

SUBMISSION TO THE

PUBLIC ACCOUNTS COMMITTEE

LEGISLATIVE ASSEMBLY

INQUIRY

on the

AMENDMENTS MADE TO THE PUBLIC SECTOR MANAGEMENT ACT
(1994) IN 2020

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Introduction

Some of the current functions and powers provided to the Public Sector Commissioner have their precedents in earlier legislation and for the purposes of this submission, the functions and powers set out in the Public Service Act (41 of 1904), the Public Service Act (86 of 1978) and the Public Service Act Amendment Act (113 of 1987) will be referred to.

The Public Service Act 1904 established the position of Public Service Commissioner who was charged with ensuring “the establishment and continuance of a proper standard of efficiency and economy in the Public Service”. In carrying out the functions of the office, the Commissioner was ‘as far as practicable’ expected to inspect each department, investigate the character of work and its relationship to other department and to examine the permanent head of the department.

The 1904 Act also provided the Commissioner with powers to summon witnesses and take evidence on oath, and require the production of official documents. Witnesses could not be compelled to answer questions. S 16 dealt with the relationship between the Commissioner and Members of Parliament thus: “No member of Parliament shall interview or communicate with the Commissioner regarding the appointment of any applicant for a position in the Public Service.”

What principles were legislated for in the 1904 Act?

- Office of the Parliament
- Independence
- Accountability – reports to the Parliament
- Economy and efficiency
- Enforcement – inspection, inquiry, witnesses

The Public Service Act 1978, which repealed the 1904 Act, provides in S14 (1) for the Public Service Commissioner “to promote and maintain effective, efficient and economic management and operation of the Public Service of the State”. The Commissioner was replaced by a three-person Board with power to issue Administrative Instructions and regulations were to be made through the Governor. The Board retained powers of entry, inspection and inquiry as well as the power to summon witnesses. Witnesses were not obliged to answer questions or produce official documents that would tend to incriminate them. S18 (4) required the Board to act according to equity, good conscience and the substantial merits of the case. It was not to be bound by the rules of evidence “but may inform itself in such a manner as it thinks fit.” Finally, the 1978 Act recognized the importance of public servants holding only a position in the service

by requiring written permission for one to take positions at the same time in other public and private organisations (S54 (1))

Had any new principles emerged since the passage of the 1904 Act? The same are found:

- Office of the Parliament
- Independence
- Accountability – reports to the Parliament
- Economy and efficiency
- Enforcement – inspection, inquiry, witnesses

While the same principles are to be found, new powers generally related to enforcement and management are included. These cover the primary role in employment as a public servant and the use of Administrative Instructions, regulations and the Public Service Notices in addition to the Government Gazette allowed in the 1904 Act. There is a clear growth in details in the Act and in greater specificity. The Board is no longer required to ensure...“a proper standard of efficiency and economy in the public service.”

The amendments made in 1987 abolished the Public Service Commission, replacing it with a sole Commissioner and established the Senior Executive Service.

Had any new principles emerged since the passage of the 1978 Act? The same are found:

- Office of the Parliament
- Independence
- Accountability – reports to the Parliament
- Economy and efficiency
- Enforcement – inspection, inquiry, witnesses

Current Functions and Powers of the Public Sector Commissioner

The current functions of the Commissioner include some that echo previous legislation and others which are more specific. Once again, efficiency and effectiveness are required but the Commissioner is expected to promote it, not ensure it as in the 1904 Act. In addition, the Commissioner is expected to advise Ministers and senior staff on improvements in management practices aimed at lifting efficiency and effectiveness; planning for future management and operation of the sector is also included for the first time. The Commissioner may, in conducting reviews use powers conferred by earlier legislation and also compel witnesses to answer questions.

Finally, the Commissioner can utilize other functions and powers conferred elsewhere in the amended Act.

The Act includes in S29 and S30 the duties and functions of Chief Executive Officers, demonstrating again a higher level of specificity than most earlier legislation.

The 2010 Act also sets out in S7, S8 and S9 public sector principles some of which are new to the legislation governing the public sector and others which make earlier principles – such as economy and efficiency – more specific.

The importance attached to the position is seen in its accountability to the Parliament. How this is achieved is a matter of convention: the Commissioner reports through the Minister assigned responsibility for the legislation in the Governor's Order allocating Ministerial responsibilities. However, other ways can be seen at work such as attendance at estimate hearings and meeting any Parliamentary Committee with terms of reference dealing with the position or its responsibilities.

The provisions relating to the appointment and management of Chief Executive Officers

High quality leaders in the public sector are critical for its contemporary and future management in a state where competition for talent is tough, the most senior jobs are drawn increasingly into the ocean of politics and where political leaders are prepared to dive under for cover and leave their senior public sector leaders to handle the flotsam.

Public sector leaders often represent the state in negotiations with the Commonwealth and local governments, lobby groups and the private sector whose own leaders have honed their skills in a competitive market, whose performances are measured in dollar terms and whose boards have access to political leaders. The operational environment is flint-hard and the state needs the best it can get with the highest possible commitment to the well-being of Western Australia, with leadership and managerial skills that match or exceed those who wish to deal with the state and who can work effectively in the system.

In this context, the Public Sector Commissioner needs provisions that allow the recruitment and management of CEO's with stellar skills and behaviours and the potential to work in a political setting which aims to meet the aspirations of its people. The longer the terms of their employment, the greater the likelihood that the state will reap significant benefits from their work.

The existing provisions in S45 are in the main similar to those found in the Public Sector Management Act 1994. Once more, they are characterized by detailed and specific actions

aimed at ensuring the maintenance of a neutral public sector. The listed requirements were in my experience followed by former Public Service Commissioners. It is important to note that the Commissioner needs to have regard to the recommended appointee's capacity to imbue staff with a sense of service to the community (S45 (13)(b)). How will that be determined? What will it mean should a Minister and an agency be in dispute over how the community's interests are to be served?

S45 does not prevent the Commissioner from finding that more than one candidate is capable of performing the duties specified, yet there is no guidance on how the Commissioner might proceed in these circumstances in legislation which is otherwise very specific. Should the suitable candidates be listed in order of priority? Should their respective skills be discussed in documents forward to the Governor through Cabinet? Should Cabinet then need more advice and conduct its own inquiries? Or is it better for the Commissioner to always recommend one candidate?

S45(7) is suitably broad in its sweep to allow the Commissioner to discuss matters such as a short-list of applicants with Ministers and the chairs of Boards who might later work with one of those short-listed. There is a risk that the political figures involved in such consultations might attempt unduly to influence the Commissioner.

The establishment and monitoring of public sector standards, codes of ethics, and codes of conduct

Over time, public sector standards, codes of ethics and codes of conduct have been published through Public Service Commissioners using the *Government Gazette*, Public Service Notices, Administrative Instructions or regulations. It is only relatively recently, from the 1990's that specific compilations have been made to bring desirable practices under clear and recognizable headings. These are intended to be general and strategic guides to organisations which then prepare their own codes.

Monitoring of each rests on complaints, audits or inspections. Monitoring might range from seeing if relevant policies exist in an organisation to providing suitable training programs or the conduct of inquiries. Organisations can be required to submit documents showing how they meet the instructions of the Commissioner, or they might respond to surveys conducted by the Commissioner.

The application and operation of Commissioner's instructions

The Commissioner must have a way of communicating with the public sector that gives effect to the powers and functions provided by Parliament. It is difficult to imagine any large organisation working without an operations manual to set out the fundamental base for the exercise of authority and the achievement of its purpose.

The size and diversity of the public sector means that the Commissioner needs to be aware of the differing problems organisations face. For example, recruitment of staff might be especially difficult in remote locations where competition for places could be low and merit selection standards might not be achievable.

The provisions relating to reviews and special inquiries

The provisions relating to special inquiries are contained in S24(H) to S24(K). The section provides the special inquirer with some new and some previously existing powers with respect to procedures and evidence at special inquiries. Legal representation is an addition to the 1978 Act but the provisions of not being bound by the rules of evidence and acting according to equity, good conscience and the substantial merits of the case remain from earlier legislation.

Roles of the Commissioners and relevant Ministers, reporting provisions, accountability framework applicable to the Commissioner in the discharge of these functions and powers

The Committee notes that it has a particular interest in the roles and interactions between the Commissioner, relevant Ministers and Departmental CEOs. The Committee asks an essential question: “To what extent does the Act promote a public sector that is designed to achieve a balance between operational independence and responsiveness to the policy agenda of an elected government?” For the sake of a future supplementary submission, it can be asserted that the separation of operational independence and responsiveness to the policy agenda of the elected government is a false dichotomy.

This term of reference is especially important but being constrained by time, the observations made above are repeated below and some initial remarks are made on responding to the policy of an elected government. These could be expanded in a supplementary submission later, should the Committee so wish.

The importance attached to the position is seen in its accountability to the Parliament. How this is achieved is a matter of convention: the Commissioner reports through the Minister assigned responsibility for the legislation in the Governor’s Order allocating Ministerial responsibilities. However, other ways can be seen at work such as attendance at Estimates Hearings and meeting any Parliamentary Committee with terms of reference dealing with the position or its responsibilities.

Responding to the policy agenda of an elected government is affected by the availability of resources, the quality of the policy itself, the legislative backing it has or needs and the priority

which government wishes to allocate to the range of policies it regards as forming its electoral support. It is possible that the implementation of a policy was not considered fully when it was accepted; it is possible that the first response is that the policy needs further development and it is possible that a policy successful at an election will not be accepted by Parliament. It is also possible that a policy might be of doubtful constitutional validity. It is also likely that a new government will assume power during the later stages of a budget cycle overseen by its predecessor and it will be necessary first to insert priorities into the process, probably delaying the presentation of the budget.

It is also likely that Minister will have formed opinions or have opinions about CEOs expressed to them by lobby groups or influential individuals. These might shape the Minister's perceptions about the capacity of the CEOs to implement the agenda of the government. In short, the CEO cannot operate independently of resources, laws, regulations and policies. The Minister cannot operate effectively and quickly without the experience and advice of CEOs who lead organisations to implement laws and policies.

Michael Wood
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