'A Proposal to Replace "True and Fair View" with "Acceptable Risk of Material Misstatement"' *Abacus*, 44(3).

¹⁹³ *Ibid.*

Definition of 'Office' and implications of the term

The Industrial Organisations and Associated Entities - Industrial Relations (Transparency and Accountability of Industrial Organisations) and Other Act Amendment Bill 2013 (the Bill) included definitions of the term 'office' and 'officer' in relation to Chapter 12.

The Legal Affairs and Community Safety Committee (the Committee) report noted that the Department confirmed that the definition of 'officer' of an industrial organisation had not changed and is provided at section 409 of the IR Act as 'a person who holds office'.¹⁹⁴ As such the definition may include remunerated and voluntary members of an industrial organisation and potentially capture a large number of persons involved in the activities of an industrial organisation.

The Committee considered the issues raised in submissions and accepted that the provisions relating to the register of material interests, as drafted, did not necessarily reach the right balance between achieving transparency and accountability of officials and respecting the privacy of individuals. The original drafting of the provisions captured more persons than the Committee considered were required to meet the policy objectives. The Bill was subsequently amended to the current definition at section 412(a) to limit the definition of an officer to the president, vice president, secretary or assistant secretary and members of the management committee, which only partly met the Committee's concerns.

The totality of the definitions found at sections 409 and 412 include the use of 'branch' within the definitions. The QTU, as an example, has 99 branches and eight offices (inclusive of head office in Brisbane). The result of this is that the definitions (although truncated from the original definitions) still apply in their current format to branches.

There is an added concern that inappropriate and unnecessary transparency and training arrangements apply to members who serve in junior elected roles and do not control the financial affairs of the organisation. Perversely, such provisions could operate in an anti-democratic way, by discouraging participation by volunteer rank and file members in their organisation.

To clarify the original policy intention, it is proposed that the definition of 'office' and 'officer' should be amended to truncate the current breadth of the term in relation to branches, and to capture only those officers it is intended to capture.

Recommendation 54

That the legislation remove training, disclosure and election requirements in respect of local and sub-branch officers of unions where such roles do not involve management of the affairs of the organisation or control of finances, and that the Registrar be granted power to exempt specific offices from these requirements on application by an organisation on these grounds.

Political donations

¹⁹⁴ The Legal Affairs and Community Safety Committee report no. 31, June 2013, page 16

Other provisions in the IR Act relating to transparency and accountability include the requirement that industrial organisations keep a written register of particulars relating to each expenditure in the year of more than \$10,000 for the same political purpose and the same political object and which require political party affiliation to be stated in political advertising remain in place.

557B Register of political spending

(1) An organisation must, for each financial year, keep a written register stating the particulars mentioned in subsection (3) for each occasion it spends more than \$10000 in the year for the same political purpose and the same political object.

Maximum penalty—40 penalty units.

(2) For subsection (1), an organisation spends more than \$10000 in a financial year for the same political purpose and the same political object if—

(a) in the year, the organisation spends money for the political purpose on 1 or more occasions for the political object; and

(b) all of the spending added together is more than \$10000.

(3) The register must state the following for the spending—

(a) the nature of the spending;

(b) the amount of the spending;

(c) the political object to which the spending relates.

Differential standards of disclosure have the potential to reduce overall compliance and cause confusion. The interests of members of organisations, and the public interest in relation to political expenditure, are best served by common thresholds and standards for disclosure.

Recommendation 55

That reporting and disclosure thresholds for political donations be aligned with section 149 of the Fair Work (Registered Organisations) Act 2009 (Cth) and the requirements of the Electoral Commission of Queensland under state legislation.

Chapter 11: Queensland Industrial Relations Commission and the Industrial Court of Queensland

Tribunals are adjudicative bodies that make decisions on issues within their jurisdiction and resolve disputes.¹⁹⁵ Tribunals have some capacity to make binding decisions over parties and are deliberately created to remove certain findings from mainstream courts.¹⁹⁶ Tribunals should be independent of the executive government and act as an effective check on executive power.¹⁹⁷ This chapter examines the role of the Queensland Industrial Relations Commission (QIRC) and the Industrial Court of Queensland (ICQ). The Review recommends retaining the current jurisdiction of the QIRC with additional powers in relation to anti-bullying and workplace discrimination. Proposals are made to improve the accountability, operation and independence of the QIRC.

11.1 Tribunal functions

Researchers have typically defined tribunals as having four main functions: judicial or normative role; legislative or administrative function; facilitative or accommodative arbitration; and policing function.¹⁹⁸

Judicial role

Although tribunals can be classed as quasi-judicial, functions associated with settling disputes and determining arbitrations are akin to a judicial role.¹⁹⁹ Further, there is an increasing reliance on the doctrine of precedent in relation to these types of matters.²⁰⁰ This position clearly applies to practice within the QIRC. The change in practice has been as a result of the increasing reliance and use of legal practitioners within the sphere of the lay jurisdiction and the importance of providing certainty and stability within the scope of industrial relations law.

Legislative role

The Australian experience of tribunals has seen arbitrators adopt a more inquisitorial role, formulating principles that regulated the parties' relationships to benefit broader societal and public interests.²⁰¹

Facilitative arbitration

The role of the tribunal to seek compromises and to mediate/conciliate matters has been a vital function within the Australian tribunal experience. The Conciliations are been

¹⁹⁵ New Zealand Law Commission (2008) *Tribunal Reform*, Study Paper 20.

¹⁹⁶ Ibid.

¹⁹⁷ Ibid. Bostock C. (2011) 'The Effect of Ministerial Directions on Tribunal Independence' 66 *Australian Institute of Administrative Law Forum*, 33.

¹⁹⁸ Thornthwaite L. and Sheldon P. (2011) 'Fair Work Australia: Employer Association Policies, Industrial Law and the Changing Role of the Tribunal', *Journal of Industrial Relations*, 53 (5).

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid.

conducted on a case-by-case basis, taking into account the needs of all parties. In this regard, Thornthwaite and Sheldon note that:

[t]his role also points to crucial differences between the tribunal and courts: first, that industrial parties in the tribunal have continuing relationships with each other and with tribunal members; and second, while ritualized and adversarial, that the arbitral process has also involved considerable compromise and negotiation.²⁰²

Policing function

Finally, there has been a clear development in the tribunal's role in the policing of the behaviour of the parties. The range of the policing related matters include: enforcing orders; registration of industrial organisations, industrial action (inclusive of protected industrial action), compliance with increasing provisions around good faith bargaining; union governance and compliance with awards and certified agreements.²⁰³

11.2 Queensland Industrial Relations Commission functions

Table 11.1 denotes the current functions and workload of the QIRC and shows matters filed between 2011 and 2014.

Table 11.1 Queensland Industrial Relations Commission Matters, 2011-2014

(from Queensland Industrial Relations Commission Annual Reports)

	Number of Matters			
	2011	2012	2013	2014
Industrial Matter				
Award Matters (includes award modernisation)	36	29	20	108
Enterprise Agreement Matters	17	79	76	13
Unfair Dismissal	83	85	115	136
Long Service Leave - payment in lieu of notice	166	178	206	215
Disputes	17	312	5	62
Wage claims/superannuation	24	19	31	16
Industrial Organisation Matters	132	105	121	105
Protected Action Ballot Orders	0	0	494	148
Public Service Appeals/Matters	0	0	56	96
Trading Hours Matters	14	11	22	15
Q-Comp Appeals	315	492	409	127
Appeals against Workers' Compensation Regulator	0	0	0	244
Apprentice and Trainee Matters	13	9	10	10
Miscellaneous Matters	115	126	138	145
TOTAL MATTERS	932	1445	1703	1440

Industrial relations matters

²⁰² Thornthwaite L. and Sheldon P. (2011) 'Fair Work Australia: Employer Association Policies, Industrial Law and the Changing Role of the Tribunal', *Journal of Industrial Relations*, 53 (5).

²⁰³ Ibid.

There is a need for an independent tribunal to deal with traditional industrial matters, including award and enterprise bargaining matters, unfair dismissals, industrial disputes, long service leave and the regulation of industrial organisations. These matters will continue as key functions of the QIRC.

The QIRC continues to hear and determine applications to vary trading hours and applications for extended trading hours. Trading hours' applications usually involve lengthy hearings with detailed submissions from concerned parties and onsite inspections. While the number of trading hours' applications is relatively small (15 in 2013-2014), they tend to be resource intensive.²⁰⁴ While they are relevant in terms of the workload of the QIRC, issues related to trading hours were not considered as part of this Review.

In addition to the *Industrial Relations Act 1999* (Qld) (IR Act), the QIRC holds a number of powers in relation to the *Workers' Compensation and Rehabilitation Act 2003* (Qld), the *Public Service Act 2008* (Qld) (PS Act) and the *Work, Health and Safety Act 2011* (Qld) (WHS Act).

Appeals against decisions of the Workers' Compensation Regulator

Since November 2012, the QIRC has had sole responsibility for hearing appeals from the Workers' Compensation Regulator (the Regulator) (formerly QComp). These matters constitute approximately 18 per cent of the total matters filed in the QIRC and about 80 per cent of the workload of commissioners.

Once workers or employers receive a workers' compensation decision from WorkCover or one of the self-insurers, they are able to seek a review of certain decisions by lodging an application for review with the Regulator. The Regulator conducts an impartial administrative file review and issues a fresh decision either confirming or setting aside the insurer's original decision. Workers or employers aggrieved by the Regulator's review decision may appeal the matter to the QIRC (appeals against decisions of the Regulator). The QIRC examines the entire matter as a fresh claim taking into account various factors which were not able to be considered at the review stage.

Annually, approximately 300 appeals are lodged. Around 75 proceed to hearing. Of those that proceed to hearing, approximately 19 to 25 cases will be appealed to the ICQ.

Generally, stakeholders supported the continuation of appeals against decisions from the Workers' Compensation Regulator being heard by the QIRC, although concerns were expressed about the timeliness of some decisions. The experience of the Commissioners in employment related matters was considered relevant in the appeals against decision from the Workers' Compensation Regulator jurisdiction. Since 2012, the QIRC has further developed its skills and expertise and has begun to streamline the processes.

The Regulator indicated to the Review that the effectiveness of the QIRC's processes and structure has enabled about 75 per cent of appeals to be resolved without having to go to hearing. The appeal process was seen as straight forward and efficient, with the majority of appeals progressing from initial lodgement to hearing in under six months. The Regulator

²⁰⁴ Industrial Court of Queensland, Queensland Industrial Relations Commission (2014) *2013 – 2014, Annual Report of the President of the Industrial Court of Queensland*, Queensland Industrial Registry.

argued that when compared with many other jurisdictions and litigation processes, the processes are timely and assist to minimise costs, disruption and uncertainty for workers and employers.

With around seven per cent of the lodged appeals progressing to the ICQ, the QIRC has demonstrated a low disputation rate for an appeal body.

Public service appeals

In July 2012, QIRC members were appointed as appeals officers under the *Public Service Act 2008* (Qld) (PS Act) for the purpose of hearing and deciding appeals against certain decisions which affect public servants. In January 2013, the public service appeals function was transferred administratively from the Public Service Commission to the QIRC.

During the 2013-14 reporting period, there were 94 public service appeals (see Table 11.2). Some 43 appeals related to disciplinary decisions and law and 21 to transfer decisions. Only about half of the matters lodged required a formal hearing.

Table 11.2: Public Service Appeals heard in the Queensland Industrial Relations Commission, 2013-14

Type of Appeal	No. of appeals
Appeal against actions under a directive (s194(1A))	9
Appeal against a disciplinary decision (s194(1B))	43
Appeal against a promotion decision (s194(1C))	15
Appeal against a transfer decision (s194(1D))	21
Appeal against decision under another Act (s194(1E))	2
Appeal against a decision under another Act (s194(1F))	4
Total	94

Recommendation 56

That the Public Service Act 2008 (Qld) should be amended to formally recognise the transfer of the Public Service Appeals functions to the Queensland Industrial Relations Commission.

Jurisdiction of the tribunal

Overall, the Review concluded that the QIRC should retain its jurisdiction over state and local governments, appeals against decisions from the Workers' Compensation Regulator, public sector appeals, employment claims under the Magistrates Court Act 1921 (Qld) and right of entry issues under the WHS Act.

The Australian Workers' Union (AWU), Queensland Council of Unions (QCU) and Building, Engineering and Maintenance Unions (BEMS) argued that the jurisdiction of the QIRC should be expanded, along the lines of the new arrangements for South Australian tribunals, to include a broader range of work related matters including worker rehabilitation,

apprentices and trainees and workplace health and safety. The Review acknowledges these views.

However, the Review considers that these matters fall outside the scope of this Review. Fundamentally, this is a review of industrial relations laws and not a review of work health and safety, workers' compensation or apprentices and trainee laws. The AWU, QCU and BEMS unions expressed their strong disappointment at the decision to not include these matters as part of this Review and indicated that they will raise issues related to the legislation covering apprentices and trainees, workers' compensation and workplace health and safety with the Queensland Government.

Recommendation 57

That the Queensland Industrial Relations Commission retain jurisdiction for industrial relations matters affecting state and local governments, appeals against decisions of the Workers' Compensation Regulator, public sector appeals, employment claims under the Magistrates Court Act 1921 (Qld) and right of entry issues under the Work Health and Safety Act 2011 (Qld).

Workplace anti-discrimination matters

Currently, where a complaint made to the Anti-Discrimination Commission Queensland (ADCQ) is not settled at the ADCQ, the matter may be referred to the Queensland Civil and Administrative Tribunal (QCAT) for determination if the complainant wishes. The Queensland Law Society (QLS) and the Bar Association of Queensland (BAQ) argued that responsibility for hearing of such matters, where they relate to the workplace or employment, should be transferred to the QIRC, with the rationale being similar to that for workers' compensation appeals. The QIRC has expertise in employment and workplace issues.

However, the LGAQ expressed concerns around any proposed changes, especially in relation to the changes inadvertently allowing parties to have their matter heard in both QCAT and the QIRC. This is not the intention of the Review.

The Review considers that the jurisdiction for workplace/employment related anti-discrimination matters should be wholly transferred from QCAT to the QIRC to prevent jurisdiction shopping. The Reference Group was advised that the annual number of workplace/employment relations discrimination cases heard in QCAT was less than 20 in most years and that the workload could be absorbed within the existing capacity of the tribunal.

This recommendation is also triggered as a minor and consequential amendment flowing from recommendation 44 in Chapter 9 to provide 'general protections' to employees and employers against discrimination. To have some work/employment related discrimination matters heard in QCAT and others heard in the QIRC would lead to confusion about the appropriate jurisdiction. Consolidating all work/employment related discrimination matters into the QIRC will reduce red tape, improve the administration of the law and provide greater clarity to affected parties about their rights and avenues of redress.

Recommendation 58

That the Queensland Industrial Relations Commission have exclusive jurisdiction for workplace/employment related anti-discrimination matters.

The proposal to extend the jurisdiction of the QIRC in relation to workplace bullying has been canvassed in Chapter 7.

11.3 Independence

The well-established principles of desirable characteristics of a high functioning tribunals include:

- public accessibility, both in terms of cost and public awareness of opportunities to seek redress through tribunals
- membership and expertise appropriate to the subject matter
- actual and apparent independence
- procedural rules which secure the observance of natural justice, which are simple and less formal than those of the ordinary courts, and which will often be more inquisitorial than adversarial, depending on the nature of the case
- sufficient powers to carry out their functions, which are proportionate to those functions
- appropriate avenues for appeal or review of tribunal decisions, in order to ensure oversight and error correction
- speedy and efficient determination of cases.²⁰⁵

One of the most important attributes is tribunal independence. Structural independence helps insulate tribunals from interference from governments, non-government organisations, pressure groups and individuals.

The question of structural independence for tribunals is plagued by the reality that it is ultimately at the mercy of legislative discretion. Where this discretion is not exercised in an open and accountable way, it undermines public trust and confidence in the tribunal system. Finding ways to ensure openness, accountability and consultation on legislative change is essential to avoid any erosion of the perceived and actual independence of tribunals from the government departments which have administrative responsibility for enabling Acts.

Independence also goes to the question of whether a tribunal is, or is 'seen to be acting independently'. These are complex issues as disappointment with decisions can be a catalyst for commentary on, for example, perceived independence, consistency, or predictability.

During the Review, a number of stakeholders expressed concern at the lack of independence of some members of the QIRC. These views were genuinely held. It is critically important for tribunals to be independent in deed and appearance.

²⁰⁵ New Zealand Law Commission (2008) *Tribunal Reform*, Study Paper 20.

Some stakeholders, including the QCU, canvassed the benefits of the changing the structure of the QIRC and the possibility of the creation of a new tribunal or tribunals. However the Review concluded that independence and accountability could be strengthened through other mechanisms.

The issue of independence has been the subject of much commentary from judicial officers, academics and lay observers.

The test of impartiality is set out in *Ebner v Official Trustee in Bankruptcy* where Gleeson CJ, McHugh, Gummow and Hayne JJ said:

*... a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide.*²⁰⁶

In a Canadian case, *L'Heureux-Dubé and McLachlin JJ* said:

*It has been observed that the duty to be impartial "does not mean that a judge does not, or cannot bring to the bench many existing sympathies, antipathies or attitudes. There is no human being who is not the product of every social experience, every process of education, and every human contact with those whom we share the planet. Indeed, even if it were possible, a judge free of this heritage of past experience would probably lack the very qualities of humanity required of a judge. Rather, the wisdom required of a judge, is to recognise, consciously allow for, and perhaps to question, all the baggage of past attitudes and sympathies that fellow citizens are free to carry, untested, to the grave. True impartiality does not require that the judge have no sympathies or opinions; it requires that the judge nevertheless be free to entertain and act upon different points of view with an open mind."*²⁰⁷

In *Minister for Immigration and Multicultural Affairs v Jia Legeng* Hayne J set out a three-step analysis to determine the impartiality of a judicial decision making process:

*Saying that a decision-maker has prejudged or will prejudice an issue, or even saying that there is a real likelihood that a reasonable observer might reach that conclusion, is to make a statement which has several distinct elements at its roots. First, there is the contention that the decision-maker has an opinion on a relevant aspect of the matter in issue in the particular case. Secondly, there is the contention that the decision-maker will apply that opinion to the matter in issue. Thirdly, there is the contention that the decision-maker will do so without giving the matter fresh consideration in the light of whatever may be the facts and arguments relevant to the particular case. Most importantly, there is the assumption that the question which is said to have been prejudged is one which should be considered afresh in relation to the particular case.*²⁰⁸

This Review, while conscious of the concerns of some stakeholders, is strongly of the belief that legislative changes in response to perceptions held about individuals does not make for good public policy. The form of any institution should be based on the agreed functions of that body. Section 11.5 of this Chapter addresses how accountability mechanisms can and should be strengthened.

²⁰⁶ *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337 at 344 [6].

²⁰⁷ *R v S (RD)* [1997] 3 S.C.R. 484.

²⁰⁸ *Minister for Immigration and Multicultural Affairs v Jia Legeng* (2001) 208 CLR 507 at 564 [185].

With that said, the Review acknowledges that it is of critical importance to all parties involved in the industrial relations system for the QIRC (as a key institution in the industrial relations regime) and all Commissioners, to not only act independently but to be perceived to do so.²⁰⁹

Appropriate independence between the Government and the industrial relations tribunal is particularly important given the Government's dual role as employer and industrial relations legislator. The industrial relations reforms which occurred between 2012 and 2014 attracted criticism due to limited stakeholder consultation and in circumstances where significant reforms were ushered through in the Consideration in Detail stage. During the Legal Affairs and Community Safety Committee's consideration of the Industrial Relations (Fair Work Act Harmonisation No.2) and Other Legislation Amendment Bill 2013 (Qld), a union argued that:

*in the case of the government's role of employer ... separation is more necessary than in any other employer/employee relationship because it must preserve the integrity and independence of the parliament.*²¹⁰

Stakeholder concern was also raised about the ability of the Minister to issue a Ministerial Directive to the QIRC and erode its independence. The Honourable Peter Wellington MP issued a dissenting report noting his concern about the ability of the Minister to direct the QIRC and '*distort the balance of power too far towards the Government as the employer of public servants*'.²¹¹

11.4 Appointments

Process

During the course of this Review of Queensland's industrial relations framework, the State Government issued a discussion paper on the 'Review of the Judicial Appointments Process in Queensland'. The Hon. Yvette D'Ath in her foreword to the discussion paper noted:

Confidence in the expertise, independence and impartiality of the judiciary is essential to the proper functioning of government in Queensland. As one of the three independent arms of government within our parliamentary democracy, the judiciary interpret and apply the laws enacted by the Parliament, and act as a check and balance on the exercise of executive power.

This Government believes that the public will only share that confidence if the process for the selection and appointment of members of the judiciary can be seen to be transparent and genuinely consultative.

The policies and procedures for judicial appointments in the majority of Australian states and territories have been reviewed in the past decade. These reviews have led to the development and publication of protocols and guidelines for the appointment of the judiciary,

²⁰⁹ Stewart A., et al. (2015) *Submission to the Productivity Commission Inquiry into the Workplace Relations Framework Labour Regulation: Is There a Case for Major Reform?* March 2015.

²¹⁰ Queensland Nurses Union (2013), *Submission to the Legal Affairs and Community Safety Committee Related to the Industrial Relations (Fair Work Act Harmonisation No.2) and Other Legislation Amendment Bill*, October 2013.

²¹¹ Legal Affairs and Community Safety Committee, (2013), *Industrial Relations (Fair Work Act Harmonisation No.2) and Other Legislation Amendment Bill (Qld)*.

*and in some cases the establishment of advisory panels to assist Attorneys-General in the assessment of candidates for appointment.*²¹²

These comments are equally relevant to the appointment processes to the ICQ and QIRC, as they are to the range of other tribunals with judicial or quasi-judicial functions.

The Reference Group is of the strong view that a more formal consultation process to enhance transparency and accountability in the appointment process of the QIRC would be beneficial.

While the outcomes of the judicial appointments review are not known at this time, the Reference Group sees considerable merit in adopting similar protocols for industrial tribunals to those which the Government decides to apply to the Courts.

Recommendation 59

That similar protocols to those which the Government introduces for the court system be developed to guide future appointments to the Industrial Court of Queensland and the Queensland Industrial Relations Commission.

Balance in appointments

Balance in the composition of the QIRC establishes a perception of fairness and independence. Current QIRC members have employer, union or legal backgrounds. While work of the QIRC relates to the Queensland public sector and local government, no Commissioners have a background in public administration. The last senior public sector manager appointed to the QIRC was Commissioner Barry Nutter who retired from the QIRC in 1999. In the Fair Work Commission (FWC), there has been a tradition of appointing senior public servants to that tribunal.

Given the scope of the jurisdiction of the QIRC, the Government should consider appointing persons with senior public administration experience in the local or state government, from relevant unions and legally qualified persons with experience in the jurisdiction. This would provide greater and more relevant experiential balance to the tribunal.

Tenure and retirement age

The issue of tenure is also relevant to the independence of tribunals. The Productivity Commission Workplace Relations Framework Draft Report (PC Draft Report), recommended that FWC appointments be for five years with the possibility of merit based reappointment.²¹³

In Queensland, prior to the enactment of the IR Act, appointments to the QIRC were for fixed seven year terms. However, that arrangement proved controversial when the Government in 1997 did not reappoint Commissioner Ray Dempsey.

²¹² Queensland Government (2015) *Review of the Judicial Appointments Process in Queensland: Discussion Paper*, October 2015.

²¹³ Productivity Commission (2015) *Workplace Relations Framework, Draft Report*, p157.

The submissions of QCU and United Firefighters' Union Queensland (UFUQ) expressed a preference for 12 year terms for members of the QIRC.²¹⁴

The 1998 Industrial Relations Taskforce noted that there were mixed views on whether QIRC appointments should be fixed term or permanent. A similar diversity of views were expressed in this current Review. On balance, in 1998, the Industrial Relations Taskforce recommended tenure of appointment to ensure the independence of the tribunal.²¹⁵ Appointments are now made on a permanent basis, in line with other court appointments.

Institutional independence is intrinsically linked with structural guarantees to ensure that members are reasonably independent of those who appoint and remunerate them and that such tenure and remuneration cannot be reduced following appointment.²¹⁶ O'Connor commented on the position of judicial officers, noting that:

*[b]ecause judicial officers have secure tenure in their current appointment to the court, they are not financially dependent upon reappointment to the tribunal. They are in a strong position to withstand pressure from the government. Politically sensitive cases can be listed for hearing before them, to protect other members from any perceived threat to their reappointment.*²¹⁷

Similarly, Stewart *et al* argued that in the case of the FWC:

*The main check at present to partisan decision-making (as opposed to appointments) is the fact that members have tenure. A government cannot be sure that its appointees will not be independent and impartial once they are secure in the job, setting aside their previous allegiances – as we believe the overwhelming majority of FWC members are able to do in practice. But if a member's prospects of reappointment (or hopes of later governmental work or appointments) were to depend on the government of the day, or the party they expected to be in power at the relevant time, that would surely heighten the incentive to make decisions that would please those expected to make the reappointment decision.*²¹⁸

Overall, most members of the Reference Group consider that the current process of permanent appointments is consistent with the need for an independent tribunal. Accordingly, the Review does not recommend any changes with respect to the tenure of Commissioners.

During this Review, there were some suggestions that the age limit for compulsory retirement at 70 years of age should be lifted. The 70 year age limitation currently applies to all judges in Queensland. Members of the FWC must retire at 65 years of age. The Reference Group has not been convinced of the need to change the current requirements. Indeed, it was of the belief that consistency with other judicial requirements in Queensland is appropriate here as well.

Administrative responsibility

²¹⁴ UFUQ and QCU submission.

²¹⁵ Industrial Relations Taskforce (1998) *Review of Industrial Relations Legislation in Queensland, Industrial Relations Taskforce Report*, December 1998, Department of Employment, Training and Industrial Relations.

²¹⁶ *Canadian Pacific Ltd v Masqui Indian Band* [1995] 1 SCR 3 [104].

²¹⁷ O'Connor, P. (2013) *Tribunal Independence*, The Australasian Institute of Judicial Administration, p 65.

²¹⁸ Stewart A., et al. (2015) *Submission to the Productivity Commission Inquiry into the Workplace Relations Framework Labour Regulation: Is There a Case for Major Reform?* March 2015.

Currently, the Queensland Treasury has administrative responsibility for the Office of Industrial Relations, the IR Act and the QIRC and ICQ. Administrative responsibility for other tribunals, courts and QCAT rests with the Department of Justice and Attorney-General. The Registrar of the Supreme and District Courts has been appointed as Registrar of the QIRC and ICQ. The Reference Group recommends transferring the administrative responsibility for the QIRC and the ICQ to the Department of Justice and Attorney-General to enhance the independence of the tribunals from the department responsible for industrial relations laws.

Recommendation 60

That the administrative responsibility for the Industrial Court of Queensland and Queensland Industrial Relations Commission be transferred to the Department of Justice and Attorney-General.

11.5 Accountability

The independence of the Commissioners and their decision making processes can be enhanced through formal accountability mechanisms. The Reference Group is proposing two measures.

First, accountability can be improved through the development of key performance measures and benchmarks to gauge the tribunal's performance. Second, the development and use of a code of conduct applying to all participants in the QIRC (including commission members) can establish expectations about appropriate standards of behaviour.

Performance indicators

Key performance indicators demonstrate that a tribunal takes seriously its responsibility to meet statutory obligations and to monitor and evaluate performance.

Currently the performance of the courts in all jurisdictions in Australia is assessed and reported annually as part of the Report on Government Services.

The FWC uses the following key performance indicators:

- improve or maintain the time elapsed from lodging applications to finalising conciliations in unfair dismissal applications
- annual wage review to be completed to enable an operative date of 1 July
- improve or maintain the agreement approval time
- 95 per cent of financial reports required to be lodged under the FW(RO) Act are assessed for compliance within 40 working days.²¹⁹

The development of performance measures for the QIRC's processes could potentially be derived from the common objectives of dispute resolution tribunals such as fairness, justice, timeliness, economy, professionalism, accessibility, flexibility and responsiveness.²²⁰

²¹⁹ Fair Work Commission. (2015) *Annual Report 2013-14, Key Performance Indicators*, <<https://www.fwc.gov.au/annual-report-2013-14/3-performance-reporting/key-performance-indicators>> accessed 30 November 2015.

²²⁰ Fleming G. (2003) 'Tribunal Independence: Maintaining Public Trust and Confidence', Paper Presented to the 6th AIJA Tribunals Conference, Sydney, 6 June 2013.

Performance measures require agreed definitions of functions and activities to ensure consistence.

The ultimate aim of performance indicators is to improve accountability and transparency. As Fleming notes:

...accountability encompasses the totality of the process and outcome, and includes practical matters, reflecting on individual and systemic standards, such as:

- *the timeliness of the process*
- *the inclusiveness and fairness of practices and procedures, by reference to accessibility and flexibility*
- *the adequacy of the reasons, given in plain English so that the parties can understand them, regardless of whether they had legal representation;*
- *predictability and consistency in decision making*
- *public reporting, education and information on the tribunal's role*
- *clear and easily accessible systems to encourage public feedback on tribunal effectiveness*²²¹

The capacity to objectively assess the staffing requirements of the QIRC currently does not exist. The establishment of performance and workload data would provide an objective mechanism to assess the number of Commissioners needed to effectively and efficiently manage the QIRC's workload.

In order to enhance the principles of independence, it would be appropriate for the President to oversee the development of performance measures and to formally issue them. Accordingly, the Review recommends the development and use of performance indicators for the tribunal and court.

Recommendation 61

That a provision be inserted under the powers of the President enabling the President to develop and issue performance measures for the Commission.

Code of conduct

All parties in the industrial relations system are entitled to be heard and treated with fairness, courtesy and respect. This could be achieved through a code of conduct or code of behaviour. For practitioners, it could outline expected standards of behaviour and professionalism. For Commissioners, the code could detail the behaviour and standard of integrity and independence required. A code would enable the QIRC to regulate the actions of its own members without relying on external interference or legislatively imposed measures.

It should be noted that a provision for the QCAT president to develop a similar code is contained in the QCAT legislation.²²²

²²¹ Ibid.

²²² See for example the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) section 172 9(c)(i) which enables the president to develop a code of conduct for QCAT.

When developing such a code, consideration should be given to the Judicial Conduct Commissioner Bill 2015 which is currently progressing through the South Australian parliament which establishes a system of dealing with complaints about judicial officers. The objects of the Bill are as follows:

Section 3(1)- The objects of this Act are to enhance public confidence in the judicial system and to protect the impartiality and integrity of the judicial system by –

- (a) providing for the appointment of a Judicial Conduct Commissioner to receive and determine complaints regarding the conduct of judicial officers; and*
- (b) providing a fair process for dealing with such complaints that recognises and protects judicial independence; and*
- (c) enhancing the existing mechanisms for removal of judicial officers where they are unable or unwilling to appropriately discharge their duties.*

Section 2 - No power or discretion vested in the Commissioner or any other person by this Act may be exercised so as to impugn the independence of the judiciary.

Given the structure of the South Australian Industrial Relations Tribunals and the ability for definition of judicial office to be prescribed by the regulations, the Act will apply to South Australian Industrial Relations Tribunals.²²³

For the same reasons as for the performance measures, a code of conduct should be issued by the President.

It is recommended that the legislation provide the powers of the President enable the President to develop and issue a 'code of conduct/behaviour'.

Recommendation 62

That a provision be inserted under the powers of the President enabling the President to develop and issue a 'code of conduct/behaviour' for users of the Queensland Industrial Relations Commission and the members of the Commission.

11.6 Queensland Industrial Relations Commission structure

In the past, the QIRC used industry panels to allocate work involving particular industries to particular Commissioners. With the referral of private sector industrial relations to the Commonwealth, industry panels in the QIRC have had less salience. Four submissions to the Review suggested establishing streams in the QIRC to deal with particular functions.²²⁴

One possible method of structuring work within the QIRC would be the establishment of streams such as:

- workers' compensation/work health and safety stream
- collective stream
- individual stream.

²²³ Judicial Conduct Commissioner Bill 2015 (SA) cl 4 (g).

²²⁴ BEMS, QCU, QNU and QTU submission.

Specialist structures can assist to ensure the effective utilisation of each member's expertise and knowledge. However, given the small size of the QIRC, the flexibility to move Commissioners in accordance with work demands is critically important. Consequently, the establishment of panels or streams in the QIRC is not recommended.

The allocation of Commissioners to matters is appropriately a matter for the President, not legislation, to ensure the independence of the tribunal. The President is best placed to ensure that work is allocated on the basis of the nature of the matter, the expertise required, workloads, and leave arrangements. The President can ensure that matters requiring significant legal expertise are allocated to a legally qualified member.

Quality, consistency and legally appropriate decisions are the foundation of a stable industrial relations system. It allows litigants to make informed decisions about possible outcomes and remedies. While greater legal stability is generally preferred, absolute legal stability would produce a rigid legal paradigm impervious to changing societal norms and practices.²²⁵

The President has commenced a range of initiatives to improve the consistency and timeliness of decision making in the QIRC without creating rigidities. To refine and improve processes of the QIRC, the President has initiated a process of engaging 'users' to improve the processes and performance of the QIRC. The President is also developing bench books and practice directions, as used in the courts system, to improve consistency of decision making processes.

The Deputy Presidents could have a leadership role in the development of these improved processes and practices for the various functions.

It should be noted that the Registrar has commenced improving the efficiency of QIRC and ICQ processes, including the greater utilisation of modern technologies.

The Reference Group welcomes the initiatives of the President and the Registrar to achieve process improvements and greater consistency in decision making.

Nevertheless, some stakeholders have stressed the need for greater timeliness of QIRC decision-making, particularly with respect to workers' compensation appeals. Accordingly, the Review makes the following recommendation.

Recommendation 63

That the processes and procedures for dealing with appeals against decisions of the Workers' Compensation Regulator be streamlined, in consultation with user groups and including consideration of greater use of early intervention and alternative dispute resolution techniques.

²²⁵ Lindquist S. and Cross F. (2010) 'Stability, Predictability, and the Rule of Law: Stare Decisis as Reciprocity Norm', *The University of Texas School of Law Conference on Measuring the Rule of Law*, April 2010.

11.7 Legal representation

The IR Act at section 319 sets out the current legal representation arrangements for matters in the QIRC. Specifically, section 319(2) of the IR Act notes that:

(2) *The party or person may be represented by a lawyer if, and only if—*

(a) *for proceedings in the court—*

(i) *the proceedings are for the prosecution of an offence; or*

(ii) *all parties consent; or*

(iii) *the court gives leave; or*

(b) *for proceedings before the commission, other than proceedings under section 278²²⁶ or 408F²²⁷—*

(i) *the proceedings relate to a matter under chapter 4;²²⁸ or*

(ii) *all parties consent; or*

(iii) *the proceedings relate to a matter under chapter 3,²²⁹ or under section 275,²³⁰ 276²³¹ or 279²³², or under chapter 12,²³³ part 2 or part 16²³⁴ and, on application by a party or person—*

(A) *the commission is satisfied, having regard to the matter the proceedings relate to, that there are special circumstances making it desirable for the party or person to be legally represented; or*

(B) *the commission is satisfied the party or person can be adequately represented only by a lawyer;*

The IR Act does not allow for automatic legal representation in the QIRC. It is subject to consent of all parties or the QIRC's leave or in special circumstances which make it desirable for the person to be legally represented, or the person can only be adequately represented by a lawyer. Where all parties consent, legal representation is allowed for unfair dismissals.

The issue of whether representation ought to be permitted should not be seen in black and white terms. Flexibility is a key ingredient of procedural fairness. If the QIRC were not a lay-person's tribunal, an employee may be denied natural justice due to an employer being represented by lawyers. Equally, a party may believe that their case can be best, or only, presented by a lawyer and a denial of leave to be represented may represent a denial of natural justice. Significantly, the QLS submission noted the decision of DP Sams in *Peter White v Asciano Services Pty Ltd t/as Pacific National* on the topic:

The conduct of this case has plainly demonstrated (if that was ever necessary), my frequent observations after seventeen years on the Bench, concerning the efficient conduct of proceedings and the welcome assistance the Commission receives when matters are conducted by competent legal practitioners. This case was conducted dispassionately, efficiently and professionally. I am reminded of, and respectfully agree with, what Sir Anthony

²²⁶ IR Act s 278 relates to power to recover unpaid wages and superannuation contribution etc

²²⁷ IR Act s 408F relates to the Commission may order repayment of fees received by private employment agent.

²²⁸ IR Act Chapter 4 relates to freedom of association.

²²⁹ IR Act Chapter 4 relates to dismissals

²³⁰ IR Act s 275 relates to power to declare persons to be employees or employers

²³¹ IR Act s 276 relates to power to amend or declare void contracts

²³² IR Act s 279 relates to orders about representation rights of associations or employee organisations

²³³ IR Act Chapter 12, Part 2 relates to registration

²³⁴ IR Act Chapter 12, Part 16 relates to deregistration

Mason, Chief Justice of Australia, said in his 1994 address, *The State of the Judicature* (1994) 68 ALJ 125 at 127:

*'But, the exclusion of lawyers neither enhances nor accelerates the course of justice. If my long experience of reading the transcripts of proceedings in the Industrial Relations Commission and its predecessor the Conciliation and Arbitration Commission has any lesson to offer, it is that the presentation of cases by non-lawyers does not lead to clarity and speedy hearings; on the contrary, it is more likely to lead to confusion and to long, drawn-out proceedings due to the failure of non-lawyers to identify the true issues clearly. No doubt lawyers are a nuisance – they habitually find unexpected defects in legislation and administrative and other decisions by those who exercise power. But that is no reason for excluding lawyers.'*²³⁵

When taking into account the matters heard by the QIRC, some matters can be deemed as having complex legal or factual issues or there exists a conflict of evidence. The body of case law supports the proposition that in such cases, legal representation ought to be available. However, some contend legal representation can be inefficient and uneconomical.

A number of jurisdictions allow for limited access to legal representation. In the South Australian industrial relations jurisdiction, the presiding tribunal members must give permission for legal representation in voluntary or compulsory conferences. Permission is not required if the legal representative in the matter is an officer/employee of an employer, the United Trades and Labor Council, or a registered association. Permission is also not required for compulsory conferences if the matter has already been referred to the QIRC.

In the FWC, a party may seek permission from the member hearing the matter in the FWC to be legally represented. A member of the FWC may only give permission for legal representation in a matter before the FWC if it would enable the matter to be dealt with more efficiently, taking into account the complexity of the matter, the party is unable to represent himself or herself effectively and it would be unfair not to allow them to be represented or it would be unfair not to allow the person to be represented taking into account fairness between the parties.

The Reference Group recommends amending the legislation to provide access to limited legal representation consistent with the representation by lawyers as found in the FW Act (e.g. employees or officers of the parties' business and an organisation such as a union or an employer association). This, in turn, could create a more cost efficient system with the skills of in-house advocates and lawyers being relied on at first instance. Stakeholders should be consulted on when such representation might be approved and the criteria to be considered.

Further, the current provisions which enable legal representation by leave of the QIRC subject to the provisions which already exist in section 319(2)(b)(iii) should be extended to matters before a full bench of the QIRC (other than before a full bench established for arbitration arising out of the inability of parties to reach agreement during bargaining, where only the unresolved issues are to be considered at arbitration). In these circumstances, the current restrictions on external legal representation should continue as it is unlikely that in such circumstances complex legal issues would arise.

²³⁵ Peter White v Asciano Services Pty Ltd t/as Pacific National [2015] FWC 7466 at 3.

Recommendation 64

That the legislation allow for the legal representation, by leave, of parties in a proceeding before a full bench (other than a full bench established to arbitrate when collective bargaining has failed to result in an agreement) where it would allow the matter to be dealt with more efficiently (having regard to the subject matter of the proceeding), or it would be unfair not to allow the party to be represented because the person is unable to represent themselves effectively.

The Government, as an employer, appears regularly in the QIRC and ICQ. It also intervenes in matters before the industrial tribunals in the public interest. In both these roles it is often legally represented. The State is expected to behave as a 'model litigant' in the conduct of all litigation, including that in the QIRC and ICQ.

11.8 Appeal mechanisms

Traditionally in the court system, appeals have been a mechanism to ensure accountability. Both individuals and organisations have been reluctant for a variety of reasons to appeal matters in the QIRC and ICQ. A solution to this is to enact a system which is more in line with court practices around appeals. It is necessary to have the ICQ reflect the traditional court system in relation to a logical, progressive, hierarchical structure.

The QIRC has capacity to hear appeals without constituting a full bench (i.e. Commissioner hearing the appeal of another matter or the appeal of an industrial magistrate's decision) only on the grounds of error of law or excess or want of jurisdiction.²³⁶ Decisions of the QIRC may be appealed by leave to the full bench on a ground *other* than error of law, or excess or want of jurisdiction.²³⁷ For matters dealt with at first instance by the QIRC relating to grounds other than error of law, or excess, or want of jurisdiction, the full bench may give leave to hear the appeal only if it considers the matter important enough in the public interest, to give leave.²³⁸

A significant issue arises where an appeal of a matter can be heard in relation to an error of law or excess, or want, of jurisdiction, when, at first instance, the matter was heard by either a member of the QIRC who is legally qualified or an industrial magistrate who is also legally qualified.²³⁹ Appeal matters which require a solid understanding of the law and subsequent legal ramifications of decisions made ought to have a legally qualified member determine such issues.

Similarly, appeals against the decision of the full bench ought to be dealt with in terms of a hierarchical approach. Currently, the President of the ICQ has a dual role as a Justice of the Supreme Court of Queensland. The Review considers an appeal against the decision of the

²³⁶ *Industrial Relations Act 1999* (Qld) s 341.

²³⁷ *Ibid* s 342(1).

²³⁸ *Ibid* s 342(3).

²³⁹ Currently, a person with a law degree who has practised as either a barrister or solicitor of the Supreme Court for five years (minimum) can be appointed to the Magistrates Court with the extension of practise within other jurisdictions as applicable for becoming a Magistrate (section 4 *Magistrates Act 1991* (Qld)).

full bench ought to be heard by the President of the ICQ, exercising the jurisdiction and powers of the Supreme Court.

During the course of the Review, issues were raised concerning the operation of current appeal mechanisms from decisions of the QIRC. Specifically the difference in the various appellate functions in relation to appeals on questions of law, appeals regarding errors of fact, and those matters in which both are alleged (compared to the appeal mechanisms under the FW Act) was raised. These matters should be canvassed further in preparation of the new Act.

Recommendation 65

That the Act ensure that only the President of the Industrial Court of Queensland can hear an appeal from a full bench. The Act should allow an interlocutory matter such as stay applications to be heard by a Deputy President of the Court.

Additionally, parties seeking to appeal decisions of the President of the ICQ ought to have the ability to appeal to the Court of Appeal as per the current IR Act.²⁴⁰

Recommendation 66

That the Act provide for appeals from decisions of the Industrial Court of Queensland to the Queensland Court of Appeal.

11.9 Costs

As a threshold principle underpinning the rule of law, Australians, regardless of means, should have the right to access high quality legal services and effective dispute resolution mechanisms necessary to protect their rights or interests.²⁴¹ Cost is a critical element in access to justice. It is a fundamental barrier to those wishing to use the litigation system.

Together Queensland (TQ) noted in their submission that the relevant section relating to costs under the IR Act applies only to the applicant and that the provision should be made mutual.²⁴² In effect, this would apply to any party who caused costs to be incurred because of an unreasonable act or omission in connection with the conduct or continuation of the matter. This is consistent with other jurisdictions.²⁴³ As such, the Review recommends parity of costs allocation between the parties and other jurisdictions.

Recommendation 67

That the provisions in relation to the awarding of costs apply to any party who caused costs to be incurred because of an unreasonable act or omission in

²⁴⁰ *Industrial Relations Act 1999* (Qld) s 340.

²⁴¹ Australian Law Reform Commission (1995) *Costs Shifting – Who Pays for Litigation*, Report No. 75, Australian Law Reform Commission.

²⁴² *Industrial Relations Act 1999* (Qld) s 335(1)(a).

²⁴³ See for example, *Fair Work Act 2009* (Cth) s 400A, 611 and the *Queensland Civil and Administrative Tribunal Act 2009* (Qld) s 102.

connection with the conduct or continuation of the matter.

11.10 Electronic access

Currently the QIRC and the ICQ are not able to receive documents electronically. The *Electronic Transactions (Queensland) Act 2001* (Qld) (ETQ Act), which provides for use of electronic communication in particular transactions, does not apply to the QIRC and industrial courts as courts and tribunals are excluded under schedule 1 of the ETQ Act. Further, there are no provisions in the current IR Act that provide for the receipt of electronic documents.

A number of tribunals and Courts have provisions that deal directly with receiving electronic communications. This is generally done through including a provision in the rules of Court that allows for rules to be made with respect to the court or registry receiving electronic documents and the use of electronic documents. For example, including provisions in the rules about electronic documents is provided for in the *Uniform Civil Procedure Rules 1999* (Qld) by the *Supreme Court of Queensland Act 1991* (Qld), schedule 5, section 26(b) and in the *Queensland Civil and Administrative Tribunal Act 2009* (Qld), schedule 2, section 24. The Review has been advised that the Registrar is in the process of reviewing the QIRC processes and forms with a view to improving the ability for documents to be provided electronically.

Amendments will be required to provide the QIRC and the ICQ with the capacity to receive documents electronically.

Recommendation 48 in Chapter 9 of this report also addresses this issue.

Recommendation 48

That the legislation provide for any record or document to be maintained, provided or transmitted electronically.



Chapter 12: Contemporary and Emerging Issues

This chapter considers how best to deal with contemporary and emerging industrial relations issues in the state jurisdiction other than workplace bullying, domestic and family violence and gender pay equity, which were addressed in earlier chapters. The chapter highlights the issues associated with an ageing workforce and the rapid pace of technological change. The chapter discusses key demographic and technological changes with particular policy implications for state and local governments.

12.1 Emerging issues

In June 2015, the Committee for Economic Development Australia (CEDA) released a report exploring the major technological and demographic challenges for the workforce of the future.²⁴⁴ These challenges include the geopolitics of a multipolar world, climate change, resource insecurity, technological developments, the growth of virtual connectivity, urbanisation and demographic change. Private and public sector workplaces are both affected by these changes to varying degrees. The following discussion focuses on two issues of particular significance in the state jurisdiction: the ageing workforce and technological advances.

The ageing workforce

Queensland's population is ageing. The median age of Queenslanders is projected to rise from 36 years in 2006 to 39.3 years 2026 and then 42.8 years in 2056. The number of persons aged 45 to 65 years is projected to increase by 108 per cent in 2056. The group of persons aged 65 years and over is projected to be four and a half times larger in 2056 than in 2006. Significantly, anticipated increases in the number of children and older people will outnumber increases among those of working age in every decade from 2016 to 2056.²⁴⁵

The changing composition of the Queensland population has implications for the labour force and workplace relations in terms of labour force participation rates, skills shortages, work organisation, flexible work arrangements and workplace health and safety.

The Queensland government labour force is ageing rapidly and has an older profile than broader industry. The Public Service Commission (PSC) reports that the proportion of the permanent Queensland public sector (QPS) workforce aged 50 years and over increased from 28 per cent in 2004 to 37 per cent in 2014.²⁴⁶ The average age of retirement for permanent employees of the QPS continues to increase slightly each year. Even so, with nearly 20 per cent of QPS employees aged 55 years and over as at 2015, it can be expected that one-fifth of the QPS workforce will retire in the next five to ten years. Workforce ageing has implications for knowledge management, service delivery, recruitment and retention, succession planning and absentee management.

²⁴⁴ CEDA (Committee for Economic Development of Australia) (2015) *Australia's Future Workforce?*

²⁴⁵ Queensland Treasury, Office of Economic and Statistical Research (2011) *Queensland Government Population Projections to 2056: Queensland Statistical Divisions*, 2011 edition, Queensland Government.

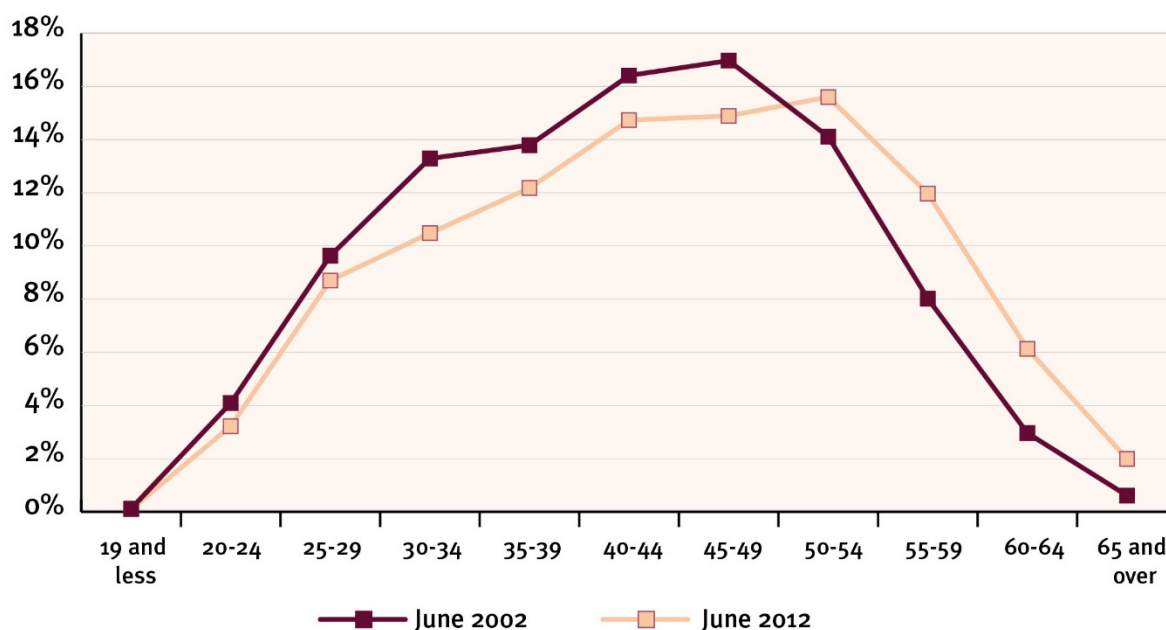
²⁴⁶ Public Service Commission (2015) *Queensland Public Sector Characteristics 2013/14*.

In the public sector, secondary school teachers, managers, social welfare workers, nurses, cleaners and carers are among those with high expected retirement rates and lower proportions of younger 'replacement' employees. A 2008 report of the Auditor-General of Queensland highlighted the issues that during the period 2008 to 2011 approximately 27,500 employees, or 47 per cent of the then Department of Education, Training and the Arts' permanent staff at the time were expected to retire. For Queensland Health, nearly 21,500 employees or 42 per cent of current permanent employees were expected to retire during the same period.²⁴⁷ There are particular challenges in addressing ageing in the education and health workforce due to the increased focus on locally-managed workplace relations in independent schools and hospital and health services.

The 2011-2012 Queensland Public Service Workforce Characteristics report prepared by the PSC also highlighted the issue of an ageing permanent public service. The following chart clearly shows the extent of the ageing workforce in the public sector over a decade (2002-2012)²⁴⁸.

Chart 12.1: Age distribution in the public sector between 2002 - 2012

Age distribution of permanent QPS workforce - headcount



Source: Queensland Public Service Workforce Characteristics: 2011-2012 (p15)

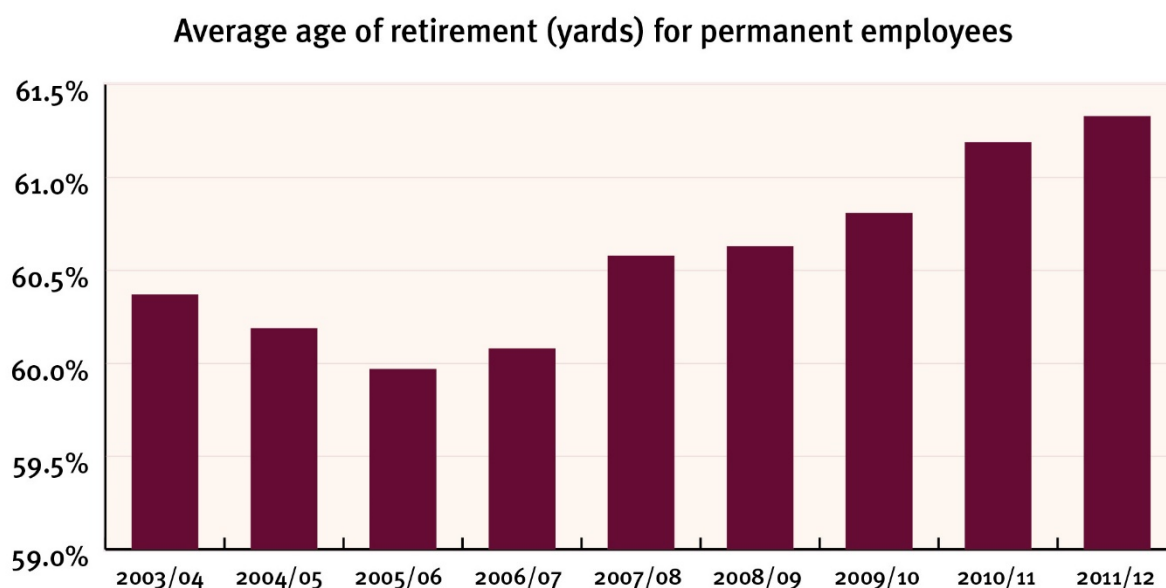
The reports also show an increase in the average retirement age since the global financial crisis in 2007 to 2008 which had remained relatively steady up to 2012. The average age of retirement continues to increase each year and in 2014 the average age of permanent

²⁴⁷ Auditor-General of Queensland (2008) *Report to Parliament No.6 for 2008. Follow-up audit of Workforce Planning at Departments of Education, Training and the Arts and Health, Incorporating Their Responses to an Ageing Workforce: A Performance Management Systems Audit*, Queensland Audit Office.

²⁴⁸ Queensland Public Service Workforce Characteristics 2011-2012

employees retiring increased to 61.6 years, the highest average age of retirement for permanent employees in ten years.²⁴⁹

Chart 12.2: Average age of retirement from 2003 - 2012



Source: Queensland Public Service Workforce Characteristics: 2011-2012 (P15)

The local government workforce is also ageing. On average, it has an older workforce compared with other government and industry sectors. Nationally, 37 per cent of the local government workforce is aged 50 years or over.²⁵⁰ The ageing workforce is not evenly distributed across the local government workforce or across the range of occupations in local government. Male employees are more likely to be aged over 50 years. The occupations of managers, carers and labourers/plant operators have a greater proportion of employees aged 50 years or more. It is more difficult to obtain data in relation to the age profile of Queensland local government workers but, in general, these national trends are likely to be reflected at the state level.

CEDA notes that these types of demographic trends will have implications for the demand and supply of skills as well as management challenges in the workplace. The report highlights the importance of the participation of women in the workplace in the future. The current gap in participation in the workforce between men and women is closer to 40 per cent, rather than the headline 12 per cent, due to high part-time employment of women.²⁵¹ Women have almost equal workplace outcomes to men until children are born and women transition to part-time work. CEDA also notes that the labour market is now a global market in many areas raising workplace issues of equity and diversity management.²⁵²

As previously indicated in 2006 and 2008, the Auditor-General of Queensland undertook a performance management systems audit of workforce planning at the (then) Department of

²⁴⁹ Queensland Public Service Workforce Characteristics 2013/14

²⁵⁰ Australian Centre of Excellence for Local Government 2015 *Profile of the Local Government Workforce 2015*

²⁵¹ CEDA (Committee for Economic Development of Australia) (2015) *Australia's Future Workforce?*

²⁵² Ibid.

Education, Training and the Arts and the Department of Health. It considered how these departments were dealing with the challenges of an ageing workforce and the systems in place to minimise the potential effect on their agencies. In October 2008, the Queensland PSC released a guide for the Queensland public service about managing an ageing workforce.²⁵³ This was accompanied by an ‘experience pays’ recruitment and retention strategy for mature-age employees. The current Queensland public sector inclusion and diversity strategy 2015-2020 developed by the PSC includes the need to expand and embed strategies to attract and support older workers and share and retain their knowledge.²⁵⁴

The PSC commented that the issue of flexible working arrangements intersects with a number of other contemporary and emerging issues, including inclusion and diversity, pay equity and domestic and family violence. The PSC is undertaking a body of work aimed at increasing the awareness and uptake of flexible working arrangements.

Technological change

Some submissions to the Review highlighted the impact of technological change on the workforce as an area which current legislation is increasingly less able to address. The changing nature of employment will continue to pose challenges to legislators.²⁵⁵

CEDA predicted that the labour market will be fundamentally changed by the current scope and breadth of technological change.²⁵⁶ The pace of change will continue to increase.

CEDA identified how existing technologies such as cloud service, big data, the ‘internet of things’, immersive communications, artificial intelligence and robotics are having a widespread effect on the economy. These technologies, together with emerging technologies in the areas of machine thinking, digital technologies and the ‘sharing economy’, will continue to have widespread impacts on the global as well as national economies.²⁵⁷

In 2012, a Deloitte report warned of a wave of major and imminent disruption on how certain industries would operate and engage with their customers. The report analysed the impacts of digital disruption across 18 industries. The industries identified to be most affected in the near future were finance, retail trade, arts and recreation, professional services and information, media and telecommunications.²⁵⁸

Similarly, the recently released discussion paper by Andrew Leigh MP outlines the opportunities and threats to traditional workplaces and employment. The discussion paper

²⁵³ Public Service Commission (2008) *A Guide for the Queensland Public Service: Managing an Ageing Workforce*, Attraction and Retention Series: A Focus on People and Business, Queensland Government.

²⁵⁴ Public Service Commission, Inclusion and Diversity webpage index http://www.psc.qld.gov.au/about-us/about-the-public-sector/inclusion_and_diversity.aspx accessed 10 December 2015.

²⁵⁵ ALA and QTU submissions.

²⁵⁶ CEDA (Committee for Economic Development of Australia) (2015) *Australia's Future Workforce?*,

²⁵⁷ Ibid.

²⁵⁸ Deloitte (2012) *Digital Disruption: Short Fuse, Big Bang*, Building a Lucky Country #2, Business Imperative for a Prosperous Australia.

highlights that increased access to ‘peer to peer’ businesses and the rise of the ‘sharing economy’ have created a range of new workplace policy issues for governments globally.²⁵⁹

The Australian Council of Trade Unions (ACTU) has identified that these new models of work are contributing to the creation of a more ‘liquid’ workforce and creating significant challenges to workplace standards and fairness and traditional models of organising and bargaining.²⁶⁰ The ACTU has announced that it will meet to consider how best to investigate and respond to these issues.²⁶¹

CEDA notes that technological advances affect the way customers engage with businesses leading to changes in the organisation of businesses. Computers and robots already replace humans in routine operations in diverse settings. In the future machine-learning algorithms will encroach on roles previously seen as skilled jobs outside the domain of automation.²⁶²

The technological advances identified above have relevance for workplaces in the state industrial relations system. An illustration of this is the advent of digitised hospitals in Queensland – see case study.

A Case Study: Digitised Hospitals

(Source: Digital Hospital: Interactive. Informed. Optimised. A publication of Metro South Health)

“In November 2015 the Princess Alexandra Hospital (PAH) will become Australia’s first large-scale digital hospital. Becoming a digital hospital will put the PAH at the forefront of healthcare innovation and technology and will lead to better care for our patients.”

“As a digital hospital our clinicians and authorised hospital staff will document and access their patient’s medical information on computers instead of using paper files.”

“New digital bedside patient monitoring devices will automatically upload vital signs and observations, such as blood pressure, temperature and heart rate, directly to the secure electronic medical record.”

The Queensland Government has also released an eHealth Investment Strategy which is set to bring Queensland’s health system into the digital age. The strategy identifies future information, communication and technology (ICT) requirements – clinical systems, business systems, ICT infrastructure and the digital future of Queensland Health. An estimated 1000 jobs will be created with the progression and implementation of the eHealth initiatives detailed in the strategy. The PAH project will involve not only the upgrade of core infrastructure and new technology to support digital workflows, but also elements such as rapid access tap-on-tap-off for all computers, which will save clinicians

²⁵⁹ Andrew Leigh (2015) *Sharing the Future: Getting Policy Right in the Age of the App*, Federal Opposition Discussion Paper, Canberra, 24 March, 2015.

²⁶⁰ Toscano N. (2015) ‘ACTU to Campaign on Behalf of Workers in the “Sharing Economy”’, *Sydney Morning Herald*, 25 May 2015.

²⁶¹ ACTU (2015) ‘In the Rush to the Sharing Economy Let’s Not Give Up Workers’ Rights’, Media Release, 22 October 2015.

²⁶² CEDA (Committee for Economic Development of Australia) (2015) *Australia’s Future Workforce?*

30 minutes each day. There will also be additional technology to support digital workflows reducing the requirement for some paper applications, but having the ability to quickly transfer patient data and clinical notes between treatment teams will keep patients at the centre of the hospital's work. Queensland Health has announced that over the coming years, all Queensland hospitals will move towards this level of digitisation, making what happens at the PAH an important workplace model for the future.

What is clear from the above case study is that significant technological advances are already affecting state system workplaces. Digitised hospitals raise issues of skills shortages and the need for staff development and training and flexible work arrangements in order to meet the demands of new technologies. There is also the potential for increased monitoring and surveillance of employees and issues of privacy and security.

Additionally, these changes present challenges for the traditional industrial relations framework which has, at least in part, been directed towards providing certainty and stability for employers and employees. This is not to say that the scope and breadth of change discussed above is incompatible with the traditional industrial relations framework but it does present challenges as to how the system can best accommodate, and indeed, where appropriate facilitate change while maintaining and supporting fairness and balance. A common response to this challenge has to be to call for greater flexibility in the system. Increased flexibility can have mixed impacts on the labour force and in the labour market.

CEDA notes that changes in technology will affect the skill composition of the labour force. There has been steady growth in employment of high-skill workers, a large decline in the share of middle-skill workers and a smaller decline in low-skill workers. Technological change will continue to increase self-employment due to outsourcing by governments, businesses and households. The effects may increase the polarisation of the labour force between the highly-skilled, well-remunerated workers versus the lower-skilled workers in insecure and vulnerable jobs.²⁶³

As CEDA notes:

[W]hile the highly skilled will push for a better work-life balance, many others will experience increasing insecurity of employment and income. For some, this is already the case. Globally, 'vulnerable employment' (including self-employment) accounts for almost 48 per cent of total employment. Persons in vulnerable employment are more likely than wage and salaried workers to have limited or no access to social security or secure income. The number of people in vulnerable employment expanded by around one per cent in 2013, a rate of growth five times higher than it was during the years prior to the Global Financial Crisis.²⁶⁴

There is a need for a more thorough investigation of technological advances and the implications for the workforce and issues raised in this chapter. Those issues are global and of increasing importance and urgency. The Review considers that further research is warranted. Ideally this should occur at a national level.

At the state level, there is a need for greater attention to the issues and the development of a more integrated response across the Queensland public sector. For example, the state

²⁶³ CEDA (Committee for Economic Development of Australia) (2015) Australia's Future Workforce?, CEDA.

²⁶⁴ Ibid, p 93.

Department of Science, Information Technology and Innovation is currently undertaking a number of relevant initiatives including 'Advance Queensland' and a collaboration to develop Queensland's digital future. The 'Jobs now, Jobs for the future' initiative is the Queensland Government's employment strategy to boost jobs and create greater employment opportunities and includes fostering emerging and innovative industries. On 3 December 2015, a Queensland parliamentary inquiry was announced which will be established to investigate the practices of labour hire companies, allegations of sham contracting arrangements, visa abuse and how workers' rights can be better protected. The inquiry is due to report its findings in the first half of 2016.

Any investigations and research undertaken in this sphere will also be able to provide information and resources of relevance to the local government sector.

Recommendation 68

That the Minister support national research through the relevant ministerial council into the policy implications of the impact of demographic and technological changes (and digital disruption) on future workplaces.

Workplace change presents challenges and opportunities for both management and employees. The communication and management of change will be critically important in how well the public service is able to respond to issues such as an ageing workforce and technological change.

A recent report by the International Labour Organisation found that recent spending cuts for the public sector in Europe were typically decided hastily, notably under pressure of budgetary deficits with the objective of doing more with less. The priority has been on quantitative adjustments rather than structural reforms. The neglect of social dialogue in the reform process has been widely criticised. These policy choices had direct effects on the social side (increasing low pay and deteriorating working conditions among public sector employees) but also on the economic side (decreased human capital and poorer-quality public services). A number of public services, such as the UK, are now experiencing problems of attraction and retention of suitably qualified young staff. Such dynamics may well lower skills and human capital levels in public sector occupations.²⁶⁵

Chapter 3 highlighted the importance of the government as a model employer. Government needs to model behaviours and actions consistent with the aspiration of attaining productive and cooperative employment relationships. Arguably, nowhere is this more important than with respect to workplace change, particularly, given the scope and scale of anticipated technological advances. In that respect, the discussion in that chapter and the recommendations in relation to genuine workplace consultation are relevant to the consideration of contemporary and emerging industrial relations matters in the Queensland public service.

²⁶⁵ Vaughan-Whitehead D. (2013) *Public Sector Shock: The impact of Policy Retrenchment in Europe*, ILO.

Appendix 1: Membership list

The members of the Industrial Relations Legislative Reform Reference Group (the Reference Group) were:

Chair	Mr Jim McGowan AM
Industrial Relations Expert	Mr Tim Lyons
Academic Expert	Professor Gillian Whitehouse
Australian Industry Group	Mr Maurice Swan
Chamber of Commerce and Industry Queensland	Mr Nick Behrens
Local Government Association of Queensland	Mr Tony Goode
Bar Association Queensland	Mr James (Jim) Murdoch
Queensland Law Society	Mr Robert (Rob) Stevenson
Australian Workers' Union	Mr Ben Swan, represented by proxy Mr Mark Raguse
Queensland Council of Unions	Mr John Battams
Queensland Council of Unions	Ms Beth Mohle
Queensland Council of Unions	Mr Neil Henderson
Queensland Council of Unions	Mr Michael Ravbar
Queensland Council of Unions	Mr Graham Moloney
Department of the Premier and Cabinet	Mr Craig Wilson
Public Service Commission	Mr Robert (Rob) Setter, represented by proxy, Mr Peter McKay, for meetings other than the first meeting.
Department of Education and Training	Ms Cathy Heffernan
Queensland Health	Mr Dave Waters
Queensland Treasury	Ms Leigh Pickering
Office of Industrial Relations	Dr Simon Blackwood

Appendix 2: Media announcement April 2015

Treasurer, Minister for Employment and Industrial Relations and Minister for Aboriginal and Torres Strait Islander Partnerships The Honourable Curtis Pitt

Thursday, April 23, 2015

IR reforms to restore fairness in Queensland workplaces

Fairness will be restored in Queensland workplaces as the Palaszczuk Government rolls out a comprehensive raft of industrial relations reforms.

Treasurer and Industrial Relations Minister Curtis Pitt said the reforms would restore important safeguards for state and local government employees.

“Campbell Newman’s arrogant LNP government stripped away vital safeguards and conditions from Queensland’s public sector workers,” he said.

“They reduced job security and created a climate of uncertainty in workplaces throughout the State.

“They fundamentally altered the framework of negotiations to remove enterprise bargaining as the core of our system.

“They made it harder – near impossible – to bargain in good faith to maintain or expand many of the features of existing enterprise bargaining agreements.

“Our reforms will ensure the hard fought and won working rights of Queenslanders lost under the previous government are returned.

“This is in line with our election commitment to restore fairness to Queensland workplaces.”

Mr Pitt said the government’s IR reforms included:

- Reinstating employment security for public servants;
- Protections against the contracting out of government services;
- Restoring immediate right of entry provisions for WHS permit holders where there are suspected safety concerns;
- Restoring the independence of the Queensland Industrial Relations Commission;
- Re-establishing the Electrical Safety Commission; and
- Returning Labour Day to May from 2016.

“We’re reversing a number of significant changes the previous government made to the Industrial Relations Act 1999,” he said.

“These changes are necessary because Campbell Newman’s attacks on Queensland workers were so extreme and unfair, attacking the day-to-day conditions and take-home pay of hardworking Queenslanders.

“The LNP went further than any government in Queensland’s history in stripping away workers’ rights.

“They introduced changes under the guise of ‘harmonisation’ with Labor’s federal Fair Work Act. In reality, all of the employee rights contained in the Fair Work Act are out, while all the requirements and productivity clauses are in.

“They not only stopped workers from bargaining for their current rights, they also prevented workers from negotiating for their conditions in the future.”

Mr Pitt said the award modernisation process which commenced under the former government and had been suspended on 17 March.

“Further award modernisation was suspended until legislative amendments are in place that remove or amend award modernisation provisions and prohibitions on content in industrial instruments,” he said.

“This will allow parties to undertake a proper consideration of allowable material that should be contained within awards.

“Changes to legislation to be introduced shortly mean that awards that have had conditions stripped out under the guise of modernisation – such as local government – will be brought to an early end.

“In their current form, these laws can be used to strip out things like penalty rates and erode conditions that had previously been included in EBAs such as annual leave periods.

“I met with the Local Government Association of Queensland earlier this week to get a better understanding of their concerns on this issue.

“We will keep them informed as we progress these changes. My message to local councils is that bargaining on outstanding EBAs should be suspended until the legislative amendments are made.

“The award modernisation process will recommence in the second half of 2015, once the IR legislation is amended and awards already ‘modernised’ will be re-made to allow for new bargaining to commence.

“We’ll also establish an Industrial Relations Reference Group including academics, government and union representatives to undertake a wider review of the State’s industrial relations laws – which were last comprehensively reviewed in 1998.”

This Review will make recommendations to the Government for legislative reform for introduction in the first half of 2016.

Appendix 3: Media announcement 20 August 2015

Treasurer, Minister for Employment and Industrial Relations and Minister for Aboriginal and Torres Strait Islander Partnerships The Honourable Curtis Pitt

Thursday, August 20, 2015

Independent Industrial Relations review to target fair and balanced laws

Jim McGowan AM will Chair an independent reference group which will carry out the first major review of Queensland's industrial relations laws since 1998.

Treasurer and Industrial Relations Minister Curtis Pitt said the reference group would play an important role in delivering fairer IR laws in Queensland.

"Restoring fairness to Queensland's IR system was one of our key election commitments and we're already well on our way to achieving this," he said.

"We've already repealed the LNP's IR laws which attacked the day-to-day conditions and take-home pay of hardworking Queenslanders.

"The next step in this process will be a major and comprehensive review of the state's industrial relations laws and tribunals.

"Since the Commonwealth assumed responsibility for private sector IR in 2010, the main focus of the Queensland IR system has been the State's public sector workforce.

"That's why we need a reference group to consider the structure, functions and powers of Queensland's IR tribunals.

"The reference group will consist of industry representatives, lawyers, academics, unions and employer groups such as the Queensland Chamber of Commerce and Industry and the Australian Industry Group."

Mr Pitt said the review would also consider contemporary and emerging industrial relations matters.

"These will include workplace bullying, domestic and family violence, gender equality and work-life balance," he said.

"The review will also consider changes in standard working arrangements such as telecommuting.


"We need to hear recommendations for reform to put an end once and for all to the IR turmoil that existed under the previous LNP Government.

"Jarrod Bleijie and the Newman Government changed Queensland's IR laws no less than 12 times in three years, creating instability and uncertainty.

"That's why we want to hear input from stakeholders, government agencies and the community.

"We're going to ensure Queensland has a modern and effective IR system that serves the interests of both workers and employers."

Jim McGowan AM has a strong IR background, having previously served as Deputy Director-General of the Department of Industrial Relations and Director-General of the Department of Justice and Attorney-General.



He is currently Adjunct professor, School of Government and International Relations at Griffith University.

The reference group will report back to the Industrial Relations Minister by December.

Community input to the review can be made at: www.treasury.qld.gov.au/IRreview

Appendix 4: List of consultations with key stakeholders in the Queensland industrial relations system

Organisation	Date of Meeting/s
Academic Roundtable	7 October 2015 (S. Charlesworth, L. Colley, M. Smith, G. Stewart and G. Whitehouse) 23 October 2015 (A. Stewart and G. Whitehouse) 30 November 2015 (D. Peetz, A. Stewart and G. Whitehouse).
Australian Industry Group	8 October 2015 11 December 2015
Australian Workers Union	24 August 2015 23 September 2015
Bar Association	2 October 2015
Chamber of Commerce and Industry Queensland	30 September 2015 10 November 2015 11 December 2015
Department of Education and Training	9 October 2015
Local Government Association of Queensland	28 August 2015 26 October 2015 11 December 2015
President of the Queensland Industrial Relations Commission	24 August 2015 10 November 2015
Public Sector Industrial Relations	7 September 2015 2 November 2015
Public Service Commission	26 August 2015 2 October 9 November 2015
Queensland Council of Unions	28 August 2015 23 September 2015 18 November 2015 11 December 2015
Queensland Health	25 September 2015
Queensland Industrial Relations Commission	23 September 2015 10 October 2015
Queensland Law Society	30 September 2015
Queensland Police Commissioner	24 September 2015
Registrar of the Queensland Industrial Relations Commission and Industrial Court of Queensland	30 September 2015
Together Queensland	28 August 2015 25 November 2015
Workers' Compensation Policy Unit, Office of Industrial Relations	2 October 2015

Appendix 5: Schedule of the persons and organisations who made written submissions to the Review²⁶⁶

Australian Industry Group

Australian Lawyers Alliance

Australian Workers' Union

Brisbane City Council

Building, Engineering and Maintenance Unions (CFMEU, ETU, PGEU and AMWU)

Chamber of Commerce and Industry Queensland

Confidential – Individual

Confidential – Organisation

Dr Shalene Werth, University of Southern Queensland

Local Government Association of Queensland

Dr Meg Smith, University of Western Sydney

Queensland Council of Unions

Queensland Law Society

Queensland Nurses' Union

Queensland Teachers' Union

Professor Sara Charlesworth, RMIT University

Together Queensland

United Firefighters' Union of Australia, Union of Employees Queensland

United Voice

Work and Family Policy Roundtable

Working Women Queensland

²⁶⁶ There were some submissions received from individuals which have not been published.

