

# Further Education and Training (Training Ombudsman) and Another Act Amendment Bill 2015

## Explanatory Notes

### Short title

The short title of the Bill is the Further Education and Training (Training Ombudsman) and Another Act Amendment Bill 2015 (the Bill).

### Policy objectives and the reasons for them

The Queensland Government has committed to establishing an independent training ombudsman as part of its plan for reinvigorating the vocational education and training (VET) sector in Queensland under *Working Queensland – Labor’s Jobs Plan*.

In 2012, the Queensland Government referred power to the Australian Government to regulate registered training organisations (RTOs). Although the Queensland Government no longer regulates RTOs, quality within the VET sector is a key focus for the Government. The Queensland Government provides significant funding through purchasing of training from pre-qualified suppliers. In addition, apprenticeships and traineeships continue to be regulated in Queensland through the *Further Education and Training Act 2014* (FET Act).

Queensland consumers do not currently have access to a sector specific independent complaints mechanism to deal with the wide range of issues that may arise in the VET sector. VET consumers can face challenges in identifying the most appropriate avenue to direct concerns or complaints. There is still a need for further support for consumers to navigate the VET system, make complaints and be assisted to resolve disputes. Consumers and governments invest significant resources in VET and it is appropriate that action be taken to support consumers in this regard.

Although measures for improving training quality and the revision of standards for providers have recently been implemented at the national level, the establishment of the training ombudsman aims to further assist the Queensland Government to improve the quality of VET in this State. The training ombudsman will be tasked to identify systemic issues, which may be identified via complaints, and report to the Minister for Training and Skills on strategies to resolve these issues.

## **Achievement of policy objectives**

### **Establishment**

The Bill amends the FET Act to achieve the policy objectives by establishing the training ombudsman as an independent statutory position appointed by the Governor in Council. The Bill provides that the training ombudsman is to be appointed for a term decided by the Governor in Council of not more than four years and paid the remuneration and allowances decided by the Governor in Council. The training ombudsman is appointed under the FET Act and not under the *Public Service Act 2008*.

To maintain the integrity of the training ombudsman, the Bill provides that a person is disqualified from becoming or continuing as, the training ombudsman if: the person is a member of the Legislative Assembly; a councillor of a local government; has a conviction, other than a spent conviction, for an indictable offence; is an insolvent under administration; or is not able to manage a corporation under the *Corporations Act 2001* (Cth).

Further, a person may be removed as the training ombudsman by the Governor in Council if the Minister is satisfied the person has: engaged in inappropriate or improper conduct in an official or private capacity; become incapable of performing the training ombudsman's functions; or neglected their duties or performed the functions incompetently.

The Bill establishes the office of the training ombudsman (the office) to support the training ombudsman. The office consists of the training ombudsman and staff of the training ombudsman. The staff will be employed under the *Public Service Act 2008*.

### **Functions**

Under the Bill the training ombudsman has the following key functions.

#### **Receive complaints**

The training ombudsman can receive complaints about:

- the provision and quality of VET by RTOs, supervising RTOs (SRTOs) and an employer employing an apprentice or trainee;
- matters relating to apprenticeships and traineeships in Queensland, including: decisions of the chief executive regarding training contracts and declaration of, and the nominal term for, an apprenticeship or traineeship;
- compliance with the FET Act by apprentices, trainees, employers and SRTOs (compliance matters);
- matters related to RTOs that have a Pre-Qualified Supplier Agreement with the Department of Education and Training (DET) (pre-qualified suppliers); and
- prescribed decisions, i.e. certain decisions made by the chief executive of DET under the FET Act, such as, the decision to register a training contract and the decision to issue a completion certificate for an apprenticeship or traineeship.

The training ombudsman can, on the request of the complainant, assess and make recommendations to the chief executive in relation to complaints about:

- an investigation by the chief executive into a compliance matter or matter involving a pre-qualified supplier; and
- a decision of the chief executive about a prescribed decision.

#### Help and advise complainants

The training ombudsman can:

- help a person to make a complaint to a referral entity (defined at new section 112A);
- refer complaints to a referral entity; and
- give information or advice to a complainant about their complaint - this can include avenues for making a complaint to another agency.

For matters that fall within the jurisdiction of another agency, such as the Australian Skills Quality Authority or the Office of Fair Trading, the training ombudsman can assist the parties to attempt to resolve the matter in the first instance. Where a resolution cannot be reached, the training ombudsman can refer the complaint to the relevant agency to progress the complainant's concerns or assist the complainant to make the complaint to the other agency.

#### Monitor complaints, make recommendations and report on systemic issues

The training ombudsman can:

- monitor the outcome of a complaint;
- make recommendations to the chief executive about apprenticeships and traineeships including the declaration, or changing the nominal term, of an apprenticeship or traineeship;
- identify and report to the Minister on systemic issues related to the provision and quality of VET in Queensland; and
- make recommendations to the Minister about:
  - ways to improve DET's systems, policies and processes in relation to pre-qualified suppliers and SRTOs;
  - matters relating to apprenticeships and traineeships in Queensland; and
  - strategies to improve the quality of VET in Queensland.

#### Promotional activities and reviews

The training ombudsman can:

- carry out promotional and educational activities related to VET in Queensland; and
- undertake or promote reviews of, or research into matters relating to the training ombudsman's functions, including reviews or research requested by the Minister.

The training ombudsman will be able to enter into an information sharing arrangement with other government entities for the purposes of sharing or exchanging information held by the training ombudsman or the government entity. The information that may be obtained under the information sharing arrangement is limited to information that relates to a complaint about a compliance matter; a matter involving a pre-qualified supplier; or a prescribed decision.

### **Independence, reporting and accountability of the training ombudsman**

The Bill ensures the independence of the training ombudsman and the office established to support the training ombudsman in the performance of his/her functions.

New section 112ZH provides that the training ombudsman is not subject to direction about the way the training ombudsman performs his/her functions. The Bill establishes the office of the training ombudsman as a public service office and the training ombudsman is the head of the office. This ensures the independence of the office. As the head of the office, the training ombudsman has, for the staff of the office, all of a chief executive's functions and powers. In addition, new section 112C provides that the training ombudsman controls the office.

While the training ombudsman is independent, the Bill provides that the Minister may refer a matter to the training ombudsman and ask the training ombudsman to review or research the matter and provide advice or make a recommendation. For example, the Minister could ask the training ombudsman to review school-based apprenticeship arrangements in Queensland to highlight best practice examples and identify impediments to growth or outcomes. However, the Minister cannot direct the nature of the advice that the training ombudsman provides.

Under the Bill, the Minister may also issue a written statement of expectations to the training ombudsman stating the Minister's expectations for the performance of the training ombudsman's functions. For example, the Minister could provide a list of priorities for the training ombudsman in relation to identifying systemic issues.

The Minister may also, by written notice, ask the training ombudsman for information or documents about a stated matter relevant to the training ombudsman's functions. For example, the Minister could request information about the number and type of complaints made to the training ombudsman for a particular period.

The training ombudsman must comply with the request or have regard to the statement of expectations when performing his/her functions.

The training ombudsman must prepare and give to the Minister, within three months after the end of each financial year, a report on the discharge of the training ombudsman's functions. The report must include copies of any notices given to the training ombudsman during the financial year. The Minister must table the report within 14 days of receiving it.

### **Alternative ways of achieving policy objectives**

There is no alternative way of achieving the policy objectives to establish a statutory position of the training ombudsman and the office of the training ombudsman as public service office.

### **Estimated cost for government implementation**

The Queensland Government's election commitment *Working Queensland – Labor's Jobs Plan* includes the commitment to invest \$5 million over three years to establish the training ombudsman and the allocation of \$0.5 million on an ongoing basis.

## Consistency with fundamental legislative principles

**Legislation should have sufficient regard to the rights and liberties of individuals - *Legislative Standards Act 1992, sections 4(2)(a)***

### Access to criminal history information

The Bill provides in new section 112W(1)(c) – (e) that a person is disqualified from becoming, or continuing as the training ombudsman, if the person: has a conviction for an indictable offence other than a spent conviction; is an insolvent under administration; or is disqualified from managing corporations because of the *Corporations Act*, part 2D.6. It is arguable that this proposal could adversely affect the rights and liberties of a person who is, or may become, the training ombudsman.

It is appropriate for appointees as the training ombudsman to be integrity checked given the training ombudsman's functions (e.g. independently reviewing decisions made by the chief executive) and powers, and given that the position is publicly funded.

Section 112ZC of the Bill enables the Minister to request from the commissioner of police a criminal history for the purposes of deciding if a person is disqualified from becoming, or continuing, as the training ombudsman. The power to obtain a person's criminal history potentially breaches the fundamental legislative principle that legislation has sufficient regard to the rights and liberties of individuals.

However, the proposed provision is considered justified as criminal history checking is appropriate to maintain the integrity of the position of the training ombudsman. In addition, the Bill provides for safeguards around the access and disclosure of the information:

- the criminal history may only be obtained with consent of the individual (new section 112ZC(2)); and
- it is an offence for a person to directly or indirectly disclose criminal history information to any other person unless the disclosure is authorised by law, with a maximum penalty of 100 penalty units (new section 112ZD).

This penalty amount under new section 112ZD is appropriate as the offence operates as an important safeguard to protect the criminal history information from further disclosure.

### Creation of offences

The Bill includes the creation of new offences and expansion of existing offences. While such provisions could potentially breach the fundamental legislative principle that legislation has sufficient regard to the rights and liberties of individuals as they impose a penalty upon the person for breach of the provision, they are considered justified.

New section 112ZE requires the training ombudsman to immediately disclose to the Minister if he/she has been convicted of an indictable offence during the term of appointment. This requirement to disclose changes in criminal history is essential to maintain the integrity of the position. The offence carries a maximum penalty of 100 penalty units. This is an appropriate penalty amount taking into account the role the training ombudsman will have in assessing investigations and decisions of the chief executive.

New section 112N gives the training ombudsman powers, when assessing a complaint under new section 112J or 112K, to request from a person stated information or a document or to attend before the training ombudsman to answer questions or produce documents. New section 112N(3) provides the person must comply with the requirement unless the person has a reasonable excuse. The maximum penalty for breach of the requirement is 100 penalty units.

New sections 112ZE(2) and 112N(3) reverse the onus of proof by requiring the defendant to raise a reasonable excuse for failing to comply with the provision. The existence of a reasonable excuse is information that is particularly within the defendant's knowledge in these circumstances. It would be difficult for the prosecution to prove the lack of a reasonable excuse. Given this, the reversal of the onus of proof in the circumstances of these provisions is considered to be appropriate.

The inclusion of this offence is necessary to ensure the training ombudsman is able to access all the information required to perform his/her functions. The penalty amount is set at a level to encourage compliance with the request for information. The amount is consistent with the penalty amount in section 160 of the FET Act for a similar offence of failing to comply with a request from an inspector for information relating to an offence committed against the FET Act.

#### Appropriate protection against self-incrimination

New section 112N (Power to require information or attendance) creates new information gathering powers and a penalty for failing to comply with the requirements unless the person has a reasonable excuse. New section 112N(4) provides that it is a reasonable excuse for an individual not to comply with the requirement if complying with the requirement might tend to incriminate the individual.

#### Indemnity from civil liability

Clause 8 amends section 194 of the FET Act to include the training ombudsman or a person acting under the direction of the training ombudsman or a staff member of the office as a 'prescribed person'. Under section 194, a prescribed person is not civilly liable for an act or omission made honestly and without negligence under the Act. Staff members are afforded indemnity under the *Public Service Act 2008*.

This amendment could be considered to have insufficient regard to individual rights and liberties by restricting an individual's ability to seek legal redress. However, it is not considered appropriate for a person to be made personally liable as a consequence of carrying out his or her responsibilities as the training ombudsman or for a person acting under the direction of the training ombudsman or a staff member. The potential breach of fundamental

legislative principles is justifiable on the basis that the provision operates to attach civil liability to the State instead.

## **Consultation**

The following stakeholders were consulted on a draft of the Bill:

- Queensland Industrial Relations Commission;
- Energy Skills Queensland;
- Queensland Ombudsman;
- TAFE Queensland;
- Australian Skills Quality Authority;
- Australian Council for Private Education and Training (ACPET);
- East Coast Group Apprenticeships;
- Apprenticeships Queensland;
- Qld Fitness, Sport and Recreation Skills Alliance;
- Motor Trades Association of Queensland;
- Office of Fair Trading;
- Queensland Council of Unions;
- Together Union; and
- Careers Australia.

There was general support for the Bill, and the introduction of an independent statutory position to assist VET stakeholders.

## **Consistency with legislation of other jurisdictions**

The Bill is specific to the State of Queensland and does not introduce uniform or complementary legislation.

## Notes on provisions

### Part 1 Preliminary

*Clause 1* provides that the short title of the Act is the Further Education and Training (Training Ombudsman) and Another Act Amendment Act 2015.

*Clause 2* provides that the Act commences on a day to be fixed by proclamation.

### Part 2 Amendment of Further Education and Training Act 2014

*Clause 3* provides that this Act amends the *Further Education and Training Act 2014* (FET Act).

*Clause 4* omits section 64(3) of the FET Act, which provides for a definition of ‘young person’. *Clause 9* inserts a definition of ‘young person’ in the schedule 1 Dictionary of the FET Act.

*Clause 5* inserts a new chapter 4A (Training Ombudsman), sections 112A to 112ZI, into the FET Act.

New section 112A provides for the definitions used in chapter 4A, including definitions for ‘compliance matter’, ‘pre-qualified supplier’ and ‘prescribed decision’.

New section 112B provides for the establishment of the training ombudsman and the office of the training ombudsman.

New section 112C provides that the training ombudsman controls the office. However, this does not prevent the attachment of the office to the department to ensure that the office is supplied with the administrative support services, such as human resources and facility support.

New section 112D provides for the functions of the training ombudsman.

New section 112E provides that the training ombudsman has power to do all things necessary or convenient in connection with the performance of his/her functions.

New sections 112F provides for the circumstances where the training ombudsman may refuse to deal with, or continue to deal with, a complaint.

New section 112G provides that the training ombudsman must refuse to deal, or continue to deal, with a complaint if the matter subject of the complaint is the subject of an application for review under the *Queensland Civil and Administrative Tribunal Act 2009* or has been reviewed by the Queensland Civil and Administrative Tribunal; or an appeal is started in the industrial relations commission or the industrial court about the matter or the industrial relations commission or industrial court makes a decision about the matter.



New section 112H provides that if a complaint is about a compliance matter or a matter involving a pre-qualified supplier the training ombudsman must in the first instance refer the complaint to the chief executive to investigate. However, the training ombudsman is not required to refer a complaint to the chief executive to investigate if: the training ombudsman refuses to deal with the complaint under section 112F or 112G; or the person has previously made a complaint to the chief executive about the matter and the chief has investigated the complaint.

The section provides how the chief executive must deal with the referred matter. The chief executive is required to investigate the complaint and give a report of the investigation explaining the action taken or proposed to be taken in relation to the complaint to the complainant and the training ombudsman.

New section 112I provides that a person may ask the training ombudsman to further deal with a complaint that has been investigated by the chief executive and the complainant is not satisfied with the outcome. This includes complaints referred to the chief executive by the training ombudsman under section 112H as well as complaints investigated by the chief executive that have not previously been made to the training ombudsman.

New section 112J provides that if a request for further assessment has been made under section 112I, the training ombudsman must notify the chief executive of the request and, unless the training ombudsman refuses to deal with the complaint under sections 112F or 112G, assess the complaint. The new section requires that once the training ombudsman has assessed the complaint, he/she must provide a report to the complainant and chief executive outlining the findings and any recommendations in relation to the matter.

New section 112K provides that if the training ombudsman receives a complaint about a 'prescribed decision', the training ombudsman must give the chief executive written notice of the complaint or request, and, unless the training ombudsman refuses to deal with the complaint under sections 112F or 112G, assess the complaint. The new section requires that once the training ombudsman has assessed the complaint, he/she must provide a report to the complainant and the chief executive outlining the findings and any recommendations in relation to the matter.

New section 112L provides that if the training ombudsman gives the chief executive written notice that the training ombudsman is further assessing a complaint under section 112J and 112K, the chief executive must give the training ombudsman a copy of the material or information before the chief executive in investigating a complaint or making a decision.

New section 112M provides that the training ombudsman may enter into an information sharing arrangement with a government entity for the purposes of sharing or exchanging information held by the training ombudsman or the government entity. Subsection (2) restricts the information sharing arrangement to information that relates to a complaint about a compliance matter, a matter involving a pre-qualified supplier or a prescribed decision. Subsection (3) authorises the training ombudsman and the government entity, despite any other Act or law of the State, to request and receive information held by the other party to the arrangement and disclose the information to the other party.

New section 122N applies if the training ombudsman assesses a complaint under new section 112J (a compliance matter or a matter involving a pre-qualified supplier) or section 112K (a prescribed decision). The training ombudsman may, by written notice, require a person to:

- give the training ombudsman stated information; or
- create, and give the training ombudsman a document; or
- attend before the training ombudsman at a stated reasonable time and place to answer questions, or produce documents.

The person must comply with the requirement unless the person has a reasonable excuse. A maximum penalty of 100 penalty units applies for breach of this section. New section 112N(4) provides that it is a reasonable excuse for an individual not to comply with the requirement if complying with the requirement might tend to incriminate the individual. The section does not apply to government entities as new section 112M provides for the training ombudsman to enter into information sharing arrangements with a government entity.

The purpose of this provision is to enable the training ombudsman to ask a person directly for information. Under the FET Act, inspectors investigate compliance with the Act and have certain powers to enter places and seize documents. Under a Pre-Qualified Supplier Agreement with DET, departmental officers have the ability to enter a pre-qualified supplier RTO's premises. The training ombudsman will not have these entry powers. However, it is considered appropriate that he/she can request information and documents or ask a person to attend and provide the information and documents, particularly in cases where the training ombudsman considers the investigation by the chief executive is not sufficient or additional information may be required to effectively assess the matter.

New section 112O provides for the custody of a document or thing produced to the training ombudsman under Chapter 4A, Part 2, division 2.

New section 112P provides that if the training ombudsman proposes to make an adverse comment about a person in a report under Chapter 4A, Part 2, division 2 the training ombudsman must not make the proposed adverse comment unless the training ombudsman gives the person an opportunity to respond to the proposed comment and the person's response is fairly stated in the report. The term 'person' has its broad meaning in this section and would include the department, or other government agency.

New section 112Q provides that the Minister may refer a matter relevant to the training ombudsman's functions to the training ombudsman to review or research and give the Minister a written report including advice or recommendations about the matter. The training ombudsman must comply with the request.

New section 112R provides that the Minister may issue a written statement of expectations regarding the performance of the training ombudsman's functions. The training ombudsman must have regard to the statement of expectations in performing his/her functions. The section provides that the statement of expectations may provide for any of the following:

- the training ombudsman's strategic or operational activities;
- reporting to the Minister about the strategic or operational activities; or
- the key priorities, other than the priority to be given to complaints, for the training ombudsman.

New section 112S provides that the Minister may, by written notice, ask the training ombudsman for information or documents relevant to the training ombudsman's functions. The training ombudsman must comply with the request.

New section 112T provides that the Governor in Council may appoint a person as the training ombudsman. The training ombudsman is appointed under the FET Act and not under the *Public Service Act 2008*.

New section 112U provides that the training ombudsman holds office for not more than 4 years as stated in the training ombudsman's instrument of appointment. A person may be reappointed as the training ombudsman.

New section 112V provides that the training ombudsman is to be paid the remuneration and allowances decided by the Governor in Council. The training ombudsman holds office on the terms and conditions, not provided for by the FET Act, that are decided by the Governor in Council.

New section 112W provides for the disqualification of a person from becoming, or continuing as the training ombudsman to ensure integrity and independence of the position.

New section 112X provides for the Minister to approve a leave of absence for the training ombudsman, and the appointment of someone else to act in office of the training ombudsman during the period of leave.

New section 112Y provides how the training ombudsman can resign and when the resignation takes effect.

New section 112Z provides that the Governor in Council may, on the Minister's recommendation, remove the training ombudsman from office if the Minister is satisfied of one of the stated matters. This section protects the independence of the training ombudsman as he/she can only be removed in limited circumstances.

New section 112ZA enables the training ombudsman to delegate his or her functions to an appropriately qualified staff member of the office of the training ombudsman.

New section 112ZB provides that if a person appointed as the training ombudsman was a public service employee immediately before taking up the appointment certain rights and entitlements are preserved. In addition, if a person is appointed as a public service employee and was, immediately before taking up the appointment, the training ombudsman, their service as the training ombudsman must be regarded as service as a public service employee.

New section 122ZC provides that, for the purposes of deciding if a person is disqualified from becoming or continuing as the training ombudsman, the Minister may, with the written consent of the person, ask the commissioner of the police service for a written report about the person's criminal history and a brief description of a conviction mentioned in the report. The section provides that the Minister must ensure the report is destroyed as soon as practicable after it is no longer needed.

New section 112ZD provides that criminal history information provided under section 112ZC is confidential. Disclosure, unless permitted under this section, is an offence with a maximum penalty of 100 penalty units.

New section 122ZE requires the training ombudsman to disclose changes to their criminal history. The section requires that if the training ombudsman is convicted of an indictable offence during the term of his/her appointment they must, unless they have a reasonable excuse, immediately disclose the conviction to the Minister. Failure to comply with this requirement is an offence with a maximum penalty of 100 penalty units.

New section 112ZF declares that the office of the training ombudsman is not a statutory body for the purposes of the *Statutory Bodies Financial Arrangements Act 1982* or the *Financial Accountability Act 2009*.

New section 112ZG provides that the staff of the office are employed under the *Public Service Act 2008*.

New section 112ZH provides that, subject to the Act and any other law, the training ombudsman is not subject to direction by any person about the way the training ombudsman performs his/her functions. Staff of the office of the training ombudsman are not subject to direction by any person other than from within the office about the way complaints are dealt with.

New section 112ZI requires the training ombudsman to prepare an annual report about how his/her functions have been discharged during the financial year.

*Clause 6* makes a minor editorial amendment to section 173 of the FET Act.

*Clause 7* amends the definition of 'official' in section 188 of the FET Act to include the training ombudsman and a staff member of the office of the training ombudsman.

*Clause 8* amends section 194 of the FET Act to ensure that the training ombudsman or a person acting under the direction of the training ombudsman or a staff member of the office of the training ombudsman is not civilly liable for an act done, or omission made, honestly and without negligence under the FET Act. Liability attaches instead to the State.

*Clause 9* includes in schedule 1 (Dictionary) definitions from the new Part 4A.

### **Part 3 Amendment of Public Service Act 2008**

*Clause 10* provides that the Act amends the *Public Service Act 2008*.

*Clause 11* amends schedule 1 of the *Public Service Act 2008* to provide that the office of the training ombudsman is a public service office and the training ombudsman as the head of the office.

Providing that the office of the training ombudsman is a public service office ensures the independence of the office. As the head of the office, the training ombudsman has, for the staff of the office, all of a chief executive's functions and powers.

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