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

TENTH ASSEMBLY

PUBLIC SECTOR MANAGEMENT AMENDMENT BILL 2024

**EXPLANATORY STATEMENT
and
HUMAN RIGHTS COMPATIBILITY STATEMENT
(*Human Rights Act 2004, s 37*)**

**Presented by
Andrew Barr MLA
Chief Minister
June 2024**

PUBLIC SECTOR MANAGEMENT AMENDMENT BILL 2024

The Bill **is not** a Significant Bill. Significant Bills are bills that have been assessed as likely to have significant engagement of human rights and require more detailed reasoning in relation to compatibility with the *Human Rights Act 2004*.

OVERVIEW OF THE BILL

The Bill would make the necessary amendments to the *Public Sector Management Act 1994* (PSM Act) to ensure the ACT public sector (ACTPS) employment framework remains compliant with *Fair Work Act 2009* (Cth) (FW Act) provisions that govern fixed term contracts.

On 6 December 2023 amendments to the FW Act commenced that limit the use of fixed term employment contracts. New section 333E of the FW Act lists the circumstances in which an employer may not engage a person for employment under a fixed term contract. This includes:

- a) Where the employment period is longer than two years.
- b) Where the employment contract includes an option to renew or extend the contract more than once, or the sum of the period for which the contract may be renewed is greater than two years.
- c) Where the employee is provided consecutive and separate contracts for the same, or substantially, work at the end of their employment period and the total employment period is greater than two years.

Where an employment contract breaches the requirements of the FW Act, the contract end date is considered void, and the person would be an ongoing employee. The FW Act includes certain exemptions to these laws, for example, where the contract provides remuneration above the high-income threshold.

The FW Act includes anti-avoidance laws that prevent an employer from taking action that would subvert the intended operation of the laws. For example, where an employer continually employs different people on fixed term contracts for a role where there is recognised ongoing work.

The PSM Act limits ongoing employment (referred to as 'office') to Australian citizens or permanent residents. The PSM Act authorises the head of service to engage persons who are not Australian citizens or permanent residents on fixed term (temporary) contracts. This approach is used to engage visa-holders to undertake vital work across the ACTPS that ensures Canberrans continue to receive expected community services.

There are instances where fixed term contracts used to engage visa-holders in the ACTPS would be in breach of the FW Act, and the FW Act would make that employee ongoing. Despite the FW Act, the PSM Act would stipulate that a

visa-holder is not capable of being an ongoing employee as they would not meet the eligibility criteria as they are not either an Australian citizen or permanent resident.

The Bill seeks to rectify this conflict of laws to ensure the ACT remains compliant with Commonwealth legislation.

The Bill would amend the PSM Act to:

- a) expand 'office' eligibility to include individuals who hold a visa that permits that person to work in the service.
- b) require the head of service to record relevant details of an officer's visa that permits that officer to work in the service.
- c) require the head of service to end the employment of an officer, who is also a visa-holder, if that officer no longer holds a visa that permits them to work in the service.
- d) ensure the provisions that authorise the head of service to engage individuals on a fixed term contract are consistent with the FW Act.
- e) allow the head of service to have regard to an individual's qualifications – including a security clearance – when considering appointment to office.

CONSULTATION ON THE PROPOSED APPROACH

The Chief Minister, Treasury, and Economic Development Directorate (CMTEDD) worked closely with the Justice and Community Safety Directorate (JACS) in considering any information security implications of the Bill, as well the Bill's compatibility with human rights.

CMTEDD worked with the ACT Parliamentary Counsel's Office on the formulation and development of the proposed amendments for inclusion in this Bill.

CLIMATE IMPACT

This Bill does not have a climate impact.

CONSISTENCY WITH HUMAN RIGHTS

Section 8 – Recognition and equality before the law

The Bill promotes the right to recognition and equality before the law provided in section 8 of the *Human Rights Act 2004* (HR Act), and the right to take part in public life provided in section 17 of the HR Act. Subsection 8(3) of the HR Act provides that everyone is equal before the law and is entitled to equal protection of the law without discrimination.

Currently, the PSM Act limits a person who is not an Australian citizen or permanent resident, but who holds a visa that permits them to work in Australia (visa-holders), to be employed under a temporary fixed term contract. The Bill creates more equal opportunities before the law for visa-holders by amending the PSM Act to allow them to be appointed to office and access more secure work arrangements.

Conversely, the Bill limits the right to equality before the law for visa-holders.

The Bill amends the PSM Act to require the head of service to end the employment of an officer if they are not an Australian citizen or permanent resident, and they no longer hold a visa that permits them to work in the service. This would have a disproportionate negative impact on people or groups based on national origin, that is, those who were born outside Australia and are not permanent residents. This is considered a reasonable and justified limitation authorised under section 28 of the HR Act. The requirement to end the employment of an officer who no longer holds a visa is required to ensure the service remains compliant with legal obligations to only employ persons who have a legal right to work in Australia. The authorisation of a right to work in Australia for those not born in Australia, or do not hold permanent residency, is provided by the Commonwealth under the *Migration Act 1958* (Cth) (Migration Act). It would be inappropriate, and beyond legal power, for the head of service to continue to employ a person who has no legal right to work in Australia.

Section 21 – Fair trial

Section 27B – Right to work and other work-related rights

The Bill promotes the right to work and other work-related rights stated in section 27B of the HR Act. Subsection 27B(1) of the HR Act provides that everyone has the right to work, including the right to choose their occupation or profession freely, and that the practice of a trade, occupation, or profession may be regulated by law. Subsection 27B(5) of the HR Act entitles everyone to enjoy the rights in section 27B without discrimination.

The Bill would promote the rights in section 27B by providing more secure work to visa-holders. Currently, the head of service may only engage a visa-holder on a fixed term temporary contract. The Bill would allow the head of service to appoint visa-holders to office in the ACTPS which provides more secure employment than a fixed-term temporary contract.

Conversely, the Bill would also limit the rights under section 27B. The Bill would amend the PSM Act to insert new section 124A which requires the head of service to end the employment of an officer, who is not an Australian citizen or permanent resident, if that officer no longer holds a visa that permits them to work in the service. A decision under section 124A is not appealable or reviewable. This would also limit the right to fair trial under section 21 of the HR Act. In particular, subsection 21(1) provides that everyone has the right to have rights and obligations recognised by law, decided by a competent, independent and impartial tribunal after a fair and public hearing.

These are reasonable limitations that are consistent with section 28 of the HR Act. Regarding the limitation to the right to work, the authorisation of a right to work in Australia for those who are not an Australian citizen or permanent resident is

determined by the Commonwealth under the Migration Act. It would be inappropriate, and beyond legal power, for the head of service to continue the employment of an officer if they no longer hold a legal right to work in the service.

Likewise, regarding the right to fair trial, there is no scope to review or appeal a decision made to end employment under the proposed section 124A of the PSM, as that decision is made in accordance with an earlier decision made by the relevant Commonwealth Minister to revoke a right to work under the Migration Act. Once that decision is made under the Migration Act, the head of service has a legal obligation to end the employment of that person as they are no longer legally entitled to work in the service. Provision of a right to review or appeal is redundant, as section 124A is only triggered in accordance with Commonwealth legislation.

Section 12 – Privacy and reputation

The Bill also limits the right to privacy as provided in section 12 of the HR Act. Section 12 states that everyone has the right not to have their privacy interfered with unlawfully or arbitrarily. The Bill would amend section 69 of the PSM Act to require the head of service to record relevant details of an officer's visa, including the period during which the officer is permitted to work in the service, the work the officer is permitted to do, and any other information that is relevant to the officer being an eligible person for appointment.

This is considered a reasonable limitation that is justified under section 28 of the HR Act. Recording of such information is required to minimise the risk that the head of service unlawfully appoints an officer, or continues to employ an officer, contrary to the conditions authorised under a law of the Commonwealth. The risk of this occurring is elevated where visa-holders are appointed as an officer, as this opens opportunity of transfer to another office under division 5.6 of the PSM Act. Where an officer, who is a visa-holder, is transferred to another office the head of service must ensure that officer is eligible for that particular office.

There are existing safeguards that would protect information that is gathered under section 69. The information that is collected would be considered '*personal information*' under section 8 of the *Information Privacy Act 2014* (IP Act), section 20 of the IP Act requires public sector agencies to comply with the Territory Privacy Principles (TPPs). Relevantly, TPP6 requires that if a public sector agency holds personal information about an individual that was collected for a particular purpose, the agency must not use or disclose the information for another purpose. Section 34 would authorise a person to make a privacy complaint to the information privacy commissioner if they consider a public sector agency has breached the TPPs.

PUBLIC SECTOR MANAGEMENT AMENDMENT BILL 2024

Human Rights Act 2004 - Compatibility Statement

In accordance with section 37 of the *Human Rights Act 2004* I have examined the **Public Sector Management Amendment Bill 2024**. In my opinion, having regard to the Bill and the outline of the policy considerations and justification of any limitations on rights outlined in this explanatory statement, the Bill as presented to the Legislative Assembly is consistent with the *Human Rights Act 2004*.

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Shane Rattenbury MLA
Attorney-General

CLAUSE NOTES

Clause 1 Name of Act

This clause provides the name of the Act is the *Public Sector Management Amendment Act 2024*.

Clause 2 Commencement

This clause provides that the Act commences on the day after its notification day.

Clause 3 Legislation amended

This clause sets out that the Act amends the *Public Sector Management Act 1994*.

Clause 4 Appointment to vacant office (Section 68 (2) (b))

This clause omits paragraph 68(2)(b).

The effect is to expand the circumstances in which the head of service may appoint a person to office to include if the person holds a legal right to work in Australia under a law of the Commonwealth.

This is achieved through reliance on paragraph 68(2)(a), which requires that the head of service may only appoint a person to vacant office if the person is selected in accordance with the merit and equity principle. The merit and equity principle is contained in section 27 of the *Public Sector Management Act 1994* (PSM Act). Paragraph 27(1)(b) confirms that section 27 applies in relation to selecting a person to be appointed as an officer to a vacant office. Paragraph 27(2)(c) requires the head of service to ensure that the person selected is an 'eligible person'. 'Eligible person' is defined in the PSM Act dictionary as (amongst other conditions), a person who satisfies any of the following: is an Australian citizen, is a permanent resident of Australia, or holds a visa that permit the person to work in the service.

Clause 5 Section 68 (2) (c) (v)

This clause removes the word 'educational' from subparagraph 68(2)(c)(v). The effect is to allow the head of service to have regard to a broader range of 'qualifications' (as defined in the PSM Act dictionary) when considering if a person is suitable for appointment. This includes an academic qualification, an apprenticeship, a licence, membership of a professional body, a registration, and a security clearance.

Clause 6 Record about officers (New section 69(e))

This clause adds new section 69(e) which requires the head of service to, if an officer holds a visa that permits them to work in the service, record relevant information about the details of that visa.

This information is vital to ensure that officers, who are visa-holders, remain eligible for engagement as an officer in the service. This includes recording the relevant time period which that officer is permitted to work in the service, the work the officer is permitted to do, and any other information that is relevant to the officer being an eligible person for appointment.

Clause 7 Fixed term temporary employment (Section 110 (1) and (2))

This clause adds a new note to subsection 110(1).

The note provides clarification that there are also applicable laws in the *Fair Work Act 2009* (Cth) that may also apply when engaging a person under a temporary fixed term contract.

Clause 8 New section 124A

This clause inserts new section 124A to the PSM Act.

Section 124A requires the head of service to end the employment of an officer if they no longer hold a visa that permits them to work in the service. A decision to end employment under this section is not an appealable decision or a reviewable decision.

This sections acts to enable the head of service to immediately end the employment of an officer who no longer holds a visa that authorises that person to work in the service. This is required to ensure that the service is not employing a person in breach of Commonwealth legislation that grants authorisation for a person to undertake work in Australia. As the person no longer hold a legal right to work in Australia, it is appropriate to stipulate that a decision to end an officer's employment under this section is not appealable or reviewable.