PSM Sub 4

Community & Public Sector Union
Civil Service Association of WA

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13th November 2013

Mr Timothy Hughes
Principal Research Officer
Public Accounts Committee [Legislative Assembly]
Western Australian Parliament
GPO Box A11
PERTH WA 6837

Dear Sir

RE: Submission of Civil Service Association (CSA): PAC regarding amendments to Public Sector Management Act 1994 (WA)

Please find attached a copy of the submission.

A hard copy will follow in the mail. The CSA is able to appear before the Committee to further support and articulate its position.

Yours sincerely

Mark Finnegan
Coordinator Member Services

Public Accounts Committee
Legislative Assembly
Inquiry into amendments to the Public Sector Management Act
CSA Submission

1. Scope of Submission

The Civil Service Association of Western Australia Incorporated [CSA] intends making submissions to the Public Accounts Committee concerning the Inquiry into amendments to the Public Sector Management Act [PSM] with respect to the following:

b) the establishment and monitoring of public sector standards, codes of ethics, and codes of conduct; and
c) the application and operation of Commissioner's instructions.

2. Background

The CSA has been representing government officers in the public sector since 1900; initially as an association incorporated under the Associations Incorporation Act 1895; and latterly in 1967 it was recognised by the Industrial Arbitration Act as an organisation.

Its federal counterpart is the Community and Public Sector Union, WA Branch. Between the two entities there are sixteen thousand members employed in the public sector and related areas.

The CSA represents many members who are classified as public service officers, who are subject to the full extent of the PSMA. There are other government officers who are subject to Parts 2 – Public Sector Principles, Part 3B – Chief Executive Officers, and Part 6 – Redeployment in particular.

3. Previous submissions to the Public Sector Commission

The CSA made submissions to the Public Sector Commission concerning the proposed 2010 amendments to the PSM Act, and drafts of the following Commissioner's Instructions:

- 2012 PCS Review of the Commissioner's Instruction – Discipline General
- 2012 PSC draft Instructions concerning Ethics, Integrity Training and Public Comment
- 2012 PSC draft Instructions to replace Approved Procedures

4. General Thrust of the CSA's concerns about Instructions and Codes of Conduct

In respect of public sector discipline, the CSA has raised concerns about the rules and practice relating to:

- the operation of the rules of procedural fairness during the disciplinary process;
- the operation of disciplinary suspensions
- disputes over the CSA's representative capacity
- the conduct of investigations by internal and external investigators; and
- the right to silence pending the conclusion of parallel investigations by regulatory or compliance authorities.

In respect of right of government officers to make public comment, the CSA has raised concerns about current and proposed restrictions appearing to infringe their Civil and Political Rights, and their implied right to freedom of speech under the Australian Constitution.

In respect of Codes of Conduct or Codes of Ethics, the CSA has raised concerns that the current versions in the public sector are generally too elastic, and are capable of being invoked oppressively because of their open-endedness. This observation fits neatly within the scope of the Chief Justice's comments in his recent Whitmore Lecture concerning Integrity agencies assuming too much power for themselves.

By and large the PSC has dismissed the CSA's concerns in spite of examples being provided as to the type of disputation before the Public Service Arbitrator or the Public Service Appeal Board.

5. Elucidation of the CSA's submissions

During the consultation process concerning the drafting of the Commissioner's Instruction – Discipline General, the CSA expressed reservations about:

a) Rules of Procedural Fairness being referred to in the Guidelines, rather than in the Instruction itself.
b) These rules are the Bias rule, Hearing rule, and Evidence rule.
c) The Guidelines purport to lack any statutory effect.
d) Yet s.78(5) PSM Act makes it clear that an appeal can be made to the Public Service Appeal Board [PSAB] if these procedural rules are not followed in making a decision or finding.
e) On the basis of s.78(5) these rules should be in the Instruction itself.

The provision for suspension

In its original submission in 2010 the CSA expressed its concern about autocratic suspensions without pay. The changes to the PSM Act allowed for three types of suspension - suspension on pay, suspension on half pay, or suspension without pay.

Under 78(1)(b)(iii), however, there is no right of appeal for suspensions on full pay. Suspension on full pay seem to be the preferred result. Since the changes the CSA has not seen any of its members suspended on half pay or without pay.

Because of this preference to use suspensions on full pay, CSA has the sole option of seeking the intervention of the Arbitrator on the basis that the allegations are baseless, and therefore the suspension cannot stand. It appears that suspensions on pay are becoming a matter of course, and scant regard is being had to the current requirements of paragraph 2.1, of the Instruction. Employing authorities go through the motions of reciting the mantra of safety of the person or others, or the operations of the organisation without genuinely considering the facts or the employee's position.

In Corrective Services, an employee was suspended on pay without the allegations being crystallised or particularised. The person is expected to wade through some detailed documentation, and identify potential breaches of discipline themself. In

spite of the CSA's protestations, an external investigator was appointed without the allegations being sent to the employee. There was a recent example of Corrective Services acting in a similar fashion to a public service officer located in Derby. She was suspend without giving proper details to ground their decision or to provide a basis for the officer to dispute the matter.

These examples demonstrate the need for the rules concerning suspension to be tightened, and in respect of the latter, there is a clear need for a statement in the Instruction that if suspension or an investigation is contemplated, then the employing authority must crystallise and particularise the allegations. In consequence, both paragraphs 1.4 and 2, the Instruction – discipline General need amendment.

The issue of representation during disciplinary interviews

Since the 2010 amendments, there has sporadic disputation with employers and investigators over the CSA's representation rights during the course of a disciplinary process.

The ability of an employee to have a representative or a support person, should be the employee's choice.

The CSA's representation rights are set out in all its awards, for example clause 36 Public Service Award – Union Facilities. That clause cannot be abridged or diminished by any employer decision or policy. Yet, employing authority policies, like that of the Disability Services Commission or the Department of Housing tend to underplay the significance of the Union's representative role.

The problem is compounded because the Department of Commerce and the Public Sector Commission [PSC] do not have a unified position on the issue. PSC tends to accept Mr Cock QC's advice that the right to representation is part of the right to procedural fairness. Commerce takes the view that under clause 36 the CSA's statutory officials and its industrial staff do not have a representative right or capacity. The CSA employs three industrial staff with legal practising certificate, whom in normal circumstances, would have representative capacity without question.

The sporadic disputation has caused the CSA to amend the objects clause in its Rules to reiterate the representative capacity of its officials and staff to assist its members in all disputes.

The CSA has applied to vary both the Public Service and the GOSAC awards to clarify the representative capacity of its officials and staff to assist its members in all disputes. The matter is currently before the Public Service Arbitrator for conciliation.

The CSA maintains that the party making the allegations should not be permitted to determine whether the employee subject to the allegations requires representation or not. In previous discussions with the Public Service Commissioner, it was acknowledged that an employee was entitled to a representative as a matter of

procedural fairness. Conference discussions with the Public Service Arbitrator have also confirmed this view.

Conduct of the Investigation

The submission was that there needs to be a statement in the Disciplinary Instruction or elsewhere regarding the conduct of the investigation process, including operating in a non-threatening environment or manner. There have been occasions where investigators can act like the Inquisition.

In a recent example [Child Protection], the Public Service Arbitrator arranged for the interview to be conducted in her rooms because of the overbearing attitude of the external investigator.

Further CSA's concerns or reservations are set out in the schedule attached to this submission. In short, while there have been requirements in the past for ethical decision making, the knowledge and skills relevant to ethical decision making have not transferred demonstrably to investigations of poor performance or discipline. There have been ongoing disputes over the ability of investigators [internal or external] to make proper assessments based on facts and principle. This deficit needs to be addressed as part of the training process.

The Right to silence

The submission was that this is a serious omission in both the Instruction and the Guidelines. There is a Common Law right against incrimination and agency investigations should be put on hold while police or CCC or other penal investigations are concluded or heard by a court or Tribunal: see *CSA v Department of Education*, PSAC 20 of 2010.

The CSA maintains its position that the Instruction should contain a statement concerning the right to silence.

6 Subsequent submissions

The CSA continues to have serious reservations about the operation of this Instruction – Discipline General in practice.

In a submission dated 1 March 2012, concerning proposed Instructions on Codes of Ethics, and Integrity Training, the CSA stated:

- *There is emerging evidence that decision makers, including investigators cannot make decisions impartially, in accordance with the facts and the law. One recent appeal to the PSAB involved the Department of Education holding an enquiry under the old PSM provisions without following due process. The Appeal was dismissed on a technicality without determining the substance.*

- *In a recently reserved matter involving the Department of Transport, the undisputed evidence is that the external investigator ignored the facts presented by interviewees in order to secure an adverse finding of breach of discipline.*

  There is also another matter pending with the same Department where it was pointed out to the Department by the CSA that the external investigator ignored evidence by failing to interview two significant witnesses supporting the member's case. The Director General has ignored the CSA's representations, and now wishes to impose a penalty greater than the one recommended by the investigator – being a loss of three days pay in addition to a reprimand.

In respect of the second matter, *Grantham v DOT* PSAB 16 of 2011, the CSA won all points of the appeal; in particular that the investigation was flawed. The whole situation could have been avoided had the investigator understood and applied the rules of procedural fairness, and demonstrated some integrity in decision making.

In respect of the third matter, *Smith v Department of Transport,* there have been two hearings of the Public Service Appeal Board. The first hearing concluded as a reserved matter. Then the Respondent raised a lack of jurisdiction in terms of s. 78 PSM Act – there could be no appeal about an adverse finding until a penalty was imposed. That appeal was then dismissed. The current appeal is reserved. However, on the record there is clear evidence that HR was lacking in assessing the nature of the case, and changed the Code of Conduct to obtain the result appealed against. Clearly these actions infringe the rule of law inherent in s. 9 PSM Act – compliance with Codes of Conduct and Codes of Ethics.

These observations were summarized in a recent e-mail from Mr Claydon to the Public Sector Commission: *Some are appearing to give agencies the answer they want or show an inability to synthesise facts to render a proper or a just outcome.*

Clearly, on the two examples provided, the rules of procedural fairness need to be reiterated in the Instruction itself.

7 Public Comment by government officers

There is clearly a case for reforming the restrictions on government officers making public comment. There is a disagreement between the CSA and PSC as to what direction the reform should take. The CSA has a libertarian view. The PSC wants to impose more restriction.

In 2012 PSC produced a draft instruction to regulate public comment and confidentiality in place of the existing Administrative Instructions 102 and 728. The proposed instruction have not been promulgated. However, further control is being rolled out by Departments, like Health, having restrictive social media polices for Facebook and other uses, which can intrude on a government officers' private life and activities.

The CSA's response to this draft was:

> *In respect of the protection of confidential information and public comment, the draft instruction goes beyond what the previous Public Service Administrative*

Instructions provide, and does not create a clear linkage with the notions of Freedom of Information and Public Interest Disclosure.

The CSA also takes the view that the current instruments go too far.

Government Officers are treated differently from citizens employed by the private sector.

The draft instruction does not acknowledge the provisions of the International Covenant on Civil and Political Rights which is part of Australian domestic law through the Australian Human Rights Commission Act 1986.

Nor does the instruction acknowledge the implied right to freedom of speech under the Australian Constitution. Convention No 151 – Labour Relations (Public Service] 1978 provides that Public Employees are to enjoy the civil and political rights essential for the normal exercise of freedom of association. Western Australia agreed to the ratification of this convention on 22 May 1992.

This draft instruction needs to be rectified to be compliant with these freedoms.

The CSA maintains this view.

The submission expanded the CSA's view:

The definition of Public comment is very wide in its scope. It is intended to catch almost anything an employee says in course of their employment or their private life.

It places unacceptable limits on free speech in the context of a democracy. Boundaries of what is permissible, and what is potentially damaging for workplace cohesion, the productivity of the department, and the functionality of the government need to be more clearly defined.

The Code raises issues about government officers' ability to work in government agencies on the one hand, and, on the other, the ability of the officers as private citizens to advocate legitimately for change in policy in other areas of government, i.e. working in Corrective Services during the day, and campaigning for environmental issues on the weekend.

Government officers [generically] should be allowed to criticise government policies in an open, public forum in their capacity as a private citizen without threat of a breach of discipline.

The CSA made detailed comments on the draft as follows:

Public comment:

The term 'public comment' is used broadly, and includes comment made on political or social issues at public speaking engagements, during radio or television interviews, on the internet (including social websites and blogs), in letters to the press or books or notices, or in other ways where the comment is

intended for the community at large. The instruction only applies to comment where it can be reasonably be regarded as having been made to the public or was intended to be so made.

The definition is broad, and ambiguous. As it stands it could be used to stifle freedom of speech or be manipulated by abusing the power conferred to constrain government officers generically.

The definition has the capacity to be applied subjectively.

It is especially inadequate for dealing with social media. Is facebook 'intended for the community at large'? What if the officer only has 20-odd facebook friends, are they the community at large?

The duties imposed by paragraph 3 continue to have effect after a public sector employee or other individual ceases working in the public sector:
This provision is trying to impose obligations broader than the protection of confidentiality at Common Law after the employment relationship has been terminated. In essence it is a servile incident which at Common Law would be void.

Public sector employees must not make public comment about the activities of any public sector body, unless: (b) they make it clear they are expressing their own views as a private citizen:
As currently constituted the provision could be abused. It is too wide because it could apply to any agency where there is no direct connection or relationship with the employment. So if the government officer makes a comment about the policy of the Potato Marketing Corporation as a farmer, but does not mention they are a private citizen. It can be inferred that the person has infringed this code.

However, people often do not preface their statements with a disclaimer that it is their own personal opinion; especially in social situations and on social media.

If expressing their private views, public sector employees should avoid making public comment, which could be perceived as…
What does perceived mean? It involves subjectivity and ambiguity. It is often used as an excuse to overreact to something, when the objective facts or requirements would dictate no action should be taken.

This part of the Code negates the latitude given in no. 5 which states that government officers can make any comment as long as the person makes it clear that it is their personal view as a private citizen. It demonstrates that the latitude is illusory, and freedom of speech can be trammelled by perception.

It limits the capacity of government officers to participate in protests and campaigns against government policy as private citizens.

7(c) ... so harsh or extreme in its criticism of the government or its policies it raises questions about the employee's capacity to work professionally, efficiently or impartially – such comment does not have to relate to the employee's area of work

The use of adjectives - harsh or extreme can provide an opportunity for a subjective decision to be made. It is capable of abuse at it is currently written and should be deleted.

There would need to be a demonstrable assessment that the officer could not work professionally, whatever that means? Given the regular inability of agencies to properly particularise breaches of discipline, it is difficult to see how agencies could make a demonstrable assessment. It is more likely that agencies would resort to assumption or conjecture, and then place the burden of proof on the officer in question.

- Further there would need to be a demonstrable assessment that the officer performed work which required the person to exercise judgment or discretion requiring impartiality.

- There would have to be shown a direct connection or relationship between the behaviour and the work in question. If that qualification was not written into the Code, then the provision would be capable of abuse.

- Covering any area of government is too broad. The area needs constraining.

8 CSA submission on Public Sector Standards and the exclusion of the jurisdiction of the Western Australian Industrial commission in dealing with matters the subject of a PSS.

The CSA does not support the continuing bar to WAIRC jurisdiction based on the existence of a public sector standard. PSS's are published by the PSC and monitored and enforced by PSC. The CSA has supported a campaign to have the bar reflected in s. 80E(7) and s. 23(2a) IR Act abolished. In 2012 a bill to that affect was introduced, but was defeated. Both government and public service officers should have the same rights of access to the Commission as a private sector or not for profit sector employee.

The repeal of the bar was a recommendation of the Whitehead review of the PSM Act in 2004. During that review the Department of Productivity and Labour Relations acknowledged deficiencies in the breach / claims process and the determination of relief. It proposed a gateway [if the agency rejected the PSC's recommendation], for access to the WAIRC and an enforceable determination. Currently, the PSC cannot enforce any recommendation it makes regarding a breach of a standard. PSC [within last 18 months] floated an alternative proposal for enforcing its decisions re a breach of PSS and sought CSA feedback. The Union has heard nothing more of the proposal since that time and the inadequacy of the flawed status quo remains.

This contention is strengthened given the lack of confidence (or interest) demonstrated by Public Sector workers and their Unions in the alternative regime administered by the Public Sector Commission [PSC]. The system is massively underutilised. The 2011/12 PSC annual report advises only 125 claims were received in 12 months. In the same period only 11 claims were upheld.

The inadequacies of the regime are well known. It reviews only processes and ignores merit. If the Government of the day and the PSC had confidence in the relevance of the PSS regime they would welcome the repeal of the bar and allow the system to compete alongside the WAIRC.

Schedule

Codes of Conduct and Integrity Training

2.1 Codes of conduct must specify to whom the code applies and what may or will occur as a result of non-compliance.

The CSA understands that this means specifying of a range of consequences for each breach of the Code depending on the seriousness of each breach rather than a general inclusion of the possible actions available under the *Public Sector Management Act 1994* (WA) s 80, ie:

- A reprimand;
- The imposition of a fine;
- Transferring the employee to another public sector body;
- Transferring the employee to another office, post or position in the public sector body;
- Reduction in the monetary remuneration of the employee;
- Reduction in the level of classification of the employee;
- Dismissal

For example, the Code should specify exactly what the consequences will be for various breaches, ie:

- A breach in the area of personal behaviour will entail a reprimand, a transfer or dismissal;
- a breach involving fraudulent or corrupt behaviour will entail a dismissal.

2.4 In conjunction with the above considerations, all codes of conduct must address the following seven areas…

- Each listed area needs further elaboration to indicate what these headings might encompass.
- There needs to be boundaries and guidelines for conduct specified within those headings. Most Codes are too elastic, and are capable of misuse or abuse of power.

- The CSA has already made several comments on communication and official information in the covering letter.
- Record keeping and the use of information needs to be compliant with relevant legislation, like the State Records Act or the Freedom of Information Act. The Codes should not creep beyond what legislation already provides.

3.1 The PSC has developed an accountable and ethical decision making training program to support public sector employees make ethical decisions

- The sentence is badly drafted. It should read 'to support public sector employees *making* ethical decisions.'

3.2 All public sector bodies shall provide this training to their employees. Board Chairs shall provide or arrange for this training to be provided to their members or employees of the board.

- The sentence is badly drafted. The two sentences should be split into separate bullet points.
- The instruction could be more specific by substituting '*this training*' to become '*Accountable and Ethical Decision-making Training.*'
- The CSA would like to be briefed on the content of the training. It is not something which can be delivered by merely going through the motions or delivering Training 101.
- There is emerging evidence that decision makers, including investigators cannot make decisions impartially, in accordance with the facts and the law. One recent appeal to the PSAB involved the Department of Education holding an enquiry under the old PSM provisions without following due process. The Appeal was dismissed on a technicality without determining the substance. In recently reserved matter involving the Department of Transport, the undisputed evidence is that the external investigator ignored the facts presented by interviewees in order to secure a finding of breach of discipline. There is also another matter pending with the same Department where it was pointed to the Department out by the CSA that the external investigator ignored evidence by failing to interview to two significant witnesses supporting the member's case. The Director General has ignored the CSA's representations, and now wishes to impose a penalty greater than the one recommended by the investigator – being a loss of three days pay in addition to a reprimand.