

2014

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

PUBLIC SECTOR BILL 2014

EXPLANATORY STATEMENT

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Outline

Since the establishment of the ACT Public Sector (ACTPS) in 1994 and the commencement of the *Public Sector Management Act 1994* (the PSM Act), there have been significant changes in culture, structure, administration and expectations of the Service. These developments have in some cases led, and in others followed, developments in other jurisdictions. In that same period, there has also been a growth of regulation governing all private and public sector employers in the arena of workplace rights and obligations.

In the *Governing the City State: One ACT Government - One ACT Public Service* Report released in February 2011, Dr Allan Hawke AC recommended a complete overhaul of the PSM Act on the basis that it was out of date and did not support a modern ACTPS.

The current ACTPS employment framework comprises enterprise agreements made under *Fair Work Act 2009 (Cwlth)* as the primary source of entitlements for non-executive staff. These agreements prevail over Territory legislation. The role of the PSM Act and Standards therefore has been to provide the main source of entitlements for executives, as well as additional rights, protections and entitlements for non-executive staff. However, the PSM Act and Standards have not been maintained to complement the changing agreements, with the tendency being to use the Standards to plug gaps in legal authority without discarding outdated concepts.

The resulting complex employment framework has created inconsistent practices across the service and led to confusion about the application of the law, as well as a high administrative burden in managing staff.

The Bill has been drafted to repeal and replace the PSM Act to cover all ACT Public Sector entities except Territory Owned Corporations. The Bill also formally establishes the ACTPS and contains heads of power for the employment of ACT public servants. The Bill further embeds the concept of a values-based service by vesting all employment powers at the Head of Service level and applying the ACTPS values to the whole of the public sector.

The major features of the Bill are:

- high level employment heads of power with detail left to regulations and policy;
- new public sector principles that set expectations of a high-performing, efficient and accountable public sector;
- inclusion of the ACTPS values which will explicitly apply to the whole public sector, including statutory officeholders and agency heads;

- creation of the office of Public Sector Standards Commissioner (which will be a statutory appointment made by the Chief Minister) with functions relating to upholding public service values;
- establishment of a Senior Executive Service in the ACTPS;
- removal of the anachronistic concept of ‘office’ to facilitate staff mobility across ACTPS directorates; and
- the key concept of merit is refocused to concentrate on outcomes rather than simply an expression of process.

Consistent with the objective to create a principles-based legislative framework, the Bill is much shorter than the PSM Act. It has seven parts with the substantive content organised as follows:

- values and operation of the public sector (Part 2);
- the office of Public Sector Standards Commissioner role (Part 3);
- establishing provisions for the public service (i.e. the administrative arrangements) and the top management structure comprising the Head of Service, directors-general and senior executive service (Part 4);
- employment powers (Part 5); and
- clarification of the application of the new legislation to public sector bodies (Part 6).

The transitional and consequential impacts of the Bill are addressed in Public Sector Regulation 2014 and the Public Sector (Consequential Amendments) Bill 2014 respectively.

Human rights issues

A number of human rights issues are called up by the Bill that require clarification and are justified below.

For avoidance of doubt, the legislation does not apply to members of the judiciary, or to members of the ACT Civil and Administrative Tribunal when exercising its hearing functions – see Part 6.

There are no misconduct procedures for staff included in the Bill, despite the standards for conduct and sanctions being included in the legislation. This is a deliberate omission as the process for deciding misconduct allegations in respect of staff below the executive level is articulated in detail in federal enterprise agreements which prevail over ACT legislation. Agreement-making is a negotiated process requiring the consent of employees and their representatives so that, in effect, employees subscribe to its content including the misconduct procedures.

Misconduct procedures for the proposed Senior Executive Service are not legislatively prescribed and are likely to be the subject of policy. This is considered reasonable and proportionate as this is a small cohort (approximately 200 people) where misconduct matters need to be dealt with efficiently on a case-by-case basis because of the extent of influence over staff and their interface with the Executive.

There are scant provisions regarding termination of appointment for the Public Sector Standards Commissioner. This is are similar to termination provisions for other statutory office holders such as the Auditor-General and provide a means to suspend, and if necessary end, the appointment of a Commissioner for alleged misconduct, physical or mental incapacity or criminal convictions where the offence is punishable by imprisonment for at least one year. It is essential to the maintenance of public confidence that where there is demonstrable concern that the office holder may not be fit and proper to hold office that there is an efficient process which can end the appointment so that public confidence in the office can be restored. It is not possible to expect that in such circumstances, the appointment continue and accommodate a lengthy termination process. The prescribed process includes Assembly consideration which is an appropriate safeguard.

Information privacy requirements in relation to employee details are partially lifted in the Bill but only to enable the sharing of information between directorates. This is consistent with a single service model under the head of service. The privacy principles apply in full to the storage and publication of employee information.

Part 1 Preliminary

Section 1 Name of Act

This is a technical provision stating the name of the Bill if enacted, which is the *Public Sector Act 2014*.

Section 2 Commencement

This is a technical provision setting the commencement date for the Act.

Section 3 Dictionary

This is a technical provision indicating that the dictionary that is found at the rear of the Bill should be read as part of and in conjunction with the remainder.

Section 4 Notes

This is a technical provision indicating that notes should be read in conjunction with the Bill to assist the reader with comprehension, although in accordance with the *Legislation Act 2001*, they have no legal status.

This part defines the ACT Public Sector and outlines the basis for public sector operations and performance, and equates how the sector goes about its work with what is to be achieved in terms of importance. The focus is on a high-performing, values-based organisation, acting with a single purpose in a co-ordinated manner to serve the Government of the day.

Section 5 Objects of Act

Section 5 (a) specifies *how* the public sector is to conduct itself in how it performs its functions. The provision emphasises the importance of political neutrality and the desire to be a values-based organisation.

Section 5 (b) provides a high level statement of the role of the ACTPS that recognises the dual nature of what the public service does serving both the Government of the day and the community on behalf of the Government.

Section 5 (c) reinforces the first object by emphasizing a continuous obligation to model and advance the public sector principles and values.

Section 6 What is the public sector?

Section 6 defines the public sector as being made up of the ACTPS and public sector members.

The *service* refers to those within the ACTPS Directorate structure, and is made up of the Head of Service and their employees, including directors-general and the senior executive service (see proposed section 19).

Public sector members refers to statutory office-holders and any person employed, appointed or engaged by the statutory office-holders (see proposed Part 6).

Section 7 What are public sector values?

Section 7 prescribes the public sector values as respect, integrity, collaboration and innovation. These values were developed following extensive consultation with staff in 2011 and currently enshrined in the *ACTPS Code of Conduct* first issued by the Commissioner for Public Administration in October 2012.

Section 7 requires that the values be demonstrated by all employees at all times when carrying out their duties. However, the provision recognises that how this looks in practice will differ depending on the nature of the work undertaken by the employee concerned. The values are also to be the lens through which the workings of the public sector are viewed, to judge and assess performance.

Note that while the provision refers to *employment*, an expansive definition of this term is applied for the purposes of the section. This is to ensure that all who comprise the public sector are subject to the values regardless of their method of engagement or appointment.

Section 8 What are public sector principles?

Section 8 contains new public sector principles that are to be applied in the course of employment by employees. There are two principles: 1) the best practice principle and 2) the merit and equity principle.

The best practice principle, like the values, must be demonstrated and applied by employees when doing their jobs. They are to work collaboratively, use resources wisely, focus on the needs of Government and the community, be responsible for their actions and make sound, justifiable decisions.

The merit and equity principle is directed at the head of service as it applies to the management of the public service. However, it is expected that most employees will be required to uphold the merit and equity principle from time to time through delegation.

The provision requires that the head of service must exercise his or her management functions so as to be an equitable employer, which is defined in the dictionary at the end of the legislation. The intention is to place a requirement on those managing people to be proactive in ensuring a diverse workplace through their hiring decisions and the development opportunities provided to staff.

The merit and equity principle also requires that decisions around who is to exercise a function are made in accordance with the best practice principle. This requirement is intended to be a modern recasting of the previous merit principle, with the focus now on staffing decisions that produce the most efficient and effective outcome for the public sector, rather than simply on procedural matters. They are also intended to ensure that a person selected is not just the best technically qualified or experienced candidate, but someone who is the best fit for the workplace on an overall assessment that also takes into account their personal characteristics and workplace circumstances.

A fair and transparent process will still be necessary to fulfil aspects of the best practice principle around being accountable and making fair decisions. The regulations will provide further detail around how the merit aspects of this principle can be satisfied.

Section 9 Public sector conduct

Like section 9 of the PSM Act, section 9 of the Bill prescribes the minimum standard of conduct expected of public sector members. Section 9 is founded on the values and signature behaviours contained in the *ACTPS Code of Conduct*, and remain the formal mechanism against which misconduct by employees will be judged. In this sense, they are the inverse of the deliberately aspirational and positive statements of expectation set out in the *ACTPS Code of Conduct*.

Section 9 covers the same ground as section 9 of the PSM Act. It remains the case that misconduct procedures are articulated in enterprise agreements for non-SES employees, and the regulations will mirror those procedures in relation to the SES.

Section 9(1) specifies minimum requirements for what an employee must do in exercising his or her functions (i.e. doing their job). The requirements include

avoidance or management of conflicts of interest, obeying a reasonable direction, and complying with the law, unremarkably, an employee must be careful, unbiased, honest and courteous. The obligation to offer assistance the public in understanding the obligations on them, or the entitlements available to them, under Territory laws is carried over unamended from the PSM Act.

Section 9(2) is deliberately broader in its application than section 9(1) and it prescribes actions that a public sector member must not do. It applies outside the performance of official functions. The proscribed behaviours are completely inconsistent with an individual continuing as an employee. They include using information gained through employment or Territory resources improperly, making comments that appear to be on behalf of Government without requisite authority and damaging the reputation of the public sector or the ACT Executive.

Proscribed behaviour, when acting in connection with employment, includes bullying, harassment and intimidation. These requirements apply not only when an employee is doing his or her job, but at any time that a member is in the workplace, or interacting with other members or doing anything that relates to his or her work and/or employment.

A public sector member must not apply improper influence, favouritism or patronage when doing their job.

Failure to act in a way that is consistent with section 9 may lead to misconduct proceedings and a finding of misconduct with any attendant sanctions. *Misconduct procedure* is defined in the dictionary at the end of the legislation, and mentions that processes may be located in industrial instruments (which is the case for the majority of staff at the time the proposed Bill is being introduced) or regulations.

Section 9(4) replaces section 9(q) of the PSM Act, and requires an employee to tell either the head of their agency, or if that person, is allegedly involved, the Public Sector Standards Commissioner, about maladministration or misconduct of another employee. While it is unlikely that misconduct action would be instigated against an employee who fails to disclose maladministration or misconduct by another employee unless that employee was also involved in the maladministration or misconduct – in which case the misconduct would be the alleged act or omission itself – this provision plays an important role in providing legal authority for an employee to report alleged misconduct. It sits alongside provisions in the *Public Interest Disclosure Act 2012* in this regard.

The obligations in section 9 are to be read subject to other legal rights or requirements. This was also the case under previous section 9, and is important as an employee's functions in their job can appear to conflict with their section 9 requirements on paper. It is not intended that section 9 curtail the ability of an employee to fulfil his or her role in any aspect.

As is the case in section 7 above, an expansive definition of *employment* is applied for the purposes of section 9. This is to ensure that all employees are subject to the minimum conduct requirements.

In this regard, later sections of the Bill provide for allegations regarding breaches of section 9 by statutory office-holders and heads of public sector entities to be considered by the Public Sector Standards Commissioner. This is a new avenue of complaint that did not feature in the PSM Act, and a new role for the Commissioner. These provisions are not intended to displace or amend the bases on which a statutory office holder might be removed. Such requirements and grounds will remain in the relevant legislation establishing the office.

Part 3 Public Sector Standards Commissioner

This part establishes the office of Public Sector Standards Commissioner (the Commissioner). The Commissioner is responsible for whole of sector matters – i.e. a reach wider than that of the Head of Service - with a particular emphasis on promoting and upholding the public sector principles and values.

Section 10 Appointment of Public Sector Standards Commissioner

Section 10 provides for the appointment by the Chief Minister of a person as the Public Sector Standards Commissioner. Unlike the PSM Act, the Chief Minister must make such an appointment.

The Commissioner is expected to be a part-time office, and the incumbent cannot also be a public servant. Section 10(2) requires a member of the ACTPS to resign from the ACTPS before taking up an appointment as Commissioner. The same condition would apply to a person appointed as acting Commissioner, but an ACTPS employee could hold delegated Commissioner functions without needing to resign.

The Commissioner is to be appointed for a term of up to five years but can be re-appointed.

As is the case with the Commissioner for Public Administration under the PSM Act, the appointment of the Commissioner is not subject to consultation and it is proposed this arrangement continue.

Section 11 Functions of Commissioner

Section 11 sets out the functions of the Commissioner with a focus on a whole of public sector role. It includes advising the Chief Minister, promoting, upholding and advising on the public sector principles and values, developing and implementing equitable employment strategies and conducting investigations into management of the public sector.

Section 11 explicitly includes a power for the Commissioner to conduct investigations. The regulations will prescribe the scope and powers at the Commissioner's disposal. They are expected to include the significant powers held by the Commissioner for Public Administration under the PSM Act in relation to Management Reviews, but also a more general investigations function at the request of the Head of Service or Agency Head.

Importantly, the Commissioner's functions also include exercising any function given to the Commissioner under the Bill or any other law applying in the Territory. An example of the way this section extends the scope of the Commissioner's functions is demonstrated in section 17 below (Commissioner may make public sector standards). The Commissioner will also have further functions to perform deriving from other Territory laws (for example, the *Public Interest Disclosure Act 2012*).

Section 12 Leave of absence for Commissioner

Section 12 provides that the Chief Minister may approve leave for the Commissioner.

Section 13 Suspension and removal of Commissioner

Section 13 provides an appropriate means to suspend, and if necessary end, the appointment of a Commissioner for alleged misconduct, physical or mental incapacity or criminal convictions where the offence is punishable by imprisonment for at least one year. It is similar to the prescription in other legislation where provision is made to suspend and remove statutory office holders. Where the Commissioner is suspended, the prescribed process requires the Legislative Assembly to consider a statement of reasons for the suspension from the Chief Minister, and to resolve the matter by either ending the suspension or ending the Commissioner's appointment.

Section 14 Ending Commissioner's appointment without suspension

Where the Commissioner becomes bankrupt or insolvent or is absent without approval in excess of the prescribed period of time then the Chief Minister must end the appointment. The Chief Minister may also end the appointment with the consent of the Commissioner for physical or mental incapacity.

Section 15 Arrangements for staff and facilities

Section 15 enables the Commissioner to make appropriate arrangements for the provision of staff and facilities with the Head of Service. This provision will ensure that the Commissioner has appropriate support to perform the functions prescribed and replicates existing arrangements without going to the expense of establishing a separate office.

Section 16 Delegation by Commissioner

Section 16 enables the Commissioner to delegate functions to both an employee and non-public sector delegates. The provision does not prescribe when delegation can occur, leaving it open for delegation to public service employees to cover the Commissioner being on leave for example.

It is necessary, given the broad range of functions prescribed for the Commissioner, that there are adequate arrangements for delegating powers to others. In the case of the functions of the Commissioner it is appropriate to provide for non-public sector delegates to cover the possibility that the Commissioner may need to use services outside of the public sector when, for example, investigating the management of all or part of the public sector. However, the ability to delegate to a non-public sector delegate is to be used sparingly, as reflected in section 16(2) which requires the Commissioner to consider whether the function needs to be exercised by an external person.

Section 17 Commissioner may make public sector standards

Section 17 enables the Commissioner, in consultation with the Head of Service, to make enforceable Public Sector Standards about a range of specified matters including the public sector principles and values, conduct and strategies for equitable employment and to eliminate disadvantage. It also enables Public Sector Standards to be made about matters prescribed by regulation.

This capacity of the Commissioner to make Public Sector Standards continues the previous arrangements in the PSM Act under which the Commissioner for Public Administration has promulgated, for example, the *ACTPS Code of Conduct* and the *Respect, Equity and Diversity Framework*.

Accordingly, the range of matters about which the Commissioner being able to make standards has been reduced to focus on public sector values and fair employment opportunities which reflects the role's revised functions. Those matters currently in a public sector standard but no longer within the Commissioner's capacity to make public sector standards will, if necessary, be included in regulations (see section 58).

Section 17(2) specifically provides that the Commissioner is able to declare a holiday for all or part of the public sector. This preserves the current arrangement.

Section 17(3) continues the arrangement in the PSM Act under which the Chief Minister must approve standards before they are made.

Appropriately, a public sector standard is to be a notifiable instrument given its new role and status.

Section 18 Establishment of Joint Council

Section 18 requires the Commissioner to establish a forum for the public sector and employee organisations to meet and consult on public sector employment issues. The terms of reference (a notifiable instrument) must be approved by the Commissioner with the agreement of the Head of Service.

These arrangements continue the approach under the PSM Act.

Part 4 The public service

Part 4 establishes the ACTPS. It also provides for a senior leadership and management structure for the effective and efficient operation of the service.

Division 4.1 Service structure

Division 4.1 houses the administrative arrangements for the ACTPS (i.e. the Head of Service and Directorates).

Section 19 Establishment of Australian Capital Territory Public Service

Section 19 establishes the Australian Capital Territory Public Service, comprising the Head of Service and their employees, which include directors-general and the senior executive service.

Section 19(2) indicates that the role of the public service is to act on behalf of the ACT Executive (i.e. the government of the day). It is important to formally bestow this function on the ACTPS, as other establishing legislation specifies functions for the bodies and offices it creates.

Section 20 Structure of the service

Section 20 provides for the formal establishment of the structure of the ACTPS in accordance with the provisions of the *Australian Capital Territory (Self-Government) Act 1988 (Cwlth)*. Under the Administrative Arrangements, the Chief Minister allocates responsibility to Ministers for stated matters, Acts, Executive powers under a Commonwealth law and prerogatives of the Crown.

The Chief Minister also determines which directorates are responsible for matters.

Division 4.2 Head of service

Division 4.2 houses the arrangements for the appointment, functions and operations of the Head of Service, the most senior official in the ACTPS.

Section 21 Appointment of head of service

Section 21 requires the Chief Minister to appoint a Head of Service. The Head of Service can be appointed for a term of up to five years and can be re-appointed.

Section 21(4) means the appointment is not subject to the Legislative Assembly committee consultation provisions of the Legislation Act, as it is not appropriate to do so. This is because although the Head of Service is a statutory appointment, it is more akin to an employment relationship with the Territory on conditions similar to that of a director-general in the public service. However, for the head of the service there is no other public service employee or member who can stand in the shoes of the employer and so this is most appropriately done by the Chief Minister as a statutory appointment.

Section 22 Functions of head of service

Section 22 prescribes that the Head of Service is responsible for leadership and management of the ACTPS and is answerable to the Chief Minister.

Section 22 specifies discrete leadership and management functions dealing with stewardship of Government policy, programs and services across the directorates and people management issues in the public service. The leadership functions emphasise the role of the Head of Service to co-ordinate the work occurring throughout the ACTPS, take control in emergencies and on the most important issues and to promote the values within the service. The management functions centre around the Head of Service deciding the public service structure and numbers, promoting equity and ensuring the public service employs people with the correct skills and approach to values.

Section 23 Conditions of appointment of head of service

Section 23 prescribes the conditions of appointment for the Head of Service, which are to be the same as for a director-general, subject to any additional terms set out in the Head of Service's instrument of appointment.

This approach reflects the uniqueness of the position, being more of an employment-like arrangement in practice as the most senior official in the public service despite being a statutory appointment.

Section 24 Delegation by head of service

Section 24 enables the Head of Service to delegate functions, and to sub-delegate a function, to both employees and people outside the ACTPS, whether they are public sector members or outside the public sector altogether.

It is necessary, given the broad range of functions prescribed for the Head of Service, that there are adequate arrangements for delegating powers to others. In the case of the functions of the Head of Service it is appropriate to provide for non-service delegates to cover the possibility that the Head of Service may need to use services outside of the public service when, for example, exercising some of the prescribed management functions. However, the decision to delegate to a non-public service delegate is not to be taken lightly, as reflected in section 24(2) which requires the Head of Service to consider whether the function needs to be exercised by an external person.

Division 4.3 Directors-general and SES employees

Division 4.3 houses the arrangements for the senior management structure, their functions and role in the service.

Section 25 Functions of director-general

Section 25 prescribes that a director-general is responsible for leadership of a directorate and leadership in the ACTPS, and is answerable to both the Minister responsible for the directorate and the Head of Service.

The directorate functions and the leadership functions for a director-general are prescribed and endeavour to recognise the tension between a director-general fulfilling their individual remit on the one hand and addressing whole-of-service responsibilities on the other. The prescribed directorate functions emphasise managing the business of the directorate and providing advice and reporting to both the Minister and the Head of Service. The prescribed leadership functions emphasise the responsibility for implementing whole of government strategies, working in a co-operative and collegiate manner and promoting and upholding the public sector values and principles and appropriate conduct.

Section 26 Delegation by director-general

Section 26 enables a director-general to delegate functions, and to sub-delegate a function delegated to him or her by the Head of Service, to both employees and non-service delegates.

It is necessary, given the broad range of functions prescribed for directors-general, that there are adequate arrangements for delegating powers to others. In the case of the functions of the director-general it is appropriate to provide for non-service delegates to cover the possibility that a director-general may need to use services outside of the public service when, for example, exercising some management functions. However, the decision to delegate to a non-public service delegate is not to be taken lightly, as reflected in section 26(2) which requires the Head of Service to consider whether the function needs to be exercised by an external person.

Section 27 Senior executive service

Section 27 establishes the Senior Executive Service (SES).

The provision specifies that an SES employee is responsible for leadership in the service and is answerable to the Head of Service and the director-general. The leadership functions for an SES employee are prescribed and endeavour to recognise the tension between an SES employee fulfilling their individual responsibilities on the one hand and addressing whole-of-service responsibilities on the other. Leadership functions emphasise responsibility for implementing whole of government strategies, promoting co-operation and collegiality and promoting and upholding public sector values and principles and appropriate conduct.

Part 5 Employment in the service

Part 5 of the Bill deals with employment in the ACT Public Sector and presents a marked departure from the PSM Act.

The Bill, for the most part, eliminates the present distinction between officers (permanent appointees) and (other) employees. Under the PSM Act, an office needs to exist for a person to be permanently appointed to the Service.

The Bill removes the concept of office as it no longer serves a useful purpose, and adds an unnecessary level of administration. It is envisaged that the service will continue to be organised through position identifiers. However, the processes to organise people and resources where required is to be a purely administrative process capable of being easily changed and adapted, rather than a legal requirement.

Division 5.1 Management of employment matters

Sections 28 to 31 of the Bill set the foundations for the powers of the Head of Service in relation to employment in the ACT public service.

Section 28 Meaning of employment matter – pt 5

Sections 28 and 29 define terms that are relevant to Part 5 of the Bill. Section 28 defines the term *employment matter* for Part 5. This term indicates that the reach of the legislation covers the whole breadth of the employment relationship from recruitment activities to termination and, to a limited extent, beyond.

Section 29 Meaning of eligibility requirements – pt 5

Section 29 specifies the eligibility requirements that a person must meet for employment in the Service.

The citizenship requirements for employment are met if a person is an Australian citizen, a permanent resident, or holds a visa permitting employment (in terms of functions, hours per week and period of employment). The section also includes an example of how a person may be employed depending on their visa conditions.

The person must also demonstrate they are capable of upholding the public sector values, satisfying conduct requirements and doing the job they are engaged to do. This is consistent with and follows on from the merit and equity principle in section 8.

The third limb of the eligibility requirements is that a person must hold the qualifications that are required for the position. Section 29(2) provides a non-exclusive list of what these qualifications may be – essentially any qualification, occupational registration or other documentary permission.

Eligibility requirements may also be prescribed by regulation.

Section 30 Head of service must manage employment matters

Section 30(1) requires the Head of Service to manage employment matters in accordance with the public sector principles in section 8. The Head of Service must also comply with any relevant industrial instrument, which will be the enterprise agreements for public servants that are not executives, and what is prescribed in the regulations for directors-general and the senior executive service.

In managing employment matters, section 30(2) requires the Head of Service to make and keep a record for the service of employees, decisions made in relation to employment matters and any information prescribed by regulation about the management of employment matters.

Section 30(3) provides that the regulations may prescribe requirements for the publication of a record (or part of a record) made under sub-section (2).

Division 5.2 Employment

Sections 31 and 32 of the proposed Bill contain the basic powers and requirements for the Head of Service to employ people in the ACT public service.

Section 31 Head of service may employ a person

Section 31 gives the Head of Service the power to employ people in the ACT public service. The limitations on this provision are that the person must meet any eligibility requirements, and any selection process or other requirements prescribed by regulation.

Section 31 also provides that the Head of Service may set a period of probation that applies from the start of a person's employment. For non-SES employees, probation provisions are set out in ACTPS enterprise agreements. For SES employees, probation provisions will be prescribed in the regulations.

Division 5.3 Change in employment

Sections 32 to 35 of the Bill describe the circumstances in which an employee's job may change either at the request of the employee or at the discretion of the Head of Service. These provisions are intended to cover the full range of changes to a public servant's employment throughout the course of their career.

The sections introduce the phrase 'statutory employment terms' or SETs which are defined in the dictionary as describing aspects on an employee's job including the functions assigned to them, the directorate in which they are employed, their classification, hours of work and period of employment

The sections cover all previously distinct movement powers under the PSM Act (for example the powers to transfer, promote, reassign or redeploy officers within and between directorates, machinery of government changes and restructures) but create more general grounds on which changes to jobs and SETs can be made. These changes also cover powers previously related to the management of offices including change from full-time to part-time hours, change between permanent, temporary or casual employment and reclassification.

For non SES employees, the procedures through which a decision can be reached in relation to these issues are prescribed in the relevant industrial agreement.

Section 32 Head of service may change employee's job

Section 32 gives the Head of Service the power to change an employee's job on a permanent or temporary basis. The section describes the numerous ways in which the job may be changed. The change must be in accordance with any requirement or notice period provided for in an industrial instrument or regulation and be consistent with the public sector principles. There must be a written record of new statutory employment terms.

Section 33 Circumstances when head of service must change employee's job

Section 33 applies in situations where an employee no longer meets an eligibility requirement or the movement is a disciplinary action as a result of a misconduct finding. Examples of the operation of this provision include:

- Matt is employed on a permanent basis in the ACTPS. The introduction of new legislation requires Matt to hold a new registration do each of the functions in his job. This means that the eligibility requirements have changed. Until Matthew obtains the new registration the Head of Service changes Matt's SETs by assigning new functions to him. If Matt is unable to obtain the new registration, the Head of Service may make further changes to Matt's SETs including changing the directorate he works in and assigning new functions to him.
- A misconduct procedure finds the appropriate disciplinary action for Russell is that he is 'demoted'. Accordingly the Head of Service ends the assignment of Russell's old functions assigns new functions, changes his classification and reduces his salary. If disciplinary action was simply the reduction of an increment, the Head of Service would reduce Russell's salary.

Section 34 Circumstances when head of service may change employee's job

Section 34 describes all of the circumstances where an employee's job may be changed by the Head of Service.

Section 34(1)(a) enables employees to request a change in their SETs. Examples of the operation of this provision include:

- Greg is looking to retire within the next 12 months and requests a move to a job at a lower level. To assist in his transition to retirement, the Head of Service changes Greg's SETs by ending the assignment of his current functions, assigning new functions to him and reducing his classification and salary.
- David gets medical advice that he should be employed on a part-time basis. The Head of Service reviews the functions assigned to him and may change David's SETs by varying or ending the current assignment if required. The Head of Service further changes David's SETs by reducing the hours he is required to work.
- Julie is employed on a long-term SES contract. Her request to be engaged in a non-SES classification on a permanent basis is accepted by the Head of Service. The Head of Service changes Julie's SETs by ending the assignment of her current functions, assigning her new functions and changing her classification, salary and the period for which she is employed.

Section 34(1)(b) applies in situations such as organisation of the workforce, or to respond to an emergency or an emerging issue. Examples of the operation of this provision include:

- The restructure of the Public Sector Management Group in the Chief Minister and Treasury Directorate results in Stella being declared excess. She is considered in isolation for a vacancy in the Commerce and Works Directorate and assessed as suitable. The Head of Service changes Stella's SETs by changing the directorate that she works in and assigns new functions to her.
- The Head of Service needs to put together a task force to quickly respond to a natural disaster. The Head of Service can identify the relevant employees to be included in the taskforce and change their SETs by assigning new functions to them and changing the directorate in which they are employed to establish the taskforce.
- To ensure all the functions in a team are exercised while one team member is on extended leave for 4 months, the Head of Service changes Denise's SETs by assigning new functions to her, changing her classification and increasing her salary for the period her colleague is on leave—formerly known as temporary transfer with a higher duties allowance.

Section 34(1)(c) applies when an employee applies for a different position and is successful in a selection process. Examples of the operation of this provision include:

- Monique is employed in a job for a 6 month period. During that period the job is advertised for permanent filling. Monique applies successfully for the job so the Head of Service changes the period for which Monique is employed from 6 months to permanent.

- Oliver is an ASO6 in ACT Health. He is successful in his application for promotion to a SOGC position in the Education and Training Directorate. The Head of Service changes Oliver's SETs by assigning new functions to him, changing the directorate in which he is employed, his classification and his salary.

Section 35 Job changed by change in service structure

Section 35 applies in situations where the Chief Minister makes changes to the service structure. For example, changes to administrative arrangements result in the movement of the Office of the Status of Women from the Community Services Directorate to the Chief Minister and Treasury Directorate. The Head of Service changes the jobs of the employees who are affected by this move by changing the directorate in which they are engaged.

It should be noted that, in the situation of a change to the Administrative Arrangements, the powers of the Head of Service are limited under section 35(2). The Head of Service is not able to change an employee's classification, salary, hours or the period for which they are employed.

Division 5.4 Secondment

The Bill provides for secondments to and from the ACT public service. Normally an ACTPS employee working for another Government would raise an immediate (and insoluble) conflict of interest. However, secondment is a long-standing practice that is widely accepted as an exception to this rule. It supports the temporary meeting of specialist skills needs, and career development through rotations or particular on the job experiences.

Section 36 Secondment to the service

Section 36 allows for secondments into the ACTPS. The section provides that a person on secondment is taken to be an employee for the purposes of sections 7, 8 and 9 of the Bill (public sector values, principles and conduct).

Section 37 Secondment of employee to another employer

Section 37 allows for the secondment of ACTPS employees to another employer, including another Government or the private sector. The section provides that employees on secondment will not be in breach ACT legislation if they are performing the job or task that they have been lawfully directed to do. This overcomes the possibility of misconduct provision applying or contraventions of other Territory law because a public servant is working for another employer doing work that may be at odds with the ACT Government agenda.

Division 5.5 Suspension and end of employment

Division 5.5 sets out arrangements relating to the end of the employment relationship. Section 38 of the Bill contains provisions relating to the suspension of public service employees on the basis of possible misconduct allegations. Sections 39 to 45 deal with the end of the employment relationship on various grounds.

Section 38 Head of service may suspend employee

Section 38 provides a basic head of power for the Head of Service to suspend an employee's employment with or without pay, in accordance with an industrial instrument or regulation.

Section 39 Head of service may end employee's employment

Section 39 prescribes the grounds on which the Head of Service can end an employee's employment, being:

- loss of one of the eligibility requirements listed in section 29;
- invalidity retirement in accordance with the Commonwealth Superannuation Scheme (CSS) or either of the Public Sector Superannuation (PSS) Schemes;
- a misconduct sanction;
- underperformance;
- the function performed by the employee is no longer required, and he or she is made redundant;
- failure of probation; or
- termination of temporary employment.

Section 40 End of employment by resignation

Section 40 reiterates the common law that an employee can end the employment relationship by resigning with the requisite amount of notice. There is an additional requirement that a public service employee must advise the Head of Service of the resignation in writing. Also, an employee requires the approval of the Head of Service to withdraw their resignation.

Section 41 End of employment resignation - abandonment of employment

Section 41 provides for the end of employment where an employee has abandoned his or her employment. Given that the employee's action has caused the end of the employment relationship in this circumstance, the proposed Bill characterises this type of ending as a resignation rather than a termination.

Generally, these provisions replace the forfeiture of office provisions in the PSM Act but with some significant differences. Apart from the term (required because of the removal of 'offices' from the legislation) and that it is a form of resignation, there are new timeframes and information requirements for the provision. They have been changed as a result of feedback from the service that forfeiture processes are difficult to finalise and are based on the absence provisions commonly seen in relation to statutory officeholders.

Accordingly, the provision applies if the employee has been absent without approval for 14 consecutive days, or 28 days in a 12 month period. Note the 12 month period is not set to calendar, or financial year periods – it can be at any time in their employment. Further, the public service employee must have failed to seek approval for the absence, either personally or through a delegate, not given a reasonable explanation for absence and not provided an intention to return to work within a reasonable time.

The intent of the provisions is to still allow for abandonment provisions to be applied only in genuine circumstances where the employee is missing from the workplace and had made no attempt to explain the situation, effectively frustrating the employment relationship. However, there is a greater onus on employees to provide sufficient information for the employer to make appropriate arrangements.

Section 42 End of employment on agreed terms

Section 42 indicates that an employee's employment may end on terms agreed between the Head of Service and employee. This provision is required to provide a legislative basis for those circumstances where settlements to exit the service are agreed between the Head of Service and an employee.

Section 43 Loss of eligibility requirement

Section 43 relates to termination of employment where an employee no longer meets eligibility requirements. This encompasses situations including where:

- an employee's visa has expired or been revoked
- an employee is no longer able to work for medical reasons (and does not meet the criteria for invalidity requirement in section 44) or
- an employee loses his or her licence or other mandatory qualification.

Section 43 also applies to where a new eligibility requirement is imposed by law after employment has commenced, an employee cannot meet the requirement, and transfer to another position is not possible.

Section 44 Invalidity retirement

Section 44 enables the Head of Service to terminate the employee's employment on the grounds of invalidity retirement for employees under the CSS and the PSS. For the provision to apply, a service employee must meet the criteria for invalidity retirement under the governing legislation for the scheme to which the employee belongs.

Note that section 44 has narrow application and only applies to CSS and PSS employees. Where an employee is not in those schemes and is no longer able to work because of a medical condition, the employee's employment can be terminated for loss of an eligibility requirement (as he or she is no longer capable of performing a function in accordance with the best practice principle).

Section 45 Payment at end of employment

Section 45 provides that at the end of an employee's employment on any ground, the Head of Service is to pay any monies owed to the employee. However, this amount can be reduced by any amounts owed by the employee.

The regulations will prescribe the process and further detail around how this provision will be applied.

Division 5.6 Re-employment

Section 46 Head of service may re-employ employee

Section 46 provides a discretion for the Head of Service power to re-employ a person who has left the public service. The regulations will prescribe the categories of a person who can be re-employed and any accompanying requirements. Also, the person must be able to meet the eligibility requirements at the time of re-employment.

Division 5.7 Public service employment

Sections 47 to 51 contain a range of provisions relating to obligations and circumstances that may arise during and after employment.

Section 47 Satisfactory performance

Section 47 provides legal authority for the ACT Public Service Performance Framework. The provision indicates that the Head of Service may determine a performance expectation for an employee in exercising a function. It is intended that these expectations will set the standard against which managers assess an employee's performance.

Note that if an employee does not meet a performance expectation, this may be grounds for termination under section 39. For non SES employees, the relevant enterprise agreements contain the process for managing underperformance. For SES employees, processes will be in the regulations and policy.

Section 48 Disclosure of certain information

Section 48 requires an employee to provide certain types of information to the Head of Service, and that failing to comply may result in misconduct. The rationale for having an express disclosure provision is that it relates to matters that could impact on a person's continuing employment, but are unlikely to come within the Head of Service's knowledge in a timely fashion, if at all, as a matter of course.

The regulations will provide further detail around the type of information required to be disclosed and when disclosure should occur.

Section 49 Repaying overpayment

Section 49 requires an employee to repay any amount paid to them by the Territory to which they were not legally entitled. For non SES employees, the relevant enterprise agreements specify the process for recovering overpayments. For SES employees, processes will be in the regulations and policy.

Section 50 Disciplinary action

Section 50 provides that the regulations may contain sanctions for where disciplinary action should be taken. The provision also requires the Head of Service to follow any disciplinary action prescribed in regulations or in industrial instruments.

Section 51 Obligations of former employees

Section 51 imposes obligations on former employees around information gained in the course of their previous employment in the public service. The provision mirrors section 9 conduct requirements for current employees not to disclose confidential information without lawful authority and not to take improper advantage of information gained during employment.

This provision supports and sits alongside the *Crimes Act 1900*, s153 which deals with the disclosure of information by public sector members.

Part 6 Public sector members

Part 6 of the Bill defines the various individuals and bodies that comprise the ACT Public Sector.

Section 52 Meaning of public sector member etc

Section 52 provides the meaning of ‘public sector member’ and refers to those statutory office holders and employees that are not within the public service (and do not report to the head of service) but are part of the broader public sector. The provision also lists public officials that are not part of the public sector, preserving the independence of the judiciary and members of the ACT Civil and Administrative Tribunal in the exercise of their hearing functions. (Note that a separate complaints system will apply in respect of those matters.) There is also the option for a person prescribed by regulation to be excluded from the public sector for the purposes of the legislation. The definitions in this section are necessary in order to determine whether a particular office or person is subject to the the application of the public sector standards and conduct provisions.

Section 53 Public sector standards for public sector member

Section 53 clarifies that a public sector member is only subject to the standards and conduct provisions in Part 2 to the extent that they are consistent with his or her functions. This section is necessary to ensure that the independence of statutory office holders is preserved and they are able to discharge their responsibilities without fear of being in breach of the provisions in proposed section 9. For example, the effect of the provision is that a statutory office holder charged with being critical of Government will not be damaging the reputation of Government if he or she produces an adverse finding or report.

Section 54 Certain statutory office-holders have pt 5 management powers

Section 54 provides for the application of the Part 5 employment powers of the head of service to a statutory office holder who engages staff directly. These public sector employers are those statutory office holders whose establishing or other legislation prescribes that they may employ staff under the Bill when enacted. In effect, for those public sector employers that engage staff directly, references to Part 5 employment powers are read as references to the relevant public sector employer. While a director-general in the public service might exercise such powers under delegation from the head of service, a statutory office holder who is a public sector

employer will exercise the powers in their own right and without reference to the head of service.

Section 55 Alleged misconduct by statutory office holder

Section 55 prescribes that the commissioner is to investigate alleged misconduct by a statutory office holder in the same way and utilising the same powers as if the alleged misconduct was by an employee. However, the commissioner must only investigate such alleged misconduct if requested to do so by the person who has the responsibility for appointing the statutory office holder.

This section appropriately ensures that the commissioner is only called upon to investigate the personal conduct of a statutory office holder where the person who has the responsibility for appointing the statutory office holder is sufficiently concerned about an allegation of misconduct as to warrant sanctions under the establishing legislation.

Section 56 Alleged mismanagement of public sector employer's staff

Section 56 prescribes that the commissioner may investigate an allegation of mismanagement of the staff of a statutory office holder, who is a public sector employer, in the same way and utilising the same powers as for a public servant employed by the head of service.

Section 57 Prescribed public sector member

Section 57 enables a regulation to identify a '*prescribed public sector member*' which refers to any other bodies prescribed in the regulations as being part of the public sector for the purposes of this Part. Given the diverse programs and services offered by the ACT Government and the corresponding variation in the bodies responsible for such services, the Bill allows the ACT Executive to prescribe other organisations as being within the public sector for the purposes of the legislation.

Furthermore, this section enables a regulation to prescribe which parts of Part 5 apply to a person employing a public sector member, procedures in relation to alleged misconduct and procedures in relation to alleged mismanagement of a public sector member.

Part 7 Miscellaneous

Section 58 Approved forms

Section 58 sets out that the Minister may approve forms. It is intended that forms will be prescribed where guidance and consistency is required in collecting or providing information. An approved form is to be a notifiable instrument.

Section 59 Regulation making power

Section 59 enables the Executive to make regulations about a range of specified matters including the public sector values and principles, the structure and organisation of the service, employment in the service and secondments.

Section 60 Authorisation to share protected information

Section 60 will allow employment information to be shared across the public sector. The provision authorises the sharing and disclosure of certain information between information holders, or a person authorised by an information holder to receive information. Disclosure includes communicating or publishing the information.

Under the PSM Act framework, ACTPS directorates were considered separate entities. The Bill proposes a framework in relation to employee information that allows it to be held and shared at a whole of service level. Only the sharing of employee information and records is authorised by this section.

DICTIONARY

The Public Sector Bill 2014 has introduced a range of different terms. Most of the terms defined in the dictionary signpost definitions contained in the body of the proposed Bill. Where this occurs, please refer to that part of the explanatory statement with commentary on the relevant provision.

For those terms used in the proposed Bill that are defined in the Legislation Act, definitions are signposted but not reproduced. Further explanation of the terms is to be found in the relevant provision of that Act and its accompanying explanatory material.

Those terms with full definitions in the dictionary to the proposed Bill are outlined below.

Definition of *classification*

This term is used in the context of SETs and refers to an employee's job level. These are listed in enterprise agreements and, for executives, regulations.

Definition of *equitable employer*

This term is used in the context of the public sector principles. To be an equitable employer requires proactive effort to achieve a diverse workforce in a number of areas, being background, gender, sexual orientation, disability, and working age.

Definition of *industrial instrument*

This term is used regularly in the proposed Bill to refer to other possible sources of conditions and entitlements for public service employees. In practice, the most common type of industrial instrument would be enterprise agreements, but there can be other documents such as contracts or deeds.

Definition of *Minister, responsible for a directorate*

This term is used mostly in Parts 3 and 4 of the proposed Bill. The definition identifies who is the relevant Minister in each of circumstance, including the possibility that there may be more than one Minister involved.

Definition of *misconduct procedure* in relation to a public sector member

This term is used throughout the proposed Bill. The definition directs the reader to an industrial instrument (most likely the relevant enterprise agreement) and, for executives, the regulations.

Definition of *permanent resident*

This term is used in the context of the eligibility requirements. The definition refers to a person who holds a permanent visa (under the federal *Migration Act 1958*, section 30), or a New Zealand citizen who holds a special category visa (under the federal *Migration Act 1958*, section 32).

Definition of *public sector member*

This term is used throughout the proposed Bill and refers to a person who is in the public sector but is not part of the public service (see section 6).

Definition of *SES employee*

This term is used throughout the proposed Bill and refers to an employee who is employed to perform the functions of a senior executive in the public service.

Definition of *whole-of-government strategy*

This term is used in the context of the Head of Service, director-general and senior executive service functions. The definition refers to any strategy, target, policy, program or service that impacts more than one directorate.