STANDING COMMITTEE ON LEGISLATION

WORKFORCE REFORM BILL 2013

TRANSCRIPT OF EVIDENCE
TAKEN AT PERTH
WEDNESDAY, 5 FEBRUARY 2014

SESSION ONE

Members

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

Hearing commenced at 1.38 pm

Mr MALCOLM WAUCHOPE
Public Sector Commissioner, sworn and examined:

Mr LINDSAY WARNER
Director Policy and Reform, Public Sector Commission, sworn and examined:

Mr JOHN LIGHTOWLERS
General Counsel, Public Sector Commission, sworn and examined:

Mr PAUL WILDING
Director Management and Practice, Public Sector Commission, sworn and examined:

The CHAIR: On behalf of the committee I would like to welcome you to the meeting. Before we begin, I must ask you to take either the oath or the affirmation. Please state your full name, contact address and the capacity in which you appear before the committee after you have taken the oath or affirmation.

[Witnesses took the oath or affirmation.]

The CHAIR: You have all 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 and a transcript of your evidence will be provided to you. To assist the committee and Hansard please quote the full title of any documents you refer to during the course of this hearing for the record. 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 and please try to speak in turn. 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 should request that the evidence be taken in closed session. If the committee grants your request any public and 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 to the committee?

Mr Wauchope: No, I do not have an opening statement to make.

The CHAIR: We are going to do things differently today; we are going to put the Workforce Reform Bill 2013 on the board so that it is easier to see and then go through the questions one at a time. Is that okay with you? Question 1: at what stage of the policy development processes arising from the 2009 Economic Audit Committee final report "Putting the Public First" was parliamentary accountability of the public sector addressed?

Mr Wauchope: I think it is fair to say that it was not addressed specifically. This was treated like any other development of a bill. We would expect that once the bill is enacted it would be allocated

or committed to a minister. We assume that would be the Minister for Public Sector Management, who is the Premier, and that the Public Sector Commission would be the agency principally charged with administering that legislation. In that sense, the accountability was considered to be part of the normal process.

The CHAIR: Thank you. Did the Public Sector Commission—PSC—seek any legal advice in connection with the Workforce Reform Bill, and if so could the committee please have a copy of that advice?

Mr Wauchope: The answer is yes. We received some formal advice from the office of the State Solicitor with respect to some aspects. We have gone through the process of seeking approval to provide that legal advice to the committee, and we have received that approval. We have nine copies of that advice for the committee.

The CHAIR: Thank you. Tabled as private.

Question 3: when the bill was being drafted or at any time before that, did the PSC conduct stakeholder consultation on part 3 of the bill? This part deals with regulations, involuntary termination, inconsistencies between Public Sector Management Act regulations on the one hand and industrial instruments and contracts on the other and appeal restrictions relating to involuntary terminations. If yes, please provide details.

Mr Wauchope: In relation to part 3 of the bill my understanding—Mr Warner is the officer who undertook the consultation—is that we did consult with the Department of Commerce, the State Solicitor's Office and also the office of the Premier.

The CHAIR: Question 4 is the one that is going to —

Hon AMBER-JADE SANDERSON: Can I just confirm something? There was no actual consultation with the stakeholders affected by the bill—those employees or employee groups?

[1.45 pm]

Mr Wauchope: No, not at this stage. The consultation will be extensive once we get to the regulation stage.

Hon DONNA FARAGHER: Just to clarify, as a part of the development of the regulations you will be undertaking consultation at that point in time?

Mr Wauchope: Absolutely.

Hon SALLY TALBOT: Is that as a part of the development of the regulations or will you just consult when you have a draft?

Mr Wauchope: I do not know whether Mr Warner wishes to add any comments to that.

Mr Warner: I think what we intend to do is to consult early on in the process. Certainly, the regulations need to comply with the statutory framework and the government's policy intent and we will do our best to consult as early as we possibly can.

Hon AMBER-JADE SANDERSON: Has the department mapped out a process and time frames for that consultation yet?

Mr Wauchope: Not that I am aware of; Mr Warner —

Mr Warner: Not at this stage. We are largely dependent on the parliamentary process and the advice from parliamentary counsel is that they are reluctant to commence drafting regulations until they are confident of the passage of the bill through Parliament.

Hon SALLY TALBOT: So you have not commenced drafting yet?

Mr Warner: That is correct.

Hon DONNA FARAGHER: Who would you expect to be consulted as part of that process—union bodies, other groups? Can you give a general scope of the groups that you would consult?

Mr Warner: Obviously, we would seek to consult with the relevant stakeholders, being unions and other public sector bodies affected by the changes.

The CHAIR: Question 4: on the screen is a copy of recommendation 39 of the report—I will just go down to the bottom—is there the 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 Wauchope: It is my view that there is no reasonable basis for a perception of a conflict of interest. The PSC is responsible for the administration the Public Sector Management Act. My general functions as specified in section 21A of that legislation require me to advise government in relation to such matters and particularly to promote the efficiency and effectiveness of the public sector. I see it as lock, stock and barrel as part of the responsibilities as set out in my statute.

The CHAIR: Thank you very much. Question 5: following on from the previous question, is the kind of government policy development role adopted by the PSC in the development of this bill consistent with the statutory requirements of the PSC to act independently?

Mr Wauchope: I think that my previous answer replies to that in part. The statutory independence specified under section 22 of the Public Sector Management Act does not override the requirement of section 21A or section 7 of that act—they coexist. Basically, it is the way that you conduct yourself.

The CHAIR: Question 6 asks whether the commission sought any advice about including the state public sector wages policy, the wages policy, references to the financial position and fiscal strategy of the state and the financial position of the relevant agency in the bill. If yes, what was the substance of that advice?

Mr Wauchope: We were not involved in that bill. It is understood that Treasury was the primary advisor in relation to those matters. I understand that the Department of Commerce instructed parliamentary counsel in relation to that element of the bill.

Hon SALLY TALBOT: Mr Wauchope, I take you back to a question asked by the Chair about the actual perceived conflict of interest. Are you prepared to comment on the fact that, unlike what happens in other jurisdictions, the Western Australian Public Sector Commission has a wide range of functions, including being responsible for internal reviews and appeals? I accept the comments you made in direct response to the Chair's question, but in light of the fact that you have more powers than most of the public sector commissions in other states, can you comment more broadly on how you are going to manage that perception of a conflict of interest? I must explain to you that I come from the clear understanding that conflicts of interest do not have to be avoided—they have to be managed so that you maintain that transparency.

Mr Wauchope: I make the point, Madam Chair, that my powers are not unfettered. A number of checks and balances are in place, not the least of which is being required to report to Parliament annually. There is an important issue about what will occur in this process—if we are specifically talking about the application of this bill enacted—in that there will be checks and balances right from the beginning to the point of termination. My actions will be reviewable under those arrangements. Essentially there are checks and balances.

Mr Lightowlers: I draw attention to the capacity for the Supreme Court to oversight unlawful activity of the commission. If the commissioner acted outside his jurisdiction, then he would be subject to administrative review by the Supreme Court as would any other administrative decision-maker exercising powers under the statute.

Hon SALLY TALBOT: When you talk about checks and balances, do they already exist in the act or are you talking about additional checks and balances that, presumably, will be available by way of regulations; in other words, they have not yet been drafted?

Mr Warner: Under the redeployment redundancy arrangements, matters about which employees feel aggrieved in the application of the regulations can be referred to the WA Industrial Relations Commission and reviewed, and that is likely to allow for any decision made by the Public Sector Commissioner under those regulations. Currently there are checks and balances. This is not anything that is expanding or restricting those arrangements.

Hon SALLY TALBOT: Can you directly answer my question about whether additional regulations will be drafted to deal specifically with the checks and balances of the provisions of this bill?

Mr Warner: It is intended that the regulations will make clear that any decision made under the redeployment and redundancy regs can be referred to the Industrial Relations Commission for review, and that would include a decision by the commissioner. For example, I refer to a decision to register someone for redeployment. That is the check and balance mechanism.

The CHAIR: I will go back to question 7. The government can already make submissions to the WAIRC about the wages policy, references to the financial position and fiscal strategy of the state and the financial position of a relevant agency. Did you consider the unintended consequences of putting these considerations into statute? If yes, what was your advice? Did you advise government of the potential for the new statutory relevant considerations to become the subject of Supreme Court litigation on the basis of the WAIRC failing to give due regard to a statutory relevant consideration; and, if yes, what was your advice? I have rolled question 7(a) and (b) into two questions.

Mr Wauchope: The Public Sector Commission was not responsible for providing advice to government about this particular matter. It is understood that Treasury was the primary adviser and that the Department of Commerce, in conjunction with Treasury, instructed parliamentary counsel about that part of the bill. Therefore, I do not have additional comments.

Hon SALLY TALBOT: Does that answer include part (b) of the question? I refer to the potential for new statutory relevant considerations to become the subject of Supreme Court litigation. Are you saying that you did not provide advice about that?

Mr Wauchope: I think we may have our questions out of order, Madam Chair.

Hon SALLY TALBOT: Question 7 starts, "Government currently has a range of freedom".

The CHAIR: I did not ask that question. I asked question 7(a) and (b).

Mr Wauchope: This may be question 6 on our list of questions.

Hon SALLY TALBOT: Okay. Madam Chair, did you just ask question (b), which asks whether the PSC advised government of the potential?

The CHAIR: Yes, I did.

Hon SALLY TALBOT: Mr Wauchope, did you advise government of the potential for the new statutory relevant considerations to become the subject of Supreme Court litigation on the basis of the WAIRC failing to give due regard to a statutory relevant consideration? Your general answer as I heard it just now was that you have not provided that advice; rather, it was done by Treasury and the Department of Commerce.

Mr Wauchope: That is our understanding, yes.

Hon SALLY TALBOT: And that applies to part (b) of the question? I would have thought that that was directly within your area of responsibility.

Mr Wauchope: My officer has just confirmed that we did not provide any specific advice on that.

[2.00 pm]

The CHAIR: That is how I thought you answered.

I will ask question 8. Requiring the independent umpire to consider the wages policy and the statutory requirements means that a policy document that is not reviewable by Parliament and can be amended to effectively change statutory law. We call this the Henry VIII clause. These clauses do not give sufficient regard to the legislative supremacy of the Parliament. That is not written correctly actually. Did you provide government with any advice about that?

Mr Wauchope: We did not. We believe that the proposed new sections are not considered to constitute Henry VIII clauses because they do not change the primary legislation; they simply require the tribunals to have regard to any changes in public sector wages policies that are issued by government. It does not remove the supremacy of the tribunal's decision-making.

The CHAIR: Thank you; that is how I saw it. Question 9: clause 4(2A)(c), "Section 26 amended", of the bill uses the term "the financial position of the public sector entity". Did the department provide any advice to government about this, and if so, what advice?

Mr Wauchope: Again, the PSC was not responsible for providing policy advice to government on this aspect of the bill. Again, it is understood that Treasury was the primary adviser in this area. The term "financial position" of the relevant public sector entity is not a term defined in the bill, as you would probably be aware. We do understand that the Department of Commerce in conjunction with Treasury instructed counsel on that aspect of the bill.

The CHAIR: Thank you; question (c): was any thought given to tying this term to an existing statutory provision to give the term a clear meaning, for example, reference to information of a type generated by an agency's chief financial officer pursuant to Section 57(2) or information of a type produced in compliance with S 61 of the Financial Management Act 2006?

Mr Wauchope: Again, from our point of view the answer is no, because it was dealt with by other agencies.

The CHAIR: Thank you; question 11: Did the commission conduct any stakeholder consultation in connection with the drafting of the bill? Did I go past one? I have missed question 10; my apologies. Was the commission asked to provide advice about the most appropriate cost index to use in the wages policy; and, if yes, what other indexes were considered as potential alternatives to CPI?

Mr Wauchope: Once again, this was a Treasury matter and it was a given policy position.

The CHAIR: That is what I thought you would say! Question 11: did the commission conduct any stakeholder consultation in connection with the drafting of the bill? If so, please provide the detail.

Mr Wauchope: As previously indicated, we did consult with the Department of Commerce, the State Solicitor's Office and the office of the Premier with regard to part 3 of the bill. Other parts of the bill, as I have said, have been dealt with in consultation with Treasury. Was there a second part to that question?

The CHAIR: No; just provide the details. Question 12: The proposed new section 95B of the PSM act is shown on the screen. Did the commission recommend the inclusion of this new section? Also shown on the screen are sections 51 and 52 of Queensland's Public Service Act 2008. You can see that those provisions are not as far-reaching as proposed Section 95. Did the PSC draw this sort of comparison, in the absence of equivalent provisions in other jurisdictions, to the attention of the government while the bill was being drafted? There are two questions in that question.

Mr Wauchope: I think Mr Warner will answer this question.

Mr Warner: The policy that the commission was operating within was what we understood to be the government's decision, a cabinet decision providing an arrangement where employees received the same treatment under the policies for management of the redeployment and redundancy framework. We worked in consultation with other agencies as the commissioner has mentioned—the office of the Premier, PCO and the Department of Commerce—to draft these arrangements. This was developed over time as different points of view were taken into account in the deliberative process. With regard to other jurisdictions, we looked at what was happening in other states and in the commonwealth and considered what would be most appropriate in the Western Australian context. Certainly, the process we came up with, we feel, is suitable for that context.

Hon SALLY TALBOT: Why? Can you give some reasons? You say that you carried out some sort of evaluation, looked at what other states were doing and made the decision that what we are looking at in the bill was the most appropriate arrangement for Western Australia. Can you give the committee some of the reasons why? What were the reasons that decision was based on?

Mr Warner: The statutory frameworks in other jurisdictions are different. I do not think we are comparing apples with apples; notwithstanding that there are some things to be learnt from what occurs in other jurisdictions. We were operating under a public sector management act framework where the redeployment–redundancy provisions, in a practical sense, are largely dealt with through regulations. That does not occur in other jurisdictions. It was not intended to do a wholesale radical change of the redeployment–redundancy provisions in the act to give effect to government policy. As a result, that was the conclusion that we came to.

Hon SALLY TALBOT: I think we have a question later about the disallowable aspects relating to the regulations. Am I right in saying that it is not intended that these regulations will be disallowable?

Mr Wauchope: Regulations will be disallowable.

The CHAIR: All regulations are disallowable.

Hon SALLY TALBOT: Okay; we might explore that when we get to those questions. I do not want to put anybody on the spot, but is it possible for you to give me one concrete illustration about why you look at a provision like Queensland—like the one up on the board now—and you say, "this will not work"? Is it simply because of the statutory framework in which we are already operating or is it because of something to do with the nature of our public service in WA? Can you just give me a feeling?

Mr Warner: I think what we are really talking about is somewhat differences in stylistic drafting styles. The provisions under the Queensland statute are considered to be quite similar to what is provided for here. The fact that there are, I guess, nuances, is largely to do with, perhaps, how they have constructed their primary legislation.

The CHAIR: Question 13: on the screen you will see an extract from an updated progress on recommendations in the 2009 EAC 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 that 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 WAIRC with respect to involuntary terminations? Can you provide us with the document that first started this policy development?

Mr Wauchope: I guess our source of authority is the cabinet decision that came from cabinet in relation to these matters. In terms of developing the bill, along the way there have obviously been some processes of that that were going backward and forward between the various people that we have been consulting including the State Solicitor's Office and parliamentary counsel and the Department of Commerce. Mr Warner, do you have any further comments to make on that?

Mr Warner: I would say that we do not believe it is accurate to categorise the bill as restricting rights of appeal to the WAIRC. What this bill does is actually enable those rights of review to be dealt with while someone remains employed, as distinct from waiting to be terminated and having to then lodge some kind of claim with the Western Australian Industrial Relations Commission for those matters leading up to their severance to be dealt with. In some ways this model puts everything in the front end as distinct from the back end which is what happens in other jurisdictions. What is dealt with by the bill in the back end, I guess, is the right of review exists if someone feels that they have not been given their full entitlement under the regulations.

Hon AMBER-JADE SANDERSON: But does it not prevent the WAIRC from reinstating someone, or reviewing those, or ordering different entitlements?

Mr Warner: Once again, what we would say is that the WAIRC could deal with any matter prior to termination and if it was found to be unfair or not an appropriate act and therefore the regulations, then no involuntary severance could occur. Or is unlikely to occur, I should say, because the process would cease.

Mr Wauchope: I think it is fair to point out too that the provisions in relation to unfair dismissal around substandard performance and discipline do not change. I mean they still have access to the WAIRC.

Hon DONNA FARAGHER: Just to be clear, in terms of the WAIRC, the only point at which they effectively cannot stop a termination is right at the very end. Prior to that, if there are issues that are raised with respect to if something has been unfair or the like, then a process could be put in place at that point in time and a review could be taken and it would come back to you, I presume, to say that this cannot occur. So it would only be right at the very end of a process—which I will ask about in a moment—that effectively they would be restricted in terms of making a determination that someone should not be terminated.

Mr Wauchope: That is correct; all the appeal provisions are up front in the process on the way to the point of termination.

The CHAIR: Question 14: Following on from the previous question, has the commission advised government that no similar restrictions to rights of appeal about involuntary separations apply in jurisdictions including Queensland, New South Wales, Victoria and the commonwealth? I guess I am just asking you for your take on that. Is there? I guess I do not like the way that the question was framed and I should have picked that up. Are there no similar restrictions to rights of appeal about involuntary separations applying in jurisdictions including Queensland, New South Wales, Victoria and the commonwealth?

Mr Lightowlers: I can draw your attention to the Government Sector Employment Act 2013 of New South Wales which was passed last year—2013. Section 74 of the legislation in fact removes industrial relations review rights for excess employees for any process that is alleged to be unfair for any reason relating to excess employment. It would not be correct to say that there are no similar restrictions on right of appeal in other jurisdictions—there are.

The CHAIR: Question 15: Proposed new Section 95B of the PSM act is showing 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 new Section 95B? Can you provide the committee with the documents that stated this policy development?

Mr Wauchope: Mr Warner will answer that question.

Mr Warner: Once again this was a process that occurred over time as issues were dealt with in trying to best ascertain how the bill could ensure that the redeployment–redundancy framework applied equally and fairly across all public sector employees. There were discussions held with the Department of Commerce, the State Solicitor's Office and parliamentary counsel as to how that

could be done. I could not tell you a specific time when that decision was made. Certainly, it was felt that in order to ensure that everyone was treated the same that was the approach to take. At the end of the day it was a decision of cabinet.

The CHAIR: It was a cabinet decision.

Hon SALLY TALBOT: Can I just clarify please. Somewhere post, say, the budget of 2011, that decision was made?

Mr Warner: It was made as we were going through the process of drafting the bill.

Hon SALLY TALBOT: Which commenced when?

Mr Warner: Following the cabinet decision in, I think, June of 2013.

Hon SALLY TALBOT: June, 2013?

Mr Warner: I think that was when the cabinet decision was, at some point. I cannot remember the exact date.

Hon AMBER-JADE SANDERSON: So these processes were ongoing while the government was signing industrial agreements with employees that stated that there would be no forced redundancies.

Mr Warner: I am not familiar about the time frame of when they were doing that. I would suggest that that might be something that the Department of Commerce would be better placed to answer. We are not involved in entering agreements with unions around working terms and conditions.

The CHAIR: Before they go to cabinet, sometimes these documents are marked "Cabinet in Confidence"—clearly before they go to cabinet—so if we were to ask for minutes of some of these documents relating to recommendation 39, would those minutes be available?

[2.15 pm]

Mr Wauchope: If they are part of the cabinet documentation or cabinet record, the answer is that it would be a matter for government. I am not in a position to make that commitment one way or the other, but the view is that it would not be something that I could provide.

The CHAIR: That is what I wanted to make very clear. Having been through the process, I understand how it is done.

Question 16: is the committee correct in understanding that Queensland, New South Wales, Victoria and the commonwealth have placed no unique limitations on appeal rights to the relevant industrial relations commission with respect to involuntary separation decisions?

Mr Lightowlers: I will answer that. To my understanding, that is not correct, and I have given reference to the New South Wales legislation that would contradict that assertion.

Hon SALLY TALBOT: Would you comment on those other jurisdictions that the chair has mentioned—Queensland, the commonwealth, Victoria?

Mr Lightowlers: Only to the extent that I could not contradict the assertion for those others, no.

The CHAIR: Question 17: Did the commission provide any advice relating to proposed changes to the PSM act contained within part 3 of the bill? In particular, did the commission provide any advice to government about the potential for clauses 13 and 14 of the bill together to retrospectively amend industrial instruments and contracts? I have a part (b), but part (a) is: if yes, can we have the details?

Mr Warner: Once again, as with the previous answer, there was no specific advice provided to government. This was done as part of that deliberative process of preparing the bill for cabinet's consideration, coming back to the primary purpose of trying to establish something that treated all public sector employees the same.

The CHAIR: Part (b) of that: did the commission recommend that the regulation-making power relating to involuntary terminations be extended to include commissioner's instructions; and, if yes, can we have a copy of the advice? If not, please provide a copy of the advice from government that this policy preference should be reflected in legislation.

Mr Wauchope: I think our position is that no such sub-delegation is considered to exist. A commissioner's instruction is not a sub-delegation, but it is an administrative instrument. I might point out that approved procedures had previously applied since the Public Sector Management Act was enacted in 1994, and with much the same status.

The CHAIR: Last question—question 18: unlike regulations made under the PSM act, commissioner's 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 commissioner's instructions. The committee has never seen this sort of link before in regulation-making powers, and we do not believe it appears in any other jurisdiction either. There are three parts to that question. Part (a): is this type of supplementary commissioner's instruction intended to be disallowable, or are these instructions just like the existing non-disallowable commissioner's instructions? I will stop there and let you answer that one.

Mr Wauchope: The point I would make is that commissioner's instructions are not considered to be equivalent to regulations, so they are not disallowable. But they are not permitted by section 22A(2) of the act to be inconsistent with that act, and section 108(2) of the act also provides that the regulations will prevail over any inconsistent commissioner's instructions. So, currently this provision in section 22A of the act which sets out what the commissioner can make commissioner's instructions on really provides guidance to the public sector, direction to the public sector, about how this is to apply and to get consistency across the sector.

The CHAIR: So, has the commission provided any advice to government about that particular question?

Mr Warner: Not specifically, to my knowledge, in relation to the matters before the committee.

Hon DONNA FARAGHER: Are we able to get a copy of the current commissioner's instructions that are —

Mr Wauchope: That have already been promulgated?

Hon DONNA FARAGHER: Yes.

Mr Wauchope: Yes, you can, of course.

Hon DONNA FARAGHER: Thank you. If we could receive a copy, that would be appreciated.

Mr Wauchope: Yes, we will do that, .

The CHAIR: Thanks. 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, and do you have any documents that require this aspect of the policy development at the instigation of government?

Mr Wauchope: I think Mr Warner has answered that already.

The CHAIR: Yes, I think so too.

Hon SALLY TALBOT: If I could just expand on this, please: what force does a commissioner's instruction have?

Mr Wauchope: Agencies are required to comply with them, but the important point here is that to the extent that they are inconsistent with the regulations, the regulations prevail, so I cannot issue an instruction that overrides the legislation.

Hon SALLY TALBOT: And you are categorising both the existing commissioner's instructions and the commissioner's instructions that are envisaged under this bill as administrative instruments.

Mr Wauchope: Sorry; I missed the last one.

Hon SALLY TALBOT: You are classifying the commissioner's instructions—the existing ones and the ones proposed by this bill—as administrative instruments.

Mr Wauchope: Yes.

Hon SALLY TALBOT: None of the existing commissioner's instructions are disallowable.

Mr Wauchope: No.

Hon SALLY TALBOT: Have any of them ever been challenged?

Mr Wauchope: No, not to my knowledge.

Hon AMBER-JADE SANDERSON: What is the mechanism for challenging them?

Mr Wauchope: I guess, as Mr Lightowlers, pointed out, there is always the Supreme Court if I was acting beyond my powers, but I would point out that, as I said, since 1994 the act provided for approved procedures, or approved procedures were promulgated under the act in much the same way as commissioner's instructions. We could have equally left the terminology "approved procedures" and it would have been no different. Prior to the 1994 act, the old Public Service Commission used to issue administrative instructions that dealt with much the same sorts of matters around discipline and the like. So there is nothing particularly remarkable about that. It is a mechanism that has existed, and I might point out that other jurisdictions have various forms of ways of communicating to the sector, which has the same force.

Hon SALLY TALBOT: Do you see these commissioner's instructions as being primarily informative? I just got a feeling from something that you just said—I just got a sort of nuance that you see them as being instructive; they are instructive devices to agencies about how they should comply with the regulations. Is that what you were intending to convey?

Mr Wauchope: As far as I see it, it is the "how" in relation to the what. Parliament sets out what has to be done. It could equally have been a Premier's circular that says, "Agencies will do (a), (b), (c) and (d)."

Hon SALLY TALBOT: I see. So to the extent that they are administrative instruments, they have the same sort of directive influence as a Premier's circular.

Mr Wauchope: I think Mr Lightowlers wants to add a comment there.

Mr Lightowlers: If I can add to that, commissioner's instructions can be, and usually are, binding. The commissioner also issues circulars that are more instructive or in guidance form. A commissioner's instruction, if it requires action, has disciplinary, or can have disciplinary, consequences. So an employee can be charged with a disciplinary offence by the employing authority for noncompliance. So they do carry consequences more often than not.

Hon SALLY TALBOT: That is giving a very wide definition to an administrative instrument, is it not?

Mr Lightowlers: In the context of an employment relationship, I do not think so. Employers commonly give instructions to employees that are binding and have disciplinary consequences. Since 1978, the Public Service Act, and now the Public Sector Management Act, has provided for exactly that type of beast. Queensland issues directives, guidelines, rulings; New South Wales produces directions, rules, directives; they are a very common mechanism in large employers such as government.

Hon SALLY TALBOT: If I have understood you correctly, the only avenue open to an agency whereby a commissioner's instruction could be challenged if that agency felt that it was not

reflecting the will of the Parliament as expressed in both the act and the regulations, which are disallowable, would be through the Supreme Court.

Mr Lightowlers: Yes—for example, for want of jurisdiction; acting unlawfully; beyond power; taking an action that no reasonable person would take, so unreasonable that it could be challenged. They are the sorts of administrative review grounds that would be available.

Hon DONNA FARAGHER: I have actually got a couple of questions. Perhaps they need to be answered in the light of the fact that the regulations have not been formulated or finalised, but I think it is important in terms of the policy of the bill and its potential effect. I just have a couple of questions with respect to the actual process, or the proposed process. If a person is registered for deployment, in terms of the point in time where you would get to what is proposed within this bill in terms of termination, what is the process that would need to be gone through before an employee would be at that point where we would go to an involuntary termination? I am looking at it in terms of: I would presume that once someone is registered, you would obviously first seek whether or not there is another section within their department or another department to which they might be able to be redeployed. Training and the like—I am not quite sure of the exact process, and I am hoping you might be able to at least give us perhaps a hypothetical example of what someone would go through, appreciating that that will be finalised through the regulations.

Mr Wauchope: That is a point I would like to make. I do not want to pre-empt the consultation process that we do intend to undertake, but obviously we have not been sitting in the background and not thinking about this. There are a number of stages, which I might ask Mr Warner to discuss, that we have thought about how it might apply, without actually locking in on it at this stage.

Mr Warner: We would see there being a phased process. The first step would be, obviously, the employer deciding that there might be surplus staff, for whatever reason that might occur. They would then obviously be advising those affected employees as to their circumstances. In effect, this makes them registrable. They are not actually registered for redeployment. That just is the first point of saying, "You are surplus." We would expect there to be opportunities to be provided to them that would be real and meaningful in terms of finding alternative employment within that organisation. The government is a big place, but some agencies are small, and that might not always be possible for whatever reason. If that is unavailable, they would seek probably to have that person registered for redeployment, and that is really where you start getting into the process. They would seek registration from the Public Sector Commission. We would expect that registration would only occur if the commission felt that the application was fair and reasonable and that the employee was genuinely surplus to that organisation. That would then be the trigger largely for the regulations that currently apply to continue to apply—that is, redeployment opportunities, preferences—you know, giving preference to job opportunities as they come up through the normal job vacancy process in government. They would be given access to counselling, retraining opportunities—all those things that are currently provided for under the regulations, and perhaps extending that to even more support. If at the end of a certain period of time, which is yet to be defined, they are unable to be found meaningful work, that is when involuntary severance would occur. The other thing that is yet to be determined is that voluntary severance is provided for currently under the redeployment and redundancy regulations, and we would not see that necessarily being removed, so that there would be the opportunity somewhere in the process for a voluntary severance—the person would probably go and take a voluntary severance—or say, "No, I want to remain employed within the public sector and seek redeployment opportunities." But, as I say, the detail of that is really at this stage conceptual, but it would be certainly phased, and there would be opportunities at every sort of decision point where a person felt aggrieved about that decision to have it referred to the Industrial Relations Commission for review.

[2.30 pm]

Hon AMBER-JADE SANDERSON: Except in the final decision.

Mr Warner: Correct.

Hon AMBER-JADE SANDERSON: And really it is accept a voluntary redundancy or redeployment with the potential for being terminated.

Mr Warner: I am sorry, I did not quite hear you.

Hon AMBER-JADE SANDERSON: So the option is accept a voluntary redundancy or redeployment but with the potential for being terminated at the end of that if we cannot find you a suitable position.

Mr Warner: That is the intent of the government's policy position: that people who are unable to find meaningful work after a period of time, as an option of last resort, will have their employment ceased.

Hon DONNA FARAGHER: In relation to that, I understand that at any point in time there are a number of officers who are on the redeployment list. Can I just seek some clarity in terms of is there an average length of time—obviously each person is different—that someone would be on the redeployment list? I suppose in asking that question, appreciating there are issues of confidentiality and the like, are you able to tell us what is the largest length of time that someone has been on redeployment?

Mr Wauchope: Madam Chair, Mr Wilding administers the current scheme and will be able to provide some information, I think.

Mr Wilding: Yes, Madam Chair. I suppose, in answering those questions in order, it is difficult with movements in and movements out of the database, but the most recent assessment we can give is there are currently 76 officers on the registered redeployment list with the Public Sector Commission at this time. In a breakdown of approximation, 36 people on that list, or 47 per cent, have been on the redeployment list for less than one year; 31 people, or 40 per cent, have been on redeployment between one and four years; and nine people, or 13 per cent, have been on redeployment for over four years. Generally, the shortest period of time that we have for someone on the redeployment list under our categorisation of our e-recruitment system is one month or less; so, that is a period of time. The longest period for a person currently on the registered redeployment list is 6.5 years.

Hon DONNA FARAGHER: Can I just clarify with respect to someone who is on the list, are they required to be at work every day, or what is the process for someone who is currently on the list?

Mr Wilding: The employment relationship between the employing authority, which in this instance is the individual agencies, and the individual is not varied. That individual does not own a line item in the management structure, but they still are required to present for work in accordance with all of the industrial instruments and obligations that go under the Public Sector Management Act and other acts, and they are required to undertake duties as provided. The employer has an obligation to provide meaningful work for that period of time, and both have a mutual obligation to attempt efforts at placement, whether that be temporary or permanent, in other agencies via the operation of the Public Sector Management (Redeployment and Redundancy) Regulations 1994. So, in effect, that person has an obligation to work and the employer has an obligation to find them meaningful work.

Hon DAVE GRILLS: If that person has for 6.5 years been on that, how do they go with holidays and things like that?

Mr Wilding: The rights and entitlements that accrue for any officer of that particular agency under that particular employment type continue to accrue. So that individual still gets four weeks annual leave and they still get the entitlement to sick leave on an accruing basis et cetera. They still are required to turn up during normal working hours and the employer finds them particular work to do that.

Hon DAVE GRILLS: Six and a half years is a long time; why is that?

Mr Wilding: There are a number of reasons, and I suppose it goes to the very heart of the reasons why these provisions are being considered. As has been previously pointed out, there are three options once a decision has been made that an employee's job is no longer required for either structural reasons, evolving technology, machinery of government, whatever, and that is that the individual is redeployed internally, the individual is offered a voluntary severance or the individual over a period of time has attempted to find employment in the rest of the sector. For whatever reason, that third period has no defined end. We cannot deregister an employee in the system. We cannot deal with that individual if at the end of the day three or four placements in agencies that may have been obtained in the best interests of that employer and the efficiency of the sector have not worked out. And, as I said, currently nine people, or 13 per cent, are there for over four years. So it is still a very small percentage, but at the end of the day there are a number of individuals who are on that registration list for a considerable period of time despite the best efforts of us and the employing authority.

Hon DAVE GRILLS: When you say a considerable period of time or a reasonable period of time, what does it say in the legislation for that? Is there any period of time, or does it physically state that?

Mr Wilding: No, it has no ending. You could be registered and be on there until you are either placed in a department or some other action under the Public Sector Management Act such as discipline, substandard performance, retirement on the grounds of ill health et cetera.

Hon AMBER-JADE SANDERSON: That goes to my question of why have you not used the options already available to you under the Public Sector Management Act, which does provide for quite broad RRR arrangements and a directive to take redeployment, and if they refuse to do that, it results in dismissal? It does seem extraordinary that we are making significant amendments to three major pieces of legislation to deal with one to five people in their sector.

Mr Wilding: These individuals have found themselves on the redeployment list for a reason, and that is that normally it is to do with evolving technology or a change in structure or indeed a skills set which no longer fits the public sector. Redeployment is an attempt to find a fit for them somewhere else in the sector, but some individuals reach a particular situation where they are no longer a fit to the sector as an entirety. That is no longer efficient and effective for the taxpayers of Western Australia, and so that is where these sorts of provisions do provide that end to date.

Hon AMBER-JADE SANDERSON: You have those provisions already in the Public Sector Management Act.

Mr Wilding: Generally speaking, a directive power is going to force a square peg into a round hole. It would create a suboptimal option when there is often a triangle where the individual does not have a particular skills set that fits a particular agency, or indeed any agencies, and in some instances a lack of will to be retrained or a lack of motivation in terms of actually working outside of an agency that they might have been in for 20 years. So it was not effective and efficient, in going back to the major tenets of the Public Sector Management Act, to force a problem from one agency onto another. Mostly, and, as I said, with those figures going down to that 13 per cent, that is resolved amicably and to the advantage of the losing organisation and the gaining organisation. Forcing an outcome is suboptimal.

Hon DONNA FARAGHER: So, what you are saying is that even if you were to move them to another agency, I understand under the current act that if they were to refuse, that is grounds for dismissal; is that correct?

Mr Wilding: Yes. We can direct —

Hon DONNA FARAGHER: So, what you are saying is that in a certain number of cases, even forcing that move is really not going to achieve —

Mr Wilding: It is shifting a problem.

Hon DONNA FARAGHER: Unfortunately, they do not have the skills set or whatever it may be for any agency.

Mr Wilding: That is absolutely the case.

Hon SALLY TALBOT: Thank you for those numbers, Mr Wilding. They are very instructive, and you may want to pass this question back to Mr Wauchope but I will carry on the conversation with you as a start off. What sort of modelling has been done about the effect of this legislation, should it pass the Parliament and be enacted, on those sorts of numbers that you were talking about? Is this effectively going to do you out of a job?

Mr Wilding: In many respects no, because registration will have a number of implications. If anything, the Public Sector Commission will be required to do more rather than less in the realm of redeployment and registrations. So at the end of the day it would be very difficult to do a model based upon changes that have yet to occur across the sector. Government enacts change across the machinery of its operations on any day of the week. We are not aware of why those decisions might be made. We cannot predict those, so it is difficult to model. But it certainly is comparable with the rest of the jurisdictions across Australia and a modern public sector that we have ability to deal with those very small numbers as a matter of last resort.

Hon SALLY TALBOT: Before Mr Wauchope comments, with the greatest of respect, any significant move that is made like this without modelling is surely just a piece of ideology. You must have some modelling that tells you how this is going to resolve the particular problems that Mr Wilding is talking about.

Mr Wauchope: Madam Chair, I certainly will not accept the characterisation of this as a piece of ideology. What it does do is it actually resets the employment relationship and it actually will require both the employer and the employee to be more proactive in managing that relationship. What we have done with the Public Sector Management Act since the changes in 2010 is to try to modernise the employment relationship from the point of recruitment through the managing of people once they are in the sector and then at the back end of that process. So certainly I see it as an enhancement to management of the public sector and, as Mr Wilding indicated, I mean it is not something out of the ordinary, as it applies elsewhere in Australia.

The CHAIR: Thank you. I will allow one last question from Amber-Jade; then the rest of the questions can be put on notice for later.

Hon AMBER-JADE SANDERSON: My question relates to the future application of the reforms. While it is stated in the submission from the commission that it will apply to a very small number of public sector employees, is there the potential, in your view, for it to be applied on a much larger scale? For example, those employees at Swan District Hospital, when that closes down, will be expecting to move to St John of God hospital, and those who do not wish to, are they likely to be registrable?

Mr Warner: It is possible, I suppose. I think the Minister for Health addressed this matter in the Legislative Assembly, so I cannot really say what is planned for those people at the hospital. But it is possible that where there is structural change and people cannot be found work, then they could be registrable and then potentially registered. I would also point out that this bill, under clause 13, allows for the first time the commissioner to revoke or suspend someone's registration. So it does allow for some protections in regard to a personal circumstance that might need to be dealt with in relation to individuals, and I think that is an improvement on the current arrangements.

The CHAIR: Thank you. Due to time constraints, I would like to thank you very much for being here over and above the time that we allocated. It has been very helpful, so thank you very much.

Mr Wauchope: Thank you, Madam Chair.

Hearing concluded at 2.42 pm