

2005

**THE LEGISLATIVE ASSEMBLY FOR THE
AUSTRALIAN CAPITAL TERRITORY**

**Public Sector Management Amendment
Bill 2005 (No 3)**

EXPLANATORY STATEMENT

**Circulated by authority of
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Chief Minister**

Overview

This Bill amends elements of contract employment arrangements for chief executives and executives in the ACT Public Service, and associated amendments to the executive employment provisions to clarify the employment powers of certain persons on whom chief executive powers are conferred under this or other legislation.

Under the *Public Sector Management Act 1994*, chief executives and executives are employed on contracts of up to 5 years. Employment is activated through a contract, although the contract is also subject to the statutory framework provided by the Act as well as the Public Sector Management Standards (the PSM Standards) and determinations of the Remuneration Tribunal under section 10 of the *Remuneration Tribunal Act 1995*.

Under this framework, introduced in late 1995, chief executives and executives are engaged under contracts to carry out duties of executive offices in accordance with the following legislative provisions:

- contract terms are no more than 5 years;
- mandatory merit processes apply except for re-engagements to the same or similar position at contract expiry;
- 12 pay points linked to pay levels set by the Remuneration Tribunal. Positions are job sized against these pay points using a consistent job sizing methodology;
- employment is governed by terms of a standard contract;
- early termination is provided in contracts but prohibited under the Act on incompatibility or any ground to the same effect;
- benefits for early termination of contract are prescribed in the Public Sector Management Standards, which for most executives provide 2 weeks for every year of service up to a maximum of 44 weeks or up to a year for pre-1995 senior executive service officers;
- pay cannot be increased through contract variations;
- executive contracts and variations must be tabled in the Assembly and the making, expiry, and termination of contracts must be gazetted;
- no specific provision for lateral transfers; and
- short term contracts do not require merit process but are limited to 9 months.

The existing framework is inflexible and does not readily support the development of individuals within positions or across different jobs in the ACT Public Service or, as a result, the framework for a strong service-wide executive culture.

The Review of the Public Sector Management Act by the former Commissioner for Public Administration recommended a return to tenure for executives in addition to a number of wider changes to the Act.

The Government is currently considering its response to the wider recommendations in the review. Intermediate changes are proposed in this

Bill to address several key issues identified in the review to implement the Territory's commitment to developing a strong executive service based on sound public service values and principles.

The executive employment framework is a composite of legislative and contract provisions. A similar approach is taken in Western Australia, although in that jurisdiction legislative provisions support more responsive management and stronger retention of executives than is currently possible in the ACT. This is achieved in part by specifically providing for transfer arrangements and clearer entitlements regarding re-engagement when executive contracts expire.

Through this Bill, some of the elements of that model will be built into the ACT executive employment framework. The scope of this Bill was determined by the need to focus on some core issues rather than anticipating a wider response to the Public Sector Management Act Review recommendations.

The PSM Standards will also be amended to support new provisions to vary contracts where there is an increase in job responsibilities. The Standards will provide that a contract variation can increase the level of a job where the increase is justified by a job evaluation. This reflects existing provisions that require that a job evaluation methodology be used to identify job levels, which, in turn, link to pay levels set by the Remuneration Tribunal.

Under the current classification arrangements for Executive positions, the proposed arrangements would mean a jump from 1.3 to 2.4 or 2.6 to 3.7 still requires a merit process. Increases within zone 1 (1.1-1.3) or zone 2 (2.4-2.6) would not. Given the scope of zone 3, which includes deputy chief executives and chief executives, the limit is two pay points. This means that within zone 3, bigger changes in classification would still require merit processes.

Some changes have already been made to provide executive redundancy benefits more in line with those available to other public service staff.

Financial Implications

There are no substantial financial implications. Any implications will be met from within existing allocations.

Part 1 Preliminary

Clause 1 Name of Act

This clause provides for the name of the Bill when it is enacted.

Clause 2 Commencement

This clause explains when the new Act will commence. It allows the responsible Minister to fix a commencement date. If that does not occur then the new Act will commence six months after its passage is notified on the Legislation Register.

Clause 3 Legislation amended

This clause explains that the amendments contained in the Bill apply to the *Public Sector Management Act 1994*. The note to this clause explains the Bill also includes amendments other legislation. These amendments are contained in **Schedule 1 – Consequential Amendments**.

Clause 4 Definitions for Act, Section 3, definition of *relevant chief executive*

This clause replaces the definition of “relevant chief executive” to ensure that the term accurately reflects administrative policy and practice. In particular, the revised definition removes any doubt that the term refers to the persons holding chief executive powers in relation to the staff already employed in, or to be employed in, administrative units, territory instrumentalities and certain statutory office holders.

Clause 5 Sections 24 to 26

This clause inserts replacement sections 24 to 26.

Replacement section 24 deals with the situation where an act provides that some or all of the staff of a territory instrumentality must be employed under the Public Sector Management Act. It recasts existing section 24 to reflect modern drafting language and removes any doubt that the chief executive of the territory instrumentality has the power to engage staff. In practice, the exercise of these powers are subject to any financial constraints.

Replacement section 25 deals with the situation where an act provides that a statutory office holder is to be assisted by staff, some or all of who must be employed under the Public Sector Management Act, and either the relevant act creating the statutory office or a declaration by the Chief Minister has conferred the powers of a chief executive officer on the statutory office holder. The new provision recasts existing section 25 to reflect modern drafting language and removes any doubt that a statutory officer holder on whom chief executive powers have been conferred either by enactment or by Chief Ministerial declaration has the power to engage staff. In practice, the exercise

of the employment powers are subject to any financial constraints. Replacement paragraph 25(5)(a) is a new provision intended to promote transparency in government, which provides that declarations under subsection 25(4) are notifiable instruments.

This clause also replaces and updates section 26, which deals with the exercise of powers in relation to staff at Calvary Hospital. It ensures that the new provision reflects the current name of the hospital, which is Calvary Health Care ACT Limited (Public Division) and removes any doubt that the Chief Executive Officer has the power to employ staff.

Clause 6 Section 28 heading

This amendment changes the heading of section 28 so that it better reflects the contents of that provision.

Clause 7 Section 28(5) to (7)

This clause omits existing section 28 (5)-(7), which deal with contract variations. These provisions are now located in new section 28AA.

Clause 8 New section 28AA

New section 28AA deals with variations to chief executive contracts and is substantially similar to former sections 28(5) –(7).

Variations must be in writing and be agreed between the parties to the contract. Variations are void where they:

- extend the term of the contract beyond 5 years and 3 months;
- increase the remuneration or allowances payable to the chief executive in a way that is not authorised by the management standards.

The new section includes a note referring to provisions in new section 33A that deal with transfers.

The new provision differs from former section 28(6) in that the term of the contract may be 5 years and 3 months, rather than 5 years and 2 months. This change ensures consistency with the approach to giving notice of non-renewal of contracts.

The new provision also allows for some variation of the total remuneration payable, providing that the variation is authorised by the management standards. This change will, for example, enable remuneration to be increased if the job requirements for the position are also increased.

New section 28AA(2)(a)(i) is substantially identical to former section 28(7). It explains that the extension of the contract beyond 5 years will only be permitted if the varied contract requires the person to be on leave during the period of the extension.

New sections 28AA(3) and (4) are transitional provisions that will ensure the new provisions apply to existing contracts. It should be noted that the new provisions do not adversely affect the entitlements of persons engaged under existing contracts. The transitional provisions will reduce the scope for possible disparity by ensuring that all chief executives are subject to the same law.

Clause 9 New section 28D

This clause inserts new section 28D, which deals with giving notice to a chief executive whose long term contract will not be renewed when it expires. It provides that the chief executive may be given three months notice of nonrenewal before the expiry of the contract. If notice is not given, and the contract is not renewed, the chief executive will be entitled to receive a payment equivalent to three months annual salary.

The entitlement to the payment referred to in this section will not arise if the chief executive accepts another position in the ACT public sector, or if the chief executive is entitled under the management standards to receive a redundancy payment. (Former senior executive service officers are entitled under the Public Sector Management Standards to a redundancy type payment on nonrenewal of a long term contract.)

The payment in lieu of notice is payable within three months after the contract expires.

The new provisions apply to all chief executive contracts that are in force and have at least three months to run when the amendments commence. As the new provisions confer a benefit that would not otherwise apply, the application of the new section to existing contracts is justified.

Clause 10 Section 29

This clause substitutes a new section 29 to make some technical amendments to existing provisions. The changes update the terminology in the section and also remove an anomalous reference to unattached chief executives.

The section reflects existing provisions that explain that a person exercising the functions of an office of chief executive for an administrative unit has certain duties in relation to that unit. The chief executive is responsible for the administration and business of the unit, must advise the Minister on matters relating to the unit and must have regard to the interests of the government and the service as a whole.

As is possible under existing provisions, a chief executive may be assigned to special duties on behalf of the Territory. The new section removes an anomalous reference to unattached chief executives. With the introduction of executive contracts in 1995, the concept of attachment and unattachment became irrelevant to chief executives.

Clause 11 Section 30 heading

This amendment changes the heading of section 30 so that it better reflects the contents of that provision.

Clause 12 Section 30(4)

This clause substitutes a new section 30(4) to extend the maximum length of temporary chief executive contracts from 9 months to 2 years. This change will permit acting arrangements to support longer-term project arrangements or assignments. Under current provisions, short term chief executive contracts over 9 months are void.

At present, where a person is given a temporary assignment as chief executive that will last for more than nine months, the person's existing contractual arrangements must be overridden permanently. The amendment will allow a person to temporarily perform the duties of a chief executive for a period of up to two years without affecting his or her substantive contract.

Clause 13 Section 30(10) to (12)

This clause omits existing section 30(10)–(12), which deal with contract variations of short term contracts made under section 30. These provisions are now in new section 30A or, through changes made under clause 19, incorporated with other merit provisions in section 65 of the Act.

Clause 14 New section 30A

New section 30A deals with variations to chief executive contracts and is substantially similar to former section 30(10)–(11). The amendment in this clause is consequential on the amendment in clause 12.

New section 30A makes it clear that temporary contracts may be varied, but the variation cannot increase the term of a temporary contract to more than 2 years. New section 30A(3) explains that the amendments will apply to existing contracts. This application will not have a prejudicial effect on the entitlements of the parties.

Clause 15 Negotiation and execution of contracts Section 31(1)

This clause substitutes a new section 31(1). This amendment will make it clear that the Chief Minister is to sign both contracts and contract variations on behalf of the Territory.

Clause 16 Section 32 heading

This amendment changes the heading of section 32 so that it better reflects the contents of that provision.

Clause 17 New sections 33A and 33B

New section 33A will clarify the power to transfer chief executives on long term contracts between offices. The new arrangements permit the Chief Minister to transfer chief executives to other chief executive offices or any other office in a department or to exercise any stated public sector function.

New section 33A(2) includes requirements for consulting the chief executive before the transfer occurs.

New section 33A(3) restricts these transfers to positions at or below current levels.

New section 33A(4) explains that a transfer under this provision is a deemed variation of the contract.

Under new section 33A(5), if the new position is below the chief executive's current level, he or she will continue to be paid at the same level as in his or her previous position for the remainder of the term of the current contract. The transfer does not affect the term of the current contract or the right to terminate under existing section 28A. This section permits early termination on grounds specified in contracts, subject to the prohibition on using the ground of incompatibility, and provides for early termination benefits to be prescribed in the Public Sector Management Standards.

New section 33A(6) explains the effect of a transfer under new section 33A on the functions of a chief executive. It makes it clear that when a chief executive is transferred, he or she must exercise the functions of the new office, or the stated functions in the instrument of transfer.

New sections 33A(7) and (8) are transitional provisions that apply the new arrangements for transfers to existing chief executive contracts. It should be noted that the new provisions cannot adversely affect a chief executive's entitlements.

New section 33B explains that a transfer under new section 33A will not be regarded as invalid merely because there is a defect or irregularity in the way the transfer is made. This provision is similar to other provisions relating to executive contracts, such as section 32.

Clause 18 Section 34

This clause replaces existing section 34, dealing with notification requirements when a chief executive is engaged, with a new provision. The new provision requires notification in the Gazette of all engagements under section 28, terminations of chief executive contracts, the end of the period of employment under a chief executive contract and any transfers of a chief executive under new section 33A. This provision ensures that the Legislative Assembly and members of the public can be informed about chief executive employment arrangements in the ACT Public Service.

Clause 19 Application of merit principle New Section 65 (1)(ba)

This clause inserts new section 65(1)(ba). Existing section 65(1)(b) applies the merit principle to the engagement of chief executives and executives on long term contracts. Under existing provisions, the merit principle and the associated processes do not apply to short term chief executive and executive contracts – under current arrangements, a short term contract is one that has a maximum term of 9 months.

Clauses 12 and 26 of this Bill extend the maximum duration of short term chief executive and executive contracts to 2 years. The amendment to section 65 will ensure that a merit process is required for all short-term executive and chief executive contracts that exceed 9 months. This means the extensions to short term contract arrangements will not diminish existing merit arrangements.

Clause 20 Section 65(1)

This clause explains that section 65 will be renumbered when the Act is republished.

Clause 21 Section 72 heading

This amendment changes the heading of section 72 so that it better reflects the contents of that provision.

Clause 22 Section 72 (5) to (7)

This clause omits existing section 72(5)-(7), which deal with contract variations. These provisions are now in new section 72A.

Clause 23 New section 72A

Section 72 deals with the engagement of executives on long term contracts. New section 72A deals with variations to long term executive contracts and is substantially similar to former section 72(5) to (7).

Variations must be in writing and be agreed between the parties to the contract.

New section 72A(2) is similar to former section 72(6). It explains the types of variation that are not permitted. These are variations that:

- extend the term of the contract beyond 5 years and 3 months;
- increase the remuneration or allowances payable to the executive in a way that is not authorised by the management standards.

A variation that does either of these things is void.

The new provision differs from former section 72(6) in that the term of the contract may be 5 years and 3 months, rather than 5 years and 2 months. This change ensures consistency with the approach to giving 3 months notice of non-renewal of contracts.

The new provision also allows for some variation of the total remuneration payable, providing that the variation is authorised by the management standards. This change will enable remuneration to be increased in accordance with the Public Sector Management Standards if the job requirements for the position are also increased.

New section 72A(2)(a)(i) is substantially identical to former section 72(7). It explains that the extension of the contract beyond 5 years will be permitted only if the varied contract requires the person to be on leave during the period of the extension.

New sections 72A(3) and (4) are transitional provisions that will ensure the new provisions apply to existing contracts. It should be noted that the new provisions do not adversely affect the entitlements of executives engaged under existing contracts. The transitional provisions will reduce the scope for possible disparity by ensuring that all executives are subject to the same law.

Clause 24 New section 75A

This clause inserts new section 75A, which deals with giving notice to an executive whose long term contract will not be renewed when it expires. It provides that the executive may be given three months notice of nonrenewal. If the notice is not given, and the contract is not renewed, the executive will be entitled to receive a payment equivalent to three months annual salary.

The entitlement to the payment referred to in this section will not arise if the executive accepts another position in the ACT public sector, or if the executive is entitled under the Management Standards to receive a redundancy payment. (Former senior executive service officers are entitled under the Public Sector Management Standards to a redundancy type payment on nonrenewal of a long term contract.)

The payment in lieu of notice is payable within three months after the contract expires.

The new provisions apply to long term executive contracts that are in force and have at least three months to run when the amendments commence. As the new provisions confer a benefit that would not otherwise apply, the application of the new section to existing contracts is justified.

Clause 25 Section 76 heading

This amendment changes the heading of section 76 so that it better reflects the contents of that provision.

Clause 26 Section 76(4)

This clause amends section 76(4) to extend the maximum length of temporary contracts from 9 months to 2 years. This change will permit acting arrangements to support longer-term project arrangements or assignments. Under current provisions, short term executive contracts over 9 months are void. At present, where an executive is given a temporary assignment that will last for more than nine months, the executive's other contractual arrangements must be overridden permanently. The amendment will allow an executive to temporarily perform other duties for a period of up to 2 years.

Clause 27 Section 76 (10) to (12)

This clause omits existing section 76(10)-(12) which deals with contract variations of short term contracts made under section 30. These provisions are now in new section 76A. The existing exemption from merit provisions relating to short term contracts up to 9 months will now be found in section 65 of the Act under changes made in clause 19.

Clause 28 New Section 76A

New section 76A deals with variations to executive contracts and is substantially similar to former section 76(10) – (12). The amendment in this clause is consequential on the amendment in clause 26.

New section 76A(2) makes it clear that temporary executive contracts may be varied, but the variation cannot increase the term of a temporary contract to more than 2 years. New sections 76A(3) and (4) explain that the amendments will apply to existing contracts. This application will not have a prejudicial effect on the entitlements of the parties.

Clause 29 Section 77

This clause is linked to clause 5 and makes a technical amendment to an existing reference to Calvary Hospital. The amendment cross-references the revised definition of chief executive officer, Calvary that is inserted by new clause 5.

Clause 30 Negotiation and execution of contracts

This clause amends existing provisions in sections 78(1) and 78(2) about who signs executive contracts on behalf of the Territory. The amendments include signing variations to contracts under new sections 72A and 76A.

Clause 31 New section 78(4)

A new section provides a revised cross reference for the existing provision about signing a contract for the chief executive officer at Calvary Hospital, and is consequential on the replacement of section 26 by clause 5 of this Bill.

Clause 32 Section 80 heading

This amendment changes the heading of section 80 so that it reflects more accurately the contents of that provision.

Clause 33 New sections 80A and 80B

New section 80A will clarify the power to transfer executives on long term contracts between offices. The new arrangements permit the chief executive of an agency to transfer executives to other offices at the same level or to exercise any stated public sector function.

New section 80A(2) includes requirements for consulting the executive before the transfer occurs.

New section 80A(3) explains that a transfer under this provision is a deemed variation of the contract.

Under new section 80A(4), the transfer does not affect the transferred executive's pay; the term of their contract; or the employer's right to terminate the contract early under existing section 73. This latter section permits early termination on grounds specified in contracts, subject to the prohibition on using the ground of incompatibility, and provides for early termination benefits to be prescribed in the Public Sector Management Standards.

New section 80A(5) explains the effect of a transfer under new section 72A on the functions of an executive. It makes it clear that when an executive is transferred, he or she must exercise the functions of the new office, or the stated functions in the instrument of transfer.

New sections 80A(6) and (7) are transitional provisions that apply the new arrangements for transfers to existing executive contracts. This application will not have a prejudicial effect on the entitlements of the parties.

New section 80B explains that a transfer under new section 80A will not be regarded as invalid merely because there is a defect or an irregularity in the way the transfer is made. This provision is similar to other provisions relating to executive contracts, such as section 80.

Clause 34 Section 81

This clause replaces existing section 81 dealing with notification requirements when an executive is engaged, with a new provision. The new provision requires notification in the Gazette of all engagements under section 72, termination of executive contracts, the end of the period of employment under an executive contract, and any transfers of an executive under new section 80A. This provision ensures that the Legislative Assembly and members of the public can be informed about executive employment arrangements in the ACT government.

Clause 35 New section 248B

This clause extends an existing prohibition of re-engagement of certain former officers and employees during a period covered by redundancy benefits to also apply to the 3 month payment for nonrenewal of contract.

Its purpose is to ensure that persons who receive or are entitled to a payment under new sections 28D and 75A because they were not given notice of nonrenewal of their contracts cannot immediately take up a different ACT public sector position, without the written approval of the Commissioner for Public Administration.

It ensures that such persons must wait three months before taking up a further offer of employment by the Territory or its instrumentalities.

Clause 36 New part 16

This clause inserts new Part 16 into the Act. Part 16 consists of new section 274 and new section 275.

New section 274 is a transitional provision that provides that clauses 4 and 5 are taken to have always applied to the employment of persons in the ACT public service. The purpose of this part is to remove any possible doubt as to whether heads of certain territory instrumentalities, certain statutory office holders or the Calvary Chief executive do or do not have full employment powers as part of their chief executive powers. Section 274 clarifies the original intent of the provisions as evidenced by, for example, the debate on the Occupational Health and Safety Amendment Bill 2000 on 25 May 2005, at page 1852 of Hansard

In referring to an amendment that he had proposed to deal with the powers of the new Occupational Health and Safety Commissioner, Mr Berry MLA set out the proposed provision and then explained its intended effect.

“Section 25I is amended by omitting subsection (3) and substituting the following section:

(3) The commissioner has all the powers of a chief executive in relation to staff assisting him or her as if the staff were employed in a department under the control of the commissioner.”

That ensures that there is complete and utter independence in the employment of staff.”

The provision to which Mr Berry referred is couched in substantially identical terms to provisions in other Territory legislation where staff of Territory instrumentalities or statutory authorities are intended to be covered by the Public Sector Management Act, and the heads of those agencies are intended to have powers equivalent to chief executive powers in relation to those staff.

Schedule 1 Consequential Amendments

Part 1.1 ACTION Authority Act 2001

Item 1.1 Section 22(3)

This item is a technical amendment to replace existing subsection 22(3). It is consequential on clauses (4) and (5) of the Bill.

Part 1.2 Crimes Act 1900

Item 1.2 Section 49A, definition of *senior officer*, example for paragraph (a) (ii)

This item is a technical amendment to update references to chief executive officers of governments agencies. It is consequential on the amendments in clauses (6) and (11) of the Bill.

Part 1.3 Emergencies Act 2004

Item 1.3 Section 22(1)

This item is a technical amendment to replace existing subsection 22(1). It is consequential on clauses (4) and (5) of the Bill.

Item 1.4 Section 22(2), note

This item is a technical amendment that is consequential on clauses (4) and (5) of the Bill.

Part 1.4 Legislation Act 2000

Item 1.5 Section 163 (1)

This item is a technical amendment to update references to chief executive officers of governments agencies. It is consequential on the amendments in clauses (6) and (11) of the Bill.

Part 1.5 Planning and Land Act 2002

Item 1.6 Section 23

This item is a technical amendment that is consequential on clauses (4) and (5) of the Bill.

Item 1.7 Section 72

This item is a technical amendment that is consequential on clauses (4) and (5) of the Bill.