WAPOU
WA Prison Officers' Union

Secretary J E P Welch
President K Brown
Ref;

RESPECT THE RISK
Keep Our Prisons Safe
www.respecttherisk.com.au

1 May 2018

Mr Mark Ritter SC
C/- IR Review Secretariat
Department of Mines, Industry Regulation and Safety
irreviewsecretariat@dmirs.wa.gov.au

Dear Mr Ritter

SUBMISSION IN RESPONSE TO THE INTERIM REPORT OF THE MINISTERIAL REVIEW OF THE STATE INDUSTRIAL RELATIONS SYSTEM

I write in relation to the call for submissions on the *Interim Report of the Ministerial Review of the State Industrial Relations System* (the Interim Report) published 20 March 2018.

In regards to the proposed recommendations and requests for additional submissions on amendments to the *Industrial Relations Act 1979* (the 1979 IR Act) or new inclusions in the renamed *Industrial Relations Act 2018* (the 2018 IR Act), we set out our submissions below.

1.0 About the WAPOU & CPSU/CSA

1.1 The Western Australian Prison Officers' Union (WAPOU) is a trade union that represents Prison Officers in Western Australia. It is affiliated with Unions WA, the Australian Council of Trade Unions and the Australian Labor Party.

1.2 It currently has approximately 2200 members throughout the WA prison system, both public and private.

1.3 Since 2013 WAPOU has been a state branch of its Federal affiliate, the Community & Public Sector Union.

2.0 Additional submission in response to Term of Reference 1

Gender neutral language

2.1 WAPOU supports amendments to the 1979 IR Act to ensure the language is gender neutral.

Plain English

2.2 The 1979 IR Act, as it is written, has been in operation for many years. The language, structure and definitions are well known by its practitioners. The intent and

63 Railway Parade
Mt Lawley WA 6050
ABN 98 518 622 745

T: (+61 8) 9272 3222
F: (+61 8) 9271 2666

E: wapou@wapou.asn.au
www.wapou.asn.au

CPSU

interpretation of each section of the 1979 IR Act has been thoroughly tested and recorded.

2.3 WAPOU does not support the rewriting of the 1979 IR Act to be in 'plain English'. This is seen as an extraordinary waste of time and resources.

The shift away from a layperson's tribunal

2.4 WAPOU fundamentally opposes changes to the 1979 IR Act that shift the jurisdiction from a layperson's tribunal toward a genuine legal domain.

2.5 We are deeply concerned with the dominant narrative throughout the Interim Report that legal professionals are the only, or even the preferred, practitioners that should operate within the realm of industrial relations.

2.6 Currently the State Industrial Relations System operates in a pragmatic, non-legalistic way with a key focus on conciliation and dispute resolution.

2.7 A greater use of and preference for legal practitioners will result in a system that is more costly to resource, with greater formality and reduced efficiencies and it will shift its focus away from efficient and pragmatic dispute resolution.

2.8 WAPOU supports the view the WAIRC should be remain empowered to 'act according to equity and good conscience'.

The introduction of costs

2.9 WAPOU opposes the introduction of costs.

2.10 Whether it be for vexatious claims, counterclaims or claims for costs, these proposed inclusions will have the practical outcome of exposing employees and unions to false allegations, undue pressure and intimidation.

2.11 Employers have a greater capacity to intimidate an employee into acquiescence or tie up union resources in defence of such claims. The recommendations proposed by the Interim Report disrupt the notion of the level playing field as employers will simply out-spend and out-resource their opponents.

2.12 WAPOU wholly submits the State Industrial Relations System should be maintained as a no-cost jurisdiction.

Streamlined and efficient

2.13 Overall the Interim Report's Terms of Reference 1 recommendations will result in a system with greater complexity, legalese and costs than the existing system.

2.14 The Interim Report's proposed recommendations within this section do not satisfy their objective to achieve a more streamlined and efficient system.

3.0 Additional submission in response to Term of Reference 2

A single system for the public sector

3.1 WAPOU supports the introduction of a single system for public sector employees.

3.2 We have always supported Prison Officers access to the Public Service Appeal Board (PSAB) and Public Service Arbitrator (PSA) on the basis the PSAB provides for expert

members to hear industry-specific matters and the PSA has extensive experience in the public sector.

3.3 However if the PSAB and PSA were to be abolished, it is WAPOU's submission that the power to hear a matter de novo be incorporated into the ordinary jurisdiction of the WAIRC.

Public Sector Standards

3.4 WAPOU submits the WAIRC should have the powers to hear breach claims related to the Public Sector Standards and Public Sector Commissioner's Instructions.

3.5 We do not believe there needs to be any impediment placed on the Public Sector Commission (PSC) in making Standards or issuing Instructions, however it is not appropriate for the PSC to hear breach claims on Standards or Instructions it has issued. It is significantly more appropriate for the WAIRC to consider alleged breaches of PSC Standards or Instructions.

3.6 It is WAPOU's position the WAIRC should only consider breaches in the application of the PSC Standards or Instructions and not consider the merits of the decisions made through the application of the PSC Standards or Instructions. For example, it is appropriate for the WAIRC to consider if there has been a breach in the application of the Employment Standard but not appropriate for the WAIRC to go to the merit selection decision an employer has made to make an appointment.

Expanding the capacity for employees to self-refer without a registered organisation

3.7 WAPOU opposes changes to the 1979 IR Act that would increase the scope of matters an employee, public sector or otherwise, may refer to the WAIRC without representation by a registered organisation.

3.8 It is our view that opening the scope will open the floodgates of industrially inexperienced employees independently making applications to the WAIRC. Representation and application by registered organisations assists with the smooth and efficient running of the WAIRC by providing a filter for credible, pursuable claims.

Workers bullied at work

3.9 WAPOU previously submitted *A Workplace Free from Bullying: WAPOU Submissions on Law Reform*, prepared by Daniel Stojanoski, during the first round of consultation on the Ministerial Review of the State Industrial Relations System.

3.10 We stand by our original submission.

The Prisons Act 1981 (WA)

3.11 Sections of the *Prisons Act 1981* (Prisons Act) that contain the rights of appeal to the WAIRC against removal decisions should be abolished and replaced by an entitlement for a Prison Officer to make an application to the WAIRC for a remedy in respect of an alleged unfair dismissal, having the same jurisdiction and powers as those applied to public sector employees.

3.12 This section of WAPOU's submission seeks to outline in detail the sections of the Prisons Act related to removal action and the WAIRC jurisdiction. It also seeks to give context to the reasons why, and to what end, these sections should be removed or nullified by introduction and application of the 2018 IR Act.

3.13 The Prisons Act posits there is a special relationship between the employer and Prison Officers to justify the difference in treatment under legislation, related to disciplinary and dismissal matters, and this is simply not true.

3.14 The claim a special relationship exists, as a result of the Chief Executive Officer's (CEO) direct command over Officers and higher reliance upon their integrity, honesty, competence, satisfactory performance and good conduct, has no basis. There is no principle at law that Prison Officers have a special relationship with their CEO, the idea is a construct designed to justify unreasonably harsh removal powers. Prison Officers are simply public employees.

3.15 The appeal mechanisms contained in the Prisons Act are sub-standard. The likelihood of a successful appeal against removal is limited by the fact only a 'loss of confidence must be established', rather than demonstration of misconduct or guilt. This is a much lower standard and one the WAIRC may have difficulty in deciding.

3.16 The WAIRC itself has conceded:

(1) it should not 'second guess' the opinion formed by the chief executive officer as to the suitability of a prison officer, and

(2) the chief executive officer is plainly the person best placed to make an assessment about suitability.

3.17 Therefore the WAIRC would be reluctant to second guess the opinion formed by the CEO as to the suitability of a Prison Officer. Without legislative change this contradiction effectively renders the appeal process to the WAIRC as null and void.

3.18 For the above mentioned reasons, it is imperative the relevant sections of the legislation be repealed. Given the terminology and intent is only that a 'loss of confidence' and lack of suitability be perceived by the CEO, the above statements have the practical effect of undermining any genuine appeal process.

3.19 The WAIRC must have powers to consider the validity of the facts underpinning a decision to remove a Prison Officer if that decision is appealed.

3.20 The Prisons Act's provisions do not currently seek to protect the appellant's (the Prison Officer's) interests in regards to any restrictions on the publication of information.

3.21 Under the Prisons Act, during an appeal the WAIRC may suppress information from being published if it is in the public interest to do so. There is no provision to have information suppressed from publication for the protection of the appellant.

3.22 The Prisons Act does not ensure the appellant's interests are protected, notwithstanding the need to consider the public interest. Restrictions on publication should be granted unless it is demonstrated the suppression would be significantly contrary to the public interest, and should take into consideration implications for criminal proceedings that should not be prejudiced.

3.23 The prospect of incriminatory material being raised and published by the WAIRC diminishes the attraction for Prison Officers to exercise the option of appealing removal decisions through the WAIRC. The 2018 IR Act must provide the WAIRC powers to restrict the publication of material that may incriminate a Prison Officer in a criminal matter.

3.24 The Prisons Act also interferes with the WAIRC's powers where it has determined the decision to take removal action was harsh, oppressive or unfair.

3.25 The WAIRC may order the removal has no effect but if it is 'impractical' for the Prison Officer to return to the workplace the WAIRC may order compensation. The 'impractical' test is not the standard convention with regard to unfair dismissals. If the employee, upon a successful appeal, seeks to return to their substantive role they should be afforded this unless the employer can demonstrate a fundamental breakdown in the relationship that prevents their return. The question of practicality should also take account of the view and wishes of the Prison Officer in the context of potential relationship breakdown and reputational damage.

3.26 Ambiguous references to practicality allow too much latitude to the employer in refusing the employee the right to return. The Prisons Act contemplates the question of practicality with respect to the availability of vacant positions for the Officer to take up. This fails to adequately recognise the nature of employment in the WA prison sector, the rate of attrition and the frequency of transfers. Only the most exceptional of circumstances should be lent upon in denying an Officer the opportunity to return to employment where it is sought. Preference should be given to the prison where the Officer was last employed, unless otherwise requested. This can be remedied through the 2018 IR Act.

3.27 The Prisons Act refers to the power of the WAIRC to direct the employer to pay an amount of compensation where return to employment is impractical. The compensation payment is described as being 'for loss or injury caused by the removal' (emphasis added). The loss and injury, both financial and reputational, in these circumstances may be significant, particularly given the process may have been protracted. The compensation should be available for both loss and injury to avoid precluding the range of impacts that could be experienced. This can also be remedied through the 2018 IR Act.

3.28 *Subdivision 3 – Appeal against removal of a prison officer* of the Prisons Act is a section that should certainly be abolished and nullified by introduction and application of the 2018 IR Act.

3.29 For example there is an absence of parity when it comes to the tendering of new evidence. Both the employee and employer may seek leave to tender new evidence at appeal but the restrictions and burdens are disproportionately weighted against the employee, as is contained in s.108, s.109 and s110A. These restrictive and inequitable provisions disempower the WAIRC from determining whether new evidence is relevant and should be admissible. There must be parity in the rights of both parties to bring new evidence, the WAIRC must have broad powers and discretion to make decisions in regards to the admissibility of new evidence and these sections must be amended.

3.30 To illustrate, s.108(4)(a) states the WAIRC needs to have regard for whether the Officer was aware of the evidence prior to the removal decision. This subsection does not take into account that an Officer may have known information existed but may not have understood the relevance prior to being informed of the removal decision.

3.31 Likewise, s.108(4)(b) states the WAIRC needs to have regard for whether the Officer had reasonable access to the evidence prior to the removal decision. Again this subsection does not take into account that an Officer may have had access to specific information prior to the removal decision but may not have understood its importance to their case.

3.32 S.107(4)(b) of the Prisons Act should be struck out. It speaks to a requirement for the WAIRC to consider the public interest when determining an appeal; inclusive of public confidence in the "integrity, honesty, conduct and standard of performance" of Prison Officers and the "special nature of the relationship" between Prison Officers and their

employer. We maintain no special relationship has been established. Additionally, the public confidence measure is entirely subjective and a matter of speculation that should not determine a worker's employment status. Either the removal decision was harsh, oppressive or unfair or it was not. This is the extent of the consideration necessary by the WAIRC in making a determination.

3.33 The WAIRC should have powers and discretion to consider whether the decision to remove a Prison Officer was harsh, oppressive or unfair and make orders accordingly. However, Subdivision 3 imposes numerous inequities and unjustifiably restricts the powers of the WAIRC. The Subdivision should be abolished and the 2018 IR Act should apply to ensure parity between the parties and so that the WAIRC is able to act comprehensively as an independent umpire.

4.0 Additional submission in response to Term of Reference 3

4.1 WAPOU supports the inclusion of an equal remuneration provision in the 2018 IR Act and to this end fully supports the submissions made by UnionsWA on this Term of Reference 3.

5.0 Additional submission in response to Term of Reference 4

5.1 WAPOU supports the expansion of the definition of "employee" to ensure all workers in Western Australia, not currently covered by state or federal jurisdictions, are properly captured by the 2018 IR Act. To this end WAPOU fully supports the submissions made by UnionsWA on Term of Reference 4.

6.0 Additional submission in response to Term of Reference 5

6.1 WAPOU fully supports the submissions made by UnionsWA in regards to Term of Reference 5.

7.0 Additional submission in response to Term of Reference 6

7.1 WAPOU does not support an Award modernisation, amalgamation or simplification process similar to what was experienced in the federal jurisdiction. We do however support steps to be taken to a redraft the scopes of various Awards to cover more workers in Western Australia. To this end WAPOU fully supports the submissions made by UnionsWA on Term of Reference 6.

8.0 Additional submissions in response to Term of Reference 7

Infringement notices

8.1 WAPOU believes it is a positive step to increase the powers of industrial inspectors in relation to issuing fines and undertakings, however this is a qualified position.

8.2 Infringement notices have a place within enforcement mechanisms however they should only be utilised where prosecution is not a pursuable option.

8.3 It should be the default within the 2018 IR Act that prosecution for breaches is sought and the issuing of infringement notices be utilised only for technical breaches when prosecution is not able to be definitively pursued.

Right of entry

8.4 WAPOU is absolutely opposed to any introduction of a fit and proper person test in relation to right of entry permits.

8.5 It is our view this proposal is without basis. There has been no compelling evidence collected since the introduction of the 1979 IR Act that would warrant such an amendment.

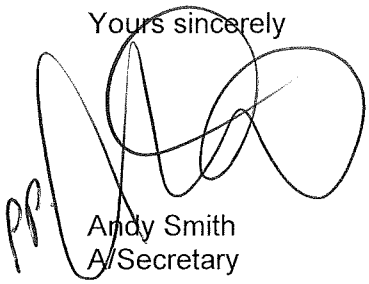
8.6 The introduction of a fit and proper person test would be an unsubstantiated hurdle to union activity and an inconsistent with, we hope, the principles of a Ministerial Review instigated by a Labor government.

9.0 Additional submission in response to Term of Reference 8

9.1 WAPOU supports the regulation of Western Australian local government employees and employers by the State Industrial Relations System and to this end fully supports the submissions made by the Australian Services Union – Western Australian Branch on Term of Reference 8.

I thank you for the opportunity to provide this further submission in regards to the *Ministerial Review of the State Industrial Relations System.*

Yours sincerely



Andy Smith
A/Secretary