

STANDING COMMITTEE ON LEGISLATION

WORKFORCE REFORM BILL 2013

**TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 5 FEBRUARY 2014**

SESSION TWO

Members

Hon Robyn McSweeney (Chair)
Hon Sally Talbot (Deputy Chair)
Hon Donna Faragher
Hon Dave Grills
Hon Amber-Jade Sanderson

Hearing commenced at 2.47 pm

Mr PETER CONRAN

Director General, Department of the Premier and Cabinet, sworn and examined:

Mr ROBERT KENNEDY

Director, Office of the Director General, Department of the Premier and Cabinet, sworn and examined:

The CHAIR: On behalf the committee, I would like to welcome you to the meeting. Before we begin, I must ask you to take the oath or the affirmation.

[Witnesses took the oath.]

The CHAIR: You will have signed a document entitled “Information for Witnesses”. Have you read and understood that document?

The Witnesses: Yes.

The CHAIR: These proceedings are being recorded by Hansard. A transcript of your evidence will be provided to you. To assist the committee and Hansard please quote the full title of any document you refer to during the course of this hearing for the record and please be aware of the microphones and try to talk into them. Ensure that you do not cover them with papers or make noise near them. I remind you that your transcript will become a matter for the public record. If for some reason you wish to make a confidential statement during today’s proceedings, you can request that the evidence be taken in closed session. If the committee grants your request any public or media in attendance will be excluded from the hearing. Please note that until such time as the transcript of your public evidence is finalised it should not be made public. I advise you that publication or disclosure of the uncorrected transcript of evidence may constitute a contempt of Parliament and may mean that the material published or disclosed is not subject to parliamentary privilege. Would you like to make an opening statement?

Mr Conran: No, Madam Chair.

The CHAIR: Question 1: has the department been involved in the development of the Workforce Reform Bill 2013?

Mr Conran: Not in a detailed fashion. This matter has previously been handled by the Public Sector Commission and the Department of Commerce and, as Mal Wauchop indicated, Treasury. Ours has been much more of an oversight role of the issue. We have provided general comments and advice in relation to the proposed legislation and some of the reasons for it. The decision that was made in implementing it, I think, was the Liberal election policy in 2007 to separate the Department of the Premier and Cabinet and the Public Sector Commission, which resulted in legislation in 2009. It meant that our role in relation to public sector matters was taken away and given to the Public Sector Commission.

The CHAIR: Question 2: at what stage of the policy development process arising from the 2009 Economic Audit Committee’s final report “Putting the Public First” was parliamentary accountability of the public sector addressed?

Mr Conran: The report itself did not focus on the issue of accountability to Parliament; rather it focused on a range of issues that included a recommendation in relation to involuntary severance. The economic audit report, while an important document, had no standing or effect. It only is

affected when government gives effect to a recommendation or part of a recommendation. Government subsequently considered the report and as a consequence, some years down the track, we have seen an introduction of the new Workforce Reform Bill. In part it was guided by the report, but there were a whole range of other issues that would have been taken into account in considering the changes that were made.

Hon SALLY TALBOT: What were some of those other sources of advice or reporting or data?

Mr Conran: As Mal Wauchope touched upon, there is a host of public sector reforms that have been going on all around Australia quite extensively over a number of years—10 years. Those issues were considered by governments and by policy advisers and advice was given to government and government has considered those issues. In developing policy in relation to public sector issues you seek the advice of directors general; you know what is going on elsewhere in the country; and you have regard to policy papers produced by various think tanks and the like. It is a normal part of a policy process. I was not involved in a detailed exercise for this; rather it was the Public Sector Commission that were principally the drivers and that is a normal process by which you develop policy. There is no one single point that leads you to the conclusion that “We must have this.” You develop policy after considering issues over many, many years. This is the direction that the public sector is going and it is the direction that employment is going generally. We are trying to get rid of some of the over-regulation in some of these areas and make jobs that are more meaningful. We have to have a much more mobile public sector—much more flexible and much more dynamic. We have to learn to work with outside groups like the not-for-profit sector, and that is happening, and we are working with universities and the like. That is just normal policy development.

The CHAIR: Question 3: on the screen there is a copy of recommendation 39 of the 2009 EAC report, which appears to be basis of the involuntary severance clauses in the bill. Back in 2009 the Public Sector Commission had a much more restricted statutory role. You will be aware that in other jurisdictions the PSC equivalent bodies do not give complete control over industrial relations issues in the public sector to a single commissioner. Is there a potential for an actual or perceived conflict of interest in requiring the PSC, as it is currently structured with its much wider powers, to lead the implementation of recommendation 39?

Mr Conran: Not in my opinion. Not surprisingly, I concur with Mal Wauchope’s comments in relation to this. Having regard to the Public Sector Management Act, he is not subject to direction. He can report to Parliament. In that regard he has much more extensive authorities than I do. I am satisfied that there is not a conflict of interest. I note that there are other arrangements in other jurisdictions and I note in some commentary provided with the questions I have that there is reference to New South Wales and the industrial powers resting with the industrial relations secretary. The industrial relations secretary in New South Wales is secretary to the Treasury. I think most people here would generally prefer the Public Service Commissioner or the director general of Commerce to have some of those powers. There are a whole range of differences. I am not sure which legislation is most like ours; I suspect it is closest to the commonwealth legislation, which is probably the closest we have to the WA model.

The CHAIR: I think you have probably answered question 4 as well in that.

Mr Conran: I will just have a look at question 4.

The CHAIR: Question 4 was the statutory requirement for the PSC to act independently. I believe you have covered that, unless have anything further to add.

Mr Conran: No.

The CHAIR: Question 5: on the screen you will see an extract from an updated progress on recommendations from the 2009 report that was tabled in the Legislative Assembly by the then Treasurer on 17 May 2011 in response to a question on notice. You will note that as far as recommendation 39 of the 2009 EAC report was concerned it was basically re-endorsed in its

original terms at the time. When precisely did government policy relating to recommendation 39 develop to restricting rights of appeal to the WA IRC with respect to involuntary termination; and, can you provide us with the document at the start of this policy development?

Mr Conran: I would have to disagree with the premise of the question, “When precisely did government policy relating to recommendation 39 develop to restricting rights of appeal”, because I think there are extensive rights of appeal proposed that have been outlined by Mr Wauchope and I would simply refer the committee to those rights.

[3.00 pm]

The CHAIR: Question 6, following on from the previous question: has the department advised government that no similar restrictions to rights of appeal about involuntary separations apply in other jurisdictions like Queensland, New South Wales, the commonwealth or Victoria?

Mr Conran: Again, I would have to disagree with the premise there. I did some checking this morning in relation to other jurisdictions, in particular New South Wales. The Government Sector Employment Act, which I do not think comes into operation until some time this month, is very clear in relation to how it deals with excess employees. Quickly paraphrasing—I will provide copies of this to the committee—division 2 of the Industrial Relations Act —

... does not apply to contracts of employment of employees of any government sector agency that are alleged to be unfair for any reason relating to excess employees, including the following:

- (a) when and how employees become excess employees,
- (b) the entitlements of excess employees (including with respect to redeployment, employment retention, salary maintenance and voluntary or other redundancy payments),
- (c) the termination of the employment of excess employees.

Save for (c), in Western Australia it is proposed that they do have rights in relation to those issues. I might also point out that it is in part contrary to some of the commentary in the questions which says that the Public Service Commissioner is the chief public sector employer. I am not sure that that is entirely accurate. For example, I am the employer of all staff within the Department of the Premier and Cabinet, and all staff in other agencies are the employees of the directors general of those respective agencies. Not much necessarily turns on that; however, if you consider that the Public Service Commissioner is also a reviewer, he is reviewing decisions of mine. There is another element of review built into the process because of the structure of the way the employment relationship is developed under the Public Sector Management Act.

I mentioned New South Wales, and I have some examples. It is quite clear also that in terms of the senior executive service in New South Wales it is very clear, and I think in relation to other jurisdictions—I have not had an opportunity to look extensively at that—but if you look at the employment arrangements for senior executives in Queensland, the commonwealth and probably in Victoria you will find that while there are certain rights, I do not think there is any appeal from any termination, noting that most of those issues are covered in the contracts of employment. I am not being specific in relation to that issue but I believe that to be case. I think some analysis of that by the committee or elsewhere might provide some further information in that regard.

Hon SALLY TALBOT: Are you indicating that the proposed appeal rights in this bill will actually leave open the possibility of dealing with substantive matters, including fairness?

Mr Conran: I cannot speak specifically in relation to that. That is more a question that needs to be considered by the Public Sector Commission. They have outlined the areas upon which they think there will be opportunities for review. They indicated that they will be publishing guidelines and

they have talked about instructions as well. Whether they go to questions of fairness or unfairness or manifestly unfair, I am not sure, but those are the sorts of issues that I think would be considered.

Hon SALLY TALBOT: I am interested because you referred to the legislation in another state indicating that Western Australia was adopting similar provisions.

Mr Conran: With respect, I am not sure that is what I said. I said in fact that Western Australia is not adopting the New South Wales approach; that is, whereas New South Wales has excluded reviews in relation to redeploy decisions to place on excess lists, my understanding is that we are providing for review mechanisms.

Hon SALLY TALBOT: I am sorry; I mis-phrased that. You were drawing the parallel saying Western Australia is in fact slightly more generous. I wonder if you have a view about that question about the substantive considerations that could be brought to appeal, but you have made clear that you do not.

Mr Conran: Yes.

The CHAIR: Question 7: proposed new section 95B of the PSM act is shown on the screen. Following on from question 5, when did government policy relating to recommendation 39 develop to include the unilateral right to vary existing contracts and industrial instruments made under the IR act by passing a regulation under the PSM act as proposed at new section 95B? Can you provide the committee with the documents that stated this policy development?

Mr Conran: I have not got any documents in relation to that. I am not sure I can agree with the term “unilateral right to vary existing contracts”. I think it is a right. “Unilateral” has different connotations when I look at such words. For the reasons I have already outlined here and for the reasons outlined by Mr Wauchope, I do not think there is anything untoward in relation to what is proposed here in that the commissioner will be publishing guidelines. That is normal operation for public sector commissioners of whatever arrangement. Again, in New South Wales they had regard to an outline of the proposed new legislation and what the Public Service Commission there would be doing. They make the point that under the GSE act, as they refer to it —

... the Public Service Commissioner can make GSE Rules. GSE Rules are a new instrument which will support the employment framework.

It goes on to say —

This might include (but is not limited to) recruitment, kinds of employment, conditions of engagement, work level standards and job evaluation, capability and termination.

It then goes on to say —

GSE Rules are an important new instrument ... which will bring the government sector in line with best practice workforce management in other jurisdictions.

The Public Service Commission there already has rule-making power, but they are clearly identifying that they are going to be making rules in relation to termination. As Mal Wauchope said, they are actually important for us because they give us as DGs the parameters within which we can work. If we step outside those parameters, that provides an opportunity for review. I do not want to go into specific cases but I can advise you that I have had challenges to decisions that I have made as being outside public sector guidelines and they have been dealt with in the Industrial Relations Court.

Hon AMBER-JADE SANDERSON: Coming back to the question: when did it become government policy to introduce legislation that would override existing agreements that the government has entered into with public sector employees?

Mr Conran: I cannot be specific. These issues have been considered by cabinet and then subsequently they have been considered in discussions, as Mal Wauchope pointed out, between

various advisers and agencies, and the Public Sector Commission. The Public Sector Commission has a direct relationship to its minister, who is the Premier. I do not sit there with the Premier and advisers in relation to those issues. They have developed those over a period of time. There is not a specific date as far as I am aware.

Hon SALLY TALBOT: Mr Conran, you might be able to help me here. I understood you to say some of your decisions have been challenged and taken to the Industrial Relations Court, the WAIRC. Is not the whole point that our line of questioning is trying to get to the bottom of that that option will not be available under the provisions of the bill? I saw you listening to the evidence at the previous public hearing. We were talking about commissioners' instructions and my understanding, from what the previous witnesses said, was that the only way to challenge that was to go to the Supreme Court. I understand there will be confidentiality provisions here, but the committee has the option to go into a private hearing if you think that you could shed any light on this.

Mr Conran: I am not sure going into a private hearing will throw much light on it. I am just informing you. I think it is probably on transcript of industrial relations proceedings where there are actions brought—whether they are successful or not is another issue—in respect of whether a director general might have complied with public service instructions or guidelines. I think just a check of those records will identify that. Quite clearly, as Mr Lightowlers pointed out, there are always administrative law remedies available in respect of decisions which are manifestly wrong, if I can remember my administrative law, but I do not think that has changed, albeit I note that maybe in New South Wales they have sought to prevent access to such actions as well. You can do that but often that is not successful.

The CHAIR: Question 8: unlike regulations made under the PSM act, commissioners' instructions under the PSM act are not currently disallowable instruments reviewable by the Joint Standing Committee on Delegated Legislation. The bill provides that regulations made relating to involuntary terminations may be supplemented by commissioners' instructions. The committee has not seen this sort of link before in regulation-making powers. I have here that it does not appear in any other jurisdiction either. You can comment on that if you like. It goes on in three parts. Question 8(a): do you know whether this type of supplementary commissioner's instruction is intended to be disallowable or are these instructions just like the existing non-disallowable commissioner's instructions?

[3.15 pm]

Mr Conran: I will defer to the Public Service Commissioner on this issue but, as I recall, his answer was that it was intended that they not be disallowable matters, but he indicated by cross reference back to, I think, section 22 of the Public Sector Management Act, that the commissioner must comply with the provisions of the act; he cannot go outside the act. I think there is a similar provision in relation to the regulations. Being outside that would, it seems to me, be an issue that could be challenged, where, I am not sure.

The CHAIR: Has the department provided any advice to government about this question?

Mr Conran: No.

The CHAIR: At what point in time did government policy relating to recommendation 39 develop to extend regulation-making powers relating to involuntary severance to commissioner's instructions? Do you have any documents that articulated this aspect of the policy?

Mr Conran: I think I have answered that. I am not aware.

The CHAIR: Question 9: is the committee correct in understanding that Queensland, New South Wales, Victoria and the commonwealth place no unique limitations on appeal rights to the relevant industrial relations commission with respect to involuntary separation decisions?

Mr Conran: I think I have already answered that question by reference to New South Wales, and indicated that I think there are some restrictions, maybe only in relation to senior executives servicing some other jurisdiction as well.

The CHAIR: You have probably answered this one too. Question 10: the committee further understands that in other jurisdictions such as Queensland, New South Wales, the commonwealth and Victoria, the PSC equivalent entities are constituted very differently from the WAPSC; for example, the extent of the minister's ability to issue directions to the commission with respect to the internal structures relating to industrial matters, the number and role of commissioners, the relationship of the commission with cabinet and designated internal statutory review mechanisms. Can you confirm that is the case?

Mr Conran: I can confirm that every jurisdiction has a different approach. Jurisdictions have developed differently over a long period of time and they have varied as to particular approach.

The CHAIR: That was the last question. Are there any questions from the committee directly? I thank you for coming in today. It is much appreciated.

Mr Conran: I have some copies of that legislation.

The CHAIR: Are you requesting private status for those documents?

Mr Conran: No; they are publicly available. I think there are nine copies.

The CHAIR: Thank you.

Hearing concluded at 3.18 pm
