Five-year Review of Queensland's Industrial Relations Act 2016

Final Report

November 2021

25 October 2021

The Honourable Grace Grace
Minister for Education
Minister for Industrial Relations
Minister for Racing

1 William Street
Brisbane Queensland 4000

Dear Minister,

Pursuant to the announcement on 3 May 2021 by the Honourable Anastasia Palaszczuk, Premier and Minister for the Olympics, and yourself to initiate a review of the operation of the Queensland *Industrial Relations Act 2016* we are pleased to present you with our *Five-year Review of Queensland's Industrial Relations Act 2016 – Final Report*.

We take this opportunity to express our appreciation to all stakeholders for their contribution to the review. We also express our gratitude to Professors David Peetz and Gillian Whitehouse for their expert assistance and our gratitude to the officers of the Office of Industrial Relations for their assistance and support throughout the Review.

Yours sincerely

Linda Lavarch

John Thompson

Acknowledgements

As the independent reviewers, we would like to acknowledge Professors David Peetz and Gillian Whitehouse for their valuable input.

We would like to acknowledge the work of staff within the Office of Industrial Relations, particularly Mrs Kelly Stoertzer and Ms Melissa Dawson who provided secretariat support and worked diligently to develop the draft contents of this Final Report, Ms Nada Dobric for ensuring we had access to all the necessary equipment to perform our role, and all policy officers who provided us with background material and analysis of the legislation for the purposes of the review. We would also like to acknowledge the support of Mr Rhett Moxham, Director (Industrial Relations Strategic Policy) and Mr Tony James, Executive Director (Industrial Relations) from the Office of Industrial Relations during the review.

Our sincere thanks and appreciation to all stakeholders who contributed their time and expertise during the consultation process for the review.

Contents

Glossary

2015 McGowan Review	*A Review of the Industrial Relations Framework in Queensland – A report of the Industrial Relations Legislative Reform Reference Group*
ABS	Australian Bureau of Statistics
AD Act	*Anti-Discrimination Act 1991* (Qld)
Agency/Agencies	Queensland public sector agency
AHRC	Australian Human Rights Commission
AI Act	*Associations Incorporation Act 1981* (Qld)
Ai Group	Australian Industry Group
ALA	Australian Lawyers Alliance
ASMOFQ	Australian Salaried Medical Officers' Federation Queensland
AWR	Annual Wage Review
AWU	Australian Workers' Union
BAQ	Bar Association of Queensland
BCC	Brisbane City Council
BRQ	Basic Rights Queensland
Bridgman Review	*A fair and responsive public service for all – Independent review of Queensland's state employment laws – May 2019*
CCIQ	Chamber of Commerce and Industry Queensland
CFMEU	Construction, Forestry, Mining and Energy Union
DFV	Domestic and family violence
DJAG	Department of Justice and Attorney-General
ERP	Equal Remuneration Principle
ETU	Electrical Trades Union
FW Act	*Fair Work Act 2009* (Cth)
FWC	Fair Work Commission
GE Act	*Gender Equality Act 2020* (Vic)
GOBO	*Apprentices' and Trainees' Wages and Conditions (Queensland Government Departments and Certain Government Entities) Order 2003*
HHS	Hospital and Health Service
HR Act	*Human Rights Act 2019* (Qld)
IC Act	*Independent Contractors Act 2006* (Cth)
IC Regulation	Independent Contractors Regulation 2016 (Cth)
ILO	International Labour Organisation
IR Act	*Industrial Relations Act 2016* (Qld)
IR Regulation	Industrial Relations Regulation 2018 (Qld)
LGAQ	Local Government Association of Queensland
MBQ	Master Builders Queensland
NES	National Employment Standards
NMW	National Minimum Wage
NSW	New South Wales
NSW IR Act	*Industrial Relations Act 1996* (NSW)
NSWIRC	New South Wales Industrial Relations Commission
OBO	*Order – Apprentices' and Trainees' Wages and Conditions (Excluding Certain Queensland Government Entities) 2003*
OIR	Office of Industrial Relations

PGEU	Plumbers & Gasfitters Employees' Union Queensland
PS Act	*Public Service Act 2008* (Qld)
PSC	Public Service Commission
QCU	Queensland Council of Unions
QES	Queensland Employment Standards
QH	Queensland Health
QHRC	Queensland Human Rights Commission
QIRC	Queensland Industrial Relations Commission
QIRCC	Queensland Industrial Relations Consultative Committee
QLS	Queensland Law Society
QNMU	Queensland Nurses and Midwives' Union
QPU	Queensland Police Union
QTU	Queensland Teachers' Union
***Respect@Work* Act**	*Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021*
***Respect@Work* National Report**	Australian Human Rights Commission 2020 – *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*
A Roadmap for Respect	*A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces*
RTBU	Rail, Tram and Bus Union
SD Act	*Sex Discrimination Act 1984* (Cth)
SMW	State Minimum Wage
Supply of Tools Order	*Supply of Tools to Apprentices – Order (No. B1849 of 1997)*
SWC	State Wage Case
The Report	*Five-year Review of Queensland's Industrial Relations Act 2016 – Final Report*
The Review	*Review of Queensland's Industrial Relations Act 2016*
ToR	Terms of Reference
TWU	Transport Workers Union
TQ	Together Queensland
UFUQ	United Firefighters Union Queensland
UWU	United Workers Union
VCAT	Victorian Civil and Administrative Tribunal
VSBC	Victorian Small Business Commission
WIV	Wage Inspectorate Victoria
Wage Theft Act	*Criminal Code and Other Legislative Amendments (Wage Theft) Act 2020* (Qld)
Wage Theft Report	*A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland* – Report No. 9, 56th Parliament Education, Employment and Small Business Committee (November 2018)
WCR Act	*Workers' Compensation and Rehabilitation Act 2003* (Qld)
WLAQ	Women Lawyers Association of Queensland
WWQ	Working Women Queensland

Executive summary

On 3 May 2021, the Honourable Anastasia Palaszczuk, Premier of Queensland and Minister for the Olympics, and the Honourable Grace Grace, Minister for Education, Minister for Industrial Relations and Minister for Racing announced a review of the *Industrial Relations Act 2016* (the Review).

Subsequently, the Honourable Grace Grace MP, instructed us to inquire into and report on the operation of Queensland's *Industrial Relations Act 2016* (the IR Act).

The IR Act was passed by the Queensland Parliament on 1 December 2016 with most provisions commencing on 1 March 2017. The Government considered that it was now timely to review the operation and performance of the provisions of the IR Act.

The 2015 review of Queensland's industrial relations laws and tribunals was the first comprehensive review of the legislation since the 1998 Gardner review which informed the development of the *Industrial Relations Act 1999*. The 2015 review came after significant changes to the state industrial relations system brought about by the federal 'WorkChoices' laws and the later referral of the residual private sector industrial relations to the federal system.

The 2016 Act aimed to restore balance and fairness for Queensland public sector and local government workers by implementing many of the key recommendations from the 2015 McGowan Review to:

- recognise collective bargaining as the cornerstone for setting wages and conditions
- enshrine minimum employment conditions and standards
- provide a right to fair treatment, general protections, workplace related anti-discrimination matters and anti-bullying protections in the state's industrial relations jurisdiction
- introduce a right for all workers to request flexible work arrangements and a right to paid leave for victims of domestic and family violence
- ensure effective, transparent, and accountable governance and reporting for registered industrial organisations and employer associations
- support a strong and effective independent umpire in the Queensland Industrial Relations Commission (QIRC).

This *Five-year Review of Queensland's Industrial Relations Act 2016* (the Review) is the first in the five years since the IR Act was passed and occurs at an appropriate time to look at the operation and performance of the provisions of the IR Act and how its provisions contribute to its main purpose (set out in section 3 of the IR Act) as well as new developments in the intervening years. There is a particular focus on sexual harassment, registered organisations, gender equity and protections for precarious workers, as outlined in the initial announcement of the Review. There are several other issues that have arisen with the operation of the IR Act, most having been identified in the terms of reference, and we address these in the course of our *Five-year Review of Queensland's Industrial Relations Act 2016 – Final Report*.

The Report makes 40 recommendations arising from targeted consultation with key stakeholders. The Review was well received throughout consultation, with stakeholders indicating appreciation for the Minister's initiative to establish the Review and reporting general satisfaction with the operation of the IR Act.

Stakeholders noted that the IR Act is operating as intended since the 2015 McGowan Review and also noted several areas where the IR Act may be updated to better reflect evolving community standards for the workplace.

A summary of the report's key findings and recommendations follows.

Sexual harassment

Much of the Queensland Government's response and key actions to the recommendations of the *Respect@Work* National Report are encompassed by other legislation and are being considered in concurrent reviews such as the Queensland Human Rights Commission (QHRC) review into the *Anti-Discrimination Act 1991*. However, within the scope of this Review, we have identified a number of issues specific to the IR Act that warranted further action.

What we can do within the IR Act is as follows:

- ensure that the objects of the IR Act reflect the importance of dealing with sexual and sex-based harassment
- ensure that the definitions of sexual harassment and discrimination in the IR Act are consistent with those in the main legislation dealing with those issues
- ensure that the QIRC has the same capacity to deal with sexual harassment as it has to deal with other matters.

Accordingly, we recommend that prevention of sexual harassment and sex-based harassment be explicitly included in the objects of the IR Act and propose to simplify the definition of 'discrimination' as presently defined in Schedule 5 of the IR Act.

The QIRC, unlike the Fair Work Commission, has the capacity to deal with individual grievances or disputes through the exercise of its general powers of conciliation and arbitration of an 'industrial matter' under the IR Act. We recommend the inclusion of sexual harassment as an industrial matter to facilitate access to orders (interlocutory orders or interim injunctions) and to form the basis of an industrial dispute for the QIRC to exercise its normal conciliation and arbitration powers for sexual harassment and sex-based harassment complaints.

Through the general powers of the QIRC there is also the capacity to seek an injunction or an interlocutory order. Utilising well defined existing provisions will not add to any complexity or confusion for a person seeking urgent relief as could occur if new provisions were introduced. The current injunctive powers of the QIRC should be strengthened to clearly cover an application involving sexual harassment.

The lack of express reference to sexual harassment within the Act can serve as an impediment to matters proceeding to dismissal. While section 320(d) of the IR Act could arguably cover sexual harassment as a fair reason for dismissal, for ease of interpretation this should be clarified by the insertion of a legislative note to Section 320 in similar terms to the *Fair Work Act 2009* (Cth) amendment.

An education process should address court and tribunal processes, such as factors that could reduce the risk of re-traumatisation of victims in hearings, and also inform decision-making. A referral should be made to the Queensland Industrial Relations Consultative Committee (QIRCC) tasking them to identify the following which could adopt best practice in responding to sexual harassment guidance materials, educative tools, training packages and best practice case management processes, as well as considering how relevant data are best collected and presented.

The use of non-disclosure clauses (NDAs) in settlement agreements in sexual harassment matters and the challenges they create was raised throughout consultations. While there is only a limited role of the IR Act on this issue, this area requires ongoing monitoring and the development of best practice principles, with a particular role for the QIRCC on this.

Registered organisations

The IR Act promotes the primacy of registered organisations by providing a scheme whereby organisations can seek and provide representation rights for employees, including standing rights in relation to particular matters. In return for exclusive rights the IR Act in conjunction with the *Industrial Relations Regulation 2018* (IR Regulation), sets out a comprehensive system of regulation encompassing almost all aspects of registered organisations' internal operation and governance. The relevant provisions of the IR Act should:

- enable the system to operate in an orderly manner
- ensure that unions and employer organisations behave with probity and in the interests of their members, and are free from inappropriate influence
- provide a mechanism for employees to be able to act collectively and form unions that will ultimately meet the above requirements of probity and acting in the best interests of members
- discourage the recognition or misleading promotion of organisations that do not have the capability or intent to do those things.

This means that the IR Act requires:

- clear definitions of the types of organisations to which it refers
- a clear distinction to be made between registered and unregistered bodies
- substantial responsibilities accruing to registered organisations, in return for privileges, freedoms and rights of collective representation to such organisations in the system
- unregistered bodies should not have either those privileges or those responsibilities, but there should be pathways for unregistered bodies to become registered organisations and protections for people seeking to do that as a means of organising collective representation
- other organisations that do not do either of those things should be excluded from the formal operation of the system, and people in them should not be able to benefit from false claims about their role in the system.

For nascent or yet to be registered associations, protections are required for members seeking to form a union for if such protection was not provided these associations might never survive to seek registration. The general protections against adverse action by employers seeking to subvert the rights to freedom of association or to strike should be available to genuine unions, and the IR Act already recognises that some may not yet be registered. The definition of an unregistered association for the purposes of the general protections should require it be:

- an unincorporated body or entity
- formed or carried on with the principal purpose of the protection and promotion of members interests in matter concerning employment; and
- formed with the intention of registering under the IR Act.

For clarity the IR Act should make it clear that eligibility for general protections does not grant representation or any other rights in any other Part of the IR Act outside Chapter 8 Part 1 General Protections. Ensuring clarity and understanding of the role, purpose, rights and responsibilities of industrial associations (in its widest meaning) is critical to orderly operation of the industrial relations system in Queensland. In furtherance of the distinction between which rights attach we are also proposing changes to the operation of IR Act provisions to delineate between registered organisations and associations of employees by creating a new subdivision enabling orders to be made preventing a group of people or an unregistered body from purporting to be able to represent employees under the IR Act when they do not have these capabilities.

Precarious workers

The precarious situation of independent courier drivers has been of growing interest since they expanded in numbers and became enmeshed in the 'gig' or 'platform' economy. One major reason for the interest in NSW's *Industrial Relations Act 1996* Chapter 6 as a model for regulation of gig economy workers is the health and safety implications for such workers, of which it appears to have a positive effect. Chapter 6 arose from legislation passed by the NSW Parliament in 1979, that allowed the NSW Industrial Relations Commission (NSWIRC) to regulate minimum terms of contracts for owner-drivers of trucks and certain other 'contract carriers'. Chapter 6 regulation does not seek to redefine contractors as employees. Rather, it aims to find a suitable form of regulation for people who do not have employee status (and sometimes do not want employee status).

The Chapter 6 model from NSW, while more relevant to the protection of minimum standards and safety than that from the other states, is not without limitations. Most prominently, as presently framed it excludes food delivery drivers and other gig economy workers in road transport. To deal with the issue of independent courier drivers in Queensland, a version of it would have to be worded to include them. The significance of Chapter 6, however, lies in the model it provides for how regulation of the minimum conditions of a group of workers who are not employees can be achieved. Accordingly, we recommend that the Chapter 6 model be adapted for legislative use in Queensland, to cover independent courier drivers. To do this, it would be necessary for constitutional reasons to obtain an exemption from the federal government, but such exemptions have already been given to New South Wales, Victoria and Western Australia, all of whom have some form of regulation regarding contractors in the transport sector.

Collective bargaining

The main issue in collective bargaining is the persistence of gender pay inequality. Queensland is well-recognised as a leader in this area, with the IR Act providing Magistrates considerably more support for gender pay equality than its counterparts in other jurisdictions, however it risks losing its edge. The appointment of a Special Commissioner (Equity and Diversity) is an example of important action, and we recommend ways that their work can complement the needs for data and model frameworks in advancing gender equality in the Queensland system, along with improvements in good faith bargaining.

Wage recovery provisions

The implementation of the enhanced wage recovery provisions which commenced on 1 March 2021 were to be subject of consideration in the review for the purposes of ascertaining not only the effectiveness of the new provisions but to also examine the processes implemented by the Industrial Registry and the Magistrates Court in the handling of applications filed pursuant to the legislation. It became evident that a degree of difficulty existed in undertaking this task as a consequence of the relatively small number of applications filed as at 30 June 2021 in the QIRC (24 applications) and Magistrates Court (eight applications) for claims under the Fair Work legislation. Additionally, a further 17 common law employment claims were filed in the Magistrates Court of which 7 remained unresolved as of 30 June 2021.

In order to conduct a meaningful review, we are of the opinion that a reasonable sample size of applications would be required before useful conclusions could be reached and therefore our recommendation is that it would be appropriate for a review of this legislation to occur at a time beyond 1 March 2023.

Other issues

We examined a range of other issues, and recommended improvements that affected parental leave, other aspects of minimum standards, casual loadings, apprentices, single-commissioner arbitration, recovery of overpayments, coverage of the QIRC, payment of unpaid wages, redundant and superfluous provisions, and on the timing of the review of wage recovery processes.

The next section contains the full text of all the recommendations, and their link to the individual terms of reference. Our substantive report follows that.

Recommendations

Terms of Reference	Recommendation
1. Review the *Respect@ Work* National Report recommendations relevant for implementation through the Act in the state's industrial relations jurisdiction.	**Preventing and eliminating sexual harassment** 1. That section 4 of the *Industrial Relations Act 2016*, which provides how the main purpose of the Act is primarily achieved, be amended to expressly include sexual harassment so that section 4(i) states: preventing and eliminating sexual and sex-based harassment, discrimination, bullying and other unfair treatment in employment.
2. (a) Review the operation and performance of the provisions of the Act and how, in practice, different provisions are contributing to its main purpose (section 3) and to how the main purpose is primarily achieved (section 4), including investigation of protections for workers subject to sexual harassment under the Act.	**Sexual harassment protections** 2. That sexual harassment be defined in the *Industrial Relations Act 2016* using the definition of sexual harassment contained in the *Anti-Discrimination Act 1991*. 3. That the definition of 'discrimination' in Schedule 5 of the *Industrial Relations Act 2016* be amended by removing subparagraphs (b) and (c). 4. That the definition of an 'industrial matter' within the *Industrial Relations Act 2016* be amended to specifically include sexual harassment and sex-based harassment, to facilitate access to orders (interlocutory orders or interim injunctions) and to form the basis of an industrial dispute for the Queensland Industrial Relations Commission to exercise its normal conciliation and arbitration powers for sexual harassment and sex-based harassment complaints. 5. That the *Industrial Relations Act 2016* be amended to specifically list sexual harassment as misconduct for the purposes of section 121. 6. That section 320 of the *Industrial Relations Act 2016* be amended to clarify that conduct includes conduct constituting sexual harassment or a finding of sexual harassment. 7. That a referral be made to the Queensland Industrial Relations Consultative Committee seeking that the Committee identify and advise on the development of guidance materials, educative tools, training packages, best practice case management processes, and statistical collations which will assist the Queensland Industrial Relations Commission staff and members in understanding the nature, drivers and impacts of sexual harassment to inform their work.

Terms of Reference	Recommendation
2. (b) Review the operation and performance of the provisions of the Act and how, in practice, different provisions are contributing to its main purpose (section 3) and to how the main purpose is primarily achieved (section 4), including investigation into how the Act can enhance the purpose of encouraging representation of employees and employers by organisations that are registered under the Act.	8. That for clarity and consistency, the *Industrial Relations Act 2016* should: a. apply consistent definitions throughout b. use, throughout the appropriate parts of the *Industrial Relations Act 2016*, the term 'registered organisation' rather than 'association' or 'industrial association' when referring to registered organisations of employees or registered organisations of employers; and c. clarify where terms refer to bodies representative of employees and employers. 9. That the definition and description of what is currently referred to as an association of employees for the purposes of section 279 of the *Industrial Relations Act 2016* comprise the following elements: a. it is an unincorporated body; and b. it is formed or carried on with the principal purpose of the protection and promotion of members' interests in matter concerning their employment; and c. it is eligible to be registered under the *Industrial Relations Act 2016*; and d. it has been formed with the intention of becoming registered under the *Industrial Relations Act 2016*. 10. That consideration be given to replacing the term 'association' where used in the *Industrial Relations Act 2016* with a more appropriate term that clearly distinguishes from, and denotes a body that is not, a registered organisation. 11. That the *Industrial Relations Act 2016* should also make clear (by a note or new subsection) that eligibility for general protections does not grant representation or any other rights in any other Part of the *Industrial Relations Act 2016* outside Chapter 8 Part 1 General Protections. 12. That Subdivision 10 of Division 4 of Chapter 11 (Orders about right to represent a group of employees, sections 478-483) of the *Industrial Relations Act 2016*, should only apply to registered organisations, and all references there to an association or an organisation that is not registered should be removed. 13. That a new Subdivision 10A be created in the *Industrial Relations Act 2016* to follow it, enabling orders to be made preventing a group of people or an unregistered body from purporting to be able to represent employees under the *Industrial Relations Act 2016* when they do not have this capability, and that any association or unregistered body that has such an order made against it becomes ineligible to subsequently obtain registration under the *Industrial Relations Act 2016* for as long as such an order is in place. This should also be specified in section 607, which should further make clear that a body predominantly controlled by people associated with an ineligible body would itself be ineligible for registration. 14. That penalty provisions be included in the *Industrial Relations Act 2016* to ensure that an unregistered organisation does not misrepresent their status, for example by claiming that they are eligible to represent employees under the *Industrial Relations Act 2016*. 15. That the definition of 'industrial activity' in section 290(b) of the *Industrial Relations Act 2016* be expanded to include activities that may be associated with nascent unionism, including discussing or disseminating information about the terms or conditions of employment (for example, rates of pay, regardless of what is specified in the employer's code of conduct).

Terms of Reference	Recommendation
3. Review the Queensland Employment Standards against the National Employment Standards and employment standards of other relevant jurisdictions, to ensure that all Queensland workers under the state jurisdiction have access to prevailing employment standards.	**Annual leave** 16. That the relevant industrial instruments be reviewed to explicitly specify which public holidays are affected by the compensation covered by subsection 31(3) of the *Industrial Relations Act 2016* with the review process supported by the Queensland Government. 17. That subsequently, subsection 31(3) of the *Industrial Relations Act 2016* be amended to ensure that its provisions only operate where the relevant public holidays are explicitly specified in the industrial instrument where compensation is said to have occurred. That is, the provision should require that instances of annual leave being inclusive of an entitlement to a public holiday only occur when that specific public holiday is identified in the award or agreement. **Personal and compassionate leave** 18. That the *Industrial Relations Act 2016* provisions should be aligned with the provisions of the *Fair Work Act 2009* for the purposes of encouraging consistency across the industrial landscape in Queensland in respect of accessing public holidays while on approved personal leave/carers leave and providing evidentiary proof (if required) for the period of such leave. **Parental leave** 19. That the flexibility of unpaid parental leave entitlements in the Queensland Employment Standards be advanced by amending the *Industrial Relations Act 2016* to: a. Allow a portion of the leave entitlement to be taken in separate blocks over a longer period, consistent with section 72A of the *Fair Work Act 2009* (Cth); and b. Specify that employees who have returned to work full-time following parental leave may still request part-time work during the period identified at section 75(2) of the *Industrial Relations Act 2016*. 20. That the entitlement, in the *Industrial Relations Act 2016*, to unpaid parental leave is available in cases of stillbirth, consistent with section 77A of the *Fair Work Act 2009* (Cth). 21. That the definition of 'child' for adoption-related leave in the *Industrial Relations Act 2016* be amended to change the age limit from 5 to 16 years, consistent with section 68 of the *Fair Work Act 2009* (Cth). 22. That the evidentiary requirements for unpaid parental leave in the *Industrial Relations Act 2016* be amended to be consistent with requirements at sections 74(5) and (6) of the *Fair Work Act 2009* (Cth). 23. That the wording of Division 8 (Parental Leave) in the Queensland Employment Standards be reviewed to reflect current standards of language that avoid implying gendered divisions of parental care. 24. That unnecessary complications, through terminology such as 'short' and 'long' forms of leave, should be reduced or eliminated. **Queensland Minimum Wage** 25. That section 459(2) of the *Industrial Relations Act 2016* be amended to allow the full bench to exercise a discretion to limit State Wage Case (SWC) increases from being flowed into parent awards whose rates exceeded those payable under a certified agreement or determination at the time of the SWC decision. **Apprentices** 26. That the percentages for competency-based progression for apprentices be aligned to the federal modern award and the value of the tool allowance be increased to a level to ensure it reflects current retail pricing. The final value of the tool allowance is a matter for determination by the relevant parties after which an application for revised and updated orders, should be made to the Queensland Industrial Relations Commission (QIRC). Any applications made to the QIRC for this purpose should be supported by the Queensland Government.

Terms of Reference	Recommendation
4. Investigating precarious and short-term employment arrangements, including the setting of minimum entitlements and conditions for independent courier drivers.	**Casual loading** 27. That casual loading for employees covered by the *Industrial Relations Act 2016* be increased from the present rate of 23 per cent to 25 per cent, which aligns with the casual loading rate applicable to employees in the National Employment System. This should be achieved through a registered organisation or a state peak council making the relevant applications in the Queensland Industrial Relations Commission, with such applications supported by the Queensland Government. **Independent courier drivers** 28. That amendments to the *Industrial Relations Act 2016* be drafted, with a view to enactment following exemption referred to under recommendation 29, to include provisions to enable the regulation of terms and conditions of work for independent courier drivers by the Queensland Industrial Relations Commission (QIRC), modelled on Chapter 6 of the *Industrial Relations Act 1996* (NSW), explicitly including independent courier drivers and riders within coverage of these provisions, and directing the QIRC to establish conditions that would, where appropriate, be comparable in value to those applying to equivalent award employees. 29. That, before enacting the above legislation, the Minister write to the federal counterpart, seeking exemption from those aspects of the *Independent Contractors Act 2006* (Cth) along similar lines to the exemption that already applies to Chapter 6 of the *Industrial Relations Act 1996* (NSW). The legislation should be being drafted while the letter is in transit.
5. Review the collective bargaining frameworks established under the Act to ensure the main purpose of the Act is being achieved.	**Mediation or arbitration by a single Commissioner** 30. That amendment be made to sections 177 and 180 of the *Industrial Relations Act 2016* to allow a single Commissioner of the Queensland Industrial Relations Commission to mediate or arbitrate one or more matters of disputation in bargaining negotiations, at the joint request of the parties. **Equal remuneration** 31. That the Special Commissioner (Equity and Diversity) be supported to: a. develop a framework for the conduct of gender pay equality audits and action plans, and work with the Public Service Commission to assist Queensland public sector employers in conducting these audits as a priority and in developing gender equality action plans that respond to the audits b. develop guidelines for a comprehensive database of employment statistics that would include data compiled from gender pay equality audits and other data needed to illustrate gender pay (in)equality across Queensland public sector agencies, and work with the Public Service Commission to ensure that this information is made available in a timely manner (at least six months prior to the end of an agreement) to bargaining parties to assist them in meeting the requirements of section 250(2) of the *Industrial Relations Act 2016* c. develop model frameworks for gender pay equality audits and action plans, and for the wage-related data required for section 250(2) affidavits, for the guidance of other employers within the Queensland jurisdiction. 32. That section 173 of the *Industrial Relations Act 2016* be amended to include the provision of information needed to meet the requirements of section 250(2) of the *Industrial Relations Act 2016* as an element of good faith bargaining provisions. 33. That the parties should monitor awards to ensure that they are consistent with the delivery and maintenance of gender pay equality with reference to the Equal Remuneration Principle.

Terms of Reference	Recommendation
6. Review the implementation of the enhanced wage recovery provisions that commenced on 1 March 2021, including the process and operation of the Industrial Registry, the Industrial Magistrates Court and the settlement mechanisms and processes that form part of the new provisions.	34. That a review of the enhanced wage recovery provisions, to enquire into the effectiveness of the process, be undertaken at a time after 1 March 2023, when potentially enough applications had been received for the review to draw useful conclusions.
7. Review the Act to identify any redundant or superfluous provisions that are no longer required, including transitional provisions and technical revisions.	35. That the provisions of the *Industrial Relations Act 2016* outlined in Appendix E be examined with a view to: a. considering the proposed deletions specified in Part I; and b. making the minor amendments specified in Part II. **Recovery of historical Queensland Health employee's overpayments (sections 947 to 952 (inclusive))** 36. That sections 947 to 952 (inclusive) of the *Industrial Relations Act 2016* are removed on the basis that their inclusion in the *Industrial Relations Act 2016* is no longer warranted or necessary. 37. That transitional arrangements be examined to ensure legacy historical overpayment agreements and transitional pay day loan agreements continued to be recognised following the removal of sections 947 to 952 (inclusive) of the *Industrial Relations Act 2016*.
8. Review the implementation and effectiveness of the reforms following the 2015 review of the *Industrial Relations Act 1999* chaired by Mr Jim McGowan AM, including assessing the performance of new jurisdictions introduced by the Act (e.g. anti-discrimination, anti-bullying, flexible work requests and domestic and family violence leave provisions).	**No recommendations made against this ToR.**

Terms of Reference	Recommendation
9. Other matters including amendments since the introduction of the Act.	**Seal and signatures as required under section 474** 38. That section 474(2) of the *Industrial Relations Act 2016* be amended to remove the need to sign under seal and amend the signature requirement for the president and secretary to a duly authorised officer under the rules of the organisation. **Coverage of QIRC** 39. That the definition of 'industrial cause' be extended to include any other matter by which statute gives jurisdiction to the Queensland Industrial Relations Commission. **Payment of unpaid wages if employee's whereabouts unknown** 40. That section 375(2) of the *Industrial Relations Act 2016* be amended to require an employer to pay unclaimed wages direct to the Public Trustee instead of the nearest clerk of the Magistrates Court. It would be open to the Public Trustee to retain such amounts paid in a special account until the allotted two year period.

Overview

On 3 May 2021, the Honourable Annastacia Palaszczuk, Premier of Queensland and Minister for the Olympics, and the Honourable Grace Grace, Minister for Education, Minister for Industrial Relations and Minister for Racing announced a review of the *Industrial Relations Act 2016* (IR Act). The media statement announcing the Review is at Appendix A.

Subsequently, the Honourable Grace Grace MP appointed us as independent reviewers to undertake that Review. It commenced on Monday 28 June 2021, with the terms of reference asking us to inquire into and report on the operation of Queensland's IR Act, with particular reference to some specified matters. These included: implementation of the relevant recommendations from the *Respect@Work* National Report; the treatment of registered organisations; the Queensland Employment Standards; precarious work including for independent courier drivers; collective bargaining frameworks; wage recovery processes; redundant or superfluous provisions; and other matters. Those terms of reference are at Appendix C.

The IR Act had been passed by the Queensland Parliament on 1 December 2016 with most provisions commencing on 1 March 2017 following the 2015 review of Queensland's industrial relations legislation (2015 McGowan Review).

The 2015 McGowan Review was the first comprehensive review of the legislation since the 1998 Gardner review which informed the development of the *Industrial Relations Act 1999*. The 2015 review came after significant changes to the state industrial relations system brought about by the federal 'WorkChoices' laws and the subsequent referral of the residual private sector industrial relations to the federal system.

The key elements of Queensland's industrial relations system that were retained in the *Industrial Relations Act 2016* included:

- the primacy of collective bargaining
- a safety net of minimum employment standards
- a system of industrial awards; individual rights to fair treatment
- an independent commission and court and the regulation of registered industrial organisations.

The *Industrial Relations Act 2016* aimed to restore balance and fairness for Queensland public sector and local government workers by implementing many of the key recommendations from the 2015 McGowan Review to:

- recognise collective bargaining as the cornerstone for setting wages and conditions
- enshrine minimum employment conditions and standards
- provide a right to fair treatment, general protections, workplace related anti-discrimination matters and anti-bullying protections in the state's industrial relations jurisdiction
- introduce a right for all workers to request flexible work arrangements and a right to paid leave for victims of domestic and family violence
- ensure effective, transparent, and accountable governance and reporting for registered industrial organisations and employer associations
- support a strong and effective independent umpire in the Queensland Industrial Relations Commission (QIRC).

In 2021, the Government considered that it was now timely to review the operation and performance of the provisions of the IR Act and how its provisions contribute to its main purpose (set out in section 3 of the IR Act). A discussion paper was produced, stakeholders were advised, and a targeted consultation process was held, focusing on key players in the Queensland jurisdiction, including major employers and employer bodies, unions, legal groups, other relevant non-government organisations, and the independent tribunal, the QIRC. These consultations took place from 26 July to 13 October 2021. A list of consultations and submissions is at Appendix B.

This Review provided stakeholders with the opportunity to make submissions on the IR Act in relation to their experiences with industrial matters such as awards, agreement negotiations and making, certifying, arbitrating, or terminating agreements, equal remuneration issues, wages, industrial action, and unfair dismissal as well as the new jurisdictions of general protections, anti-discrimination, anti-bullying, flexible work, and good faith bargaining.

A key aspect of this Review is the jurisdictional limitations. The regulation of private sector industrial relations matters in Queensland was referred to the Commonwealth on 1 January 2010. The principal legislation for the National industrial relations system is the *Fair Work Act 2009* (Cth) (FW Act). It has been estimated that the residual Queensland industrial relations jurisdiction under the IR Act is now approximately 14.6 per cent of the state's workforce, principally comprising state and local government sectors. The scope of this Review is therefore circumscribed by these constitutional limitations, and also the fact that the appropriate forum for action on some issues is outside the industrial relations jurisdiction in Queensland.

Importantly, our Review occurred following the Report of the National Inquiry into Sexual Harassment in Australian Workplaces, a matter raised by the Premier and Minister in their announcement of the Review.

On 20 June 2018, the Sex Discrimination Commissioner, Kate Jenkins, and the then federal Minister for Women, the Honourable Kelly O'Dwyer MP, announced the National Inquiry into Sexual Harassment in Australian Workplaces to provide recommendations to increase protections against workplace sexual harassment. That Inquiry examined the prevalence, nature and reporting of sexual harassment in Australian workplaces, consulting widely with government agencies, business groups, community bodies and individuals across Australia.

On 5 March 2020, the National Inquiry into Sexual Harassment in Australian Workplaces culminated in the release of the *Respect@Work*: Sexual Harassment National Inquiry Report (2020) (the *Respect@Work* National Report).

The *Respect@Work* National Report identified that the current system for addressing sexual harassment in Australia is complex and confusing for victims and employers to understand and navigate. It is also noted that most people who experience sexual harassment never report it.

The *Respect@Work* National Report outlined 55 recommendations that focus on an approach for government, employers, and the community to better prevent and respond to sexual harassment in the workplace and provide leadership and innovation in addressing this complex and difficult issue.

Five key areas that underpinned this approach included:

1. improvements to data and research
2. primary prevention
3. legal and regulatory framework
4. workplace prevention and response
5. support, advice and advocacy.

The *Respect@Work* National Report made it clear that addressing and preventing sexual harassment in the workplace required a national approach to provide an effective and robust legal and regulatory framework across all levels of government. Much of the Queensland Government's response to the recommendations of the *Respect@Work* National Report would be encompassed by other legislation and considered in concurrent reviews such as the QHRC review into the *Anti-Discrimination Act 1991* (AD Act). Nonetheless, we identified a number of issues specific to the IR Act that warranted further action.

This Review of the IR Act is the first in the five years since the legislation was passed and occurs at an appropriate time to take stock. It has a particular focus on sexual harassment, gender equity and protections for precarious workers, as outlined in the initial announcement of the Review. The role of registered organisations is also specified in the terms of reference as an issue of note. There are, indeed, a range of other issues that have arisen with the operation of the IR Act, most having been identified in the terms of reference, and we address these in the course of our Report.

Stakeholders considered that, for the most part, the IR Act was working well, though they identified various areas where they considered it could be amended to better reflect their expectations. Submissions centred around those matters in relation to the issues in the terms of reference of the Review.

This Report makes 40 recommendations arising from targeted consultation with key stakeholders, and these are listed in the next section. Our views and recommendations in relation to each of the issues are found in the body of the report.

Sexual harassment

At the outset we would like to acknowledge the women who bravely shared their experience of being subjected to sexual harassment. We were equally outraged and dismayed by the stories of workplace sexual harassment, especially so in the case of the women in construction. Yet at the same time we were heartened by the resolve of all stakeholders to support zero tolerance of sexual harassment and their motivation to eliminate sexual harassment of any nature.

This review provides one avenue through which strategies to address sexual harassment might be extended. Following the release on 5 March 2020 of the report and recommendations of the *Respect@Work* National Report, and subsequent responses from the Federal and Queensland governments, there is a clear opportunity to ensure that the Queensland IR Act supports the elimination of sexual harassment as effectively as possible and complements other measures that are in place or under development.

The *Respect@Work* National Report identified that the current system for addressing sexual harassment in Australia is complex and confusing for victims and employers to understand and navigate. It also noted that most people who experience sexual harassment do not report it. Overall, it offered a new framework for addressing the problem of sexual harassment in Australian workplaces, at the heart of which was recognition of the need to move beyond a purely reactive approach based on individual complaints to a proactive approach that '…requires positive actions from employers and a focus on prevention'.[1]

The *Respect@Work* National Report presented a multifaceted set of recommendations, recognising that addressing sexual harassment requires not only changes to legal and regulatory frameworks but also a wide range of monitoring and educative measures, both inside and outside workplaces. Within the legal and regulatory framework, recommendations focused on the *Sex Discrimination Act 1984* (Cth) (SD Act) and the Australian Human Rights Commission (AHRC), as well as the FW Act and Fair Work Commission (FWC). Of particular relevance for this review are recommendations 28 to 34 of the *Respect@Work* National Report, which proposed changes to the Fair Work system. These are as follows:

- **Recommendation 28:** The Fair Work system be reviewed to ensure and clarify that sexual harassment, using the definition in the Sex Discrimination Act, is expressly prohibited.
- **Recommendation 29:** Introduce a 'stop sexual harassment order' equivalent to the 'stop bullying order' into the Fair Work Act. This should be designed to facilitate the order's restorative aim.
- **Recommendation 30:** Amend Section 387 of the Fair Work Act to clarify that sexual harassment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust, or unreasonable.
- **Recommendation 31:** Amend the definition of 'serious misconduct' in the Fair Work Regulations to include sexual harassment.
- **Recommendation 32:** Additional guidance material for all employers relating to unfair dismissal, which includes dismissal relating to sexual harassment, be developed by the Fair Work Commission in consultation with the Workplace Sexual Harassment Council.
- **Recommendation 33:** The Fair Work Ombudsman update its employee information and guidance relating to workplace rights under the Fair Work Act to include sexual harassment, such as amending the Fair Work Information Statement.
- **Recommendation 34:** The Fair Work Ombudsman and Fair Work Commission, with guidance from the Workplace Sexual Harassment Council, ensure that their staff undertake training and education on the nature, drivers and impacts of sexual harassment to inform their work. Statutory office holders in these jurisdictions should also be supported and encouraged to undertake this training and education.

The Australian Government released its response to the *Respect@Work* National Report (*A Roadmap for Respect*) on 8 April 2021.[2] Sex Discrimination Commissioner Kate Jenkins commented that while she was pleased with the response, "I think it would be a real missed opportunity with such comprehensive reform for the Government to not at least consider some kind of positive duty be put into the Act".[3] The Australian Government's subsequent legislative response was the introduction, on 24 June 2021, of the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 (the Amendment Bill). This Amendment Bill, which was consistent with A Roadmap

1 Australian Human Rights Commission (2020) *Respect@Work*: National Inquiry into Sexual Harassment in Australian Workplaces, page 14.

2 Australian Government, A Roadmap for Respect: Preventing and Addressing Sexual Harassment in Australian Workplaces, pages 15 – 16.

3 ABC TV, 7:30 (2021) *Government responds to Kate Jenkins' Respect@Work Report, 8 April* (Transcript available at: www.abc.net.au/7.30/government-responds-to-kate-jenkins%E2%80%99-respect-at/13294294.

for Respect, provided legislative responses to recommendations 16, 20, 21, 22, 29, and 30 of the *Respect@Work* National Report.

The Senate Education and Employment Legislation Committee scrutinised the Amendment Bill, and a final report was released on 6 August 2021, recommending it be passed. However, in addition to two other recommendations, the Committee acknowledged stakeholder concerns that not all of the *Respect@Work* National Report recommendations had been included in the Bill and referred to the Australian Government's advice that the review of the FW Act would 'be informed by the results of the next National Sexual Harassment Survey to be undertaken by the AHRC in 2022, which will enable an evidence-based approach to be taken to the review'.[4]

The Senate Committee also noted the Australian Government's position that 'the current Bill does not represent the entirety of the government's response', that some of those recommendations 'require further consideration and analysis before they can be implemented through legislation' and the Australian Government's commitment to give further consideration to a number of these recommendations.[5]

The Amendment Bill was passed by both Houses and received assent on 10 September 2021. *The Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (*Respect@Work* Act) has:

- amended the object clause in the SD Act to make it clear that in addition to the elimination of discrimination and harassment, the SD Act aims 'to achieve, so far as practicable, equality of opportunity between men and women'
- extended the scope of the SD Act:
  - to include all members of State and Federal Parliament, State and Territory public servants, and judges along with their staff and consultants
  - to have the SD Act apply to any employee using the same definition as employee from the model *Work Health and Safety Act 2011* (Cth) to reduce complexity but the SD Act now covers interns, apprentices, volunteers and self-employed persons
  - to cover situations where a person is harassed in connection with their work but do not need to be performing work to be covered
  - covers any person who 'causes, instructs, induces, aids or permits sexual harassment and sex-based harassment'
  - the coverage of the ancillary liability provision in section 105 of the SD Act so that a person who causes, instructs, induces, aids or permits another person to engage in sexual harassment or sex-based harassment can also be found liable for the unlawful conduct.
- prohibited sex-based harassment conduct
- clarified victimising conduct can lead to civil and criminal proceedings
- extended time for complaints from six months to 24 months
- given the AHRC power to hear complaints under the new victimisation civil provisions.

The FW Act was also amended, including provisions to:

- clarify sexual harassment can be a valid reason for dismissal when considering whether a dismissal was harsh, unjust or unreasonable
- extend the stop bullying order provision to include stop sexual harassment orders (eligible employees who believe they have been sexually harassed at work can make an application to stop sexual harassment to the FWC from 11 November 2021).

The Queensland Government has responded to the recommendations of the *Respect@Work* National Report by investigating several legislative avenues through which to implement the proposed new framework and reporting of sexual harassment in the workplace. A review of the AD Act, which is being conducted by the QHRC, is a central component this approach. Terms of Reference for the AD Act review, which will report in June 2022, include 'options for legislating a positive duty on all employers to take reasonable and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation as far as possible'[6] (echoing Recommendation 17 of the *Respect@Work* National Report: 'Amend the SD Act to introduce a positive duty on all employers to take reasonable

4 The Senate Education and Employment Legislation Committee (2021) Sex Discrimination and Fair Work (*Respect at Work*) Amendment Bill Report, page 23 (citing the Attorney-General's Department submission).

5 Ibid, p.27.

6 Queensland Human Rights Commission review of the *Anti-Discrimination Act 1991* (Qld), Terms of Reference, available at: www.qhrc.qld.gov.au/law-reform/about-the-review/terms-of-reference.

and proportionate measures to eliminate sex discrimination, sexual harassment and victimisation, as far as possible'). Overall, that review is considering whether the law:

- needs improving so it better responds to people who have experienced discrimination
- should have a role in identifying and eliminating systemic causes of discrimination, sexual harassment, and victimisation
- should require organisations and workplaces to eliminate discrimination, sexual harassment, and victimisation.[7]

The Queensland Government through OIR (Workplace Health and Safety Queensland) is also investigating the development of a Code of Practice that would apply to workplaces with the aim of preventing sexual harassment at work. That investigation includes exploration of guidance and information for businesses and employees on workplace sexual harassment prevention, health and safety obligations and responsibilities as well as exploring avenues for complaint. This commitment will address recommendation 35 of the *Respect@Work* National Report.

This five-year Review of the IR Act presents the opportunity to consider complementary provisions within the state's industrial relations jurisdiction. In accordance with items 1 and 2 of the Terms of Reference (ToR) for this Review, consideration has been given to specific recommendations of the *Respect@Work* National Report that may be appropriate for implementation through the IR Act.

Stakeholders were overwhelmingly supportive of measures to protect employees against sexual harassment. Recommendations in support of this aim were made by both employer and employee representative groups as well as two legal peak bodies, albeit with the reservation from some employer representative groups that any new regulations should not increase employers' responsibilities. Consideration has also been given as to how provisions of the IR Act provide protections for employee subject to sexual harassment, with a view to identifying measures that could be adopted to improve protections. The adequacy of sexual harassment protections for employees outside of the IR Act's jurisdiction (i.e., national system employees in Queensland covered by the FW Act) has not been considered as part of this review.

Preventing and eliminating sexual harassment

Several stakeholders[8] encouraged the Queensland Government to adopt the proactive (positive duty) approach at the heart of the *Respect@Work* National Report in the state's AD Act, which will then form the basis for complementary measures in other legislation, including the IR Act. It was summed up by the Queensland Nurses and Midwives' Union (QNMU) in the following terms:

> *Elimination of sexual harassment in the workplace will not be achieved without practical reform and sustained cultural change to the way in which we view, report and respond to sexual harassment.*[9]

While sexual harassment was the focus of many submissions, sex-based harassment (harassment based on gender, but not of a sexual nature) did not feature strongly, due to the emphasis on *Respect@Work*. However, sex-based harassment appears more common than sexual harassment[10] (and is a common feature in male-dominated sectors), with similar origins in an organisational culture of misogyny. While some forms of sex-based harassment would be covered by existing anti-bullying provisions, others would escape coverage.

A positive duty, in addition to what already exists in workplace health and safety regulation, is necessary to ensure employers prioritise preventing sexual and sex-based harassment. Without this, employers pay greater attention to compliance under industrial relations and workplace health and safety law than discrimination law. A positive duty would also prevent employers from avoiding responsibility for preventing harassment involving co-workers, suppliers, or customers. In particular, it would encourage firms to create both formal rules and an organisational culture that opposed sexual and sex-based harassment.

That said, it is not obvious that this positive duty should rest in the IR Act. It seems more appropriate for it to be where users would expect to find it, in legislation concerning discrimination, human rights and/or workplace health and safety.

7 Ibid.

8 See submissions from QCU, CFMEU, QNMU, ALA, and BRQ.

9 Queensland Nurses and Midwives Union, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

10 Community and Public Sector Union, *What Women Want Survey Report 2013/14*, Sydney, pages 54-56; Georgina Murray, David Peetz, and Olav Muurlink, 'Structuring Gender Relations Among Coal Mine Employees', in Peetz, D & Murray, G (eds) *Women at Work: Labor Segmentation and Regulation*, Palgrave MacMillan, New York, 2017, page 129.

Nonetheless, the provisions of the IR Act should do everything that they can to inhibit sexual and sex-based harassment. Accordingly, it is appropriate that prevention of these should be explicitly included in the objects of the IR Act.

Recommendation:

1. **That section 4 of the *Industrial Relations Act 2016*, which provides how the main purpose of the Act is primarily achieved, be amended to expressly include sexual harassment so that section 4(i) states: preventing and eliminating sexual and sex-based harassment, discrimination, bullying and other unfair treatment in employment.**

Responding to workplace sexual harassment

In accordance with items 1 and 2 of the ToR, consideration has been given to recommendations of the *Respect@ Work* National Report suitable for implementation through the IR Act in the state's industrial relations jurisdiction, and to how provisions of the IR Act should improve protections for employees subjected to sexual harassment.

The starting point is to assess the current Queensland regulatory and policy framework available to an employee who has been subjected to sexual harassment.

Current Queensland Regulatory and Policy Framework

Redress for sexual harassment can be made through:

- a complaint to the QHRC under the AD Act. Work-related matters (including work-related sexual harassment matters) not resolved through the QHRC complaints process may be referred to the QIRC for hearing[11]
- a complaint to the AHRC under the SD Act.[12] Complaints accepted by the AHRC may be referred to conciliation. If a matter is not resolved at conciliation, a person may apply to have the matter heard in the Federal Court of Australia (FCA) or the Federal Circuit Court of Australia (FCC). Section 10 of the SD Act deals with operation of State and Territory laws. Subsections (3) and (4) ensure that a person cannot take action in both jurisdictions for the same matter
- a general protections application under the IR Act against adverse action on the basis of a workplace right[13] or general protections against adverse action of workplace discrimination[14]
- for Queensland Public sector employees – the Public Service Commission (PSC) Directive individual grievance procedure. Noting that Directives are separate from and do not displace grievance-related provisions within the IR Act or in a modern award or agreement that applies to an employee[15]
- through the dispute resolution procedure in the relevant modern award[16]
- through the Queensland *Work Health and Safety Act 2011* (Qld), which may be relied upon to provide protection against sexual harassment where that sexual harassment poses a risk to a person's health and safety.

Stakeholder views

Given that the Queensland industrial relations jurisdiction principally provides coverage for state public sector and local government employees, the submissions were focused on this group of employees. Of relevance here is the QIRC's broader capacity than the FWC to manage disputes and grievances, in particular the exercise of general powers of conciliation and arbitration for industrial disputes that are regarded as 'industrial matters' under the IR Act.[17]

11 Chapter 3 of the AD Act prohibits sexual harassment generally, which covers sexual harassment in the workplace. Chapter 3 provides that a complaint against a person who has sexually harassed another person may be made under chapter 7 of the AD Act.

12 All Queensland employees also now have access to protections against sexual harassment in the workplace through the SD Act.

13 *Industrial Relations Act 2016* (Qld), Chapter 8 Part 1 Div. 3 (ss 282- 289).

14 Ibid, Chapter 8 Part 1 Div. 5 s 295.

15 Individual employee grievances directive (11/20) may be made for matters including: where a public service employee has an 'honest belief' that 'the conduct or behaviour of an employee, agent or contractor constitutes bullying in the workplace, sexual harassment, racial vilification, religious vilification or vilification on the grounds of gender identity or sexuality' or that 'the conduct or behaviour of an employee is a breach of the Code of Conduct'. The Workplace investigations directive (17/20) sets out procedures for investigations into a public service employee's work performance or personal conduct.

16 For example The Queensland Public Service Officers and Other Employees Award – State 2015 (clause 7) provides a typical example and includes a specific treatment for grievances which involve allegations of sexual harassment which provides where the grievance involves allegations of sexual harassment an employee should commence the procedure at Stage 3 thus ensuring they are dealt with appropriately and at a suitably high level.

17 Industrial matter is referred to in s 9 of the IR Act and Industrial matters are listed in Schedule 1 to the Act.

The Queensland Council of Unions (QCU) submitted:[18]

> *Ideally, a complaint about sexual harassment should be made at the workplace following a model grievance/complaint procedure contained in the mooted [Work Health and Safety] Sexual Harassment Code of Practice or included in a dispute resolution within an industrial instrument which is specifically designed to address sexual harassment complaints. If the procedure is not being followed or ignored, or there is no resolution to the matter, a party should be able to apply to the QIRC to exercise its conciliation and arbitration powers to attempt to resolve the matter as an industrial dispute.*

In responding to Recommendation 28 of the *Respect@Work* National Report to expressly prohibit sexual harassment in the Fair Work system, the QCU observed that the AHRC stopped short of recommending the general protections provisions of the FW Act expressly include sexual harassment leaving this for further consideration. However, picking up on the AHRC proposal of an alternative stand-alone prohibition against sexual harassment through prohibiting sexual harassment as a form of adverse action without the need to identify it as a form of discrimination[19] the QCU recommended that the general provisions be amended to clarify that sexual harassment can be an adverse action taken by an employer.

The QCU proposed amendments to the IR Act to:

a) amend the general protections provisions to provide that an employer must not take adverse action against a person because a person has been sexually harassed or a person is committing sexual harassment against them by:

   (i) Including sexual harassment in section 278(1)(c) so that it reads:
   To provide protection from workplace discrimination and sexual harassment.

   (ii) Adding in a new subsection to what is adverse action which provides:
   Adverse action includes action taken by an employer against an employee who has been sexually harassed, is being sexually harassed, or is or has participated in a complaint about sexual harassment. Note – sexual harassment and an employer's failure to deal fairly and effectively with a complaint about sexual harassment can also be a form of discrimination.

b) clarify that an industrial law for the purpose of a person exercising a workplace right includes both Commonwealth and State discrimination laws

c) amend section 295 Discrimination by adding in a new subsection:
(1A) An employer must not take adverse action against a person who is an employee, or prospective employee, of the employer because the person has been sexually harassed, or is being sexually harassed, or has made a complaint about being sexually harassed, or has or is participating in a complaint about sexual harassment. Note – This subsection is a civil remedy provision.

d) amend Schedule 1 to include sexual harassment as an Industrial matter

e) amend Schedule 5 Dictionary to include a definition of sexual harassment that provides sexual harassment has the meaning given by section 119 of the AD Act.

The QNMU, in recognising that the QIRC also exercises specific powers to handle the determination of sexual harassment complaints referred from the QHRC, considered the IR Act should provide for a definition of sexual harassment and expand the general protections against discrimination in employment to include protections against sexual harassment. The QNMU also proposed amending the IR Act to create a specific workplace right by including in Section 284 that a person has a workplace right if the person is able to make a complaint or inquiry to the QHRC or a tribunal under the AD Act in relation to a work-related matter.

The Queensland Law Society (QLS) on the other hand did not consider it necessary to introduce an express prohibition against sexual harassment in the IR Act, as section 118 of the AD Act expressly prohibits sexual harassment in all fields and 'there would be no utility in legislating for mirror prohibition within the IR Act'. They also considered introduction of a 'workplace right not to be sexually harassed' to be unnecessary, as the right in s 118 AD Act is a workplace right for the purposes of s 284(1)(a) of the IR Act as the AD Act is an industrial law.

Basic Rights Queensland (BRQ) identified instances of adverse action taken against clients of Working Women Queensland (WWQ) who have experienced sexual harassment and sought to uphold their workplace right. This adverse action had taken the form of either being demoted, suspended, victimized, transferred or treated less

18 Queensland Council of Unions, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*, page 10.

19 Australian Human Rights Commission (2020) *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, page 518.

favorably. The impact of such actions had more often than not led to psychological injury.[20]

The QHRC advised:[21]

> *The Commission considers that an express prohibition against sexual harassment in the Queensland workplace relations system may provide greater clarity for employer and provide more remedial options for employees subjected to sexual harassment. While the Commission supports better clarity and more options for people who experience sexual harassment, there needs to be further consideration of how an express prohibition in the IR Act would operate. It is important that, given the broad coverage of the prohibition against sexual harassment in the AD Act, the AD Act prohibition is not diminished, and that the option for redress under the AD Act is retained for people who experience sexual harassment in the workplace in Queensland. Any amendment in this regard needs to consider the different coverage of workplace matters under the IR Act and work-related matters under the AD Act.*

The QHRC confirmed that under the current definition of workplace right, making a complaint of sexual harassment to the Commission under the AD Act is a protected workplace right.

The QHRC expressed support of a specific workplace right not to be sexually harassed but were of the view this needed further consideration as to how the protection right would operate and what remedial action would be available to a person subjected to sexual harassment in the workplace.[22]

The QHRC in considering the definitions in the IR Act submitted that the definition of discrimination in Schedule 5 is unusual, as inclusion of discrimination on the basis of sexuality and on the basis of family responsibilities are both prohibited under the AD Act. Further, the QHRC is of the view that the appropriateness of the definition of discrimination in the IR Act should be carefully considered, including how it should apply throughout the relevant provisions of the Act noting that the words 'discrimination' and 'discriminate' are used in various parts of the IR Act. The QHRC noted that:[23]

> *The definition has most significance to the meaning of adverse action in the general protections provisions. These provisions were modelled on the general protections provisions in the FW Act, however, the FW Act does not include a definition of discrimination. In the absence of a definition in the FW Act, the Courts have given discrimination a narrow interpretation, more akin to direct discrimination but with the element of intent.*[24]

Analysis

Many of the key actions to be taken against sexual harassment and sex-based harassment concern other acts, in particular the AD Act and the workplace health and safety regulations. These areas are under review, and we do not attempt to duplicate the work of those reviews here.

What we can do within the IR Act is as follows:

- ensure that the objects of the IR Act reflect the importance of dealing with sexual and sex-based harassment
- ensure that the definitions of sexual harassment and discrimination in the IR Act are consistent with those in the main legislation dealing with those issues
- ensure that the QIRC has the same capacity to deal with sexual harassment as it has to deal with other matters.

The first of these is covered by the recommendation made above; the remainder are covered by the discussion below.

To align the definitions, we first recommend that 'sexual harassment' be defined in the IR Act in the same way as it is defined in the AD Act.

Second, we propose to simplify the definition of 'discrimination' as presently defined in Schedule 5 to the IR Act. The current definition in the Act was broader than that elsewhere, because at the time the IR Act was previously amended on this issue, it was necessary to separately and explicitly include discrimination on the grounds of

20 Basic Rights Queensland, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

21 Queensland Human Rights Commission, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*, page 5.

22 Queensland Council of Unions, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

23 Queensland Human Rights Commission, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*, page 11.

24 The QIRC considered the meaning of 'discriminates between the employee and other employees of the employer' in section 282(1)(d) (meaning of adverse) in *Gilbert v Metro North & Ors* [2021] QIRC 255, wherein the QIRC said at paragraph [16]: *"In s 282(1)(d), 'discriminates' ought to be given its ordinary meaning, drawing on the meaning of the term in anti-discrimination law only to a limited extent"*.

sexual preference and family responsibilities to give adequate coverage under the IR Act. Separate mention of these issues is no longer required as a definition of discrimination, as other laws have been updated to encompass these matters. It is noted however that 'family responsibilities' is a term used elsewhere in the Act and is separately defined in Schedule 5. Careful consideration also needs to be given to the correlation of the definition of discrimination in Schedule 5 with all provisions of the IR Act which use the terms 'discrimination' and 'discriminate' to ensure that it aligns with legislative intent.[25]

The QIRC, unlike the FWC, has the capacity to deal with individual grievances or disputes through the exercise of its general powers of conciliation and arbitration of an 'industrial matter' under the IR Act. Throughout consultations stakeholders have identified that sexual harassment needs to be expressly included in Schedule 1 'Industrial matters' to put beyond doubt that it is an industrial matter. We support this view and recommend the inclusion of sexual harassment as an industrial matter to facilitate access to orders (interlocutory orders or interim injunctions) and to form the basis of an industrial dispute for the QIRC to exercise its normal conciliation and arbitration powers for sexual harassment and sex-based harassment complaints.

While there is merit in considering a proposal to create a stand-alone protection, we consider this needs careful consideration. For reasons that a workplace general protection is a protection from an adverse action taken by an employer and against an employee or potential employee, there would be little benefit from identifying sexual harassment as an 'adverse action' by the employer because, typically, the employer is not committing the action, it is an employee of the employer. In the context of the principal employers covered by the Queensland IR Act, namely the state and local government, this is even more so.

Adverse action is only relevant in the IR Act here if it is undertaken for a prohibited reason, which is fundamentally about an employee exercising a workplace right (an employer cannot cause harm to somebody for actions such as belonging to a union or seeking to have their award enforced). It would be difficult to prove that someone was sexually harassed because they wanted to exercise a workplace right. Importantly, though, the employer should not be able to undertake an adverse action against somebody when it arose because they were harassed. If that person makes a formal complaint, then the existing provisions provide protection. At issue is whether someone who has been harassed could be moved sideways, into another area, potentially to their disadvantage, while the perpetrator experiences minimal consequences to their career. Proving that this is the reason may be difficult, even more so if the complaint was not formal. This is a real issue, as we understand that few victims formally complain.

It is our expectation that making 'sexual harassment' a matter of industrial law would solve this potential problem. If, however, this turns out not to be the case, then consideration would need to be given to amending either section 285 (protection - which the proscribed causes of adverse action are specified) — to list whether someone has been subject or potentially subject to sex-based harassment or sexual harassment, or been a witness to such harassment, as a prohibited reason for adverse action — or expanding the grounds of discrimination (section 295) along these lines. Developments in case law and workplace practice under the new IR Act will need to be monitored closely to determine if any further action along these lines is necessary.

Early intervention

The *Respect@Work* National Report recommended that a 'stop sexual harassment order' equivalent to the 'stop bullying order' be inserted into the FW Act and that this measure 'should be designed to facilitate the order's restorative aim' (recommendation 29).

The Australian Government responded to this recommendation through modifications to the anti-bullying provisions of the FW Act which come into effect on 11 November 2021. The Explanatory Memorandum to the Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 notes:[26]

> *Sexual harassment that constitutes bullying behaviour is already covered by the existing Part 6-4B jurisdiction. However, there will be some modifications to how this part applies to sexual harassment. In particular, the jurisdiction can be enlivened on one occasion or instance of sexual harassment; this is appropriate as sexual harassment is not always repeated or continuous (new subsection 789FD(2A)).*

The proposed stop orders would not be available in cases where there is no risk of harassment occurring again, for example when the person who harassed the employee is no longer employed at the workplace.

While a stop sexual harassment order has shortcomings, in that it does not provide comprehensive protection,

25 As identified by the QHRC in its submission at point 11 the relevant IR Act provisions include: section 4 (how main purpose is achieved); section 248 (ensuring modern award provides for equal remuneration); section 278 (purposes of general protections); and section 454 (commission to prevent discrimination in employment); section 143 (modern awards not to discriminate against an employee); section 278 (purpose of general protections include relief for person who have been discriminated against); section 282 (meaning of adverse against); and section 299 (coverage by particular instruments).

26 Sex Discrimination and Fair Work (Respect at Work) Amendment Bill 2021 and Explanatory Memorandum.

it may provide early intervention to stop the conduct and be of benefit where it is likely the parties may have an ongoing relationship, for instance where offending behaviour is unlikely to result in dismissal.

In the context of the Queensland regulatory framework, views were sought on arrangements that would enable the equivalent of a stop sexual harassment order to provide prompt intervention. Options identified included:

- using existing injunction or interlocutory order provisions in the IR Act and amending the definition of an 'industrial matter' within the IR Act to specifically include sexual harassment to facilitate access to orders (interlocutory orders or interim injunctions) to form the basis of an industrial dispute for the QIRC to exercise its normal conciliation and arbitration powers
- amending the stop bullying provisions in the IR Act to clarify that a 'stop bullying order' is available in the context of sexual harassment (same as the proposed Australian Government response)
- creating a standalone 'stop sexual harassment order' similar to the 'stop bullying order' but tailored to address sexual harassment, to be inserted into the IR Act
- recommending that a 'stop sexual harassment order' be inserted into the AD Act.

In the circumstance of early intervention, provisions exist for the QIRC to address a range of issues that include:

- preventing a party to a dispute from committing an act or continuing to engage in a wrongful act prior to the hearing of the matter
- preventing any contact between a complainant and alleged perpetrator pending conciliation and/or arbitration of the matter
- maintaining the status quo in the workplace, with an employer prevented from taking adverse action against a complainant until the substantial matter is dealt with unless there are genuine safety issues.

We also note that since the introduction of anti-bullying provisions in 2016 this has been a little used measure for injunctive relief. The number of applications has thus far peaked at 17 (in the year from 1 July 2017 to 30 June 2018) with 11 applications recorded for the period from 1 July 2020 to 9 June 2021.[27]

Stakeholder views

Whilst there was overwhelming support for the ability to seek early intervention by way of injunctive relief there was not a consensus on how best to provide such measures for victims of sexual harassment. Concerns were raised over making an already complex and confusing system more complex and whether stop orders could be used in conjunction with other applications under the IR Act. There was no support for the injunctive relief being inserted in the AD Act with the IR Act being the preferred legislative vehicle.

Some stakeholders preferred the inclusion of a standalone stop sexual harassment order, similar to the existing stop bullying order, while others considered this could be achieved through amending the existing stop bullying provisions aligning Queensland to the new FW Act provision. However, the QCU, while promoting interim relief for victims of sexual harassment, considered that existing provisions with amendment were preferable to the introduction of a new measure in terms of a stop sexual harassment order. The QCU submitted:[28]

> *It should also be noted that unlike the jurisdictional constraints of the FW Act, the powers of the Queensland Industrial Relations Commission ('QIRC') are not as restricted as the Fair Work Commission ('FWC') in its capacity to deal with individual grievances or disputes. For instance, the QIRC may exercise its general powers of conciliation and arbitration powers for an industrial dispute about any 'industrial matter' under the IR Act. However, there is no specific definition of 'sexual harassment' as an industrial matter in the IR Act other than it could fall within the definition of 'matters relating to the relationship between employers and employers'. … Other general powers of the QIRC can also be used if sexual harassment is defined as an industrial matter.*

For instance, a party could apply to the QIRC for an interim injunction or interlocutory order in relation to a sexual harassment matter, either as part of its general powers or as part of the general protection mechanisms if adverse action is taken against an employee who has made a complaint or is or has participated as a witness in a complaint.

In assessing the difference between using the IR Act general powers and the FW Act proposed stop sexual harassment orders, the QCU was of the view that an interim injunction can be sought to protect a person pending

27 Data provided by the QIRC during consultations. See also the 2020-2021 *Annual Report of the President of the Industrial Court of Queensland*, page 38, available at: www.qirc.qld.gov.au/sites/default/files/a_report_2021.pdf?v=1633987437.

28 Queensland Council of Unions, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*, pages 10, 11.

an application to the QIRC to resolve an industrial dispute about a sexual harassment complaint whereas under the FW Act provisions, the FWC would need to make a finding that sexual harassment has occurred and will reoccur before making an order.

Analysis

Through the general powers of the QIRC there is the capacity to seek an injunction or an interlocutory order.[29] When seeking early intervention and protection this is a well understood and comprehensive process within the Queensland industrial relations system. Utilising well defined existing provisions will not add to any complexity or confusion for a person seeking urgent relief as could occur if new provisions were introduced. For these reasons it is considered that the current injunctive powers of the QIRC should be strengthened to clearly cover an application involving sexual harassment, rather than introducing new concepts and new provisions.

To make it clear that injunctive relief for sexual harassment is available through the QIRC injunction powers it is recommended that sexual harassment be expressly included as an 'industrial matter' within Schedule 1 'Industrial matters' of the IR Act and in accordance with section 9. However, regard should be had to whether there are currently any gaps in the QIRC powers to make interim injunctive orders and if so, rectify those gaps so that the QIRC can provide additional injunctive orders to parties to a proceeding. When reviewing the injunctive powers of the QIRC regard should be had to the injunctive powers of the Queensland Civil and Administrative Tribunal (QCAT),[30] which can grant an injunction including an interim injunction when 'just and convenient' to do so either on QCAT's own initiative or on an application by a party whether or not it has given any person whose interests may be affected by the order the opportunity to be heard.

Another issue for consideration is the jurisdictional coverage of the FW Act sexual harassment orders under the anti-bullying provisions. Given the section 27 non-exclusion of occupational health and safety matters, the FW Act bullying provisions, which were introduced after the referral, do not automatically apply to the entire federal jurisdiction. The bullying provisions in the FW Act apply to Queensland employees who automatically fall within the national industrial relations jurisdiction, but due to constitutional limitations and the section 27 non-exclusions, the FW Act anti-bullying provisions do not apply to Queensland's referred residual private sector (including sole traders and partnerships). The IR Act's anti-bullying provisions are able to apply to the residual referred private sector because occupational health and safety is a non-excluded matter under section 27(2) of the FW Act.

In light of the drafting of the FW Act for stop sexual harassment orders, the same issue arises where the FW Act jurisdiction covers employees of private sector corporations but not employees of unincorporated businesses. When considering the amendments recommended in this Report for applications for orders to promptly address sexual harassment in the workplace, it would also be necessary to ensure that all Queensland employees have the ability to seek interim relief or interlocutory orders to stop being sexually harassed – if not under the FW Act, then under Queensland legislation. This could be achieved through an amendment to section 8 of the IR Act to expand subsection (2)(b) to include after 'bullying' the words 'and sexual harassment' or if sexual harassment is included as an industrial matter under Schedule 1 then this would provide access to injunctions for sexual harassment for all employees covered by the IR Act. However, further consideration has to be given to this issue.

Recommendations:

2. **That sexual harassment be defined in the *Industrial Relations Act 2016* using the definition of sexual harassment contained in the *Anti-Discrimination Act 1991*.**
3. **That the definition of 'discrimination' in Schedule 5 of the *Industrial Relations Act 2016* be amended by removing subparagraphs (b) and (c).**
4. **That the definition of an 'industrial matter' within the *Industrial Relations Act 2016* be amended to specifically include sexual harassment and sex-based harassment, to facilitate access to orders (interlocutory orders or interim injunctions) and to form the basis of an industrial dispute for the Queensland Industrial Relations Commission to exercise its normal conciliation and arbitration powers for sexual harassment and sex-based harassment complaints.**

29 *Industrial Relations Act 2016* (Qld), ss 473, 474.

30 *Queensland Civil and Administrative Tribunal Act 2009* (Qld), ss 58, 59.

Sexual harassment and dismissal

Issues raised through the *Respect@Work* National Report suggest that the current FW Act protections against unfair dismissal have resulted in uncertainty in responding to sexual harassment, both in terms of the type of misconduct that warrants dismissal and procedural fairness issues in effecting the dismissal.[31] This has now been clarified by the insertion of the following legislative note in section 387 of the FW Act:[32]

> *Note: For the purposes of paragraph (a), the following conduct can amount to a valid reason for the dismissal:*
> *a. the person sexually harasses another person; and*
> *b. the person does so in connection with the person's employment.*

Under subsection 121(1)(b) of the IR Act an employer may dismiss an employee 'if the employee engages in misconduct of a type that would make it unreasonable to require the employer to continue the employment during the period of notice.' The type of misconduct referred to at subsection 121(1)(b) is described at subsection 121(2) as including theft; assault; fraud; and other misconduct prescribed by regulation. The Industrial Relations Regulation 2018 (IR Regulation) does not prescribe any other type of misconduct. It is recommended that sexual harassment be included in this section as misconduct.

The IR Act also contains protections against unfair dismissal including at section 317 that an employee who has been unfairly dismissed may apply to the QIRC for reinstatement. Under section 316 a dismissal is unfair if it is harsh, unjust or unreasonable. In terms of dismissal on the grounds of an employee's conduct, section 320 provides that in deciding whether a dismissal was harsh, unjust or unreasonable, the QIRC must consider if the dismissal relates to the employee's conduct; whether the employee had been warned about the conduct; whether the employee was given an opportunity to respond to the claim about the conduct; and any other matters the QIRC considers relevant. If it is found the employee has been unfairly dismissed the QIRC may consider reinstatement, or if re-instatement is not practical, the QIRC may order the employer to pay compensation to the employee.

Section 320 of the IR Act is similar to section 387 of the FW Act. We propose that an amendment to the IR Act, based on the AHRC recommendation 30, which seeks amendment to section 387 'to clarify that sexual harassment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable', be considered through Queensland's review.

The Queensland Teachers' Union (QTU) submitted that the 2021 'Expect Respect' QTU survey noted a number of repeated substantiated sexual harassment complaints against employees with no subsequent penalty applied. In their view, the lack of express reference to sexual harassment within the IR Act serves as an impediment to matters proceeding to dismissal.[33] Stakeholders recognised that while section 320(d) of the IR Act could arguably cover sexual harassment as a fair reason for dismissal, for ease of interpretation this should be clarified by the insertion of a legislative note to section 320 in similar terms to the FW Act amendment.

We recommend that an amendment to section 320 of the IR Act, based on the AHRC recommendation 30 and subsequent amendment to section 387 of the FW Act, clarifies that sexual harassment can be conduct amounting to a valid reason for dismissal in determining whether a dismissal was harsh, unjust or unreasonable. We also recommend that for the purposes of section 121(1)(b), sexual harassment be included as misconduct in section 121(2).

Recommendations:

5. **That the *Industrial Relations Act 2016* be amended to specifically list sexual harassment as misconduct for the purposes of section 121.**
6. **That section 320 of the *Industrial Relations Act 2016* be amended to clarify that conduct includes conduct constituting sexual harassment or a finding of sexual harassment.**

31 Australian Human Rights Commission (2020) *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, pages 526-529.

32 This section was amended by the *Sex Discrimination and Fair Work (Respect at Work) Amendment Act 2021* (Cth).

33 Queensland Teachers' Union, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*, page 4.

Transparency

The use of non-disclosure clauses (NDAs) in settlement agreements in sexual harassment matters and the challenges they create was raised throughout consultation.

The *Respect@Work* National Report found the use of NDAs was a particularly topical and challenging issue that arose during that Inquiry.[34]

> *The Commission heard about the benefits of NDAs in sexual harassment matters in protecting the confidentiality and privacy of victims and helping to provide closure. However, there were also concerns that NDAs could be used to protect the reputation of the business or the harasser and contribute to a culture of silence.*

The AHRC in recognising the complexity of the issue recommended a practice note or guideline that identifies best practice principles be developed by the Commission, in conjunction with the Workplace Sexual Harassment Council, to inform the use of NDAs in workplace sexual harassment matters.[35]

Views of stakeholders in this Review included advocating for the disallowance of confidentiality clauses by harassers or employers in settlements, with the victim of the harassment to be the only person allowed confidentiality[36] or only allowing an NDA if the applicant requests it,[37] and recognition that publication can be an impediment to reaching a settlement.[38] We heard that there are very few conferences where a NDA is not included in the agreement, but it was acknowledged that some people may want the outcome publicised as a preventive measure while others find the confidentiality helps them to move on by removing pressure to talk about it to others and stopping the 'gossip'.[39] On the one hand, transparency of outcomes can deter repeat behaviour by perpetrators and allow women to avoid predators, but conversely, confidentiality in settlements (to the satisfaction of employer and victim) can facilitate closure.

The QHRC advised that its template settlement agreement no longer includes an NDA, with this matter left to the parties to decide. The QIRC does not use a template agreement. In Victoria, NDAs are being examined by a Ministerial Taskforce (chaired by Bronwyn Halfpenny and Liberty Sanger) that is investigating sexual harassment.

We have not reached a conclusion sufficient for recommendation as to the use or otherwise of NDAs, bearing in mind the limited role of the IR Act on this issue. However, we are mindful that, as noted above, the *Respect@Work* Council (formerly the Workplace Sexual Harassment Council) has been tasked with developing a practice note or guideline that identifies best practice principles to inform the use of NDAs in workplace sexual harassment matters. In our view the Queensland Industrial Relations Consultative Committee (QIRCC) would be well placed to monitor and advise the Queensland industrial jurisdiction on any note or best practice principles developed by the *Respect@Work* Council.

Guidance materials, support processes and QIRC proceedings

Recommendations of the *Respect@Work* National Report for the Fair Work system extended beyond legislative changes to the training and education of staff on 'the nature, drivers and impacts of sexual harassment to inform their work' (Recommendation 34). Guidance material for employers and employee information and guidance relating to workplace rights developed by the FWC were also recommended (Recommendations 32 and 33). Similar arrangements will be necessary in the Queensland jurisdiction to accompany changes to the IR Act and other actions comprising the suite of responses to the *Respect@Work* National Report.

In accordance with the *Respect@Work* National Report recommendation the *Respect@Work* Council has been established to assist the bodies with regulatory responsibility (which includes the FWC) in developing the gender expertise and specialist skills regarding workplace sexual harassment to work effectively within the integrated system.

34 Australian Human Rights Commission (2020) *Respect@Work: National Inquiry into Sexual Harassment in Australian Workplaces*, page 32.

35 Ibid, Recommendation 38.

36 CFMEU, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

37 BRQ, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

38 Consultation with Australian Lawyers Alliance.

39 Consultation with Basic Rights Queensland.

Stakeholder views

The QCU proposed a number of measures to improve understanding of drivers and impacts of sexual harassment and the complaint handling procedures. These measures include:

- training being provided to relevant QIRC members and staff on any new jurisdiction, and on 'the nature, drivers and impacts of sexual harassment' by the QHRC
- establishment of a 'special reference group' within the QIRC including external stakeholders' representative of unions, the QHRC and employer representatives of the State Government and local government, to oversee the implementation of education and training, and the development and implementation of specific processes and procedures to deal with sexual harassment complaints
- the adoption of more sensitive procedures to protect complainants such as telephone conferences, and private conferences with the complainant separated from the respondent which are informed by those of the QHRC.[40]

The Construction, Forestry, Mining and Energy Union (CFMEU) proposed the establishment of a specialist sexual harassment tribunal either by utilising existing resources of the QIRC or through additional funding which is victim-focussed having safeguards and protection (which reflects recommendation 39 of the *Respect@Work* National Report) such as:

- a dedicated person to manage sexual harassment matters
- a specialist court registry
- a safety precinct with rooms for women only
- proceedings to be conducted in a closed court room
- evidence to be given remotely
- evidence-in-chief to be audio-visually recorded prior to the hearing
- protection from direct cross-examination by a self-represented party
- having a support person present while giving evidence
- no encounter with, and protection from the respondent
- disallowance of confidentiality clauses by harassers or employers in settlements, with the victim of the harassment to be the only person allowed confidentiality.[41]

BRQ submitted that through its WWQ service it has found that the structure, timing and conduct of a conference or hearing can significantly influence whether the matter can be effectively resolved in that forum.

> *In the experience of WWQ in supporting and advocating for women who are seeking redress for sexual harassment or associated adverse action, the structure, timing and conduct of a conference (and where relevant a hearing) can significantly influence whether the matter can be effectively resolved in that forum. We refer broadly to conferences across the IR and human rights jurisdictions.*
>
> *For matters involving allegations of sexual harassment or assault to be effectively managed, a conference should be held in a responsive manner (similar in timeframe to unfair dismissal) and with the aim of preserving the employment of the applicant and with consideration to safety and wellbeing risks that delays may exacerbate.*
>
> *The structure of a conciliation conference (how and where it is run) involving any matter of gendered violence (such as sexual harassment or assault) should be considered with the input of the applicant and or their representative. This may include keeping the parties separate and facilitating private discussion with the conciliator or commissioner. All such, proceedings should be run in a manner that upholds the dignity of the applicant and that also builds on her identified safety strategies including maintaining a safe distance from the alleged perpetrator and minimising opportunity for retaliatory or further abusive behaviour.*[42]

40 Queensland Council of Unions, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

41 Construction, Forestry, Mining and Energy Union, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

42 Basic Rights Queensland, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*

A range of measures promoting victim-centricity and choice in QIRC proceedings relating to sexual harassment to improve the experience of participants were advanced by stakeholders. These could include:

- prioritising sexual harassment matters to ensure timeliness
- providing support options for complainants during conferences
- supporting complainants appearing via video-link in proceedings.

Another issue raised was that the QIRC does not provide specific data relating to the outcome of sexual harassment matters which are resolved at a conference. Matters that do not proceed to hearing are recorded as having been withdrawn which does not provide a meaningful understanding of the outcome of sexual harassment complaints.

Analysis

Arrangements to inform education and training, and the development and implementation of specific processes to deal with sexual harassment complaints within the QIRC, are well supported by stakeholders albeit with differing views as to how this can be achieved. As recognised in the *Respect@Work* National Report the education process should address court and tribunal processes, such as factors that could reduce the risk of re-traumatisation of victims in hearings, and also inform decision-making.

It is our view that the QIRCC would be best placed to lead this work for the Queensland industrial relations jurisdiction. A referral should be made to the QIRCC tasking them to identify the following which could adopt best practice in responding to sexual harassment:

- Guidance materials.
- Educative tools.
- Training packages.
- Best practice case management processes.

In directing this work, the QIRCC could also require the establishment of guidelines for dissemination of educative materials to embed systems to maintain awareness. It is envisaged the QIRCC would be informed by the work of the *Respect@Work* Council.

Further, the QIRCC could consider how data is collected and presented in relation to sexual harassment complaints.

Recommendation:

7. That a referral be made to the Queensland Industrial Relations Consultative Committee seeking that the Committee identify and advise on the development of guidance materials, educative tools, training packages, best practice case management processes, and statistical collations which will assist the Queensland Industrial Relations Commission staff and members in understanding the nature, drivers and impacts of sexual harassment to inform their work.

Registered organisations

Chapter 12 of the IR Act, in conjunction with the IR Regulation, sets out a comprehensive system of regulation encompassing almost all aspects of registered organisations' internal operation and governance.

The system provides for the existence and operation of organisations that represent employers and employees. Mostly, the Act refers to organisations that are registered under the IR Act and uses the term 'organisations' to describe registered unions and registered employer associations. There are brief references to 'associations', a term which has different definitions in different parts of the IR Act, but which always includes unregistered unions. The idea of recognising the existence of these bodies is to allow time for unregistered associations to develop into registered organisations in employment areas where no other union has coverage, and so certain protections are afforded to groups of workers on their path to registration.

The IR Act does not impose any reporting or governance requirements on associations (that is, on unregistered unions). In contrast, registered organisations, as a condition of their ongoing registration, are subject to rigorous statutory requirements, accountability and transparency requirements designed to protect the interests of members of those organisations as well as providing for transparency over the financial conduct including political donations of registered organisations. The legislative framework recognises this significant regulatory burden and oversight of these organisations by providing registered organisations with exclusive rights. Accordingly, treatment of registered organisations and unregistered associations differs in the IR Act.

The IR Act promotes the primacy of registered organisations by providing a scheme whereby organisations can seek and provide representation rights for employees, including standing rights in relation to particular matters. Specifically:

- *Purposes of the IR Act are achieved by:*
  - encouraging …and by recognising the right to freedom of association, right to organise and be represented (section 4(m))
  - encouraging representation by registered organisations (section 4(n)).
- *Bargaining for certified agreements:*
  - The legislation intends that collective bargaining can occur between employers and registered organisations.
- *Modern awards:*
  - The legislation intends that parties to modern awards are limited to registered organisations, employers and employees.
- *Demarcation disputes:*
  - Since 2007, the IR Act has allowed the QIRC to make exclusive representation rights for a registered organisation where the QIRC is satisfied that the conduct of an unregistered association is preventing, obstructing or restricting negotiations or discussions between the employer and an organisation.
  - Whilst this acknowledges the existence of associations, it is only to exclude them from formally representing the industrial interests of employees where a union has coverage.
- *General protections:*
  - The general protections under the FW Act and the IR Act 2016 (and previously under 'freedom of association' in the *Industrial Relations Act 1999*) protect employees who choose to associate with either unregistered or registered associations, as accords with international best practice.
  - The protection is wide (to encompass employees associating with unregistered associations) but the ability to bring an action on an employee's behalf and be joined as a party is limited to registered organisations. This does not prevent an unregistered association from advocating for an employee in the QIRC, but they do not have standing as a party.
- *Workplace bullying:*
  - An unregistered association has no standing in relation to an application for a civil penalty order where an order to stop bullying is contravened.
- *Section 481(2)(c) IR Act:*
  - The QIRC may make an order if satisfied that the unregistered association had made, or was making, representations about its rights, functions or powers under the Act.

Employer group stakeholders raised the issue that employers were at times placed in the precarious position of having to engage with unregistered associations along with the registered organisations who were legally entitled to act on behalf of employees. The Local Government Association of Queensland (LGAQ)[43], which had minimal dealings with unregistered associations to date, expressed concern if 'unregistered associations were given the same license to represent members/clients before the commission on matters generally reserved for registered organisations.' The Chamber of Commerce and Industry Queensland (CCIQ)[44] said 'All registered organisations that are given the exclusive rights should be upheld to their rigorous statutory requirements that are designed to protect the interests of their members.'

The QCU in its submission referred to the purposes of the IR Act which encourage:

- fairness and representation at work, and the prevention of discrimination, by recognising the right to freedom of association, the right to organise and the right to be represented
- the representation of employees and employers by organisation that registered under the Act.[45]

It commented that:[46]

> *In recognising a key purpose as encouraging the representation of employees by registered organisations, the IR Act confers certain rights, protections, and also requires those organisations to be accountable… the IR Act also extends some of those rights i.e., general protections to an 'industrial association' but only where that body has been established with a view to seeking registration…*
>
> *there have been a number of matters in recent years where organisations not registered under the IR Act have sought to have the same rights and privileges of unions registered under the IR Act, without the responsibilities and accountabilities of being a registered organisation.*

Definitions relating to organisations and associations

There are a number of relevant definitions used through the Act.

Chapter 12 – Industrial organisations and entities

Chapter 12 of the IR Act sets out the rights and responsibilities of employees, employers and industrial organisations.

Part 2 of Chapter 12 sets out requirements for registration as an organisation. In particular, section 602 provides that an association may apply for registration as an employee organisation or an employer organisation, but a corporation may only apply as an employer organisation. Section 607 sets out registration criteria for all applications requiring the QIRC to be satisfied inter alia that the applicant exists to further protect its members interests and compliance with the obligations under Chapter 12 and Chapter 8 of the IR Act.

Section 608(1)(b) provides that the QIRC must not approve an employee organisations' application for registration unless there is no existing organisation to which the applicant's members might belong or could conveniently belong to, that would be able to effectively represent them. This limitation restricts certain associations from registering as an industrial organisation.

Chapter 8 – General protections

Chapter 8 of the IR Act provides a general protections jurisdiction in Queensland for employees against adverse action during employment or dismissal from employment. These protections are equivalent to those in the FW Act in relation to workplace rights and adverse action, freedom of association with industrial associations, workplace discrimination, and providing effective relief for persons discriminated against. While Chapter 8 extends general protections to industrial associations, it limits the ability to make an application on an employee's behalf and to seek penalties to registered organisations.

As set out in section 278 the purpose of general protections (Chapter 8) are relevant to this discussion concerning freedom of association, including the idea that a person is free to:

- become or not become a member of an industrial association
- be represented or not represented by industrial association
- participate or not participate in lawful industrial activities.

43 Local Government Association of Queensland, *Review of Industrial Relations Act 2016 Submission*, page 7.

44 Chamber of Commerce & Industry Queensland, *CCIQ submission to the Industrial Relations Act 2016* Review, page 2.

45 Queensland Council of Unions, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*, page 17.

46 Ibid, page 17.

Section 279 defines industrial association as meaning either:

- an employee organisation
- an association of employees having as a principal purpose the protection and promotion of their interests in matters concerning their employment
- an employer organisation
- an association of employers having as a principal purpose the protection and promotion of their interests in matters concerning their employment; or
- a branch of an industrial association mentioned above (emphasis added).

However, 'industrial association' and the term 'the association' appear to be used interchangeably in this Part, for example in section 282(4) relating to adverse action taken by an industrial association.

Chapter 11 – Orders about Right to represent a group of employees

Subdivision 10 of Division 4 of chapter 11 pertains to orders about the right to represent a group of employees. Section 478 defines association for the purpose of this subdivision as meaning 'an entity that is formed or carried on to protect and promote its members' interests in matters concerning the members' employment, but is not registered as an organisation under the IR Act.

Dictionary definitions

The above provisions distinguish between organisations and associations, which are further defined at schedule 5 of the IR Act (the dictionary). Under schedule 5:

- an **organisation** means a body registered under chapter 12 as an organisation,
- an **association** —
  - (a) generally, means an unincorporated body or entity formed or carried on to protect and promote its members' interests; and
  - (b) for chapter 11, part 2, division 4, subdivision 10, see section 478.
- an **eligible association** means an association that is eligible to be, but is not, registered as an organisation
- an **industrial association**, for chapter 8, part 1, see section 279.

International context

The IR Act should be consistent with the intent of the relevant International Labour Organisation (ILO) Convention (No 87) on freedom of association, which Australia has ratified. Articles 2 to 4 of this Convention provide that:

- Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation (Article 2).
- Workers' and employers' organisations shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof (Article 3).
- Workers' and employers' organisations shall not be liable to be dissolved or suspended by administrative authority (Article 4).

Stakeholder views

Section 279 provides five components of the definition of industrial association distinguishing between organisations and an association of employees or employers.

Submissions centred on the definition and purpose of associations of employees. For the purposes of Chapter 12 an incorporated body can only apply for registration as a registered organisation of employers and accordingly an association of employees when referred to in the IR Act must mean an unincorporated body.

The High Court case of *Re McJannet; Ex Parte Minister for Employment, Training & Industrial Relations (Qld)* supports the view that expressions like 'an association of employees' do not connote the existence of a legal entity.[47] In a recent case before the QIRC, VP O'Connor accepted that the term 'trade union' does not mean an

47 (1995) 184 CLR 620 at 639-640.

entity with some distinct corporate personality from that of its individual members.[48] While this case determined that the organisation behind this application was neither an industrial association nor a trade union within the meaning of the IR Act, clarity around what is an association of employees is required.

The legislative purpose of section 279 is to provide protection for registered organisations and their members and also groups of workers who may go on to obtain registration. This protection is extended for reasons that if groups of workers organise but are not protected the scheme of registration would be undermined by lawful attacks on groups of workers who had not yet been able to apply for registration.

The QCU is proposing an amendment to section 279 of the Act to define an association of employees 'as an industrial association of employees having as a principal purpose the protection and promotion of their interests in matters concerning their employment seeking registration under this Act' and adding additional legislative notes to section 279 as follows:

> *Note— An organisation is a body that is registered as an organisation under chapter 12—see schedule 5, definition of organisation.*
>
> *An industrial association of employees is a body that:*
>
> *(i) is eligible to seek registration as an employee organisation under the Industrial Relations Act 2016 (Qld);*
>
> *(ii) is formed with the express purpose of seeking registration as an employee organisation under the Industrial Relations Act 2016 (Qld); and*
>
> *(iii) is seeking registration as an employee organisation under the Industrial Relations Act 2016 (Qld).*
>
> *An industrial association of employees cannot include a corporation within the meaning of Section 596 of this Act.*[49]

This proposal would complement the view expressed by the recent QIRC decision in *Gilbert v Metro North Hospital Health Service & Ors*[50] and is consistent with section 602(1), which excludes a corporation from seeking registration as an employee organisation. The QCU does not give reasons for its proposed insertion of the word 'industrial' to describe the association of employees. We do not consider using the terminology 'industrial' would unduly restrict the existing definition nor does it expand the definition. However, it could create confusion or ambiguity in the context of the terminology industrial associations in that provision. Consequently, we do not recommend adding in the word 'industrial' to the definition of 'association of employees'.

Analysis

In the above context, and bearing in mind the historical importance attached in Australia to an orderly system of industrial relations regulation, the provisions of the IR Act regarding registered organisations should achieve the following:

- enable the system to operate in an orderly manner
- ensure that unions and employer organisations behave with probity and in the interests of their members, and are free from inappropriate influence
- provide a mechanism for employees to be able to act collectively and form unions that will ultimately meet the above requirements of probity and acting in the best interests of members
- discourage the recognition or misleading promotion of organisations that do not have the capability or intent to do those things.

This means that the IR Act requires:

- clear definitions of the types of organisations to which it refers
- a clear distinction to be made between registered and unregistered bodies
- substantial responsibilities accruing to registered organisations, in return for privileges, freedoms and rights of collective representation to such organisations in the system

48 *Gilbert v Metro North Hospital Health Service* [2021] QIRC 255, [104].

49 *Queensland Council of Unions, Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*, pages 22-23.

50 *Gilbert v Metro North Hospital Health Service* [2021] QIRC 255.

- unregistered bodies should not have either those privileges or those responsibilities, but there should be pathways for unregistered bodies to become registered organisations and protections for people seeking to do that as a means of organising collective representation
- other organisations that do not do either of those things should be excluded from the formal operation of the system, and people in them should not be able to benefit from false claims about their role in the system.

The provisions of the IR Act that set out the rights and responsibilities of registered organisations did not attract negative comment from stakeholders. They seem to us to be appropriate and fit for purpose, in terms of ensuring that these organisations behave with probity and in the interests of their members. While many aspects of the requirements on unions are similar to provisions that had existed in the federal jurisdiction, there was no pressure to adopt any provisions that had recently been added, or proposed to be added, into the FW Act. The substantive content of the regulation of registered organisations appears appropriate and not needing any change.

However, some other parts of this aspect of the IR Act warrant improvement.

To start, the IR Act would be clearer to readers if there was greater consistency and clarity of language in describing associations of employees and distinguishing associations of employees from associations of employers. To this end, the Schedule 5 Dictionary should have clear, and separate, definitions of 'registered organisation of employees' and 'registered organisation of employers', and these terms should be used consistently though the IR Act. Further, there should be a clear, and separate, definition of an unregistered organisation, using whatever term appears appropriate.

The term 'association' should not be used, at least not with the meanings that it currently has. The present definition of 'association' in Schedule 5, which gives two different meanings to the term depending on which part of the IR Act it appears in, should be abandoned. Nor should the term 'organisation' be used without being preceded by a qualifier such as 'registered' or 'unregistered'.

Second, there is no benefit from having some provisions that give recognition to the coverage of unregistered associations when they are not asked to fulfil the responsibilities that registered organisations must fulfil. This issue is relevant to section 478, which, in its different forms since 2007, has had the effect of allowing the QIRC to make a coverage order between a registered and an unregistered body. The orders may be made if an unregistered association is obstructing the performance of work, harming an employer's business or obstructing negotiations or discussions between the employer and a registered organisation or the employer and its employees. This provision was used in late 2017 by the United Firefighters Union Qld (UFUQ) when it sought orders from the QIRC against the Queensland Auxiliary Firefighters' Association Inc. (QAFA) about the right to represent the industrial interests of auxiliary firefighter employees under the IR Act.[51] The Full Bench found that it had the jurisdiction to issue orders sought by the UFUQ, as QAFA was making representations that it has rights, functions or powers in relation to employees which it did not have.[52] However, the Full Bench did not exercise its discretion to make orders, mainly because it was not persuaded about the views of the affected employees and the impacts an order would have on the employer (both relevant considerations under the IR Act).[53]

This matter has created further ambiguity by, on the one hand, recognising a dispute but then, on the other hand, not making orders which would uphold the exclusive rights of a registered organisation. The inclusion of 'associations' in this Part of the IR Act in 2007 was to allow the QIRC to make exclusive representation rights for a registered organisation, where the QIRC was satisfied that the conduct of an unregistered association was preventing, obstructing or restricting negotiations or discussions between the employer and an organisation. Using a demarcation dispute against an unregistered association of employees has, however, proved an ineffectual method of upholding representation rights and is conceptually flawed as the registered organisation has representation rights anyway.

Part of the solution appears to be to revert to the pre-2007 arrangements with regard to the relevant passage in the IR Act (Subdivision 10 of Division 4 of Chapter 11), and only permit orders about exclusive representation rights in relation to registered organisations. This removes any confusion or belief that unregistered organisations may have collective rights.

The issue that the 2007 amendments to section 478 sought to address was the overlap between registered and unregistered organisations. In more recent years, another issue has been the apparent potential for unregistered bodies that have no capability or intention to seek registration to try to portray themselves as recognised unions within the IR Act — in effect, wanting some of the benefits but none of the responsibilities associated with registration. It is one thing for a group of workers in a poorly unionised area to try to organise themselves to negotiate collectively; it is quite another for an external body to seek to obtain some of the benefits of the system,

51 *United Firefighters' Union of Australia, Union of Employees, Queensland v Queensland Auxiliary Firefighters Association Inc.* [2018] QIRC 066.

52 Ibid, paragraph [91].

53 Ibid, paragraph [92].

without exposing themselves to the financial disclosure and auditing responsibilities normally associated with the system. The former group is deserving of the general protections for freedom of association; the latter group is not.

Accordingly, there is a need for the QIRC to have the capacity, on application, to make orders preventing a group of people or unregistered body from purporting to be able to represent employees under the Act when they do not have this capability. The most appropriate place for this in the Act would be a new Subdivision immediately after the existing Subdivision 10 (that is, a new Subdivision 10A). To prevent such bodies from simply purporting to represent a different group of workers after being rejected, this new subdivision should provide that any association or unregistered body that has such an order made against it becomes ineligible to subsequently obtain registration under the IR Act for as long as such an order is in place. These changes would also require amendment to section 607, which concerns the criteria for registration, listing non-exclusion under this subdivision as a criterion. To prevent 'phoenixing' (the same people re-establishing a similar type of body with just a different name), the amendment to section 607 should also make clear that an organisation would be ineligible if it was predominantly controlled by people associated with a body that would itself be ineligible for registration.

Such arrangements should be supplemented by a provision that imposes a penalty if there was misrepresentation being made that an organisation had the right to represent employees within the system, or otherwise misleading conduct is being undertaken.

This brings us back to the matter of the general protections and how these relate to unregistered associations. The general protections against adverse action by employers seeking to subvert the rights to freedom of association or to strike should be available to genuine unions, and the Act already recognises that some may not yet be registered. From the submissions we received and from our own reading of the issues, it appears that the definition of an unregistered association for the purposes of the general protections should contain the following elements. It should:

(i) be an unincorporated body or entity

(ii) be formed or carried on with the principal purpose of the protection and promotion of members interests in matter concerning employment; and

(iii) be formed with the intention of registering under this Act.

Regarding the first point, it has long been recognised that an already-incorporated body cannot be a registered organisation. Articles of incorporation that make one eligible for status as an incorporated body are unlikely to meet the requirements for registration under the IR Act, and some types of incorporated bodies (e.g. a company) have objectives that are incompatible with acting democratically in the interests of all members. The second point concerns the genuineness of the proposed union, and the third has already been mentioned.

It is inherent in the nature of general protections that they extend to a wider category of unions than are encompassed by 'registered organisations' – that is, also to nascent unions who may eventually obtain registration for the purposes of the remaining parts of the IR Act. Without the protections so provided, such unions might never survive to seek registration. The other side of this coin is that not all bodies that are covered by the general protections are treated like registered organisations in the rest of the IR Act. So, the Act should also make clear (by a note or new subsection) that eligibility for general protections does not grant representation or any other rights in any other Part of the Act outside Chapter 8 Part 1 General Protections.

The General Protections are, in part, aimed at protecting freedom of association, and hence compliance with ILO Convention 87. It can be argued that questions about the compliance of the IR Act with ILO Convention 87 are not raised by these provisions, as this Convention permits member countries, through Article 8, to require organisations comply with certain laws pertaining to the good governance, made in accordance with the law of the land. Article 8 further provides that:

1. *In exercising the rights provided for in this Convention, workers and employers and their respective organisations, like other persons or organised collectives, shall respect the law of the land.*
2. *The law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this Convention.*

Moreover, as mentioned compliance with ILO Convention 87 is promoted by the fact that the General Protections of Chapter 8 Part 1 of the IR Act (sections 278-314) apply not only to members of registered organisations but also unregistered organisations. That said, we attach high importance to the ability of employees to freely self-organise into nascent unions. The ability of employees to be able to act collectively and belong to registered unions is undoubtedly protected in the General Protections. The ability of employees to act collectively and form nascent unions is also mostly protected in the provisions of the General Protections. These provisions do this, not so much

through recognising unions that are, for the most part, not unrecognised in the Act, but by protecting the activities of employees engaging in union-like activities, regardless of whether or not the organisation they belong to is a registered union or even whether they belong to any type of union at all.

These employees may, for example, be organising fellow employees to resist inappropriate management action, and they should not be able to be dismissed or adversely affected for such activities. Much of this potential activity is already protected by the definition of 'industrial activity in section 290(b), which is quite broad. This definition includes, amongst other things:

- encouraging, or participating in, a lawful activity organised or promoted by an industrial association
- representing or advancing the views, claims or interests of an industrial association.

However, there may be some activities not encompassed here. So, some additional activities may need to be separately specified. These might include:

- discussing the terms or conditions of employment with other employees (for example, rates of pay, regardless of what is specified in the employer's code of conduct)
- disseminating information about the terms or conditions of employment (again, regardless of what is specified in the employer's code of conduct).

This discussion raises questions about the relationship between provisions in the IR Act and freedom of association rights under section 22 of the Human Rights Act 2019 (HR Act) and section 7 of the AD Act. A number of submissions raised matters about this intersection of these issues, including the relationship between the treatment of 'trade union' in the HR Act or AD Act, the definition of registered organisation and association in the IR Act, and the common law definition of trade union. Issues of consequent changes to other legislation apart from the IR Act are, however, matters outside the scope of this Review. These issues should be investigated, including by the review of the AD Act.

Recommendations:

8. That for, clarity and consistency, the *Industrial Relations Act 2016* (IR Act) should:
   - apply consistent definitions throughout
   - use, throughout the appropriate parts of the IR Act, the term 'registered organisation' rather than 'association' or 'industrial association' when referring to registered organisations of employees or registered organisations of employers
   - clarify where terms refer to bodies representative of employees or employers.
9. That the definition and description of what is currently referred to as an association of employees for the purposes of section 279 of the *Industrial Relations Act 2016* (IR Act) comprise the following elements:
   - it is an unincorporated body; and
   - it is formed or carried on with the principal purpose of the protection and promotion of members' interests in matter concerning their employment; and
   - it is eligible to be registered under the IR Act; and
   - it has been formed with the intention of becoming registered under the IR Act.
10. That consideration be given to replacing the term 'association' where used in the *Industrial Relations Act 2016* with a more appropriate term that clearly distinguishes from, and denotes a body that is not, a registered organisation.
11. That the *Industrial Relations Act 2016* (IR Act) should also make clear (by a note or new subsection) that eligibility for general protections does not grant representation or any other rights in any other Part of the IR Act outside Chapter 8 Part 1 General Protections.
12. That Subdivision 10 of Division 4 of Chapter 11 (Orders about right to represent a group of employees, sections 478-483) of the *Industrial Relations Act 2016*, should only apply to registered organisations, and all references there to an association or an organisation that is not registered should be removed.
13. That a new Subdivision 10A be created in the *Industrial Relations Act 2016* (IR Act) to follow it, enabling orders to be made preventing a group of people or an unregistered body from purporting to be able to represent employees under the IR Act when they do not have this capability, and that any association or unregistered body that has such an order made against it becomes ineligible to subsequently obtain registration under the IR Act for as long as such an order is in place. This should also be specified in section 607, which should further make clear that a body predominantly controlled by people associated with an ineligible body would itself be ineligible for registration.
14. That penalty provisions be included in the *Industrial Relations Act 2016* (IR Act) to ensure that an unregistered organisation does not misrepresent their status, for example by claiming that they are eligible to represent employees under the IR Act.
15. That the definition of 'industrial activity' in section 290(b) of the *Industrial Relations Act 2016* be expanded to include activities that may be associated with nascent unionism, including discussing or disseminating information about the terms or conditions of employment (for example, rates of pay, regardless of what is specified in the employer's code of conduct).

Employee entitlements

A guiding principle of the 2015 McGowan Review[54] was consistency, where appropriate, between the Queensland Employment Standards (QES) as provided for under Chapter 2, Part 3 of the IR Act and the National Employment Standards (NES) set out in Part 2-2 of the FW Act. This current Review also considered any differences in the entitlements of the QES and NES with a view to making recommendations for legislative amendment where entitlements could be improved for employees in the Queensland industrial relations system.

The QES under the IR Act include 14 minimum employment conditions. The NES provide for 11 minimum employment entitlements that have to be provided to all National System employees, but include recent changes to casual employee conversion entitlements, which are dealt with in a later chapter of this report.

Both the IR Act and the FW Act contain minimum employment standards regarding notice of termination and payment of redundancy. Ordinarily in both jurisdictions, these minimum standards cannot be negated by an industrial instrument such as a modern award or enterprise agreement. However, the FW Act provides that a modern award may include a term specifying when the legislated redundancy entitlement does not apply. The FW Act further provides that if a modern award includes such a term an enterprise agreement may incorporate the term.[55]

Ten stakeholders made submissions regarding minimum entitlements under the IR Act.[56]

Annual leave

Since 1916, statutory or award provisions have dealt with the way in which employees should be paid for working on public holidays and (from 1946) how public holidays that fell during an employee's annual leave should be treated. The provision at issue here is now section 31(3) of the IR Act, which says that if an employee is entitled to additional annual leave as compensation for working on a particular public holiday, annual leave is inclusive of the particular public holiday. Queensland is the only jurisdiction in Australia in which there is a provision to give an exemption to annual leave being exclusive of public holidays.

Four employee group stakeholders proposed amendment of the QES to remove this treatment of annual leave with respect to public holidays. Amongst those, the QNMU has long advocated for the removal of section 31(3) of the IR Act, so that annual leave would be exclusive of public holidays, in line with the NES. This argument has been on the basis that the additional annual leave for nurses and midwives was compensation for their being paid a lower penalty rate for certain public holidays and was not for their working on particular public holidays; hence, it was argued, this group should not be excluded from compensation for working on those public holidays. In the decision in an unsuccessful appeal to the QIRC by the QNMU on this issue, the QIRC observed that the IR Act does not give any guidance as to the necessary compensation for the exception to apply.[57]

It appears to us that a large part of the problem lies in imprecision in the IR Act and in the relevant industrial instruments as to whether and in what ways compensation is occurring. Nurses and midwives are not the only occupations affected by this issue. The exclusion in section 31(3) may also apply to other occupational groups to greater or lesser extent, depending on how it is implemented in other agencies, these include for example ambulance officers and police.

Trade-offs that were made in past years can become the subject of dispute between parties because of conflicting views as to the terms of that trade-off when it is not documented clearly. The IR Act enables that to occur by not requiring the terms of a trade-off to be specified. Awards sometimes specify the public holidays that are not covered by this provision but are silent on which ones are covered. The issue then becomes complicated by the fact that, since the 2001 amendments to the IR Act, there has been an increase in the number of public holidays. This may affect the additional annual leave entitlements under subsection 31(3): should not an increase in the number of compensable public holidays lead to some change in compensation? Yet to remove this provision may create complications and implications for employees and employers in some occupations.

54 Industrial Relations Legislative Reform Reference Group (2015) *A Review of the Industrial Relations Framework in Queensland – A report of the Industrial Relations Legislative Reform Reference Group (December 2015)*.

55 *Fair Work Act 2009* (Cth), s 121.

56 Queensland Council of Unions, Together Queensland, United Workers Union, Electrical Trades Union, Plumbers and Gasfitters Employees Union, Queensland Nurses and Midwives' Union, Local Government Association of Queensland, Queensland Law Society, Basic Rights Queensland, Queensland Police Union.

57 *Queensland Nurses and Midwives' Union of Employees v State of Queensland (Department of Health)* [2018] QIRC 050.

The solution appears to lie in two courses of action:

1. being explicit about which public holidays are affected by this compensation, and
2. requiring the parties to document to one another (or the QIRC, if the matter ends up with it) the basis for any purported compensation.

While other jurisdictions have, for good reason, not permitted such trade-offs, it would be remiss to now allow a windfall gain in benefits that were provided as such a trade-off.

Recommendations:

16. **That the relevant industrial instruments be reviewed to explicitly specify which public holidays are affected by the compensation covered by subsection 31(3) of the *Industrial Relations Act 2016* with the review process supported by the State Government.**
17. **That subsequently, subsection 31(3) of the *Industrial Relations Act 2016* be amended to ensure that its provisions only operate where the relevant public holidays are explicitly specified in the industrial instrument where compensation is said to have occurred. That is, the provision should require that instances of annual leave being inclusive of an entitlement to a public holiday only occur when that specific public holiday is identified in the award or agreement.**

Personal and compassionate leave

Section 98 of the FW Act provides that where an employee takes paid sick or carer's leave that includes a public holiday, the employee is to be paid the public holiday, as opposed to the employee taking paid sick or carers leave on that public holiday. An equivalent provision does not exist in the IR Act.

It was argued that Queensland employees were disadvantaged as the FW Act allowed an employee to take the said public holiday as a public holiday.

Section 41(1)(b) of the IR Act also requires an employee to provide a doctor's certificate for absences exceeding two days, whereas the FW Act only requires the employee to be able to provide evidence that would satisfy a reasonable person.

Regarding compassionate leave, an issue raised was whether the QES should match the new NES provision which extends section 104 to include miscarriage as a reason for compassionate leave. We are satisfied with the QES on this issue, as section 47(2)(a)(ii) already provides for compassionate leave if an employee or the employee's spouse or current partner has a stillbirth or a miscarriage.

No change is required on compassionate leave for a stillbirth or miscarriage.

Recommendation:

18. **That the *Industrial Relations Act 2016* provisions should be aligned with the provisions of the *Fair Work Act 2009* for the purposes of encouraging consistency across the industrial landscape in Queensland in respect of accessing public holidays while on approved personal leave/carers leave and providing evidentiary proof (if required) for the period of such leave.**

Parental leave

The unpaid parental leave entitlements in the QES, while broadly commensurate with those provided in the FW Act, currently fall behind on several measures. Although the drafting of the FW Act extends the application of unpaid parental leave entitlements in the NES to all non-national system employees and employers in Australia (FW Act, Chapter 6, Part 6-3) (an extension that relies on the external affairs power of the Constitution[58]) and the FW Act does not exclude a state law providing for unpaid parental leave entitlements that are 'more beneficial' than those under the extended FW Act (FW Act section 747), it is appropriate for the QES to be amended to, at a minimum, align with the NES.

Consistency between the jurisdictions is also important given that, in a couple, one parent could be a national system employee and the other a non-national system employee. The provisions of the *Paid Parental Leave Act 2010* (Cth) (PPL Act) also apply to all employees subject to eligibility requirements, whether in state or federal industrial relations systems.

The QES parental leave provisions were aligned more closely with the federal NES in the 2016 IR Act, when—in response to recommendation 40(b) of the 2015 McGowan Review[59]—important changes were introduced including the extension (to eight weeks) of the permissible period of concurrent leave for parents who are both entitled to unpaid parental leave, and the ability to take this leave in separate portions.

Arrangements such as these, that allow greater flexibility in usage, are recognised as important in encouraging leave uptake for both parents, particularly fathers.[60] Their inclusion places Queensland ahead of state jurisdictions that limit concurrent leave to one week. However further extensions of flexibility are now needed for the unpaid parental leave provisions in the Queensland jurisdiction to remain consistent with or more beneficial than the FW Act provisions. While it may also be possible to simplify the legislative arrangements by indicating where FW Act provisions apply, there are benefits in continuing to include the provisions expressly in the IR Act for one point of reference.

One advance would be to include or exceed the 'flexible unpaid parental leave' provisions recently introduced in the federal jurisdiction under the *Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020* (Cth). Section 72A of the FW Act sets out these flexibility extensions, which allow up to 30 days (six weeks) of the unpaid leave entitlement to be taken flexibly (in a continuous block or in separate periods of one or more days each) within 24 months after the birth or adoption of a child.[61] While the broad QES right to request flexible working arrangements provision would allow for such an arrangement to be entered into in practice (subject to agreement), signalling this clearly in the parental leave provisions of the IR Act would be beneficial and instructive to employers and employees.

Another improvement in flexibility would be to enhance the capacity for parents of young children to move between full-time and part-time work after returning to work from parental leave. Several submissions drew attention to barriers encountered after initially returning to work full-time. Together Queensland provided the example of a working couple in which one parent takes 26 weeks' leave (while the other remains working full-time), then the second parent takes 26 weeks' leave (while the first parent returns to work full-time).[62] When the second parent returns to work full-time, the first parent often wishes to change from full-time to part-time, however section 74 of the IR Act offers the right to return part-time work only to those currently on parental leave. Other submissions (for example from the QCU and United Workers Union (UWU)) underlined the problem and argued that the IR Act should be flexible enough to allow for this movement between full and part-time after returning to work from parental leave.[63]

While a right to request flexible working arrangements is available under Division 4 of the QES, specification in Division 8 of the flexibility to request moves between full and part-time work during the permitted period of part-time working specified in section 75(2) of the IR Act would facilitate the shared parenting arrangements outlined in the example above and thus assist in supporting more gender egalitarian patterns of work and care. Such a change would be unlikely to create a burden on the system and would be consistent with the overall purpose of the IR Act,

58 Explanatory Memorandum to the Fair Work Bill 2008 (see, for example, notes for clause 742).

59 Industrial Relations Legislative Reform Reference Group (2015) *A Review of the Industrial Relations Framework in Queensland – A report of the Industrial Relations Legislative Reform Reference Group (December 2015)*

60 Gornick J and Meyers M (2008) 'Creating gender egalitarian societies: An agenda for reform', *Politics & Society* 36(3), pages 313-49; Haas L and Rostgaard T (2011) 'Fathers' rights to paid parental leave in the Nordic countries: consequences for the gendered division of leave', *Community, Work & Family* 14(2) pages 177-95; Whitehouse G and Nakazato H (2021) 'Dimensions of social equality in parental leave policy design: comparing Australia and Japan', Social Inclusion 9(2), pages 288-299.

61 These changes (which also included amendments in respect of children who are born prematurely and require immediate hospitalisation, who are stillborn, or who die within the first 24 months of life) followed earlier extensions of flexibility in the *Paid Parental Leave Act 2010* (Cth). A concise summary of the FW Act changes can be found on the Fair Work Ombudsman website, Changes to unpaid parental leave entitlements, available at www.fairwork.gov.au/about-us/news-and-media-releases/website-news/changes-to-unpaid-parental-leave-entitlements.

62 Together Queensland, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

63 Queensland Council of Unions, Submission to the *Five-Year Review of Queensland's Industrial Relations Act 2016*; United Workers Union, Submission to the *Five-Year Review of Queensland's Industrial Relations Act 2016*.

which includes, at section 4(k), 'promoting diversity and inclusion in the workforce, including by providing a right for employees to request flexible working arrangements to help balance their work and family responsibilities'.

Recommendation:

19. That the flexibility of unpaid parental leave entitlements in the Queensland Employment Standards be advanced by amending the *Industrial Relations Act 2016* (IR Act) to:

a. Allow a portion of the leave entitlement to be taken in separate blocks over a longer period, consistent with section 72A of the *Fair Work Act 2009*; and

b. Specify that employees who have returned to work full-time following parental leave may still request part-time work during the period identified at section 75(2) of the IR Act.

Access to unpaid parental leave entitlements is also more inclusive in the NES than the QES, specifically in relation to stillbirths and adoptions. Another recent amendment to the FW Act introduced with the *Fair Work Amendment (Improving Unpaid Parental Leave for Parents of Stillborn Babies and Other Measures) Act 2020* (Cth) provided that an eligible employee whose baby is stillborn, or dies within the first 24 months, would be entitled to the same unpaid parental leave (generally up to 12 months) as the parent of a live baby.

Another, longer standing, discrepancy between the NES and QES lies in the child's age limit for access to adoption-related unpaid parental leave, which is set at 16 years in the NES but five years in the QES. Apart from South Australia (which also sets a limit of five years) all other Australian jurisdictions specify age limits of 16 or 18 years.

Recommendations:

20. That the entitlement, in the *Industrial Relations Act 2016*, to unpaid parental leave is available in cases of stillbirth, consistent with section 77A of the *Fair Work Act 2009*.

21. That the definition of 'child' for adoption-related leave in the *Industrial Relations Act 2016* be amended to change the age limit from 5 to 16 years, consistent with section 68 of the *Fair Work Act 2009*.

Submissions to the Review also raised concerns about the evidentiary requirements for accessing unpaid parental leave. The need for a doctor's certificate (for example at sections 63 and 64) was viewed as overly narrow and proposals were raised by the QCU and QNMU to allow evidence from a registered midwife.[64]

Current requirements at section 74(5) the FW Act offer another alternative—these simply require 'evidence that would satisfy a reasonable person', while still allowing, at section 74(6), that an employer could request a medical certificate. Following the FW Act model would offer benefits of consistency across jurisdictions and the inclusiveness of more generic terminology.

Recommendation:

22. That the evidentiary requirements for unpaid parental leave in the *Industrial Relations Act 2016* be amended to be consistent with requirements at sections 74(5) and (6) of the *Fair Work Act 2009*.

Revisions to the IR Act in 2016 also refined the wording in relation to parental leave in ways that were more consistent with a gender egalitarian model of parenting. While the term 'birth-related leave' had been adopted prior to 2016 (replacing 'maternity' leave in most instances), the term 'primary-carer' was also removed from

64 Queensland Council of Unions, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016;* Queensland Nurses and Midwives' Union, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

descriptions of the leave provisions in 2016. The three types of parental leave (birth-related, adoption and surrogacy leave) had previously been described as leave '…to enable the employee to be the child's primary carer' (section 71GA, *Industrial Relations Act 1999*, as current at 3 July 2015); in 2016 this was changed to leave '…to enable the employee to be responsible for the care of a child' (section 56(2) of the 2016 IR Act).

This was closer to the wording in the FW Act, which describes the recipient of the entitlement as an employee '…who has or will have a responsibility for the care of the child' (section 70(b)). The change was a significant advance on the notion of 'primary carer', which implies a division of parenting labour likely to be associated with traditionally gendered norms of a male breadwinner and female carer.

Nevertheless, use of the terms 'short' and 'long' parental leave in the IR Act continues to echo such gender divisions. The FW Act, in contrast, does not use these terms, simply providing (at section 70) that an employee is entitled to 12 months unpaid parental leave if the leave is associated with the birth or adoption of a child and the employee has or will have a responsibility for the child's care. Amending the IR Act to align more closely with the terminology and parental leave types in the FW Act would assist in modernising the provisions and ensuring greater consistency with gender egalitarian goals. This would also be enhanced by limiting use of the term 'maternity leave' in the IR Act (the FW Act uses it only in relation to 'special maternity leave') and ensuring that pronouns are gender-neutral wherever possible.

Recommendations:

23. That the wording of Division 8 (Parental Leave) in the Queensland Employment Standards be reviewed to reflect current standards of language that avoid implying gendered divisions of parental care.

24. That unnecessary complications, through terminology such as 'short' and 'long' forms of leave, should be reduced or eliminated.

Long service leave

Under the FW Act, states and territories have responsibility for long service leave legislation for both National and State System employees.

Submissions by the QNMU and Together Queensland argued that long service leave entitlements had fallen below those in other jurisdictions, in particular Victoria, where recent amendments enable employees to access or cash out long service leave after seven years' service.[65] They recommended permitting employees with seven years' service to access a proportional period of long service and removing the requirements relating to termination payments. This would mean a greater number of employees would be accessing long service leave earlier than anticipated by their employer, which would have cost implications.

A submission by Ai Group sought to allow an employee to 'cash out' all or part of their long service leave entitlement if, their employer agreed, in lieu of taking the leave.[66] Allowing this would pre-empt consideration by the QIRC of a request to do this unless there was a dispute. This could also have financial implications for employers whose liability may not as yet have crystallised.

A further submission[67] sought amendments to clarify continuous service for casuals in determining their long service leave entitlement as a consequence of a decision in the QIRC (*Quilligan v UnitingCare* (2019) QIRC 188).

We are aware that COVID-19 has resulted in a substantial increase in applications to the QIRC, affecting the workload of the Commission. Whether other such increases in applications to 'cash out' long service leave are ongoing will only be determined over time.

Unlike other QES changes, this area affects National System employees as well, and there has been no consultation with such employers on this matter. Accordingly, we refrain from making any substantive recommendation, pending the outcomes of any wider consultations in respect of such proposals.

We are of the view that no amendments be made at this time to sections 95(2) and (4), 103(3) or 110(3) and (4) of the IR Act. If any proposals for amendments to long service leave provisions are to be considered, then a full consultation process should be undertaken, including both State and National System employers and employee representatives.

65 Queensland Nurses and Midwives' Union, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*; Together Queensland, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

66 Ai Group, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

67 Consultation with Industrial Relations Regulation and Compliance, Office of Industrial Relations, Queensland Government.

Domestic and family violence leave

Queensland was Australia's first jurisdiction to provide a legislated workplace response to domestic and family violence (DFV). Measures introduced through the IR Act aimed at redressing DFV include:

- providing employees with access to dedicated DFV leave
- permitting employees to access to carer's leave to care for a person affected by DFV
- prohibiting employers from taking adverse action against employees and prospective employees affected by DFV.

Dedicated DFV leave was introduced as an additional entitlement and as such is not tied to any other form of leave such as personal leave. DFV leave is available for all categories of employees and includes:

- ten days paid leave per year for full-time non-casual employees
- a pro-rata entitlement to the full-time entitlement for part-time employees
- ten days unpaid leave per year for long-term casual employees
- two days unpaid leave per year for short-term casual employees.

The carer's leave arrangements provided for through the former *Industrial Relations Act 1999* were amended so that an employee could access leave to care for a person affected by DFV.

These amendments also added protection against adverse action for those affected by DFV under its general protections provisions. Under section 296, an employer cannot take adverse action against an employee, or prospective employee, because someone has committed domestic violence against the person.

Following representations by the Queensland Government, the Australian Government, through the *Fair Work Amendment (Family and Domestic Violence Leave) Act 2018* (Cth), amended the FW Act to include, under the NES, an employee entitlement to five days unpaid DFV leave per year. However, the FW Act was not amended to provide a general protection against adverse action for employees affected by DFV.

The existing provisions of the IR Act concerning entitlement to domestic and family violence (DFV) leave were not identified for amendment by any stakeholders, though the importance of access to DFV leave was emphasised by a number of submissions. QCU's submission noted the utility of flexible work arrangements for employees in a variety of circumstances,[68] including employees experiencing DFV or caring for a DFV victim. In discussing the potential introduction of minimum standards for independent courier drivers, BRQ identified access to parental and DFV leave as key entitlements under the QES not currently provided to workers in the gig economy.[69]

We do not consider it necessary to recommend any change to the IR Act in this area.

Flexible working arrangements

Chapter 2, Part 3, Division 4 of the IR Act provides for altering the way an employee works under a flexible working arrangement.

The right to request a flexible working arrangement applies to all employees and is not restricted to specific purposes or categories of employees. Nor are flexible working arrangements restricted to the matters identified in the IR Act.

As is the case under the FW Act, a formal request must be in writing and a response provided within 21 days. Under the IR Act, an employer's response must also state that the QIRC has jurisdiction to hear and decide a dispute over the request. This legislative right of appeal and the broad application of the right to request flexible working arrangements make the Queensland entitlement significantly more beneficial to employees than the NES provisions.

Two submissions from employee organisations sought changes to allow group (as opposed to individual) applications for flexible working arrangements. It does not appear necessary, however, to amend the legislation to deal with this issue. Such matters could be managed through directives or through multiple individual requests.

We do not consider it necessary to recommend any change to the IR Act in this area.

68 Queensland Council of Unions, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

69 Basic Rights Queensland, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

Minimum wage and State Wage Case

Since 2011, the QIRC has mirrored the outcome of the Expert Panel of the FWC in its decision in the Annual Wage Review (AWR). While the QIRC is not bound to follow the AWR outcome, the QIRC has observed on several occasions that it requires a 'compelling argument' to depart from mirroring the AWR outcome in its State Wage Case (SWC) decision.[70]

The AWR[71] is heard and determined within the context of minimum rates and modern award rates for private sector workers within the national industrial relations jurisdiction. Moreover, workers impacted by the AWR have experienced low wage rate outcomes over the past decades and have little or no opportunity to secure wage increases through the auspices of bargaining.

The Queensland industrial relations jurisdiction includes several unique features which affect award rates outcomes for workers covered by the state system. These features are not subject to consideration by the Expert Panel when it determines the outcome of its AWR given the scope of its jurisdiction.

Relevantly, the federal National Minimum Wage (NMW) ($772.60)[72] has a lower monetary value than the Queensland Minimum Wage (QMW) ($808.50)[73].

Following the Queensland Government's referral of its residual private sector industrial relations powers to the Commonwealth in 2010, employees in the state jurisdiction are almost exclusively employed in state and local government sectors.

Significantly, employees within the Queensland jurisdiction are mostly covered by collective agreements. As at 1 March 2021, certified agreements in the state and local government sectors cover 98.2 per cent of the employees subject to the Queensland industrial relations jurisdiction. The composition of workers in the state jurisdiction is significantly different from those in the federal jurisdiction in terms of industry sectors and the manners in which wage increases are determined.

The federal minimum wage is mostly relevant to private sector employees in the federal system. Indeed, by 2018, nationally, 22.5 per cent of non-managerial employees were national modern award reliant, and almost all of these were in the private sector. In the Queensland industrial relations jurisdiction only 1.8 per cent of employees are award-reliant for their actual rate of pay.

Another unique feature of the Queensland industrial relations jurisdiction is the legislated provision that allows for the flow-on of provisions from certified agreements into a relevant state modern award (section 145 of the IR Act). This feature allows for wages and conditions in an award to be lifted to a level consistent with the prevailing standard achieved by collective bargaining within a specific cohort of employees, rather than any broader standard prevailing in the community. In practice, the facility to flow-on certified agreement provisions into the relevant award has only been applied in the Queensland public sector. There are 18 public sector awards that have received a full or partial flow-on.

Employees within the coverage of awards that have been subject to a successful flow-on application are in a unique position of being able to benefit from both future collective bargaining outcomes and from the outcomes of an increase to the SWC.

A number of SWC decisions prior to the 2021 SWC decision[74] delivered outcomes that led to pay rates in awards pertinent to employees in the Queensland public sector overtaking the rates settled upon in their certified agreements resulting in some employees' receiving adjustments to their pay rates from the certified agreement and an additional "top up" from the SWC. That is, some award rates exceeded the agreement. This was caused by an historic decision to have 'rolled up' rates from certified agreements 'flowed on' in awards in direct contrast to what occurs in the Fair Work sphere of coverage.

The QIRC, however, does not have the discretion to take account of this phenomenon when determining SWC outcomes.

This was highlighted when the issue was the subject of submissions in the most recent SWC on behalf of the state. These submissions did not attract any level of support from the applicants or, for that matter, the QIRC. The QIRC stated that 'if it is considered that some inequity or inconsistency rises by operation of the statutory provision, then that is a matter for the legislature and not for the Commission to determine.'

70 Queensland Industrial Relations Commission, available at: www.qirc.qld.gov.au/awards/state-wage-cases.

71 Fair Work Commission, available at: www.fwc.gov.au/awards-and-agreements/minimum-wages-conditions/annual-wage-reviews.

72 FWO website – www.fairwork.gov.au/newsroom/news/annual-wage-review-2021.

73 QIRC website – www.qirc.qld.gov.au/awards/state-wage-cases.

74 Queensland Industrial Relations Commission, available at: www.qirc.qld.gov.au/awards/state-wage-cases.

Union submissions to this Review sought to amend the IR Act to mirror section 206 of the FW Act, so that the base rates in agreements could be no less than in modern awards or the Queensland minimum wage, and the higher rate becomes the rate of pay for the relevant certified agreement.

There is a level of complexity associated with this matter, and it would not be solved by the above proposal. The solution appears to lie in legislatively granting to the QIRC Full Bench a level of discretion not currently available in these considerations around general rulings arising from the SWC.

Recommendation:

25. That section 459(2) of the *Industrial Relations Act 2016* be amended to allow the full bench to exercise a discretion to limit, or otherwise amend, State Wage Case (SWC) increases that would be flowed into parent awards whose rates exceeded those payable under a certified agreement or determination at the time of the SWC decision.

Apprentices

The issue of apprentices arises because minimum pay rates for certain apprentices have fallen behind movements in other minimum pay rates. The main mechanism for adjustment of apprentice pay rates is the following orders, which currently apply in the state system[75]:

- *Apprentices' and Trainees' Wages and Conditions (Queensland Government Departments and Certain Government Entities) Order* (GOBO)
- *Order - Apprentices' and Trainees' Wages and Conditions (Excluding Certain Queensland Government Entities) 2003* (OBO)
- *Supply of Tools to Apprentices* (Supply of Tools Order)

The GOBO, which applies to the State Government sector, has not been reviewed since it was first published in 2001. As a result, first- and second-year apprentices employed by the Queensland public service are currently paid 40 and 55 per cent of the standard rate, compared with 55 and 65 per cent for their matriculated counterparts in a Government Owned Corporation (GOC) or in the private sector (details are in Table 1).

Some 320 apprentices are employed under GOBO arrangements in State Government departments and agencies (plus another 199 in GOCs, who are in the federal system and hence not covered by GOBO). They are mostly located in schools and health services, though some are also in the departments providing public works or transport infrastructure.

Table 1 - minimum award rates for apprentices who commenced their apprenticeship on or after 1 January 2014 under the federal and state systems

Year of apprenticeship	Federal modern award % of standard rate for apprentices who have not completed year 12	Federal modern award % of standard rate for apprentices who have completed year 12	OBO % of relevant adult rate	GOBO % of tradesperson's rate specified in the award
1st year	50	55	40	40
2nd year	60	65	55	55
3rd year	77	77	75	75
4th year (if applicable)	90	90	90	90

The OBO applies to the Local Government sector, plus the Parents and Citizens Associations in public schools and some private sector workers. (These workers, who transferred to the federal system in other states, stayed in the state jurisdiction in Queensland after the 2010 referral of powers, due to the initial superiority of those arrangements at the time particularly with respect to competency-based wage progressions. However, they were exceeded by the federal provisions by 2013.)

75 Queensland Industrial Relations Commission, available at: www.qirc.qld.gov.au/library/trainees-and-apprentices

The OBO includes inconsistent and obsolete provisions and has not been reviewed since 2003. Both the OBO and GOBO have become outdated in terms of the training packages, the referencing to obsolete awards, and the apprentice percentages when comparing to federal modern awards. A revised award schedule, which was anticipated to replace the OBO and GOBO some time in or after 2016, has not eventuated.

The Supply of Tools Order has not been reviewed since 2010. This order currently provides for an annual allowance of $600 for tools or $2400 over the term of a four-year apprenticeship for plumbers, and a lesser amount for electrical apprentices. Due to the failure to review wage relativities since 2003, apprentice wages have become so low that they act as a disincentive to apprenticeships.

Proposals in submissions included that:

- QIRC be required to annually review orders made under the IR Act, sections 136 (minimum wages) and 137 (tool allowance) for apprentices or trainees
- orders made pursuant to sections 136 and 137 of the IR Act be subject to the annual state wage case and general ruling pursuant to section 458 of the IR Act.

However, the matters raised here do not appear to require legislative solution. Application by the parties to amend the provisions, and consideration by the QIRC, could resolve the issue. Whilst not a matter for legislative intervention, the review considers the matters raised need to be resolved promptly.

Recommendation:

26. That the percentages for competency-based progression for apprentices be aligned to the federal modern award and the value of the tool allowance be increased to a level to ensure it reflects current retail pricing. The final value of the tool allowance is a matter for determination by the relevant parties after which an application for revised and updated orders, should be made to the Queensland Industrial Relations Commission (QIRC). Any applications made to the QIRC for this purpose should be supported by the State Government.

Precarious and short-term employment

The issue of insecure or precarious employment in Australia has been a feature of media reporting, reviews and inquiries in recent years including the current inquiry of the Senate Select Committee on Job Security. Insecure or precarious employment includes working arrangements such as casual and temporary employment, labour hire, contracting, and 'sharing' or 'gig' economy platforms.

Data from the Australian Bureau of Statistics (ABS) shows that, in 2019, there were 2.6 million employees that did not receive paid leave entitlements, representing a little under a quarter of all employees in Australia. The ABS and many observers typically use information on paid leave entitlements as a proxy for measuring casual employment in the Australian labour force. Most casuals are in jobs with predictable hours and have quite stable and regular employment.[76] Thus casual employment status is not an indicator of the genuinely unpredictable nature of employment, but rather of the nature of the employment relationship including its precarity.

On 27 March 2021, the Australian Government amended the casual provisions in the FW Act[77] in response to recent Federal Court of Australia decisions of Skene[78] and Rossato.[79] In these cases, the Federal Court found that the employee was entitled to leave even though the employer claimed the employee had been compensated for the loss of leave entitlements by the payment of a casual loading. The employer was found to have misclassified the employment as casual when the employee was engaged on contracts which the courts considered were 'stable, regular and predictable'.

The federal amendments created a statutory definition of 'casual employee' which replaced the previous terminology of 'long term casual' with a 'regular casual'. The amendments defined 'casual' status as occurring where an offer of employment is made on the basis of 'no advance commitment' by the employer to provide continuing and indefinite work according to an agreed pattern of work for the person. The actual working arrangements after employment commenced became irrelevant to this definition. The provisions applied retrospectively. The amendments also included changes to the NES by introducing casual conversion as a new minimum standard.

The Queensland Government had voiced its concerns at this time in a submission to the Australian Senate Education and Employment Legislation Committee inquiry into the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020.[80]

On 4 August 2021, the High Court of Australia allowed WorkPac's appeal of the Rossato decision and declared that a reasonable expectation of continuing employment was not inconsistent with the nature of casual employment under the FW Act, though such an expectation does not constitute the 'firm advance commitment' necessary to distinguish casual employment from permanent employment.

While the current position of casuals under federal law is not satisfactory from a Queensland perspective, there seems little benefit from legislating for a different regime for casual employment in this state. Casual employment is not high in either the state or local government sectors in Queensland, with only seven per cent of Queensland public sector employees classed as casual in 2021. This number in turn represents only an estimated 14 per cent of employees without leave entitlements in Queensland. The great majority of casual employees in the state would not benefit from changes that would mostly serve to confuse participants in casual employment.

Casual loading

There is, however, the matter of the 'casual loading' rate. This refers to the multiplier applied to the base rate of pay received by a casual employee. The casual loading for employees in the national system is set by the FWC, and under the FW Act must be expressed as a percentage. It is presently 25 per cent, having been first set at that rate in the Metals Award in 2000, and gradually applied to other awards subsequently.

In the Queensland jurisdiction, the QIRC determines the casual loading, and can do so in response to an application or in some instances at its own initiative. The IR Act does not specify the existence of a casual loading in the QES. Nor does it specify any conditions for the form or content of the casual loading. In practice, the letting of casual loading rates takes into account paid entitlements that casual employees do not receive (but which 'permanent' employees do). These foregone entitlements have been taken to include different types of leave and advance notice of the employment arrangement ending. The current level of the casual loading in most Queensland awards is 23 per cent, based on a decision in 2001.

76 Peetz, D. (2020). *What do the data on casuals really mean*? Brisbane, Centre for Work, Organisation and Wellbeing, Griffith University.

77 Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2021.

78 *WorkPac Pty Ltd v Skene* [2018] FCAFC 131.

79 *WorkPac Pty Ltd v Rossato* [2020] FCAFC 84.

80 Queensland Government (2021) *Submission to the Senate Standing Committee on Education and Employment on the Fair Work Amendment (Supporting Australia's Jobs and Economic Recovery) Bill 2020*.

Other jurisdictions vary in their treatment of casual employees. In all with a state system, the casual loading rate is a matter for the relevant state tribunal. In Western Australia by law that loading must be no less than 20 per cent, in other states a minimum loading is not legislatively specified. The vast majority of casual employees, however, are in the federal jurisdiction.

Three employee organisations made submissions recommending that the casual loading rate in Queensland awards be increased to 25 per cent.[81] Submissions proposed that this could be achieved by way of an application to the QIRC for a general ruling by the bargaining parties, or via codification in the QES.

With casual employment widely acknowledged as an insecure form of employment, it would be equitable for those employed under such arrangements to be entitled to the same loading under the Queensland state system as applies to employees in the federal system.

Recommendation:

27. That casual loading for employees covered by the *Industrial Relations Act 2016* be increased from the present rate of 23 per cent to 25 per cent, which aligns with the casual loading rate applicable to employees in the National Employment System. This should be achieved through a registered organisation or a state peak council making the relevant applications in the Queensland Industrial Relations Commission, with such applications supported by the Queensland Government.

Conversion and other issues for casuals

Under the IR Act a long-term casual employee is defined as a casual employee engaged by a particular employer, on a regular and systematic basis, for one or more periods of employment during the one year immediately before the employee seeks to access this entitlement. Long-term casuals currently have access to the same unfair dismissal provisions under the IR Act as permanent employees. This provides protection against unfair dismissal if the dismissal is harsh, unjust or unreasonable, or for an invalid reason.

Thus, while permanent and long-term casual employees are protected from dismissal for unfair or invalid reasons, casual employees with less than twelve months service are presently excluded from these provisions.

Several amendments were made to the *Public Service Act 2008* (PS Act) as a result of the 2015 McGowan Review.[82] These included amending definitions of public service employee to change the terminology 'temporary employee' to 'fixed-term temporary employee'. This amendment also separated casual employees from the definition of fixed-term temporary employee. A new section provided for the employment of fixed term temporary employees.

Others provided casual and temporary employees in the Queensland public service with a mechanism for conversion to permanent employment. Transitional arrangements were provided under the IR Act to introduce the requirement to review the employment status of a casual employee after two years.

Further amendments were made to the IR Act as well as the PS Act in 2020[83] to give effect to the stage one public sector management reforms, which arose from the recommendations of the *A fair and responsive public service for all – Independent review of Queensland's state employment laws – May 2019* (Bridgman Review). This review was commissioned to review how Queensland public sector employment laws could best meet the objectives of fairness in the employment relationship, responsiveness of employees to the community and to the government and inclusiveness of public sector employment.

Amendments to the IR Act included the insertion of provisions requiring public service appeals (which were previously heard by the QIRC under the PS Act) to be heard under the IR Act to ensure transparency and increase consistency in appeal decisions. A requirement for a 12-month review of casual employment was also introduced but the decision is not appealable until after two years employment.

The strengthening of casual conversion provisions for workers after 12 months service provided a pathway to more secure employment which requires strong protections from unfair dismissal for vulnerable and/or disadvantaged workers. Nonetheless, it was submitted that the casual conversions rights in the *Queensland Local Government Industry Award (Stream A) – State 2017* and the PS Act had limitations in providing successful conversions.

81 Together Queensland, United Workers Union, Queensland Nurses and Midwives' Union.

82 Industrial Relations Legislative Reform Reference Group (2015) *A Review of the Industrial Relations Framework in Queensland – A report of the Industrial Relations Legislative Reform Reference Group* (December 2015).

83 *Public Service and Other Legislation Amendment Act 2020* (Qld).

Options to address this issue were varied and included:

- including a conversion process in the QES with the onus on employers to review an employee's position after 12 months and make a decision on conversion within 28 days of the 12-month anniversary
- allowing access to unfair dismissal to be reduced from 12 months to six months
- changing the casual conversion clause to present a casual worker with a right to request conversion to permanent status through a review of the employment circumstances to determine whether the circumstances of the employment had changed to no longer meet the casual definition
- including in the IR Act the provision that reflects the casual conversion clause in the local government award
- Investigating the scope for the IR Act to expand coverage and entitlement for at risk workers and in doing so consider any developments in the FW Act.

In addressing this issue, we are conscious of the desirability of not departing far from federal industrial relations law on an issue where doing so may cause considerable confusion amongst a group of employees (Queensland casuals in workplaces outside the state jurisdiction) who mostly do not have access to employee representatives. Yet employees that are engaged in areas of insecure work and casual employment are more likely than not to be women and/or young persons who according to submissions are not served well by the provisions of the FW Act which are limited in responding to such circumstances.

Our desire to minimise the potential for confusion does not preclude changes being made to the PS Act, for those employees who, in effect, have a single employer (the State Government) and access to information through the employer or employee representatives. However, it appears to be outside the scope of this review to make specific recommendations in that area. A thorough review of the PS Act should give consideration to these issues.

When looking at the question of precarious work, the biggest issue — and the one in which there is the greatest scope for state government action — concerns 'gig economy' or platform economy workers. It is the biggest issue for precarious workers because they lack the protection afforded by the employment relationship and hence the unfair dismissal standards, minimum entitlements and scope for representation that employment law affords. It is the aspect with the biggest scope for state government action because these workers are not covered by federal employment law in the form of the FW Act.

While the federal *Independent Contractors Act 2006* (Cth) (IC Act) (a contemporary of the now-redundant WorkChoices legislation) theoretically covers such workers, it is feasible for states to gain coverage through a federal exemption, as has already occurred with owner-drivers of heavy vehicles in New South Wales, Victoria and Western Australia (discussed later). The group of 'gig economy' workers that is most relevant to that exemption, and which is the special focus of the terms of reference of this review, is independent courier drivers. It is their situation to which we turn.

Independent courier drivers

The situation of independent courier drivers has been of growing interest since they expanded in numbers and became enmeshed in the 'gig' or 'platform' economy. The platform economy is presently small as a portion of the overall workforce,[84] but has considerable potential to grow. Its emergence reflects several factors. Managerial desire for greater flexibility has increased. Some new digital technologies enable 'algorithmic management'[85] to substitute for control via the employment relationship. New models of organisational structure have developed. The labour utilised may be classed as 'employees' but is normally treated as 'contractors'. All these factors are relevant to the situation of independent courier drivers.

The Transport Workers Union (TWU) has sought regulation of independent courier drivers in Queensland, [86] making use of a mechanism similar to Chapter 6 of the *Industrial Relations Act 1996* (NSW) (NSW IR Act). Other unions have supported this submission through the QCU submission.[87] The Ai Group is opposed to such regulation at the state level. [88] Queensland University of Technology's Centre for Decent Work and Industry also supported introduction of state-level regulation, though argued that there is a need for regulation of independent contractors working in other sectors in addition to those in the road transport and delivery industry.[89]

84 Katz, L. F., & Krueger, A. B. (2016) 'The Rise and Nature of Alternative Work Arrangements in the United States', 1995-2015, *NBER Working Paper No. 22667*. Washington DC: National Bureau of Economic Research.

85 Mohlmann, M., & Zalmanson, L. (2017) 'Hands on the Wheel: Navigating Algorithmic Management and Uber Drivers' Autonomy', *Thirty Eighth International Conference on Information Systems*, South Korea.

86 Transport Workers Union, Submission to the "*Review of the Operation of the Queensland Industrial Relations Act 2016*", *22 July 2016, The Transport Workers' Union of Australia*, page 32.

87 Queensland Council of Unions, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*, page 43.

88 Ai Group, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*, page 10.

89 Queensland University of Technology Centre for Decent Work and Industry, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*, page 2.

One major reason for the interest in NSW's IR Act Chapter 6 as a model for regulation of gig economy workers is the health and safety implications for such workers. In Sydney, for example, five independent courier riders (not subject to Chapter 6 regulation) died at work within three months in 2020.[90] A further two died in Melbourne within two months in late 2020.[91] So, one important criterion by which to assess the Chapter 6 reforms in NSW is their relationship to workplace safety. Other similarities between the situation in heavy vehicle road transport (prompting Chapter 6) and the circumstances of independent courier drivers include:

- a concentration of power amongst corporate entities at the top supply chains setting rates
- terms and conditions through tendering cycles but with little accountability for pressures on workers to cut safety corners and develop fatigue
- the failure of the existing industrial relations framework to provide workers with stable minimum standards and entitlements.

Chapter 6 arose from legislation passed by the NSW Parliament in 1979, that allowed the NSW Industrial Commission (NSWIRC) to regulate minimum terms of contracts for owner-drivers of trucks and certain other 'contract carriers'. This legislation, which remains in place (now as 'Chapter 6'), has had implications for safety, with various ideas for extending this model to 'gig economy' workers in other industries and jurisdictions. The legislation enables the NSWIRC to issue 'contract determinations' that specify minimum standards for covered workers. These are analogous to 'awards' in labour regulation.

For example, the NSW *General Carriers Contract Determination 2017*, which supplemented or replaced 30 existing company-specific contract determinations, establishes, for various types of truck owner-drivers: minimum rates of remuneration, comprising a per-kilometre rate, an hourly rate (both varying by truck size and type), allowances and a minimum earnings guarantee, and formulae for adjustment of these; entitlements to annual leave and rest breaks; various minimum standards of work by the owner-driver and obligations on the 'principal contractor', including transparency of work allocation; specific arrangements for full-time full-year (50 hours per week x 50 weeks) workers; and union representation rights, where sought by workers. In practice, the system has meant that employees and owner drivers attract comparable net remuneration, to the extent that no one model undercuts the other. Adjustment to the labour rate component of owner-driver rates is linked to the adjustment to the federal modern award, with cost recovery added. Many employers see benefits from this approach, as there is stability in the relative costs of different forms engagement. Hence the model has survived changes in the ideological complexion of state governments.

The NSWIRC can also approve 'contract agreements', which are analogous to 'collective agreements' in labour regulation, and between owner-drivers and firms. These contract agreements are exempt from competition law restrictions.

In 2019, ten applications relating to contract determinations were filed and all ten matters were completed within the year. No applications for compensation for termination of contracts of carriage were filed.

Chapter 6 regulation does not seek to redefine contractors as employees. Rather, it aims to find a suitable form of regulation for people who do not have employee status (and sometimes do not want employee status).

One consequence of Chapter 6 does indeed appear to be improved safety, as indicated by a trend decline in the share of fatal heavy vehicle accidents accounted for by NSW. In 1989, the share of NSW in fatal heavy vehicle crashes was nearly nine percentage points more than its share in crashes of other vehicles. By 2020, the proportions were almost identical. Trend analysis (using regression to smooth out annual variations) shows that the average decline in fatal accidents involving articulated trucks in NSW was five per cent per annum, around double the average annual decline in other fatal accidents in NSW or in fatal accidents in other states.[92] This may be due to reducing the incentives on drivers to drive fast, skip breaks, or engage in other risky behaviours such as drug or stimulant use and overloading. Chapter 6 also aimed to reduce problems of long hours and low margins.

There have been several deaths of courier riders in other states. As Chapter 6 appears to be associated with an improvement in road safety for articulated truck drivers in NSW, we would expect an improvement for safety amongst Queensland independent courier drivers from a model along these lines.

Alternative regulatory models for owner-drivers are provided by legislation in Victoria and Western Australia. In Victoria, the *Owner Drivers and Forestry Contractors Act 2005* is administered by the Victorian Small Business

90 Kamilia Palu, 'Food delivery rider hit by truck becomes fifth death in three months', *Yahoo News*, 23 November 2020, au.finance.yahoo.com/news/food-delivery-rider-hit-by-truck-becomes-fifth-death-in-three-months-122924369.html.

91 Nick Bonyhady, 'DoorDash reveals second courier died in two-month span', *Sydney Morning Herald*, 10 September 2021, www.smh.com.au/national/doordash-reveals-second-courier-died-in-two-month-span-20210910-p58qhf.html

92 Analysis of data from federal Bureau of Infrastructure and Transport Research Economics' Australian Road Deaths Database on Fatal Crashes, published in in https://www.bitre.gov.au/statistics/safety/fatal_road_crash_database, and analysed in D Peetz, '*The relationship between the Chapter 6 provisions of the New South Wales Industrial Relations Act and road safety outcomes*', September 2021.

Commission (VSBC), Victorian Civil and Administrative Tribunal (VCAT) and Wage Inspectorate Victoria (WIV).[93] The WIV can:

- provide information to contractors and hirers about the legislation
- monitor compliance
- investigate potential contraventions
- prosecute offences under the Act.

However, the legislation is mainly about dispute resolution, and does not enable standards to be established. The VSBC can provide alternative dispute resolution, and the VCAT can hear and determine disputes from contractors or hirers on referral by the VSBC should that be unsuccessful. VCAT may make an order in relation to a dispute (e.g. payment or refund of money, and specific performance of a contract). In 2019-20, the VSBC received 26 applications for disputes, for which nine mediations were completed.

In Western Australia the *Owner Driver (Contracts and Disputes) Act 2007* (ODCD Act) is enforced by the Road Freight Transport Industry Tribunal (the Tribunal).[94] The Tribunal can hear and determine disputes regarding the terms of an owner-driver contract; breaches of the ODCD Act or its Code of Conduct and certain other matters regarding the conduct of contract negotiations. In 2019-20, six applications were filed.

The Chapter 6 model from NSW, while more relevant to the protection of minimum standards and safety than that from the other states, is not without limitations. Most prominently, as presently framed it excludes food delivery drivers and other gig economy workers in road transport. To deal with the issue of independent courier drivers in Queensland, a version of it would have to be worded to include them.

The significance of Chapter 6, however, lies in the model it provides for how regulation of the minimum conditions of a group of workers who are not employees can be achieved. This principle — of targeting regulatory arrangements to the specific circumstances of a sector — is not just relevant to independent courier drivers, but to other 'gig economy' workers as well. It also relies on the relevant tribunal autonomously matching remuneration in the employee and contractor sectors. While this is indeed what happens, there is no guarantee this would always happen. Like the NSWIRC, the QIRC indeed has the institutional capability to administer a system similar to Chapter 6, but policy should clearly establish an expectation that conditions for contractors that would, where appropriate, be comparable in value to those applying to equivalent award employees.

Following this model would enable a specialist area of the QIRC to inquire into and set minimum standards for work arrangements for people not classed as employees and determine appropriate rights and entitlements for these arrangements. In doing this, it should focus on workers with high degrees of vulnerability (the TWU recommended a focus on degrees of dependency, but this could inadvertently exclude workers reliant on multiple platforms unless carefully expressed). This approach would also prevent rights to collectively bargain or organise from being withheld from workers on the basis of whether or not they were classed as employees.

Successful operation of such a provision could provide a model for the extension of protections to other 'gig economy' workers. There are many difficulties in successfully regulating to protect the situation of vulnerable gig economy workers, especially where payment is based on a piece rate rather than a time rate. Specific knowledge of the circumstances of any area being considered for regulation is necessary.

The approach proposed here is one way of taking account of the specific circumstances facing workers and firms on the independent courier driver sector, and lessons can be drawn from this for any future policy. It would be an option for legislators to draft this provision in a way that enabled other specified aspects of the 'gig economy' to be covered by a new, specialist area of the QIRC. Future extensions such as that, however, are not the concern of this review, and the development of legislation to protect independent courier drivers should not be held up by concerns about other parts of the 'gig economy'.

While it is not expected that the Queensland Government's inspectorate service should become involved with compliance activities related to these provisions (that role should be undertaken by the relevant industrial parties), the government should monitor any workload impacts resulting from this new provision to ensure that the inspectorate remains sufficiently resourced to undertake its role.

93 *Owner Drivers and Forestry Contractors Act 2005* (Vic).

94 *Owner Driver (Contracts and Disputes) Act 2007* (WA).

Recommendation:

28. That amendments to the *Industrial Relations Act 2016* be drafted, with a view to enactment following exemption referred to under recommendation 29, to include provisions to enable the regulation of terms and conditions of work for independent courier drivers by the Queensland Industrial Relations Commission (QIRC), modelled on Chapter 6 of the *Industrial Relations Act 1996* (NSW), explicitly including independent courier drivers and riders within coverage of these provisions, and directing the QIRC to establish conditions that would, where appropriate, be comparable in value to those applying to equivalent award employees.

The main potential limitation on Queensland legislating in this area is the potential for it to be overridden by the federal IC Act. The IC Act covers courier drivers, however, the IC Act or its subordinate legislation, the Independent Contractors Regulation 2016 (Cth) (IC Regulation) can specify a state law as exempt and therefore able to retain effect.

NSW and Chapter 6 avoid the difficulty such legislation may encounter by virtue of an exemption from the Federal Government that prevents it from being overridden by the IC Act. Similar exemptions apply to quite different legislation relating to owner-drivers in Victoria and Western Australia. The same exemption should be sought from the Federal Government in relation to this proposed legislation, but this should not delay preparation of the statute.

The Queensland Government has previously corresponded with the Commonwealth seeking in-principle support for amendment of the Commonwealth legislation to allow Queensland to legislate minimum entitlements and conditions for independent courier drivers, but has not been able to specify the content of any reforms in this area. This lack of detail has been an impediment to gaining previous approval from the Federal Government for an exemption. The Queensland Government should be in a position to be significantly more explicit about the shape that reform in this area would take. It need not seek exemption at this stage for regulation of other areas of the 'gig economy' beyond those described here.

Recommendation:

29. That, before enacting the above legislation, the Minister write to the federal counterpart, seeking exemption from those aspects of the *Independent Contractors Act 2006* (Cth) along similar lines to the exemption that already applies to Chapter 6 of the *Industrial Relations Act 1996* (NSW). The legislation should be being drafted while the letter is in transit.

Collective bargaining

The IR Act, at Chapter 4, provides that collective bargaining, in good faith and with a view to reaching agreement, is the primary basis for deciding wages and employment conditions. Further, it provides where agreement cannot be reached, that the commission can help the parties reach agreement or if not, reduce the matters in dispute, and arbitrate the matter if conciliation is not successful.

Chapter 4 sets out the process for bargaining and for the certification of an agreement. The IR Act also provides for a new industrial instrument - a bargaining award - which is an award that covers an employer, employees of the employer, and an employee organisation that represents or is entitled to represent employees who are covered by the bargaining award. To date, no bargaining awards have been made.

As is also the case elsewhere, most public sector employees in Queensland are covered by agreements, rather than awards. Award-reliant employees in the state's industrial relations' jurisdiction represent 1.8 per cent of all employees subject to the Queensland industrial relations jurisdiction. Approximately 99 per cent of state public sector workers (excluding senior executives) are covered by certified agreements. Similarly, there is extensive agreement coverage in the local government sector with only an estimated 1,200 to 1,500 local government employees being award reliant.

The IR Act requires that for an agreement to be certified or a bargaining award to be made, the application must provide a range of gender related information about relevant employees, regarding their existing and proposed conditions of employment.

Collective bargaining allows employers and employees (and their unions) to negotiate employment conditions, beyond those contained in the QES and the relevant modern award, which reflect the circumstances of specific organisations and workplaces.

Good faith bargaining provisions at section 173 of the IR Act are modelled on those at section 228(1) of the FW Act. The QIRC is able to make directions in conciliation relating to good faith bargaining. Section 173 of the IR Act imposes a general duty on negotiating parties to "bargain in good faith" and specifically outlines how parties are expected to negotiate in good faith.

The IR Act also provides that taking protected industrial action is a right of negotiating parties, subject to requirements, as part of the collective bargaining process.

As of 1 March 2021,[95] there were:

- 88 local government certified agreements, approximately 40 per cent of which (35 agreements) have a nominal expiry date beyond 2022. Thirty-seven agreements expire in 2021 and a further 16 agreements are already past their nominal expiry dates; and
- 34 public service certified agreements, of which all but one (*Queensland Corrective Services – Correctional Employees' Certified Agreement 2016*) have a nominal expiry date of no earlier than March 2022.

In 2015, the Queensland Government introduced a capped wages policy of 2.5 per cent increases per annum. On 17 June 2020, the Queensland Parliament made temporary amendments to the IR Act which became operative on assent (22 June 2020).[96] The purpose of the amendments is to maximise the protection of public sector employment in Queensland and to respond to the financial impact of the COVID-19 health pandemic by:

- deferring the payment of wage increases that would otherwise be payable under certified agreements during the 2020–21 financial year and the following financial year
- providing for 2019 wage adjustments and other variations to certified agreements, and
- temporarily modifying the collective bargaining process under Chapter 4 of the IR Act.

The wage deferral arrangements apply to all Queensland public sector certified agreements by specifying that the wage increase normally due in the 2020–21 financial year would instead be paid one year later; the subsequent wage increase that would normally be due in the 2021–22 financial year would instead be paid six months later; and any wage increases subsequent to this would not be impacted. In this way, after the wage increase deferral period had been completed, public sector certified agreement rates of pay will have returned to their original trajectory.

Most public sector agreements will reach nominal expiry in the next 12 months, with 24 agreements due to expire in 2022. There are 11 agreements which have either passed their nominal expiry date or were due to expire in 2021

95 Queensland Industrial Relations Commission agreements, available at www.qirc.qld.gov.au/agreements.

96 Community Services Industry (Portable Long Service Leave) Bill 2019 and Explanatory Notes.

where a reprint has occurred to provide for wage increases until 2022. The majority of the reprinted agreements also recognise the deferral of public sector wage increases (no increase in 2020) which was introduced by the Queensland Government through legislation in response to the COVID-19 coronavirus pandemic and its anticipated economic impact on the state.

Single Commissioner mediation or arbitration

At various stages of bargaining between employees and employers, negotiations often stall, sometimes causing lengthy delays that do not benefit either party. Currently any arbitration on matters of dispute in bargaining must be undertaken by a Full Bench. This can lead to long lags due to availability issues arising from competing workloads.

To expedite the process, submitters proposed that the IR Act should provide for mediation or arbitration by a single Commissioner with the consent of all relevant parties, and the incorporation of the mediated or arbitrated outcome into the final instrument. Such changes would align the Queensland industrial jurisdiction with the broader civil jurisdiction, as per section 42 of the *Civil Proceedings Act 2011*.

It is anticipated that the single Commissioner would be taken as a referral from the full bench and that any outcome would be considered to be made on behalf of the full bench. This will ensure that the status of the outcome is not diminished and current appeal rights in relation to a determination of the full bench under chapter 4, part 3, division 2 of the IR Act are not disturbed as a consequence of the outcome being determined by a single Commissioner.

Recommendation:

30. That amendment be made to sections 177 and 180 of the *Industrial Relations Act 2016* to allow a single Commissioner of the Queensland Industrial Relations Commission to mediate or arbitrate one or more matters of disputation in bargaining negotiations, at the joint request of the parties.

An agreement before voting

The 2015 McGowan Review noted that collective bargaining in the Queensland public sector has been problematic for some parties from both the government side and the public sector unions.[97] Difficulties arose where agreement could not be reached – whether it be between the bargaining parties on one side of the table (for example where multiple unions are involved in a negotiation for one agreement) or across the table. The IR Act sought to deal with these difficulties with conciliation and arbitration arrangements and by ensuring that an agreement could only be put to an employee vote when the parties had reached agreement.

As with all collective bargaining arrangements, some negotiations and some elements of the legislative provisions cause difficulties in practice. One example of this is where all union parties but one has reached agreement with the employer and wish to put the proposed agreement to employee ballot, but this cannot be done until all parties agree.

This issue has led to protracted bargaining timeframes, frustration for employers, unions and employees, and in some cases increased industrial action. Where most unions and the employer are in agreement, but one or two unions are not, it is likely that those parties in agreement would prefer to be able to progress to an employee vote if they believe a majority of employees would agree to the proposed agreement.

The existing provisions of the IR Act were intended to provide for fairness and balance in that small cohorts of employees represented by a union cannot be overlooked and left worse off where their union considers the proposed agreement does not adequately provide for those workers or, for example, address longer-standing issues such as work value. This is particularly important where the work of those small cohorts may have been historically undervalued in agreement making in the past, for example, due to low union membership and in some highly-feminised cohorts.

The provisions also ensure that union groups cannot be precluded from bargaining. As well as unions, some employees have been vocal about this issue, including employees of local councils writing to members of Parliament about their wish to make an agreement, claiming a majority of the employees to be covered by the

97 Industrial Relations Legislative Reform Reference Group (2015) *A Review of the Industrial Relations Framework in Queensland – A report of the Industrial Relations Legislative Reform Reference Group (December 2015)*.

agreement would vote the agreement up, but a minority of employees represented by a single union would not agree and the agreement cannot in any case be put to a vote because of the one union not agreeing.

While it is noted that a single union's objections may hold up bargaining and therefore potentially delay wage increases, the provisions were developed to ensure that certain cohorts could not be left behind through a majority employee vote. Such an impasse could, for example, be resolved by the employer negotiating more closely with the union with outstanding issues to resolve the matters in dispute, with conciliation and arbitration through the QIRC available to assist. The capacity for single-commissioner conciliation and arbitration recommended above would assist in this regard.

No-disadvantage test

Submissions argued that the existing no disadvantage test, introduced in the early 1990s, was no longer effective due to a significant widening of the gap between minimum award rates and rates contained in bargaining instruments. Employers were now in a position where they could reduce or threaten to reduce employee entitlements from an existing bargaining arrangement whilst still satisfying the no disadvantage test.

Amendments were proposed to section 210(4) to remove the wording 'in the context of the employment conditions considered as a whole' arguing that in the FW Act, the intention of the analogous provision was limited to a short-term arrangement.

Amendments were also proposed to change the benchmark "entitlements and protections" to those contained under an existing bargaining instrument or, where there was no bargaining instrument the modern award and QES.

Whilst the latter proposal is based upon reasoning that employees consider their existing employment conditions as their standard, and not those contained in the modern awards or QES, such an amendment would be a departure from existing practices that would in effect reduce the flexibility in both directions of enterprise-level bargaining.

No change is recommended on this issue.

Scope orders

Scope orders relate to who is to be covered by an agreement. Some parties proposed changes to the provisions on scope orders including:

- adding criteria in section 185, so that the QIRC had to consider the entitlements and conditions of the group of employees who are seeking the scope order in comparison to other employees doing the same or similar work with different employers
- the views of the relevant employers and the group of employees concerned
- changing the term 'fairly chosen' to 'fairly selected', since either an employer or union/group of employees may apply for a scope order.

Some of these were said to be necessary to enable the Act to satisfy the requirement of the ILO Convention 98 for 'voluntary negotiation'.

Since the introduction of the scope order provisions, there have been few applications at a state level. Some argue this is a result of deficiencies in the provisions, but nevertheless they have been sparingly used. The changes sought are, in the minds of the reviewers, significant, going beyond the FW Act scope order provisions and lack evidentiary support.

No change is recommended on this issue.

Equal remuneration

Gender pay equality is a constantly moving goalpost, with advances towards its achievement requiring multiple and continually refined strategies.[98] The industrial relations regulatory framework remains one of the most important avenues through which it can be pursued and equal remuneration for equal value (as encapsulated in ILO 100 – the Equal Remuneration convention) monitored and advanced. The five-year review of Queensland's IR Act thus provides an important opportunity to ensure that the legislative framework is supporting the goal of gender pay equality as effectively as possible.

98 For example: O'Reilly J, Smith M, Deakin S and Burchill B (2015) 'Equal pay as a moving target: International perspectives on forty-years of addressing the gender pay gap'. *Cambridge Journal of Economics* 39 (2): 299-317; Rubery J and Grimshaw D (2015) 'The 40-year pursuit of equal pay: A case of constantly moving goalposts'. *Cambridge Journal of Economics* 39: 319–343; Whitehouse G and Smith M (2020) 'Equal pay for work of equal value, wage setting and the reproduction of gender pay inequality: perspectives from Australia, New Zealand and East Asia'. *Journal of Industrial Relations* 62(4): 519-532.

Queensland is well-recognised as a leader in this area, with the IR Act providing considerably more support for gender pay equality than its counterparts in other jurisdictions. Not only is equal remuneration for work of equal or comparable value specified (at section 4(j)) as one of the means through which the main purpose of the Act is to be achieved,[99] Queensland's exemplary Equal Remuneration Principle (ERP) is given effect at section 248 and the Act also requires gender equality to be addressed in the process of application for and certification of bargaining instruments (through the affidavit required at section 250(2)).

However, the efficacy of, and capacity for compliance with, these provisions are matters of ongoing concern and Queensland risks losing its 'leading edge' status if advances to date are not effectively implemented and maintained. Submissions raised particular difficulties with the requirement at section 250(2) that applications for a bargaining instrument must be accompanied by an affidavit containing wage-related information for the employees to be covered by the agreement, the steps taken to ensure equal remuneration for work of equal or comparable value and justification for any differential treatment of wages for different groups of employees. Problems identified included the burden involved in compiling the material, the need for greater clarity of purpose and specificity on what is required and the limited efficacy of the exercise when it is addressed primarily as a compliance exercise at the end of the bargaining process.

The LGAQ argued in its submission that preparing affidavits for certification involved significant extra work and questioned whether 'as they stand [the affidavits] do anything other than generate additional work for no return for councils'.[100] The QTU stated that the affidavit process was 'ineffectual and meaningless' and recommended that section 250 be reviewed to better enable positive outcomes for workers in terms of equal remuneration.[101] The need to expand or clarify the scope of the wage-related information required for the affidavit was also raised, with QNMU noting the importance of including breakdowns of full-time, part-time and casual employees by gender.[102] Other submissions raised concerns over lack of transparency in the current process, for example, the ETU submitted that an affidavit should include details of what information was provided to relevant employees and industrial organisations to satisfy section 171 of the IR Act.[103]

The QCU submission highlighted the problem that, in practice, 'equal remuneration is often a consideration at the end of bargaining for certification requirements'.[104] Similarly, the QNMU observed that by 'this stage of the process, they want their agreement approved and don't want to be prosecuting issues. However, they should not be put in a situation to agree that ER has been addressed, when it likely hasn't'.[105]

These difficulties underline the need to establish a more effective way of monitoring gender pay equality in the collective bargaining process. The current provisions in the IR Act at section 250(2), introduced in response to recommendation 35 of the 2015 McGowan Review,[106] represent the most successful attempt to date to require relevant information in an affidavit.

Queensland's first Pay Equity Inquiry recommended that section 9 of the *Industrial Relations Regulation 2000* be amended to state that 'the affidavit accompanying the agreement which is sought to be certified, setting out relevant information about the agreement, must also establish what steps are being taken to ensure equal remuneration has occurred or will occur' (recommendation 8).[107] However, this was not fully effected; nor was recommendation 2 of the 2007 Pay Equity Inquiry, that 'section 9 of the *Industrial Relations Regulation 2000* be amended to require the affidavit to provide information about the reasons for and purpose of any provisions of the proposed agreement which provide for or result in differential treatment of different groups of employees'.[108] Given this long history, it is important that the strengthened provisions adopted following the 2015 McGowan Review be supported to ensure that they operate as intended.

A suggestion raised in several submissions (for example, QCU, QNMU[109]) was that wage-related information about employees be provided to the parties at the beginning of the bargaining process or at least six months prior to the nominal expiry date of an agreement. While this would greatly enhance the capacity to address equal remuneration

99 This is a longstanding provision in the Queensland Act; in contrast the Fair Work Act does not specify equal remuneration for work of equal or comparable value as an object.

100 Local Government Association of Queensland, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

101 Queensland Teachers' Union, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

102 Queensland Nurses and Midwives' Union, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

103 Electrical Trades Union, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

104 Queensland Council of Unions, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

105 Queensland Nurses and Midwives' Union, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

106 Industrial Relations Legislative Reform Reference Group (2015) *A Review of the Industrial Relations Framework in Queensland – A report of the Industrial Relations Legislative Reform Reference Group* (December 2015), pages 90, 91.

107 Cited in Dixon, Nicolee & Queensland Legislative Assembly (2001) *Pay equity: the Industrial Relations Act Amendment Bill 2001* (Qld). Brisbane: Queensland Parliamentary Library, Publications and Resources Section.

108 Queensland Industrial Relations Commission (2007) *Pay Equity: A Time to Act*. Brisbane: Queensland Industrial Relations Commission.

109 Queensland Council of Unions, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*; Queensland Nurses and Midwives' Union, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

in a transparent manner as part of the bargaining process, it would not in itself solve the problems encountered, potentially adding to the burden of compliance unless relevant data were readily available to the parties. The main implementation difficulties reported (particularly the burden the affidavit process imposes, questions over the scope of wage-related information required, and the practice of addressing the issue only at the end of the bargaining process) would be addressed most effectively if the required information was compiled centrally on a regular basis in a database available to the parties for use during the bargaining process.

One of the ways this could be facilitated would be for the Special Commissioner (Equity and Diversity) to combine the task of developing a framework for gender pay equality audits with the compilation of relevant employment statistics, thus building a comprehensive resource that the bargaining parties could access. Gender pay equality audits, and associated gender pay equality action plans, have the potential to drive significant change. The data produced would simultaneously extend the capacity for monitoring and advancing gender pay equality in the public sector, consistent with the Gender Equity Strategy 2015-2020 goal of providing gender metrics to encourage transparency and deep analysis, as well as easing the burden on bargaining parties in meeting their obligations under section 250(2) of the IR Act.

Using gender pay equality audits as part of this process would thus be an efficient approach. The idea of regular gender equality audits and plans are not new in Queensland, having been promoted in various ways in a number of reports and reviews (including recommendation 36 of the 2015 McGowan Review).[110] Moreover, an exemplary model for audits and action plans is currently available in association with Victoria's *Gender Equality Act 2020*. The Special Commissioner (Equity and Diversity) would be ideally placed to draw on these resources and design a suitable approach for the Queensland public sector.

Recommendation:

31. That the Special Commissioner (Equity and Diversity) be supported to:

- **a. develop a framework for the conduct of gender pay equality audits and action plans, and work with the Public Service Commission to assist Queensland public sector employers in conducting these audits as a priority and in developing gender equality action plans that respond to the audits**
- **b. develop guidelines for a comprehensive database of employment statistics that would include data compiled from gender pay equality audits and other data needed to illustrate gender pay (in)equality across Queensland public sector agencies, and work with the Public Service Commission to ensure that this information is made available in a timely manner (at least six months prior to the end of an agreement) to bargaining parties to assist them in meeting the requirements of section 250(2) of the *Industrial Relations Act 2016***
- **c. develop model frameworks for gender pay equality audits and action plans, and for the wage-related data required for section 250(2) affidavits, for the guidance of other employers within the Queensland jurisdiction.**

Considerable lead time would be required for these processes, hence they could be implemented sequentially (for example focusing first on leading public sector agreements as examples and delaying others, particularly those for local government, until a future bargaining round). This would reduce immediate pressure on the parties, provide an educative process and enable the accumulation of resources and model approaches. An appropriate time limit should nevertheless be set for all agreements to comply with the process, for example within two bargaining rounds.

There is also some scope to strengthen the process further by making greater use of the good faith bargaining provisions (section 173 of the IR Act). It would be possible and desirable to specify the provision of information needed to meet the requirements of section 250(2) of the IR Act as an element of good faith bargaining in the relevant section. This would provide an additional signal to the parties of what is expected and underline the importance of the affidavit process.

110 Industrial Relations Legislative Reform Reference Group (2015) *A Review of the Industrial Relations Framework in Queensland – A report of the Industrial Relations Legislative Reform Reference Group (December 2015)*

Recommendation:

32. That section 173 of the *Industrial Relations Act 2016* (IR Act) be amended to include the provision of information needed to meet the requirements of section 250(2) of the IR Act as an element of good faith bargaining provisions.

Constant monitoring will be required to assess the impact of these recommendations. Should they not prove efficacious, an alternative option would be to accept that very limited wage-related information relevant to equal remuneration can be provided at the time of certification of an agreement and compensate by ensuring that 'no extra claims' provisions do not exclude the possibility of equal remuneration applications to the QIRC during the life of the agreement. However, supporting the affidavit process would be a more efficient process and would become more so over time as resources accumulated.

In addition to collective agreements, awards are also crucial in establishing gender egalitarian pay scales and, through regular review, correcting new inequalities that arise over time. Following the 2015 McGowan Review, central features of Queensland's ERP have been incorporated into the IR Act at section 248, which establishes the requirement to ensure that modern awards provide for equal remuneration.

However, the requirement for a four-yearly cycle of award reviews was also abolished at that time and the IR Act no longer provides an enforcement mechanism through which awards are to be maintained as contemporary and equitable documents. While only one submission (from the QTU[111]) called for implementation of a mandatory four-year award review, and reinstatement of full reviews on this cycle would impose a significant burden on the parties, a comprehensive approach to gender pay equality through the industrial relations system would require awards to be reviewed through a gender lens at regular intervals. Given the important role that awards play in providing a basis for pay structures within the jurisdiction, the parties should be encouraged to monitor relevant awards with a view to making application for a review where provisions are not consistent with the delivery and maintenance of gender pay equality.

Recommendation:

33. That the parties should monitor awards to ensure that they are consistent with the delivery and maintenance of gender pay equality with reference to the Equal Remuneration Principle.

These recommendations would help to ensure that Queensland retains its leading edge in the area of gender pay equality provisions but would also need monitoring over time and new initiatives as the 'goalposts' change. The goal of gender pay equity more widely would also be advanced by promotion of Queensland's strengths and ongoing actions in this area.

Queensland's ERP has been widely recognised as exemplary, not only in comparison with provisions in the federal jurisdiction[112] but also in the attention it has received elsewhere including New Zealand.[113] It is important that its progressive features (which include, but are not limited to, its rejection of the need for a male comparator in assessing wage inequality and acknowledgement of the possibility of historical undervaluation of work based on gendered assumptions) are promoted and that reversion to the limited, strictly male comparator based, approach adopted in the most recent federal equal remuneration case (in the early childhood education and care sector) is resisted.

111 Queensland Teachers' Union, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

112 Smith M and Whitehouse G (2020) 'Wage-setting and gender equality in Australia: advances, retreats and future prospects'. *Journal of Industrial Relations* 62(4), pages 533-559.

113 Charlesworth S and Heap L (2020) 'Redressing gendered undervaluation in New Zealand aged care: Institutions, activism and coalitions'. *Journal of Industrial Relations* 62(4), pages 608-629.

Wage recovery

The *Criminal Code and Other Legislation (Wage Theft) Amendment Act 2020* (Wage Theft Act) included provisions to resolve wage recovery matters in a timely, inexpensive, and informal manner through creation of a simplified wage recovery process. It also amended the IR Act to enable the use of the existing jurisdiction of the Industrial Magistrates Court to provide a pathway for small claims made under the FW Act that included the elements of wages, superannuation, leave and other lawful employment entitlements. That Act responded to the recommendations of the report of the Education, Employment and Small Business Committee, *A fair day's pay for a fair day's work? Exposing the true cost of wage theft in Queensland* (the Wage Theft Report), arising from the 2018 Parliamentary inquiry into wage theft in Queensland. The Wage Theft Report found that around 437,000 workers were affected by wage theft, costing them approximately $1.22 billion in wages and $1.12 billion in unpaid superannuation each year. It also noted that an under-resourced Fair Work Ombudsman and lack of action by the Federal Government in this regard have hindered workers' ability to recover their unpaid wages, and highlighted various barriers workers face in bringing a wage recovery claim, such as the complexities of navigating the legal system, often prohibitive costs and fees, lengthy timeframes, and the need for legal representation. Approximately half of unpaid or underpaid workers opted not to pursue a claim due to these difficulties.

The new wage recovery jurisdiction commenced on 1 March 2021. By 30 June 2021, 32 Fair Work applications had been filed, 24 in the QIRC and eight in the Magistrates Court. Five matters were resolved by conciliation. Eleven more were referred to the Magistrates Court for hearing. Only four claims for unpaid amounts (under the jurisdiction of the Queensland IR Act) were made, all in the Magistrates Court. Of these, two matters were resolved in conciliation, and one was referred for hearing. A further 17 common law employment claims were filed, six were resolved in conciliation, while seven remained unresolved.

Consultation revealed that meaningful discussions had occurred between the relevant registry staff regarding the implementation of the new process and that OIR had developed a draft Benchbook for the Magistrates Court.

Stakeholders involved in undertaking wage recovery actions indicated that there had been insufficient time since the inception of the legislation to offer any constructive commentary and believed that a review would be more beneficial if it were to be undertaken beyond 1 March 2022. This is probably slightly early, as even by then there may not be enough data available.

That said, there were concerns expressed about the decision to omit the requirement for parties to participate in a compulsory conciliation before a member of the QIRC. Amendments to the IR Act made by the Wage Theft Act, and consequential amendments made to the *Industrial Relations (Tribunals) Rules 2011* (IR Tribunal Rules), ensure that wage recovery applications heard by the Industrial Magistrates Court are conducted consistently with the requirements for wage recoveries heard by the Federal Circuit Court. The requirements for conciliation under the Federal Circuit Court are provided for by section 34 of the *Federal Circuit Court of Australia Act 1999* and rule 45.13B of the Federal Circuit Court Rules 2001. Conciliation (mediation) is not compulsory under the Federal Circuit Court. The Federal Circuit Court of Australia may, by order, refer proceedings to a mediator for mediation in accordance with the Rules of Court. Referrals to a mediator may be made with or without the consent of the parties to the proceedings. The same power exists for wage recoveries being heard by an Industrial Magistrates Court (Part 3B, Division 5, IR Tribunal Rules).

In addition to this power to order the parties to participate in a mandatory settlement conference, the Wage Theft Act also included an additional preliminary step that requires the Industrial Registrar to refer the parties to a wage claim to conciliation before a member of the QIRC prior to the matter being allocated to an Industrial Magistrates Court. A party to the wage claim has the right to advise the Industrial Registrar that they do not wish to participate in this conciliation. The purpose of this step was to facilitate the prompt referral of a wage claim to conciliation (within days) prior to the matter being allocated to an Industrial Magistrates Court.

Recommendation:

34. That a review of the enhanced wage recovery provisions, to enquire into the effectiveness of the process, be undertaken at a time after 1 March 2023, when potentially enough applications had been received for the review to draw useful conclusions.

Redundant and superfluous provisions

The IR Act includes a number of transitional provisions, including:

- to allow for the conclusion of the award modernisation process which was underway at the time of the 2015 McGowan Review of the *Industrial Relations Act 1999* and the introduction of the IR Act
- delaying the equal remuneration reporting for agreement certification to apply to local government agreements made before 1 January 2019
- the retention of some provisions in relation to Queensland Health-specific payroll deductions.

Some of the transitional provisions were to allow for the conclusion of the award modernisation process which was underway at the time of the 2015 McGowan Review[114] and the introduction of the new IR Act.

Chapter 18 of the Act includes repealed and transitional provisions following the 2015 review of the IR Act. As in line with the ToR, these provisions have been reviewed to determine if they are still required. Consequently, the sections of the IR Act outlined in Part I of Appendix E have been identified as no longer required. Some more complicated amendments to redundant provisions are in Part II of that appendix.

OIR has identified a number of provisions of the Act for potential amendment. These amendments were said to be minor and/or technical amendments or, it was suggested, would better reflect the intended policy position underlying the provisions.

Recommendation:

35. That the provisions of the *Industrial Relations Act 2016* outlined in Appendix E be examined with a view to:

a. considering the proposed deletions specified in Part I; and

b. making the minor amendments specified in Part II.

Recovery of historical Queensland Health employee overpayments

Chapter 15, Part 3, provides for a 'Health Employer', being Queensland Health (QH) or a Hospital and Health Service (HHS) established under the Hospital and Health Boards Act 2011, to recover overpayments and transitional pay-day loans made to its employees.

The QH provisions were introduced in 2012 by the Newman Government[115] to assist QH in commencing the recovery of overpayments being made to health employees due to ongoing systemic errors in the QH payroll system.

At the time, QH also extended its pay date cycle from three to ten days so transitional loans were made to health employees to ensure they were not financially out of pocket during the transition. The IR Act's section 949 was specifically included to allow QH to recover any outstanding transitional loans when health employees cease their employment with the agency.

The 2015 McGowan Review noted the ongoing operation of these provisions and recommended monitoring of the provisions. [116] This resulted in the inclusion of section 952, which states:

1) *The Minister must, within two years after the commencement, review the operation of this part to decide whether the provisions of this part remain appropriate.*

2) *The Minister must, as soon as practicable after completing the review, table a report about its outcome in the Legislative Assembly.*

114 Industrial Relations Legislative Reform Reference Group (2015) *A Review of the Industrial Relations Framework in Queensland – A report of the Industrial Relations Legislative Reform Reference Group (December 2015)*.

115 *Industrial Relations (Fair Work Harmonisation) and Other Legislation Act 2012.*

116 Industrial Relations Legislative Reform Reference Group (2015) *A Review of the Industrial Relations Framework in Queensland – A report of the Industrial Relations Legislative Reform Reference Group (December 2015)*.

An internal review of these provisions conducted by the OIR in 2019 noted stakeholder concerns that the provisions were inappropriate as they unfairly create a lesser set of rights for health employees compared with other government employees. Unions sought for the health-specific provisions to be repealed and it was their view that transitional arrangements are not necessary.

In consultation, a health employee union[117] sought the repeal of sections 947-952 of the IR Act. These are the 2012 amendments to the *Industrial Relations Act 1999* introduced to recover QH payroll overpayments generated by the introduction of a new payroll system in 2010. QNMU argued that wage recoveries raised issues about the probity of evidence and recovery of tax components that could never be pursued nurses or midwives themselves. It also pointed to the 'immeasurable financial and emotional distress' caused by over 11 years of uncertainty, and that many members subject to these actions had retired or suffered from ill health, raising serious questions about the worth of seeking repayment from them so long after an error by QH's own systems. In this context, it is noteworthy that the option to pursue overpayments so long after the event would not be available to a private employer.

In our view, these provisions have served their purpose and are no longer required.

Recommendations:

36. That sections 947 to 952 (inclusive) of the *Industrial Relations Act 2016* (IR Act) are removed on the basis that their inclusion in the IR Act is no longer warranted or necessary.

37. That transitional arrangements be examined to ensure legacy historical overpayment agreements and transitional pay day loan agreements continued to be recognised following the removal of sections 947 to 952 (inclusive) of the *Industrial Relations Act 2016*.

117 Queensland Nurses and Midwives' Union, *Submission to the Five-Year Review of Queensland's Industrial Relations Act 2016*.

Operation of the IR Act 2016 and the post-McGowan reforms

Most of the issues relevant to the 2015 post-McGowan reforms that were raised by parties and that warranted consideration have been discussed under other headings within this preliminary report.

The only other matter raised about the post-McGowan reforms was the question of whether the bargaining awards should remain in the IR Act for reasons that these provisions have not been used since their introduction in 2016. We consider that the provisions should remain.

Several other issues were raised about the operation of the IR Act.

Seal and signature

The requirement for an organisation to sign under seal when applying for an injunction are outdated and cumbersome. Other applications only require duly authorised officers to sign, and this provision needs to be brought in line with these requirements.

Recommendation:

38. That section 474(2) of the *Industrial Relations Act 2016* be amended to remove the need to sign under seal and amend the signature requirement for the president and secretary to a duly authorised officer under the rules of the organisation.

Coverage of QIRC

The powers conferred on the QIRC can only be exercised where there in an 'industrial cause' which is defined at Schedule 5 of the IR Act as 'includes an industrial matter and industrial dispute'.

The powers exercised by the QIRC in all proceedings could be sharpened by the extension of the definition 'industrial cause' to include an expanded definition.

Jurisdictional arguments arise are often time consuming and costly, and could be substantially lessened if this lack of clarity were removed.

Recommendation:

39. That the definition of 'industrial cause' be extended to include any other matter by which statute gives jurisdiction to the Queensland Industrial Relations Commission.

Legal representation in the QIRC

Historically the issue of legal representation in the QIRC has been contentious, particularly as it had its origins as a lay tribunal. The issue was not included within the ToR. Despite that exclusion, we were inundated with a myriad of submissions, that ranged from granting unfettered legal representation to removing any right to legal appearances in QIRC proceedings.

Professional legal bodies said that people subject to adverse action matters, in which civil penalties could be sought against them could, only be granted legal representation if the other party agreed. They argued that greater legal representation would assist the QIRC in dealing with adversarial proceedings involving unrepresented parties, without prior experience with the justice system. Litigants denied the right to be legally represented were said to be encouraged to rely upon non-qualified persons, which allegedly had undesirable consequences including the denial of justice for the litigant. They claimed it was unfair that a lawyer who was an employee of a party was able to appear, but an external lawyer was unable to appear.

From the other perspective, the 2016 expansion of the capacity of parties to be represented in the QIRC was counter to the purpose of lay tribunals that were focused on the speedy resolution of matters in which equitable outcomes could be reached unhampered by technical and cumbersome procedures.

By this view, QIRC proceedings were marred by frequent procedural delays, not proportionate to the complexity of the matters before the tribunal. The primary focus of the QIRC, they argued, should return to providing speedy and equitable outcomes, hence a complete overhaul of section 530 of the IR Act was required.

In addition to the 'big picture' positions advanced by the various proponents, there were a number of more minor amendments suggested by stakeholders in respect of a number of specific matters.

In the absence of specificity in the TOR regarding matters of legal representation, and bearing in mind the importance for workers of the notion that the QIRC should be a lay tribunal, and involve minimal cost to participants, there is no justification in our view for making any recommendation for change on this topic.

Payment of unpaid wages if employee's whereabouts unknown

A situation may arise where an employer is unable to comply with section 373 because the whereabouts of the employee are unknown and cannot be discovered after a reasonable diligent search by the employer. Under section 375, if after 30 days the whereabouts of the employee are still unknown then the employer must pay the wages payable to the former employee to the nearest clerk of the Magistrates Court.

The Public Trustee is currently adopting the position that moneys will only be received by them after being held pursuant to the definition of unclaimed moneys under the *Public Trustee Act 1978* (PTA).

Hence any moneys which are currently required by legislation to be paid to the court will only be accepted by the Public Trustee following the expiration of that two-year period. This can result in the courts holding and having to account for large amounts, or more likely a large number of small amounts, of unpaid wages for the two year period. As the money needs to be given to the nearest clerk of the Magistrates Court it is possible that moneys will be paid to numerous court registries. Some registries might be unfamiliar with the process to be followed including that the funds need to be paid to the Public Trustee after two years.

The courts are not set up to track down the owners of unclaimed moneys nor to distribute such moneys. By comparison this is one of the functions of the Public Trustee, who have expertise in handling unclaimed funds. It was submitted to us that it is unlikely that an employee who is trying to trace unpaid wages would think to approach the court and it is much more likely that they will track down their funds if there is a single repository held by the Public Trustee.

Recommendation:

40. That section 375(2) of the *Industrial Relations Act 2016* be amended to require an employer to pay unclaimed wages direct to the Public Trustee instead of the nearest clerk of the Magistrates Court. It would be open to the Public Trustee to retain such amounts paid in a special account until the allocated two year period.

Appendices

Appendix A – Media statement, 3 May 2021

Queensland to investigate sexual harassment protections for workers

Published Monday, 03 May, 2021 at 02:08 PM

JOINT STATEMENT

Premier and Minister for Trade
The Honourable Annastacia Palaszczuk

Minister for Education, Minister for Industrial Relations and Minister for Racing
The Honourable Grace Grace

Sexual harassment protections for workers will be investigated as part of a review of Queensland's industrial relations laws.

Speaking at Labour Day celebrations at Barcaldine in central Queensland, Premier Annastacia Palaszczuk said Queensland's worker safety net was due for review.

"Our industrial protections must keep pace with the changing shape of work to ensure everyone gets a fair go," the Premier said.

"And as recent events have shown, sexual harassment and gender inequity in the workplace is a pressing issue that needs addressing.

"Our review of the Industrial Relations Act will investigate industrial protections for workers subjected to sexual harassment, including the independent Queensland Industrial Relations Commission having the power to make anti-sexual harassment orders.

"As we look at current issues in the workplace, the review will also investigate protections for workers in precarious and short-term employment arrangements in Queensland, such as independent courier drivers."

The Premier said the review would dovetail with the Palaszczuk Government's response to the recommendations of Respect@Work: Sexual Harassment National Inquiry Report.

The review will commence soon and will include extensive consultation with unions and other stakeholders.

Industrial Relations Minister Grace Grace said the Palaszczuk Labor Government had a proud record of protecting workers' rights.

"We were the first state in Australia to make industrial manslaughter an offence, which now carries maximum penalties of 20-year jail terms and fines of up to $10 million," she said.

"We made wage theft a criminal offence and made it easier for workers to recover lost wages.

"Our nation-leading labour hire licensing laws protect workers from exploitation at the hands of unscrupulous providers.

"We've delivered substantial reforms to mine safety and built fair wages into major infrastructure projects

"We've delivered portable long service leave for Queensland's 40,000 or so community sector workers, most of them women, and the nation's first paid domestic and family violence leave

"We've improved our workers' compensation laws and restored rights stripped away by the LNP.

"The Labour Day public holiday is back in its rightful place in May and we have legislation before the Parliament to make it easier for our first responders to receive compensation for PTSD.

"The Palaszczuk Government will continue to champion the rights of modern-day workers in the 21st century, as it always has."

ENDS

Appendix B – Reviewers membership

Linda Lavarch

Linda is a lawyer by profession and has broad experience in developing and advising on public policy in Australia. Linda served in the Queensland Parliament from 1997 to 2009 and was appointed the State Attorney-General in 2005 serving in this position until October 2006. During her time in the Queensland Parliament Linda served in a number of parliamentary roles including Chair of the former Scrutiny of Legislation Committee (1998-2001) and Chair of the Ethics Committee (2007-2009) and Chair of the Committee of the Investigation into Altruistic Surrogacy.

After retiring from the Queensland Parliament Linda joined the team at the Australian Centre for Philanthropy and Nonprofit Studies (ACPNS) at Queensland University of Technology (QUT) co-ordinating a Nonprofit Law project aimed at streamlining the laws that regulate charities and not for profits in Australia. She was appointed by the then Federal Government as Chairperson of the National Not-for-profit Sector Reform Council (2011-2013) and Chairperson of the Not-for-profit Sector Tax Concession Working Group (2013). From 2015 to 2020 held the position of Director of Member and Specialist Services with the Queensland Nurses and Midwives' Union (QNMU) and from January 2021 to May 2021 remained with the QNMU working on special projects.

Linda currently holds Board and Advisory Committee positions including Chair of the Board of Directors of Screen Queensland, Director of Volunteering Queensland, Advisory Board member of Australian Centre for Philanthropy and Nonprofit Studies (QUT) and Advisory committee member of the QUT Pathway to Politics Program.

John Thompson

John is a plumber and drainer by trade with a long history of involvement in the Queensland union movement commencing in 1978 as a State Organiser for the Plumbers and Gasfitters Employees Union (PGEU) and culminating with his election as the General Secretary of the Queensland Council of Unions in 1995. In this period, he held senior roles at a national level including Deputy Federal President of the PGEU and Executive member of the Australian Council of Trade Unions.

In 2000 he was appointed as an Industrial Commissioner with the Queensland Industrial Relations Commission holding office until his retirement in February 2021. Concurrently between 2000 and 2006 he held the appointment of Commissioner with the Australian Industrial Relations Commission (now Fair Work Commission).

John is currently the Chairperson of the Contract Cleaning Industry (Portable Long Service Leave) Authority Board having previously served on numerous other Boards including WorkCover Queensland, Sunsuper, QSuper, BussQ, Queensland Performing Arts Trust, State Training Council and the Plumbers and Drainers Examination and Licensing Board.

Appendix C – Review of the operation of the Queensland *Industrial Relations Act 2016* Terms of Reference

The Honourable Grace Grace MP, Minister for Education, Minister for Industrial Relations and Minister for Racing, instructs the reviewer to inquire into and report on the operation of Queensland's *Industrial Relations Act 2016* (the Act), in particular:

1. Review the *Respect@Work* National Report recommendations relevant for implementation through the Act in the state's industrial relations jurisdiction.
2. Review the operation and performance of the provisions of the Act and how, in practice, different provisions are contributing to its main purpose (section 3) and to how the main purpose is primarily achieved (section 4), including:
   (a) investigation of protections for workers subject to sexual harassment under the Act.
   (b) investigation into how the Act can enhance the purpose of encouraging representation of employees and employers by organisations that are registered under the Act.
3. Review the Queensland Employment Standards against the National Employment Standards and employment standards of other relevant jurisdictions, to ensure that all Queensland workers under the state jurisdiction have access to prevailing employment standards.
4. Investigating precarious and short-term employment arrangements, including the setting of minimum entitlements and conditions for independent courier drivers.
5. Review the collective bargaining frameworks established under the Act to ensure the main purpose of the Act is being achieved.
6. Review the implementation of the enhanced wage recovery provisions that commenced on 1 March 2021, including the process and operation of the Industrial Registry, the Industrial Magistrates Court and the settlement mechanisms and processes that form part of the new provisions.
7. Review the Act to identify any redundant or superfluous provisions that are no longer required, including transitional provisions and technical revisions.
8. Review the implementation and effectiveness of the reforms following the 2015 review of the *Industrial Relations Act 1999* chaired by Mr Jim McGowan AM, including assessing the performance of new jurisdictions introduced by the Act (e.g. anti-discrimination, anti-bullying, flexible work requests and domestic and family violence leave provisions).
9. Other matters including amendments since the introduction of the Act.

The reviewer will be required to take written submissions and consult with stakeholders and experts, including but not limited to employers, unions, and the legal profession.

The reviewer will provide a report to the Minister, which may include an interim report. The report is required no later than 25 October 2021.

Appendix D – Consultation

There was extensive consultation with stakeholders and experts, including but not limited to employers, unions and the legal profession helped inform our understanding of the main issues and the views expressed in relation to sexual harassment within the workplace. Initial consultation was undertaken between 16 July and 13 October 2021.

We held face-to-face meetings and sought written submissions from stakeholders. To help guide stakeholders in their written submission, a discussion paper with questions to generate feedback relating to the TOR was provided to stakeholders listed in the table below. The stakeholders in the table below were sent the discussion paper on 16 July and called for written submissions by 2 August 2021. We received a total of 24 submissions, either written or oral, and met with stakeholders as noted in the table below.

Targeted stakeholder	Written submission	Meeting
Unions		
Queensland Council of Unions (QCU) and representatives of affiliates	Yes	25 August 2021
Together Queensland (TQ)	Yes	25 August 2021 7 September 2021
Queensland Teachers' Union (QTU)	Yes	25 August 2021
Transport Workers Union (TWU)	Yes	10 August 2021
Construction, Forestry, Mining and Energy Union (CFMEU)	Yes	24 August 2021
Australian Workers' Union (AWU)		16 August 2021 1 September 2021
Queensland Nurses and Midwives Union (QNMU)	Yes	25 August 2021 2 September 2021
Queensland Police Union (QPU)	Yes	25 August 2021 6 October 2021
Plumbers & Gasfitters Employees' Union Queensland (PGEU)	Yes	13 August 2021
Electrical Trades Union (ETU)	Yes	13 August 2021
United Workers Union (UWU)	Yes	25 August 2021
Rail, Tram and Bus Union (RTBU)		
Shop, Distributive and Allied Employees Association		
Australian Salaried Medical Officers' Federation Queensland (ASMOFQ)		
Government / Courts and tribunals		
Queensland Industrial Relations Commission (QIRC) and Industrial Court of Queensland	Yes	23 August 2021
Chief Magistrate		2 September 2021
Justice Glen Martin	Yes	16 September 2021
Queensland Human Rights Commission (QHRC)	Yes	26 July 2021 13 October 2021
Public Service Commission (PSC)		9 August 2021
Queensland Treasury		9 August 2021
Department of Education	Yes	24 August 2021
Queensland Health		30 August 2021
Department of Justice and Attorney-General (DJAG)	Yes	
Office of Industrial Relations (OIR) – Industrial Relations Regulation and Compliance and Industrial Relations Public Sector	Yes	30 August 2021
Queensland Police Commissioner	Yes	

Targeted stakeholder	Written submission	Meeting
TAFE Qld		
Local Government		
Local Government Association of Queensland (LGAQ)	Yes	10 August 2021
Brisbane City Council		27 August 2021
Legal/community legal sector		
Bar Association of Queensland (BAQ)	Yes	11 August 2021
Queensland Law Society (QLS)	Yes	25 August 2021
Australian Lawyers Alliance (ALA)		31 August 2021
Women Lawyers Association of Queensland (WLAQ)		3 September 2021
Basic Rights Queensland (BRQ)	Yes	16 August 2021
Peak Employer Groups		
Chamber of Commerce and Industry Queensland (CCIQ)	Yes	19 August 2021
Australian Industry Group (Ai Group)	Yes	13 August 2021
Master Builders Queensland (MBQ)		19 August 2021
Queensland Trucking Association	Yes	
Housing Industry Association		
National Retail Association		
Queensland Hotels Association		
Academics		
Queensland University of Technology Centre for Decent Work and Industry (Dr Penny Williams, Prof. Robyn Mayes, A/Prof Deanna Grant-Smith)	Yes	

Appendix E - Provisions in the IR Act that appear to be redundant or are identified as warranting minor change or removal

Part I – Provisions that appear to be redundant

Provision and title
Section 991 could possibly be removed, subject to advice from OQPC
Section 993(2) – Modern Awards
Section 994 - Review and variation of modern awards under old Ch 20, Pt 20, Div 2
Section 996 - Applications to vary modern award
Section 1000 - Existing applications for certification
Section 1001 - Application for certification—proposed agreement negotiated with employee organisation and approved by employees
Section 1003 - Application of Ch 5, Pt 2, Div 2 to local government sector
Section 1013 - Parental leave started under repealed Act
Section 1014 - Parental leave—application of obligation to advise about significant change
Section 1015 - Long service leave—agreement or notice under old s 45 or 71HD
Section 1018 - Long service leave—existing decisions or agreements about entitlement to, payment for, or taking of, leave
Section 1021 - Application of division
Section 1021A - Continuation of bargaining under this Act
Section 1021B - Taking of protected industrial action under this Act
Section 1021C - Continuation of protected action ballot process under repealed Act
Section 1021D - Continuation of conciliation etc.
Section 1023 - Existing proceedings
Section 1024 - Proceedings not yet started
Section 1025 - Application of rules made under repealed Act
Section 1027 - Authorised industrial officers taken to be authorized under this Act
Section 1028 - Applications under old s 365(1) continued
Section 1029 - Notices taken to be issued under this Act
Section 1030 - Written objection taken to be made under this Act
Section 1031 - Continuation of agreement about contributions to superannuation fund
Section 1034 - Provision for old s 415 (General requirements for applications)
Section 1036 - Provision for old s 427 (Change of callings)
Section 1038 - Provision for old s 447 (Approval application)
Section 1039 - Provision for old s 459 (Powers of commission)
Section 1040 - Provision for old s 461 (Financial help for application)
Section 1041 - Provision for old s 466 (Breach of demarcation dispute undertaking)
Section 1042 - Provision for old s 468 (Amendment to cure noncompliance if rule declared void)
Section 1043 - Provision for old s 472 (Approval to change 'union' to 'organisation' in name)
Section 1044 - Provision for old s 473 (Approval for other name amendment)
Section 1045 - Provision for old s 474 (Approval for eligibility rule amendment)
Section 1046 - Provision for old s 478 (When amendment may be made)
Section 1047 - Provision for old s 482 (Registrar must arrange for elections)
Section 1048 - Provision for old s 502 (Referral to commission)
Section 1049 - Provision for old s 503 (Commission may authorise registrar to investigate)
Section 1050 - Provision for old s 512 (Financial help for application)

Provision and title
Section 1051 - Provision for old s 519 (Prospective candidates)
Section 1052 - Provision for old s 520 (Existing office holders)
Section 1053 - Provision for old s 524 (Declaration about eligibility or ceasing to hold office)
Section 1054 - Provision for old s 535 (Recovering member's liabilities)
Section 1056 - Provision for old s 555 (Obligation to prepare accounts)
Section 1065 - Provision for old s 571 (Grounds for registrar's investigation)
Section 1066 - Provision for old s 575 (Registrar's examinations and audits
Section 1069 - Provision for old s 590 (Who may apply)
Section 1071 - Provision for old s 594 (Who may apply)
Section 1072 - Provision for old s 596 (Publication of application)
Section 1073 - Provision for old s 599 (Obligation to appoint returning officer)
Section 1074 - Provision for old s 612 (Amalgamations and withdrawals)
Section 1075 - Provision for old s 613 (Commission may decide)
Section 1076 - Provision for old s 617 (Amalgamation permitted only under div 2)
Section 1077 - Provision for old s 622 (Requirements for withdrawal)
Section 1078 - Provision for old s 636A (Making complaint about organisation or officer)
Section 1079 - Provision for old Ch 12, Pt 16, Div 2
Section 1080 - Provision for old Ch 12, Pt 16, Div 3
Section 1086 - Existing appeals under Workers' Compensation and Rehabilitation Act 2003

Part II – Provisions that warrant amendment

Provision	Comment	Recommendation
Regulation 9 made under section 337	Section 337 of the IR Act allows for the Registrar to issue an officer or employee of an organisation with an authority with reliance on a prescribed regulation which in this case mandates that 2 passport size photographs be provided when in practice only one is required.	That Regulation 9 – Application for issue of an authority – Act section 337 be amended at r 9(d)(i) to require only one passport size photograph signed on reverse side by the person.
Section 373 (4)	This section of the IR Act relates to an employer who pays an employee wages by means other than cash in a manner that does not allow for any charges to be levelled against the employee due the method of payment. The amendment proposed simply removes wording that on the face is not necessary.	That section 373(4) of the IR Act be amended by deleting the wording in line 2 "are to be paid".
Section 975(2)	This subsection of the IR Act provides for the frequency for proceedings of the consultative committee in that the Minister **must** convene a meeting at least twice a year.	That subsection 975(2) is amended to provide flexibility for the Minister in when these meetings are convened.