



SSTUWA

The State School Teachers' Union of W.A. (Inc.)

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Mr Mark Ritter SC
C/- Review Secretariat

By Email: irreviewsecretariat@dmirs.wa.gov.au

Dear Mr Ritter

RE: SSTUWA — Further Submission to the Ministerial Review of the State Industrial Relations System

Thank you for the invitation to the State School Teachers' Union of Western Australian Inc. (SSTUWA) to make a further submission to the review, following the publication of the *Ministerial Review of the State Industrial Relations System Interim Report* ('Interim Report').

We understand that it is not necessary to canvass matters that were included in our original submission. This submission provides a response to some of the matters discussed in the Interim Report that are of particular interest to the SSTUWA and our members.

Our additional submissions concern the following matters:

- the jurisdiction and powers of the WAIRC in relation to public sector employees;
- entitlement to representation by legal practitioners in all matters before the WAIRC;
- orders for costs;
- the contractual benefits jurisdiction of the WAIRC;
- equal remuneration;
- workplace bullying; and
- access to the WAIRC in cases where employees are dismissed following a negative working with children notice.

The jurisdiction and powers of the WAIRC in relation to public sector employees

SSTUWA supports the position taken in relation to the abolition of the various public-sector specific constituent authorities.¹ The existing system is complex and sometimes confusing, and it is not clear to us what benefit it provides that the WAIRC in its general jurisdiction could not.

¹ *Interim Report*, 231 [634].

SSTUWA strongly supports the removal of limitations on the jurisdiction of the WAIRC that prevent public sector workers from accessing the WAIRC to the same extent as private sector workers.

We do not accept the argument that the public sector is better served by some powers being retained by the Public Sector Commission. For reasons that have been extensively canvassed in other submissions, SSTUWA believes that the system of appeal to the Public Sector Commission in relation to a breach of public sector standards is largely ineffective in achieving just outcomes for workers. In our experience, a worker generally cannot obtain an enforceable order that will remedy the harm done to them, even when the employer has been found to have clearly breached a standard.

SSTUWA acknowledges the role of the Public Sector Commissioner in developing Public Sector Standards and would not object to the WAIRC's jurisdiction in public sector matters being expressed in a way that does not disturb the Public Sector Commissioner's authority in this respect.

We cannot see any real difficulty with a system where the WAIRC determines disputes in relation to the application of Public Sector Standards. We believe this is conceptually and practically a better system than the present one, where the Public Sector Commissioner is engaged in both the development of guidelines and their enforcement, with severely restricted and, we would say, ineffective enforcement mechanisms.

SSTUWA does not believe that floodgates will open if the WAIRC is given jurisdiction in relation to industrial matters that arise from disputes around the application of Public Sector Standards. We are confident that the WAIRC is readily able to distinguish arguments about genuine industrial disputes from 'non-industrial' contests about, for example, the relative merits of individuals involved in an otherwise sound selection process.

Entitlement to representation by legal practitioners in all matters before the WAIRC

SSTUWA does not support expanding the entitlement to representation by legal practitioners.²

SSTUWA does not object to representation by legal practitioners as a matter of principle. However, we are concerned that as a matter of practicality, the involvement of legal practitioners adds to the cost of proceedings.

In cases where one party is represented by a legal practitioner and the other is not able to afford the cost of legal representation, there can be reasonable grounds to be concerned about the issue of fairness between the parties.

² *Interim Report*, 142–145.

SSTUWA believes that the existing provisions in relation to representation by lawyers in matters before the WAIRC appear to strike a reasonable balance between the issues of cost and fairness between the parties, while allowing legal representation in cases involving questions of law, by agreement between the parties and/or in relation to alleged unfair dismissal, contractual benefits claims and long service leave matters.

Orders for costs

SSTUWA does not support changes to the no costs nature of the WAIRC that are discussed in the Interim Report.³

Many potential applicants, particularly self-represented workers, have limited savings and could face financial devastation in the event of an adverse costs judgement.

We are concerned that the fear of an adverse costs judgement would deter people with good claims from making applications to the WAIRC. While the probability of an adverse judgement may be quite low in such cases, the devastating impact of an adverse judgement on a person of modest means is such that a rational person may decide not to take the risk.

While appreciating the concern in relation to vexatious claims, we do not believe that the issue is of such magnitude that it outweighs the policy problem that is created when persons of modest means but with good claims are deterred from seeking a just determination of those claims.

The contractual benefits jurisdiction of the WAIRC

SSTUWA has reservations about the proposed changes to the contractual benefits jurisdiction of the WAIRC that are canvassed in the Interim Report.⁴

Traditionally, the WAIRC's Commissioners have come from a range of different backgrounds, and the ability of a Commissioner to understand industrial realities has been at least as important as possessing legal qualifications or experience as a practising lawyer. We believe that a diversity of backgrounds among Commissioners has been beneficial to the workings of the WAIRC.

If it is considered necessary to depart from the existing approach for the reasons set out in the Interim Report, SSTUWA considers that it is vastly preferable to adopt the approach of retaining the contractual benefits jurisdiction within the WAIRC, rather than moving it to the Industrial Magistrates Court. We would be concerned that moving the jurisdiction to a court could result in increased complexity and cost of proceedings and would be a barrier to seeking justice for many workers.

³ *Interim Report*, 145–147.

⁴ *Interim Report*, 122–126.

Equal remuneration

SSTUWA supports the inclusion of an equal remuneration provision in the IR Act for the following reasons, which we believe are consistent with the observations of the Interim Report⁵:

- the gender pay gap in Western Australia is significantly higher than the national average and there are good reasons to think that the 'real' gap has been understated in recent years due to a disproportionate decline in wage growth in sectors where males are more likely to work (e.g. mining)
- to the extent that there is any mechanism to address the issue within the current State industrial relations system, this has not been able to be effectively used
- inclusion of an equal remuneration provision within the IR Act would be consistent with public policy objectives to reduce inequities in the labour market.

Workplace bullying

SSTUWA supports the WAIRC having an anti-bullying jurisdiction similar to that of the Fair Work Commission (FWC). We agree with the view expressed in the Interim Report that a recommendation along these lines would be within Term of Reference 2.⁶

We note that the termination of the employment of a person who has brought a claim under the FWC's anti-bullying jurisdiction will generally mean that the FWC can no longer deal with the matter. This is because the FWC is only empowered to make orders where there is a risk of bullying continuing.⁷

SSTUWA believes there are cases where it would be inappropriate to constrain the powers of the WAIRC in the way that the FWC's powers appear to be constrained. For instance:

- If it is established that there has been bullying of a worker who has since left the organisation, there could still be a reasonable concern that there are circumstances in the work place that will continue to present a risk to current or future workers.
- It is possible to envisage cases where a worker who has been subjected to bullying may have a reasonable belief that the bullying may continue despite them leaving the workplace. This is particularly so given the prevalence of social media.
- There may be occasions where a worker who has been subjected to bullying, and who leaves the workplace, may reasonably look to the WAIRC to order the employer to take suitable steps to remedy the situation. For example, a worker may seek an order that the employer publicly withdraws derogatory statements made against the worker by the person or persons who engaged in bullying

⁵ *Interim Report*, 243 [638].

⁶ *Interim Report*, 230 [630].

⁷ See, for instance, *Lin v Woolworths Limited Pty Ltd* [2017] FWCFB 3879 (28 July 2018), [20].

towards them. In other cases, it may be appropriate to make orders for reasonable health care expenses when these expenses cannot be recovered through the workers compensation system.

For these reasons, SSTUWA believes that if powers to deal with workplace bullying are provided to the WAIRC, these powers should be extensive enough to deal with the ongoing risk of bullying to others in the event the worker being bullied has left the workplace, and to effectively remedy any harm done, as far as is reasonably practicable.

Access to the WAIRC in cases where employees are dismissed following a negative working with children notice

SSTUWA welcomes the acknowledgement provided in relation to this issue in the Interim Report⁸.

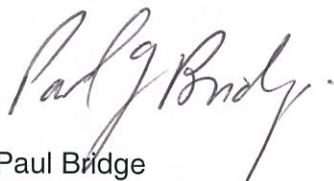
While the number of such cases is small, the effect on individuals is devastating.

As we outlined in our initial submission, there are effective alternatives to dismissal that maintain the integrity of the child protection policy objective, while avoiding grave injustices to individuals who are not guilty of any crime.

We appreciate the complexity of the issue, and we hope that the information provided by the Education Department and enforcement authorities will assist in formulating a position on the matter. SSTUWA is very happy to continue to engage with the relevant stakeholders in an attempt to reach a decent resolution of this very complex issue.

Thank you for the opportunity to make this further submission.

Yours sincerely



Paul Bridge
Senior Vice President, SSTUWA

⁸ Interim Report, 228–229.