

Schedule A – Department of Justice response to the Terms of Reference for the Ministerial Review of the State industrial relations system

1. Review the structure of the Western Australian Industrial Relations Commission with the objective of achieving a more streamlined and efficient structure.

Comment

The Public Service Arbitrator is a constituent authority under the Industrial Relations Act 1979 (IR Act) and has an exclusive jurisdiction to enquire into and deal with any industrial matter relating to a State government officer, a group of government officers or government officers generally.¹

In December 2014, both the *Prisons Act 1981* and the *Young Offenders Act 1994* were amended to enable the application of Part 5 – *Substandard performance and disciplinary matters* provisions of the *Public Sector Management Act 1994 (PSMA)* to apply to both prison officers and youth custodial officers.

PSMA Section 78 provides for appeals by employees against certain decisions made by the employer under Part 5 of the PSMA. Section 78 provides for different appeal rights depending on whether an employee is, or is not, a “government officer” within the meaning of section 80C of the IR Act 1979.

The WAIRC has taken the view that prison officers are not government officers within section 80C of the IR Act². Youth custodial officers are in the opinion of the State Solicitor’s Office, government officers for the purposes of Part 5 of PSMA.³

This has the effect of enabling youth custodial officers to appeal Part 5 decisions to the Public Service Appeal Board (PSAB). The PSAB is constituted by 3 members, a Commissioner (sitting as the Public Service Arbitrator) and an employer and employee representative. The employer and employee representative are nominated by the employer and relevant union respectively. A decision of the PSAB is final as there is no further appeal process. The PSAB can only adjust the decision of the employer it has no injunctive or compensatory powers. Thus it can either uphold the decision of the employer or put the employee back into the position that the employee was in at the time that disciplinary action was commenced. There is capacity to make an application for Judicial Review at the WA Supreme Court for jurisdictional error, but such applications are extremely rare.

The PSAB also takes a *De Novo* (*‘from the beginning’*) approach that determines a matter as a rehearing of all the evidence and processes rather than an examination of the employer’s processes in reaching a decision⁴. As such, it is for the PSAB to consider appeals based on the evidence before it, and it has a greater scope to substitute its view for that of the employer at first instance. In the case of dismissal for misconduct, it is for the employer to establish on the evidence that misconduct occurred. This is opposed to the test applicable in the unfair dismissal claims before the Commission, to the effect that the employer is only required to have a genuine belief, based on reasonable grounds, that the relevant misconduct took place.

Prison officers that are subject to Part 5 PSMA decisions have different appeal rights. Their appeal is to the Commission in its general jurisdiction. It is constituted by a single Commissioner. A prison officer is not subject to PSAB restrictions and has injunctive, compensatory rights and rights of appeal within the WAIRC, WA Supreme Court of Appeal and to the High Court of Australia (if sought).

¹ S80E Jurisdiction of Arbitrator

² *McGinty v Department of Corrective services* 2012 WAIRC 00054

³ Advice received from R Bathurst, Senior Assistant State Solicitor, 14 November 2016

⁴ *Harvey v Commissioner for Corrections, Department of Corrective Services* 2017 WAIRC 00728 at 15

Therefore on the same set of disciplinary actions and procedures set out in Part 5 PSMA, a prison officer may be compensated rather than reinstated and appeal the department's processes whereas youth custodial officers (and public servants) are restricted in their abilities to seek redress. It follows that employers in PSAB matters cannot be better heard in relation to the practicability of an employee being returned to work but can in the general division where alternative outcomes are available for consideration.

The two processes are also significantly different with respect to resources and efficiency. For example, in **Harvey v Commissioner for Corrections, Department for Corrective Services 2017 WAIRC 00728**, the PSAB was required to convene with 3 members (subject to the ongoing mutual availability of the three members) and was heard over a period of 21 days, each member was required to consider the evidence of 11 witnesses, examine five volumes of documents that ran to 1355 pages, plus documents tendered in evidence. By contrast a hearing that related to a prison officer in the general division of the WAIRC and was convened with a single Commissioner was heard over a period of 3 days⁵, the outcome for each case was the same, and both employees were reinstated. The single Commissioner process was more efficient and timely.

For the same reasons set out for the PSAB, it is recommended that the Review consider streamlining and consolidating the removal action process for the loss of confidence appeals in relation to Prison Officers and Youth Custodial Officers. The Department recommends that these appeals are heard in the general division of the WAIRC before a single Commissioner rather than, before an appeal convened before the Chief Commissioner or the Senior Commissioner and two other Commissioners. It should be noted the same process also applies to loss of confidence appeals in relation to Police Officers.

Consideration 1

The review considers:

- a) the merits of the PSAB jurisdiction in its current form; and
- b) the Public Service Arbitrator to hear and determine similar matters with jurisdiction that aligns with the Single Commissioner which provides for injunctive, compensatory rights and rights of appeal within the WAIRC and WA Supreme Court of Appeal.

2. Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission on a range of matters for which they are currently excluded.

Comment

The Public Sector Commission has the authority pursuant to the *Public Sector Management Act 1994* to establish public sector standards in human resource management, as well as administering compliance with the legislation to provide relief for a breach of the Standards.

The Standards are based on principles rather than rules. This allows public sector agencies to design human resource practices that are consistent with the relevant Standard and suit their operational requirements. The Regulations provide for:

⁵ *Mattar v Minister for Corrective Services 2017 WAIRC 00794*

- a person to lodge a breach of Standard claim if they believe a Standard has been breached and they have been adversely affected by that breach;
- the impartial handling of the claim, resolution where possible and, where resolution does not occur, an independent determination by the Commissioner on whether there has been a breach of a Standard; and
- the Commissioner to recommend, and in some circumstances direct, what relief, if any, is to be provided when a breach of a Standard is determined.

The purpose of this process is to vest the jurisdiction with the Public Sector Commission rather than the WAIRC. It is not permissible for the WAIRC and the Public Service Arbitrator to deal with specific matters that are relevant subject matters of human resource Standards.⁶ However, when consideration is given to provisions in both the PSMA and IR Act, there are times when to oust the jurisdiction of the WAIRC would potentially leave an aggrieved employee without a remedy, and this may be considered unfair and as such may not have been the intention of the Parliament.⁷

Consideration of a breach claim by both an agency and Public Sector Commission is not without its restrictions. For example, the Employment Standard on its ordinary and natural meaning is a legislative instrument, directing public sector bodies that where they need to fill a vacancy in their organisation, they are obliged to do so in the manner set out in the Employment Standard. The Employment Standard does not apply to a transfer proposed by an employer that is unrelated to filling a vacancy.⁸

It is therefore the case that whilst departmental processes may be reviewable by a breach of Standard procedure and within the exclusive jurisdiction of the PSC, the subject matter may be scrutinised by and a remedy sought in the WAIRC⁹.

In the public sector there is no HR Standard on bullying. Bullying is likely to be dealt with through internal grievance procedures and this often gives rise to allegations of bias and conflicts and less than satisfactory results.

Consideration 2

The review considers:

- a) the jurisdiction of both the Public Sector Commission and WAIRC with respect to the HR Standards, with a view to establishing one body that has the authority to deal with both the subject matter and procedural issues that arise from a breach of a HR Standard; and
- b) the jurisdictional power for the WAIRC to deal with workplace bullying in the same legislative framework as the Fair Work Commission.

3. Consider the inclusion of an equal remuneration provision in the Industrial Relations Act 1979 with the objective of facilitating the conduct of equal remuneration cases and other initiatives in the Western Australian Industrial Relations Commission.

Consideration 3

The Department of Justice supports a Western Australian industrial relations system that delivers fair and equitable outcomes for all employers and employees that are covered by the *Industrial Relations Act 1979*.

⁶ Section 23(2a) and Section 80E(7) Industrial Relations Act 1979

⁷ WA Prison officers' Union of Workers v The Minister for Corrective Services 2014 WAIRC 00313 at 30

⁸ WA Prison officers' Union of Workers v The Minister for Corrective Services 2014 WAIRC 00313 at 43

⁹ HR Standards on Employment, Performance Management, Grievance Resolution, Termination and Discipline

4. ***Review the definition of "employee" in the Industrial Relations Act 1979 and the Minimum Conditions of Employment Act 1993 with the objective of ensuring comprehensive coverage for all employees.***

Consideration 4

The Department of Justice supports a definition of "employee" that ensures that all employees of the department are treated equally and fairly.

5. ***Review the minimum conditions of employment in the Minimum Conditions of Employment Act 1993, the Long Service Leave Act 1958 and the Termination, change and Redundancy General Order of the Western Australian Industrial Relations Commission to consider whether:***
 - a. *The minimum conditions should be updated; and*
 - b. *There should be a process for statutory minimum conditions to be periodically updated by the Western Australian Industrial Relations Commission, without the need for legislative change.*

Comment

The WA Supreme Court of Appeal¹⁰ recently decided on the question whether employees had an entitlement under both an industrial agreement and *the Long Service Leave Act 1958 (WA)* or whether one or the other applies. The Court of Appeal held that the two schemes do not operate in tandem. The Review may wish to consider amendment to the Long Service Leave Act to ensure that the findings of the Court of Appeal are captured for clarity in the legislation.

Consideration 5

The review considers:

- a) the inconsistency across industrial agreements and legislation on eligibility of employees to access pro rata long service leave; and
 - b) amendment to the legislation and/or industrial agreements for a uniform approach as to both length of service eligibility for accessing pro rata long service leave and the circumstances in which it can be accessed.
6. ***Devise a process for the updating of State awards for private sector employers and employees, with the objectives of:***
 - a. *Ensuring the scope of awards provide comprehensive coverage to employees;*
 - b. *Ensuring awards reflect contemporary workplaces and industry, without reducing existing employee entitlements;*
 - c. *Ensuring awards are written in plain English and are user friendly for both employers and employees; and*
 - d. *Ensuring that any award updating process is driven by the Western Australian Industrial Relations Commission, with appropriate input from the award parties other relevant stakeholders.*

Consideration 6

The Department of Justice supports a Western Australian industrial relations system that delivers fair and equitable outcomes for all employers and employees that are covered by the *Industrial Relations Act 1979*.

¹⁰ Public Transport Authority of WA v Yoon [2017]WASCA 25

7. **Review statutory compliance and enforcement mechanisms with the objectives of:**
 - a. **Ensuring that employees are paid their correct entitlements;**
 - b. **Providing effective deterrents to non-compliance with all State industrial laws and instruments; and**
 - c. **Updating industrial inspectors' powers and tools of enforcement to ensure they are able to effectively perform their statutory functions.**

Consideration 7

The Department of Justice supports a Western Australian industrial relations system that delivers fair and equitable outcomes for all employers and employees that are covered by the *Industrial Relations Act 1979*.

8. **Consider whether local government employers and employees in Western Australia should be regulated by the State industrial relations system, and if so, how that outcome could be best achieved.**

Consideration 8

The Department of Justice supports a Western Australian industrial relations system that delivers fair and equitable outcomes for all employers and employees that are covered by the *Industrial Relations Act 1979*.