

2018

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

WORKPLACE LEGISLATION AMENDMENT BILL 2018
(Workplace Privacy Amendment Act 2016 and Public Sector Management Act 1994)

EXPLANATORY STATEMENT

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WORKPLACE LEGISLATION AMENDMENT BILL 2018

This explanatory statement relates to the Workplace Legislation Amendment Bill 2018 (the Bill) as presented to the 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 is to be read in conjunction with the Bill. It is not, and is not meant to be, a comprehensive description of the Bill.

The purpose of this Bill is to amend the:

- *Workplace Privacy Amendment Act 2016*; and
- *Public Sector Management Act 1994*.

PUBLIC SECTOR MANAGEMENT AMENDMENTS

This amendment is to ensure consistency between the *Fair Work Act 2009 (Cwth)* ('Fair Work Act'), industrial instruments (enterprise agreements) and the *Public Sector Management Act 1994* in relation to employer deductions from an employee's salary, where an overpayment has occurred.

The Fair Work Act prohibits an employer in most circumstances from deducting money from an employee's salary without the employee's express written authorisation. The ACTPS enterprise agreements, made under the Fair Work Act, work in concert with the *Public Sector Management Act 1994* to provide a framework for recovery of monies paid to employees in error, resulting in an overpayment.

The changes made to the current overpayment provision, section 246 of the *Public Sector Management Act 1994* allow for recovery action in accordance with the enterprise agreement provisions to proceed if the employee and Head of Service cannot agree on a repayment arrangement. This amendment removes the previous requirement that any recovery action must be agreed between the employee and the Head of Service.

In the vast majority of cases employees are able to negotiate reasonable repayment arrangements without the need for intervention by the Head of Service. This amendment is required to address situations where agreement to reasonable recovery arrangements is withheld by an employee. However there are factors that the Head of Service will have regard to and these are specified in clauses 4(a)-(e) of the Bill, including:

- a) the period in which the overpayment occurred; and
- b) the circumstances of the overpayment; and
- c) the gross and net amount of the overpayment; and
- d) the public servant's financial circumstances;
- e) any other relevant circumstance.

Consideration of the public servant's financial circumstances may include any hardship faced by the public servant. Hardship factors go beyond financial circumstances and generally may include (but not be excluded to): family tragedy,

serious illness, impacts of natural disaster and other serious or difficult circumstances.

The Head of Service must allow a reasonable period to agree on an arrangement for repayment before determining arrangements for repayment without the public servant's agreement. The reasonable period is a subjective test based on the opinion of the Head of Service.

The amendment ensures that no public servant derives a benefit to which they are not entitled and that debts owing to the Territory are enforceable and recoverable in a timely manner. It provides certainty and integrity in the management of public funds.

Where employees are in dispute over the recovery matter, through the internal review or dispute resolution provisions of industrial instruments, they have access to the Fair Work Commission for resolution.

WORKPLACE PRIVACY AMENDMENTS

In February 2016, the Minister for Justice, Shane Rattenbury MLA, tabled a report on the review of the *Workplace Privacy Act 2011* (the WPA). The purpose of the review was to identify any need for legislative changes to improve the operation of the WPA, which recognises an employer's need to take reasonable steps to protect their business and monitor their workplace without unreasonably impinging on a worker's right to privacy.

The *Workplace Privacy Amendment Bill 2016* contained legislative amendments required to implement the review recommendations, including allowing employers to apply to the Magistrates Court for an authority to conduct surveillance of employees outside of the workplace.

Clause 5 of this Bill is to omit un-commenced sections 5, 7 through to 16 prior to their commencement date of 14 April 2018 which relate to covert surveillance by employer *outside* the workplace. These provisions allow an employer to apply to the Magistrates Court for a warrant to undertake surveillance outside the workplace and were delayed due to union objection. Following consultation on the un-commenced sections, it was agreed that the provisions should not commence until least restrictive limitation on rights to privacy and other rights can be developed to ensure that the policy meets obligations under the *HRA*.

Human Rights Implications

During the Bill's development due regard was given to its compatibility with human rights as set out in the *Human Rights Act 2004* (HRA).

The PSM amendments limit the following rights contained in the *Human Rights Act 2004* (HRA):

- Section 12 – Privacy and reputation; and
- Section 21 – Fair Trial.

Limitations on human rights– Section 28 (2) of the HRA

The preamble to the HRA notes that few rights are absolute and that they may be subject only to the reasonable limits in law that can be demonstrably justified in a free and democratic society. Section 28 (2) of the HRA contains the framework that is used to determine the acceptable limitations that may be placed on human rights.

Section 28 requires that any limitation on a fundamental right must be authorised by a Territory law, be based on evidence, and be reasonable to achieve a legitimate aim. Whether a limitation is reasonable depends on whether it is proportionate.

Section 12 – Privacy and reputation

Section 12 of the HRA states that-

Everyone has the right not to have his or her privacy, family, home or correspondence interfered with unlawfully or arbitrarily; and not to have his or her reputation unlawfully attacked.

Nature of the right affected:

The right to privacy in the HRA is based on the right to privacy set out in Article 17 of the International Covenant on Civil and Political Rights ('ICCPR'). As international case law does not exhaustively define 'privacy' or 'private life', the European Court of Human Rights applies a general test of whether there is a reasonable expectation of privacy in order to determine if the right to privacy is engaged¹.

The UN Human Rights Committee, commenting on the right to privacy, has noted that 'as all persons live in society, the protection of privacy is necessarily relative. However, the competent public authorities should only be able to call for such information relating to an individual's private life the knowledge of which is essential in the interests of society...² The right to privacy is not absolute and may be reasonably limited by laws which can be demonstrably justified in a free and democratic society.

¹ *Halford v United Kingdom* (1997) 24 EHRR 523 at [45].

² UN Human Rights Committee, *General Comment 16: The right to respect of privacy, family, home and correspondence, and protection of honour and reputation (Art 17)*, UN Doc CCPR General Comment 16 (1988), para 7.

Clause 4 of the Bill is to remove the previous requirement that any recovery action must be agreed between the employee and the Head of Service. The Bill is replaced by a new section 246 to allow for recovery action to be undertaken in accordance with the industrial instrument provisions where agreement cannot be reached on a repayment arrangement. This section also provides for consideration of relevant factors such as the person's financial circumstances and any other relevant circumstance, which may include any hardship experienced by the employee. If the Head of Service decides to progress with a repayment arrangement without agreement with an employees, the employee is able to have the matter resolved by an independent body, the Fair Work Commission, through the workplace resolution provisions of industrial instruments.

While this clause may be seen to restrict the right to privacy in terms of examining an employee's financial position, some of this detail is necessary for the Head of Service to make a fully informed decision in relation to a reasonable recovery arrangement. This clause is only applied after an employee has had the opportunity to engage in discussions and arrange a reasonable recovery arrangement. Appropriate procedural fairness and natural justice principles applies in these discussions.

The overarching objective and purpose is to ensure the ethical management of public funds, where an overpayment has been identified. There are risks to the Territory if these processes are not managed effectively.

This clause attempts to produce a result that balances the competing considerations of the Territory and the employee in the least rights restrictive way.

Importance of the purpose of the limitation:

While this clause may be seen to restrict the right to privacy in terms of examining an employee's financial position, some of this detail is necessary for the Head of Service to make a fully informed decision in relation to a reasonable recovery arrangement.

This clause is only applied after an employee has had the opportunity to engage in discussions and arrange a reasonable recovery arrangement. Appropriate procedural fairness and natural justice principles applies in these discussions.

The nature and extent of the limitation:

A subjective test has been included in relation to allowing a timeframe for a repayment to be made. However, under the new section, this requirement has been limited, as the Head of Service may determine 'reasonable arrangements' for the repayment by having regard to the matters specified in clauses 4(a)-(e) of the Bill, including:

- a) the period in which the overpayment occurred; and
- b) the circumstances of the overpayment; and
- c) the gross and net amount of the overpayment; and
- d) the public servant's financial circumstances;
- e) any other relevant circumstance.

Consideration of the public servant's financial circumstances may include any hardship faced by the public servant. Hardship factors go beyond financial circumstances and generally may include (but not be excluded to): family tragedy, serious illness, impacts of natural disaster and other serious or difficult circumstances.

The Head of Service must allow a reasonable period to agree on an arrangement for repayment before determining arrangements for repayment without the public servant's agreement. The reasonable period is a subjective test based on the opinion of the Head of Service.

Relationship between the limitation and its purpose:

The changes made to the current overpayment provision, section 246, of the *Public Sector Management Act 1994* allow for recovery action in accordance with the enterprise agreement provisions. This amendment is required to address situations where agreement to reasonable recovery arrangements is withheld by an employee. However in the majority of cases, employees are able to negotiate reasonable repayment arrangements without the need for intervention by the Head of Service.

There are risks to the Territory if the overpayment processes are not managed effectively.

Less restrictive means reasonably available to achieve the limitation's purpose:

In developing the Bill, an assessment was made as to whether any less restrictive means were available to achieve the purpose of the Bill. There is no less restrictive means available beyond those included in the Bill.

Section 21 of the HRA (Fair trial) provides that -

Everyone has the right to have criminal charges, and rights and obligations recognised by law, decided by a competent, independent and impartial court or tribunal after a fair and public hearing.

Section 21 (1) of the Human Rights Act is primarily concerned with an accused person's rights during criminal trials. It also encompasses rights that an individual may have under civil or administrative law. In 2015, the High Court succinctly stated that, in *'the absence of a clear, contrary legislative intention, administrative decision-makers must accord procedural fairness to those affected by their decisions'*.³

The manner in which a person's interests are affected is relevant to whether a duty to afford procedural fairness exists. There is less likely to be a duty to afford procedural fairness where a decision affects a person as a member of the public or a

³ *Minister for Immigration and Border Protection v WZARH* [2015] HCA 40 (4 November 2015) [30] (Kiefel, Bell and Keane JJ). Procedural fairness will not be implied in relation to an exercise of legislative power by an administrator—that is, in the making of delegated legislation

class, rather than in their individual capacity. Procedural fairness may not apply where a decision 'affects so many people that it is really a legislative act; or where the range of public policy considerations that the deciding body can legitimately take into account is very wide'.

Clause 4 of the Bill does not set out avenues for an internal review or the process for attempting to negotiate a reasonable recovery arrangement. These mechanisms are already contained in industrial instruments, and including these in the Bill may confuse matters. Employees are fully entitled to a fair hearing throughout these initial negotiations. This right is only limited by this clause to the extent that it only operates in circumstances where these negotiations become intractable or delayed. While this clause appears to limit the human right to a fair trial, the natural justice and procedural fairness requirements of industrial instruments provide legally enforceable rights in these circumstances. Further, industrial instruments provide an avenue to have these matters resolved by an independent body, the Fair Work Commission, should the matter remain in dispute. The limitation on this right is necessary to ensure legitimate recovery action of public monies, where an overpayment has been identified, and this process cannot be unreasonably frustrated. This clause is only applied after an employee has had a full opportunity to be heard and to engage in the discussion around reasonable recovery arrangements. This is therefore the least rights restrictive way to achieve this outcome and ensure integrity in the management of public money.

Importance of the purpose of the limitation:

While this clause may be seen to restrict the right, for an employee to have a fair hearing, this is not the case. This clause is only applied after an employee has had the opportunity to engage in discussions and arrange a reasonable recovery arrangement.

Industrial instruments provide an avenue to have these matters resolved by an independent body, the Fair Work Commission, should the matter remain in dispute.

The nature and extent of the limitation:

While this clause may be seen to restrict the right, for an employee to have a fair hearing, this is not the case. Employees will be given a full opportunity to engage and negotiate a reasonable repayment arrangement, according to their individual circumstances.

The Head of Service must allow a reasonable period to agree on an arrangement for repayment before determining arrangements for repayment without the public servant's agreement. The reasonable period is a subjective test based on the opinion of the Head of Service.

Alternatively, if the employee and the Head of Service cannot come to an agreement and the Head of Service decides to proceed with a repayment arrangement, the employee can seek to have the matters resolved under the workplace dispute provisions of the industrial instrument by an independent body, the Fair Work Commission.

Relationship between the limitation and its purpose:

While this clause may be seen to restrict the right, for an employee to have a fair hearing, this is not the case.

The overarching objective and purpose is to ensure the ethical management of public funds, where an overpayment has been identified. There are risks to the Territory if these processes are not managed effectively.

Less restrictive means reasonably available to achieve the limitation's purpose:

In developing the Bill, an assessment was made as to whether any less restrictive means, for an employee to have a fair hearing, in order to achieve the purpose of the Bill. There is no less restrictive means available beyond those included in the Bill.

CLAUSE NOTES

Clause 1 Name of Act

This clause provides that the name of the Act is the *Workplace Legislation Amendment Bill 2018*.

Clause 2 Commencement

This clause provides for the commencement of the Act. The Act will commence on a day after the notification day.

Clause 3 Legislation Amended

This clause identifies the Acts amended by the Bill. The *Workplace Privacy Amendment Act 2016* and *Public Sector Management Act 1994*.

Clause 4 Section 246

This clause is to remove the previous requirement that any recovery action must be agreed between the employee and the head of service.

Subsection 1 requires a public servant to repay any amounts to which the public servant is not legally entitled.

Subsection 3 allows for arrangements for repayment to be agreed between the head of service and the public servant.

If the head of service and the public servant cannot agree on an arrangement for repayment, subsection 4 allows the head of service to determine reasonable arrangements for repayment, an objective standard. The head of service must consider the elements listed in subsections (a) to (e) when determining the reasonable arrangements for repayment.

The head of service must allow a reasonable period to agree on an arrangement for repayment before determining arrangements for repayment without the public servant's agreement. The reasonable period is a subjective test based on the opinion of the head of service.

Clause 5 Section 5 and 7 to 16

This clause is to omit un-commenced sections 5 and 7 through to 16.