

Public Sector Bill 2022

Statement of Compatibility

FOR

Amendments to be moved during consideration in detail by the Honourable Grace Grace MP, Minister for Education, Minister for Industrial Relations and Minister for Racing

Prepared in accordance with Part 3 of the *Human Rights Act 2019*

In accordance with section 38 of the *Human Rights Act 2019* (HR Act), I, the Honourable Grace Grace MP, Minister for Education, Minister for Industrial Relations and Minister for Racing make this statement of compatibility with respect to the amendments to be moved during consideration in detail (ACiDs) of the Public Sector Bill 2022 (Bill).

In my opinion, the ACiDs for the Bill are compatible with the human rights protected by the HR Act. I base my opinion on the reasons outlined in this statement.

Overview of the amendments

The amendments respond, in part, to issues raised in stakeholder submissions and agency feedback provided after the Bill was introduced.

Amendments to the definition of “public sector employee”

The ACiDs include an amendment to clause 12 of the Bill to clarify that, despite the definition of “public sector employee” in clause 12(1), a person is always a public sector employee if another Act provides they are to be, may be, or are employed or appointed under the new Public Sector Act. This ensures that the Bill gives effect to the intent of all other Acts that contemplate the employment of employees under the new Public Sector Act.

Amendments to permanency of employment provisions

The ACiDs include an amendment to clause 81(1) to clarify that the clause contemplates circumstances where another Act enables the employment of staff but does not specify the basis of that employment (such as permanent employment).

The ACiDs also include an amendment to clause 81(2) to clarify that, when determining whether employment on a non-permanent basis is permitted, the focus is on the specific employee in question.

Amendments to reviews of non-permanent employment

The ACiDs include an amendment to clause 112 of the Bill to clarify that if a chief executive of a public sector employee is permitted or required to offer to convert the employee's employment to a permanent basis under chapter 3, part 9, division 1 of the Bill, the employee may be employed on a permanent basis, despite anything in another Act which provides for their basis of employment.

For example, this amendment will clarify that community visitors appointed under the *Public Guardian Act 2014* (PG Act), who will become public sector employees under the Bill, can be appointed on a permanent basis as a result of the Public Sector Act framework and despite any requirement in the PG Act.

Amendments to public sector review framework

The ACiDs include amendments to exclude the Electoral Commission of Queensland (ECQ) and Queensland Human Rights Commission (QHRC) from the Bill's public sector review framework.

This is achieved by amending clause 254(2) of the Bill to include references to the ECQ and QHRC.

The treatment of these entities mirrors the treatment of core integrity bodies, such as the Crime and Corruption Commission, Ombudsman, Information Commissioner, Integrity Commissioner and Auditor-General, which are similarly excluded from the public sector review framework.

Amendments to civil liability provisions

The ACiDs include an amendment to clause 268(1)(b) of the Bill to extend civil liability protections to all associates to judges and members of courts of record. This will have the effect of capturing associates to members of the Land Court.

The purpose of the amendment is to ensure consistency of treatment between associates to Supreme Court judges, District Court judges, Commissioners under the *Industrial Relations Act 2016*, and judges and members of other courts of record.

Amendments to require strategic reviews under the *Anti-Discrimination Act 1991* and *Electoral Act 1992*

The ACiDs include consequential amendments to the *Anti-Discrimination Act 1991* (AD Act) and *Electoral Act 1992* (Electoral Act) to ensure the QHRC and ECQ are subject to periodic strategic reviews.

These amendments are a consequence of the exemption of the QHRC and ECQ from the Bill's public sector review framework. The amendments are necessary to ensure these entities will be subject to a formal review mechanism, similar to what is done for other entities that will not be subject to the public sector review powers, like the Ombudsman, Information Commissioner, Integrity Commissioner and Auditor-General.

Similar to the approach that exists in respect of these other entities, new section 248 of the AD Act and new section 33B of the Electoral Act state that, in conducting a strategic review:

- the reviewer for a strategic review has the powers an authorised auditor has under the *Auditor-General Act 2009* (AG Act) for an audit of an entity; and
- the AG Act and other Acts apply to the reviewer as if the reviewer were an authorised auditor conducting an audit of an entity.

Applying the powers under section 46 of the AG Act, for the purpose of conducting a strategic review, a reviewer may:

- enter, at any reasonable time:
 - a place occupied by the ECQ or QHRC;
 - a place occupied by a financial institution with which the ECQ or QHRC maintains an account; or
 - another place if the occupier of the place consents to the entry;
- inspect, examine, photograph or film anything in the place;
- take extracts from, and make copies of, any documents in the place;
- take into the place persons, equipment and materials that the reviewer reasonably requires; and
- require any person in the place to give to the reviewer reasonable assistance in relation to the exercise of the powers mentioned in the previous dot points.

A person must comply with such a requirement, unless the person has a reasonable excuse. The maximum penalty for this offence is 40 penalty units. However, it is not a reasonable excuse for an individual to fail to comply with such a requirement that complying with the requirement might tend to incriminate the individual.

Under the applied section 46 of the AG Act, there are the following limits on the use of answers by, or documents produced by, an individual under a requirement by a reviewer:

- an answer by the individual, or any information document or other thing obtained as a direct or indirect consequence of the individual giving the answer, is not admissible against the individual in a criminal proceeding, other than a proceeding relating to the falsity of the answer, if the answer might in fact tend to incriminate the individual; and
- the fact that a document was produced by the individual is not admissible in evidence against the individual in a criminal proceeding, other than a proceeding relating to the falsity of the document, if producing the document might in fact tend to incriminate the individual.

Amendments to schedule 1

The ACiDs include an amendment to ensure the Gasfields Commission is a public service entity under clause 9(b) of the Bill. This corrects an anomaly in the treatment of the Gasfields Commission and its employees under the *Public Service Act 2008* and gives effect to the intent of the *Gasfields Commission Act 2013* by ensuring the Commission and its staff are subject to the Bill's public service-specific provisions.

Human Rights Issues

Human rights relevant to the Bill (Part 2, Division 2 and 3 *Human Rights Act 2019*)

In my opinion, the following human rights under the HR Act are relevant to the ACiDs:

- privacy and reputation (HR Act, section 25);
- fair hearing (HR Act, section 31(1)); and
- rights in criminal proceedings, especially in relation to not being compelled to testify against oneself or confess guilt (HR Act, section 32(2)(k)).

These human rights arise from the proposed strategic review mechanisms in the AD Act and Electoral Act.

If human rights may be subject to limitation if the Bill is enacted – consideration of whether the limitations are reasonable and demonstrably justifiable (section 13 *Human Rights Act 2019*)

(a) the nature of the right

Right to privacy and reputation (HR Act, section 25)

Section 25 of the HR Act protects individuals from unlawful or arbitrary interference with their privacy, family, home or correspondence, and from unlawful attacks on their reputation. The scope of the right is broad, and the underlying value of the right is the importance of protecting an individual's freedom from the unjustified involvement of public authorities in their private sphere.¹

The concept of 'privacy' is not defined in the HR Act. It has been interpreted to encompass information privacy, including personal information and health records and correspondence, and extends to an individual's private life, including their identity and physical and medical integrity.²

Privacy as it relates to personal information may be limited by the reviewer for a strategic review being able to obtain documents and information from the ECQ or QHRC or from any persons in places occupied by these bodies (under amendments 7 and 8, applying section 46 of the AG Act).

Right to fair hearing (HR Act, section 31) and rights in criminal proceedings (HR Act, section 32)

The right to a fair hearing in section 31 of the HR Act provides an individual charged with a criminal offence or a party to a civil proceeding with the right to have the charge or proceeding decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Section 32 of the HR Act states that an individual charged with a criminal offence is entitled without discrimination to a number of minimum guarantees, including not to be compelled to testify against themselves or to confess guilt (section 32(2)(k)).

¹ *Director of Housing v Sudi* [2010] VCAT 328 [29].

² *Kracke v Mental Health Review Board* (2009) 29 VAR 1; [2009] VCAT 646 [619].

Though the right to a fair hearing and the rights in criminal proceedings refer to applying during a hearing or when an individual has been charged with a criminal offence or is a party to a civil proceeding, case law indicates that the right against self-incrimination is engaged before the possibility of a trial or any charges being laid. The issue was considered in *Re Application under Major Crimes (Investigative Powers) Act 2004* (2009) 24 VR 415; [2009] VSC 381 at [162] where it was determined that an individual's right against self-incrimination can be infringed where statements made by the individual before any charges are laid are subsequently used in criminal proceedings.

An individual's right to a fair hearing and the guarantee not to be compelled to testify against themselves or to confess guilt may be limited by the powers exercised by the reviewer for a strategic review being able to require a person to give reasonable assistance, especially in view of an individual not being able to claim a reasonable excuse for not complying with the requirement on the basis that doing so might tend to incriminate the individual (under amendments 7 and 8, applying section 46 of the AG Act).

(b) the nature of the purpose of the limitation to be imposed by the ACiDs if enacted, including whether it is consistent with a free and democratic society based on human dignity, equality and freedom

The purpose of the limitations on the right to privacy, right to a fair hearing and rights in criminal proceedings is to equip the strategic reviewer with sufficient powers so that the strategic review process can provide appropriate accountability and oversight of the ECQ and QHRC and these two bodies are answerable for the performance of their functions.

Strategic reviews will focus on whether the ECQ's and QHRC's functions are being performed economically, effectively and efficiently. Granting a reviewer the powers under the AG Act will ensure that strategic reviews of these bodies are comprehensive and able to identify all relevant aspects of the performance of their functions.

By enhancing the performance of the ECQ's and QHRC's functions, the strategic review powers will promote the human rights championed by those bodies, including most relevantly the right to recognition and equality before the law in the case of the QHRC (section 15 of the HR Act) and the right to take part in public life in the case of the ECQ (section 23 of the HR Act).

(c) the relationship between the limitation to be imposed by the ACiDs if enacted, and its purpose, including whether the limitation helps to achieve the purpose

The limitations on the right to privacy related to the reviewer for a strategic review being able to obtain documents and information from the ECQ or QHRC or from any persons in places occupied by these bodies will achieve the purpose by assisting the reviewer to develop a full and accurate understanding of how the relevant body is performing its functions.

Equally, the limitations on the right to a fair hearing and rights in criminal proceedings caused by the fact that an individual may be required to produce a document or give information even though doing so might tend to incriminate the individual will also achieve the purpose by giving the reviewer the ability to collect accurate and first-hand information from those working within the ECQ and QHRC. These limitations on human rights will allow the reviewer to form

a view about whether the functions are being performed economically, effectively and efficiently.

(d) whether there are any less restrictive (on human rights) and reasonably available ways to achieve the purpose of the Bill

An alternative to the approach taken in the amendments is to provide no alternative accountability mechanism at all. However, this would not be as effective in achieving the purpose of the limitation of ensuring appropriate accountability and oversight of the ECQ and QHRC.

The amendments will not require a reviewer for a strategic review to exercise the powers that may limit individuals' human rights. It is expected that, consistent with previous strategic reviews of the Ombudsman, Information Commissioner, Integrity Commissioner and Auditor-General, strategic reviews of the ECQ and QHRC will be conducted in collaboration between a reviewer and those bodies, without resorting to the powers the reviewers will have under the AG Act.

There are safeguards which will lessen the extent of the limitation on the right to privacy. Under the ACiDs, the AG Act and other Acts will apply to a reviewer in conducting a strategic review as if the reviewer were an authorised auditor conducting an audit of an entity. This will mean that section 53 of the AG Act will apply in relation to *protected information* obtained by the reviewer, being information that:

- is not publicly available;
- is disclosed to, obtained by, or made by the reviewer in relation to a strategic review; and
- is relevant to the strategic review.

Section 53 of the AG Act will prohibit the reviewer from making a record of, divulging or communicating protected information, unless it is done in the performance of the reviewer's duties.

Also, new section 249 of the AD Act and new section 33C of the Electoral Act to be inserted by amendments 7 and 8 will require the reviewer for a strategic review to give a copy of a proposed report to the Minister and the Electoral Commissioner or Human Rights Commissioner. If the Electoral Commissioner or Human Rights Commissioner gives comments on the proposed report, the reviewer must incorporate any amendment agreed to dispose of the comments in the final report or include the full comments in the final report. It is expected that this process will reduce the extent of information being included in final reports that might limit an individual's right to privacy.

The ACiDs also contain safeguards to reduce the extent of the limitations on the right to a fair hearing and rights in criminal proceedings. Specifically, under the applied section 46 of the AG Act, there are the following limits on the use of answers by, or documents produced by, an individual under a requirement by a reviewer:

- an answer by the individual, or any information document or other thing obtained as a direct or indirect consequence of the individual giving the answer, is not admissible against the individual in a criminal proceeding, other than a proceeding relating to the falsity of the answer, if the answer might in fact tend to incriminate the individual; and

- the fact that a document was produced by the individual is not admissible in evidence against the individual in a criminal proceeding, other than a proceeding relating to the falsity of the document, if producing the document might in fact tend to incriminate the individual.

The exception to allow the admission of evidence in a proceeding relating to the falsity of an answer or a document is to facilitate honesty and transparency in the provision of information to a reviewer for a strategic review.

Therefore, in my view, there are no less restrictive and reasonably available ways to achieve the purpose of the ACiDs.

- (e) the balance between the importance of the purpose of the ACiDs, which, if enacted, would impose a limitation on human rights and the importance of preserving the human rights, taking into account the nature and extent of the limitation

On balance, I consider the importance of the purpose of the ACiDs—which includes providing for accountability arrangements for the ECQ and QHRC, including to ensure their functions are being performed economically, effectively and efficiently—outweighs the limitations on the rights to privacy and a fair hearing, as well as rights in criminal proceedings.

I consider that the safeguards mentioned above mitigate the extent of the limitations. After weighing up the purpose and the extent of the limitations on rights, I consider that the importance of the purpose outweighs the limitations described above.

- (f) any other relevant factors

Nil.

Conclusion

In my opinion, the ACiDs for the Bill are compatible with human rights under the HR Act because they either do not limit a human right or limit a human right only to the extent that it is reasonable and demonstrably justified in a free and democratic society based on human dignity, equality and freedom, in accordance with section 13 of the HR Act.

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