A REVIEW OF THE NORTHERN TERRITORY
PUBLIC SECTOR EMPLOYMENT
AND MANAGEMENT ACT

July 2009
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1 EXECUTIVE SUMMARY

This review of the Public Sector Employment and Management Act (the Act) forms a major part of the Northern Territory Public Sector Reform and Revitalisation Package, approved by the Northern Territory Government in 2008.

The Minister for Public Employment established a Review Committee (the Committee) in late 2008 to guide the process and provide a report on the outcomes of the review. The Committee prepared a discussion paper and called for submissions in December 2008. Submissions closed on 31 March 2009 and 45 submissions were received.

The Committee undertook an exhaustive review of the submissions, many of which were substantial, and a number of recurring themes became apparent as summarised below:

- There is general support for:
  - broadening the merit principle to include diversity;
  - retaining the “single-employer model”;
  - relocating the Principles of Public Administration and Management, Human Resource Management and Conduct from the Regulations to the Act and reviewing them to ensure they remain contemporary;
  - the Act to be heavy on principles and light on prescription;
  - streamlining and review of inability, disciplinary and medical incapacity provisions;
  - appeal provisions to be retained “in-house” with the ability to limit forum shopping by employees;
  - a major review of subordinate legislation, particularly the Employment Instructions; and

- Agencies considered there should be more devolution of powers and functions to Chief Executives to ‘let the managers manage’ and decrease bureaucratic red-tape.

Many of the submissions raised issues primarily related to the administrative application of the provisions of the Act and subordinate legislation, and matters related to details of process.

The Committee considered in some detail recent reforms to public sector legislation in other jurisdictions and in some instances found examples worthy of adoption in the Northern Territory. However it became apparent to the Committee that the Act, some 16 years after its enactment in the Northern Territory, remains an effective and relatively
simple piece of legislation which in many respects is still highly regarded by other jurisdictions.

The Committee also reviewed the potential impact of the new federal *Fair Work Act* on the Territory’s legislation to ensure that its proposals to amend the Act were consistent with the federal legislation.

As a consequence of the above the Committee found that there were a number of areas in the Act which would benefit from clarification or deletion of provisions where these were no longer seen to be necessary for inclusion in the Act and/or which could be better dealt with in the subordinate legislation.

However there were two areas where the Committee believed that considerable change to the Act was warranted. The first of these was the need for the Act to be more explicit on the performance obligations and career development of employees. This will ensure that the Northern Territory Public Sector, through the Act, retains a primary focus on the positive aspects of providing an effective and responsive service to the Government and wider Northern Territory community.

The second primary area for change relates to the way in which inability and disciplinary matters are dealt with given the strong view expressed in many submissions that the current provisions were too prescriptive and complex. Closely associated with this issue are the current provisions for appeals against decisions including promotion decisions.

The Committee formed the view that there would be considerable benefit to all stakeholders if the Act was amended to remove as much prescription on process as was reasonable, and to the extent necessary, include this in subordinate legislation. This should be supported by a simplified and consolidated appeal mechanism which is focussed on achieving fair outcomes in a timely manner without compromising the merit principle and the principles of natural justice and the Committee has recommended the Act be amended to provide for a single and simplified Northern Territory Public Sector Appeal Board.

The review and the report’s recommendations are not able to address every matter raised in detail and considerable work remains to be done in the drafting stage. However the Committee believes its recommendations provide the basis for considerable improvement in how the Act will continue to guide the performance and success of the Northern Territory Public Sector for many years into the future.

The Committee is extremely grateful for the effort put into the submissions by agencies, unions and individuals, and trusts that this report will go a large way towards meeting their expectations for improvements in the employment and management practices adopted in the Northern Territory Public Sector.
1.1 SUMMARY OF RECOMMENDATIONS

Recommendations for Part 1 – Preliminary

1. A new section defining the objects of the Act be included based on recommendations by the Commissioner for Public Employment.

2. The current Principles of Administration and Management; Human Resource Management; and Conduct, with amendments to include the concepts of collaboration, responsiveness, innovation, and mutual responsibility, be reviewed and included in the Act.

3. Section 3 (Interpretation) of the Act be reviewed to ensure consistency with any new definitions and other related legislation.

4. The Act be amended to clarify that minor technical errors in administering a provision of the Act will not affect the process or invalidate any action taken, provided that the action referred to has been undertaken in accordance with the principles of the Act and in good faith.

5. The definition of merit be amended to include diversity, and the Merit Selection Guidelines be updated to enable the adequate and proper use of the broadened definition.

6. The Act be amended to permit the section 57 “Special Measures” provisions of the Anti-Discrimination Act to be utilised in the Northern Territory Public Sector.

7. The Act to be amended to replace the term “Chief Executive Officer” with “Chief Executive”.

Recommendations for Part 2 - Administration

8. The intent of Part 2 (Administration) of the Act be retained in full.

Recommendations for Part 3 – Commissioner for Public Employment

9. Part 3 (Commissioner for Public Employment) be amended if necessary to ensure compatibility with the Information Act, the Public Interest Disclosure Act and the federal Fair Work Act.

10. Section 14 (Powers of Commissioner) be amended to make it clear that determinations by the Commissioner may apply retrospectively.
11. The Commissioner for Public Employment ensures that all delegations to Chief Executives are reviewed as necessary pending any future amendment to the Act.

Recommendations for Part 4 – Chief Executives

12. An extensive review of Employment Instructions be undertaken by the Commissioner for Public Employment in consultation with Chief Executives and, where relevant, employee organisations to ensure that unnecessary prescription is eliminated and consistency with the high levels of accountability and principles in the Act is achieved.

13. Section 19(2) (Chief Executives) and section 20 (Termination of appointment) be amended to provide for appointment and termination of Chief Executives by the Chief Minister.

14. Section 23(1) (Accountability of Chief Executives) of the Act be amended to make a Chief Executive responsible for compliance with the principles of the Act and for providing strategic leadership to the Agency and effective delivery of services to the community.

15. Section 27 (Delegation by Chief Executive) of the Act be amended to provide beyond doubt that a Chief Executive may delegate his or her functions and powers to a person as well as an employee.

16. Section 28(2) (Reports by Chief Executives) be amended to require an Agency to report on its compliance with the principles of the Act.

Recommendations for Part 5 – Appointment, Promotion, Transfer and Resignation

17. Section 29 (Chief Executives to appoint, promote and transfer) be retained in full with changes to terminology to redefine the basis of employment as ongoing or fixed term and that the terminology of “appointment” is reviewed in the drafting process.

18. The Act be amended to prescribe beyond doubt that an employee holds the right to a designation achieved at the time of initial employment or promotion rather than to any particular position or duties associated with that position.

19. Section 30 (Procedure for filling vacancies) be retained in full reflecting the concept that where duties are to be performed for more than six months, advertising should take place and a selection be made on merit and conducted through an open and transparent process. However, the specific requirements for advertising be reviewed to streamline and simplify the process.
20. Section 31 (Conditions for appointment &c.) be retained in full.

21. Section 32 (Appointments on permanent basis to be on probation) be amended to clarify that the Chief Executive may extend the probation to take into account absences from work.

22. Section 34(5) (Temporary and fixed period employment) be amended to allow Chief Executives to be provided with the ability to renew fixed period employment arrangements in accordance with conditions determined by the Commissioner for Public Employment. The terminology in this section be amended to reflect the tenure terminology suggested in Recommendation 17 above.

23. Section 34 (Temporary and fixed period employment) be amended to clarify explicitly that an employee is able to undertake multiple employment arrangements within the Northern Territory Public Sector.

24. Section 35 (Transfers) be retained in full.

25. Section 37 (Resignation) be retained in full.

26. Section 38 (Re-appointment of persons resigning to become candidates at elections) be amended to clarify that re-appointment can only occur in respect of the results of the election immediately following resignation.

Recommendations for Part 6 – Secondment and Redeployment

27. Section 39 (Chief Executives may make secondment arrangements) be amended to provide for a Chief Executive and another employer to enter into a mutually acceptable secondment agreement for a period of up to three years and that the existing section 40 (Procedure where arrangement ceases) be deleted.

28. Section 41 (Declaration of permanent employee to be potentially surplus to requirements), section 42 (Transfer of surplus employees) and section 43 (Redeployment and redundancy) be retained in full.

Recommendations for Part 7 – Inability

29. Part 7 (Inability) be retitled “Capability of Employees to Perform Duties” to provide a positive focus on the desired outcome of good performance with the inability and unsatisfactory performance provisions covering the default situation of an employee becoming unable to fulfil or incapable of performing his or her duties.
30. The Act contains specific provisions covering the development and implementation of performance systems which need to be upheld and consistently maintained by agency Chief Executives.

31. The Act contains specific provisions relating to:

- The obligations and responsibilities of Employees to perform their assigned duties to the best of their ability at all times and accept responsibility for their behaviour and decisions.

- The obligations and responsibilities of Agencies to establish and administer effective performance and development systems which are directed towards advancement of the objects of the Act, observance of the public sector principles and code of conduct and achievement of the agency’s designated role and objectives.

- The development of suitable performance systems to be integrated with an agency’s employment practices and inform its employment decisions relating to particular employees.

- The information gathered by any agency’s performance and development system to be used to inform any decision taken or proposed to be taken under this Act provided that it is relevant to the decision and the rules of natural justice are applied.

32. The Act contains clear expression of the actions a Chief Executive can take as a result of unsatisfactory performance or inability as being to suspend, reduce salary, demote, transfer or terminate the employment arrangement with the additional clarification that an employee can be directed to attend counselling, mediation or training.

33. All of the provisions of Part 7 (Inability) be reviewed and re-drafted to ensure consistency and best practice in dealing with unsatisfactory performance, however this may be caused.

34. The details of process in Part 7 (Inability) be reviewed and removed to Employment Instructions provided that this does not diminish the legal effectiveness of any decisions or actions taken.
35. The Act contains clear powers for Chief Executives, when dealing with employees who are unable to obtain and/or maintain qualifications, registration, licences or satisfy clearance requirements where this is fundamental to the nature of their employment in the Northern Territory Public Sector, to transfer the employee or terminate the employment relationship.

Recommendations for Part 8 - Discipline

36. Section 49 (Breaches of discipline) be retained in full.

37. The Act be amended to remove the current requirement for Chief Executives to consult with the Commissioner for Public Employment in making a decision under section 50 (Summary dismissal).

38. Prescriptive disciplinary processes be refined and dealt with through an Employment Instruction provided that this does not diminish the legal effectiveness of any decisions or actions taken.

39. The current penalties in section 51(10) (Procedure in respect of breaches of discipline) be amended to clarify the Chief Executive can demote, and/or direct an employee to attend counselling, mediation or training.

40. The current provisions on abandonment of employment be amended to enable a Chief Executive to terminate employment after 14 days provided that reasonable attempts have been made to locate and contact the employee and appropriate attendance at work should be contained in the Code of Conduct.

41. The Act be amended to enable Chief Executives to suspend employees for up to six months before having to seek the Commissioner for Public Employment’s approval to extend.

42. The Act be amended to provide Chief Executives with the authority to allow employees suspended without pay to access accrued recreation or long service leave, without affecting the suspension status, if the suspension without pay will result in financial hardship for the employee and his/her dependants.

Recommendations for Part 9 – Appeals and Review

43. The current general grievances process be retained with the added ability to review decisions relating to minor outcomes resulting from disciplinary or inability matters and that the notification process for these matters to be 14 days.
44. The current provisions regarding the Promotion Appeals Board and the Inability and Disciplinary Appeals Boards be deleted.

45. The functions of the current Promotions Appeals Board and Discipline and Inability Appeals Boards be combined and a new Northern Territory Public Sector Appeal Board established as follows:

**Northern Territory Public Sector Appeal Board**

The Board consists of:

- A chair appointed by the Commissioner for Public Employment – must be experienced and/or qualified to deal with appeal matters (but not necessarily a legal practitioner);

- A nominee of the Chief Executive of the agency in which the appellant is employed; and

- A nominee of the prescribed employee organisation (union).

**Appeal Procedures**

- An appeal may be by way of a review of all available evidence, not just evidence taken into account by the Chief Executive [as per current section 58(2)] of the Act.

- The procedure for the appeal is at the discretion of the Board but must observe the principles of natural justice and be conducted with as little formality and technicality and with as much expedition as a fair and proper consideration of the matter permits.

- A party to an appeal may appear personally or by an agent but not a person if that person has been instructed to act as the party’s lawyer in a manner which would be subject to the *Legal Profession Act* unless the Board determines that it would be in the best interests of the hearing to allow legal representation.

**Deciding the Appeal**

- For promotions, inability and discipline matters and any other termination related matter the Board may confirm the decision appealed against, set the decision aside and substitute another decision or return the issue to the decision maker with directions if necessary.
- For matters relating to disciplinary and inability outcomes the Board should only review and determine matters affecting remuneration, including termination; and

46. The current provisions of the Act be amended to clarify the ability of the Appeal Board to decide a hearing will not proceed if the employee is seeking redress through Fair Work Australia or under other court proceedings.

Recommendations for Part 10 - Miscellaneous

47. Sections 60 (By-laws), 63 (Performance of duties of statutory office holder in absence), 64 (Public Sector Consultative Council) and 65 (Regulations) of the Act be retained in full.

48. Section 61 (Work outside employment) be amended to clarify the employee is required to only notify the Chief Executive of the proposed work outside employment.

49. Section 62 (Work on public holidays) be deleted.

50. The Commissioner for Public Employment review the current constitution and function (as prescribed in the Regulations) of the Public Sector Consultative Council to ensure it meets current needs.

51. Section 64A (Protection from legal proceedings) be amended to afford protection to employees acting in the Northern Territory’s interests on either statutory or non-statutory boards, or companies incorporated under the Corporations Act.

52. Schedule 1 of the Act be amended to include the Commissioner for Health and Community Services Complaints to clarify the status of the Commissioner as an agency Chief Executive for the purposes of the Act.
2 PURPOSE

The review of the Public Sector Employment and Management Act (the Act) forms a major aspect of the Northern Territory Public Sector Reform and Revitalisation Package, approved by the Northern Territory Government in 2008 which resulted in the Northern Territory Public Sector Strategic Workforce Plan 2008 – 2011. Inherent in the reform agenda approved by the Government is the need to consider the legislation to determine whether it continues to provide a framework which facilitates the effective and efficient management of the Northern Territory Public Sector’s most important asset, its people, and to examine the alternative structural arrangements which any new legislation should embody. The Northern Territory Government has been clear in its intention that the review of the Act should be a thorough examination of the legislative framework to serve the Territory well into the future.
3 REVIEW PROCESS

3.1 REVIEW COMMITTEE

A Review Committee (the Committee) was established by the Minister for Public Employment to oversight the review process and to provide an independent report on the outcomes. The Committee is chaired by Mr Barry Chambers, a former Chief Executive in the Northern Territory Public Sector, who is joined by Mr Ken Simpson, Commissioner for Public Employment, and Ms Naomi Porrovecchio, former Regional Director of the Community and Public Sector Union.

3.2 CALL FOR SUBMISSIONS

Submissions for the review of the Act were publicly called for in December 2008 and closed on 31 March 2009. To assist potential submitters a discussion paper was prepared by the Committee and released at the time submissions were invited. A total of 45 submissions were received, each of which has been considered by the Committee. In order to maintain the transparency of the review most of the submissions were published on the website of the Office of the Commissioner for Public Employment. The Committee assessed submissions for publication based on the permission of the author, relevance to the review and confidentiality of information contained in the submissions.

3.3 INITIAL CONSIDERATIONS

3.3.1 Underlying Concepts

Central to the review of the Act, was consideration by the Committee of the underlying policy objectives and concepts contained in the current Act; and their continued relevance in the current public sector environment. The three primary objectives of the existing legislation considered by the Committee were as follows (as sourced from the Second Reading Speech introducing the Public Sector Employment and Management Bill in 1992):

1. To direct attention in key structural issues in the arrangements for the management of the Public Sector. It was designed to express in real terms the fact that employees in the Public Sector are ultimately employed by the Territory Government. In this respect the Act was intended to:

   (a) consolidate employment arrangements within the Northern Territory Public Sector to cover the vast majority of employees; and

   (b) detail respective functions of the Commissioner for Public Employment, as the deemed employer, and Chief Executive Officers to give real substance to the concept of letting the managers manage.
2. Establish comprehensive accountability measures including:
   (a) to make performance management and performance reporting a key feature of management arrangements; and
   (b) to introduce some very specific annual reporting requirements. The Act enshrined in legislation the concept and requirements of performance management.

3. To provide a framework for the key features of employment in the public sector; they being recruitment and promotion, transfer and redeployment, mobility and discipline and procedures for appeal.

The aim at the time the Act was introduced was to create provisions which were comprehensive and simple so that the rights and entitlements of employees and management respectively were unequivocal and clear.

In addition to the primary objectives, the Act:
   (a) Clarified the various forms of employment tenure available as being permanent, temporary and contract.

   (b) Determined that the primary basis on which vacancies were to be filled was merit. The incorporation of this principle in the Act was important in providing a positive environment for its protection and for proper consideration of equal opportunity issues.

   (c) Shifted the accountability arrangements relating to redeployment and retraining to ensure that Chief Executive Officers assumed primary responsibility in managing staff that may be potentially surplus. It was only when this responsibility had been properly discharged that recourse was to be had to the Commissioner and award provisions.

   (d) Instituted promotion, grievance and discipline appeals procedures which were seen to be practical, sensible, fair, efficient and effective.

Under the Act the subordinate legislation was intended to assume a more important role in providing flexibility to deal in different ways with issues as they arose. At that time the Employment Instructions represented an innovative approach to management within the legislative framework. The emphasis was to be on the application by Chief Executives of common sense in a framework of the principles and policies established either by the Act itself or through the interaction of the Commissioner with Chief Executives. This presented a level of guidance for employees and employers consistent with what they were used to, in moving from a prescriptive legislative base to a more flexible framework. Since then agencies have developed practices which are prescribed in Employment Instructions and also based on workplace culture and practice, and in 2009 they are looking for further
flexibility to deal with issues in an environment which is subject to far greater change than ever before.

Finally, a conscious decision was also taken at the time of introducing the Act not to establish a Senior Executive Service as it was considered unnecessary and potentially divisive. It was considered the principle objectives of a separate Senior Executive Service (contract employment based on performance, mobility and special development programs) could be achieved without the legislative and administrative burden that had been a feature of Senior Executive Service systems instituted elsewhere. The Committee continues to support this view.

In examining the above concepts the Committee was aware of the changes in the industrial relations environment which have since occurred, particularly the introduction of workplace bargaining since 1996.

Whilst there have been a number of minor amendments to the Act in the last 15 years, none have effected any fundamental change to the above concepts. Although many of the submissions commented on the ability to administer these concepts, and one or two proposed major amendments regarding the single employer concept, it is the view of the Committee that these concepts remain substantially intact and relevant both now and for the foreseeable future.

3.3.2 Submissions - Consideration of Issues by Part

In reviewing the proposals raised in the submissions a number of recurring themes became apparent to the Committee. These are summarised as follows:

- There is general support for:
  - broadening the merit principle to include diversity;
  - retaining the “single-employer model”;
  - relocating the Principles of Public Administration and Management, Human Resource Management and Conduct from the Regulations to the Act and reviewing them to ensure they remain contemporary;
  - the Act to be heavy on principles and light on prescription;
  - streamlining and review of inability, disciplinary and medical incapacity provisions;
  - appeal provisions to be retained “in-house” with the ability to limit forum shopping by employees;
  - a major review of subordinate legislation, particularly the Employment Instructions; and
• Agencies considered there should be more devolution of powers and functions to Chief Executives to ‘let the managers manage’ and decrease bureaucratic red-tape.

Many of the submissions raised issues primarily related to the administrative application of the provisions of the Act and subordinate legislation, matters related to details of process and some other issues that were related to the review but considered outside of the specific scope of the review. The Committee deemed the most appropriate way to consider the submissions was to deal with the related parts and sections of the Act, as per the public Discussion Paper. Specific consideration of the matters raised is dealt with under section 4 of this Report. Consideration at this level also took into account other jurisdictional comparisons where appropriate.

3.3.3 Australian Public Sector Legislative Reviews

In 2008 there were reviews of public sector legislation undertaken in South Australia, Queensland and New South Wales. Recommendations from the New South Wales review are still to be considered, the South Australian review has resulted in a revised Bill which is yet to be assented to, and the Queensland review resulted in a new Act which came into effect in July 2008.

Of note in each case was the incorporation of principles, objectives and/or values into the respective Acts. Other notable changes were the conferring of matters dealing with termination of employment to the state industrial relations tribunals under the Fair Work Scheme, the inclusion and/or re-writing of provisions to allow for greater mobility and redeployment of staff within their public services, and a change in focus from administrative process to outcome driven provisions regarding discipline, inability and performance management practices.

Many of these changes reflect conditions which have been enshrined in the current Act since its introduction in 1993 and in reviewing the reports and changes to other public sector legislation, the Committee was reminded time and again of the simplicity and effectiveness of the Act. Indeed the current Act is still highly regarded by other jurisdictions but the Committee believes that it can be further improved.

3.3.4 Impact of Federal and Other Legislation

The Committee was mindful of the constraints imposed on the Northern Territory Government under the Northern Territory (Self-Government) Act 1978. The Northern Territory (Self-Government) Act grants the Northern Territory Legislative Assembly powers to make laws in respect to public sector employment, and to the Commissioner for Public Employment to make determinations for establishing terms and conditions of employment for Northern Territory Public Sector employees. However the power to deal with matters pertaining to the relationship between employers and employees was retained by the
Commonwealth. Consequently, unlike the other Australian states, the Northern Territory has no general industrial relations powers and the principal body for dealing with industrial relations matters is that established under federal legislation. Significantly for the Northern Territory this means that it is automatically subject to any industrial relations reforms imposed by the Commonwealth.

It was therefore imperative for the Committee to consider the impact of changes resulting from the federal industrial relations reform and enactment of the new *Fair Work Act* which replaces the *Workplace Relations Act*. The Committee sought advice on the effects of the *Fair Work Act* on the Northern Territory Public Sector generally, and more specifically on the Act. The direct impact of the *Fair Work Act* on the current Act itself is negligible; however the Committee noted that amendments will need to be made during the drafting process to ensure consistency with the *Fair Work Act* in both the Act and the subordinate legislation, in particular the By-laws. Whilst there may be changes to the bargaining processes, these are not covered by the Act and are considered outside the scope of this report.

In considering the appeals process in relation to terminations the Committee was mindful of the fact that the *Fair Work Act* places greater emphasis on reinstatement rather than compensation and that an applicant for a hearing would be prevented from having the same matter heard in another forum. This is considered further in the section of the report dealing with appeals.

On a final note in relation to this matter, the Fair Work Regulations have recently been released. Based on a preliminary assessment there is no apparent effect on the Act, but there will be some effect on the subordinate legislation which will need to be considered.

### 3.3.5 Drafting and Legal Issues

As part of its review process, the Committee sought general advice from Parliamentary Counsel regarding current drafting practices and language. As there was strong support for much of the process detail to be removed from the Act particular attention was paid to the possible resulting implications. To this end, the Committee also sought general advice from the Department of Justice.

As a result of the discussions, the Committee understands that where the law is stated in general principles it may lead to uncertainty in interpretation and may be subject to interpretation through the courts and/or it is likely to result in a requirement for more detailed subordinate legislation. The Committee also recognises that while many of the submitters want the ability to be flexible in administering the provisions, some of the submitters actually called for more guidance in applying the provisions. While some of these issues can be dealt with through the drafting process and through Employment...
Instructions the Committee is keen for the Act to be as precise as possible to limit the need for further interpretation of the Act by courts and related bodies.

### 3.3.6 Legislative Structure

In its final considerations, the Committee turned to the structure and format of the current Act and reviewed the structural arrangements utilised in other jurisdictions. One of the many issues to arise through the review process was the perceived complexity of the current framework and the apparent requirement to refer to a number of pieces of legislation to undertake administrative actions in accordance with the Act.

On examination, the Committee is of the view that any significant reduction to the current Act would most likely require increasing the provisions in another piece of legislation. In reviewing other jurisdictions, the Committee found some jurisdictions have conditions of employment such as long service leave and recreation leave provisions contained in their Acts. Some Acts are heavily principled, the Regulations contain machinery matters and the guidelines are extremely comprehensive and long. Further some jurisdictions have conditions contained in their Workplace Agreements.

The Committee was also mindful of the changes in the industrial landscape since the introduction of the Act. As previously stated, workplace bargaining did not commence until 1996 and so from the commencement of the Act, Northern Territory Public Sector terms and conditions of employment were legislated through the By-laws or Award provisions.

Although it is now accepted practice for Workplace Agreements to include terms and conditions of employment the Committee noted that many of the By-law provisions are not covered in current agreements, and many of the agreements are not due to be renegotiated for at least another twelve months. Further the Committee was advised that there is a small percentage of Northern Territory Public Sector employees who do not fall under the coverage of any of the current Workplace Agreements, and therefore whose conditions are only provided through the By-laws. The Committee is of the view that the By-laws should be retained but amended and refined to reflect the Agreements where necessary. This should also allow agencies such as the Department of Business and Employment to more easily administer conditions of employment without the need to reference a variety of agreements as is the current case.

The Committee has not recommended reducing the number of legislative instruments, however it does recognise and supports the ongoing review of all of the subordinate legislation to ensure consistency and to reduce where possible the requirement for additional employment conditions to be determined or clarified at a later date.

Having reviewed the format of other public sector legislation, the Committee has made some recommendations to change the format of the current Act to increase the usability to the reader and the inclusion of additional provisions dealing specifically with performance...
and development. The Committee considered the South Australian Bill provided a good example of a format to follow in some areas although there are fundamental differences between the two jurisdictions.

There was widespread support for the Act to provide more focus on the Principles of Public Administration and Management, Human Resource Management and Conduct as the basis of employment in the Northern Territory Public Sector; and for less prescription and process detail on how human resource management should be administered. The Committee viewed this as consistent with the general theme of accountability being directed towards those who have more immediate responsibility for implementing the policy and service agenda of the Government of the day.

In view of the many issues raised in the recommendations the Committee was not able to form a view on whether the current Act should be amended or repealed and replaced by a new Act. This is largely a matter of drafting and can be determined at a later stage in the review process.
4 SPECIFIC CONSIDERATION OF THE ISSUES RAISED BY PART

4.1 PART 1 – PRELIMINARY

Purpose of the Act

The current Act does not contain any expressly stated objectives. Apart from clarifying the purpose of an Act, objectives can also be used in law to assist with interpreting provisions of the Act. While a number of submissions support the inclusion in the Act of objectives and principles, very few provided any detailed examination or suggestion of the nature or content of any such provisions. As an examination of the various Australian and New Zealand public sector ethical frameworks had already been undertaken for a recent Public Service Commissioners’ Conference, the Committee examined the results, which attempted to define the framework under the following basic components:

- **Values**: the organisational principles that set out how the public sector is expected to serve the Government, Parliament and the community;
- **Management principles**: the organisational principles that describe how the public sector will be managed and administered;
- **Employment principles**: organisational principles that describe how staff will be managed and treated; and
- **Code of conduct**: the ethical standards required of individual public sector employees.

It was clear to the Committee that despite the range of approaches, terminologies and applications used by the various jurisdictions, the basic fundamentals are already contained in the Principles of Public Administration and Management, Human Resource Management and Conduct as defined in the Regulations. However, the Committee considers these principles would be enhanced by the inclusion of additional statements elaborating on:

- the concept of collaboration between agencies in pursuing the Government’s policy and service agenda;
- the need for agencies to be responsive to the changing needs of the Government and the community;
- the need for the Public Sector to be innovative in pursuing the Government’s policy and service agenda; and
- the concept of mutual obligation including the need for employees to perform to the best of their ability and accept responsibility for their behaviour and decisions.
The Committee is of the view that the inclusion of defined objectives and principles in the Act in a prominent and up front manner is consistent with the importance of their role in underpinning the main purpose of the Act.

However the Committee considers that the specific details of the objectives and principles can best be resolved by the Commissioner reviewing other legislation and providing a report to the Minister to form the basis for legislated amendment.

Having recommended the inclusion of objectives and principles in the Act, the Committee believes it is also appropriate to review the whole of section 3 to determine if existing definitions require amendment or new definitions need to be included; and to ensure consistency with and appropriate referencing of other recently introduced legislation such as the Public Information Disclosure Act, Care and Protection of Children Act, Information Act and Fair Work Act.

The Committee noted the majority of submissions supported the broadening of the definition of the merit principle to include diversity. Along with this support, many expressed a desire for some guidance as to the impact of this inclusion in selection processes. The Committee recommends the amendment of the definition of merit to include diversity, and that the Merit Selection Guidelines should be updated to enable the adequate and proper use of the broadened definition.

In conjunction with broadening the definition of Merit to include diversity, the Committee recommends the Act should also be amended to permit the section 57 “Special Measures” provisions of the Anti-Discrimination Act to be utilised in the Northern Territory Public Sector. This will allow agencies to develop recruitment programs targeted at specific equal employment opportunity groups who might not otherwise be selected for a job under the merit principle. It appears to the Committee to be an anomaly that the section 57 provisions of Anti-Discrimination Act apply to the wider Northern Territory community, but do not apply to the largest single employer within that Community, and that in enabling the use of these provisions, the Northern Territory Public Sector can better reflect the diversity of the community that it serves.

Specific Minor Issues

One of the submitters recommended that the terminology of “Chief Executive Officer” used in the Act be amended to the currently used term “Chief Executive”. The Committee believes that adopting this proposal would clarify the matter and is consistent with terminology adopted in other jurisdictions which have recently reviewed their legislation. The balance of this report uses the term “Chief Executive”.

The Office of the Commissioner for Public Employment proposed that Section 3 be amended to include a stipulation that minor technical errors in administering a provision of
the Act will not affect the process or invalidate the action. The Committee supports this proposal to ensure that reasonable and due process is not frustrated, subject to the additional qualification that the action referred to has been undertaken in accordance with the principles of the Act and in good faith.

Some submissions proposed, either directly or indirectly, that the Act be amended to provide for the achievement of wider government and community objectives such as sustainable development. The Committee believes that this approach could lead to the primary purposes of the Act being obscured without adding any improvement to the achievement of other policy objectives of the Government, as these matters are specifically covered in other legislation and policy direction which applies to the whole Northern Territory Public Sector.

Recommendations for Part 1 – Preliminary

The Committee recommends that:

1. A new section defining the objects of the Act be included based on recommendations by the Commissioner for Public Employment.

2. The current Principles of Administration and Management, Human Resource Management, and Conduct, with amendments to include the concepts of collaboration, responsiveness, innovation, and mutual responsibility, be reviewed and included in the Act.

3. Section 3 (Interpretation) of the Act be reviewed to ensure consistency with any new definitions and other related legislation.

4. The Act be amended to clarify that minor technical errors in administering a provision of the Act will not affect the process or invalidate any action taken, provided that the action referred to has been undertaken in accordance with the principles of the Act and in good faith.

5. The definition of merit be amended to include diversity, and the Merit Selection Guidelines be updated to enable the adequate and proper use of the broadened definition.

6. The Act be amended to permit the section 57 “Special Measures” provisions of the Anti-Discrimination Act to be utilised in the Northern Territory Public Sector.

7. The Act to be amended to replace the term “Chief Executive Officer” with “Chief Executive”.

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4.2 PART 2 – ADMINISTRATION

There was very little comment raised in the submissions regarding this Part of the Act. The Northern Territory Police Association sought to clarify in the Act the distinct separation of the powers and functions of the Minister and Commissioner for Police and the Minister and Commissioner for Public Employment. The Committee believes that this is a matter of government policy and no specific amendments to the Act are required to deal with the matters raised.

Another submission raised the possibility of re-structuring the Act so the responsibilities of the Minister, Commissioner and Chief Executives are immediately sequential. The Committee believes the current structure relating to these matters is appropriate.

None of the submissions proposed changes to the specific provisions relating to the Minister’s duties. The Committee believes no changes should be made to these duties as they provide a useful mechanism for the Government to continuously review and improve the performance of the Northern Territory Public Sector and they should remain.

No comments were received in relation to section 7 – Establishment, Change of Name and Abolition of Agencies. It is the view of the Committee that no changes are required to these provisions unless otherwise required by legislative drafting or for reasons unforseen by the Committee that relates to implementing the recommendations.

Recommendations for Part 2 - Administration

The Committee recommends that:

8. The intent of Part 2 (Administration) of the Act be retained in full.
4.3 PART 3 – COMMISSIONER FOR PUBLIC EMPLOYMENT

The majority of submissions supported the concept of the ‘single employer’ model for the Northern Territory Public Sector.

The Committee believes this concept should be retained as it recognises the relatively small size of the Northern Territory Public Sector in comparison to other jurisdictions; allows the Government to contain costs; and ensures sufficient consistency of employment conditions across the Northern Territory. It also enables specific terms and conditions of employment to be determined to address issues such as skills shortages and incentives for work in remote areas which are common to many agencies.

The ‘single employer’ model also supports the concept of a career in the Northern Territory Public Sector through enhanced, seamless employee mobility between agencies as required, something which in other jurisdictions has needed to be dealt with through specifically drafted provisions.

In the Committee’s view there is considerable benefit in having common terms and conditions to support mobility and equity, and in matters relating to the Government’s wages policy and salary matters, including recruitment, retention, reward and recognition incentives, being retained centrally. The existence of the Office Commissioner for Public Employment gives practical effect to this concept.

The Committee considers the current provisions of Part 3 of the Act are fundamentally sound, and in particular the provision provides considerable flexibility for the Northern Territory Public Sector to readily adapt itself to changing circumstances without recourse to legislative or regulatory action.

The majority of comments in submissions on this Part centred on the extent to which the Commissioner delegated functions and powers to agency Chief Executives. There was a general desire that the Commissioner’s role should be to set the employment framework with agency Chief Executives managing the day to day employment relationship and accountability resting with the decision maker who has primary responsibility for delivering the Government’s policy and service agenda.

The Committee is of the view that it is important the power to delegate exists, but it is not in a position to enter the debate on the extent of delegation. That is in reality, a matter for the Commissioner and agency Chief Executives to resolve. However the Committee supports the principle that, as far as is practical and prudent, and consistent with the single employer model and the principles of the Act, accountability should sit with the primary decision maker. This matter can of course be addressed under the current Act if thought necessary and indeed the Committee was advised of some recent changes to delegations.
The Committee notes that several jurisdictions have devolved the ‘employer’ function to agencies; and are now having to deal with the problem of significantly different employment arrangements for employees at the same designation in different agencies. Such a change can not be readily undone and the Committee strongly recommends the Northern Territory does not adopt this model.

Specific Issues Arising from Submissions

Two specific matters were raised in submissions that warrant comment.

The Office of the Information Commissioner raised several issues around the compatibility of the Act and the Information Act and the Public Interest Disclosure Act. The issues related to the need for public sector practices to comply with Information Privacy Principles and how improper conduct that comes to light is dealt with under both the Act and Public Interest Disclosure Act, and the relationship between the two Acts. The Committee recognises the need for compatibility between legislation which impacts on employment and suggests this is a matter which can be best addressed during the drafting process.

Additionally the Office of the Commissioner for Public Employment, in its submission, pointed out that from time to time the question has arisen as to whether determinations issued by the Commissioner can have effect retrospectively. In practice they have been issued at times to have retrospective effect. The Committee agrees that section 14 of the Act should be amended to confirm this is the case.

Recommendations for Part 3 – Commissioner for Public Employment

The Committee recommends that:

9. Part 3 (Commissioner for Public Employment) be amended if necessary to ensure compatibility with the Information Act, the Public Interest Disclosure Act and the federal Fair Work Act.

10. Section 14 (Powers of Commissioner), be amended to make it clear that determinations by the Commissioner may apply retrospectively.

11. The Commissioner for Public Employment ensures that all delegations to Chief Executives are reviewed as necessary pending any future amendment to the Act.
4.4 PART 4 – CHIEF EXECUTIVES

The relationship between the Commissioner for Public Employment and a Chief Executive is fundamental to the concept of the Northern Territory Public Sector single employer model in which Chief Executives are accountable to their Ministers for the performance of their agencies in meeting the Government’s objectives and implementing the policy and service agenda. In particular, the interaction between sections 23 and 24, where a Chief Executive’s dealings with employees can be restricted by the contents of Employment Instructions issued by the Commissioner for Public Employment is critical and was, not surprisingly, the subject of direct and indirect comment in a number of submissions.

The Committee considers that the ability of the Commissioner for Public Employment to issue Employment Instructions is entirely consistent with the single employer model and that this position should remain unchanged. The issue is how far these Employment Instructions go in enabling Chief Executives a sufficiently wide discretion in managing employee relationships consistent with the accountability and function requirements specified in sections 23 (Accountability of Chief Executives) and 24 (Functions of Chief Executives) and the powers provided by sections 25 (Powers of Chief Executives), 26 (Chief Executive may employ number of employees necessary) and 27 (Delegation by Chief Executives) of the Act.

The content of the submissions from agencies was generally of the view that the current Employment Instructions made in accordance with section 16 (Employment Instructions) of the Act are too detailed and prescriptive and unreasonably constrained Chief Executives in performing their legislated functions.

The Committee recognises the fact that since 1993 when most of the Employment Instructions were made, the expectation of Chief Executives to respond quickly to changing circumstances and implement Government policy has significantly increased and greater flexibility in managing employees to meet these needs is now required.

The Committee supports the view that some of the current Employment Instructions are overly prescriptive and that more reliance should be placed on Chief Executives complying with the agreed principles in the Act, particularly the provision of natural justice, in regard to their dealings with employment matters.

However at this stage it is not possible for the Committee to determine specifically what might be an “unreasonable” constraint or how greater flexibility might be provided given the wide range of matters covered by the current Employment Instructions. The Committee considers that ultimately this is a matter for consultation between the Commissioner for Public Employment and Chief Executives collectively and in some matters, the prescribed employee organisations. The Committee noted that section 16(1) already provides that the Employment Instructions be “not inconsistent” with the Act and therefore a review of the
Employment Instructions should be undertaken in full recognition of the revised principles recommended above; and the high level of accountability to Ministers placed on Chief Executives by the Act.

**Appointment and Termination of Chief Executives**

The provisions relating to the appointment and termination of Chief Executives in sections 19 (Chief Executives) and 20 (Termination of appointment) was also the subject of some comment.

It was suggested that it was inconsistent for the Administrator to appoint a Chief Executive but termination could be done in a variety of ways, including at any time by the appropriate Minister.

The Committee believes there is merit in the view that the appointment and termination of a Chief Executive should be by the same party. In reality it is understood the current practice is for the Chief Minister to make the final decision on the appointment and termination of a Chief Executive and the Committee believes the Act should be amended to reflect this situation.

**Specific Issues Arising from Submissions**

It was suggested that an amendment to section 23(1) (Accountability of Chief Executives) regarding the accountability of a Chief Executive be made. The Committee believes that some amendment to the language to accord with contemporary strategic public sector management practice is appropriate and that the requirement for “… proper, efficient and economic administration” be replaced by a requirement to comply with the principles of the Act and provide strategic leadership to the Agency and effective delivery of services to the community. This would be consistent with other proposals to minimise the degree of prescription provided in the Act and subordinate legislation.

A proposal to amend section 27 (Delegation by Chief Executives) to provide beyond doubt the power for a Chief Executive to delegate a function to a person as well as an employee is supported by the Committee given that a person engaged to undertake a role within an Agency may on occasions not meet the strict definition of “employee” under the Act.

Other proposals to extend the reporting requirements to include reference to social issues and ecological sustainable development were seen to be extending the role of this Act beyond its principal objective of dealing with the employment relationship. The Committee believes that there is ample provision in other more relevant legislation and through Government policy direction for reporting on any specific matters to be addressed. However the Committee considers it appropriate that section 28(2)(f) (Reports by Chief Executives) be amended to provide that an Agency is required to report on its compliance with the principles of the Act.
Recommendations for Part 4 – Chief Executives

The Committee recommends that:

12. An extensive review of Employment Instructions be undertaken by the Commissioner for Public Employment in consultation with Chief Executives and, where relevant, employee organisations to ensure that unnecessary prescription is eliminated and consistency with the high levels of accountability and principles in the Act is achieved.

13. Section 19(2) (Chief Executives) and section 20 (Termination of appointment) to be amended to provide for appointment and termination of Chief Executives by the Chief Minister.

14. Section 23(1) (Accountability of Chief Executives) of the Act be amended to make a Chief Executive responsible for compliance with the principles of the Act and for providing strategic leadership to the Agency and effective delivery of services to the community.

15. Section 27 (Delegation by Chief Executive) of the Act be amended to provide beyond doubt that a Chief Executive may delegate his or her functions and powers to a person as well as an employee.

16. Section 28(2) (Reports by Chief Executives) be amended to require an Agency to report on its compliance with the principles of the Act.
4.5 PART 5 – APPOINTMENT, PROMOTION, TRANSFER AND RESIGNATION

As expected this Part of the Act drew substantial comment from submitters given the high level of activity and personal interest in these matters.

Nature of Employment

A number of agencies suggested changes to the terminology associated with the nature of employment, in particular the notion that ‘permanency’ implies a job for life, irrespective of job performance. In addressing these issues the Committee formed a view that it would be useful and reflective of current employment practice to change the terminology of “permanent” to “ongoing”, “temporary” to “fixed term”, and “appointment” to “employed” in section 29(3) (Chief Executives to appoint, promote and transfer). Such a change would require amendment to a number of sections in the Act to ensure consistency.

Many of the agencies also expressed concern about the preconception that employees “own” their positions and can only be “unattached” from their position by mutual agreement. The perceived impact is that it can make it difficult to backfill positions when the occupant is on long term leave, or temporary promotion or transfer, particularly to another agency, to undertake other duties. In examining the wording of the current Act the Committee considered there may be some potential conflict between the provisions of section 24 (Functions of Chief Executives) where a Chief Executive has the functions (subject to Employment Instructions) to;

- assign to and vary designations of employees (ie employment level) subject to some conditions, and

- assign duties to be performed by each employee;

and the provisions of section 29(1) (Chief Executives to appoint, promote and transfer) where a Chief Executive may appoint, promote or transfer an employee to perform duties.

The Committee is of the view that the Act requires amendment to clarify that employees only have an ongoing right to hold a designation that is associated with the position to which they are initially appointed or promoted but subsequent to this, the duties they perform are entirely at the discretion of the Chief Executive provided that the principles and other provisions of the Act are complied with.

The Committee believes that this approach is entirely consistent with a single employer model and should be seen as enhancing employment in the Northern Territory Public Sector as a career and provide substantial flexibility to agencies in meeting operational requirements. The clarification of employment practices associated with this distinction should go a long way towards remedying the current difficulties associated with backfilling long term vacancies. This may require some clarification in an appropriate Employment
Instruction but as noted earlier, care should be taken to avoid too much prescription in what is essentially a clear distinction.

**Filling of Vacancies**

Some of the agencies commented that the current requirement in the Act to advertise all vacancies in which duties which are to be performed for a period exceeding six months, is bureaucratic, cumbersome and restrictive. There was also some suggestion to allow for automatic promotion subject to fulfilling specific criteria. In considering this issue the Committee was of the view that fundamental to applying the concept of the merit principle was the requirement for merit to be determined through an open and transparent process. The advertising of vacancies affords all interested candidates the ability to apply and be considered appropriately, maximises the pool of meritorious candidates from which to select, and supports the concept of a career in the Northern Territory Public Sector.

The Committee also considers that an open and transparent process should be “the norm”. Having said that, the Committee does recognise there are some circumstances that may justify by-passing this requirement, and there are already mechanisms which exist in the Act to allow this to occur where properly validated.

Other issues raised in relation to this provision regarded addressing the ability to broadband positions for advertising and to retain a pool of applicants for more than six months. The Committee considered these matters pertain to administrative policy and procedure and the current Employment Instructions and Advertising policies should be reviewed and streamlined to allow greater efficiencies in the process.

**Probation**

A number of submissions contained varying views regarding the need for and application of probation periods within the Northern Territory Public Sector. Some suggested probation should apply to both permanent (ongoing) and temporary (fixed term) employment, some suggested if performance management and development were properly undertaken there would be no need for probation periods and others suggested the probation period should be lengthened.

In considering this matter in some detail the Committee noted that the new federal *Fair Work Act* which applies to all public and private sector employees in the Northern Territory does not provide any probationary period but that recourse to the unfair dismissal provisions (for large employers) only occurs after six months.

Probation does provide an opportunity for the agency to assess whether a new employee is satisfactory and for termination to occur simply where warranted, subject to the potential involvement of the Commissioner for Public Employment. It could be argued that interview panels may be inclined to be less than thorough in making their initial recommendation to
appoint if they feel a mistake can be addressed during the probation period. The alternative argument is that the complete absence of a probation period and reliance on the ongoing management of an employee’s performance and monitoring of his or her ability to perform the assigned duties at the designated level, as envisaged by Part 7 (Inability) of the Act, is not only desirable but should be sufficient.

The Committee also considered the issue of whether a probation period should apply to a temporary employment arrangement as it was pointed out that in some cases persons initially employed on this basis were subsequently appointed on a permanent basis where probation applies unless otherwise exempted under the provisions of section 32(2) (Appointments on permanent basis to be on probation).

On balance the Committee formed the view that the continued retention of a probation period was beneficial but could be enhanced by requiring a proactive induction and performance management system during this period. This could be strengthened by appropriate amendments to the relevant Employment Instruction. The Committee did not see a benefit in extending the probationary period to cover temporary employment noting that the principles of natural justice apply to any decision to terminate the contract.

In cases that justify longer periods of probation due to employees working for long periods without direct supervision, the Committee believes that the current powers of the Commissioner for Public Employment under section 32(4) are sufficient and that agencies should make their case to the Commissioner for Public Employment if they believe the circumstances justify a longer probation period.

In relation to the probation provisions a number of submitters also suggested that the Act should be amended to clarify that the probation period will continue until the appointment has been confirmed in writing by the Chief Executive or delegate to ensure that poorly performing probationers are not appointed through administrative oversight. The Committee is of the view it is up to the Agency to manage the probation processes in a timely manner. Further to this it was also suggested the Act should specify that where an employee is absent from the workplace, the probation period should be extended accordingly to allow the relevant agency to undertake a proper assessment of the employees performance and suitability for the job. The Committee believes there is merit in recommending the Act be amended to clarify that the Chief Executive may extend the probation to take into account absences from work.

Temporary and Fixed Period Employment

The provisions of this section detail the ability of the Commissioner for Public Employment to determine terms and conditions for temporary and fixed period employment arrangements, including those for casual employees and executive contract officers.
In large part the primary concern regarding this section related to providing the ability for Chief Executives to renew fixed term arrangements without reference to the Commissioner for Public Employment. In considering the comments the Committee noted the recent delegation of power from the Commissioner for Public Employment to Chief Executives giving them the discretion to renew a contract on more than one occasion.

The Committee considered the responsibility of determining employment conditions should appropriately remain with the Commissioner for Public Employment as the single employer, however section 34(5) (Temporary and fixed period employment) should be amended to allow Chief Executives to be provided with the ability to renew fixed period employment arrangements in accordance with conditions determined by the Commissioner for Public Employment. The Committee also considered the terminology in this section should be amended to reflect the tenure nomenclature suggested above.

There were suggestions by at least two submitters that the Act should be amended to clarify explicitly that an employee is able to undertake multiple employment arrangements within the Northern Territory Public Sector, that is to work in two or more jobs which are in different agencies. Such arrangements more commonly occur in remote locations or regional centres where it can be difficult to attract or recruit employees. The Committee supports this recommendation.

**Other matters**

There were no specific comments raised in relation to the transfer provisions of the Act. Having reviewed some of the other transfer arrangements legislated for in other public sector jurisdictions, the Committee suggest this may be reflective of the simplicity of the provisions and the ease with which they are applied in the Northern Territory Public Sector. As such the Committee recommends these provisions should be retained in full.

There was also very little comment regarding the resignation provisions except to suggest they are no longer relevant and should be removed. Although the Committee considered the possibility of removing the resignation provisions, in keeping with the natural concept that the Act deals with the way in which employees enter the Northern Territory Public Sector, how they are or can be dealt with during their employment and how they leave the Northern Territory Public Sector, which may be through termination, resignation or through the natural expiry of any fixed term arrangements; the Committee considered it appropriate to retain the provision as is.

There were a couple of comments regarding the re-appointment of persons resigning to become candidates at election. One suggested that the provisions need to be clarified to ensure that re-appointment only operates to provide a right to a former employee in respect of the result of the election immediately following resignation. Once a former
employee has been “duly elected” the right to re-appointment should cease to exist. The Committee concurs with this suggestion.

The second comment suggested that there are difficulties in managing operational requirements for employees who may wish to campaign for pre-selection before the election is called. The Committee considered this issue is an operational one which should more appropriately be dealt with by agencies and if necessary through an Employment Instruction.

Recommendations for Part 5 – Appointment, Promotion, Transfer and Resignation

The Committee recommends that:

17. Section 29 (Chief Executives to appoint, promote and transfer) be retained in full with changes to terminology to redefine the basis of employment as ongoing or fixed term and that the terminology of “appointment” is reviewed in the drafting process.

18. The Act be amended to prescribe beyond doubt that an employee holds the right to a designation achieved at the time of initial employment or promotion rather than to any particular position or duties associated with that position.

19. Section 30 (Procedure for filling vacancies) be retained in full reflecting the concept that where duties are to be performed for more than six months, advertising should take place and a selection be made on merit and conducted through an open and transparent process. However, the specific requirements for advertising should be reviewed to streamline and simplify the process.

20. Section 31 (Conditions for appointment &c.) be retained in full.

21. Section 32 (Appointments on permanent basis to be on probation) be amended to clarify that the Chief Executive may extend the probation to take into account absences from work.

22. Section 34(5) (Temporary and fixed period employment) be amended to allow Chief Executives to be provided with the ability to renew fixed period employment arrangements in accordance with conditions determined by the Commissioner for Public Employment. The Committee also considered the terminology in this section should be amended to reflect the tenure terminology suggested in Recommendation 17 above.

23. Section 34 (Temporary and fixed period employment) be amended to clarify explicitly that an employee is able to undertake multiple employment arrangements within the Northern Territory Public Sector.
24. Section 35 (Transfers) be retained in full.

25. Section 37 (Resignation) be retained in full.

26. Section 38 (Re-appointment of persons resigning to become candidates at elections) be amended to clarify that re-appointment can only occur in respect of the results of the election immediately following resignation.
4.6 PART 6 – SECONDMENT AND REDEPLOYMENT

Division 1 - Secondment

There was minimum comment made by submitters in relation to the provisions of this Division of the Act. The comments received pertained to the complete removal of the provisions, or amendment to ensure they support greater exchanges between the public and private sectors.

The Committee regarded it as appropriate to retain in the Act the legislative power for a Chief Executive to enter into a secondment arrangement. Given that any secondment arrangement would almost certainly be on a voluntary basis, the only requirement is for a negotiation of mutually acceptable arrangements between the Chief Executive and the employee to cover off related issues including placement upon return. As such the Committee believes that the retention of a power for a Chief Executive and employee to enter into a secondment arrangement on mutually acceptable terms is all that is required and that the provisions in the Act pertaining to the return of the employee can be removed. Further, if upon an employee’s return an unresolved dispute emerges, then the employee has access to the grievance provisions of the Act if necessary.

Any further requirements in respect of these arrangements could be adequately, and more appropriately, dealt with by an Employment Instruction.

Division 2 - Redundancy

Division 2 of this part of the Act relating to redeployment and redundancy attracted more substantial comment from agencies. The issue and management of redeployment as provided for in section 43 has also been raised as problematic. On reviewing the specific provisions of this Division, as well as those within the schedules to the various workplace agreements which refer to these provisions, the Committee determined there was still a necessity for the Act to provide Chief Executives with the power under section 41 (Declaration of permanent employee to be potentially surplus to requirements) to declare an employee as potentially surplus; and the power under section 42 (Transfer of surplus employees) to transfer an employee to other duties without reference to the merit principle.

In relation to section 43 (Redeployment and redundancy), although Chief Executives are responsible for the management of potentially redundant employees the Committee felt that the single employer model still requires the ability for the Commissioner for Public Employment to have a final say on whether a termination under the redundancy provisions of awards and agreements should proceed. Additionally the Committee recognises that it will not always be possible or even desirable to retrain and/or redeploy some highly specialised skilled individual employees, and this needs to be considered in light of any “no forced redundancy” policy of the Government of the day. In the event that an employee
remains dissatisfied with the redundancy and termination process they will still retain the right of appeal to an independent appeal body.

Recommendations for Part 6 – Secondment and Redeployment

The Committee recommends that:

27. Section 39 (Chief Executives may make secondment arrangements) be amended to provide for a Chief Executive and another employer to enter into a mutually acceptable secondment agreement for a period of up to three years and that the existing section 40 (Procedure where arrangement ceases) be deleted.

28. Section 41 (Declaration of permanent employee to be potentially surplus to requirements), section 42 (Transfer of surplus employees) and section 43 (Redeployment and redundancy) be retained in full.
4.7 PART 7 – INABILITY

There was a great deal of comment from submitters regarding Parts 7 (Inability) and 8 (Discipline) of the Act. Specifically, many submitters expressed frustration with the practical application of and the perceived disconnect between the inability, medical incapacity and discipline provisions. This becomes even more apparent when referring to the relevant Employment Instructions.

Many of the agencies also commented on the perception that the Act favoured the rights of employees over employer requirements to achieve outcomes and thus any actions taken by the agency to address issues, particularly regarding performance of duties, often result in frustration for both the manager and employee involved, and have a significant impact on the surrounding work unit. On the other hand, employees feel poorly treated when performance issues are suddenly raised during formal performance feedback processes, and there have been no previous indicators of concerns about an employee’s performance.

The Committee felt there should be a more positive focus on the obligations of both the employer and the employee in promoting and achieving acceptable levels of performance and that it would be useful to change the title of this section to “Capability of Employees to Perform Duties” to express this focus. The Committee also considered performance capability should be an integrated system:

- emphasising mutual responsibilities and principles of conduct;
- emphasising the development of suitable performance systems to be upheld and maintained within agencies and expression of what they are designed to achieve; and
- clarifying in simple and contemporary terms the various performance issues, how they can be addressed and what outcomes can be achieved.

The Committee believes that while the current provisions do allow the issues to be addressed, there is a lack of clarity in the terminology expressing the performance issues and the current structure of the provisions does not easily lend itself to use.

As such, the Committee is of the view this Part of the Act should be more explicit in detailing the obligations of both the employer and employee in promoting and achieving acceptable levels of performance and in forming a cohesive and cooperative relationship necessary to achieve required agency outcomes and quality service to the community. This should be reflected in the performance systems established by the agency Chief Executives and which should allow:
• the individual requirements of employees to be considered when setting and reviewing training and development goals to achieve both their career goals (for which ultimately the employee is responsible) and specific job goals (for which both the employee and employer are responsible);

• formal setting of shared objectives of the agency and individual in achieving Government objectives;

• an environment in which to communicate constructive and fair feedback in terms of meeting these goals and objectives;

• communication of desired and required training needs to achieve current goals and support where possible in the achievement of the individual’s career aspirations.

This Part should also then provide an agency with the ability to deal with issues where the desired outcomes and objectives which have been discussed and reviewed cannot be met due to:

• unsatisfactory or incompetent performance; and/or

• inability for reasons due to medical, physical or psychological incapacity to perform duties, or loss of an essential qualification, licence or registration or where the employee fails to satisfy clearance requirements of the job; and/or

• inappropriate employee conduct (to be dealt with through the discipline process).

This Part should then describe unsatisfactory performance and inability, and provide the relevant powers or actions that can be used to determine the nature of the performance issues (ie. investigate, assess through medical or other means) and provide the actions that a Chief Executive can take during and following a decision that a performance issue exists. The Committee will need to defer to the skill of the drafters in expressing these concepts in real terms.

However the Committee thought the proposed approach being considered in the 2008 South Australian Public Service Bill appears to deal with this issue in a clear and straightforward manner. The Bill clearly states through the principles the responsibilities of the agency in relation to performance management and development. The relevant section is as follows:

“7 – Public sector performance management and development

(1) Each public sector agency must establish and administer effective performance management and development systems in respect of the employees of the agency.
(2) Performance management and development must be directed towards advancement of the objects of this Act and observance of the public sector principles and code of conduct.

(3) Performance management and development must be integrated with the agency’s employment practices and inform its employment decisions relating to particular employees.

(4) Each public sector agency must make information about its performance and development system available to employees of the agency.”

The Committee is further of the view that employees’ responsibilities in relation to performance should be spelt out either in the principles or through the code of conduct and should cover the responsibility to perform to a standard that is satisfactory in the opinion of the agency Chief Executives, to accept responsibility for their decisions and actions, to make themselves available and willingly participate in performance management activities and professional development in order to enhance their work performance, career and service to the community.

The Committee is also of the view that in dealing with unsatisfactory performance and inability the Act should merely consider the broad principles to be followed with the detail, to the extent necessary, contained in the Employment Instructions. Those broad principles are the natural justice principles that:

(a) The Chief Executive should have good reason before suggesting an employee is performing to an unsatisfactory standard;

(b) The employee needs to be advised and given an appropriate time to respond; and

(c) The Chief Executive should consider the response before making a decision.

This Part of the Act should also include the actions open to the Chief Executive where an employee’s performance is considered unacceptable or below the required standard. The current actions are to reduce salary, transfer or terminate the employment arrangement and the Committee believes this should remain the case.

The Committee considered that the current inability provisions should be limited to dealing with the inability of an employee to perform duties on the grounds of medical and physical incapacity and/or loss of essential qualification(s) or licence(s).

In the circumstances of dealing with medical or physical incapacity to perform duties, whether it be permanent or temporary, the Act should allow the Chief Executive to investigate the matter as appropriate, for the employee to have access to the outcomes of any medical assessment required, and the Chief Executive should be able to determine
the most appropriate outcome for the employee and agency based on the information available.

In relation to dealing with loss of an essential qualification or licence, the Act should ensure the broad principles of natural justice are applied, the Chief Executive should explain the grounds pertaining to the inability to the employee, the employee should have the opportunity to respond and the Chief Executive should consider the employee’s response.

The current actions are to suspend, reduce salary, demote, transfer or terminate the employment arrangement and the Committee believes this should remain the case with the additional provision that an employee can be directed to attend counselling, mediation or training.

The Department of Education suggested that particular attention should be paid to dealing with employees who are unable to obtain and/or maintain clearances to work with children. The Committee considered the issue raised had wider application and was broader than the requirement arising from the Care and Protection of Children Act. With that in mind the Committee recommends the Act be amended to provide clear powers for Chief Executives when dealing with employees who are unable to obtain and/or maintain qualifications, registrations, licences and/or satisfy clearance requirements where this is fundamental to the nature of their employment in the Northern Territory Public Sector, to transfer the employee or terminate the employment relationship.

Recommendations for Part 7 – Capability of Employees to Perform Duties

The Committee recommends that:

29. Part 7 (Inability) be retitled “Capability of Employees to Perform Duties” to provide a positive focus on the desired outcome of good performance with the inability and unsatisfactory performance provisions covering the default situation of an employee becoming unable to fulfil or incapable of performing his or her duties.

30. The Act contains specific provisions covering the development and implementation of performance systems which need to be upheld and consistently maintained by agency Chief Executives.

31. The Act contains specific provisions relating to:
   - The obligations and responsibilities of Employees to perform their assigned duties to the best of their ability at all times and accept responsibility for their behaviour and decisions.
• The obligations and responsibilities of Agencies to establish and administer effective performance and development systems which are directed towards advancement of the objects of the Act, observance of the public sector principles and code of conduct and achievement of the agency’s designated role and objectives.

• The development of suitable performance systems to be integrated with an agency’s employment practices and inform its employment decisions relating to particular employees.

• The information gathered by any agency’s performance and development system to be used to inform any decision taken or proposed to be taken under this Act provided that it is relevant to the decision and the rules of natural justice are applied.

32. The Act contains clear expression of the actions a Chief Executive can take as a result of unsatisfactory performance or inability as being to suspend, reduce salary, demote, transfer or terminate the employment arrangement with the additional clarification that an employee can be directed to attend counselling, mediation or training.

33. All of the provisions of Part 7 (Inability) be reviewed and re-drafted to ensure consistency and best practice in dealing with unsatisfactory performance, however this may be caused.

34. The details of process in Part 7(Inability) be reviewed and removed to Employment Instructions provided that does not diminish the legal effectiveness of any decisions or actions taken.

35. The Act contains clear powers for Chief Executives, when dealing with employees who are unable to obtain and/or maintain qualifications, registrations, licences and/or satisfy clearance requirements where this is fundamental to the nature of their employment in the Northern Territory Public Sector, to transfer the employee or terminate the employment relationship.
4.8 PART 8 - DISCIPLINE

Most of the submissions made in relation to the discipline provisions argued that the existing legislative and procedural provisions and processes dealing with disciplinary matters are overly prescriptive and lack the necessary flexibility to allow for timely consideration of these matters and that the current arrangements do not necessarily lead to the best outcome for any or all parties involved.

After examining the current provisions in detail the Committee concurred with this view and sought ways to improve the means of dealing with disciplinary matters.

**Specific Breaches**

Some of the agencies commented that the specific breaches and penalties currently listed in section 49 (Breaches of discipline) of the Act should be reviewed. In examining legislation in other jurisdictions the Committee concluded that the current list of breaches provided coverage broad enough to be applied across the range of circumstances likely to be encountered in the Northern Territory.

As an alternative to the current listing, the Committee considered the proposition that an employee breaches discipline when the principles are disregarded, not complied with or when the employee acts in a manner inconsistent with the Principles and that perhaps this should be all that is required as a definition of a breach in the Act.

The Committee sought advice in relation to this possibility and formed the view that it was preferable to specify the matters that constitute a breach affording clarity to all parties with a general ‘catch all’ as is currently contained in the Act, rather than relying on general descriptions which might then require subsequent clarification. Given the frequent involvement of lawyers in advising agencies and employees on discipline matters and the outcomes achieved, the current provision appears to work well. The Committee therefore supports the retention of section 49 in full.

**Summary Dismissal**

None of the submissions made specific comment in relation to the summary dismissal provisions, despite most agencies commenting that Chief Executives should have greater authority in managing their agencies in the spirit of “let the managers manage”. The Committee supports the retention of the ability to summarily dismiss when the public interest warrants it. The Committee is also of the view that as an agency Chief Executive has the authority to employ, the authority to dismiss should also rest with the Chief Executive. The Committee therefore believes the current requirement in section 50 (Summary dismissal) for consultation with the Commissioner for Public Employment should be removed. The practical role of the Commissioner has in the past been to question whether the Chief Executive has applied the rules of natural justice in making a
decision under this section, or if not (as it is not required in summary dismissal) whether the decision appears reasonable.

As the Committee is recommending that the Act is amended to clarify that all decisions taken under the auspices of the Act must comply with the rules of natural justice, it is considered there is no further need for a legislated requirement to consult with the Commissioner for Public Employment on this matter.

**Procedures**

The majority of submissions support the removal of prescriptive process from the Act. The Committee recommends reviewing and amending, where necessary, and transferring much of the disciplinary procedural content into an Employment Instruction. The Committee believes that the primary requirement for dealing with any potential discipline matter is to rigorously apply the principle and rules of natural justice as already detailed in EI3 – Natural Justice. However it is important that any amendments in this regard do not diminish the legal effectiveness of the provisions. The Committee also considers that in general terms any timelines set for the response by an employee should be 14 days other than in the case of summary dismissal.

**Penalties**

The Committee believes that if the Act provides for breaches of discipline then it should also deal with the penalties that may be applied when a breach is determined. Some of the submitters suggested that the penalties need to be reviewed and perhaps broadened. Some also suggested the current wording lacks clarity regarding the ability of a Chief Executive to demote an employee as a result of a discipline action. Others suggested it should be explicit in the Act that a Chief Executive can require an employee to attend counselling or mediation. The Committee noted that other jurisdictions do provide one or both of these options as a possible remedy for or outcome of disciplinary actions.

The Committee considers that clarification of the ability of Chief Executives to demote, and/or direct an employee to attend counselling, mediation or training, is required. Further the Committee agreed with submitters there should some level of consistency in the application of penalties across agencies but that this could be dealt with in an Employment Instruction.

**Abandonment of Employment**

Some agencies suggested that the current provisions for abandonment of employment should be amended to enable termination to occur within a reduced timeframe (current timeframe is 28 days), or that the provision should be deleted altogether and dealt with under the disciplinary provisions. While attendance at work should be a requirement of the Code of Conduct, absence from duty without leave is already a disciplinary matter under
section 49(h) and can be dealt with in the normal way with termination the ultimate sanction.

However, the provisions of section 54 (Abandonment of employment) provide for specific action where absence from duty is over an extended period. As such the Committee believes the current provisions should be retained with an amendment to enable a Chief Executive to terminate an employee after 14 days unexplained absence from duty provided that the Chief Executive is satisfied that reasonable attempts have been made to locate and contact the employee.

**Specific Issues**

A number of submitters suggested there is a need to provide a mutual incompatibility clause for situations where the employment relationship has irretrievably broken down and the relationship needs to be ended but where it is neither a redundancy situation nor clearly a discipline matter. The Committee concurred with the advice it received regarding this matter that to legislate for such a provision would be risky due to the possibility of inappropriate use by employees and agencies. In any case the Committee believes the capacity already exists for the Commissioner for Public Employment to deal with such situations using the wider powers under the Act.

Some agencies suggested that Chief Executives should have the authority to suspend for up to six months (currently three) before having to seek the Commissioner for Public Employment’s approval for further extensions. The Committee concurs with this suggestion, as experience suggests many instances require greater than three months to resolve.

Finally, a number of submitters suggested Chief Executives should have the authority to allow employees access to accrued recreation and long service leave during a period of suspension without pay. The Committee believes this would be appropriate if the period of suspension without pay is likely to result in financial hardship for the employee and his/her dependants. However access should be limited only to recreation and long service leave which an employee could be entitled to if employment was ceased.

**Recommendations for Part 8 - Discipline**

The Committee recommends:

36. Section 49 (Breaches of discipline) be retained in full.

37. The Act be amended to remove the current requirement for Chief Executives to consult with the Commissioner for Public Employment in making a decision under section 50 (Summary dismissal).
38. Prescriptive disciplinary processes be refined and dealt with through an Employment Instruction provided that this does not diminish the legal effectiveness of any decisions or actions taken.

39. The current penalties in section 51(10) (Procedure in respect of breaches of discipline) be amended to clarify the Chief Executive can demote, and/or direct an employee to attend counselling, mediation or training.

40. The current provisions on abandonment of employment be amended to enable a Chief Executive to terminate employment after 14 days provided that reasonable attempts have been made to locate and contact the employee and appropriate attendance at work should be contained in the Code of Conduct.

41. The Act be amended to enable Chief Executives to suspend employees for up to six months before having to seek the Commissioner for Public Employment’s approval to extend.

42. The Act be amended to provide Chief Executives with the authority to allow employees suspended without pay to access accrued recreation or long service leave, without affecting the suspension status, if the suspension without pay will result in financial hardship for the employee and his/her dependants.
4.9 PART 9 – APPEALS AND REVIEW

The majority of submissions called for the streamlining of the current appeal and review provisions. Currently the formality of appeal and review processes increases concurrent with the severity of the matter being dealt with. In particular the Disciplinary and Inability Appeal processes have become increasingly legalistic, cumbersome and in many cases, protracted.

Under the existing appeal and review arrangements:

- Employees aggrieved by their treatment in employment, can apply to the Commissioner for a review of the treatment under section 59 (Review of grievances) of the Act. The Commissioner for Public Employment has the authority to decide on the grievance.

- Promotion Appeals, the outcome of which potentially impacts on the remuneration of the employees involved, are determined by a Promotion Appeal Board which operates independently of the Commissioner for Public Employment. The composition of the Board is a chair appointed by the Commissioner for Public Employment, a nominee of the agency and nominee of the appropriate union.

- Inability and Disciplinary Appeals, which review decisions affecting remuneration and employment, are dealt with by a Board, independent of the Commissioner for Public Employment, and comprised of a Chair appointed by the Minister for Public Employment, a nominee of the Commissioner for Public Employment, and a nominee of the appropriate union.

There appears to be little concern expressed in the submissions with the way in which general grievances are dealt with and the Committee believes that retention of this provision is warranted.

The major concern expressed by agencies in relation to promotion appeals regarded the ability of the Board to substitute the Chief Executive’s decision with one of their own, based on their assessment of relative merit. The view of the Committee is there is not much purpose in having an appeal process without the capacity to make decisions that go to the heart of the original assessment of merit. The Committee supports the retention of the current promotion appeal process which works well in the vast majority of cases and in recent times the power to substitute a decision has been rarely used.

Although some of the submissions proposed the Inability and Disciplinary Appeal Boards should be limited in their ability to hear matters relating to termination on the basis these matters could be appropriately dealt under the *Fair Work Act*, the majority supported the retention of the Appeal Boards. However, the Committee considered the primary concern in dealing with these appeals related to the requirement to appoint an external
Chairperson (a member of the legal profession or other qualified person) which often leads to considerable delays in hearing and determining matters before them. This practice has also resulted in proceedings which have become increasingly formal and legalistic and often not well understood by the parties participating in the appeal.

The Committee considered a number of alternatives, including having matters pertaining to termination being dealt with by the newly created body, Fair Work Australia. The Committee considers claims that the *Fair Work Act*’s statute on unfair dismissal (which is 14 days) is enough time for an employee to seek advice and lodge a claim is debatable. Additionally as the major employer in the Northern Territory, the Committee considered the Northern Territory Public Sector is better placed to have an internal process to hear and determine matters without the complicated process of an external hearing, which could be expensive and intimidating for employees, may still lead to delays in matters being determined based on the potential case load of the body and could be carried out by parties without a full understanding of Northern Territory Public Sector requirements.

It is the view of the Committee that a Board to hear inability and disciplinary appeals should be constituted in the same way promotion appeals are, that is, an appropriately qualified chair nominated by the Commissioner for Public Employment (rather than the Minister as is the current practice and this would have the added advantage of removing the Minister from direct involvement in any employment matters in the Northern Territory Public Sector), a nominee of the agency, and a nominee of the appropriate union. The appeal boards should be limited to dealing with matters affecting an employee’s remuneration including termination, generally be a lawyer free zone, and that its decisions will be final. Any further appeal process would only be by way of judicial review.

The Committee also considered it appropriate to limit the Appeal Board to hearing matters relating to decisions affecting an employee’s basic remuneration including termination and that other disciplinary and/or inability outcomes should be dealt with under the grievance proceedings.

Finally, many agencies also expressed concerns about the ability of employees to “shop around” and utilise multiple appeal mechanisms to review termination decisions. The Committee is of the view that the current provisions should be amended to clarify the ability of the Appeal Board to decide that a hearing cannot proceed if the employee is seeking redress through Fair Work Australia or under other statutory or court proceedings.
Recommendations for Part 9 – Appeals and Review

The Committee recommends that:

43. The current general grievances process should be retained with the added ability to review decisions relating to minor outcomes resulting from disciplinary or inability matters and that the notification process for these matters to be 14 days.

44. The current provisions regarding the Promotion Appeals Board and the Inability and Disciplinary Appeals Boards be deleted.

45. The functions of the current Promotions Appeals Board and Discipline and Inability Appeals Boards be combined and a new Northern Territory Public Sector Appeal Board established as follows:

   **Northern Territory Public Sector Appeal Board**

   The Board consists of:

   - A chair appointed by the Commissioner for Public Employment – must be experienced and/or qualified to deal with appeal matters (but not necessarily a legal practitioner);
   - A nominee of the Chief Executive of the agency in which the appellant is employed; and
   - A nominee of the prescribed employee organisation (union).

   **Appeal Procedures**

   - An appeal may be by way of a review of all available evidence, not just evidence taken into account by the Chief Executive [as per current section 58(2)] of the Act.

   - The procedure for the appeal is at the discretion of the Board but must observe the principles of natural justice and be conducted with as little formality and technicality and with as much expedition as a fair and proper consideration of the matter permits.

   - A party to an appeal may appear personally or by an agent but not a person if that person has been instructed to act as the party’s lawyer in a manner which would be subject to the *Legal Profession Act* unless the Board determines that it would be in the best interests of the hearing to allow legal representation.
Deciding the Appeal

- For promotions, inability and discipline matters and any other termination related matter the Board may confirm the decision appealed against, set the decision aside and substitute another decision or return the issue to the decision maker with directions if necessary.

- For matters relating to disciplinary and inability outcomes the Board should only review and determine matters affecting remuneration, including termination; and

46. The current provisions of the Act be amended to clarify the ability of the Appeal Board to decide a hearing will not proceed if the employee is seeking redress through Fair Work Australia or under other court proceedings.
4.10 PART 10 - MISCELLANEOUS

Because of the nature of the matters dealt with under this part of the Act, each matter is commented on as follows:

**By-Laws**

Comments raised by submitters recommended either updating the By-laws to reflect the provisions of the workplace agreements, or the complete abolition of the By-laws. Whilst the Committee supports the updating of the By-laws, the primary deliberation of the Committee related to the need to have the capacity to make By-laws. It was the view of the Committee that this capacity should be retained.

**Work Outside Employment**

The majority of comments in relation to this provision suggested the decision regarding the ability of an employee to undertake other employment should be made only in relation to whether or not it resulted in an actual or perceived conflict of interest and/or whether it interfered with the employee’s performance at work. As these matters are already dealt with under the inability provisions and the Code of Conduct, the submissions suggested that there is no further requirement for these provisions in the Act and they should be deleted.

However another view is that there is a benefit in retaining the current requirement for approval to remind parties of their responsibilities to each other through the employment contract. On balance the Committee believed there is a benefit in employees only notifying the Chief Executive of proposed work outside their public sector employment, rather than seeking permission to engage in work outside of employment. In this way, if a conflict of interest is determined it can then be dealt with appropriately. The Committee therefore recommends retaining these provisions with the amendment that the employee is required to only notify the Chief Executive of the proposed work outside employment.

**Work on Public Holidays**

Some of the submissions proposed the deletion of this provision on the basis that the power to require an employee to work on public holidays exists as a normal part of the employment contract. Based on advice from Office of the Commissioner for Public Employment concurring with the above view, the Committee recommends the deletion of this provision.

**Performance of duties of statutory office holders in absence**

The Committee considers this provision should be retained.
Public Sector Consultative Council

Although some submitters believed the contribution of the Public Sector Consultative Council was minimal, in general there was continued support for its retention. The Committee is of the view that there is value in ensuring there is consultation on major service wide issues between the Commissioner for Public Employment, agencies and unions, and supports the retention of this provision. However, the Committee believes that the Commissioner for Public Employment should review the current makeup of the Public Sector Consultative Council as prescribed in Part 4 of the Regulations to ensure it meets current needs.

Protection from legal proceedings

The Committee supports the retention of the protection afforded by this section. The Committee also supports the suggestions by way of submissions from the Departments of Justice and Chief Minister that protection should also be afforded to employees acting in the Territory’s interests on either statutory or non-statutory boards, or companies incorporated under the Corporations Act.

Regulations

The Committee considers there is a need to retain the ability of the Administrator to make Regulations which generally deal with the machinery matters of Government. There will be a requirement as a result of this review for the Regulations to be amended.

Schedule I

Schedule I lists certain office holders (Auditor-General, Ombudsman and Commissioner of Police) who are appointed under other Acts, but who also need to be seen as agency Chief Executives for the purposes of the Act. The Committee took advice from the Commissioner for Public Employment and the Department of Justice that the Commissioner for Health and Community Services Complaints should also be listed because of a lack of clarity that the Commissioner was the Chief Executive of the Commission under the Health and Community Services Complaints Act.

Recommendations for Part 10 - Miscellaneous

The Committee recommends that:

47. Section 60 (By-laws), section 63 (Performance of duties of statutory office holder in absence), section 64 (Public Sector Consultative Council) and section 65 (Regulations) of the Act be retained in full.
48. Section 61 (Work outside employment) be amended to clarify the employee is required to only notify the Chief Executive of the proposed work outside employment.

49. Section 62 (Work on public holidays) be deleted.

50. The Commissioner for Public Employment review the current constitution and function (as prescribed in the Regulations) of the Public Sector Consultative Council to ensure it meets current needs.

51. Section 64A (Protection from legal proceedings) be amended to afford protection to employees acting in the Northern Territory’s interests on either statutory or non-statutory boards, or companies incorporated under the Corporations Act.

52. Schedule 1 of the Act be amended to include the Commissioner for Health and Community Services Complaints to clarify the status of the Commissioner as an agency Chief Executive for the purposes of the Act.
5. SUBORDINATE LEGISLATION

Consistent with all of the recommendations made by the Committee is the view that all of the subordinate legislation should be reviewed to pick up and reflect amendments to the Act, and to review and ensure their continued relevance. As a matter of course the Public Sector Employment and Management Regulations will need to be reviewed and amended as appropriate, and the guidance of Parliamentary Counsel should be sought as to what matters are best retained or provided for in the Regulations as opposed to other subordinate legislation.

In particular the Employment Instructions should be reviewed to provide the necessary guidance and best practice process to agencies to allow them to resolve actions effectively and efficiently within the principles of the Act. The By-laws should be amended in line with the current workplace agreements and all determinations, delegations and whole of government employment policies should be reviewed to allow in so far as possible, processes to be simplified and delegations to be retained at the appropriate level. To this end, the Committee recommends the many useful comments made by submitters relating to the subordinate legislation should be available to those involved in re-drafting these matters.
6. OTHER MATTERS

Power Water Corporation

In its submission to the Review the Power Water Corporation expressed its preferred position as being able to exit coverage by the Act and establish its own employment arrangements. This was on the basis that it would be consistent with its obligations under the Government Owned Corporations Act to act in a commercial manner.

The Committee considers that a decision to remove the Power Water Corporation from coverage under the Act is a matter of Government policy. However the legislative means of implementing such a decision in future is not entirely clear and the Committee believes that it would be appropriate for the Government to seek specific legal advice on this matter.

Technical Issues

There were many technical matters raised in relation to specific provisions in the Act. Although the Committee has tried to address the issues raised, it was not possible within the time constraints, or indeed considered necessary, to provide for specific remedies in every single area. As such the Committee considers that these issues be considered by officers experienced in providing advice to agencies regarding employment matters to ensure that corporate knowledge is not lost and legal implications can be raised and dealt with during the drafting process.
7. ATTACHMENTS

A A DISCUSSION PAPER ON THE NORTHERN TERRITORY PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT LEGISLATION

B LIST OF SUBMITTERS FOR THE REVIEW OF THE PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT LEGISLATION
BACKGROUND

The Northern Territory has the smallest (16,000) public sector in Australia and is the most recent, having come into existence in 1978 at the time of self government. The public sector provides services to a community of 215,000 spread over one sixth of the Australian continent. Thirty-two percent of the population is indigenous of whom over seventy percent live in remote communities.

The Public Sector Employment and Management Act (PSEMA) came into effect in the Northern Territory on 1 July 1993. The previous Public Service Act of the Northern Territory, which had been in existence for some fifteen years, was considered to no longer provide an appropriate legislative framework for a growing public sector undergoing substantial change.

PSEMA created an innovative ‘principle based’ legislative framework which was described at the time as being ‘short on prescription’ and which established a model of devolution in public sector management. It was widely regarded as ‘best practice’ Australian public sector legislation.

In the lead up to and immediately after, introduction of the PSEMA and its subordinate legislation in 1993, considerable time and resources were dedicated to ensuring a high level of awareness of the new legislative package both at government and public sector levels. As a result of those efforts there was a general understanding and acceptance of the thrust and intent of the new legislation.

Since 1993 there have been a number of parliamentary cycles, governments have changed, new Ministers appointed, ministerial portfolios varied and new directions set. The Northern Territory Public Sector (NTPS) has also been subject to substantial evolution with agencies created or disbanded and new CEOs and senior executive staff appointed as part of the evolutionary process.

That said, the question arises as to whether the current legislation continues to provide the flexibility, functionality and certainty in terms of responsibility and accountability that was originally envisaged. Does the existing legislation meet the foreseeable future requirements of the NT Government and its public sector?

PURPOSE

The Northern Territory Government recently approved development of a package aimed at reform and revitalisation of the NTPS, including;

- review of the Public Sector Employment and Management Act;
- redefinition of ‘merit’ in the Act to value diversity;
- development of a sector-wide HR Strategic Plan and workforce planning framework;
- a new Leadership Development Framework;
- the Northern Territory Government becoming a financial member of the Australian and New Zealand School of Government (ANZSOG);
- the Department of the Chief Minister establishing and managing a ‘think tank’ with membership drawn from participants in the NTPS Leadership Program, to consider strategic issues facing the Northern Territory;
reviewing current policies including the Work Life Balance Strategy, Willing and Able Strategy and the Indigenous Employment and Career Development Strategy with the aim of increasing the employment of people with disabilities, Indigenous people and other disadvantaged groups in the community and achieving work life balance for all NTPS employees;

• development of a sector-wide Innovation/Recognition and Reward program; and

• undertaking biennial NTPS staff surveys relating to staff satisfaction, agency performance and issues of concern.

Inherent in any reform and revitalisation programme such as this is the need to consider the relevant enabling legislation and whether it continues to provide a framework that facilitates effective and efficient management of the NTPS’ most important asset, its people, and to examine alternative structural arrangements which any new legislation should embody.

There is a universal view amongst public sector managers and unions that the PSEMA needs review, what is not clear is the extent of the required overhaul.

The Minister for Public Employment, The Honourable Rob Knight MLA, has established a committee to review PSEMA and report to him in early 2009. The committee is to be independently chaired by Barry Chambers who will be joined by Ken Simpson, Commissioner for Public Employment and Naomi Porrovecchio, Regional Director of the Community and Public Sector Union.

The purpose of this discussion paper is to outline the broad structure of the NTPS and provide a brief summary of various PSEMA provisions. This will assist stakeholders to consider the existing arrangements and prepare submissions on improvements that can be made in the area of public sector human resource management. For ease of reference a summary of the intent of each of the relevant clauses is provided, followed by a brief commentary where appropriate.

Submissions are invited on all or parts of the Act, including Regulations, By-Laws and Employment Instructions. Submissions can be emailed to enquiries.ocpe@nt.gov.au or posted to PO Box 4371 Darwin NT, marked “PSEMA Review”.

NT PUBLIC SECTOR GOVERNANCE ARRANGEMENTS

Following the 2008 Northern Territory election, the Government implemented a limited restructure of the NTPS. As a consequence, the NTPS structure in 2008 is summarised below.

Principal Agencies

• Department of the Chief Minister
• Treasury
• Department of Business and Employment
• Department of Regional Development, Primary Industry, Fisheries and Resources (includes NT Tourist Commission)
• Department of Local Government and Housing
• Department of Natural Resources, Environment, the Arts and Sport
• Department of Planning and Infrastructure
• Department of Education and Training
• Department of Health and Families
• Department of Justice
• Police, Fire and Emergency Services
• Office of the Commissioner for Public Employment
Government Businesses
- Power and Water Corporation
- Darwin Port Corporation

Other Agencies / Statutory Authorities
- Department of the Legislative Assembly
- Aboriginal Areas Protection Authority
- Land Development Corporation
- Ombudsman and Health Complaints Commission
- Auditor General
- NT Electoral Commission

Commentary
It may be of assistance in understanding the Northern Territory’s unique governance arrangements to provide a brief historical overview.

Under the Federal Northern Territory (Self-Government) Act (NT SGA) 1978, power to deal with matters pertaining to the relationship between employers and employees was not ceded to the NT Government but retained at Federal Government level through the Workplace Relations Act. Under this Act, regulation of Federal industrial relations is divided between the following bodies:
- the Australian Industrial Relations Commission (AIRC) – essentially disputes and unfair dismissals;
- the Workplace Authority – registration of agreements and checking them for compliance with the no-disadvantage test, recording of transmission of business arrangements and publication of pay scales;
- the Workplace Ombudsman – inspectorial and prosecutorial services; and
- the Australian Fair Pay Commission – periodic adjustment of the Federal minimum wage.

It should be noted that successive NT Governments have made policy decisions to pursue collective rather than individual bargaining agreements.

Despite the lack of industrial relations powers, the NTSGA does grant the NT Legislative Assembly powers to make laws in respect to public sector employment, and to the Commissioner for Public Employment to make determinations for establishing terms and conditions of employment for NTPS employees. To address any inconsistency between these NT laws and Federal awards, the NTSGA prescribes that the latter shall prevail to the extent of any inconsistency.

In 1993 the NT Legislative Assembly enacted the Public Sector Employment and Management Act (PSEMA) for “…… regulation of the NT Public Sector and the human resource administration and management of other agencies established for government or public purposes, and for related purposes.”

For this reason Government businesses and other agencies noted above have similar terms and conditions of service as NTPS employees in the principal agencies.

The PSEMA also establishes the CPE as the statutory employer of all public sector employees, creates CEOs, designates the powers, functions and responsibilities of each and the relationship between them. Further details are provided in the relevant
As a result of this mix of Federal and NT law, terms and conditions of employment for NTPS employees are contained in a number of legislative instruments. These include, in descending order of legal authority:

- Union Collective Agreements (UCA), which displace awards (Federal);
- PSEMA and its Regulations (NT);
- By-laws, Employment Instructions and Determinations made under the PSEMA (NT).

It is important to appreciate that this mix of legislative provisions makes the NTPS unique amongst Australian public sector jurisdictions. Agency CEOs in other jurisdictions may have greater autonomy to enter into agency and/or individual agreements and negotiate employment conditions with their employees. Justification for the Northern Territory’s unique approach stems from the view that in a small jurisdiction, the NTPS ‘one employer’ model supports a career public service and greatly enhances overall flexibility, equitable workplace agreement negotiation and implementation, mobility and redeployment of staff between agencies in order to meet changing government priorities.

On 25 November 2008, the Federal Government introduced the Fair Work Bill into Parliament. Broadly, the Bill will rewrite Australian industrial relations law to create:

- a new institution called Fair Work Australia to replace the Workplace Authority, the AIRC and the Australian Fair Pay Commission;
- a Fair Work Division in the Federal Court;
- an associated body named the Fair Work Ombudsman;
- a legislated system of minimum employment standards titled National Employment Standards;
- a system of modern awards, mainly industry based but with some capacity for occupational awards;
- an emphasis on collective bargaining, with enhanced rights of entry for trade unions and for orders associated with majority representation and bargaining in good faith;
- a new unfair dismissal regime that will cover employees in small businesses after a year’s service; and
- provisions for high income earners (set at $100,000 indexed) to opt out of the award system and move onto common law contracts of employment.

The Fair Work Bill runs to 613 pages plus over 500 pages of explanatory memorandum, it is still being analysed for its impact on the Northern Territory. As a result, information provided in this discussion paper may require updating.

In considering changes to the PSEMA, the scale of new national industrial relations arrangements and their potential impact on the NTPS should not be ignored.
Prior to discussing the PSEMA in greater detail, it is important to understand the concept of separation of powers inherent in Australia’s Westminster system of government.

Separation of powers refers to the doctrine, implied within the Australian Constitution, that the three principal functions of government: the executive, the legislature and the judiciary should be exercised by separate and independent bodies (1). The doctrine signifies that, although it may be developed and implemented by public servants, government policy is set and approved by Ministers of the elected Government (the executive). This establishment of government policy is undertaken separately and independently from law making (the legislature), which in the Northern Territory is carried out by the Legislative Assembly. Finally, the courts (the judiciary) are responsible for interpreting those laws in respect of matters which come before the courts.

Commentary

The separation of powers doctrine provides a basis for understanding the relationships between the various entities covered by the PSEMA. One of the major benefits of the PSEMA legislation when introduced was that it incorporated the doctrine by explicitly separating and defining the various powers and functions of Ministers, the CPE and CEOs. Further clarification of the relationship is provided in the Code of Conduct.

Three aspects of the separation of powers doctrine that warrant specific emphasis in the context of this discussion paper are public servants’ obligations to the government of the day, the requirement for public servants to be politically neutral and restrictions on Ministerial / ministerial staff directions to CEOs. These aspects are discussed below.

- **Obligation to the Government of the Day**

The Principles of Public Administration and Management (Regulation 2) and the Principles of Conduct (Regulation 4), together with the Code of Conduct (Employment Instruction No 13), clearly set out a range of matters concerned with NTPS employees’ obligations to the government of the day. In broad terms, the first priority of employees is to carry out government policy in a manner that withstands the closest public scrutiny. Public sector employees are therefore obliged to serve their Ministers, within the law, with skill, impartiality, professionalism and integrity.

- **Political Neutrality**

The Regulations require NTPS employees to serve whatever government is in power in the same professional and impartial way. This convention of political neutrality is designed to ensure that NTPS employees provide strong support for the good government of the Northern Territory regardless of the political party in power.

NTPS employees are therefore responsible for providing advice to Ministers that is frank, independent, based on an accurate representation of the facts and which is as comprehensive as possible. However, final decisions on policy are the prerogative of Ministers. Public servants must not withhold relevant information, nor seek to obstruct or delay a decision, nor attempt to undermine, nor improperly influence government policy.

- **Restriction on Ministerial / Ministerial staff Direction to CEOs.**

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The PSEMA sets out the functions of CEOs and states that they are subject to the direction of the portfolio Minister. It must be emphasised this direction is not absolute and there are a number of crucial restrictions on the extent to which a Minister may direct a CEO. While these restrictions are discussed in greater detail below, it is clear that Ministers and their staff are not able to direct CEOs in respect of public employment matters.

OVERVIEW OF THE PUBLIC SECTOR EMPLOYMENT AND MANAGEMENT ACT

The preamble to the PSEMA states:

An act for the regulation of the Public Service of the Northern Territory and the human resource administration and management of other agencies established for government or public purposes, and for related purposes.

The PSEMA is divided into ten parts:
1. Preliminary
2. Administration
3. Commissioner for Public Employment
4. Chief Executive Officers
5. Appointment, promotion, transfer and resignation
6. Secondment and redeployment
7. Inability of employee to discharge duties
8. Discipline
9. Appeals and review
10. Miscellaneous

PART 1 – PRELIMINARY

Section 3 – Interpretation

Sub clause 3(1) defines various entities and terms under the Act, including inter alia:

“Agency” means a Department or other unit of administration of the Public Sector of the Territory established under section 7, or continued in existence as an agency, by the Public Sector Employment and Management (Transition and Savings) Act or an organisation specified in Schedule 1;

“Appropriate Minister” the minister responsible for administering a particular agency;

“Chief Executive Officer: a person appointed under section 19 of the Act, as well as an Acting Chief Executive Officer;

“Commissioner” means the Commissioner for Public Employment appointed under section 10 of the Act, as well as the Acting Commissioner.

In relation to employees of the Department of the Legislative Assembly, “Commissioner” means the Speaker of the Legislative Assembly;

“Employee” means a person employed in the Public Sector, excluding the Commissioner or a chief executive officer;

“Minister” means the Minister responsible for administering the Public Sector Employment and Management Act, (currently the Minister for Public Employment).

Subclause 3 (2) defines the “merit principle” as follows:
A reference in this Act to the merit principle is a reference to the principle that an appointment, promotion or transfer under this Act should be on the basis of, and only the basis of, the capacity of the person to perform particular duties, having regard to the person's knowledge, skills, qualifications and experience and the potential for future development of the person in employment in the Public Sector.

Commentary

Subclause 3 (2) establishes the merit principle as the cornerstone of the employment and management legislative framework and as the sole basis for appointment and promotion within the Public Sector.

Whilst the principle of merit is defined in the Act, it is important to appreciate that the principle, in its widest sense, embodies an ethos targeted at the achievement of best practice human resource management. For example, whilst not explicitly stated in the definition, wider consideration of the principle encompasses concepts including:

- a totally apolitical public sector where decisions are made without fear or favour;
- the exclusion of any hint of nepotism in selection or promotion decisions;
- avoidance of decisions that have the potential to be seen as corrupt or providing unfair advantage to an individual or group;
- public sector leadership that appreciates the uniqueness of each employee and recognises individual qualities, aspirations and potential.

Note:
Government approval has recently been given to amend the definition of merit in PSEMA to include ‘the diversity that a person from an EEO target group brings to the workplace’ as one further aspect of merit-based selection, along with those mentioned above.

The amendment will permit weight to be given to EEO diversity, while still adhering to the well-established principles of merit-based selection. Selection panels will now be able to give consideration to the diversity a person from an EEO target group brings to the specific workplace. In this way, consideration of the need for representation from EEO target groups within workplaces becomes standard practice, rather than being ‘special’ treatment of people from those groups. Current identified EEO target groups include: Indigenous persons, persons from non-english speaking backgrounds, persons with a disability and women seeking senior management positions.

PART 2 – ADMINISTRATION

Section 6 – Duties of the Minister
This section details the duties of the Minister responsible for administering the PSEMA, currently known as the Minister for Public Employment. These duties include:

- advising other Ministers of policies, practices and procedures that should be applied to any aspect of human resource management in the NTPS generally or in the agencies for which they have ministerial responsibility;
- advising other Ministers on structural changes required to improve efficiency and effectiveness;
- planning the future management of the NTPS;
- Reviewing the effectiveness and efficiency of the NTPS. A review can be initiated by the Minister, or at the request of another Minister.
Whilst responsibility for the management review function rests clearly with the Minister responsible for public sector employment, the work involved is not necessarily performed by the CPE’s Office. In fact, the review and audit function is usually performed by the NT Auditor General or by external consultants contracted for specific reviews.

Note limitations to the appropriate Minister’s role under section 22 below.

PART 3 – COMMISSIONER FOR PUBLIC EMPLOYMENT

Section 11 – Delegation by Commissioner

This section allows the Commissioner to delegate to any person any of his or her functions and powers under the Act, after consultation with the appropriate CEO.

Commentary

This section allows the Commissioner to delegate his/her powers to any person (ie not necessarily an NTPS employee). It may be appropriate, for example, for the CPE to delegate to a person outside the NTPS the power to investigate a certain matter (eg a lawyer or a retired public servant).

Similarly, the CPE may wish to delegate some of his/her functions of redeployment to an agency regional manager to ensure prompt and efficient management of the process.

Section 12 – Commissioner Deemed to be Employer

This section establishes the CPE as the statutory or central employer of all NT public servants and therefore responsible as principal negotiator for all enterprise bargaining negotiations and respondent to all awards affecting NTPS employees. The CPE retains the industrial relations function, as the central employer, on behalf of the Territory.

Commentary

A unique feature of the PSEMA is that it is based on the concept of a single employer, that is, the CPE on behalf of the Territory Government. Unlike most other jurisdictions that have fragmented the employing power to individual agencies, including separate certified agreements and/or AWAs, successive NT Governments have opted to retain the single employer concept. The question of whether this employment model remains valid is worth considering.

Although the PSEMA establishes the CPE as the central employer, the legislation is based on the fundamental concept of ‘let the managers manage’. For this reason the Act and its subordinate legislation set out broad principles and guidelines, rather than detailed practices and procedures.

The PSEMA is designed to clearly identify and define the separate roles and responsibilities of the CPE and CEOs. CEOs are responsible, and accountable, for the day to day operations of their agencies, the CPE has responsibility for dealing with
those issues of principle and broad employment policy that have sector-wide application.

**In essence the CPE is responsible for developing the NTPS employment relations policy framework. CEOs are responsible for managing their staff within that framework.**

### Section 13 – Functions of the Commissioner

This section details the CPE’s functions, with the primary emphasis on providing the appropriate employment framework within which CEOs can manage their agencies.

These functions include inter alia:

- determining designations and employees’ conditions of service;
- ensuring adherence to the merit principle;
- assisting CEOs develop and implement personnel practices and procedures in their agency;
- advising the Minister on public employment policies and monitoring their implementation;
- conducting inquiries, investigations, etc into management practices in agencies;
- any other functions imposed by the Act or directed by the Minister.

#### Commentary

Section 13 sets out the CPE’s functions in specific terms and makes it clear that his/her role is to deal with issues of principle and sector-wide policy, not operational issues within agencies.

This section indicates unequivocally that the role of the CPE is not to function in isolation or by issuing detailed general orders on operational directives. A brief glance at the functions of the CPE show heavy emphasis on verbs such as: “advise”, “consult”, “assist”, “coordinate”, etc. There is therefore an irrefutable requirement for a constructive “partnership” * between the CPE and all CEOs.

This partnership is achieved through a wide variety of forums including:

- regular consultation with agencies,
- Coordination Committee and Sub Committees,
- Public Sector Consultative Council,
- various agency and project specific working groups,
- various EBA implementation working groups,
- HR forums, including in regional areas,
- Sector-wide remote locality working groups, etc.

* Although this partnership is crucial, it does not detract from the CPE’s accountability for sector-wide employment relations nor the requirement to report to the Minister on management of human resources within NTPS. See section 18 below.

### Section 14 – Powers of the Commissioner

Section 14 empowers the CPE to carry out his/her functions, as well as to issue determinations on all matters permitted by the PSEMA or an award, eg to determine particular terms and conditions to apply to an individual or class of employees.

### Sections 15 to 18
These sections empower the CPE to undertake special investigations in relation to any matter under the Act (section 15), to issue Employment Instructions relating to the CPE’s functions (section 16) and to require the keeping of employee records (section 17). Section 18 requires the CPE to report to the Minister on the management of human resources within the NTPS. The Minister is required to lay a copy of the Commissioner’s report before the Legislative Assembly.

**Commentary**

The CPE’s powers to undertake investigations under section 15 are far-reaching including: authority to enter land or buildings occupied by an agency, summon a person whose evidence is material, take evidence on oath and administer an oath and require a person to produce documents that are in the possession of that person. Such an investigation may be appropriate to determine the extent of an agency’s compliance with the PSEMA, if the CPE had reason to believe that a serious breach had occurred.

Section 16 empowers the CPE to issue Employment Instructions, which must be Gazetted. The Instructions may require a certain standard of performance to be observed, or specify an approval process. Employment Instructions are the principal instruments by which the CPE exercises his/her practice and procedure functions.

As indicated below, the Instructions are limited in number and not lengthy. As far as practicable, they ensure that the major policies and principles which must be observed are stated clearly and simply. At the same time, the Instructions provide CEOs and agency staff with some discretion and flexibility in their application and observance.

There are currently 13 Employment Instructions in operation.

1. Advertising, Selection, Appointment, Transfer and Promotion  
2. Probation  
3. Natural Justice  
4. Performance Management  
5. Medical Incapacity  
6. Inability to Discharge Duties  
7. Discipline  
8. Management of Grievances  
9. Omitted  
10. Employee Records  
11. Equal Employment Opportunity Management Programs  
12. Occupational Health and Safety Programs  
13. Code of Conduct  
14. Part-Time Employment

An indication of the comprehensiveness of the Employment Instructions as practice and procedure guidelines is that, with the exception of incorporation of Transfers (EI 9) into EI 1 and some other minor amendments, there have been no major changes or additions to the original list. It may therefore be appropriate and timely to review and establish whether they continue to represent best practice and remain true to the ‘let the managers manage’ concept.

Section 18 provides very specific direction on the CPE’s reporting requirements and forms a critical element in the CPE’s accountability to the Minister and NT Government.

Matters the CPE is required to report include:

- extent to which the principles of human resource management have been
Part 4 – Chief Executive Officers

Section 22 – Directions by Appropriate Minister
This section establishes that every CEO is subject to the direction of the appropriate Minister, with certain crucial exceptions.

Commentary
Section 22 represents a critical element in the establishment and protection of the merit principle. Specifically, sub clause 22 (2) prevents any Minister from directing a CEO in relation to:

- appointment, promotion, assignment or terms and conditions (including remuneration) of a person;
- designation or duties of an employee; and
- inability, medical incapacity or discipline action.

Section 23
This section mandates that CEOs are accountable to the appropriate Minister for the performance of their functions and must comply with Employment Instructions and directions given by the Commissioner or an Appeal Board.

Commentary
As indicated in the commentary for Clause 18 above, Clause 23 provides a vital element in the accountability framework of CEOs. The two critical facets of this section include:

1. satisfactory achievement of the objectives specified in CEOs performance agreements with the appropriate Minister; and
2. provision of accurate and comprehensive annual and other reporting in compliance with clause 28 of the PSEMA.

Section 28 of the Act provides very specific annual reporting requirements. Each year every CEO is required to report to the appropriate Minister, and hence the broader NT community, what their agencies have been doing, how well their objectives have been achieved and, in particular, achievements or deficiencies in human resource management.

Section 24 – Functions of Chief Executive Officers
CEOs have broad ranging responsibilities in relation to the effective and efficient management of the agency and its employees. Responsibilities include inter alia:

- devising organisational structures, strategies and operational arrangements;
- meeting performance objectives set by the appropriate Minister;
- assigning duties and designations, directing employees of the agency and evaluating employee performance;
- assisting employees in their development;
• planning, implementing and monitoring the financial and administrative performance of the agency;
• ensuring equal employment opportunities and health and safety standards are implemented and maintained.

Commentary
Section 24 is designed to complement section 13 and clarifies the delineation between the respective roles of the CPE and CEO. The section establishes that, subject to the Employment Instructions and application of the merit principle, CEOs are fully accountable for the total operations of their agency, including management and development of every employee.

Section 25 – Powers of Chief Executive Officers
This is an enabling provision giving CEOs power to carry out their functions. The section ensures CEOs can sign contracts, particularly to employ people.

Section 26 – Chief Executive Officer May Employ Number of Employees Necessary
This section enables a CEO to employ any number of employees, at any designation, but only to the extent that funds are provided and available.

Commentary
This provision reinforces the ‘let the managers manage’ concept by providing CEOs with the flexibility to rearrange staffing quickly to meet changing demands and priorities, while at the same time ensuring fiscal accountability by requiring CEOs to manage their agencies within allocated budgets.

Section 27 – Delegation by the Chief Executive Officer
Allows the CEO to delegate to an employee within his/her agency (as opposed to the CPE in section 16 who can delegate to a person any function or power. The CEO can still exercise the function or power even if it has been delegated.

Section 28 – Reports by Chief Executive Officers
Similar to accountability of the CPE (section 18), CEOs are required to report annually to the appropriate Minister on the operation of the agency, the performance of its staff and its financial and administrative status. The Minister must lay a copy of the report before the Legislative Assembly.

Commentary
It is important to note that, in order to satisfactorily achieve the requirements of sections 13, 18, 24 and 28, it is essential that appropriate audit and reporting mechanisms are established both at agency and OCPE levels.

The value and benefit of these reporting requirements are directly related to the quality and comprehensiveness of the information and data that is provided. In the past some reporting has been of questionable accuracy due to deficiencies in auditing mechanisms at agency level.

PART 5 – APPOINTMENT, PROMOTION, TRANSFER AND RESIGNATION

Section 29 – Chief Executive Officers to Appoint, Promote and Transfer
This section details the CEOs powers to appoint, promote or transfer an employee and to perform duties in his or her Agency.
The section enables a CEO to appoint employees on either a ‘permanent’ or ‘temporary’ basis. Employment on a permanent basis means there is no fixed period of appointment and the appointment can only be terminated in accordance with PSEMA. Employment on a temporary basis means employment other than on a permanent basis.

**Commentary**

Permanent employment characterises the employment relationship of the vast majority of public sector employees. This category of worker includes permanent part-time employees.

Employment on a temporary basis encompasses fixed term contracts, including executive contracts and casual employment.

The proportion of permanent workers to temporary employees is managed by each agency CEO. The type of employment offered by the CEO is unregulated and, consistent with section 26, enables a CEO to employ any number of employees, at any designation, but only to the extent that funds are provided and available. It also enables CEOs to rearrange staffing quickly to meet emerging priorities.

**Section 30 – Procedure for Filling Vacancies**

This section requires CEOs to advertise vacancies exceeding 6 months. It also enables CEOs to seek approval from the CPE to select without advertising a person who satisfies the requirements of section 31.

It also requires CEOs to publish all appointments, promotions and transfers.

**Commentary**

All selections regardless of whether or not they have been advertised are subject to the merit principle.

Requests from agencies for the CPE to exercise his or her power to allow the CEO to appoint a person without advertising the vacancy are generally limited. An example of CPE approval of a request (section 30(1)(b)) would be when an agency has recently advertised a vacancy, the preferred applicant withdraws their application and the agency seeks to appoint the next most suitable applicant, thus avoiding the costly and time consuming exercise of readvertising the position.

The legislated requirement to advertise all vacancies greater than 6 months except in limited circumstances is often cited as a barrier to a more efficient and responsive process to the filling of vacancies, notwithstanding the need to retain an open and transparent process when it comes to the appointment of persons to the NTPS.

Transparency and accountability may still be achieved if this limitation was removed or amended provided that all selections are subject to merit and CEOs continue to be required to publish all appointments, promotions and transfers.

**Sections 31 to 34**

These sections describe the requirement on CEOs to adhere to certain conditions when appointing employees, including:
• the need to only appoint, promote or transfer an employee if they have the necessary educational qualifications and meet such other requirements (including health and physical fitness) that are determined by the Commissioner,
• the appointment of a person on a permanent basis to be on probation, and
• the ability to terminate at any time the employment contract of a temporary employee.

Section 34 empowers the CPE to determine the duties or classes of duties in an agency or the NTPS generally that –
• may be performed on an appointment for a fixed period; or
• may only be performed on an appointment for a fixed period.

**Commentary**

The value and benefit of these sections may, in some instances, have become redundant. For example, the requirement for employees to have relevant educational qualifications is often prescribed in other specific legislation or policy (trade licensing requirements, professional body membership, professional registration boards, physical fitness requirements) etc.

Equally, the requirement that all permanent appointments be on probation assumes that only a legislative requirement will ensure observance by CEOs, rather than what ultimately is sound employment practice.

The capacity of a CEO to terminate a temporary employment contract is more than capable of being dealt with by the specific terms of that contract. The same observation could equally apply to section 37 – Resignation.

In respect of section 34, the question arises whether the CPE should remain the arbiter determining duties or classes of duties, duration (up to 5 years), and terms and conditions of fixed term appointments, including Executive Contract Officers?

Are the CPE’s roles here still relevant and are they consistent with the principle of ‘let the managers manage’, eg do they allow CEOs sufficient flexibility to rearrange staffing quickly to meet changing demands and priorities?

**PART 6 – SECONDMENT AND REDEPLOYMENT**

**Division 1 – Secondment**

**Sections 39 – 40**

This section detail CEOs’ powers to enter into an agreement for the secondment of an employee for a period not exceeding 3 years, if they consider it is in the public interest.

The secondment arrangement may be with an authority or employer who is not an agency, for example a private sector employer.

**Commentary**

The intent of these sections is to enable CEOs to have the flexibility to transfer for a defined period, skilled employees from either other public sector jurisdictions or the private sector and vice versa. Any secondment is not required to adhere to the merit principle nor are they subject to review under section 59.
This facilitative provision is seldom used and may be redundant given the high level of turnover and mobility in the NTPS.

**Division 2 – Redeployment and Redundancy**

**Section 41 – Declaration of Permanent Employee to be Potentially Surplus to Requirements**

This is an enabling provision giving CEOs power to declare a permanent employee as potentially surplus to the requirements of their agency. In so doing, the CEO must state the reasons for the declaration and forward a copy of the notice to the Commissioner and the prescribed employee organisation.

**Sections 42 – 43**

These sections empower the CEO to transfer a permanent employee who has been declared potentially surplus to the requirements of their agency. In these instances the merit principle does not apply.

Where a CEO is unable to transfer an employee within the agency, they may request the CPE to give directions to retrain, transfer or terminate employment of an employee.

Where the CPE receives such a request he or she may direct the CEO to:
- take steps in relation to the training and redeployment of the employee, or
- terminate the employment of the employee.

The CPE may also give the CEO of another agency directions relating to transfer of the employee.

**Commentary**

Inherent in the administration of any public sector is the need to respond quickly and efficiently to Government restructures. The capacity to do so is an inherent feature of most Australian public sector administrative arrangements.

A distinguishing feature of PSEMA is the ‘one employer’ model. Justification for this unique approach stems from the view that in a small jurisdiction like the Northern Territory, the ‘one employer’ model supports a career public service and greatly enhances overall flexibility by facilitating mobility and redeployment of staff between agencies when the need arises due to changing government priorities.

Whilst PSEMA contemplates the possibility of the CPE directing a CEO to terminate the employment of a permanent employee who has been declared potentially surplus, this has usually been achieved through voluntary redundancy.

While redeployment of some categories of staff is possible, there are numerous NTPS employees with specialist skills that make this provision impractical.

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**PART 7 – INABILITY OF EMPLOYEES TO DISCHARGE DUTIES**
**Section 44 – Inability of Employee to Discharge Duties**

This section enables a CEO, by notice in writing and based on reasonable grounds, to determine that an employee is not:

- fit to discharge, suited to perform or capable of efficiently performing their duties;
- performing their duties efficiently or satisfactorily; or
- qualified for the efficient and satisfactory performance of those duties.

The section requires the CEO to advise the employee of their opinion and the grounds and invite a response in writing from the employee within 14 days explaining any matter referred to in the notice.

**Section 45**

As soon as practicable after the 14 days, the CEO, if not satisfied with the employee's explanation, can arrange for an investigation.

The person(s) authorised by the CEO to carry out the investigation may direct the employee to submit to an examination by:

- medical practitioners; or
- other persons having relevant qualifications approved for that purpose by the CPE.

Within 14 days of receiving the investigator's findings the CEO must advise the employee of those findings and reasons.

**Section 46**

This section empowers the CEO to impose the following sanctions in response to the findings of the investigation:

- reduce the salary of employees within the range of the designation;
- transfer an employee within the Agency and at a lower salary; or
- terminate the employment.

If circumstances prevent the CEO from transferring the employee, the CEO may recommend to the CPE that the CPE transfer the employee to another agency (section 35).

**Section 47**

Allows the CEO to suspend or transfer an employee pending an explanation or investigation. The suspension or transfer can remain in effect for a period not exceeding 3 months or until the employee provides a satisfactory explanation, the CEO no longer holds an adverse opinion about the employee's performance or the CEO decides to take action.

Employees may appeal to an Inability Appeal Board under section 57 of PSEMA.

The section goes on to explain what would happen to an employee's entitlements in the event that the appeal is upheld.

**Section 48**

This section empowers a CEO to determine (having regard to appropriate medical evidence) that an employee is totally and permanently incapacitated. When this is determined by the CEO they may retire the employee.

**Commentary**

Inability processes are used infrequently, for example there were no Inability Appeals lodged in 2007 and there were two in 2008. Anecdotal evidence suggests that this process is rarely initiated by an agency, due primarily to the associated prescriptive and often lengthy delays. That is not to say that a process of some kind is not warranted.
PART 8 – DISCIPLINE

Section 49 – Breaches of Discipline
Section 50 – Summary Dismissal

Prescribes the various disciplinary offences that apply to employees employed under PSEMA and the procedures that would apply in respect of any suspected breaches. In particular, this section establishes that an employee commits a breach of discipline if they:

1. contravene or fail to comply with the Act;
2. are found guilty in a court of an offence that affects the employee’s employment committed before or after commencement of the Act;
3. disregard or disobey a lawful order/direction given by a person having authority to give such an order/direction;
4. use a substance (including liquor or a drug) in a manner that results in inadequate performance of the employee’s duties or improper conduct at the place of employment;
5. are negligent or careless in the discharge of any of the employee’s duties or fail to perform the duties assigned to him or her;
6. in the course of employment or in circumstances having a relevant connection to his or her employment, conducts himself or herself in an improper manner;
7. harass or coerce another employee;
8. without good cause, are absent from duty without leave;
9. except as authorised by his or her CEO, engage in any remunerative employment, occupation or business outside the Public Sector;
10. in relation to an application of the employee for appointment, promotion or transfer to perform duties in an agency or at any stage in the selection process, provide information to the CEO or the CEO’s representative that the employee knows, or ought to know, is false or misleading;
11. provide information in the course of his or her employment that he or she knows or ought reasonably to know is false or misleading;
12. fail to remedy previous unsatisfactory conduct or fail to comply with a formal caution;
13. otherwise disregard or act in a manner inconsistent with the prescribed principles.

The prescribed principles appear at the end of this paper.

Commentary

A primary purpose of disciplinary action is to protect the integrity and reputation of the workplace rather than just to punish the offender. Although specific and general deterrence are important in determining what action the CEO takes at the end of the process, the action is to protect the workplace.

When embarking on possible disciplinary action it is necessary to read the relevant sections of the PSEMA in conjunction with the procedures set out in the Employment Instructions and Regulations. By way of illustration, section 51 of PSEMA provides only one point at which an employee is provided a ‘right to be heard’, by written submission. However, Employment Instruction 7 refers to three points in the process where an employee must be invited to make a written submission. A Disciplinary Appeal Board (and other external review body) will have regard to the Employment Instruction.
The rules of procedural fairness (which is the same as “natural justice”) underpin the disciplinary process and are fairly straightforward. There are two main parts to the rules: a ‘right to be heard’ and secondly, a ‘right to an unbiased decision maker’. Various secondary rules support these two principal rights.

For example, ‘the right to be heard’ does not necessarily involve a right to an oral hearing or to legal representation. Part 8 of PSEMA generally requires this right to be exercised by written allegations and submissions. However, the right to be heard will always include the necessity to ‘know the charges’. This requires that any adverse information be advised to the employee. Flowing from the right to be heard, it is crucial that any letter provided to an employee under section 51 (3) alleging a breach of discipline, includes comprehensive particulars of facts and circumstances which are said to constitute the breach of discipline.

Although Part 8 of PSEMA does not apply to employees appointed on a “temporary basis”, it is still NTPS practice that they be afforded procedural fairness.

Where an alleged breach of discipline is particularly serious, section 50 provides the ability to proceed directly to summary dismissal. For this action to be used successfully the CEO must be satisfied that the evidence is so strong that the possibility of any future reversal of the decision is negligible.

In 2008 three Disciplinary Appeals were lodged. One has been disallowed; one is pending and one withdrawn.

The processes for dealing with discipline matters in the NTPS are generally more complex and time consuming than in most private sector workplaces. At the very least, an examination of existing processes with a view to streamlining and simplifying them may be warranted. A possible outcome might include abolishing the need for ‘in-house’ disciplinary review mechanisms and adoption of the federal AIRC jurisdiction or soon to be established Fair Work Australia body. The latter approach has been adopted by the Australian Public Service and some State jurisdictions.

In the likely event that the Federal Government, through Fair Work Australia, restores a comprehensive unfair dismissal jurisdiction, it might be desirable to consider the potential for restricting ‘forum shopping’ by aggrieved employees.

### PART 9 – APPEALS AND REVIEW

**Sections 55 – 56 Promotion Appeals/Promotion Appeal Boards**

These sections provide that an employee who is aggrieved by the promotion of another employee may, within a 14 day period after notification of the selection, appeal to a Promotions Appeal Board against the selection on the grounds of superior merit. (refer to Part 1, section 3 for the revised definition of merit).

An employee cannot appeal unless they were an applicant for the job and they would have been promoted had they been successful. An employee who was not an applicant may appeal only if approved by the CPE.

The procedures in relation to an appeal are at the discretion of the Appeal Board. The Board is constituted by:

- a Chairperson appointed by the CPE,
- a person nominated by the CEO, and
- a person nominated by the prescribed employee organisation.
In determining the appeal under this section the Appeal Board may:
- disallow the appeal,
- allow the appeal and direct the CEO to promote the appellant, or
- direct the CEO to re-advertise the vacancy.

**Commentary**

A promotion appeal cannot be lodged by an employee, unless: they were an applicant for the job and they would have been promoted had they been successful, against a selected external applicant, selections at level or transfers.

Whilst sections 55 and 56 deal specifically with Promotion Appeals there is no doubt that the limitations mentioned above do result in employees utilising section 59 – Grievance Reviews as an alternative. As reported in section 59, one of the most common reasons for grievances concerned selection processes.

<table>
<thead>
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<th>Reasons</th>
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<tr>
<td>Selection processes</td>
<td>19</td>
</tr>
<tr>
<td>Application of procedures and policies</td>
<td>18</td>
</tr>
<tr>
<td>Bullying and harassment</td>
<td>16</td>
</tr>
<tr>
<td>Application of conditions of service</td>
<td>15</td>
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<tr>
<td>Management action or decision</td>
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<tr>
<td>Personal conflicts within the workplace</td>
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<tr>
<td>Termination of probationary employment</td>
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</tr>
<tr>
<td>Total handled</td>
<td>84</td>
</tr>
</tbody>
</table>

The powers of the Appeal Board to overturn the decision of a CEO or to order readvertisement of the vacancy represent significant powers. However only a small number of appeals are upheld (see below).

<table>
<thead>
<tr>
<th>Year</th>
<th>Handled</th>
<th>Allowed</th>
<th>Disallow</th>
<th>Re-advertise</th>
<th>Withdrawn</th>
<th>Vacated</th>
<th>Outstanding</th>
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<tbody>
<tr>
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<td>4</td>
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<tr>
<td>2007-08</td>
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<td>1</td>
<td>29</td>
<td>12</td>
<td>15</td>
<td>21</td>
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</table>

The interaction between sections 55, 56 and 59 may warrant closer examination with a view to assessing the merit of integrating and streamlining the grievance review process. It may also be appropriate to examine the scope of any internal grievance review mechanism in the context of the increasing number of other external review bodies and the extent to which ‘forum shopping’ occurs.

A fundamental challenge for such a review would involve the need to balance an efficient and effective internal review process with the equally important objective of upholding the *Principles of Public Administration and Management* and the *Principles of Human Resource Management*.

**Sections 57 – 58 Inability or Disciplinary Appeals/Procedure of Appeals**

These sections enable an employee who is aggrieved by the intention of a CEO to take action under the PSEMA inability or discipline provisions to lodge an appeal.

The appeal may be against the intention or action of the CEO.
The procedure for appeals is detailed but, in summary, requires an Appeal Board to be constituted by:

- a Chairperson appointed by the Minister,
- a person nominated by the Commissioner, and
- a person nominated by the prescribed employee organisation.

The person appointed to be Chairperson must be a lawyer who has been admitted to the legal profession for at least 5 years, or be deemed by the Minister to have other suitable qualifications or experience.

In determining an appeal the Appeal Board can:

- disallow the appeal, or
- allow the appeal in whole or in part and direct the CEO to take action as the Appeal Board considers necessary.

The remainder of section 58 details procedures for the conduct of Inability and Disciplinary Appeal Board hearings.

**Commentary**

The number of Inability and Disciplinary appeals is small, eg for the 2007-08 reporting period there were 5.

In many Australian public sector jurisdictions appeals of this nature have been abolished and the appropriate State or Federal industrial tribunal jurisdiction applied.

See commentary provided for sections 49 and 50.

**Section 59 – Review of Grievances**

This section provides that if an employee is aggrieved by the CEO’s intention to terminate the employee’s employment on probation, they may within 14 days request the CPE to review the decision.

The section also prescribes that in any other case where an employee is aggrieved by their treatment in employment in the public sector they may, within 3 months of the action or decision, request the CPE review the action or decision.

If the CPE believes that an employee has not taken adequate steps to seek redress of the grievance in their agency, the CPE may refer the matter to the CEO for consideration within a specified time and not conduct any review until the expiry of that time.

The CPE has the same powers and obligations as an inability or discipline appeal board to deal with a review.

**Commentary**

According to Promotion Appeal and Grievance Review records, in the 2007 – 08 reporting year 84 grievance reviews were conducted, compared to 79 in the preceding year. The most common issues raised in grievances concern selection processes; application of procedures and policies; bullying and harassment; application of conditions of service; management practices; personal conflicts in the workplace and termination of probationary employment.
The 2007 – 08 CPE annual report noted that “While the grievance process reveals occasional examples of poor management or decisions, the number of grievances does not indicate any general trend towards poor management practices across agencies”.

Previous comments made in sections 57 and 58 relating to streamlining processes are applicable.

PART 10 – MISCELLANEOUS

Section 60 – By-Laws
Prescribes the CPE’s power to make By-laws relating to matters that are required or permitted by PSEMA or an award, and in particular, by-laws relating to:

- leave;
- entitlement to and payment of allowances;
- recruitment and transfer expenses;
- conditions applying to employees transferred to the Public Service or a statutory corporation;
- conditions applying to employees in remote localities;
- leave and other fares; and
- other terms and conditions of employment.

Commentary

The provisions of section 60 are crucial in ensuring the CPE has the capacity to make or amend by-laws that relate to conditions of service for the NTPS. This enabling provision ensures that specified conditions of employment can be made or altered as operational or industrial circumstances dictate. The ability of the CPE to make by-laws for the NTPS generally is complementary to the central employer model.

Section 61 – Work Outside Employment

Section 62 – Work on Public Holidays
Section 61 prohibits employees from engaging in outside employment except with the approval of a CEO. The CEO can only give such approval if satisfied that the paid employment will not interfere with performance of the employee’s duties.

Section 62 enables the CEO to require the whole or part of his or her agency to be kept open on a day observed as a holiday in the Northern Territory.

Commentary

The statutory prohibition on employees engaging in outside employment unless approved by the CEO stems from the long held view that the potential for a conflict of interest arising out of that employment should be avoided. This type of requirement although currently contained in the PSEMA, may more appropriately be prescribed in subordinate legislation (by-law, employment instruction, etc.)

The same can be said for section 62 which allows a CEO to require an agency to remain open during a public holiday. The implied management prerogative to operate an agency during a public holiday is not reliant on this statutory provision.
Section 64 – Public Sector Consultative Council

Section 64 establishes a Public Sector Consultative Council (PSCC) which is representative of the CPE, agencies and employee organisations. The main function of the Consultative Council is to provide a forum for the parties to discuss matters of general interest to the public sector.

Commentary

Provision of a statutory requirement to have a consultative council is unusual. The fact that such a provision exists is probably testament to the nature of the relationship between the employer and public sector unions at the time PSEMA was being developed. The requirement to continue such a provision is questionable.

CODE OF CONDUCT

Employment Instruction No 13, Code of Conduct establishes the basic level of conduct expected of all employees. The following Regulations form part of the Code and are applicable to all CEOs, executive contract officers and NTPS employees:

- Regulation 2 – Principles of public administration and management,
- Regulation 3 – Principles of human resource management,
- Regulation 4 – Principles of conduct.

A breach of the Code of Conduct is a breach of discipline under section 49(p) of the PSEMA. For ease of reference Regulations 2, 3 and 4 are repeated below.

Regulation 2 – Principles of Public Administration and Management

a) the Public Sector shall be administered in a manner which emphasises the importance of optimum service to the community;

b) formulation and delivery of information and advice to the Government shall be done in an objective and impartial way, and with integrity;

c) administrative responsibility and authority shall be clearly defined to allow the expeditious discharge of that responsibility and exercise of authority with appropriate levels of accountability;

d) the Public Sector shall be structured and administered so as to enable decisions to be made and actions taken without excessive formality and with a minimum of delay;

e) proper standards of financial management and accounting shall be exercised at all times.

Regulation 3 – Principles of Human Resource Management

a) subject to the Act (PSEMA), selection of persons to fill vacancies in the Public Sector shall be done on the basis of merit;

b) human resource management actions shall be taken in such a manner as to ensure the exclusion of nepotism, patronage, favouritism and unlawful and unjustified discrimination on any ground in respect of all employees and persons seeking employment in the Public Sector;

c) employees shall be treated fairly and shall not be subject to arbitrary or capricious administrative acts;

d) human resource administration and management in the Public Sector shall be consistent with the principles of equal employment opportunity;

e) employees shall be;

   i. afforded reasonable, independent avenues of redress against improper or unreasonable administrative acts;

   ii. afforded reasonable access to training and development;

   iii. remunerated at rates commensurate with their responsibilities.
Commentary

A recurring theme throughout this paper has been that, whilst CEOs have the power to appoint or promote staff, the legislation is emphatic that merit is the sole basis upon which vacancies are to be filled.

In the NTPS merit is determined through a fair and transparent assessment process based on the stated principles of merit, natural justice, human resource management and conduct. These guiding principles are detailed in the PSEMA, Regulations and Employment Instructions.

To assist CEOs and agencies, OCPE has published the *Merit Selection Guide*, a set of principle-based guidelines designed to allow flexible, practical approaches to selection in order to achieve meritorious outcomes.

Whilst merit is defined in the Act and guidelines have been developed, it is one of the fundamental and most crucial of every CEO’s responsibilities to ensure its application in his/her agency.

Regulation 4 – Principles of Conduct

a) employees shall perform their official duties with skill, impartiality, professionalism and integrity;

b) employees shall disclose their private financial and other interests where those interest may, or may appear to, conflict with their official duties, and shall take all reasonable steps to prevent such conflict;

c) employees who are responsible for incurring or authorising expenditure shall exercise due economy and ensure the efficient and economical use of government resources and facilities;

d) employees shall not take advantage of their official duties, status, powers or authority in order to seek or obtain a benefit for themselves or for any other person or body;

e) employees shall exercise proper courtesy, consideration and sensitivity and shall act with fairness and equity in all their dealings with members of the public and with other employees;

f) employees shall not engage in improper conduct, in their official capacity or otherwise, that adversely affects the performance of their duties or brings the Public Sector into disrepute.

Code of Conduct

Whilst the above principles establish the philosophical framework for employment and management in the NTPS and are expressed in general terms, the Code of Conduct (Employment Instruction No. 13) is designed to provide more detailed guidance on a range of issues that affect employees from time to time. The Code deals with important matters of ethics and principle, including the relationship between employees and the government of the day.
**Commentary**

As for the merit principle, the Code of Conduct forms a key component of the NTPS employment and management framework. The principles and Code of Conduct are binding on all employees and must be observed by all, including CEOs and the CPE. Where agencies have special needs that may not be adequately addressed by the Code of Conduct, CEOs may develop agency specific codes of conduct. Such codes must be consistent with the PSEMA, Regulations, By-Laws and Employment Instructions.

**ADDITIONAL INFORMATION**

The following references provide additional information in relation to this topic:

- *Public Sector Employment and Management Act*
- Regulations
- By-Laws
- Employment Instructions
- Booklet – *Public Sector Employment and Management Act, Principles and Code of Conduct* (OCPE)
- Booklet – Merit Selection Guide (OCPE)
- Document – NTPS Employees and Elections (OCPE)
- Document – Guidance on Caretaker Conventions (DCM)
- Booklet – Executive Contract Employment in the Northern Territory Public Sector (OCPE)
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<td>2. Department of Education and Training + 2 Supplementary submissions</td>
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<td>3. Department of Health and Families</td>
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<td>6. Department of Natural Resources, Environment, the Arts and Sport</td>
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<td>8. Department of Regional Development, Primary Industry, Fisheries and Resources</td>
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<td>15. Australian Capital Territory Commissioner for Public Administration</td>
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<td>16. Batchelor Institute of Indigenous Tertiary Education</td>
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<td>17. Charles Darwin University</td>
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<td>18. Darwin Community Legal Service</td>
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<td>19. David Hawkes Consulting (Public Sector Management Consultant)</td>
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<td>20. Dr Graham F Smith, Clayton Utz</td>
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<td>21. Australian Nursing Federation</td>
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