

2019

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

PUBLIC SECTOR MANAGEMENT AMENDMENT BILL 2019

EXPLANATORY STATEMENT

**Presented by
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Chief Minister**

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INTRODUCTION

This explanatory statement (the statement) relates to the *Public Sector Management Amendment Bill 2019* (the Bill) as presented to the ACT Legislative Assembly. It has been prepared in order to assist the reader of the Bill and to help inform debate on it. It does not form part of the Bill and has not been endorsed by the Assembly.

The Statement must be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill. What is said about a provision is not meant to be taken as an authoritative guide to the meaning of a provision – this being a task for the courts.

OVERVIEW OF THE BILL

The purpose of this Bill is to make amendments to the *Public Sector Management Act 1994* which overall will strengthen the existing ACT Public Service employment framework and provide greater alignment within the existing employment framework to ensure that the legislation operates effectively.

The primary changes arising through these amendments is the authorisation of the release of new employee contact information to the relevant union and how long service leave is calculated. The amendments relating to the release of new-starter information is already provided for within the Enterprise Agreements. However, such an amendment would ensure that the sharing of new-starter information is also authorised under Territory legislation, as well as the enterprise agreements.

Under the current employment framework, long service leave (LSL) entitlements are provided for through the Enterprise Agreements and Part 4.3 of the *Public Sector Management Standards 2006* (2006 Standards). Part 4.3 of the repealed standards continue to apply in accordance with section 113 of the *Public Sector Management Standards 2016*. In 2011, amendments were made to the *Public Sector Management Act 1994* (PSM Act) with the intention of placing all employee entitlements into the Enterprise Agreement. Specifically, section 164 (Long Service Leave Benefits not to be granted) was removed from the PSM Act, however no new provisions were inserted in the 2006 Standards or the Enterprise Agreements in its place. Section 164 provided that long service leave benefits are not to be granted under other laws to Territory employees. The inadvertent removal of section 164 meant that the *Long Service Leave Act 1976* (LSL Act) applied to ACTPS employees. To rectify and clarify what LSL provisions are applicable to ACTPS employees, an amendment has been made to the LSL Act.

The Bill also contains several minor and technical amendments.

HUMAN RIGHTS IMPLICATIONS

The Bill is drafted to be compatible with human rights as set out in the *Human Rights Act 2004* (HRA). Rights under the HRA may be limited if such limitations are reasonable and proportionate. This Bill engages a number of rights protected under the HRA, including the following:

- section 8 – recognition and equality before the law;
- section 12 – right to privacy and reputation;
- section 15 – freedom of association.

Section 28 of the HRA allows the legislature to reasonably limit human rights by laws that can be demonstrably justified in a free and democratic society. In deciding whether a limit is reasonable, consideration must be given to the nature of the right, the importance of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and any less restrictive means are reasonably available to achieve the purpose. The amendments in this Bill have been developed consistent with the premise that governments not only have responsibility to ensure human rights are free from violation, but that governments are required to provide for the full enjoyment of rights, subject to any reasonable and justifiable limitations.

Section 8 – Recognition and equality before the law

The right to recognition and equality before the law is contained in section 8 of the HRA. It states that everyone has the right to enjoy his or her human rights without distinction or discrimination of any kind, and 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.

Long Service Leave Act amendments and entitlements

Schedule 1 of the Bill amends the dictionary definition of ‘employee’ by clearly affirming that for the purposes of the application of the *Long Service Leave Act 1976* (LSL Act), the LSL Act does not apply to a ‘public employee’.

While this amendment may be seen to restrict the right to equality in terms of removing an entitlement to an employee of the ACT Public Service, it is necessary for the effective administration and calculation of long service leave within the ACT Public Service. In addition, the Enterprise Agreements already provide long service leave entitlements for all employees, including casual employees, with the eligibility requirements and entitlements for long service leave prescribed under the *Public Sector Management Standards 2006* (the Standards). Subsequently, the amendment is not removing an entitlement away from the

workforce. Rather, the intention of the amendment is to confirm and clarify which entitlements apply to the ACT Public service workforce.

It has always been the intention and is the current processing practice that for the purposes of calculating and processing long service leave, the PSM Standards apply and the LSL Act does not apply to public servants. While this amendment is removing the future application of the LSL Act, it is recognising that for a period of time the LSL Act did in fact apply to ACT public servants, even though this was not the intention.

As a result, to balance this limitation the amendments will not be applied retrospectively. They will only be applied prospectively. Where an argument is made that the employee's long service leave entitlement be more advantageous under the LSL Act, the long service leave entitlement may be calculated under the terms and conditions of the LSL Act. For those employees who may have been entitled to long service leave under the LSL Act, and believe it is in fact more advantageous, the employee will have the opportunity to request that the appropriate calculations are undertaken and the more beneficial entitlement will be paid. This process will occur on a case by case basis and when requested by an employee.

The relationship between the limitation and its purpose has been assessed. There are components of the LSL Act which are more beneficial to the employee, in particular where public holidays fall during a period of long service are counted as leave. Whereas, under the Standards, public holidays that fall during a period of long service leave are deducted from long service leave. This is due to long service leave being accrued in calendar days which includes all weekends and public holidays.

However, these 'detriments' have been assessed and are outweighed when the LSL Act is compared to the provisions in the Standards. The long service leave entitlements for casuals under the Standards are superior to that which would apply under the LSL Act. In particular, the Standards are more beneficial in regards to the entitlement, the amount of long service leave accrued, payment of leave, periods of service and payment in lieu. For example, under the LSL Act, casual employees accrue 6.0667 weeks of long service leave after 7 years of continuous service. This is because under the LSL Act, long service leave accrues at the rate of 1/5 of a month's leave for each year of service. This can be interpreted as 2 months of long service leave after 10 years' service. This is less than the entitlement provided for under the Standards, where casual employees accrue 9 calendar weeks of long service leave after 7 years of service. Under the Standards, long service leave accrues at the rate of 9 calendar days of long service leave for each year of service which can be interpreted as 3 months of long service leave after 10 years' service. The Standards also recognise prior service with other States/Territories and the Commonwealth whereas the LSL Act does not.

The overarching objective and purpose of these amendments is to ensure the consistent and correct management and application of long service leave entitlements. There are risks to the Territory if these are not administered correctly and there continues to be a lack of clarification on these entitlements.

All employees (including casual staff) will have their long service leave entitlements displayed on their payslips. Those staff members that do not have seven years of service will see a zero balance in their long service leave entitlements. For staff members with concurrent service, there is currently an alert on payslips to contact Payroll Services six-weeks before taking long service leave to allow for manual calculations of their entitlements. Other safeguards that have been implemented include an online long service leave enquiry form to facilitate long service leave related questions and queries.

In developing this Bill, an assessment was made as to whether any less restrictive means could be applied to achieve the amendment. There is no less restrictive means available beyond those included in the Bill. Section 84(c) of the *Legislation Act 2001* also provides an initial safety net whereby an amendment of a law does not affect an existing right, privilege or liability acquired, accrued or incurred under the law.

Definition of 'eligible person'

The Bill inserts a new definition to provide clarity on the definition of *permanent resident* in terms of an eligible person for employment. The nature of the right under section 8 of the HRA is not absolute and is engaged by the Bill.

The definition clarifies that a *permanent resident* means a person who holds a permanent visa for the *Migration Act 1958* (Cwlth), section 30; or a New Zealand citizen who holds a special category visa under the *Migration Act 1958* (Cwlth), section 32. The purpose of this amendment is to provide additional guidance on eligibility requirements for potential employees, supporting the human right of taking part in public life (per section 17 of the HRA).

The importance and purpose of the limitation is to ensure that the Territory does not employ an individual beyond the means of their valid visa status. This could potentially bring the Territory into disrepute or have legal ramifications, should the Territory employ an individual without the necessary valid visa.

To be eligible for permanent appointment within the ACT Public Service, an employee needs to be either an Australian Citizen or Permanent Resident. The amendment clarifies that New Zealand citizens with special category visas are eligible for permanent appointment. While this clause may be seen to restrict the right to equality on the grounds of immigration status, the limitation is due to legal requirements of employing people on a permanent

basis. However, the clause does not restrict people on temporary valid working visas from employment within the ACT Public Service. People who have valid working visas can still be employed on a temporary basis within the ACT Public Service. The requirement to be either an Australian Citizen or Permanent Resident for eligibility for permanency within the ACT Public Service has been in effect since the establishment of its *Public Sector Management Act* in 1994.

The limitation is the least restrictive means available to achieve the limitation's purpose. It is also important to note that immigration matters and the power to issue visas do not sit with the Territory, rather they are a Commonwealth power. The provision is more generous than the Commonwealth Public Service; where a potential employee has to be an Australian Citizen to be considered for a permanent position, permanent residents are unable to do so. The requirement, to be an Australian or New Zealand citizen or a permanent resident within the ACT Public Service, is the same as eligibility requirements for a permanent position within the Victorian Public Service.

Section 12 – Right to privacy and reputation

Sharing of information with Unions

The right to privacy and reputation is contained in section 12 of the HRA and states that everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily. However, the nature of the right is not absolute. The term 'arbitrary interference' is described as intending to guarantee that even interference provided by law should be in accordance with the provisions, aims and objectives of the International Covenant on Civil and Political Rights and should be reasonable in the particular circumstances. This amendment relates to the release of new-starter information to unions and is already provided for within the Enterprise Agreements. The amendment to the Bill may engage and limit the right to privacy by allowing a new employee's work contact information to be provided to a union.

The purpose of the limitation is to support the Government's commitment to encourage union membership as provided under the Union Encouragement Policy. The new provision was negotiated as part of the enterprise bargaining process during which the Government, unions, and employee representatives discussed the routine provision of certain private information to unions. A provision has been included into ACT Public Service Enterprise Agreements, however as these agreements are considered federal legislation, it was decided that an information sharing provision would also be required under the PSM Act.

The Bill limits the sharing of new starter information to the employee's name, position and directorate, work email address and work phone number. ACT Government emails are standardised and are not private as they can be accessed in a number of ways. While the information to be provided to unions is limited and available publicly (through the gazette

and ACT Government Directory), it is not available for all employees and the act of collating it and providing it to a third-party triggers privacy provisions. As such, this constitutes the release of private information which must be authorised either through consent or by a lawful authority to do so.

In providing the unions with this information, the Territory will inform the relevant unions of their privacy obligations. The *Privacy Act 1988* (Cwlth) will also continue to apply to unions that are registered organisations. This ensures an employee's personal information will be protected in the same way unions capture other personal information of their members.

While the right to privacy may be engaged, it is limited through a number of means. It is important to note that the provision will only be applied to new employees. New employees have the option to 'opt out' of having their information provided to the union(s). They will receive information describing what will occur and will have the opportunity to opt out of the provision of that information. The decision to adopt the 'opt out' system was negotiated as part of the enterprise bargaining agreement and selected as the preferred option. Should an employee 'opt out' of having their information shared with the union(s) there will be no repercussions and the union(s) will not be informed that an individual has opted out.

Clause A9.6 of the *ACTPS Administrative and related classifications Enterprise Agreement 2018-2021* also provides that the new starter may withdraw their consent within 14 days after their commencement through notifying the head of service that they do not wish to have their information shared. Further, subject to clause A9.5, the ACT Government will not provide information to the union(s) until at least twenty one days after the new employee has commenced employment.

The limitation is reasonable given the limited information shared, the opt-out mechanism and that the proposal was negotiated with relevant unions, as the employee representative, through the enterprise agreement process (i.e. consultation process was undertaken and employee endorsement was achieved through a ballot, in accordance with the Fair Work Act 2009). As a result, the limitation is the least restrictive limitation possible to achieve a balance between the rights.

It is also important to note that new employee information will only be provided once, and the information will only be provided to the employee's union which, in accordance with its rules, the union is entitled to represent. Clause A9.6 of the *ACTPS Administrative and related classifications Enterprise Agreement 2018-2021* also provides that the new starter has 14 days post commencement where they may notify the head of service that they do not wish to have their information shared. Further, subject to clause A9.5 the ACT Government will not provide information to the union(s) until at least twenty one days after the new employee has commenced employment. The sharing of information with unions is due to

commence as each new Enterprise Agreement commences and in accordance with the relevant Union Representation Schedule. Information will be provided to unions on a monthly basis.

Section 15 – Freedom of Association

Section 15 of the HRA states that everyone has the right to freedom of association. Releasing the contact information of new employees to unions could be perceived to engage an individual's right to freedom of association. While the Bill may engage this right, the amendment can be seen to support an individual's freedom of association by allowing them to receive information from their relevant union(s).

The amendment to the new starter paperwork provides new employees with the option to indicate whether or not they would like their work contact information shared with the union(s) through an 'opt out' check box. The Government is not asking new employees if they are a member of a union or what their intentions regarding their interactions with unions may be. Rather, the amendment provides new employees with the option to consider whether they would like to receive more information from the respective union(s). This approach can be seen to support freedom of association; it is an opportunity provided to new employees to receive information distributed by unions and to allow them to consider joining a union should they wish to do so.

The right to freedom of association will only be engaged for new employees who have had the opportunity to consider the proposal. Having and making the choice to join a union remains at the discretion of the individual - the ACT Government encourages and supports this right. This amendment aims to provide a further mechanism for new employees to make that choice.

It is important to note that safeguards exist under the *Fair Work Act 2009* to protect an individual's freedom of association. Section 340 'Protection' provides protection against adverse action and Section 350 'Inducements – membership action' provides protections relating to union membership action.

AMENDMENTS

Part 1 Public Sector Management Act 1994

Clause 1 Name of Act

This is a technical clause and sets out the name of the new Act as the *Public Sector Management Amendment Act 2019*.

Clause 2 Commencement

This clause provides that the new Act will commence on the day after it is notified on the Legislation Register.

Clause 3 Legislative Amended

Clause 3 specifies that this Act amends the *Public Sector Management Act 1994* and the *Long Service Leave Act 1976*.

Clause 4 Appointment to vacant office Section 68(1), note

This clause removes the explicit note on the head of service exercising a function in relation to an appointment in accordance with the merit and equity principle.

These notes were inserted in various sections of the *Public Sector Management Act* in 2016 and have created some confusion. This amendment does not remove the requirement of the merit and equity principle. It merely removes the ambiguity of the current provisions and will avoid any confusion that the principle only applies to the sections where the note is referred to. Section 8 (3) of the *Public Sector Management Act 1994* states the head of service must exercise a function under the *Public Sector Management Act 1994* in accordance with the merit and equity principle. This principle is fundamental to the operation of the ACT Public Service and is to be applied to all functions.

Clause 5 Promotion to vacant office Section 83(1), note

As mentioned previously, this clause removes the explicit note on the head of service exercising a function in relation to a promotion to vacant office in accordance with the merit and equity principle. It does not remove the requirement of the application of the merit and equity principle. Section 8 (3) of the *Public Sector Management Act 1994* states the head of service must exercise a function under the *Public Sector Management Act 1994* in accordance with the merit and equity principle. This principle is fundamental to the operation of the ACT Public Service and is to be applied to all functions.

Clause 6 Transfer to vacant office Section 92 (1), note

As above, this clause removes the explicit note on the head of service exercising a function in relation to a transfer to vacant office in accordance with the merit and equity principle.

This does not remove the requirement of the application of the merit and equity principle. Section 8 (3) of the *Public Sector Management Act 1994* states the head of service must exercise a function under the *Public Sector Management Act 1994* in accordance with the merit and equity principle. This principle is fundamental to the operation of the ACT Public Service and is to be applied to all functions.

Clause 7 Simultaneous transfer within administrative unit Section 93 (2), note

As above, this clause removes the explicit note on the head of service exercising a function in relation to a simultaneous transfer within administrative units in accordance with the merit and equity principle. It does not remove the requirement of the application of the merit and equity principle, rather it removes the ambiguity surrounding the note. Section 8 (3) of the *Public Sector Management Act 1994* states the head of service must exercise a function under the *Public Sector Management Act 1994* in accordance with the merit and equity principle. This principle is fundamental to the operation of the ACT Public Service and is to be applied to all functions.

Clause 8 Transfer between administrative units Section 94, note

As above, this clause removes the explicit note on the head of service exercising a function in relation to a transfer between administrative units in accordance with the merit and equity principle. It does not remove the requirement of the application of the merit and equity principle. Section 8 (3) of the *Public Sector Management Act 1994* states the head of service must exercise a function under the *Public Sector Management Act 1994* in accordance with the merit and equity principle. This principle is fundamental to the operation of the ACT Public Service and is to be applied to all functions.

Clause 9 Re-employment after maternity leave Section 141(3), note

As above, this clause removes the explicit note on the head of service exercising a function in relation to re-employment after maternity leave in accordance with the merit and equity principle. It does not remove the requirement of the application of the merit and equity principle. Section 8 (3) of the *Public Sector Management Act 1994* states the head of service must exercise a function under the *Public Sector Management Act 1994* in accordance with the merit and equity principle. This principle is fundamental to the operation of the ACT Public Service and is to be applied to all functions.

Clause 10 New Section 242A

This clause provides the authorisation to share certain personal information with a relevant union. This clause outlines that the sharing of certain personal information only applies to a new starter (i.e. a person who is engaged, appointed or employed under the *Public Sector Management Amendment Act 2019*). Under this clause the new starter must be given a reasonable opportunity to 'opt out' of having their new starter information disclosed to the

relevant union. This clause sets out the information which is authorised to be shared with the relevant union for the new starter's classification.

Clause 11 Dictionary, definition of eligible person

This clause amends the definition of eligible person to clarify it also applies to someone on secondment.

Clause 12 Dictionary, new definitions

This clause inserts a new definition into the Bill for permanent resident.

A permanent resident means a person who holds a permanent visa for the *Migration Act 1958* (Cwlth), section 30 or a New Zealand citizen who holds a special category visa under the *Migration Act 1958* (Cwlth), section 32.

Schedule 1 Other amendments – Long Service Leave Act 1976

[1.1] Dictionary, note 2

This clause relates to the current note 2 and provides that the term 'public employee' be added to the current note.

[1.2] Dictionary, definition of *employee*

This clause amends the definition of 'employee' under the *Long Service Leave Act 1976* to provide that the LSL Act does not apply to a public employee (as defined under the PSM Act) or a person employed by a member of the Legislative Assembly under the *Legislative Assembly (Members' Staff) Act 1989*, section 10. The definition of 'employee' will now clearly exclude a public employee and a person employed by a member of the Legislative Assembly. This is to confirm that the *Long Service Leave Act 1976* does not apply to public employees or those staff employed by a member of the Legislative Assembly under the *Legislative Assembly (Members' Staff) Act 1989*, section 10.

It is useful to note however, that the length of long service entitlements is more generous under Part 4.3 of the 2006 Standards than under the LSL Act.