



Northern
Territory
Government

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Mr Ken Simpson *S 18/7/09*
Commissioner for Public Employment
GPO Box 4371
DARWIN NT 0801

14 May 2009

Dear Mr Simpson *Ken*

**RE: REVIEW OF PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT
ACT (PSEMA) - FURTHER SUBMISSION**

Further to the department's submissions dated 6 and 17 April 2009, please find enclosed a further submission in relation to the Review of the PSEMA.

Yours sincerely

SHARRON NOSKE
A/CHIEF EXECUTIVE



Supplementary Submissions to the
Review of the *Public Sector
Employment and Management Act*
and Subordinate Legislation

14 May 2009

REVIEW OF *PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT ACT* (PSEMA) – FURTHER SUBMISSIONS

***Director General Dept Ageing, Disability and Home Care v Lambert* [2009] NSWCA 102**

This recent New South Wales Court of Appeal case highlights principles and legislation which, if incorporated into the PSEMA, would in the department's submission enhance the PSEMA.

In summary, the case deals with an appeal against a decision of the NSW Government and Related Employees Appeal Tribunal (the Tribunal) and it highlights features of the NSW *Public Sector Employment and Management Act* (NSW PSEMA) as discussed in more detail below.

While it is not proposed to quote the case in any detail, the Court found in part that, "The scope of the proper order (of the Tribunal) was to be defined by the interests of vulnerable persons in the care of the Department and not by the effect of the order on the individual public servant" – see page 3 of the decision.

Put simply, the Court found that the Tribunal erred in that it focussed unduly on the punitive aspect of the Chief Executive's decision rather than on the protection of the public interest effected by that decision. It is submitted that it would be appropriate to amend the PSEMA so as to provide a public interest basis for the decisions by a Chief Executive and to also limit the grounds for review of an appeal board established in accordance with the PSEMA.

It is submitted that appeal boards constituted under the current PSEMA can place undue emphasis on how an action taken by a Chief Executive pursuant to section 51(10)(a)(1) of the PSEMA affects the employee, and it is submitted that, in keeping with the above, the PSEMA should be amended to make it clear that the review is to focus on the protective rather than the punitive aspect of a Chief Executive's decision.

For example, in the case of improper conduct by a teacher towards a student it is submitted that the review by a disciplinary appeal board should focus on the protection of the public interest, as determined by the interests of the student affected by the conduct and the potential interests of future students who might have contact with the employee, rather than on the action being punitive in nature from the employee's perspective.

Further, while the need for a review mechanism is strongly endorsed, it is submitted that the Chief Executive of an agency is best placed to determine the public interest and the best interests of the clients of the agency and that the decisions of Chief Executives should therefore be less susceptible to being varied or overturned by an appeal board.

Further aspects of the NSW PSEMA

Section 46 of the NSW PSEMA states in part;

46 Dealing with allegations of misconduct

- a) If an allegation is made to the appropriate Department Head that an officer may have engaged in any misconduct, the appropriate Department Head may:
 - i. decide to deal with the allegation as a disciplinary matter in accordance with the procedural guidelines, or,
 - ii. decide that it is appropriate to take remedial action with respect to the officer.

“Remedial action” is defined by section 42 of the NSW PSEMA as follows;

42 Definitions

remedial action, in relation to an officer means one or more of the following:

- (a) counselling
- (b) training and development
- (c) monitoring the officer’s conduct and performance
- (d) implementing a performance improvement plan
- (e) the issuing of a warning to the officer that certain conduct is unacceptable or that the officer’s performance is not satisfactory,
- (f) transferring the officer to another position in the Public Service that does not involve a reduction of salary or demotion to a lower position,
- (g) any other action of a similar nature.

It is submitted that the PSEMA would benefit from having a similar and somewhat less formal alternative for dealing with improper conduct.

Such an option would then allow for three clear approaches to dealing with improper conduct vis (i) “informally” by the local manager of the workplace (ii) more formally by way of “remedial action” and (iii) formal disciplinary proceedings. If this approach was to be adopted then only the most serious incidents of improper conduct would need to be dealt with in accordance with the formal disciplinary provisions.

It is further submitted that even if it is decided not to adopt the concept of “remedial action” in accordance with the above, some of the actions available to a Chief Executive under the NSW PSEMA should in any case be incorporated in to section 51(10)(1)(a) of the PSEMA to rectify deficiencies in relation to actions currently available to a Chief Executive. In particular it is recommended that those actions provided for by the NSW PSEMA sub-sections 42(a), (b), (c), (d), (e) and (g) should be added to section 51(10)(1)(a) of the PSEMA.

There are further elements of the NSW legislation which are specifically relevant but which are not addressed here. It may also be necessary to consider the *Government and Related Employees Tribunal Act 1980* (NSW).

Suffice to say that it is submitted that consideration should be given to amending the PSEMA in keeping with the above to establish the capacity to deal with misconduct by way of "remedial action", as provided for in the NSW legislation, as a useful alternative to the formal disciplinary procedures under the PSEMA.

Further, sub-section 46(4) of the NSW PSEMA states;

- (4) Even though the appropriate Department Head decides to deal with an allegation of misconduct as a disciplinary matter in accordance with the procedural guidelines, the Department Head may, at any stage of the process:
 - (a) decide to take remedial action with respect to the officer concerned, or
 - (b) decide to dismiss the allegation, or decide that no further action is to be taken in relation to the matter, or both.

It is submitted that the PSEMA should also be amended to include provisions of similar effect to the above. And in the event that it is decided not to adopt the concept of "remedial action" as referred to in sub-section 46(4)(a) above, it is submitted that the PSEMA should in any case be amended in a manner similar to sub-section 46(4)(b) as currently there appears to be no capacity in Part 8 of the PSEMA for a Chief Executive to discontinue disciplinary proceedings once commenced.

It is submitted that corresponding amendments for the purposes of Part 7 of the PSEMA would also be appropriate.

Dealing with Charges, Convictions etc

Notwithstanding paragraph 13 of "Employment Instruction Number 13 – Code of Conduct" it is submitted that the PSEMA does not deal adequately with situations where employees are charged or convicted of criminal offences, particularly serious offences which might ground disciplinary proceedings under Part 8 of the PSEMA.

It is submitted that few NTPS employees are aware of the requirement pursuant to paragraph 13 of the Code of Conduct.

It is further submitted that the current requirement in the Code of Conduct is in any case deficient in that on a narrow interpretation it only requires the mere disclosure of a charge/conviction and arguably it does not require the disclosure of particulars relevant to the charge/conviction. Obtaining knowledge of such particulars in a timely manner is an essential part of determining the extent to which, if at all, a particular charge/conviction may be relevant to an employee's duties and whether or not disciplinary proceedings under Part 8 of the PSEMA may be appropriate.

Further, while the employer may request that the employee execute an "Authority" permitting the employer to obtain particulars from police, employees will not necessarily agree to do so. While arguably an employee

could be directed to execute such an Authority it is submitted that this is both a time consuming and inefficient way of dealing with charges/convictions, particularly in relation to serious matters which may have a direct impact on the employee's capacity or suitability to continue in the performance of their duties. This is a particularly important issue for this agency in relation to teachers and other school based staff where the safety and well being of children is of such concern.

It is accordingly submitted that this issue should be dealt with in the PSEMA itself and not the Code of Conduct, and, that consideration should be given to amending the PSEMA to give a Chief Executive the clear legislative capacity to obtain, as a minimum, full particulars of charges and convictions directly from police in relation to an NTPS employee.

It is further submitted that the PSEMA be amended along the lines of section 75(2) of the *Teacher Registration (Northern Territory) Act (TRNTA)* as follows.

Section 75(2) of the TRNTA states;

75 Transfer of information

(1)

(2) If the Commissioner –

- (a) receives information in relation to a person who is a teacher (whether registered or under an authorisation); and
- (b) considers that the Board would be required under section 49 to investigate the matter,

the Commissioner must inform the Board of the nature of the complaint and the name and place of employment of the person about whom the information was received.

It is submitted that while there will be some difficult policy considerations to be addressed in doing so, a similar provision should be added to the PSEMA specifically in relation to teachers and other school based personnel. It is further submitted that while a provision along the same lines as the above is to be preferred, as a minimum the provision should require the reporting of charges and convictions – albeit of an appropriate level of seriousness.

May 2009