

Hon Jay Weatherill MP



Government
of South Australia

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Dear Ms McMahon

Re: Public Sector Bill 2008

I refer to our meeting on 16 March 2009, regarding the Public Sector Bill 2008.

As I indicated at the meeting, I believe that we have been able to address most of the PSA's concerns in the course of drafting and consulting on the Bill, and I acknowledge the productive way in which the PSA has engaged with Government throughout this process.

Nonetheless, there remain some outstanding differences between us. We addressed these differences at the meeting, and the purpose of this letter is to confirm the Government's current position in respect of them.

A set of draft proposed amendments to the Bill is attached to assist your understanding of the Government's position, which is as follows:

Public Sector Representative Organisation

The requirement to consult with representative organisations on matters that affect public sector employment is now contained within the public sector principles (Part 3, clause 5) under employer of choice.

The PSA proposes to return essentially to the equivalent provisions in the Public Sector Management Act. The effect of these provisions is to provide a preference for some legitimate unions over others (ie those with "a significant number of public sector employees"). This is not something the Government can support.

Code of Conduct

The Government agrees in principle with the PSA's concern to ensure that the Code of Conduct cannot unduly restrict the conduct of employees outside their employment. However, I am advised that the clause proposed by the PSA, contains great ambiguity and would be likely to create confusion.

As an alternative way of addressing the issue, the Government is prepared to elevate to the Bill the wording equivalent to that currently found in the Public Sector Management Regulations 1995 (Regulation 15), regarding disclosure of information. Please find the wording attached (Amendment no 1).

I understand that this wording may not be sufficient for you. But given that we agree on the principle, it should be possible to come to an acceptable provision, and I would encourage you to continue discussions in this regard.

Reclassification

The Government undertook before the Parliamentary debate commenced that appeals in relation to decisions regarding reclassification would not be excluded by regulation.

However, I understand that the PSA seeks greater certainty than that provided by this undertaking. Therefore, the Government will move amendments to protect reclassification appeals. These will be in the same terms as those proposed by the Opposition in the House of Assembly (see Amendments 2 – 3, attached).

Suspension during an investigation

The Government intended in drafting the Bill that the power to suspend from duty pending the completion of an investigation be with pay, except in the specific circumstances set out in clause 56(2). Even then, suspension without pay is discretionary.

I understand that the PSA's concern is that this intention has not been made sufficiently clear. Therefore the Government will move an amendment to clause 56(1) to provide that clarity (see Amendment 4).

Public Sector Grievance Review Commission - Appointment

The Government agrees with the PSA that, to ensure that appropriate appointments are made, the Minister should invite representations from public sector representative organisations on any proposed appointment, and a person appointed as a Commissioner should have appropriate knowledge and experience.

The Government proposes to move amendments in this regard (see Amendment 5, attached).

Public Sector Grievance Review Commission - Panels

The Bill provides for reviews by a single Commissioner rather than the continuation of a panel of representatives. This change has been made primarily on the basis that the panel arrangements can be cumbersome, and add time and expense to what should predominantly be relatively straightforward matters. The Government is not persuaded that the benefits of the panel arrangements outweigh those disadvantages.

Therefore, the Government does not support the proposal to re-establish the panels.

Term Employment, Probation

The PSA proposes that in respect of both term employment and probation, the Bill should be amended to provide for ongoing employment:

- in the case of term employment, where employment beyond the agreed term occurs; and
- in the case of probation, where the probationary period is not notified in writing in advance of the employee agreeing to the employment.

One underlying purpose of the Bill is to lead to managers better managing their employees. The effect of these proposals is that ongoing employment status can be obtained unknowingly. The Government wants decisions regarding employment status to be consciously made. It does not believe that it is appropriate that a person should automatically become an ongoing employee because of some inadvertence or inattention or mistake on the part of their manager.

Therefore the Government does not support these proposals.

Termination Powers of Chief Executives

The arguments for and against giving Chief Executives the power to terminate employment have been made many times. I do not repeat them here.

The Government does not support the proposal to make the CPSE responsible for terminating employment.

Power of the Commissioner to investigate of his own initiative

Similarly, the arguments regarding the CPSE's powers have also been made many times.

The Government does not support the proposals to give the CPSE the power to act in various respects "*at the Commissioner's own initiative*".

Conclusion

I note that we have further narrowed the differences between us as a result of yesterday's meeting.

Once you have had a chance to consider the matters set out in this letter, I would encourage the PSA to see if any further narrowing of the differences between our positions is possible.

If you have any concerns about the matters set out in this letter, please contact Simon Blewett on 8463 5686.

Yours sincerely



For
Hon Jay Weatherill MP
**MINISTER ASSISTING THE PREMIER IN CABINET BUSINESS
AND PUBLIC SECTOR MANAGEMENT**

17 / 3 / 2009

Legislative Council—Bill No 65

Amendments to be moved by the Minister for State/Local Government Relations [1]

South Australia

Public Sector Bill 2008

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Amendment No 1 [StateLocal-1]—

Clause 14, page 14, lines 20 to 22 [clause 14(2)]—

Delete subclause (2) and substitute:

- (2) The public sector code of conduct does not prevent or limit the disclosure of information gained in the employee's official capacity or comment or advocacy on matters affecting the public sector or business of the public sector if the disclosure, comment or advocacy—
- (a) is required as part of the employee's official duties; or
 - (b) is required or authorised under the *Freedom of Information Act 1991* or the *Whistleblowers Protection Act 1993* or is otherwise required by law; or
 - (c) occurs with the permission of the public sector agency by which the employee is employed; or
 - (d) —
 - (i) does not give rise to any reasonably foreseeable possibility of prejudice to the Government in the conduct of its policies, having regard to the nature of the disclosure, comment or advocacy, the employee's current role or previous roles in the public sector and the circumstances in which the disclosure, comment or advocacy occurs; and
 - (ii) does not involve—
 - (A) any disclosure of information contrary to any law or to any lawful instruction or direction relating to a specific matter; or
 - (B) any disclosure of information with a view to securing a pecuniary or other advantage for the employee or any other person; or
 - (C) any disclosure of information of commercial value the disclosure of which would diminish its value or unfairly advantage a person in commercial dealings with the Government; or
 - (D) any disclosure of information in breach of intellectual property rights.
- (2a) Subsection (2) applies whether the disclosure is made in an official or private capacity.

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- (2b) The public sector code of conduct does not prevent or limit comment or advocacy by an employee on matters affecting the public sector or the business of the public sector if the comment or advocacy occurs in the employee's capacity as a member of the governing body of an organisation that represents the interests of public sector employees.

Amendment No 2 [StateLocal-1]—

Clause 45, page 24, line 40—

Delete "in accordance with the regulations"

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Amendment No 3 [StateLocal-1]—

Clause 48, page 25, after line 29—

After subclause (2) insert:

- (3) The remuneration level of an employee of a public sector agency may be reclassified by the agency on the initiative of the agency or on application to the agency by the employee.
- (4) The regulations may not exclude the right of an employee to apply under Part 7 Division 4 to the Public Sector Grievance Review Commission for review of a decision on an application by the employee under subsection (3).

Amendment No 4 [StateLocal-1]—

Clause 56, page 28, after line 21—

After subclause (1) insert:

- (1a) Subject to subsection (2), a suspension will be with remuneration.

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Amendment No 5 [StateLocal-1]—

Schedule 2, clause 1, page 41, after line 27—

After subclause (2) insert:

- (2a) Before the Governor makes an appointment under subclause (2), the Minister must invite representations from public sector representative organisations on the proposed appointment.
- (2b) A person appointed as a commissioner must have, in the opinion of the Governor, appropriate knowledge and experience of principles and practices of public sector employment.

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