

Review of the *Public Sector Employment and Management Act*

Submission of the Think Tank (Chief Minister's Reform & Revitalisation Group)

Summary of Recommendations

- Retain the 'single employer' model for its advantages in achieving consistency in employment conditions and allowing a career public service with a single set of over-arching principles
- Amend PSEMA to include clear Objects promoting a diverse, dynamic and responsive work force enshrining the highest principles of conduct and management of employees
- Ensure that the amended PSEMA contains only broad principles relating to concepts such as natural justice, merit principle, and employee rights of appeal and review of adverse decisions
- Relocate to within PSEMA the Principles of Public Sector Administration and Management, the Principles of Human Resource Management, and the Principles of Conduct which presently appear in the Code of Conduct and Regulations.
- Remove overly prescriptive procedural requirements and detail from PSEMA and also, wherever possible, from subordinate legislation: regulations, by-laws, employment instructions, determinations and instruments (i.e. return to original goals of flexibility and simplicity with the only certainty being that natural justice, fairness and merit principle will apply to all actions).
- Conduct an extensive review and overhaul of current Employment Instructions to ensure that they are consistent with the Act, and, more importantly, that they are non-prescriptive, flexible, responsive to, and suited to, the needs of a revitalised public service, while recognising the need to provide guidance to managers trying to manage the NTPS in a consistent manner
- Amend Part 9 of the Act to allow appeals of all selections, transfers and appointments (rather than just promotions, as is presently the case) but, in the interest of expediency and certainty in selection processes, limit the grounds of appeal to review of the selection panel's decision (rather than appeal *de novo* on the basis of superior merit as is now the case) and require such appeals to be determined within a very short time of receipt.
- Limit the jurisdiction of Disciplinary and Inability Appeal Boards to situations involving a serious penalty (e.g. suspension, termination, reduction of salary)
- Ensure that, while maintaining the approach that 'managers are left to manage' the Office of the Commissioner for Public Employment does recognise and effectively carry out its important role in:
 - promoting useable and worthwhile performance management systems which could be used to: recognise and reward good performance; effectively manage poor performance (including termination where warranted); and to strengthen merit selection processes by providing a means to verify day-to-day proven performance
 - providing education and centralised, consistent high-level advice about the operation of PSEMA with a view to dispelling many 'myths' surrounding natural justice, the merit principle, selection, discipline and inability processes, and other aspects of public sector human resource management
 - educating selection panels about the merit principle and in particular the upcoming change to the definition of merit to include EEO diversity as another component of merit

General Submission relating to Recommendations

When it was introduced in 1993, the *Public Sector and Employment Management Act* (PSEMA) was less prescriptive than existing models of public sector management and regarded as 'best practice' in the area. The discussion paper prepared for the review raises the question as to whether the legislation continues to provide the "*flexibility, simplicity and certainty... that was envisioned at its introduction, and does it meet the requirements for the NT public sector going forward.*"

In answer to this question, the conclusion of the Reform & Revitalisation Working Group (the 'Think Tank') is that, while the existing PSEMA does create a model which works well for our small service, and generally meets the requirements for the NTPS to move forward, the flexibility and simplicity that were intended originally have been lost, or at least diluted, in practice over the intervening sixteen years.

In this regard the Think Tank makes the following comments:

The model of the Commissioner for Public Employment as a single employer of all public servants has been proven to work well for our small public service and has the advantages of providing consistency of employment conditions, a 'whole of government' approach to public service, and the ability to allow for a career public service with flexibility to move from agency to agency within the service. The model is supported.

However, while acknowledging that the model of a single employer affords these obvious advantages, we are of the view that generally the *Public Sector Employment and Management Act* (PSEMA), and the role of the Office of the Commissioner for Public Employment (OCPE) in overseeing the provisions of PSEMA, should be limited to dealing with broad policy and principles, rather than procedural and operational detail. Thus, PSEMA should avoid, insofar as is possible, setting out specific provisions for management of employees, and instead be a clear, concise, principles-based piece of legislation which sets out values and broad principles.

In this regard, a noticeable omission from PSEMA is a provision setting out the objects of the Act. Our recommendation is that the amended PSEMA commence with a strong statement of Objects, emphasising that the Act is intended to promote a diverse, dynamic and responsive work force governed by the principles of natural justice, merit and fairness. At present, many of these broad principles are contained in the Regulations or other supporting legislative framework such as Employment Instructions, Merit Selection Guide and the Code of Conduct. These principles should be collected into and form part of PSEMA.

It is a reasonable goal to expect that we will have a strong and professional public service, with employees performing to the highest level in keeping with a code of exemplary conduct. However, this expectation of a higher standard of performance from employees also creates a reciprocal duty to ensure that management of public servants will be of the highest standard. This means creating a PSEMA that enshrines the principles that all employees are to be afforded a high level of natural justice, that the merit principle will govern all selections and appointments in the NTPS, and that employees will have effective and efficient review processes to ensure they are treated fairly. PSEMA and its supporting legislative framework (Regulations, Bylaws, Employment Instructions, Determinations and Instruments) should emphasise this broad ideal, rather than setting out specific rules to deal with each circumstance. In particular, the constant message in relation to merit selection, disciplinary and inability processes and performance

management should be that there is no set, 'fixed in stone', framework for conducting such processes, but rather that any process is acceptable so long as it can be demonstrated that an action taken is consistent with the merit principle, and that natural justice was afforded.

More specifically, Part 7 (Inability) and Part 8 (Discipline) of PSEMA should be re-drafted to remove the fairly high level of prescription. (For example, the requirement in section 45 for the CEO to conduct an investigation in all inability actions has proven to be so onerous in practice that agencies rarely embark on the process at all. Another example is the provision in section 46(2) that limits the power of a CEO to take any action if an inability appeal has been commenced.) Similarly, many of the current Employment Instructions also contain a great deal of, sometimes inconsistent and outdated, set procedures that have the effect of impeding flexibility in practice. (An example of this is Employment Instruction 4 relating to Performance Management which is interpreted by OCPE and Agencies alike to require that performance reports remain confidential, thereby effectively negating their usefulness.) It is recommended that all of the Employment Instructions should undergo a significant overhaul, with the aim of doing away with set procedures, in favour of more general recognition that steps taken should be flexible and suited to the circumstances, rather than process-based.

The merit principle is the keystone of public sector employment and, with the upcoming amendment to add EEO diversity as another component of merit, provides the basis for ensuring that the public sector operates without nepotism and values the unique individual abilities and attributes of employees from a wide range of cultures. Yet, despite the vital importance of the merit principle, at present, of all selection processes, only promotions are subject to appeal. To ensure consistent enforcement of the merit principle in relation to all appointments, promotions and transfers within the NTPS, Part 9 (Appeals) should be amended to include all merit-based selections in the appeals process, rather than just promotions. However, it should be made clear in PSEMA that merit appeals are reviews of the selection panel's decision and not *de novo* selection processes, and that the only issue before the Board is whether the panel's decision was consistent with the merit principle. In order to avoid delay and uncertainty in selection processes, the Act should retain the 14 day appeal period and set a time frame for completion of merit appeals of four weeks from the date of notification of the selection. (Note: One member of the group expressed a strong view against this proposal, giving as the reason that it would be "not workable in practice and add a lot more layers and workload". Others in the group felt that it was a positive step in reinforcing the importance of merit principle to extend appeal rights to all selections, but emphasised that it is vitally important that the appeal process is efficient and effective.)

In relation to Disciplinary Appeals, we support the suggestion made by OCPE to limit the jurisdiction of the Board to matters with serious penalties such as termination, suspension or reduction in salary.

There is a prevailing view of managers and within HR units, that discipline and inability procedures are unduly onerous, and that grievance and appeal processes are 'weighted in favour of employees.' This view is not supported by the evidence (statistically a significant majority of grievances and appeals are decided in favour of the employer), and disciplinary and inability management requirements are not quite so rigid and onerous as the practices that have built up would suggest. Nevertheless, despite the inaccuracy of the view that PSEMA favours employees, the fact remains that this view exists. For this reason the OCPE should actively take steps to engage the workforce in dispelling such myths and in finding ways to address any legitimate concerns that agencies may have.

The Office of the Commissioner for Public Employment, as the ultimate employer, should endeavour to become regarded as the 'place to go' for dependable high-level advice about the broad principles embodied in PSEMA, and should reinforce this position by engaging with agencies to provide training and education, in addition to centralised, competent and consistent advice about all aspects of the operation of PSEMA.