UNIONSWA
WA's PEAK UNION BODY

UnionsWA Incorporated • ABN 64 950 883 305
Level 4, 445 Hay Street, PERTH WA 6000
PO Box Z5380, St Georges Tce, PERTH WA 6831
Tel: +61 8 9328 7877 • Fax: +61 8 9328 8132
unionsyes@unionswa.com.au • www.unionswa.com.au

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Hon Robyn McSweeney MLC
Chair
Standing Committee on Legislation Committee
Legislative Council
Parliament House
Perth WA 6000

Dear Ms McSweeney

**UnionsWA submission on Workforce Reform Bill 2013**

UnionsWA is the governing peak body of the trade union movement in Western Australia, and the Western Australia Branch of the Australian Council of Trade Unions (ACTU). As a peak body we are dedicated to strengthening WA unions through co-operation and co-ordination on campaigning and common industrial matters. UnionsWA represents around 30 affiliate unions, who in turn represent approximately 140,000 Western Australian workers.

***Overview of issues with Workforce Reform Bill***

The *Workforce Reform Bill* (WR Bill) is deeply concerning to our affiliates. The stated purposes of this Bill, according to its Explanatory Memorandum, are to *'provide the capacity to implement enhanced and more flexible redeployment arrangements'* and to *'ensure that decisions made by the Western Australian Industrial Relations Commission (WAIRC) and the Salaries and Allowances Tribunal have appropriate regard to the Public Sector Wages Policy Statement, the State's financial position and fiscal strategy'.*

UnionsWA does not accept this as an accurate statement of the intent or outcomes of the WR Bill. We submit that the true purpose is to undermine employment rights of public sector workers, resulting in those workers having fewer unfair dismissal and collective bargaining rights than private sector workers. Such retrograde changes, if successfully instituted in the public sector, will add to the pressure by employer groups and conservative governments to erode the job security of all Western Australians.

The WR Bill will also reduce the independence of the WA Industrial Relations Commission (WAIRC) by adding 'considerations' for decisions that basically amount to privileging the policies of the state government of the day. By incorporating what is effectively the state government's case into legislation the government will have an unfair advantage over other parties, who unlike the government can only rely on the submission process to make their cases to the Commission.

Of further concern is that the WR Bill is not actually the 'full story' of the government's proposed changes. The Bill amends not only the *Industrial Relations Act 1979* (IR Act), but also the *Public Sector Management Act 1994* (PSM Act). The new sections 94 and 95A of the PSM Act potentially confer sweeping powers to the government through as yet unreleased regulations. Given that those regulations are intended to apply to and override current awards and agreements – their absence means the government is avoiding accountability for how it decides to treat its workforce and deliver services.

The WR Bill is part of the state government's ideological attack on the role of the public sector, using its own budget mismanagement as justification for privatisation, cut backs and under-funding to threaten our public hospitals, schools, and other services. Undermining the job security of public sector workers will endanger the sector's ability to attract and retain skilled and experienced staff, and wreck its capacity to deliver quality public services for the people of WA.

In short, UnionsWA advocates that the Standing Committee reject the WR Bill in its entirety. The state government should instead commit itself to fully engaging with the public sector workforce through its unions to identify genuine measures that improve the productivity of the public sector and deliver quality services for all Western Australians.

On the specifics of the WR Bill – UnionsWA outlines problems with key amendments below.

***Key Amendments to the Industrial Relations Act 1979 (IR Act)***

**The proposed clause 4: amending Section 26 of the IR Act will erode the independence of the WAIRC by privileging the state government's arguments in legislation.**

The amended text includes

> *s26 (2A) In making a public sector decision the Commission must take into consideration the following —*
>
> > *(a) any Public Sector Wages Policy Statement that is applicable in relation to negotiations with the public sector entity;*
> >
> > *(b) the financial position and fiscal strategy of the State as set out in the following —*
> >
> > > *(i) the most recent Government Financial Strategy Statement released under the Government Financial Responsibility Act 2000 section 11(1);*
> > >
> > > *(ii) the most recent Government Financial Projections Statement released under the Government Financial Responsibility Act 2000 section 12(1);*
> > >
> > > *(iii) any submissions made to the Commission on behalf of the State government;*
> >
> > *(c) the financial position of the public sector entity.*

'*Consideration*' before handing down a '*public sector decision*' would apply to decisions on conditions in collective agreements, *and* decisions with potential financial impact on a public sector entity. Considerations could apply to matters such as reclassification appeals or claims for additional staff to cover increasing workloads

The state government is privileging its own arguments by placing them in legislation – rather than making those arguments at a hearing. No evidence has been provided that the WAIRC has not before now taken these matters into account. The Commission is already required by section 26(1)(d) of the current IR Act to take into consideration

> *(i) the state of the national economy;*
>
> *(ii) the state of the economy of Western Australia;*
>
> *(iii) the capacity of employers as a whole or of an individual employer to pay wages, salaries, allowances or other remuneration and to bear the cost of improved or additional conditions of employment;*

*(iv) the likely effects of its decision on the economies referred to in subparagraphs (i) and (ii) and, in particular, on the level of employment and on inflation;*

The inclusions of additional considerations are simply the state government's attempt to apply extra pressure to the Commissioners. Workers and their representatives would face additional hurdles to arguing that the orders they seek are not contrary to wages policy or the government's financial strategy, *or* that the orders *are* contrary but the WAIRC should make them anyway.

UnionsWA also notes that the current state government *Public Sector Wages Policy* for 2014 states at its point 3 that

*The Government of Western Australia requires that increases in wages and associated conditions for all industrial agreements be capped at the projected growth in the Perth Consumer Price Index, as published from time to time by the Department of Treasury.*

Perth CPI growth will be 2.5 per cent in 2013-14, and each year thereafter, according to the *2013-14 Government Mid-year Financial Projections Statement* issued by the WA Treasury.

The conditions in this policy effectively mean that public sector workers will be negotiating *not* for how large a real wage increase they can receive, but for how small a real wage *cut* they must endure. Such a condition will damage the sector's ability to attract and retain skilled and experienced staff, and should not be privileged in legislation as is proposed by this Bill.

The reliance on Treasury projections of Perth CPI growth also raise important questions of good faith bargaining. Little if any information is provided to the WA public about how Treasury arrives at its projected estimates for CPI. Section 42B(2) of the current IR Act clearly states that, to be bargaining in good faith, negotiating parties must do a number of things including

*(c) disclosing relevant and necessary information for bargaining;*

How the WA Treasury arrives at its Perth CPI growth projections will clearly become *'relevant and necessary'* information for good faith bargaining if the limitations of the *Public Sector Wages Policy* are to be accepted.

It is also the case that Treasury projections are often subject to revisions given changing economic circumstances. It is not clear from either the proposed changes, or the text of the wages policy, whether the previously agreed pay outcomes will also be subject to revision given that pay increases appear to be envisioned as *relative* to the projected CPI figure. For example – will an upward revision in CPI result in employee pay rises being increased by the same amount as compensation?

The proposed considerations, as well as the wages policy the Commission is meant to consider, are poorly thought out and should be rejected.

**The proposed clauses 5 & 6 amending sections 80E & 80I will reduce the appeal rights for public sector workers by having matters determined by regulation, not legislation.**

The amended text includes

*s80E (7) Despite subsections (1) and (6), an Arbitrator does not have jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench the following —*

*(a) any matter in respect of which a decision is, or may be, made under regulations referred to in the Public Sector Management Act 1994 section 94 or 95A;*

*(b) any matter in respect of which a procedure referred to in the Public Sector Management Act 1994 section 97(1)(a) is, or may be, prescribed under that Act.*

*Section 80I(3) A Board does not have jurisdiction to hear and determine an appeal by a government officer from a decision made under regulations referred to in the Public Sector Management Act 1994 section 94 or 95A.*

These clauses will limit a Public Service Arbitrator's jurisdiction to enquire into any matter in which a decision is, or may be, made under regulations concerning redeployment and redundancy. The additional reference to s95A of the *Public Sector Management Act* allows for the creation of regulations regarding termination of employment. *At this point we do not know the content of the regulations.*

In an appeal it appears that the WAIRC can *only* make a determination as to whether the regulations have been properly applied. The Commission cannot review the actual decision itself. Since there is at this stage little publically available information on the content of these regulations – Parliament is effectively being asked to legislate on 'watch this space'. This should be unacceptable to a Committee charged with considering legislation.

***Key Amendments to the Public Sector Management Act 1994 (PSM Act)***

**The proposed clauses 9 & 10 amending sections 22A & 29 give government as an employer more unaccountable powers to redeploy and make redundant public sector workers.**

The amended text includes

*22A. Commissioner's instructions*

*(1) The Commissioner may issue written instructions concerning the following —*

*(a) the management and administration of public sector bodies;*

*(b) the management and administration of the Senior Executive Service;*

*(c) human resource management, including the disposition of employees and offices under section 22B;*

*(d) official conduct;*

*(e) the taking of improvement action;*

*(f) dealing with suspected breaches of discipline, disciplinary matters and the taking of disciplinary action, under Part 5 Division 3;*

*(ga) dealing with —*

*(i) redeployment and redundancy of employees; and*

*(ii) termination of employment;*

*(g) any other matter in respect of which Commissioner's instructions are required or permitted under this Act;*

*(h) any other matter in connection with the functions of the Commissioner in respect of which the Commissioner considers it is necessary or desirable to issue instructions.*

...

*29. Functions of CEOs and chief employees*

*(1) Subject to this Act and to any other written law relating to his or her department or organisation, the functions of a chief executive officer or chief employee are to manage that department or organisation, and in particular —*

...

*(g) to manage and direct employees employed in that department or organisation and, without limiting the generality of this paragraph, to be responsible for the recruitment, selection, appointment, deployment and termination of employment of those employees;*

These changes provide a broad power to the Public Sector Commissioner to issue written instructions concerning *'any other matter'* in connection with the Commission's functions. Such an open ended clause will reduce accountability for decisions on redeployment, redundancy and termination of employment.

Changes giving the heads of public sector agencies the power to terminate employees are also an attempt by the state government to avoid being answerable for its own unpopular forced redundancy decisions. It is an embarrassingly obvious attempt to make agency heads and the Public Service Commissioner wear the blame.

**The proposed clauses 13 & 14 amending Section 94 and inserting sections 95A & 95B ensure that the potentially sweeping powers contained in regulations will apply to and override current awards and agreements.**

The amended text includes

*94 (1) The Governor may under section 108 make regulations prescribing arrangements for registrable employees in relation to —*

*(a) redeployment and retraining; and*

*(b) redundancy.*

*(2A) Regulations referred to in subsection (1) —*

*(a) must specify which parts of the Public Sector must comply with the regulations; and*

*(b) may require specified matters to be dealt with or determined in accordance with the Commissioner's instructions.*

...

*95A. Termination of employment of registered employees*

*(1) In this section — registered employee has the meaning given in section 94(1A).*

*(2) The Governor may under section 108 make regulations providing for the following —*

*(a) the termination of employment of a registered employee, whether registered before, on or after the commencement of the Workforce Reform Act 2013 section 14;*

*(b) the terms and conditions (including remuneration) which are to apply to a registered employee whose employment is terminated under the regulations.*

*(3) If the employment of a registered employee is terminated under regulations referred to in subsection (2), the contract of employment of the employee is terminated.*

*(4) Regulations referred to in subsection (2) may require specified matters to be dealt with in accordance with the Commissioner's instructions.*

*95B. Inconsistent provisions, instruments and contracts*

*(1) In this section — industrial instrument means an award, industrial agreement or order made under the Industrial Relations Act 1979, including a General Order made under section 50 of that Act, whether made before, on or after the commencement of the Workforce Reform Act 2013 section 14.*

*(2) The provisions of this Part and regulations referred to in sections 94 and 95A prevail, to the extent of any inconsistency, over —*

*(a) any other provision of this Act other than section 7, 8 or 9; and*

*(b) any industrial instrument.*

It is not clear whether any genuine opportunity will be provided by the government to consult on the new redeployment & redundancy regulations. This is particularly concerning given that the regulations will cover the most important parts of the new employment regime being instituted by the Bill.

Parliament and the WA public should be given the opportunity to fully consider the content of these regulations particularly as they *must* cover (if they are to do their job) the following:

- how an employee becomes a registered redeployee,
- the notice period for registration, employer obligations re training and offering vacancies to a redeployee,
- voluntary severance payments,
- forced severance payments,
- compensation if moving with job to following privatisation or contracting out and
- notice periods for involuntary termination.

The proposed section 95B means that the terms of the new redeployment and redundancy regulations apply retrospectively, because they will override any award or industrial agreement, or term of an employment contract having contrary effect. It is unusual for Parliament to pass retrospective legislation of this kind, and the result is that workers who have bargained in good faith under the state system will have their current agreed conditions unilaterally overturned.

**The proposed clause 15 replaces Section 95 and inserts Section 96 winding back the right to go to the WAIRC to challenge and appeal decisions, and removing unfair dismissal rights.**

The amended text includes

*95. Jurisdiction of Industrial Commission in relation to section 94 decision*

*(1) In this section —*

*section 94 decision means a decision made or purported to be made under regulations referred to in section 94 (other than a decision which is a lawful order by virtue of section 94(4)).*

*(2) A section 94 decision may be referred to the Industrial Commission —*

*(a) under the Industrial Relations Act 1979 section 29(1)(a); or*

*(b) by an employee aggrieved by the decision,*

*as if it were an industrial matter that could be so referred under that Act.*

*...*

*(6) The Industrial Commission does not have jurisdiction in respect of a section 94 decision if the employment of the employee concerned is terminated.*

*...*

*96A. Jurisdiction of Industrial Commission in relation to section 95A decision*

*(1) A decision made or purported to be made under regulations referred to in section 95A to terminate the employment of an employee or any matter, question or dispute relating to the decision is not an industrial matter for the purposes of the Industrial Relations Act 1979.*

*(2) Despite subsection (1), a decision made or purported to be made under regulations referred to in section 95A(2), other than a decision to terminate the employment of an employee, may be referred to the Industrial Commission —*

*(a) under the Industrial Relations Act 1979 section 29(1)(a); or*

*(b) by an employee or former employee aggrieved by the decision,*

*as if it were an industrial matter that could be so referred under that Act.*

*...*

*(5) In exercising its jurisdiction in relation to a decision referred under subsection (2), the Industrial Commission —*

*(a) must confine itself to determining whether or not the employee concerned has been allowed the benefits to which the employee is entitled under the regulations referred to in section 95A(2)(b); and*

*(b) does not have jurisdiction to exercise its powers under the Industrial Relations Act 1979 section 23A.*

The amended section 95 contains an additional limitation on the jurisdiction of the WAIRC to hear applications regarding decisions made regarding redeployment and redundancy. If an employee's employment is terminated the WAIRC does not have jurisdiction and the employee cannot challenge the process.

Section 96A limits the WAIRC's jurisdiction to hear applications on decisions to terminate the employment of a redeployee. A redeployee will *only* able to make an application to the WAIRC regarding whether or not they have received all entitlements arising from the decision to terminate. They are *not* able to challenge the decision itself, and the Bill specifically excludes them from the WAIRC's unfair dismissal jurisdiction.

***Conclusion***

The proposed *Workforce Reform Bill* will undermine employment rights of public sector workers, resulting in those workers having fewer job security and collective bargaining rights than the private sector workforce. Such retrograde changes, if successfully instituted in the public sector, will add to the pressure by employer groups and conservative governments erode the job security of all Western Australians. The Bill will also further eat away at the independence of the WA Industrial

Relations Commission, and potentially confer sweeping powers to the state government through as yet unreleased regulations.

Undermining the job security of public sector workers will endanger the sector's ability to attract and retain skilled and experienced staff, and wreck its capacity to deliver quality public services for the people of WA. It is part of a general attack on the public sector that includes privatisation, cut backs and under-funding threatening our public hospitals, schools, and other services

UnionsWA advocates throwing out of the WR Bill in its entirety. The state government should instead commit itself to fully engaging with the public sector workforce through its unions to identify genuine measures that improve the productivity quality service delivery of the WA public sector.

UnionsWA and its affiliates would like the opportunity to speak to and give evidence about the content of the *Workforce Reform Bill* directly to the Standing Committee. Please contact me on 08 9328 7877 or MHammat@unionswa.com.au to discuss matters further.

Yours sincerely

**Meredith Hammat**
**Secretary UnionsWA**