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

PUBLIC SECTOR MANAGEMENT ACT AMENDMENT BILL 2010

EXPLANATORY STATEMENT

**Presented by
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Chief Minister**

Background / Overview

The *Public Sector Management Act 1994* (PSM Act), the Public Sector Management Standards 2006 (PSM Standards) and ACTPS Collective/Enterprise Agreements (Agreements), along with whole of government policies, comprise the legislative employment framework in the ACT Public Service (ACTPS).

The PSM Act derives from the *Commonwealth Public Service Act 1922* (now repealed). The PSM Act predates industrial Agreements made under the *Workplace Relations Act 1996*, and subsequently the *Fair Work Act 2009*.

Successive rounds of Agreement-making in the ACTPS have seen matters originally covered exclusively in the PSM Act and PSM Standards modified by Agreements. In several instances Agreements have expressly overridden the PSM Act or PSM Standards in relation to a particular matter.

Over time, the interaction between the PSM Act, PSM Standards and Agreements in relation to some matters has become unnecessarily complicated, making the legislative employment framework difficult to interpret for practitioners and individual staff. Having matters duplicated in multiple documents creates ambiguity about the role and function of the different components of the legislative employment framework.

This amending Bill is intended to address, in part, inconsistencies between the components of the employment framework. The amendments will contribute to the overall efficiency of the ACTPS.

It is also important to note, in the context of some of the amendments proposed by the Public Sector Management Bill 2010, that Commonwealth legislation now determines what terms and conditions of employment prevail in the ACT. This amendment, therefore deals with a number of provisions which are currently replaced by Federal laws at the operational level. Those Federal laws are not subject to the *Human Rights Act 2004*. However, recognising that there may be concerns around removing protections/rights prescribed within these provisions, it is worth noting that the provisions that are proposed to be omitted are inoperable due to the repeal of the *Commonwealth Merit Protection (Australian Government Employees) Act 1984*.

While it is correct that a number of relevant rights and obligations will now be located in Federal industrial instruments that are negotiated, there will be no erosion in protection as the process and structures around these instruments will ensure adequate scrutiny takes place. Most importantly, these agreements will be assessed against a modern award by a tribunal (Fair Work Australia) and there are rights of action under the federal legislation (e.g. adverse action, etc) that provide high levels of protection incorporating principles of fairness and natural justice.

Clause 1 Name of Act

This clause is a technical clause stating the title of the instrument as the *Public Sector Management Amendment Act 2010*.

Clause 2 Commencement

This clause is a technical clause which 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 two years and one day 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 that the Bill also includes amendments to other legislation, these amendments are contained in Schedule 2.

Clause 4 New section 9A

This clause inserts new section 9A which makes it clear that the misconduct procedures that apply to public employees are set out in Agreements. The clause also provides capacity for misconduct provisions to be included in the PSM Standards in any circumstance where an Agreement does not apply.

Clause 5 Definitions for div 3.7, Section 39, definition of *designated group*

This clause updates the definition of *designated group*. For the purposes of the PSM Act *designated group* means a group of any of the following people:

- a) an Aboriginal person or Torres Strait Islander
- b) a person who has migrated to Australia and whose first language is a language other than English;
- c) a child of a person mentioned in paragraph (b);
- d) a person who has a disability.

Clause 6 Equal employment opportunity programs, Section 40(1)(a)

This clause omits the term *relevant staff organisations* and substitutes the term *relevant unions*, which is defined in the Dictionary section of the PSM Act. For the purposes of the PSM Act *relevant union* for an office means an employee organisation:

- a) registered under the *Fair Work (Registered Organisations) Act 2009 (Cwlth)*; and
- b) entitled to represent the industrial interests of 1 or more people working in the administrative unit in which the office exists; and

- c) covered by an industrial agreement that applies to 1 or more people working in the administrative unit in which the office exists.

Clause 7 Access and equity programs, Section 41(1)(a)

Similar to the amendment to section 40, relevant unions now replaces references to relevant staff organisations.

Clause 8 Industrial democracy programs, Section 42(1)(a)

Similar to the amendment to section 40, relevant unions now replaces references to relevant staff organisations.

Clause 9 Joint council, Section 44(2)

Similar to the amendment to section 40, relevant unions now replaces references to relevant staff organisations.

Clause 10 Section 65

This clause substitutes section 65 which deals with the application of the merit principle. While the provisions of the section remain substantially similar to former section 65, the section is amended as follows:

- a) new subsection 65(1)(f) is inserted, consequential to new section 108A, to clarify the requirement for competitive selection, as prescribed, for fixed term temporary engagements of more than 12 months;
- b) a new Note is inserted providing a definition for **function**, expressed at 65(1), as prescribed under the *Legislation Act 2001*;
- c) new subsection 65(3) is inserted to allow for identified positions for Aboriginal and Torres Strait Islander people and people with a disability;
- d) subsection 65(5), formerly 65(3) is amended so that any function performed under 65(1) to (3) in accordance with a prescribed program is not unlawful under the *Discrimination Act 1991*; and
- e) new terms and definitions for **approved program** and **identified position** are inserted at subsection 65(6).

For the purposes of this section, an **approved program** is an equal employment opportunity program or any other prescribed program to encourage the appointment, engagement, promotion or transfer of women or people in a designated group (equal employment opportunity program and designated group are defined under section 39 of the PSM Act).

For the purposes of this section an **identified position** means a position, as determined by the chief executive that is to be filled in accordance with the prescribed process by an Aboriginal person or a Torres Strait Islander or a person who has a disability.

In essence subsections 65(3) and 65(5) enable a chief executive to modify, as prescribed, the application of the merit principle in relation to eligibility for positions and assessment of applicants for positions for Aboriginal and Torres Strait Islander persons, persons with a disability, women or people in a designated group. These powers engage the rights outlined in the *Human Rights Act 2004* (HR Act) at subsections 8(2) and (3) which provide:

- (2) Everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind.
- (3) Everyone is equal before the law and is entitled to the equal protection of the law without discrimination. In particular, everyone has the right to equal and effective protection against discrimination on any ground.

However, while it is acknowledged that these modifications to the merit principle engage the right to equal protection of the law, the qualification of the merit principle in these circumstances is a reasonable limit that can be demonstrably justified in a free and democratic society, and is therefore consistent with the requirements set out under section 28 of the HR Act.

In late 2009, the ACT and Commonwealth Governments entered into a partnership agreement with the aim of closing the gap in relation to outcomes for Aboriginal and Torres Strait Islander people. As part of the Indigenous Economic Partnership Agreement, the ACT Government committed to increase the participation of Aboriginal and Torres Strait Islander people in the ACTPS.

The ACT Government believes it has an ethical imperative, as well as an obligation under the National Partnership Agreement with the Commonwealth to increase its Aboriginal and Torres Strait Islander employment rate within the public service.

The effect of these provisions is to reverse long standing discrimination in employment for these groups of people. They are important provisions because jobs have significant impacts on Aboriginal and Torres Strait Islander families, including improved economic, health and educational outcomes. The qualification is consistent with Principle 1 of the Aboriginal Justice Agreement – Empowerment and Community inclusion.

Likewise people with disabilities represent about 16 percent of Australian working-age population, yet constitute only 1.6 percent of the ACTPS. These provisions are reasonable and justifiable in that they will assist to reverse this under representation and increase the level of participation in the ACTPS workforce for Canberrans with a disability.

The economic objectives of the ACT Women's Plan 2010-2015 include opportunities for women to increase economic independence throughout their lifecycle, including equitable pay for the true value of their work and leadership and decision making opportunities for women and girls. While women comprise 66% of the ACTPS workforce, they only comprise 39% of the executive cohort, and on average, for every dollar which a man in the ACTPS earns, a woman earns 94.5 cents. It is reasonable and justified to adopt measures which would encourage pay parity between men and women in the service, and equal representation at the highest levels of leadership in the service.

The ACT Multicultural Strategy 2010-2013 identifies that approximately 2% of the ACT population were born overseas and approximately 14% speak a language other than English at home. As at June 2009, 12 per cent of the ACTPS workforce identified as having a first language other than English. In the pursuit of equality it is reasonable and justified to provide the capacity for measures which would align the representation of culturally and linguistically diverse percentage of the ACTPS with that of the community.

Further, subsection 27(1)(a) of the *Discrimination Act 1991*, Measures to achieve equality, provides that an act will not be unlawful if a purpose of the act is to ensure that members of a relevant class or people have equal opportunities with other people. The qualification of the merit principle seeks to ensure that Aboriginal and Torres Strait Islander persons, persons with a disability, women and people in a designated group have employment opportunities that are equal to all other persons.

Clause 11 Sections 70 and 71

This clause substitutes existing sections 70 and 71 and inserts new sections 71A, 71B and 71C. Consistent with existing provisions, section 70 *Appointment on probation* establishes that appointment to the ACTPS is subject to probation in accordance with section 70, subject to certain exceptions. Section 71 *Appointment on probation-prescribed training office* is amended so that rather than dealing with appointment on probation for training offices and teaching offices it now deals with appointment on probation for prescribed training offices and new section 71A *Appointment on probation-teachers* deals with appointment on probation for teachers.

Sections 70, 71 and new 71A are restructured to specify the commencement of probation and the period after which probation is taken to be confirmed. In the interests of certainty of employment for officers the periods after which probation is taken to be confirmed has been reduced as follows:

- from 24 months to 12 months under section 70;
- from 12 months to 6 months after the officer completes the relevant course of training under section 71; and
- from 2 years and 6 months (30 months) to 18 months after the date of appointment under section 71A.

Further, the former concept whereby appointment could only be confirmed at the completion of the period of probation is amended to allow appointment to be confirmed at any time during the probationary period (dependant on the standard of health and fitness of the officer and other prescribed pre-appointment requirements). This concept is expressed through subsections (2) and (3) under sections 70, 71 and 71A respectively.

Subsections 70(4), 71(4) and 71A(4) prescribe the circumstances by which the appointment of an officer may be ended, where the chief executive is satisfied on reasonable grounds that any of these circumstances are applicable.

The amendment also introduces to subsections 70(4), 71(4) and 71A(4) provisions that allow the employment of an officer on probation to be terminated if they do not undertake a requisite medical assessment. Previously, section 70(8) prescribed that the appointment of an officer could not be, or be taken to be confirmed unless the chief executive was satisfied that the officer had undertaken a medical examination and on the basis of such an examination, that their health and fitness was satisfactory. However, the PSM Act was silent on what further action/decision a chief executive could take in this circumstance. To resolve the situation this amendment enables the chief executive to take action.

Subsections 70(5), 71(5) and 71A(5) set out the provisions of former subsection 70(6), prescribing that appointment on probation must not be ended unless the officer has been given at least 14 days notice of the reason/s for ending the appointment and the day the appointment will end. Before giving notice to an officer the chief executive should give the officer an opportunity to state his or her views in relation to the ending of their appointment and should consider the views of the officer.

71A inserts a new definition for **teacher** which confirms the operation of the section in relation to teachers at the Canberra Institute of Technology.

New section 71B *Extension of period of probation* introduces a power to enable a probationary period to be extended. In practice, extensions of probationary periods already occur and this is not inconsistent with the PSM Act or Agreements. However, new subsection 71B(1) makes it clear that a chief executive may extend probation in circumstances where they are satisfied on reasonable grounds that an additional period of time is required to assess the probationary officer's suitability and is reasonable given individual circumstances.

Subsection 71B(2) sets out the maximum additional time periods for extensions of probation, but does not limit the number of times an extension may be made within the allowable time frames. Subsection 71B(3) provides that a probationary period cannot be extended unless the probationary officer has been given written notice of the reasons, length and end date of an additional period of probation. Before giving notice to an officer the chief executive should give the officer an opportunity to state his or her views in relation to the extension of their probation and should consider the views of the officer.

Consistent with similar provisions under subsections 70(4), 71(4) and 71A(4), new subsection 71B(4) allows the chief executive to confirm appointment at any time during the extended period of probation and 71B(5) provides grounds for ending probation, where the chief executive is satisfied on reasonable grounds that this is an appropriate action, thereby terminating the officer's employment with the ACTPS.

New section 71C *Appointment without probation* relocates provisions dealing with appointment without probation, previously located under former subsections 70(2)(c)-(e), so that the provisions for appointment with probation and appointment without probation are dealt with in separate

sections. The section has been restructured but the provisions are substantially similar to former subsection 70(2).

Clause 12 Division 5.5, heading

This amendment changes the heading of division 5.5 from *Promotions and transfers of officers* to *Promotion of officers* so that it better reflects the contents of the division which now focuses on matters relating to promotion of officers. Provisions relating to the transfer of officers are now relocated to division 5.6 *Transfer of officers*.

Clause 13 Sections 82 to 96

This clause substitutes sections 82 to 90 under division 5.5 and sections 91 to 96 under division 5.6 and inserts new sections 96A through 96D. Previously, division 5.5 *Promotions and transfers of officers* provided a range of powers to enable the promotion and transfer of officers and employees as a result of recruitment processes, or as in the case of some transfers, outside of recruitment processes and through what are sometimes known as management initiated transfers.

Division 5.5 also dealt with promotion or transfer on the advice of a joint selection committee (JSC) and/or a management initiated joint selection committee (MJSC). Simultaneously, the PSM Act, PSM Standards and Agreements provided prescription about the constitution of JSCs and MJSCs. Additionally, both the PSM Act and PSM Standards contained significant prescription about the establishment, management and processes of JSCs and MJSCs.

The purpose of this amendment is:

- a) to create better alignment between the three components of the legislative employment framework and to reduce the complexity and volume of prescription in relation to JSCs and MJSCs; and
- b) to clarify and streamline the expression of the current transfer powers.

The PSM Act is restructured so that the provisions of former division 5.5 *Promotions and transfers of officers* are separated to form division 5.5 *Promotion of officers* including sections 82 to 90 and division 5.6 *Transfer of officers* including sections 91 to 96 and new sections 96A to 96D.

Division 5.5 *Promotion of officers* (sections 82 to 90)

Section 82 inserts new terms and definitions for: ***appellable level position***; ***joint selection committee*** and ***principal union***.

For the purposes of this division ***appellable level position*** means an office where the maximum salary is lower than the minimum salary for the Senior Officer Grade C (or equivalent) and any office which requires teaching qualifications.

For the purposes of this division **joint selection committee** means a committee constituted as prescribed in the PSM Standards and includes a management initiated joint selection committee.

For the purposes of this division **principal union** means the relevant union whose membership includes the largest number of officers occupying positions of the class to which a promotion or transfer is to be made.

Section 83 *Promotion to a vacant office* is substituted and updated to clarify that a chief executive may fill a vacant office by promotion, as prescribed, and that written notice must be given to an officer so promoted. Subsections 83(3) and 83(4) are relocated to division 5.6 *Transfer of officers*, as relevant.

Section 84 is substituted and amended to change the heading from *Appeals* to *Promotion appeal* and to reflect arrangements for promotion appeals as prescribed under the Appeal Mechanism (AM) in Agreements.

Former section 85 *Determination of appeals* is omitted as provisions relating to the grounds for the determination of promotion appeals are overridden by the AM.

Former section 86 *Promotion appeal rights of certain officers* becomes section 85 with the heading changed to *Promotion appeal by excess officer*. The section is amended to remove superfluous detail relating to unattached officers. An officer's status as an unattached officer does not affect the operation of the section. The section is also amended, similar to section 84, to reflect arrangements for promotion appeals as prescribed under the AM.

Former section 87 *Review of non-appellable promotion decisions by merit protection agency* becomes section 86 with the heading changed to *Review of certain promotion decisions*. Provisions relating to an application to the merit protection agency for review, grounds for review and the processes of the merit protection agency in considering the review, expressed in former subsections 87(1)-(6) and 87(8)-(10), are replaced at subsections 86(2) and 86(3) to reflect arrangements for review as prescribed under the Internal Review Procedures (IRP) in Agreements (see Clause 32 for further detail). Former subsection 87(7) is retained and becomes subsection 86(4). Section 86 substitutes the concept of a non-appellable promotion with the new term, defined at 86(5), of **reviewable level office**.

Amendments to sections 84 to 86 do not limit the appeal or review rights of officers

For the purposes of this section **reviewable level office** means an office with a maximum salary that is equal to or higher than the minimum salary for the Senior Officer Grade C (or equivalent) with the exception of teaching offices.

Section 87 *Promotion on advice of joint selection committee* substitutes and combines the provisions of former sections 88 and 89 (for the purposes of promotion only in this division) providing the power for a chief executive to promote an officer to fill a vacant office within their administrative

unit on the advice of a JSC. Prescription about the constitution of, establishment, management and processes of JSCs and MJSCs is omitted from the PSM Act and relocated to the PSM Standards. Similarly, former section 90 *Procedure of joint selection committee* is omitted from the PSM Act and relocated to the PSM Standards.

Section 88 *How promotions take effect* substitutes and updates section 91 *Taking effect etc of promotions and transfers* and is substantially similar to the former provisions.

Section 89 *Death of an officer before appeal decided* substitutes and updates former section 92 and is substantially similar to the former provisions.

Section 90 *Cancellation of promotion* substitutes and updates former section 93 *Cancellation of promotion or transfer* and is substantially similar to the former provisions with the exception of the omission of references to transfer. Section 90 provides for a chief executive to cancel a promotion before it takes effect where they believe on reasonable grounds that this action is appropriate. Provisions for the cancellation of transfer are moved to new section 96E (below).

Division 5.6 *Transfer of officers* (sections 91 to 96D)

Section 91 becomes *Definitions—division 5.6* and inserts new terms and definitions for: ***appellable level position***; ***joint selection committee***; ***principal union*** and ***office***. Definitions for division 5.6 are identical to those at section 82 (above).

Section 92 becomes *Transfer to vacant office* and clarifies that a chief executive may fill a vacant office by transfer, as prescribed, and that written notice must be given to an officer so transferred. Section 92 is used to effect a transfer arising from a merit selection recruitment process.

Section 93 becomes *Simultaneous transfer within administrative unit* and substitutes and updates former section 95. Section 93 is substantially similar to the former provisions.

Section 94 *Transfer between administrative units* substitutes and updates former section 94 *Transfer of officers by chief executive from one administrative unit to another* so that where it is proposed to transfer an officer from one administrative unit to another administrative unit outside a recruitment process, the transfer is to be made under section 94 with the agreement of both the releasing and gaining chief executives. Where the releasing chief executive does not agree the gaining chief executive may ask the Commissioner for Public Administration (Commissioner) to approve the transfer.

Section 95 becomes *Management initiated transfer-within administrative unit* which deals with a chief executive's power to transfer an officer within their administrative unit, outside of a recruitment process, that the efficient administration of the unit requires the transfer. Transfers of this nature were previously made under section 83 of the PSM Act.

Section 95 also provides a chief executive with the power to transfer officers, unattached officers and employees between administrative units under their portfolio where, as a result of a change in the ACTPS Administrative Arrangements (AAs), such transfers are required. Previously, only the Commissioner held this power for both intra and inter agency transfers.

Section 96 *Management initiated transfer-between administrative units* substitutes and updates former section 96 *Transfers of officers and employees between administrative units*. The provisions of section 96 are substantially similar to the former provisions, providing powers for the Commissioner to transfer an officer or a group of officers, unattached officers and employees between administrative units where satisfied that the transfer is necessary for the efficient administration of the service and/or as a result of a change in the AAs.

New section 96A requires that where the Commissioner proposes to exercise powers under section 96 in relation to two or more officers, the Commissioner must also meet the consultation requirements prescribed for management or government initiated transfers under Agreements.

New section 96B substitutes and combines the provisions of former sections 88 and 89 (for the purposes of transfer only in this division) providing the power for a chief executive to transfer an officer to fill a vacant office within their administrative unit on the advice of a JSC. Prescription about the constitution of, establishment, management and processes of JSCs and MJSCs is omitted from the PSM Act and relocated in the PSM Standards.

New section 96C *How transfers take effect* clarifies that transfers take effect as prescribed in the PSM Standards.

New Section 96D *Cancellation of transfer* sets out provisions for a chief executive to cancel the transfer of an officer within their own administrative unit.

Clause 14 Promotion of officers who complete courses of training for special positions, Section 98(3)

This clause substitutes the former convoluted provisions for appeal at subsection 98(3). The amendment does not change the operation of the provision or the rights of an officer to appeal.

Clause 15 Temporary performance of duties—offices other than offices of chief executive and executive offices, Division 5.6, heading

This clause omits the former heading of division 5.6 *Temporary performance of duties-offices other than offices of chief executive and executive offices*. This amendment is consequential to amendments in clause 13 which substitutes and relocates new division 5.6 *Transfer of officers* between sections 90 and 91 so that it better reflects the contents of the division, which is now focused on matters relating to transfer of officers.

Clause 16 Definitions for div 5.6, Section 99

This clause omits existing section 99 which deals with definitions for division 5.6. This amendment is consequential to amendments in clauses 13 and 15. Definitions for division 5.6, *Transfer of officers* are provided at section 91.

Clause 17 Sections 100 to 104

This clause changes the heading of section 100 from *Directions to act* to *Temporary transfer*. The change in terminology is similarly applied through sections 101 to 104 and in simultaneous amendments to the PSM Standards to align the terminology used in relation to matters covered by sections 100-104 across the legislative employment framework.

Section 100 remains substantially the same but is restructured so that provisions contained in former subsections 100(1) and (2) are combined into subsection 100(1). Former subsections 100(3), 100(4) and 100(5) become subsections 100(2), 100(3) and 100(4) and former subsections 100(8) is moved and inserted as new subsection 100(5).

The heading of section 101 is changed from *Directions to act in certain offices for more than 3 months or until the occurrence of an event* to *Notification of certain temporary transfers to higher office* so that it better reflects the contents of the provision. Reference to an appellable promotion is replaced with reference to ***appellable level positions*** (see clause 13).

Subsection 101(2) is amended to extend the period for which notice of a temporary transfer is to be made from 3 months to 6 months to align with advertising requirements and appeal rights prescribed in Agreements and clarifies that notice of the transfer is to be made in the Gazette. Subsections 101(3) and 101(4) are omitted as a consequence of the change in notification arrangements at 101(2).

Section 102 is amended to reflect new arrangements for appeals as prescribed under the AM on the basis that a promotion appeal committee established under the repealed *Merit Protection (Australian Government Employees) Act 1984* (Cwlth) (MP Act) cannot operate (see Clause 32 for further information).

Section 103 is substituted changing the heading from *Lapsing of appeals* to *Lapsing or discontinuing of appeal* and while the concepts of the former provisions remain substantially similar, the section is restructured to better clarify the circumstances in which an appeal lapses and the circumstances in which an appeal may be considered to be discontinued. The section is also amended to update the reference to a period exceeding 3 months at subsection 103(1)(h)(ii) with a period exceeding 6 months at 103(2)(b)(i)(B) consistent with amendments at section 101.

Former section 104 *Determination of appeal* is omitted as the concepts contained within these provisions are overridden by the AM.

Former section 105 *Procedure if appeal is successful* becomes Section 104 with the heading changed to *Temporary transfer if appeal successful* and is amended to reflect arrangements for appeals as prescribed under the AM.

Amendments to sections 104 and 105 are not intended to limit the appeal rights of officers.

Clause 18 Section 105, division 5.7 heading and section 106

This clause substitutes sections 105 and 106. Section 105 becomes *Meaning of office—div 5.7*.

The heading of section 106 is changed from *Power to engage employees* to *Power to engage temporary employee* to better clarify the purpose of the provision. Former subsection 106(2), which prescribed that a person shall not be engaged to perform the duties of an executive office under the division, is omitted as the definition of **office** at section 105 now applies to section 106.

Clause 19 Sections 107 and 108

This clause omits former section 107 which provided for the temporary employment overseas of persons recruited overseas. The provision was a superfluous carryover from the Commonwealth's *Public Service Act 1922*. Nothing within the PSM Act prevents the temporary engagement of a person overseas or within Australia to subsequently work overseas where other prescribed requirements are met.

This clause substitutes and amends the heading of section 108 from *Temporary employment—generally* to *Temporary employment—fixed term less than 12 months* and inserts new 108A *Temporary employment—fixed term not more than 5 years* so that the relevant provisions for these two different types of temporary engagement, formerly dealt with under section 108, may be separately and more clearly expressed.

While the provisions for both sections remain substantially similar in their operation, subsection 108A(3) is amended to provide for the re-engagement of a temporary employee for a further fixed term period, in the same position, where the aggregate period of all engagements is no more than 5 years and where the initial engagement of the person was made in accordance with prescribed merit selection requirements.

Clause 20 Section 112

This clause substitutes, updates and amends former section 112 and inserts new section 112A.

Section 112 prescribes that unless terminated earlier, in accordance with this section, temporary employment terminates at the end of the fixed term of engagement. Subsection 112(2) provides that a chief executive may terminate the employment of a casual employee at any time and may terminate the employment of a temporary employee on the provision of reasonable notice. Before giving notice of the termination of temporary employment the chief executive should provide

reasons for the termination and give the temporary employee an opportunity to state his or her views in relation to the termination of the temporary employment and should consider the views of the officer.

The section is amended so that:

- a) the heading is changed from *Termination of employment* to *Termination of temporary employment* which more accurately reflects the content of the section;
- b) subsections 112(1) and (2) are restructured but remain substantially similar;
- c) the reference at 112(1) to section 177 is amended to section 112A; and
- d) the section now provides for an employee to terminate their temporary employment, with notice, before the end of their contract and for the notice period to be waived or altered by mutual agreement.

New section 112A relocates and updates the provisions of former section 177 which related to termination of employment for temporary employees on maternity leave. This amendment is made as a consequence of the omission of part 8 *Maternity leave* (see clause 31).

Clause 21 Sections 115, 115A and 116

This clause omits sections 115, 115A and 116. Section 115 prescribed mobility arrangements which were introduced in 1994 at the time the ACTPS became a separate service from the Australian Public Service (APS). These provisions were introduced to allow portability of entitlements for officers moving from the APS to the ACTPS where they resigned from the APS one day and were appointed to the ACTPS on the next day. While the former provisions supported the Government's intentions in relation to portability of entitlements they were arduous and had administrative shortfalls and consequently the concepts for the movement of officers from the APS to the ACTPS via mobility arrangements are omitted from the PSM Act while portability of entitlements are retained.

Under the mobility provisions APS officers moving to the ACTPS were appointed through either 'deemed transfer' or 'deemed promotion', rather than a standard ACTPS appointment, and were not subject to a probation process with the ACTPS. The provisions also set out complex administrative procedures which required notification, in the Gazette, of both the 'deemed transfer' or 'deemed promotion' and the appointment of the officer and adherence to prescribed timeframes and appeal mechanisms (as appropriate) prior to the transfer/promotion and appointment being able to take effect.

Section 115 is omitted so that officers of the APS who move to the ACTPS are appointed under usual appointment arrangements within the PSM Act (division 5.3 *Appointment of officers*) while retaining portability of entitlements through prior service recognition arrangements in the PSM Standards, where all other prior service recognition provisions are located.

Section 115A provided mobility rights for certain employees of ACTEW Corporation Limited. These provisions were inserted into the PSM Act by the *Electricity and Water (Corporatisation)*

(Consequential Amendments) Act 1995 (EWCA Act) following corporatisation of the former Australian Capital Territory Electricity and Water Authority in 1995. The provisions allowed portability of entitlements for certain transferred employees where they returned to the ACTPS within a 3 year period from the commencement of the *Electricity and Water (Corporatisation) (Consequential Provisions) Act 1995* (EWCP Act). As the relevant part of the EWCA Act, for mobility provisions, commenced on 1 July 1996 the application of section 115A elapsed on 30 June 1999 and therefore the section is redundant and is omitted.

Section 116 extended the provisions relating to portability of entitlements under section 115 to officers of the APS who were engaged as a chief executive or executive by the ACTPS. As portability of entitlements through prior service recognition arrangements for all employees are prescribed in the PSM Standards, section 116 is also unnecessary and is omitted.

Clause 22 New section 118A

New section 118A *Quashing etc of conviction* relocates and updates the provisions of former section 192 *Nullification of conviction* as a consequence of the omission of part 9 *Discipline* (see clause 32).

Section 118A provides for a person who has been convicted of an offence and has been subject to disciplinary action, including termination of employment, to apply to the relevant chief executive for reappointment to the service or reconsideration of any other discipline action where their conviction is quashed, nullified or set aside or where they are pardoned or released from prison as a result of an inquiry into their conviction.

A chief executive must consider any application made under subsection 118A(2) and must give the applicant written notice of their decision to do one or more of the following:

- reappoint the person to an appropriate office;
- transfer the person to an appropriate office;
- promote the person
- take other action to address the disciplinary action;
- refuse the application.

In giving notice to an officer the chief executive should give the person an opportunity to state his or her views in relation to the proposed action and should consider the views of the person.

While the provisions of section 118A are substantially similar to the former section 192, the section has been amended to:

- a) replace references to the nullifying of a conviction with the quashing of a conviction in line with definitions prescribed in the *Spent Convictions Act 2000*;
- b) replace references to dismissal and/or dismissed from the service with more contemporary terminology of terminated and/or termination of employment;

- c) provide for an application for reappointment or transfer/promotion by a person or an officer to be made to the relevant chief executive in the first instance rather than to the commissioner; and
- d) provide for an application for reconsideration of a decision of the relevant chief executive to be made to the Commissioner on the basis that the appellant, in the case of a person whose employment had been terminated, will not fit within the definition of an employee for the purposes of the AM.

Clause 23 New section 122

This clause inserts new section 122 which provides the power for a chief executive to terminate the employment of an employee as a result of misconduct. This amendment is consequential to the omission of part 9 Discipline (see clause 30).

Clause 24 Part 6 heading

This clause amends the heading of part 6 from *Retirement and redeployment of officers other than chief executives and executives* to *Retirement and redeployment of officers*. The amendment removes the superfluous reference to chief executives and executives from the heading simultaneous to the amendment of **officer** within the definitions for the part at section 139 (see clause 25).

Clause 25 Section 139

This clause substitutes section 139 changing the heading from *Interpretation—pt 6* to *Definitions—p6* and inserts new terms and definitions for **essential qualification, not qualified to perform duties** and **underperformance**, refining the definition for **excess officer**, amending the definition for **officer** and omitting the definition for **appeal committee**.

For the purposes of this part, **essential qualification** means a qualification that the officer must have to lawfully perform their duties or is a prerequisite to a function that is a necessary part of the officer's employment.

For the purposes of this part **not qualified to perform duties** means the officer does not hold or is not eligible to hold an essential qualification or the essential qualification has been suspended, cancelled or otherwise withdrawn.

For the purposes of this part **underperformance** means failure by an officer to perform the duties of an office to the standard reasonably required.

Officer is amended to clarify that chief executives and executives are not covered by the provisions of Part 6 and the term **appeal committee** and its definition is omitted as they are anachronistic.

Clause 26 Sections 143 and 144

This clause substitutes sections 143 and 144 amending the heading for section 143 from *Action by chief executive to reduce officer's classification or retire officer from the service* to *Redeploy or retire officer from service* and for section 144 from *Action by commissioner to reduce officer's classification* to *Date of effect of redeployment or retirement*.

Consistent with the amended section headings the provisions dealt with by sections 143 and 144 are restructured so that the role and responsibilities of a chief executive/Commissioner towards the redeployment or retirement of an officer are expressed under section 143 and the effect of the proposed action whether agreed or not agreed by the officer is prescribed under section 144.

Section 143 outlines the responsibilities of a chief executive and the Commissioner in identifying a suitable position for an officer where the chief executive is satisfied on reasonable grounds that the officer is unable to perform their duties due to physical or mental incapacity or is not qualified to perform their duties or is an excess officer, before the officer may be given notice of the chief executive's intention to reduce the officer's classification or retire the officer from the service.

Where an officer is to be given notice of the chief executive's intentions to reduce the officer's classification or retire the officer from the service, the chief executive should provide reasons and should give the officer an opportunity to state his or her views in relation to the proposed action and should give appropriate weight to the views of the officer.

Section 143 is amended to replace references to the 'transfer' of an officer (under section 83 and 96) with the 'redemption' of an officer. This provides greater flexibility in the movement of an officer dependant on the individual circumstances, in line with provisions for the redeployment of medically unfit staff in Agreements.

Subsection 143(9) is inserted to clarify that the giving of a notice under this section is appealable in accordance with arrangements for appeals as prescribed under the AM.

The amendment also omits all elements from sections 143 and 144 which relate to inefficiency as these matters are overridden by Agreements. The omission of inefficiency procedures from the PSM Act does not limit the rights of appeal and/or review of an officer which are now prescribed within Agreements.

Clause 27 Section 147

This clause substitutes section 147 changing the heading from *Appeals* to *Underperformance*. The former provisions of section 147 in relation to the making of an appeal are relocated to section 143(9) (see clause 26). Section 147 now clarifies that procedures applying to the management of underperformance (formerly inefficiency) by an officer are prescribed in Agreements.

Clause 28 Long service leave, Part 7

Clause 28 omits part 7 *Long Service Leave*. Consistent with the employment framework model provided for in this Bill matters relating to employee entitlements are to move from the PSM Act and PSM Standards to Agreements.

Due to the complexity of long service leave provisions, the accrual methodology and capabilities of the ACTPS Human Resource Management System, Chris21, the movement of long service leave provisions to Agreements will be a staged process to allow for revision of the technical elements required to facilitate a change in the accrual methodology. At this time, part 7 is omitted from the PSM Act and moved to the PSM Standards where the terminology and structure of the long service leave provisions will be amended to align with the structure of leave provisions included in Agreements without any change to entitlements.

Clause 29 Maternity leave, Part 8

Similar to part 7 and consistent with the employment framework model, part 8 is omitted from the PSM Act. Provisions relating to maternity leave within the PSM Act are modified by Agreements and ACTPS policy which instructed ACTPS Agencies to use leave not provided for elsewhere to extend the maximum period of paid maternity leave from 12 to 18 weeks. To achieve the relocation of maternity leave, existing provisions in the PSM Act, Agreements and ACTPS policy have been consolidated with entitlements expressed in a clearer more contemporary format without modification to the substance of the entitlements.

Once again, the incorporation of maternity leave provisions into all ACTPS Agreements will be a staged process. To facilitate the staged process of incorporating maternity leave into Agreements across the service it is proposed that the date of effect for this part of the amendment be a date fixed by the Minister. This would allow the Minister to delay the omission of part 8 until all occupational Agreements have incorporated maternity leave. It is proposed that the automatic commencement date be two years after notification as this will allow sufficient time for all Agreements to incorporate maternity leave provisions before part 8 is omitted.

As executives in the ACTPS are not covered by Agreements it is proposed that all leave types, including long service leave (to occur in the future) and maternity leave be replicated in the PSM Standards in a new separate chapter for executives.

Clause 30 Discipline, Part 9

Part 9, *Discipline* is omitted on the basis that ACTPS Agreements expressly cover the field in this area effectively overriding Part 9 of the PSM Act. Further part 9 as was formerly prescribed within the PSM Act did not operate on a number of levels as a result of the repeal of the *Merit Protection (Australian Government Employees) Act 1984* (Cwlth) (MP Act) and therefore the Merit Protection Agency.

Sections 187, 190, 191, 192, 193, 198, 199, 200 and division 9.6 are effectively inoperable as they either incorporate or are dependent on processes related to a disciplinary appeal committee and/or the merit protection agency which have not existed since 1999 (see clause 32 for further details).

However, to ensure there is capacity for discipline and misconduct provisions in the future, if these were not provided in Agreements, new section 9A *Misconduct* provides for an alternative to prescription in Agreements. Sections 192 *Nullification of conviction*, 218 *Imprisonment* and 220 *Deduction of pecuniary penalty from salary* are relocated to Parts 5 and 13 respectively. These provisions do not deal with matters specifically relating to misconduct and discipline processes and are therefore retained within the PSM Act.

Clause 31 Section 222

This clause substitutes section 222 to replace the provisions at former subsection 222(3)(b) and 222(4) to an application for a review of the decision of the chief executive under the MP Act. New subsection (5) now clarifies that this is an appellable decision and that an appeal is to be made to the Commissioner on the basis that the appellant, having been retired from the service will not fit within the definition of an *employee* for the purposes of the AM.

Former subsection (5) is more clearly and concisely expressed at new subsection (6) without any change to the application of the provision.

Clause 32 Part 11

This clause substitutes part 11 of the PSM Act. Previously, part 11 set out review and appeal processes for matters which were reviewable under the PSM Act. Over time mechanisms and processes for review and appeal have developed in Agreements which operate to the exclusion of sections 84(1) *Promotion appeals*, 102(1) *Direction to act in a higher office* (for more than three months) and part 11 of the PSM Act. However, the review and appeal mechanisms provided within Agreements do not exclude all rights of review or appeal prescribed within the PSM Act, nor do they displace the mechanisms by which these reviews or appeals are managed.

A number of these rights of review or appeal refer to the Merit Protection and Review Agency (MPRA). The MPRA was established under the MP Act and continued to provide services to the ACTPS when the ACTPS was established in 1994. However, the MP Act was repealed on commencement of the *Public Service Act 1999* (Cwlth) (the PS Act). While the PS Act establishes the office of the Merit Protection Commissioner with similar functions to those previously prescribed under the MP Act, the PS Act does not extend the services provided by the Merit Protection Commissioner to the ACTPS. References to the MPRA and the MP Act are remnants of a previous era in Commonwealth legislation and to continue to refer to them is anachronistic.

References to the MPRA and the MP Act are replaced with references to the ACTPS IRP or AM located in Agreements. To provide further clarity of the operation between the PSM Act and

Agreements the PSM Act is also amended to provide a consolidated list of all reviewable and appealable decisions in schedules to the PSM Act.

In place of the former procedures, Part 11 now prescribes that reviewable and appealable decisions contained within the PSM Act are listed in schedules to the PSM Act and identifies that in relation to these types of decisions, a decision maker must give notice of their decision in writing and that the officer who is the subject of the decision may seek a review or appeal (as relevant) of the decision.

However, to ensure there is capacity for undertaking reviews and appealing decisions in the future, if these were not provided in Agreements, definitions for review and appeal are inserted within the PSM Act dictionary and include an alternative to prescribed processes within Agreements.

Clause 33 New section 249

New section 249 relocates and updates the provisions of former section 218 *Imprisonment* as a consequence of the omission of part 9 *Discipline* (see clause 32). While the provisions of section 249 are restructured they remain substantially similar to former section 218.

Clause 34 New section 250A

New section 250A *Deduction of monetary penalty* relocates and updates the provisions of former section 220 *Deduction of pecuniary penalty from salary* as a consequence of the omission of part 9 *Discipline* (see clause 32). While the provisions of section 248C are restructured they remain substantially similar to former section 220.

Clause 35 Management standards, Section 251(5), definition of *specified defence service*

This clause substitutes the reference at section 251(5) to *specified defence service* – see section 70(12) and relocates the definition from section 70(12) to section 251(4). The definition is substantially similar to that previously provided at section 70(12).

Clause 36 Schedule 1

This clause substitutes existing Schedule 1, *Modifications and adaptations of Part 9* in its application to employees as a consequence of the omission of part 9 *Discipline*. New Schedule 1, *Reviewable decisions* is inserted and lists all reviewable decisions that are identified within the PSM Act.

Clause 37 Schedule 2

This clause substitutes existing Schedule 2, *Modification of Merit Protection Act* in its application under section 235 as a consequence of the substitution of Part 11, *Review of certain decisions and investigation of grievances*. New Schedule 2, *Appellable decisions* lists all appellable decisions within the PSM Act.

Clause 38 Dictionary, new definition of *Aboriginal person or Torres Strait Islander*

This clause inserts a definition for ***Aboriginal person or Torres Strait Islander*** consistent with the *Aboriginal and Torres Strait Islander Elected Body Act 2008*.

Clause 39 Dictionary, definition of *action*

This clause omits the term ***action*** which is now redundant as a consequence of the substitution of part 11 (see clause 34).

Clause 40 Dictionary, new definition of *appeal*

This clause inserts a new definition for ***appeal*** for the PSM Act.

Clause 41 Dictionary, new definitions of *appellable decision* and *appellable level position*

This clause inserts the new term ***appellable decision*** for the PSM Act and the new term of ***appellable level position*** for the purposes of divisions 5.5 and 5.6.

Clause 42 Dictionary, definition of *appellable promotion* and *approving authority*

This clause omits the term ***appellable promotion*** which is replaced by the new term ***appellable level position*** (see clauses 13 and 41) and omits the term ***approving authority*** as a consequence of the omission of part 7 (see clause 30).

Clause 43 Dictionary, definition of *authorised person*

This clause omits the definition of ***authorised person*** which is now redundant as a consequence of the substitution of part 11 (see clause 34).

Clause 44 Dictionary, definition of *category A officer* and *category B officer*

This clause omits the definition for ***category A officer*** and ***category B officer*** which are now redundant as a consequence of the omission of part 7 (see clause 30).

Clause 45 Dictionary, definition of *chief executive*

This clause substitutes the definition for ***chief executive*** to remove the reference to division 9.6 at (b) as a consequence of the omission of part 9 (see clause 32).

Clause 46 Dictionary, definition of *Commonwealth Long Service Leave Act*

This clause omits the definition of ***Commonwealth Long Service Leave Act*** which is now redundant as a consequence of the omission of part 7 (see clause 30).

Clause 47 Dictionary, definition of *confinement*

This clause omits the definition of *confinement* which is now redundant as a consequence of the omission of part 8 (see clause 31).

Clause 48 Dictionary, definition of *decision*

This clause omits the definition of *decision* which is now redundant as a consequence of the substitution of part 11 (see clause 34).

Clause 49 Dictionary, definition of *detached officer*

This clause omits the definition of *detached officer* which is now redundant as a consequence of the omission of part 9 (see clause 34).

Clause 50 Dictionary, definition of *director*

This clause omits the term *director* which is now redundant .

Clause 51 Dictionary, definition of *disciplinary appeal committee*

This clause omits the definition of *disciplinary appeal committee* which is now redundant as a consequence of the omission of part 9 (see clause 32).

Clause 52 Dictionary, definition of *employee*, paragraphs (b) and (c)

This clause substitutes the definition of *employee* to omit former (b) as a consequence of the omission of part 9 (see clause 32) and to amend the reference at new (b) to the new heading for part 11.

Clause 53 Dictionary, definition of *employment*

This clause omits the definition of *employment* which is now redundant as a consequence of the omission of part 9 (see clause 32).

Clause 54 Dictionary, new definition of *essential qualification*

This clause inserts the new term and definition for *essential qualification* for the purposes of part 6 of the PSM Act.

Clause 55 Dictionary, definition of *excess officer*

This clause substitutes the definition of *excess officer* to amend the reference to part 6 to the new heading for the part.

Clause 56 **Dictionary, definition of *industrial award***

This clause omits the definition of *industrial award* which is replaced by the new term of and definition for *industrial instrument* (see clause 57).

Clause 57 **Dictionary, new definition of *industrial instrument***

This clause inserts the new term and definition for *industrial instrument* in place of the term industrial award which is now redundant.

Clause 58 **Dictionary, definition of *internal appeal officer***

This clause omits the definition of *internal appeal officer* which is now redundant as a consequence of the substitution of part 11 (see clause 34).

Clause 59 **Dictionary, new definition of *joint selection committee***

This clause inserts the new term of *joint selection committee* which is defined within divisions 5.5 and 5.6.

Clause 60 **Dictionary, definition of *leave and leave officer***

This clause omits the definition of *leave* and *leave officer* which are now redundant as a consequence of the omission of parts 7 and 8 (see clauses 30 and 31).

Clause 61 **Dictionary, definition of *long service leave***

This clause omits the definition of *long service leave* which is now redundant as a consequence of the omission of part 7 (see clause 30).

Clause 62 **Dictionary, definition of *maternity leave***

This clause omits the definition of *maternity leave* which is now redundant as a consequence of the omission of part 8 (see clause 31).

Clause 63 **Dictionary, definition of *Merit Protection Act* and *merit protection agency***

This clause omits the definition of *Merit Protection Act* and *merit protection agency* which are now redundant.

Clause 64 **Dictionary, definition of *misconduct***

This clause substitutes the definition of ***misconduct*** to remove references to omitted part 9 and division 9.4 and to update the definition to provide for the breadth of behaviours identified as misconduct by Agreements.

Clause 65 **Dictionary, new definition of *not qualified to perform duties***

This clause inserts the new term of ***not qualified to perform duties*** which is defined under part 6.

Clause 66 **Dictionary, definition of *office*, paragraphs (c) and (d)**

This clause substitutes the definition of ***office*** and is a technical amendment replacing headings for divisions 5.5 and 5.6 and updating the section number at (d).

Clause 67 **Dictionary, definition of *officer***

This clause substitutes the definition of ***officer*** which is amended to remove (a)(iii), (c) and (d) as the relevant section and parts are omitted from the PSM Act and to replace the heading for part 6 at (c).

Clause 68 **Dictionary, definition of *original office***

This clause omits the definition of ***original office*** which is now redundant as a consequence of the omission of part 9 (see clause 32).

Clause 69 **Dictionary, new definition of *principal union***

This clause inserts the new term of ***principal union*** which replaces the term ***principal relevant staff organisation*** for purposes of the PSM Act (see also clause 75).

Clause 70 **Dictionary, definition of *proceeding***

This clause omits the definition of ***proceeding*** which is now redundant as a consequence of the omission of part 9 (see clause 32).

Clause 71 **Dictionary, definition of *promotion appeal committee***

This clause omits the definition of ***promotion appeal committee*** which is now redundant.

Clause 72 **Dictionary, definition of *public office***

This clause omits the definition of ***public office*** which is now redundant as a consequence of the omission of part 9 (see clause 32).

Clause 73 **Dictionary, definition of *redundancy***

This clause omits the definition of *redundancy* which is now redundant as a consequence of the omission of part 7 (see clause 30).

Clause 74 Dictionary, new definition of *relevant union*

This clause inserts the new term of *relevant union* which replaces relevant staff organisation for the purposes of the PSM Act.

Clause 75 Dictionary, definition of *relevant staff organisation*

This clause omits the definition of *relevant staff organisation* which is now redundant.

Clause 76 Dictionary, definition of *review*

This clause substitutes the definition of *review* which is amended to replace the reference to omitted part 9 and to insert the relevant parts within which the term will apply as a result of the Bill.

Clause 77 Dictionary, new definition of *reviewable decision*

This clause inserts the new term *reviewable decision* which is defined at section 225.

Clause 78 Dictionary, definition of *salary*

This clause omits the definition of *salary* which is now redundant as a consequence of the omission of part 9 (see clause 32).

Clause 79 Dictionary, definition of *study bank*

This clause omits the definition of *study bank* which is now redundant as a consequence of the substitution of part 11 (see clause 34).

Clause 80 Dictionary, definition of *unauthorised absence*

This clause omits the definition of *unauthorised absence* which is now redundant as a consequence of the omission of part 8 (see clause 31).

Clause 81 Dictionary, new definition of *underperformance*

This clause inserts a new definition for *underperformance* for the purposes of part 6.

Clause 82 *Tobacco Act 1927*, sections 42F(3) and 42G(3)

This is a technical amendment that is made as a consequence of clause 28 of the Bill.