

DISCIPLINARY UNFAIRNESS IN QUEENSLAND PUBLIC SERVICE LEGISLATION

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ABSTRACT

A just system of discipline within an organisation requires four characteristics: a clear set of offences, proportionate punishments clearly linked to the offences, oversight and appeals from disciplinary decisions, and independence from political masters. This paper examines Queensland public sector legislation and policy from 1863 to the present to demonstrate how well these four criteria are addressed. An analysis of the presence of these four characteristics in the Queensland context finds that the public sector legislation in Queensland is in breach of the guidelines that define a just and fair system in which disciplinary action is dispensed. We argue that creation of arbitrary powers to punish or dismiss staff is unjust if the legislation does not fully inform staff of what constitutes a breach of discipline, does not guarantee proportionate punishments to offences, and/or allow the disciplinary process to be used as a tool to coerce staff to perform in a politicised or otherwise unethical manner. We conclude by making recommendations as to how this situation may be rectified.

INTRODUCTION

A just system of discipline within an organisation requires four characteristics: a clear set of offences, proportionate punishments clearly linked to the offences, oversight and appeals from disciplinary decisions, and independence from political masters. Essentially such a system has predictability in its definition of what constitutes a breach and of the types of response likely to be attached to a disciplinary matter. A disciplinary system which does not give surety concerning the types of behaviour constituting breaches, and of the likely or possible responses to such offences cannot be considered to fair and just (Brockner, Ackerman & Fairchild, 2001).

In our public sector agencies, there is a presumption that public servants are afforded the highest levels of certainty and protection from unfairness in the specific legislation governing their employment. However, there is little by way of examinations of the actual levels of certainty and fairness of public service

legislation — and indeed the potential for abuses — pertaining to public sector employee conditions, in the literature. In the absence of these examinations the assumption is simply that the legislation, policy, and processes in place will afford a fair and equitable outcome for public servants who are the subjects of disciplinary matters. Therefore, this paper contributes to the broadening of knowledge pertaining to actual and potential levels of fairness and procedural justice as prescribed by public service legislation, policies, and processes. It is our view that is not enough to focus on actual miscarriages of justice — many of which are unlikely to come to public attention — but equally to focus on examining the legislation and its potential to be utilised for arbitrary decision-making that somehow are allowable and justifiable under a broad frame of power. The examination of this issue entails a detailed discussion of the elements of the ‘Act’ which are deemed, under the guiding principles of what constitutes a fair and just disciplinary system, to be inappropriate and unjust. We argue that the presence of these elements in the ‘Act’ renders it a tool capable of being exploited by Ministers and other senior public sector officials, and that such actions will be acceptable and excusable in the present legislative context. Our findings highlight significant policy implications which include denying employees’ right to fair and equitable disciplinary proceedings. When the legislative, policy, and processes frameworks deny access to this right, perceptions of injustice will be prevalent and may raise discernments of corruption within the public sector; which raises further broader implications for government. Alternatively, “procedurally fair treatment could result in positive organisational outcomes, such as organisational commitment, interpersonal trust, job satisfaction, organisational citizenship behaviour, and job performance” (Van der Bank, Engelbrecht & Strumpher, 2008, p 1.).

This paper examines the creation of powers in a public sector disciplinary system to punish or dismiss staff in an arbitrary manner. In doing so, this paper aims to examine the fundamental features of a fair and open disciplinary process and their presence in the Queensland public sector context. However the scope of the analysis does not extend to a discussion of powers in relation to appointment and promotion, which can also be exploited, and it will not discuss procedural fairness beyond the question of appeal. The question of disciplinary unfairness in the Queensland public service is examined. Finally, this paper intends to only highlight the potential for abuse of the powers and not to prove that the powers discussed are being exploited to politicise the public sector. It will commence with a clarification of terminology and a brief history of relevant legislation, before addressing each of the key issues (clarity of offences, scale of sanctions of offences, and oversight and appeals) and recommending solutions.

DISCIPLINARY FAIRNESS

A fair disciplinary system must be free from arbitrary decision-making (Rubin, 2007). That is, subjective decision-making is not guided by the rule of law, reason, or justice. Without these protections, staff in any organisation would not be able to predict what actions will constitute offences or what penalty they will attract. They are also important for developing trust and a perception of fair treatment within the workplace (Lind & Tyler, 1988; Brockner et al., 2001). A disciplinary system which lacks transparency creates the potential for individuals to be accused of unforeseen allegations of misconduct which, due to their unspecified nature, minimises the possibility for the employee to avert these situations or circumstances which may or may not be designated as constituting unethical behaviour or conduct. The elements of a fair system can best be described by the Leventhal criteria:

Perceptions of procedural justice are further informed by the ground rules for a decision-making process, the process used to select those who make the allocative decision or summary judgment, information requirements and decision structures, the presence of safeguards, and the degree to which opportunities exist to either appeal decisions or change the ground rules.” (Rubin, 2007, p. 127).

NON-SPECIFICITY OF POWERS FACILITATES ARBITRARY DECISIONS

The lack of specificity of powers contained in the public sector legislation may result in either a blanket power of discretion to determine what behaviour constitutes an offence either in the present, past, or future. Our analysis illustrates that this present day construction of disciplinary processes in the Queensland public sector is an artefact of State Government carried through from the 1860s. Moreover, a disciplinary process is arbitrary when there is no scale of sanctions tied to offences. However, if clear instructions exist then employees are provided with certainty in advance of the type of conduct which will trigger sanctions.

In comparison, the primary piece of legislation which specifies criminal offences in Queensland, the Queensland Criminal Code 1989, specifies each offence and the corresponding penalty that is attached to it. This legislation therefore provides a clear set of boundaries within which sanctions can be applied for that particular offence. Also there is a collection of common law precedents to inform a court of a fair penalty based on those given to previous offenders in similar circumstances. Unlike Queensland’s public sector legislation, these criminal law mechanisms provide a person with a reasonable expectation of the quantity and quality of a penalty attached to a specific offence. Conversely, the present legislation relating to disciplinary processes in

the public sector lack boundaries or other guarantees of proportionality attached to offences. This situation allows disproportionate punishments and the selective application of punishments based on unjust subjective criteria like cronyism or personal enmity. The ability to differentiate between severity of offences has been demonstrated in the Australian context (Stewart, 1992), including in case law (Sappideen, Warburton & Eastman, 2008).

LACK OF OVERSIGHT AND APPEALS MECHANISMS

Further compounding the issue of unfairness in the Queensland public sector's disciplinary regime is the lack of oversight and appeals mechanisms available to employees involved in these processes. Oversight involves the review of decisions to reveal if there has been maladministration in the application of sanctions and an appeals process allows a person to seek redress from maladministration. The existence of suitable oversight and appeal functions are essential to ensure fairness and system compliance in practice. Ewing (1989, p. 4) refers to this as corporate due process: "no employee should be deprived of his or her job and well-being... without a fair hearing". There is a strong recognition of the importance of due process in disciplinary matters in the workplace (Edelman, 1990).

POLITICAL INTERFERENCE

An independent, non-partisan public sector is a core feature of the Westminster System (Eichbaum & Shaw, 2008; Mulgan, 2008). With this point in mind, it is crucial that political actors do not have exclusive control over the administration of the disciplinary system as the risk for further abuse of power may politicise the public sector. The danger for employees of an organisation with arbitrary powers is that these have potential to be used as a threat to coerce an employee to act in a particular manner.

CLARITY OF OFFENCES

Queensland has a history of relying on vague terminology to define disciplinary offences. The 1863 Act, clause XIV, provided little clarity of disciplinary offences. Permanent officers could be dismissed or punished for bankruptcy, breach of duty, pecuniary embarrassment, incompetence, or "conduct rendering it unfit that he should remain" in the service (the unfitness clause).

Breach of duty and incompetence are vague disciplinary breaches; however, the assessment of these offences could be decided on a case by case basis after determining the duties of each position and establishing what constitutes satisfactory performance or incompetence. It is not clear whether this type of

process was undertaken before section 10 of the 1889 Act requiring department heads to report annually on the nature of work and background information on each staff member to the Civil Service Board. Under section 11 of The Civil Service Act of 1889, the Board inspected “character of the work performed by every officer” in every department. Sections 12 to 14 explained that the Board could then decide the most effective manner of operating the agencies and their employment arrangements. This task would have become unmanageable as the number of employees reached the thousands, but it was not until a century later that the 1988 Act ordered a performance appraisal system for individual employees be established (QPD 19 April 1988: 5984). In theory, this process could inform the question of incompetence and resolve this particular issue of clarity, but at no time has a process or guideline ever been expressly designed to address the breach of duty or incompetence provisions. Furthermore, no guidelines were ever provided as to what constituted unfitness in the performance of one’s duties. This clause remained in legislation till 1988. However, section 32(1)(vii) of the 1922 Act added equally vague words making it an offence to engage in disgraceful or improper conduct. The 2008 Act dropped the term disgraceful, but retained improper conduct (s.187(2)(a)). The question which underpins this analysis examining issues of fairness in disciplinary matters is that the term improper is not defined, and its interpretation relies on the subjective judgement of the Department head.

Other offences under s.187 of the Public Service Act 2008, carry the restraining caveat that an officer must act unreasonably; such as, “(c) been absent from duty without approved leave and without reasonable excuse”.

The Macquarie Dictionary (2006) defines ‘proper’ as, amongst other things, “conforming to established standards of behaviour or manners; correct or decorous”; from which we can conclude that improper conduct would not conform. Each Queensland agency now has a Code of Conduct which could function as a list the standards of behaviour. However, because the breach of the Code is also an offence under s.187(1)(f), then impropriety must have been intended to exist in addition to the Codes and relate to more than the contents of the Codes. Determining impropriety is a subjective decision and the potential scale of offences would vary greatly between a libertarian and puritanical point of view. The subjective nature of the terms was raised in the debate on the 1996 Bill by Daryl Briskey, a Labor member, in relation to the terms disgraceful and improper.

Part 6 of the Bill is scandalous, too. The employing authority may discipline an officer if the authority is reasonably satisfied that the officer has been guilty of misconduct.

Misconduct is defined as—

- (a) Disgraceful or improper conduct in an official capacity; or
- (b) Disgraceful or improper conduct in a private capacity that reflects seriously and adversely on the public service.

What is disgraceful or improper conduct in a private capacity? Who decides? Will this Government get Rona Joyner [a puritanical Queensland social agitator] in to decide? I would not be surprised. (QPD 5 September 1996: 2529)

The retention of this term in the legislation which governs disciplinary matters for Queensland public servants is unjust. It is extremely difficult for these offences to be interpreted in any other than a subjective fashion, which may or not reflect broader societal expectations of public servants behaviour either on or off the job. Thus, employees cannot know what types of conduct would reasonably trigger a breach and or an offence under the act.

The issue of disgraceful conduct is slightly different; grace is the exercise of power in a person's favour, regardless of reason or rationality. The act of grace, therefore, is merely an exercise of power to provide another person with a benefit regardless of whether the person deserves it or the decision is rational. Conversely, one falls into disgrace by falling out of the powerful person's favour and no longer receiving the benefits of their exercise of power. (The Macquarie Dictionary extends the definition of disgrace to shameful or dishonourable conduct, which is very similar to improper conduct.) Once again, relying on a term like disgrace does not require questions of justice or rationality; it is simply sufficient that the person no longer likes you. Consequently, empowering a person to punish disgraceful acts is, by definition, the empowerment of a person to punish a person for doing something they arbitrarily do not like. The 2008 Act replaced the term disgraceful with inappropriate, which the Macquarie Dictionary defines as "suitable or fitting for a particular purpose, person, occasion, etc.", and is equally as subjective as its predecessor. The introduction and retention of these terms are clearly unjust and provide an opportunity for the exercise of arbitrary power.

It could be argued that a blanket provision for fairness was provided by the Principles of Public Administration and Personnel Management first provided under the 1988 Act and now included in Part 3 of both the 1996 and 2008 Acts. Specifically, under the *Public Service Act 2008*, these principles state:

25 The management and employment principles

- 1) Public service management is to be directed towards —
 - a. maintaining impartiality and integrity in informing, advising and assisting the Government; and

- 2) Public service employment is to be directed towards promoting —
 - a. best practice human resource management; and
 - b. equitable and flexible working environments in which all public service employees are —
 - i. treated fairly and reasonably; and
 - ii. remunerated at rates appropriate to their responsibilities.

This is a significant change from the 1996 version which, at section 7(b), also said that “officers [where] to be treated fairly and not to be subjected to arbitrary or capricious acts or decisions”. Unfortunately, these provisions are unenforceable. They are merely guidelines and no sanctions apply if they are breached. It is unlikely they will ever be used as anything more than platitudes. Though, the principle in section 7(b) was referred to, though not relied upon, by the Queensland Industrial Relations Commission (Deirdre Marie Gomm AND Department of Corrective Services [No.B45 of 2004]).

The first clear statement of an offence by a public official was when the Vagrants, Gaming and Other Offences Act 1936 was amended to make it an offence for a person to induce a public official to leak the contents of a confidential Bill before the House (in reality the Cabinet ministers) approved its publication. This offence arose out of the leakage of contents of the Racecourses Acts and Other Acts Amendment Bill to The Courier Mail newspaper. While the clause was never applied and was removed in 1952, neither the Opposition nor the press complained about the right of the government to punish a public official for leaking, rather they only cared that the press should not be inhibited from printing the material once leaked (Lack, 1961).

The nature of offences was cleared up to some extent in 1988 by the introduction of a Code of Conduct. Section 29 of the Public Service Management and Employment Act 1988, which is now s.187(f) of the 2008 Act, provided that a Director-General could take action if an officer had “contravened, without reasonable excuse, a provision of this Act or a code of conduct”. Today, under Directive No 9/96, a code of conduct includes a code approved under the Public Sector Ethics Act 1994 or “any Code of Conduct, or other rule, policy or guideline, by which the authority has established a relevant standard of conduct” (OPSC, 1996).

In 1987, the Savage Report recommended the adoption of a Code of Conduct for public servants not to instruct employees, but because the public deserved

to be made aware of the guidelines of their conduct in the same manner as most professional bodies and technical associations.

The Committee therefore considers that there should be a clearer delineation of what is expected of Government employees and that this be achieved by the adoption of a code of ethical conduct which should be published for the benefit of existing employees, for the orientation of new staff and for the information of the public. (Savage, 1987, p.59)

This 'clear delineation' was the first recording of the specific offences that would attract punishment. However, the 1988 Code was rather sparse in its provisions compared with current codes. It restated general Westminster principles and other key values including serving the elected officials by effective and efficient achievement of government goals, integrity, political impartiality, respect for persons and justice, and equity in dealing with internal or external people. The Code then goes on to describe proper conduct including: treating other staff members; standards of dress; use of alcohol and drugs; use of official resources; and following lawful directions. The bulk of the Code deals with handling conflicts of interest and making public comments (Queensland Government, 1988).

Under the Public Sector Ethics Act 1994, every agency must develop a Code of Conduct based upon certain ethical obligations outlined in the Act. Codes now exist in almost every Queensland government agency; some of which are incredibly detailed. But the Codes do not remove the uncertainty surrounding misconduct. Section 187 of the Public Service Act 2008 changed the wording of the 1988 section to require the compliance with "an obligation imposed on the person under a code of conduct". The term obligation has a clear meaning under the Public Sector Ethics Act 1994, upon which all codes are based. The ethical obligations in the Act are broad statements of character, such as showing respect for persons and being diligent, rather than specific rules. Thus, the 2008 legislation has changed the requirements from meeting individual rules of conduct to being responsible to abide by broad, and, therefore, vague, obligations.

In 1994, the then Premier Wayne Goss in his Second Reading Speech on the Public Sector Ethics Bill 1994 stated that the Bill was intended to create:

...a comprehensive approach to setting appropriate standards of professional ethics for public servants and other public officials who make decisions, exercise powers and control taxpayer-provided resources on behalf of the Government. (QPD 19 October 1994: 9686)

The system was comprehensive insofar as it provided for the boundaries of ethical behaviour and the education of staff. However, neither the Act nor the Codes clarified the vague disciplinary terms in the Public Sector Management and Employment Act 1988, such as “disgraceful or improper conduct” and “unfitness” for service.

In summary, since 1863, Queensland employees have been subject to vague terminology that facilitates the use of arbitrary power. This began with it being an offence to breach one’s duty or show incompetence. These at least, may have been addressed through performance review processes. Second, there was the unfitness clause which was entirely subjective and was removed in 1988. Finally, since 1922 Queensland public officials are still subject to the disgraceful/inappropriate and improper conduct clauses. The latter still exists in addition to the requirement to meet broad ethical obligations introduced in 1994. Consequently, public servants in Queensland are subject to arbitrary punishment, because they can be disciplined for breaching offences which can be subjectively interpreted by the chief executive of the agency.

SCALE OF SANCTIONS TO OFFENCES

Under most Australian states’ Criminal Codes, each offence is linked to a specific penalty. This format limits the range of punishment for a specific offence to an appropriate level. In addition, common law precedents inform the judges and the judged whether the sanction applied is fair in comparison to similar cases of the same offence. Linked penalties and precedents are essential for a fair and open justice system and, therefore, the prevention of arbitrary punishment. A similar system does not exist and has not existed in regard to discipline within the Queensland public sector. For example, The Civil Service Act of 1889, ss.40-41, said that “trivial offences” could be dealt with by fines. However, no clear guideline was provided to indicate which offences were trivial and which were not, nor were a type of sanction quarantined from one type of offence or the other.

The Public Service Management and Employment Act 1988, s.29(3), now section 188 of the *Public Service Act 2008*, provided the following examples of disciplinary action:

- (a) Terminate the officer’s employment;
- (b) Reduce the officer’s classification level and change the officer’s duties accordingly;
- (c) Transfer or redeploy the officer to other employment in the public service;
- (d) Forfeit or defer a remuneration increment or increase of the officer;
- (e) Reduce the level of the officer’s remuneration;

- (f) Impose a penalty on the officer of not more than the total of 2 of the officer's periodic remuneration payments;
- (g) Direct that a penalty imposed on the officer be deducted from the officer's periodic remuneration payments;
- (h) Reprimand the officer.

The only restraint on their application is that, under s.188(1) the chief executive can only apply a disciplinary action that he or she "considers reasonable in the circumstances". No directives have been issued which would clarify what is reasonable. Thus, a chief executive who wants to impose a harsh punishment need only classify the offence as severe and punish accordingly. The Public Service Commission's non-binding Discipline Guideline (PSC, 2009) simply restates the sanction options and provides some suggestions of other matters to consider. It does not provide guidance on proportionality or appropriateness of specific sanctions in relation to individual offences or offence types. Section 47 of the Public Service Act 2008 states that directives are binding (ss.3) while guidelines are not, and are only for "guidance" (ss.5).

Similarly, there is no list of precedents across agencies, or, for all we know, within agencies beyond the personal experience of decision makers to guide a judgement of severity or reasonableness. The Discipline Guideline states that an employee has the ability to respond to the appropriateness of the punishment, but this is no guarantee that it would be amended.

Therefore, Queensland chief executives have the power to apply any punishment they wish to any offence. There are no guidelines to be followed or precedents which staff can use to determine whether the punishment they received is proportionate or the equivalent meted out to other offenders in similar circumstances. Such a situation is demonstrably unfair and allows for exploitative punishment of staff ranging from mild or no punishment for those in favour to maximum punishment for minor offences for those who are out of favour.

OVERSIGHT AND APPEALS

A system that does not provide for some independent oversight or a system of appeals to verify the justice of decisions is open to abuse because there is no restraint on the exercise of power or checks to moderate offences with disciplinary consequences. Lack of oversight and appeal for some offences and the lack of adequate oversight and appeal processes for other offences are extremely problematic in the context of what constitutes fairness for employees.

Up till the 1950s, all annual reports of the Public Service Commissioner included a statement of the disciplinary matters investigated across the public sector and of the corresponding punishments given to offenders. However, figures on disciplinary action taken within or across agencies are no longer published and no central agency reviews the disciplinary decisions of individual agencies. Hence, there has been an absence of transparency and oversight of disciplinary decision-making in the Queensland public sector for at least fifty years.

Queensland legislation has always allowed some staff to be dismissed without appeal. For example, bankruptcy was made a trigger for automatic dismissal from 1889 till 1896 (The Civil Service Act of 1889, s.38). This was unjust as the accused could not challenge the equity of the decision. The provision was removed after the depression of the early 1890s, as Members were sympathetic to the plight of many people who found themselves in financial difficulties. As William O'Connell said:

I hold now, and have always held, that it is a cruel thing running through all our statutes, that because a man gets into pecuniary difficulties his employer — where the State is the employer — shall cast him into the street, and say, "You have done good service for years, there is no black mark against you, but simply because you have been unlucky in your investments you shall be debarred from earning your living in the way in which you have been accustomed to earn it". (QPD 22 October 1896: 1271-1272)

The existing regime allows dismissal without appeal for incompetence for employees on probation and, since The Civil Service Act of 1863, clause XI, new employees on probation have not been able to appeal from a decision that they be dismissed for incompetence. In the Public Service Management and Employment Act 1988, section 23, the power was extended to dismissal during a six month probationary period for all non-performing appointments and non-contract promotions (Hon Brian Austin, QPD, 19 April 1988, p.5984). The current provision is s.95 of the Public Service Act 1996. Section 195(1)(d)-(e) of the Public Service Act 2008, excludes appeals from decisions of a minister or the Governor in Council, decisions relating to superannuation or probation (including dismissal of a probationer), decisions about classification levels or decisions about promotion, transfer, redeployment or secondment of senior staff. Other subsections limit appeals in relation to promotion and allow the chief executive to exclude some selection processes from appeal. In addition, section 194(1)(b) does not allow appeals from a decision to terminate a public servant's employment. Thus, there is only a small window of matters from which an appeal can be made.

The nature of appeals from other disciplinary decisions has varied over time. In 1863, disciplinary appeals could be made to a Civil Service Board of Inquiry. Under the 1896 Act, the department head dealt with minor cases of negligence or carelessness and staff had a right of appeal to the Board in relation to these minor offences. Under the 1922 Act, section 32(2), the departmental head retained the power to deal with minor offences, but the Commissioner could investigate any allegation of misconduct (s.34).

Since 1988, CEOs of agencies have had full authority for disciplining their staff and all disciplinary cases, other than those for staff on probation, have access to an appeals process. The Public Service Commissioner's Discipline Guideline further states that if an employee has a right of appeal they can only appeal against the severity of the penalty, and they can only do so if the penalty is not dismissal. Under the 2008 Act, s.190, the rules of natural justice apply to disciplinary decisions, but there is no sanction for failure to apply them. Thus, they provide little protection against a determined and unscrupulous decision maker.

It may have been possible for public servants to rely on their traditional tenured employment to protect them, but Queensland employees of the public service do not have tenure, despite the use of the term in the Act. A truly tenured staff member has more security as the Macquarie Dictionary definition of tenure is "a period of office or employment that terminates, possibly subject to certain conditions, only on resignation or retirement". But tenure never existed in Queensland. There are many examples of employees being retrenched for operational reasons. For example, over 600 public servants lost their jobs in the 1921-22 financial year, and the rest suffered wage cuts due to the loan embargo placed on Queensland from 1920 to 1924 (Scott, Laurie, Stevens & Weller, 2001).

Section 121(2) of the Public Service Act 2008 says that all employment is on tenure unless it is on contract. However, it would be fair to conclude that under the Queensland Government tenure has not been given its common meaning. Section 138 allows a chief executive to dismiss staff who he or she believes to be "surplus to the department's needs". If they had tenure, they could not be retrenched.

Despite these features of the Act, none of these provisions prevents an employee from taking action in the Queensland Industrial Relations Commission for unfair dismissal. However, the expense and time consuming exercise would prevent or dissuade many employees from appealing to the

Commission. A fair disciplinary system would encompass an accessible and affordable appeals process.

In summary, Queensland public servants are subject to arbitrary dismissal without appeal or oversight when they are on probation. Furthermore, despite recent changes that have extended probation from the first appointment to new promotions even when appeals are available they do not allow a person to have a review of the decision resulting in their dismissal.

These identified gaps in the recourse available to employees who find themselves accused of a breach or offence highlights the importance of a fair and equitable disciplinary system which would ideally encompass an accessible and affordable appeals process.

POLITICAL CONTROL

Public sector discipline in Queensland has always had the potential to be politicised. In line with the Westminster system of government, ministers ought to take responsibility for the actions of their department because they ultimately control all aspects of its operation including discipline. In present day government, the chief executive officer controls the department but the ministers, and in practice the Premier with whom each director-general holds their employment contract can direct the actions of their chief executives and enforce the directions through the sanction of terminating their contract.

Furthermore there has always been evidence of political control over public sector discipline that has taken on a number of forms. The Civil Service Board of Inquiry was not an independent statutory body and was therefore under the influence of the ministry. The 1889 Civil Service Board had, amongst other duties, responsibility for investigating and disciplining staff. The departmental head would determine whether a *prima facie* case existed then pass the matter on to the Board for investigation and determination. The Board then reported to the minister who sought Governor in Council approval for the recommended action (QPD 22 October 1896: 1264). Ministers therefore retained final authority and they could either ignore the Board's recommendation or take action against an officer without going through the Board. This was predicted by O'Sullivan in the debates on the 1889 Bill (QPD 1889: 459). He said that the Board was only a buffer between the Departmental head who made recommendations and the minister who, in the guise of Governor in Council, made the appointments or promotions. Under the 1896 Act (section 41), the Board was made up entirely of ministers who had direct power to discipline for any breach, including the notorious unfit provision.

Even after the creation of a Public Service Commissioner in 1920, Cabinet retained the ability to override the Commissioner. The new arrangements only reduced ministers' workload, not their power. Under the 1922 Act, section 14, the Public Service Commissioner could only make recommendations to the Governor in Council, not make decisions himself. Section 7(1) allowed the Governor in Council to ignore a recommendation from the Public Service Commissioner, or act of its own accord. However, the Premier denied that Cabinet would override the Commissioner: "The Government, of course, will adopt the recommendations of the Public Service Commissioner. Ministers are not so prone to take on responsibility and unnecessary duties to go against the Commissioner" (QPD 28 September 1922: 2007). When the Commissioner was replaced by a Board in 1968, many members of public sector unions thought the role of the Board was vague and suspected that it was only a tool of the Cabinet and key select department heads (Colley, 2004).

On the positive side, after 1988, a minister who wanted to see a person disciplined would have to rely on their CEO to take the action. However, the 1996 Act continued the 1988 disciplinary powers which give the Premier control over CEOs' appointments and the ability to instruct them in carrying out of their duties.

At the time of the 1996 Bill, the Labor Party claimed that the Act gave the Premier too much power over CEOs; ignoring the fact that Labor had the same power from 1989 to 1996 and retained these powers since returning to office in 1988. (Bligh, QPD 8 August 1996: 2236-2247; Beattie, QPD 8 August 1996: 2238 and QPD 5 September). Direct coercive controls also exist through contract employment process, which reflects in a microcosm each of the issues outlined above. The 1922 Act began the process of separating the employment of senior and junior staff by excluding officers earning over £300 per annum from access to the Industrial Arbitration Court to set their pay and standards. Parliament, and therefore Cabinet as Parliament's controller in practice, would set the conditions for staff on higher salaries. Later, under the Public Service Act Amendment Act 1968, senior officers were removed from the award and their employment arrangements were determined by the ministry (Colley, 2004). Contracts followed in 1988 and their use has been retained and expanded by each subsequent government. In the 1980s, the Savage Report recommended placing senior officials on contracts to reduce the likelihood of patronage; though how this effect would result is unclear. Under the Public Service Management and Employment Act 1988, s.14(1)(b), CEOs were placed on contract ostensibly so that good service could be rewarded and bad performers removed (Hon Brian Austin, QPD, 19 April 1988, p.5984). This was a strange initiative given that Queensland government employees never had true tenure and CEOs could always be removed (Colley, 2005).

The current contractual arrangements exist because of misunderstanding and inattention. Both sides of politics were happy to use contracts but also described them as “the end of Westminster government”. The ALP opposed the introduction of contracts in 1988. De Lacy, a senior Opposition member, referred to contracts and other employment changes with the statement: “this legislation... strikes at the very heart of what people in the Labor Party believe in. We cannot support it, and it is our intention to oppose it as strenuously as we can” (QPD 20 April 1988: 6234). In its pre-election policy statements in 1989, the ALP (Goss, 1989) said it would return tenure to all staff below senior executive officer (SES) and end contract employment in order to return professionalism and end politicisation (presumably all SES would then be non-contract and untenured staff). When they took government in 1989, the ALP left intact contract provisions as well as each of the other provisions De Lacy had strenuously opposed. They employed both CEOs and part of the SES on contracts from 1989 to 1995.

Nonetheless, Labor attacked the inclusion of the contracts provisions in the Coalition government’s 1996 Bill. ALP members thought these were new terms despite the fact that they remained unchanged from 1988. Their poorly thought out and contradictory arguments are informative for illustrating the potential for abuse of contracts. Wells said that a Premier’s ability to review the employment and personnel decisions of CEOs gave Queensland an American ‘spoils system’ of appointments. The spoils system gives the President the power to appoint personally 1500 senior officials. Moreover, even though the Public Service Commissioner was a statutory officer, his or her contract would effectively place them under the Premier’s control. Wells continued that this provision would, in turn, neuter the Ministers who would no longer have any control over their CEOs. The latter would recognise the Premier as their real master and report directly to him or her.

...all CEOs will be the Premier's creature as a result of these arrangements. They will report to him and they will be administered by a Public Service Commissioner who will be in his thrall, and the Premier, not their Minister, will be the other party to their contract... (QPD 5 September 1996: 2541)

Curiously, Wells said the provision would make it more likely that an incoming government, presumably a Labor government, would take advantage of the provisions and replace the handpicked staff of their predecessor with their own: “What this Bill does is institutionalise discontinuity... The Westminster tradition of an independent Public Service receives its deathblow in this Bill” (Wells, *QPD*, 5 September 1996, p.2541; see also Schwarten, p.2548-2549). Needless to say, Labor has kept these provisions in place.

The government argued the 1996 Bill would reduce politicisation by the Commissioner's directives and guidelines, promoting "a level playing field and a transparent process" as well as an increase in tenured positions and its reliability would reduce temporary employment and the use of contractors (QPD 5 September 1996: 2540). These hopes were not enshrined in the Act and have not been acted upon under either the Coalition or Labor governments.

Contracts have both good and bad outcomes. They provide security for the short term and compensation on termination. But the minister's control over reappointment provides a strong influence over the officer's behaviour. This perennial argument relates to the balance between management efficiency and public sector independence. Arguments regarding the fairness of contracts in public sector employment mainly revolved around the loss of security through the loss of tenure as against the managerial perspective of removing a non-performing officer through non-renewal of a contract. However, this argument is only credible in a service in which a person must choose between contracts and genuine tenure, which has never existed in Queensland for public servants.

In summary, under Queensland legislation, the ministry has always had either direct or persuasive indirect control over the disciplinary system. If they could not make the decisions about discipline they usually had final say on serious cases via the Governor in Council. This has been enhanced under recent legislation which introduced contracts for senior employees. Contracts are held by the Premier, as senior member of the government, and therefore he or she can summarily dismiss any contract employee without reason as long as the government is willing to pay the penalty provision of the contract.

SOLUTIONS

The remaining catch-all provision relating to impropriety needs to be removed. It is arbitrary and, now with the advent of the Public Sector Ethics Act 1994 and detailed Codes of Conduct in each agency, superfluous. However, the 2008 Act needs to be amended to reflect the former wording seeking compliance with specific provisions of codes rather than the broad ethical obligations.

A scale of offences and sanctions needs to be developed. This does not need to be a detailed process like the Criminal Code under which each offence has its own sanction, but it can be a grouping of offences into categories with sanctions attached to each category. There are two potential methods for this to occur. Firstly, the Public Service Commissioner could issue a directive outlining a scale and the nature of offence types that would match the

progressive levels of sanction types. This is the easiest, but would probably cause a great deal of confusion given the individual nature of the agencies' separate Codes. The alternative would be to issue a directive, instructing departments to develop their own scale to be published within their own Codes.

The current appeals process would still be sufficient if the previous two initiatives take place. These would remove the confusion over whether a disproportionate or vexatious disciplinary action was valid on appeal.

It is not possible to completely remove the influence of the ministry over the disciplinary process. The best that can be achieved is to place the supervisory and appeals process into the hands of an independent statutory officer. This is currently the case in Queensland, but, as with the other independent statutory officers, the Public Service Commissioner is on contract. This paper will not enter into the arguments over the level of independence that can or cannot be obtained from having contractual independent positions. Once again, the correction of the first two characteristics will, while combined with the existing independent Commissioner, significantly improve the justice of the current Queensland system.

CONCLUSION

This paper has shown that a just system of discipline within an organisation requires four characteristics. First, It must have a clear set of offences so that employees can be certain in advance of what conduct will trigger disciplinary action. Second, the nature of the punishments must be clearly linked to the offences and ought to also be proportionate to the severity of the offence. Third, there needs to be oversight and appeals from disciplinary decisions to ensure that the system is operating correctly. Finally, the system should ideally be out of the control of political masters. Historically, Queensland public sector legislation has breached these four guidelines and continues to do so today.

Since 1863, Queensland public servants have been subject to vague terminology that facilitates the use of arbitrary power. These have included the unfitness clause, and the offences of breach of duty, incompetence, and disgraceful or improper conduct. In the present day context, there are still no guidelines linking offences to sanctions and no universal system of precedents to assist in the uniform application of sanctions. This situation is clearly concerning and has many negative implications, not least influencing public perception of underhand practices and, more seriously, perceptions of corrupt and unfit governments. Queensland public servants are subject to arbitrary dismissal without appeal or oversight when they are on probation and the

appeals mechanisms for other offences do not apply when a person is dismissed. The ministry has always been able to control the disciplinary system. The increase in the use of contracts makes dismissal easier and accountability more difficult. This paper has highlighted a number of provisions available to Ministers and other senior public officials to exploit with little available recourse for a public servant who believes justice has not been served.

In principle it does not matter if these highly unlikely or potential situations exist, and that these provisions, to date, have not been exploited. What is critical in this instance is the continued existence of a system that allows these provisions to remain and for their potential exploitation. A system such as this is unjust.

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