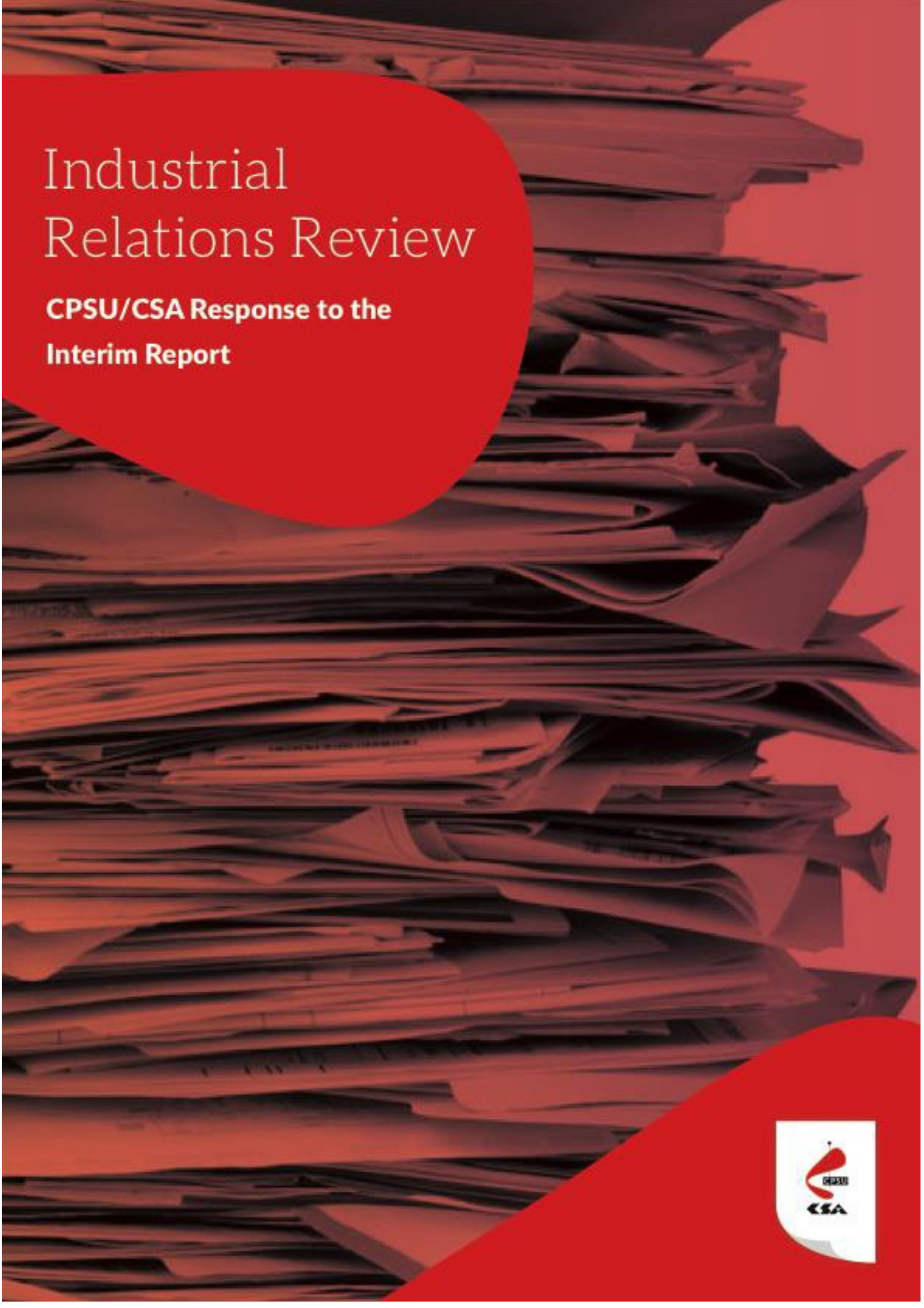
Industrial Relations Review

CPSU/CSA Response to the Interim Report



CPSU/CSA Response to the Interim Report of the Industrial Relations Review

The Civil Service Association of Western Australia (CSA) has been representing public sector employees since 1900; initially as an association incorporated under the *Associations Incorporation Act 1895*; and latterly in 1967 it was recognised by the *Industrial Arbitration Act* as an organisation.

Its federal counterpart is the Community and Public Sector Union, WA Branch (CPSU) and is known as the CPSU/CSA.

The CSA is the relevant Union for the purposes of this review, however we have many operations in common and will use the name CPSU/CSA to refer to the Union for the purposes of this submission.

The CPSU/CSA represents many members who are covered by the *Industrial Relations Act 1979* (IR Act) and the *Public Sector Management Act 1994* (PSM Act), and thus it has an interest in any review or proposal concerning the operation of the Western Australian Industrial Relations system.

The CPSU/CSA is also an affiliate of UnionsWA, and independent of any political party.

Initial submission to the Industrial Relations Review

In December 2017, the CPSU/CSA made a written submission to the Industrial Relations Review which included a series of recommendations made in response to the Terms of Reference.

Following the release of the Review's Interim Report in March 2018, the CPSU/CSA has compiled the following submission to address key points raised in the Interim Report, as well as further questions posed to stakeholders by the Review and items which the CPSU/CSA believes fall within the Terms of Reference however were not articulated in the Interim Report.

Response to Chapter 2 of the Interim Report

In considering the recommendations proposed in Chapter 2 of the interim report, the CPSU/CSA has divided them into two tables: Agreed and Not agreed. The CPSU/CSA notes the following issues arising in the discussion in Chapter 2.

CPSU/CSA members who have read the Interim Report have expressed concern about the tendency to prefer legally trained persons over persons with industry experience for appointments to the Western Australian Industrial Relations Commission (WAIRC) and are opposed to any diminution of the determinative practices of the layperson's tribunal. They fear that decisions based on black letter law will increase, and will be detrimental to the interests of ordinary workers.

The CPSU/CSA also notes that in their conclusion [7], Eureka Lawyers referred to the current IR system as having *a number of unique and positive features. Particularly, the commitment to the efficient and low cost disposal of disputes should be retained, as well as the WAIRC's unique power and jurisdiction under s 44 and the denial of contractual benefit matters.*

Our members' views are in accord with the CPSU/CSA's formal submissions that follow:

Union density and increased individual access to WAIRC

The CPSU/CSA does not support the proposition that individual access to the WAIRC should be enlarged because of diminishing union density.

The following unions have coverage of various occupations or activities in the public sector and are regular parties to applications in the WAIRC:

- the Civil Service Association
- the WA Police Union
- the Health Services Union
- the State School Teachers Union
- United Voice
- the Australian Services Union
- the ANFIUW Perth
- WA Prison Officers Union
- The Association of Professional Engineers Australia

The activities include applications for:

- new industrial agreements
- award variations
- minimum wages adjustments
- general orders
- enterprise orders
- unfair dismissals
- reclassifications
- disputes over conditions of employment

The following table shows the aggregate number of union members in Western Australia with a stake in the public sector:

Union	Number of members in WA (31/12/2017)
Civil Service Association	14,539
WA Police Union	6,498
Health Services Union	5,857
State School Teachers Union	16,458
United Voice	19,034
Australian Services Union	5635
Australian Nursing Federation Industrial Union of Workers	29,474
WA Prison Officers Union	2,325
Association of Professional Engineers Australia	732
United Fire fighters	1,231
Australian Rail, Tram and Bus Industry Union	630
Shop distributive and Allied employees Association	23,044
Independent Education Union	4,811
WA Municipal Road Boards, parks and Racecourse Employees Union	1,270

The information is derived from WAIRC Annual Reports. The approximate aggregate total in Western Australia is 131,538 members. In the private sector, union density now stands at 10.1%. In the public sector union density is 38.5%.

The significance of this information is that public sector unions have a different profile from private sector unions in terms of their density, industrial disputation and access to the WAIRC. There is no justification for permitting open access for all employees to the WAIRC; particularly in the public sector. To do so would open the floodgates for unmeritorious cases, and cause a clogging of the system. Reclassifications and claims of unfair dismissal or denied contractual benefits by individual employees are the exceptions. The CPSU/CSA like other unions assesses each case on its merits – whether it is winnable or partly winnable to avoid unmeritorious cases going to the WAIRC. This acts as a vetting process which prevents a large volume of cases from causing excessive workload issues at the Commission.

Expanding the scope of the WAIRC: Jurisdiction over breaches of Public Sector Standards

The second Term of Reference has been narrowly interpreted by the Interim Report, however in the CPSU/CSA's view, it should instead be interpreted to expand the scope of substantive access for employees to the WAIRC, rather than the method of individual access over access by their representative Unions:

> *2. Review the jurisdiction and powers of the Western Australian Industrial Relations Commission with the objective of examining the access for public sector employees to the Western Australian Industrial Relations Commission* ***on a range of matters for which they are currently excluded****.*

In the initial submission to the Industrial Relations Review, the CPSU/CSA touched on the expansion of the jurisdiction of the Western Australian Industrial Relations Commission (WAIRC) to encompass the whole of the public sector workforce on all disputes, including breaches of Public Sector Standards, and decisions made in relation to the regulations affecting redeployment and redundancy.

Currently, there is no available relief to employees who have successfully evidenced an employer's breach of standard, in one of the following areas:

- Employment (applies when filling a vacancy by way of recruitment, selection, secondment, transfer and temporary deployment [acting])
- Performance Management
- Grievance Resolution
- Redeployment
- Termination
- Discipline

The Public Sector Commission is responsible for setting these standards and also for assessing compliance. Unfortunately, there is not currently any avenue for escalating such matters to the WAIRC. For example, in the event a breach of the Employment Standard is established in relation to the appointment of a long-term acting position, there is a recommendation from the PSC to the agency to recommence the temporary deployment process and focus on systemic change within the agency. There is no penalty to the agency for refusing to follow this recommendation, nor does the WAIRC have jurisdiction to hear the matter. The individual within the workforce who was adversely impacted by the breach has no relief. Given the importance of Public Sector Standards to the overall integrity and functionality of the sector and the relative lack of power of employees to hold their employers accountable to these standards, this requires urgent reform which the IR Review has capacity to do within the second Term of Reference.

The CPSU/CSA recommends that the IR Review eliminates jurisdictional impediments to the WAIRC jurisdiction to hear breach of standard claims as well as redeployment and redundancy matters, by repealing section 80E(7) and section 23(2)(a) of the IR Act (or non-inclusion of these sections in the new IR Act) and amending Part 7 of the Public Sector Management Act.

Equity and Good Conscience

In Western Australia, the operation of equity and good conscience under equivalent provisions of section 26(1)(a) IR Act go back to 1901 or thereabouts. The WAIRC and its

predecessors were conceived primarily as a layperson's tribunal. The fact that it is still very much a layperson's tribunal is reflected in the qualifications required for appointment of the Chief Commissioner, and Commissioners in general. Section 9(2) IR Act mandates high level industrial relations experience or a university qualification or equivalent for appointment as a Chief Commissioner. No qualifications are specified for the other Commissioners. Historically, the other Commissioners were appointed on the basis of their experience in industry, or in the union movement. Such experience appears to be waning in recent appointments. There appears to be a preference for legally qualified people to be appointed.

As part of that ethos, the tribunal could deliver decisions based on equity and good conscience rather than being limited to decisions based on black letter law. The history of the case law on this matter is set out in Marcelle V Brown *Western Australian Industrial Relations Law,* second edition, paragraph 430. An earlier history of the case law is set out in *Digest of Western Australian Arbitration Reports, Volumes I - XIV, 1901 – 1920.* An extract from that Digest is set out as Appendix A. A significant observation about the operation of the phrase – equity and good conscience – is set out in *Independent Teachers Association v Holy Trinity School* (1975) AILR 1046. In that case, Dey J stated that the phrase was a directive that the tribunal should adopt a *broad approach of common sense and common fairness, eschewing all legal or other technicality*: op. Brown.

Before the Boilermaker's decision, the Arbitration Courts or Commissions had the ability to determine claims of underpayment in terms of equity and good conscience; particularly if the claim could not be proved to the fullest extent. There is no justification therefore to remove claims of denied contractual benefits from the WAIRC because a decision could be made on the basis of equity and good conscience. The system appears to have worked well since its inception. The real problem has been various attempts to erode the jurisdiction by appeals to black letter law principles. Or to opine that the legislature did not contemplate the WAIRC hearing claims beyond a certain value by assessing a claim as commercial rather than industrial. The real reform is to prevent jurisdictional quibbles about the extent of the WAIRC jurisdiction itself.

Successive attempts to erode the contractual benefits jurisdiction

Since 1986 there have been a series of cases challenging the scope of the Commission's jurisdiction on denial of contractual benefits. Often the jurisdictional demurer is designed to force the claimant with a legitimate contractual benefit to recover the debt or the so-called damages in a more expensive jurisdiction: see *Perth Finishing College v Watts* (1989) 69 WAIG 2307, *Kouris* , *Hotcopper v Saab* [2002] WASCA 190 and others. This is a real issue rather than the qualifications of Commissioners to determine the claim. The gnawing away of the jurisdiction needs to be ceased by Parliament declaring the limits of the jurisdiction by a financial or salary cap or some other mechanism.

The WAIRC exercising judicial power

The CPSU/CSA notes that the Interim Report has expressed concern about the WAIRC exercising judicial power in the context of contractual benefit claims, and s. 46 – Interpretation of awards and orders. The Report referred to *Burns v Gaynor* [2018] HCA 15. The CPSU/CSA does not agree with or accept the analysis of the concerns expressed in the Report, and the issue of constitutionally does not arise in relation to s. 46 in particular.

A statutory right to hear an application for interpretation of an award or agreement existed from the inception of the Arbitration Court: see *Digest of Western Australian Arbitration*

Reports, Volumes I - XIV, 1901 – 1920 and *Digest of Western Australian Industrial Gazettes Volumes 1 -10, 1921 – 1930.* An extract from that Digest is set out as Appendix B. The right to make this type of application was reiterated in the legislation that established the Industrial Commission and later the WAIRC without much change. In effect the statutory application survived the breakup of the Arbitration Court with the establishment of an Industrial Commission and the Industrial Magistrates Court, presumably as the result of the Boilermaker's decision. The application remained part of the arbitral function. In essence it was and still is part of the arbitral function because the Tribunal is asked to make a declaration about the meaning of an award or order which it had made, or to clarify the meaning of a clause.

The gravamen of the High Court majority decision in Gaynor's decision rested on s. 75(iv) of the Constitution. Their Honours stated [paragraph 64]:

> *Sections 28 (2) (a) and (c), 29 (1) and 32 of the NCAT act are invalid to the extent that they purport to confer jurisdiction upon NCAT in relation to the matters between Mr Burns, and Mrs Corbett and Mr Gaynor. Pursuant to s 31 of the Interpretation Act 1987 (NSW) they may be read down to avoid that conclusion so that they do not confer jurisdiction upon NCAT where the complainant and the respondent to the complaint are residents of different states within the meaning of s 75 (iv) of the Constitution.*

In respect of s. 46 it is unlikely that there would ever be a situation where a decision's constitutionality is called into question. Neither s. 46 nor the Industrial Relations Act has operated to deal with interstate disputes as a matter of law. So the Gaynor case is inapplicable.

If in the event that a contractual benefits claim involved an applicant resident in Western Australia and an employer resident in another state, then the Gaynor case might apply. However, such a result would have to take into account of s. 3 IR Act – application-offshore. Indeed, the Gaynor case does not advance the Boilermaker's decision in such a way as to threaten the constitutionality of contractual benefit claims. The West Australian Constitution Act does not impose the strict separation of powers between judicial and legislative functions like the Australian Constitution Act does.

Legal Representation

The extent to which legal practitioners are entitled to appear in their own right or as agents has been the subject of some controversy since the inception of the Arbitration Acts. The history of the case law on this matter is set out in Marcelle V Brown *Western Australian Industrial Relations Law,* second edition, paragraph 324 (again, include extract) An earlier history of the case law is set out in *Digest of Western Australian Arbitration Reports, Volumes I - XIV, 1901 – 1920.* An extract from that Digest is set out as Appendix C. In paragraph 325, Brown sets out the arguments for and against extending the rights of counsel to appear; particularly where there is no question of law involved. However, the Interim Report does not advance the argument any further. Limits on legal representation are conditioned by the fact that the WAIRC is still a layperson's tribunal. This should not change.

What is overlooked is the increase in litigation expenses if counsel is involved. This will increase pressure to change the no cost jurisdiction into a jurisdiction where costs are awarded generally to the victor. This increases the pressure to engage counsel because of the added risk of costs. There should be no trial by cheque book in the WAIRC.

Young Offenders Act – loss of confidence

The Interim Report notes that various changes may require amendments to other legislation, like the Young Offenders Act. The amendments to the Young Offenders Act subject Youth Custodial Officers to the discipline regime of the Public Sector Management Act, and then consequentially the Act allows appeals to the PSAB against adverse findings and penalties. If appeals to the PSAB were abolished, then the Young Offenders Act would have to be amended to reflect the move to the general jurisdiction of the WAIRC.

In addition, the Young Offenders Act subjected Youth Custodial Officers to the loss of confidence process, which has the capacity to fast track dismissals for serious breaches of discipline, and limits the scope of the challenge to the dismissal in the WAIRC.

The CPSU/CSA opposed that raft of amendments to the Young Offenders Act in 2013, and did so again when that part of the legislation came up for review in 2018. On both occasions the CPSU/CSA argued that the provisions were unnecessary, procedurally unfair, and the rationale for loss of confidence was inappropriate for the context of youth detention. That these provisions have never been invoked since they came into force suggests that they are either superfluous or redundant as a disciplinary tool. A copy of the CPSU/CSA's submission to the Loss of Confidence Review in January 2018 is attached as Appendix D.

The CPSU/CSA notes that the WA Prison Officer's Union has consistently opposed the legislation on loss of confidence also.

Removal of privative provision – s. 34(3) and (4) IR Act

The CPSU/CSA opposes the removal of s. 34(3) and (4) IR Act because it would provide a further opportunity for parties to challenge decisions of the Commission. Such a provision was deliberately inserted as a result of past challenges to the jurisdiction of the Commission or its interstate or federal equivalents through the prerogative writs. The provision of the appeal process in s. 90 IR Act on the basis of exceeding jurisdiction, error of law in construction or interpretation of a statutory instrument or denial of audience obviates the need for any intervention through a prerogative writ.

The retention of the President as an office of the Commission

The CPSU/CSA does not support the abolition of the office of President. The fact that there have been acting Presidents for some time is no argument for change. Having a Supreme Court Justice acting as the chair of the Full Bench is similar to having an acting position. The CPSU/CSA notes that the Chief Justice had some concern of having two appellate positions in the Supreme Court. The CPSU/CSA submits that the jurisdiction of the IAC should be retained in its current form.

The renaming of the Commission in Court Session and the Full Bench

The Commission in Court Session was created in 1963 to exercise its current jurisdiction related to wages and conditions policy, and to hear appeals from decisions of single Commissioners. Later, the hearing of appeals was vested in the Full Bench under the chair of the President.

While the CPSU/CSA sees merit in changing the name of the Commission in Court Session to the Arbitral Bench, the CPSU/CSA does not support changing the name of the Full Bench to the Judicial Bench. The change is seen as too legalistic and not in line with the ethos of the Commission as a layperson's Tribunal. The current name of Full Bench should remain. It is noted that the FWC retains the Full Bench nomenclature.

The CPSU/CSA also notes the submission of UnionsWA, which suggests that the two entities be amalgamated again into a Full Bench competent to hear all appeals [at p 8], which the CPSU/CSA would also support.

IR Review Interim Report

CPSU/CSA response to recommendations – Chapter 2

Agreed

Recommendation No	Rationale
1	Support name change only – IR Act 2018
2	Support review
3	Support use of Plain English
6	Support name change to Arbitral Bench
9,10	Dual appointments
11	Support the extension of the retirement age
13	Supported
14	Supported
16	Supported
20	Supported
21	Supported

IR Review Interim Report

CPSU/CSA response to recommendations – Chapter 2

Not Agreed

Recommendation No	Rationale
4	Retain the name of the Full Bench as is the case with Fair Work
5	Retain the President within the WA IRC
7	Do not abolish the IAC
8	Retain the current jurisdiction of the IMC with reference to State Employment Standards
12	Equity and good conscience should not be removed or diluted
15	Retain privative clause
17	Contractual benefits should be retained in its present form
18	Do not change current access for Legal Practitioners
19	Do not change the costs regime in s. 27 IR Act.
20	Not supported

Response to Chapter 3 of the Interim Report

The CPSU/CSA has considered Chapter 3 of the Interim Report. The CPSU/CSA welcomes the following observations, and provides further comment or submission on the paragraphs within the Interim Report as identified below:

- Paragraph 371 of the Interim Report:

  ….the law in Western Australia with respect to the regulation of public sector employment and the public sector jurisdiction of the WAIRC is bafflingly complex. There is a patchwork maze of provisions that lead only to confusion, uncertainty and the possibility at least for unfairness. This is quite contrary to the ideal of an excessive, or fair and modern State system.

The CPSU/CSA submits that the Constitution Act 1889 needs to be reviewed in the light of a recent decision of the Full Bench in *CSA v Housing Authority* [2018] WAIRC 00184 because it touches upon the employment status and relationship of certain government officers with the Crown or the State. The status of all government officers, and their relationship with the Crown or the State should be uniform and consistently the same. For example, s. 64 PSM Act does not adequately achieve that objective. A copy of a recent Housing Authority decision of 2018 is attached as Appendix E.

- Paragraph 372 of the Interim Report:

  ….differently characterised public sector employees have different rights of access to the jurisdiction of the WAIRC. The decisions that they challenge vary, as does the remedies that can be granted…..

  …. The preliminary opinion of the review is that the constituent authorities add unnecessary complexities and uncertainties to an already problematic system.

- Paragraph 376 of the Interim Report:

  In the opinion of the review, the above only needs to be set out to indicate the system is in a mess…….. The jurisdiction of the WAIRC and its constituent authorities, with respect to the public sector, needs wholesale change.

The CPSU/CSA has previously provided submissions about how the change could be achieved through a draft "bill." However, the CPSU/CSA wants the Arbitrator's jurisdiction preserved within the general jurisdiction because of the scope of the orders that can be made; for example part of s. 80E(5) states:

> *but any act, matter or thing done by an employer in relation to any such matter is liable to be reviewed, nullified, modified or varied by an Arbitrator in the course of the exercise by him of his jurisdiction..*

- Paragraph 377 of the Interim Report:

  The new system ought to be characterised by commonality of rights to refer to industrial matters and/or to appeal against decisions of an employing authority to the WAIRC, a uniformity of processes the WAIRC may engage in, and the remedies that can be granted against referred industrial matters and challenge decisions.

- Paragraph 421 of the Interim Report:

  No one who made submissions to the present Review suggested the Whitehead Review recommendations be resurrected.

However, the CPSU/CSA did make reference to the Whitehead Review in in our submission to the IR Review in December 2017 regarding Breach of Standards and the restrictions on the jurisdiction of the WAIRC were similar in effect:

> In submissions to the Department of Commerce concerning the proposal in the Labour Relations Legislation Amendment and Repeal Bill 2012, the CPSU/CSA noted:
>
> *The repeal of the bar was a recommendation of the Whitehead review of the PSM Act in 2004. During that review the Department of Productivity and Labour Relations acknowledged deficiencies in breach claim determination relief, and proposed a gateway to the reviewer that if the agency rejected the PSC's recommendation, then access to the WAIRC should be granted to make a determination.*
>
> *This contention is strengthened given the lack of confidence (or interest) demonstrated by Public Sector workers and their Unions in the alternative regime administered by the PSC. The system is massively underutilised. The 2011/12 PSC annual report advises only 125 claims were received in that 12 months. In the same period only 11 claims were upheld.*
>
> *The inadequacies of the regime are well known. It reviews only process and ignores merit. Further the recommendations of the PSC concerning a proven breach are unenforceable.*
>
> The CPSU/CSA therefore affirms the findings of the Whitehead and Fielding reviews, both of which express concerns about deficiencies in the current system and recommend reform of the breach of standards process.

The relief provided for breach of standards is still an inadequate remedy, as has been discussed above in relation to Chapter 2 of the Interim Report and the second Term of Reference.

- Paragraphs within 3.46 of the Interim Report - Abolition of Constituent Authorities; in particular paragraph 558.

- Paragraphs within 3.47 of the Interim Report - salaried staff; in particular paragraph 574.

In the past, the CPSU/CSA has encountered some reluctance by government representatives to change conditions of employment because the employees under the CPSU/CSA's coverage were classified as wages staff. The distinction between salary staff and wages staff is somewhat illusory and the remuneration problems, if they exist, can be resolved by the

reclassification process. For example, as a result of a reclassification of printers at the government printer and zookeepers resulted in the CPSU/CSA obtaining coverage of that work.

- Paragraphs within 3.48 of the Interim Report - the use of s. 32 and s. 44

The CPSU/CSA sees no reason to change the existing arrangements. Respondents often put a response in advance in any event. Usually, if a s. 44 matter is urgent, then it is mentioned in the application and later discussed with the Associate. The CPSU/CSA agrees with Slater and Gordon's submission at paragraph 579.

The CPSU/CSA notes the observation in paragraph 578 about using s. 44 applications for disciplinary matters. The CPSU/CSA has often resorted to s.44 if there is an urgent need to obtain further and better particulars for disciplinary or poor performance issues. The CPSU/CSA and SSTU have tried to obtain interim orders for interim reinstatement, which are open to private sector employees to obtain under s. 44(6)(bb)(ii) IR Act, or to obtain a conciliated outcome because conciliation is not available under the PSAB or to obtain information, like an investigation report. Unfortunately if the application for interim reinstatement is forced to a hearing, then the hearing is likely to be abandoned once the matter is referred to the PSAB within the 21 day time frame. The Arbitrator loses jurisdiction once the appeal is filed: *CSA v DSC* [Ngiam] [2005] WAIRC 02043 and others. A copy of that decision is attached as Appendix F.

The CPSU/CSA notes that Eureka Lawyers also made submissions on this subject [pp 2 - 3].

- Paragraphs within 3.49 of the Interim Report – Recruitment and Promotion [582 – 584]

The CPSU/CSA does not want a return to the system of promotion appeals. The CPSU/CSA has expressed concern that the Public Sector Commission does not have the power to overturn an appointment when there is evidence that the decision of the employer is not merit based. The power of the Public Sector Commission should be invigorated to permit interference with substantive recruitment decisions which are not merit based.

The CPSU/CSA's main concern in relation to the application of public sector standards has been with respect to decisions involving forced transfers, acting on higher duties, or secondment where a decision is not merit based. The CPSU/CSA would want amendments to give power to the WAIRC to intervene on the merits of the case. This will require an amendment to the provisions of s. 80E and its equivalent in the general jurisdiction, which impede jurisdiction based on the existence of a public sector standard.

- Paragraphs within 3.50 of the Interim Report - termination due to redundancy [585 – 590]

The Report notes the CPSU/CSA's submissions in this respect. The CPSU/CSA notes the following submissions in support:

- ELC, recommendation s 5 and 6, p 6.

- Paragraphs within 3.51 of the Interim Report - typographical error in s. 80(1)(c)

- Paragraphs within 3.52 of the Interim Report – public sector standards [592 – 611]

The report notes the CPSU/CSA's submissions in this respect. The CPSU/CSA notes the following submissions in support:

- ELC, recommendation 7, p 6.

The CPSU/CSA does not accept that there would be two competing jurisdictions because the operation of section 23(3)(d) IR Act could be extended to make the applicant exercise an election to choose one jurisdiction over the other.

Nor does the CPSU/CSA accept the proposition that if the WAIRC's jurisdiction was extended the floodgates would open. No evidence has been produced to justify this hypothesis and previous litigation referred to in the CPSU/CSA's earlier submission indicates that the floodgates would not open. The CPSU/CSA does not support individual employees having resort to the WAIRC on all matters. The current regime should be retained.

- Paragraphs within 3.53 of the Interim Report - unfair dismissal [612 – 615].

The CPSU/CSA submission supporting the abolition of the PSAB deals with the issues raised under this section. The CPSU/CSA is seeking the same rights for its members as other unions or private individuals have under the general jurisdiction.

- Paragraphs within 3.56 of the Interim Report - individual access to be WAIRC [616 – 618]

The CPSU/CSA submits that the dividing line is already quite clear. Individuals have no right to initiate disputes of a collective nature. They have a right to challenge their unfair dismissal or their redundancy if there is no valid reason, and also to initiate a reclassification dispute under s. 80E (2a) IR Act. In practice, the current dividing should be sufficient to meet the material needs of an individual employee.

- Paragraphs within 3.57 of the Interim Report– working with children checks – [624 626]

The CPSU/CSA endorses the submission of the SSTU. The CPSU/CSA submits that the problem extends to other fields of employment – Child Protection, Juvenile detention, Medical and social work.

- Paragraph within 3.57 – representation by legal practitioners [627]

The CPSU/CSA's position has been set out in its further submissions on Chapter 2. Unions who employ practitioners with current practising certificates also run the risk of employers objecting to the appearance of union legal practitioners. Indeed the Department of Health objected successfully to the HSU's legal representative making an appearance in conciliation: see *HSU v Department of Health* [2009] WAIRC 00447. A copy of the decision is attached as Appendix G.

- Paragraphs within 3.58 – Anti-bullying jurisdiction

The CPSU/CSA intends to refrain from commenting on any matter within the experience and coverage of the Police Officers Union or the AMA or Prison Officers Union. However, some of the CPSU/CSA's comments are also based on commonalities of interest or overlapping concerns about the legislative plight of the public sector in general.

Response to Chapter 4 of the Interim Report: Equal Remuneration

Chapter 4 of the Interim Report – Equal Remuneration relates to the third term of reference:

> *3. Consider the inclusion of an equal remuneration provision in the Industrial Relations Act 1979 with the objective of facilitating the conduct of equal remuneration cases and other initiatives in the Western Australian Industrial Relations Commission.*

The review looks at what mechanism in the Act would be necessary to further the aim of equal remuneration, which is to diminish the gender pay gap (GPG) in Western Australia which is 22.5 per cent, compared with the national average of 15.2 per cent. The GPG is the difference between male and female average weekly full time earnings and is the key statistical measure of pay inequity in Australia and internationally. It is well established in the current economic literature that reducing the GPG has economic as well as social benefits.

In 2010 the State Wage Order included a provision in Principle 10 for 'equal remuneration for men and women for work of equal or comparable value' which is consistent with a principal object of the IR Act in s6(ac). However, the review notes that there is limited practical application for this provision and there have been no decisions based on this principle.

The CPSU/CSA agrees with proposals 35 and 36 of the Interim Report as follows:

The 2018 IR Act is to include an equal remuneration provision based upon the model in the Industrial Relations Act 2016 (QLD). This ensures that the provision is available and not subject to the State Wage Order, increasing the legal protection of this principle.

The current provision in the State Wage Order is insufficient and it has not resulted in any practical outcomes to reduce pay inequity. An equal remuneration provision based on the model in Queensland will enable the CPSU/CSA to initiate equal remuneration cases for classifications predominantly occupied by females such as Dental Clinic Assistants (DCAs), Child Protection workers and Social Trainers. This model is preferred by the CPSU/CSA due to not being constrained by annual wage reviews and facilitating greater scope of potential applicants. The provision should include a requirement for equal remuneration provision in state awards and agreements.

The Interim Report also contains a proposal that the 2018 IR Act is to include a requirement that the WAIRC develop an equal remuneration principle to assist parties in bringing or responding to applications brought pursuant to the equal remuneration provision. This will ensure there is a clear process for the parties with guides on what the Commission would be considering and what is likely to lead to a positive result for equal remuneration applications and will encourage consistency in the Commission's application of the provision.

Response to Chapter 6 of the Interim Report: Minimum Conditions of Employment

The relevant Term of Reference is to Review the minimum conditions of employment in the *Minimum Conditions of Employment Act 1993*, the *Long Service Leave Act 1958* and the Termination, Change and Redundancy General Order of the Western Australian Industrial Relations Commission to consider whether:

a) The minimum conditions should be updated; and
b) Whether there should be a process for statutory minimum conditions to be periodically updated by the Western Australian Industrial Relations Commission without the need for legislative change.

This also considered that the Termination, Change and Redundancy General Order (TCR General Order) also provides for minimum conditions. The review was concerned with how minima should be periodically updated by the WAIRC without the need for legislative change.

Submissions also looked at whether the WA minimums should include those provided for in the Federal system.

The CPSU/CSA agrees with proposals 47-52 of Chapter 6 of the Interim Report, regarding the importation of minimum conditions of employment into the 2018 IR Act.

Proposals 47-48, that the 2018 IR Act include a Part that provides for minimum conditions of employment for employees covered by the State system to be called the State Employment Standards (SES), is on the basis that the most beneficial parts of the Fair Work Act (FW Act), Minimum Conditions of Employment Act, Long Service Leave Act and Termination, Change and Redundancy General Order should all be set out in a single piece of legislation for ease of determining rights and obligations of state system employees.

For the purpose of providing consistency and clarity of entitlements, the CPSU/CSA supports these proposals in principle however suggests an alternate name (for example, State Minimum Conditions [SMC]) as SES in the context of the WA public service already refers to the Senior Executive Service.

In terms of Proposal 48's reference to a possible provision for Family Domestic Violence Leave (FDVL) as a minimum condition of employment, the CPSU/CSA recommends that this provision should be included in the form of paid leave in the terms of the current entitlement in the CSA Agreement.

The CPSU/CSA supports Proposal 49, that the SES (or SMC) condition with respect to long service leave includes an expansion of its scope to casual employees and seasonal workers, as well as addressing other problems with the Act in terms of compliance and penalties. Issues also arise regarding casuals access, clarity about cashing out, long absences for workers compensation, and transferring between related companies. The CPSU/CSA's view is that this appropriately remedies the barriers to long service leave which have been faced due to an increased casualisation of the workforce since the LSL Act was introduced. It is also necessary from a gender equity perspective due to the overrepresentation of women in casual employment and their entitlement to accrue LSL during parental leave (and other paid leave). Restricting the 'cashing out' of long service leave until an entitlement has accrued or crystallised as a legal entitlement (ie. the whole of the period) supports this crucial workforce

entitlement and prevents the employer from replacing accrued long service leave with financial incentives to vulnerable workers.

The CPSU/CSA supports proposal 50 which would enforce these long service leave provisions via pecuniary penalties to employers in the event of non-compliance, along with compensation and/or associated orders made by the IMC, on application by an industrial inspector, the employee or their Union. There is currently no avenue for employees or the Union to enforce LSL entitlements and no relief for non-compliance. This is a clear legislative gap that needs to be filled, particularly in the context of the pervasiveness of wage theft (more of a problem in the small business contingent of the state IR system, than the public sector).

The CPSU/CSA supports proposals 51-52, which will enable a review of the SES (or SMC) within 12 months of passing of the 2018 IR Act and then every two years thereafter (and at any additional time decided by the WAIRC), which will include submissions from stakeholders and interested members of the public. This removes the process from politics by ensuring the WAIRC are the instigators of the updates to the conditions and must include a provision that minimum conditions cannot be reduced. This will ensure state minimum conditions of employment will not fall below the federal provisions and reflects current community expectations.

Proposal 53 which is for further comment by stakeholders, inquires whether the casual loading currently set at 20 per cent under the MCE Act should be increased or whether the issue should be deferred to consideration by the WAIRC, either on an award by award basis, or as a possible updated or enhanced SES, to be determined by the Arbitral Bench. The CPSU/CSA's view is that a proposal to increase casual loading is not contentious as 20% is standard in many registered agreements across the state and other jurisdictions in Australia, therefore there is no need to engage WAIRC resources to consider the appropriateness of raising this amount. As Proposal 48 involves incorporating the MCE into the IR Act as SES (or SCN), the review should recommend an increase in casual loading to be incorporated also.

Proposal 54 requests stakeholder's comments on the nature and extent of the FDV leave to be included in the SES, including the length of the leave and the extent to which the leave should be paid or unpaid. This has not been approved in Federal Test cases as a standard minimum, so the inclusion would be to ensure that it is established in WA. The CPSU/CSA's view is that this has been agreed to by the Government for the current round of Agreements. It would help to enshrine the conditions if they were included. Given the public sector is a large component of the state IR System these provisions would now apply to most employees under the IR Act. Their extension to all employees under the jurisdiction of the IR Act would lead valuable social change which would have a positive effect on retention rates, OSH, and productivity of employees who are victims of FDV.

Response to Chapter 8 of the Interim Report: Compliance and Enforcement

The section focuses on the following three items:

- Ensuring employees are paid their correct entitlements;
- Effective deterrents in place for non-compliance with State industrial laws and instruments; and
- Updating industrial inspectors' powers and tools available to enable them to perform their statutory duty.

The terms of reference for the third point was broadened after consultation with stakeholders to include right of entry provisions.

Sole enforcement provision for breach of entitlements is application to the IMC under s. 83 of the IR Act

- Noted that under FW Act, FW inspectors can issue infringements, compliance notes and enforceable undertakings.

Notes that the penalties for non-compliance are so low they fail to act a deterrent especially when compared to provisions under the FW Act.

- Partly due to *Fair Work Amendment (Protecting Vulnerable Workers) Act 2017* (Cth)
- The Productivity Commission have argued for increasing penalties for employers that keep false or misleading records and highlighted that the benefits of non-compliance outweigh the penalties.
- Effectively, fines are seen as a cost of doing business.
- Reference to accessorial liability provisions under FW Act

We support the position put forward by United Voice for reverse onus of proof in matters that involve obligations of the Employer such as keeping accurate records.

The CPSU/CSA supports Proposals 58-65, and 68 of the Interim Report:

The CPSU/CSA supports Proposal 58(a)(b) and (c), that Industrial Inspectors be given powers to issue infringement notices for breaches of record keeping, issue compliance notices and enforceable undertakings in line with provisions of FW Act s. 715 and s. 716. Currently the only mechanism to address breaches is through the IMC, which can be a lengthy process and unsuitable for minor breaches.

The CPSU/CSA supports Proposal 59 for matching and indexing penalties for enforcement proceeding in IMC with penalties under s. 539 FW Act. The CPSU/CSA agrees that the current penalties are too low and do not act as a disincentive against breaches.

The CPSU/CSA supports Proposal 60, to include provisions parallel to s. 55 FW Act for accessorial liability, as this will create additional disincentives against breaches, as well as Proposal 61, that gives the IMC the ability to impose penalties for breaches of the SES, Award, Agreement or any other industrial instrument.

The CPSU/CSA supports Proposal 62, to create a comparable provision to s. 557C FW Act for a reverse onus of proof in cases where the employer has failed to keep records, make them available or provide a payslip. This will reverse the current situation where employers are protected from prosecution when they have breached the record keeping requirements

as applicants are not able to obtain supporting evidence. The CPSU/CSA also supports Proposal 63 prohibiting the employer from providing false or misleading information or creating false records.

The CPSU/CSA supports Proposal 64 to create comparable provisions to s. 112 and s. 113 *Fair Trading Act 2010* (WA) to facilitate Industrial Inspectors' ability to share or obtain information from DMIRS or other State Government agencies. Currently Industrial Inspectors do not have the authority to do so which hinders investigations.

The CPSU/CSA supports Proposal 65 to broaden the powers of Industrial Inspectors under s. 98 IR Act to exercise their powers at Business premises where the Inspector reasonably believes relevant document or records are being kept. This responds to the changing nature of work with contracting, sub-contracting, labour hire and 'Gig economy' workers. The CPSU/CSA notes that the FW Act does not deal with Right of Entry for Occupational Safety and Health matters, which are covered by State legislation and recognises the important role of Unions in keeping workplaces safe.

The CPSU/CSA supports Proposal 68 to provide an amendment to s. 49I IR Act for the ability to make copies of records or evidence of breaches by photograph, video or other electronic means when exercising Right of Entry. This would be an update in the provision in line with developments in technology and introduces a civil penalty comparable to s. 504 FW Act for the misuse of documents or materials collected.

The CPSU/CSA does not agree with Proposal 67, that the Right of Entry provisions are to include a requirement for each permit holder to be a fit and proper person, and for the WAIRC to consider any other suspensions, sanctions or revocations under the Fair Work Act. Submissions were made by various employer groups which have made an argument in support of such a proposal however the CPSU/CSA shares the views of all other employee representative Unions, that the changes are not warranted, as there has been very little evidence to support their necessity.