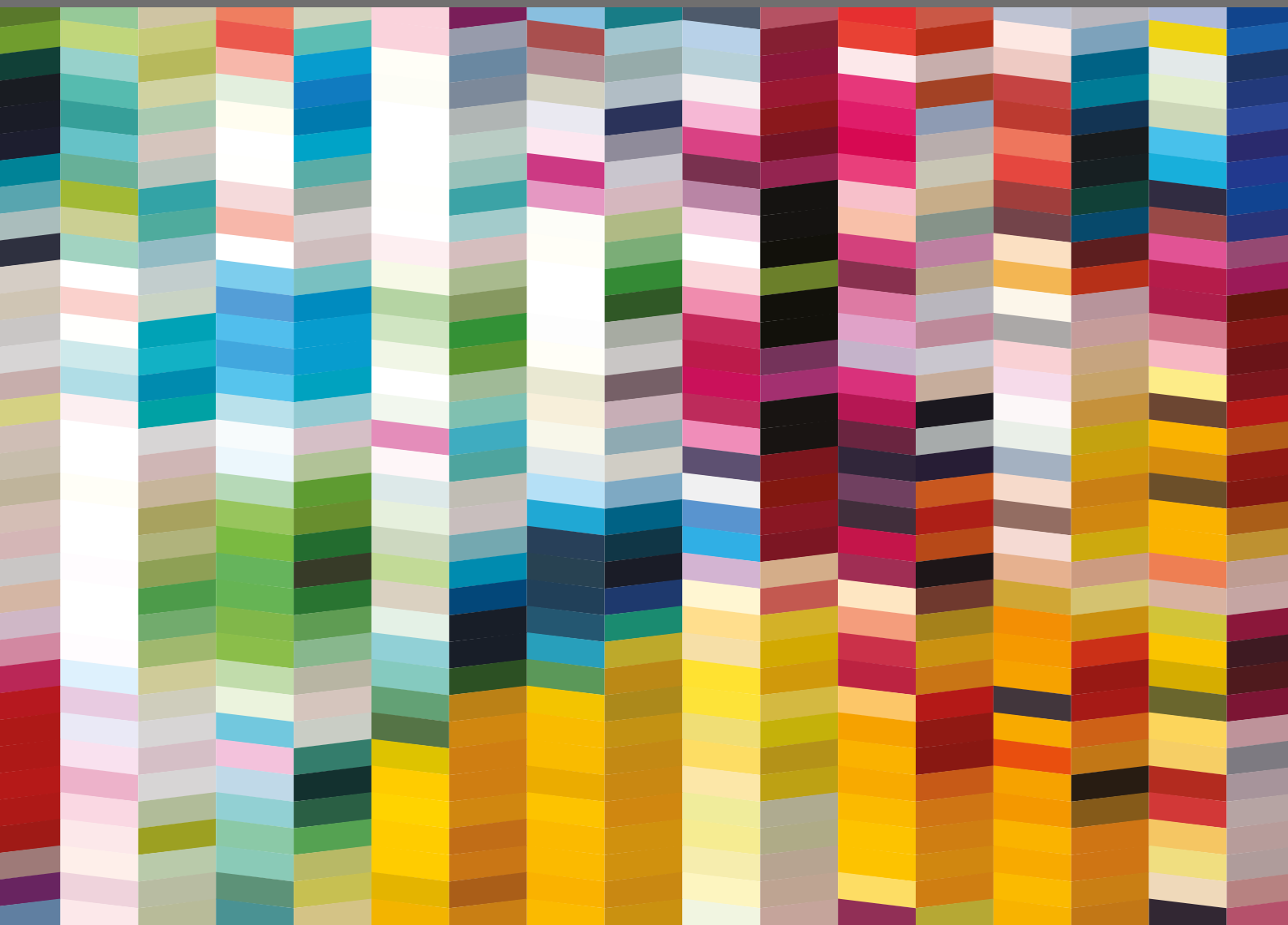


# A fair and responsive public service for all

INDEPENDENT REVIEW OF QUEENSLAND'S  
STATE EMPLOYMENT LAWS – MAY 2019

Report to the Honourable Anastacia Palaszczuk MP, Premier of Queensland



INDEPENDENT REVIEWER  
Peter Bridgman BA (HONS) LLB (HONS) FIML



**Queensland**  
Government

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3 May 2019

The Hon Anastacia Palaszczuk MP  
Premier and Minister for Trade  
1 William Street  
Brisbane  
QUEENSLAND 4000

Dear Premier,

In September of last year, you commissioned me to conduct an independent review of Queensland's public employment laws. I am pleased to attach my final report.

Over the past seven months, I have held almost a hundred meetings and workshops, connecting with an estimated five hundred stakeholders.

There are significant problems and issues about the employment laws and practices that need resolution for a fair, responsive and inclusive public sector.

The system is long overdue for maintenance and repair.

Particular challenges include placing the employment relationship at the centre of why government hires people, and requiring a positive performance framework based on the reality of high-quality employees striving to serve the community and the government well. Other recommendations are about addressing gender equity, improving equal opportunity, streamlining discipline and strengthening the whole sector to help deliver more consistency in the employment experience and high quality governance of Queensland public services.

I would like to acknowledge and thank everyone who contributed to the review through provision of information, attending workshops, providing formal feedback or simply sharing their expertise and lived experiences. This review is all the richer for their support and assistance.

I would also like to particularly thank your Office, the Department of the Premier and Cabinet and the Public Service Commission for their dedication and commitment to the review.

Yours sincerely,



Peter Bridgman  
Independent Reviewer  
BA (Hons) LLB (Hons) FIML

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## Terms of reference

Queensland Government

### Review of public sector employment laws – *A Fair and Responsive Public Service for All*

#### Purpose

The *Public Service Act 2008* and other laws, policies and procedures establish the framework for employment and management of the public service and other public sector employees.

The Government is committed to ensuring that the public sector is a fair employer and that employees are responsive to the needs of the community and the government.

The review is to consider the laws, policies and procedures of employment in the Queensland public sector, and report to the Premier on any recommended changes to the them to ensure the Queensland public sector is fair and responsive, an employer of choice, and a leader in public administration.

#### Terms of reference

1. The review will examine the laws, policies and relevant procedures governing public employment in Queensland including the *Public Service Act 2008* and other legislation about employment, management and ethical obligations of employees in government entities.

##### Exclusions

- (i) Employment in entities that are not government entities for s.24 of the *Public Service Act 2008* (eg local government, parliament, Government House, courts, police officers, school councils, government owned corporations).
  - (ii) Employment under the *Ministerial and Other Office Holder Staff Act 2010*.
2. The review will have regard to how legislation ensures:
    - (a) delivery of the government's objectives;
    - (b) the government's commitment to Westminster principles in public employment;
    - (c) merit in public employment;
    - (d) the outcomes of the 2015 review of the *Industrial Relations Act*;
    - (e) the public sector is:
      - (i) a fair employer that manages capably and consistently;
      - (ii) responsive to the needs of government and the community;
      - (iii) diverse;
      - (iv) focused on professional and non-partisan service delivery;
      - (v) able to give frank and fearless advice;
      - (vi) efficient and effective and provides value for money.
  3. The review of the legislation is to consider the following:
    - (a) fairness in management of employees;

- (b) employees' rights and obligations;
- (c) responsiveness in providing services to the community and to government;
- (d) integrity and impartiality in providing services and in supporting policy development and implementation;
- (e) continuous improvement, innovation and responsiveness;
- (f) promoting the government as an employer of choice;
- (g) equality of employment opportunity, diversity that reflects the community, and equity of pay and other conditions; and
- (h) the role of the Public Service Commission, other government agencies and the Queensland Industrial Relations Commission for public employment matters.

### **Process**

The review will be conducted by an independent reviewer supported by a secretariat from the Department of the Premier and Cabinet. The reviewer may request that additional expertise be provided to assist the review.

The reviewer may receive submissions from stakeholders, including in confidence.

A final report will be provided to the Premier by the end of March 2019 including details of recommended legislative changes and the form and nature of institutions to support the objectives of a fair and responsive public service for all. The final report may include recommendations about issues to be addressed following conclusion of the review.

## A model for the Queensland public sector

This report finalises an intensive review of public sector employment laws in Queensland and recommends changes that include different language and concepts about how and why people work for the State Government in its various guises. The following model and table of key concepts and terms bring together these new ideas for *A fair and responsive public service for all* to help readers navigate the proposals.

The model is based on the recognition that the public service can broadly be categorised as being either part of the public health system, the public education system or ‘the rest’, comprising other government departments and agencies. To one side sit other systems that are either outside the scope of this review (e.g., Queensland Police Service) or are subject to different arrangements (e.g., TAFE Queensland, Government Owned Corporations).

6 In the model, statutory bodies sit either within individual portfolios or to one side as ‘independent systems’. In reality, very few statutory bodies operate as independent systems – most sit within the

purview of the portfolio, carrying out their functions with their legislated degree of independence from ministerial direction but dependent on the portfolio for administrative (HR, finance, ICT, policy, and other ‘corporate’ services) support and responsible to the Parliament through the portfolio minister.

Consequently, while many statutory authorities operate their own employment systems, they are all ultimately subject to the same public sector system management.

Importantly, this review seeks to put the employee at the heart of this system (see Figure 2). It is built on the premise that governments rely on employees working in structures rather than the structures themselves to deliver services that benefit Queenslanders.

The model, then, is based on a matrix system – vertical delivery systems (health, education, other departments and programs) supported by horizontal thematic or support systems (such as policy, finance, human resources) that contribute to effective delivery of programs and services (see Figure 3).

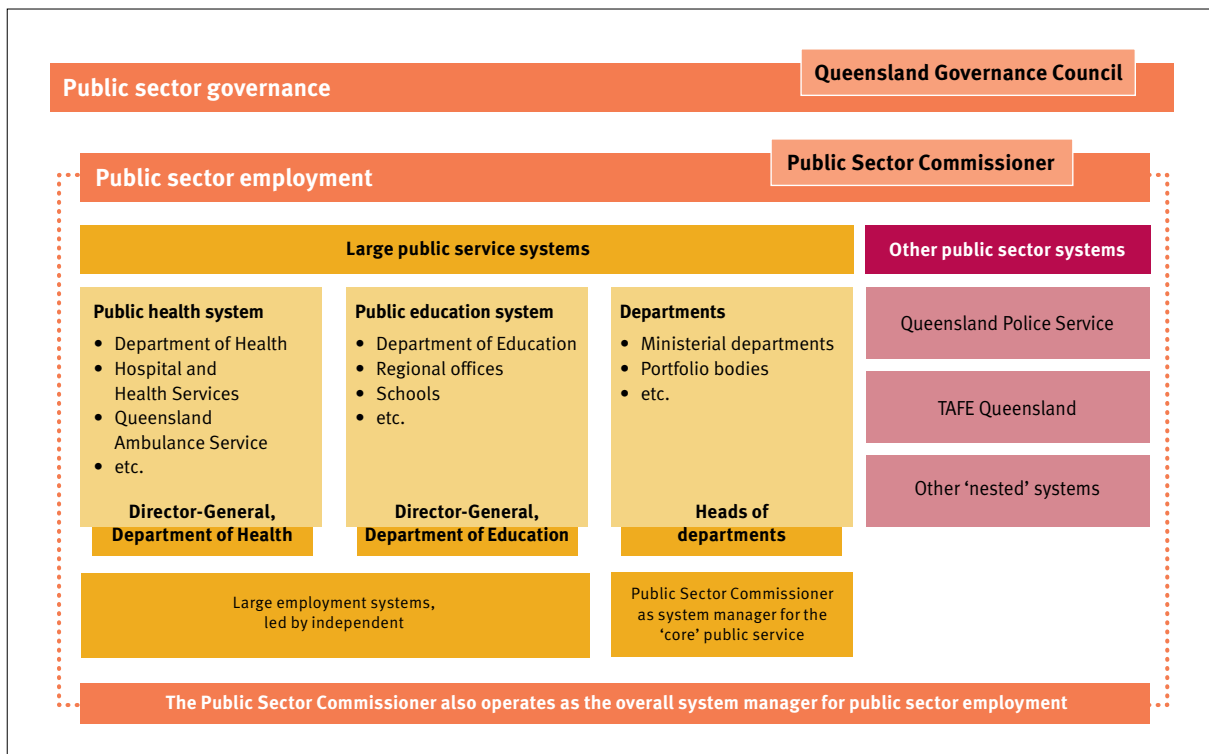


Figure 1: Public Sector Governance – a proposed model.



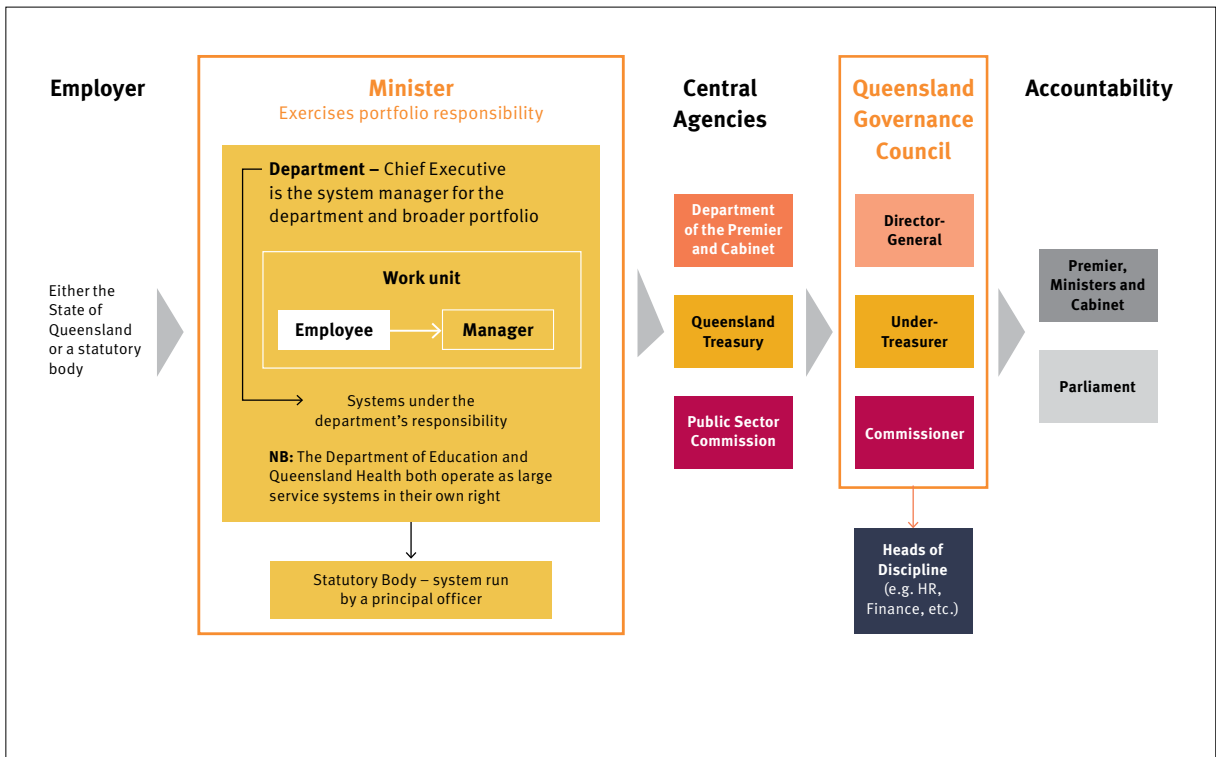


Figure 2: Putting employees at the centre of the public employment system.

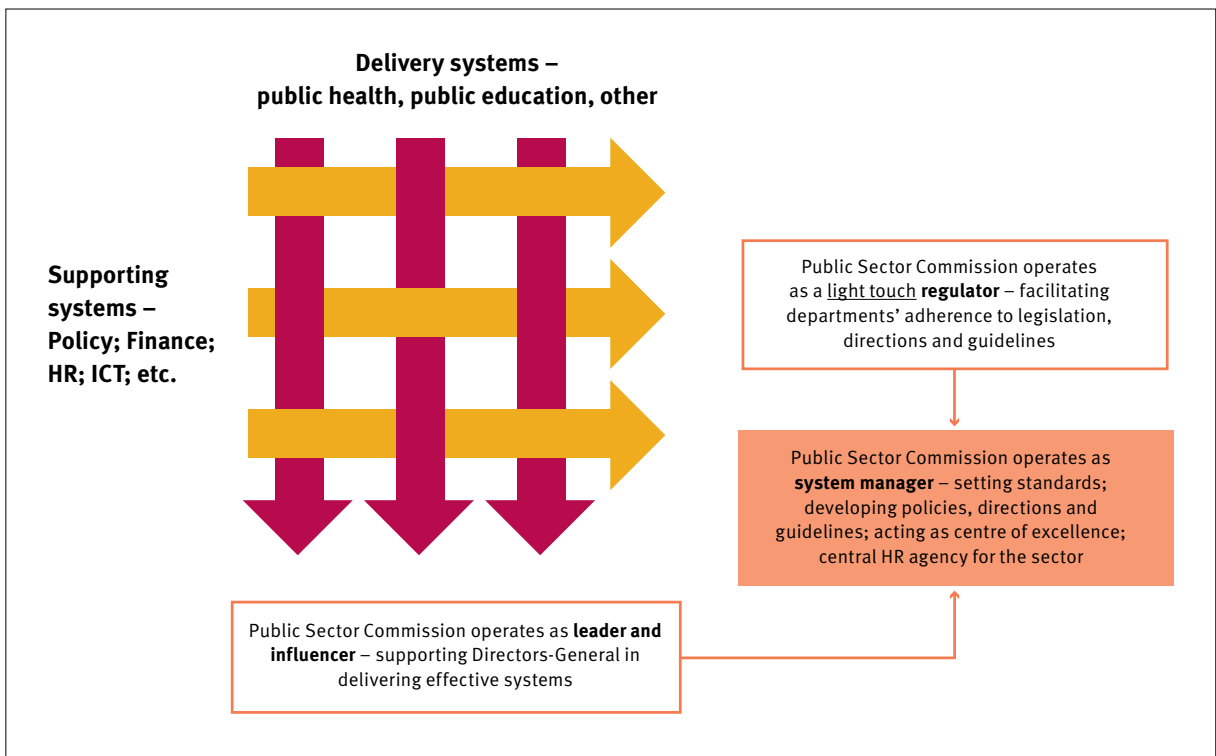


Figure 3: A matrix approach to systems.

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## Key concepts and terms

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<b>Employee</b>	<p>A person employed by the State under the new Act or another Act, or by a state entity under its Act, to work in a department or state entity. Does not include local governments or Government Owned Corporations.</p> <p><i>Replaces public service officer, public service employee, general employee and some other terms.</i></p>
<b>Employer</b>	<p>Either the State of Queensland or a state entity with separate employing power (whether representing the state or not).</p> <p><i>No precise counterpart in Public Service Act 2008 but see section 219(2); Issues Paper pages 11–12.</i></p>
<b>Chief executive</b>	<p>The head of a government department by whatever title designated by Administrative Arrangements Order, appointed by the Governor in Council as a chief executive and assigned to a particular department by the Premier.</p> <p><i>No change.</i></p>
<b>Principal officer</b>	<p>The head of an entity that is not a department, including the head of an administrative entity under a department that is an independent employment system, by whatever title. Appointed as principal officer by the chief executive of the department.</p> <p><i>Compare head of public service office and sundry other titles under numerous Acts.</i></p>
<b>Administrative entity</b>	<p>An organisation that has no separate statutory basis that is still part of a department but managed as an independent employment system by a designated principal officer for the entity. An administrative entity is created by the Governor in Council (including in an Administrative Arrangements Order) but is part of a department.</p> <p><i>New term.</i></p>
<b>Portfolio</b>	<p>All the departments and state entities (statutory bodies and administrative entities) under a minister.</p> <p><i>New statutory term, but well understood generally.</i></p>
<b>System</b>	<p>An interconnected network of people and things (e.g., office space, equipment, services) working together, and the rules, procedures and principles for getting things done, both as a whole and in each part. Parts might be sophisticated enough to be systems themselves (such as departments that are part of the larger public sector, a school that is part of the state education system).</p> <p><i>New term in this context. See <a href="#">section 9.3</a> for detail.</i></p>
<b>Employment system</b>	<p>A system for managing employees and resources to deliver services to the community and services and support to the Government, as required by the Government.</p> <p><i>New term.</i></p>
<b>Large employment system</b>	<p>Employment system for (a) public health (b) state schooling (c) other departments and entities.</p> <p><i>New term.</i></p>

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<b>Independent employment system</b>	A system designated as independent and under a principal officer. <i>Comparable to public service office but different application.</i>
<b>System manager</b>	The chief executive of a department or principal officer of a designated state entity or administrative entity, responsible for organisation and management of an employment system. <i>New in context of Public Service Act 2008; currently used in Hospital and Health Boards Act 2011.</i>
<b>Large employment system manager</b>	A system manager of a large employment system or of a whole sector system. There are three of these: the Director-General Health (system manager under the <i>Hospital and Health Boards Act 2011</i> ); Director-General Education for state schooling, and the Public Sector Commissioner for all other employees employed under the new Act (compare current departments and public service offices). <i>New term.</i>
<b>Program</b>	A service or combination of services intended to deliver on government priorities. <i>New term.</i>
<b>Whole sector system</b>	System for management of (a) public policy and public governance (b) financial management and (c) public employment. <i>New term.</i>
<b>Department; government department</b>	An employment system declared by an Administrative Arrangements Order to be a government department under a chief executive. The primary support to the portfolio minister. <i>Compare department.</i>
<b>State entity</b>	An organisation created by a Queensland Act that employs people for state purposes. <i>Similar to government entity.</i>
<b>Public Sector Commissioner Public Sector Commission</b>	Central human resources agency for the entire public sector. The Commissioner is the system manager for public sector employment and large system manager for departments and other entities not under other large system managers. The Commission is the staff supporting the Commissioner who is head of the new entity. <i>New entity and office replacing Public Service Commission and commission chief executive. The four-member commission board is not replaced.</i>
<b>Special Commissioner (Equity and Diversity)</b>	Senior role in the Commission appointed by the Premier to focus on equity and diversity issues across the public sector. <i>New office.</i>
<b>Queensland Governance Council</b>	Oversight body for whole sector governance, integrating policy, people and money issues. <i>New body.</i>

<b>Employment Direction</b>	Binding rule made by the Industrial Relations Minister, the Public Sector Commissioner or a large employment system manager <i>Replaces Directives.</i>
<b>Binding policy</b>	Rules made by a chief executive or principal officer binding employees under the chief executive (department) or principal officer (independent system) <i>New term.</i>
<b>Case manager</b>	A person engaged by the Public Sector Commissioner to manage complex or intractable matters and those not progressing in a timely way, and in specified cases decide the matter. <i>New role.</i>

### **Employment and industrial relations**

The distinction between employment and industrial relations as legal topics can be confusing. ‘Employment’ as used in this report is not intended to encompass ‘industrial relations’ (public sector industrial relations in particular) currently managed in the Office of Industrial Relations.

#### **A note on references**

References to the *Issues Paper* refer to pages in the PDF version of the document:

[www.forgov.qld.gov.au/review-public-employment-laws](http://www.forgov.qld.gov.au/review-public-employment-laws).

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## Overview

This report is about managing public employment in Queensland. It recommends new ways to understand how and why government employs people, starting from the employee and the work they are needed for. This is a major shift from the current laws that start with institutions and their managers.

The recommended approach builds on:

- employees who are engaged and paid to do their work competently, responsibly, responsively and apolitically
- the purpose of government employment, which is to deliver services and run government well
- the system of government with ministers at the peak but also responsible to the Parliament and the electorate, supported by a responsive and inclusive public service
- employment systems that are coherent, flexible, fair and well led by chief executives and principal officers, respected for their competence and fairness
- coherent and consistent governance of the Queensland public sector.

The recommended model is informed by the following concepts:

- employees are fundamental and central to government
- there is a chain of responsibility from employees to their employer, the state
- managers must manage well
- employment and management are for the purposes of government
- leaders are responsible for the functioning of systems for employment and management
- very large systems such as health and education need special management
- ministers, to be responsible, must be supported in their portfolios
- the entire public sector needs thoughtful and forward-looking governance.

### Employees matter

Government achieves its objectives—delivering services and programs, properly managing public resources, and making good decisions—by employing people to do specific jobs. Without employees, government would simply not exist.

Employees matter. The laws governing employment should start from the employee and the employment relationship with the state and state entities.

Employment is for a purpose: to do a job in a workplace. The structure of government is therefore important to assign employees to relevant workplaces. Structures are commonly understood to be the government departments and various statutory entities and separate services. This review recommends changes to how government organisations are managed but not necessarily to how they are understood by employees, politicians and the public or what they are called.

### Chain of responsibility

The Westminster system is founded on ministerial responsibility, discharged through the departments and other state entities, so management and the allocation of responsibility is important.

Responsibility starts with employees who are responsible for attending to their work diligently, maintaining and developing their personal and professional skills, maintaining respectful relationships, and understanding, adhering to public sector standards and behaving accordingly.

Managers and executives are responsible first as employees themselves, but also as managers, to manage well, ensure subordinates are supported in their performance and development, to manage positively, and to attend to their own development as managers.

At the head of organisations, chief executives and principal officers are responsible for managing the system, including by delegation and prudent accountability mechanisms, and ensuring managers are well-skilled for their roles.

A central human resources agency led by a Public Sector Commissioner is responsible for standards and consistency of employment experience across the whole sector.

## Purpose

People are employed, and systems managed, for government purposes, being:

- delivery of services and programs to benefit the community, economy and environment
- stewardship of the scarce resources of government on behalf of the state and in turn on behalf of the community and people of Queensland
- assisting individual ministers and the Cabinet to make the best possible decisions to implement policy efficiently and effectively.

## Systems

The whole public sector employment system is the responsibility of the Public Sector Commissioner including management development and fairness in the employment experience.

Large systems have special management challenges, and the underpinning legislation should provide flexible ways of managing these complicated organisations including distribution of resources and functions, monitoring performance and ensuring high quality performance. The Queensland public sector has three very large employment systems, roughly each a third of the numbers: public health; state schooling; and other government departments and agencies.

Large system management responsibility is vested in the chief executives for the two large program systems (public health; state schooling) and the Public Sector Commissioner for the other departments who have responsibility for standards and practices in those systems and for consistency within the system.

Departmental system management is the responsibility of chief executives who manage through delegation of employment and management functions.

Independent systems are managed by principal officers.

Systems currently depend on the collaboration and attention of Directors-General to act collectively for the greater good. While there have been significant improvements in the ways that Directors-General collaborate, a stronger centre is required to deliver improved system management to improve fairness and management performance and to give government the tools it needs for a responsive public sector.

## Ministers supported by departments

Under the Westminster system, ministers are responsible for their portfolios. Chief executives of departments are key to discharging that responsibility for the entire portfolio. Departments, under chief

executives, coordinate advice to the minister, managing Cabinet and Parliamentary matters as well as providing policy support, high quality administration, and well managed systems.

## Whole sector governance

Coherent, thoughtful and forward-looking governance for the whole public sector and management of the system of governance is the responsibility of a new Queensland Governance Council bringing together the three central agencies – the Department of the Premier and Cabinet, Queensland Treasury and the proposed Public Sector Commission.

## Other initiatives

The review's recommendations include many initiatives for fairness, responsiveness and inclusiveness. Some of the more important ones are:

- retention of merit as the central driver in selection and promotion decisions, expanded to reflect broader human rights criteria
- a Special Commissioner (Equity and Diversity) to drive improvements in equity, including gender pay equity, and a diverse workforce
- clearer, simpler language and removal of artificial distinctions and categories
- recommended investment in management improvement for early and mid-career managers, to complement executive leadership programs, and to improve management consistency across the whole sector
- clearer criteria for engaging casual and temporary staff and for their conversion to ongoing employment, including a right to request conversion and a merits review of conversion decisions
- a review of senior positions to improve management and control of higher paid roles
- a new system for independent case management of complex, intractable or long-standing discipline and performance improvement matters
- an internal review of decisions to direct an employee attend an independent medical examination, and possible use of other health practitioners with an employee's agreement
- an employee's right to raise issues with a more senior manager
- realigning public sector appeals processes with the Queensland Industrial Relations Commission's industrial jurisdiction, affording greater review rights and improved transparency of decision making.

Queensland's public sector delivers services and programs sometimes despite the difficulties in the employment laws, often because of the competence, skills, goodwill and commitment of chief executives, executives and managers.

The review recommends both high level changes to the structure and language of government employment and changes of detailed matter in order to deliver fairness, responsiveness to the community and government and inclusion.

Overall the result is for orthodox employment laws, better aligning public sector employment with the common law where it can, retaining the strengths of the current system, especially strong devolution to chief executives and a facilitative approach from the centre, but also building on the strengths by a new alignment of system management and system governance.

## List of recommendations

### Recommendation: A new Act

1. A new Public Sector Act is needed to replace the *Public Service Act 2008*. It should be drafted in plain language using straightforward concepts, and be employee-focused. The Act should cover the entire public sector (with exceptions as stated in the terms of reference). Drafting responsibility should be with the Department of the Premier and Cabinet.
2. The Act should state clearly that the objectives of public sector employment are to deliver the services and programs of government, ensure public resources are managed efficiently and accountably, and support the government in making and implementing public policy decisions.

### Recommendation: A permanent public service

3. Employment in the Queensland public sector should continue generally to be ongoing employment, reflecting Westminster principles.

### Recommendation: Temporary and casual employment

4. Temporary employment should continue to be restricted to temporary circumstances. Criteria permitting temporary employment should be stated in the Act.
5. Conversion criteria for temporary and casual employees should be amended to provide for a right to request after one year in addition to current chief executive reviews after two years and then annually. Criteria should be stated with more specificity and include budget certainty as well as the ongoing requirement for the role and be drafted in consultation with unions.
6. Conversion decisions should be reviewable by the Public Sector Commissioner as a merits review with no further appeal. The Commissioner should be able to make an Employment Direction about the conduct of merits reviews, including management of deemed refusals and possible remit of the matter back to the chief executive.
7. If the decision being reviewed was a 'deemed refusal', the chief executive must provide detailed reasons for the refusal in writing to the employer and the Public Sector Commissioner within 14 days of the application.

### Recommendation: Termination of chief executive and senior executive contracts

8. Procedural fairness should be provided to a chief executive, senior executive or the Public Sector Commissioner in making a decision to terminate their employment contract on notice.

### Recommendation: Natural justice when ending appointment term of statutory officeholder

9. The Department of the Premier and Cabinet should review provisions across the statute book to ensure adequacy of procedural fairness in making a decision to end the appointment of a statutory office holder appointed for a term and not purport to oust the jurisdiction of the Supreme Court.

### Recommendation: Redundancy

10. To remove doubt, the Act should invest power in a chief executive of a department or other state entity to terminate employment for redundancy, subject to normal industrial processes, and under guidance of an Employment Direction.

### Recommendation: Retain Crown prerogative

11. The preserved prerogative to dispense with services in section 219(3) of the *Public Service Act 2008* should be retained, subject to Crown Law advice on the application of the prerogative across the public sector.

### Recommendation: Responsibility for performance and development

12. The Act should state that an employee bears responsibility for their performance and personal and professional development.
13. An employee's manager should have responsibility to ensure that the employee understands their responsibility for personal and professional development and that reasonable opportunities are provided for development.

### Recommendation: Management development

14. The central human resources agency, the Public Sector Commission, should have a function to facilitate high quality, consistent management development for the entire public sector, delivered at an agency level. Appropriate resources should be allocated to the Commission for that function.
15. Chief executives should have a responsibility to ensure that managers in their departments or agencies have, or are taking reasonable steps to develop, appropriate management skills; that their management performance is of a high standard; and that management performance is regularly tested. Power to institute corrective action should be explicitly stated.
16. Further, an employee with management responsibilities should have personal responsibility to ensure their own development as a manager.



### **Recommendation: Queensland Governance Council**

17. A Queensland Governance Council should be established with membership being the chief executives of the Department of the Premier and Cabinet and Queensland Treasury and the Public Sector Commissioner (*ex officio*) and up to two other members who are chief executives of Queensland Government departments, appointed by the Premier. The Council's functions should include setting the research agenda, managing whole sector systems, coordinating with the large employments sectors in health and education, and engagement with employee representatives. The Council should have power to establish committees (including standing committees) and working groups to report to the Council.
18. The Council should be established administratively immediately and given responsibility for implementation of the package of reforms recommended in this report.

### **Recommendation: Reviews and inquiries**

19. The Queensland Governance Council should determine a five-year rolling program of reviews of agencies (or part), programs and themes. Reviews must not be conducted into individual employees' performance or conduct.
20. The Premier should have power to commission administrative inquiries to be conducted by the Public Sector Commissioner or a Special Commissioner appointed by the Premier for the purpose into an aspect of public administration.
21. The Public Sector Commissioner or a Special Commissioner should have power to undertake the review or inquiry including where relevant power to compel production of documents and witnesses and to report with appropriate protection and immunity, noting the intent for relative informality and speed of establishment and finalisation.

### **Recommendation: Research**

22. The Public Sector Commission should have a function to conduct, fund or commission research to position Queensland as a leader in public administration. An appropriate budget should be appropriated to conduct or commission the research activity.
23. The research agenda should be decided by the Queensland Governance Council after consultation with other departmental chief executives and public sector unions.

### **Recommendation: The merit principle**

24. The Act should retain the primacy of the merit principle, restated in terms that acknowledge merit and diversity working together to ensure employment decisions prefer the person best suited to the job.

### **Recommendation: Human rights and equal opportunity in employment**

25. The Act should provide for human rights and equal opportunity plans about employment matters, concordant with obligations in the *Human Rights Act 2019* and employment related attributes under the *Anti-Discrimination Act 1991*, including: engagement of employees and unions in developing the plans; reporting against the plans to the Public Sector Commissioner; and corrective action by the Commissioner in the event of dissatisfaction with a report.

### **Recommendation: Gender equity**

26. The Act should align with the *Industrial Relations Act 2016* on matters of gender pay equity.

### **Recommendation: Special Commissioner (Equity and Diversity)**

27. There should be a Special Commissioner (Equity and Diversity) within the Commission, appointed by the Premier for up to five years on a full-time or part-time basis.
28. The continuing need for and functions of the Special Commissioner should be reviewed as part of a performance review after five years.
29. The Special Commissioner's terms of reference should include improving human resource practice, procedures and behaviour to improve equity and diversity in employment across the public sector; participation in public sector employment of particular communities including Aboriginal and Torres Strait Islander peoples, people with disabilities and those from culturally and linguistically diverse backgrounds; and methods to achieve gender pay equity and improved reporting of equity and diversity issues by government entities. The Special Commissioner would have the powers of a Special Commissioner (refer Recommendation 20), including to make reports to the Premier; and should be required to report annually including in the Public Sector Commission's annual report.

### **Recommendation: Senior Executive Service profile and movement**

30. The approved establishment for senior executives should be on a full-time equivalent basis to remove barriers against part-time engagement, parental leave and job sharing.
31. The terms of reference of the Special Commissioner (Equity and Diversity) should include examination of barriers to movement from AO8 to SO to SES to encourage greater gender participation at senior levels, potentially integral to the Public Sector Commissioner's audit of the SES and review by the Queensland Governance Council.

### **Recommendation: Increments and parental leave**

32. The observations in the report about access to increments for part-time employees and access to parental leave should be noted.

### **Recommendation: Responsibilities**

33. The principles in sections 25–26 of the *Public Service Act 2008* should be restated in positive language as responsibilities of employees, managers and chief executives.

### **Recommendation: Positive performance**

34. The Act should state a positive performance framework.
35. The Public Sector Commission should develop a detailed framework for positive performance management for personal and professional development and early identification and management of concerning conduct.
36. Use should be made of tiered and abbreviated processes for misconduct and poor performance including warnings and final warnings.
37. Alternative dispute resolution mechanisms should be formally stated in the Act as an option for resolution of workplace concerns, noting that they will not always be appropriate.
38. The Act should require the Public Sector Commissioner to state by Employment Direction timeframes for management of formal action including mandatory referral to the Public Service Commissioner of matters involving old allegations (e.g., more than 12 months) and matters initiated but not resolved for more than e.g., six months, to be managed externally under the Public Sector Commissioner through a panel of skilled specialist individuals. An employee should also have the right to request a matter be referred to the Commissioner for external management.

### **Recommendation: Recognition of excellence, innovation and high performance**

39. The Queensland Governance Council should have a statutory function of fostering and recognising excellence, innovation and high performance by employees individually and in work teams.

### **Recommendation: Transparency in appeals and reviews**

40. The Public Sector Commission and the Office of Industrial Relations should jointly prepare and publish detailed guidance to employees and their representatives, managers and decision makers about natural justice in investigations, suspension decisions and discipline, and reviews and appeals. The Commission should incorporate that guidance in capability development for managers and leaders.

### **Recommendation: Show cause notices**

41. An Employment Direction for disciplinary action should provide that any notice, letter or advice to an employee in a disciplinary matter or direction must only state the employee is liable to be dismissed if the chief executive believes on reasonable grounds that the employee might, in the circumstances, be dismissed.

### **Recommendation: Investigations**

42. The Act should specify that investigations into alleged misconduct or deficient performance must be conducted fairly.

### **Recommendation: External investigators**

43. The Public Sector Commissioner should develop detailed Employment Directions for the conduct of investigations, emphasising that external investigations are the exception.
44. The Public Sector Commissioner should manage a standing offer arrangement for external workplace investigators, with a list of approved providers being named individuals that agencies may use for external investigations if the criteria for use of external investigators are met. A chief executive who wishes to use a different provider must obtain the prior written approval of the Commissioner.
45. If an agency uses an external investigator it must report on the conduct of an external investigation to the Public Sector Commissioner. The Commissioner should report annually on the use of external investigators and the quality and value of those services.
46. An external investigator may only be engaged if it is reasonably necessary or expeditious to do so.

Preference should be given to investigations being conducted by public sector employees.

47. An external investigator must conduct an investigation on the same basis that a public sector employee must conduct an investigation.
48. An investigator, or the investigator's legal practice or other advocacy entity, must not be engaged to advise or act for the agency in actual or contemplated proceedings related to an investigation.

#### **Recommendation: Suspension**

49. The suspension powers should be combined into one single power with a six-months limit on suspension with pay, extendible in specific circumstances.

#### **Recommendation: Independent medical examination**

50. The Act should provide for independent medical (or other professional) examination, with a mandatory internal review to assure the employee and the chief executive of the reasonableness of the original direction.

#### **Recommendation: Use of performance management tools**

51. The Act or other authoritative instruments should include reference to a broad range of tools such as counselling and warnings as a means of positive performance management to ensure managers are sure about their authority to use those tools.

#### **Recommendation: Summary dismissal**

52. The Public Sector Commission should issue detailed guidance about the range of disciplinary sanctions that might be applied under the Act or other law.

#### **Recommendation: Abandonment of employment**

53. The Act should provide that a chief executive may dismiss an employee, including summarily if the circumstances warrant, if the chief executive reasonably believes the employee has abandoned employment or the employee is absent from work without authority and unlikely to return to work soon because the employee is in prison.

#### **Recommendation: Separation of discipline from performance**

54. The positive performance framework should separate performance management and improvement from discipline.

#### **Recommendation: Right to raise issues**

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

#### **Recommendation: Initiating discipline**

56. The Act should require positive performance action as a prerequisite to issuing a formal notice initiating performance improvement or disciplinary action. A sector-wide Employment Direction should require initiating formal proceedings to be accompanied by a statement about action taken before issuing the proceedings, such as positive performance action taken earlier and why the response is not adequate, how the proposed action complies with any relevant Employment Direction, or why those actions or requirements are not relevant or have not been met. The statement should be given to the employee and the issuing officer's manager (unless the issuer is the chief executive).

#### **Recommendation: Case management**

57. The Act should provide for case management by the Commissioner, through a panel of specialist external providers appointed by the Commissioner, for discipline and performance management. Matters must be referred to the Commissioner after specified time frames and may be requested by either the employee or the chief executive. The Commissioner should have absolute discretion in deciding whether to appoint a Case Manager.
58. Case Managers should have power to: manage timeframes in progressing a matter; require parties to meet with the Case Manager; and prepare privileged reports for the Commissioner, the chief executive and (if relevant) a Union representing the employee on the conduct of the matter to enable practice improvements; make a recommendation to the chief executive about disposition of the matter under case management or a part of it.
59. Case Managers may also conduct internal reviews of a direction to attend a medical examination personally made by a chief executive referred to the Commissioner.

#### **Recommendation: Appeals and reviews to Queensland Industrial Relations Commission**

60. Appeals and reviews (with the exception of conversion decisions) should be to the Queensland Industrial Relations Commission (QIRC) under the *Industrial Relations Act 2016*.

### **Recommendation: Grievances**

61. The right of an employee to make a complaint should be called a grievance to differentiate it from client and customer complaints. A grievance may be preceded by raising an issue with a more senior manager, and amenable to case management and external review at the QIRC. Grievances should be the principal vehicle for ventilating and resolving individual concerns, rather than disputes under the *Industrial Relations Act 2016*.

### **Recommendation: Improved public information**

62. The Public Sector Commissioner's reporting function should be broadened to include more extensive information about public employment and public services, including the costs and benefits of public employment, to increase openness and transparency and workforce profile.
63. The Queensland Governance Council should have a function of disseminating information, possibly through reports to the Premier and for publication, about the nature and value of public administration, services delivered and programs.

### **Recommendation: Complaint management systems**

64. The obligation to maintain client and customer complaint management systems and to report on complaints should be extended to cover the full range of public entities that are also required to implement and report on the equal opportunity obligation.
65. The Public Sector Commissioner should develop jointly with relevant agencies a sophisticated set of tools to assist management of difficult client and customer complaints, and frivolous and vexatious complaints, and issue an Employment Direction for a consistent approach to complaint management.

### **Recommendation: Improved public sector skills**

66. The Queensland Governance Council should consider programs and tools to improve public sector skills and critical thinking about policy implementation.

### **Recommendation: Binding employment directions**

67. Binding Employment Directions (to replace Directives) may be made by the following: (a) Industrial Relations Minister for industrial relations purposes; (b) Public Sector Commissioner for the entire public employment sector or parts of it; and (c) large employment system managers for their systems. In drafting Employment Directions, the Public Sector Commissioner and the large employment system managers should undertake effective consultation and collaboration to ensure consistency.

68. Heads of government departments, managers of independent systems and delegates of large system managers may make binding policies for their organisations consistent with Employment Directions.

### **Recommendation: Change management**

69. The Queensland Governance Council should take a lead role in building public sector-wide change management capability, organisational resilience and workplace wellbeing.

### **Recommendation: Public Sector Commissioner and Commission**

70. The Act should establish the Public Sector Commission and an office of the Public Sector Commissioner.

### **Recommendation: Strategic review**

71. The Public Sector Commission should be reviewed every five years, modelled on the strategic reviews of other independent offices.
72. A capability and resources assessment should be undertaken by the Queensland Governance Council as soon as possible to ensure the Public Sector Commission is properly established and resourced for transition to the new Act.

### **Recommendation: Heads of discipline**

73. The Queensland Governance Council should have authority under the Act to appoint a public employee as head of a discipline, responsible for developing communities of practice and excellence in performance across the public sector in the area of discipline.

### **Recommendation: Machinery of government**

74. Processes for creating and changing government departments should be better coordinated with Administrative Arrangements Orders, and the language and processes currently used in departmental arrangements notice should be simplified.
75. Disputes about the details of resource allocation in a machinery of government change should be decided by the Queensland Governance Council.

### **Recommendation: Systems and system managers**

76. Chief executives of government departments should have responsibility for managing the employment and management systems of the department through delegation, and for managing the minister's portfolio as a system.

77. The Act should provide for independent employment systems under nominated principal officers being either statutory entities within a portfolio or administrative entities declared by regulation, whether in a department or a portfolio body, with employment and management autonomy for that entity as a system.
78. An independent system manager may make arrangements with the portfolio chief executive for support and other services.

**Recommendation: Agency governance**

79. The Queensland Governance Council should ensure agency governance models are regularly reviewed. Guidance should be issued by the Public Sector Commission about management of agencies with complicated governance arrangements.

**Recommendation: Chief executive employment**

80. The Premier should be the statutory employer of all chief executives, with power to delegate functions to the Public Sector Commissioner. The departmental ministers' power to direct the chief executive should continue.
81. The Public Sector Commissioner's functions should include supporting the Premier in discharging the employer function including facilitating development opportunities for chief executives.

**Recommendation: Chief executive performance reviews**

82. The Public Sector Commissioner should have the function of undertaking performance reviews of chief executive of government departments at the Premier's request.

**Recommendation: A more meaningful Senior Executive Service**

83. The Queensland Governance Council should make recommendations to the Premier about options for building a more meaningful Senior Executive Service (SES) in light of the audit and review of senior executive, senior officer and section 122 arrangements.

**Recommendation: SES establishment**

84. The Public Sector Commissioner should audit of all SES, section 122 and senior officer (SO) positions across the public sector to inform review by the Queensland Governance Council of those cohorts and the management arrangements for them. The Queensland Governance Council should report to the Premier on changes to enhance management, performance and efficient long-term use of senior executives, section 122 contractors and senior officers.
85. The Public Sector Commissioner should conduct triennial reviews of executive and senior-level employees, to inform Budget considerations, to ensure that establishment remains fit for purpose, and enable public sector leadership to respond more effectively to government priorities.

**Recommendation: Senior Executive Service**

86. Future arrangements for developing the senior executive service as a service should be considered by the Queensland Governance Council in the context of the audit and review of SES, section 122 and SO roles, including the responsibility of the Public Sector Commissioner for employment of the SES.

**Recommendation: A new ethics framework**

87. The government should initiate a forward-looking examination of an integrated ethics and integrity model for state employees under the leadership of the Queensland Governance Council.
88. The Queensland Governance Council should consider whether the Act (or some other instrument) should contain a statement of values in Queensland public sector employment and how such a statement relates to other elements of the integrity framework.

**Recommendation: Pre-employment screening**

89. If a chief executive determines that a pre-employment check is necessary for a particular position, checks, including criminal history, child-related and other vulnerable population cohort work, should be provided for by regulation covering obtaining, using, sharing, storing, and disposing of the information obtained. The review commends this provision for all public sector employment, including sectors outside the terms of reference.

### **Recommendation: Citizenship**

90. The Act should not limit employment to citizens but should include a provision ensuring employment is available only to people who have a lawful right to work in Australia, and that employment (a) cannot be for a term longer than the lawful right and (b) ceases if a person no longer has the right to work in Australia. Chief executives should have power to require applicants to provide evidence of their relevant rights.

### **Recommendation: Re-engagement of election candidates**

91. The Act should provide for re-employment of unsuccessful candidates for election modelled on the Commonwealth *Public Service Act 1999* provisions, covering Commonwealth elections, all state and territory elections.

### **Recommendation: Civic rights**

92. The Public Sector Commission should issue guidance reinforcing employees' right to civic participation.

### **Recommendation: Interchange and placement**

93. Interchange and placement arrangements between public entities and other entities should be encouraged and facilitated by the Public Sector Commissioner.

### **Recommendation: General employees**

94. The category of general employee should not continue as a separate statutory category. Existing general employees should, as far as possible and consistent with industrial instruments, have the same rights and obligations as other employees. If necessary, there should be power to make a regulation to provide for different rights and obligations of employees covered by the relevant general employee industrial instruments.

### **Recommendation: Integrity Commissioner's budget and resources**

95. The Queensland Governance Council should consider the appropriate arrangements for budget administration and human resources support for the Integrity Commissioner.

### **Recommendation: Gazettal of employment records**

96. Gazettal should be required for Governor in Council decisions, including appointment of chief executives and statutory officers and for machinery of government changes.

97. The Queensland Governance Council should, in consultation with the State Archivist, establish alternative means of giving notice and enduring storage of employment decisions under the Act.

### **Recommendation: Human resource policies**

98. The Act should require consultation with affected unions in the making of binding human resources policies and Employment Directions both at a system level and agency level. Consultation should be encouraged for other directions and for guidance material.

99. The Act should require that all human resource policies and Employment Directions be published in searchable form online and be accessible to the general public.

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## Consultation

The review was commissioned in September 2018.

Terms of Reference were published in November 2018 and an *Issues Paper* was released in December 2018 seeking feedback on 50 questions relating to public sector employment.

Since September 2018, the review has conducted around 100 meetings and workshops, reaching out to an estimated 500 stakeholders.

The review has conducted regular sessions with the most critical stakeholders, including unions representing public sector employees, Directors-General, chief human resources officers and the Public Service Commission.

The *Issues Paper* sought feedback from both employers and employee representatives. Fifty-eight written responses were received, including six from unions, 15 from across public sector agencies and 37 from individuals. Several meetings were held with stakeholders to supplement written responses or instead of them.

The review met with public sector unions on several occasions.

A notional deadline of 25 January 2019 for responses to the *Issues Paper* was agreed with stakeholders. In practice, the review continued to receive and consider responses up to 22 March 2019.

The review decided not to publish written responses, and while stakeholder input is widely referred to in this report, individual stakeholders are not identified.

A summary of the responses and the key themes covered in responses is at [Appendix 12.1](#).

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## Acknowledgements

The review was conducted by the Independent Reviewer, but in the nature of such a substantial body of work, assistance was given by the many stakeholders inside government and the unions.

Support was provided by the Department of the Premier and Cabinet, including administrative support in development of the *Issues Paper* by Ms Christine Sims.

I express my appreciation for the openness of all stakeholders, and especially acknowledge Mr Rob Lloyd Jones who as Director of the review provided honest, testing advice and invaluable input.

## 1 Public sector employment in Queensland: where to from here?

This independent review was commissioned by the Premier, the Honourable Anastacia Palaszczuk MP, because it was thought some things needed to change for Queensland’s public services to be fair, responsive and inclusive—for them to be the best public services we can have.

This is the first review of public service laws since the late 1980s. The only substantive review before that was JD Story’s Royal Commission in 1918–19.

The review concludes that both the law and the culture of employment in the Queensland public sector should change to achieve the objective of *A fair and responsive public service for all*.

Outdated and troublesome public service employment laws make it harder to build high-performing organisations. Complicated legal jumbles make it harder for good people to get on with their jobs.

But changing the law is only part of the way forward. An Act of Parliament does not directly deal with culture and behaviour.

While this report is primarily about the public sector employment laws, it also makes recommendations about practice intended to drive culture and behaviour change while remaining true to the fundamentals of Westminster government and contemporary conventions of distributed authority and management, and to provide pointers for employees and managers in the future.

The recommendations will need new laws, new human resources processes, a shift in culture to be more positive about performance, investment in management capability and management of complicated employment systems.

### 1.1 Queensland’s public sector employment laws

The *Issues Paper* included much material about the statutory framework relevant to public employment in Queensland. It is not repeated here<sup>1</sup>.

The main statute, the *Public Service Act 2008*, applies in whole or part to most public employees, but many other statutes provide for the employment and management of staff<sup>2</sup>.

The Act sits alongside an array of other law that impacts on public employees and their managers, and laws of general application affecting everyone, including laws about workers compensation, workplace health and safety, industrial relations, anti-discrimination, criminal offences, and working with vulnerable people.

Accountabilities specific to public employees include those governing misconduct, financial accountability, maintenance and disclosure of public records, judicial review, administrative appeals and reviews, parliamentary scrutiny, financial and performance audit, public sector ethics and parliamentary and Cabinet processes.

The main focus of this review is the *Public Service Act 2008*, but the recommendations are for a new statutory framework that is wider in its scope than ‘the public service’<sup>3</sup>, and providing a basis for management of the wider system of public employment.

#### **A note about industrial relations**

Employment law is different from industrial relations law. In Queensland at various times public sector industrial relations has been the responsibility of the central human resources agency but separate at other times. Currently there is a separate Office of Industrial Relations within the Department of Education because the Minister for Industrial Relations is also Minister for Education. The review makes no recommendations to merge or keep separate employment and industrial relations functions, a machinery of government matter for the Premier. The review does make comment about the need for better synergies between the central human resources agency and the Office of Industrial Relations.

1 The *Issues Paper* is available at [www.forgov.qld.gov.au/review-public-employment-laws](http://www.forgov.qld.gov.au/review-public-employment-laws).

2 Including the *Hospital and Health Boards Act 2011* that governs employment of more than one third of all public employees, but performance and discipline for those employees is under the *Public Service Act 2008*.

3 Narrowly defined in the *Public Service Act 2008* to the exclusion of about half all public employees. The public service is composed of most (but not all) employees in departments and employees in the public service offices listed in Schedule 1 of the Act.



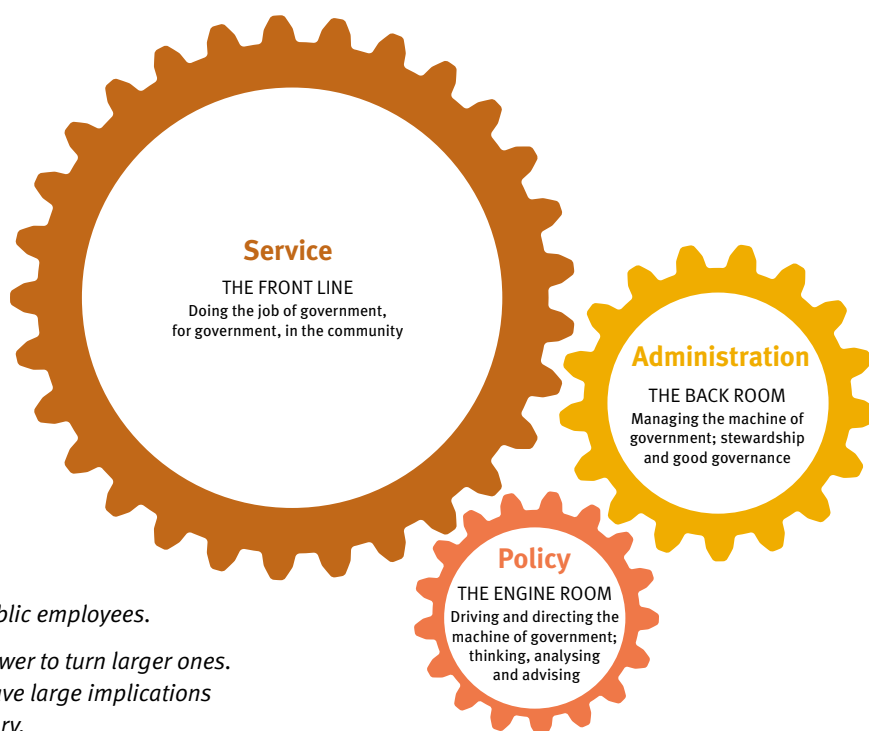


Figure 4: Three role types of public employees.

Small cogs can deliver great power to turn larger ones. Policy decisions can and will have large implications for resources and service delivery.

The primary context of public employment is Queensland’s system of government, based on **Westminster principles** of responsible government under the **rule of law**, with a one-house legislature, the Legislative Assembly, a separate judiciary, and **responsible ministers** drawn from Members of the Legislative Assembly.

The **purpose of public employment** is to ensure people are available to deliver on behalf of the government.

What is delivered? A combination of the **services** government wants delivered; good **governance and stewardship** of public resources and accountability for the exercise of government’s sovereign powers; and good **policy decision making** and implementation, as illustrated in Figure 4.

The Westminster context is top-down. Ministers are responsible for their portfolios. Under ministers,

chief executives of departments and other agencies manage employees and the resources of government to ensure efficient and effective service delivery, governance and policy work. Authority cascades down, and accountability flows up. The review preserves this orthodoxy, as illustrated in [Appendix 12.2](#).

### 1.2 A brief history of Queensland’s public sector employment laws

Sir George Bowen was appointed Governor of the new Colony of Queensland in 1859. Until separation, the area was part of the colony of New South Wales.

In January 1860 the new Governor laid down progressive rules for public employment in an executive council minute<sup>4</sup> based partly on Northcote-Trevelyan principles favouring: merit; entry by examination; and an educated, apolitical service<sup>5</sup>. The executive council minute is reproduced in [Appendix 12.4](#).

4 Queensland Government Gazette, 21 January 1860. See also Scott, J., Laurie, R., Stevens, B. & Weller, P. (2001) *The Engine Room of Government: The Queensland Premier’s Department 1859–2001*, University of Queensland Press, Brisbane, pp.24–25; Lauchs, M. & Staines, Z. (2009) “Public sector legislation in Queensland: old or new directions”. *Proceedings of the 2009 IPAA National Conference*, Institute of Public Administration Australia, Brisbane.

5 Great Britain Civil Service Committee, Northcote, S. H., & Trevelyan, C.E. (1854). *Papers on the Re-Organisation of the Civil Service*. Presented to Both Houses of Parliament by Command of Her Majesty. London: H.M. Stationery Office. [www.civilservant.org.uk/library/1854\\_Northcote\\_Trevelyan\\_Report.pdf](http://www.civilservant.org.uk/library/1854_Northcote_Trevelyan_Report.pdf).

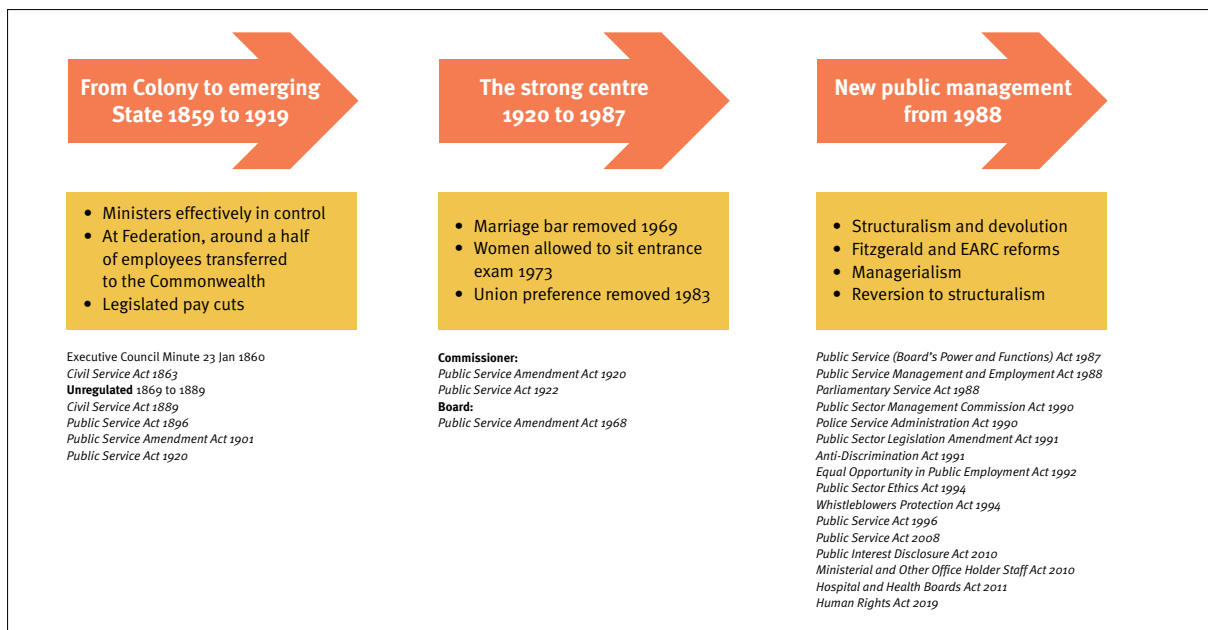


Figure 5: A short history in three phases.

Figure 5 illustrates in brief form the history of Queensland's public sector employment laws, in three stages: From Colony to Emerging State; the era of the Strong Centre; and New Public Management<sup>6</sup>.

These three stages are described in more detail in [Appendix 12.3](#), taking the interested reader briefly through each stage and in particular, more recent history from 1988 to 2015.

### 1.2.1 Where to from here?

Over recent decades, strong structural solutions have seen the separation of large numbers of public sector employees from the public service proper<sup>7</sup>: police (long considered separate), fire and emergency services, ambulance, TAFE, and the huge public health sector. Privatisation, commercialisation and contracting out have further reinforced the dominance of structuralism and the new public management in shaping the public sector.

Increased Commonwealth involvement in key sectors—health and education in particular—has also fundamentally changed the approach to service delivery and public sector employment. These growth areas now

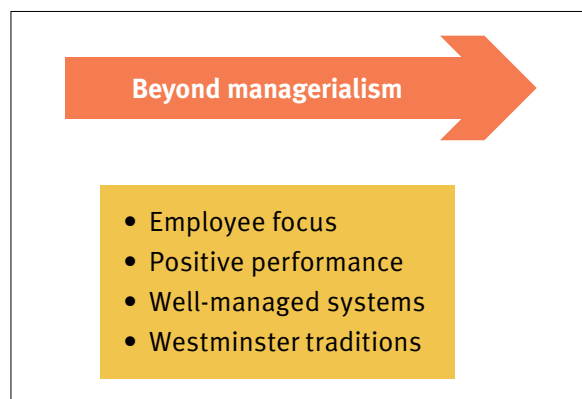


Figure 6: Beyond managerialism to employee-focused systems.

6 The figure and the following description draw on the work of Linda Colley, Mark Lauchs and others.

7 Defined in the *Public Service Act 2008* as most (but not all) employees in government departments and so-called public service offices.

establishment, creating a needs-based approach to management and resourcing<sup>8</sup>.

This review provides an opportunity for a fourth stage, an employee-centred approach to delivering the government's priorities in well-managed systems that focus on positive performance, as depicted in Figure 6.

Despite these dramatic developments, core employment law concepts have remained relatively stable: the *Public Service Act 2008* is firmly grounded in the 1988 Act<sup>9</sup>, the major markers being devolution of power to departments under strong Directors-General, emphasis on management, and strong fiscal imperatives. The managerial era continues.

However, there are examples of failure of the internal market in the public sector resulting in the inefficient distribution of resources, lumpy access to backroom services and work-arounds. Incentives and other settings are not always yielding the intended benefits; deep pathway dependencies reinforce and maintain structures and practices that are not necessarily desired or desirable; and there is information asymmetry between the political domain that makes decisions about the architecture of the public sector and the administrative domain that informs the decisions.

And there has been a falling away of trust both inside the system and with external stakeholders, especially unions.

Where there is evidence of market failure, the report recommends enhanced central guidance and, in some cases, regulatory control intended to stabilise the system, align policy intent with laws and behaviour, and bring greater certainty. See [page 105](#).

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8 The growth models for health and education have overtaken traditional establishment and fiscal constraint methods for managing public sector growth to the extent that Fiscal Principle 6 of the Charter of Fiscal Responsibility made under s. 11 of the *Financial Accountability Act 2009* is barely relevant.

9 Lauchs, M., & Staines, Z. (2009) "Public sector legislation in Queensland: old or new directions". In Proceedings of the 2009 IPAA National Conference, Institute of Public Administration Australia. The apparent stability of concept disguises considerable volatility: the 2008 Act has been amended 56 times, ten times in 2014 alone. Further amendments are before the Legislative Assembly at time of writing: Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2018, Personalised Transport Ombudsman Bill 2019; Health and Wellbeing Queensland Bill 2019. Many amendments are minor in nature flowing from the wide reach of the *Public Service Act 2008* and its relatively inflexible approach.

## 2 The purpose and effect of public sector employment laws

The State Government employs people so it can deliver services to the community and business, and run government well, both as steward and decision maker. The Act should state this, so that employees have a sound basis to understand their purpose, and the paramount reasons for having the job they have. Governmental purpose makes public sector employment different in some ways from other employment.

Public employment has much in common with other employment, but it is not equivalent to employment in the business and community sectors: it is the same in some ways but different in others.

David Thodey, chair of the Independent Review of the Australian Public Service recently related his experience of divergent views about public employment<sup>10</sup>.

*People have always drawn comparisons between the public and private sectors.*

*There are those who see them as the same. I often hear commentary from the business community that goes something like this:*

*'If only the government would behave more like business, take a more business-like approach to things—how it identifies opportunities and engages with risk, how it deals with red tape, how it structures its systems and processes, how it manages its costs—then things would be better.'*

*It's an idea echoed in politics...*

*Having led a major listed corporation in the past, people often assume I know what it takes to turn the public sector on a coin and make it operate like a great Australian company. But that's not how this works.*

*Still others acknowledge similarities between the public and private sector but question their significance. ... Columbia University professor and political scientist Wallace Sayre ... famously said 'public and private management are fundamentally alike in all unimportant respects'. I assure you that's not how this works either.*

*At the other end of the spectrum, some see irreconcilable differences. I have also encountered this view—that because I come from the private sector,*

*I can't possibly understand the unique challenges of government administration.*

*The truth is there will always be valuable insights to share between different sectors and areas of practice. Yes, operating context is important. But organisations are always made up of people who engage in activities that use processes and technology, to create something of value.*

*This means there is much to learn from each other — in fact we must learn to collaborate more than we do today whether in public, private, non-profit or academic sectors.*

### 2.1 Same

Employment is the provision of labour by an employee to the benefit of the employer. It is the same whether the employment is for profit, community or public. It is a legal relationship, subject to the terms of contract and other legal requirements, including, and especially in public employment, statutes.

Public sector employees, like any employees, must turn up to work, do their best, obey lawful instructions and the law, and treat people respectfully.

The centre of any employment relationship, including public employment, is the employment contract. For many public employees, as explored in detail in the *Issues Paper*, that contract is found in a mixture of the various Acts and subordinate instruments, their appointment, statement of responsibilities, and lawful directions.

The historic relationship of master and servant, once dominant in thinking about government employment, has evolved to one of contracting parties:

*The evolution in the common law as to the relationship of employment has been seen as a classic illustration of the shift from status (that of master and servant) to that of contract (between employer and employee)<sup>11</sup>.*

### 2.2 Different

There are many drivers of difference between public and other employment detailed in this section.

#### 2.2.1 History

The long legal history informing public employment laws, outlined here and in the *Issues Paper*, points

10 Thodey, D. (2018) "A tale of two reviews". [www.apsreview.gov.au/news/tale-of-2-reviews](http://www.apsreview.gov.au/news/tale-of-2-reviews).

11 *Byrne v Australian Airlines Ltd* [1995] HCA 24; (1995) 185 CLR 410 [27] McHugh and Gummow JJ, referring to *Attorney-General of New South Wales v Perpetual Trustees Company (Ltd)* (1955) 92 CLR 113 (Privy Council) 122–123 [17–18].

to a practical need to legislate for certainty about the special relationship between the State (or Crown) and its employees, but legislation itself raises potential problems, including how common law affects public employment<sup>12</sup> and how static Acts of Parliament operate in an increasingly dynamic world.

### 2.2.2 Context

The context of public employment is a main departure point, both the operating context, as Thodey suggested in the quote above, and the formal context. That context includes near-codified terms of employment in statute for most public employees, exemplified by the *Public Service Act 2008*, complemented by a large suite of laws about misconduct, ethics, financial accountability, use and procurement of goods and services and rafts of procedural obligations.

### 2.2.3 Institutional forms and norms

A lot of public employment is within large organisations, mostly monolithic departments or public institutions such as hospitals and schools, themselves parts of very large organisational forms, the public health system and the state education sector. These institutions, like other large employers, have complicated internal rules and cultures, sometimes even developing internal managerial silos that have distinct ways of working and interacting. So, there is sameness in the structural experience of work across public and private sectors at the large scale.

But public institutions are different. There are connections to the political level and beyond that simply do not exist in the private sector or are very narrowly focused at the most senior levels, (such as in peak bodies lobbying ministers).

Decisions need a lawful basis: Westminster government is government under law, government subject to the **rule of law**. Acts are generally drafted in Queensland to give power and responsibility to ministers and to very senior officials. It follows that hierarchical pathways can dominate day-to-day work. Procedures, designed to protect the system of government and assure against improper employment practice, add complexity. And there are **unavoidable overheads**, especially for wide-ranging public accountability and reporting, not found in other contexts<sup>13</sup>.

### 2.2.4 Public accountability

The public sector uses taxpayer money and exercises public power over others. Public employees are therefore called to account in ways private employees are not and public employees are stewards of the resources they use<sup>14</sup>.

#### **Public sector accountability**

- Disclosure of documents under right to information (freedom of information) laws
- Requirements to keep public documents
- Central agency oversight of policy, financial and human resource matters
- Parliamentary oversight through reporting, committees (including Estimates) and questions
- Complaints that may be made to the Ombudsman
- Mandated complaint-making processes in agencies
- Review and appeal right to tribunals of some decisions made by public employees
- Judicial review by the Supreme Court
- Stringent financial accountability and reporting
- Internal and external auditing
- Formal ethical requirements
- Public interest disclosure laws
- Disclosure of interests by senior staff
- Obligatory stakeholder engagement
- Exposure to political and media scrutiny
- Formal requirements for major decisions to be referred to Cabinet and the Executive Council.

Accountability arrangements are complex. Continua of accountability relationships operate both horizontally (internal mechanisms from internal control and reporting, including to parliament) and vertically (external, also to parliament). The complexity and embeddedness of accountability *necessarily* creates overheads in public employment. Skimping on these overheads creates risks to public value, good governance and the integrity of the body politic.

The *Public Service Act 2008* states accountability mechanisms to deal with performance and conduct

12 See McCarr, G.J. (1988) *Aspects of public sector employment law*. Sydney: The Law Book Company, 23–43.

13 Finance and banking have dense obligations—and probably more so after the recent Royal Commission—but these are very specific in character and form.

14 While legal ownership of assets might vest in the state (*Financial Accountability Act 2009* s. 3), there is a strong recognition of stewardship. This is an area of interest to the Thodey review of the Australian Public Service: “Bolster our role as stewards”, <https://contribute.apsreview.gov.au/collective-endeavour/inpo4d935aobd21a196821e>.

issues at an individual level, and management principles and obligations on senior leaders. These statements fall short of ascribing responsibility, as discussed below.

### 2.2.5 Policy levers

Public employees play a crucial role in development and implementation of public policy, including influence over resource allocation, change of laws, and scope and operation of programs. Private employment has no such authority.

## 2.3 Same and different

The convergence and divergence illustrate the important job that a public employment law must do. This review proceeds on the basis that where there is sameness, orthodox employment principles apply. Where there is difference, the law should state with clarity how that difference is governed<sup>15</sup>.

The imperatives of fairness, responsiveness and inclusivity also generate a need for particular provision when orthodoxy does not adequately address circumstances.

The proposed Act should focus: first on the employment relationship; second on a positive framework for management of people and organisations; and then on the systems for managing and employing people in structures—the institutions of government.

It is also an opportunity to bring consistency and coherence to an increasingly fractured public administration, through a new framework for public governance. To bring that consistency and coherence, the Act should apply to the broader public sector as a series of inter-related systems and not a narrow concept of institutional silos<sup>16</sup>.

While the Act's reach should be across the public sector, there must be flexibility to allow systems to manage according to need and purpose. Every employee and manager should be bound to fairness, responsiveness and inclusivity, but the details need to be shaped by local demands and local context. Scale is one important context, and the recommendations include greater flexibility to the managers of very large employment systems.

In keeping with the review's Terms of Reference, the Act will not reach State Government employment in the Queensland Parliament, Ministerial and Opposition offices, Government House or as a police officer<sup>17</sup>.

Responsibility for preparing the new Act should be under the Director-General, Department of the Premier and Cabinet as principal policy advisor to the portfolio minister (the Premier) and independent of detailed administration of the Act.

### Recommendation: A new Act

1. A new Public Sector Act is needed to replace the *Public Service Act 2008*. It should be drafted in plain language using straightforward concepts, and be employee-focused. The Act should cover the entire public sector (with exceptions as stated in the Terms of Reference). Drafting responsibility should be with the Department of the Premier and Cabinet.
2. The Act should state clearly that the objectives of public sector employment are to deliver the services and programs of government, ensure public resources are managed efficiently and accountably, and support the government in making and implementing public policy decisions.

15 Some important 'differences' arise from the long history and politics of the public service. Some recommendations are intended to re-build lost trust and engagement between employers and employees.

16 The departments, public service offices and statutory bodies.

17 Although some universal, generally beneficial, provisions like right to re-employment after standing of election, civil liability and equal opportunity reporting, should have general application, as currently under the *Public Service Act 2008*. There is also a recommendation for generally applicable pre-employment screening.

### **A note on the size of the public service**

This review is not about the size of the public service, but about the statutory and other mechanisms for managing public sector employment. There is continuing interest in the size of the public sector. Controversy is fuelled by media and political interest in the question, yet there is genuine desire among ministers and officials for the sector to be as efficient and effective as possible.

The following observations are made here because employment mechanisms map into the question of public sector numbers.

**First**, public institutions need employees to do their jobs. And those jobs are not just the ‘frontline’<sup>18</sup> but also the backroom, the stewards of public resources and the policy workers supporting good decision making.

Stripping away those support roles in an attempt to reduce numbers creates major risks<sup>19</sup>.

**Second**, how big or small a public service agency is (or should be) is a product of the services it delivers, the resources allocated to it, and the overheads needed to manage properly. The task of ‘right-sizing’ falls to its chief executive and the budget makers.

**Third**, traditional ideas that we can control the size of public services by budget and establishment (numbers control) have been swept aside by federally-driven demand funding, especially in health and education.

**Fourth**, public services, despite sometimes-glacial development and a predilection to growth<sup>20</sup>, are dynamic systems that must be managed to perform and shaped to deliver the elected government’s policy.

**Last**, politics plays a huge part in public sector numbers. Political discourses are the vital beat of a democratic heart and engaged by all side of politics, commentators, media, community and business, peak bodies and lobbyists. We all want efficient public services but cutting back my pet program would be a travesty. Public sector leaders and managers might be beyond politics, but they must have the tools to manage numbers as best they can in this political climate

The orthodox tools of managing numbers (budget and establishment) are important. But they are insignificant given the growth funding models in health and education under national funding arrangements.

Well-motivated and productive employees working in well-managed systems are the ideals, but managers also need tools to address poor conduct and poor performance because those things will happen. And government must be able to respond to changing circumstances. Hence down-sizing tools such as transfer, redeployment and redundancy are part of the mix too.

The employee-centric approach is not a soft approach on growth. It is tougher than the existing institutional focus, because it demands active engagement on the purpose for employment and individual performance.

18 A difficult and elastic concept, fraught with definitional complication, and a distraction from the real task of managing for efficiency and economy.

19 See for example Carr, R. (2019) “Voters have their say on mess of a transport system” *Australian Financial Review*, 4 March 2019, p. 7: This was written in the partisan context of a state election in NSW of course, but the view is instructive. Speaking of (in his view) poor transport infrastructure decisions, Carr says “*Lousy process explains it. Clean out seasoned middle-managers from the public sector and you lose corporate memory. Someone forgets to tell bidders what pipes and wires lie under the road surface.*” The backroom does matter. This not simply a partisan or fashionable complaint: Mitchell, A. (2015). “Time to end outsourcing and rebuild the public service”. *Australian Financial Review*, 14 June 2015.

20 There are incentives to grow work units: reward systems often measure pay and status by how many staff and how much budget, and once grown it is very hard to shrink a public function.

### 3 The employment relationship

The *Public Service Act 2008*, as noted in the *Issues Paper*, is difficult to understand: the language is artificial, there are fine definitional distinctions, the focus is on institutions ahead of people and the Act speaks from a predominantly negative view of the employment relationship.

#### 3.1 The employer

It is common for public employment statutes, including the *Public Service Act 2008*, to focus on the institutional form of the employer, the state in its various forms, and the powers of superordinate participants over employees. This may be a legacy of old ideas of Crown employment as status, master and servant, but contract long ago supplanted status in public employment.

The Act, as an employment statute, is *inside out*: employment is a contractual relationship; status, described by who has power over whom, is an incident of employment, not the other way around.

This review is an opportunity to turn the Act *right way out*, and draft laws that centre on the employee and the employment relationship and its purposes, rather than the institutional forms of government and who has power. A truly employee-centred approach also emphasises the importance of fairness.

There are only two classes of employment relationship in the 90-plus Acts listed in the *Issues Paper*. These provide for employment:

- between employees and the **state** (in departments, public service offices and some statutory bodies)<sup>21</sup>
- between employees and a **statutory entity** with distinct legal status and authority to employ. Some such entities represent the state (e.g., hospital and health services, TAFE Queensland), some do not (e.g., Legal Aid, Building Queensland).

#### 3.2 Office holders

As the *Issues Paper* noted, some of the most important jobs in state government are done by *office holders* who are not legally employees<sup>22</sup> even if they discharge employer responsibilities, as is the case with heads of public service offices under the *Public Service Act 2008*<sup>23</sup>. (It is a matter of construction in each case if appointment to a statutory role is employment or not.)

The status of these senior roles, alongside those of departmental chief executives, is important to the government's ability to manage the state as an independent sovereign entity. The High Court in *AEU* said<sup>24</sup>:

*[58] In our view, also critical to a State's capacity to function as a government is its ability, not only to determine the number and identity of those whom it wishes to engage at the higher levels of government, but also to determine the terms and conditions on which those persons shall be engaged. Hence, ministers, ministerial assistants and advisers, heads of departments and high-level statutory office holders, parliamentary officers and judges would clearly fall within this group. The implied limitation<sup>25</sup> would protect the States from the exercise by the [Australian Industrial Relations] Commission of power to fix minimum wages and working conditions in respect of such persons and possibly others as well. And, in any event, ministers and judges are not employees of a State.*

The distinction is important because ordinarily an employee is amenable to instruction and direction from the employer, but some high offices inherently should be beyond the government's power to direct, especially those calling the government to account or to make decisions unswayed by the government's preference.

Examples of office holders who are not employees include the judiciary (judges of the various courts); quasi-judicial roles (e.g., Mental Health Review Tribunal and Queensland Civil and Administrative Tribunal members); some high offices such as the Auditor-General, chair and other senior roles at the Crime

21 The Crown is employer, under the *Police Service Administration Act 1990*, e.g. s. 5.15: "An officer ... is taken ... to be an employee of the Crown".

22 Although treated as employees for some important purposes like PAYG tax, superannuation, workplace health and safety, workers compensation.

23 Illustrated by *Thomas v Attorney-General and Minister for Justice and Minister for Training and Skills* [2019] QSC 308, and the discussion there by Bowskill J of the responsibilities of such an office holder [90]–[99].

24 *Re Australian Education Union & Australian Nursing Federation; Ex parte Victoria* [1995] HCA 71; (1995) 184 CLR 188 ("AEU").

25 "on the exercise of Commonwealth legislative powers which prohibits interference with or curtailment of the governmental functions of the state, or with its capacity to function as a government": *AEU* [8].



and Corruption Commission, Integrity Commissioner, Electoral Commissioner, hospital and health board members.

However, some office holders with statutory or implied independence are employees, including the Police Commissioner employed by the Crown, the State Librarian employed by the Library Board of Queensland (that represents the state) and the Public Guardian (employer unstated but likely the state).

See also [section 5.1.4](#) about removal of statutory officers.

### 3.3 Departmental chief executives

The position of departmental head is legally interesting. Directors-General are appointed by the Governor in Council under section 92 of the *Public Service Act 2008*. Collectively they form a separate Chief Executive Service (section 89) established to promote efficiency and effectiveness, collaboration, performance management, and service delivery (section 90).

As a service, chief executives are appointed as a chief executive but not to a particular role (e.g., Director-General, Department of Environment and Science). They are assigned to agencies by the Premier. Chief executives enter contracts of employment with the Premier (section 96) for terms not longer than five years (section 97(1)) but are subject to termination by the Governor in Council on one month's notice signed by the Premier (section 96(3)). In theory the Premier may move a chief executive about—that is also implied by having a separate Chief Executive Service.

The Act is not explicit as to who the employer of a chief executive is, and who discharges the function of their employer. The best view seems to be the state is employer, and the employer function is shared by the Premier (appointment, assignment, termination) and the departmental minister (see section 100). Decisions about a chief executive's contract are excluded from judicial review (sections 216(1)(b)(ii) and 218), including a purported 'ouster' from jurisdictional error (section 216(2))<sup>26</sup> and from the reach of the industrial relations system (section 217).

While the *Public Service Act 2008* rests the entire management and employment responsibility of departments and agencies on chief executives' shoulders, chief executives seldom engage personally in discipline or performance matters, relying (as they must in larger entities) on delegates to act on their behalf<sup>27</sup>. Further there is no provision for professional and personal development of chief executives, a matter that should be addressed if there is to remain a Chief Executive Service that has any meaning beyond elevated status. See also [section 9.4.3](#).

### 3.4 Senior executives

Like their bosses, the chief executives, senior executives collectively form a separate service established by the *Public Sector Legislation Amendment Act 1991* and continued in existence by sections 42 and 44 of the *Public Service Act 1996* and sections 105 and 108 of the *Public Service Act 2008*. Initially, chief executives were in the Senior Executive Service but separated in 2008. The purpose of the Senior Executive Service is to promote effectiveness and efficiency (section 106(1)), build a service-wide perspective and develop skills (section 106(2)). The Public Service Commission chief executive appoints (section 110), seconds (section 111) and transfers and redeploys (section 115) senior executives and facilitates their development (section 107), but otherwise the employer function rests with their chief executive.

Senior executives must enter into a contract with their departmental chief executive (section 113) for a term not longer than five years (section 114(1)) terminable on one month's notice given by the departmental chief executive. The exclusions and ouster discussed above for chief executives also apply to senior executives (but not in their entirety to senior officers).

Senior executives are employed by the state and the employer responsibility is shared between the commission chief executive (appointment, deployment) and the departmental chief executive.

26 Discussed below at [section 5.1.3](#).

27 One departmental submission said it was not appropriate for a Director-General to be involved personally in matters that might end up at the Queensland Industrial Relations Commission.

## 4 Job security

A crucial difference between public sector and other employment is the need to construct administration that endures through political change, technological development and external crises. That endurance, however, should not be or lead to fossilisation: responsiveness to a changing world is crucial.

### 4.1 The structure of government

Despite apparent volatility and frequent machinery of government change, there is remarkable underlying stability in the structure of Queensland's government.

Over the years since mid-1915 (the government of TJ Ryan) there have been 21 Premiers and eight changes of government, yet the core functions remain, sometimes contracting but mostly expanding. [Appendix 12.5](#) shows the Ryan Ministry and departments in 1915 and maps them against 2019 arrangements. The stability reflects the underlying political and economic stability of Queensland.

Transformative policy has played a part in reshaping public services: devolution and managerialism under Ahern in 1988; the Goss reforms from 1990 to 1995; the Bligh thematic concept of public administration; the Newman-era fiscal restraint; and trends such as privatisation and outsourcing<sup>28</sup>, the ever-shifting sands of centralisation-decentralisation<sup>29</sup>, and federal involvement in the structure and funding of certain large public functions.

Over the long term, expansion of public services and public employment is driven mainly by population growth<sup>30</sup> and increased government involvement in economic development and social policy.

### 4.2 Westminster and Cabinet government

The *Issues Paper* reinforced the centrality of the Westminster tradition in how government is organised and resourced through employment.

Ministerial responsibility is fundamental to that tradition. It dictates a key point of government organisation, because to be *responsible* ministers sit atop a hierarchy, supported by the head of a government department<sup>31</sup>.

But ministers do not operate as silos. They hold collective responsibility in a Cabinet system. Uniquely, Cabinet is constitutionally recognised in Queensland<sup>32</sup>. Individual ministerial authority is constrained by collectivity; the responsibility is shared. The Queensland Cabinet Handbook expresses the obligation as follows<sup>33</sup>:

*Cabinet is responsible for the performance of the government. Each minister acts jointly with and on behalf of Cabinet colleagues in their capacity as ministers. Not only does this ensure collective responsibility, but it also enhances collective adherence to all decisions made in Cabinet. Cabinet decisions reflect collective conclusions and are binding on all ministers as government policy. If a minister is unable to publicly support a Cabinet decision, the proper course is to resign from Cabinet. All ministers are required to give their support in public debate to collective decisions of the Cabinet and the government.*

28 These planks of public choice theory were not generally adopted in Queensland's late 1980s reforms, but significant features of public policy for 25 years or more, despite public controversy and political cost: Quiggan, J. (2016) "People have lost faith in privatisation and it's easy to see why". *The Conversation* 10 August 2016; Vize, R. (2019). "The tide is turning against public service privatisation". *The Guardian*, 29 March 2019 (about UK moves to privatise aspects of public health). Gallop, G. (2012). "Why privatisation killed Queensland Labor". *Sydney Morning Herald* 27 March 2012 (commenting on the fall of the Bligh Government); Ferguson, A. (2015) "The brutal politics of privatisation stark after Queensland election shock". *Sydney Morning Herald*, 2 February 2015 (fall of the Newman Government). Recently announced re-departmentalisation of prison management in Queensland illustrates the complexity in applying public choice theory: Easton, S. (2019). "Queensland government takes back control of privately run prisons". *The Mandarin*, 27 March 2019.

29 E.g. Wettenhall, R., & Aulich, C. (2009). "The public sector's use of agencies: A dynamic rather than static scene". *Public Organization Review*, 9(2), 101–118.

30 See [Figure 16: Queensland population profile and public service numbers, 1860–2000](#) on [page 144](#).

31 That is not to deny matrix organisations or to praise the one minister one department model. Multi-minister departments have long operated with great success elsewhere e.g. UK, Cth, NSW and Vic.

32 *Constitution of Queensland 2001* s. 42: "(1) There must be a Cabinet consisting of the Premier and a number of other ministers appointed under section 43. (2) The Cabinet is collectively responsible to the Parliament." Constitutional recognition of Cabinet is unique to Queensland in Australian states, although Tasmania allows the Governor to appoint a person as Secretary to Cabinet, a political post in substitution for a minister: *Constitution Act 1934* (Tas) ss. 8A, 8F–8H.

33 Department of the Premier and Cabinet (2017) *The Queensland Cabinet Handbook: Governing Queensland*. Brisbane: State of Queensland, p. 2.

In supporting a minister, public servants are supporting the entire system of Cabinet government and helping to make it work. This is one of the necessary overheads of government<sup>34</sup>.

### 4.3 A permanent public service

Job security is a crucial feature of Westminster government. Whatever name it is given—tenure, permanence, on-going employment—the crucial characteristic is that public employees are not subject to termination on political grounds.

The origins of the ‘permanent’ civil service in the United Kingdom tells us much about how Queensland (and Australia generally) adopted and adapted this idea.

#### **The origins of a permanent civil service**

*... permanence in a civil servant means something more than security of tenure or the mere retention of a job for a long time. It means retention of that job during a change of Government.*<sup>35</sup>

Permanency of public service emerged in Great Britain in the centuries following the overthrow of James II by William of Orange, the strengthening of Parliament and the Bill of Rights 1689<sup>36</sup>. The Crown, over time, withdrew from politics, Parliament became ascendant and political life became more hurried and more partisan<sup>37</sup>. Administration gradually<sup>38</sup> became

autonomous of politics: complexity and the inconsistency of political careers demanded continuity of the activity of government beyond changes in the ministry.

Public employees became permanent in the sense they were not subject to removal on political grounds (despite some spectacular purges)<sup>39</sup>.

The storied Northcote-Trevelyan report was:

*the greatest single governing gift of the nineteenth to the twentieth century: a politically disinterested and permanent Civil Service with core values of integrity, propriety, objectivity and appointment on merit, able to transfer its loyalty and expertise from one elected government to the next*<sup>40</sup>.

It was a gift also to Queensland in the form of the *Public Service Act 1922* and its clear language of a permanent cadre of public servants.

Permanent employment stands in contrast to temporary and casual employment<sup>41</sup>. In *NSW v Commonwealth* in 1908, the High Court described permanent employment as a status and privilege conferred on an employee<sup>42</sup>. In that case, Higgins J said of the *Civil Service Act 1884* (NSW):

*I find that the word “permanent” cannot mean to refer to permanency in tenure of office; cannot involve a right to the office for life or for any definite time (cf. sec. 57 of the Act of 1884); and that it must refer*

34 See page 26.

35 Parris, H. (1968) “The Origins of the Permanent Civil Service, 1780–1830”. *Public Administration*, 46(2), 143–166.

36 House of Commons Information Office (2010). *The Glorious Revolution*. Factsheet G4. The Bill of Rights is the foundation for parliamentary privilege including in the Legislative Assembly.

37 Borus, G. (2007) “Political parties in the years before and after the glorious revolution”. *Hungarian Journal of English and American Studies* (HJEAS), 13(1/2), 121–130; De Krey, G.S. (1983) “Political Radicalism in London after the Glorious Revolution.” *The Journal of Modern History*, 55(4), pp. 585–617.

38 Cox, G.W. (2018) “British state development after the Glorious Revolution.” *European Review of Economic History*, forthcoming, DOI: 10.1093/ereh/hey028. Cox asserts civil state stability was cemented only once non-military budget was controlled by Parliament after the *Civil List Act 1831*.

39 A vicious purge in 1762, the “massacre of the Pelhamite innocents”, extended to junior officials who had been loyal to deposed Prime Minister Thomas Pelham-Holles Bloy, M. (2016) “The Massacre of the Pelhamite Innocents”. [www.historyhome.co.uk/c-eight/constitu/massacre.htm](http://www.historyhome.co.uk/c-eight/constitu/massacre.htm). Lord Bute succeeded Pelham but was a poor political judge and did not last long: Roberts, C., Roberts, D. F. & Bisson, D (2016) *A History of England, Volume 2: 1688 to the Present*. New York: Routledge, p. 311.

40 Hennessy, P. (1999) Founder’s Day address, Hawarden Castle 8 July 1999, cited in *Whither the Civil Service*, Research Paper 03/49, House of Commons Library, p. 8; but see Greenaway, J. (2004). Celebrating Northcote/Trevelyan: Dispelling the Myths. *Public Policy and Administration*, 19. 1–14.

41 *State of New South Wales v Amery* [2006] HCA 14; *Dao v Australian Postal Commission* [1987] HCA 13; (1987) 162 CLR 317; *Criminale v State Authorities Superannuation Board* [1989] HCA 48 [3] citing Lee J at first instance: “employment shall be permanent in the sense that barring serious economic circumstances and, of course, putting to one side misconduct by the employee, the position is intended to be available indefinitely”; however permanent has been contrasted with part-time in some industrial instruments e.g. *Belton v General Motors-Holden’s Ltd* [1984] HCA 54; (1984) 154 CLR 632 [5], [11], or restrictions on time for an method of terminating employment e.g. *Re Federated Storemen & Packers Union of Australia; Ex parte Wooldumpers (Vic) Ltd* [1989] HCA 10; (1989) 166 CLR 311.

42 *New South Wales v Commonwealth* [1908] HCA 24; (1908) 6 CLR 214 Griffith CJ.

Table 1: Tenure of public employees.

Jurisdiction	Term of appointment
Commonwealth <i>Public Service Act 1999</i>	The categories of APS employees are defined in s. 7: (a) ongoing APS employees; (b) APS employees engaged for a specified term or for the duration of a specified task; (c) APS employees engaged for duties that are irregular or intermittent. s. 20 gives an agency head the rights, duties and powers of an employer on behalf of the Commonwealth.
NSW <i>Government Sector Employment Act 2013</i>	s. 3 provides: “ <i>Public Service employee</i> means a person employed in ongoing, term, temporary, casual or other employment, or on secondment, in a Public Service agency (and employee of a Public Service agency means a person so employed in a Public Service agency).” See also <i>Government Sector Employment (General) Rules 2014</i> s. 20 (Ongoing employment), s. 21 (temporary or term employment for up to 12 months), s. 22 temporary or term employment for more than 12 months).
Victoria <i>Public Administration Act 2004</i>	s. 20 assigns to a public service body Head on behalf of the Crown all the rights, powers, authorities and duties of an employer in respect of the public service body and employees in it. Terms are therefore governed by the common law and any contract or other statement of terms.
South Australia <i>Public Sector Act 2009</i>	s. 45(2) provides that engagement is: (a) an ongoing employee, or (b) a term employee, or (c) a casual employee.
Western Australia <i>Public Sector Management Act 1994</i>	s. 3 defines a permanent officer as a person appointed for an indefinite period under s. 64(1)(a); a public service officer is defined as an executive officer, permanent officer or a term officer; s. 64(1)(b) provides for appointment of a term officer for a term not exceeding 5 years; s. 100 empowers an employing authority to engage a person under a contract and to appoint a person on a casual employment basis provides.
Tasmania <i>State Service Act 2000</i>	s. 37(3) provides employment must be either as a permanent employee or for a specified term or the duration of a specified task.
ACT <i>Public Sector Management Act 1994</i>	s. 24(1) “An officer is appointed to an office on a permanent basis” Temporary employment is for a fixed term (s.110), or casual temporary (s. 111). The fixed term is less than 12 months or up to five years subject to consultation with the relevant union (s. 110(1)).
Northern Territory <i>Public Sector Employment and Management Act 1993</i>	s. 29(3) provides: (3) Employment under subsection (1) may be: (a) ongoing – being employment until the employee resigns or the employment is terminated under this Act, other than casual employment; or (b) fixed period – being employment for a period of time specified in the contract of employment, other than casual employment; or (c) casual – being employment to work as and when required from time to time. (Before the current Act, ongoing employment was permanent, fixed period, or temporary).
New Zealand <i>State Sector Act 1988</i>	s. 59 empowers departmental chief executives to “appoint such employees of the department (including acting, temporary, or casual employees) as the chief executive thinks necessary”.

*to the character of the duties performed. The man in “permanent employment” is distinguished from the man in “temporary employment” by the fact that his work is not casual or emergency work.*

The *Public Service Act 2008* refers to ‘tenure’ in the sense of on-going employment as the usual term of engagement. A distinguishing feature of the public service officer under the Act is tenure, contrasted to another public service employee who is not a public service officer who is temporary or casual. The Act contrasts tenure with *fixed term* (e.g. contract), *temporary* (to meet unusual needs) or *casual* employment. ‘Tenure’ was used in some predecessor Acts<sup>43</sup> and is also found in the *Hospital and Health Boards Act 2011*.

The *Dictionary of Human Resource Management* defines ‘job tenure’ as:

*the length of time that an employee holds a particular job*<sup>44</sup>.

Another specialised dictionary offers the following definition<sup>45</sup>:

**tenure** noun 1. *the right to hold property or a position; he has tenure he has a permanent job, from which he cannot be sacked or made redundant* 2. *the time when a position is held during his tenure of the office of chairman.*

Provisions about permanence by various names in other jurisdictions are shown in Table 1.

Security of tenure is one important means to secure stable administration, intended both to avoid partisan appointments and to enable enduring administration: a ‘permanent public service’ rather than permanence of employment. (This raises an important question about contracts for the most senior employees, discussed below at [section 5.1.2](#).)

This proposition is also consistent with the *State Government Entities Certified Agreement 2015*.

The review recommends that ongoing employment be the basis of public sector employment (preserving the *status quo*) and that temporary and casual engagement continue to be limited to specific circumstances.

There is also a category of general employee, unique to Queensland and outside the ‘public service’ (public employees but not public service employees). The designation has industrial and historical meaning. A general employee may be ongoing, temporary or casual and those who are temporary or casual have the same conversion rights as public service employees. General employees are discussed below at [section 10.6](#).

The review considers that the term ‘ongoing employment’ better reflects the nature and purpose of engagement than other terms.

### Recommendation: A permanent public service

3. Employment in the Queensland public sector should continue generally to be ongoing employment, reflecting Westminster principles.

### Probation

In Queensland probationary appointment for new employees, generally for three months, is provided for in section 126 of the *Public Service Act 2008*. Probation is common across all public employment laws<sup>46</sup> as it is at general law<sup>47</sup>. The Police Service Administration (Discipline Reform) and Other Legislation Amendment Bill 2019 includes a disciplinary sanction of probation. That is not recommended in this review because of potential industrial rights implications of a public service employee on probation<sup>48</sup> and because the review recommends an alternative progressive disciplinary mechanism<sup>49</sup>.

43 *Public Service Management and Employment Act 1988* s. 19 provided for appointment to a public service office “upon tenure that is not limited by time” or for a “limited duration of tenure” (meaning by slightly circuitous drafting, on contract), and s. 15A: senior executive tenure “conditional on continuing satisfactory work performance.” *Public Service Act 1996* s. 69(1) “Appointment as an officer in a department is on tenure” unless on contract. *The Public Service Act 1922* used the word ‘permanent’.

44 Heery, E. & Noon, M. (2008) *A dictionary of human resource management* 2nd ed. Oxford: Oxford Reference Online.

45 Ivanovic, A (2006) *Dictionary of Human Resources and Personnel Management: Over 7,000 Terms Clearly Defined* 3rd ed. London: A&C Black Publishing Ltd, p. 257.

46 Cth s. 22, no period of probation prescribed; NSW s. 44 and Government Sector Employment (General) Rules 2014 s. 5 (maximum three months for new or returning employee as senior executive; six months for others); Vic s. 21 may be employed on probation for three months, extendable; SA s. 48 no probation or up to 12 months; WA no statutory provision, dealt with in industrial instruments: see *Industrial Relations Act 1979* s. 23A; NT s. 32, no probation, six months extendable for up to an additional six months; ACT s. 70 generally 12 month, extendable.

47 See *Nulty v Blue Star Group Pty Ltd* [2011] FWA 975.

48 The *Industrial Relations Act 2016* deals with the industrial rights of probationary employees.

49 At [section 7.4.10](#).

## Work hours

Actual hours of attendance are usually managed locally, subject to industrial instruments and special requirements. See also Directive 02/18 Minister for Industrial Relations Directive *Hours, Overtime and Excess Travel*; Directive 07/18 Minister for Industrial Relations Directive *Attendance Recording and Reporting Requirements*; Directive 4/15 Commission Chief Executive Directive *Support for employees affected by domestic and family violence*.

Appointment may be full-time or part-time<sup>50</sup>, casual work, or under relevant industrial instruments, shift work.

## The work required of the employee and level of employment

The public sector has a rich language describing the detail of work to be done by an employee. Commonly-used terms include:

- position and position description
- role and role description
- office
- duties and duty statement
- designation.

Despite the language of the *Public Service Act 2008* most employees understand their responsibilities by reference to their ‘position’— a combination of classification level and job title within a stated agency and location.

Here are some examples of jobs advertised on the Queensland Government jobs website in January 2019:

- Senior Human Resources Officer, Department of Education, South East Region Hope Island Office, classification AO4, permanent, full time.
- Client Administrative Officer, Public Trust Office, Client Experience and Delivery team located in Maryborough, classification AO2, temporary full time from 25 February 2019 to 4 February 2020.

- Casual Driving Examiner, Department of Transport and Main Roads, Emerald, classification AO3 (hourly rate stated), casual.
- Executive Director, Technology Transport and Main Roads, Carseldine, s. 122 contract classification SES2 high, for five years with possible extension.
- Executive Director, Legal Division, Queensland Police Service, Brisbane City, classification SES2, contract.
- Custodial Correctional Officers, Queensland Corrective Services, various locations, classification GS1, permanent (generic advertisement for the department’s ‘talent pipeline’).
- Principal Policy Officer (Legislation), Department of Agriculture and Fisheries, Brisbane City, classification PO5, permanent flexible full time.
- Director, Strategy and Support, Department of Justice and the Attorney-General, Brisbane City, classification SO (Senior Officer) temporary full time from 1 February 2019 to 31 December 2019.

These job advertisements show a person is appointed to a job<sup>51</sup> by reference to:

1. the job’s title, called ‘designation’ in the *Public Service Act 2008*
2. the agency and geographical location where the work will take place
3. the classification by reference to an industrial instrument or, for senior roles, health or public service directive
4. the term of appointment (how long the employment arrangement advertised is for) and whether it is ongoing, temporary or under contract
5. whether the job is full-time, part-time or casual.

Nationally, the level of an employee is variously described by reference to:

- classification<sup>52</sup> or
- designation<sup>53</sup>.

50 That can be changed by agreement.

51 Including by promotion.

52 ACT, linked to industrial instruments or for the SES, prescribed by the management standards; Cth *Public Service Classification Rules 2000* made under s. 23; NSW: employees are to be employed in a *classification of work*: s. 45; NSW s. 45 employees are to be employed in a *classification of work* and under s. 46 *assigned to a role* in that classification (also uses ‘level’ and ‘grade’); SA defines remuneration level by reference to a determined classification structure

53 NT s. 3(1): “designation means a specified level or range of salaries assigned to an employee in an Agency on a scale described in an award or determined by the Commissioner”; SA in s. 77 provides “A public sector agency may, but is not required to, designate specified duties in the employment of the agency as a position with a specified title.”

The Queensland *Public Service Act 2008* section 98 refers to both classification level and designation of roles. Section 98(3) includes the following definition:

*designation, of a role, includes the title of the role and its organisational location within a department*<sup>54</sup>.

‘Classification level’ is undefined but is referred to throughout the Act by reference to rulings (directives or guidelines). There are two ministerial rulings relevant to classification level (suggesting it is an industrial matter):

Directive 10/16 Minister for Employment and Industrial Relations Directive *Transfer Within and Between Classification Levels and Systems* provides the following definitions that are industrial in character:

*Classification Level shall comprise a number of pay-points through which officers will be eligible to progress.*

*Classification Stream means the stream within the classification system e.g. Administrative, Professional, Technical or Operational Stream.*

*Increment shall mean for all officers (where applicable) an increase in salary from one pay-point to the next highest pay-point.*

*Pay-point shall mean the specific rate of remuneration payable to officers within a Classification Level.*

Directive 03/18 Minister for Industrial Relations Directive *Higher Duties* provides as follows:

9.2 “higher classification level” for the purpose of this directive, means a classification level which has a higher maximum salary than the maximum salary of the classification level actually held by the employee. This includes a higher maximum salary under a section 122 contract under the *Public Service Act 2008*, except where that contract requires specialised skills and the relieving employee does not possess those skills.

9.3 “lower classification level” for the purpose of this directive, means a lower classification level which has a lower maximum salary than the maximum salary of the classification level the employee is relieving at.

This language is important for stating what an employee is to do, and for fixing remuneration, by reference to relevant instruments (industrial instruments for most, directives for executives and senior officers), and

therefore for the mechanics of changing employment arrangements, including appointment, promotion, redeployment, transfer and demotion.

### 4.3.1 Mandatory qualifications: prerequisites to employment

Some public sector roles can only be done by a properly and formally qualified person, giving rise to mandatory qualifications for appointment and continued employment. Examples include:

- professional registration or accreditation for some roles such a teacher, medical practitioner or registered allied health practitioner, engineer, or veterinary surgeon
- holding a work suitability status, such as a ‘blue card’ for jobs that involve working with children<sup>55</sup>
- holding a valid driver licence or trade ticket.

These mandatory qualifications need to be stated transparently and must only be required where they are essential for actual role. For example, mandating that an employee must hold a practising certificate as a lawyer is different from a mandatory qualification of being admitted as a lawyer; experience as a teacher may be essential for some roles in the Department of Education, but being a registered teacher is not if the person is not required to teach.

Losing a mandatory qualification might mean the person cannot perform the job and may therefore be in fundamental breach of the contract of employment and may be grounds for terminating employment. Specificity and justification are important.

There is also an important nexus between discipline and mandated qualifications, especially for medical and allied health professionals, teachers and lawyers, where proven or alleged misconduct or incompetence may trigger obligations to report to the relevant registering authority. Those authorities in turn may investigate and cancel registration or impose practice conditions that compromise the employee’s ability to work or to discharge the full duties of a job. That in turn may result in considerable delay in progressing issues.

The *Public Service Act 2008* does not contemplate this circumstance adequately. See section 7.4.8 and Recommendation 49 that recommends an explicit power to suspend rather than dismiss an employee who has lost mandatory qualifications.

54 And by circuitous drafting, public service offices.

55 *Working with Children (Risk Management and Screening) Act 2000*.

## 5 The employment experience

Fairness in public services is in lived experience. Stakeholders were very forthcoming disclosing their experiences. Much useful information about systemic impediments to fairness came from chief human resource officers and chief executives. Of course, unions were a repository of much of the lived experience of their members.

### 5.1 Employment security

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

As noted above and in the *Issues Paper*, public employment job security is not a ‘job for life’: the employer can, subject to proper requirements and fairness, terminate employment for cause or genuine redundancy; employees have a right to resign or retire subject to proper notice. This has always been the case in Queensland, as has the residual right to dispense with services under the Crown<sup>56</sup>.

Security of tenure is therefore (in practice) subject to:

- ordinary and orthodox management of employees including:
  - dismissal for misconduct, underperformance, failure to attend work or obey a lawful direction
  - incapacity (also called involuntary ill-health retirement)
  - genuine requirements for temporary or casual workers
  - contracting senior staff (in Queensland, since 1988)
- genuine redundancy
- resignation or retirement.

#### 5.1.1 Temporary and casual employment

The *Public Service Act 2008* contemplates ongoing employment (called tenure) as the basis of *public service* employment. Temporary and casual employees

are not *public service officers*, but they are *public service employees* if the employment is in a department or public service office and is not in the category *general employee*<sup>57</sup>.

Under the Act, temporary and casual arrangements cannot be used for chief executive or senior executive roles<sup>58</sup>.

It is obvious that a large employer will need temporary employment arrangements when the circumstances are themselves temporary, and casual employees for relevant circumstances.

The constraints on temporary and casual employment in the *Public Service Act 2008* are in:

- section 148: temporary employment is only used ‘to meet temporary circumstances’, and under section 149 is subject to possible conversion to tenured employment (but not if the temporary employment is on a casual basis). See also Directive 08/17 *Temporary Employment*
- section 149A: conversion of casual employment to ongoing status as a public service officer or general employee, and Directive 01/17 *Conversion of casual employees to permanent employment*
- sections 147 and 148: employment on a temporary or casual basis for the anomalous class of general employee<sup>59</sup>.

Directive 08/17 gives guidance to chief executives about when temporary employment might properly be used<sup>60</sup>:

#### 7.2 *Circumstances that indicate an appointment should be on a temporary rather than permanent basis include, but are not limited to:*

- *when an existing employee is taking a period of leave (such as parental leave) and needs to be replaced until the date of their expected return from leave;*
- *when skills are required for a one-off project with a specific end date;*
- *where funding for a project or program after a specific date is uncertain;*

56 Section 5.1.6.

57 The review recommendations about system management render irrelevant distinctions about officers and employees, departments and offices.

58 s. 148(1).

59 Who might also be employed on an ongoing (tenure) basis.

60 s. 149(4) provides that employment of temporary employees and whether the employment is full-time, part-time or casual, is subject to relevant directives about temporary employment.



- *when an existing employee is absent from their substantive role due to secondment; and*
- *when skills are temporarily required prior to a permanent appointment being made in accordance with the directive relating to recruitment and selection.*

The Directive is permissive, not mandatory: a chief executive might employ a person temporarily if there is budgetary uncertainty (third dot point) but equally might appoint on an ongoing basis even though that may create downstream management issues.

Temporary or casual engagement has no statutory limit under the *Public Service Act 2008*<sup>61</sup>. It is possible for a person to be a temporary employee for a long time, even many years<sup>62</sup>, rolling from project to project, or funded from external sources that are not ‘guaranteed’ but are a persistent feature of the department’s work.

Some jurisdictions manage temporary employment by setting an upper limit on how long a person may be engaged: see Australian Capital Territory<sup>63</sup>, Commonwealth<sup>64</sup>, New South Wales<sup>65</sup> and South Australia<sup>66</sup>. In Canada, casual employees may not work more than 90 days in any calendar year<sup>67</sup>.

There was no consensus among stakeholders for a limit on temporary employment, although that was the preference of one union.

Employer stakeholders argued that flexibility and responsiveness demanded temporary employment options. Unions argued that temporary employment should be much less common, acknowledging that conversion rights, properly implemented, put a brake on overuse.

Another option for management is for all temporary employment to be on written term contract. The review considers that would be inefficient.

It is recommended that the present arrangements allowing open-ended temporary employment in specific circumstances with conversion rights for temporary and casual employees should continue with modifications discussed below, as providing a workable balance. Clearer criteria for temporary or casual employment and conversion will bring sharper focus on engagement of temporary employees and the prospects of ongoing work for them.

One significant deficit is that the temporary employee Directive, as presently drafted, does not refer to ongoing funding as a consideration. The Directive states three elements shown in bold:

9.6 *When reviewing the status of a temporary employee’s employment and deciding whether their employment is to be converted to permanent, the chief executive of an agency must consider the following criteria:*

- a) whether there is a **continuing need for the person to be employed** in the role, or a role which is substantially the same, and **the role is likely to be ongoing**; and*
- b) the merit of the temporary employee for the role by applying the merit criteria in section 28 of the PS Act. (Emphasis added)*

Affordability is a consideration in casual conversion under Fair Work modern awards<sup>68</sup>:

- (g) Reasonable grounds for refusal include that:*
  - (i) it would require a significant adjustment to the casual employee’s hours of work*

61 The *Public Service Act 1922* (Qld) s. 18(3)(v) stated a maximum term of temporary employment of nine months, extendible in certain circumstances, and able to be converted to permanent employment.

62 The Applicant in *Carey v President of the Industrial Court Queensland & Anor* [2004] QCA 62 worked as a temporary employee in the one Department for more than nine years.

63 *Public Sector Management Act 1994* s. 110: temporary employment is for a fixed term no longer than 12 months or up to five years if the head of service consults with the relevant union first. The Act includes a mechanism to prevent re-employment for rolling terms.

64 Employment for a specific term or specific task Act s. 22(2)(b). Term engagement initially no longer than 18 months extendible for maximum totalling three years or five years for SES position advertised on APS Jobs: Regulation ss. 3.4 and 3.5(4), Directions s. 22. No time limit on specific task temporary engagement.

65 *Government Sector Employment Rules 2014* s. 10(1): “The maximum total period for which a Public Service non-executive employee may be employed in temporary employment in the same Public Service agency is four years within any continuous period of five years.” There is provision for extension for a further four years in certain circumstances in s. 10(2).

66 s. 45: for a project or exceptional circumstances not exceeding five years or duties of a temporary nature not exceeding two years.

67 *Public Service Employment Act 2002* (Canada) s. 50(2).

68 *4 yearly review of modern awards – Part-time employment and Casual employment* [2018] FWCFB 4695 [2] (emphasis added).

*in order for the employee to be engaged as a full-time or part-time employee in accordance with the provisions of this award—that is, the casual employee is not truly a regular casual as defined in paragraph (b);*

- (ii) *it is **known or reasonably foreseeable that the regular casual employee’s position will cease to exist within the next 12 months;***
- (iii) *it is known or reasonably foreseeable that the hours of work which the regular casual employee is required to perform will be significantly reduced in the next 12 months;*  
or
- (iv) *it is known or reasonably foreseeable that there will be a significant change in the days and/or times at which the employee’s hours of work are required to be performed in the next 12 months which cannot be accommodated within the days and/or hours during which the employee is available to work.*

SA Pathology, a South Australian public health sector entity, states a budget criterion:

*The position is required to continue on an ongoing basis and there is ongoing funding to support this*<sup>69</sup>.

The language of the Directive about the role, continuity of service and the potential ongoing work is ‘curious’, to use Justice Crow’s word in *Katae*<sup>70</sup>. The Directive is procedural rather than deliberative for the most part.

At the very least the Directive should be redrafted as a deliberative document rather than a procedural one, including relevant and irrelevant considerations in conversion decisions, and be more definite about the limits of engaging on a temporary or casual basis.

Conversion is an important legal right with a long history in Queensland’s public employment laws<sup>71</sup>. But it operates in a charged industrial environment. Whether or not there has been historic overuse (as suggested by union stakeholders) there are issues

with engagement of temporary and casual employees that should be addressed.

Some matters of principle can be stated.

First, temporary engagement is a necessary incident of employment but both Westminster principle and long-standing Government policy<sup>72</sup> prefer ongoing employment over temporary or casual employment. On that basis, the criteria for temporary and casual engagement are adequately stated in the Directive clause 7.2, but redrafting is needed to clarify the conditions and limits of use.

Second, the review supports retention of the two-year review followed by annual reviews to emphasise that even in the absence of a time limit temporary employment is for specific managerial circumstances, not a new norm. Addition of a right to request after one year’s continuous engagement will align Queensland with the Commonwealth casual employment modern award and should apply to both temporary and casual employees. Possible abuse can be combatted by having clearly stated criteria.

Some employer stakeholders commented that the obligation to review after two years and then annually is administratively burdensome and could be wasteful for roles that by definition could not be converted. The review notes this is a genuine concern but on balance considers that these management reviews are a useful brake on proliferation of temporary arrangements and ensure that temporary and casual arrangements are not thoughtlessly extended.

Good administration will reduce the administrative burden. For example, a position could be identified in one review as funded from temporary sources, and subsequent reviews need only visit that element. It may also be possible to identify classes of position as not likely to be ongoing, for example because they are externally funded from temporary sources (‘soft funding’). The complications of employees moving between different jobs, sometimes at different levels, should be addressed by clearer criteria being stated to guide both the employees and their managers<sup>73</sup>.

69 Public Service Association of SA (2018) “SA Pathology – Contract to Ongoing Employment: Phase 1 Implementation”. [www.cpsu.asn.au/latest-news/sa-pathology-contract-to-ongoing-employment--phase-1-implementation](http://www.cpsu.asn.au/latest-news/sa-pathology-contract-to-ongoing-employment--phase-1-implementation).

70 The appeal in *Katae*, mentioned in the *Issues Paper*, seems to have been settled by the state lodging a Notice of Agreement to Dismissal of Appeal on 1 April 2019.

71 Possibly reflecting Westminster principles of a permanent public service or, alternatively, to circumvent merit processes: Colley, L. (2005). “Reworking merit: Changes in approaches to merit in Queensland public service employment 1988 to 2000”. Proceedings of the 19th Association of Industrial Relations Academics of Australia and New Zealand Conference, Sydney, 140.

72 Generally bi-partisan with occasional exceptions.

73 This was a significant complication discussed by Justice Crow in *Katae*, and the source of much confusion generally.

Third, employee stakeholders noted that a significant number of decisions are not made in the timeframe, meaning that section 149(3) operates as a deemed refusal. On appeal to the QIRC, the employee has no basis to argue their case, and the chief executive effectively has a right of ambush because the QIRC quite properly requires the necessary information to be filed. That systemic unfairness results in a perverse incentive for decisions not to be made, but to let them lapse.

Fourth, the review is concerned that the QIRC is not the best forum for review of conversion decisions which are fundamentally managerial in character and require deep information about organisational practice and resources and budget processes. The decisions are not industrial in character. For the small number that do have an additional industrial element, there are alternative mechanisms to bring a dispute to the QIRC<sup>74</sup>. It is recommended that conversion decisions be reviewed on application to the Public Sector Commissioner as a merits review<sup>75</sup>. Because the decision to convert is managerial, not legal, there should be no further review or appeal<sup>76</sup>. The Commissioner might use the panel established for case management as a resource for reviews<sup>77</sup>.

The Commissioner should be able to return a matter to the chief executive for further consideration.

Procedure for these reviews should be set out in an Employment Direction.

Fifth, the perverse incentive for deemed refusals should be addressed by requiring the chief executive to give detailed reasons for the refusal to the employee and the Commissioner within 14 days of the application. There should be a positive onus on the chief executive to demonstrate how the criteria for conversion are not met. The deemed refusal is sensible and practical but the perversity of incentive should be removed: the work would still need to be done in a timely way and the applicant given time to develop their case.

### Workload

Some stakeholders thought merits review before the Commissioner might be an unacceptable workload. There may be a surge in merit review applications initially, whether as a genuine backlog of poorly managed conversion reviews or reflecting poor relations between employee representatives and managers.

There is no particular evidence that shows such will be the case. However, after any initial surge, the workload should be stable and the new system so much more transparent that numbers should stabilise at reasonable levels.

Stakeholder fears about workload reinforce the need for improved management of temporary employment. In a well-managed system, conversion reviews would not be a workload challenge.

The intent of the Public Sector Commissioner's control of merits review is:

- first to entrench the review as managerial not legal
- second to provide a strong incentive in departments and agencies for better management of engagement of temporary and casual employees and the conversion process.

If there is initially burdensome workload, the proposed panel members may be able to assist the Commissioner.

To assist managing workloads, the Public Sector Commissioner should have power to make an Employment Direction about merits review of conversion decisions including relevant criteria for the review, time frames and remittal.

### Queensland Civil and Administrative Tribunal as an alternative

The conversion could be reviewed instead by the Queensland Civil and Administrative Tribunal (QCAT) in its review jurisdiction. QCAT advised it would be relatively easy to create a list for such reviews but could not advise on workload and staffing implications without more data and analysis. QCAT is highly skilled in reviewing administrative decisions. Members' decisions are appealable to the appeals tribunal.

Like the QIRC, QCAT is largely a legal forum and may not be better equipped than QIRC for these largely managerial decisions. Generally, stakeholders did not prefer QCAT as a review body to QIRC especially if (as recommended) QIRC's public sector and industrial jurisdictions are aligned.

74 For example, under the *State Government Entities Certified Agreement 2015*.

75 Compare the review jurisdiction of QCAT: *Queensland Civil and Administrative Tribunal Act 2009* ss. 17–24.

76 For clarity, judicial review and Ombudsman complaint would remain available.

77 See [section 7.4.7](#).

### Recommendation: Temporary and casual employment

4. Temporary employment should continue to be restricted to temporary circumstances. Criteria permitting temporary employment should be stated in the Act.
5. Conversion criteria for temporary and casual employees should be amended to provide for a right to request after one year in addition to current chief executive reviews after two years and then annually. Criteria should be stated with more specificity and include budget certainty as well as the ongoing requirement for the role and be drafted in consultation with unions.
6. Conversion decisions should be reviewable by the Public Sector Commissioner as a merits review with no further appeal. The Commissioner should be able to make an Employment Direction about the conduct of merits reviews, including management of deemed refusals and possible remit of the matter back to the chief executive.
7. If the decision being reviewed was a 'deemed refusal', the chief executive must provide detailed reasons for the refusal in writing to the employer and the Public Sector Commissioner within 14 days of the application.

#### 5.1.2 Contracts for higher paid employees

Several stakeholders urged a return to ongoing appointment of senior executives and chief executives. The most-stated rationale is that term contracts cause employees to be risk averse especially toward renewal time. This is also a live topic in the current review of the Australian Public Service<sup>78</sup>.

No reliable research for or against this proposition has been identified: it seems a matter of lived experience.

Westminster principles of permanence lend weight to this argument.

Job security for higher paid employees is a real concern. There remain only a very small number of 'tenured' senior executives, hangovers from the Goss Government Senior Executive Service and the early Borbidge Government when senior executives were not on time limited contracts<sup>79</sup>.

Senior executive career paths have changed considerably since the initial reforms under the Ahern government in 1988–89 (so-called banded public servants, paid under time limited contracts in remunerations bands) and then the Senior Executive Service (1991).

Former Director-General of Education and University of Queensland academic Roger Scott said in the context of changes to chief executives after the change of government in 2015:

*The biggest change—even since Rob Borbidge and Peter Beattie—is that the career paths of senior executives is much wider and more flexible, so that public service security is less valued.*

*On both sides of the political divide, there are opportunities either in other jurisdictions—as seen by the incoming director-general of the Premier's Department—or in the private sector. This applies all the way down though the senior ranks but it is particularly relevant at the top.*

*Change of government does not mean the end of the world for a director-general but rather the moment of choice. In making that choice, a complex mix of considerations interact on both sides<sup>80</sup>.*

The more tenuous nature of senior executive contracts no doubt is a consideration for some in plotting their career paths, and undoubtedly impacts differentially on women who are more likely to work part-time and to request parental leave.

One primary issue is safeguarding against politicisation of the senior ranks. Twenty years ago, Professor Richard Mulgan<sup>81</sup> urged greater transparency, modelled on the 1990s New Zealand approach.

78 Easton, S. (2019). "No more long knives: bring back permanent secretaries, argues 1980s Treasury dep sec". *The Mandarin*, 13 March 2019. [www.themandarin.com.au/105310-no-more-long-knives-bring-back-permanent-secretaries-argues-1980s-treasury-dep-sec/](http://www.themandarin.com.au/105310-no-more-long-knives-bring-back-permanent-secretaries-argues-1980s-treasury-dep-sec/).

79 All chief executive and the vast majority of SES are now contracted. The Borbidge government contract provisions commenced 1 December 1996.

80 Quoted in Whittaker, J. (2015) "Qld public servants 'must be patient' in bureaucracy shake-up". *The Mandarin*, 27 February 2015. [www.themandarin.com.au/23989-health-boss-public-service-chief-walk-ql-shake](http://www.themandarin.com.au/23989-health-boss-public-service-chief-walk-ql-shake). See also Scott, R. (2015) *Appointing CEOs after a change of government – lessons from the past*. Brisbane: TJ Ryan Foundation. [www.tjryanfoundation.org.au/cms/page.asp?ID=1019](http://www.tjryanfoundation.org.au/cms/page.asp?ID=1019).

81 Mulgan, R. (1998) *Politicising the Australian Public Service?* Research Paper No. 2 1998–1999. Canberra: Australian Parliament House Library.

One transparency measure recommended below (Recommendation 8) is to require natural justice in terminating contracts.

Some might argue that reversion to ongoing employment would logically bring downward movement in the remuneration package to reflect the value of tenure. The Public Service Commission advised as follows:

*SES moved to contract employment in the Public Service Act 1996. Prior to that, under the Public Service Management and Employment Act 1988, a senior executive was tenured (i.e. appointment not limited by time).*

*There was no loading (compensation) offered to SES with the move from tenured to contract in 1996.*

*Transitional arrangements at the time included:*

- *New SES were appointed on contract*
- *Tenured SES were not forced to go on contract in their current roles or if they were transferred or redeployed*
- *Tenured SES could elect to go on contract in their current roles if they wished*
- *Tenured SES were appointed on contract if they were promoted.*

As discussed below, senior employees are liable to termination for a range of reasons including loss of trust and confidence, which, if rationally based, is not dissimilar to the pre-1996 performance-based tenure as follows:

*Tenure is conditional on continuing satisfactory work performance and is to be given effect to by performance planning and review<sup>82</sup>.*

This review concludes there is no compelling case at this stage to revert from time-based tenure on contract for chief executives and senior executives to ongoing engagement. The proposed audit and review of senior executives, senior officers and section 122 arrangements (see Recommendation 84) may provide an opportunity for the government to consider the merits of changing this arrangement.

### 5.1.3 Ousting jurisdiction

The ability to test decisions about chief executive and senior executive contracts is affected by sections 215 to 218 that together purport to remove such decisions from the courts and industrial forums.

Section 216(1) provides:

- (1) *This part applies to the following matters (each an excluded matter)—*
  - (a) *a decision to appoint, or not to appoint, a person under this Act or as a statutory office holder;*
  - (b) *the contract of employment of, or the application of this Act or a provision of this Act to, any of the following—*
    - (i) *a commissioner;*
    - (ii) *a chief executive;*
    - (iii) *a senior executive;*
    - (iv) *a senior officer;*
    - (v) *another public service officer whose employment is on contract for a fixed term.*

The definition of ‘decisions’ in section 216(2) is important:

*decision includes a purported decision affected by jurisdictional error.*

This is a privative clause of some note<sup>83</sup>.

The ability to test legality in the face of a jurisdictional error is a defining feature of a State Supreme Court and in certain circumstances will be constitutionally invalid<sup>84</sup>.

While there are constitutional limits to parliament’s ability to remove or ‘oust’ jurisdiction, the High Court in *Kirk* noted:

*[100] This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the State Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian*

82 s.15A(2) *Public Service Management and Employment Act 1988* as amended by *Public Sector Legislation Amendment Act 1991*. The provision did not apply to chief executives of government departments.

83 An attempt by the legislature to limit the jurisdiction of the courts to test the correctness of an administrative decision. Jurisdictional limits are important in encouraging finality but may have constitutional implications.

84 *Kirk v Industrial Relations Commission* (2010) 239 CLR 531. See also Beck, L. (2012) “What is a ‘Supreme Court of a State?’” *Sydney Law Review*, 34(2), pp. 295–315; Spigelman, J.J. (2010) “The Centrality of Jurisdictional Error”, *AGS Administrative Law Symposium*: Sydney, 25 March 2010; Gilmour, J. (2010) “Kirk: Newton’s apple fell” *Conference of the Sir Samuel Griffith Society*, Perth.

constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.

The distinction between jurisdictional error and non-jurisdictional error is important<sup>85</sup>.

Section 216(2) predates the seminal decision in *Kirk* but was nonetheless drafted after the decision in *Barratt v Howard*<sup>86</sup> which described how procedural fairness applied to the termination of an appointment of a Secretary under the now-replaced *Public Service Act 1922* (Cth). *Barratt* forms the basis of the termination provision in the *Public Service Act 1999* (Cth)<sup>87</sup>. That provision reads as follows:

#### 59 Termination of appointment

- (1) *The Governor-General may, on the recommendation of the Prime Minister and by notice in writing, terminate the appointment of a Secretary.*

*Note: In Barratt v Howard [1999] FCA 1132, the Federal Court of Australia described the basis on which requirements of procedural fairness applied to the termination of an appointment of Secretary under section 37 of the Public Service Act 1922.*

- (2) *Before recommending to the Governor-General that the appointment of the Secretary of the Prime Minister's Department be terminated, the Prime Minister must have received a report about the proposed termination from the Commissioner.*
- (3) *Before recommending to the Governor-General that the appointment of the Secretary of a Department other than the Prime Minister's Department be terminated, the Prime Minister must have received a report about the proposed termination from the Secretary of the Prime Minister's Department.*

- (4) *The report from the Secretary of the Prime Minister's Department about the proposed termination of the appointment of the Secretary of another Department must:*

- (a) *be prepared after consultation with the Commissioner; and*
- (b) *if the Secretary of the Prime Minister's Department and the Commissioner disagree in relation to the proposed termination—explain the substance of the disagreement.*

Section 60 provides that a former Secretary may be engaged to perform other duties.

Section 38 of the Commonwealth Act provides a different process for termination of Commonwealth senior executives. It requires a certificate from the Public Service Commissioner that any requirements in the Australian *Public Service Commissioner's Directions* have been satisfied and that the Commissioner is of the opinion that termination is in the public interest. The *Directions* include, for example, a requirement that an employee be informed of a suspected breach of the Code of Conduct and be given an opportunity to make a statement about the suspected breach.

It is important to note that *Barratt v Howard* involved termination of a Secretary on the basis of loss of trust and confidence by the minister and the impact that had on the functioning of the Secretary's department. The procedural fairness requirements remain relatively low<sup>88</sup>.

The ability to unilaterally terminate chief executive and senior executive contracts is open at general law if the contract so provides. However, the Act's purported insulation of a public sector decision maker from accountability maybe both legally problematic and unfair. The review recommends chief executive and senior executives be afforded procedural fairness in decisions to terminate their contracts under statutory or contractual notice provisions<sup>89</sup>.

There is a different circumstance for non-renewal of contracts.

85 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [2018] HCA 4; *Maxcon Constructions Pty Ltd v Vadasz* [2018] HCA 5. In the context of the repealed *Public Service Act 1996* see *Carey v President of the Industrial Court Queensland & Anor* [2004] QCA 62.

86 [1999] FCA 1132.

87 s. 59 inserted 2012.

88 For removal of a statutory office holder for want of trust and confidence in Queensland see *Thomas v Attorney-General and Minister for Justice and Minister for Training and Skills* [2019] QSC 308.

89 See also *Public Service Act 2008* s. 57 for termination of the Commissioner's contract.

The model SES contract<sup>90</sup> provides a process for intended renewal or non-renewal of a contract (as opposed to its termination):

## 2. TERM OF EMPLOYMENT

2.1 *This Contract, and the employment of the Senior Executive, starts on the Commencement Date and ends on the End Date.*

2.2 *If the Senior Executive wishes to be considered for further employment as a senior executive after the Expiry Date, the Senior Executive must give notice of that to the Chief Executive no more than 4 months or less than 3 months before the Expiry Date.*

2.3 *If the Chief Executive receives a notice under clause 2.2, the Chief Executive may give notice to the Senior Executive no more than 3 months or less than 2 months before the Expiry Date whether or not the Senior Executive will be further employed as a senior executive.*

2.4 *If the Chief Executive gives a notice under clause 2.3 that the Senior Executive will be further employed as a senior executive, a new contract of employment (not a variation to extend this Contract) must be entered into for a further term of up to 5 years.*

2.5 *A notice under clause 2.3 stating that the Senior Executive will not be further employed as a senior executive does not need to provide reasons for that decision.*

2.6 *A failure by the Chief Executive to give notice under clause 2.3 is not a breach of this Contract.*

2.7 *If the Senior Executive does not give a notice under clause 2.2, the Senior Executive will be taken to have elected not to be further employed as a senior executive.*

2.8 *If the Senior Executive:*

(a) *receives a notice under clause 2.3 that they will not be further employed; or*

(b) *does not receive a notice from the Chief Executive under clause 2.3,*

*then this Contract will end on the Expiry Date without requiring further notice from the Chief Executive.*

It is open to parties to an employment contract to agree with such a process (even if the state is unlikely to agree to changes and the bargaining power of most candidates for senior executive roles is probably low).

Stakeholders noted that the requirement of the senior executive employee to give a notice is probably unnecessary bureaucracy and can leave an employee exposed through omission. The review leaves it to the proposed Queensland Governance Council to consider what reforms if any are needed to this contractual renewal and non-renewal process in the audit and review of the senior executive service, senior officers and section 122 arrangements (See Recommendation 84).

### Recommendation: Termination of chief executive and senior executive contracts

8. Procedural fairness should be provided to a chief executive, senior executive or the Public Sector Commissioner in making a decision to terminate their employment contract on notice.

#### 5.1.4 An aside: Removal of statutory office holders

The Borbidge Government's *Public Service Act 1996* included a provision authorising the Governor in Council to remove statutory office holders for cause or for no cause (with listed exceptions). Trenchant criticism against the provisions in parliament and the media did not persuade the government<sup>91</sup>.

A similar provision was in the Bill for the *Public Service Act 2008* (sections 139–140). The Scrutiny Committee again commented unfavourably. The government justification was in the same terms as the previous Bill<sup>92</sup>.

The relevant sections were later removed by the *Integrity Reform (Miscellaneous Amendments) Act 2010*. Neither the Explanatory Note nor the second reading speech<sup>93</sup> provide reasons for this policy change, although the original criticisms remain valid.

90 As at 3 July 2017: [www.forgov.qld.gov.au/file/34296](http://www.forgov.qld.gov.au/file/34296).

91 *Hansard*, 8 August 1996, pp. 2230–2240; *Hansard* p. 2241 by Mr Fitzgerald, Lockyer, sourced to Dr Michael Jackson, reported in *The Australian*, 2 August 1996 as “unprecedented” and “exceptional”.

92 See *Alert Digest* 2008, Issue 7, pp. 18–20 and Issue 8, pp. 61–63. The Committee cited relevant High Court precedent in support of its position that natural justice should be provided including *Annetts v McCann* (1990) 170 CLR 596 and *Jarratt v Commissioner of Police* (NSW) (2005) 224 CLR 44.

93 *Hansard*, 3 August 2010 pp. 2306–2307.

An even wider removal power is in the *Government Sector Employment Act 2013* (NSW) section 77(1):

*The Governor may remove a person to whom this Part applies from office at any time for any or no stated reason and without notice.*

Section 78 provides for compensation for removal for the balance of the term or 38 weeks gross remuneration<sup>94</sup>.

Section 23 of the *Human Rights Act 2019* (Taking part in public life) may indeed require a different process, as noted by Victorian Government Solicitor about the counterpart provision in section 18 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic):

*the grounds for removal of elected office holders should be established by laws based on objective and reasonable criteria and should incorporate fair procedures*<sup>95</sup>.

Statutory officers may be removed in ways stated in the relevant statute for cause or reason such as ‘misbehaviour, incapacity, or being unfit, in the opinion of the Governor in Council, to hold the office’<sup>96</sup>.

As a matter of principle, a plenary power to remove statutory office holders without cause is not justifiable.

Given the history of this matter, and the possible impact of the *Human Rights Act 2019*, it is recommended that the Department of Premier and Cabinet review provisions for removal of statutory office holders to ensure consistency with natural justice and the constitutional status of the Supreme Court.

The Clerk of the Parliament told the review that some removal provisions were not consistent with appointment requirements, saying:

*statutory provisions dealing with officers of parliament/other statutory officers are incredibly inconsistent as to appointment, removal, strategic review and reporting.*

The recommended review might also consider the consistency of such provisions across the statute books and whether involvement of the Parliament

in appointment should be reflected also in removal and other relevant circumstances.

For clarity, the following recommendation is not intended to affect constitutional, political and judicial office holders such as the Governor, Ministers and Assistant Ministers, and judges whose removal is subject to other processes<sup>97</sup>.

### Recommendation: Natural justice when ending appointment term of statutory officeholder

9. The Department of the Premier and Cabinet should review provisions across the statute book to ensure adequacy of procedural fairness in making a decision to end the appointment of a statutory office holder appointed for a term and not purport to oust the jurisdiction of the Supreme Court.

## 5.1.5 Redundancy and other job security considerations

### (a) Redundancy

The Queensland Employment Security Policy notes that redundancy will only be used in exceptional circumstances with the approval of the public service commission. This is consistent with the principles of job security in a Westminster system discussed above. Nonetheless, dismissal for redundancy is an important incident of the power to employ generally and should be retained, appropriately regulated and managed consistently with the principles and the policy.

The state as employer should have the same rights of employers at common law to make changes to the structure, scope and scale of its workforce. The Act should provide for redundancy subject to safeguards consistent with Westminster principles and industrial rights.

As noted in the *Issues Paper* the state has long had authority to shape its workforce through redundancy in the event of changed need for programs or activities.

94 For application and exclusion see ss. 75, 76 and 79. The provision is carried forward from the *Public Sector Management and Employment Act 2002* (NSW) ss. 114–120, and before that the *Public Sector Management Act 1988* (NSW) ss. 89–94.

95 [humanrights.vgso.vic.gov.au/charter-guide/charter-rights-by-section/section-18-taking-part-public-life](http://humanrights.vgso.vic.gov.au/charter-guide/charter-rights-by-section/section-18-taking-part-public-life).

96 This example is from s. 7 of the *State Development and Public Works Organisation Act 1971* referring to the Coordinator-General and Deputy Coordinator-General.

97 Removal of assistant ministers: *Constitution of Queensland 2001* s. 26 and membership of the Executive Council: s. 49; judges: s. 60, 61. These offices are out of the review’s scope anyway.



The *Industrial Relations Act 2016* refers to these circumstances in the following terms<sup>98</sup>:

The employee's employment is terminated because the employer no longer requires the job done by the employee to be done by anyone.

The *Public Service Act 2008* section 138 empowers chief executives to 'take action under a directive':

*if the chief executive of a department believes a public service employee is surplus to the department's needs because—*

- (a) more employees are employed in the department than it needs for the effective, efficient and appropriate performance of its functions; or*
- (b) the duties performed by the employee are no longer required.*

Directive 4/18 *Early Retirement, Redundancy and Retrenchment* made by the Minister for Industrial Relations applies. The directive does not mention section 138.

Additionally, the Minister (Premier) may direct action under section 42:

*42 Minister may direct action about surplus public service employees*

- (1) This section applies if the Minister is satisfied more public service employees are employed in a department than it needs for the effective, efficient and appropriate performance of its functions.*
- (2) The Minister may direct the department's chief executive to take action in accordance with relevant rulings of the commission chief executive.*

Both provisions apply only to departments, but the regulation applies section 138 to some other State Government entities and there are other statutes with redundancy provisions<sup>99</sup>. There is no commission chief executive ruling.

Various industrial instruments provide a process for reduction of workforce through redundancy, mandating

consultation with employees and their representatives as precursors to decisions to terminate for redundancy<sup>100</sup>.

Power to terminate employment for redundancy (and to move employees by transfer and redeployment) is important for proper management of workplaces. It is recommended the statutory powers in section 138 (chief executive decision about redundancy) be retained, applying broadly to the principal officers of state entities.

The review considers the ministerial power in section 42 is unnecessary and involves the Premier in management matters. The Premier has other administrative means to achieve the same objectives including ordering a review or inquiry about the resources of a department, and through the budget process.

The Public Sector Commissioner should also have power to make an Employment Direction for redundancies that applies across departments or other agencies or the public sector as a whole.

### Recommendation: Redundancy

10. To remove doubt, the Act should invest power in a chief executive of a department or other state entity to terminate employment for redundancy, subject to normal industrial processes, and under guidance of an Employment Direction.

### 5.1.6 Prerogative power to dismiss

Section 219(3) preserves the traditional right of the state (the Crown) to dismiss at will. It provides:

*The right or power of the State recognised at common law to dispense with the services of a person employed in the public service is not abrogated or restricted by any provision of this Act.*

The provision applies to departments and public service offices in schedule 1 to the Act (including for example the Auditor-General), and by the regulation to:

- Hospital and Health Services
- Legal Aid Queensland

98 s. 125(1)(b). That section is part of the Queensland Employment Standards stated in the Act. For redundancy see ch. 2 div. 13. Compare *Fair Work Act 2009* (Cth) s. 119(1)(a): "the employer no longer requires the job done by the employee to be done by anyone, except where this is due to the ordinary and customary turnover of labour".

99 *Ambulance Service Act 1991* s. 18; *Fire and Emergency Services Act 1990* s. 29; *Parliamentary Service Act 1988* s. 39 (out of scope); and *Public Service Regulation 2008* that applies s. 138 to hospital and health services, Legal Aid Queensland, Queensland Agricultural Training Colleges, Queensland Ambulance Service (despite having its own statutory provision), but not to the CCC, Gasfields Commission, QFES (which has a statutory provision in similar terms to the QAS), QBCC; Residential Tenancies Authority, Safe Food Production QLD and Trade and Investment Queensland. This is another example of the lack of coherent policy underlying the application or not of the *Public Service Act 2008* and further support for a sector-wide coverage by the proposed new Act.

100 E.g. *Queensland Public Service Officers and Other Employees Award – State 2015* cl. 10.2.

- Agricultural Training Colleges
- Queensland Ambulance Service
- Queensland Building and Construction Commission
- Queensland Fire and Emergency Service
- Residential Tenancies Authority.

It is not applied by the regulation to:

- Crime and Corruption Commission
- Gasfields Commission
- Queensland Rural and Industry Development Authority
- Safe Food Production Queensland.

In *Berenyi v Maynard* Phillippides JA notes the effect of this provision was to preserve the common law power regardless of the Act's other provisions about termination of an employee (in that case a senior executive officer under contract)<sup>101</sup>.

On the general principle, in *Commissioner of Police for NSW & v Jeffrey Jarratt* Mason P said<sup>102</sup>:

*[83] In my view, none but the last matter raises an argument requiring detailed attention. I say this, in part because of the very nature of the principle as a firmly established common law right peculiar to the Crown (and in that sense a prerogative in the Blackstonian sense: see Davis v The Commonwealth [1988] HCA 63; (1988) 166 CLR 79 at 108). Case after case has affirmed its continued, albeit narrowing, application. It has been properly recognised by Hely J in Barratt (165 ALR at 609 [8]) as:*

*... based on the notion that the Crown cannot by contract hamper its freedom of action in matters which concern the welfare of the State: Smith: Public Employment Law (1987) p86. ... [I]t is in the interests of the community that the ministers for the time being advising the Crown should be able to dispense with the services of its employees if they think it desirable', per Rowlatt J quoted in Fletcher v Nott [1938] HCA 25; (1938) 60 CLR 55 at 68.*

*[84] Simply because statute addresses some aspects of an officer's service is not enough to exclude the principle from applying to its termination. Aspects of a police officer's service have long been regulated by statute, but this has not prevented the application of the dismissal principle in a long line of authorities*

*involving police officers. In Windeyer J's words in Marks (at 586):*

*... it does not need a statute to bring the rule in. It would need a statute to put it out.*

*See also Fletcher at 77, Kaye at 198 and 204, Coutts at 105–6.*

*[85] What Kirby P said in Suttling (at 436) with reference to the Education Commission Act 1980 is equally applicable to the present situation:*

*The Act governing the employment of the [respondent] is not written on a blank page. It is expressed in terms which are derived from, and are to be understood bearing in mind 'the heavily entrenched penumbra, supported by the tradition, authority and public policy' attaching to employment in the Crown service: see Wilson J, Coutts at 105.*

However, the prerogative can be displaced by statute<sup>103</sup>.

For that reason it is recommended the preservation expressed in *Public Service Act 2008* section 219(3) be carried forward to the new Act. Advice should be sought on application of the prerogative to public sector employment rather than public service employment. (Note this review excludes the Queensland Police Service and chapter 8 of the *Public Service Act 2008* does not extend to police.)

### Recommendation: Retain Crown prerogative

11. The preserved prerogative to dispense with services in section 219(3) of the *Public Service Act 2008* should be retained, subject to Crown Law advice on the application of the prerogative across the public sector.

## 5.2 Performance and development

An employee should bear responsibility for their work performance, and it is recommended that the Act make that point<sup>104</sup>.

A recurring theme in consultation and over many years of working with public servants is the challenge of professional and personal development.

Public employees in professional jobs such as nurses, teachers, lawyers, social workers, engineers and veterinarians, may have clear professional development

101 [2015] QSC 370, [41], [43].

102 [2003] NSWCA 326, Meagher and Santow JJA agreeing.

103 *Kelly v Commissioner of the Department of Corrective Services & Anor* [2001] NSWCA 148.

104 Compare the "Work performance and personal conduct principles" in s. 26.

pathways, sometimes with compulsory professional development under the various registration schemes.

But what is the pathway for administrators? Human resource specialists? Policy officers?

A second recurring theme is confusion about who is responsible for this development. Some bemoan the lack of programs provided by their departments and the time and cost to attend to personal and professional development. Others actively seek out development opportunities at their own cost in their own time through professional bodies and conferences<sup>105</sup>, further study, commercial training programs, writing papers for journals and so on.

Good performance often requires ongoing professional development; career advancement almost always requires that bit extra<sup>106</sup>.

Senior stakeholders—the chief executives and chief human resource officers—were of the view that development responsibility should be shared: employees have an obligation to care for their own development; employers should provide reasonable opportunities.

The review concludes that the Act should state responsibility for professional and personal development lies with individual employees.

Agencies should actively facilitate and contribute to development systemically. Examples might include ensuring reasonable time is available for employees to attend conferences and other programs, internal training and development opportunities are available, and reasonable assistance is provided for external development opportunities. Managers (as discussed below) should have explicit responsibility to work with subordinates on developing their careers and sustaining and lifting performance including development opportunities. A manager's own development planning should always include plans for management development and improvement.

### Recommendation: Responsibility for performance and development

12. The Act should state that an employee bears responsibility for their performance and personal and professional development.
13. An employee's manager should have responsibility to ensure that the employee understands their responsibility for personal and professional development and that reasonable opportunities are provided for development.

See also Recommendations 15 and 16 about managers' development.

#### **A note: Tap into existing excellence**

The Queensland public sector does in fact have many excellent managers, with excellent knowledge and experience. The institutional form of departments, separate services and agencies, and the weakening of the centre over the past 30 or more years makes it hard to tap into that resource systemically. The recommended processes for building stronger communities of practice should lead to better sharing of that excellence, in the process developing local leadership. See [section 9.1.4](#).

49

## 5.3 Management

Public employment takes place in the context of institutional forms, many of them large like departments and hospitals. Management through hierarchies is inevitable in large form institutions in a Westminster government.

The *Public Service Act 2008* and other employing frameworks place an individual (chief executive) at the pinnacle of an organisation. This top-down framework operates in practice through delegating management functions to other employees.

Every public sector employee in a government department has a manager (except for the chief executive), and every public service manager (including chief executives but not some office holders) is an employee.

105 Examples include the Australian Evaluation Society; Institute of Public Administration Australia; Economic Society of Australia; Australian Human Resources Institute.

106 The review of course is not saying every employee must engage in developmental activities. An employee is entitled to be satisfied with their lot if they are performing well otherwise.

The responsibilities of a public service manager are stated in section 26 of the *Public Service Act 2008*<sup>107</sup>:

- (2) *Also, a public service manager must take all reasonable steps to ensure each public service employee under the manager's management is aware of the following—*
- (a) *the work performance and personal conduct expected of the employee;*
  - (b) *the values of the public service and of the department or public service office in which the employee is employed;*
  - (c) *what constitutes corrupt conduct under the Crime and Corruption Act 2001.*
- (3) *Further, a public service manager must—*
- (a) *pro-actively manage the work performance and personal conduct of public service employees under the manager's management; and*
  - (b) *if a case of unacceptable work performance or personal conduct arises, take prompt and appropriate action to address the matter.*
- (4) *In this section—*  
**public service manager** *means a public service employee whose duties involve or include managing other public service employees in the carrying out of their duties.*

These three subsections, the totality of management responsibility in the Act, are masterly in their brevity. They seem also to be the only attempt in Australia to capture public sector management responsibility in legislation<sup>108</sup>.

An obvious omission is the suite of accountability laws that bind and affect public employees. Corrupt conduct is but a fraction of these, and at the least the obligation to inform should include accountability tools, industrial and workplace matters and employee responsibilities.

Some further examples of public sector accountabilities include:

- anti-discrimination and human rights
- industrial rights including International Labour Organisation (ILO) conventions
- rights of association
- public records
- public sector integrity
- public interest disclosure
- financial accountability and audit
- parliament and parliamentary accountability
- complaint management
- code of conduct and the *Public Sector Ethics Act 1994*
- employee responsibilities
- manager responsibilities
- human resource management practice.

See also [section 2.2.4](#).

The obligation must, of course, be proportionate to the management responsibility and managers (especially those less senior) should be supported in discharging the awareness obligations, such as appropriate and publicly available materials.

The Public Sector Commission should be responsible for coordinating the availability of such materials, some of which might be developed by other accountability entities, such as the Crime and Corruption Commission, Integrity Commissioner, Ombudsman and Information Commissioner, each of whom actively produces guidance materials of high quality already, but not necessarily directed to public sector managers.

The review notes particularly the relatively poor understanding of public interest disclosures (or whistleblowing). As one stakeholder opined, whistleblowers should be treated as free consulting

107 The section applies to public services offices and by the regulation to health and hospital services but not to any other listed entity.

108 These subsections and ss. 88H–88N were inserted into the *Public Service Act 2008* by the *Crime and Misconduct and Other Legislation Amendment Act 2014*, apparently implementing Callinan-Aroney Commission of Inquiry and Commission of Audit recommendations for “refocusing responsibility of [sic] conduct in public sector agencies to line managers and ultimately CEOs to be dealt with promptly, with the PSC having a role in monitoring and auditing of agency response: responsibility of conduct in public sector agencies to line managers and ultimately CEOs to be dealt with promptly, with the PSC having a role in monitoring and auditing of agency response”: Explanatory Note to the Bill p. 9. No stakeholder thought the sections practically useful.

advice about shortcomings, not as troublemakers. Experience is that public employees do not understand the very serious obligations under the Act.

Responsibility for education and training about public interest disclosure is vested under the *Public Interest Disclosure Act 2010* in the Ombudsman, who has a range of excellent resources on the internet<sup>109</sup>.

The concern is that the Ombudsman's otherwise excellent efforts have not percolated to managers. The same observation can be made about the Public Service Commission's materials, many of which are also excellent: stakeholders repeatedly observed that the Commission puts out a guideline or other document and nothing changes. The challenge is not just to develop high quality materials. It is to achieve behaviour change. This disconnection between intended and actual effect is one driver of a perceived lack of responsiveness. The managerial chain of responsibility is one means of driving that change.

Also of note is the change to the *Public Sector Ethics 1994* that originally required chief executives to 'ensure that public officials of the entity are given appropriate education and training about public sector ethics.' After the 2010 changes the obligation is to 'give access to appropriate education and training about public sector ethics'. The shift is consistent with the primary responsibility recommended for employees' own professional development, but it does not come with accountability or consequences if employees do not get up to speed and managers do not follow through.

No doubt there are many skilled public sector managers who communicate well with their subordinates, are proactive and prompt in addressing performance or conduct concerns.

Nonetheless, input to the review from employer representatives and unions alike was that there is much room for improvement.

Managing people in any organisation is a complicated role, requiring sophistication, a mix of soft and hard skills, detailed knowledge of the organisation and the duties of each employee managed, and accountability up the line. Management skills do not spontaneously emerge on appointment but are acquired through experience and learning.

It is not uncommon for people to be promoted to management roles because they are good at the technical content of their more junior jobs. Excellence in writing briefs, teaching, project management, delivering frontline health services or navigating complex policy through stakeholders is not necessarily a predictor of excellence in managing others: the skill it takes to win that management job is not necessarily the skill needed to be a great manager.

Stakeholders regularly made this observation about the challenges less experienced managers face in those difficult conversations about performance or misconduct<sup>110</sup>.

Unsurprisingly early career managers often struggle to be good managers. So too, reaching higher into executive ranks, it is often assumed leadership skills are already present or will develop organically. That is a poor assumption: experience and systematic skills development are important for both managing and leading, and seniority should not be automatically conflated with excellence.

Confidence in a manager's skills and performance should start from knowing the person was selected or promoted on merit and will be responsible for their own performance and development. Responsibility for ensuring a public sector manager is a good manager should fall on the shoulders of that person's manager, cascading up the hierarchy until the Director-General<sup>111</sup>.

The review recommends that chief executives should have power to address issues with a manager who is not managing adequately, for example: to undergo training or development; to remove the manager's management responsibility; and to reassign the manager to a non-management role including (in appropriate circumstances) to demote the manager to a non-managerial level (subject to positive performance management and natural justice).

The Public Service Commission's functions stated in section 46 of the *Public Service Act 2008* include: enhancing human resource management and capability, promoting management and employment principles, and enhancing leadership and capability in relation to management matters.

109 [www.ombudsman.qld.gov.au/improve-public-administration/public-interest-disclosures](http://www.ombudsman.qld.gov.au/improve-public-administration/public-interest-disclosures).

110 Promotion is of course often preceded by people acting in supervisory roles, thereby gaining on-the-job experience.

111 Under the *Public Service Act 2008* good management is a function of the Director-General alone, but by delegation can be distributed throughout the hierarchy.

The Commission's chief executive has a function of facilitating the development of senior executives and senior officers, but not of other employees (sections 58, 107 and 117). There is no assigned central responsibility for development of either the vast bulk of employees or for chief executives.

Input from chief executives is that mobility between departments is impeded by wide differences in agency management frameworks. Transferring staff do not necessarily understand local management practice or language. It is therefore recommended that the Public Sector Commission have statutory responsibility for facilitating whole sector management development. Responsibility for rollout and delivery should remain at an agency level.

#### **Recommendation: Management development**

14. The central human resources agency, the Public Sector Commission, should have a function to facilitate high quality, consistent management development for the entire public sector, delivered at an agency level. Appropriate resources should be allocated to the Commission for that function.
15. Chief executives should have a responsibility to ensure that managers in their departments or agencies have, or are taking reasonable steps to develop, appropriate management skills; that their management performance is of a high standard; and that management performance is regularly tested. Power to institute corrective action should be explicitly stated.
16. Further, an employee with management responsibilities should have personal responsibility to ensure their own development as a manager.

## 6 The best public service we can have

The *Public Service Act 2008* states aspirations for the Queensland public service: the public service is to be:

- high performing: section 3(1)(a)
- capable: 46(1)(a)
- diverse and highly skilled: 26(2)(c)
- effective and efficient: 3(1)(b), 25(1)(a) and (e); 26(1)(b); 36(1)
- collaborative: 25(1)(c); 26(1)(d)
- continually improving: 25(1)(d); 26(1)(f)
- best practice: 25(2)(a)
- fully accountable: 25(1)(e)
- an employer of choice: 25(1)(g)
- equitable and flexible in work practices: 25(2)(b)
- achieving excellence: 26(1)(a)
- proactive: 26(3)(a).

These adjectives are important in shaping the type of public service Queensland aspires to, but their achievement is another matter altogether. That achievement is the responsibility under the Act of the chief executives and individual managers and employees, of the Public Service Commission and its chief executive, and of the minister, the Premier.

### 6.1 Achieving potential

#### 6.1.1 Leadership development

Achieving the aspirations requires resources, capabilities and dedication.

The Public Service Commission, according to the budget papers for 2018–19, has a staff of 70 full-time equivalents and a budget of \$14.6 million, \$9.8 million of which is employee expenses (about two-thirds of the total).

The Public Service Commission advised the review about its functions as follows:

*The Queensland Public Service Commission (PSC) partners with agencies to achieve a vision of a high-performing, future focused public sector. It has a lead role in designing and implementing frameworks, policies and strategies to improve sector-wide performance and ensure employees are valued,*

*supported and enabled to deliver at their best, now and in the future. The PSC provides stewardship by managing an employment framework that drives performance, accountability and trust. Through the monitoring and reporting of sector-wide data, including the annual employee opinion survey, the PSC provides insights that enable evidence-based decision-making. The PSC develops public sector capability by partnering with agencies to attract, engage and develop a workforce with the necessary skills and capabilities. It plays a key role in building a more inclusive and diverse public sector, developing executive leaders to drive performance and strengthening collaborative governance capability. In recent years, the PSC has also focused on enabling an agile, future-focused public sector and has worked closely with agencies to develop a 10-year human capital outlook, and implemented a 3-year human capital strategic roadmap, to better prepare for the future of work and respond to changing community needs.*

Professional development has a varied history in Queensland. Before 1988, the Public Service Board, through its Consultancy Division, had some investment in executive level leadership programs. The 1987–88 reforms swept that board and its programs aside. The Office of Public Service Personnel Management was administrative in character and had no place in leading professional development.

After the change of government in 1989, the Public Sector Management Commission (PSMC) provided some leadership in capability development, notably through the Executive Leadership and Development Program (ELDP). The program was popular with senior executives, but costly and over time became elitist. Involvement in the Australian and New Zealand School of Government (ANZSOG) afforded some high-level capability development from the early 2000s.

It, too, is an expensive delivery model and at the highest level is a master's degree program<sup>112</sup>. The Institute of Public Administration Australia (IPAA)<sup>113</sup> collapsed as fiscal restraint following the 2012 election impacted the training and development spend, resulting in a significant downturn in systemic improvement and development in Queensland public administration.

112 [www.anzsog.edu.au/masters](http://www.anzsog.edu.au/masters).

113 The Institute of Public Administration Australia (IPAA) is “the nationwide professional association for those involved in public administration”: [www.ipaa.org.au](http://www.ipaa.org.au). The Queensland division office was closed during the era of ‘fiscal repair’: [www.ipaa.org.au/meeting-tonight-for-ipaa-queensland-members](http://www.ipaa.org.au/meeting-tonight-for-ipaa-queensland-members). The Public Service Commission acted as placeholder for the Division and recently commenced IPAA Qld activity: [qld.ipaa.org.au](http://qld.ipaa.org.au). The address on the website at time of writing was the Commission’s.

Over recent years the Public Service Commission's focus has been on procurement and contract management of externally provided leadership programs, including through the emergence of Lead4Qld and the revival of IPAA under the aegis of the Leadership Board and hosted by the Public Service Commission<sup>114</sup>.

If Queensland is to reach the aspirations listed above, there must be a reshaping of the tools and investment for leadership in public administration. The Public Sector Commission is the logical point to coordinate and drive any change, but to do so it must be adequately resourced, its internal management redesigned for the broader functions recommended in this report, and its authority enhanced across the public sector.

The review acknowledges the excellent work already initiated by the Public Service Commission, but notes that priorities should include:

- research into public administration and management
- high quality executive leadership development
- high quality management development
- structured review of departments and agencies
- reporting of performance and leadership
- achieving pay equity objectives.

### 6.1.2 Integrated public sector governance

The review also considers there should be a strong focus on whole sector governance, bringing together the central agencies responsible for policy, people and money.

There is presently a Leadership Board consisting of all the heads of government departments. The review has been told it is useful for agreeing broad issues, but because of its size and diffuse makeup it is not a deliberative body, and does not integrate governance, being more collegial than suited to detailed discussion.

The review recommends a sharp, integrated focus on governance in a Queensland Governance Council consisting of between three and five members:

- Director-General, Department of the Premier and Cabinet (chair)
- Under Treasurer
- Public Sector Commissioner
- up to two other chief executives of other departments.

The additional members should be appointed by the Premier for a specified term.

The Council would not replace the current four-member board (independent chair plus the first three in the above list) that oversees the Commission's activities. The current board should be discontinued. The Council would be an integrating body, specifically intended to think deeply and holistically about governance of the Queensland public sector and provide leadership across the domains of policy, people and money.

The review canvassed extensively the views of public sector leaders on whether external members might bring diversity of views and experience. The current Public Service Commission includes an independent chair but that has been vacant for an extended period. Previous external members have included former senior public servants, business leaders and academics. The ability to engage with those external leaders was considered potentially important and even enjoyable, but the real-world impact was different<sup>115</sup>.

The review considers the major challenges are best informed by serving chief executives making up the Council. The need for diverse opinion can be accommodated in other ways including committees and advisory boards to the Council, a targeted research agenda, astute use of heads of discipline under the Council, and co-opting additional expertise or diversity if desired.

The recommended initial makeup of the Council is therefore the three central agency leaders *ex officio* with consideration of one other Director-General<sup>116</sup>. The Queensland Governance Council could be formed administratively immediately with or without an additional Director-General co-opted.

The Queensland Governance Council should have with specific responsibilities and functions for:

- integrating whole sector systems for policy and governance, financial management and human resources
- coordinating with the other large-scale employment systems (public health and state education)
- regular, high level engagement with employee representatives
- setting the research priorities agenda for the Commission

<sup>114</sup> [qld.ipaa.org.au](http://qld.ipaa.org.au).

<sup>115</sup> See also the Thodey quote on [page 26](#): business expertise is not necessarily transformative.

<sup>116</sup> That arrangement would also allow the government to ensure a gender mix in the event the three central agency heads were all male (as indeed the substantive position holders at the time of writing are).



- systematic review of agencies, programs and public administration themes
- appointing Heads of Discipline
- governance guidance where there are complex management issues
- review of SES, SO and section 122 arrangements.

The Council should be able to establish standing committees (the Leadership Board might be an example), and committees and working parties for particular topics of public sector governance and public administration excellence, and stakeholder reference committees for structured engagement with external stakeholders<sup>117</sup>, and power to co-opt additional expertise if desired.

The review makes no comment on the rhythm of Council business or the frequency of its meetings. Rather, the review's intention is to establish a body with a clear set of responsibilities and functions and the gravitas and status to get things done. Form, in other words, should follow function.

### A head of service?

Some jurisdictions designate a senior person as 'head of the service'<sup>118</sup>, often the head of the central policy agency<sup>119</sup>. The Thodey Review is considering this idea with the Secretary, Department of the Prime Minister and Cabinet as statutory Head of Service and a Head of People, the Australian Public Service Commissioner. The rationale is stated thus:

*The APS needs empowered and accountable leaders to set the tone and direction for the service. In particular, the Secretary of PM&C and the APS Commissioner have critical roles in, respectively, overall leadership of the service and responsibility for people and capability within the APS<sup>120</sup>.*

This review does not recommend a Head of Service, preferring instead:

- integrating the people, money and policy elements of governance under a triumvirate of public sector leaders: the Queensland Governance Council

being the heads of the three central agencies, supplemented with one or two other heads of departments

- strengthening the authority of the central human resources agency under an authoritative Commissioner supported where needed by Special Commissioners with whole sector reach
- clarifying the employment relationship of chief executives and the state through the Premier and the role and purpose of the chief executive service
- clarifying the employer status of the state and state entities, effected through chief executives and principal officers
- retaining strong devolution of employment authority on behalf of the state to those chief executives
- strengthening communities of practice through Heads of Practice for key public administration and professional functions under the Queensland Governance Council
- allowing sophisticated devolution in the very large employment systems (public health and state education) to more local levels or to cross-cutting functions.

The objective of unity that might spring from a designated head of service is intended to be in the lived experience of consistent and coherent employment experience and identification of the employer as being the state (in its various guises as departments and statutory entities). The Queensland Governance Council has a function of unifying governance across the employment experience, replenishment of service capacity and stewardship of public resources, and the decision making and responsive capacity of public services.

That said, the review commends to the Premier consideration of the Thodey Review's future work as an alternative.

117 Unions, academics, business, community peak bodies etc. Compare Queensland Industrial Relations Consultative Committee established by s. 968 *Industrial Relations Act 2016*. The Committee is chaired by the Industrial Relations Minister. Other members include the Public Service Commissioner and two chief executives or senior executives of departments nominated by the minister (presumably representing State Government employers), local government (employers covered by the Act), and four nominees of unions: s. 970; meeting at least twice yearly: s. 975.

118 The small Australian jurisdictions: Tasmania and the two Territories and notably the United Kingdom where the head of Prime Ministers' was traditionally also the Cabinet Secretary and the Head of the Home Civil Service. The arrangement has been reformed.

119 Director-General, Department of the Premier and Cabinet in the Queensland context.

120 Independent Review of the Australian Public Service (2019). *Priorities for change*. [www.apreview.gov.au/resources/priorities-change](http://www.apreview.gov.au/resources/priorities-change).

### Recommendation: Queensland Governance Council

17. A Queensland Governance Council should be established with membership being the chief executives of the Department of the Premier and Cabinet and Queensland Treasury and the Public Sector Commissioner (*ex officio*) and up to two other members who are chief executives of Queensland Government departments, appointed by the Premier. The Council's functions should include setting the research agenda, managing whole sector systems, coordinating with the large employment sectors in health and education, and engagement with employee representatives. The Council should have power to establish committees (including standing committees) and working groups to report to the Council.
18. The Council should be established administratively immediately and given responsibility for implementation of the package of reforms recommended in this report.

#### 6.1.3 Review of departments and other agencies

The *Public Service Act 2008* has several provisions about the review of organisations. The Act assumes that reviews will generally be concerned with effectiveness and efficiency or adherence to the management and employment principles in section 25. For historical reasons, namely the assumption of the functions of the abolished Service Delivery and Performance Commission, the review function is procedurally formal and technical rather than being focused on the utility of the review, the purpose and impact of reviewing, and the benefits of inquiring minds attending to leadership in public administration.

As stated in the *Issues Paper*, Queensland, like other jurisdictions, has a long tradition of organisational reviews. The Public Service Commission's latest program of reviews, Capability Blueprints, encourages departments to critically look at their own functions and direction based on a standard analytical frame and approach. Stakeholders report this facilitative approach is far better received than other recent experiences

including heavy structural reform, review-for-fiscal restraint, and forensic, quasi-judicial approaches.

Many investigations and reviews need no more authority than Cabinet's decision or the Premier's imprimatur (and maybe some budget). Departments happily cooperate and engage with an opportunity to address complicated issues in a structured way<sup>121</sup>. But there are instances where compliance with a review cannot be assumed and there are even examples where a review was re-booted as a formal Commission of Inquiry to ensure cooperation of officials<sup>122</sup>. Legislated independence might sometimes make informal review uncomfortable for reviewers and the agency alike.

A formal, statutory power to conduct reviews can therefore be helpful. Most public employment laws in Australia have such authority, and those jurisdictions that do not have other ways to mount investigations into agencies or programs.

In any case, the government needs ongoing intelligence on its own activities. Such intelligence ensures a culture of continuous improvement, and that the public service continues to challenge the *status quo* and continues to be responsive in a dynamic world.

The review acknowledges the positive attitude to, and outcomes arising from, the Capability Blueprint program. It has been a valuable initiative. However, Capability Blueprints build on the *status quo* without necessarily affording challenges to change or transform. A vacuum so created is likely to be filled by others with mandates to dig deeper as shown in Table 2.

Each of these powers is vital for accountability and transparency, but they are mostly reactive and seldom lend themselves to holistic views of public administration. From experience they are poor vehicles for reshaping institutions or designing robust public policies.

The review recommends a dual approach to review and inquiry: periodic review, and *ad hoc* inquiry.

Reviews and inquiries might be concerned with:

- a department or other agency<sup>123</sup>
- part of a department or agency
- a program or policy area

121 For example, this review itself; and the *Opportunities for Personalised Transport* review undertaken in 2016.

122 Queensland Rail Train Crewing Practices Commission of Inquiry [www.strachaninquiry.qld.gov.au](http://www.strachaninquiry.qld.gov.au).

123 concurrence would be required for agencies with accountability obligations and statutory independence from the Executive Government such as Auditor-General, Ombudsman, Information Commissioner, Integrity Commissioner, Crime and Corruption Commission, Racing Integrity Commission, Electoral Commission, Human Rights Commission.

Table 2: Reviews by accountability bodies.

Accountability body or process	Example
Crime and Corruption Commission	Taskforce Flaxton.
Auditor-General	Performance audits and specific audits such as e-Health, market-led proposals, confidentiality and disclosure of government contracts.
Human Rights Commission	E.g., women in prison (2008 and 2019); Indigenous access to health services.
Ombudsman	E.g., strip searching in prisons, patient transport subsidy.
QCAT	Power to recommend about policies practices and procedures in the context of a review of an administrative decision: <i>Queensland Civil and Administrative Tribunal Act 2009</i> s. 24(3).
Queensland Productivity Commission	Regulatory impact. Imprisonment and recidivism review.
Commissions of inquiry	Recent commissions of inquiry have canvassed new generation rolling stock, rail train crewing, various health facilities, child protection practices, ICT systems (health payroll), responses to natural disasters.
Inquests	Stakeholders say inquests are particularly stressful for individual employees giving evidence and costly and diverting of resources for entities involved.
Parliament and parliamentary committees	Estimates; Portfolio committees; scrutiny of legislation; questions with and without notice.

- a theme, e.g., human resources management, use of external investigators, ICT procurement
- interactions between departments or agencies or parts thereof.

Reviews and inquiries should not substitute for positive performance actions or disciplinary and other corrective management. Accordingly, a review or inquiry under the proposed Act should not be commissioned into individual employees.

The periodic review should complement the Capability Blueprint program, and operate on a 'no surprises' basis, that is, be open and transparent and directed to reporting on current practices and areas for improvement and leadership.

Based on anecdotal input to this review, these periodic reviews may present chief executives with much

desired opportunities to stimulate change through external impetus.

There should be a *rolling five-year review program* decided by the Queensland Governance Council and managed through the Public Sector Commission. The discipline of planning this cycle of reviews will provide certainty to the sector and allow ample time to plan for complex or difficult reviews and change processes and acquiring and deploying the right skills for the reviews.

An *ad hoc inquiry* may be undertaken by the Public Sector Commissioner or commissioned by the Premier.

The Premier should have power to appoint Special Commissioners to undertake reviews and inquiries to complement the Public Sector Commission and enhance independence or capability<sup>124</sup>. A review or inquiry should have appropriate authority to require documents to be produced, witnesses to appear,

124 cf. *Public Service Act 1999* (Cth) s. 48A; *Government Sector Employment Act 2013* (NSW) s. 82 (special ministerial inquiries); *Public Administration Act 2004* (Vic) s. 56 (Premier may direct Commission to conduct inquiry); *Public Sector Management Act 1994* (WA) (special inquiries); *Public Sector Act 2009* (SA) ss. 14(1)(f) and 18 (that give the Commissioner a function of conducting reviews and investigations using investigative powers). The proposed Special Commissioner (Equity and Diversity) is one such Special Commissioner.

and for reports and recommendations to be published<sup>125</sup>. Note, however, the intention is for these administrative inquiries to be less formal, less costly, more flexible and speedier to establish than a commission of inquiry. The intent is an administrative inquiry would obviate the need to convert an investigation into a formal commission (as happened with Strachan <sup>126</sup>). Complementing the Auditor-General's performance audits (see note below), the review program should include a mix of new reviews and consideration of progress made in addressing past reviews.

Importantly, it is not enough to just conduct a review. Examples abound of well-intentioned, well-commissioned and well-conducted reviews that languish. The Queensland Governance Council should therefore ensure that review lessons and insights are acted upon, shared across the sector and reported publicly.

Over time, the body of work associated with the review program will also become a useful resource to support and supplement the proposed research capability.

#### **A note: Hospital and Health Service investigations**

Part 9 of the *Hospital and Health Boards Act 2011* provides for investigations into 'management, administration or delivery of public sector health services, including employment matters.'<sup>127</sup>

'Employment matters' is not defined in the Act<sup>128</sup>. The Hospital and Health Board Regulation 2012 describes employment matters in terms of movement of employees between services, changes in classification, continuation of entitlements, and disclosure of employment information.

(Part 9 investigations are heavily regulated and the Act is dense with procedural requirements, which is not the intention of the administrative inquiries recommended here.)

This review notes the potential for the review function to be interpreted widely, and considers investigations into individuals should not take place under Part 9, but be dealt with as performance or disciplinary matters under the *Public Service Act 2008* and the proposed new Act, and encourages clarification of the *Hospital and Health Boards Act 2011* accordingly.

#### **A note: QAO performance audit remit**

The Auditor-General notes the intent in the *Issues Paper* to address the review and inquiry functions of the central human resource agency.

For clarity, nothing in this review or the proposed Act is intended to supplant or diminish the Auditor-General's performance audit function. Indeed, it is hoped that the accountability agencies working together will lift review capacity overall and better articulate these activities for organisational and policy outcomes.

#### **Recommendation: Reviews and inquiries**

19. The Queensland Governance Council should determine a five-year rolling program of reviews of agencies (or part), programs and themes. Reviews must not be conducted into individual employees' performance or conduct.
20. The Premier should have power to commission administrative inquiries to be conducted by the Public Sector Commissioner or a Special Commissioner appointed by the Premier for the purpose into an aspect of public administration.
21. The Public Sector Commissioner or a Special Commissioner should have power to undertake the review or inquiry including where relevant power to compel production of documents and witnesses and to report with appropriate protection and immunity, noting the intent for relative informality and speed of establishment and finalisation.

#### **6.1.4 Research**

The review recommends that the Public Sector Commission has an explicit research and reporting function, responsibility and capacity for a targeted and informative research program intended to position Queensland as a leader in public administration nationally and internationally.

The priorities for research should be determined by the proposed Queensland Governance Council and funded under the Council's direction.

Without attempting to predict or direct priorities, a few points can be made.

125 Compare *Commissions of Inquiry Act 1950* section 20.

126 See footnote 122.

127 s. 189.

128 Except to exclude from the term and conditions of employment for making health service directives in section 47(1)(d). The term is defined in detail in the *Public Service Act 2008* s. 30(4) for the purposes of the general equal employment obligation to mean the actions relating to employment of people.

First, the review is not suggesting the Commission should become an academic institution<sup>129</sup>.

Second, current research (of smaller scope than recommended) is undertaken cooperatively and without the need for large dedicated budget. That remains the preferred option.

Third, research should be practically focused, and might be undertaken through a range of ways:

- commissioning from reputable academic and think tank institutions
- scholarships and fellowships
- visiting scholar and researcher-in-residence programs both in the Commission and in other agencies
- support for writing and publication of research findings
- staff interchange with research institutions.

Another agency might be the appropriate research leader, for example, the Department of Health in aspects of health administration, the Department of Agriculture and Fisheries in cross-border biosecurity administration or the Department of Natural Resources, Mines and Energy in complex community engagement challenges.

Priority areas mentioned by stakeholders included:

- the hollowing out of public administration especially in (a) policy design and (b) implementation and delivery of strategic human resource management practice
- strategic capacity and leadership—the ability to tackle complex and ‘wicked’ problems, manage complexity and uncertainty, the capacity to manage internal and external dissent and complex community response to government initiatives, and the ability to challenge assumptions
- operating at the political-administrative interface
- shaping and analysing government – the habit of critical inquiry about what government does and how it does it, non-defensive review and analysis

of agencies and programs, and understanding practice in other jurisdictions and sectors

- managing conflict and managing difficult people in the workplace, community engagement and service delivery
- responsive and adaptive capability – meeting and anticipating trends and changes, guiding decision makers, and contributing to vision about the potential and future of government delivery and priorities
- building positive organisational cultures
- workplace wellbeing.

Of course, it is easy to be distracted by fashionable ideas or apparent successes elsewhere<sup>130</sup>. A critical eye is needed as well as energy, enthusiasm and innovation lest directions prove tangential and diversionary.

Resources will be required to achieve the aspirations through research and other means. The Queensland Governance Council should take the lead on framing and negotiating budget sources for the research agenda.

### Recommendation: Research

22. The Public Sector Commission should have a function to conduct, fund or commission research to position Queensland as a leader in public administration. An appropriate budget should be appropriated to conduct or commission the research activity.
23. The research agenda should be decided by the Queensland Governance Council after consultation with other departmental chief executives and public sector unions.

## 6.2 Merit, diversity and inclusion

The *Issues Paper* raised the complicated question of how merit in public employment can be reconciled with demands for diversity and inclusion.

Merit in public employment has evolved, in Australia at least, from its 19th century purpose of combatting

129 The Thodey Review has floated the idea of a specialised academy for the Commonwealth: “A dedicated, sustainably resourced, APS Academy to source, design, deliver and/or leverage relevant capability-building initiatives to support the model. This should draw on best practice in each profession, as well as public, private, domestic and international experience”: Independent Review of the APS (2019). *Priorities for Change*. Canberra: Commonwealth of Australia, p. 38. While the idea may be workable at the Commonwealth level, the diffusion of responsibility across three large systems (health, education and departments generally) and the relatively smaller cohort of senior executives, and the proposed chain of management accountability, do not favour a Queensland public sector academy. The proposed management development uplift can be delivered more effectively and flexibly by other means.

130 E.g. Guay, J. (2019) “Public innovation labs around the world are closing — here’s why: In Mexico City and Colombia, a change in political priorities shut down labs”. *Apolitical*, 27 February 2019, [apolitical.co/solution\\_article/public-innovation-labs-around-the-world-are-closing-heres-why](https://apolitical.co/solution_article/public-innovation-labs-around-the-world-are-closing-heres-why).

impropriety<sup>131</sup>. It is now seen as a way of getting the best person for the job.

The concept of merit as best-person-for-the-job is itself under siege as a means of exclusion.

This is not a new thought. Sociologist Michael Young gave us the word ‘meritocracy’ 60 years ago in a dystopian novel *The rise of meritocracy*<sup>132</sup>, but his use was ironic and sarcastic, framed through a psychometric lens replete with ignored class, cultural and other biases leading to distortions and counter-merit outcomes. There are, in his dystopia:

*many different dimensions of merit, each with its own importance and its own difficulty of achievement. But in the late 20th and early 21st centuries [fictional] scholars and policy makers alike avoided the challenge of interrelating and reconciling these conflicting ideals, instead employing simplistic assumptions and deliberate silences*<sup>133</sup>.

Philosophical discourse should inform how we understand merit, but it only takes us so far. Ultimately merit manifests in actual decisions about who gets appointed or promoted from a field of available candidates.

Under the *Public Service Act 2008*, merit is largely procedural and formulaic, and sometimes defensive<sup>134</sup>. The aspiration for ‘The best public service we can have’ needs to be enlivened in the context not only of attracting, retaining and developing the best skilled people as employees but also building the best teams and services we can, all with efficiency, fairness and responsiveness, with inclusiveness, equality of opportunity and in recognition of Queensland’s new human rights regime.

Input from stakeholders leads the review to conclude the changes wrought to equal opportunity laws in 2008 were a backwards step in the awkward act of balancing merit, diversity and inclusion.

The response ought to be one of *recasting what merit means* in that broader sweep rather than trying to adjust processes for each of merit, equity, diversity and inclusion. Ultimately the aspiration will be achieved culturally and behaviourally rather than just through law and procedure.

The *Issues Paper* stated some of the ways merit is stated in other laws. The input about this tended to favour the plain speaking of the New Zealand model:

*Chief executives shall give preference to the person who is best suited to the position.*

The current review of New Zealand’s public employment laws says this:

*Merit will remain a fundamental principle of the Public Service, but we have to approach it in a more comprehensive and holistic way to ensure our Public Service is able to fulfil its purpose. Our workforce will perform better, will be better able to achieve desired outcomes, and will be happier, if it is diverse and inclusive*<sup>135</sup>.

*Appointing and promoting on merit appears the most straightforward principle to implement. The reality is that merit is constrained when anyone is effectively excluded from applying for a position. Considerations of gender, disability, sexual orientation and ethnicity have affected and continue to affect many New Zealanders. The Public Service needs to address inherent barriers to merit, such as the concerns that there may be discrimination experienced by Māori and some other cultural communities, the challenges of an ageing population, and inflexible work practices. The Public Service has a leadership role to meet and demonstrate employment standards, including a diverse and inclusive workforce. The Public Service must reflect the communities it serves and welcome diversity in an inclusive manner*<sup>136</sup>.

131 E.g. nepotism, preferment, purchase of office, politicisation.

132 Young, M. (1958). *The Rise of the meritocracy 1870–2033: An essay on education and society*. London: Thames and Hudson. The book was a dystopian fantasy: merit does not go well.

133 Celarent, B. (2009). “The Rise of the Meritocracy, 1870–2033 by Michael Young”. *American Journal of Sociology*, 115(1), pp. 322–326; but compare Allen, A. (2011) “Michael Young’s The Rise of the Meritocracy: A Philosophical Critique”. *British Journal of Educational Studies*, 59(4), pp. 367–382. See also McNamee, S.J. & Miller, R.K. (2004) *The Meritocracy Myth*, by Lanham, MD: Rowman and Littlefield.

134 That is, decision makers erect processes and documentation to defend against a possible media or other criticism, or legal challenges like a promotion appeal: *Public Service Act 2008* s. 191(1)(c).

135 *State Service Act Reform: Workforce*. [www.havemysay.govt.nz/assets/PDFS/Folder-1/10-WORKFORCE-FAQs.pdf](http://www.havemysay.govt.nz/assets/PDFS/Folder-1/10-WORKFORCE-FAQs.pdf)

136 *Reform of the State Sector Act 1988 Directions and Options for Change*. [www.havemysay.govt.nz/option-2](http://www.havemysay.govt.nz/option-2).

Stakeholders observed the difficulty of reconciling merit with the demand for efficiency<sup>137</sup>, instancing:

- an employee with a strong track record and lengthy experience acting in a job being required to go through a full merit process: public advertising, interviews and referee checks to predictably win promotion on merit
- part-time employees with high potential not scoring on ‘merit metrics’ because of less on-the-job work experience
- selection criteria and interview processes embedded with unconscious biases reducing attractiveness of roles and prospects of diverse selection decisions
- a complicated multi-dimensional matrix for assessment of a technical job resulting in a multitude of separate criteria for assessment, the successful candidate scoring two points higher than the unsuccessful second-place getter.

The commitment to merit remains strong among stakeholders and is evidenced in the government’s commitment to merit-based chief executive selection.

#### **A note: Opaque recruitment**

A common complaint from those outside public employment is the opaque nature of public sector recruitment, job applications and selection methods. The tendency to formalism and technical approaches operates as a barrier to improving diversity. It would be useful for the Special Commissioner (Equity and Diversity) to reflect on how these systems can operate best to facilitate entry to public employment rather than being a barrier against it, and for the Public Sector Commissioner to develop more transparent systems for whole sector use. It may be an important research topic

Stakeholders responding on merit, equity and diversity accepted that a narrow conception of merit was neither achieving the intended purpose of the best person for the job nor building the desired diversity in employment. No stakeholder offered a formulation encompassing diversity, inclusion and the rather contemporary and challenging ‘belonging’, despite the invitation do so in the *Issues Paper*.

Belonging may be too unformed as a concept for public employment law just yet:

*Here’s an easy way to understand belonging, a concept that’s often confused with diversity and inclusion. It’s been said that diversity is like being invited to party, inclusion is being asked to dance, and belonging is dancing like no one’s watching—it’s that sense of psychological safety that employees can be their authentic selves without fear of judgment<sup>138</sup>.*

The challenge for the review is to craft a statement of the merit principle encompassing diversity and inclusion<sup>139</sup>.

#### **A note on recruitment**

Some stakeholders suggested that public services rely too heavily on external recruitment agencies, citing both cost and the prospect of de-skilling.

External recruitment agencies make sense where there is bulk recruitment and high turnover (such as call centres) and where there is a strong need to manage the integrity of the process, such as very senior roles. Some specialised roles may also warrant external support to ensure that the field of applicants is suitably broad and deep.

There is a potential concern where external agencies are engaged to provide administrative support for a process run otherwise by a department. Managers are busy, but if this practice is common, as suggested, it may reflect an undesirable disengagement from the employment process. It may, equally, represent dissatisfaction with public sector recruitment practices, reflecting perceived inefficiencies.

#### **Recommendation: The merit principle**

24. The Act should retain the primacy of the merit principle, restated in terms that acknowledge merit and diversity working together to ensure employment decisions prefer the person best suited to the job.

137 Especially merit demonstrated through process.

138 Lewis, G. (2017). “Why creating a sense of belonging is a gateway to diversity and inclusion”. LinkedIn Talent Blog 2 November 2017. [business.linkedin.com/talent-solutions/blog/diversity/2017/why-creating-a-sense-of-belonging-is-a-gateway-to-diversity-and-inclusion](https://business.linkedin.com/talent-solutions/blog/diversity/2017/why-creating-a-sense-of-belonging-is-a-gateway-to-diversity-and-inclusion). The original dance simile probably belongs to “inclusion strategist” Verna Myers: [learning.vernamyers.com](https://learning.vernamyers.com).

139 Belonging may arise as a cultural phenomenon among diverse and inclusive employees employed and promoted on merit. It need not be completely discarded merely because it is fashionable but unformed.

### 6.3 Equal opportunity

Statutory equal opportunity obligations were introduced in Queensland in the Equal Opportunity in *Public Employment Act 1992*, and repealed in 2008 when the provisions were changed and folded into the *Public Service Act 2008*.

Both sets of provisions identify four target groups<sup>140</sup>:

- (a) *people of the Aboriginal race of Australia or people who are descendants of the indigenous inhabitants of the Torres Strait Islands*
- (b) *people who have migrated to Australia and whose first language is a language other than English, and the children of those people*
- (c) *people with a physical, sensory, intellectual or psychiatric disability (whether the disability presently exists or previously existed but no longer exists).*
- (d) *women.*

The statutory equal employment opportunity (EEO) obligation and its relationship with the merit principle are stated in section 30(2) and (3):

- (2) *Without limiting subsection (1), each relevant EEO agency must act to—*
  - (a) *enable members of the EEO target groups to do the following as effectively as people who are not members of those groups—*
    - (i) *compete for recruitment, selection, promotion and transfer;*
    - (ii) *pursue careers; and*
  - (b) *eliminate unlawful discrimination about employment matters by the agency or its employees against members of the EEO target groups.*
- (3) *To remove any doubt, it is declared that this section, does not require the taking of action incompatible with the merit principle.*

The main positive obligation in the 2008 Act is to report annually to the Public Service Commission.

The 1992 Act also required each agency to develop an EEO management plan (section 6) using the following steps (sections 7 and 14):

- issue a policy statement and keep employees informed
- nominate a person in the agency to have EEO responsibility
- consult with trade unions and employees
- collect statistics
- review policies and practices
- set objectives and implementation strategies
- assess implementation
- report annually against the plan.

The then Public Service Commission could refuse to approve a plan and ask for changes<sup>141</sup> or refer it to the former Anti-Discrimination Tribunal (now QCAT) for investigation. The Tribunal had power to recommend amendments to a plan if it was referred to the Tribunal by the Commissioner. This looks awkward through contemporary eyes: chief executives are far more powerful and the central authority less so since 1996, demanding a different balance.

But the review concludes, both in-principle and on the input from stakeholders, that the 2008 reforms took away too much, attenuating the EEO obligation, relying solely on reporting and a never-used power to express dissatisfaction.

Employee stakeholders noted that the current provisions disengage the EEO obligation from employees both individually and collectively.

Employer stakeholders expressed dissatisfaction with an empty reporting obligation against four target groups that did not resonate with human rights obligations. The passing of the *Human Rights Act 2019* reinforces the disconnection<sup>142</sup>.

The review recommends aligning the EEO obligation to the *Human Rights Act 2019* and the *Anti-Discrimination Act 1991* with its broader set of attributes relevant to employment; re-engaging employees and their representatives in the EEO process through planning and policies; and strengthening the reporting obligations in the context of the proposed Public Sector Act and the *Human Rights Act 2019*.

140 Other groups can be prescribed by regulation. None are. These words are from the 1992 Act s. 3.

141 Compare *Public Service Act 2008* s. 33–34.

142 s. 22: “if the commission chief executive is dissatisfied with any matter relating to a report ... the commission chief executive may recommend ... the taking of action ...”.



Specifically, chief executives should be obliged to:

- (a) develop human rights and equal opportunity plans that enable all people in Queensland eligible for public employment to compete for recruitment, selection promotion and transfer in an agency, and to pursue careers<sup>143</sup>
- (b) consult with employees and relevant unions in development and implementation of plans, policies and procedure
- (c) report against the plans annually to the Commissioner and in the entity's annual report.

The Public Sector Commissioner should have power to report to the Premier any matters of dissatisfaction with a report, and to report publicly on that dissatisfaction if it is not resolved.

The Public Sector Commissioner might develop model plans in consultation with the Human Rights Commissioner and the Special Commissioner (Equity and Diversity).

### Recommendation: Human rights and equal opportunity in employment

25. The Act should provide for human rights and equal opportunity plans about employment matters, concordant with obligations in the *Human Rights Act 2019* and employment related attributes under the *Anti-Discrimination Act 1991*, including: engagement of employees and unions in developing the plans; reporting against the plans to the Public Sector Commissioner; and corrective action by the Commissioner in the event of dissatisfaction with a report.

## 6.4 Gender equity

Gender equity is a special topic in Australian employment given the large historical and current disparities of employment experience on gender grounds including the well documented, though not uncontested<sup>144</sup>, gender pay

gap. Gender equity is a significant public employment strategy: see *50/50: On equal footing: Queensland public sector gender equity strategy*<sup>145</sup>.

Progress on gender pay equity has proved difficult. There are some small legislative barriers that can and should be changed for quick runs, but reliance on industrial means and goodwill has not been enough to achieve the stated policy objectives<sup>146</sup>.

Some stakeholders complained that local practices present systemic barriers to equality for some women, including how time at work is calculated for increments, promotion and development opportunities; differential impacts on superannuation of various practices; and access to parental leave employees and their partners (if any) regardless of gender identity.

Some stakeholder criticisms are better addressed as industrial issues for enterprise bargaining industrial disputes.

### Two areas for immediate attention

Stakeholders elevated two issues that seem to deserve prompt attention.

- (a) Part-time employees are required to serve longer, *pro rata* time to be eligible for increments<sup>147</sup>. In the interests of fairness increments should be available to part-time employees after the same period required for a full-time employee if they demonstrate competencies and other normal considerations, not a longer time calculated on full-time equivalence. Development of competency criteria and assessment may be a considerable task in some cases, but seems necessary to ensure increments are earned other than by time serving.
- (b) Apparent impediments to full participation in parental leave by employees and their partners regardless of gender identity<sup>148</sup>.

Both matters are outside the review's terms of reference.

143 Compare *Equal Opportunity in Public Employment Act 1992* (repealed) s. 4(2).

144 E.g. Chung, F. (2018). "How would you close the gender pay gap?". [www.news.com.au/finance/work/at-work/how-would-you-close-the-gender-pay-gap/news-story/ae16514e8ba1c611e11b82885c3b9518](http://www.news.com.au/finance/work/at-work/how-would-you-close-the-gender-pay-gap/news-story/ae16514e8ba1c611e11b82885c3b9518).

145 [www.forgov.qld.gov.au/file/11776/download?token=092NCi80](http://www.forgov.qld.gov.au/file/11776/download?token=092NCi80).

146 Public Service Commission (2015) *Gender Equity Strategy 2015–2020*. [www.forgov.qld.gov.au/file/11776/download?token=092NCi80](http://www.forgov.qld.gov.au/file/11776/download?token=092NCi80). See also for example Spalding, P. (2018) "EB9: why does gender pay equity matter?" *Queensland Teachers' Journal*, 123(8), 2 November 2018, p. 10; Wordsworth, M. (2018) "More men than women still being promoted to highest levels of Queensland's public service." [www.abc.net.au/news/2018-10-03/more-men-than-women-still-rising-in-queensland-public-service/10329418](http://www.abc.net.au/news/2018-10-03/more-men-than-women-still-rising-in-queensland-public-service/10329418).

147 The complaint is that a 0.5 FTE employee is not until two years; a 0.6 FTE employee, 20 months, when they may have achieved the same development and learning that is rewarded after one year for a full-time employee.

148 Parental leave is governed by Minister for Industrial Relations Directive 17/18 *Paid Parental Leave*.

The gender equity gap between aspiration and performance demands attention both in terms of authoritative action and the means of changing behaviour.

Several steps are needed, including:

- providing institutional leadership through a Special Commissioner (Equity and Diversity) within the Public Sector Commission, appointed by the Premier
- aligning the public employment and industrial relations considerations
- changing human resource practices to ensure far wider availability of part-time work, flexible working arrangements and promotional opportunity for everyone
- addressing systemic issues of bias or distortion in selection processes
- identifying gender bias in organisational culture and behaviour
- improvements in recording and reporting gender equity issues in public employment
- providing power to investigate gender equity issues.

Two particular issues identified in the review are:

- changing the SES profile to full-time equivalent
- programs to facilitate transition from AO8 to SO to SES.

Several stakeholders urged a focus on cognitive bias in appointment and promotion processes. As noted in the *Issues Paper*, research on addressing biases through training and education is mixed. One recent Australian study suggested blind recruitment was marginally useful or even deleterious<sup>149</sup>. Cognitive bias is real, of course, and may be impervious to change by didactic means alone. It is also noted cognitive biases will affect all observers including external stakeholders, for example, confirmation and attribution bias<sup>150</sup>. The famous Dunning-Kruger effect operates here too: overestimation of competence by the less skilled or informed<sup>151</sup>, and underestimation by the more skilled and informed, potentially encouraging cloning effects.

The review considers this is a topic that requires detailed consideration and might be the subject of the proposed research program and detailed exploration of human resource practice improvement under the Special Commissioner (Equity and Diversity).

Other particular issues might include whether the Public Sector Act or an Employment Direction should cover broader availability of part-time work and a right to request flexible work arrangements in the Public Sector Act.

For clarity, the review intends the focus not to be on women alone, but the gaps between women's and men's work experience, opportunities and remuneration (including barriers to men's participation, for example, in parental leave), and gaps for employees with different gender identities.

There also remains much work to be done to facilitate improved participation and access by Aboriginal and Torres Strait Islander peoples as well as people with disabilities and culturally and linguistically diverse members of the community. These should remain a strong focus for the sector as a whole and the Special Commissioner (Equity and Diversity).

#### Recommendation: Gender equity

26. The Act should align with the *Industrial Relations Act 2016* on matters of gender pay equity.

#### Recommendation: Special Commissioner (Equity and Diversity)

27. There should be a Special Commissioner (Equity and Diversity) within the Commission, appointed by the Premier for up to five years on a full-time or part-time basis.
28. The continuing need for and functions of the Special Commissioner should be reviewed as part of a performance review after five years.
29. The Special Commissioner's terms of reference should include improving human resource practice,

149 Hiscox, M.J. et. al. (2017) *Going blind to see more clearly: unconscious bias in Australian Public Service shortlisting processes*. Canberra: Behavioural Economics Team of the Australian Government. See also Easton, S. (2018) "Tiptoeing through the merit minefield: blind recruiting and the search for objectivity". *The Mandarin*, 20 June 2018. [www.themandarin.com.au/94601-tiptoeing-through-the-merit-minefield-blind-recruiting-and-the-search-for-objectivity](http://www.themandarin.com.au/94601-tiptoeing-through-the-merit-minefield-blind-recruiting-and-the-search-for-objectivity).

150 Jones, E. E. & Harris, V. A. (1967) "The attribution of attitudes". *Journal of Experimental Social Psychology*, 3 (1): 1–24; Leavitt, F. (2015), *Dancing with Absurdity: Your Most Cherished Beliefs (and All Your Others) are Probably Wrong*. New York: Peter Lang Publishers.

151 Kruger, J., & Dunning, D. (1999). "Unskilled and unaware of it: How Difficulties in Recognizing One's Own Incompetence Lead to Inflated Self-Assessments". *Journal of Personality and Social Psychology*, 77 (6), pp. 1121–1134 Dunning, D. (2014) "We are all confident idiots". *Pacific Standard*, 27 October 2014.

procedures and behaviour to improve equity and diversity in employment across the public sector; participation in public sector employment of particular communities including Aboriginal and Torres Strait Islander peoples, people with disabilities and those from culturally and linguistically diverse backgrounds; and methods to achieve gender pay equity and improved reporting of equity and diversity issues by government entities. The Special Commissioner would have the powers of a Special Commissioner (refer Recommendation 20), including to make reports to the Premier; and should be required to report annually including in the Public Sector Commission's annual report.

#### **Recommendation: Senior Executive Service profile and movement**

30. The approved establishment for senior executives should be on a full-time equivalent basis to remove barriers against part-time engagement, parental leave and job sharing.
31. The terms of reference of the Special Commissioner (Equity and Diversity) should include examination of barriers to movement from AO8 to SO to SES to encourage greater gender participation at senior levels, potentially integral to the Public Sector Commissioner's audit of the SES and review by the Queensland Governance Council.

#### **Recommendation: Increments and parental leave**

32. The observations in the report about access to increments for part-time employees and access to parental leave should be noted.

#### **6.5 Workforce profile**

A more inclusive and diverse Queensland public sector necessarily means a different workforce profile. The Public Service Commission is responsible for centrally collecting, analysing and reporting comprehensively on the entire public workforce to inform policy and action to achieve the objective of inclusive public services. This analysis and reporting function, which has improved immeasurably in recent times, will need to become even more detailed and sophisticated if it is to develop the appropriate insights to steer decision making across the sector (see Recommendation 62).

## 7 Managing positively

### 7.1 What makes a good manager?

Managing is very rewarding, especially when the manager is working with ‘motivated employees performing at their best<sup>152</sup>.’

But there are times when employees lose motivation or are not performing well or even do the wrong thing. Management is harder when dealing with these things.

Most first-time managers can struggle with the reality of authority versus influence, control of others versus gaining commitment and building team performance, as the ‘myth and reality’ table in [Appendix 12.6](#) shows. Head of the Harvard Business School Leadership Initiative, Professor Linda Hill, who devised the table, has some advice for new and emerging leaders<sup>153</sup>:

*Leadership is a self-development process.  
You have to teach yourself.*

Realisation that self-development is needed often starts when the first-time the manager is obliged to deal with underperformance, absence or misconduct; when the newly-promoted senior executive has to realign people and jobs<sup>154</sup>.

New Zealand has an interesting provision in section 56 of its *State Sector Act 1988* that requires departmental chief executives to have a personnel policy that complies with the principle of being a good employer:

- (2) For the purposes of this section, a good employer is an employer who operates a personnel policy containing provisions generally accepted as necessary for the fair and proper treatment of employees in all aspects of their employment, including provisions requiring—
- (a) good and safe working conditions; and
  - (b) an equal employment opportunities programme; and
  - (c) the impartial selection of suitably qualified persons for appointment (except in the case of ministerial staff); and

- (d) recognition of—
  - (i) the aims and aspirations of the Māori people; and
  - (ii) the employment requirements of the Māori people; and
  - (iii) the need for greater involvement of the Māori people in the Public Service; and
- (e) opportunities for the enhancement of the abilities of individual employees; and
- (f) recognition of the aims and aspirations and employment requirements, and the cultural differences, of ethnic or minority groups; and
- (g) recognition of the employment requirements of women; and
- (h) recognition of the employment requirements of persons with disabilities.

### 7.2 Principles

The *Public Service Act 2008* does not tell managers what to do. It does not say who is responsible for making sure managers can deal with the tough stuff, or how to do it in responsive, fair and inclusive ways. Of course, an Act cannot prescribe strictly how to deal with these complicated discretionary decisions. However, as it stands, the Act and supporting guidance do not balance adequately practical support for managers and natural justice for employees. Coupled with the hollowing out of HR functionality and capability across the sector, minor matters can easily assume unnecessary complexity.

One criticism of the *Public Service Act 2008* is its ‘deficit model’ of employee management.

Section 26 states the ‘work performance and personal conduct principles’:

#### **26 Work performance and personal conduct principles**

- (1) *In recognition that public service employment involves a public trust, a public service employee’s work performance and personal conduct must be directed towards—*
- (a) *achieving excellence in service delivery;*
  - and*

152 [www.fairwork.gov.au/how-we-will-help/templates-and-guides/best-practice-guides/managing-underperformance](http://www.fairwork.gov.au/how-we-will-help/templates-and-guides/best-practice-guides/managing-underperformance).

153 Hill, L.A (2011) podcast [www.hbs.edu/news/Pages/item.aspx?num=2082](http://www.hbs.edu/news/Pages/item.aspx?num=2082).

154 Conflict avoidance is very real: Harrison, F. “A Conceptual Model of Organizational Conflict”. (1980) *Business and Society* 19, 20 (2) pp. 30–41. New and different skills are needed to work with new generations of public servants with different aspirations and expectations: Prantika, R., & Singh, M. (2018). “Effective feedback for millennials in new organizations. *Human Resource Management International Digest*, 26(4), 25–27.

- (b) *ensuring the effective, efficient and appropriate use of public resources; and*
- (c) *giving effect to Government policies and priorities; and*
- (d) *collaborating with other departments with a focus on public service-wide priorities as well as department-specific priorities; and*
- (e) *providing sound and impartial advice to the Government; and*
- (f) *improving all aspects of the employee's work performance; and*
- (g) *arrying out duties impartially and with integrity; and*
- (h) *acting honestly, fairly and in the public interest; and*
- (i) *interacting with staff members under the Ministerial and Other Office Holder Staff Act 2010 respectfully, collaboratively and with integrity; and*
- (j) *observing all laws relevant to the employment; and*
- (k) *ensuring the employee's personal conduct does not reflect adversely on the reputation of the public service; and*
- (l) *observing the ethics principles under the Public Sector Ethics Act 1994, section 4; and*
- (m) *complying with an approved code of conduct and any approved standard of practice as required under the Public Sector Ethics Act 1994, section 12H or 18.*

There are additional principles specifically for managers, discussed at [section 5.2](#), taking the reader first to pro-active management but then immediately to dealing with deficits.

Sections 88H and 88I empower the commission chief executive to issue directives and undertake reviews of departments about work performance (by reference to discipline). These provisions and the public service manager principles were inserted by the *Crime and Misconduct and Other Legislation Amendment Act 2014* (see footnote 108). It seems these powers have never been used.

The review heard from many stakeholders that these principles in section 26 are oddly worded, even quaint, but not especially useful to employees or their managers trying to motivate and facilitate best performance.

The principles are not framed as responsibilities, and do not articulate well with the 'management and

employment principles' in section 25. As a matter of drafting, neither section states who is the actor in terms of the principles: the introductory words are that 'public service management is to be directed towards ...' and 'a public service employee's work performance and personal conduct must be directed towards ...' the stated principles.

The review recommends that the Act state new management principles and expectations about performance and conduct, drafted in terms of the responsibility of employees, their managers and leaders of public sector entities and systems, consistent with the chain of responsibility.

Some of those responsibilities are discussed above at [sections 5.2](#) and [5.3](#).

### Recommendation: Responsibilities

33. The principles in sections 25–26 of the *Public Service Act 2008* should be restated in positive language as responsibilities of employees, managers and chief executives.

### 7.3 Positive performance

The review benefitted from the input of many State Government employees from early career to middle manager to chief executive, other high office holders, and from political players in both Government and Opposition.

It is true there were many concerns and anecdotes about unfairness, poor management practice, and inconsistency. These concerns and anecdotes were invited.

It is also true that many people wanted it known to the review that overall the Queensland Public Service is in good shape, and that the negative stories are the exception, not the rule. The data bears this out.

As at 31 December 2018:

- 292 employees were on suspension – this is equivalent to just over 0.1 per cent of the reported workforce; and
- There were 429 workplace investigations completed in the preceding six months – representing just under 0.2 per cent of the reported workforce.

Overwhelmingly, employees get on with the jobs competently and with goodwill; managers are doing a good job of management, working with staff through those moments of struggle and facilitating best-possible outcomes. Despite inevitable difficulties, overwhelmingly employees like their jobs, respect their colleagues and

do their best. They want to respond positively to the needs of clients, community and the government.

The goodwill, professionalism and collegiality of public employees helps overcome some of the deficiencies that are the focus of this report.

It is when things go wrong that the weakness of the model is exposed, often by corrective action leaping immediately to a punishment focus and then bogging down in procedure.

It need not be that way.

The Act should proceed from a positive performance framework that recognises employees are there for a reason (to do the necessary and valuable works of government), that they have been appointed on merit for that purpose and that achievement of that purpose is valued<sup>155</sup>.

We know that employees are capable of this because they have been selected or promoted on *merit*, they will take *responsibility* for their own performance and development, and that managers work with staff to test their performance and facilitate their development. Further the system supports staff by ensuring managers are well-performing managers and their performance is also tested, and development is facilitated by the chief executive.

This confidence in people is the starting point of a positive performance framework – management that works with strengths yet understands there may also be deficits, and facilitates necessary action in a positive way.

The framework starts with giving managers the tools they need, the soft skills of working with people through difficulty and disappointment to adaptation and change where needed.

Those soft skills do not emerge spontaneously on being appointed as a manager. They need to be grown by the person (i.e., through self-development

and responsibility). But the employment system that was confident enough to give them management responsibility should also facilitate that development. That is why the review recommends a major investment in early and mid-career management development in addition to senior staff leadership. The Public Sector Commission needs resources to build programs and opportunities across the entire public sector. Chief executives should be able to access the best possible programs and opportunities to facilitate high performing management in their agencies, knowing their staff will develop in a consistent framework that is portable across the sector.

The materials should include new fit-for-purpose guidance to complement the guidelines and other frameworks for sanctioning misconduct and correcting under performance and broadening the tools available, including employee-initiated improvement, alternative dispute resolution processes where suitable<sup>156</sup>, informal management intervention and progressive discipline.

Positive performance is not a novel idea in Queensland.

The webpage *Manage performance positively* urges good management practice<sup>157</sup>. Tellingly, it links to the Victorian Public Service Commission’s Talking Performance<sup>158</sup>.

While these resources are useful, they fall far short based on the reported experiences of employee stakeholders that reflect negative or punitive approaches and wide variability from agency to agency. Some stakeholders told the review the Public Service Commission already has programs of the type envisaged. If that is true, they are not achieving the purpose of fairness and responsiveness. The existing programs may not be reaching the audience in need (the target is misdirected, and in any case the current Commission has no particular role in developing at least half of public employees outside the public service). More likely they are not the programs needed to bring the necessary behavioural and cultural change.

155 Not expected or demanded as a deficit model might do.

156 Caution needs to be observed using alternative dispute processes in high conflict situation such as abusive relationships, alleged bullying, sexual harassment and so on. Poorly used, mediation and other alternative dispute processes can be quite destructive, forcing accusers/victims into high-stakes face-to-face dealing with alleged perpetrators. This is one of the criticisms uncovered by Dame Laura Cox at Westminster: Cox, L. (2018). “The Bullying and Harassment of House of Commons Staff: Independent Inquiry Report”. London: House of Commons Commission, and a suggested failing of the Melbourne Response into sexual abuse that obliged claimants for compensation to sit with or opposite the abusers: Milligan, L. (2018) *Cardinal: The rise and fall of George Pell*. Melbourne: MUP.

157 [www.forgov.qld.gov.au/manage-performance-positively](http://www.forgov.qld.gov.au/manage-performance-positively).

158 A document inherited from that Commission’s predecessor, the State Service Authority: [vpsc.vic.gov.au/resources/talking-performance](http://vpsc.vic.gov.au/resources/talking-performance).

And as noted elsewhere in this report, the current Public Service Commission (like its predecessors under the 1988 and 1996 Acts) does not have the same authority given to its predecessors by the 1922 and 1990 Acts. The softer centre is probably one reason for the lack of traction on the ground. Good policy, initiatives and guidance have less chance of achieving their intended effect if managers can ignore them without consequence. The result is a less responsive system.

The Act should reinforce the need for positive performance management by requiring managers to act in a timely way, to demonstrate adherence to good practice, including by raising issues and proposing formal action<sup>159</sup> and for management skills to be developed and checked continuously.

It is recommended that management action to improve performance should demonstrate good practice by requiring managers who initiate performance improvement action, in simple form such as by checklist, to<sup>160</sup>:

- state the positive steps taken before initiating the action
- demonstrate conformance with performance improvement policies of the agency and Commission or explain divergence from those
- be subject to a right to raise an issue.

The documentation should be given to the employee as part of the positive performance approach.

Integral to this approach is tight management of the processes. There are many anecdotes of performance and discipline matters dragging on for long periods – even years. That should not continue. The review recommends a process for internal and external management of performance and discipline matters.

Fairness dictates that an affected employee has rights, too, including natural justice and a fair, timely review of proposed action.

Lastly, poor management needs to be identified and acted on as a performance deficit itself. Improper management, abuse of position and the like should be dealt with as conduct issues.

### Recommendation: Positive Performance

34. The Act should state a positive performance framework.
35. The Public Sector Commission should develop a detailed framework for positive performance management for personal and professional development and early identification and management of concerning conduct.
36. Use should be made of tiered and abbreviated processes for misconduct and poor performance including warnings and final warnings.
37. Alternative dispute resolution mechanisms should be formally stated in the Act as an option for resolution of workplace concerns, noting that they will not always be appropriate.
38. The Act should require the Public Sector Commissioner to state by Employment Direction timeframes for management of formal action including mandatory referral to the Public Service Commissioner of matters involving old allegations (e.g., more than 12 months) and matters initiated but not resolved for more than e.g., six months, to be managed externally under the Public Sector Commissioner through a panel of skilled specialist individuals. An employee should also have the right to request a matter be referred to the Commissioner for external management.

#### 7.3.1 Recognition of positive performance

The *Issues Paper* noted the emphasis in the *Public Service Act 2008* on negative aspects of performance. While it is important managers and chief executives can act effectively when things go wrong, there should also be a way to recognise excellence and positive performance.

The Premier gives Awards for Excellence that:

*acknowledge the exemplary work by individuals and teams across the Queensland public sector, and recognise the outstanding initiatives being developed and delivered for the benefit of all Queenslanders*<sup>161</sup>.

The review considers that excellence and achievement at a more administrative level should be positively acknowledged, especially for good employment and

159 It is noteworthy that even small financial transactions require countersigning under various financial accountability processes but an investigation, performance process or disciplinary proceeding may not, even though a poorly executed process could be very costly.

160 One Union stakeholder suggested a small series of such checklists might go close to covering the field of performance and discipline actions.

161 [www.qld.gov.au/about/events-awards-honours/awards/public-service-excel](http://www.qld.gov.au/about/events-awards-honours/awards/public-service-excel).

management practice and for focus areas under Heads of Discipline. It is recommended that the Queensland Governance Council should ensure that good practice is acknowledged and modelled.

It would be unusual to legislate for such a system, and the review considers the Queensland Governance Council, possibly in conjunction with Heads of Discipline, should have a function of recognising excellence, innovation and high performance by individuals and work teams as an administrative function.

### Recommendation: Recognition of excellence, innovation and high performance

39. The Queensland Governance Council should have a statutory function of fostering and recognising excellence, innovation and high performance by employees individually and in work teams.

## 7.4 Investigations, suspensions and discipline

The positive performance framework will allow an employee and manager to work adaptively through early stages of corrective action, but beyond that, the law needs to be clear in providing the employer authority to deal effectively, fairly and speedily with matters of legitimate concern.

The reality of any workplace, public or private, large or small, is that some people will fall by the wayside or fall behind: misconduct or poor performance.

Poor performance may be transient (life's circumstances distract the employee from fully attending to the job, such as a relationship issues or an ill relative needing attention) or longer term (capacity loss due to accident or illness). Attendance issues can be serious, especially if routine absences impact on a team's capacity or quality of work.

The Fair Work Ombudsman describes poor performance as follows:

*Underperformance, or poor performance, is when an employee isn't doing their job properly, or is behaving in an unacceptable way at work. It includes:*

- *not carrying out their work to the required standard or not doing their job at all*
- *not following workplace policies, rules or procedures*
- *unacceptable behaviour at work, e.g. telling inappropriate jokes*
- *disruptive or negative behaviour at work, e.g. constantly speaking negatively about the company<sup>162</sup>.*

Misconduct is defined in section 187 of the *Public Service Act 2008* as follows:

(4) *In this section—*

**misconduct** means—

- (a) *inappropriate or improper conduct in an official capacity; or*
- (b) *inappropriate or improper conduct in a private capacity that reflects seriously and adversely on the public service.*

*Example of misconduct—*

*victimising another public service employee in the course of the other employee's employment in the public service*

Behaviour that is wrong, improper or unlawful might attract a qualifier—serious misconduct—because the more serious the misconduct the more serious the disciplinary consequences<sup>163</sup>.

The Fair Work Ombudsman describes serious misconduct as follows:

*Serious misconduct is when an employee:*

- *causes serious and imminent risk to the health and safety of another person or to the reputation or profits of their employer's business or*
- *deliberately behaves in a way that's inconsistent with continuing their employment.*

*Examples of serious misconduct include:*

- *theft*
- *fraud*
- *assault*
- *being drunk at work*

162 [www.fairwork.gov.au/employee-entitlements/managing-performance-and-warnings](http://www.fairwork.gov.au/employee-entitlements/managing-performance-and-warnings). This description is contestable. It includes examples of misconduct, amplifying the caution sounded by some stakeholders about the necessary overlap between performance and conduct.

163 The *Public Service Act 2008* does not define serious misconduct, but s. 179A requires employees to report prior serious disciplinary action defined as action resulting in termination, reduction in classification, rank or remuneration, transfer or redeployment to other employment. Dismissal for misconduct may have consequences for accessing *pro rata* long service leave: *Industrial Relations Act 2016* s. 95



- *refusing to carry out work duties.*

The *Public Service Act 2008* prescribes a framework for disciplinary action in chapter 6 (sections 186A to 192) complemented by guidelines on discipline<sup>164</sup> and workplace investigations<sup>165</sup>, and the Public Service Commission has developed a performance framework discussed below.

Grounds for discipline are stated in section 187(1):

- (1) *A public service employee's chief executive may discipline the employee if the chief executive is reasonably satisfied the employee has—*
  - (a) *performed the employee's duties carelessly, incompetently or inefficiently; or*
  - (b) *been guilty of misconduct; or*
  - (c) *been absent from duty without approved leave and without reasonable excuse; or*
  - (d) *contravened, without reasonable excuse, a direction given to the employee as a public service employee by a responsible person; or*
  - (e) *used, without reasonable excuse, a substance to an extent that has adversely affected the competent performance of the employee's duties; or*
  - (ea) *contravened, without reasonable excuse, a requirement of the chief executive under section 179A(1) in relation to the employee's appointment, secondment or employment by, in response to the requirement—*
    - (i) *failing to disclose a serious disciplinary action; or*
    - (ii) *giving false or misleading information; or*
    - (f) *contravened, without reasonable excuse—*
      - (i) *a provision of this Act; or*
      - (ii) *a standard of conduct applying to the employee under an approved code of conduct under the Public Sector Ethics Act 1994; or*
      - (iii) *a standard of conduct, if any, applying to the employee under an approved standard of practice under the Public Sector Ethics Act 1994.*

A chief executive<sup>166</sup> may take any disciplinary action **considered reasonable in the circumstances:**

*188 Disciplinary action that may be taken against a public service employee*

- (1) *In disciplining a public service employee, the employee's chief executive may take the action, or order the action be taken, (disciplinary action) that the chief executive considers reasonable in the circumstances.*

*Examples of disciplinary action—*

- *termination of employment*
- *reduction of classification level and a consequential change of duties*
- *transfer or redeployment to other public service employment*
- *forfeiture or deferment of a remuneration increment or increase*
- *reduction of remuneration level*
- *imposition of a monetary penalty*
- *if a penalty is imposed, a direction that the amount of the penalty be deducted from the employee's periodic remuneration payments*
- *a reprimand.*

Stakeholder input consistently suggested the examples in section 188 were not useful and may result in the range of disciplinary options being limited in the minds of managers where they are in fact mere examples<sup>167</sup>.

Some of the examples are not usual discipline outside the public sector (e.g., monetary penalty).

Several stakeholders urged a different approach to sanctions, including warnings. Voluntary agreement is also useful where the employee recognises the need for change.

During the review period, a Bill governing police discipline was introduced to Parliament<sup>168</sup>. The Bill was the result of a major project conducted jointly by the Queensland Police Service and the Crime and Corruption Commission. It provides an interesting starting point for how disciplinary sanctions might fit with a positive performance framework in the civilian context.

164 Commission Chief Executive Guideline 01/17: *Discipline*.

165 Public Service Commission (2018) *Managing workplace investigations: a practical guide for the Queensland public sector*. Brisbane: Public Service Commission.

166 And others operating under these provisions including head of a public service office and chief executive of a hospital and health service.

167 *Acts Interpretation Act 1954* s. 14D.

168 Police Service Administration (Discipline Reform) and Other Legislation Amendment Bill 2019.

### 7.4.1 Adherence to policies

Employee stakeholders' insistence that discipline and investigations were unfair led the review to examine in detail the relevant Public Service Commission documents. Based on the input, one might have expected the guidelines to be poorly drafted or inadequate.

They are not.

The Public Service Commission's guidelines on discipline and workplace investigations guidelines are reasonable and provide sensible assistance, but they do not have enough traction on the ground.

One common concern among stakeholders is that Commission guidance is developed and promulgated but not put into effect.

The lack of consequence no doubt stems in part from the little consequence that attaches to poor management, a matter addressed elsewhere in this report.

The Commission's remit and lack of resources adds to the problem.

The review accepts this is highly contestable.

The softening of the central human resources agency in 1988 and 1996 and the failure later to re-invest it with appropriate authority and, particularly, resources has had a negative effect on the body politic and on fairness, responsiveness and inclusiveness. Without an appropriate guiding hand from the centre, the public sector can drift (and has drifted) into uncoordinated responses to government change and therefore inconsistencies from place to place leading to unfairness, sometimes even flagrant unfairness.

While the review is not arguing for standardisation at the expense of flexibility and agility, it is clear that the softer centre does not have traction on the ground with departments. In recent years, inconsistency and unnecessary tension has crept into the system as a consequence of design features.

Binding rulings, called directives in the current Act<sup>169</sup>, and non-binding rulings (guidelines) should be meaningful. Whether binding or not, failure to understand their import and act as required, or in light of the guidance, should have consequences for the

individuals concerned and operate as a flag for chief executives that managers are not managing well.

Recommendation 56 deals with the requirement to adhere to positive performance objectives.

### 7.4.2 Conduct and Performance Excellence

The Public Service Commission developed a framework called Conduct and Performance Excellence (**CaPE**), a framework for 'timely, proportionate and relevant management of unsatisfactory employee conduct or work performance, or allegations of same.'<sup>170</sup> CaPE categorises conduct or performance issues into three (but functionally five) categories, each with a benchmark time for finalisation:

- (a) Category 1a: minor matter that requires informal management (7 days)
- (b) Category 1b: minor matter that require formal management (28 days)
- (c) Category 2: repeated instances of category 1 conduct; minor misconduct inconsistent with the Code of Conduct but not malicious or wilful; careless or negligent performance rather than lack of requisite skills (51 days)
- (d) Category 3a: serious misconduct; misconduct warranting discipline if proven; conduct reasonably raising the prospect of termination of employment; serious neglect (139 days)
- (e) Category 3b: matters with possible criminal implications (where police or court attention is pending, consideration to be given at 200, 290 and 350 days)<sup>171</sup>.

As noted in the *Issues Paper*, the *Public Service Act 2008* proceeds to a negative or punitive frame of reference whereas effective management includes a positive approach of working effectively with employees who have exhibited concerning performance deficiencies before a formal punitive process commences.

CaPE, despite its name, is not about management excellence or even adequacy. It is fundamentally about correction and punishment. Like the *Public Service Act 2008* (and probably because of it) CaPE conflates discipline and performance. While the document suggests missing benchmarks might 'trigger CaPE contact', at least for category 3a, the document is not a binding Directive; there is no apparent consequence

169 The review recommends they be renamed Employment Directions.

170 [www.forgov.qld.gov.au/report-conduct-and-performance-data-your-agency](http://www.forgov.qld.gov.au/report-conduct-and-performance-data-your-agency).

171 The seemingly odd number of days in some cases arises from adding numbers of days for different stages. The stages are: evaluation of the complaint; investigation; adjudication or decision making, notice to the employee.

to a manager or chief executive for missing targets and no resources in the Commission to visit consequences anyway<sup>172</sup>. CaPE is not fit for its suggested excellence purpose and needs to be complemented by a positive performance toolkit.

### 7.4.3 Natural justice in discipline

Section 190 of the *Public Service Act 2008* obliges chief executives to act according to law, and to ‘comply with ... the principles of natural justice’:

#### *190 Procedure for disciplinary action*

(1) *In disciplining a public service employee or former public service employee or suspending a public service employee, a chief executive must comply with this Act, any relevant directive of the commission chief executive, and the principles of natural justice.*

(2) *However, natural justice is not required if the suspension is on normal remuneration.*

The jurisprudence and literature about natural justice are vast, complicated for lawyers, let alone employees and managers: it is no wonder that anecdotes from lawyers and industrial advocates include some awful examples of natural justice being denied<sup>173</sup>.

Queensland Health has issued an employment policy that describes natural justice as follows<sup>174</sup>:

*Natural justice has two rules:*

*Rule against bias: decision-makers are to be objective, free of bias, and have no personal interest in the matter being decided.*

*Hearing rule: an individual is to be informed of the decision to be made and have the opportunity to present their case prior to a decision being made.*

But just how a manager in a work unit, acting under a chief executive’s delegation, ensures natural justice is another matter altogether. Unpacking the two basic rules, the rule against bias and the hearing rule, is not simple, and despite the pervasiveness of natural justice in administrative decision making<sup>175</sup>, the obligation is often stated but not explained operationally.

Confusion about natural justice drives risk aversion, which in turn can give rise to egregious failures of management, where poor performance and inappropriate behaviour goes unaddressed simply because management is afraid to act or poorly advised. The path from inertia to tolerance and tacit acceptance is short. Workplaces where poor performance and poor behaviour are accepted are notoriously hard to turn around.

Practical application of natural justice principles is vexed and controversial<sup>176</sup>. This is in part the result of a lack of any coherent explanation of natural justice in practice.

The Queensland Industrial Relations Commission does not, as a matter of course, publish decisions in much of its *Public Service Act 2008* jurisdiction. This creates

172 Data provided by the Public Service Commission for the June 2018 quarter indicated that 62% of Category 2 (minor matters) were not finalised in benchmark times. This red flag has not resulted in action however.

173 While quite old now, there is much instructive in the examples cited in Spry, M. (2007) “Natural justice and public sector misconduct investigations” *AIAL Forum*, 54, pp. 117–124.

174 Department of Health Human Resources Policy E14 (QH-POL-400) *Suspension of employees*. Suspension for both departmental and Hospital and Health Board employees is governed by the *Public Service Act 2008*. It is entirely unclear if this policy, and many others, have effect as binding health service directives issued by the system manager under s. 8 of the *Hospital and Health Boards Act 2011*. On its face it is made by the Chief Human Resources Officer and is said to apply to employees in the department and all services. The policy framework at [www.health.qld.gov.au/system-governance/policies-standards](http://www.health.qld.gov.au/system-governance/policies-standards) types suggests human resource policies and standards are mandatory in the department and the hospital and health services (although authority for this is difficult to source) and some on their face apply only to departmental employees and not in the services, for example *Anti-discrimination and vilification Policy* Number QH-POL-101. The oddity of the restricted application is that the policy seems to state laws of general application that clearly bind health employees in services as well as the department: see *Davis v Metro North Hospital and Health Service & Ors* [2019] QCAT 18.

175 See for example Flick, G.A. (1979) *Natural justice: principles and practical application*. Sydney, Butterworths. Lindsay, R. (2010) “Natural Justice: Procedural Fairness: ‘Now we see though a glass darkly’”. *AIAL Forum*, 63, pp. 67–76, tracing the origins of natural justice; Lindsay, R. (2015) “Disciplinary hearings: What is to be done?” *AIAL Forum*, 50, pp. 77–85;

176 E.g. McMillan, J. (2008) “Natural Justice – Too Much, Too Little or Just Right?” *AIAL Forum*, 58, pp. 33–42 (address delivered to AIAL National Forum 15 June 2007); Spry, M. (2007) “Natural justice and public sector misconduct investigations” *AIAL Forum*, 54, pp. 117–124, a repose to McMillan (2008); McGarry, G.J. (1988) *Aspects of public sector employment law*. Sydney: The Law Book Company, pp. 170–175; for description from judges speaking extra-curially see French, R. S. (2010) “Procedural Fairness – Indispensable to Justice?” Sir Anthony Mason Lecture, The University of Melbourne Law School Law Students’ Society; Robertson, A. (2015) “Natural justice or procedural fairness” *Judges and the Academy*. [www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-robertson/robertson-j-20150904](http://www.fedcourt.gov.au/digital-law-library/judges-speeches/justice-robertson/robertson-j-20150904).

a gap in knowledge, and an unfair imbalance: Crown Law and a small number of private law firms, are solicitors on the record in the bulk of matters for employers. They have access to a far greater body of precedent than any individual employee or union can possibly access, leaving employees, their solicitors or other advocates considerably disadvantaged. This ‘information asymmetry’ affects some individual agencies that have little experience before the Commission and do not develop consistency of practice.

The Public Service Commission publishes occasional ‘notable cases’<sup>177</sup> that might, if well-presented, go some way to improving transparency. But they are difficult to find, so heavily redacted (presumably on privacy grounds) that they fail to make the pertinent point accessibly, and do not form a body of useful guidance. One might contrast the Fair Work Commission’s bench books<sup>178</sup> (acknowledging their very different origins and purposes).

The Queensland Industrial Relations Commission (QIRC) indicated interest in preparing and publishing bench books for its jurisdictions to address the information gaps arising from non-publication of decisions. Such an outcome would be laudable. This review has no role to recommend action to the QIRC. In any case given other recommendations, the QIRC’s jurisdiction will be a final point of testing with new, earlier testing points in the form of a right to raise issues and case management. Accordingly, it is recommended that the Public Sector Commission, together with the Office of Industrial Relations develop and publish detailed guidance suitable for departmental and agency human resources staff to guide their advice and recommendations to chief executives, and for unions and individual employees and their advocates and lawyers in understanding what is reasonable and appropriate based on other experience and precedent, and as practical pointers on natural justice in investigations and formal corrective processes.

### Recommendation: Transparency in appeals and reviews

40. The Public Sector Commission and the Office of Industrial Relations should jointly prepare and publish detailed guidance to employees and their

representatives, managers and decision makers about natural justice in investigations, suspension decisions and discipline, and reviews and appeals. The Commission should incorporate that guidance in capability development for managers and leaders.

#### 7.4.4 Threats to dismiss

One strongly voiced complaint from employee stakeholders is that disciplinary documentation and directions (e.g., to attend a medical examination or a disciplinary meeting) as a matter of course include an implied or actual threat of dismissal when dismissal is not realistically open on the facts.

This may flow from the examples of disciplinary outcomes in section 188, that end up in documents as a cut-and-paste of potential consequences. It may be that some less skilled managers fear pre-judging by stating anything other than full list of examples, or that dismissal might be excluded if it is not in a list. Equally, it may be a simple case of misuse of management templates.

It was reported to the review that the threat is regularly included in directions to attend a medical examination, attend a disciplinary or performance management meeting and in general correspondence, even if the employee (however reluctantly) has indicated an intention to comply.

From stakeholder input, employees often react with fear and understandably become defensive. The result is delaying tactics, escalation and ‘lawyering-up’.

Mention of termination or dismissal seems to be a matter of course rather than a matter of careful consideration. The review considers this is systemically unfair and recommends that the range of possible sanctions in a show cause notice should only mention dismissal or termination if the chief executive considers that is legitimately open on the material. It is noted that the Public Service Commission template notices do *not* include the material objected to by the unions<sup>179</sup>.

This recommendation may be controversial.

However, this seems to be a habit borne of risk aversion, inexperience, poor advice or advice not being sought<sup>180</sup>.

177 [www.forgov.qld.gov.au/appeal-decision-affecting-your-employment](http://www.forgov.qld.gov.au/appeal-decision-affecting-your-employment).

178 [www.fwc.gov.au/resources/benchbooks](http://www.fwc.gov.au/resources/benchbooks).

179 Of course, a notice may be to show cause why the employee should not be dismissed, where it is the actual substance of the notice.

180 Stakeholders reported that legal advisors, ethical standards and human resource units are risk averse and seemingly reluctant to recommend practical and informal resolution of issues.

Correcting the habit requires firm guidance as judgement develops over time.

If dismissal is not initially thought to be a real prospect but later becomes so, chief executives can always deal with that at the penalty stage of discipline, allowing an extra opportunity for the employee to make submissions if necessary. The unfairness of threatening dismissal as a matter of course outweighs any administrative inconvenience.

### Recommendation: Show cause notices

41. An Employment Direction for disciplinary action should provide that any notice, letter or advice to an employee in a disciplinary matter or direction must only state the employee is liable to be dismissed if the chief executive believes on reasonable grounds that the employee might, in the circumstances, be dismissed.

### 7.4.5 Normal remuneration

One troubling aspect of investigations and suspensions is the treatment of employees whose usual pattern of work results in payment of shift and other loadings. Anecdotes included health workers being denied night shifts during investigations, resulting in significantly lower pay, sometimes never having the previous work pattern reinstated regardless of the outcome. There is no statutory requirement for natural justice in a manager making such a change, even if it might be unfair and have a major effect on the employee.

An employee suspended on ‘normal remuneration’ does not have to be provided natural justice<sup>181</sup>. ‘Normal remuneration’ is a difficult term for employees with complicated allowance structures. It is defined in schedule 4:

*normal remuneration, for a public service officer, means all of the remuneration and other entitlements to which the employee is or would be entitled, as prescribed under a directive.*

Commission Chief Executive Guideline 01/17: *Discipline* references normal remuneration but provides no guidance about its calculation<sup>182</sup>.

Department of Health Human Resources Policy E14 (QH-POL-400) *Suspension of employees* provides as follows:

*Normal remuneration means:*

- *the ordinary hours worked by the employee; and*
- *the amounts payable to the employee for the hours, including (for example) allowances, loadings and penalties; and*
- *any other amounts payable under the employee’s employment contract.*

*Where the employee is a shift worker, any decision to suspend the employee should not adversely affect their entitlements including remuneration, allowances, loadings or shift penalties provided for by the relevant industrial instrument.*

The review considers greater certainty and consistency should be given in the Act itself. See Recommendation 49 below.

### 7.4.6 Investigations

This section and the next, about the use of external investigators, are concerned with disciplinary investigations and do not impinge on investigation of corrupt conduct or for internal or external control (such as audit).

Formal investigations occurred in about a quarter of all CaPE matters in the fourth quarter of 2018. Of those, about one-third were external, at a cost of \$824,222, but almost half were at no reported cost<sup>183</sup>. The average cost per external investigation undertaken for a cost was just under \$11,000.

This data does not align with the anecdotal material from both employee and employer stakeholders indicating a higher use and apparently greater cost. It is possible some expenditure is categorised other than for CaPE purposes, such as legal costs or management consultancies, or there is under-reporting.

Employee stakeholders reported experience of external investigators not conducting investigations fairly. In some cases, external investigators were said to act as advocates rather than investigators, or subjected employees to ‘kangaroo court’ processes, or appeared to have prejudged matters. Some stakeholders argued that external investigators have a vested interest in

181 s. 190(2).

182 This is understandable. Public servants in departments and public service offices for the most part are paid at an award rate without significant allowances.

183 Presumably undertaken by staff of other departments or agencies, despite the Public Service Commission’s guidance about characterising those as not external: see below.

finding against the relevant employee lest they be no longer engaged. In the case of some solicitors, it was reported that they not only investigated matters but later represented the agency in legal proceedings, raising potential conflicts of interest. This is discussed in the next section.

Other union stakeholders were critical of ethical standards units being staffed by former police officers, making the point that workplace investigations are not criminal investigations; the end result is not criminal prosecution. It was also said that some ethical standards units use criminal investigation methods inappropriately or are too zealous, investigating even minor matters that should be managed differently<sup>184</sup>.

A counter view was put by one experienced investigator (who was not ex-police) that ethical standards units developed specialised skills that speeded up investigations and relieved managers and human resource units from a difficult task for which they may not be qualified<sup>185</sup>.

These reported experiences may be coloured by the unions' interests on members' behalf. But as a matter of principle, investigations should be conducted fairly and in accordance with the principles of natural justice. External providers should be subject to the same obligations as public employees (objectivity, respect for others, economy and efficiency, code of conduct obligations and where relevant the model litigant principles).

#### 7.4.7 External investigations

The *Issues Paper* invited input on the factors that should guide engagement of external investigators. The factors emerging from that input and other analysis include:

- (a) size of agency: small agencies may not have adequate capacity or the right skills
- (b) relationships
- (c) technical expertise required
- (d) costs and time

- (e) issues of potential bias
- (f) need for speedy investigations
- (g) whether other legal proceedings are on foot.

External investigators are currently sourced (for the most part) through Standing Offer Arrangements<sup>186</sup>. There is no category specific to workplace investigations in the capability matrix for some standing offer arrangements used. Some stakeholders suggested this should be improved and made more transparent, as many of the providers on that standing offer and the whole of government legal services panel do not have adequate understanding of workplace investigations.

The Public Service Commission's workplace investigations guide provides the following advice<sup>187</sup>:

184 Compare Ferraro, E.F. (2015). *Investigations in the Workplace* 2nd ed. Boca Raton, Florida: CRC Press: "Common mistake #2: using law enforcement vernacular instead of the language of business" (p. 4); "Common mistake #4: Seeking employee prosecution as an investigative objective" (p. 13 and repeated p. 84); "Common mistake #7: undertaking an unnecessary investigation" (p. 26); Common Mistake #8 "Threatening to involve law enforcement or bring criminal charges" (p. 37); "Common mistake #10: Allowing, asking or insisting the fact-finder make recommendations" (p. 76); "Common mistake #19: Believing employee prosecution is an effective deterrent" (p. 486).

185 The same stakeholder also reported extensive use of one particular external investigator by the relevant department to make up capacity shortfalls.

186 Anecdotally, departments access investigators through as many as four different standing offer arrangements.

187 Public Service Commission (2018) *Managing workplace investigations: A practical guide for the Queensland public sector*. Brisbane: Public Service Commission, pp. 15–16.

An external investigator is a person or service provider that is engaged through a contract arrangement to conduct a workplace investigation. Suitably qualified external investigators may be sourced through the Professional Services Standing Offer Arrangement (SOA), unless the required expertise is not available under the SOA.

Some considerations for engaging an external investigator might include:

- the requirement for specialist skills — do the nature of the allegations require specific expertise not available within the agency?
- conflict of interest — is there a real or perceived conflict of interest or bias? Does the matter require an investigation by someone external to the work area or agency?
- risk to public confidence — is there a risk to public trust and confidence?
- funding— is the cost of the proposed external investigation proportionate to the seriousness of the matter? Would it be more resource effective to engage a suitably skilled internal person (within the agency or a representative from another agency) to conduct enquiries or undertake an investigation?
- capability and capacity — does the agency have the capability required to conduct an investigation and the capacity to do so in a timely manner? Does the matter provide an opportunity for capability development by partnering with a more experienced leader/manager from within the agency or another agency?

...

Before engaging an external investigator, determine their suitability by:

- identifying the skills required from a prospective investigator prior to engagement
- conducting a preliminary interview to determine skills and capabilities, ascertain relevant expertise and verify qualifications
- undertaking referee checks, if required
- ensuring they have relevant insurances and licences if the external investigator is not listed under the Professional Services SOA

- identifying and managing any actual or potential conflicts of interest.

...

When engaging an external investigator, it is recommended that the case/contract manager:

- identifies the decision maker, determines the authority for the investigation, governance of the investigation and the authorisation channels
- briefs the investigator and provides them with a copy of the *Code of Conduct for the Queensland public service* and any legislation, policies, procedures and/or guidelines relevant to the matter being investigated
- advises the investigator of any internal agency supports to be afforded to parties such as access to a support person and provision of a copy of the electronic recording or transcript of their interview
- maintains regular communication with the investigator and manages their performance throughout the period of the contract
- determines and agrees upon the process regarding the retention of records and documentation with the investigator in accordance with agency record keeping requirements and legislation
- creates a plan to provide agreed regular updates on the progress of the investigation to both the decision maker and participants.

Better control over use of external investigators and management of procurement and better reporting is required.

The Public Sector Commissioner should manage a separate standing offer or preferred supplier arrangement specific to workplace investigations, and mandate use of that list, unless approved by the chief executive of the agency<sup>188</sup> personally. Suppliers should be individuals (not firms or companies), who have demonstrated appropriate qualifications, skills and experience in undertaking fair, objective, high quality and independent investigations<sup>189</sup>.

An investigation conducted by another public employee (someone from a shared service provider or another agency as a matter of cooperative management) is not

188 Or in large employment systems, the delegate of the system manager, being the principal officer of a subsystem.

189 While there are Australian Qualifications Framework qualifications for workplace investigations these alone are not sufficient, and there may be many highly skilled individuals who do not hold the relevant certificate who should not for that reason alone be excluded. That is, the Public Sector Commissioner should develop an appropriate framework for this purpose, relevant to the Queensland public sector and not just leaning on a private sector focused qualification.

an external investigator. Use of other public employees should be preferred to external investigations.

As mentioned above, stakeholders reported that some providers conduct a workplace investigation and then go on to provide advocacy services for the state in subsequent proceedings. No input was received from any external investigator on this matter. However, the review is concerned that unresolvable conflicts of interest may arise, Chinese walls notwithstanding, if a solicitor has a stake in the findings and subsequent decision making.

A workplace investigation is primarily for fact-finding, not to advise the decision maker or to enhance the prospects of defence in litigation, but there was considerable input to show that external investigators sometimes traverse this territory. The role of a workplace investigator is fundamentally different from that of a solicitor or industrial advocate in contemplated or actual proceedings, especially if the investigator's report or process is material to those proceedings.

Disquiet was voiced by some stakeholders about the use of external investigators at all, arguing that in a combined workforce of about 250,000 there should be capacity to investigate even difficult and delicate workplace issues. The extracts from Public Service Commission's guidance draw attention to inter-agency cooperation as an alternative to external consultants. The review received no direct input on capacity, but stakeholders' observations are consistent with propositions that the human resource function has been 'hollowed out'<sup>190</sup>.

However, there are clearly circumstances when specialised skills only available from an external investigator are required.

The review considers the use of external investigators should be more tightly managed and that investigation must be separated from legal advice and from consequential litigation and advocacy. It is recommended that chief executives not additionally engage an external investigator (or that person's legal practice or advocacy firm) to provide legal advice or take steps in contemplated or actual proceedings arising from or related to the investigation. An Employment Direction should be made to this effect.

This separation of workplace investigation from later advice or litigation should strengthen the proper use of external lawyers to inform decision making when that is prudent.

Investigations by external providers should be conducted by the provider on the same basis as if the investigation was being conducted by a public employee, including adherence to Code of Conduct and any employment directions.

Nothing in this section is intended to impact on investigations by the Queensland Police Service, the Crime and Corruption Commission or other similar bodies. The section refers solely to the conduct of workplace investigations.

### Recommendation: Investigations

42. The Act should specify that investigations into alleged misconduct or deficient performance must be conducted fairly.

### Recommendation: External investigators

43. The Public Sector Commissioner should develop detailed Employment Directions for the conduct of investigations, emphasising that external investigations are the exception.
44. The Public Sector Commissioner should manage a standing offer arrangement for external workplace investigators, with a list of approved providers being named individuals that agencies may use for external investigations if the criteria for use of external investigators are met. A chief executive who wishes to use a different provider must obtain the prior written approval of the Commissioner.
45. If an agency uses an external investigator it must report on the conduct of an external investigation to the Public Sector Commissioner. The Commissioner should report annually on the use of external investigators and the quality and value of those services.
46. An external investigator may only be engaged if it is reasonably necessary or expeditious to do so. Preference should be given to investigations being conducted by public sector employees.
47. An external investigator must conduct an investigation on the same basis that a public sector employee must conduct an investigation.

*Example: A solicitor or workplace investigation firm engaged to undertake an investigation must observe the natural justice principle, adhere to the Code of Conduct and any relevant Employment Directions.*



48. An investigator, or the investigator's legal practice or other advocacy entity, must not be engaged to advise or act for the agency in actual or contemplated proceedings related to the investigation.

### 7.4.8 Suspension

The two suspension provisions in the *Public Service Act 2008* (section 137 non-disciplinary, with pay and section 189 where there is liability to discipline, optionally without pay) do not work well for stakeholders. There is a predilection to suspend on pay that, according to stakeholder submissions rises out of risk aversion and the implications of a long, drawn-out investigation and disciplinary process. Notoriously employees have been suspended on pay for extended periods—even years—pending management action. These are the exception of course. The Public Service Commission data shows that:

- for all suspensions (paid and unpaid), about 33 per cent are less than three months
- about 60 per cent of all suspensions on pay are less than six months (cumulative)
- about 16 per cent of all suspensions are 12 months or longer.

Raw numbers are small compared with the size of the sector<sup>191</sup>, with the Department of Education having a greater share of longer suspensions because of the nature and time frames for dealing with registered teachers who are suspended and being progressed through a complicated multi-layered disciplinary process involving the department, the Queensland College of Teachers and QCAT.

One issue with the current provisions raised by stakeholders is that disciplinary action enlivening section 189 ranges widely (from no action to dismissal).

A second is the 'alternative duties' inquiry required in that section, and a third, the 'normal remuneration' requirement in section 190 discussed above.

Section 137 suspension (non-discipline, with pay) requires satisfaction of a jurisdictional fact, that the chief executive believes not suspending the

employee prejudices proper administration and efficient management of the agency. This requirement appears to be a procedural statement of a principle that suspension on pay is a last resort compared with productive engagement of a paid employee in the workforce.

Setting aside the philosophical problem of proving a negative, subsection (3) requires the chief executive to consider 'all alternative duties that might be available for the officer to perform'. On the stakeholder input, this obligation is almost meaningless in practice.

Neither employee nor employer stakeholders thought the provisions satisfactory in practice, preferring quick resolution to lengthy investigations and uncertainty, or in other words, efficiency to waste.

The review recommends the suspension provisions be combined into a single provision to suspend that sits alongside other related corrective action and interventions like investigation and warnings. Strict timeframes are recommended if suspension is with pay being:

- Maximum initial suspension: six months, decision by the chief executive or delegate<sup>192</sup>
- An extension for a further three months by the departmental Director-General<sup>193</sup>
- A second extension for three months granted personally by the large employment system manager or the Public Sector Commissioner for other systems
- Finally, further extensions each not exceeding three months may be granted only in exceptional circumstances by the Public Sector Commissioner personally<sup>194</sup>.

The data discussed above show that only a small, manageable number of extension decisions would rise to the Public Sector Commissioner or large system manager for personal decision.

The suspension power should deal with the loss of mandatory qualifications so that employees are afforded a fair opportunity to regain qualifications. The options currently are to dismiss the employee (which might be unfair); suspend the employee on pay; or initiate

191 In the fourth quarter of 2017–2018, Public Service Commission information is that 198 public sector employees were in or had completed a period of suspension being less than 0.08% of employees. 32 employees (0.01%) were suspended for 12 months or longer, all but three of whom were subject to external investigation by the CCC, police or health ombudsman or before the courts.

192 Or under an Employment Direction in a large employment system.

193 Or in large employment systems the large system manager's delegate (more senior than the original decision maker).

194 By this stage the matter should also be under a case manager anyway. Consideration should be given to the case manager being able to approve or recommend approval.

disciplinary proceedings (which might be unsustainable and unfair) and suspend without pay.

### Recommendation: Suspension

49. The suspension powers should be combined into one single power with a six-months limit on suspension with pay, extendible in specific circumstances.

The suspension model is explained below.

#### The suspension model

Chief executive delegates suspension to appropriate senior officer.

Delegate (or chief executive personally) reviews recommendation of manager to suspend and may suspend employee if:

- (a) it is in the interests of the proper and efficient management of the department for the officer to be suspended and it is not practical for the employee to be temporarily assigned to alternative duties, or
- (b) the employee has been given notice to show cause why the employee should not be dismissed, or
- (c) the employee has been notified that the employee is being investigated for misconduct that might result in the employee being dismissed for the misconduct, or
- (d) the employee is serving a custodial sentence.

The suspension may be without pay or with pay.

An employee may also be suspended without pay if the employee ceases to hold a mandatory qualification (rather than dismissing the employee).

*Examples: a teacher fails to renew the teacher's registration and is therefore not capable of being employed as a teacher. Rather than dismissing the teacher the chief executive may suspend the teacher pending remediation of registration.*

*An employee who is required to hold a driver licence has the licence suspended for a period of three months. The chief executive may suspend the employee for the period of suspension rather than dismissing the employee (or assign the person to other duties).*

The suspended employee must be given a written statement by the decision maker setting out when the

suspension commences, the reasons for the suspension, the intended maximum length of the suspension, whether the suspension is with or without pay, and the employee's right for a review of the suspension decision.

If suspension is *with pay*:

- the suspension must be no longer than six months unless extended
- the employee is to be paid on the basis of the remuneration actually received by the employee on average over the past three months.

Suspension with pay may be extended for a further period of three months by the chief executive in person (or in a large employment system, a person more senior than the decision maker delegated by the large system manager for that purpose)

Suspension with pay may be again extended for one further period of three months with the approval of the relevant large system manager personally (that is, DG Health or DG Education or Commissioner).

If there are exceptional circumstances the Commissioner may extend suspension on pay for further periods of three months. (The review has not identified any relevant exceptional circumstances, but there may be.) Alternatively, a case manager may either approve the extension or recommend approval to the chief executive or Commissioner.

If approval to extend suspension with pay is not given by relevant decision maker before the end of the period of suspension the chief executive must either end the suspension and direct the employee to return to duties (with or without conditions) or suspend the employee without pay.

For clarity, a chief executive can (subject to natural justice) finalise discipline during a period of suspension (including by dismissal) or end the suspension.

### 7.4.9 Medical examinations

The power to require an employee to undergo a medical examination is contentious<sup>195</sup>.

Stakeholders agree there is a place for the provision, but differ considerably on what the provision should be, when it should be enlivened, and accountability arrangements for involuntary medical examination.

One option is for the Act to be silent and let the power arise from the common law as discussed in the *Issues Paper*.

Given the strong anecdotal (though not quantitatively demonstrated) evidence of misuse of the power as a disciplinary tool rather than a genuine inquiry as to fitness to work, there is merit in the Act more fully stating the power, the conditions of its use, and accountabilities sitting around the power.

Further many stakeholders were concerned the power was limited to medical practitioners when there may be allied health professionals who were better equipped to advise on fitness for work including psychologists, occupational therapists and physiotherapists.

The review considers the power should be used only when the chief executive reasonably forms an opinion that a medical or other examination is necessary. The employee should be kept informed of the decision and its reasons and the resulting report should be given to the employee unless a medical opinion states clearly to the contrary in the interests of the employee.

Union stakeholders sought appeal processes against a direction to attend a medical examination.

Under the current framework an appeal would lie to the QIRC in the *Public Service Act 2008* jurisdiction. As noted in the *Issues Paper* there are two decisions about employees attempting to resist a direction to attend a medical examination. *Metro South Hospital and Health Service & Leighton v Luthje*<sup>196</sup> was a QCAT appeal about the interaction of anti-discrimination laws and the *Public Service Act 2008* power to direct.

The employee sought to restrain the employer from making the direction. The Appeal Tribunal refused the relief because directing the examination is a step in a process leading to a decision and an injunction should not operate to prevent the decision maker from taking the steps towards the decision. The relief might be granted against a decision to retire the officer, but not against the direction that would (on production of the report) inform the decision maker. The Tribunal concluded:

*[52] Whilst an employee may believe they will be retired, and be proven correct following the IME, the employer must show its hand before injunctive relief can legitimately stop a legislatively enshrined process, which must balance the competing interests of ensuring public safety in the health system with individual rights of the employees serving it. Without an*

*independent assessment of Mr Luthje's ability to perform the genuine occupation requirements of [his job], it remains to be seen whether or not his ability to perform his job has been compromised, or whether Metro South Hospital and Health Service can make any reasonable accommodations.*

The QIRC refused an injunction in *Eggins v State of Queensland*<sup>197</sup>. The employee had failed to attend a medical examination as directed under section 175 of the *Public Service Act 2008* and after a warning that he was under a lawful direction to attend, he sought the injunction. He also argued that being on sick leave precluded the Director-General from making the direction. The QIRC refused the relief. First, directions to attend medical examination to assess fitness to work (at least at common law) are reasonable<sup>198</sup>.

Second, it was reasonable for the delegate to suspect in the circumstances that the employee's absence was caused by his mental health. Third, absence on sick leave did not preclude operation of the *Public Service Act 2008*. Fourth, though not quite in these terms, the direction was a step towards making an assessment (compare *Luthje*).

While these cases both concern injunctions to prevent an IME rather than a merits review of the direction, they point to the character of a direction as a step towards a decision rather than a substantive decision itself.

An appeal against a direction may cause considerable delay in progressing proper assessment of fitness to work and if the employee is suspended on pay, an unreasonable burden on the state. The review notes stakeholder concerns that directions to attend medical examinations can be misused and can be oppressive.

The review concludes that an internal review strikes a balance between power to make the direction in reasonable circumstance and full-scale appeal against a direction that is intended to inform a decision about fitness to work. The internal review should be administrative in character, on the papers (not necessarily involving a hearing) and conducted by a more senior person than the person who issued the direction, or if that is not feasible (for example, the issuer is the Director-General or a Deputy Director-General), the Public Sector Commissioner (who might delegate the review or refer it to a case manager). The reviewer's task would be to assess if the direction was *prima*

196 [2015] QCATA 145.

197 *Eggins v State of Queensland* (Department of Justice and Attorney-General, Queensland Corrective Services) [2015] QIRC 203.

198 Citing Martin J in *Litchfield-Bennett v State of Queensland* (Queensland Ambulance Service) [2015] ICQ 005.

*facie* reasonable and to do so as quickly as possible, to assure the chief executive of the reasonableness of the direction. The reviewer would make a recommendation, not a decision, and the chief executive could act with broad discretion in light of that recommendation to confirm, amend or revoke the direction.

Stakeholders also expressed concern that the power was only for a medical practitioner's examination to be directed. Sometimes another health professional such as a physiotherapist or psychologist might be better equipped to advise on whether treatment might render the employee again fit for work or reasonable adjustment. The proposal is that a different professional might only be named with the employee's consent. Given the employee has consented, internal review might be superfluous.

Another option to improve transparency suggested by union stakeholders might be to allow an employee to choose a particular medical practitioner from a shortlist of providers nominated by the chief executive<sup>199</sup>. If that course is adopted by the government, again no internal review would be necessary so long as the employee understood the implications of such a choice.

The review recommends that the instructions to the examining practitioner should be given to the employee in the interests of fairness and transparency. The resulting report should also be given unless a medical practitioner in the report opines it should not be given to the employee in the employee's interests (compare section 177).

The Police Service Administration (Discipline Reform) and Other Legislation Amendment Bill 2019 includes the following provision for reform of the medical examination power in the police service:

*7.14 Examination by medical practitioner*

*(1) This section applies if—*

- (a) a prescribed officer is considering starting disciplinary action against the subject officer; and*
- (b) the disciplinable conduct involves absence from duty.*

*(2) The prescribed officer may—*

- (a) appoint a medical practitioner to examine the subject officer and give the commissioner a written report on the subject officer's mental or physical condition; and*

*(b) direct the subject officer to submit to the examination.*

*(3) The report on the medical examination must include the medical practitioner's opinion as to whether the subject officer's mental or physical condition was a cause of the subject officer's absence from duty.*

*(4) The commissioner must give the subject officer a copy of the report.*

Given the differences between police and other public employees, and the long and vexed history of section 175, a more detailed prescription is recommended.

The detail recommended here is *not* because there is demonstrated misuse of the power to direct.

It is a response to very clear assertions from union stakeholders about their members' concerns of potential abuse, emblematic of the falling away of trust in industrial relations over the past decade. Chief executives consulted in the review clearly understood the gravity of the directions and the importance of being fair. The high level of distrust about these decisions among employee stakeholders flags potential unfairness that should be leavened by improved, legislated protections.

The recommendation is intended to bring a greater degree of order and to facilitate greater trust over time.

### Recommendation: Independent medical examination

50. The Act should provide for independent medical (or other professional) examination, with a mandatory internal review to assure the employee and the chief executive of the reasonableness of the original direction.

The recommended model is described below.

#### **Examination by medical or another practitioner**

A medical examination (or other examination) may be required of an employee if:

- (a) a chief executive is considering starting disciplinary action against an employee; and
- (b) the disciplinable conduct involves:
  - i. absence from duty or
  - ii. poor work performance or

<sup>199</sup> The Office of Industrial Relations has lists of medical practitioners it uses for WorkCover purposes that might usefully be adapted by the Public Sector Commissioner for these medical examinations.

- iii. the employee's standard of conduct; and
- (c) the chief executive believes on reasonable grounds that the employee's state of health is causing or contributing to the conduct.

Additionally, a medical (or other) examination may be required if a chief executive believes on reasonable grounds that an employee's state of health poses an unreasonable risk of harm to the employee or others or loss to the state or another state entity.

The chief executive may—

- appoint a medical practitioner to examine the employee and give the chief executive a written report on the employee's mental or physical condition; or
- appoint another professionally qualified person with the agreement of the employee (including, for example, a psychologist, physiotherapist, or occupational therapist) to examine the employee and give the chief executive a written report on the employee's condition within the person's professional competence; and
- direct the employee in writing to submit to the examination, stating the reasons for the direction and providing a copy of the instructions or request to the medical practitioner or other person.

The chief executive may also give the employee a panel of three or more medical practitioners to choose from. The employee may elect to see one of those medical practitioners.

The employee must act on the direction even if the employee is absent from work whether on suspension or during a period of leave including sick leave unless it is unreasonable to do so.

The report on the examination must include the medical practitioner or other person's opinion as to whether the subject officer's mental or physical condition was a cause of the subject officer's absence from duty, and may if required by the instructions or request, detail other matters such as the employee's fitness for duty, any necessary treatment to render the employee fit, and reasonable adjustments.

The chief executive must give the employee a copy of the report unless a medical practitioner's opinion stated in the report is that disclosing the report or its contents to the employee may be prejudicial to the employee's health or wellbeing.

### **Internal review of direction to attend medical examination**

An Employment Direction may provide separate procedures for internal review of a direction to attend a medical examination, including that there is no internal review if the employee consents to an alternative practitioner or elects to attend a practitioner on a panel of names given by the chief executive.

If the chief executive has personally given the direction, an internal review request may be made to the Public Sector Commissioner. A Commissioner's internal review may be made by a Commissioner's case manager panel member.

### **Reports to Commissioner**

Chief executives must report annually to the Public Sector Commissioner about all directions to attend medical and other examinations and internal reviews and the Commissioner must include data about examinations and reviews and analysis of the data in the Commission's annual report.

### **Common law not displaced**

The right at common law to require a medical examination is not displaced by the Act.

## **7.4.10 Progressive discipline**

Some stakeholders argued for a system of progressive discipline, sometimes called 'three strikes', or similar to complement the show cause process commonly in use across the Queensland public sector that operates more as a 'big bang'. A common progressive trajectory is described by an American author as follows:

**Verbal warning.** *A verbal warning is one that is more informal. It serves to ensure that the employee is aware of the infraction and is given the opportunity to take steps to remedy it. (The warning is verbal, but you should document it.)*

**Written warning (one or more).** *A written warning is a more formal warning to the employee. It is issued if the verbal warning does not result in a positive change in the employee's behavior. It usually includes an action plan or next steps that must be taken in order to ensure that there are no further consequences. An employer may choose to have more than one written warning for some infractions. Usually, the employer and employee sign the written warning and it goes into the employee's personnel file.*

**Suspension** (with or without pay). *Suspension is generally reserved for major infractions or for situations that require investigation before further action is taken. It can serve as a final warning to the employee that if behavior is not improved, termination will result next.*

**Termination.** *Termination is usually a last resort, but sometimes it cannot be avoided. Documentation is important every step of the way, but especially for any termination decision*<sup>200</sup>.

While the current Act does not exclude warnings (or a wide range of other possible disciplinary sanctions available at common law), there is considerable reluctance to take progressive disciplinary action other than that stated in the examples to section 188.

The absence of graduated corrective management tools is noticeable and on the stakeholder input, is a major reason for the limited use of the full range of management interventions of this type.

There are criticisms of progressive discipline<sup>201</sup>.

Further, progressive discipline is not a simple formula. It requires great skill, including reasonable and consistent management behaviour<sup>202</sup> and clear, positive action by managers to address the concerning conduct<sup>203</sup>.

Nonetheless the relative absence of warnings and similar tools from Queensland public service management should be addressed. These tools should be available and used when appropriate. It is recommended that the Act include reference to progressive discipline tools. Such a reference would affirm the validity of this broader range of tools in the context of positive performance<sup>204</sup>.

The same comment might be made about counselling. It is clear from stakeholders that counselling is used by managers, but because of its informal nature useful data are not available.

### **An alternative approach**

The Act could leave sanctions to the common law, complemented by the Public Sector Commissioner's Employment Directions or guidance. Even though that would help declutter the Act, that approach is *not* recommended. Both employer and employee stakeholders thought managers need considerable guidance stated in the Act, consistent with other observations here and in the *Issues Paper* about risk aversion. Nonetheless, the review recommends a very high degree of guidance on discipline be stated in the Act.

### **Recommendation: Use of performance management tools**

51. The Act or other authoritative instruments should include reference to a broad range of tools such as counselling and warnings as a means of positive performance management to ensure managers are sure about their authority to use those tools.

### **7.4.11 Summary dismissal**

A search of the QIRC published cases reveals very few cases of a public employee being summarily dismissed<sup>205</sup>.

Just what constitutes summary dismissal is complicated and there is no settled use of the term. Sometimes it refers to dismissal without notice, sometimes to dismissal with notice effectively immediately and without payment of the notice period. It is usual to link summary dismissal to 'serious misconduct'.

Section 1.07 of the *Fair Work Regulations 2009* requires 'serious misconduct' to be given its 'ordinary meaning', and instances:

200 Bruce, S. (2014). "Pros and cons of a progressive discipline program". *HR Daily Advisor*, [hrdailyadvisor.blr.com/2014/06/25/pros-and-cons-of-a-progressive-discipline-program](http://hrdailyadvisor.blr.com/2014/06/25/pros-and-cons-of-a-progressive-discipline-program).

201 E.g. Bingham, S. (2018). Progressive Discipline Policy: Improvement or Punishment? There is no room for disrespectful behaviour. *HR.com: HR Legal and Compliance Excellence Essentials*, 28 September 2018. Bruce (2014) *op cit*.

202 Levoy, B. (2009). "Progressive discipline". *Optometric Management*, 44(7), p. 71.

203 Falcone, P. (2010) *101 sample write-ups for documenting employee performance problems a guide to progressive discipline & termination* 2nd ed. New York: AMACOM Books, xxix.

204 I have no doubt there are managers using progressive discipline. It is however largely invisible to the stakeholders engaged in the review including unions.

205 E.g. *Lang v Queensland Ambulance Service* [2002] QIRCComm 188; 170 QGIG 320, dismissal under the summary dismissal provisions of the relevant industrial instrument. There may be other cases that did not show on the search terms used. One chief executive recounted a case of reinstatement from summary dismissal for want of procedural fairness.

- *Wilful or deliberate behaviour that is inconsistent with the continuation of the contract of employment*
- *Conduct that causes serious or imminent risk to: the health or safety of a person; or the reputation, viability of or profitability of the employer's business*
- *The employee, in the course of his or her employment engaging in theft, fraud or assault;*
- *The employee being intoxicated at work; and*
- *The employee refusing to carry out a lawful or reasonable instruction that is consistent with the employee's contract of employment.*

The *Small Business Fair Dismissal Code* made under section 388(1) of the *Fair Work Act 2009* states that:

It is fair to dismiss an employee without notice or warning when the employer believes on reasonable grounds that the employee's conduct is sufficiently serious to justify immediate dismissal.

The Code defines serious misconduct inclusively as 'theft, fraud, violence and serious breaches of occupational health and safety procedures.'

Summary dismissal is usually justified only in serious cases. In *Lang, Asbury C of the QIRC* (as she then was) accepted the Ambulance Service's submissions about relevant case law as follows<sup>206</sup>:

*These cases establish that summary dismissal is justified when an employee wilfully or deliberately flouts an essential condition of the contract of employment (North v TV Corp 11 ALR 599 at 609 per Smithers and Evatt JJ); disobeys a lawful instruction which has been reinforced over a short period of time (Stephens v Barrie Charles Holdings Pty Ltd 157 QGIG 138 at 143 per Fisher C); engages in acts of insubordination which go to the heart of the employment contract (Byrnes v Treloar (1997) 77 IR 332 at 336 per Stein J) or is habitually neglectful or definitely refuses to pursue the employer's lawful policy of business (Adami v Maison de Luxe Limited [1924] HCA 45; (1924) 35 CLR 143 at 153 per Isaacs ACJ).*

To these might be added cases about specific misconduct such as:

- theft or improper personal use of the employer's property
- workplace violence
- serious safety breaches
- disparagement of the employer
- drug and alcohol use (both at work and outside work but resulting in erratic behaviour at work) and accessing pornographic material at work.

Note that there are other examples where poor process resulted in finding that dismissal for proven misconduct was otherwise unfair (as harsh, unjust or unreasonable) including because the misconduct was not serious misconduct<sup>207</sup>.

In private employment there is no contractual right to terminate employment at will: there must be a reason for the termination<sup>208</sup>.

Circumstances warranting summary dismissal for cause from public employment are not inherently different from those in other employment. If there is reluctance to summarily dismiss in cases of proven serious misconduct that should be addressed, it is poor management to force parties through an unjustified and drawn out process when a summary process is fair at law and in practice, especially given the availability of unfair dismissal relief as a check.

#### **Recommendation: Summary dismissal**

52. The Public Sector Commission should issue detailed guidance about the range of disciplinary sanctions that might be applied under the Act or other law.

#### **7.4.12 Abandonment**

Stakeholders reported confusion about the authority of a chief executive to terminate employment when an employee had apparently abandoned employment or was unable to work because the employee was in prison and not on leave from work, therefore in fundamental breach of the employment contract.

206 *Op cit.* Mr C. Murdoch represented the Ambulance Service. In that case the QAS commenced a disciplinary process but before it was complete, dismissed the employee for failure to obey lawful directions to attend work. Stepping outside the already commenced process was sufficient for the dismissal to be unfair, but in any case, the employee's application was dismissed, the Commissioner noting dismissal was 'inevitable' if the process had been followed.

207 *Puszka v Ryan Wills Pty Ltd* [2019] FWC 1132 is a recent example of this last point.

208 *Croft v Smarter Insurance Brokers Pty Ltd* [2016] FWC 6859.

*Example: Stakeholders told the review it was not uncommon for an employee not to return from leave, having obtained other employment overseas or interstate.*

*One Department has a template termination notice for use after (a) a period of unexplained absence, (b) one or more attempts to contact the employee to discuss the reasons for the absence<sup>209</sup>.*

Uncertainty about appropriate action in the imprisonment example no doubt stems from its rarity.

Ordinarily abandonment might be left to the common law but given the high levels of uncertainty it is recommended the Act deal with it explicitly.

The dismissal would be subject to the usual natural justice requirements, and the employee would obviously retain the right to seek unfair dismissal relief.

Of course, in relevant circumstances the chief executive might give leave with or without pay or suspend the employee instead of dismissal<sup>210</sup>.

### Recommendation: Abandonment of employment

53. The Act should provide that a chief executive may dismiss an employee, including summarily if the circumstances warrant, if the chief executive reasonably believes the employee has abandoned employment or the employee is absent from work without authority and unlikely to return to work soon because the employee is in prison.

### 7.5 Disciplinary sanction while other proceedings are pending

Stakeholders reported that extended delays are mostly because there are other pending proceedings and the employee is suspended or on alternative duties.

The review considers that chief executives should have the right, as they probably do at common law, to dismiss or otherwise sanction the employee for misconduct, non-attendance or poor performance, subject to the usual requirements and regardless of the other proceedings. This is a matter the Public Sector Commissioner should consider in framing guidance or Employment Directions about discipline with the benefit of formal legal advice from the Crown Solicitor.

### 7.6 Accountability

A central plank in fairness is accountability for decisions that affect employees, including decisions about who wins a promotion, transfer, remediation of poor performance, and disciplinary acts. There is also a special class of decision relating to job security, that of conversion from temporary or casual employment to ongoing employment.

Queensland has used several different models of accountability over recent decades:

- a separate appeals body within the central agency<sup>211</sup>
- a commissioner for public service appeals hearing promotional and disciplinary appeals<sup>212</sup>
- a public sector equity commissioner who determined appeals in disciplinary and conduct matters and promotions, and a classification review tribunal consisting of the commissioner for public sector equity and two others appointed by the public sector management commission<sup>213</sup>
- appeals to the public service commissioner about decisions taken (or not taken) under a directive, discipline, promotion. The power could be delegated to an employee of the office of the public service<sup>214</sup>.
- appeals to the public service commission chief executive about decisions under a directive, discipline, promotion, transfer, conversion from temporary employment<sup>215</sup>. At one stage appeals

209 Interestingly the template itself has several errors in it, evidencing it is cut-and-paste from a private sector source reinforcing the need for high quality guidance from the Public Sector Commissioner for consistency and legality in these high stakes matters.

210 This is what often happens, sometimes after the fact, if an employee is absent without leave e.g. after an accident or sudden illness, or due to natural disasters.

211 *Public Service Act 1922* section 35 constituted an Appeal Board consisting of a magistrate (or if directed by the Governor in Council, a Supreme Court judge), a representative of the Commissioner and a union or other employee representative. It was replaced in 1968 (when the Commissioner was replaced by the Public Service Board) by an Appeal Tribunal effectively a standing commission of inquiry and a promotion appeal committee.

212 *Public Service Management and Employment Act 1988* s. 32. The commissioner made recommendations rather than determining matters.

213 *Public Sector Management Commission Act 1990* ss. 5.2–5.8. Industrial matters remained in the jurisdiction of the Queensland Industrial Relations Commission. See also *Public Sector (Appeals) Amendment Act 1991*.

214 *Public Service Act 1996* ss. 93–107. Appeals about employees under the commissioner were to the QIRC: s. 106.

215 *Public Service Act 2008* s. 194 as passed. The appeals were generally heard by delegates who were “appropriately qualified”.



were heard by employees from other departments, partly by way of skills development. The consensus among stakeholders is that the experiment was not a success.

- the current system about decisions under a directive, discipline, promotion, transfer, conversion from temporary and casual employment and fair treatment appeals<sup>216</sup>. Appeals lie to the QIRC under the *Public Service Act 2008* as “IRC members” not under the *Industrial Relations Act 2016*.

Stakeholders, as reported in the *Issues Paper*, were concerned that non-publication of decisions resulted in poor practice, a lack of shared knowledge of jurisprudence, and information asymmetry between the state and Hospital and Health Services (using Crown Law or a small number of private solicitors able to develop precedent banks) and employees whether represented or not.

The review heard reports from stakeholders on both sides that conduct of matters before the QIRC was difficult. Unions said that employer representatives were not acting as model litigants; employer stakeholders thought unions were too quick to lawyer-up and shift to aggressive litigation. Forum shopping between the public service and industrial jurisdictions was said to be common.

Unsurprisingly then, many stakeholders questioned the suitability of the QIRC as an appeals or review forum especially for matters that have a strong managerial content rather than an industrial or legal focus under the *Public Service Act 2008*. There is no such consensus about the matters under the *Industrial Relations Act 2016* (unfair dismissals, stop bullying applications, industrial disputes). This may show that the difficulty is with the split procedure and jurisdictions under the public employment law rather than the better established and more strongly managed industrial law processes. That certainly was the view of the QIRC in stakeholder engagement.

Union stakeholders had varying views on whether there should be a specialised venue for public sector appeals, appeals to QCAT or continuation of the QIRC as the appeals forum with improvements.

The review considers many of the difficulties of the current process arise from issues with first line management and human resource practices, resulting in lengthy delays in managerial progress of performance and conduct concerns, and an unbalanced approach

to organisational risk. Recommendations for improved processes and management capacity are intended to address these deficits in part. Success would be reflected in:

- fewer matters going to appeal or review
- matters that do reach the appeal stage being more the complicated, serious or genuinely difficult to resolve
- appeals being far better formed and managed.

But merely changing those front-end processes will not be enough.

### 7.6.1 Managing performance and conduct matters

Stakeholders uniformly sought separation of performance from discipline on the basis that the interventions are fundamentally different in practice. This conflation has anecdotally been a major impediment to improving processes.

The review concurs and recommends a new approach to performance founded on positive principles, leaving discipline for misconduct, and cases where positive performance management and improvement has not yielded improvement.

#### Recommendation: Separation of discipline from performance

54. The positive performance framework should separate performance management and improvement from discipline.

### 7.6.2 Right to raise issues

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

The recommended approach is for an administrative right to raise issues. An employee disaffected by a decision or a process should have a right to raise issues with a superior officer. This is similar to the idea of an internal review. Many aspects of public administration use internal review processes to allow a chief executive

216 *Public Service Act 2008* s. 194 as amended to date.

to check where a different first-line decision by a delegate might be improved or adjusted in light of circumstances<sup>217</sup>.

Internal reviews of public employment decisions (and conciliation of grievances) are legislated in South Australia<sup>218</sup>:

*60. A public sector agency is required to endeavour to resolve its employees' grievances by conciliation (regardless of the fact that employees may apply for review of its decisions).*

*61(1) An employee aggrieved by an employment decision of a public sector agency directly affecting the employee may apply for an internal review of the decision by the public sector agency.*

There is much to commend an early process as both fair and ensuring senior managers and chief executives are aware of decisions made by their subordinates.

The Public Sector Commissioner (or a large employment system manager) should be able to make an Employment Direction about how rights to raise issues are managed.

The right to raise issues should not apply to: decisions made by chief executives personally; decisions already the subject of external review; decisions about whether a matter should be case managed; recommendations made by a case manager; decisions about extending suspension with pay; a decision directing a medical examination (because there is an internal review process for those decisions).

Obviously, dismissal decisions should also be outside such review, as at present, because there is a formal legal unfair dismissal relief process.

Raising an issue would be the exercise of a workplace right for section 284 of the *Industrial Relations Act 2016*. See also [section 7.6.6](#) about grievances.

### Recommendation: Right to raise issues

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

### 7.6.3 Starting formal processes

Natural justice requires that an employee knows the case against them.

It is usual for formal processes to commence with a notice to show cause being given to the employee. There are template notices prepared by the Public Service Commission<sup>219</sup>.

Formal performance improvement is described in the Public Service Commission's 'Five-step performance improvement plan (PIP)<sup>220</sup>' and a three-step process for Queensland Health that usefully points to preliminary consideration of underlying causes such as poor job design, workplace conflict and ill-health<sup>221</sup>.

Employees and unions complain that notices often escalate matters inappropriately. Anecdotally, it is not unusual for the material accompanying the notices to be voluminous and distracting, sometimes including very old matters that have not previously been raised<sup>222</sup>.

Corrective processes should be started fairly and be preceded by positive performance action<sup>223</sup>: formal proceedings should not come as a surprise, but if they do, there should be good reasons, or the manager's own performance might be called into question.

217 More than 90 Acts provide for internal review of decisions. Examples include: right to information decisions, adult proof of age card decisions, dog declaration and destruction orders, certain victims of crime assistance decisions.

218 *Public Sector Act 2009*. The process and conduct of the reviews are left to regulation: s. 61(2). And *Public Sector Regulations 2010*, s. 26 'Employment decision' is defined in s. 3: as "an administrative decision relating to the employment of a person, including an administrative decision relating to the engagement, promotion, transfer, remuneration, entitlements or termination of employment of a person and a decision to take disciplinary action against a person" Dismissal is excluded by s. 59. The ACT in 1994 provided for internal review of employment decisions but repealed those provisions in 2011.

219 See [www.forgov.qld.gov.au/follow-disciplinary-process](http://www.forgov.qld.gov.au/follow-disciplinary-process).

220 [www.forgov.qld.gov.au/follow-5-step-performance-improvement-plan](http://www.forgov.qld.gov.au/follow-5-step-performance-improvement-plan).

221 Queensland Health (2017). *Performance improvement*. Policy G11 (QH-POL-190). [www.health.qld.gov.au/\\_\\_data/assets/pdf\\_file/0023/164129/qh-pol-190.pdf](http://www.health.qld.gov.au/__data/assets/pdf_file/0023/164129/qh-pol-190.pdf).

222 The review is aware of one instance where the first interaction with an employee about alleged poor performance was a 78-page notice to show cause including allegations about conduct up to five years before and not previously raised, and stated in vague and opinionated language. That notice was revoked after the employee's lawyer objected and a fresh notice over 40 pages in length substituted. The lawyer's opinion was that the second notice was just as unfair as the first. Both notices had been prepared by the Department's human resources branch.

223 The review acknowledges that serious misconduct and unexplained or fundamental breaches may demand immediate action.

This recommendation will require some level of consistency across the public sector in the steps to be taken before formal correction action commences, and how formal action is triggered, and any process to assure the reasonableness of the notice or requirement to undergo formal performance management or improvement.

To be clear, this recommendation is intended to facilitate, not impede, action. It is acknowledged there is a current conservatism about taking disciplinary action. The recommended documentation, as a prerequisite to action, is not to be a further impediment to good management but a step in positive management that a good manager might adopt as a matter of course, and would benefit the manager by demonstrating the *prima facie* reasonableness of the intended action to both the employee and the more senior manager, and afford the chief executive a way of testing managers' skills.

It is envisaged that the accompanying material may be quite brief, enough to assure a more senior manager that the formal step is reasonable and reasonably necessary in the circumstances (including that no prior steps have been taken if the circumstances are serious enough to warrant immediate formal action). It is not intended to be a complete history of relevant action. As one union stakeholder suggested, a small set of relatively simple checklists would probably suffice.

For clarity, there should be no right to raise an issue or external appeal about a decision to initiate formal performance improvement or issue a notice to show cause, although external case management might happen in relevant circumstances. Further, if the chief executive personally initiates the action the obligation would only be to give a copy to the employee.

### Recommendation: Initiating discipline

56. The Act should require positive performance action as a prerequisite to issuing a formal notice initiating performance improvement or disciplinary action.

A sector-wide Employment Direction should require initiating formal proceedings to be accompanied by a statement about action taken before issuing the proceedings, such as positive performance action taken earlier and why the response is not adequate, how the proposed action complies with any relevant Employment Direction, or why those actions or requirements are not relevant or have not been met.

The statement should be given to the employee and the issuing officer's manager (unless the issuer is the chief executive).

### 7.6.4 Case management

An enduring criticism of the *Public Service Act 2008* is that review of decisions is too late, too formal, and too risky. The right to raise issues mechanism (see 7.6.2 above) is an attempt to bring early attention to decisions that might be improved by a second set of eyes.

Managing poor performance and misconduct is complicated, and risk management (overly cautious behaviour) remains a real issue affecting fairness and reducing efficiency.

The review recommends a new system for managing difficult or long-standing cases and to improve internal processes. Cases would be referred to the Public Sector Commissioner for case management if:

- a chief executive requests case management
- the employee (or representative) requests case management, if the employee can show the department is not properly progressing the matter
- a trigger point (refer below) is reached.

Case management would be under the Public Sector Commissioner through external case managers being individuals engaged on a case-by-case basis, paid sessionally. The costs of case management should be borne by the relevant department or agency<sup>224</sup>.

**An alternative:** each case manager could be appointed as a Special Commissioner (Recommendation 20) by the Premier as a pool to manage cases assigned to them by the Public Sector Commissioner. These Special Commissioners would then be paid on a sessional basis.

The Public Sector Commissioner should have absolute discretion about whether a matter will be case managed or returned to the chief executive, affording an opportunity for the employee or manager to better progress the matter.

Wide discretion will serve to ensure:

- (a) authority to impose case management remains with the Commissioner
- (b) chief executives have a strong incentive to require prudence in managing matters (lest matters be sent back with a reminder of the obligations rather than the benefit of case management)

224 Compare case appraisal under *Uniform Civil Procedure Rules 1999* ss. 334–345.

- (c) case management is not seen as a right, a delaying tactic, or a way to abrogate management responsibility.

The intention of the review, supported by the CaPE data, is that very few matters would be case managed under the Commissioner at any one time, especially once recommended management improvement is implemented and bearing fruit (which will take some time). Prevalence of case management in a particular agency would indicate poor management of systems under the chief executive or principal officer, indicating a possible need for intervention.

Case managers should not be public employees but highly skilled and authoritative individuals, able to assist employees and managers to progress matters effectively<sup>225</sup>.

Case managers should have power to direct the management of the case by, for example, imposing time frames for production or exchange of documents, attendance at meetings or medical examinations lawfully required by a chief executive, require production of documents and evidence.

A case manager should also have power to:

- require attendance at meetings in order to facilitate resolution or agreement about steps forward through mediation of other processes
- mediate or otherwise attempt to resolve the matter
- report to the Commissioner, chief executive or representing union about exemplary or deficient conduct of a matter before the Case Manager, to facilitate practice improvements
- make a recommendation to the departmental chief executive about disposition of the matter or part of it<sup>226</sup>. Such a recommendation and material supporting it should be relevant material in any appeal to the QIRC<sup>227</sup>.

The 'trigger events' requiring referral to the Commissioner should be prescribed by regulation:

- the concerning conduct or performance deficits in question include matters older than one year
- the matter is not finalised by the end of six months after a notice to show cause in disciplinary

proceedings is issued or 12 months after performance management commences.

### Recommendation: Case management

57. The Act should provide for case management by the Commissioner, through a panel of specialist external providers appointed by the Commissioner, for discipline and performance management. Matters must be referred to the Commissioner after specified time frames and may be requested by either the employee or the chief executive. The Commissioner should have absolute discretion in deciding whether to appoint a Case Manager.
58. Case Managers should have power to: manage timeframes in progressing a matter; require parties to meet with the Case Manager; and prepare privileged reports for the Commissioner, the chief executive and (if relevant) a Union representing the employee on the conduct of the matter to enable practice improvements; make a recommendation to the chief executive about disposition of the matter under case management or a part of it.
59. Case Managers may also conduct internal reviews of a direction to attend a medical examination personally made by a chief executive referred to the Commissioner.

### 7.6.5 External review

One stakeholder characterised the major difference between public and private employment to be the availability of employment related appeals, a primary device to protect the Westminster independence of the public service.

The current system of external review by the QIRC is but one historic variation, as discussed above.

Stakeholders were critical of the QIRC for a range of reasons but unable to suggest coherent alternatives. Several stakeholders, both employee and employer, urged a different jurisdiction be used because of dissatisfaction with the QIRC's processes, lengthy delays and lack of transparency.

As noted above, this arises, at least in part, from the divergent jurisdictions.

225 Panels should not be allowed to grow into a Kafkaesque bureaucracy. The intent is that better first point management and prudent oversight and early review or intervention will lead to fewer matters and less need for intervention. Quality of intervention is thus more important than quantity.

226 Compare *Fair Work Act 2009* s. 595(2).

227 A Case Manager's power, privileges and immunities may be usefully anchored to those given to a Special Commissioner. See note above about alternative.

The review recommends:

- retention of the QIRC as the appeals body except for conversion decisions that are managerial in character
- reviews and appeals be under the *Industrial Relations Act 2016* and not in a distinct and separate public employment jurisdiction as at present
- reviews and appeals be therefore conducted under QIRC normal processes, subject to oversight by the Industrial Court of Queensland, and normal publication of reasons allowing jurisprudence to develop.

The intent of the package of reforms is that few matters would be appealed. Matters before the QIRC would be:

- inherently difficult because of complicated facts or law or divergent opinion about the law
- intractable (usually because of personalities) or
- an employee simply insisting on their ‘day in court’<sup>228</sup>.

A recommendation of a case manager and materials in support of it should be relevant material for the QIRC in an appeal.

Matters that reach the QIRC should therefore be far better formed, narrower in scope, and informed by better materials because of better local management or high-quality external case management.

### Recommendation: Appeals and reviews to Queensland Industrial Relations Commission

60. Appeals and reviews (with the exception of conversion decisions) be to the Queensland Industrial Relations Commission (QIRC) under the *Industrial Relations Act 2016*.

## 7.6.6 Grievances

Grievances, a special type of complaint about being treated unfairly at work, are important for fairness. Union stakeholders pointed to the issues confronted by their members when grievances were not possible because the then public service commission revoked the relevant Directive.

The result was a spike in disputes under industrial relations laws because legitimate concerns were not able to be raised formally in any other way. Arguably the result was higher costs and inefficiencies than grievances might have caused.

Section 281A of the *Public Service Act 2008* now requires the commission chief executive to make a directive about grievances, called ‘complaints by officers and employees’. (See Directive 02/17 *Managing employee complaints*.<sup>229</sup>) The Directive sets out a wide range of matters that might be the subject of complaint, a local decision, and review by various means to the QIRC or the Ombudsman<sup>230</sup>.

The *Public Service Act 2008* refers to grievances raised under industrial instruments and by reference to unfair treatment<sup>231</sup>.

As mentioned above, constraints on industrial rights between 2012 and 2015 resulted in employees resorting to industrial disputes under the *Industrial Relations Act 1999*. It seems there remains an enduring habit of forum shopping between the employment laws and the industrial laws<sup>232</sup>. As a matter of principle the review considers individual matters before the QIRC should be managed as grievances (or ‘fair treatment appeals’) rather than disputes.

The review’s preference for ‘grievance’ arises from the need to manage the matter complained about separately from the appeal process, including by case management if it proves complex or intractable. Appeal should be the final step, not the plan from the start. Further, it is useful in the context of responsiveness to the community to differentiate between complaints about the quality of or access to services from complaints about the employment experience or the conduct of colleagues.

The recommended right to raise an issue is relevant to this context. See [section 7.6.2](#).

There should be legislated authority to refuse to deal with a frivolous or vexatious grievance.

228 Model litigants (the state as employer) should never pursue matters just to have their day in court.

229 [www.forgov.qld.gov.au/system/files/documents/directive-02-17-managing-employee-complaints\\_3.pdf?v=1490336869](http://www.forgov.qld.gov.au/system/files/documents/directive-02-17-managing-employee-complaints_3.pdf?v=1490336869).

230 The Ombudsman does not actually review but investigates complaints and because QIRC review is available may refuse to entertain a complaint (as the Directive explains).

231 s. 195(3A)(e) precluding a fair treatment appeal “relating to the resolution of a grievance under an industrial instrument, other than a decision about the outcome of the grievance”. By way of example the *Queensland Public Service Officers and Other Employees Award – State 2015* includes grievance procedures in cl. 7.1–7.2. The right for fair treatment appeals is stated in ss. 194(1)(eb) and 200(1A). about a decision the employee believes is “unfair and unreasonable”. A chief executive is responsible for ensuring fair treatment of departmental employees: s. 98(1), example after par. (h).

232 Recommendation 60 should allow the QIRC to deal with forum shopping.

### Recommendation: Grievances

61. The right of an employee to make a complaint should be called a grievance to differentiate it from client and customer complaints. A grievance may be preceded by raising an issue with a more senior manager, and amenable to case management and external review at the QIRC. Grievances should be the principal vehicle for ventilating and resolving individual concerns, rather than disputes under the *Industrial Relations Act 2016*.

#### 7.6.7 Support person

The *Issues Paper* sought input on the use of support persons in performance and disciplinary meetings. Input predictably reflected divergent interests between employees and employers.

Employers were positive about support persons being present at meetings and able to assist during breaks and in other non-participatory ways, but did not think advocacy was either useful or supportable in principle. Several submissions made the point that such meetings were an important opportunity for the individual employee to speak for themselves and that advocates are not necessarily concerned with practical resolution but protection of clients' rights and positioning in potential litigation.

Unions expressed a preference for advocacy during the meetings citing imbalances in power, an asserted tendency for panels of employer representatives to confront an employee and the occasional presence on an employer's part of an advocate, whether in-house or external. On that view, meetings are adversarial and representation by a union delegate or advocate is appropriate.

Several statutes provide for support persons in various circumstances<sup>233</sup>.

The review concludes that the complaints from union stakeholders are about behaviour and culture, and the tension that might naturally arise in such meetings. Permitting advocates will not necessarily improve misguided conduct. Lifting management capability and accountability will.

The review leaves the specific detail about the function of a support person to the Public Sector Commissioner by Employment Direction.

<sup>233</sup> "Support person" is used in 13 Acts in the Queensland Statute book e.g. *Police Powers and Responsibilities Act 2000*, *Mental Health Act 2016*, *Forensic Disability Act 2011*, *Child Protection Act 1999*. Many such provisions are directed to fairness for individuals under a legal disability or in proceedings. The *Queensland Civil and Administrative Tribunal Act 2009* specifically precludes the support person from representing a party at a hearing or from addressing the Tribunal: s. 91(5).

## 8 Responsiveness

The Terms of Reference required the review to consider how laws, policies and procedures about public employment ensure responsiveness to the community and to the government.

The *Issues Paper* included a model of a responsive public service, reproduced in Figure 7.

### 8.1 What is responsiveness?

Responsiveness is one of the Advancing Queensland Priorities, stated as:

***Make Queensland Government services easy to use***

*The government wants to make sure that Queenslanders feel like it is easy to do business with their government, and to ensure it does not become a frustration in their lives.*

*While advancing technology and digitisation of services is making it faster and more efficient to access information and services for some, it is also important to remember that not everybody has the same access to technology and some are not able or confident in using it<sup>234</sup>.*

This aspiration is about the community and concerns the left half of Figure 7.

Community responsiveness is specifically discussed in [section 8.2](#).

The idea that public services should be responsive is not new, and it has long been recognised that responsiveness might compete with other objectives such as efficiency, keeping expenditure levels in check and being apolitical<sup>235</sup>.

There are many ways to understand public sector responsiveness.

#### 8.1.1 Responsiveness as obligation

The *Public Service Act 2008* requires responsiveness of public employees:

- Section 3(1)(a)(i): The main purposes of this Act are to ... establish a high performing apolitical public service that is ... **responsive to Government priorities**
- Section 25(1)(a): Public service management is to be directed towards ... providing responsive, effective and efficient **services to the community and the Government**

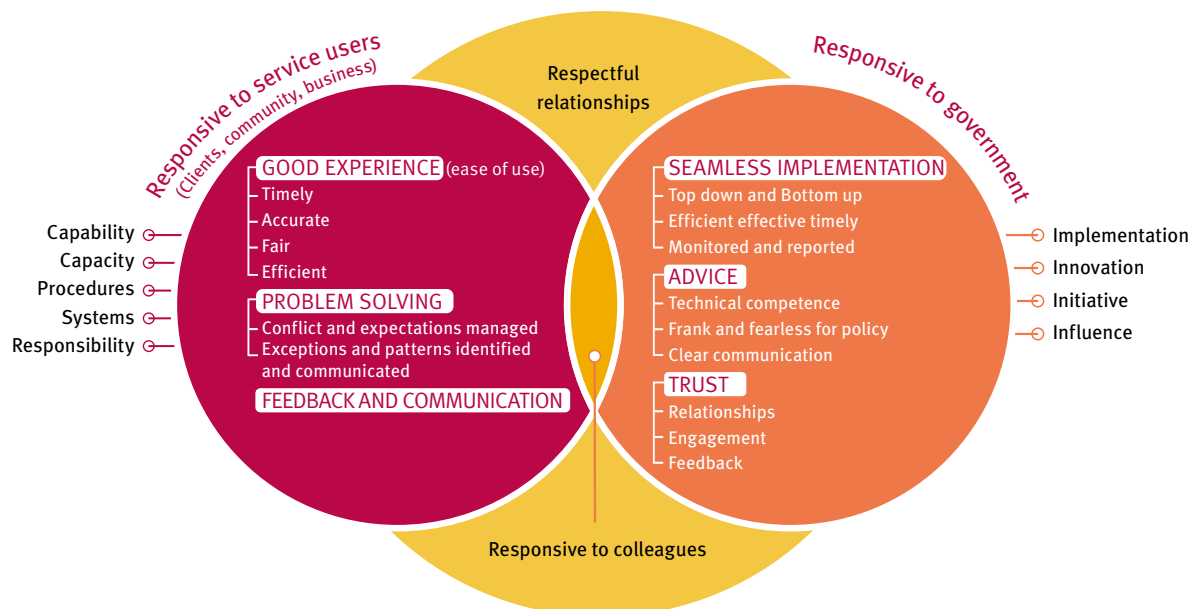


Figure 7: Responsive public services.

234 [www.ourfuture.qld.gov.au/responsive-gov.aspx](http://www.ourfuture.qld.gov.au/responsive-gov.aspx).

235 McCamy, R.L. (1954). "Responsiveness versus Efficiency in Public Service". *The Annals of the American Academy of Political and Social Science*, 292, 30–38; Denhardt, R., & Jennings, E. (1989). Image and Integrity in the Public Service. *Public Administration Review*, 49(1), 74–77 in response to Wildavsky, A. (1988). Ubiquitous Anomie: Public Service in an Era of Ideological Dissensus. *Public Administration Review*, 48(4), 753–755.

Table 3: Use of ‘responsiveness’ in other employment statutes

Commonwealth – other documents (example)	APS Senior Executive Work Level Standards: ‘Roles are responsive to stakeholder needs and engage stakeholders during times of change, resolving conflict and managing sensitivities within constrained timeframes’.
New South Wales – other documents (example)	The NSW Public Sector Capability Framework: The NSW Public Sector Capability Framework provides a common foundation tool that enables the NSW public sector to attract, recruit, develop and retain a responsive, capable workforce (and five other mentions). Responsive, accurate and timely service is a measure in the NSW balanced scorecard <sup>238</sup> .
<i>Public Administration Act 2004</i> (Vic)	s. 7(1)(a) public sector values include: <b>responsiveness</b> —public officials should demonstrate responsiveness by— (i) providing frank, impartial and timely advice to the Government; and (ii) providing high quality services to the Victorian community; and (iii) identifying and promoting best practice
<i>Public Sector Management Act 1994</i> (WA)	s. 7(b) Public administration and management principles: the Public Sector is to be so structured and organised as to achieve and maintain operational responsiveness and flexibility, thus enabling it to adapt quickly and effectively to changes in government policies and priorities
<i>Public Sector Act 2009</i> (SA)	s. 4(a) object of the Act: to promote a high performing public sector that ... is responsive to Government priorities Public sector principles in s. 5: s. 5(1): under ‘Public focus’ the public sector is to ... recognise the diversity of public needs and respond to changing needs s. 5(2): under “Responsiveness” the public sector is to: <ul style="list-style-type: none"> <li>• implement the Government’s policies in a timely manner and regardless of the political party forming Government;</li> <li>• provide accurate, timely and comprehensive advice;</li> <li>• align structures and systems to achieve major strategies while continuing to deliver core services</li> </ul> s. 5(4) under the heading ‘Excellence’: the public sector is to ... move resources rapidly in response to changing needs
<i>State Service Act 2000</i> (Tas)	s. 7(1): The State Service Principles are ... (e) the State Service is responsive to the Government in providing honest, comprehensive, accurate and timely advice and in implementing the Government’s policies and programs; and ... (ja)(ii) officers will be responsive to Government priorities s. 51B(e): An officer or employee employed in an Agency is to ...ensure that ... he or she is responsive to Government priorities in the performance or exercise of his or her functions or powers;
<i>Public Sector Management Act 1994</i> (ACT)	s. 8: a public servant does the public servant’s job in accordance with the best practice principle if the public servant ... (b) is responsive, collaborative and accountable
<i>Public Sector Employment and Management Act</i> (NT)	s. 5B(d)(i): The administration management principle is that the administration and management of the Public Sector must be directed towards ... ensuring that in carrying out their functions Agencies ... are responsive to the changing needs of the community and the government S. 24(2)(a) about chief executives’ functions: The Chief Executive Officer must exercise those functions in a way that ... is responsive to government policies and priorities
<i>State Sector Act 1988</i> (NZ)	s. 32(1)(b): The chief executive of a department or departmental agency is responsible to the appropriate Minister for ... the department’s or departmental agency’s responsiveness on matters relating to the collective interests of government



- Section 98(1)(d): A chief executive is responsible for ... adopting management practices that are **responsive to Government policies and priorities.**

Responsiveness is important enough that almost every jurisdiction writes it into the public employment laws, summarised in Table 3. (The Commonwealth and New South Wales Acts do not use the word, but responsiveness features in management documents.)

These formulations might be worded as obligations, but it is difficult to see how consequences can be visited on anyone for not being responsive. They are in fact aspirations or principles.

To some extent, responsiveness is a matter of perception and difficult to measure objectively.

### 8.1.2 Responsiveness as accountability

B. Guy Peters is one of the most eminent thinkers and writers about government in the world. He casts responsiveness to government and to the community as different, maybe conflicting, forms of *accountability* arising through two different ‘pressures’<sup>237</sup>:

- pressures upwards: political accountability manifest in constraints on public employees, blurring the administrative/political dichotomy<sup>238</sup>
- pressures downwards: being responsible and responsive to the public and clients has real consequences for employees and demands new concepts about what public employment means.

Responsiveness in both guises demands an understanding by officials of what the community and government wants, and conversely some ability of the community or government to communicate meaningfully what is required. Trust and quality of communication are potentially very important.

### 8.1.3 Responsiveness as trust

In the *Issues Paper*, responsiveness was said to be underpinned by trust, a two-way construct. Trust grows between people, not unilaterally.

There are many ways of thinking about trust including<sup>239</sup>:

- a legal, employment concept<sup>240</sup>
- a philosophical idea<sup>241</sup>
- a psychological state, one that informs the quality of relationships, involving emotion and subjectivity. Trust here may be cognitive (based on things we know) or affective (based on affiliation, and feelings arising from interactions)<sup>242</sup>.

237 Peters, B.G. (1993). “Searching for a Role: The Civil Service in American Democracy”. *International Political Science Review/Revue Internationale De Science Politique*, 14(4), 373–386.

238 Peters cites here Appleby, P. (1949). *Policy and Administration*. University, AL: University of Alabama Press. See also Svava, J. (1998). “The Politics-Administration Dichotomy Model as Aberration”. *Public Administration Review*, 58(1), 51–58, arguing that complementarity is empirically, philosophically and theoretically more real than dichotomy.

239 Trust can also be a political construct which is complicated and includes both community (and public service) loss of trust in politics and politicians as servants of the public interest; and a *politics of distrust* that informs politicians’ views of accountability institutions and the means of political advantage.

240 See e.g. Flannigan, R. (2016). “Contesting public service fiduciary accountability”. *University of Queensland Law Journal*, 36(1), pp. 7–37; Anon (1980). “Every public service function attracts fiduciary accountability”. *The Yale Law Journal*, 90(1), 189–215 commenting on trust being required post-employment.

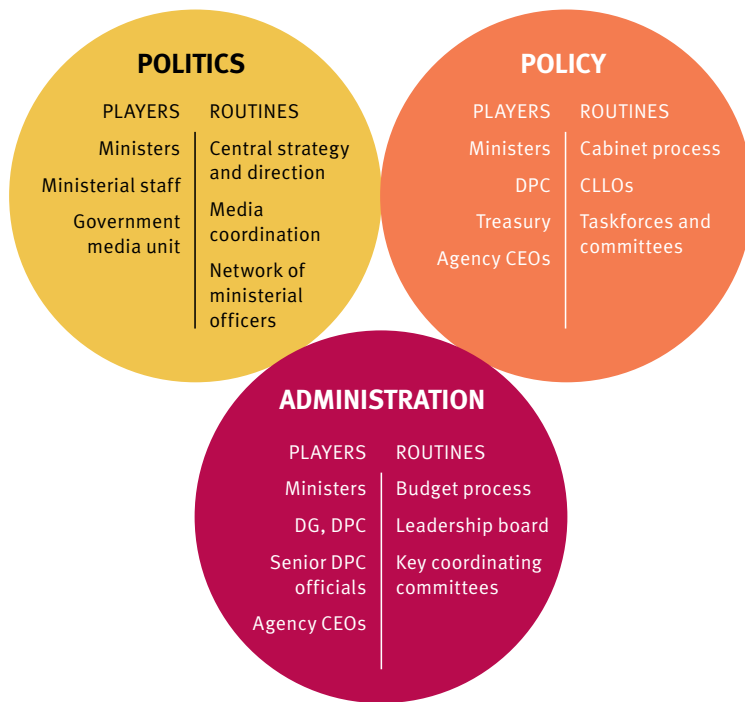
241 Summarised in McLeod, C. (2015). “Trust”, from *The Stanford Encyclopedia of Philosophy*: [plato.stanford.edu/archives/fall2015/entries/trust/](http://plato.stanford.edu/archives/fall2015/entries/trust/): “Trust is important, but it is also dangerous”. See also Faulkner, P. and Simpson, T. eds. (2016). *The Philosophy of Trust*, Oxford: Oxford University Press.

242 See e.g. Curtis, B.R. (2012) *Psychology of Trust: Psychology of Emotions, Motivations and Actions*. New York: Nova Science Publishers. Rottenberg, K.J. (2018). *The Psychology of Trust*. London: Taylor & Francis. Gottman, J.M. (2011) *The science of trust*. New York: W.W. Norton (a book about trust in intimate relationships).

**Context matters**

Glyn Davis has posited three domains of government: politics, policy, and administration, adapted by Anne Tiernan and shown here in Figure 8<sup>243</sup>.

Figure 8: Three domains of government.



Each domain has its own strong and dynamic culture. There are divergent senses of time and urgency, differing concepts of achievement. The differing senses of time are depicted in Figure 9.

Figure 9: Time cycles across government domains.

Domain	Politics	Policy	Administration
<b>Short</b>	<b>News</b> Hourly, daily, episodic	<b>Briefs and Cabinet</b> Repeating and interlacing – weekly	<b>Budget and reporting</b> Annual
<b>Medium</b>	<b>Cabinet</b> Weekly, cycle	<b>Parliament for Bills</b> 6 months to 2 years	<b>Government of the day</b> Cross-election cycles
<b>Long</b>	<b>Electoral</b> 3–5 years, cycle	<b>Budget</b> Annual	<b>Program life</b> Highly variable – years or decades
<b>Very long</b>	<b>Anything else</b> Idiosyncratic and idiopathic	<b>Career</b> Highly personal	
<b>Drivers</b>	<b>Re-election</b> <b>Retaining power</b> <b>Staying in Cabinet</b>	<b>Promotion and superannuation</b> <i>‘I made a difference.’</i>	<b>Promotion and superannuation</b> <i>‘I did a good job.’</i>
<b>What is success?</b>	<b>Achievement</b> measured by observable actions and Bills through Parliament	<b>Promotion and position</b>	

243 Davis, G. (1995) *A government of routines: Executive coordination in an Australian State*, Melbourne: Macmillan; Tiernan, A. (2018). “What Are the Consequences of Incessant Reform? Losing Trust, Policy Capacity and Institutional Memory in the Queensland Core Executive”. In Rhodes. R.A.W. (2018). *Narrative Policy Analysis: Cases in Decentred Policy*. Palgrave Macmillan.

Community bodies and businesses also have divergent cultures, and different understandings and senses of time as Thodey hints (see page 26).

Culture also impacts on trust and perceptions of responsiveness –

A ministerial advisor thinking about media deadlines and the minister’s diary might see a few hours delay as *unresponsive*; the finance director composing the requested figures for the advisor might marvel at how

quickly departmental staff compile the complicated information.

A business leader meeting with officials is frustrated at apparent lack of comprehension about business basics while public servants grow frustrated at unrealistic expectations about what can be done legitimately.

Erin Meyer’s exploration of cross-cultural business management<sup>244</sup> suggests eight styles and preferences that may help inform the challenges of building trust across domains. See Table 4.

244 Meyer, E. (2014) *The Culture Map: Breaking Through the Invisible Boundaries of Global Business*.

Table 4: Meyer’s 8 styles.

<b>Communication</b>	low to high context – the amount of information needed for meaning
<b>Evaluation</b>	preferences for negative feedback: direct or discrete
<b>Leadership</b>	hierarchical or egalitarian
<b>Decision making</b>	consensual or hierarchical
<b>Trust</b>	based on personal knowledge or working well together
<b>Disagreement</b>	conflict avoidance to direct even abrupt dealing
<b>Scheduling</b>	is time linear or flexible
<b>Persuasion</b>	specific case versus concepts

Meyer’s dimensions overlap and they are contestable, but they do tell us that building trust is not linear.

One empirical study of 360 degrees assessments suggested three critical elements of organisational trust<sup>245</sup>:

- expertise and judgement
- positive relationships
- consistency<sup>246</sup>.

Relationships were the trump card; consistency a close second; but all three were crucial.<sup>247</sup>

### 8.1.4 Responsiveness is complicated

The three perspectives on trust reveal some important challenges in building perceptions of responsiveness.

First, cultural considerations can impact on trust and perceptions. Second, there are divergent cultures both within government and between government and other interests. Third, being knowledgeable and a good judge, being an expert, is not enough. The soft skills of relationships and observable consistency are also important.

244 Meyer, E. (2014) *The Culture Map: Breaking Through the Invisible Boundaries of Global Business*.

245 Zenger, J. & Folkman, J. (2019) “The 3 elements of trust”. *Harvard Business Review*, 5 Feb 2019, [hbr.org/2019/02/the-3-elements-of-trust](https://hbr.org/2019/02/the-3-elements-of-trust). The study used data from the 360° assessments of 87,000 business leaders in the USA.

246 Said to be setting a good example, ‘walking the talk’, keeping promises, following through on commitments, and going above and beyond.

247 This was a factorial study. ‘Crucial’ means the factor explained a significant amount of statistical variance.

In thinking about responsiveness of departments to the elected government, the opportunity to build trust is important. It is hard for public servants below the most senior levels to get access to a minister or advisor. If people do not meet and talk, perceptions of responsiveness depend on familiarity with names on briefing notes and comfort with content.

### **Trust and relationships: an aside**

Accommodation of ministers, Directors-General and policy advisors at 1 William Street in Brisbane presents challenges. Past practice in Queensland had ministers co-located with departmental officials in many buildings in the Brisbane CBD. Interaction was relatively easy. Ministers and Directors-General could be seen walking into the building and in lifts. There was a degree of intimacy between ministers and their departments.

In the new building, ministers and their advisors are located on upper, secure floors. Directors-General and immediate staff are on the same floor. Elsewhere in the building, policy and administration staff sit in open plan offices or, in some departments, in different buildings altogether.

The review was told these arrangements were decided by the Newman Government, but it lost office before the building was occupied.

As a casual observation, the separation of ministers and Directors-General to special floors is more like the more remote experience in Canberra with Ministers 'on the hill'.

The review commends a higher degree of interaction to ministers and advisors wanting to see greater responsiveness.

### **8.1.5 Can the law make a difference?**

What can the law do about trust, positive relationships, consistency, and divergent cultures? These things seem beyond legislative reach.

The difficulties do not mean public employment law should avoid the topic or resort to platitudes.

The review makes several recommendations intended to improve responsiveness and enhance the sense of trust the community might have in public services and the government in public employees supporting them.

The Australian Public Service Commission describes responsiveness as follows<sup>248</sup>:

*Responsiveness to the Government demands a willingness and capacity to be effective and efficient. Responsive APS employees:*

- *are knowledgeable about the Government's stated policies*
- *are sensitive to the intent and direction of policy*
- *take a whole-of-government view*
- *are well informed about the issues involved*
- *draw on professional knowledge and expertise and are alert to best practice*
- *consult relevant stakeholders and understand their different perspectives*
- *provide practical and realistic options and assess their costs, benefits and consequences*
- *convey advice clearly and succinctly*
- *carry out decisions and implement programmes promptly, conscientiously, efficiently and effectively.*

*Responsive advice is frank, honest, comprehensive, accurate and timely .... The advice should be evidence-based, well-argued and creative, anticipate issues and appreciate the underlying intent of government policy. Responsive advice is also forthright and direct and does not withhold or gloss over important known facts or 'bad news'.*

*Responsiveness demands a close and cooperative relationship with ministers and their employees. The policy advisory process is an iterative one, which may involve frequent feedback between the APS and the minister and his or her office.*

*Responsive implementation of the Government's policies and programmes ... is achieved through a close and cooperative relationship with ministers and their employees. Ministers may make decisions, and issue policy guidelines with which decisions made by APS employees must comply. Such ministerial decisions and policy guidance must, of course, comply with the law and decisions by APS employees must meet their responsibilities for impartiality and efficient, effective and ethical use of resources.*

## 8.2 Responsiveness to the community

*Trust in government can depend on citizens' experiences when receiving public services*<sup>249</sup>.

As the *Issues Paper* noted, responsiveness to the community depends on employees being properly skilled and qualified to do their jobs, performing well, and being adequately supported by management, systems and resources.

Resource allocation and program design are outside the scope of this review, but it was a topic raised by many employee stakeholders: responding to clients and the community requires resources. Employees should be able to raise resourcing challenges with their managers. Managers should have the skills to navigate the complicated paths about resource allocation and working within resource constraints.

The community's understanding of public services is important for responsiveness. A well-informed community will know better what to expect from public employees, how to make good use of services, and how to give constructive feedback.

Ministers and other elected members speak about the importance of public services and the good work of public employees delivering on behalf of the government, and unions advocate on behalf of their members and reinforce the positive contribution they make.

The Public Sector Commissioner's reporting function should be resourced to include much more extensive publication of information about public employment: beyond numbers to costs, mobility, training, performance and conduct matters; beyond institutional form to the purpose of programs and meeting community need.

Openness and transparency are important tools in improving public understanding of how the public sector works, the value it adds, how services are accessed, how services might be improved. The function should be to inform the community about the value and cost of public employment in order to build public confidence that public services are well managed, and about policies and actions for a diverse workforce and inclusive public services (see section 6.5).

The Queensland Governance Council should also have a function of informing the public about the nature, value and cost of public administration to complement the Public Sector Commissioner's reporting function and the research agenda.

### Recommendation: Improved public information

62. The Public Sector Commissioner's reporting function should be broadened to include more extensive information about public employment and public services, including the costs and benefits of public employment, to increase openness and transparency and workforce profile.
63. The Queensland Governance Council should have a function of disseminating information, possibly through reports to the Premier and for publication, about the nature and value of public administration, services delivered and programs.

### 8.2.1 Customer complaints

The *Public Service Act 2008* requires departments to have systems for dealing with 'customer complaints'<sup>250</sup>. This is one element of feedback that is integral to responsive public services. Other mechanisms might also be instituted, including community engagement on programs and services.

The system should extend across the sector.

Stakeholders indicated that difficult customer and community members can place an undue burden on employees who must manage the complaints and the complainants. Instances put to the review included:

- repeated complaining
- frivolous or vexatious complaints
- verbal aggression
- physical violence.

In some workplaces, such as schools, complaints become elevated by the duty of care to children or other vulnerable people. Stakeholders reported diversion of senior staff time to managing the complaints and difficult people.

249 [www.oecd.org/gov/trust-responsiveness.htm](http://www.oecd.org/gov/trust-responsiveness.htm).

250 s. 219A.

Nationally there are useful materials for managing difficult complaints, often developed by Ombudsmen<sup>251</sup>.

The review recommends that the Public Sector Commissioner should, in conjunction with the Ombudsman and key departments and agencies, develop high quality materials and training programs to assist employees manage difficult complainants, and issue Employment Directions to develop consistent approaches to client and customer complaints.

### Recommendation: Complaint management systems

64. The obligation to maintain client and customer complaint management systems and to report on complaints should be extended to cover the full range of public entities that are also required to implement and report on the equal opportunity obligation.
65. The Public Sector Commissioner should develop jointly with relevant agencies a sophisticated set of tools to assist management of difficult client and customer complaints, and frivolous and vexatious complaints, and issue an Employment Direction for a consistent approach to complaint management.

## 8.3 Responsiveness to government

1. (a) Public servants do not choose their ministers  
(b) they have to understand and respond to the government of the day.
2. (a) Ministers do not choose their public servants  
(b) they have to marshal the public service to the government's policy goals<sup>252</sup>.

The first limb of each of these propositions is about lack of choice. Each is axiomatic in a Westminster democracy under rule of law:

- bureaucrats have to accept the political will of the people and the parliament
- ministers should not be allowed to wreck the integrity of government for partisan purposes.

The second limbs may cause more unease:

- public servants must adapt and change even while building a stable and predictable system for the elected government
- the permanence of the public service is an incoming minister's inheritance and not easily manipulated.

A new incoming government, victorious in election, has the right to shape government to its will, and no doubt that will include some addressing unease about individuals possibly loyal to its predecessor, especially if they have been out of power for a long time. Undoing policies they do not like will also be part of the agenda, and sometimes there is a sense of urgency in stamping authority. The enduring character of public services demand an orderly and lawful transition. Disruption is consistent with the proposition; wrecking is not.

Both second limbs have a learning or understanding component. The political domain is legitimately concerned with winning elections but must then attend to governing and to administering the machine of government, turning the public service to its will.

*Public servants ought to be on tap and not on top*<sup>253</sup>.

The public service, especially for those concerned with policy, is an expert domain but it must adapt to new ministers, new preferences, new styles and new policies. Sooner or later, there will also be new faces at the top of departments.

251 E.g. Queensland Ombudsman *Managing unreasonable complainant conduct*. [www.ombudsman.qld.gov.au/improve-public-administration/public-administration-resources/managing-unreasonable-complainant-conduct](http://www.ombudsman.qld.gov.au/improve-public-administration/public-administration-resources/managing-unreasonable-complainant-conduct). WA Ombudsman (2012). *Managing unreasonable complainant conduct: A manual for frontline staff, supervisors and senior managers* 2nd ed. [www.ombudsman.gov.au/\\_\\_data/assets/pdf\\_file/0022/35617/GL\\_Unreasonable-Complainant-Conduct-Manual-2012\\_LR.pdf](http://www.ombudsman.gov.au/__data/assets/pdf_file/0022/35617/GL_Unreasonable-Complainant-Conduct-Manual-2012_LR.pdf). Victorian Public Service Commission (2015) *Managing Difficult Situations Involving the People a Manager Manages*. [www.vpsc.vic.gov.au/html-resources/development-guides/development-guide-8-managing-difficult-situations-involving-the-people-a-manager-manages](http://www.vpsc.vic.gov.au/html-resources/development-guides/development-guide-8-managing-difficult-situations-involving-the-people-a-manager-manages).

252 A loose restatement of Hennessy, P. (1986). *Cabinet*. New York: Basil Blackwell.

253 More correctly referring to "experts" and probably originally Russell, G.W. (1910) "Notes of the Week: Fair Play in Legislation". *The Irish Homestead: The organ of Irish agricultural and industrial development*, 17(53), p. 1087, but widely attributed to others with many variations.

Politicians are, generally, public figures, in the business of recognition and appearance. Public servants are not<sup>254</sup>:

*Unlike Cabinet Ministers who have their fame entombed in rows of bulging biographies, the great Civil Servants often hardly attain to the humble dignity of a footnote to history. A Civil Servant does good by stealth and would blush to find it fame; a Cabinet Minister does good by publicity and would resign if he failed to secure it! It is easy to decide which is the more indispensable to a nation's welfare. The country easily survives the frequent changes of ministries; it hardly moved a muscle when a Labour Government climbed for a moment to office; but it would receive a staggering blow if the Civil Service suddenly took it into its head to resign tomorrow. Some Governments are in office but not in power; the Civil Service is always in office and always in power.*

It is in this complicated context that public employees navigate the axioms and the uncertainties of being responsive to government.

The *Issues Paper* proposed a model for responsiveness to government that posited four activities<sup>255</sup>:

- Implementation
- Innovation
- Initiative
- Influence.

### Implementation

Implementation is ideally seamless:

- top down as well as bottom up (meaning direction is taken from ministers while the frontline and customers are engaged, and co-design enlivened)<sup>256</sup>
- efficient, effective and timely, and
- subjected to structured inquiry – evaluation embedded into implementation and integrated into policy steering<sup>257</sup>.

While implementation is an inherent step in the policy process<sup>258</sup>, it is a step that presents challenges: Where are the resources? Who is responsible for implementation? How are policy gaps managed? How are policy overlaps handled? Who resolves disagreements about detail?

If responsiveness is putting government initiatives in place, the public service needs to be good at implementation and overcoming the challenges, and good at change management.

Implementation and policy project planning are areas for development that the Queensland Governance Council should attend to.

### Recommendation: Improved public sector skills

66. The Queensland Governance Council should consider programs and tools to improve public sector skills and critical thinking about policy implementation.

### Innovation and initiative

To innovate, to take initiative, is to take risks. In a low trust environment, risk appetite diminishes and risk aversion flourishes. If responsiveness includes taking initiative and coming up with ideas (including ones that maybe are not so welcome), public servants need to know they are supported and trusted.

Stakeholder discussions about this challenge canvassed the question ‘Who’s got your back?’ In a department that should be the Director-General and the manager, but ideally trust in people (their expertise, experience and integrity) and trust in process (weed out the ideas that will not fly) are enablers for innovation: initiative-takers should not be suppressed by worrying about what the hierarchy might think.

254 UK Conservative Prime Minister Stanley Baldwin, address to Civil Service dinner, 1925 quoted in Scott, A. (2009) *Ernest Growers: Words and forgotten deeds*. Basingstoke: Palgrave Macmillan, p. xv. Baldwin was first Prime Minister in a minority government that lost confidence vote leading to Britain’s first Labour government, under Ramsay Macdonald. Baldwin was returned with a comfortable majority at the next election nine months later, hence the caustic ‘climbed for a moment to office’.

255 Figure 2, page 7.

256 Sabatier, P. (1986) “Top-down and bottom-up approaches to implementation: A critical analysis and suggested synthesis”. *Journal of Public Policy*, 6(1), pp. 21–48; Ansel, C., Sorensen, E. & Torfing, J. (2017) “Improving policy implementation through collaborative policymaking”. *Policy & Politics*, 45(3), pp. 467–486.

257 E.g. Sandberg, N. Stensaker, B., & Aamodt, P.O. (2002) “Evaluation in policy implementation: An insider report”. *The International Journal of Public Sector Management*, 15(1), pp. 44–54.

258 See the Australian policy cycle in Althaus, C., Bridgman, P. & Davis, G. (2016). *The Australian Policy Handbook* 6th ed. Sydney: Allen & Unwin.

Advice should not just be technically competent but also frank, fearless and clearly communicated. Timeliness is important too: responsiveness takes place in the rapidly cycling world of political decision making, a world where ministers and chief executives sometimes wonder if they are in charge of their diaries or the diary is in charge of them.

There remains a challenge of how a public service act can assist responsiveness—a function of culture—behaviour and individual capabilities, and the demand for mutual trust.

### Influence

The discussion about management and leadership touched on the sometimes subtle difference between controlling and leading. The key lies in an ability to influence outcomes. Responsiveness is not just doing what you are told, but understanding the desired outcome and driving to its achievement by garnering support, and perhaps shaping the outcome differently so it is achievable yet acceptable.

This is a leadership task and should be included in leadership development.

### Tension

Tension among the factors is apparent. How does being responsive to government fit with being apolitical, and giving advice that is frank and fearless<sup>259</sup>? Does the need for stability and predictability militate against innovation<sup>260</sup>? Balancing these competing factors requires a high degree of sophistication and potentially exposes the public servant to turbulent winds: public service culture results in ‘penalties for failure being vastly out of proportion to the rewards for success’<sup>261</sup>.

## 8.4 Employment directions

Acts of Parliament are static, and poor vessels for responsiveness to rapid change. They are complicated to write, complicated to read, and slow to amend. That is why regulations and other instruments do a lot of important work and are potential vehicles for enhancing responsiveness in employment practice – in both culture and behaviour.

The *Public Service Act 2008* allows for regulations and for *rulings* in the form of directives and guidelines to be made by the commission chief executive and the Minister for Industrial Relations separately, on separate topics, or possibly jointly. Directives are binding<sup>262</sup> and must be published in the *Gazette*<sup>263</sup> whereas a non-binding ‘guideline’ can be made in any way (usually by publishing it on a website)<sup>264</sup>.

The distribution of rulemaking is described best by stating the matters only the Industrial Relations Minister may rule on:

#### 54 *Rulings by industrial relations Minister*

- (1) *The industrial relations Minister may make rulings about—*
  - (a) *the remuneration and conditions of employment of non-executive employees*<sup>265</sup>; or
  - (b) *other matters under this Act that the Minister may make a ruling about*<sup>266</sup>.
- (2) *However, a ruling under subsection (1)(b) may only be made for non-executive employees.*
- (3) *To remove any doubt, it is declared that the industrial relations Minister can make a ruling about the remuneration or conditions of employment of a public service employee who is covered by an industrial instrument.*

259 MacDermott, K. (2008) *Whatever Happened to Frank and Fearless? The impact of new public management on the Australian Public Service*. Canberra: PNU Press.

260 Management Advisory Committee (2010) *Empowering change: Fostering innovation in the Australian Public Service*. Canberra: Australian Government.

261 Malcolm Turnbull as reported in Dennett, H. (2014) “Innovation in a no-risk system: ‘we have to be smarter’.” *The Mandarin*, 5 November 2014. Compare Kay, R. & Goldspink, C. (2016) *Public sector innovation: Why it’s different*. Australian Institute of Company Directors.

262 s. 47(3).

263 s. 48(1).

264 s. 48 requires commission rulings to be on the Commission’s website and the IR minister’s to be on the relevant departmental website. They are all available at [www.forgov.qld.gov.au/directives-awards-and-legislation](http://www.forgov.qld.gov.au/directives-awards-and-legislation).

265 Defined as chief executives, senior executives, senior officers and s. 122 employees paid as senior officers or higher.

266 No particular other provisions in the Act or regulation.



The minister and commission chief executive must consider each other's opinion, consult with affected agencies and unions and may make joint rulings. It seems the minister has not issued guidelines.

In a practical sense everything else is for the commission chief executive.

The body of rulings made under these powers, and other guidance documents, are of varying quality and kept in varying states of repair. Some seem to repeat the Act or paraphrase it. Others give more practical advice.

Nationally there appears to be two models. One is that central agencies produce numerous rulings on specific topics, as in Queensland. The other, exemplified by the Commonwealth and NSW is for one single document consolidating all directions or instructions.

Directives under the *Public Service Act 2008* are complicated by both the Premier and the Minister for Industrial Relations having responsibility for public sector employment and industrial relations respectively, and rulings may be made by either or both.

There is some discomfort in this model. Some stakeholders thought ministerial oversight and approval remains important and even that the Premier should be the maker of employment rulings; others that this subordinate set of instruments might be handled better by officials than politicians.

The review examined the body of current and some historical directives and guidance material to understand what might make for a good system of flexible rules to supplement the Act and regulations. The following observations arise from that examination.

- The present system gives rise to a disaggregated and weighty body of documents that are not coherent and can be difficult to navigate and maintain.
- There is a predilection in rulings to repeat the words of the Act (possibly because it is so impenetrable and accurate restatement in plain language is risky).
- Other directives attempt restatement but do so at the expense of accuracy and precision leading to potential error.
- Some directives are just not helpful (see discussion about the temporary employment directive).

- On the other hand, some directives are excellent examples of how guidance can be given in a balanced and accurate way, though this guidance may not have gained traction in practice.
- If the practical existence of basic employment rights is dependent on a directive, employees are exposed to unfair removal of those rights. This was the lived experience from 2012 to 2015 and contributed considerably to the distrust discussed in this report.
- Drafting by the Public Service Commission has not been consistently good, compared for example with the quality of legislative and statutory instruments prepared by the Parliamentary Counsel.

The review concludes that binding rulings (to be called **Employment Directions**) may be made by:

- the Industrial Relations Minister for the purposes currently stated in *Public Service Act 2008* section 54
- the Public Sector Commissioner for the whole public sector
- the Public Sector Commissioner for departments and agencies as large system manager
- the two large employment system managers (public health and state schooling) for those systems<sup>267</sup>.

Other binding **Employment Policies**, consistent with the Employment Directions, may be made by chief executive of departments, principal officers of independent systems and delegates of the large employment system managers for employees under their leadership.

The review suggests that, because the Employment Directions can have major implications for employees' rights and obligations, they should be statutory instruments drafted by the Parliamentary Counsel as subordinate legislation<sup>268</sup>. The Queensland Governance Council should seek the views of the Queensland Parliamentary Counsel on this issue.

Regardless, Employment Policies should be drafted under the responsible officer in accordance with any guidelines of the Parliamentary Counsel<sup>269</sup>.

267 The *Hospitals and Health Boards Act 2011* empowers the system manager to make health service directives: s. 47.

268 *Legislative Standards Act 1992*, s. 7

269 Compare Queensland Parliamentary Counsel (2016). *Guidelines for Drafting Local Laws*. [www.legislation.qld.gov.au/file/Guidelines\\_Local\\_Laws.pdf](http://www.legislation.qld.gov.au/file/Guidelines_Local_Laws.pdf) for local governments preparing local laws and *Legislative Standards Act 1992*, s. 9.

Non-binding guidance may of course also be issued<sup>270</sup>.

The *Public Service Act 2008* qualifications on the scope and precedence of directives should continue for Employment Directions<sup>271</sup>.

Again, without pre-empting the Council's considered opinions, a 'head of discipline' for change management might be one step; research another; and a concerted effort at upskilling senior executives as change managers a third.

### Recommendation: Binding Employment Directions

67. Binding Employment Directions (to replace Directives) may be made by the following: (a) Industrial Relations Minister for industrial relations purposes; (b) Public Sector Commissioner for the entire public employment sector or parts of it; and (c) large employment system managers for their systems. In drafting Employment Directions, the Public Sector Commissioner and the large employment system managers should undertake effective consultation and collaboration to ensure consistency.
68. Heads of government departments, managers of independent systems and delegates of large system managers may make binding policies for their organisations consistent with Employment Directions.

### Recommendation: Change management

69. The Queensland Governance Council should take a lead role in building public sector-wide change management capability, organisational resilience and workplace wellbeing.

## 8.5 Change management

Responsive public services manage change well – seamlessly, apparently effortlessly, and efficiently. But change management remains a long-standing challenge for public services nationally. As noted in [section 9.2](#) discussing machinery of government and in the *Issues Paper* at pages 26–27, change imposed on government departments presents major challenges and stresses, demonstrating lower than optimal organisational resilience.

Recommendations about a systems focus, coherent management capability and consistency of practice and language will partly address this concern.

But the review remains concerned that change management capability is low in many agencies, and responsibility for building capability is diffuse and unfunded. It is recommended that the Queensland Governance Council take a lead on building change management capability and resilience.

270 The *Public Service Act 2008* provides for non-binding rulings called 'guidelines': s. 47. Such documents have a variety of names in human resource management including policies, guidance notes, notes, forms, flyers etc. While this is a matter of drafting detail, the review considers legislating for ordinary administrative discretion is unnecessary.

271 E.g. *Auditor-General Act 2009*, s. 28; *Public Service Act 2008* ss. 51, 52.

## 9 Structures, institutions and processes

### 9.1 Systems and institutions

The *Public Service Act 2008*, like its counterparts across Australia, is more concerned with the institutional form of government than what government does and why it employs people.

This review concludes that a different starting point is needed to ensure the objectives of fairness, responsiveness and inclusivity, one that starts with people and why they are employed and focuses on the employee as the means by which government achieves its purposes of delivering services, managing resources well and making good decisions<sup>272</sup>.

Those purposes are not delivered by static, abstract institutions but in dynamic systems made up of people working together in interconnected ways where the available resources, practices and structures enable (or constrain) activity.

Our system of government demands institutional form because ministers are responsible and must be supported by resources appropriately organised to deliver programs, ensure good governance and assist decision making. Experience in Queensland and elsewhere shows that the institutional form of *Minister-DG-department* is just one possibility.

Services and support are delivered in *systems* that might present as institutional form but are nonetheless groups of people working together in interconnecting networks.

A systems approach highlights inter-relationships and patterns of events in a dynamic way<sup>273</sup>, and allows for integration of constituent parts rather than reductionist approaches, breaking a large institution into smaller and smaller delivery units, blurring the public policy purpose.

A systems approach is not novel, especially in the health sector:

*a system refers to a set of common objects or people and the relationships and interactions that make them part of a larger whole, working together towards a common purpose*<sup>274</sup>.

The implications of adopting systems thinking should make little difference to individual employees whose jobs remain unchanged and whose workplaces bear the same names. It would make a big difference to those managing large organisations, and to political leaders whose focus is delivery of outputs and outcomes, efficiency, accountability and control. Adaptive use of people and assets becomes the focus rather than the form of vehicle for delivery of services.

A systems approach would allow for sophisticated, non-linear devolution of functions (for example, in a matrix of responsibilities, or combinations of regional and functional devolution).

#### **Example of a systems approach: Schooling**

A classroom is an almost self-contained system for delivering educational outcomes to students under the guidance of employees: teachers and teacher aides. But a class must be seen in the context of a larger system of which it is part: a school, populated by many classes and related support such as administration, cleaning and grounds keeping, tuck shops, parents and community. Each school forms part of both a regional system and a schooling system (primary, secondary), and the entire system of state schooling. Public schooling itself is part of a wider system still encompassing also non-state schools, universities and other education sectors into a national framework.

Managing the entire large employment system (the role of the Director-General of Education under the Minister for Education) requires management of each other system under skilled managers running component systems.

The Queensland public sector can be seen as three approximately equally-sized large systems that can be managed as whole systems under respective managers:

- Public health system under the Director-General, Department of Health, as system manager including the Hospital and Health Services under Boards, and the department

272 The Constitutional formulation is governing “for the peace welfare and good government” of Queensland: *Constitution Act 1867*, s. 2.

273 Senge, P.M. (1991) *The Fifth Discipline: The Art and Practice of the Learning Organization*. New York: Doubleday. Bertalanffy, L. (1965) *General systems theory*. NY: George Braziller; Bertalanffy, L. (1975) *Perspectives on general system theory*. NY: George Braziller.

274 Fenton, K. (2016) *Transforming services: a systems-based approach*. *Public Health Matters Blog*. [publichealthmatters.blog.gov.uk/2016/07/14/transforming-services-a-systems-based-approach](http://publichealthmatters.blog.gov.uk/2016/07/14/transforming-services-a-systems-based-approach).

- State schooling system under the Director-General, Department of Education, including regions, schools and other operating descriptors and the department
- Departments and other agencies as a system under the Public Sector Commissioner as system manager.

Employment systems in departments and most agencies would continue to operate as they do now, with authoritative chief executives delegating functions

and responsible for management of the entire system under their control. The large systems will be managed with greater flexibility under the control of the large system manager, distributing authority to subsystems whose managers operate by delegation, akin to chief executives. Independent system managers, responsible for smaller systems, mostly accountability focused, will be able to craft bespoke management reflecting their different functions.

Table 5: Central human resource agencies in Australia.

Commonwealth	Australian Public Service Commission under the Australian Public Service Commissioners, also Special Commissioners, Merit Protection Commissioner Staff: 199 headcount including 2 Commissioners and 12 senior executives. Merit Protection Commissioner supported by 12 employees of the APSC.
New South Wales	Australian Public Service Commission <sup>277</sup> under the Australian Public Service Commissioners, also Special Commissioners, Merit Protection Commissioner Staff: 199 headcount including 2 Commissioners and 12 senior executives. Merit Protection Commissioner supported by 12 employees of the APSC.
Victoria	Victorian Public Sector Commission under the Victorian Public Sector Commissioner and an Advisory Board Staff: 69 headcount; 66.1 FTE. 5 senior executives.
Queensland	Public Service Commission under a chief executive and a Commission of four members (including the chief executive) Staff: 70 FTE, 4 senior executives (3 vacant) plus (notionally) the Integrity Commissioner.
South Australia	Commissioner for Public Sector Employment supported by the Office of the Commissioner (previously Office for the Public Sector within the Department of the Premier and Cabinet).
Western Australia	Public Sector Commissioner supported by a Public Service Commission Staff: 113 headcount; 102.09 FTE. Commissioner and 6 others in leadership group (2016–2017).
Tasmania	The Employer (Minister administering the Act); Head of the State Service (chief executive of the administering department); State Service Management Office (within the department)
Australian Capital Territory	Public Sector Standards Commissioner supported by staff of Workforce Capability and Governance Division (Public Sector Management Group and Professional Standards Unit) under the Head of Service and Director-General Chief Minister, Treasury and Economic Development Directorate and the relevant Deputy Director-General.
Northern Territory	Commissioner for Public Employment Staff: 36 headcount. Commissioner and 6 heads of division.

<sup>277</sup> The Commission is established under the Commissioned by sch. 1 pt. 3 of the *Government Sector Employment Act 2013* as a separate agency (not under a department) and is not otherwise referred to in the Act. The Commissioner is a statutory office holder not in the public service of New South Wales.

### 9.1.1 Central agency

Central agencies of government have responsibility for standard setting, coordinating activity, and providing central services.

Table 5 shows the central agencies and their leadership in each Australian jurisdiction. Employee numbers are drawn from the most recently available annual reports where available. (Central human resource agencies by jurisdiction were listed in detail with their legislated functions in the *Issues Paper* at 4.7, pages 62–64).

It is theoretically possible to conduct the employment affairs of the state without a separate central agency (compare Tasmania and ACT), but a sector the size and shape of Queensland's benefits from a central agency that can state standards and bring cohesion to overall conduct of employment matters. One of the motivating factors for this review was, after all, a perception that undesirable differences in employment practices had developed and consistency was needed for both fairness and efficiency.

The distinction in Queensland between the public service proper (departments and public service offices) and other elements (notably the health sector, and the separate services)<sup>276</sup> is artificial. It is driven only partly by good governance requirements. Other important factors include historical treatment of railways and police, public service count, and politics.

Given the conclusions reached elsewhere in this report the distinction is no longer useful. The central agency should have a remit covering the entirety of public employment<sup>277</sup>.

Structures vary considerably between jurisdictions and over time. As Figure 5 on page 24 shows, Queensland has had almost every configuration including no central agency, ministerial boards, independent boards, stand-alone commissioners, and multiple commissioners. Commissioners and boards, since 1922 at least, have been supported by dedicated organisations or offices and even dual commissions<sup>278</sup>.

### A stronger centre

The Public Service Commission operates as the steward of public service standards. Its effectiveness has waxed and waned since its inception, and in its current iteration the commission has established a strong track record of collaboration with departments through the CEO Leadership Board.

However, collaboration among Directors-General is not always mirrored by effective partnerships on the ground, or in consistency in the lived experience of employment. The review identifies a strong need for more active guidance—and some modest regulation—to improve fairness and improve management performance.

There is some tension between the stewardship role and a more definite regulatory focus. The devolution to departments in 1988 shifted the central human resources agency away from a rules and compliance approach to one of standard setting and, ultimately in the present day, a high sense of self-regulation at agency level.

More muscular approaches were invoked and abandoned from time to time under successive governments, exemplified by the fact that the central command portended in Directive 05/12 *Workforce Establishment Management Framework* was never used. Devolution succeeded in lifting management standards and differential responsiveness but gave away too much of government's ability to manage the sector as a whole through the central human resources agency: the toolbox was shrunk.

Strong fiscal controls have yielded governance dividends and efficiencies in individual programs, but for government outcomes as a whole, the toolbox needs to be more comprehensive. It needs to include human resource management as well as standard setting and stewardship, capacity and authority to shift employment outcomes, organisational culture and individual behaviour from the centre.

That is why the review recommends the proposed Public Sector Commission's functions should extend beyond standard setting to include more active management of key performance improvement topics<sup>279</sup> and enhanced

276 *Issues Paper* pp. 27–29; 42.

277 Bar those elements that are not amenable to executive government direction, and out of this review's scope as currently stated in sections 13 and 24(2) of the *Public Service Act 2008*, most notably offices under the Governor alone, Government House, honorary offices, local governments, government owned corporations, the parliamentary and police services, the courts, judiciary and their associates and various entities that are not executive government (school councils for example). It is possible in a system-driven frame (rather than an institutional one) for separate system managers to opt-in, at least functionally.

278 In the short service delivery and performance commission era.

279 E.g. extended suspension on pay, use of external investigators and management of complex, intractable or long-running discipline.

governance authority alongside the central policy (Department of the Premier and Cabinet) and finance (Queensland Treasury) agencies.

Inevitably, this comes with aspects of regulatory activity – but light touch regulation is likely to be more effective in shifting culture and behaviour to where they need to be.

### Two central agencies?

One union stakeholder strongly argued for a dual commission approach: a standard setting, facilitative whole sector Commission, complemented by a more narrowly focused regulator reflecting a conventional difference in management control between the public service ‘proper’ and broader public sector employment.

The review on balance preferred a unitary approach with a balanced Public Sector Commission providing both standards governing all public employment, and more active engagement on both specific topics and in relevant large employment systems under the relevant system manager.

The review commends a risk approach to identify and target areas of greater compliance effort. Models such as regulatory triangles and pyramids and responsive regulation are widely used by Commonwealth agencies to drive responsive compliance and enforcement and facilitate self-regulation<sup>280</sup>.

### Commissioner’s status and title

The status of the commission chief executive is not stated in the *Public Service Act 2008*. The office is head of a public service office prescribed in schedule 1 of that Act and is said to be a statutory office holder in schedule 1 of the *Integrity Act 2009*. However, section 57 provides for a ‘written contract of employment’ to be entered into. There are reasons why the principal officer of the commission should be a statutory office holder for a term, mainly about independence. In many jurisdictions, the commissioner is said by the relevant Act not to be a public service officer, presumably to remove the commissioner from the employment considerations the office regulates.

This review concludes the distinction is less important than the authority of the office and the ability of the incumbent to influence behaviour and culture. In the

systems architecture, the Public Sector Commissioner is large system manager for public sector employment and will have specific functions for public employees outside the other two large employment systems. The role is also head of the Public Sector Commission, a relatively small entity that logically is an independent system within the Premier’s portfolio.

Ultimately the manifestation of the central human resources agency and its name are matters of preference, but they should be meaningful to the outside world, and reflect appropriately the authority and functions invested in the entity and the accountability for performance. A different title and structure also flag change. It is recommended there be a central responsibility for the state’s public employment system in a Public Sector Commissioner supported by a Public Sector Commission.

### Recommendation: Public Sector Commissioner and Commission

70. The Act should establish the Public Sector Commission and an office of the Public Sector Commissioner.

### 9.1.2 Transition to the new Commissioner and Commission

This report recommends enlarged functions for the central human resources agency, the Public Sector Commission. It follows that the capabilities, budget and staff numbers will need adjustment. It is open to the Government to adopt the title Public Sector Commissioner administratively for the chief executive immediately if that is preferred.

A capability and resources assessment should be undertaken as soon as possible with a view to assessing the most appropriate structure and resourcing for the Public Sector Commissioner’s staff. It is likely additional resources will be necessary, possibly building over time, for the commission to discharge its wider functions.

The review recommends the commission should be on a similar footing to other independent entities with oversight functions. One way to achieve this is periodic, independent strategic reviews. Compare Auditor-General, Integrity Commissioner, and Information Commissioner (each five-yearly) and the Ombudsman (seven-yearly). A five-yearly review seems appropriate.

280 E.g. Senate Standing Committee on Economics (2014). *Performance of the Australian Securities and Investments Commission*. Canberra: Parliament of Australia. [www.aph.gov.au/Parliamentary\\_Business/Committees/Senate/Economics/ASIC/Final\\_Report/index](http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/ASIC/Final_Report/index); Australian Tax Office (nd). *Compliance Model*. [www.ato.gov.au/about-ato/managing-the-tax-and-super-system/strategic-direction/how-we-help-and-influence-taxpayers/compliance-model](http://www.ato.gov.au/about-ato/managing-the-tax-and-super-system/strategic-direction/how-we-help-and-influence-taxpayers/compliance-model); Australian Government (2014). *Regulator Performance Framework*. [docs.jobs.gov.au/system/files/doc/other/regulator\\_performance\\_framework.pdf](https://docs.jobs.gov.au/system/files/doc/other/regulator_performance_framework.pdf)

### Recommendation: Strategic review

71. The Public Sector Commission should be reviewed every five years, modelled on the strategic reviews of other independent offices.
72. A capability and resources assessment should be undertaken by the Queensland Governance Council as soon as possible to ensure the Public Sector Commission is properly established and resourced for transition to the new Act.

### 9.1.3 Queensland Governance Council

There is general consensus that the four-person commission, consisting of an independent chair and the Director-General, Department of the Premier and Cabinet, Under Treasurer and the commission chief executive, does not bring sufficient focus to assist the Commission in discharge of its functions. Historically Queensland has had a Public Service Board, a single commissioner, multiple commissioners, a commissioner supported by advisory boards and the present chief executive and four-member commission model.

The recommended model is for the present commission to be abolished and for a new Queensland Governance Council to be created, not to oversee the Commission, but charged with cohesive and forward-looking governance of the public sector, bringing together the three central agencies and the management of policy, people and money (Recommendation 17).

### 9.1.4 Heads of discipline

Discipline networks under 'heads of discipline', senior executive employees recognised for their excellence in a discipline, are often used in government to provide leadership and to develop communities of practice. The Queensland public service has made some initial steps in this direction through the appointment of chief procurement officers and the Queensland Government Chief Information Officer.

The review recommends a statutory role of head of discipline, appointed for various disciplines by the Queensland Governance Council for a specified period, say two or three years. It is envisaged the head of discipline role would be in addition to the person's normal job. While not being promotional, the appointment might be supported in other ways depending on the circumstances.

Without pre-empting the deliberation of the proposed Queensland Governance Council, heads of discipline might be appointed for:

- change management
- community engagement
- financial management
- evaluation
- human resource management
- dispute resolution
- industrial relations
- ICT procurement
- policy implementation

Appointment as head of discipline by the Queensland Governance Council should be with concurrence of the person's chief executive.

Chief executives would be at liberty to appoint internal heads of discipline for their agencies<sup>281</sup>.

### Recommendation: Heads of discipline

73. The Queensland Governance Council should have authority under the Act to appoint a public employee as head of a discipline, responsible for developing communities of practice and excellence in performance across the public sector in the area of discipline.

### 9.2 Machinery of government

One crucial purpose of the *Public Service Act 2008* and its predecessors is to complement the Administrative Arrangements Orders made under the State Constitution by creating and changing the organisational structures, mainly departments, that support ministers in their portfolios.

Machinery of government or **MoG** changes are notoriously disruptive of work patterns, relationships and priorities. Stakeholders generally commented on the complexity of MoG change and its undesirability from an administrative and employment perspective. Yet it remains one of the major tools for a government to shape the public service to its legitimate political will. To that extent, perceptions about MoG change relate to perceptions of responsiveness: the government-of-the-day seeks structural change in order to drive forward a policy agenda, and public employees say how hard it all is.

281 For example, the Department of Transport and Main Roads has a designated head of ICT discipline, the chief information officer, to bring cohesion to diffuse ICT management in that relatively large and complicated department with large extra-departmental entities.

MoG change and its management and impact are emerging areas of public administration research and should be considered by the Queensland Governance Council in shaping its own research agenda.

The literature suggests that ministers often underestimate the disruptive impact of MoG change, that Treasury or Finance over-estimate the cost-efficiencies (and under-estimate the costs) and that organisations require a settling-in period before they can reach peak productivity<sup>282</sup>. Too often, such considerations are secondary to the policy or political objective when MoG changes are under discussion.

This in part is a result of the loss of change management focus in the public sector. Organisational management responsibility has become more and more fractured since 1988 (with the exception of the PSMC change agenda, especially in the first term of the Goss Government)<sup>283</sup>.

The language used in department arrangements notices (an administrative device to name and move or abolish small units of administration) is confusing and poorly understood outside a small cognoscenti in the Public Service Commission. The form of the notices does not articulate well with the administrative arrangements managed by the Department of the Premier and Cabinet. They should be better articulated and simplified.

The *Government Sector Employment Act 2013* (NSW) has a useful provision about smaller units of public administration in section 22(2):

*A Department or other Public Service agency may comprise such branches or other groups of employees as the Secretary of the Department or the head of the other agency determines from time to time.*

The provision opens the possibility to heads of departments describing the relevant units leaving it to the Administrative Arrangements Order and the notices to simply state the unit name and its place in a particular system.

In a large MoG change there will inevitably be differences of opinion about which resources should be deployed where, especially for corporate support functions and allocation of senior executive staff. One stakeholder identified a MoG change that resulted in one department having two heads of corporate services and another none.

Queensland Treasury has detailed guidance for managing MoG change<sup>284</sup>, as do other Australian governments<sup>285</sup>.

The Queensland Governance Council should be final arbiter in MoG change negotiations.

### Recommendation: Machinery of government

74. Processes for creating and changing government departments should be better coordinated with Administrative Arrangements Orders, and the language and processes currently used in departmental arrangements notice should be simplified.
75. Disputes about the details of resource allocation in a machinery of government change should be decided by the Queensland Governance Council.

## 9.3 Departments and other agencies of government

The traditional distinction between ‘public service’ and other public employment is only meaningful if there is a real distinction and purpose in classifying employment that way.

Of course there are many people remunerated from the state purse who are not employees and there are categories of employees who should not be amenable to executive government direction, as explored in the *Issues Paper* and defined in the *Public Service Act 2008*<sup>286</sup>.

282 See, for example, Dunleavy, P & White, A (2010) *Making and Breaking Whitehall Departments* London; Institute for Government [www.instituteforgovernment.org.uk/publications/making-and-breaking-whitehall-departments](http://www.instituteforgovernment.org.uk/publications/making-and-breaking-whitehall-departments).

283 E.g. McMonagle, H. (2012) “Queensland’s Public Sector Management Commission: Goss’s Governmental ‘Reformation’?” Centre for the Government of Queensland Summer Scholar Journal, 2.

284 Queensland Treasury (2017) *Guidelines for Machinery of Government (MOG) Changes*. [www.treasury.qld.gov.au/resource/guidelines-machinery-government-mog-changes](http://www.treasury.qld.gov.au/resource/guidelines-machinery-government-mog-changes) and see generally the high-quality guidance at [www.forgov.qld.gov.au/machinery-government-changes](http://www.forgov.qld.gov.au/machinery-government-changes).

285 E.g. Australian Public Service Board [www.apsc.gov.au/machinery-government-mog-changes-guide](http://www.apsc.gov.au/machinery-government-mog-changes-guide); (see also ANAO Audit Report No 3 of 2016–2017 *Machinery of Government Changes* [www.anao.gov.au/work/performance-audit/management-machinery-government-changes](http://www.anao.gov.au/work/performance-audit/management-machinery-government-changes); Victoria Treasury and Finance [www.dtf.vic.gov.au/financial-management-government/machinery-government-changes-vps-operating-manual](http://www.dtf.vic.gov.au/financial-management-government/machinery-government-changes-vps-operating-manual).

286 ss. 13, 24(2).



The review considers the lists in those provisions appropriate, but recommends that the proposed Act should apply far more broadly than the departments and public service offices, but with greater flexibility.

The separation of the health system from the public service had some important implications. It was motivated by the distributed governance obligations of the national health reform agreement. It also had an important effect on the way public service employment was counted, and in particular by shifting higher paid professionals onto a new category of 'health executive', and a reduction in the count of senior executives and section 122 contracts.

But it is not inherently different employment to be delivering the government's priorities for public health, and as noted in the *Issues Paper*, the separation has resulted in disparities in employment experience among the various hospital and health services, between the services and the Department of Health, and between that department and other departments.

The *Hospitals and Health Boards Act 2011* began life as the *Health and Hospital Networks Act 2011* but was amended by the *Health and Hospitals Network and Other Legislation Amendment Act 2012* some months later, expunging the network language of the national agreement and replacing it with the institutional forms of boards and services.

The inversion of health first and hospitals second is also important: the symbolic impact of the 2012 changes was to elevate the institutional forms over the purpose of delivering health services (whether in hospitals or elsewhere) and give primary position to hospitals over health outcomes. Further the institutional elevation comes at the cost the overall system and the capacity of the system manager to actually manage the system.

These observations are relevant to employment purposes: people working in and managing the state public health system take note of the primacy of hospitals and of institutional form over the health outcome.

The leaders of the services and board members may not all understand the relative positions of their roles and that of the system manager. The complicated mix of prescribed, non-prescribed and departmental employment and apparently unified, but in practice distributed industrial relations arrangements, should be clarified and simplified. The system manager's responsibility needs to be properly enlivened to enable fairness and equity across employment in the public health system and between that system and other systems.

There is an important distinction between the departments and other government agencies: departments are administrative entities of the state with no independent legal identity (they are the state). Statutory bodies may have a separate legal status, even if they represent the state and are supported by public service offices. The Government has, and should have, capacity to create, abolish or change departments of its own volition; it cannot and should not have that capacity about statutory offices, which is a matter for the legislature<sup>287</sup>.

A wide variety of language is used in machinery of government provisions around Australia and New Zealand to distinguish departments from other entities. Some make very fine distinctions in complicated language.

This review recommends that the distinction should be one of function rather than form: what is the entity intended to do as a system or part of a system rather than its structure.

The language of government department (or department of state) is time honoured, well understood by stakeholders and the community, and sensible. It should be retained as the main vehicle to support the responsible minister and the discharge of the minister's functions. It is consistent across all Australian jurisdictions<sup>288</sup>.

287 There was a difference of opinion between the Acting Crown Solicitor and Deputy Parliamentary Counsel about this ability to change statutory entities under the public employment law in the context of the Public Service Bill 1996: see *Hansard*, 11 September 1996 p. 2764 (Mr Borbidge) and related tabled advices from the Deputy Parliamentary Counsel and the Acting Crown Solicitor. The Bill was amended out of an abundance of caution.

288 Except the ACT which operates as a single unified service organised in directorates. Note that the *Financial Management Act 2009* has a slightly wider definition of department for the financial accountability adding to departments under the *Public Service Act 2008*: entities with appointed or prescribed 'accountable officers'; the Office of the Governor; the Legislative Assembly.

There should also be power to create non-departmental entities of executive government. While this is not generally Queensland practice, if available it would allow the government greater flexibility in organising executive government, and if the New South Wales practice is adopted, aligning those entities to departments will clarify responsibilities and the role of departments in supporting ministers across their portfolio responsibilities.

A crucial function of executive government could thereby be created and managed as a system in a portfolio, associated with but not part of a department without the need for separate legislation. The departmental chief executive could be system manager for the department and the posited entity.

The third meaningful category is statutory entities that employ people separately to carry out their functions. Many of those are listed in the *Issues Paper* along with the employment arrangements. These entities include statutorily designated officers of the Parliament<sup>289</sup>, and other officers with high levels of independence such as the Auditor-General, Crime and Corruption Commissioner, Electoral Commissioner, Director of Public Prosecutions and Legal Aid Queensland to name a few.

Independence, and the importance of function should not lead to inconsistency in the employment experience. Accordingly, it is recommended that the principles under the proposed Act should apply to all public employment (that is not excluded as per the current Act), with appropriate capacity in those independently operating offices and in distributed systems to create local rules consistent with the principles as necessary.

For those reasons, the idea of systems and system managers should also be legislated. Two special classes of system for this purpose are: independent systems under statutory officers who require a high degree of autonomy and large systems under the principal officers of very large entities that may work best when authority is distributed, most notably health (where the idea is already legislated albeit with major shortcomings) and state education.

### 9.3.1 Large systems

The Act should provide specifically for large employment system managers charged with system management and development for particular whole sector functions or very large institutional forms (notably health and education). The Act should provide for the following large system managers.

#### Public sector employment system manager

- Public Sector Commissioner
  - whole sector employment under the Public Sector Act.

#### Large employment system managers

- Director-General
  - public health system<sup>290</sup>
- Director-General, Department of Education
  - State education under the *Education (General Provisions) Act 2006* with authority to issue employment directions for that sector<sup>291</sup>
- Public Sector Commissioner
  - employment not under other large system managers in departments and other entities that are managed by the chief executive or principal officer by delegation.

Public sector employees under this scheme fall into three roughly equally-sized clusters under large system managers: public health; state schooling; other departments and entities.

The two program large employment system managers should have added responsibility under the Act for management of the systems, for example, by making system employment directives that complement the whole sector directives.

### 9.3.2 Independent systems

Some government functions must be independent of ministerial or central agency control, including an array of accountability agencies. Many small agencies depend on a department for support even though their responsibilities are independent from the department or even designed to call the department to account.

289 Information Commissioner, Integrity Commissioner, Ombudsman.

290 A development and enhancement of the current system manager role under the *Hospital and Health Boards Act 2011* with authority to issue employment directions for the public health system. Once established those provisions could be rolled into the new Act.

291 This would allow the Director-General significant degrees of freedom to devolve management to schools, regions or other innovative clusters.

Some of these are ‘public service offices’, entities that are not departments but staffed by public servants under a statutory officer. There are presently 30 public service offices listed in schedule 1 of the *Public Service Act 2008* (and see section 4.5 of the *Issues Paper*). One of them is the Public Service Commission under its chief executive.

Another 11 entities are entire public sector functions that are staffed by employees under separate, non-public service arrangements, the largest being TAFE Queensland, and including the Ombudsman and Crime and Corruption Commission.

Of the three agencies headed by statutorily designated officers of the Parliament, two are staffed as public service offices (Information Commissioner and Integrity Commissioner) but the Ombudsman’s Office is separate.

Finally, there is the possibility of functions that are currently usually parts of departments being separated under the department for added autonomy, led by a senior executive given considerable autonomy in employment of public employees for the function.

While not current practice in Queensland, the Commonwealth, New South Wales and United Kingdom use such arrangement. This would allow greater flexibility without necessarily using machinery of government tools to change the shape of government and allow for some experimentation in governance arrangements, facilitating greater responsiveness.

The review recommends that ‘independent systems’ be able to be declared or created under the Act to afford autonomy to these functions while keeping consistency and coherence in employment at the whole system level.

### 9.3.3 Portfolios as systems

Departmental chief executives should be portfolio system managers on behalf of the relevant minister, ensuring policy development across the portfolio is coordinated and managed, including budget, annual reporting, and Cabinet and parliamentary business.

The discussion about Employment Directions and Employment Policies sets out the system management hierarchies. The public sector consists of three roughly equally-sized employment systems under the Public Sector Commissioner, and the Directors-General of Health and Education.

Leaders of individual institutions (or sub-systems of large systems) assume local accountability for employees under their leadership.

This devolution should be extended so that the government can set distinct functions under a leader accountable to a departmental chief executive who delegates authority to that person as an independent system manager.

An independent employment system is the equivalent of a public service office under the *Public Service Act 2008*, but a regulation should also be able to establish a non-statutory (administrative) independent system, and declare the system manager.

Independent system managers should be able to make arrangements with departmental chief executives for support services (e.g., human resources, finance, audit, ICT).

### Recommendation: Systems and system managers

76. Chief executives of government departments should have responsibility for managing the employment and management systems of the department through delegation, and for managing the minister’s portfolio as a system.
77. The Act should provide for independent employment systems under nominated principal officers being either statutory entities within a portfolio or administrative entities declared by regulation, whether in a department or a portfolio body, with employment and management autonomy for that entity as a system.
78. An independent system manager may make arrangements with the portfolio chief executive for support and other services.

### 9.4 Chief executives and senior executives

The Westminster system of responsible ministers demands a coherent structure to support the minister. That structure is a principal officer responsible for providing support to the minister and in discharging the minister’s functions. In Queensland these are the Directors-General (and Under Treasurer and Commissioner) of the government departments and agencies<sup>293</sup>.

293 Called secretaries of departments (Cth, NSW, Vic, Tas); Directors-General of Directorates or Departments (ACT, NT), chief executives of Departments (SA, WA).

Table 6: Organisation of government and its employment entities.

<b>Cth</b>	<p><i>Public Service Act 1999</i>  <b>Agency Minister</b> and <b>Agency (Department, Executive Agency (s. 65), Statutory Agency)</b>  <b>Agency Head</b>  <b>Departments under Secretaries</b></p>
<b>NSW</b>	<p>The <i>Government Sector Employment Act 2013</i> (NSW) creates two main employment spheres: the broader <b>government sector</b> and a subset, the <b>public service</b>. The government sector includes (s. 3 definition):</p> <ul style="list-style-type: none"> <li>the Public Service <ul style="list-style-type: none"> <li><b>Departments</b> under <b>Secretaries</b></li> <li><b>Executive Agencies</b> under the declared head of each Agency</li> </ul> </li> <li>the Teaching Service</li> <li>the NSW Police Force</li> <li>the NSW Health Service</li> <li>the Transport Service of NSW</li> <li>any other service of the Crown ("<b>separate Agencies</b>")</li> <li>service of any other person or body performing public functions under an Act and declared by regulation (none identified).</li> </ul>
<b>Vic</b>	<p>The Public Administration Act 2004 (Vic) organises State employment into:</p> <ul style="list-style-type: none"> <li>10 <b>Departments</b> under <b>Department Heads</b> (each styled a <b>Secretary</b>)</li> <li>16 <b>Administrative Offices</b> each relating to a department and under an Administrative Office Head by whatever title (example: Victorian Government Solicitor's Office under the Victorian Government Solicitor)</li> <li>25 <b>Persons with functions of public service body Head</b> who each heads an office, authority, commission or other entity (example: Victorian Auditor General's Office under the Auditor-General)</li> <li>16 <b>Special bodies</b> under the chief executive officer called whatever name is given by the constituting legislation (examples: Victoria Police under a Chief Commissioner; Mental Health Tribunal under a President)</li> <li>some 3781 other entities, about half of which employ staff are noted on the Victorian Government internet site<sup>295</sup>.</li> </ul>
<b>WA</b>	<p><i>Public Sector Management Act 1994</i> (WA) describes the public sector in terms of agencies: <b>Departments</b> and <b>SES organisations</b>; and other <b>public sector bodies</b> including agencies, Ministerial offices and non-SES organisations. The <b>public service</b> is constituted by departments, SES organisations and other persons employed under pt. 3. Both SES organisations and non-SES organisations are statutory and generally report to a Minister through a board. The chief executive and senior executives in SES organisations are public service; other employees are not, being part of the 'general public sector'. All employees in non-SES organisations are general public sector. Each agency has either a <b>chief executive officer</b> (CEO) or a <b>chief employee</b> who are the <b>employing authorities</b> for employees in their organisations. The <b>responsible authority</b> is the governing body (e.g. board) if there is one, otherwise the minister.</p>
<b>SA</b>	<p>Under the <i>Public Sector Act 2009</i> (SA), the <b>public service</b> consists of <b>administrative units</b> called <b>departments</b> and <b>attached offices</b>. An attached office is always attached to a department. For example, the Office of the South Australian Productivity Commission is attached to the Department of the Premier and Cabinet. Every administrative unit must have a <b>chief executive</b>. Everyone employed by or on behalf of the Crown must be employed in the public service except for offices stated in s. 25(2) (such as judges, the Auditor-General, and police and teachers who are employed in separate services).</p>
<b>Tas</b>	Departments headed by Secretaries; other agencies with various titles for head of the agency.
<b>ACT</b>	<p>The <i>Public Sector Management Act 1994</i> (ACT) establishes the Territory public service, consisting of employees in the categories of <b>senior executives</b> (the <b>head of service, directors-general</b> and <b>executives</b>); <b>officers</b>; and <b>employees</b>. An 'employee' is a temporary employee; an officer is appointed on a permanent basis. Each public servant has a <b>job</b> being the functions they discharge because of their employment. The public service is organised into <b>administrative units</b> colloquially called Directorates, composed of offices. An administrative unit is headed by a Director-General.</p>
<b>NT</b>	<p>The <i>Public Sector Employment and Management Act</i> (NT) provides for <b>employment</b> in <b>Agencies</b> of employees of the public sector. The <b>public sector</b> is all Agencies. The Commissioner for Public Employment is the employer of all public sector employees.</p>

The national arrangements in other jurisdictions are summarised in Table 6.

The title of chief executives—other than the statutory ones—is a matter of interest to government stakeholders. Views vary, with several stakeholders believing Secretary is historically important, more reflective of public administrative leadership, and more in harmony with the other large jurisdictions. Some stakeholders were non-committal, seeing nomenclature as a second order issue.

Overall this is a matter for government to decide but if ‘Secretary’ is adopted, it could be stated in the Act with some drafting efficiency. As with the Commonwealth, a different functional title could be adopted.

Of course, Secretary could be used now under the *Public Service Act 2008* and its predecessors, but for whatever reason governments have chosen not to use that title. Of note, the statutory title has been ‘chief executive’ since 1988 but not one chief executive has had that actual title bestowed, the preference being Director-General and Under Treasurer<sup>294</sup>.

One argument for adopting Secretary is the opportunity that change presents to arrange the next levels of administration (see below). Another is that it frees the title Director-General to describe the heads of non-departmental executive agencies, a common practice in the Commonwealth and UK governments, and some constituent parts of the mega-departments in New South Wales. This is a matter that might be resolved in light of the proposed audit of senior executives, section 122 contracts and senior officers.

#### 9.4.1 Complicated governance

Before the Bligh Government’s restructure, most agencies had only one Deputy Director-General or equivalent, though central agencies and some larger departments had two. As at 2 April, many agencies had multiple Deputy Directors-General listed on their organisational websites, for example<sup>295</sup>:

#### State Development, Manufacturing, Infrastructure and Planning

6 (2 occupied, 4 vacant) plus Coordinator-General

#### Environment and Science

10 (6 occupied, 3 vacant, 1 on secondment to another department)

#### Natural Resources, Mines and Energy

6 (4 occupied, 2 vacant)

#### Education

7 (5 occupied, 2 vacant)

#### Health

5 (all occupied)

#### Transport and Main Roads

5 (all occupied)

#### Treasury

3 (Deputy Under Treasurers – 2 occupied, 1 vacant)

#### Housing and Public Works

5 (all occupied)

#### Agriculture and Fisheries

4 (3 occupied, including Chief Biosecurity Officer, 1 vacant)

#### Employment Small Business and Training

3 (all occupied)

The growth of deputies and senior executive direct reports has important implications for the proper management of agencies and the way chief executives receive support from below. The review is concerned the model has changed but that practices and cultures have not necessarily developed appropriately.

Two anecdotes during consultation illustrate the concern. One chief executive reported that delays in receiving briefing material arose from a large number of senior executives (10 or more) previewing and approving a brief before it progressed. That was speedily remedied by the newly-appointed chief executive with altered procedures.

Another related that a very senior officer declined to act on a policy direction on the basis that the authority in the department lay not only in the chief executive but in the next levels as they were more stable and likely to survive political change, a statement that might attract the Yes Minister epithet ‘courageous’.

294 Commissioners who head departments hold statutory office.

295 Data provided by the Public Service Commission.

The review is not urging return to a fancifully better past where one or two deputy directors-general were the natural complement to a good director-general. Rather, the review acknowledges the reality of the current position, but also that changes in governance practice should be made to improve governance under such a complicated model: adaptation to new ways of working rather than reversion to the past.

### Recommendation: Agency governance

79. The Queensland Governance Council should ensure agency governance models are regularly reviewed. Guidance should be issued by the Public Sector Commission about management of agencies with complicated governance arrangements.

See also Recommendation 69.

#### 9.4.2 Chief executive employment and performance

Chief executives of government departments occupy a different place in administration from other employees. They are managers of staff, but not themselves managed or supervised; under but not reporting to the minister. Chief executive performance is a delicate subject but one that should nonetheless be discussed and examined.

The informal hierarchy in Queensland places the Director-General of the Department of the Premier and Cabinet as first among heads of departments, but that office is not naturally one to oversee other Directors-General: one Director-General is not the employer of another, but *first among equals*.

Currently chief executives are appointed by the Governor in Council and deployed to a department by the Premier who also enters into a contract under section 96 of the *Public Service Act 2008*, but are subject to commission chief executive directives and departmental minister's directions. This apparent four-way split works because of the sophistication and goodwill of the participants, but it lacks coherence.

This review is an opportunity to clarify the roles of chief executives as both employees and leaders. The Premier should be responsible for recommending to the Governor in Council appointment, contracting and engagement of departmental chief executives. It is therefore recommended that the Premier's role under the Act be broadened to that of the employing authority for all chief executives with day-to-day management delegated as prudent to the Public Sector Commissioner and the departmental ministers (retaining the intent of *Public Service Act 2008* section 100).

The Premier should be able to ask about chief executive performance. Practically that should be undertaken for the Premier by an official, logically the Public Sector Commissioner.

The Premier might make a standing request for annual reviews or a program of reviews as well as *ad hoc* reviews in the event of performance concerns<sup>296</sup>.

The Public Sector Commissioner's functions should include assisting the Premier in discharge of the employment function for chief executives including their professional development and performance, maintenance of any employment records and integrity related information.

#### 9.4.3 A chief executive service

The *Public Service Act 2008* (like most counterpart statutes) links chief executives to particular departments. It is unique in having a formally separate Chief Executive Service<sup>297</sup>. If there is to be such a service, and if it is to be meaningful, consideration should be given to flexible deployment mechanisms. Current mechanisms include complicated combinations of secondments, temporary appointment and acting arrangements. There are of course practical impediments to flexible deployment of chief executive roles<sup>298</sup>, but there are many examples of chief executive mobility in Queensland, some immensely successful, others proving the reality that public administration requires a combination of soft and hard skills.

296 In which case natural justice considerations might be relevant (see Recommendation 8).

297 The now-repealed *Public Sector Employment and Management Act 2002* (NSW) included a broader concept of a chief executive service, and there was, anecdotally, some permeability of chief executives between departmental head and deputy. The *Government Sector Employment Act 2013* (NSW) reverts to linear arrangements. There are several features of the *Public Service Act 2008* that appear to be adopted from the 2002 NSW Act.

298 most notably the Commissioner of the Police Service: appointment requires agreement of the chair of the Crime and Corruption Commission: *Police Service Administration Act 1990* s. 4.2. Realpolitik also comes into play: there must be a fit between the departmental minister, the chief executive and the content demands of the job.

Table 7: Senior executives and s. 122 contracts 2012–2018.

	2012	2013	2014	2015	2016	2017	2018
<b>SES</b>	344	328	299	308	324	323	319
<b>s.122</b>	452	349	354	375	400	406	439
<b>Total</b>	<b>796</b>	<b>677</b>	<b>653</b>	<b>683</b>	<b>724</b>	<b>729</b>	<b>758</b>
<b>SES equivalent</b>						92	116
<b>Total</b>		Data not collected in this period				<b>821</b>	<b>874</b>

### Recommendation: Chief executive employment

80. The Premier should be the statutory employer of all chief executives, with power to delegate functions to the Public Sector Commissioner. The departmental ministers' power to direct the chief executive should continue.
81. The Public Sector Commissioner's functions should include supporting the Premier in discharging the employer function including facilitating development opportunities for chief executives.

### Recommendation: Chief executive performance reviews

82. The Public Sector Commissioner should have the function of undertaking performance reviews of chief executive of government departments at the Premier's request.

### 9.4.4 Senior executives and s. 122 contract employees

As noted in the *Issues Paper*, the *Public Service Act 2008* section 105 creates a service-within-a-service for senior executives. Senior Executive Service (SES) employees are appointed by the PSC chief executive and contracted by departmental Directors-General for a period not exceeding five years. The contract may be terminated by the state, and the employee may resign, on one month's notice. Contracts are renewable at the state's discretion.

Tight control of the SES establishment is exercised via section 109, under which the Governor in Council effectively sets numbers and classifications of SES employees in each department.

Contracts made under section 122 may also be used to employ people at higher remuneration. Section 122 contracts are intended to address either short-term priorities (i.e., specific programs or projects) or to allow departments to compete in the market for specific skills (e.g., engineers). The review was told it is usual for a market-driven section 122 arrangement (necessary to attract a skilled individual) to be offset against an establishment SES position.

Separately from the *Public Service Act 2008*, executives are employed under the *Hospital and Health Boards Act 2011* and in the uniformed services on similar contractual arrangements.

The complicated pathways are obvious: for example, there are two entry paths under the *Public Service Act 2008*, responsibility is split between the chief executive of a department and the commission and there is strict management and control of numbers for some but not all executives.

Stakeholders sought greater clarity about these pathways. Human resource managers were vocal about the need to align SES and section 122, at least in part because they have to manage expectations in the face of uncertainty.

Table 7 shows the numbers of senior executives and section 122 contracts over the seven years from 2012 to 2018 in departments and public service offices<sup>299</sup>. This review is not examining numbers of senior executives; it is concerned with the mechanics of management. The numbers illustrate the interaction between section 109 and section 122.

Currently about half these senior positions are filled under section 122 arrangements. By comparison, outside of the SES cohort, the contracted, casual and temporary employees represent around 20 per cent of staff.

299 Source: Public Service Commission. The data had been prepared for another purpose, not this review.

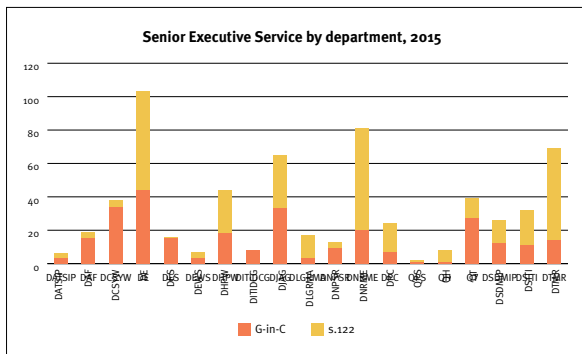


Figure 10: SES and s. 122 by agency in 2015.

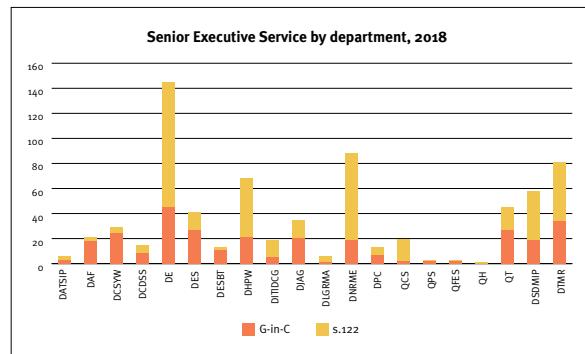


Figure 11: SES and s. 122 by agency in 2018.

Based on stakeholder input, it is unlikely that this many SES roles are actually temporary.

On the other hand, there is no evidence of misuse of section 122 arrangements (although some stakeholder input did assert as much). The evidence points to section 122 being a work-around the institutional inflexibility inherent in using establishment controls. There has been no substantive change to the Governor in Council establishment since the end of 2015 (other than some minor machinery of government adjustments).

It is hardly surprising that departments have sought different ways to deal with organisational pressures. Changes in education administration illustrate this point. Of the additional 33 section 122 arrangements in 2018, 28 were in the Department of Education, all arising from either school growth or enhanced regional management arrangements, as outlined below.

- In 2018, enrolments in 13 schools grew to more than 1600 pupils, triggering an upgrade of the Principal role to Executive Principal (a job remunerated at SES levels), reflecting increased leadership challenges. (Normal recruitment practices apply.)
- Assistant Regional Director (ARD) to Principal ratios were reduced by management choice from 1:40 to 1:27, resulting in additional 15 ARD positions. ARDs support Principals through coaching and mentoring and general support. The new ratios were intended to deliver enhanced student outcomes by providing better support for school leaders.
- Both the growth-driven Executive Principal positions and the new ARDs are remunerated under standard employment arrangements at executive levels, resulting in a need to use section 122 contracts

because SES numbers are fixed by the Governor in Council under an unrelated system.

The Executive Principals and ARDs are not paid market-based pay and they are not temporary roles.

Across the sector, the Public Service Commission does not collect statistics on the length of or renewal of section 122 contracts making analysis of their use difficult in this review. However, analysis of employment figures is revealing.

Figure 10 and Figure 11 show the use of section 122 by agency (yellow) and the SES establishment approved under section 109 (orange) for 2015 and 2018.

In most departments, establishment SES are the majority of higher-paid employees, but the exceptions are notable.

There are good reasons for use of section 122 contracts including managing operational realities, employing specialists such as engineers, delivering IT projects, and engaging with the private sector.

However, the position over the two data points reveals continuity rather than temporary need drives the use of section 122 contracts.

The inflexibility of establishment control creates pressure that is released through the only other available mechanism. Unfortunately, that inflexibility has also been a brake on corrective action to address temporary market challenges, pushing those arrangements into quasi-permanency.

The system works by working around the rules. A new set of rules will be needed for best practice.



The Act that created the SES said this<sup>300</sup>:

*The Senior Executive Service is established to promote the efficiency and effectiveness of the public sector by attracting, developing and retaining a core of mobile, highly skilled senior executives who are responsive to government, industry and community needs.*

If the SES is a *service*, it should be a whole sector resource, a repository of intelligent, adaptable, resourceful and directed leaders in public administration. The tight tie-in to individual departments and agencies of ‘SES positions’ is important for stability and chief executive certainty, but it militates against the idea of a service.

A requirement for mobility develops the employee for even greater contribution and would allow targeted deployment of these high cost human resources to areas of high need.

In some other jurisdictions, the capability of senior executives has become closely linked to ideas of mobility, ensuring that future leaders have the right mix of skills and experiences to enable them to be more effective leaders.

All jurisdictions face recruitment, retention, development and deployment challenges for higher paid employees. Attraction from private and community sectors produces struggles with the different realities of public employment. Skill matching may lead to silos and militates against mobility.

The appointment/contract bifurcation under the *Public Service Act 2008* does not help. Many chief executives invest heavily in recruitment, retention and development of ‘their’ executives. Directors-General themselves are not highly mobile, so their sense of loyalty to a department and a leadership cadre is strong. Little wonder then that previous mobility programs were viewed cynically as shifting underperformers.

The review acknowledges the efforts in recent years by the Public Service Commission to reinvigorate SES mobility, including a clearer, more discernible sense of corporate responsibility across the CEO Leadership Board.

However, more needs to be done to embed executive mobility in the ambitions and lived experiences of the top management team for the Queensland public service.

The review concludes that the proposed Public Sector Commissioner should have a stronger hand as system manager for the senior executive service. Stakeholders have identified this as potentially contentious, driven by a perceived ownership by departmental chief executives over senior executives in their departments<sup>301</sup>.

A strong option would be for the Public Sector Commissioner to be the employing authority for all senior executives, with day-to-day management devolved to chief executives. Given the possibility of tension about that option, the review considers the question of how to build a meaningful ‘service’ should be addressed in light of the proposed audit and review of SES, senior officers and section 122 arrangements.

### **Recommendation: A more meaningful senior executive service**

83. The Queensland Governance Council should make recommendations to the Premier about options for building a more meaningful Senior Executive Service (SES) in light of the audit and review of senior executive, senior officer and section 122 arrangements. (See Recommendation 84).

#### **A note on Senior Officers**

The cohort of Senior Officers was identified in the *Issues Paper* as a matter of on-going concern.

The status of this important class of employees should be examined in the proposed audit and review. However, there is an opportunity to rethink the position and the lower ranks of SES2, possibly to amalgamate those levels (SO and SES2L) into a new designation of ‘Executive’ whether ongoing or time-limited contract (with legacy arrangements honoured or relinquished by agreement with appropriate incentives).

Compare the Commonwealth’s ‘Executive Level’ or EL designation.

300 s. 10B *Public Management and Employment Act 1988* as amended by the *Public Sector Legislation Amendment Act 1991*. This formulation is popular in Queensland legislation. It is echoed in *Public Service Act 2008* s. 106, and the *Hospital and Health Boards Act 2011* s. 71 (health executive service).

301 Interestingly no Director-General the review spoke to indicated resistance to stronger central management of the SES on that basis for themselves, but some DGs and other highly-ranked stakeholders did indicate it might be an issue within the chief executive cohort.

### Frank and fearless advice

Responses to the *Issues Paper* generally agreed that one of the most important functions of the SES is to provide frank and fearless advice to the government-of-the-day.

Over the years, much has been made of ‘frank and fearless advice’ and many commentators have postulated discord between the political and administrative domains of government. Some stakeholders argued such potential for discord warranted an end to contracts for senior executives.

The bureaucracy, especially in departments, has a primary role to advise executive government. The advice should be robust, informed by the available evidence rather than opinion or preference, responsive to community, stakeholder and government views, and canvassing the merits or otherwise of various alternatives.

The executive government is entitled to treat advice as such. It is advice, not binding determination by technical experts.

The NSW Ministerial Code of Conduct stated in the *Independent Commission Against Corruption Regulation 2017* provides the following definitive statement about commissioning and using public service advice in that state:

5 *Lawful directions to the public service*

- (1) *A minister must not knowingly issue any direction or make any request that would require a public service agency or any other person to act contrary to the law.*
- (2) *A minister who seeks advice from a public service agency that is subject to the minister’s direction must not direct that agency to provide advice with which the agency does not agree.*
- (3) *For the avoidance of doubt, this section does not prevent ministers discussing or disagreeing with the advice of a public service agency, making a decision contrary to agency advice or directing an agency to implement the minister’s decision (whether or not the agency agrees with it). Nor does this section prevent an agency changing its advice if its own view changes, including following discussions with the minister.*

As with the broader public service, the SES cohort should be broadly reflective of and responsive to of the community it serves though clearly not at the expense of quality. The review’s commentary on merit, equity and inclusiveness applies to SES employment as it does to other employment decisions.

Improved flexible work arrangements for SES to encourage part-time employment and job sharing in senior roles should take place as soon as possible. The current understanding of section 109 (based on headcount) militates against part-time work and job sharing, acting as a barrier for some women’s participation at senior levels, and causing reluctance among chief executives to give up two senior positions for one full-time equivalent: senior executives are respected for their rare talent and not lightly relinquished.

### Recommendation: SES establishment

84. The Public Sector Commissioner should audit of all SES, section 122 and senior officer (SO) positions across the public sector to inform review by the Queensland Governance Council of those cohorts and the management arrangements for them. The Queensland Governance Council should report to the Premier on changes to enhance management, performance and efficient long-term use of senior executives, section 122 contractors and senior officers.
85. The Public Sector Commissioner should conduct triennial reviews of executive and senior-level employees, to inform Budget considerations, to ensure that establishment remains fit for purpose, and enable public sector leadership to respond more effectively to government priorities.

### Recommendation: Senior executive service

86. Future arrangements for developing the senior executive service as a service should be considered by the Queensland Governance Council in the context of the audit and review of SES, section 122 and SO roles, including the responsibility of the Public Sector Commissioner for employment of the SES.

## 10 Forward-looking challenges

### 10.1 Ethics and integrity

The *Public Sector Ethics Act 1994* was extensively amended in 2010 as discussed in the *Issues Paper*. Stakeholders did not offer a cohesive response to the questions about the preferred model.

One ethicist stakeholder expressed a strong preference for the original formulation as more grounded in ethical principles (with the possible exception of ‘efficiency and economy’ that is not so much a value as an aspiration).

Another ethicist indicated the Act was unhelpful in guiding conduct and should be completely rethought.

The ethical obligations of public employees in Queensland are found in various statutes and have become disaggregated. A detailed mapping of the ethics laws as they stand should be undertaken to inform a forward-looking analysis of the possible ethics needs for the Queensland public sector in the decades ahead.

Public employment will continue to evolve, creating new, possibly as-yet not clear patterns of work and direct and indirect accountabilities, fluid boundaries between the public, private and community sectors. There will be new integrity challenges arising from emerging technologies that will continue to transform the way employees interact with each other, with stakeholders and with their employer.

The recommended system model allows that evolution to happen organically under the Government’s guidance.

A new machinery for public sector ethics should be developed, integrating the new model, the diversity and merit framework, positive performance, responsiveness and the recommended responsibility model.

The task of building a new integrity model for the next 20 years will fall to others. The Queensland Governance Council working with the integrity network—the Integrity Commissioner, Crime and Corruption Commission, Information Commissioner, Human Rights Commissioner, Ombudsman and others—and consulting with employees and unions seems the appropriate forum to start this important work.

### Values

The Queensland public service has ‘values’ and associated behaviour that can be seen on banners and flyers in government buildings and online. See Figure 12.

These statements were, the review was told, developed consultatively with public service employees during the Newman Government. Apparently, they resonate with employees, but the review was not provided with any research about how these values impact on employees’ behaviour, how they understand their jobs, or how the values shape workplace climate.

These statements are exhortations rather than ‘values’ even if they are sensible and useful reminders and very practical. They resonate with the review’s objective of a fair, responsive and inclusive public service.

There are differing perspectives on how value statements operate. For example, Argyris and Schon<sup>302</sup> postulate a psychological model with values as theories of action, focusing on differences between espoused values and observable behaviour as key to a learning process.

Figure 12: Queensland public service values.



#### Customers first

- Know your customer
- Deliver what matters
- Make decision with empathy



#### Ideas into action

- Challenge the norm and suggest solutions
- Encourage and embrace new ideas
- Work across boundaries



#### Unleash potential

- Expect greatness
- Lead and set clear expectations
- Seek, provide and act on feedback



#### Be courageous

- Own your actions, successes and mistakes
- Take calculated risks
- Act with transparency



#### Empower people

- Lead, empower and trust
- Play to everyone’s strengths
- Develop yourself and those around you

302 E.g. Argyris, C. & Schon, D. A. (1996), *Organizational Learning II*. Reading, Mass: Addison Wesley; Dick, B. and Dalmau, T. (1999) *Values in Action*. Brisbane: Interchange Publications.

John Rohr, one of the great American thinkers about public administration, takes a constitutional view, seeing ‘regime values’ as the democratic responsibilities of public employees, a foundation of ethically informed discretionary decision making<sup>303</sup>, and fundamental principles that should guide administrative behaviour<sup>304</sup>.

Such differing perspectives heighten the need for statements of values in public employment to be grounded in their intended purpose (guide learning or inform conduct), and clear articulation of the well-spring of values (individual and relational or constitution, for example). The future work should consider:

- if there is a place in the Act (or in some other managerial document) for a statement of public sector values
- what a statement would be intended to achieve
- how meaningful value statements should be generated, including, for example, in consultation with employees
- the consequences (if any) of poor alignment of the stated values and employees’ conduct
- the extent to which the values are required of external contractors.

### Values elsewhere

The Commonwealth Act in section 10 includes such a statement, often held out as an example for others to follow.

#### 10 APS Values

##### *Committed to service*

- (1) *The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.*

##### *Ethical*

- (2) *The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.*

##### *Respectful*

- (3) *The APS respects all people, including their rights and their heritage.*

##### *Accountable*

- (4) *The APS is open and accountable to the Australian community under the law and within the framework of ministerial responsibility.*

##### *Impartial*

- (5) *The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.*

The Commonwealth also has<sup>305</sup>:

- employment principles in section 10A
- Commissioner’s directions about the values, and employment principles
- a code of conduct<sup>306</sup>
- an obligation on departmental secretaries and other leaders in section 12 to ‘uphold and promote the APS Values and APS Employment Principles’.

A challenge of legislated values such as these is that they (or parts of them) might be contestable. Innovation for example may not be welcomed in high value procurement. Espoused openness sits uneasily with Cabinet exemptions from freedom of information, especially if it is selectively and politically used<sup>307</sup>. And what are the consequences if an employee does not agree with the espoused value?

Elements of this package, especially the Code of Conduct’s requirement that employees’ behaviour must ‘at all times’ uphold the values and employment principles, are currently being tested before the High Court in *Banerji* discussed in section 10.3.3 below.

303 E.g. Rohr, J. (1989) 1989a. *Ethics for Bureaucrats: An Essay on Law and Values*. 2nd ed. New York: Marcel Dekker; Rohr, J.A. (1986). *To run a constitution: The legitimacy of the administrative state*. Lawrence: University of Kansas Press. Rohr’s focus is very USA, citing for example values such as freedom, equality and interestingly property rather than ‘the pursuit of happiness’ stated in the Declaration of Independence. Rohr’s concepts are (with adaptation as a normative model) are applicable elsewhere: Overeem, P. (2008) “Are revitalisation and regime change possible”. Netherlands Institute of Government Conference, Enschede, 20–21 November 2008.

304 Rohr, J. (1998). “Regime values.” In Shafritz, J. M. (ed.), *International encyclopedia of public policy and administration*. Westview Press. p. 1929.

305 Printable versions of the core documents are at [www.apsc.gov.au/print-demand-aps-values-employment-principles-and-code-of-conduct](http://www.apsc.gov.au/print-demand-aps-values-employment-principles-and-code-of-conduct). See also [www.agriculture.gov.au/about/jobs/benefits-conditions/aps-values-and-code-of-conduct](http://www.agriculture.gov.au/about/jobs/benefits-conditions/aps-values-and-code-of-conduct).

306 See Australian Public Service Commission (2017). Values and Code of Conduct in Practice. [www.apsc.gov.au/sect-12-working-government-and-parliament](http://www.apsc.gov.au/sect-12-working-government-and-parliament), quoted above at page 98 in the context of responsiveness.

307 E.g. *Fisse v Secretary, Department of Treasury* [2008] FCAFC 188.

Some other statements of values are in Table 8. Not every jurisdiction adopts a values framework in the public employment Acts. Interestingly, values are variously: values expected of employees; values to be acted on by chief executives; or values generally informative of conduct.

Much will be learned from the High Court's final deliberations in the *Banerji* case expected in the second half of 2019. In the meantime, several recommendations in this Report commend statements of responsibility rather than reliance just on frameworks of values or principles. Responsibilities speak in the language of attribution: they say who is responsible. But responsibilities are fortified in a framework of values and principles. This is a topic for future research and reflection.

This is a dynamic area and the Commonwealth Thodey Review is also looking at the issue in some detail. The Queensland Governance Council should consider the High Court and Thodey Review outcomes as they emerge.

#### **Recommendation: A new ethics framework**

87. The government should initiate a forward-looking examination of an integrated ethics and integrity model for state employees under the leadership of the Queensland Governance Council.
88. The Queensland Governance Council should consider whether the Act (or some other instrument) should contain a statement of values in Queensland public sector employment and how such a statement relates to other elements of the integrity framework.

### **10.2 Common pay**

Several stakeholders raised pay disparity as a significant issue in the review.

While fundamentally an industrial rather than employment issue, pay disparity is a complicating feature for the state as employer of a large, diverse, mobile and transferrable workforce, and raises issues about equity across the sector.

One significant issue is differential tax treatment of employees of Hospital and Health Services that significantly increases net pay.

The review also notes the Thodey review's interest in this as a challenge for the Australian Public Service<sup>308</sup> where enterprise bargaining has driven differential pay across agencies on common classification framework<sup>309</sup>.

The review commends this challenge to the Queensland Governance Council for future consideration.

### **10.3 Suitability for employment**

The *Public Service Act 2008* dedicates many pages to acquiring, using, storing and disposing of criminal history and safe working with children information. Some of this detail is now being reproduced in other employing Acts including the *Ministerial and Other Office Holder Staff Act 2010* and *Parliamentary Service Act 1988*.

This information is relevant to certain jobs, essential even to ensure meritorious appointment: vulnerable children should be protected, and the *Working with Children (Risk Management and Screening) Act 2000* is one means to assess suitability (or detect unsuitability) to undertake child related work.

However, as noted in the *Issues Paper*, there is considerable bureaucracy attendant on obtaining, using, storing and later disposing of this information.

Children are but one vulnerable population where screening might be important. Legislation might not yet be in place, but other populations will become relevant for pre-employment screening including the elderly, people with disabilities, and people with mental health issues.

The review is concerned that the Act is cluttered with criminal history and blue card material when it could be dealt with elsewhere. Given the need for pre-employment checks across the entire public sector, these provisions should be available to other public employers, so their statutes do not similarly become cluttered.

Accordingly, it is recommended the Act should allow for pre-employment screening, to be dealt with by regulation, by any prescribed employing authority. This recommendation should be implemented in light of experience with the *Working with Children (Risk Management and Screening)* and *Other Legislation Amendment Bill 2018* once enacted.

308 Independent Review of the APS (2019). *Priorities for Change*. Canberra: Commonwealth of Australia, p. 35; Easton, S. (2019). "What 'common pay' really means and other things we learned questioning David Thodey". *The Mandarin*, 21 March 2019. No everyone thinks it is a good idea: Lloyd, J. (2019) "Common pay for public servants would be a disaster". *Canberra Times*, 2 April 2019.

309 [www.apsc.gov.au/classification-framework](http://www.apsc.gov.au/classification-framework).

Table 8: Values in other public employment laws.

<b>Vic</b>	<p><b>Section 7 Public sector values</b></p> <p>(1) The following are the public sector values—</p> <ul style="list-style-type: none"> <li>(a) <b>responsiveness</b>—public officials should demonstrate responsiveness by— <ul style="list-style-type: none"> <li>(i) providing frank, impartial and timely advice to the Government; and</li> <li>(ii) providing high quality services to the Victorian community; and</li> <li>(iii) Identifying and promoting best practice;</li> </ul> </li> <li>(b) <b>integrity</b>—public officials should demonstrate integrity by— <ul style="list-style-type: none"> <li>(i) being honest, open and transparent in their dealings; and</li> <li>(ii) using powers responsibly; and</li> <li>(iii) reporting improper conduct; and</li> <li>(iv) avoiding any real or apparent conflicts of interest; and</li> <li>(v) striving to earn and sustain public trust of a high level;</li> </ul> </li> <li>(c) <b>impartiality</b>—public officials should demonstrate impartiality by— <ul style="list-style-type: none"> <li>(i) making decisions and providing advice on merit and without bias, caprice, favouritism or self-interest; and</li> <li>(ii) acting fairly by objectively considering all relevant facts and fair criteria; and</li> <li>(iii) implementing Government policies and programs equitably;</li> </ul> </li> <li>(d) <b>accountability</b>—public officials should demonstrate accountability by— <ul style="list-style-type: none"> <li>(i) working to clear objectives in a transparent manner; and</li> <li>(ii) accepting responsibility for their decisions and actions; and</li> <li>(iii) seeking to achieve best use of resources; and</li> <li>(iv) submitting themselves to appropriate scrutiny;</li> </ul> </li> <li>(e) <b>respect</b>—public officials should demonstrate respect for colleagues, other public officials and members of the Victorian community by— <ul style="list-style-type: none"> <li>(i) treating them fairly and objectively; and</li> <li>(ii) ensuring freedom from discrimination, harassment and bullying; and</li> <li>(iii) using their views to improve outcomes on an ongoing basis;</li> </ul> </li> <li>(f) <b>leadership</b>—public officials should demonstrate leadership by actively implementing, promoting and supporting these values;.</li> <li>(g) <b>human rights</b>—public officials should respect and promote the human rights set out in the Charter of Human Rights and Responsibilities by— <ul style="list-style-type: none"> <li>(i) making decisions and providing advice consistent with human rights; and</li> <li>(ii) actively implementing, promoting and supporting human rights.</li> </ul> </li> </ul>
<b>SA</b>	<p>Values are not explicitly stated. See <i>Public Sector Act 2009</i> section 5 Public sector principles <i>Public Sector (Honesty and Accountability) Act 1995</i> Division 3 Duties of senior officials; Division 4 Duties of corporate agency executives; Division 5 Duties of public sector employees.</p>
<b>ACT</b>	<p><b>Section 7 Meaning of public sector values</b></p> <p>(1) The public sector values are—</p> <ul style="list-style-type: none"> <li>(a) respect; and</li> <li>(b) integrity; and</li> <li>(c) collaboration; and</li> <li>(d) innovation.</li> </ul> <p>(2) The public sector values must be—</p> <ul style="list-style-type: none"> <li>(a) demonstrated by a public servant when acting in connection with the public servant’s job; and</li> <li>(b) applied in a way that is appropriate to the public servant’s job; and</li> <li>(c) used to inform and evaluate the operation of the service.</li> </ul>

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**NSW**

Section 7 Government sector core values

The core values for the government sector and the principles that guide their implementation are as follows:

**Integrity**

- (a) Consider people equally without prejudice or favour.
- (b) Act professionally with honesty, consistency and impartiality.
- (c) Take responsibility for situations, showing leadership and courage.
- (d) Place the public interest over personal interest.

**Trust**

- (a) Appreciate difference and welcome learning from others.
- (b) Build relationships based on mutual respect.
- (c) Uphold the law, institutions of government and democratic principles.
- (d) Communicate intentions clearly and invite teamwork and collaboration.
- (e) Provide apolitical and non-partisan advice.

**Service**

- (a) Provide services fairly with a focus on customer needs.
- (b) Be flexible, innovative and reliable in service delivery.
- (c) Engage with the not-for-profit and business sectors to develop and implement service solutions.
- (d) Focus on quality while maximising service delivery.

**Accountability**

- (a) Recruit and promote employees on merit.
  - (b) Take responsibility for decisions and actions.
  - (c) Provide transparency to enable public scrutiny.
  - (d) Observe standards for safety.
  - (e) Be fiscally responsible and focus on efficient, effective and prudent use of resources.
- 

**UK**

The UK Civil Service Code is based on:

- integrity
  - honesty
  - impartiality (fair, just and equitable)
  - political impartiality
  - objectivity.
- 

**Canada**

*Public Service Employment Act 2003*

Preamble

Recognizing that:

the public service has contributed to the building of Canada, and will continue to do so in the future while delivering services of highest quality to the public;

Canada will continue to benefit from a public service that is based on merit and non-partisanship and in which these values are independently safeguarded...

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**India**

*Draft Public Services Bill 2007*

- 6. Values of Public Services: The Public Service and the Public Servants shall be guided by the following values in the discharge of their functions:
    - (a) patriotism and upholding national pride;
    - (b) allegiance to the Constitution and the law of the nation;
    - (c) objectivity, impartiality, honesty, diligence, courtesy and transparency;
    - (d) maintain absolute integrity.
- 

310 [www.gov.uk/government/publications/civil-service-code/the-civil-service-code](http://www.gov.uk/government/publications/civil-service-code/the-civil-service-code).

311 Available at Department of Personnel and Training: [www.dopt.gov.in/download/acts](http://www.dopt.gov.in/download/acts). *The Central Civil Services (Conduct) Rules 1964* (available on the same website) lists in s. 3(1) a total of 22 value-related obligations and prohibitions.

### Recommendation: Pre-employment screening

89. If a chief executive determines that a pre-employment check is necessary for a particular position, checks, including criminal history, child-related and other vulnerable population cohort work, should be provided for by regulation covering obtaining, using, sharing, storing, and disposing of the information obtained. The review commends this provision for all public sector employment, including sectors outside the terms of reference.

#### 10.3.1 Citizenship

The *Public Service Act 2008* includes citizenship and residency requirements for employment as a ‘public service officer’. In effect that means non-citizens who do not have a lawful right to remain indefinitely in Australia, and have permission to work, must be engaged as temporary, casual, or general employees. Note that section 122 contracts are for public service officers, and therefore the citizenship/residence requirement apply.

As one government department submitted, this operates to the exclusion of whole classes of the community who have a right to work in Australia but may not have permanent residency, such as refugees and asylum seekers. The State Government opted into the Safe Haven Enterprise Visa arrangement in February 2016. That arrangement allows temporary protection visa holders to work or study in a regional area. After five years the person is eligible to apply for a permanent migration visa, subject to other normal requirements.

It was argued the citizenship/residence requirement was inconsistent with the Multicultural Queensland Charter set out in the *Multicultural Recognition Act 2016*.

The department also submitted there may be some technical uncertainty about the eligibility of New Zealand citizen to be employed as public service officers.

The review also notes the *Human Rights Act 2019* and its implications for participation in the public service, including that the state has under the relevant international convention a right to determine eligibility for participation.

The citizenship/residency requirement does not apply to employment under other Acts: they do not have such a limitation (including the public health sector, police, ambulance, fire and emergency services, TAFE and statutory offices). Further, the distinction between public officers and other public employees is artificial and not relevant in the model proposed for public employment. As noted in the *Issues Paper*, this is not an issue in most other jurisdictions<sup>312</sup>.

### Recommendation: Citizenship

90. The Act should not limit employment to citizens but should include a provision ensuring employment is available only to people who have a lawful right to work in Australia, and that employment (a) cannot be for a term longer than the lawful right and (b) ceases if a person no longer has the right to work in Australia. Chief executives should have power to require applicants to provide evidence of their relevant rights.

#### 10.3.2 Electoral participation

Public servants do not lose civic rights by virtue of employment. Apart from officials under the *Electoral Act 1992*, there is no legislated bar against political party membership or from standing for elected office<sup>313</sup>. Being seen to be objective and apolitical is a different matter of course, especially in more senior roles.

Section 44 of the Australian *Constitution* notoriously precludes from eligibility for election anyone who ‘holds an office of profit under the Crown’, a term that encompasses state public servants<sup>314</sup>. There is no similar prohibition from election to the state parliament, but the *Parliament of Queensland Act 2001* requires:

- State public employees to take leave for the election period<sup>315</sup>
- certain office holders to resign the office immediately on being nominated as a candidate for election to the state parliament<sup>316</sup>.

There are also requirements affecting members of other Australian Parliaments and elected local government officials<sup>317</sup>.

312 *Issues Paper*, p. 29.

313 One individual submission urged a ban on party membership.

314 *Sykes v Cleary* [1992] HCA 60, (1992) 176 CLR 77.

315 s. 66.

316 For example, the Auditor-General and the chief executive of the Public Service Commission. See s. 67(1)(a)–(f).

317 *Parliament of Queensland Act 2001*, s. 68; *Local Government Act 2009*, s. 155(3), *City of Brisbane Act 2010*, s. 155(3).



Table 9: Entitlement to re-employment of unsuccessful election candidates.

<b>Cth</b>	entitlement to be re-engaged: s. 32 <i>Public Service Act 1999</i> (Cth), complemented by <i>Australian Public Service Commissioner's Directions 2016</i> s. 32
<b>NSW</b>	s. 72 (Commonwealth elections only)
<b>Vic</b>	s. 115 and sch. 1 (Commonwealth and Victorian elections)
<b>WA</b>	s. 103 (Commonwealth, WA and any other State or Territory parliament)
<b>SA</b>	s. 66 (Commonwealth and SA): "the employee must be re-engaged"
<b>NT</b>	s. 38 (Commonwealth and NT)
<b>ACT</b>	The Australian Capital Territory has a right to request that must result in re-employment if the request is reasonable (SES), or to the same or similar position or as an unattached employee for officers, and a right to re-employment for other employees: s. 131 (senior executives), s. 136 (non-SES officers), s. 139 (other employees)

The *Public Service Act 2008* sections 129–132 provides for the return to employment of any employee under the state, including police employees, who resign to be a candidate for election to the federal or Queensland parliaments but are defeated. The right is a right to request re-employment. Similar provisions exist in other jurisdictions.

The right in the Queensland Act is narrower than the Commonwealth, which is expressed as an entitlement to be re-engaged rather than a right to request and runs also to state elections (but not local elections). Entitlement to re-employment is summarised in Table 9.

No jurisdiction makes provision for re-employment after unsuccessfully standing for election to local government. The Queensland *Constitution* expressly recognises and protects local government. Consideration should be given to whether candidates for local government election should also have a right to re-employment.

### Recommendation: Re-engagement of election candidates

91. The Act should provide for re-employment of unsuccessful candidates for election modelled on the Commonwealth *Public Service Act 1999* provisions, covering Commonwealth elections, all state and territory elections.

### 10.3.3 Public comment on government matters

Public employees are members of the community but there are qualifications on any employee's public commentary that reflects on their employer. The Code of Conduct deals with this topic as follows:

*1.3 Contribute to public discussion in an appropriate manner*

*Commenting on government policy is a matter for ministers, not employees. Unless prior authorisation has been given, we will not comment to the media on government policy.*

*Where providing factual information to the public on government policy is a part of our official duties and responsibilities, we will ensure that information is appropriately authorised, and that we properly represent government policy and administration in its intended manner and spirit.*

*Like any other citizen, we have the right to contribute to public discussions on community and social issues in our private capacity.*

*In doing so, we will:*

- a. takes reasonable steps to ensure that any comment we make will be understood as representing our personal views, not those of government*
- b. maintain the confidentiality of information we have access to due to our roles, that is not publicly available, and*
- c. be aware that personal comments about a public issue may compromise our capacity to perform the duties of our role in an independent, unbiased manner.*

The Crime and Corruption Commission has issued a Corruption Prevention Advisory on social media<sup>318</sup>.

This is a fluid topic with rapidly evolving social media technology and use. The law may be significantly altered by the pending High Court decision in *Comcare v Banerji*<sup>319</sup>.

### **Comcare v Banerji**

Oral submissions were heard by the Court on 20 March 2019. The decision appealed from is *Banerji v Comcare (Compensation)* [2018] AATA 892 and revolves around whether the termination transgresses the constitutionally implied freedom of political communication: *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 561–562, modified and refined in *Coleman v Power* (2004) 220 CLR 1, *McCloy v New South Wales* (2015) 257 CLR 178 pp. 194–195 [2] and *Brown v Tasmania* (2017) 261 CLR 328.

Ms Banerji, a former Commonwealth public servant was dismissed for breach of the Code of Conduct by posting some 9000 tweets under a pseudonym. The tweets did not identify her but were critical of her department, her superiors, the Minister and the government’s policies. Her application to restrain dismissal failed on the basis the right to freedom of expression is not unfettered, the *Public Service Act 1999* (Cth) section 13(11) providing

*“An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS” and the Code of Conduct requiring her as an APS employee to “disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.”*

After her dismissal, Ms Banerji sought workers compensation for post-traumatic stress disorder arising from the dismissal. The Administrative Appeals Tribunal set aside the rejection at first instance, finding the dismissal was not reasonable administrative action because it was an unlawful trespass on the implied constitutional freedom: *Banerji v Comcare (Compensation)* [2018] AATA 892.

### **Recommendation: Civic rights**

92. The Public Sector Commission should issue guidance reinforcing employees’ rights to civic participation.

### **10.4 Privacy**

The Public Service Commission raised the use and management of information in its workforce research and for discipline, instancing that information about bullying reported in workplace surveys was thought to be private to the bully and therefore not reportable, or that resolution of a bullying complaint could not be shared with the complainant, aggravating workplace distress.

This concern was raised too late for substantive investigation in this review, but is added to afford a basis for further development of the issue by the Public Sector Commissioner in consultation with the Information Commissioner and the Leadership Board.

In common with suitability information, access to and use of personal information to further fair and responsive public services might be dealt with by way of Employment Direction or regulation.

### **10.5 Interchange and placement**

Responsiveness of the public sector is likely to be enhanced if there is well-targeted interchange and placement arrangements between agencies, with other governments and between the public sector and other sectors.

There is very little movement between the private and public sectors in Queensland, and anecdotally some of the movements into the public service have not been successful. It may be that poor attention to orientation and support in the transition has not been adequate in the past.

Movement between the public and community sectors is more common though that too has proved challenging in some cases.

The intent of interchange is admirable and (at least in theory) should improve responsiveness of the public service and understanding of government in private employment. It is also a means of attracting highly skilled staff to senior roles.

318 Crime and Corruption Commission (2017). *Social media and the public officer*.

319 Case C12/2018.

The *Public Service Act 2008* provides for interchange arrangements in section 184:

*under which—*

- (a) a public service employee employed in a department performs duties in another entity; or*
- (b) a person employed by or within another entity performs duties in a department.*

A complementary provision in section 183 refers to ‘work performance arrangements’ (unrelated to work performance in section 26) that allow a Queensland Government public service employee to work in another entity (described in the example as Queensland Government or other jurisdictions’ public entities) and vice versa.

One stakeholder raised a concern that registered auditor companies may not be satisfied that interchange arrangement were adequate to protect the registration status of the private entity. Similar concerns may arise as financial services are more tightly regulated, and potentially exist for some professions such as barristers in private practice.

The Act might also usefully refer to placement arrangements (where there is no implied mutuality of exchange).

### **Recommendation: Interchange and placement**

93. Interchange and placement arrangements between public entities and other entities should be encouraged and facilitated by the Public Sector Commissioner.

## **10.6 General employees**

Stakeholder advice about general employees (examples of general employee roles include gardeners and cleaners) was split between those who thought the category should be abolished, and general employees given the same rights and obligations as others; those who had no opinion; and those who thought the question too fraught to be addressed (meaning the category of general employee must be retained).

It seems the main differences between general employees and public service employees are industrial in character including amenability to transfer, payment of locality allowances and access to certain appeal rights.

Advice from one major employer of general employees (the Department of Education) was:

*The Department would support any amendments to the PS Act that result in general employees being treated similar to other public service employees from a consistency perspective.*

*This will provide industrial efficiencies as well as remove the confusion that currently exists when applying industrial instrument provisions to general employees as opposed to other public service employees/officers.*

The review considers that the persistence of contrary views and potential complication the Act should allow a regulation to provide for the category by reference to industrial instruments. Abolition of the category should not result in lessening of rights.

### **Recommendation: General employees**

94. The category of general employee should not continue as a separate statutory category. Existing general employees should, as far as possible and consistent with industrial instruments, have the same rights and obligations as other employees. If necessary, there should be power to make a regulation to provide for different rights and obligations of employees covered by the relevant general employee industrial instruments.

## **10.7 Integrity Commissioner**

The management and budget of the Integrity Commissioner falls under the general oversight of the Public Service Commission. The Commission in turn is supported by the Department of the Premier and Cabinet for human resources support, financial management, information technology, facilities and a range of other support services.

The Integrity Commissioner’s functions extend well beyond the scope of the current Public Service Commission and the proposed Public Sector Commission. Further, the Integrity Commissioner is an officer of the Parliament<sup>320</sup>, and has functions affecting ministers and other members of parliament, ministerial staff and local government.

The Integrity Commissioner is regulator of private lobbyists. Chief executives and senior executives are designated persons who may request and receive advice that has important legal effects and that may be relevant

320 *Integrity Act 2009* s. 6.

Colonial Secretary's Office,  
Brisbane, 4th May, 1864.

**I**N consequence of very numerous applications for employment in the Civil Service, it is notified for public information, that there are now no vacancies to be filled up, and that the Government is not likely to require additional clerks or other employés for a considerable time to come.

No applications can henceforth be received at this office; and those persons who have been for some time endeavoring to obtain appointments in the Civil Service are strongly recommended to seek other employment, as the Government will not be able to provide for them.

ROBERT G. W. HERBERT.

Figure 13: No more applications, please.

The Treasury,  
Brisbane, 25th October, 1899.

**H**IS Excellency the Administrator of the Government, with the advice of the Executive Council, and upon the recommendation of the Public Service Board, has been pleased to appoint

JOHN JOSEPH BARRY

to be a Clerk, on probation, in the Customs Department, Rockhampton; such appointment to take effect as from the 23rd October, 1899.

ROBERT PHILP.

Department of Justice,  
Brisbane, 25th October, 1899.

**H**IS Excellency the Administrator of the Government, with the advice of the Executive Council, has been pleased to direct that

JAMES MCPHERSON, Bailiff of the District Court at Cloncurry, be dismissed from the Public Service.

A. RUTLEDGE.

Figure 14: An appointment and a dismissal.

to their employment. Declarations of chief executives' interests are given to both the Integrity Commissioner and the Public Service Commission, and the purposes of giving one to each differ. Finally, the Integrity Commissioner is excluded from the operations of the *Public Service Act 2008* for various purposes<sup>321</sup>.

Given the independence and importance of the Integrity Commissioner, locating budget and support arrangements under the Public Service Commission is not appropriate.

During consultation the Integrity Commissioner thought the arrangements might more appropriately be provided by the Parliamentary Service. The review is concerned that the Parliamentary Service is itself small and may not be able to provide adequate support without significant supplementation.

The review concluded that support for the Integrity Commissioner through the Public Service Commission is neither administratively efficient nor free from potential conflicts between the two entities' functions. Additional research and consultation beyond the scope of this report is needed, and the disposition of this issue is left for further consideration.

### Recommendation: Integrity Commissioner's budget and resources

95. The Queensland Governance Council should consider the appropriate arrangements for budget administration and human resources support for the Integrity Commissioner.

### 10.8 Public employees serving on boards

The *Issues Paper* raised a matter about public employees who sit on board on behalf of government or in an official capacity. There was insufficient input to express a detailed view on this issue. It remains an important topic and should be the subject of further consideration by the proposed Queensland Governance Council.

### 10.9 Gazettes

The *Queensland Government Gazette*, like its counterparts in other jurisdictions, has an important history as an enduring record of public decisions, some of great importance, some more of passing note. Historically it has been the public notice and enduring record of appointments and other matters affecting employment.

It was the way important matters of State (or Colony) were communicated to the world at large, illustrated by Figure 13 in response to apparently ample interest in government employment in the early days of the Colony of Queensland<sup>322</sup>.

321 s. 35 not a public service office; ss. 56, 64 disqualified from appointed to public service commission roles.

322 *Queensland Government Gazette*, 5(40), 7 May 1864 p. 305 and reprinted pp. 317 and 346.

The Gazette recorded appointments and dismissals and all sorts of movements of employees (see Figure 14)<sup>323</sup>.

Gazettal serves two purposes: notice to the world and a permanent record, demonstrated by the ease with which the above examples were found.

The Department of the Premier and Cabinet, charged with administration of matters of state, thought gazettal remained an important way of ensuring enduring records were made of Administrative Arrangements Orders, Ministerial appointments and appointment to senior posts, including chief executives of departments. These decisions are made by the Governor in Council.

Gazettal has important implications under the *Evidence Act 1977* illustrated by the following provisions:

**43A Administrative arrangements to be judicially noticed**

*Judicial notice must be taken of the administrative arrangements set out in an order published in the gazette and purportedly made under the Constitution of Queensland 2001, section 44.*

**50 Proof of act done by Governor or Minister**

*Where by any law at any time in force the Governor or the Governor in Council or a Minister is authorised or empowered to do any act, production of the gazette purporting to contain a copy or notification of any such act shall be evidence of such act having been duly done.*

Proof of instruments made by the Governor, Governor in Council, a minister or public entity is provided for in section 48(2):

*Evidence of the instrument may be given by producing any of the following documents—*  
*(a) the gazette purporting to contain it.*

Gazettal of these instruments therefore has utility and may be a worthy investment in efficiency of court proceedings and the like.

Employer stakeholders generally do not like the requirements to publish employment matters in the Gazette, such as advertising vacancies, notifying appointments and promotions and the like (see comprehensive list *Issues Paper* footnote 96 page 30).

The gazettal process was said to be time consuming and costly, when the notice purpose is (in the consensus opinion) better served by internet publication. Stakeholders had no easy answer to the enduring record purpose, however.

For many notices, alternative arrangements can already be made under the *Public Service Act 2008*.

It is recommended that the new Act continue to require Gazette notice of the formal matters of state, but that notice and permanent record requirements may be discharged for other matters by alternative arrangements approved by the Queensland Governance Council in consultation with the State Archivist.

**Recommendation: Gazettal of employment records**

- 96. Gazettal should be required for Governor in Council decisions, including appointment of chief executives and statutory officers and for machinery of government changes.
- 97. The Queensland Governance Council should, in consultation with the State Archivist, establish alternative means of giving notice and enduring storage of employment decisions under the Act.

**10.10 Human resources policies: Consultation and access**

Union stakeholders noted that it was often difficult to access human resource policies of agencies, including some being behind firewalls and not available to the general public and the unions.

As a matter of fairness and transparency such documents should be freely available, preferably searchable, not only to employees but also to their representatives, job applicants and the world at large.

There were also concerns about inadequate agency level consultation. As a matter of course, affected unions should be consulted in the making of human resource policies that potentially affect their members. See also Recommendation 67.

In passing, many policies should be similar between agencies and the burden of engagement and publication reduced by effective harmonisation, facilitated by the Public Sector Commission working with chief executives and heads of discipline.

323 Both notices from *Gazette*, 129(72) 28 October 1899 p. 1022.

### Recommendation: Human resource policies

98. The Act should require consultation with affected unions in the making of binding human resources policies and Employment Directions both at a system level and agency level. Consultation should be encouraged for other directions and for guidance material.
99. The Act should require that all human resource policies and Employment Directions be published in searchable form online and be accessible to the general public.

### 10.11 Public Safety Business Agency

Stakeholders expressed confusion about the governance arrangements for the Public Safety Business Agency, a statutory body under the *Public Safety Business Agency Act 2014*.

The agency is responsible for a large budget and more than 1100 employees<sup>324</sup>.

That Act establishes a board of three members: the Police Commissioner, the Fire and Emergency Services Commissioner and a third independent member (usually a senior Treasury officials)<sup>325</sup>.

The chief operating officer of the agency is appointed by the Governor in Council and is declared in Schedule 1 of the *Public Service Act 2008* to be the head of the agency as a public service office. Staff of the agency (other than the chief operating officer) are employed under the *Public Service Act 2008*<sup>326</sup>.

Section 12 of the Act defines the relationship between the board and the chief operating officer, and section 11(1) states the functions:

- (a) to help the board to perform its functions;
- (b) to be responsible for the day-to-day operation of the agency.

The concerns expressed were to the effect that unions were unsure if one of the two commissioners or the chief operating officer is the chief executive (as that term is used in the *Public Service Act 2008*). One union suggested the two commissioners take turns to be the effective chief executive of the agency. This may flow from the practice of rotating the chair of the board stated in section 8G(2):

*Each year on the anniversary of the appointment of the first chairperson, the role of chairperson rotates to the other commissioner*<sup>327</sup>.

The chair has no stated management function under the Act and would have the common law responsibilities of a chair of such a body like managing meetings of the Board. The board has a collective oversight function only.

It is clear the chief operating officer has the employer responsibility under the *Public Service Act 2008* but also appreciates that the board's composition, including two chief executives of other government entities and the rotating chair, might lead to confusion both in the agency and among employees and unions.

The concerns are operationally real, and it would be useful for the Queensland Governance Council to work with the agency about how the board and chief operating officer operate together and how the two commissioners can separate their role as board members from their role as user of the agency's services.

324 *Annual Report 2017–2018*: expenditure > \$443 million; staff 1131 FTE. Staff are covered by the Queensland Public Service Officers and Other Employees Award – State 2015.

325 The independent member at time of writing—and for many years—was the Executive General Manager, Risk and Intelligence, [www.treasury.qld.gov.au/about-treasury/our-key-people](http://www.treasury.qld.gov.au/about-treasury/our-key-people).

326 s. 17(1).

327 See *Annual Report 2017–2018* p. 34: “Responsibility for the Chair rotates annually in September between the QPS Commissioner and the QFES Commissioner”.

## 11 Implementation

Recommendation 1 is for a new Act with a very different language and organisation, and for the Act to be prepared under the Department of the Premier and Cabinet. Preparation of an Act and its passage through the Parliament is a lengthy exercise, but implementation of many recommendations need not be delayed while Parliamentary Counsel does its drafting. There are many things the government can do before the Bill is prepared and enacted.

### 11.1 Implementation activity

Implementation activity could include the following:

1. The Public Service Commission as currently constituted by the Director-General, Department of the Premier and Cabinet, the Under Treasurer and the commission chief executive form the core of the Queensland Governance Council (Recommendation 17).
2. The Commission (Council) could start the process of implementing matters that can be achieved administratively, including:
  - a. the audit of senior executive, senior officer and section 122 roles (Recommendation 84)
  - b. exploration of public sector ethics and public sector values (Recommendation 87)
  - c. the capability assessment for the proposed Public Sector Commission (Recommendation 72)
  - d. consideration of alternatives to gazettal for employment related notices (Recommendation 97)
  - e. engagement between employers and employee representatives
  - f. budget appropriation for implementation and ongoing costs of recommendations that have budget implications lest resource constraints guarantee failure rather than delivering success (see below).
3. The Public Service Commission might review and revise the current directives governing temporary and casual conversion to align the Directives with policy intention (Recommendations 4 to 7).
4. The Public Service Commission might:
  - a. commence research and development of the recommended management development program (Recommendation 14)
  - b. start developing the statement of the detailed positive performance program (Recommendation 34 and 35)
  - c. prepare guidance about expanded tools for formal corrective action (Recommendations 36, 51 and 52)
  - d. start work on the standing offer arrangements for workplace investigations (Recommendation 44)
  - e. develop guidance on the proposed preliminary notice for discipline or performance improvement (Recommendation 56).
5. The Department of the Premier and Cabinet might commence:
  - a. the process for drafting the Bill (Recommendation 1)
  - b. review of the statute book for provisions about removal of statutory office holders (Recommendation 9)
  - c. change in budget management and support for the Integrity Commissioner (Recommendation 95).
6. Recruitment for the proposed Special Commissioner (Equity and Diversity) could commence, and, if necessary, appointment be made under section 122 arrangements (Recommendation 27).

#### 11.1.1 Resources

Governments around Australia are adept at embracing the potential for administrative improvement but sometimes reluctant to provide necessary resources: the perennial cry from Treasuries is that budget is limited and change must happen from within allocated monies.

Several recommendations in this report will require a change in the resources available to the proposed Public Sector Commission. The Queensland Governance Council should closely examine the resource implications and prepare budget bids accordingly.

Making high-value changes without getting the budget right almost guarantees failure.

Many of the recommendations with resource implications potentially yield long-term benefits. Proper exploration of those should be undertaken<sup>328</sup>.

### 11.1.2 Lead times

Some recommendations will take considerable time to yield results. For example, improved management skills, intended to deliver greater fairness, consistency of employment experience and consistency of language and portability of skills, can only happen over time, possibly some years.

The review intends the package of recommendations to be implemented as soon as possible, but tracking progress and scaling up investment should be managed by the Queensland Governance Council.

## 11.2 General matters in *Public Service Act 2008*

This report does not canvass every provision in the *Public Service Act 2008*. Generally, if a matter has not been explored in the report, the review recommends continuation of the existing provisions adapted as necessary for the new models of employment by the state: responsibility, positive performance, system management, and central governance.

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328 A complication among economists nationally and internationally is how to calculate the future value of present investment, and problem known as discounting the future e.g. Harrison, M. (2010). *Valuing the Future: the social discount rate in cost-benefit analysis*. Visiting Researcher Paper, Productivity Commission, Canberra. Quiggin, J. (2010). *Discounting the future, yet again*. [www.johnquiggin.com/2007/02/23/discounting-the-future-yet-again](http://www.johnquiggin.com/2007/02/23/discounting-the-future-yet-again). Terrill, M. & Batrouney, H. (2018) *Unfreezing discount rates: Transport infrastructure for tomorrow*. Grattan Institute Report No. 2018-03, March 2018.



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## **12 Appendices**

- 12.1 Results of consultation**
- 12.2 Model of the Westminster System**
- 12.3 How did we get here?**
- 12.4 Civil service employment laws of Queensland – 1860**
- 12.5 Mapping departments: 1915 to 2019**
- 12.6 Challenges for new managers**
- 12.7 Institutional arrangements**
- 12.8 Discipline flowchart**

## 12.1 Results of consultation

*A fair and responsive public service for all* is an independent review of the *Public Service Act 2008* and other Queensland public employment laws. The review was commissioned in late 2018. An *Issues Paper* was published online on 21 December 2018 to assist with input to the review. The *Issues Paper* listed 50 questions to guide input to the review, though responses were not limited to these questions.

A total of 58 responses were received. Six responses were received from unions representing individuals employed in the Queensland public sector. Fifteen responses were received from entities across the Queensland public sector and the remaining 37 responses were from individuals.

The following is a précis of the issues raised in these responses. It is not intended to be a detailed or comprehensive reflection of the responses received. Responses have been grouped according to the nature of the respondent (i.e., union, employer or individual) but responses and issues raised have not been attributed to individuals or organisations.

### 12.1.1 Union responses

Responses were received from six organisations representing Queensland public sector employees.

Responses questioned the extent to which a legislative review could affect change, noting that **cultural and behaviour change** would be required across the public sector to reinforce any changes to legislation to promote fairness, inclusiveness and responsiveness.

Responses identified a high level of confusion around the **scope** of the *Public Service Act 2008*, particularly regarding which public servants are and are not covered by the Act. Some responses sought changes to tidy up arrangements or to increase the scope of inclusions (e.g., TAFE Queensland employees) to improve consistency in managing employees. Other responses argued for separate legislation to cover each of the structure of government and public sector employment.

Responses generally agreed that there was a need to reset the **employment relationship**, to move on from what is seen as negative language in the existing *Public Service Act 2008*. Responses argued that the employment relationship, as described in the Act, is predicated on the assumption that an employee will need to be disciplined at some point in their working life. The Act does not frame a positive employment relationship and does little to spell out what is expected of the employer or the manager.

Responses agreed that the hierarchy from legislated requirements through **regulations and directives** to practice in individual agencies is not effectively aligned. There is too much scope for individual managers and agencies to apply latitude in interpretation. This reduces consistency and creates tension in the employment relationship. The lack of consistency is also a significant impediment to addressing fairness across the sector. Some responses also argued for enhanced enforcement of the legislative framework.

Specific concerns were raised around the application of the government's **temporary conversion** policy and Directive, with most responses arguing that any improvements delivered by departments in the past year have been incremental at best. The alleged poor rate of conversion is cited by responses as proof of a fundamental imbalance in the employment relationship. Instances of departments and agencies 'gaming' the system to meet government policy were put forward.

Responses agreed that the **merit principle** was critical to the public sector but offered different views on addressing imperfections in the existing application of the merit principle. Clearly, the question is complex and requires careful consideration by all parties. In general, responses highlighted the need for greater transparency in recruitment.

Responses acknowledged the good progress that has been made on **gender pay equity** in Queensland, but criticised more recent efforts to provide a policy framework to improve gender pay equity in the public sector workforce. Some responses highlighted the need for greater effort in embedding flexible working arrangements in public sector agencies.

In **disciplinary** matters, there was broad agreement that the current system was not working for either employer or employee. The role of the Queensland Industrial Relations Commission was queried, with some responses noting that the Commission's decisions were not openly communicated. It was also noted that HR matters were not a good fit with the Commission's expertise or jurisdiction.

Disciplinary proceedings were viewed as overly-legalistic in conduct, with criticism that the process did little to support good management or employee outcomes. The role of **external investigators** was criticised, with most respondents feeling that the commissioning of external investigators ran counter to the principle of fairness and many criticising the capability of external investigators. Union responses also suggested that procedural fairness is difficult where an external

investigator is commissioned. In general, employee representatives did not feel that external investigations were warranted or effective.

There was a consensus among responses that the current process, under which a union may provide a **'support person'** who is barred from advocating on behalf of an individual, was unhelpful and did not support procedural fairness.

It was generally agreed that discipline had become a proxy for ineffective **performance management** – issues had been allowed to escalate because local management had not dealt with performance issues. Discipline has become the *de facto* response to difficult employees, regardless of the issue at hand. There was consensus that managers needed better support to navigate the differences between performance and conduct issues.

The average length of time to complete disciplinary proceedings was identified in responses as being critical. In some cases, **disciplinary proceedings** have taken more than six months to complete, with some cases taking more than a year or two to complete. Employee representatives felt that the human impact of this on individuals who were effectively living in a constant state of uncertainty and conflict was consistently ignored or underestimated by employers. Responses generally felt that employers had become increasingly and overtly hostile throughout disciplinary processes.

Related to this issue, the application of **suspension** provisions under the Act was criticised. Application of the provision is open to interpretation, including the requirement to consider alternative employment. In addition, once triggered, the suspension provision is not always subject to review and the employer has no obligation to remain in contact with the suspended employee.

**Independent Medical Examinations** were also identified in responses as being the source of much friction in the employment relationship, with responses identifying the need for greater procedural fairness – for instance, by allowing an employee to select a medical provider from an approved panel and guarantee confidentiality and individual privacy.

Responses felt that departments—and particularly the HR areas in departments—had become increasingly **risk averse**, which had in turn led to increasing inconsistencies in managing employees and unnecessary delays in resolving problems. Some responses noted an apparent disconnect between managers and departmental HR business units.

The role of the Public Service Commission as **'system manager'** (as referenced in the *Issues Paper*) was highlighted in responses as being currently not fit for purpose. Relationships had become fractured and fragmented, and the system manager was generally not seen as an influential figure. Most responses singled out the Commission as requiring change, including to strengthen the Commission's leadership role across the sector.

Additional relationship issues were highlighted in the larger and more complex public services, particularly **health**. The relationships between the Department as system manager, the individual Hospital and Health Services and employees were seen as increasingly problematic. The *Hospital and Health Boards Act 2011* was generally agreed to be a significant barrier to fairness and consistency.

### 12.1.2 Employer responses

Responses were received from 15 organisations employing Queensland public sector employees. Employer responses tended to view the *status quo* more favourably and generally felt that public sector entities exercised their employment and management obligations reasonably and in good faith.

Nevertheless, responses accepted that it was timely to update the *Public Service Act 2008* and in particular to address technical issues such as conflicts with the *Industrial Relations Act 2016* (e.g., probation periods) and to address the negative language and institutional nature of the existing Act. Some responses felt that it was also timely to consider articulating a clearer value proposition for the public sector, such as through a **Public Service Charter**. In general, there was broad agreement that technical or legislative change would need to be supported by **cultural and behavioural change** across public sector agencies.

In terms of the **scope** of the Act, responses did not state the need for any change. It was noted that any change to TAFE Queensland employees would have implications for the organisation in terms of their competitiveness in a contestable market. Responses generally accepted that the majority of employed public servants did not recognise a connection with the state as employer as opposed to a department or business unit but differed as to whether this was indeed a problem requiring resolution. Responses were more likely to point to the need to educate all public servants about requirements such as Code of Conduct provisions and how they apply in day-to-day roles.

Public sector organisations argued in favour of **adaptability and flexibility** in the implementation of public employment legislation, to better reflect the variations between organisations in terms of size and function. It was also suggested that the Act should concentrate on spelling out minimum standards and allowing more room for discretion in management of employees.

Some responses noted that agencies can be net exporters of talent to the wider sector and flexibility in recruitment and ability to offer competitive remuneration rates in the market were critical to ongoing capability. There was, however, agreement that there could be **consistency** and equity across the sector in many HR matters such as recruitment, appeals and flexible working arrangements.

Responses noted that **Equal Employment Opportunity** (EEO) targets were not being met across the sector and argued that more work was needed to better understand why this was so. It was generally agreed that language in the Act was outdated. Responses generally felt that more could and should be done on EEO and gender pay equity matters.

Responses shared employee representatives' view that the **merit principle** was a cornerstone of public sector employment and agreed that interpretation of the principle could be improved. Responses suggested that merit is widely misinterpreted, and that legislative clarification and policy guidance could be issued alongside training and communication to improve understanding of merit. It was also felt that re-positioning merit in a more contemporary setting should be considered, including potential extension to include diversity.

Some responses felt that merit and diversity were incompatible, while others noted that an individual's merit can indeed be part of their diversity, by virtue of lived experience or connection to a community. There was general agreement that some confusion prevailed in this space. All responses agreed that a better connection between merit and EEO was required.

Responses accepted the need for the Queensland public service to be an **employer of choice** and had a range of suggestions to support achievement of this objective, particularly around professional development and mobility across the sector.

Responses also argued for establishing shared criteria for **pre-employment screening** across the sector, potentially aligned to specific roles. Responses noted

that the Working with Children (Risk Management and Screening) and Other Legislation Amendment Bill 2018 that was currently before Parliament aimed to include a 'No Card, No Start' policy and noted that any changes to the *Public Service Act 2008* would need to align with the proposed amendments.

Employer responses noted the importance of **temporary conversion** provisions, but also highlighted the challenges of managing conversions in accordance with additional requirements such as FTE caps and departmental budgets. Responses noted that legislation was ambiguous on conversion and limitations in the policy and associated guidelines often resulted in misinterpretation and inconsistencies in application. Responses also felt that there was inconsistency between the Act and Directives. Responses argued for clearer guidance and noted that a more effective approach would be better recruitment practices in the first instance. Employer responses also felt that the existing process placed a significant administrative burden on agencies.

Responses were split on the question of **general employees**. Many responses noted the cost implications of any change, while others argued for consistency in management. Responses generally accepted that the existing definition of general employee needed to be refined and improved.

Responses accepted the need to address **management capability** at all levels and agreed that the Public Service Commission should take on this responsibility through training, guidance and other assistance. Responses also tended to accept that the responsibilities of public sector managers under section 26 of the Act could be improved or refined. Critical to this was the understanding that challenging performance discussions, while difficult, needed to occur earlier and more frequently. Some responses suggested that expectations be articulated more clearly, including through job descriptions and in recruitment. Some responses also noted the dichotomy between union allegations of heavy-handedness in managing discipline and *Working for Queensland* survey results which suggest that staff are concerned that performance issues are, in fact, not being addressed.

Responses accepted that management practice needed to better differentiate between performance management and **discipline**. Responses noted that the Act as drafted tended to blend performance management and conduct requiring discipline, where separate processes may lead to better outcomes. There was broad agreement that the Act needed to be more specific about managers' responsibilities in relation to employee performance.

There was also general acceptance that the process could be simplified and recognition that consistency in performance management would be required across the sector. Responses also canvassed legislating reasonable time limits for decision-makers to ensure timely consideration of matters, noting that exceptions would need to be provided for in complex cases.

Responses noted that streamlining disciplinary procedures would benefit all parties, but also noted that this would also make **suspension** provisions more efficient and fairer. Responses argued for removal of appeal on second show cause notices as this was often used as a delaying tactic which results in employees remaining on suspension for extended period – both findings and penalty can be appealed and considered arising from the penalty determination.

Responses suggested that greater clarity on ‘alternative duties’ and ‘alternative employment’ would assist application of suspension provisions. Responses also argued for a requirement for employees to attend interviews, citing examples where challenging the requirement to participate in an interview has delayed investigations. There was general agreement that suspension should be time-limited, for example, by requiring expenditure equivalent to more than six months’ pay to be explicitly approved by the Director-General.

There were also specific questions raised about the application of suspension provisions in systems that deal with vulnerable people, and the impact of suspension on an individual’s ability to work with these groups. For example, the withdrawal of a blue card could also affect an individual’s ability to perform duties, which would require the individual to be suspended (or ‘stood down’) from duties.

Responses also argued that employers had more discretion than was currently being exercised in identifying **alternative duties** instead of suspension. It was suggested that managers be required to consider alternative duties and to document what duties had been identified and considered, including any reason why the employee could not be employed in those alternative duties.

Employer responses accepted the need for improved **performance management** practices, including through simpler and abbreviated processes to progressively manage problems. For example, alternative dispute resolution and warnings could be employed more effectively to tackle performance issues. Similar processes could be employed for lesser levels of misconduct, where the behaviour is unlikely

to warrant summary termination. Responses also argued for a separate termination pathway for employees where attempts to improve performance did not result in the desired outcomes.

Where matters proceeded to discipline, responses argued for a **risk management** approach to assist decision-making and to facilitate early resolution of matters. Responses argued that employers were restricted in their options once a case proceeded to discipline. Responses also argued that the system allowed too many review and appeal rights, which could be easily be misused. The high likelihood of an appeal or review being triggered encouraged avoidance behaviour and risk aversion. Some responses equated this with management paralysis.

Responses noted that the **Queensland Industrial Relations Commission** makes decisions but does not publish appeals. It was suggested that the Public Service Commission should publish decisions on a frequent basis to assist agencies in understanding precedent.

Employer responses were more likely to support **external investigations**, noting that the decision to outsource was usually made based on resourcing, capability, risk, credibility and the nature of the matter. Ensuring appropriate capability in managing investigations appeared to be top of mind for most agencies. Responses accepted that managing a pool of practitioners across the sector could afford benefits. It was also suggested that, by virtue of being external, participants may view an external investigator as being more neutral than an internal investigator. Employer responses also suggested that all parties needed to change mindset with respect to disciplinary processes to accept they are primarily administrative in nature, and not legal and adversarial.

In response to employee representatives’ concerns about union representation in investigations (and limitations on the role of a **support person**), employers noted the importance of individuals being able to speak for themselves and not being influenced by others. Employers also noted that the role of the external investigator was to investigate, not to make a decision, and challenged the relevance of an advocate during an investigation, arguing that legal or other representation would hinder the investigator’s ability to gather evidence and would likely lead to further and extensive delays in managing the process. It was also pointed out that the support person could effectively act as a witness to the investigation itself. Employers accepted that clearer definition and articulation of the separation of these roles could be helpful to help address the incorrect assumption that investigations needed to be

adversarial in character. Responses generally agreed that the role of the investigator needed to be spelled out clearly at the start of the process, along with ground rules for third party representatives.

Employers were supportive of the need to require **Independent Medical Examinations**, particularly where there was a potential risk to other team members or to members of the public. Responses noted that at present, the Act was too prescriptive with regard to the triggers for an Independent Medical Examination (IME), with departments required to base the decision on one of two reasons when both may apply. Other responses noted that common law needed to be considered by departments alongside the *Public Service Act 2008*. The general requirement on employers to provide a safe and healthy workplace was cited as a potential reason for an employer to require an IME.

It was also suggested that an employer should be able to require an individual to submit to an IME where they have been on extended sick leave and are not cooperating with the employer's attempt to ascertain their capacity to return to work. Responses also argued that there are reasonable grounds to require diagnostic tests, though noted that this could be treated carefully through a risk management framework. Similarly, greater information sharing with other entities (e.g., QSuper and WorkCover) could reduce the stress for individual employees but would also need to be managed within careful guidelines.

Regarding **redundancies**, employer responses highlighted instances where employees have not been able to reskill to other duties and argued for the extension of the current categories to cover such examples. Related to this, it was also argued that mechanism to allow for redeployment across agencies would be useful to allow technical skills to be redeployed to where they are needed.

Responses accepted that improved management of the **Senior Executive Service** (SES) was required, including a possible point in time—and regular rolling—review of section 122 contracts and departmental SES profiles. Responses tended to agree that the SES cohort needed to better reflect the intention of being a whole of sector resource rather than tied to individual departments and tended to accept that employment contracts should reflect this relationship. Responses also accepted that executive mobility, while improving, was key to the cohort's success. Some responses canvassed a reversion from contracted employment to permanent appointment.

Responses tended to agree that the **Senior Officer** cohort was no longer sustainable over the long-run due to IR pressures and accepted that resolution was required.

Employer responses generally accepted the need to enhance the role and function of the Public Service Commission as **system manager**, but tended to regard such changes as incremental and not fundamental. Employer responses were also more favourable towards a definition of system manager based on facilitation and enabling rather than one based on regulation and compulsion. Notwithstanding this, it was generally accepted that the system manager's authority should mean that advice and guidance would carry weight across the sector. Responses also argued that the *Public Service Act 2008* should be less prescriptive in detailing the role and functions of the system manager, arguing that this would allow greater operational flexibility.

Few responses directly addressed system **governance**. The role of the CEO Leadership Board was noted in some responses, while others noted the need for integration of system management with the central agencies collectively and also improved alignment of HR and IR matters. While there remain a range of options for system governance, responses were generally agreed that form should follow function and that the role of the system manager needed to be clearly articulated in order to define how it should be managed.

Responses noted that improved **integration** between HR and IR matters was required, but did not feel that this needed to be a structural solution.

Responses generally felt that the system manager, along with the other central agencies, could offer greater support to manage **machinery of government** (MoG) changes. Improved guidance and support were generally needed to assist decision-makers and to improve change management practices. Responses noted the problems that can be caused by partisan behaviour in negotiating MoG changes, which only serve to delay implementation of changes. Responses argued for a clear articulation of the role of the central agencies in facilitating MoG changes, with some responses suggesting this be enshrined in a new Public Service Act. It was also argued that communication of MoG changes and new responsibilities could be improved.

Responses also noted that the current system for managing and approving MoG change was technical, formal and could be streamlined with changes published online rather than Gazetted.

In general, employer responses supported a review of the requirement to publish matters through the **Queensland Government Gazette**. The costs and relevance of gazettal in a digital age were considered largely superfluous and the lack of searchability of gazettal information was generally viewed as unhelpful.

Employer responses also accepted additional clarity could be provided regarding the ethical and other considerations of public employees on **government boards** and argued that an enhanced governance framework, in line with the Uhrig and Webbe-Weller reviews, could be of use.

### 12.1.3 Individual responses

Responses were also received from 37 individuals. A number covered industrial matters (i.e., pay and conditions) that are outside the scope of this review. A small number of responses sought advice or to progress individual complaints – again, outside the scope of this review. Almost all responses reinforced the conclusion that management skills need to be addressed.

There was a small group of quite substantive responses, covering a range of issues. Some of the issues canvassed in these responses include:

- **Senior leadership**
  - Changing CEO contracts such that CEOs are engaged by the Public Service Commission rather than the Premier, constraining ministerial input into CEO recruitment and extending contracts to seven years with reasonable compensation for non-renewal, to enable CEOs to better provide frank and fearless advice
  - Reverting SES roles to permanent and not contracted positions to encourage frank and fearless advice and protect individuals
  - Increasing executive mobility across the sector and a focus on increasing capability through ongoing professional development
  - Conversion of existing section 122 contracts to SES establishment with identification of positions to allow for career development rotations or reservation for specialist or technical skills
  - A separate, enhanced system for approval of genuine limited-term positions to ensure that section 122 positions are only used for the purpose they were designed for
  - A new code of conduct for executives, including a ban on membership of political parties.
- **Discipline**
  - More timely resolution of disciplinary matters, recognising the impact that long processes can have on individuals and the organisations in which they work
  - Improved dissemination of decisions to supplement Directives and guidance
  - Clarifying the operation of suspension provisions and improved decision-making
  - Clarifying the role of external investigators and improved commissioning and management of these investigations.
- **System management**
  - MoG-proofing through the use of more generic titles, separation of policy and regulation, improved deployment of shared services and use of taskforces for discrete projects
  - Providing more administrative room for manoeuvre for departments to innovate and be employers of choice
  - Improved liaison between the system manager and client departments and agencies
  - Use of key performance indicators to drive improved management outcomes
  - Building and nurturing a more mobile workforce
  - Updating information on the merit principle and communicating this more effectively across the sector
  - Peer review of agency processes and procedures and the outcomes they deliver.
- **Management skills**
  - Expanding the section 26 requirement on managers and ensuring the requirements are effectively communicated and assessed
  - Committing to ongoing professional development for all staff and particularly managers, to ensure skills remain contemporary and relevant
  - Overhauling performance management processes.

## 12.2 Model of the Westminster system

The model in Figure 15 depicts the distribution of Westminster authority and accountability in a Commonwealth context)<sup>329</sup>.

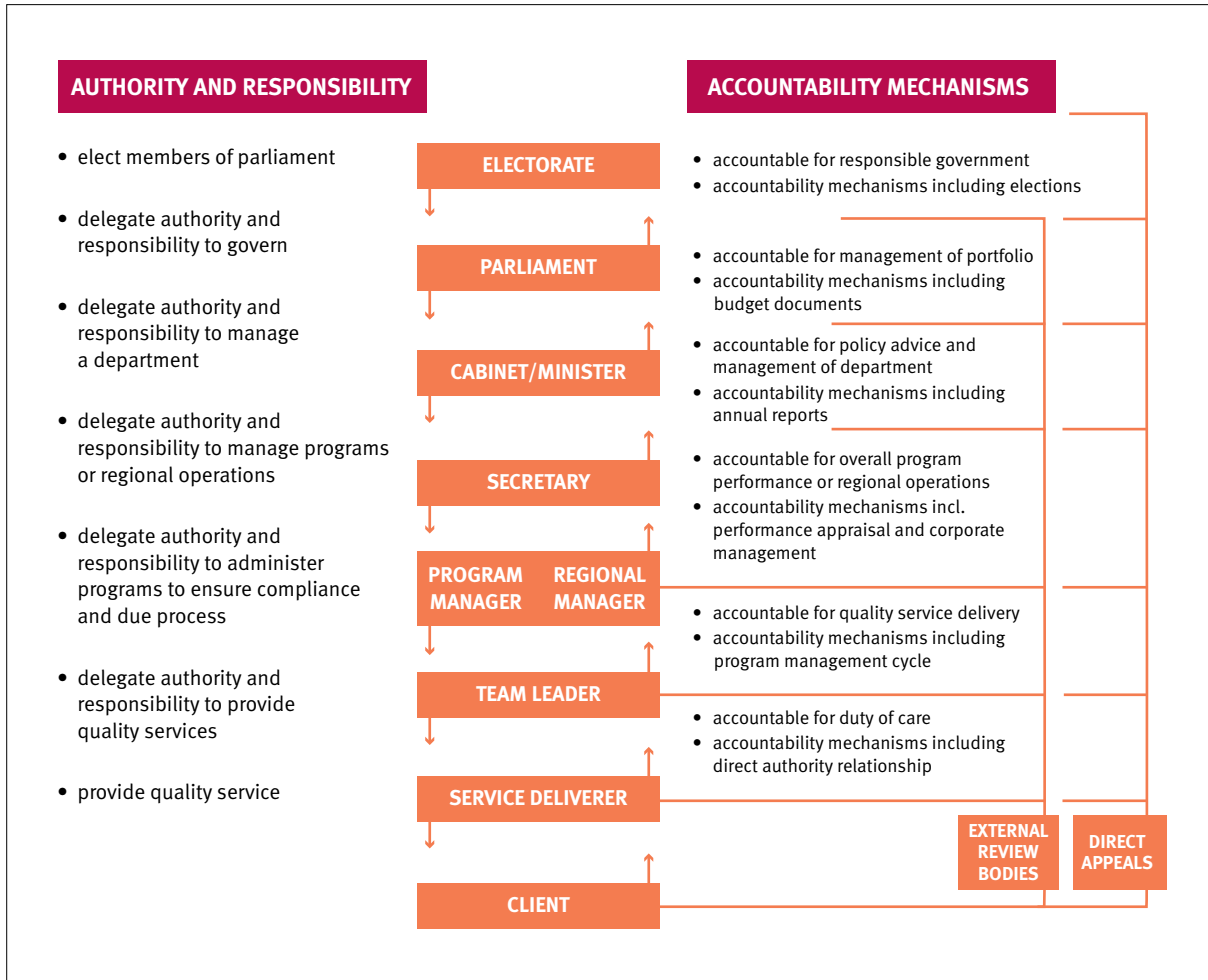


Figure 15: Authority and accountability in public employment.

329 Briggs, L. (2009) *Delivering performance and accountability*. Canberra: Australian Public Service Commission. [www.apsc.gov.au/delivering-performance-and-accountability](http://www.apsc.gov.au/delivering-performance-and-accountability).



### 12.3 How did we get here?

This section explains the rationale of the three stages from 1859 to the present day. See page 24 for the depiction of the three stages and why this rationale is important to the review.

#### 12.3.1 Stage 1: From colony to emerging state

*Public Service in Queensland can be said to have commenced with the arrival at Redcliffe on 13 September 1824 of the brig “Amity” from Sydney, carrying the first convicts, for settlement at Moreton Bay. The few persons in charge and performing services in association with the settlement, although then employed and paid by the Government of New South Wales, constituted the first Public Service in that part of the Colony of New South Wales which was to become in 1859 the Colony and subsequently the State of Queensland<sup>330</sup>.*

Governor Bowen’s principles were displaced by the practices under the *Civil Service Act 1863* passed by the second Parliament, following an election held that year. The Act lacked the merit concept, replacing it with probation, and abolished entrance examinations. A patronage system developed.

Dissatisfaction with the capacity and quality of the public service was noted by the Premier, Robert Herbert<sup>331</sup>, and a Select Committee on the Working and Organisation of the Civil Service in 1866. Nonetheless, many ministers apparently enjoyed the patronage system:

*Ministers could and did make cronyistic appointments outside of the rules and had the power to effectively make arbitrary dismissals by judging a staff member to be “unfit” for the service<sup>332</sup>.*

The Act was repealed in 1869, the statutory formalities apparently being unnecessary for a small service under

direct political control<sup>333</sup>. Public employment was unregulated, based on personal contract until 1889 when a board was established under the *Civil Service Act 1889*<sup>334</sup>, replaced later by the *Public Service Act 1896* in largely the same terms.

The Act brought notions of a career service but practices still favoured patronage and exemptions from examination. The 1896 change from a civil service to a public service did not improve things: political patronage rose with support from the highest levels.

Ministers remained intimately involved in employment decisions and management, culminating in abolition of the independent board in 1901, replaced by a ministerial board, entrenching political control of the public service.

#### 12.3.2 Stage 2: The strong centre

In 1918–19, JD Story’s Royal Commission into the classification and allowances payable to public service officers resulted in a new, strong model of central control and a commitment to a professional service appointed on merit. This was a time of great civil service reform in Australia, the United Kingdom and the United States.

The Queensland reforms were not only needed but were progressive, albeit built on a very powerful centre under control of an appointed official. Story became the first Commissioner under the new *Public Service Act 1922* until his retirement in 1939. That Act, amended from time to time (including resurrection of a three-member board in 1968), governed public service employment for almost 70 years.

Story and later public service leaders presided over top-down institutions. The centre controlled and could and did intervene. Public service numbers were managed by the centre through ‘establishment control’:

- 330 D.W. Fraser (1963), former Public Service Commissioner, “Early public service in Queensland”, paper read at meeting of the Royal Historical Society, 11 April 1963.
- 331 Knox, B.A. (1972) “Herbert, Sir Robert George Wyndham (1831–1905)”. *Australian Dictionary of Biography*, vol. 4, Melbourne: MUP. [adb.anu.edu.au/biography/herbert-sir-robert-george-wyndham-3757](http://adb.anu.edu.au/biography/herbert-sir-robert-george-wyndham-3757). See also Kieza, G. (2017) “Queensland’s first Premier, Robert Herbert, led the same-sex charge”. *Courier-Mail* 1 October 2017.
- 332 Lauchs, M., & Staines, Z. (2009) “Public sector legislation in Queensland: old or new directions”. In Proceedings of the 2009 IPAA National Conference, Institute of Public Administration Australia, p. 1–2.
- 333 For a more detailed explanation of the reasons, including a power struggle between civil servants and the political class see Gough, T. (2010) *Queensland Journal of Labour History* 11, pp. 32–41.
- 334 Following a Royal Commission into *Classification of Officers of the Public Service and the Mode of Keeping the Public Accounts of the Colony*. That Commission censured the under secretary and chief inspector of education for their failures to plan for and initiate reforms of education, paving the way for JD Story’s rise to under-secretary.

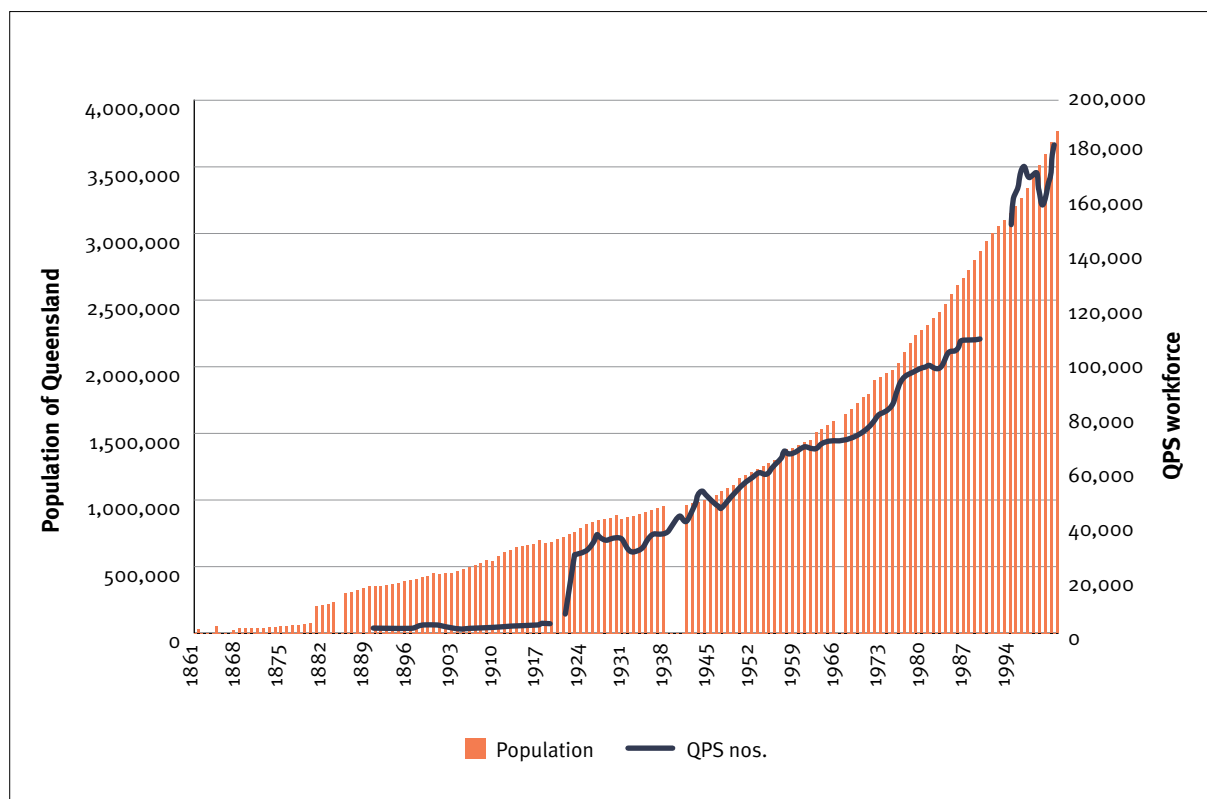


Figure 16: Queensland population profile and public service numbers, 1860–2000<sup>340</sup>.

the maintenance of lists of employees, and numbers limited by classification and location<sup>335</sup>.

Such a system was bound to feel strain as the size of the public service grew to meet an expanding populace (see Figure 16)<sup>336</sup> and new ways of thinking about public administration emerged.

### 12.3.3 Stage 3: New public management: structuralism and devolution

By the late 1980s, public administrative thinking had evolved. The Whitehall model that laid the foundations of every Australian jurisdiction's public services had been shaken up by the Thatcher Government's efficiency drives and managerial devolution<sup>337</sup>.

335 This was a serious exercise. The Public Service lists that are still available for various years from 1864 to 1948 were detailed and "include the salary (and various allowances), the date from which the salary was received, the date of appointment to present office, and whether under Public Service Acts or excluded from Acts. Qualifications, where appropriate are also recorded. Many entries provide additional information about the officer in footnotes – some explaining the allowances received (for example, mileage allowance for use of own motor car (9d. per mile) and others relating to previous positions held." (Quote from commercial genealogy website.) The lists are accessible through the State Library of Queensland.

336 Generated from Australian Bureau of Statistics (2018) *Australian Demographic Statistics* (cat. no. 3101.0). Population in mid-March 2019 was almost 5.1 million: [www.qgso.qld.gov.au/products/reports/pop-growth-qld/qld-pop-counter.php](http://www.qgso.qld.gov.au/products/reports/pop-growth-qld/qld-pop-counter.php)

337 See e.g. Dorey, P. (2015) "The legacy of Thatcherism: Public sector reform". *L'Observatoire de la société britannique*, 17, 33–60; Burton, M. (2013) *The Politics of Public Sector Reform: From Thatcher to the Coalition*. London: Palgrave Macmillan Limited.

340 The post-1917 jump in numbers is due to changes in the way the workforce was calculated, for example to include railway workers. The drop in the 1940s is due to the exclusion of officers on war service. Gaps in the data are because information was not collected during the period.

Locally, the Public Service Board's authority was challenged by a dominant Treasury, determined to bring business-like management informed by public choice theory<sup>339</sup> to the fore.

The Bjelke-Petersen Government commissioned a public sector review, chaired by Ernest Savage who was a trustee of the ruling National Party<sup>340</sup>.

His appointment proved politically contentious, especially once he fell out with the Premier<sup>341</sup>.

### Ahern Government

Savage's review was published in 1987 and accepted in large part. The Public Service Board was effectively abolished in 1987 by interim legislation.

A new *Public Service Management and Employment Act 1989* heavily influenced by, or actually under the control of, Treasury<sup>342</sup>, was adopted by the Ahern Government following Bjelke-Petersen's fall from power in December 1987.

Commissioner Tony Fitzgerald, reporting in July 1989, was supportive<sup>343</sup>. He said the Act:

*considerably reforms the administration of the public service in this State. All the reforms are consistent with modern theories of public administration: the reduction in the role of central agencies such as the Public Service Board, the increase in responsibility for efficient administration by chief executives, the employment of people by contract, the creation of a redeployment/redundancy scheme, and promotion by merit alone*<sup>344</sup>.

The Act adopted aspects of what is now called the new public management, the application of public choice theory to public administration. In particular the Act brought: a strong performance and planning focus; emphasis on fiscal control and financial management; decentralisation of employment power and accountability and enhanced freedom to manage at agency level; and separation of political and administrative domains in employment.

Many of these features remain intact to this day. The Act was, however, cautious on the more radical public choice theory reforms such as contracting out, political appointment at senior levels, privatisation of public services and incentive-based management<sup>345</sup>.

339 For an overview of public choice theory see Shughart, W.F. (2018). "Public choice". *The Library of economics and liberty*. [www.econlib.org/library/Enc/PublicChoice.html](http://www.econlib.org/library/Enc/PublicChoice.html). For a critique see Pressman, W.F. (2004). "What is wrong with public choice". *Journal of Post Keynesian Economics*, 27(1), pp. 3–18; and Schwartz, H.M. (1994). "Public Choice Theory and Public Choices: Bureaucrats and State Reorganization in Australia, Denmark, New Zealand, and Sweden in the 1980s". *Administration and Society*, 26(1), pp. 48–77.

340 Other committee members were Gordon Douglas, Sugar Board Head and former Public Service Board Chairman John Andrews, and one of the Public Service Board Commissioners and former Private Secretary to the Premier, Russ Roberts, who was later appointed Director, Office of Public Service Personnel Management.

341 Ministerial Statement by the Premier, Sir Joh Bjelke-Petersen, *Hansard*, 20 Nov 1987, 4673–4764.

342 The Bill was introduced by the Minister for Finance, Brian Austin, rather than the Premier. See also Warburton, N. (1987) Second reading debate on the Public Service (Board's Powers and Functions) Bill, *Hansard*, 20 November 1987, 4700–4701, citing an unnamed Treasury source as saying "We managed to kill off the Public Service Board. We now want to see it through to the bitter end by being in absolute control of the legislation" (this was the last parliamentary sitting day for Premier Bjelke-Petersen); Knox, W. (1987) *op cit.*, 4701. The Director of the Office, Russ Roberts denied Treasury developed the Act but admitted the Savage recommendations accepted Treasury's submission over the Public Service Board's: see Colley, L. (2004) *Myth, monolith or normative model? Evolution of the career service model of employment in the Queensland Public Service 1859–2000*. Unpublished PhD Thesis, Griffith University, p. 198.

343 Hede, A. (1993) "Managerial and equity reform of the public sector" in Stevens, B. & Wanna, J. (eds), *The Goss Government: Promise and Performance of Labor in Queensland*, Macmillan Education, Melbourne. That support was used politically to justify abolition of the reformist PSMC by the Borbidge government.

344 *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct* (1989), Government Printer, Brisbane, 131 ("Fitzgerald report").

345 For a more detailed discussion in the national and international contexts see Johnston, J. (2000) "The New Public Management in Australia". *Administrative Theory and Praxis*, 22(2) 345–368; Gruening, G. (2001) "Origin and theoretical basis of New Public Management". *International Public Management Journal*, 4, 1–25; Colley, L. (2005) "Reworking merit: Changes in approaches to merit in Queensland public service employment 1988 to 2000". Proceedings of the 19th Association of Industrial Relations Academics of Australia and New Zealand Conference, Sydney, 140.

An Office of Public Service Personnel Management replaced the Public Service Board, central personnel administration was considerably weakened, and career public service traditions loosened<sup>346</sup>, including employment on contract for chief executives and other senior positions.

Senior appointments to the Office were criticised as overtly political<sup>347</sup>. Importantly, employment authority was devolved to departmental chief executives, mostly then called Under Secretary or Director-General.

### Goss Government

The Goss Government's *Public Sector Management Commission Act 1990* established a new, strong central personnel agency, the Public Sector Management Commission (PSMC).

The *Public Sector Legislation Amendment Act 1991* introduced a Senior Executive Service and adjusted retrenchment provisions<sup>348</sup>, but the 1989 Act governing the employment relationship otherwise remained largely intact.

The PSMC was:

*a reforming agency which conducted wide-ranging departmental reviews, established a Senior Executive Service, created a number of public sector standards, introduced equal employment opportunity policies and placed a greater emphasis on training within the public sector*<sup>349</sup>.

The PSMC, like its predecessor Office of Public Service Personnel Management, was politically contentious, fed in part by resistance to the reform agenda<sup>350</sup>.

### Borbidge Government

In 1996, the Borbidge Government repealed the PSMC Act and passed the *Public Service Act 1996*, effectively reverting to the 1989 model with a new, less powerful central personnel agency<sup>351</sup> and strong reliance on devolved authority and financial management.

### Beattie Government

The 1996 Act remained in place for the entirety of the Beattie Government's four terms, but during its third term a stronger central agency was partly revived in the form of a Service Delivery and Performance Commission (SDPC), established in 2005, with a remit of performance reviews of agencies and functions.

### Bligh Government

The current Act, passed in 2008 in Premier Anna Bligh's first year as Premier, largely reflected the 1996 Act but also incorporated the SDPC functions back into the Public Service Commission, yielding the highly technical and procedural review processes in the current Act<sup>352</sup>.

Advice from the Department of the Premier and Cabinet to this review is that the Bill was prepared in haste, largely to implement the policy decision to abolish the SDPC and to prepare for the forthcoming major shakeup of departments.

In 2009, there was a major restructuring of departments: 23 departments were reshaped into a complicated web of responsibilities between 18 ministers and 13 departments arranged in six clusters<sup>353</sup>. Voluntary redundancies were offered especially to senior executives and senior officers in corporate support and business support roles.

346 Colley, L. (2005) *op cit.*, 142.

347 Warburton, N. (1987) Second reading debate on the Public Service (Board's Powers and Functions) Bill, *Hansard*, 20 November 1987, 4699. Coaldrake, P. (1989) *Working the system: Government in Queensland*. St Lucia: UQP, 74–75.

348 s. 28 introduced the language of surplus employees as the measure of when redundancies might be triggered by the Governor in Council (now the departmental chief executive or the Premier).

349 Parliament of Queensland (2015) *Queensland's public sector*. Fact Sheet 4.5.

350 Wanna, J. (1992) "Trust, Distrust and Public Sector Reform: Labor's Managerialism in Queensland". *Policy, Organisation and Society*, 5:1, 74–82.

351 Public Service Commissioner supported by an Office of the Public Service.

352 ss. 3(2)(b)(ii), 36(1)(d) and (e), 37–41, 46(1)(e), (ea) and (k), 58(2)(a), 62(3)(a), ch. 3 div. 4 (ss. 80–87), ch. 3 pt. 6 (ss. 88H–88N).

353 Bligh, A. (2009) "Bligh reforms continue with public service restructure". Media statement 26 March 2009. [statements.qld.gov.au/Statement/Id/63159](http://statements.qld.gov.au/Statement/Id/63159).

Chief executives continued to hold significant devolved authority, but in the complicated arrangements, the next level, deputy director-general and associate director-general<sup>354</sup>, assumed much larger operational accountabilities.

A suite of integrity legislation provided for protection of public interest disclosures, strengthening the Integrity Commissioner and separation of employment in political offices, and restatement of the public sector ethics principles.

### **Newman Government**

Premier Campbell Newman promised in the 2012 campaign to abolish the matrix model of departments and ministers. He implemented that promise in the first set of administrative arrangements of the new government. The Bligh matrix model was unpicked: 19 ministers sat atop 20 departments<sup>355</sup>.

However, the strong content-focused deputy director-general role continued, as it does to this day. Some things are very hard to undo in public employment, demonstrating both the power of pathway dependencies and the information asymmetry between the political and administrative domains in making decisions about the form of the public sector.

The Newman Government also oversaw the separation of health from the public service, the result of Queensland entering the national health agreement under the Bligh Government: the agreement required all states to devolve management to a local level by July 2012<sup>356</sup>.

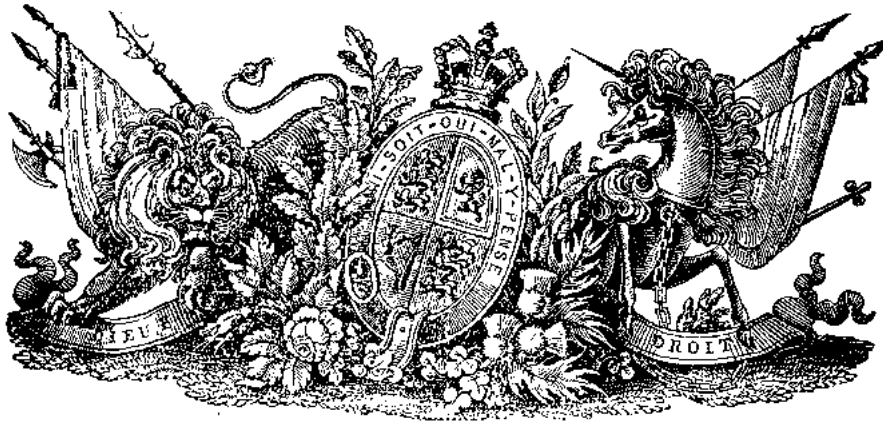
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354 Associate Director-General was a new designation largely to accommodate those chief executives under the old structure who were not appointed Director-General of the new agencies. The designation seems to have fallen out of use.

355 Police and Community Safety as two departments under the one minister.

356 Council of Australian Governments (2011) National Health Reform Agreement. [www.federalfinancialrelations.gov.au/content/npa/health/\\_archive/national-agreement.pdf](http://www.federalfinancialrelations.gov.au/content/npa/health/_archive/national-agreement.pdf).

## SUPPLEMENT.



QUEENSLAND  
**Government Gazette.**

PUBLISHED BY AUTHORITY.

No. 7.]

SATURDAY, 21 JANUARY.

[1860.

*Colonial Secretary's Office,  
 Brisbane, January 23, 1860.*

**CIVIL SERVICE OF QUEENSLAND.**

**H**IS Excellency the Governor is pleased to direct the publication for general information of the following extract from the proceedings of the Executive Council with respect to the organization of the Civil Service of Her Majesty in this Colony.

*By His Excellency's command,  
 R. G. W. HERBERT.*

*At the Government House,  
 Brisbane, 23rd January, 1860.*  
 PRESENT :

His Excellency the Governor.  
 The Honorable the Colonial Secretary.  
 The Honorable the Attorney-General.  
 The Honorable the Colonial Treasurer.

His Excellency the Governor lays before the Council the following

**MINUTE ON THE ORGANIZATION OF HER MAJESTY'S  
 CIVIL SERVICE IN THE COLONY OF QUEENSLAND.**

1. I beg to direct the attention of the Council to the expediency, for many obvious reasons, of organizing on a permanent system, Her Majesty's Civil Service in this Colony; and also of testing, according to fixed rules, the qualifications of the young men, who may, from time to time, be proposed to be appointed to the junior situations in any of the public departments.

2. I am confident that this Council will agree with me that individual merit and not patronage, or connection, should procure the first admission into Her Majesty's service of candidates for public employment; and also their subsequent promotion in the several Civil Establishments.

3. The system of competitive examinations has already been introduced with success both in the United Kingdom, and also in India, Canada, and other dependencies of the Empire. This system has been found not only calculated to secure for the public service men of good character, sound information, ability, and

efficiency; but also to apply a powerful stimulus to scholastic institutions, and to public education generally.

4. In accordance with the plan adopted in the United Kingdom, I propose that the Clerical Staff of each department shall be organized as follows:—

- I. Chief Clerk, beginning at a *minimum* of £400 and rising by £20 yearly to a *maximum* of £500 per annum.
- II. Clerks of *first class*, beginning at a *minimum* of £300, and rising by £20 yearly to a *maximum* of £450 per annum.
- III. Clerks of *second class*, beginning at a *minimum* of £200, and rising by £20 yearly to a *maximum* of £300 per annum.
- IV. Clerks of *third class*, beginning at a *minimum* of £100, and rising by £10 yearly to a *maximum* of £100 per annum.

5. The salaries recommended above are, of course, subject to the sanction of the Queensland Parliament. The important subject of the establishment of a system of superannuation allowances, such as are provided in England for old and faithful public servants, must also engage the attention of that Legislature.

6. It will also be obvious to the Council that it is not proposed to complete the above organization until the amount of business in the various public departments shall require it. At the present moment, and, probably, for some time to come, one or two clerks will be sufficient in many of the offices. But it is important to adopt *forthwith* a fixed system of classification; leaving the framework of each class to be filled up, as public business may increase.

7. I propose, moreover, that promotion from the junior to the higher classes in the several Departments shall take place only when the Chief of the Department shall have reported to the Governor in Council that the Civil officer to be promoted has been faithful and diligent in the discharge of his duties, and fully deserves this mark of the favor and approval of the Government.

8. I strongly recommend that admission to the junior or third class of clerks be procurable only by competitive examinations, open to all natural-born, or naturalised subjects of the Queen.

9. For this purpose, I propose that a Board shall be instituted, to be called the Board of Examiners for the Civil Service; and to consist of the persons for the time being filling the offices following:—

Colonial Secretary.  
Attorney-General.  
Colonial Treasurer.  
President of the Legislative Council.  
Speaker of the Legislative Assembly.

I propose, further, that three of the members of the said Board shall form a *quorum* thereof, and may exercise all the functions of the Board; and that the Clerk of the Executive Council for the time being shall act as Secretary to the said Board. The Board should be empowered, when necessary, to delegate its powers to special examiners, to be approved by the Governor.

10. The duties of the Board will be to examine all candidates for the public service who may present themselves in accordance with the following Regulations:—

11. Every candidate for admission to the junior or third class of the public service, must present written certificates, satisfactory to the Board, proving—

- A. That he is above 16 and under 25 years of age.
- B. That he is free from any physical defect or disease which would be likely to interfere with the proper discharge of his duties (Certificates to this effect must be produced from two legally recognised medical practitioners.)
- C. That his moral character is such as to qualify him for public employment. (A certificate to this effect must be produced from a legally recognised minister of religion, or from the master or tutor under whom the candidate may have been educated.)

12. All candidates who shall have complied with the above Regulations will be subjected to an examination, during two successive days, by the Board; and those who shall have satisfactorily passed the examination will be appointed, in order of merit, to fill any vacancies which may exist in the junior grade of the public service.

13. The following shall be the indispensably necessary subjects of examination, in which all candidates must satisfy the Board:—

- A. Exercises designed to test handwriting and orthography. (Every candidate must show that he can write a clear, bold hand, and that he can spell correctly from dictation).

B. Arithmetic, including vulgar and decimal fractions.

C. Geography, especially that of the British Empire generally, and of the Australian Colonies in particular.

D. The outlines of English history, including the history and political institutions of the Australian Colonies.

E. English composition, especially the power of writing letters on official business, and of making a *précis* or digest, in the form of a narrative, of official correspondence.

14. In addition to the above subjects, indispensable for all, each candidate may offer himself for examination, at his own option, in one or more of the following subjects:—

- A. Latin.
- B. Greek.
- C. One modern language, which must be either French, or German, or Italian.
- D. Pure and mixed Mathematics.
- E. Physical Science and Civil Engineering.

G. F. BOWEN.

The Council express their entire concurrence in the views of His Excellency the Governor, and advise that the foregoing minute be published in the *Government Gazette*, with a notification of an examination to be held of the candidates for such third class clerkships as may be required in the public offices.

A. ORPEN MORIARTY,  
Clerk of the Executive Council.

*Colonial Secretary's Office,  
Brisbane, 23rd January, 1860.*

#### CIVIL SERVICE OF QUEENSLAND.

With reference to the minute this day published respecting the Civil Service of Queensland, His Excellency the Governor directs it to be notified that four third class Clerks will shortly be required for Her Majesty's Civil Service in this Colony; viz., one Clerk in the office of the Colonial Secretary, one in that of the Surveyor-General, one in that of the Legislative Council, and one in that of the Legislative Assembly.

All natural-born and naturalized subjects of the Queen who desire to be candidates in accordance with the regulations prescribed as above for that purpose, and published in the *Queensland Government Gazette*, will transmit the required certificates of age, health, and moral character (see paragraph 11 of the Minute of His Excellency the Governor), on or before the 1st day of March, 1860, under cover to the Clerk of the Executive Council, Brisbane, Queensland; and will present themselves for examination at the office of the Colonial Secretary, at Brisbane, at 11 o'clock a.m., on Tuesday, the 5th day of March, 1860.

*By His Excellency's command,*

R. G. W. HERBERT.

## 12.5 Mapping departments: 1915 to 2019

To understand both the need for stability of public administration and the need to evolve it is instructive to reflect on how the Queensland government has been organised over time.

Here are the portfolio titles in TJ Ryan's first ministry, over one hundred years ago:

- Premier, Chief Secretary, and Attorney-General
- Deputy Premier, Treasurer and Secretary for Public Works
- Secretary for Agriculture and Stock
- Secretary for Public Lands
- Secretary for Railways
- Secretary for Public Instruction
- Home Secretary<sup>357</sup>
- Secretary for Mines
- Minister without office<sup>358</sup>.

There existed 10 ministerial departments (railways and the police force were outside the technically defined public service):

- Chief Secretary's Department
- Department of Justice
- Treasury Department
- Department of Public Works
- Department of Agriculture and Stock
- Department of Public Lands
- Railways Department
- Department of Public Instruction
- Home Secretary's Department
- Department of Mines.

This structure still makes some sense in contemporary Queensland even though names have changed, and the administrative machinery has grown along with the population<sup>359</sup>.

The following mapping is approximate only, to illustrate the relative stability of government over more than 100 years. The 'no equivalents' appear to reflect the contemporary emphasis on:

- social policy
- economic stimulation
- technological change.

357 The Home Secretary is one of the so-called 'Great Offices' of the UK Government (the others are Prime Minister, Chancellor of the Exchequer and Foreign Secretary), and in the UK is responsible for (among other things) migration, policing and national security. In the Queensland context, the Home Secretary assumed the responsibilities of the former Colonial Secretary in 1896, and was responsible for health, welfare, local governments and courts, police and prisons, aborigines, recreation, and internal administration of government. It later evolved into Health and Home Affairs in 1935 and the Health Department from 1963, with other functions assuming greater importance and their own ministers. See, e.g., Robinson, R. H (1959) "Highlights of the home secretary's department in Queensland", *Journal of the Royal Historical Society of Queensland*, 6(1), 122–129.

358 A contemporary equivalent might be Special Minister of State (e.g. Minister Hawke in the Morrison Government; Minister Jennings in the Andrews Government).

359 The population of Queensland as at 31 December 1915 was 676,707 "not including full-blooded Aborigines": *Brisbane Courier* 2 June 1915, p. 6. It is now over five million: [www.qgso.qld.gov.au/products/reports/pop-growth-qld/qld-pop-counter.php](http://www.qgso.qld.gov.au/products/reports/pop-growth-qld/qld-pop-counter.php). See also Figure 16 above.



Table 10: Comparison of the First Ryan Ministry (1915) and the Second Palaszczuk Ministry (2019).

<b>First Ryan Government 1915</b>	<b>Second Palaszczuk Government 2019</b>
Chief Secretary's Department	Department of the Premier and Cabinet
Department of Justice	Department of Justice and Attorney-General
Treasury Department	Queensland Treasury
Department of Public Works	Department of Housing and Public Works
Department of Agriculture and Stock	Department of Agriculture and Fisheries
Railways Department	Department of Transport and Main Roads
Department of Public Instruction	Department of Education
Home Secretary's Department	Queensland Health Queensland Police Service Queensland Corrective Services Queensland Fire and Emergency Services Department of Aboriginal and Torres Strait Islander Partnerships Department of Local Government, Racing and Multicultural Affairs
Department of Mines Department of Public Lands	Department of Natural Resources, Mines and Energy
No equivalent in 1915	Department of Child Safety, Youth and Women Department of Communities, Disability Services and Seniors Department of Employment, Small Business and Training Department of Environment and Science Department of Innovation, Tourism Industry Development and the Commonwealth Games

## 12.6 Challenges for new managers

Figure 17 is a representation of the challenges facing new managers in US business environments, developed by Professor Linda Hill of the Harvard Business School<sup>360</sup>, but illuminating also in the Australian public administration context, especially if one were to add emphasis on the importance of influence over power, the pyramidal necessity of Westminster organisational form, and accountability and responsibility.

Figure 17: Challenges for new managers.

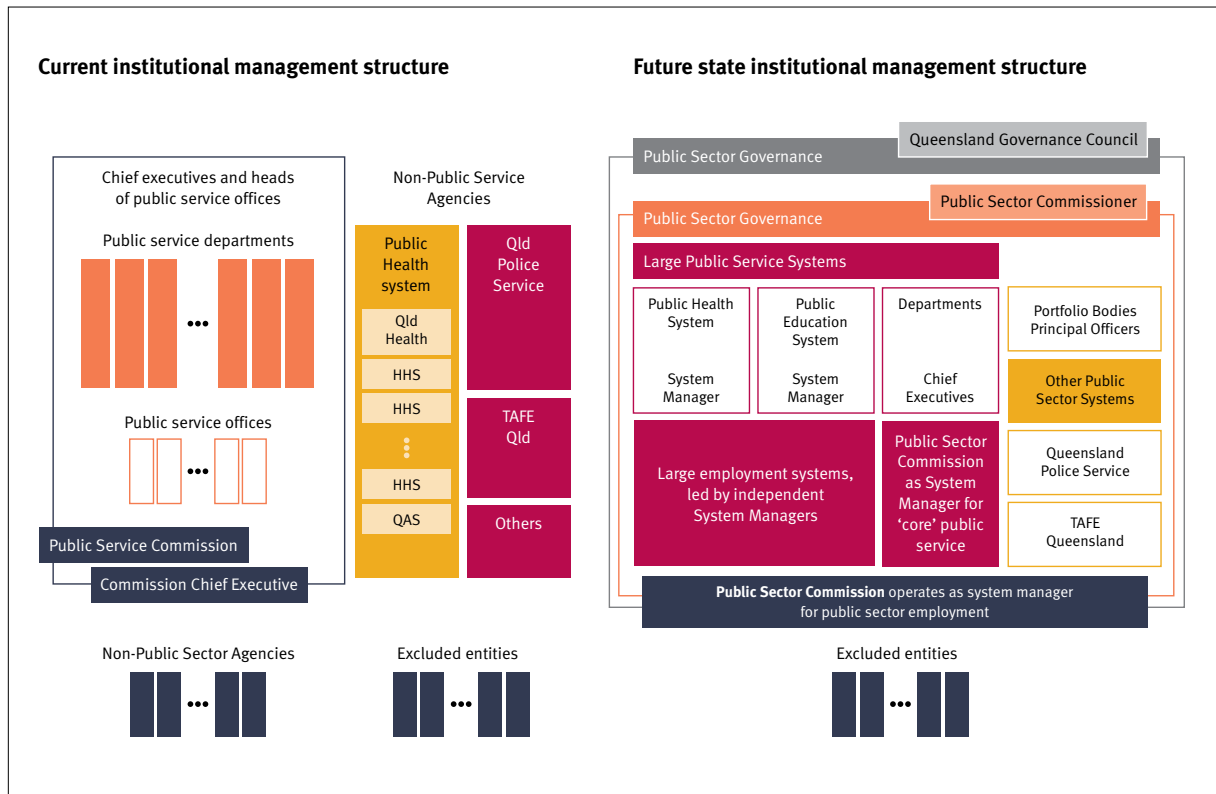
	MYTH	REALITY
<i>Defining characteristic of the new role</i>	<b>Authority</b> “Now I will have the freedom to implement my ideas”	<b>Interdependency</b> “It’s humbling that someone who works for me could get me fired.”
<i>Source of power</i>	<b>Formal authority</b> “I will finally be on top of the ladder.”	<b>“Everything but”</b> “Folks were wary, and you really had to earn it.”
<i>Desired outcome</i>	<b>Control</b> “I must get compliance from my subordinates.”	<b>Commitment</b> “Compliance does not equal commitment.”
<i>Managerial focus</i>	<b>Managing one-on-one</b> “My role is to build relationships with individual subordinates.”	<b>Leading the team</b> “I need to create a culture that will allow the group to fulfill its potential.”
<i>Key challenge</i>	<b>Keeping the operation in working order</b> “My job is to make sure the operation runs smoothly.”	<b>Making changes that will make the team perform better</b> “I am responsible for initiating changes to enhance the group’s performance.”

360 Hill, L.A. (2007) “Becoming the boss”. *Harvard Business Review*, January, pp. 2–10, at 4. See also Hill, L.A. (2003) *Becoming a Manager: How New Managers Master the Challenges of Leadership*. Boston: Harvard Business School Press.; Hill, L.A. & Lineback, K. (2011) *Being the Boss: The 3 Imperatives for Becoming a Great Leader*. Boston: Harvard Business School Press.

## 12.7 Institutional arrangements

Figure 18 is a representation of the proposed changes in institutional arrangements. It contrasts the existing, fragmented system with the proposed model of more integrated system management. It should be viewed in conjunction with the recommendations in this final report.

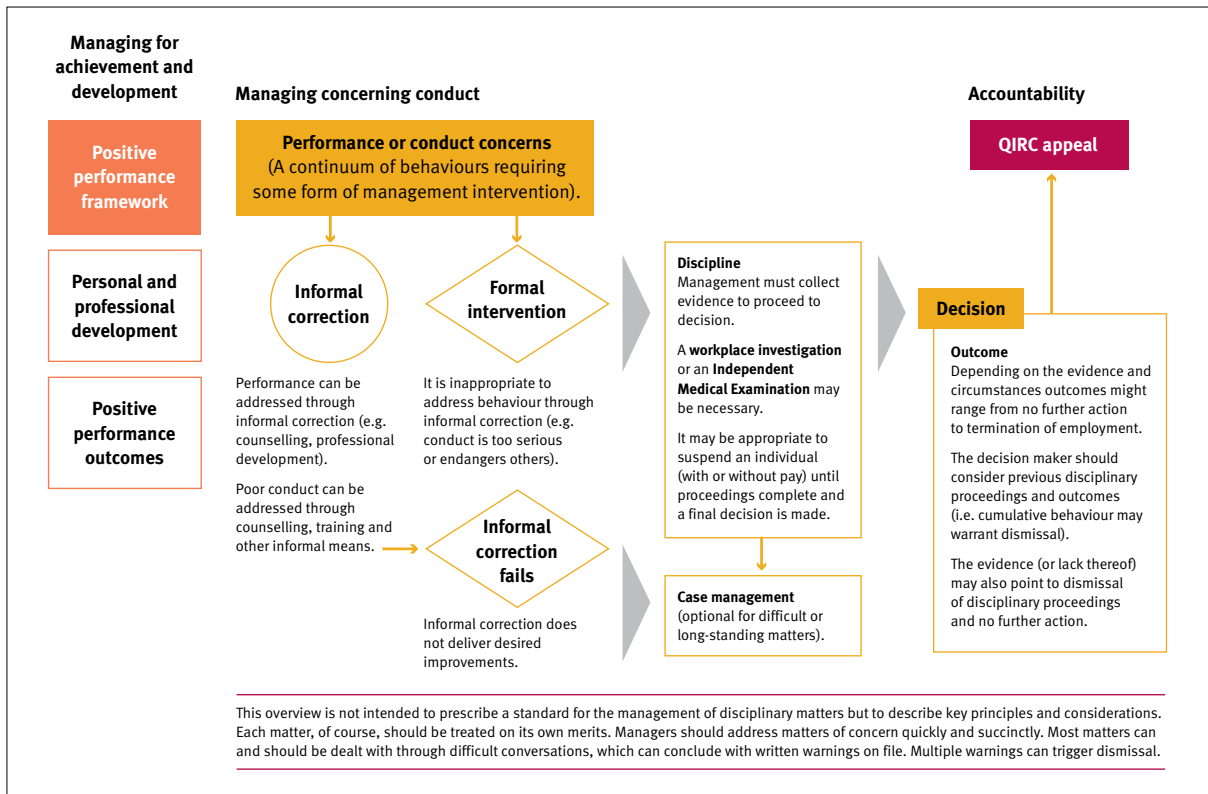
Figure 18: Institutional arrangements.



## 12.8 Discipline flowchart

Figure 19 is a high-level, simplified representation of the proposed disciplinary model set out in this review. Of course, every disciplinary matter should be addressed on its own merits, but general principles should apply across the board. The following figure is attached as a simple aid for managers, though it is hoped that the Public Sector Commission, working in concert with the other large employment system managers and all departments, will build on this foundation with more detailed practical advice for managers.

Figure 19: Performance management and discipline.



### Abbreviations used in this paper

CE; CEO	Chief Executive; Chief Executive Officer
DAF	Department of Agriculture and Fisheries
DATSIP	Department of Aboriginal and Torres Strait Islander Partnerships
DCDSS	Department of Communities, Disability Services and Seniors
DCSYW	Department of Child Safety, Youth and Women
DES	Department of Environment and Science
DESBT	Department of Employment, Small Business and Training
DG	Director-General
DHPW	Department of Housing and Public Works
DITICG	Department of Innovation, Tourism Industry Development and the Commonwealth Games
DJAG	Department of Justice and Attorney-General
DLGRMA	Department of Local Government, Racing and Multicultural Affairs
DNRME	Department of Natural Resources, Mines and Energy
DoE	Department of Education
DPC	Department of the Premier and Cabinet
DSDMIP	Department of State Development, Manufacturing, Infrastructure and Planning
DTMR	Department of Transport and Main Roads
EEO	Equality of employment opportunity
FTE	full-time equivalent (employee)
HHS	Hospital and Health Service
HR; HRM	human resource(s); human resource management
IME	independent medical examination
MoG	machinery of government
PSBA	Public Safety Business Agency
PSC	Public Service Commission
PSMC	Public Sector Management Commission (1990–1996)
QCS	Queensland Corrective Services
QFES	Queensland Fire and Emergency Services
QH	Queensland Health
QIRC	Queensland Industrial Relations Commission
QPS	Queensland Police Service
QT	Queensland Treasury
SES	Senior Executive Service
SO	Senior Officer

