

**1994**

**AUSTRALIAN CAPITAL TERRITORY LEGISLATIVE ASSEMBLY**

**PUBLIC SECTOR MANAGEMENT BILL 1994**

**SUPPLEMENTARY EXPLANATORY MEMORANDUM**

**Amendments to be moved on behalf of the Government**

**Circulated by authority of  
Rosemary Follett, Chief Minister**

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## OUTLINE

The purpose of these amendments to the Public Sector Management Bill is to:

- mirror certain Commonwealth reciprocal mobility provisions and to provide for continuation of movement at level between the services without merit competition
- continue the Legal Aid Commission as a separate employing authority and include the Office of Public Prosecutions as an autonomous instrumentality
- provide for an independent member to the Executive Staffing Committee and provide for majority decision by that Committee
- provide the same level of preference to returned soldiers in the appointment processes as is available under the Public Service Act 1922 (Cw)
- clarify the superannuation for the Clerk of the Legislative Assembly in case of invalidity retirement
- make several changes recommended by the Standing Committee on Scrutiny of Bills and Subordinate Legislation,
- and make several minor changes to improve the text and clarify the meaning of some provisions.

These Government amendments have no significant financial implications.

## DETAILED EXPLANATION

### Interpretation

**Clause 3** is to be amended to amend the definition of "autonomous instrumentality" to omit the Legal Aid Commission and to include the Office of the Director of Public Prosecutions.

**Clause 3** is to be further amended to insert the definition of "criminal offence" because of its general application.

**Clause 3** is to be further amended by amending the definition of "non - appealable promotion" to accommodate existing appeal arrangements in respect of teaching positions.

## **General principles of management in employment matters**

**Clause 8** is to be amended to improve the text by substituting "government agencies" for "administrative units or Territory instrumentalities".

## **PART III - New Division Heading**

**Part III** is to be amended by inserting **after clause 23** a new heading "Division 2A - Exercise of Chief Executive Powers in relation to certain public employees". This will improve the readability of the text by helping readers to locate these related provisions concerning Chief Executive Officer powers.

## **Powers relating to certain staff providing services to Calvary Hospital**

**Clause 26** is to be amended to clarify arrangements under which the Chief Executive Officer of the hospital may exercise Chief Executive powers under this Act in respect of staff of the hospital who are employed under this Act. The powers of a Chief Executive are directly conferred on the Chief Executive Officer instead of requiring the Chief Minister to make an instrument designating the officer to exercise such powers. Similar amendments will be moved in relation to the DPP and other senior office holders.

## **Delegation by Commissioner or Chief Executives**

**Subclauses 36(2) to 36(7) inclusive** are to be amended by inserting provisions allowing the Commissioner or the Chief Executive to sub-delegate their powers under this Act and under a law other than this Act. The need for the amendment became apparent in preparing consequential amendments to the *Administration Act 1988* which are provided for in the Public Sector Management (Transitional and Consequential Provisions) Bill 1994. Sub delegation is possible presently under that Act.

## **Interpretation**

**Clause 39** is to be amended by amending the definition of "industrial democracy program" to refer to "government agencies" instead of "administrative units or Territory instrumentalities". This makes the definition consistent with clause 8, and improves the text.

## **Joint Council**

**Clause 44** is to be amended at subclause 44(1) to make it clear that Joint Council shall be established.

### **Suspension and removal from office**

**Clause 50** is to be amended to provide for the suspension of the Clerk of the Assembly to terminate on the Assembly negating a resolution for removal. A new subclause 50(4A) is to be inserted and subclause 50(5) is to be amended to achieve this effect. Under the existing clause 50(5), if the Assembly negated a resolution to remove the Clerk during the 3 sitting day suspension, there is no provision for the suspension to terminate.

### **Retirement**

**Clause 51** is to be amended by inserting after subclause 51(1), new subclauses to provide that the Clerk cannot be retired on invalidity grounds unless the Commonwealth Superannuation Board of Trustees has issued a certificate under the relevant Superannuation Act. The desirability of such provisions was advised by the Commonwealth Department of Finance after the Bill had been introduced.

### **Staff**

**Clause 54** is to be amended to clarify that the Clerk of the Assembly has all the powers of a Chief Executive in respect of staff employed in the Legislative Assembly Secretariat. The staff of the Secretariat are to be employed under the provisions of this Bill.

### **Senior Executive Classifications**

**Clause 57** is to be amended by omitting at paragraph 57 (1)(b) the reference to the Legal Aid Commission and inserting the Office of Director of Public Prosecutions.

### **Reclassification of Offices**

**Clause 58** is to be amended by omitting subclauses 58 (5) and (6). These subclauses are to be reinserted as a new clause 59 to replace the existing clause 59 - "Employment Streams" which is to be removed as agreed in negotiations with unions. This approach will assist implementation of the legislation by avoiding extensive renumbering of the Bill.

### **Application of Subsection 58(2) to ACT Electricity and Water Authority and Office of the Director of Public Prosecutions**

**Clause 59** is to be amended by omitting the existing clause on employment streams, as the division of the Service into employment streams is no longer required after negotiation with unions. A new clause 59 will be created by inserting the immediately preceding two subclauses 58(5) and (6) under a new heading "Application of subsection 58(2) to ACT Electricity and Water Authority and Office of the Director of Public Prosecutions". This will save extensive renumbering of the Bill. The effect of the new clause 59 is that ACTEW and the Director of Public Prosecutions may reclassify their positions without reference to the Commissioner for Public Administration.

## Interpretation

**Clause 63** is to be amended by omitting from paragraph 63(4)(e) "under" and substituting "for the purposes of". The effect of the amendment is to clarify a point identified by the Scrutiny of Bills Committee that it was not clear whether the relevant standard was being made under clause 91 or under clause 251.

## Application

Consequent upon the amendments to remove the Legal Aid Commission from the application of the Bill and to include the Office of the Director of Public Prosecutions as an autonomous instrumentality, **clause 64** is to be amended to omit references to the Legal Aid Commission and to include references to the Director of Public Prosecutions.

## Application of the merit principle

Consequent on the removal of the provisions relating to employment streams (formerly clause 59), **clause 65** is to be amended to remove the reference to employment streams at paragraph 65(1)(b).

## Appointments - generally

**Clause 68** is to be amended by removing the reference to a unanimous decision of the Executive Staffing Committee. This amendment is necessary for consistency with amendments to clause 74 on the Executive Staffing Committee. The clause is to be further amended to remove references to the Legal Aid Commission and to insert references to the Office of the Director of Public Prosecutions.

## Appointment to be on probation

**Clause 70** is to be amended by omitting the reference to "subsection (7)" and substituting "subsections (7) and (11)". At the end of the section, two new subclauses (11) and (12) are to be added. **New subclause 70(11)** has the effect of disapplying to officers who are absent on specified defence service, the requirement that they must be found to be medically fit before they can be appointed to the Service. This continues conditions already available under the *Public Service Act 1922* of the Commonwealth. **New subclause (12)** defines "specified defence service" in similar terms to the Public Service Act definition.

## Notification of Vacancies in Senior Executive Offices

**Clause 72** is to be amended by inserting a **new subclause 70(1A)** which requires that the Commissioner for Public Administration ensure that where a vacancy occurs in the position of Chief Executive Officer (CEO), Calvary Hospital, that the position is filled in

accordance with the requirements of the Public Sector Management Act and the prescribed selection procedures. This amendment is required to overcome the unintended anomaly where the CEO of Calvary would be required to sit on the selection panel for his or her CEO position.

### **Executive Staffing Committee**

**Clause 74** is to be amended by, at sub-clause 74(2), omitting "An" and substituting "subject to sub-section (2A), and". Paragraph 74(2)(c) is to be amended by omitting the paragraph and inserting a new paragraph to provide that the third member of the panel who is independent of the administrative unit in which the vacancy exists, is suitably qualified for membership of the Committee and is chosen from a list approved by the Chief Minister after consultation with the relevant staff organisation.

**Subclause 74(3)**, is to be omitted and new subclauses (2A) and (3) inserted. **New subclause 74(2A)** is to provide for the Committee where the vacancy being filled is that of the Chief Executive Officer of Calvary Hospital. The need for special committee arrangements for this position did not become apparent until late in the drafting of the Bill and after further consultation with Calvary Hospital representatives.

The purpose of the new subclause 74(3) is to provide for the Chairman of the Committee and this clause is amended consequent on and to refer to subclause 74(2A).

**Subclause 74(4)** is to be amended by omitting the subclause and substituting a new subclause which makes the Commissioner's powers clear in the appointment and promotion of SES officers and which provides that the Commissioner may approve a recommendation where there is a majority as distinct from a unanimous decision. This removes the veto of any one member of the Committee.

**Subclause 74(5)** is to be amended consequent upon the amendment of subclause 74(4) to provide that a recommendation to appoint or promote to a Senior Executive Service position does not lapse in the case of a majority decision.

### **Appointment or promotion of SES officers in ACT Electricity Authority and Legal Aid Commission (A.C.T.)**

**Clause 75** is to be amended to remove the Commissioner's veto power over appointments and promotions to the Senior Executive Service in ACTEW and the Legal Aid Commission. It is proposed that such appointments be made after consultation with the Commissioner.

**Clause 75** is to be amended further to remove the references to the Legal Aid Commission and to insert references to the Director of Public Prosecutions and the Office of the Director of Public Prosecutions.

### **Fixed-term appointments**

**Clause 80** is to be amended by omitting **subclause 80(6)** and inserting a new subclause (6) which clarifies the meaning of the provision.

**Clause 80** is to be further amended by omitting subclause (11) which defines a criminal offence. The definition of "criminal offence" is to be inserted at clause 3.

### **Superannuation arrangements**

**Clause 81** is to be amended by omitting "a complying superannuation fund within the meaning of the *Superannuation Guarantee (Administration) Act 1988*" and substituting "an approved superannuation fund within the meaning of the *Superannuation (Productivity Benefit) Act 1988*". This corrects the reference to the appropriate superannuation Act of the Commonwealth. The effect is that existing arrangements continue.

### **Determination of appeals**

**Clause 85** is to be amended to give effect to the Scrutiny of Bills Committee suggestion that the references to "more" and "most" efficient throughout the Bill be made consistent. At **subclause 85(1)**, "made" is to be omitted and "brought" is to be inserted. At **subclause 85(1)**, "more or" is to be inserted before "most". At **subclause 85(2)**, "more or" is to be inserted before "most", and at **subclause 85(3)**, "more or" is to be inserted before "most".

### **Transfers and promotions to specified offices may be made in accordance with the order of passing exams**

**Clause 97** is to be amended by omitting the clause and inserting a new clause with new wording which provides that the Public Sector Management Standards may specify the classes of offices which may be filled in order of the results of examinations or tests. This clarifies the previous wording in respect of the roles intended for the Standards and the Gazette.

### **Promotion of officers who complete courses of training for special positions**

**Clause 98** is to be amended consequent upon the amendment of clause 97. **Paragraph 98(1)(b)** is to be amended by omitting "classification that is specified in the notice" and substituting "specified classification". This will allow the classification to be specified in the relevant Standard.

## **Directions to Act**

**Clause 100** is to be amended by omitting the definition of efficiency at subclause 100(1). The clause is the same provision as in Public Service Regulation 116A of the Commonwealth. On closer examination of the operation of the clause and related provisions, the definition was found unnecessary as the definition is provided in subclause 104(2) and is appropriately located there.

## **Determination of appeal**

**Clause 104** is to be amended to give effect to suggestions by the Scrutiny of Bills Committee that references to efficiency throughout the Bill be checked for consistency.

**Subclause 104(1)** is to be amended by omitting "lodged" and substituting "brought". This does not change the effect of the provision, but makes the wording more precise. **Subclause 104(1)** is to be further amended by inserting "more or" before "most". **Subclause 104(2)** is to be amended by inserting "more or" before "most". **Subclause 104(3)** is to be amended by inserting "more or" before "most".

## **Power to engage employees**

**Clause 106** is to be amended by inserting new subclause 106(1A) to provide that only the Commissioner for Public Administration may engage a person to perform the duties of a Senior Executive position under the temporary employment provisions.

## **Temporary Employment - Generally**

**Clause 108** is to be amended so that it provides that a short term temporary engagement may not be extended beyond 12 months and with the agreement of the principal relevant staff organisation and that the prior agreement of that organisation is required for longer term temporary employment (over 12 months). Consultation with unions on extension is consistent with the temporary employment arrangements under the Public Service Act and with practices in areas of the Teaching Service. Unions have requested that it continue.

## **Officers of the Australian Public Service to have certain rights of entry to ACT Public Service**

**Clause 115** is to be amended by omitting clause 115(3) and (4) and inserting new clauses which mirror the Commonwealth legislative provisions on reciprocal mobility arrangements. These amendments are being made at the Commonwealth's request following introduction of their legislation into the Parliament on 12 May 1994. The amendments make it clear that a permanent move to the ACTGS from the APS is deemed to be a transfer or promotion which takes effect according to the rules set out in the new paragraphs; that an officer does not have to serve probation in the gaining service if he or



she has already been confirmed or served probation in the losing service; and that an APS officer is required to resign from the APS to take up a permanent position with the ACTGS. **Clause 115** is to be amended at subclause 115(6) to continue the facility of management to move officers at level between the Australian Public Service and the ACT Government Service without a merit process.

**Clause 115** is to be further amended so that annual leave, long service leave and sick leave benefits accrued in the Australian Public Service and before joining the ACT Government Service would be credited according to the rules applying at the time when the officer resigned from the Australian Public Service. Provision is also made to recognise continuous service in the Australian Public Service for the purpose of employment benefits in the ACT Government Service, including for the calculation of redundancy benefits.

### **Reappointment of retired officers**

**Clause 117** is to be amended at subclause 117(1) by omitting "in the circumstances prescribed for the purposes of this subsection". The removal of this phrase overcomes a potential and unintended effect being to restrict any reappointment unless it has been prescribed for and this will now allow unobjectionable re-appointments e.g. of a person who had resigned from the Service several years ago and who has decided to return to the Service after winning a position on merit.

### **Officers whose services cannot reasonably be used in an SES office at the same or equal classification**

**Clause 133** is to be amended by omitting at subparagraph 133(2)(b)(iii) the reference to "subsection 132(3)" and substituting "this subsection". This will correct a cross-reference.

At paragraph 133(3)(a), the words "prescribed for the purposes of this paragraph" are to be omitted and substituted by "of 14 days commencing on the day on which the notice is to be given to the officer". This amendment clarifies the commencement of and the duration of the period of notice.

### **Interpretation**

**Clause 148** is to be amended by omitting the definition of "officer" and substituting a new definition which will include a person employed by a Territory instrumentality or by a statutory office holder. It is intended that the long service leave provisions continue to apply to those who are currently entitled to long service leave according to the provisions of the *Long Service Leave (Commonwealth Employees) Act 1976*. By extending the definition of "officer", the current extent of application of the Commonwealth long service leave provisions in respect of Territory employment is retained.

**Management Standards with respect to previous employment with prescribed authorities etc.**

**Clause 150** is to be amended by inserting a new subclause **150(2A)** which will provide that there is sufficient authority to continue to recognise service in the Independent State of Papua New Guinea for long service leave purposes.

**Long Service Leave - Period of Employment**

**Clause 154** is to be amended at paragraph 154(2)(a) by omitting "Part", and substituting "section". This amendment follows from the amendment to clause 150.

**Continuity of Employment**

Consequent upon the amendments to clauses 150 and 154, **clause 155** is to be amended by adding "or" at the end of paragraph **155(4)(c)**; by omitting "or" at paragraph **155(4)(d)**; by omitting at paragraph **155(4)(e)**; by omitting "(d) or (e)" and substituting "or (d)" at subclause **155(4)**; and by omitting (d) or (e) at paragraph **155 (5)(a)** and substituting "or (d)".

**Status of periods of absence**

**Clause 156** is to be amended to streamline the text. The effect of the clause has not been altered.

**Long service leave and payments in lieu of long service leave**

**Clause 158** is to be amended by inserting two new subclauses **158(8)(A)** and **158(8)(B)** to mirror provisions of the Commonwealth's Australian Capital Territory (Consequential Provisions) Bill 1994 which provides that long service leave credits are transferred between the services, and not cashed out when an officer takes advantage of the reciprocal mobility provisions. An exception is made by way of subclause **158(8)(B)** for teachers who joined the ACT Schools Authority from the NSW system on the establishment of the Authority and who accrue long service leave at the New South Wales rate. In such instances, the difference between the NSW rate and the Commonwealth rate of accrual may be cashed out on resignation by a teacher to take up a position in the Commonwealth. Clause 158 applies to employees with ten or more years' service.

**Extended leave or pay in lieu of leave for officers not entitled to long service leave**

**Clause 159** applies to officers with more than one but less than ten years' service who may receive a payment in lieu for long service leave accrued. Clause 159 is to be amended to provide for the transfer of leave credits instead of cashing out in the same manner as provided for in the amendments to clause 158.

## Maternity Leave

**Clause 167** is to be amended to extend the definition of "officer" to include the staff of statutory office holders. Such staff currently receive maternity leave benefits by way of the application of the Commonwealth's *Maternity Leave (Commonwealth Employees) Act 1973*, either directly or by administrative application. Those provisions should continue by way of coverage through the Public Sector Management Act. The definition of officer at **clause 167** therefore needs to be amended by omitting the existing definition which covers the employees intended to be covered.

## Entitlement to paid maternity leave

**Clause 170** is to be amended to tidy the drafting, by omitting "or" at **paragraph 170(3)(a)**; by inserting, "or" at the end of **paragraph 170(3)(b)**; by inserting a new paragraph (c) immediately after **paragraph 170(3)(b)** to provide where paragraphs (a) and (b) do not apply to a person while the person is employed by a prescribed body or a prescribed organisation", and by omitting **sub-clause 170(4)**.

## Disciplinary action in respect of Chief Executives

**Clause 181** is to be amended at **subclause 181(6)** by omitting "Convenor" and substituting "Chairperson".

The Scrutiny of Bills Committee suggested that the inconsistency in the titles of "Convenor" and "Chairperson" for the chair of Boards of Inquiry for discipline matters be made consistent throughout the Bill.

## Nullification of Conviction

To correct a cross-reference, **subclause 192(3)** is to be amended by omitting "159(1)" and substituting "188(1)".

## Official directions to be carried out

To correct a cross-reference, **paragraph 234(b)** is to be amended by omitting "231" and inserting "232".

## Application of provisions of Merit Protection Act

**Clause 235** is to be amended by omitting **subclause 235(1)** and inserting a new subclause which provides that the *Merit Protection (Australian Government Employees) Act 1984* apply to officers and employees of the Territory as if the ACT were a Commonwealth authority and the officers and employees were Commonwealth employees.

Following consultation with the Commonwealth and in light of the drafting of the Commonwealth Bill titled *Australian Capital Territory Public Service (Consequential Provisions) Bill 1994*, the provisions relating to the application of the Commonwealth Merit Protection Act need to be adjusted so that they link with the Commonwealth provisions.

### **Interpretation**

**Clause 236** is to be amended by amending the definition of "government contractor" and "officer" so that these definitions are aligned with the application of the *Crimes (Offences Against the Government) Act 1989*.

### **Disclosure of information to Auditor-General or Ombudsman**

**Clause 237** is to be amended to overcome the effect of the provision resulting in a possible breach of client privilege in relation to matters before the ACT Legal Aid Office. The amendment proposed has the effect of not extending the provision to information covered by the secrecy provision of subsection 92(2) of the *Legal Aid Act 1977*.

### **Disclosure of information to authorised official**

Consequent on the amendment to clause 237, **clause 238** is to be amended to overcome the possibility of breaching client privilege.

The amendment has the effect of not extending the provision to information covered by the secrecy provisions of subsection 92(2) of the *Legal Aid Act 1977*.

### **Disclosure of information in certain circumstances**

**Clause 239** is to be amended by inserting a new paragraph (ca) after paragraph (c) to provide that disclosure would not, apart from this section, constitute an offence against subsection 92(2) of the *Legal Aid Act 1977*.

### **Miscellaneous - Second Jobs**

**Clause 244** is to be amended to clarify the intention that an officer should be prohibited from undertaking any remunerative employment aside from the officer's primary job in the public service, unless he or she has the approval of the head of his/her department.

### **Management Standards**

**Clause 251** is to be amended by inserting "resignation" after "retirement" at paragraph 251 (2)(n) to correct an oversight. **Clause 251** is to be amended to provide that the Management Standard made with respect to matters in paragraph 251(2)(j) takes effect subject to any direction issued by the Director of Public Prosecutions under section 12 of

the *Director of Public Prosecutions Act 1993*. The reference to "commencement day" at **subclause 251 (3)** is to be omitted to make it clear that it is intended that commencement be on the day on which the section commences under the commencement provisions (clause 2) of the Bill.

**Subclause 251(4)** is to be amended by omitting the subclause and inserting new **subclauses 251(4) and (5)**. To ensure that the conditions for returned soldiers are the same as apply under the *Commonwealth Public Service Act 1922*, a provision is to be included so that the Public Sector Management Standards may provide for the special conditions that are applicable to returned soldiers including preference in relation to appointments or promotions.

## Schedule 2

**Schedule 2** is to be omitted consequent on the amendment to **clause 235**. This results from consultations with the Commonwealth on the application of the provisions of the *Merit Protection (Australian Government Employees) Act 1984* to Territory employees.

## Schedule 3

**Schedule 3** is to be amended to provide for modifications to the *Merit Protection (Australian Government Employees) Act 1984* to ensure the appropriate application of the Commonwealth's merit protection provisions to employees of the Territory.

Included in these amendments is an amendment to correct a punctuation error identified by the Scrutiny of Bills Committee. The schedule is to be amended at page 199 line 5 of the Bill, by omitting "Executive". and substituting "Executive;".

## Schedule 4

**In relation to the proposed modification of subsection 5(1) of the Occupational Health and Safety Act 1989, definition of "designated work groups"**

The Scrutiny of Bills Committee identified cross-referencing errors and suggested adjusting the definition of "designated work groups". The definition of "designated work groups" in **Schedule 4 at page 199, lines 22 to 25** is to be amended by omitting the definition and substituting a new definition which is more accurate and contains the correct cross-references.

The Scrutiny of Bills Committee contrasted the provisions of clause 22 with clause 249 and Schedule 4. The Committee noted that subclause 22(4) (Commissioner's investigative powers) gives very strong protection against self-incrimination whereas Schedule 4, and in particular Part IVA inserted by the Schedule and which relates to inquiries, does not. Schedule 4 is therefore to be amended by inserting two new sections 60D and 60J to modify the *ACT Occupational Health and Safety Act 1989*.

New section 60D will modify the *Occupational Health & Safety Act 1989* so that self-incrimination is taken to be a reasonable excuse on the part of a person who is required to give information or documents.

New section 60J will modify the *Occupational Health and Safety Act 1989* to provide that where answering a question or producing a document may tend to incriminate a person, then this would be taken to be a reasonable excuse on the part of the person for not answering the question or producing a document.