

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN
CAPITAL TERRITORY

PUBLIC SECTOR MANAGEMENT
AMENDMENT BILL 2001

EXPLANATORY MEMORANDUM

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Outline

Over the past two decades, Australian public services moved substantially away from the traditional concept of a career service. Even 15 years ago, chief executives were appointed from within the career stream and might be expected to be protected against ministerial disfavour through a central personnel agency/process that could rotate them into new appointments where they might wait out the tide of ministerial disfavour. That is, it was possible for chief executives to 'stay on the books' and return to level at a later date. The last vestiges of this traditional system disappeared when chief executives accepted enhanced salary packages as a compensation for weakened security of tenure. The ACT introduced such a system through a series of amendments to the Principal Act in 1995.

Thus, at present, the ACT conforms to the current Australian standard where traditional 'checks and balances' of responsible government were replaced by mechanisms preferred by those in favour of 'responsive government'. The winners of this new system were the ministerial holders of executive government who faced fewer obstacles in their way when appointing persons to the office of chief executive of government agencies. Traditionally, Australian public service systems developed procedural protections designed to give effect to 'the merit principle', which holds that:

- personnel decisions to hire, fire and promote individuals within the public service should be made on the basis of tests of 'relative suitability' of those competing for such rewards; and that
- such decisions should arise from due processes of administrative regularity; and that
- such decisions should be subject to tests of administrative accountability.

Traditionally, even the office of chief executive of public service agencies was acknowledged as distinct from the normal 'down the line' positions comprising the career service. As the system evolved, the concept of a 'senior executive service' emerged as a bridge between the 'career service' and the 'chief executive service', thus suggesting three broad categories of public office:

- chief executives appointed by the government of the day, perhaps with involvement from a public service commissioner, even when on fixed term contracts, particularly in regard to the head of the chief minister's department;
- senior executive services, often on contract appointments, appointed by chief executives, but with due-process checks or sometimes even formal appointment by a public service commissioner; and

- the rest of the career service, appointed by their agencies on terms and conditions determined by a central personnel agency/public service commission.

As the system now stands, here in the ACT and generally across Australia, chief executives are:

- appointed by the chief minister, to agencies which themselves are created and abolished by the chief minister (see sections 13 and 27 of the Principal Act);
- serve on terms and conditions contained in a contract between the chief minister and the appointed person (see section 31), which must be tabled by the chief minister in the Legislative Assembly;
- are required to work 'under the relevant minister' (see section 29a); it is notable that the Principal Act emphasises that the contract should not be taken 'to derogate in any way from the responsibility of the Minister administering' an agency for its policies or performance (see section 28B);
- are required to 'have regard to the interests of the Government and the Service as a whole' (see section 29c);
- are subject to early termination according to the terms and conditions of their contract (see section 28A); and
- are eligible for reappointment without compliance with the usual merit principles as outlined in section 65 (see section 28C) - although such reappointment processes must still comply with prohibitions on 'patronage or favouritism' and unlawful discrimination.

Under the ACT system, chief executives employ 'executive officers' in much the same way as the chief minister contracts for the employment of chief executive officers. The ACT system retains a central personnel officer called the 'Commissioner for Public Administration' (see sections 18-23), but this appears to be of lessor practical importance than the similar office of Commissioner for Public Employment in many of the States.

This Bill intends to achieve the following:

- to bring greater transparency and accountability to the employment regime for senior executive officers; and
- to return to the traditional concepts of a career service.

The Bill makes extensive use of notes as provided for under section 12 of the *Interpretation Act 1967*. Such notes are purely for explanatory purposes only and do not form part of the Act.

Clause Notes

Clauses 1 and 2 are technical requirements. They name the Act and note the day the Act commences.

Clause 3 names the *Public Sector Management Act 1994* as the Principal Act, except section 19 which amends the *Remuneration Tribunal Act 1995*.

Clause 4 provides a definition for a term used in the Bill. *Appropriate Legislative Assembly committee* means a committee that has been nominated by the Speaker, or if no committee has been nominated, the public accounts committee.

Clauses 5 and 6 provide substitute definitions for *chief executive* and *employee*. The effect of these changes is to return senior executives to permanent appointments. When the fixed-term contract system was implemented in 1995, chief executives ceased to be 'officers' and became, in effect, temporary *employees* under fixed-term arrangements. The Principal Act distinguishes between *employees* (under fixed-term contracts of employment) and *officers* (who have permanent appointments). Thus, if chief executives are to be permanently appointed rather than engaged under fixed-term contracts, they must be defined as *officers* rather than *employees*.

Clause 7 provides a substitute definition of *executive*.

Clause 8 is a technical amendment to correct a prior drafting error.

Clause 9 includes chief executives and executives in the definition of *officer*. Refer to clauses 5 and 6.

Clause 10 removes a reference to chief executives from the definition of *part-time officers*. As a chief executive is to be subject to conditions of employment negotiated with the Senior Appointments Commissioner, there is no need to provide separately for 'part-time' officers.

Clause 11 inserts several definitions of terms used throughout the Bill.

Clause 12 inserts new division 2A into Part 3 of the Principal Act. The new division provides for the new office of Senior Appointments Commissioner (SAC). The SAC would oversee and take an active role in the employment of all senior executives in the ACT Public service.

The SAC would be chosen by both the chief minister and an appropriate Legislative Assembly committee (most likely the Public Accounts Committee). The chief minister would forward a nomination to the committee. If a majority of the committee agree, the appointment would be made. If a majority of the committee do not agree, the chief minister would then put forward an alternative candidate for consideration. This process is the same as the one used to appoint the ACT Auditor-General.

The SAC appointment is for 7 years, with the terms and conditions of employment fixed by the Remuneration Tribunal. The SAC would be eligible for reappointment. The positions of SAC and Commissioner for Public Administration (see section 18) may be jointly held by the same person.

The SAC is to work independently of government and have input into all aspects of the employment of executives at all levels ie hiring, transfer and removal from office,

The SAC is responsible from time-to-time for reviewing the functions of each department's chief executive. A report of each review is to be sent to the responsible minister. The SAC is able to hire staff and is to produce an annual report on the functions of their office. The report is presented to the Legislative Assembly by the chief minister.

The SAC may only be removed from office by resolution of the Legislative Assembly. The Assembly would, by resolution, refer the matter to an appropriate Assembly committee for consideration. The committee must complete its inquiry within 15 working days (normally three weeks), observe the principles of natural justice and only recommend removal from office if a majority of committee members were convinced there was just cause. Examples of just cause are contained in a notes to the clause, however, the list of examples is not exhaustive. The SAC may be suspended from office during the committee inquiry.

Clauses 13 and 14 are technical amendments to the Principal Act.

Clause 15 omits sections 28 to 35 from the Principal Act. These sections provide for the use of fixed-term contracts for chief executives.

Clause 16 inserts new parts 4A and 4B. Part 4A provides for the employment of chief executives and Part 4B provides for the employment of executives.

Features of Part 4A

A list of chief executive responsibilities and core competencies is provided as a guide to the selection of a chief executive. A chief executive is also charged with acting independently of the responsible minister or the chief minister in matters relating to the employment of individuals in the administrative unit, including the making of certified agreements and Australian Workplace Agreements.

The selection process is laid out for the employment of chief executives. This process has four steps.

Step 1 the SAC advertises a vacancy and prepares a list of candidates in order of merit. Candidates must be selected on merit and

have certain legislated capabilities. This list is forwarded to the responsible minister.

- Step 2 the minister can either approve a candidate from the list or reject all candidates. If all candidates on the list are rejected, the SAC prepares another list of candidates for consideration.
- Step 3. If approved, the minister forwards the candidate to an Assembly committee (most likely the public accounts committee). The committee considers the candidate and, if approved by a majority of their number, notification is sent to the chief minister. The committee also sends a report to the Assembly. If the committee rejects the candidate, the minister would select an alternative candidate for consideration.
- Step 4 The chief minister makes the appointment.

Although chief executives would be given a specified term of employment for a position (up to 5 years), they would be given a permanent position in the ACT Public Service. Terms and conditions of employment would be fixed by the Remuneration Tribunal.

After their term of appointment has been fulfilled, a number of options are open to a chief executive. The SAC must either recommend reappointment, transfer to chief executive to another chief executive office, or declare the chief executive to be unattached.

A recommendation for reappointment must also be approved by the minister and endorsed by an appropriate Legislative Assembly committee. If either the minister or the Assembly committee refuses to endorse reappointment, the SAC must either transfer the chief executive to another chief executive office, or declare the chief executive to be unattached.

The SAC, with the agreement of the responsible minister, may make a concurrent appointment of a chief executive who holds one chief executive office to another chief executive office. However, the chief executive would only be eligible to be paid remuneration and entitlements for one of the chief executive offices.

The responsible minister may remove a chief executive from office for just cause, however, they may only do so if an appropriate Legislative Assembly committee endorses a SAC recommendation to do so. The Legislative Assembly would, by resolution, refer the matter to the committee for their consideration. The committee must complete its inquiry within 15 working days (normally three weeks), observe the principles of natural justice and only recommend removal from office if a majority of committee members were convinced there was just cause. Examples of just cause are contained in a notes to the clause, however, the list of examples is not exhaustive. The SAC may be suspended from office during the committee inquiry.

If a chief executive is not reappointed or transferred to another chief executive office, or before the end of the chief executives term of office the office is vacated or abolished, the SAC may declare the chief executive to be unattached. The unattached chief executive stops being unattached on transfer to a vacant chief executive office or executive office, or on retirement from the service.

The SAC must do everything reasonable to assist an unattached chief executive to find a suitable position or engagement within or outside the service. If, within a reasonable period of time of being declared unattached, the unattached chief executive has not been transferred to a vacant chief executive office or arranged employment outside the service, the SAC may seek to arrange the transfer of the unattached chief executive to an executive office.

An unattached chief executive may retire from the service at any time of their choosing. The SAC may approve the payment of a special benefit to an unattached chief executive in order for them to retire within a stated period.

Chief executives currently employed under fixed-term contracts would be able to fulfil the terms of that contract. However, once off contract they may only be reappointed with the joint approval of the SAC and an appropriate Legislative Assembly committee. If the chief executive is not reappointed they may be transferred or declared to be unattached.

Features of Part 4B

The SAC, in consultation with the chief executives, must ensure that the service is staffed with executives (together constituting a senior executive service) who have the ability to manage administrative units at the most senior level and constitute a unifying force at the most senior levels of the service, by their training and approach to the management of the service.

The SAC, in consultation with the chief executives, is responsible for developing the senior executive service so that executives have ability and integrity and are imbued with a spirit of service to the public. The SAC is responsible for ensuring that executives and potential executives are appropriately trained to achieve the highest standards of efficiency and management in the service. Chief executives must comply with any reasonable request by the SAC to release employees for training – up to 15 days (normally 3 weeks) in total per year.

A list of core competencies is provided as a guide to the selection of an executive. The SAC and chief executive must have regard for these qualities in any decision relating to the filling of a vacancy in an executive office in an administrative unit. The different ways in which a vacancy may be filled are: appointment of a new executive, reappointment, transfer, or concurrent appointment of another executive. The merit principle (see section 65) applies to the filling of a vacancy.

The relevant chief executive may appoint an executive to a vacancy, but must do so in consultation with the SAC. Executives would be given a specified term of employment for a position (up to 5 years), and they would be given a permanent position in the service. Terms and conditions of employment would be fixed by the Remuneration Tribunal.

At the end of a term of office for which an executive is appointed, the chief executive, in consultation with the SAC, must either: reappoint the executive for a further term, transfer the executive to another executive office, arrange for the transfer of the executive to an executive office in another administrative unit, or declare the executive to be unattached.

Conditions of employment of an executive on transfer within (or into) an administrative unit (other than the term of office, and subject to any applicable remuneration tribunal determination) are not affected by the transfer, unless the relevant chief executive and the executive agree otherwise. The relevant chief executive must consult with the SAC before finalising any change to the conditions of employment.

The chief executive of an administrative unit may remove an executive from office for just cause subject to any procedures under the executive's conditions of employment. Examples of just cause are included in notes, but the list is not exhaustive. The chief executive must consult with the SAC before removing an executive from office.

If an executive is not reappointed or transferred into another executive office, or before the end of the executive's term of office the office is vacated or abolished the relevant chief executive may declare the executive to be unattached. The unattached executive stops being unattached on transfer to a vacant executive office or other office, or on retirement from the service.

The SAC and chief executive in which the unattached executive last held office (the primary chief executive) must do everything reasonable to assist an unattached executive to find a suitable position or engagement within or outside the service. If, within a reasonable period of time of being declared unattached, the unattached executive has not been transferred to a vacant senior executive office or arranged employment outside the service, the SAC may seek to arrange the transfer of the unattached executive to another office in the service.

An unattached executive may retire from the service at any time of their choosing. The primary chief executive, in consultation with the SAC, may approve the payment of a special benefit to an unattached executive in order for them to retire within a stated period.

Executives currently under contract would be able to fulfil the terms of their current contract, however, once off contract they may only be reappointed with the joint approval of the chief executive and the SAC. Executives not reappointed may be declared to be unattached.

Clause 17 omits Part 5, division 4. This division provides for the engagement of executives.

Clause 18 is a technical amendment providing for the renumbering of the Principal Act in its next republication.

Clause 19 inserts the Senior Appointments Commissioner into the relevant section of the *Remuneration Tribunal Act 1995*.

Schedule 1 contains a number of additional amendments to the Principal Act. These are consequential upon the substantive changes contained in the rest of the Bill. Several of them are merely changes in wording to bring the Act into line with current drafting style.