GOVERNMENT RESPONSE TO

LEGISLATIVE COUNCIL SELECT COMMITTEE

REPORT ON INDUSTRIAL RELATIONS

SEPTEMBER 2000

INTRODUCTION

On 1 December 1999 the Minister for Justice and Industrial Relations, the Hon Peter Patmore, introduced the *Industrial Relations Amendment Bill 1999* into the House of Assembly. The Bill represented the culmination of nearly a year's consultation and development in bringing together the key elements of the Government's industrial relations policy as articulated during the 1998 election campaign.

On the same day that the Bill was introduced into the House of Assembly, the Legislative Council resolved:

> That a Select Committee of Enquiry be appointed to inquire into and report upon the Government's proposed changes to the Industrial Relations law with particular reference to the draft Bill that is available for public comment.

The Report of the Select Committee was tabled in the Legislative Council on 4 April 2000.

The Government has given careful and appropriate consideration to the recommendations and views expressed in the Select Committee's Report. The attached paper sets out the Government's response to the Report. It is, however, noted that the Select Committee has endorsed, or not disagreed with, the great majority of the provisions contained in the Bill.

The few major areas of disagreement concern employer-deducted union fees, the abolition of the office of Enterprise Commissioner, the introduction of a 'no net detriment' test in respect of Enterprise Agreements, and right of entry for union officials. These matters are core issues of the Government's publicly stated and publicly debated industrial relations policy. In respect of these issues, the Government has not been persuaded by the Select Committee's arguments that it should change or depart from its policy as expressed in the Bill.

The Government intends therefore that the Bill as passed by the House of Assembly will be presented for consideration and debate by the Legislative Council at the earliest appropriate opportunity.

RESPONSE TO THE RECOMMENDATIONS OF THE

LEGISLATIVE COUNCIL SELECT COMMITTEE'S

REPORT ON INDUSTRIAL RELATIONS

Report Recommendation		Government Response
2.1	This refers to Clause 4(a)(b) of the *Industrial Relations Amendment Bill 1999,* which amends s.3(1) of the *Industrial Relations Act 1984.* The definition of "controlling authority" be amended to correctly reflect the relevant provisions of the *Police Regulation Act 1898.* The Committee supports the clause.	
2.2	Clause 4(c)(c) amending s.3(1). 'Outworker' should be included in the definition of "employee". The Committee supports the clause.	
2.3	Clause 4(c)(a) & (b) amending s.3(1). The terms 'trainee' and 'apprentice' should be included in the definition of "employee". The Committee supports the clause.	
2.4	Clause 4(c)(d) amending s.3(1). The definition of "employee" should be amended to correctly reflect the relevant provisions of the *Police Regulation Act 1898.* The Committee supports the clause.	

2.5	Clause 4(e)(a)(iii) amending s.3(1). The definition of "industrial matter" should be amended to include a matter relating to 're-employment'. The Committee supports the clause, but considers that the terms 're-employment' and 'reinstatement' should be defined.	**The Committee's recommendation is not supported.** These are well-established and widely understood notions which are applied in consistent and uncontroversial fashion by the Industrial Commission. An attempt to establish criteria may have the effect of inhibiting the Commission's present flexibility.
2.6	Clause 4(e)(a)(vi) amending s.3(1). A dispute relating to Long Service Leave should be included in the definition of "industrial matter". The Committee supports the clause.	
2.7	Clause 4(e)(a)(vii) amending s.3(1). Deduction by an employer of union fees from an employee's wages to be included in the definition of "industrial matter". The Committee's view is that deduction of union fees should not be included as an industrial matter. An industrial matter should pertain to a relationship between an employer and an employee. The Committee notes the High Court has determined that employer-deducted union fees does not constitute an industrial matter.	**The Committee's recommendation is not supported.** The High Court's ruling is not germane to the instant circumstances. That ruling was in respect of the Commonwealth legislation and in the absence of any explicit provision in the federal Act. The proposed amendment does not automatically make deduction of union fees compulsory. It permits the Commission to hear an application seeking to include such a provision into an award, or to approve an agreement with such a provision.

2.7 (cont)		Deduction of union fees from an employee's wages, or any other kind of deduction, is a 'convenience' for employees. It is the employee who chooses if such a deduction will be made, irrespective of whether there is an award or agreement provision permitting it. Despite the arguments against union fee deductions put to it, the Committee itself noted that "if an employee requests an employer to deduct union fees, or any other payments from their wages, a reasonable employer should agree to this request."
3.1	Clause 13(a) & (c) amending s.27(1) & (4). Consequential amendments relating to the abolition of the Enterprise Commissioner's position. The Committee disagrees with the clause.	The issue of the abolition of the position of Enterprise Commissioner is dealt with at Committee Recommendation 10.1 and following.
3.2	Clause 13(b) amending s.27(2). The criteria relating to intervention are altered. The Committee supports the clause.	
4.1	Clause 15(b) amending s.29(1A). The provision will enable employees to refer long service leave disputes to the Industrial Commission. See also Recommendation 2.6. The Committee supports the clause.	

4.3	Clause 15(c) amending s.29(1B). The current fourteen-day time limit for lodging applications relating to termination is increased to twenty-eight days, and the Commission's discretion to extend the time limit has been restricted to exceptional circumstances. The Committee disagrees with the clause, and believes the time limit should be twenty-one days.	**The Committee's recommendation is not supported.** The effect of the amendment will be to largely preclude applications being accepted by the Commission outside the stipulated time period, and will greatly minimise arguments about whether 'out of time' applications should be accepted by the Commission.
4.4	Clause 15(d) amending s.29(1C). The amendment is intended to clarify that officers of the Workplace Standards Authority are authorised to make applications relating to breach to the Commission. The Committee supports the clause.	It should be noted that this provision is not intended to be exercised solely by the Minister, as seems to have been concluded by the Committee. Indeed the reverse is the case i.e. the practical and operational intention is to explicitly empower authorised WSA officers to make applications.
4.5	Clause 15(e) inserting s.29(1D & E). Applicants are required to include in an application full details of the claim and the nature of the remedy sought. The Committee supports the clause.	
4.6	Clause 15(f) inserting s.29(3). The Commission's power to attempt to conciliate is made explicit. The Committee supports the clause.	

5.1	Clause 16, inserting s.30 and 30A. Existing and some new criteria relating to termination of employment have been codified and consolidated. The Committee agrees with the principle of the clause.	
5.2	Clause 16, at proposed s.30(11). The Committee believes that the Industrial Commission should take into account the viability of a business when considering any order for compensation in lieu of reinstatement or re-employment.	**The Committee's recommendation is not supported.** This proposal in effect would have the potential to provide an exemption from the unfair dismissal laws to employers whose businesses were operating at a marginal level or who claimed that an order would have a detrimental effect on the business. In such circumstances, there would be no sanction that could be applied to an employer who had unfairly dismissed an employee. This line of reasoning is not a defence against, say, breach of award, and should not be available in cases of unfair dismissal, or redundancy.
5.3	Clause 16, at proposed s.30(11). The Committee's view is that where termination occurs the employee should make reasonable efforts to seek alternative employment pending a hearing in order to mitigate the loss for which he or she seeks compensation. See also 6.1.	**The Committee's recommendation is not supported.** It is not agreed that an employee who has been unjustly or unlawfully dismissed "has a duty" or an "obligation" to mitigate his or her financial loss solely in order to reduce the liability of an offending employer.

5.4	Clause 16, inserting s.30A. Employees under federal awards and presently excluded from application to the federal jurisdiction for the hearing of disputes should be entitled to apply for a hearing of a dispute specified in s.29(1A)(a) or (b). The Committee supports the clause.	The contrary view, as detailed at 5.5 of the report, was noted but not supported by the Committee.
6.1	Clause 17(b) The criteria relating to the power of the Commission to issue orders in respect of remedies for termination of employment have been consolidated and codified. The Committee supports the clause.	
7.1	Clause 18 amending s36(1) & (2). A requirement for the Commission to assess Enterprise Agreements against the public interest provisions of the Act. The Committee does not support this clause as it is consequential to the proposed abolition of the office of Enterprise Commissioner.	The issue of the abolition of the position of Enterprise Commissioner is dealt with at Committee Recommendation 10.1 and following.
8.1	Clause 19 amending s.61F(1). Minimum conditions of employment criteria have been amended to reflect the 'no disadvantage' test and the section has been re-written to provide greater clarity. The Committee support the clause.	

9.1 to 9.10	Clause 21(b) amending s.61J(1). A proposed enterprise agreement must meet a new 'no net detriment' criterion before it can be approved and registered. The Committee believes the current provisions should be retained. The Committee does not support the amendment, believing that the present 'fairness in all of the circumstances' test, properly applied, is sufficient, and that no person should be precluded from accepting conditions of employment which may not meet a no detriment test if that employee does so fully informed, without duress and if the Commissioner believes such an agreement is fair in the relevant circumstances after assessing it against the existing stringent tests.	**The Committee's recommendation is not supported.** The amendment is necessary if workers are to be afforded adequate protection in relation to negotiating their conditions of employment. Clearly the majority of employers act fairly in dealing with employees, but equally clearly a minority does not and the Government would be irresponsible if it did not act to ensure that workers' conditions are not reduced simply because employees lack the bargaining power, knowledge or representation to protect their interests.
10.1 to 10.9	Clause 22 repealing Division 3 of Part IVA. The office of the Enterprise Commissioner be abolished. The Enterprise agreements system to be retained but hearings to approve agreements will be dealt with by all Industrial Commission members. It is the Committee's view that the office of Enterprise Commissioner be retained.	**The Committee's recommendation is not supported.** There may have been some logic in establishing a discrete office of Enterprise Commissioner to oversee and assist with the implementation of the new system. But the system was introduced seven years ago. It is now well-established and understood, and there is no good reason why the processing and approval of agreements could not sensibly and efficiently be dealt with by all members of the Commission.

11.1 to 11.7	Clause 30 amending s.77(1)(a) Right of entry provisions will permit access to worksites in respect of persons eligible to become union members, although access can only occur in non-working hours unless the employer agrees otherwise, and only after reasonable notice has been given to the employer of an intention to visit the workplace.	
	The Committee broadly agrees with this clause, but believes the qualifications relating to access in non-working times and the giving of reasonable notice should be included in the Act rather than dealt with by way of Regulation.	**The Committee's recommendation is supported.**
	The Committee believes that a penalty for breach of the right of entry provisions should be included.	**The Committee's recommendation is not supported.** The Act does not currently contain penalties for breach and it is not thought that this relatively minor amendment justifies penalty sanctions.
	The Committee further believes the Act should include a provision similar to s.296(2)(a) of the *New South Wales Industrial Relations Act 1996* which, in effect, precludes right of entry to workplaces where the employer holds a conscientious objection certificate relating to membership of a religious society or order (such as the Brethren).	**The Committee's recommendation is not supported.** The suggestion misconstrues the fundamental premise underlying right of entry. The religious or any other persuasion of an employer should not be allowed to determine the basic rights of employees. Whether or not employees wish to speak with a union official is up to them, not their employer. It should be noted that, while the proposed amendment provides a limited right of access for union officials to prospective members, it also has the effect of quite substantially tightening the existing right of entry provisions in respect of existing union members.

12.1 and 12.2; and 12.9	Clause 24 amending s.61ZE. The Register of Enterprise Agreements will be available for inspection and copying. The Committee does not agree with this Clause, believing that an Enterprise Agreement is a confidential matter between employer and employee and should not be available for public inspection but limited to the parties involved.	**The Committee's recommendation is not supported.** The purpose of agreements is to provide arrangements which are tailored to the particular needs of a workplace, not to replace the transparent award system with one cloaked in secrecy. Ensuring that employees' rights are protected, and to reduce exploitation to a minimum, requires reasonable access to agreements.
12.12	The Committee believes that the Enterprise Commissioner's office should be adequately resourced to enable all the duties and responsibilities of the Commissioner to be carried out effectively.	The relevance of this recommendation is not clear. There is no suggestion that the office has not been adequately resourced, and the matter will not be an issue if the office is abolished.