



## Northern Territory Police Association Incorporated

31 March 2009

Our Ref: 0106/08

Commissioner for Public Employment  
GPO Box 4371  
DARWIN NT 0801

**BY EMAIL:** [ocpe@nt.gov.au](mailto:ocpe@nt.gov.au)

Dear Sir,

**RE: REVIEW OF PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT ACT AND SUBORDINATE LEGISLATION**

Thank you for your letters of 17 December 2008 and 23 February 2009 inviting our Association to make submissions to the review of the above legislation.

As you aware, this Association represents the interests of all sworn members of the Northern Territory Police Force – i.e. Police Officers, Aboriginal Community Police Officers ("ACPO") and Auxiliaries. Our comments in these submissions are in light of the impact that the *Public Sector Employment and Management Act* ("PSEMA") has on our membership through its association (if any) with the *Police Administration Act* ("the PAA") and our ability to deal with the Commissioner of Police in the areas of employment policy and industrial relations.

It is our view that the Police Force is not a department of the Northern Territory Public Service that is regulated by the PSEMA and the Commissioner for Public Employment is not the "nominal employer" of sworn members appointed under the PAA.

The relationship between a police officer and the government which they serve is a unique one and different at law to that of a typical "master and servant" relationship. It is a well-established rule of common law that members of the police force are not "employees". The rule was made plain in the case of *Attorney-General (NSW) v Perpetual Trustee Co Ltd*<sup>1</sup> in which it was stated that "there is a fundamental difference between the domestic relation of servant and master and that of the holder of a public office and the State which he is said to serve. The constable falls within the latter category. His authority is original nor delegated and is exercised at his own discretion by virtue of his office...". A full

<sup>1</sup> (1955) 92 CLR 113

discussion of the employment status of police in Australia can be found in the article "*Employment Status of the Police in Australia*"<sup>2</sup>

The Police Force was established pursuant to Part II of the PAA. Sworn members are appointed to their functions as a Constable, ACPO or Auxiliary pursuant to section 16 (constable) or section 19 (ACPO and Auxiliary) of the PAA by the Commissioner of Police and are answerable to the Commissioner of Police with regards to discipline and other "employment" issues.

The Commissioner of Police is appointed pursuant to Division 2 of Part II of the PAA and is "*charged and invested with the general control and management of the Police Force...*"<sup>3</sup>. We note that the Commissioner of Police is also invested with powers and functions of a Chief Executive Officer "*within the meaning of the Public Sector Employment and Management Act*"<sup>4</sup>, however that reference in our view relates to the Commissioner's control of the un-sworn component of the workforce employed within the broader Police, Fire and Emergency Services.

The Commissioner of Police's invested powers for the general control and management of the Police Force in our view includes the power to enter into industrial agreements with our Association regarding matters relating to the remuneration and terms and conditions of service of the members of the Police Force. Conditions and service of members of the Police Force are governed by Part III of the PAA. Whilst they may mirror conditions of service of the broader public sector in many areas, the rights and entitlements of sworn members of the Police Force are developed entirely separately from the processes provided for under the PSEMA and are determined by the *Police Arbitral Tribunal*, which is established under Division 1 of Part III of the PAA.

Until now, it has been the practice of the Commissioner of Police to cede to the Commissioner for Public Employment the negotiation of terms and conditions of service as set out in Determinations and Consent Agreements that are in existence from time to time in accordance with Divisions 1 and 2 of Part III of the PAA. Determinations and Consent Agreements have then been signed off by the Minister for Public Employment, rather than the Minister for Police.

We have found the experience of having to deal with the Commissioner for Public Employment rather than the Commissioner of Police on industrial issues to be problematic. It has been the experience of this Association that many issues that arise are peculiar to the Police Force and as such are matters that the Office of the Commissioner for Public Employment ("OCPE") can not properly appreciate or find difficult to come to terms with. It is our submission that the practice of having industrial negotiations dealt with through consultation with the OCPE rather than the Commissioner of Police causes delays in settling of negotiations on terms and conditions of service to be included in Determinations and Agreements made under the PAA.

In reviewing the application of the PSEMA to any control over industrial relations between the Commissioner of Police and this Association, we submit there is no legislative basis for

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<sup>2</sup> Joseph Carabetta, 1 Melbourne University Law Review [Vol 27 2003]

<sup>3</sup> Section 14(1) *Police Administration Act*

<sup>4</sup> Section 14(5) *ibid*

the continued involvement of the Commissioner for Public Employment in those industrial issues to which Part III of the PAA relate.

Under Part III of the PAA, the only involvement that the Commissioner for Public Employment has in the affairs of the Police Arbitral Tribunal is to recommend to the Minister a person to fill a vacancy in the office of the Minister's nominee or deputy of the Minister's nominee. "Minister" is not defined in the PAA and there is no reference in the PSEMA to the Minister for Public Employment as being the Minister responsible for entering into Consent Agreements with this Association under Division 2 of Part III of the PAA.

We draw your attention to section 18 of the *Interpretation Act* – "Definitions of government expressions" and in particular the definition of "Minister":

"Minister" means –

(a) *the minister for the time being administering the Act in which, or in respect of which, the expression is used"...*

Section 51 of the PAA states:

*"The Minister and the Police Association may, from time to time, enter into consent agreements relating to the remuneration and terms and conditions of service of members of the Police Force, other than the Commissioner, a Deputy Commissioner, an Assistant Commissioner or a member of the rank of Commander".*

In our view, it is clear that the correct interpretation of this authority is that the Minister for Police is the Minister who is authorised to enter into agreements with this Association and the Minister for Public Employment has no such authorisation.

We also note the functions of the Minister for Public Employment as provided for under Part 2 of the PSEMA respectively are as follows:

*"6. Duties of Minister*

*It is the duty of the Minister to –*

*(a) advise other ministers on policies, practices and procedures that should be applied to any aspect of human resource management in the Public Sector generally or in Agencies for which they have ministerial responsibility;*

*(b) advise other ministers on structural changes that should, in the opinion of the Minister, be made in order to improve the efficiency and effectiveness of Public Sector operations;*

*(c) cause to be carried out planning for the future management of the Public Sector;*

*(d) cause to be reviewed, on the Minister's own motion or at the request of another minister, the efficiency and effectiveness of any aspect of Public Sector operations; and*

*(e) cause to be devised programs and initiatives for management improvement in the Public Sector and recommend their implementation to other ministers.*

In our view, the duty to advise the Minister for Police on industrial matters is simply that – a duty to advise and does not include an authorization to determine matters that are essentially industrial issues between the Commissioner of Police and this Association.

Similarly, the functions of the Commissioner for Public Employment include relevantly:

*13. Functions of Commissioner*

*The functions of the Commissioner are –*

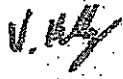
*(a) to determine the respective designations and other terms and conditions (including the remuneration) of employment for employees; ..."*

As we have stated earlier in these submissions, it is our view that sworn members of the Police Force are not "employees" for the purpose of the PSEMA. For those reasons as set out herein, it is our view that the Commissioner for Public Employment can only intervene in matters that relate to un-sworn employees who are employed by the Commissioner of Police in his capacity as the Chief Executive Officer of Police, Fire and Emergency Services.

We submit that the PSEMA and/or the PAA be amended to make clear the separate functions of the Minister and Commissioner for Public Employment on the one hand and the Minister for Police and Commissioner of Police on the other.

We thank you for the opportunity to provide these submissions into the review of the PSEMA.

Yours Sincerely,



**Vince Kelly**  
**President**