Ministerial Review of the State Industrial Relations System

Prepared by the WA Police Union

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Introduction

On 22 September 2017, the State Government ("the Government") announced a Ministerial review ("the review") was to be conducted into the State industrial relations system. Mr Mark Ritter SC is responsible for overseeing the review process.

The WA Police Union (WAPU) received a letter dated 3 October 2017 about the review from the Minister for Commerce and Industrial Relations Hon. Bill Johnston MLA.

The review's terms of reference are[1]:

1. Review the structure of the Western Australian Industrial Relations Commission with the objective of achieving a more streamlined and efficient structure.

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.

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.

4. Review the definition of "employee" in the *Industrial Relations Act 1979* and the *Minimum Conditions of Employment Act 1993* with the objective of ensuring comprehensive coverage for all employees.

5. 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) 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.

6. Devise a process for the updating of State awards for private sector employers and employees, with the objectives of:

    a) ensuring the scope of awards provide comprehensive coverage to employees;

    b) ensuring awards reflect contemporary workplaces and industry, without reducing existing employee entitlements;

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[1] Hon Bill Johnston MLA to WAPU President, 3 October 2017, Letter.

c) ensuring awards are written in plain English and are user friendly for both employers and employees; and

d) ensuring that any award updating process is driven by the Western Australian Industrial Relations Commission, with appropriate input from the award parties and other relevant stakeholders.

7. Review statutory compliance and enforcement mechanisms with the objectives of:

   a) ensuring that employees are paid their correct entitlements;

   b) providing effective deterrents to non-compliance with all State industrial laws and instruments; and

   c) updating industrial inspectors' powers and tools of enforcement to ensure they are able to effectively perform their statutory functions.

8. Consider whether local government employers and employees in Western Australia should be regulated by the State industrial relations system, and if so, how that outcome could be best achieved.

WAPU welcomes the opportunity to make a submission to the review as outlined by the Minister.

WAPU has constantly advocated that the existing *Industrial Relations Act 1979* be amended to better recognise the unique working conditions of its Members. In particular, that the WA Government grants police officers and police auxiliary officers (PAO) full access to the WA Industrial Relations Commission (WAIRC).

WA Police Union

WAPU was founded in January 1912. Since then, WAPU has been at the forefront of representing the rights, interests and welfare of police officers throughout the State.

The Union currently has more than 6,500 Members – 98 per cent of all police officers in the WA Police Force. Members consist of sworn police officers, PAOs and Aboriginal police liaison officers employed by the Commissioner of Police.

WAPU assists Members by providing a range of services including industrial, legal and welfare support.

Background

According to Minister Johnston, the McGowan Labor Government aims to deliver a State industrial relations system that is fair, accessible and contemporary[2]. WAPU argues the existing system is failing to meet those criteria in relation to the State's police officers.

Employment legislation framework of WA police officers and PAOs

Most WA government employees are employed under the *Public Sector Management Act 1994*. Police officers, PAOs and Aboriginal police liaison officers though are employed under the *Police Act 1892* ("the Police Act"). Being employed under the Police Act results in WAPU Members having fewer industrial rights and protections compared to the wider public sector.

Section 10 of the Police Act requires officers to first swear the official oath of office prior to being engaged in the role. Officers swear to uphold the law and protect the community until they are legally discharged from the role[3]. WAPU Members are always obligated to act as police officers for as long as they are employed by the WA Police Force. The resulting community expectation is that where police intervention is required, officers – whether on-duty or off-duty – will *always* come to the aid of anyone requiring assistance. The consequences for an officer, should they fail to act appropriately when off-duty, are far reaching, including punitive and/or disciplinary actions from management.

Section 14 requires officers to obey all lawful commands from their superior. The requirement effectively prevents officers from engaging in strike action. Such a requirement is necessary for the purposes of community safety. It nonetheless restricts the ability of WAPU Members to pursue and advance their interests compared to other public sector employees. WA Police industrial agreement negotiations are traditionally complex and drawn out, due in part to the fact that WAPU Members are limited in the types of industrial action they can undertake.

Coverage under the *Industrial Relations Act 1979*

The WA industrial relations system is legislatively underpinned by the *Industrial Relations Act 1979* ("the IR Act").

Important to WA police officers was the *Industrial Relations Amendment Act 2000* that introduced Schedule 3 to the IR Act. Schedule 3 specifically defines the IR Act's applicability in relation to police officers and PAOs. In summary, the key provisions of Schedule 3:

- Recognise police officers as employees of the Commissioner of Police in accordance with Section 80C of the IR Act;

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[2] Ibid

[3] *Police Act 1892*, as at 2 May 2011, p 5.

- Takes WAPU to be, and to have always been, an organisation of employees; and
- Allow police officers access to the WA Industrial Relations Commission (WAIRC), under the jurisdiction of the public service arbitrator.

However, Schedule 3 still does not provide police officers or PAOs with the same statutory rights as other WA public sector employees. The interrelationship between the IR Act and the Police Act effectively limits the purview of the WAIRC to WA Police-related awards and industrial agreements. Section 2 (3) of Schedule 3 prohibits the WAIRC from considering a number of other matters critical to WAPU Members:

"*Despite subclause (2), an Arbitrator does not have jurisdiction to enquire into or deal with, or refer to the Commission in Court Session or the Full Bench, any matter relating to or arising from the* ***transfer, demotion, reduction in salary, suspension from duty, removal, discharge, dismissal or cancellation of the appointment*** [WAPU emphasis] *under the Police Act 1892 of a police officer, police auxiliary officer or Aboriginal police liaison officer or, in the case of a special constable, the cancellation under that Act of the constable's appointment.*"[4]

WAIRC is able to consider and adjudicate on similar matters to those in Section 2 (3) for all other WA public sector employees. By contrast, the Commissioner of Police has unfettered power. The outcome being the Commissioner of Police (or whomever acts in his authority) can make arbitrary, unilateral decisions about certain employment matters that cannot be tested against a minimum standard for compliance or reasonableness. This is especially pertinent in relation to decisions about transfer and tenure.

The WA Police Force has the complete discretion to impose time limits (tenure) on the portfolios and districts in which police officers are stationed. Police officers have no formal independent and impartial forum to mediate, conciliate and/or arbitrate should they have reason to dispute management's decision to transfer (or conversely, not to transfer). The inability of police officers to access the WAIRC to appeal such decisions can have significant ramifications at an individual, family and community level:

- Placing pressure on the partners of officers who must move in tandem with management and policy edicts;
- Creating a financial impost for families who must sell homes in depressed markets or who lose income as the non-police partner leaves one job to find another;
- Uprooting children from their schooling, sporting and social commitments;
- Generating unnecessary emotional costs which arise from frequently packing up and unpacking a home as well as loss of support networks;

[4] *Industrial Relations Act 1979*, as at 21 January 2017, p 318.

- Negating the time and effort police officers take in building relationships with disaffected youth, Indigenous elders, business and community leaders, particularly in regional WA; and
- Weaken levels of police knowledge about local offender patterns and networks.

In January 2014, WAPU provided a submission to the Legislative Council Standing Committee on Legislation ("LC Committee"). The submission was in response to the proposed *Workforce Reform Bill 2013* (eventually coming into force as the *Workforce Reform Act 2014)*. WAPU argued the unfairness of Section 2 (3) given Members have less industrial rights and protections compared to other public sector employees. Two options were proposed to address this inequity:

- That Schedule 3 of the IR Act is amended to exclude police officers from the Government's Wages Policy by inserting a new subsection; or
- That Section 2 (3) is removed from Schedule 3 of the Act.

The LC Committee's final report did not endorse either option. Instead, police officers remain subject to Government Wages Policy as per Section 26 (2A). Nor did the LC Committee report address the concerns WAPU expressed in relation to Section 2 (3) of Schedule 3.

Since January 2014, WAPU has endorsed removing Section 2 (3) as its preferred option. This amendment will provide our Members with the same access to the WAIRC as enjoyed by all other WA public sector employees.

Review Terms of Reference – WAPU Response

WAPU's response to the review's terms of reference (TOR) concentrates on the three most relevant to WAPU Members.

TOR 2: Review the jurisdiction and powers of the WAIRC with the objective of examining the access for public sector employees to the WAIRC on a range of matters for which they are currently excluded

Policing by its very nature is a dangerous job. WAPU Members nonetheless face an inequitable situation in terms of accessing the State's industrial umpire. Police officers and PAOs deserve the same access granted to other emergency service workers including firefighters and paramedics.

In our 2017 Pre-Election Submission, WAPU proposed the complete removal of Section 2 (3) from Schedule 3 of IR Act. This would allow police officers to access the WAIRC in relation to:

- Employment matters such as recruitment, selection, secondment, transfer and temporary deployment;
- Performance management;
- Grievance resolution;
- Redeployment;
- Termination; and
- Discipline.

Removing Section 2(3) will provide WAPU Members with the same access to the WAIRC as enjoyed by all other public sector workers and employees in WA. WAPU understands this would likely impact the Commissioner's prerogative as prescribed within the *Police Act 1892* ("Police Act") on the areas related to:

- Section 8 removal of non-commissioned officers from their position as well as the power to fill any vacancy;
- The Commissioner's power to remove officers they have lost confidence in under Section 33L;
- Non-commissioned officers' avenue of appeal to the WAIRC in relation to Section 33L removals; and
- An officer's right to appeal to the WAIRC under Section 33P against a no-confidence notice on the grounds the Commissioner's decision was harsh, oppressive or unfair.

Amending the above sections would represent a significant change to the Police Act, which would also need to be reflected in the accompanying *Police Force Regulations 1979*.

A less complex option might be to expand the scope of the WA Police Appeal Board under Part IIA of the Police Act. Under Section 33E, the Police Appeal Board is currently limited to appeals in relation to disciplinary offences. By contrast, the *Victoria Police Act 1993* allows police officers in that State to apply to the Police Registration and Services Board (PRSB) to review decisions including[5]:

- To disallow the officer's promotion;
- That the officer is unsuitable for promotion to a position of senior constable (general duties);
- Not to promote the officer, being a constable, to the rank of senior constable in the same position;
- To reduce the officer's rank or seniority;
- To reduce the officer's remuneration;
- To make a directed (non-disciplinary) transfer of the officer;
- To otherwise compulsorily transfer the officer; and
- To terminate the officer's appointment

The PRSB's powers vary according to the matter being reviewed. In the case of non-disciplinary transfers, the PRSB is able to set aside the original decision and refer it (including recommendations) to the Commissioner of Police for final determination[6].

Alternatively, and specific to the IR Act, Section 2 (3) of Schedule 3 could be amended to allow the WAIRC to review a broader range of matters for police officers, PAOs and Aboriginal police liaison officers. Such a scheme exists in other jurisdictions. Part 8 of the South Australia *Police Act 1998*, for example, allows SA police officers to apply to the South Australian Employment Tribunal to review certain decisions relating to termination and transfers[7]. Under such a system, WA police officers could bring non-disciplinary employment matters to the WAIRC. If the WAIRC is satisfied the matter meets the 'harsh, oppressive or unfair' criteria, it would be able to ask the Commissioner of Police to review the decision.

Improving WAIRC access for WA police officers will involve legislative change regardless of the option chosen. But WAPU argues such change is needed to ensure its Members at least have similar standards of protection as other police officers across the states and territories.

[5] *Victoria Police Act 2013*, as at 17 December 2013, p 111.
[6] Ibid p 120.
[7] *Police Act 1998*, as at 4 September 2017, p 18.

TOR 4: Review the definition of "employee" in the *Industrial Relations Act 1979* and the *Minimum Conditions of Employment Act 1993* with the objective of ensuring comprehensive coverage for all employees

The term "employee" in the IR Act is defined under Section 7. Police officers were not included in this definition until the *Industrial Relations Amendment Act 2000* came into operation. Under Section 2 (2) of Schedule 3, police officers are now included as a "government officer" within the meaning of Section 80C[8]. However, falling under the definition of "employee" does not entail WAPU Members with the full rights enjoyed by other public sector employees. This includes the rights of employees under the *Minimum Conditions of Employment Act 1993* ("MCE Act").

In theory, the MCE Act's definition of "employee" does not apply to[9]:

- Volunteers;
- People who receive a disability pension and are aided by a supported employment service;
- People paid wholly by commission or piece rates; and
- People appointed as wardens under the *National Trust of Australia (WA) Act 1964*.

However, the Police Act and Section 2 (3) of Schedule 3 of the IR Act significantly influence the minimum protections WAPU Members have as employees. One example is the minimum protections for unpaid parental leave.

An employee's entitlement to unpaid parental leave in Western Australia is provided by both Division 6 of the MCE Act and nationally through Division 5 of Part 2-2 of the *Fair Work Act 2009* ("FWA"). Section 744 of the FWA also extend its unpaid parental leave entitles to non-national employees (including state public sector employees).

Clause 32 of the existing *WA Police Industrial Agreement 2014* contains parental leave conditions for WA police officers. Provision 10 (b) of that clause states[10]:

"An employee on return from parental leave shall be entitled to the same position, or a position equivalent in pay, conditions and status and commensurate with the employee's skill and abilities, as the substantive position held immediately prior to proceeding on Parental Leave."

It is WAPU's understanding the WA Police Force's current practice is to backfill positions previously occupied by police officers on parental leave after the position's substantive

[8] *Industrial Relations Act 1979*, as at 21 January 2017, p 318.

[9] WA Department of Commerce (2011). *Minimum conditions of employment – A guide for employers and employees*: p 3.

[10] *WA Police Industrial Agreement 2014*, PSAAG 5 of 2014, p71.

occupant has accessed a period of four months unpaid parental leave. Officers returning to work after a period of four months unpaid leave are not automatically allocated to the same position they occupied prior to proceeding on parental leave. Instead, those officers are offered a 'like' position within the portfolio or district.

Section 2 (3) of Schedule gives the Commissioner of Police absolute authority to transfer officers throughout the WA Police Force. This includes officers currently taking unpaid parental leave. However, WAPU contends this is a breach of Section 84 of the FWA which provides that only where a position no longer exists shall an employee be placed in a like position[11]. In terms of the unpaid parental leave conditions of our Members, WAPU believes Section 109 of the Australian Constitution should be used as a guide. Namely, where a State law is inconsistent with a valid Commonwealth law, the latter shall prevail[12].

[11] *Fair Work Act 2009* Part I, as at 3 October 2017, p 149.
[12] http://www.aph.gov.au/About_Parliament/Senate/Powers_practice_n_procedures/Constitution

TOR 7: Review statutory compliance and enforcement mechanisms

Bargaining in good faith is a common and established industrial relations concept across national jurisdictions. However, the IR Act did not recognise the concept until 2002 through the *Labour Relations Reform Act 2002*[13].

Section 42B of the IR Act requires parties to bargain in good faith in relation to industrial agreements. "Bargaining in good faith" is not explicitly defined. Rather, Section 42B (2) states parties demonstrate it through behaviours including[14]:

- Stating their position on matters at issue, and explaining that position;
- Meeting at reasonable times, intervals and places for the purpose of conducting face-to-face bargaining;
- Disclosing relevant and necessary information for bargaining;
- Acting honestly and openly, which includes not capriciously adding or withdrawing items for bargaining;
- Recognising bargaining agents;
- Providing reasonable facilities to representatives of organisations and associations of employees necessary for them to carry out their functions;
- Bargaining genuinely and dedicating sufficient resources to ensure this occurs; and
- Adhering to agreed outcomes and commitments made by the parties.

Section 42B (3) also gives the WAIRC the discretion to determine that a party engaging in industrial action is in breach of their duty to bargain in good faith[15]. However, Section 42D states that the duty of good faith does not require a concluded agreement. No bargaining party is required to agree to an industrial agreement either in whole or part[16]. For WAPU Members, Section 42D can have the effect of unnecessarily protracting industrial agreement negotiations. When bargaining fails to reach an agreement, the only solution currently available is for arbitration under Section 42G or 42I of the IR Act.

The 2016 and 2017 State Wage Policies (SWP) capped outcomes at 1.5 per cent per annum and $1,000 per annum respectively. These caps are absolute with no opportunity for the parties involved to explore productivity improvements or other offsets. In WAPU's experience, this has resulted in successive governments refusing to provide any offer to settle bargaining until the last possible moment. WAPU believes this to be deliberate delaying tactic by government – stalling until the release of its latest Economic and Financial Outlook before

[13] http://airaanz.econ.usyd.edu.au/papers/Gillian_Caspersz.pdf
[14] IR Act 1979: pp. 71-72.
[15] IR Act 1979: p 72.
[16] IR Act 1979: p 74.

making its 'offer'. Combined with SWP prohibition on retrospective payments, such an approach unfairly discriminates against public sector employees genuinely bargaining in good faith.

At present, there is no penalty for a party that delays bargaining or does not genuinely negotiate. WAPU advocates the WAIRC be given a mechanism to compel good faith beyond its current capacity to declare bargaining has ended. WAPU further argues there needs to be consequences for any party who delays bargaining or is not trying to reach genuine agreement.

Section 443(1) (b) of the FWA requires the Fair Work Commission to be satisfied that applicants for a protected ballot order are, "…*genuinely trying to reach an agreement with the employer of the employees to be balloted*"[17]. WAPU argues Section 42B (2) of the IR Act should be amended to contain a similar provision:

> *"42B (2) Without limiting the meaning of the expression, bargaining in good faith by negotiating parties includes doing the following things —*
>
> After existing (a) to (h):
>
> *(i) genuinely trying to reach an agreement."*

Parties would still be allowed to reject an agreement as per Section 42D. But the IR Act should also try and prevent parties from simply going through the motions. Having to satisfy the WAIRC of a genuine effort to reach an agreement would strongly assist towards this outcome. Such an amendment is particularly important for WAPU Members given the restrictions they face on taking industrial action.

[17] *Fair Work Act 2009* Part I, as at 3 October 2017, p 491.

Summary

Nearly four years have passed since the introduction of the *Workforce Reform Bill 2013*. The issues WAPU raised at the time are just as relevant in November 2017. It is inexcusable to our Members that their industrial rights and protections continue to lag behind those of other public sector workers. This is despite WA police officers being confronted with increasing rates of violent and drug-related crime as well as subsequent risks to their personal safety.

WAPU submits that the review makes the following recommendations to the State Government:

1. WA police officers are granted full access to the WAIRC by the complete removal of Section 2 (3) of Schedule 3 in the *Industrial Relations Act 1979*;

2. That the definition of 'employee' is consistent in both the *Industrial Relations Act 1979* and the *Minimum Conditions of Employment Act 1993*, legally ensuring police officers have the same minimum entitlements as other WA public sector employees;

3. Section 42B (2) of the *Industrial Relations Act 1979* is amended to include 'genuinely trying to reach an agreement' for parties to demonstrate they are bargaining in good faith; and

4. The *Industrial Relations Act 1979* be amended to impose penalty or enforcement mechanism for parties who delay public sector bargaining.

The adoption of these recommendations would go a long way in making the State's industrial relations system fair, accessible and contemporary to WA police officers and PAOs.