

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

**REPORT ON THE
PUBLIC SECTOR MANAGEMENT
(AMENDMENT) BILL 1995**

STANDING COMMITTEE ON PUBLIC ACCOUNTS
Report Number 8

November 1995

RESOLUTION OF APPOINTMENT

The Standing Committee on Public Accounts was appointed by the Legislative Assembly on 9 March 1995 with the following terms of reference:

- (a) examine:
 - (i) the accounts of the receipts and expenditure of the Australian Capital Territory;
 - (ii) the financial affairs of the Australian Capital Territory; and
 - (iii) all reports of the Auditor-General which have been laid before the Assembly;
- (b) report to the Assembly, with such comments as it thinks fit, any items or matters in those accounts, statements and reports, or any circumstances connected with them, to which the Committee is of the opinion that the attention of the Assembly should be directed;
- (c) inquire into any question in connection with the public accounts which is referred to it by the Assembly and to report to the Assembly on that question; and
- (d) inquire into and report on the implementation of the Public Sector Management Act 1994 with particular reference to:
 - (i) the public interest; and
 - (ii) any other related matter.

Current Inquiry

On 19 October 1995 the Assembly referred to the Committee the Public Sector Management (Amendment) Bill 1995 for inquiry and report by 29 November 1995.

The Chief Minister subsequently wrote to the Committee and included copies of exposure drafts of the *ACT Remuneration Tribunal Bill 1995* and the *ACT Remuneration Tribunal (Consequential and Transitional) Provisions Bill 1995*. The Chief Minister advised that the drafts were intended to form part of the package of legislation related to the introduction of contracts for executives in the ACT Public Service.

COMMITTEE MEMBERSHIP

Ms Rosemary Follett MLA (Chair)

Mr Trevor Kaine MLA (Deputy Chair)

Ms Lucy Horodny MLA

Secretary: Bill Symington

Assistant Secretary: Chris Papadopoulos

SUMMARY OF RECOMMENDATIONS

RECOMMENDATION 1

The committee recommends that chief executives may be employed on performance contracts, and that increased remuneration for loss of tenure should be determined by the Remuneration Tribunal, provided that any such contracts shall:

- (a) be public documents in their entirety;
- (b) include a clear statement that the ultimate responsibility for policy, budget and agency performance rests with the relevant Minister; and
- (c) set out clearly the grounds on which the contract may be terminated, which shall not include incompatibility. (paragraph 6.11)

RECOMMENDATION 2

The committee recommends that existing chief executives have the option of retaining their tenure or changing to contract employment. (paragraph 6.12)

RECOMMENDATION 3

Noting the flexibility within the existing employment arrangements for senior executive officers, the committee recommends that there be no change to the method of employing such officers. (paragraph 6.13)

RECOMMENDATION 4

The committee recommends that before any decision is made in relation to an ACT Remuneration Tribunal, the views of the Commonwealth Government and the Commonwealth Remuneration Tribunal be sought, and provided to the committee for its further consideration. (paragraph 9.6)

1. INTRODUCTION

Conduct of the Inquiry

1.1. On 19 October 1995, the Chief Minister presented to the Assembly the *Public Sector Management (Amendment) Bill 1995*. On the same day, the Assembly referred the Bill to the Standing Committee on Public Accounts for inquiry and report.

1.2. The committee approached a number of organisations seeking submissions to the inquiry, and publicised the inquiry through media release. In the short time available for the inquiry it was not feasible to advertise in the ACT print media.

1.3. In the event, the committee received submissions from the Chief Minister's Department, the Community and Public Sector Union ACT Branch (CPSU), the CPSU Professional Division, the ACT Division of the Australian Society of Certified Practising Accountants, and the Community Information and Referral Service of the ACT. The Public Service Commissioner also wrote to the committee providing background papers relating to the Commonwealth Government's decisions on a new Public Service Act.

1.4. As mentioned earlier, the Chief Minister also advised the committee that the *ACT Remuneration Tribunal Bill 1995* and the *ACT Remuneration Tribunal (Consequential and Transitional) Provisions Bill 1995* were intended to form part of the package of legislation related to the introduction of contracts for executives in the ACT Public Service. The Chief Minister provided the committee with exposure drafts of these Bills.

1.5. The committee held a public hearing on 13 November 1995 and evidence was taken from the Chief Executives of the Chief Minister's Department and the Department of Urban Services, the Directors (Industrial Relations and Staff Development) and (Human Resource Policy) of the Chief Minister's Department, and Mr Ned McGrath of the Professional Division of the CPSU.

1.6. The committee was conscious of the fact that it was unlikely, in the circumstances, that current Senior Executive Service (SES) officers in the ACT Government Service would be prepared to provide views by way of submission or in oral evidence to the committee, and this proved to be the case.

1.7. Accordingly, the committee has been obliged to proceed with this review on the basis of views put by the Government through its officials and by the CPSU.

1.8. A dissenting report by Mr Trevor Kaine is at pages 19 and 20.

2. PURPOSE OF THE BILL

2.1. The Bill is intended to amend the principal Act by¹:

- providing contract employment for up to five years for chief executives and executives
- abolishing the SES
- changing the name of the ACT Government Service (ACTGS) to the ACT Public Service (ACTPS).

2.2. The terms and conditions of employment of chief executives and SES officers are covered by the present Act, Public Sector Management Standards (Standards), Awards and enterprise bargaining agreements. The amendments provide that chief executives and executives will be employed in the ACTPS with their employment, and tenure, subject to key terms and conditions contained in written contracts which are to be performance oriented.

2.3. The remuneration of executives will be set by an ACT Remuneration Tribunal which will be established by enactment of the *ACT Remuneration Tribunal Bill 1995*. Certain conditions of employment such as leave entitlements will be covered by the existing Act provisions and the Standards.

2.4. The Bill provides that existing chief executive and SES offices be declared vacant and that new executive offices be created. There will be the option of offering employment to former chief executives and SES officers, without competitive selection, provided the job is at a similar work-level to the officer's previous job; or advertising the position for competitive selection.

2.5. Any chief executives or former SES officers who are not employed under contract will be offered retirement packages, and where such offers are not taken up, the officers will, subject to their qualifications, be redeployed to the highest available non-executive position.

2.6. The cost of remunerating chief executives and executives is to be met from existing appropriations and the documentation states that the Bill has no significant financial implications.²

¹ Public Sector Management (Amendment) Bill 1995, Explanatory Memorandum

² *ibid*

3. COMMITTEE COMMENT

3.1. The committee's approach to the consideration of the Bill has focussed upon those major areas which give rise to concern about a proposal which will have far reaching implications for the day to day governance of the ACT. In the limited time available for this review, the committee has been unable to give detailed comment on the Bill's provisions or explore the ramifications of changes which will have a substantial bearing upon the structure of the ACTGS as a career service, and upon the ethic of "public service" which is engendered by an apolitical public service.

3.2. These issues and others will undoubtedly be pursued within the Assembly when it debates the Bill. The purpose, therefore, of this report is to establish a basis for detailed Assembly consideration of the Bill, including the end effects for the ACTGS of the proposed changes, and the roles of those officers who will take administrative control of providing ACT Government services affecting all members of the ACT community.

3.3. The major areas of concern to the committee are:

- (i) the public interest and how it is served by the Bill
- (ii) the role of the SES, and the need for change
- (iii) the ACTGS career structure
- (iv) contractual arrangements and confidentiality
- (v) provision for terminating chief executive and executive contracts on grounds of incompatibility.

3.4. For the same reasons that time has prevented a considered review of the *Public Sector Management (Amendment) Bill*, the committee has limited itself to some broad observations about the *ACT Remuneration Tribunal Bill 1995* and the *ACT Remuneration Tribunal (Consequential and Transitional) Provisions Bill 1995*. The committee would expect that the Assembly will provide the opportunity for a more thorough examination of their implications for the good governance of the ACT.

4. THE PUBLIC INTEREST

4.1. The stated rationale for the amending legislation and the move to contract employment for the executive group is to remedy:³

- a lack of focus on ACTGS service delivery objectives
- insufficient flexibility in employment options
- poor relativities between responsibilities and remuneration
- inappropriate remuneration policy and determination mechanisms
- a lack of "whole of Government" focus
- cumbersome selection processes
- limited development and mobility opportunities.

4.2. The committee is somewhat bemused that this rationale should be put forward as a basis for legislative change of such significant and radical effect upon the wellbeing of those individuals who presently form the SES, those officers who would reasonably expect to develop a career in the ACTGS, and ultimately upon the wider ACT community.

4.3. Any one of the factors mentioned as a rationale are capable of remedy within the existing ACTGS structures and the Act. In the committee's view, the rationale is questionable when the perceived shortcomings in the management of the ACTGS should have been, and are now capable of being, addressed by the chief executives of the various agencies concerned. To the extent that some or even all the shortcomings exist within specific programs or across whole agencies, they should have been capable of correction by administrative action and without the need for legislation.

4.4. The committee has some difficulty in accepting the notion that all the shortcomings are palpable across the whole ACTGS as this has not been obvious. However, if they were and had this been a matter of concern, the committee has cause to express disquiet that agency chief executives had collectively allowed an untenable situation to continue.

4.5. Officials did not provide to the committee reasoned justification for legislative remedies when administrative solutions have always been available. Although officials were invited to point to instances where the SES was found to be

³ Chief Minister's Department, submission to the committee, para 2.3

deficient in meeting its commitment to the Government or in delivering services to the ACT community, they declined to do so.⁴

4.6. In essence, the public interest is its shareholding in the ACTGS, the cost of its administration, its capacity to provide services to the ACT community and its effectiveness and efficiency in service delivery. If in any of these areas the ACTGS has been found to be wanting, then the Government and the chief executives of agencies are answerable to the community through the Legislative Assembly, and this should continue to be the case.

4.7. However, it is also important that the public have confidence in the ability and capacity of the ACTGS to advise the Government of the day on policy issues and to deliver services without fear or favour; and it is in this particular that the committee has reservations as to the rationale for the changes proposed by the legislation.

5. THE SES AND THE NEED FOR CHANGE

5.1. The Chief Executive of the Chief Minister's Department advised that it is important not to see the proposed legislation as necessarily a reflection on the capacity of the Public Service. The committee was advised that it was a matter of improving and enhancing the capacity of the service to perform⁵ but when pressed, the committee was further advised that the broader issues included attracting the right sort of people to deliver the Government's outcomes, and that one of these was comparable and attractive employment conditions designed to create mobility.⁶

5.2. The committee was advised that the initiatives are about jobs with clearly defined outcomes.⁷ However, the committee has reservations as to whether the legislation of itself will lead to better outcomes. The thrust of comment made to the committee by officials was that the initiatives would assist chief executives to attract a better field of candidates for vacancies, and allow the ACT Government to offer the sort of remuneration and contractual flexibility necessary for it to compete with other States.

Tenure and Fixed Term Contracts

5.3. The basis for any change to the structure of the ACTGS senior executive service, which necessarily means a change to the ACTGS as a whole, ought to be that such a change is in the public interest. Permanent tenure and publicly disclosed expectations of officers have been the accepted practice with Australian public sector employment and are to continue with regard to officers who are not members of the proposed new executive. The committee, therefore, queries why such fundamental conditions of employment should be superseded with regard to executives. The committee poses the question as to how the public interest, as distinct from that of the

⁴ Transcript, p8

⁵ *ibid*, p8

⁶ *ibid*, p9

⁷ *ibid*, p9

Government of the day, will be enhanced by removing tenure and obscuring the transparency of the employment contracts for executives.

5.4. The Report of the Commonwealth's Public Service Act Review Group (December 1995) stated that "introduction of contract employment elsewhere has been associated with increased remuneration which has been the driving force in some instances. This is not regarded as a sufficient basis for the introduction of contracts if it puts at risk other important principles."⁸ The Review Group did, however, support the idea that remuneration be set at income levels necessary to ensure that high calibre staff are encouraged to undertake this work.⁹

5.5. The committee has no difficulty with the contract employment of SES officers per se, with a mix of permanent tenure and fixed term appointments. Indeed contract employment could well provide the degree of flexibility that some agencies require in order to secure the services of suitably qualified persons for specific tasks. It was acknowledged by the Chief Executive of the Department of Urban Services¹⁰ that contract employment was appropriate to the achievement of outputs in an agency which is oriented to the delivery of (specialised) services with a specific set of objectives.

5.6. However, the committee notes that the current legislation allows for fixed term SES appointments. It would appear to the committee that major objectives of the Bill are to enable the setting of remuneration levels to attract particular persons, and the contract focus upon performance. The committee was advised that with one agency, advertising in the past three or four years had attracted very poor fields apart from locals.¹¹ It was not clear to the committee whether this experience related to remuneration or other factors, and there was no evidence to suggest that this has been a matter of concern to chief executives across the ACTGS. The question of executive performance is discussed in more detail below, especially in regard to confidentiality aspects, but the committee has no, in principle, objection to any system that requires executives and other employees to justify their worth in terms of the outcomes they are paid to produce.

Consultation and Views of SES Officers

5.7. It was put to the committee that executives prefer to be employed on a contract basis, with specified goals and performance-based pay.¹² Moreover, Government consultation with serving SES officers had revealed that none had problems with the proposed structure. The committee was advised that the Chief Minister had discussed the legislative changes with all SES officers.¹³

5.8. Those SES officers who accept contracts will be exposed to the vagaries of the employment market, which ought to be of some concern to those officers of maturer

⁸ Report of the Public Service Act Review Group, December 1994, p100

⁹ *ibid*, p101

¹⁰ Transcript, pp4,7

¹¹ *ibid*, p10

¹² *ibid*, p3

¹³ *ibid*, p30

years. Up to 20% of SES officers will not be offered contracts and will either lose their jobs or lose income.¹⁴ Those who accept contracts will be materially disadvantaged by the requirement that they cash out their furlough and leave entitlements. It would appear that these officers will also lose their accumulated sick leave credits.

5.9. In these circumstances, and given the significance of the changes to their careers, it is surprising that apparently none of the SES officers voiced objections to the proposed legislation.

5.10. The committee has reservations about taking this non-objection as representing a universal acceptance of the proposed changes among the SES. The committee notes that there are big issues at stake for all the SES officers and surmises that as individuals they may have deemed it unwise to challenge a Government which has set its course by such dramatic means.

5.11. While the committee accepts that there is a nationwide trend toward executive contracts, clearly a number of jurisdictions, and especially the APS which is of direct relevance to the ACTGS, have maintained dual tenured and contracted systems for their executive officers. The problem the committee has with the proposals for the ACT SES is that they do not appear to have been fully considered in the ACT context, and the committee is left with the impression that the proposed ACT executive contract arrangements are an exercise in change for change sake rather than an intellectual consideration of the cost effective and service effective benefits to the ACT.

5.12. The committee is strongly of the view that the Government should satisfy the Assembly that there has been full and wide ranging consultation with all those who will be affected by the proposed legislation, including all members of the SES and all members of the senior officer stream within the ACTGS. The committee is conscious, as indicated above, that there may be reticence by officers in expressing their views openly to chief executives and Ministers.

Comparisons with the Commonwealth, States and the Northern Territory

5.13. It was put to the committee that the move toward contracts for public service executives was not only widespread but welcomed by executives across the country.¹⁵ Officials advised that there were productivity gains to be had from putting executives on fixed contracts. However, in this context, officials advised there were no shortcomings with existing SES officers but said that contracts were necessary to attract "the right sort of people" and thereby improve service delivery and the implementation of Government policy.¹⁶

5.14. As is currently the case with the ACTGS, the Australian Public Service (APS) provides a mixture of permanent tenure, fixed term appointments and temporary

¹⁴ The Canberra Times, 11 October 1995, p1

¹⁵ Transcript, p3

¹⁶ *ibid*, p13

contracts for executives; Queensland has tenure based on satisfactory performance for most SES officers; South Australia has fixed term contracts for new executive officers but permanent tenure for existing executives; Victoria, New South Wales, Tasmania and the Northern Territory have all moved to fixed term contracts.

Mobility

5.15. The committee was advised that the current SES structure is not conducive to promotional and mobility opportunities.¹⁷ However, the committee does not see how a fixed contract system for executives would enhance mobility. By definition, fixed term contracts are intended to attract people to carry out a specific task or tasks within particular programs and agencies. As noted earlier, the committee was advised that for one particular service oriented agency contracts would enable it to recruit for specific jobs.¹⁸

5.16. A further apparent obstacle to mobility is that contracts are to be written against performance criteria. This suggests that contracts would need to be rewritten should an executive be transferred, or seek transfer, to another executive position within the same or another agency. The committee has some difficulty in accepting that the renegotiation of contracts in these circumstances would improve mobility compared to present arrangements where SES officers transfer to other positions within agencies or to other agencies. In fact, the reverse would seem to be the case. Presently, executives are transferred with little or no difficulty both within and between agencies.

5.17. The committee is of the view that in real terms, the APS is likely to be a natural recruiting ground for executives. APS officers are familiar with the ACTGS environment and more importantly would see a natural interchange effect between the two services. However, the non portability of benefits such as accrued leave, furlough and sick leave contained in the proposed legislation would be positive disincentives for any executive level officers who might contemplate a period contract with the ACTGS.

5.18. The committee was advised that the ACTGS needed to look beyond the Commonwealth to other State and Territory governments whose roles were more similar to that of the ACTGS.¹⁹ However, the committee again draws attention to the abundance of experienced and talented APS officers resident in the ACT, and the relative ease and cost-effectiveness with which these people could be employed, not least in terms of relocation. The committee considers that a system whereby such officers would not have the choice of tenured as well as contract employment may also deter many of them from joining the ACTGS.

Equity and the Protection of Rights previously established by Law

5.19. For reasons given above, the committee has serious reservations that the proposed legislation does not conform with the basic tenet that legislation coming

¹⁷ *ibid*, p3

¹⁸ *ibid*, pp4,7

¹⁹ *ibid*, p16

before the Assembly should not unduly trespass on rights previously established by law, or unduly trespass on personal rights and liberties.

5.20. Those SES officers, and indeed other officers of the ACTGS in the future, who accept executive contracts will incur substantial financial penalty and loss of amenity by being required to cash out accumulated recreation leave or long service leave entitlements.²⁰ The Bill is silent on whether officers would also forfeit accumulated sick leave credits. The after tax return on leave and furlough cash out is substantially less than the real value of the leave when taken as leave. Further, the committee is concerned that the proposed legislation appears to ignore the beneficial purpose of leave.

5.21. The committee is strongly of the view that the provisions in the Bill relating to the cash out of leave should be reviewed to ensure equity for those currently serving SES officers who accept executive contracts and that the Bill be amended to ensure that there be no ambiguity in relation to the carry over of sick leave credits.

6. THE ACTGS CAREER STRUCTURE

6.1. The committee is concerned at the extent to which the proposed legislation will impact not only on incumbent SES officers, but on the ACTGS as a whole.

6.2. The changes will dramatically affect the ACTGS as a career service and the committee is concerned that insufficient consideration has been given to this aspect of the ACT's human resources. The committee is unaware that the service as a whole, and particularly the senior officer stream, has been consulted in any way on the proposals.

6.3. The proposed legislation allows for an organisational structure which the committee can only conclude will mean that the career structure for ACTGS officers will effectively end at the senior officer level. For reasons already given, there are positive disincentives for senior officers who currently have permanent tenure to harbour aspirations to be part of the executive stream.

6.4. Officers who wish to progress beyond the senior officer level will be required to resign from the ACTGS to take up an executive contract, thereby foregoing the accrual of entitlements, such as sick leave, recreation leave and long service leave, which are part of their conditions of service as permanent officers.

6.5. Clause 59 of the Bill provides for the cashing out of accrued leave for officers who accept executive contracts. The Explanatory Memorandum to the Bill states that as executive contracts will be for periods of five years or less, it is undesirable that persons entering those contracts retain large leave credits.²¹ Payment will therefore be made to such officers before they are contracted.

²⁰ *Public Sector Management (Amendment) Bill 1995, clause 59*

²¹ *Explanatory Memorandum to the Public Sector Management (Amendment) Bill 1995, p13*

6.6. The committee is concerned that the requirement in the Bill for officers who accept executive contracts to give up permanent employment, and therefore security of tenure and the accrual of leave entitlements, will act as a major disincentive for ACTGS officers who have aspirations to the executive service.

6.7. It is of concern to the committee that the important ACTGS human resource will not be encouraged to develop to its full potential and that the ACT itself will be the loser to the extent that the service becomes stunted and atrophied. The committee is fortified in its view that insufficient consideration has been given to these important after effects of the proposed legislation, and considers that the perceived downsides call for a period of more intensive examination of the legislation.

6.8. It goes without saying also, that a system of fixed executive contracts will inevitably lead to a loss of valuable corporate memory. It can be argued that this occurs with the present arrangements when officers leave the service for whatever reason. However, at the start of a new system when all executives are contracted for up to five years there will be a time in the future when potentially a large number of executives could be leaving the service at about the same time. This circumstance has the potential to have a deleterious effect on the quality of service provided by the ACTGS in the future. It also lends weight to a committee view that a mix of tenured and contract employment for executives would appear to be more desirable in the long-term interests of the ACT community.

6.9. In its consideration of the issue of permanent tenure versus fixed-term appointments, the Public Service Act Review Group recommended that there be capacity, in limited circumstances, for APS employees to be promoted into or within the SES for a fixed term, at the expiration of which the officer would revert to his or her previous status in the APS. This provision could be used where the Public Service Commissioner judged that the prospects of redeployment at the SES level upon completion of the term were minimal.²²

6.10. The committee is attracted to a similar provision for the ACTGS which would allow for ACTGS officers to be contracted at the executive level with provision to revert to their previous status, and with all entitlements, at the expiration of the contract.

RECOMMENDATION 1

6.11. The committee recommends that chief executives may be employed on performance contracts, and that increased remuneration for loss of tenure should be determined by the Remuneration Tribunal, provided that any such contracts shall:

- (a) be public documents in their entirety;
- (b) include a clear statement that the ultimate responsibility for policy, budget and agency performance rests with the relevant Minister; and

²² Report of the Public Service Act Review Group, December 1994, p100

- (c) set out clearly the grounds on which the contract may be terminated, which shall not include incompatibility.

RECOMMENDATION 2

6.12. The committee recommends that existing chief executives have the option of retaining their tenure or changing to contract employment.

RECOMMENDATION 3

6.13. Noting the flexibility within the existing employment arrangements for senior executive officers, the committee recommends that there be no change to the method of employing such officers.

7. CONTRACTUAL ARRANGEMENTS AND CONFIDENTIALITY

7.1. The principle of accountability is fundamental to the public sector. When the community's money is used to buy goods or services, the community properly expects to have the Government account for its decisions on why and how it chooses to expend funds.

7.2. The Chief Minister's Department's submission to this inquiry advised that:

“As is accepted employment practice it is not appropriate for the details of individual contracts to be made public; they are personal and will quite properly remain confidential between relevant parties to the contract.”²³

7.3. The committee takes issue with this position. While it may be accepted practice in the private sector to keep contracts confidential, especially in relation to remuneration, this principle does not hold with regard to public sector employment. While it is possible that in other Australian jurisdictions contracts for executive employment are confidential, the committee sees no compelling reason why the ACT should follow such a practice.

7.4. The committee is concerned that there is no intention to provide for disclosure of the details of contracts between chief executives and the executive officers whose services they would engage. Officials advised that pro-forma contracts would be made public, but that individual contracts would remain confidential.²⁴

7.5. The committee notes that the conditions under which public officials are presently employed, and their remuneration, are on the public record and can be accessed by any person with a reasonable right to such information.

²³ Chief Minister's Department submission, s.2.13

²⁴ Transcript, pp26-27

7.6. The committee can see no reason why contracts between chief executives and their executives should remain confidential when similar provisions are considered anathema where other public servants and public officials are concerned.

7.7. While the committee accepts that the assessment of a person's performance against the criteria set down in his or her contract should properly remain a matter between the immediate parties, the committee considers that details of what that person is expected to do, and how much he or she will be paid to do it, must be on the public record.

7.8. The committee believes that such confidential contracts are not consistent with the principle of accountability. The committee also considers that reasonable accessibility to the terms of individual contracts would allay any concerns which may be held that the executives are, in some way, beholden to a politically driven set of employment objectives.

8. PROVISION FOR TERMINATING CONTRACTS ON GROUNDS OF INCOMPATIBILITY

8.1. Officials advised that executive contracts would contain a provision to allow discontinuation of a contract on the basis of incompatibility between a Minister and chief executive, or a chief executive and an executive.²⁵

8.2. Officials were unable to satisfy the committee as to what would constitute incompatibility. The committee was advised that it was a fact of life that some people simply did not get on and, rather than dismissing someone on "trumped-up" charges of inefficiency, as was presently the case, it was better to face this reality squarely and acknowledge that a lack of chemistry between people can mean that they simply cannot work together effectively.²⁶

8.3. The committee is somewhat surprised that executives might now be dismissed on "trumped-up" charges and, in any case, draws attention to the existence of the Merit Protection Review Agency (MPRA), a body to which employees dismissed or demoted in such fashion can appeal for a determination should they feel that they have been unfairly dealt with.

8.4. In the absence of a legislative definition, the committee is unable to say just what is intended by the notion of "incompatibility", but the word does suggest some recognition from both sides that there is a deficiency in the relationship. The committee poses the question of what would happen if incompatibility was detected by only one party, but notes that it will always be the senior party who will hold the power to initiate the termination of a contract.

8.5. It is the committee's view that a contractual provision for terminating an executive's appointment on the basis of incompatibility, without any definition of what

²⁵ *ibid*, p18 et seq

²⁶ *ibid*, pp13, 18-20

that term encompasses, has the potential to send worrying messages to the ACTGS and to the community about what is expected of executive officers and, by extension, public servants in general.

8.6. The committee is concerned that there may be a perception among public officials and in the community generally that conscientious executives can be dismissed on the basis of a personality clash rather than a lack of performance. Similarly, while the committee cannot be certain that incompatibility provisions in contracts would discourage the concept of frank and fearless advice to Government, there would seem to exist the potential for such a perception to permeate the ranks of the ACTGS,

9. CREATION OF ACT REMUNERATION TRIBUNAL

9.1. The committee asked officials why it was necessary to establish an ACT Remuneration Tribunal when the Commonwealth Remuneration Tribunal was already in existence.

9.2. It was put to the committee that the ACTGS and the ACT Government were quite different entities to their Commonwealth counterparts, and that something as fundamental as setting remuneration levels for public servants was not something which could ideally be contracted out to another government.²⁷

9.3. In addition, officials commented that the Northern Territory and the States each had their own remuneration tribunals.²⁸

9.4. The committee had some concern that the proposed legislation provides for the Chief Minister to make an interim determination on remuneration levels. The committee was advised that this would only apply to instances where there was insufficient time for the ACT Remuneration Tribunal to make a determination.

9.5. The committee was further advised that the provision is similar to that contained in the current legislation, whereby the Government, by regulation or some other device, could make an interim determination where there was no determination in place for a position.²⁹

RECOMMENDATION 4

9.6. The committee recommends that before any decision is made in relation to an ACT Remuneration Tribunal, the views of the Commonwealth Government and the Commonwealth Remuneration Tribunal be sought, and provided to the committee for its further consideration.

²⁷ *ibid*, pp32-33

²⁸ *ibid*, p33

²⁹ *ibid*, p33

10. REMUNERATION OF JUDGES

10.1. The committee drew officials' attention to an apparent flaw in the Explanatory Memorandum dealing with the remuneration of judges.

10.2. The Explanatory Memorandum states that existing ACT Supreme Court judges, all of whom currently hold appointments as judges to the Federal Court of Australia, will continue to have their remuneration set by the Commonwealth Remuneration Tribunal. Future judges who do not also hold a position with the Federal Court will have their remuneration set by the ACT Remuneration Tribunal.

10.3. The Explanatory Memorandum is silent, however, on the method of remuneration for ACT Supreme Court judges appointed subsequent to the commencement of the Act and who also hold an appointment to the Federal Court. The committee sought clarification on this issue, and was advised that such judges would also continue to have their remuneration set by the Commonwealth tribunal.³⁰ In other words, there would be only two "classes" of judges: those appointed to both both the Federal and Supreme Courts, and those with Supreme Court duties only.

10.4. The committee was advised that, far from encouraging identical remuneration, the legislation deliberately sought to avoid the situation where an ACT Remuneration Tribunal would be "locked in" to matching the remuneration for ACT Supreme Court judges set by its Commonwealth counterpart for those who are also appointed to the Federal Court.³¹

10.5. The committee can foresee difficulties for the ACT Government in having two different tribunals setting remuneration for ACT judges. The committee is concerned that such a situation may engender conflict between the different "classes" of judges.



Rosemary Follett MLA
Chair
November 1995

³⁰ *ibid*, p34 et seq

³¹ *ibid*, p35

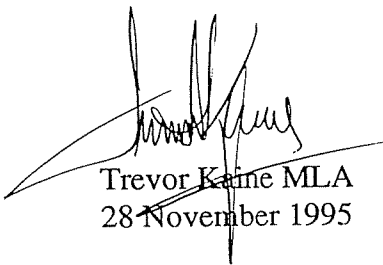
DISSENTING REPORT FROM MR TREVOR KAINE MLA

1. Much of the Report purporting to be a Report of the Public Accounts Committee does not have my endorsement.
2. My dissension is based generally on the facts that:
 - a. Only two opposing points of view were put to the committee in any detail. These were from the Government, represented by the Chief Executive of the ACTGS, Mr John Walker, and other officers, who supported the Bill, and Mr E McGrath representing the CPSU, who opposed the Bill. No substantive committee position could be reasonably based on the conflicting evidence presented.
 - b. No outside expert opinion was obtained. I submitted the names of two potential witnesses, one from the New South Wales Government and one from the Victorian Government, but as far as I am aware neither was available. The NT Public Service Commissioner was invited but was unable to attend.
 - c. A submission to the committee from the ACT Division of the Australian Society of Certified Public Accountants, which was supportive of the Bill, was ignored by the committee.
 - d. Ms Horodny, the third member of the committee, was not present at the only public hearing held by the committee. Since I largely dissent from the Report, it represents, therefore, largely the views of the Chair.
3. The Report submitted by the Chair contains an inherent bias against the Bill which is not supported conclusively by the evidence presented to the committee. An example of this bias is the clear questioning of evidence that all SES officers had been consulted, with the concomitant implication of bad faith on the part of the Government.
4. In particular, I do not fully support, inter alia:
 - a. Part 4 of the Report;
 - b. Most of paragraph 5.2;
 - c. Paragraph 5.10;
 - d. The second sentence of paragraph 5.11;
 - e. Most of paragraph 5.12;
 - f. Paragraph 5.16;
 - g. The general proposition inherent in paragraphs 5.19, 5.20 and 5.21; and
 - h. Much of the content of Part 6.
5. It will be clear to Members, therefore, that the Report, in the main, does not reflect my view. Nor, in my opinion, is very much of it supported by evidence heard by the Committee.
6. There are parts of the Report which express sentiments for which I have some sympathy. For example:

a. I am not convinced that details of contracts between public officials and the Government should be confidential. I heard no evidence that would change my opinion. I therefore support, in principle, the content of Part 7 of the Report.

b. I do not take issue with the general thrust of Part 8 of the Report relating to "compatibility". Because of the possibility of inappropriate dismissal of employees, I agree that the word "compatibility" needs to be legislatively defined if it is to be used as a criterion for such drastic action.

c. I support the concern expressed in paragraph 10.5 about the possible future conflict that could emerge from having the remuneration of ACT Supreme Court judges determined by two different organisations.



Trevor Kaine MLA
28 November 1995