PSEMA Steering Group
OCPE
Via Email Only

Greg Macdonald
Employee

Dear Members,

REVIEW OF THE *PUBLIC SECTOR EMPLOYMENT MANAGEMENT ACT*

I submit the following for the Committee's consideration. They are my personal views in response to the Minister's invitation of 4 December 2008 and do not represent the views of the Department of Justice.

BACKGROUND

1. On perusing the *Public Sector Employment Management Act* (PSEMA) the reader obtains the impression of a well drafted and commonsense piece of legislation. That is not to say the PSEMA cannot be improved. However, the Committee should be cautious of implementing change solely on the basis of concerns raised by particular stakeholders. I consider it is crucial that, in reviewing the PSEMA, the Committee apply the test of; 'What constitutes sound policy and principle?', then works from those positions to improve the PSEMA.

2. No doubt a review of what public sector legislative schemes currently exist in other jurisdictions will assist. However, due to both the relative smallness of the NTPS and the fact that some aspects of 'innovation' in other jurisdictions have had adverse consequences for the independence and professionalism of the public sector, provisions implemented elsewhere should be scrutinised from the 'policy and principle' perspective referred to above.

3. Academics are often criticised for being irrelevant. However, Professor Patrick Weller of Griffith University has 30 years experience in State and Commonwealth government administration and the relationship between the public sector and elected governments. Professor Dean Jaensch of Flinders University would also have some views, as a commentator on the Territory. I'm sure they would be willing to speak to the Committee if it wished.

4. It is also respectfully submitted that the Committee should be conscious that the current provisions of the PSEMA have generated a significant body of corporate knowledge. Any wholesale re-drafting of the PSEMA will reduce that knowledge, and probably result in a piece of legislation much more difficult to follow and apply than the PSEMA.

5. Conversely, the Employment Instructions can be easily modified, as they should be from time to time. Some of the current Employment Instructions are very good. For example, Employment Instruction 3 concerning natural justice (aka procedural fairness) is very well written and clear in its application. Without the reference of Employment Instruction 3 the frequency and level of errors in decisions and actions taken under the PSEMA would be much greater. However, other Employment Instructions would benefit from simplification and clarification. What should not be done is to reduce the level of guidance which the Employment Instructions provide. HR practitioners are entitled to (and need) this guidance to assist certainty and consistency. The true question is; 'What should the guidance and prescription be?'

POSITIVE FEATURES OF THE PSEMA

6. The office of the Commissioner for Public Employment (CPE) as the statutory employer and central employment regulator is a positive aspect of the PSEMA. It ensures consistency, certainty and that a 'whole of government' approach is applied to employment in the public sector. Essential aspects of public sector employment are not so straightforward as a mere exchange of remuneration for labour, including in the context of the PSEMA and delegated legislation. The CPE should be retained as the central employer and regulator, with responsibility for employment policy, procedure and advice.

7. The right of employees to appeal disciplinary, inability and promotion decisions is important. Statistics and other measures may provide a reasonable indication of the utility or necessity for these rights. However, although there is currently no systemic deviance in any of these areas of employment, it is the case that from time to time incorrect decisions are made by Agencies. In addition, there are rare cases in which deviant process and/or decisions are the cause. It should also be noted that the mere existence of a right to appeal in the important areas of discipline, inability and promotion probably has a prophylactic effect in several ways.

8. In the absence of appeal rights, employees will exercise rights in the AIRC, or seek judicial review. The *Hales* and *Howkins* proceedings in the Supreme Court are recent examples of this course, which can be much more expensive and resource intensive than PSEMA appeals.

9. Although s59 grievances are less easily justified, due to their subject matter being generally of less consequence, similar arguments exist to support their retention. In addition, temporary employees (who are nowadays much more common) only have s59 as a means of a review.

10. Associated with this is that permanency should be retained as a cornerstone of public sector employment. That is not to say that some modifications to the PSEMA are not indicated. However, experience in other jurisdictions clearly indicates that abolition of permanent appointment has an adverse impact on the completeness of frank advice to government. The increasing number and involvement of Ministerial staff is a further reason to ensure protections against politicisation of the public sector and erosion of its independence.

Although the Territory experience appears to be different to that in some other jurisdictions, the principle involved is of some value.

11. Principle aside, the bureaucracy which would be created by contract employment would be cumbersome and costly. Permanent appointment also assists the NTPS claiming an 'employer of choice' status.

12. The merit principle should also be retained as a strong feature of the PSEMA, despite that recruitment and retention of skilled staff presents increasing difficulties for the NTPS. Promotion or advancement of staff without the risk of non-selection (ie without full advertising) is seen by many as desirable. However, existing employees already have the 'inside running' in the selection process, and the public sector should, in part, rely upon recruitment from other sectors to remain effective and contemporary. Where advertising of any vacancy is limited or nonexistent, it is impossible to service the merit principle because there is no 'true field' from which to select the applicant of superior merit. The tension between the merit principle and expeditious filling of vacancies or advancement needs to be recognised, and any changes to improve recruitment and retention should not be at the significant expense of the merit principle.

POSSIBLE IMPROVEMENTS

13. Despite the above comments, the PSEMA (and particularly the Employment Instructions) could no doubt be improved. I consider this could largely be achieved through simplification and clarification of some provisions (and particularly the Employment Instructions).

14. The selection/promotion procedures could be streamlined without damaging the merit principle. For example, DoJ has run generic/broad banded advertisements for a range of legal positions over the past 8 years. This presents efficiencies in the process.

15. Likewise, the disciplinary, inability and promotion appeal provisions and procedures should be examined. Again, the majority of any difficulties will be the result of the Employment Instructions (and non-legislated processes which have developed) rather than the PSEMA. Section 59 grievances should also be considered, having regard to the nature and gravity of grievances lodged over the past several years. It may be that some further disqualifications, in addition to the existing "frivolous and vexatious", are required.

16. If permanent appointment is to be retained as a primary feature of the PSEMA, it may also be necessary to consider whether the CEOs ability to terminate the employment relationship due to inadequate performance should be increased. Whether the crux of this issue lies in the 'inability' or performance management provisions, or some other approach, would need to be considered.

17. Any changes which can be made to assist and enable 'managers to manage' should also be made. For example, it is not clear whether a CEO can demote

an employee for operational, performance, disciplinary or inability reasons, and it is quite possible they cannot. Despite the dangers and dispute which such a power would involve, the Committee may conclude it would assist CEOs to better manage and result in a more effective public sector. It may be that the current CEO power to transfer also requires consideration, albeit that the current provisions appear quite clear.

18. Associated with this is that there should be a clearer and increased requirement on 'managers to manage', including having regard to efficiencies and the application and expenditure of public funds. This is particularly in relation to the designations of EO1/ECO1 and above. It is likely that most units within the NTPS are well managed, however that does not mean that some clearer focus is not possible. These matters could be addressed in the Regulations (prescribed principles), and in relevant contracts.

19. On a broader level, increased training of managers in relation to the ethics and professional responsibilities of public sector employees would be likely to assist the NTPS. However, this is not a matter for legislative measures.

20. Lastly, the prescribed principles should contain an increased express focus on the attainment of objectives and outcomes by all employees in assisting the good governance of the Territory.

If the Committee has any queries concerning the above, I would be happy to discuss.

Yours faithfully

Greg Macdonald
Employee

30 March 2009