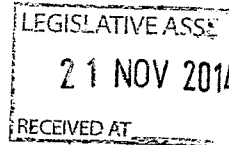




Premier of Western Australia

Our ref: 24-491982

Mr Peter McHugh
Clerk of the Legislative Assembly
Legislative Assembly
Parliament House
PERTH WA 6000



Dear Mr McHugh

PUBLIC ACCOUNTS COMMITTEE - RESPONSE TO FINAL REPORT OF THE INQUIRY INTO AMENDMENTS TO THE PUBLIC SECTOR MANAGEMENT ACT 1994

I refer to Report No. 6 of the Public Accounts Committee, the *Final Report of the Inquiry into Amendments to the Public Sector Management Act 1994*, which was tabled in the Legislative Assembly on 21 August 2014.

In accordance with Standing Order 277(1) of the Standing Orders of the Legislative Assembly, I report to the Assembly the Government's response to the recommendations of the Committee.

The Report also included a series of recommendations directed at processes overseen by the Public Sector Commissioner. I have sought the views of the Commissioner and also provide his response to those recommendations pertaining to his functions.

Yours sincerely

Colin Barnett MLA
PREMIER

Encl

21 NOV 2014

**RESPONSE TO PUBLIC ACCOUNTS COMMITTEE - FINAL REPORT OF THE
INQUIRY INTO AMENDMENTS TO THE *PUBLIC SECTOR MANAGEMENT ACT*
1994**

Recommendation 1

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner amending Approved Procedure 8 – Timing and assessment of CEO performance agreements, to ensure:

- the financial performance of the department against the budgeted appropriation is incorporated as one of the required components of a CEO performance agreement; and***
- the annual CEO performance assessment process includes formal participation of Treasury and the Public Sector Commissioner regarding the achievements of CEOs against relevant performance criteria.***

The Public Sector Commissioner (the Commissioner) supports in principle this recommendation.

Financial Performance

The 2014/2015 *CEO Performance Agreement Framework* includes a requirement for CEOs to report on 'fiscal responsibilities', which includes reporting on their respective Treasury approved resource agreements.

The Commissioner will review Approved Procedure 8 and the *CEO Performance Agreement Framework*, in consultation with the Department of Treasury, with a view to including agency financial performance as a standing component of CEO performance agreements.

Participation in Assessment

The Commissioner agrees to review Approved Procedure 8 and the *CEO Performance Agreement Framework* to ensure that the performance assessment process includes formal participation by the Commissioner and the Under Treasurer.

However, given that section 47(4) of the *Public Sector Management Act 1994* (PSM Act) states that it is the responsible authority (i.e. Board or Minister) of a CEO that is responsible for assessing the extent to which the CEO meets the performance criteria set out in his current performance agreement; this participation will be limited to the provision of advice to enable the responsible authority to assess the CEO's overall performance.

Recommendation 2

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner ensuring that the relevant minister continues to be consulted when a recommendation to remove a CEO is being considered under section 49 of the PSM Act.

The Commissioner supports this recommendation and reaffirms his previous advice¹ that he will always consult with the responsible minister and responsible authority prior to making a recommendation to the Governor to remove a CEO.²

Recommendation 3

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner amending Commissioner's Instruction No. 3: Discipline – general, or issuing a new Instruction, to ensure the procedural requirements of the Instruction apply beyond its current remit to cover disciplinary proceedings conducted under other instruments outside Part 5 of the Public Sector Management Act 1994.

Extension of the disciplinary regime under Part 5 of the PSM Act to other public sector employees is supported in principle.

Since its introduction, the application of Part 5 has been extended to broader employee categories on several occasions. In December 2000, the *School Education Act 1999* resulted in the application of Part 5 of the PSM Act to teaching and wages staff of the Education Department. In addition, section 76(1)(b) of the PSM Act makes provision for the application of Part 5 to be extended to other classes of public sector employees by way of regulation. To date, this power has been exercised on two occasions:

- in 1996 when regulation 14 of the *Public Sector Management (General) Regulations 1994* was made, which prescribed persons employed under the *Education Act 1928* in the Western Australian Department of Training, as well as academic staff and other staff employed under section 31(1)(a) of the *Colleges Act 1978* at Karratha College; and
- in August 2014 when regulation 14 was amended to extend application of Part 5 to Social Trainers employed by the Disability Services Commission.

It is also proposed to extend Part 5 to prison officers as set out in the *Custodial Legislation (Officers Discipline) Amendment Bill 2013*.

While possible to extend the application of Part 5 to other classes of public sector employees by way of regulation, any extension should have regard to any particular vocational or employment considerations applicable to the category of public sector employee.

In addition, to avoid conflict with the myriad of statutes and industrial instruments currently governing the employment of other classes of public sector employees, any extension should occur on a case-by-case basis, rather than unilaterally via Commissioner's Instruction.

¹ Submission No. 5 Public Sector Commission, 14 November 2013, p 22.

² Under constitutional convention and in accordance with s 60 *Interpretation Act 1984*, the Governor acts on the advice of the Executive Council. In practice, therefore, the Commissioner cannot act to recommend the Governor remove a CEO without the concurrence of the Premier, and at least one other Minister. The Premier co-signs an executive council minute recommendation from the Commissioner to the Governor to remove a CEO under section 49.

The *Discipline Standard* contains guiding principles regarding procedural fairness that are applicable to the entire sector.

Recommendation 4

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner amending Commissioner's Instruction No. 3: Discipline – general, to include an explicit, and binding, statement that employing authorities are required to ensure procedural fairness is applied to all parties during disciplinary proceedings.

The Commissioner strongly supports the application of procedural fairness to all parties during disciplinary proceedings.

Commissioner's Instruction No 3 reflects this, stating that,

“employing authorities must comply with the PSM Act, the rules of procedural fairness, the Discipline Standard... and this instruction”.

Whilst this statement does not strictly fall under the operative part of the instruction, it reflects the existing common law requirement that agencies must comply with the rules of procedural fairness when undertaking disciplinary proceedings.

As the requirements of procedural fairness vary according to the circumstances of a matter and are an evolving common law concept, it is not considered appropriate to amend the Instruction to include a general statement that agencies are required to ensure procedural fairness is applied. The Instruction details specific binding rules that contribute towards the satisfaction of procedural fairness, such as notice periods and opportunity to respond requirements.

In addition, in exceptional cases, agencies may have valid reasons for not affording procedural fairness. As stated in the Commission document, *A Guide to the Disciplinary Provisions contained in Part 5 of the PSM Act*,

“In rare circumstances, an employing authority may validly choose not to apply the principles of natural justice to a particular situation. Courts and tribunals considering these matters have generally only deemed such actions valid if the circumstances are considered exceptional and the public interest considerations, for example immediate public safety, override the need to afford procedural fairness”.³

Therefore, it is not considered necessary to amend Commissioner's Instruction No. 3 as recommended.

Recommendation 5

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner amending Clause 1.4 of Commissioner's Instruction No. 3: Discipline – general, to require employing authorities to provide employees with the specific details of

³ Public Sector Commission, *A Guide to Disciplinary Provisions contained in Part 5 of the PSM Act*, at 2.1.2.

allegations made, prior to commencing disciplinary proceedings under Part 5 Division 3 of the Public Sector Management Act 1994.

The Commissioner is strongly of the view that agencies must act fairly and reasonably during disciplinary processes. The Commission encourages this through the provision of advice and training to agencies.

Clause 1.4(a)(i) of *Commissioner's Instruction No: 3* requires employing authorities to provide an employee with written notice of the conduct relating to the alleged breach of discipline in sufficient detail to enable the employee to know what is alleged against him or her.

The term "sufficient detail" has been accepted and applied as an appropriate measure to meet the disclosure rules of procedural fairness by courts and disciplinary tribunals in Western Australia and in other states.⁴ In *Natural Justice and Public Sector Misconduct Investigations*⁵ Max Spry states that,

"Once a decision has been made to commence an investigation, the employee suspected of misconduct must be given notice of the allegations in **sufficient detail** to allow him, or her, to respond in a meaningful way." (emphasis added)

The word "sufficient" operates in context to import consideration of the purpose for which the detail is provided. It allows flexibility so that the degree of detail that must be provided to enable a person to respond properly can be determined in each case having regard to individual facts and circumstances and the seriousness of the matter. The use of the alternative "specific", as proposed by the Committee, may allow a lesser degree of flexibility and slow the process unnecessarily.

The Commission's *Disciplinary Investigations under Part 5 of the Public Sector Management Act 1994 – A guide for agencies* provides further guidance to agencies on this matter,

Procedural fairness dictates that the allegations should be specific enough to allow the employee to respond adequately – it is not sufficient to make broad or very general allegations. It is always preferable to give the employee specific times and dates where possible. It may also be necessary to include further clarification following an outline of the allegations, particularly where the behaviour may have been demonstrated on a number of occasions or in more than one way. Consultation with the Agency Support Division of the Public Sector Commission is advisable if you are having difficulty determining how best to phrase the allegations.

It is considered that Commissioner's Instruction No. 3 and accompanying guidelines adequately promote procedural fairness in relation to notifying employees of allegations.

⁴ Civil Service Association of Western Australia (Incorporated) v Director General, Department of Family and Children's Services [2002] WAIRComm 7213; Peter Hans Weygers -v- The Director General of the Department of Education [2012] WAIRComm 844 ; Plenty & Plenty v Seventh-Day Adventist Church Of Port Pirie [2003] SASC 68; McAleer v The University of Western Australia [2007] FCA 52

⁵ [2007] 54 Australian Institute of Administrative Law Forum 117, 119

Recommendation 6

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner amending Clause 1.9 of Commissioner's Instruction No. 3: Discipline – general, to require reasons for disciplinary decisions to be made available as a matter of course rather than at the request of the employee.

Mandating the provision of reasons in every case, even where neither the employing authority nor the employee consider reasons necessary, would be contrary to a primary purpose of the *Public Sector Reform Act 2010* to streamline and simplify disciplinary processes in the public sector.

However, Commissioner's Instruction No.3 will be amended to include a requirement for employing authorities to advise an employee of their right to request reasons for disciplinary decisions. This would ensure that all employees who have limited knowledge of disciplinary procedures are aware of this right.

If reasons were mandated, it would not be appropriate for these to be published because, unlike criminal proceedings, disciplinary matters are considered in private.

Recommendation 7

The Premier consider incorporating into the Public Sector Management Act 1994, a conflict of interest and apprehended bias provision similar to the conflict of interest provision which exists under section 50 of the Public Administration Act 2004 (Victoria).

While the incorporation of a specific conflict of interest and apprehended bias provision has some merit, existing administrative law requirements are considered to offer an adequate safeguard against conflicts of interest and bias in relation to the actions of the Commissioner.

The Commissioner is subject to the same rules to conform to natural justice requirements as any other administrative decision-maker, including acting fairly and without bias. This would require the Commissioner to decline to act if he considered that he had a conflict of interest.

In the event of a conflict of interest, section 23(1) of the Public Sector Management Act 1994 gives the Commissioner the ability to delegate the relevant power or duty. This includes any power to conduct disciplinary proceedings.

Recommendation 8

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner considering ways in which key trends identified in employee exit interviews can be utilised for compliance monitoring activities and published in summary form in the Commission's annual State of the Sector report and Statistical Bulletin.

Whilst there are concerns regarding the efficacy of data collected through employee exit interviews, the Commissioner will consider ways to collect and utilise data from exit interviews for compliance monitoring and workforce analysis purposes.

It is considered preferable for staff morale issues to be addressed prior to officers exiting the sector, therefore, the Commission is currently refocussing its employee perceptions survey on employee engagement to provide a more accurate picture of sector morale.

Recommendation 9

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner facilitating amendments to the Public Sector Management (Breaches of Public Sector Standards) Regulations 2005 to enable all parties the right to representation during a Breach of Standard Claim process.

The Commissioner supports the right of all parties to a breach proceeding to be adequately supported in order to facilitate the process. Where necessary, this may include the need for representation. However, it is not considered appropriate to codify a right to representation.

Breach of standards claims result in the Commission reviewing the adequacy of administrative decisions regarding matters including recruitment and grievance resolution within the public sector. The range of remedies that can be awarded mostly require an agency to recommence the relevant administrative process at the point at which the breach occurred.

As the Committee's report acknowledges, the parties to a breach of standards claim are entitled to either a support person (for the claimant) or another person to assist (for the public sector body) unless the conciliation and review officer decides the involvement of these parties would impede the proceedings. There is no right to representation unless the conciliation and review officer considers this necessary in order for the process to proceed in an effective manner.

The Commission has only had several requests from claimants to have legal representation during the review or conciliation process in the last four years. One was accepted as it was considered necessary to the process.

The proposal for a right to representation for all parties needs to be weighed against the potential time and cost implications of imposing such a right. It is considered that the existing provisions strike the right balance, having regard to the desire to ensure that breach of standards proceedings, which are administrative in nature, are conducted in a non-adversarial manner, concluded without undue delay and with a minimum of formality.

Recommendation 10

The Premier seek and report on any response from the Public Sector Commissioner regarding the possibility of the Commissioner continuing to apply the practice of openness in reporting to ensure all Special Inquiries, Reviews and Investigations (with the exception of those relating to possible public interest disclosures), are tabled in a timely manner.

The Commissioner considers that there is strong argument for tabling reports relating to special inquiries, reviews and investigations undertaken under Part 3 A of the PSM Act, where matters are of such significance as to require reporting.

However, where special inquiries and reviews are held upon the direction of the Minister, the Commissioner is required to provide the report to the Minister⁶. Decisions regarding tabling are then considered to be a matter for the Minister. Governments have a longstanding practice of tabling reports of special inquirers, in the same way that reports of Royal Commissions are tabled.

Recommendation 11

The Premier look at ways to amend the Public Sector Management Act 1994 to encourage special inquirers to make evidence public whenever possible, while requiring them to provide detailed reasons whenever they issue a direction that material remain confidential.

Legislative amendment is not considered necessary to encourage greater transparency in the conduct of special inquiries.

While the principle that hearings of an inquiry into matters of substantial public interest and controversy should be held in public is accepted, the issue of whether evidence is to be taken in public or made public at some stage should continue to be a matter to be determined by the individual special inquirer.

There have been circumstances where special inquirers have chosen to conduct all or part of their hearings in private, and to protect the evidence thereby gained from publication. The reasons for those decisions were explained in their reports. It is noted that such occurrences have been rare. This approach is consistent with that of Royal Commissions. For example, parts of *Inquiry into Obstetric and Gynaecological Services at King Edward Memorial Hospital 1990-2000*, were not tabled to protect patient confidentiality.

There is a risk that attempting to draft legislative guidance for special inquirers regarding confidentiality could have the undesirable effect of creating uncertainty surrounding an inquiry's powers and protections, and act as a disincentive for potential witnesses who seek confidentiality from coming forward with evidence.

In addition, the records of a special inquiry are already governed by the *State Records Act 2000* and are subject to the *Freedom of Information Act 1992*. These Acts provide an additional assurance that inquiry records will be retained and access to them appropriately managed.

However, in keeping with the intent of the recommendation, the letter appointing a special inquirer will now include a statement encouraging openness in evidence gathering, unless there is a public interest to the contrary.

⁶ ss 24G and 24K(2) PSM Act

Recommendation 12

The Public Accounts Committee be consulted as part of the process for the appointment of Public Sector Commissioners.

The appointment of the Public Sector Commissioner should continue to be the prerogative of the executive government.

The *Public Sector Management Act 1994* does not provide that the Commissioner is an “officer of Parliament”. This is to be contrasted with the *Auditor General Act 2006* with respect to the office of the Auditor General, and the *Corruption and Crime Commission Act 2003* with respect to the Parliamentary Inspector of the Corruption and Crime Commission.

As noted by the Committee, only the appointments of the Auditor General, CCC Commissioner and Parliamentary Inspector to the CCC involve Parliamentary committees. Other independent statutory officers are appointed at the discretion of the executive alone.

Recommendation 13

The Premier, as Minister responsible for administering the Public Sector Management Act 1994, examine means by which a framework can be established for regularly evaluating the performance of the Public Sector Commissioner where the statutory functions of the Commissioner are conducted for, or impact the operations of, the Executive branch of Government.

The recommendation is supported. In conjunction with the Commissioner, I will consider ways to formalise the current statement of intent process to ensure the Commissioner’s performance is regularly evaluated.

Recommendation 14

The Premier facilitate the establishment of a mechanism whereby the Public Sector Commissioner is subject to regular oversight through the parliamentary committee system. Ideally, this oversight should encompass functions similar to those currently prescribed to the Joint Standing Committee on the Commissioner for Children and Young People: namely, to examine the reports of, and consult with, the Commissioner.

On balance, it is considered that there is currently sufficient Parliamentary oversight of the office of the Public Sector Commissioner.

The Commissioner is already subject to regular oversight by the Parliamentary committee system. Of the 15 Parliamentary committees, the Public Sector Commissioner has given evidence to or provided advice to 6 of these over the last 2 years:

- Public Accounts Standing Committee;
- Public Administration Standing Committee;
- Estimates and Financial Operations Standing Committee;
- Legislation Standing Committee;

- Joint Standing Committee on the Commissioner for Children and Young People; and
- Education and Health Standing Committee.

The Legislative Council's Standing Committee on Public Administration terms of reference expressly cover the Public Sector Commissioner. That committee's functions are to:

- (a) inquire into and report on –
 - (i) the structure, efficiency and effectiveness of the system of public administration;
 - (ii) the extent to which the principles of procedural fairness are embodied in any practice or procedure applied in decision making;
 - (iii) the existence, adequacy, or availability, of merit and judicial review of administrative acts or decisions; and
 - (iv) any Bill or other matter relating to the foregoing functions referred by the Council; and
- (b) consult regularly with the Parliamentary Commissioner for Administrative Investigations, **the Public Sector Commissioner**, the Information Commissioner, the Inspector of Custodial Services, and any similar officer.