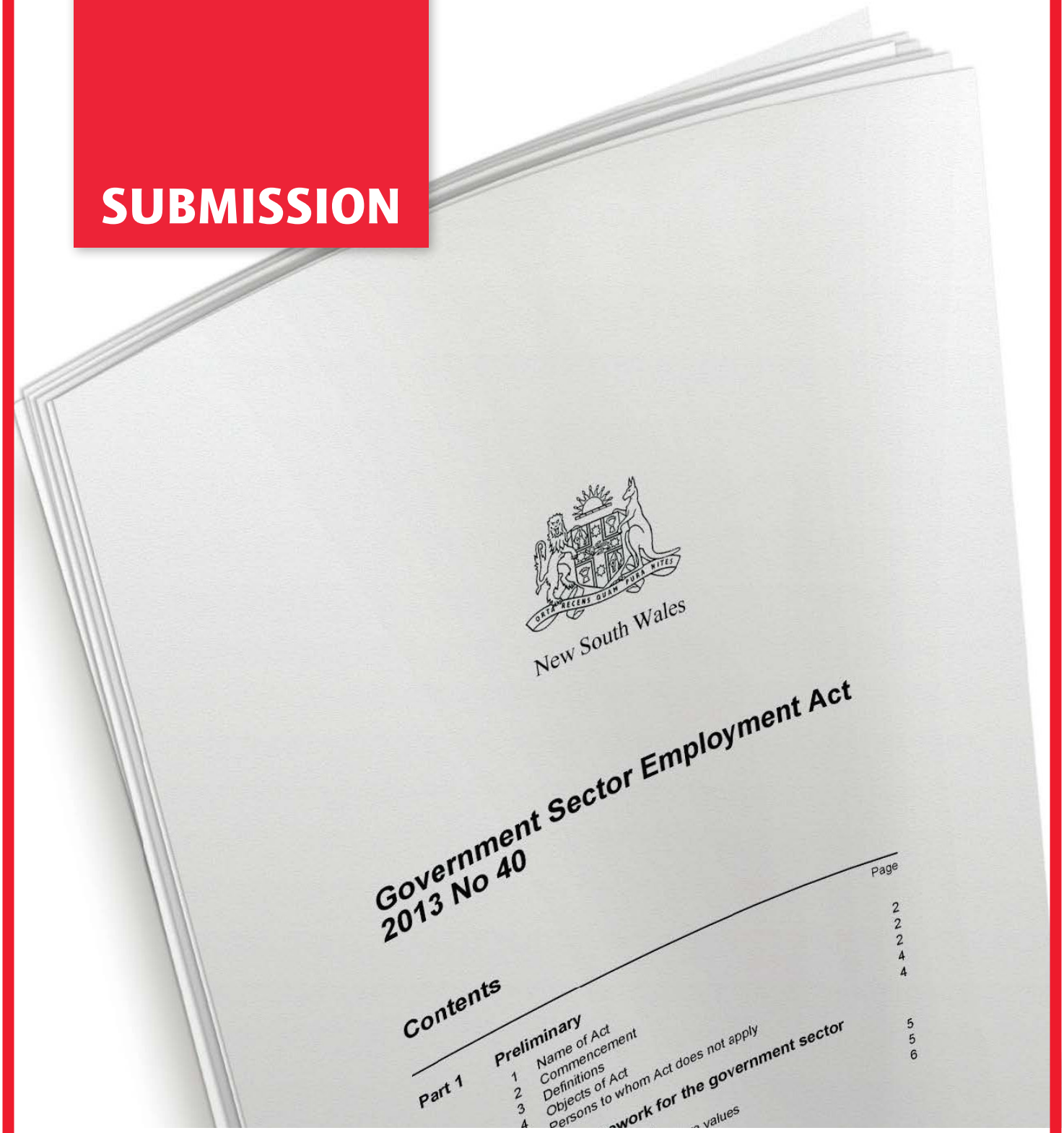
SUBMISSION



Submission to the Review of the *Government Sector Employment Act 2013*
September 2020

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Executive Summary

The Public Service Association (the Association) provides this submission to the Public Service Commission's (PSC) invitation to participate in the Independent review of the *Government Sector Employment Act 2013* (Act) being conducted on behalf of the parliament. As the key stakeholder for employees employed under the Act, we hold a critical position in understanding the way that the Act's implementation on 24 February 2014 altered the way that the Public Sector now operates.

It has been the long-held view of the PSA that the GSE was not a success upon implementation and caused issues across the sector that would not have occurred if the government had instead undertaken to amend the existing legislation covering the structure and governance of the public sector previously, the *Public Sector Employment and Management Act 2002* (PSEM). The consequence of enacting a new instrument, and having to work from a blank slate meant that although some areas of concern were addressed by the Act, many other issues developed due to the way the Act was drafted.

Many of the issues with the Act over the years have required urgent repair via parliamentary amendment or by updating the regulation and/or the rules that accompany the Act. The past five years have shown that the Act was not a mature piece of legislation and was imposed to meet a political, rather than administrative, imperative. The changes, as varied as they were, have not corrected this immaturity in the legislation.

The Association maintains our belief that the Public Sector would be best served by a repeal of the Act and restoration of, following a review of the advantages the Act has produced, to allow for their incorporation into, a revived PSEM framework. Noting this is a political decision however, we will address the rest of our remarks to addressing the shortcomings within the Act and, where appropriate, offering solutions to those issues.

For this process, we have relied upon our extensive knowledge and experiences of dealing with the Act on a daily basis, our consultation with our membership across the sector and previous submissions made to various groups and committees on the Act and its operation.

Issues of particular note when reviewing the Act can be placed in the following heading:

- Recruitment practices and the capability framework;
- Mobility, appeals and promotional positions;
- Disciplinary processes;
- Performance development;
- Discrimination.

We also note that the past five years have corresponded to a period of time where the turnover of staff within the Public Sector has probably been at its greatest ever. By design, job cuts and turnover has been greatest in 'back office' roles of government Agencies. The result has been a substantial loss within Human Resource and Industrial Relations roles. Frontline managers dealing with these issues on a day to day basis have never had to do so with such a low level of support.

Recruitment Practices and the Capability Framework (external recruitment issues)

The Act does not support a mature, robust recruitment strategy for the Public Sector. As acknowledged by the PSC during its 2018 review of recruitment strategies within the Public Sector, recruitment in the Public Sector had gone backwards following the implementation of the Act in 2014.

Recruitment has become a longer, costlier process, while outcomes have not greatly improved. Indeed, the People Matter Employee Survey published in 2017, which helped identify these very issues reported that only 35% of employees are confident in the way recruitment decision were being made. In April 2017 the Audit Office released a report on the use of Contingent Work in the Public Sector that similarly found that costs had blown out in the sector and that agencies lacked any long-term planning to retain and attract the best employees.

Role Descriptions

The first issue here is in the writing of the role descriptions prior to recruitment. Although the writing of a policy officer, manager or administrative assistant position can benefit from a high level of generic language, the Public Service has a diverse range of roles and many require very specific skill sets. Many of these skills sets are linked to industrial instruments that have been determined with regard to specific competency or accreditation frameworks. Capability framework role descriptions downplay specific skill sets and regulatory requirements of roles. At best, this can lead to recruits not understanding the role they are applying for or better candidates with more relevant knowledge and skills being passed over. At worst, it can lead to the employment of someone without the actual regulatory requirements to fill the role.

For example, the Association was informed, off the record by a government employee, that a fire fighting agency were recruiting pilots without the appropriate additional licences to operate aircraft in a fire zone at certain altitudes. The way the GSE is wedded to the capability framework is not helpful in recruiting to such a diverse range of roles as is required by the Public Sector. This is subconsciously acknowledged by the government in the way that recruitment to professions such as teaching, the police force and health are regulated by separate acts.

Recruitment process

Once a role description is written to comply with the requirements of the Act it then needs to be advertised and a competitive merit selection undertaken to fill the role. A clear view at the time of implementation of the Act seems to have been that the old process of application, CV and interview was not producing the best outcomes. However, the introduction of the requirement for capability assessments seems to have had an adverse effect on recruitment outcomes.

The requirement to undertake additional assessment above and beyond the use of an application process and an interview have forced managers to invent (unspecified by the Act or the PSC) additional assessment processes.

Time and support-poor, recruitment managers have largely relied on outsourcing these processes to private providers. Private providers lack the job specific, public sector general knowledge required to tune these tasks to the specifics of the role being recruited. The outcome has been an explosion in the use of role-playing sessions, behavioural assessments and highly discredited psychometric testing in deciding candidates. None of these processes have improved the quality of recruits with these type of tasks more susceptible to being 'gamed' by applicants who lack the knowledge and skills to stand out via an assessment of their job specific skills or knowledge.

In addition, it has become clear that certain recruitment managers have come to rely upon one recruitment agency for all recruitment purposes. This process is not regulated by the Act or any internal tendering process but has instead evolved organically and is managed within each Agency without oversight or consistency. The result is a possible avenue of corruption as managers are not monitored in how they award contracts to manage these processes. To make matters worse, the Association is aware of managers who were engaged from these private providers then being in charge of future recruitment, leading to clear conflict of interest situations occurring. It is also possible that former Managers or other public servants have crossed the other way, to the private sector, and now offer services to Agencies taking advantage of their government contacts and relationships.

Issues of this nature are highlighted in an ICAC report published in February 2018, but to date have not been adequately addressed within the Act nor government policies.

The outcome of all these issues with recruitment (ie time consuming and costly) is that Agencies rely more and more on contingent labour hire solutions to fill vacancies. Between 2012-13 financial year and the latest publically released figures for 2019-20, the amount spent by the government on Contingent Labour has almost tripled, to over $1.5 billion. Issues around contingent labour use are many (and some will be detailed later) but at this stage the key take away is their use is a clear sign that the Act's recruitment strategies have made Public sector recruitment less efficient. Outsourcing the filling of roles to a recruitment or labour hire agency requires proportionately less paperwork for managers and gets the role filled far quicker than the Act allows.

Temporary appointments

The Act outlines a simpler recruitment process for temporary appointments, two comparative assessments as opposed to three for permanent appointment. However, the Act then outlines additional hurdles for these roles.

Firstly, the time limits on temporary appointments do not recognise a number of roles in the public sector, where funding arrangements do not allow for permanent appointments. The Act does have provisions for eased reappointment in these circumstances but the Association is aware that these exemptions are not evenly applied. Groups, such as Rice Researchers in Primary Industries, find their employment threatened every five years as they work for Agencies seemingly incapable of dealing with this situation.

The PSEM made temporary limits dependent upon the status of the role. The GSE has shifted the focus from the role to the individual and has therefore created the issue of long-term temporary staff in permanently temporary roles.

The conversion process is similarly problematic under the Act. Staff appointed under temporary appointment are serving long periods in roles following the truncated comparative assessment process. However, to be converted to on-going employment in those roles permanently, the Act requires a new comparative assessment process. This is costly and unfair on temporary staff who have been performing their roles acceptably for, in many cases, a substantial period of time.

The Association proposed in 2018 that the PSC consider protocols for direct appointment of long-term temporary staff to roles on an on-going basis where an employee won their temporary role through a truncated comparative assessment process and their performance had been satisfactory during their time in the role. The time and cost savings involved would be substantial and would improve the incentive for good candidates to go for temporary roles where they could see a clear path to permanency down the track should their performance merit it. The experience of working in a position for some time also is far superior to assess the capability of an officer than a made up role play scenario.

Casual employment is enabled by Section 43 and is poorly adhered to. Similarly, where a position appears to be of an ongoing nature there should be enabling provisions to allow for the employee to seek the conversion of their employment to permanency.

Mobility, Appeals and Promotional positions (internal recruitment issues)

On the surface, the Act has improved the opportunities for mobility of staff both within and between Agencies. In reality, the Act has overseen a decrease in this activity. Some of the reasons for this relate to the lack of trust in the recruitment practices (outlined above), but there are several more issues that have current employees more stationary than before 2014.

As well as the clear evidence, as outlined in the results of People Matters survey results over multiple years, the lack of trust in the recruitment process has affected more than just recruitment.

Capability Framework

The capability framework has unhinged long term employees from their own roles by shifting the goalposts while they have continued to occupy their roles. This is apparent from the increasing situation of existing staff, in unchanged roles, being deemed incapable of performing their own jobs through restructure processes.

If staff who have filled a role for years without performance issues are deemed not to meet the capability to perform the role during assessment, then the error lies with the capability framework and its implementation, not the employee. Unfortunately, the Act is not written that way. The result has been recruitment and restructure chaos that has cost Agencies time, effort, money and the trust of their workforce.

In these instances, insult is added to injury when Agencies end up using contingent labour solutions to deal with the workload shortfall from removing existing employees from their existing roles. Such Agency staff are deemed to meet the capability framework through a process nowhere near as thorough or officious as that applying to staff with a proven ability to perform the role.

Talent Pools

The use of Talent Pools is another instance where the Act represented an improvement on the PSEM but unfortunately, the results have shown the opposite.

Take up of the Pools within Agencies has been patchy and slow. Managers don't trust other Agency recruitment processes and do not utilise candidates from Talent Pools even where they are set up. Far from having the reputation of a ready source of capable workers, Talent Pools are seen as refuse dumps of candidates not deemed worthy by the original Agency. They are associated with failed candidates, regardless of how many people applied for the small number of roles. In addition, employees informed that talent pools are to be created are disinclined to apply for the process believing that being placed in such a pool is a pointless exercise. We are

also seeing in some Agencies, GSE compliant officers who have successfully been placed on the talent pool overlooked for non GSE compliant candidates who are appointed temporarily to roles in their place. There is no obligation it appears to utilise the selection process or talent pool allowing former working relationships and nepotism to creep back into the service.

Under the PSEM, staff assessed as worthwhile of consideration, without winning a position, were placed on Eligibility Lists that were ranked. In contrast the lack of any ranking or structure within Talent Pools leads to the idea that they are somehow inferior and that they are a means of upsetting the concepts of merit by placing lower ranked candidates in the pool but pulling them out first for vacancies ahead of their more meritorious colleagues.

Appeals

The Act gutted existing appeals provisions contained in the PSEM, which were in themselves insufficient in acting as a means of checking the merit-based recruitment system then in place.

By removing the ability of an employee to challenge a selection process on the basis of merit, the Act has remained the mechanism while removing its teeth. Recruitment panels now have no check on their power to appoint to positions which would act to ensure that they actual fulfil their mandate to appoint the most meritorious person to a role. With the introduction of capability assessments unrelated to the actual role being filled, it is now easier for Managers to act in a manner that would represent misconduct or even corruption.

The old concept of an external, independent member of recruitment panels slowly broke down over many years meaning panels are now very much beholden to the Agency creating them. Far from breaking up existing culture and acting as mechanism for change, merit panels now deeply reflect the status quo within Agencies and will lead to 'merit' decisions reflecting those norms.

It is clear that the opportunities for corruption are increasing in an environment where employees seeking to gain recruitment to new positions have no recourse to challenge an appointment so long as the administrative process of the Act is followed.

Promotional positions

The Act has led to a situation where there is no longer internal recruitment undertaken prior to going outside an Agency to fill vacancies. The failure to encourage promotion from within has created a culture in which existing staff do not feel valued or supported. This has been a long-term trend over many decades but the GSE accelerated this process of moving towards totally open recruitment for all positions. Combined with the difficulties with recruitment practices, employees find their internal career progression stymied by a lack of

opportunities. Temporary opportunities are filled via contingent labour as an expediency measure, limiting career development opportunities and the capability assessments downplay their learned experience and knowledge from working in the Agency.

Increasingly, the Association is also having reported to us the difficulty in gaining access to temporary appointments in other Agencies. Parent Agencies increasingly make it difficult for employees who win temporary positions in other Agencies to take up the opportunities. Given the difficulty in filling vacancies, managers are increasingly limiting their employee's opportunities for career development and mobility within the sector through administrative and intimidatory actions, such as suggesting their job may not be there to return to or flat out forbidding them to accept the secondment. It's little wonder that the People Matter's survey in 2017 showed that only 50% of respondents believed that their Organisation is committed to developing its employees.

Application of mobility to SOCS

Issues of mobility have also been hampered by the continuing drift of, previously core, public sector functions into State Owned entities. Many staff have found their roles transferred to State Owned Corporations or other private entities. Having been transferred via legislation transferring the functions to the entities, employees have had difficulty returning to the public sector, despite entitlements contained in *State Owned Corporations Act 1989* to allow for just this eventuality. The PSC has opposed efforts by the Association to assist our members seeking employment opportunities back in the Public Sector by challenging their right to continuity of service for the purposes of their entitlements. Such an attitude is not in line with stated government policy of encouraging mobility and portability of skills.

Reassignment Provisions

Reassignment of employees to different roles within the sector was not introduced via the Act but the emphasis of how these were to occur was altered in 2014. There is a distinct lack of safeguards around how the function can be used, with the onus being on the employee to show why the move is unreasonable, which is leading to reassignment being used as a form of punishment. Protections for staff need to be greater to ensure that the reassignment has a legitimate business need, and that all other options have been considered prior to enacting a forced transfer, including evidence of an EOI to fill the role. Urgency is no impediment to these actions as an urgent transfer should only be a temporary measure, ensuring this provision is only used where absolutely necessary, ending its effectiveness as a tool to punish staff.

The Act requires employees to be transferred to roles that will not result in a financial penalty to them. However, the Act also stipulates that Senior Executive officers will have their allowances and penalty payments considered as part of this assessment. By limiting this safeguard to senior officers, the result is, by inference, that other

grades do not have this protection. As such the clauses are being interpreted as being solely around the base salary rate of the two roles being compared. As such employees are being financially punished through these reassignments which appear superficially to be at grade when shift penalties and allowances are compared.

The outcome is many employees would rather relinquish their roles than be forcibly transferred away from their current role. Forced to relocate between country towns is a common concern amongst members working in rural locations, upsetting family schooling arrangements and forcing them to spend money moving homes. All this occurs against an environment where access to the Crown Employees (Transferred Employees Compensation) Award is increasingly challenged.

Conversion principles – improvement but also regression

One of the clear areas of improvement in the Act was the improvement in forcing Agencies to consider the conversion of temporary employees to permanent status. However, once again there are clear issues with how the Act regulates the issue.

Firstly, although the Act required Agencies to not have temporary employees placed in limbo long term by putting limits on how long they can remain on temporary contracts, it does not make any sort of provision for automatic conversion. Transition arrangements for existing long-term temporary employees were enacted for a limited period but many agencies did not meet those timelines and the PSC was forced to extend timeframes for those provisions. However, none of this has dealt with the issue of temporary employment commenced after the introduction of the Act. Only specific provisions around automatic conversion will force Agencies to deal effectively with this problem.

Similarly, the Act failed to address conversion of casual staff to on-going status where there was a clear pattern of work over an extended period of time. Such conversions did occur under the PSEM in areas such as Court Officers but those provisions have disappeared since 2014.

Return to Work – forced retirements

The Act includes a requirement (Section 56) for Agencies to dispense with the services of employees who are incapable of performing the full range of duties required by their role due to medical restrictions. Such a requirement is not consistent with the government's role as an employer of choice or its requirements under Work, Health and Safety legislation around safety risk management, or suitable duties under the Workers Compensation legislation and Discrimination legislation.

This provision is now used aggressively by Agencies and their Return to Work Co-ordinators to remove workers from their roles as swiftly as possible. This is occurring in many areas before any effort is made to assist the

employee with finding alternative employment, attempting to find workplace adjustments to accommodate their impairment or any consideration of other alternatives. The mobility provisions, used so readily in recent examples for mass redeployment such as the bush fires and COVID-19 pandemic, have not been used to move a worker to a safe workplace five kilometres down the road to assist them in remaining in employment.

Work, Health and Safety requirements for people injured at work and with accepted claims have a level of protection but there is a major gap in legislation and policy surrounding workers injured away from work. It is clearly now the accepted position across the sector that the role and strategy of managers and Return to Work Co-ordinators is to remove the employee as the first and last option. The Act's structure and wording has created this moral abyss, leading to the appalling decline in workers identifying with a disability (see below).

Disciplinary Processes

Under the PSEM, the system for managing unsatisfactory performance and misconduct was underpinned by detailed Procedural Guidelines which held the force of law and applied across the entire public service.

The detail contained within the Rules of the Act are nowhere near as detailed and do not have sufficient provisions to protect the procedural fairness of an employee under investigation.

The Act mentions procedural fairness but the Rules do not outline specific or general requirements to be followed to ensure that fairness is enacted in each step of the process.

In several Agencies, the Association has taken issue at the role of investigator, prosecutor and decision maker all being undertaken by the same individual. Employees have been denied access to materials used in making decisions against them despite this placing an undue burden on them in preparing their defence. Other examples the Association has been aware of have been a failure to provide defined charges prior to commencing an investigation, and witness lists that select who will be interviewed based on a manager's recommendation rather than all potential witnesses to an incident.

The PSEM Guidelines did not allow this cowboy behaviour that can have a highly negative effect on careers, physical and mental health.

Although outside the scope of this review, the Association does note that the government still has not addressed mental health on a sector wide basis. Despite implementing strategies that apply to the private sector, little had been done within the sector to address mental health issues. Unfortunately, this usually manifests itself in employees being dealt with through a disciplinary process or being targeted for medical retirement without any action taken to assist the employee with their health problem.

Performance Development

The Association supports the increased emphasis upon performance development in the Act and particularly the Regulation and Rules underpinning the system. Despite concerns with the delay between the commencement of the Act and the implementation of performance development systems, the Association commends the government in improving its language, particularly in encouraging the use of the term 'performance development' as opposed to 'performance management'.

We note that results have not followed to intentions of the Act however. People Matters survey respondents continue to highlight concerns around the implementation of the system and in our view this stems from a lack of training, support and resource allocation to ensuring the system works efficiently and effectively.

The recent amendments made to the Rules by the PSC were a step forward and were supported by the Association. However, whilst ever Agencies continuously need to find savings to meet their budgetary requirements for the labour expenses cap, efficiency dividends and other such measures, funds for training and support of such systems will limit their effectiveness.

Discrimination

On a plain reading of the Act, clause 63 appears to ensure that it will operate with a mind to avoiding discrimination but the reality has proven different. The government has failed to acknowledge that discrimination can be built into the way the Act, its Regulation and Rules all operate within the real world. The result has been declining rates of employees with disability, has placed unintended ceilings on Aboriginal employment and has made it more difficult for women and people with carers responsibilities to take up senior Executive positions with the government.

Disability

The combination of role descriptions, commercialised recruitment processes and the use of medical retirement processes has seen a dramatic decline in people identifying as having a disability working for the government.

The Premier has issued a goal to increase the disability employment to 5.6% but the percentage of people with a disability has declined from 2006 at 5% to 3.1% in 2014, to 2.5% in the 2019 Workforce Profile.

The above barriers are invisible impediments to the recruitment of people with disability and it is not acceptable for the government, which should be a model employer, to not be aware of how the Act operates in a discriminatory manner.

Aboriginal Employment – Targeted vs Identified positions

Identified positions have been lost as a consequence of the Act and replaced with targeted positions. Targeted positions do not require Aboriginal employees and often lose the significance of why a position is identified.

Positions have been changed to targeted and had qualification requirements added to the roles. It is galling to the Aboriginal community that these decisions are being taken by senior management without community input or consultation. This often leads to Aboriginal people not being deemed capable of filling the roles, despite it being a role to work with Aboriginal people or policy.

The result is that the roles meant to lead engagement between the government and the Aboriginal community lack the cultural knowledge to do so effectively. In many instances, the community also commence the relationship with resentment as the role has clearly failed to recruit an Aboriginal officer. For many roles the workers' knowledge of Aboriginal culture and community is the difference between the service being provided effectively or engagement with the community failing to deliver the outcomes required.

The Association's Aboriginal Council has noted recent cases where identified positions have been reviewed with the aim of altering the status to targeted. This has the clear outcome of disadvantaging the incumbent during the

process as the change in role description scrubs the importance of Aboriginality and usually incorporates some sort of generic academic requirement.

The Aboriginal Council is also concerned at the existence of a "red, yellow and black glass ceiling" at about the Clerk Grade 7/8 level. There are very few positions above this level that incorporate Aboriginal cultural knowledge as a requirement, and hence very few workers above this level. Quite apart from the inherent racism in not believing that Managerial positions have a need for such knowledge or background, it also caps career progression for workers whose skill set is unique and does not translate well under the capability framework.

Recruitment for Aboriginal Roles

The Aboriginal Council has noticed two aspects of Aboriginal recruitment of deep concern.

Selection panels for identified and targeted positions do not have an Aboriginal person on the selection panel by default. This is clearly a failure to recognise the significance of Aboriginality for these roles. Even where positions are targeted, rather than identified, a voice for the community should be present during the selection process. By having a person with suitable knowledge of the Aboriginal cultural requirements of the role, this will increase the likelihood of reducing tokenism and increasing competency. The Aboriginal Council recommends that there be a requirement that all targeted and identified positions have a suitably qualified member from the Aboriginal community on selection panels. The Association adds that any attempt to argue a lack of suitably qualified members is to the shame of the government, not an impediment to implementing this requirement.

Secondly, all the issues affecting recruitment and promotion across the public sector more generally are multiplied within the Aboriginal community. Recruitment continues to be a slow process and contingent labour is usually not an appropriate solution for these roles. A vacancy in an identified position will lead to a loss of engagement that can not immediately be made up upon the role being filled. Where the whole purpose of the role is community engagement, succession planning needs to occur in a different way to most other positions.

The Aboriginal Council has considered these aspects and is proposing that there are positions created which are broad banded with Aboriginal people being selected to these roles and gaining progression as they go up the incremental scale. This option is also supported as a pre-retirement planning option, whereby community relations and Aboriginal cultural connections and job specific technical skills are likely to be rare and can be replaced over several years with mentoring, with the recruitment of employees to a lower position, with automatic promotion when the incumbent retires. Community building takes decades, as does the acquisition of cultural knowledge.

There is a proliferation of Aboriginal Employment policies in the Government Sector. These policies are well intentioned but contain no mechanism to ensure that Aboriginal recruitment, retention, mentoring, promotion and networking actually increases. The Aboriginal Council recommends that outcomes from these strategies be linked to Senior Executive performance contracts.

The Association is of the belief that the failure of the government to set hard targets as part of an enforceable Affirmative Action policy will result in continued failure.

Senior Executives

Public Service senior executives are subject to termination without cause at any time. In addition, the Act establishes almost no limits on terms of employment that can be enforced by employers. The outcome has been contracts that require no limit on hours worked by senior executives, and no recourse should they be terminated.

Such conditions, by definition, will act as an impediment to the employment of women and other people with carer's responsibilities. Section 41 (1) has the chilling effect of placing employment at that level out of the reach of large proportions of the community, based solely on their carer's responsibilities. This will inherently disadvantage women over men.

Respect and recognition in the Act

Section 63 of the Act refers to "workforce diversity" as the catch all for groups such as (but not limited to) people of different gender, cultural and linguistic backgrounds, to Aboriginal people and people with a disability.

Discrimination against Aboriginal and Torres Strait Islander people has traditionally been about more than just being recognised as a separate cultural group. As the First Nations people of this country, displaced and positively discriminated against through state legislation and authority, they have a unique position in society and the identified and targeted positions recognise this special obligation to them.

To this end the Aboriginal Council have also recommended that a standing council of Aboriginal workers, selected from the whole of government be selected via the Aboriginal Land Council network be created to advise on how Aboriginal employment can be improved across the sector, with particular focus on Agencies that have a significant role in addressing Closing the Gap targets. Such a committee would assist the government in taking their Aboriginal policies beyond the obvious limitations of the existing agency specific policy units.

As with all other groups subject to discrimination over many years, Aboriginal and Torres Strait Islander people deserve more than a token mention in the Act. As outlined above, only positive action will ensure all are treated equally.