Government of **Western Australia**
Department of **Health**
Office of the Director General

Mr Mark Ritter SC
C/o Department of Mines, Industry Regulation and Safety
Labour Relations
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By email: irreviewsecretariat@dmirs.wa.gov.au

Dear Mr Ritter

MINISTERIAL REVIEW OF THE STATE INDUSTRIAL RELATIONS SYSTEM

I refer to correspondence received from the Hon. Bill Johnston MLA dated 3 October 2017 in relation to the Ministerial Review of the State Industrial Relations System which you are undertaking.

The Department of Health (**Department**) has considered the Terms of Reference and consulted with health service providers. The Department provides the following written submission on behalf of the WA health system. The Department also seeks consideration in relation to additional aspects of the State industrial relations system not covered by the Terms of Reference.

Jurisdiction of the Public Service Appeal Board and Public Service Arbitrator

In order to achieve a more streamlined and efficient structure within the Western Australian Industrial Relations Commission (**WAIRC**), consideration should be given to abolishing the jurisdiction of the Public Service Appeal Board (**PSAB**) and Public Service Arbitrator (**PSA**).

The PSAB is constituted by a Chairperson (the PSA), an employee nominated representative and an employer nominated representative. The Department does not see the need for three persons to preside over a matter and this requirement is onerous on all parties concerned, inefficient and time consuming. It is evident that the three person PSAB does not promote fairness or guarantee impartiality when the two nominated representatives, in all matters that the Department is aware of, agree with the Chairperson's decision. A single Commissioner is capable of hearing all matters that are subject the PSAB and would be far more effective and efficient in doing so.

The current structure also creates inconsistency with how matters are being heard for public service wages employees and government officers. The jurisdiction of the PSAB does not currently include all public sector employees. For instance, in the WA health system, some occupational groups have industrial matters heard by a single Commissioner whereas other occupational groups can only have matters heard exclusively by the PSAB.

At present, there are occupational groups in the WA health system which have matters heard under the general jurisdiction by a single Commissioner and others have matters heard exclusively by the PSAB. Abolishing the PSAB would ensure consistency in relation to how matters are heard by the WAIRC across the WA health system and the broader public sector.

The Department's preference is that the PSA and PSAB jurisdiction is absorbed by the general jurisdiction of the WAIRC and is performed by a single Commissioner as provided under section 23 of the *Industrial Relations Act 1979* (WA) (**IR Act**). All matters that are subject to the PSAB should be appealable to the Full Bench in the first instance. Currently, decisions of the PSAB are beyond appeal which is problematic when the PSAB is not hearing decisions that are subject to an appeal in its true meaning. An appeal is an application to a higher court or tribunal to reconsider the decision of a lower court or tribunal. The PSAB only reviews decisions of an employing authority, not a lower court or tribunal. The PSAB decisions should be subject to appeal; the same as the decisions of a PSA or a single Commissioner.

Industrial Action and Associated Deterrents

Consideration should be given to strengthening the provisions of the IR Act in relation to industrial action. The current provisions of the IR Act are inadequate in deterring industrial action which has the potential to harm an employing authority economically, or poses a risk to the safety and welfare of the community.

Industrial action has the potential to impact on the health outcomes of the Western Australian community. As an example, in July 2015, a union advised WA health system employers that their members would commence work bans effective immediately. Work bans included not removing dirty linen, not removing rubbish bags and not removing dirty meal trays from patients. The work bans posed an infection control and hygiene risk to patients, as well as a financial cost when agency staff were enagaged at short notice.

The Department proposes that definitions are included in the IR Act for protected and unprotected industrial action and submits clear processes should be established for industrial organisations to apply for protected industrial action. The Department envisages this being similar to provisions of the *Fair Work Act 2009* (Cth) or the *Industrial Relations Act 2016* (Qld). Key elements of the process to apply for protected industrial action should include:

- industrial action only being taken by a party to an industrial agreement once the expiry date of the industrial agreement has passed;
- industrial action only being taken once an application has been made and approved by the WAIRC;
- three working days written notice being provided to the other negotiating party/ies before taking industrial action; and
- the written notice specifying the date of the intended industrial action and what the action is.

Review of penalty provisions in the *Industrial Relations Act 1979* (WA)

In order to provide effective deterrents to non-compliance with State industrial laws and instruments, consideration should be given to reviewing the penalties available at subsection 84A(5) of the IR Act to the Full Bench in relation to the contraventions as provided at subsection 84A.

At present, the Full Bench may issue a penalty not exceeding $2,000 in the case of an employer, organisation or association and $500 in any other case. This deterrent is insufficient and ineffective.

In *The Minister for Health Incorporated as the Board of Hospitals Formerly Comprised in the Metropolitan Health Service Board and Incorporated as the Board of the WA Country Health Service under s7 of the Hospitals and Health Services Act 1927 (WA) v The Australian Nursing Federation, Industrial Union of Workers Perth*[1] the WAIRC issued an Order for the ANF by its officers and employees to lift all bans in place, in particular bed closures, and to take no further action. The Order was disregarded and industrial action continued. The WAIRC noted in a subsequent Order[2] that 'closing beds' continued to have a deleterious and serious impact on the public health system and patients, and that it was not in the public interest for the action to continue.

A review of comparable interstate jurisdictions[3] has found there are significantly higher penalties available in relation to contraventions. The Department recommends updating subsection 84A(5) of the IR Act to provide appropriate penalties for employers, organisations, associations, and in any other case. These amounts should be no less than up to $10,000 in the case of an employer, organisation or association and no less than up to $3,000 in any other case.

In addition to an increase to the penalties contained in section 84A(5) of the IR Act, consideration should be given to implementing penalty units rather than dollar amounts to allow for amendment to the penalty unit. This would ensure the dollar amount of a pecuniary penalty remains contemporary without requiring amendment to the IR Act.

Industrial Agreement provisions in the *Industrial Relations Act 1979* (WA)

To ensure efficiency, the Department seeks to insert a new provision into section 42 of the IR Act to provide a timeframe for the registration of industrial agreements filed for registration in the WAIRC.

There are existing provisions within section 42 of the Act that provide timeframes for bargaining, for example subclause 42(5) provides for when a party may initiate bargaining under section 41(1) and 42A provides a party who has been

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[1] 2013 WAIRC 00089.

[2] *The Minister for Health Incorporated as the Board of Hospitals Formerly Comprised in the Metropolitan Health Service Board and Incorporated as the Board of the WA Country Health Service under s7 of the Hospitals and Health Services Act 1927 (WA) v The Australian Nursing Federation, Industrial Union of Workers Perth* (2013 WAIRC 00100).

[3] New South Wales, South Australia, and Queensland.

provided with notice to initiate bargaining pursuant to subclause 42(1) with 21 days to respond if they wish to enter into negotiations for an industrial agreement.

The New South Wales *Industrial Relations Act 1996* (NSW)[4] provides a timeframe for the registration of enterprise agreements. The Department recommends the IR Act be amended to include a timeframe of 21 days to subsection 41(2) as follows:

> Subject to subsection (3) and sections 41A and 49N, where the parties to an agreement referred to in subsection (1) apply to the Commission for registration of the agreement as an industrial agreement the Commission shall register the agreement as an industrial agreement within 21 days of the application.

The Department also suggests the IR Act includes parameters around permitted terms in industrial agreements. Under section 41 of the Act, the Commission can only register an agreement as an industrial agreement if it is an agreement with respect to industrial matters. Industrial agreements should include matters strictly pertaining to the employment relationship and should not include discrete matters that do not pertain to the employment relationship.

In 2012, during the bargaining for a replacement industrial agreement a union sought to include a provision in the replacement agreement to regulate parking rates at certain sites. The Department rejected the claim on the basis that an industrial agreement should only include matters pertaining to the employment relationship. Parking for WA health system employees is commonly regulated by private third party providers outside of the Department's control. There were a number of matters in dispute in relation to the replacement agreement and the parties agreed to arbitrate those matters. Arising from arbitration, the WAIRC included a provision in the agreement in relation to parking. Specifically, that parking charges to employees working at certain hospitals would be $5.50 per day.[5]

The Minister for Health and the Minister for Commerce later sought a writ of certiorari quashing the parking clause in the agreement. Arising from the application, the Supreme Court of Western Australia issued a declaration the WAIRC exceeded its jurisdiction in registering the agreement with a provision included by Order of the WAIRC under section 42G of the IR Act.[6]

The IR Act broadly defines an 'industrial matter' and includes most things connected to the employment relationship. While there are limits on what is

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[4] See Chapter 2, Part 2, Division 2, Section 34.

[5] See *The Minister for Health in his Incorporated Capacity under s7 of the Hospitals and Health Services Act 1927 (WA) as the Hospitals Formerly Comprised in the Metropolitan Health Service Board, the Peel Health Services Board, WA Country Health Service and the Western Australian Alcohol and Drug Authority) v The Australian Nursing Federation, Industrial Union of Workers Perth* (2014 WAIRC 01142).

[6] *Re Harrison, Ex parte Hames* [2015] WASC 247.

included in 'industrial matter'[7] it would be useful for the IR Act to specify what the limits are.

The Department notes the Terms of Reference seeks feedback from stakeholders as to whether consideration should be given to devising a process to update state awards for private sector employers and employees, with the objective of ensuring awards are written in plain English and are user friendly for both employers and employees. The Department is supportive for the scope of this Term of Reference to be applied to public sector awards, should it be considered.

Legal Representation before the Western Australian Industrial Relations Commission

The Department submits section 31 of the IR Act should be amended as it limits the ability for a party to be represented by a legal practitioner.

At present, the IR Act only allows for a legal practitioner to appear and be heard in proceedings before the WAIRC in accordance with section 31(1)(c) or where a question of law is raised or argued, or is likely to be raised or argued as per section 31(4).

The WAIRC has determined that an employee of an organisation who is a legal practitioner is unable to appear.[8] This was problematic in proceedings related to the negotiation of a WA health system industrial agreement in 2016. The union party to the agreement objected to the A/Director of Health Industrial Relations Service from participating in assisted bargaining in the WAIRC pursuant to section 42E of the IR Act. The union's objection was on the basis that, at the time, the incumbent of the position was a legal practitioner which provided for inequitable representation between the parties for the purposes of bargaining. The objection was supported by the WAIRC.

Under section 20 of the *Health Services Act 2016* (WA), the Department Chief Executive Officer (**CEO**) has a number of specified functions including the negotiation of health system-wide industrial agreements. The Director's position had the delegated authority to act on behalf of the Department CEO and to lead negotiations for replacement industrial agreements. To disallow an employee of an organisation with the delegated authority to make decisions to participate in assisted bargaining simply because the incumbent is a legal practitioner is inefficient and cumbersome.

I trust this submission assists with the review of the State industrial relations system. If you would like further information or clarification in relation to the Department's submission, please contact Ms Kelly Worlock, A/Executive

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[7] Ibid.

[8] *The Health Services Unionof Western Australia (Union of Workers) v Director general of Health as Delegate of the Minister for Health in his Incorporated Capacity under section 7 of the Hospitals and Health Services Act 1927 for the Hospitals formerly comprising the Metropolitan Health Services Board* (2009 WAIRC 00447).

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Yours sincerely

Dr DJ Russell-Weisz
DIRECTOR GENERAL

23 November 2017