

OCPE SUBMISSION

REVIEW OF THE *PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT ACT* AND SUBORDINATE LEGISLATION

Purpose

This submission represents the Office of the Commissioner for Public Employment's (OCPE) response to the Northern Territory Government's invitation to contribute to the review of the *Public Sector Employment and Management Act* and subordinate legislation. The review is being undertaken to determine if the legislation remains contemporary and relevant to allow the public sector to be efficiently and effectively managed to meet the changing needs of government and the community.

Submission

The information contained in this submission takes into account the Office's experiences in administering the Act over the past 15 years, our understanding of public employment Acts in other jurisdictions and the views of OCPE employees. In providing the response, the Office considered the:

1. collective framework of the Act and subordinate legislation;
2. philosophy and principles underlying the Act;
3. review of the *Public Sector Employment and Management Act* (the Act);
4. subordinate legislation including:
 - Regulations,
 - By-laws,
 - Employment Instructions,
 - Determinations,
 - Public Sector Instruments,
 - the continued relevance of, and requirement for, various related legislation such as the *Public Sector Employment and Management (Transition and Savings) Act* and the *Public Sector Employment (Interim Arrangements) Act*, and
5. possible impact of federal legislation, current and proposed, on provisions of the Act and subordinate legislation.

1. *Collective framework of the public sector employment legislation*

The PSEM legislation consists of the Act, Regulations, By-laws, Employment Instructions, Determinations and Public Sector Instruments. The Act defines the powers, functions and responsibilities for dealing with employment matters. The regulations deal with machinery matters, by-laws outline general conditions of service, and Employment Instructions are the mechanism which governs the relationship between Commissioner and Chief Executive Officers (CEOs), reflecting the overall framework approach. The Commissioner can issue determinations providing additional conditions of employment for individuals or groups of employees as required. Public Sector Instruments are used by the Commissioner to devolve functions/powers to the CEOs to enable expediency in employment matters. Most of the Instruments are currently related to the delegation of powers in relation to recruitment processes.

Overlaying the extant NTPS employment legislative framework are the (currently) *Workplace Relations Act*, workplace collective agreements and Prison Officers', Senior

Prison Officers' and Police Arbitral Tribunal Determinations. Finally, in recognition that the legislation is principle based, agencies have the ability to develop their own policies and procedures to address agency-specific issues. Although the framework appears quite complex, the Act and subordinate legislation do allow agencies to readily adapt their procedures and respond to change. In reviewing the legislation, OCPE has considered the need to ensure the Principles underpin all aspects of the employment relationship, the basic processes minimise delay, and the By-laws and Determinations are consistent.

2. *Philosophy and principles underlying the Act*

The philosophy underlying the introduction of the *Public Sector Employment and Management Act* in 1993 was the requirement for the legislation to reflect the need for the public service to meet the changing expectations of the government and the public it served. The intent was to provide flexibility, simplicity, accountability and responsibility, and allow for a broad, principles-based approach to employment and employment related issues, replacing the rigid and prescriptive 'one size fits all' approach that previously existed.

It enabled the development of policies and procedures to address the varying needs of agencies; provided simplicity in terms of application of the legislation, clearly defined employment related functions and roles of the Ministers, Commissioner for Public Employment and Chief Executive Officers; as well as accountability by the requirement to report the extent of observance and adherence to the employment principles prescribed in the Regulations; and finally outlined employee obligations, rights and entitlements.

In line with the strong view that the OCPE functions should be confined to broad policy and strategy, not detailed operational matters, the Commissioner remained the statutory employer responsible for determining terms and conditions of employment for public sector employees. Responsibility and accountability for the operational authority and management of agencies were largely devolved to CEOs. Those matters that have not been delegated are predominantly those that cannot legally be delegated, or have service wide implications. In that respect the Act recognised the need for agencies to deal with issues in different ways, while the needs of government as a whole and the need for sector-wide policies and principles (eg. merit) were still taken into account.

It is this Office's view that the philosophy and underlying principles considered relevant when the Act and subordinate legislation were first introduced retain their relevancy for the present and foreseeable future. Overall, the Act and subordinate legislation continue to allow agencies to address employment related issues in a flexible manner and specific to agency needs, however, there is scope to reinforce the principles and to provide further operational flexibility. The roles and functions of the Minister, Commissioner and CEOs outlined in the Act are sufficiently defined but broad enough to reflect contemporary needs, and the reporting requirements continue to ensure accountability and allow public scrutiny of employment practices within the public sector.

OCPE supports continuation of the role of the Commissioner as the statutory employer for the Northern Territory Public Sector, which was re-endorsed in 2002 after a review of the role of the Office of the Commissioner for Public Employment. Although this role is unique to the Northern Territory, it recognises the relatively small size of the NT public sector in comparison to other jurisdictions; allows the government to contain costs; ensures sufficient consistency of employment conditions across the Northern Territory whilst enabling

particular terms and conditions to be determined by the Commissioner to address issues such as skills shortages and remote incentives. The 'central employer' model also reflects the ability to be a career public sector through enhanced, seamless employee mobility between agencies as required.

In stating this view, the OCPE recognises some CEOs may recommend that the Commissioner devolve more powers to allow them to determine remuneration and conditions of employment for individuals within their agencies. It is the strong view of this Office that as most occupations/designations exist in more than one agency, there is benefit in common terms and conditions to support mobility and equity, and matters relating to the wages policy and salary matters, including recruitment, retention, reward and recognition incentives, being retained by the Commissioner.

3. *Review of the Public Sector Employment and Management Act.*

OCPE undertook a comprehensive review of each section of the Act in the context of its part in, and the overall scheme of the Act. Specific comments and recommendations are contained in Attachment A.

It is the view of the OCPE that the majority of the Act's provisions continue to be contemporary and current, providing the CPE and CEOs with the requisite powers and functions to deal with employment matters at both the strategic and administrative level with an appropriate level of expediency. In summary, the major changes recommended as part of this submission are:

- the Act should contain only major matters of principle, with procedural matters detailed in the subordinate legislation such as the Regulations and Employment Instructions;
- the Principles of Public Administration and Management, Principles of Human Resource Management and Principles of Conduct should be relocated from the Regulations to the Act. The principles underpin and clarify the objectives of the employment legislation, moving them into the Act will accentuate their importance and is consistent with legislative models in other jurisdictions;
- streamlining of discipline and inability provisions for consistency and clarification to ensure ease of application, this includes removal of procedural matters in relation to discipline and inability provisions to subordinate legislation and clarification of the application of natural justice in both provisions;
- limiting Disciplinary Appeal Boards to hear the more serious matters pertaining to reduction of salary, suspension without remuneration, demotion or termination. Other less serious discipline penalties can be dealt with under the grievance provisions;
- provide discretion to the Disciplinary Appeal Board not to hear disciplinary actions being dealt with in other jurisdictions such as the courts or Anti-Discrimination Commission;
- amending the medical incapacity provisions to allow termination due to frustration of contract for employees on extended (12 or 18 months or more) sick leave;
- Promotion Appeal Boards function should be to review the decision of selection panels to assess whether selections are consistent with the merit principle, after which the appeal board may disallow the appeal or direct re-advertising or reconsideration of the selection; and
- removal of repealed sections from the Act.

4. Subordinate legislation including Regulations, By-laws, Employment Instructions, Determinations, Public Sector Instruments, and the continued relevance of and requirement for various related legislation such as the Public Sector Employment and Management (Transition and Savings) Act, the Public Sector Employment (Interim Arrangements) Act

OCPE undertook a review of the subordinate legislation and specific comments and recommendations are contained in Attachment B. In summary, the OCPE recommends:

- the regulations require amendment to include various matters of process removed from the Act;
- amending the By-laws to ensure consistency with provisions of the *Workplace Relations Act* and in particular the National Employment Standards. Retaining the conditions in the By-laws will remove the need for negotiations of workplace agreements having to contain matters already contained elsewhere;
- amending the Employment Instructions to include matters of process removed from the Act and as a result of amending the Act;
- reviewing the Determinations to ensure consistency and relevancy in line with the legislation;
- seeking legal advice regarding the requirement to maintain the *Public Sector Employment and Management (Transition and Savings) Act*, the *Public Sector Employment (Interim Arrangements) Act*, and the Public Sector (Exemption) Regulations.

5. Possible impact of current and proposed federal legislation on the provisions of the Act and subordinate legislation

One consideration in reviewing the provisions of the Act was the possibility of restricting appeals regarding terminations (both discipline and inability) to Fair Work Australia. However, the OCPE considered it more appropriate to retain the current disciplinary and inability appeal board provisions, with some restrictions to the matters which could be referred for hearing.

Summary

It is the view of the OCPE that the Act and subordinate legislation continue to meet the needs of the NTPS and reflect contemporary HR practice. The legislation allows the determination of flexible, competitive and equitable employment conditions and a framework that facilitates individual agencies to develop specific policies and practices to meet their business needs. General conditions of service are simple to administer and competitive in providing flexibility and reduce administrative tasks. Mobility within the NT public sector is ensured and recruitment is undertaken in accordance with the principle of merit.

It is the view of this Office, that while changes are required to be made to the Act and subordinate legislation, the 'overhaul' needed is relatively limited. There is scope, however, to reinforce the principles and to provide further operational flexibility by moving the Principles from the Regulations to the Act, and removing detailed process matters from the Act to the Regulations and Employment Instructions.