

PUBLIC SERVICE BILL 2013
EXPLANATORY MEMORANDUM

General Outline

This Bill repeals the *Public Sector Management Act 2000*.

The purpose of this Bill is to create a more contemporary Act that will continue to meet the needs of the public service and provide flexibility, simplicity and certainty of responsibility and accountability.

Broadly, the Bill —

- Generally simplifies and removes some process currently contained in the old Act, emphasises the application of the principles underpinning the Act as the basis for administrative action, administration of the public service, and conduct of its employees.
- Emphasises employee conduct and performance and the responsibilities of the CEO in delivering high quality services.
- Changes the appeal mechanisms in the Act through the abolition of the Public Service Board and the appointment of a Commissioner to hear appeals and who will be a person of some independence and stature.

Clauses

Part 1 Preliminary matters

Clause 1 — Short Title

This clause is a formal clause which provides for the citation of the Bill. The Bill when passed may be cited as the *Public Service Act 2013*.

Clause 2 — Commencement

This clause provides for sections 1 and 2 to commence on the day on which notification is published in the Gazette. The remaining provisions are to commence on a day or days fixed by the Administrator by notice in the *Gazette*.

Clause 3 — Objects of Act, sets out the objects of the Act.

Subclause (1) fixes the objects of the Act so as to include the list of Norfolk Island Administration (NIA) public service principles required in accordance with the Roadmap Funding Agreement of December 2012 as well as including the APS values found at section 10 of the *Public Service Act 1999 (Commonwealth)*. The provisions dealing with the public service principles under sections 9, 10, 11 and 12 go on to require consistency and compliance by the public service with those objects of the Act.

Subclause (2) provides the way in which the objects can be achieved which is through the application of the defining principles, denoting the role of the Commissioner to review

management decisions of the public service, and setting out the role of Chief Executive Officers to provide leadership and to manage the public service.

Clause 4 — Interpretation

Subclause (1) sets out the meaning to be attached to various words and phrases (some words and phrases are defined in the body of the proposed enactment where they may have limited application).

the Administration means the same as in the *Norfolk Island Act 1979 (Commonwealth)*.

administration management principle, see section 8.

breach of discipline, see section 59.

casual employee means an employee employed as mentioned in paragraph 37(3)(c).

Chief Executive Officer, see section 25.

Code of Conduct means the rules in section 82(3).

Commissioner means the person holding or occupying the office of Public Service Commissioner mentioned in section 15.

designation means a specified level or range of salaries assigned to an employee on a scale described in an enterprise agreement or determined by the Chief Executive Officer.

disciplinary action means action under paragraph 62(1)(b) or (c).

employee means a person employed in the public service, other than —

- (a) the Commissioner;
- (b) the Chief Executive Officer;
- (c) a person who is self-employed or employed by an organisation other than the public service and is engaged to perform a particular function or provide particular advice to the public service; and
- (d) a person or class of persons as may be prescribed.

employment, for an employee, means employment in the public service.

enterprise agreement means an enterprise agreement made in accordance with Part 11 that provides for the determination of conditions of employment of employees.

equality of employment opportunity principle, see section 11.

Executive Contract of Employment means a contract of service —

- (a) as the Commissioner; or
- (b) as Chief Executive Officer; or
- (c) to perform duties or a class of duties determined under paragraph 42(1)(b) as duties or a class of duties which may only be performed for a fixed period;

and which is nominated as an Executive Contract of Employment in the contract document.

fixed period employee means an employee employed as mentioned in paragraph 37(3)(b), including an employee employed under an Executive Contract of Employment.

grievance proceeding means a review under section 68.

health practitioner means —

- (a) a registered medical practitioner; or
- (b) any other person registered under the Health Practitioner Regulation National Law of a State or of another Territory to practise in a health profession (other than as a student).

human resource management principle, see section 9.

inability or performance grounds, see subsection 54(1).

merit principle, see section 10.

ongoing employee means an employee employed as mentioned in paragraph 37(3)(a).

performance and conduct principle, see section 12.

promotion means employee promotion in accordance with Part 6.

public service means the organisation established or continued under this Act consisting of —

- (a) the Chief Executive Officer; and
- (b) each other person appointed or employed by —
 - (i) the Crown in right of Norfolk Island; or
 - (ii) the Administration; or
 - (iii) a territory instrumentality

(other than a person excluded from the public service by or under Schedule 1).

public service principles means the set of principles set out in sections 7 to 12.

remedial action means action under paragraph 56(1)(b) or (c).

remuneration includes salary and allowances.

review delegate means the person appointed by the Commissioner under section 18.

salary includes wages, and salary or wages payable by increments within a range of salary or wages.

territory instrumentality means a body corporate that is established by or under an Act (including the *Companies Act 1985*) and —

- (a) is comprised of persons, or has a governing body comprised of persons, a majority of whom are appointed by or on behalf of the Crown, the Administration or the Legislative Assembly; or
- (b) is subject to direction or control by a Minister; or
- (c) is declared by regulation to be a territory instrumentality for the purposes of this definition,

but does not include —

- (d) the public service; or
- (e) a body declared by regulation not to be a territory instrumentality for the purposes of this definition

Subclause (2) clarifies that where another Act makes specific provision for the employment of persons within the public service, that those provisions have effect subject to the provisions of this proposed Act.

Subclause (3) deals with the situation that an enterprise agreement or legislation concerning superannuation applies to an employee or the CEO, this proposed Act applies subject to that agreement or legislation.

Clause 5 — Application makes it clear that it does not apply to a class of persons, including those remunerated by fees allowances or commission, those acting in an honorary capacity, any prescribed person or class of persons referred to in Schedule 1.

Clause 6 — Application of Criminal Code 2007, makes it explicit that the offence provisions of the Act will fall within the criminal responsibility provisions of the *Criminal Code 2007*. The note to the clause states — *Chapter 2 of the Criminal Code 2007 states the general principles of criminal responsibility, and the elements of an offence, deals with issues of criminal responsibility, establishes general defences, and deals with burden of proof. It also defines, or elaborates on, certain concepts commonly used in the creation of offences*

Part 2 — General principles relating to the public service

This Part sets out general principles relating to the public service, and provides for the general principles that underpin the Act as the basis for administrative action, administration of the public service, and conduct of its employees.

Clause 7 — Public service principles, states that the general principles that underpin the Act are the administration management principle; human resource management principle which includes the merit principle and equality of employment opportunity principles; and the performance and conduct principle encompasses and enhances the principles that were formerly contained in the old Act.

Subclause (2) requires the Commissioner, the CEO, and employees to uphold the Principles.

Clause 8 — Administration management principle, broadly prescribes how the public service will be administered and managed.

Clause 9 — Human resource management principle, broadly prescribes how public service employees will be managed and requires that Chief Executive Officer provide a fair, flexible, safe and rewarding workplace to promote and comply with the objects of the Act.

Subclause (2) incorporates into the human resource management principle the merit principle and the equality of employment opportunity principle.

Clause 10 — Merit principle, describes the merit principle to be applied in accordance with contemporary public service systems in Australia.

Clause 11 — Equality of employment opportunity principle, establishes the equality of employment opportunity principle. This provision is designed to ensure all persons have equal opportunity to compete for employment and pursue careers in the public service; to ensure the elimination of unlawful discrimination in human resource management practices, and promote diversity among employees to achieve a public service that is reflective of the diversity of persons in the community and ensure the consistency and compliance with the objects of the Act.

Subclause (2) defines “unlawful discrimination” for the purposes of the Act.

Proposed clause 12 — Performance and conduct principle, describes the performance and conduct principle. This provision describes the general behavioural and performance

standards that apply to public service officers during their employment in the public service including the obligation to act consistently and in compliance with the objects of the Act.

Subclause (2) defines “public service employee”.

Part 3 —Administration

Clause 13 —Duties of Minister provides that the Minister has the responsibility to consult with the CEO as required by the Act and to advise other Ministers of structural changes made or intended to be made within the public service, consult with the Commissioner as required, and administer the Act in accordance with its provisions. Reference to the Chief Minister is made in places where a specific power is given. [Note that the Minister is, under the *Interpretation Act 1979*, the Minister allocated responsibility for the Act.]

Clause 14 — Minister’s power to obtain information etc provides power to the Minister to obtain information or advice from the Chief Executive Officer or to obtain such information through the Chief Executive Officer from other areas of the public service.

Part 4 — Public service Commissioner

Clause 15 — Appointment of public service Commissioner provides for the appointment of the Commissioner by the Administrator on a resolution of the Legislative Assembly, sets out the kinds of qualification and experience that are to be required, requires the appointment to be published in the *Gazette*, requires that the terms and conditions of appointment be agreed between the Commissioner and the Chief Minister, and requires that the person appointed must not be ordinarily resident in Norfolk Island or be a former employee of the Administration or of the public service or territory instrumentality as described in the old Act.

Clause 16 — Termination of appointment provides that the Commissioner’s appointment continues until it expires or is terminated. The Commissioner may resign by written notice to the Administrator and may be dismissed for cause as described.

Clause 17 — Acting Commissioner provides for the Administrator upon the advice of the Chief Minister to appoint an acting Commissioner for a period no longer than 12 months and generally in accordance with the terms of an Executive Contract of Employment.

Clause 18 — Delegation by Commissioner provides the power for the Commissioner to delegate any of his powers or functions under the Act to any person. A person so appointed is called a “review delegate”. A review delegate would be able to hear appeals under the Act.

Clause 19 — Functions of Commissioner requires the Commissioner to determine the practice and procedure for making and reviewing decisions concerning discipline and termination of employment; conduct inquiries and investigations into management practices; make arrangements with the CEO for the provision of staffing and accommodation to enable the Commissioner to carry out the functions required by the Act. The Commissioner is also to establish policies and procedures for the Commissioner’s staff; and such other matters as may be imposed upon the Commissioner by the Act (or any other Act).

Clause 20 — Powers of Commissioner sets out that the Commissioner has such power as needed to carry out the functions prescribed and may in writing determine matters to be determined by the Commissioner.

Clause 21 — Commissioner's investigatory powers, provides the Commissioner with investigatory powers. Thus—

Subclause (1) provides for the power for the Commissioner available to be used in carrying out his or her functions, to undertake an investigation in any way the Commissioner considers appropriate in relation to any matter under the Act.

Subclause (2) provides for powers in the Commissioner to require persons to appear, or give or verify information on oath or otherwise.

Subclause (3) requires a person to comply with a requirement to appear before or provide information to the Commissioner under subclause (2) and imposes a penalty if the person does not comply.

Subclause (4) expresses an offence against subclause (5) as an offence of strict liability (that is, no fault elements apply). The requirements for an offence of strict liability are set out in the *Criminal Code 2007* (section 23). Where there is strict liability means that there are no fault elements that need to be established but defences of mistake of fact is available.

Subclause (5) provides that a person who has a reasonable excuse for not complying with subclause (2) can use this as a defence to a prosecution under subclause (3).

Subclause (6) provides that, without limiting subclause (5), it is a reasonable excuse if complying with the requirement of the Commissioner might tend to incriminate a person.

Clause 22 — Confidential information empowers the Commissioner to receive and to deal with confidential information in performing a function under this Act.

Clause 23 — Funding of Commissioner's activities requires the Administration to provide the Commissioner with funds to carry out the Commissioners duties and requires the Commissioner to provide an annual budget of anticipated expenditure.

Clause 24 — Reports by Commissioner requires the Commissioner to provide an annual report upon the matters dealt with in the preceding year.

Part 5 — Chief Executive Officer and Deputy Chief Executive Officer

Clause 25 – Chief Executive Officer provides that there is to be the CEO.

Clause 26 — Appointment of Chief Executive Officer provides for the CEO to be appointed by the Chief Minister on a resolution of the Legislative Assembly, for the appointment to be notified in the Gazette and for the appointment to be not subject to any appeal or review.

Clause 27 – Termination of appointment provides that the appointment of the CEO will continue for the term of the contract of appointment until the expiry of that contract or by either party terminating the contract or unless the Chief Minister terminates the appointment in his or her absolute discretion.

Clause 28 — Acting Chief Executive Officer provides for the appointment of a public service employee to act as the CEO during any period or for all periods when the CEO is absent, unable to discharge duties or the position of CEO is vacant. On each occasion that a person appointed under such instrument is required to act as CEO during the period of such instrument, the person cannot be acting or act for any period longer than 6 months. The period of the instrument of appointment itself can be longer than 6 months in duration. The terms and conditions for such acting CEO appointment are to be determined by the Minister and the Minister can terminate the appointment at any time. (NB: Such instrument can be revoked at any time by the Minister under the *Interpretation Act 1979*).

Clause 29 — Directions by Minister provides that the Minister may give directions to the CEO but must not do so in connection with enumerated matters including the employment of a particular person, the designation of a particular employee or to commence or cease action in connection with a particular employee.

Clause 30 — Chief Executive Officer responsible to Minister provides that the CEO is responsible to the Minister for the performance of the CEO's functions under the Act.

Clause 31 — Functions of the Chief Executive Officer sets out the various functions of the CEO, the prime and over-riding function being to manage and provide strategic leadership of the public service, and sets out the manner in which the functions must be carried out. The clause also provides extensive description of the responsibilities the CEO has in carrying out the functions: these include directing employees; devising organisational structures; assigning designations to employees; assisting employees in various ways; devising and implementing financial plans; establishing, implementing and maintaining employee and other records and information; and ensuring appropriate health and safety standards.

Clause 32 — Employee records requires the CEO to keep employment records for each employee.

Clause 33 — Powers of Chief Executive Officer states that the CEO has such powers as are necessary to enable the CEO to carry out the CEO's functions or exercise the CEO's powers under this or any other Act.

Clause 34 — Chief Executive Officer may employ number of employees necessary establishes the power of the CEO to employ staff for the public service but requires that the CEO must do so within the finances available for that purpose.

Clause 35 — Delegation by Chief Executive Officer prescribes to whom the CEO can delegate powers or functions. The provisions of the *Interpretation Act 1979* (sections 23A and 23B) provide for various matters and powers that may be exercised in connection with delegations.

Clause 36 — Reports by Chief Executive Officer requires the CEO to report on the extent in accordance with an enactment or the *Norfolk Island Act 1979 (Commonwealth)* on the operation of the public service and dealing with the various matters set out in the clause. Such report is required to be tabled by the Minister within 2 sittings days after receiving it.

Part 6 — Employment, promotion, transfer and resignation

Clause 37 — Chief Executive Officer to employ, promote and transfer sets out the responsibilities and duties of the CEO in the employment promotion and transfer of persons in the public service. It provides that a person must not be employed or promoted other than in accordance with the merit principle and that it may be ongoing, for a fixed period, or casual and repeats that employment must be within the finances available. The provision also requires the CEO to give notice of their intention to employ, promote or transfer any person in the public service with the manner of giving notice and the persons to whom notice is to be given to be as required under the Act or as prescribed.

Clause 38 — Procedure for filling vacancies requires that a position to be filled (if to be filled) must be filled in the manner prescribed.

Clause 39 — Conditions for employment, etc requires that the CEO not employ, promote or transfer a person unless they possess the qualifications required for the position and meet any other requirements of the position (such as health or police or security clearance) such requirements being determined by the CEO or as prescribed.

Clause 40 — Probation for ongoing employees is an extensive clause dealing with the conditions for probation of ongoing employees and for exempting an ongoing employee from a 6 month probation period when appointed. Probation may be waived only as provided and when the probation period expires the employee must be confirmed, terminated (after giving notice to the employee) or have the probation period extended for not longer than 6 months.

Clause 41 — Termination of fixed period or casual employment provides that the CEO may terminate the employment of a fixed period or casual employee at any time subject to the terms of the employment contract under which they are employed.

Clause 42 — Fixed period employment provides for the power of the Minister in accordance with a recommendation of the CEO to determine the duties in the public service that may be performed for a fixed period or which may *only* be performed for a fixed period. The clause also provides power for renewal of a fixed period employment arrangement in accordance with terms and conditions determined by the Minister in accordance with a recommendation of the CEO.

Clause 43 — Casual employment sets out the conditions of employment that apply to casual employment arrangements. The clause is drafted for consistency with the fixed period provisions as appropriate. Thus the CEO can determine the duties or classes of duties that can be or can only be performed on a casual basis (and not for an ongoing or fixed period).

Subclause (2) prescribes that the person employed to perform casual duties cannot be required to perform other than casual duties as determined under subclause (1)).

Subclause (3) provides for the CEO to determine the terms and conditions that apply to casual employment arrangements and subclause (4) provides that a determination must have been made under subclause (3) before a casual employee can be employed.

Subclause (5) provides the conditions under which a casual employment arrangement can be renewed.

Clause 44 — Transfers authorises the transfer of employees to perform other duties and also to transfer an employees to perform duties performed by other employees of the same designation as the employee being transferred; any such transfer may be for a fixed period or on-going; does not attract the merit principle. An employee transferred under this provision may not refuse to transfer as required.

Clause 45 — Transfer and change to duties generally provides conditions that apply to the transfer of an employee under clause 31, including that the duties an employee is employed, promoted or transferred to can be varied without the employee's consent.

Subclause (2) clarifies that the employee's consent is not required for a transfer. In transferring an employee natural justice applies and the employee's views will be considered.

Subclause (3) prescribes that an employee's consent must be obtained if the transfer is to a lower designation, often referred to as a reduction by consent.

Subclause (4) provides that an employee can be transferred to a lower designation if the transfer is the result of an action under clause 56(3) – *Remedial Action* or clause 62(3) – *Discipline Action*.

Clause 46 — Resignation deals with the entitlement to and manner of resignation by an employee and provides that regulations may specify a notice period. A resignation cannot be withdrawn without the consent of the CEO. A person who resigns can only be re-employed in accordance with the human resource practices and procedures and the regulations.

Clause 47 — Re-employment of persons resigning to become candidates at elections provides for the re-employment of a person who resigns to seek election as a candidate for a seat in a House of the Commonwealth parliament or the Legislative Assembly but only where the person has resigned for that purpose not more than one month before the close of nominations for the election to be contested. Re-appointment of an unsuccessful candidate or of any other former employee is not automatic where the person is subject to certain legal proceedings so that the person is not eligible for re-appointment unless the proceedings are determined or the person is acquitted or unless the CEO is of the opinion that the offence is such that it is unlikely the services of an employee would, in the circumstances be terminated.

Application by an unsuccessful election candidate for re-employment must be lodged within 2 months following the declaration of the poll.

Clause 48 — Multiple employment arrangements provides clear authority that a person is able to enter into more than one concurrent employment contract in the public service. For example, an employee may be employed under one part time employment arrangement and under part time arrangement working on weekends. Subclause (2) provides that a person at the time of performing duties will be subject to the Act under each contract separately.

Clause 49 — Special measures to address inequality of opportunity permits the implementation and use of “special measures” (as defined in subclause (3)) in the public service to which the merit principle does not apply. The use of special measures is designed to enable the public service to better reflect the diversity of the community that it serves.

Part 7 — Secondment and redeployment

Clause 50 — Chief Executive Officer may make secondment arrangements enables the CEO to enter into arrangements for a period no longer than 3 years, to second a person from the public service to a position outside it or a person outside, into the public service. This could involve the public service and a private entity or another public service such as that of the Commonwealth or a State.

Clause 51 — Declaration of ongoing employee to be potentially surplus to requirements empowers the CEO to declare that a particular employee is surplus to requirements so that the CEO may give the employee written notice so stating and stating the reason for making the declaration. A copy of such a notice must be given to any prescribed employee organisation.

Clause 52 — Transfer of surplus employees empowers the CEO to transfer an employee to perform duties in a place other than where they have previously been performed. Such a transfer does not attract the merit principle.

Clause 53 — Redeployment and redundancy empowers the CEO who is unable to transfer an employee under section 44 (Transfers) or section 52 (Transfer of surplus employees) who has been declared potentially surplus (section 51(1)) to require the surplus employee to undergo training or re-deployment, transfer or termination. If a person is terminated the person can only be re-employed in the public service in accordance with the human resources policy or in accordance with regulation.

Part 8 — Employee inability or performance

Clause 54 — Inability or performance grounds describes the grounds that justify a CEO taking remedial action in relation to an employee’s inability or performance. The CEO is required to have regard to principles set out in subsection (3) and in making a determination may have regard to the matters set out in subsection (4). However before taking action the CEO must under subsection (5) be satisfied that the action is appropriate and reasonable in the circumstances and that the employee has been given a reasonable opportunity to show why the action should not be taken. Once the CEO has decided to take remedial action subsections (6), (7) and (8) deal with the requirement as well as when and how the employee must be given written notice of it and the notice must contain reasons for the decision and

inform the employee of their right to seek a review of the decision (section 68) or to appeal (section 69).

Clause 55 — Medical examination and report, provides that if the CEO has reasonable grounds to suspect that an employee's physical, mental or medical health may be adversely affecting an employee's performance, the CEO can engage a health practitioner to determine if this is so. This clause also prescribes the requirements related to the health practitioner's report.

Subclause (1) sets out the circumstances under which this clause applies.

Subclause (2) provides that the CEO may engage a health practitioner to determine whether an employee has a physical or mental illness or disability that may adversely affect the employee's performance of the duties he or she is assigned to perform.

Subclause (3) requires an employee to submit to an examination by a health practitioner. If an employee refuses to submit to an examination, a CEO can take other action under the Act, including disciplinary action under Part 9.

Subclause (4) requires that the health practitioner is to give a written report to the CEO.

Subclause (5) sets out the information that must be contained in the health practitioner's report.

Subclause (7) provides that if a health practitioner recommends against releasing a medical report directly to an employee, the CEO must not release the report to the employee, however the CEO must give the report to another health practitioner if one is nominated by the employee.

Clause 56 — Remedial action, describes the actions available to the CEO in relation to an employee's inability or unsatisfactory performance. Subclause (1)(b)(i) allows the CEO to order an employee to undertake training, counselling or other remedial activities. It should be noted that the CEO can implement more than one remedial action under subclause (1)(b).

Subclause (2) requires an employee to comply with an order under subclause (1)(b)(i). If the employee does not comply the CEO may take other action under the Act, for example disciplinary action.

Subclause (3) specifies that a transfer implemented as a remedial action under clause 56 is not subject to the merit principle and it is not necessary for the employee to consent to the transfer.

Clause 57 — Employee may be suspended pending decision, provides the CEO with the ability to suspend an employee from duty if the CEO suspects the inability or performance grounds are of such a serious nature as to require the removal of the employee from the workplace pending a decision under clause 54(2) of the Act.

Sub clause (2) provides the CEO with the ability to suspend an employee for one or more periods, together not exceeding 6 months, with or without remuneration.

Subclause (3) provides the Commissioner with the ability to extend an employee's period of suspension for any further periods necessary for the CEO to make a decision under clause 54(2).

Subclause (4) provides that a suspension will cease when the suspension period expires, the CEO makes a decision under clause 54(2), or the CEO or the Commissioner revokes the suspension.

Subclause (5) prescribes that an employee does not accrue any sick leave, recreation leave or long service leave during a period of suspension; however an employee may, during the period of suspension, use any recreation or long service leave entitlement that the employee accrued prior to being suspended. The use of recreation or long service leave during suspension does not affect the status of the suspension.

Subclause (6) provides that, subject to subclause (7), once the CEO makes a decision under clause 56(1)(a) to take no remedial action under clause 56, an employee's suspension is lifted and any leave that would have accrued to an employee during the period of suspension will be credited to the employee. If any period of suspension was without remuneration the employee will be paid what he would have been entitled to if they hadn't been suspended, and if an employee had used recreation or long service leave during a period of suspension that leave will be re-credited.

Subclause (7) prescribes that if the remedial action is termination, subclause (6) does not apply.

Clause 58 — Retirement on the grounds of invalidity, defines the meaning of total and permanent incapacity. This clause provides for the instance where an employee may be retired on the grounds of invalidity.

Subclause (2) provides for the CEO to retire an employee if satisfied on reasonable grounds that the employee is totally and permanently incapacitated.

Subclause (3) prescribes the conditions that must be complied with before the CEO can retire an employee, including the need for a medical report, and the procedures described are followed.

Subclause (4) provides that the CEO can take other action under clause 54 of the Act, if not satisfied that an employee is totally and permanently incapacitated. For example, the CEO may decide to terminate an employee's employment.

Part 9 — Discipline

Clause 59 — Breaches of discipline provides in subclause (1) an extensive list of matters that constitute a breach of discipline and subclause (2) seeks to describe the conditions under which it may be found that an offence affects an employee's employment.

Clause 60 — Chief Executive Officer may take disciplinary action provides that the CEO may take disciplinary action, if satisfied on reasonable grounds that the employee has committed a breach of discipline but must do so in accordance with the relevant regulations.

Clause 61 — Medical examination and report, provides that if the CEO has reasonable grounds to suspect that an employee's physical, mental or medical health may have caused or contributed to a breach of discipline by an employee the CEO engage a health practitioner to determine if this is so. The clause also prescribes the requirements related to the health practitioner's report.

Subclause (1) sets out the circumstances under which this clause applies.

Subclause (2) provides that the CEO may engage a health practitioner to determine whether an employee has a physical or mental illness or disability that may adversely affect the employee's performance.

Subclause (3) requires an employee to submit to an examination by a health practitioner. If an employee refuses to submit to an examination the CEO can take other action under the Act, including further disciplinary action.

Subclause (4) requires the health practitioner to give a written report to the CEO.

Subclause (5) sets out the information that must be contained in the health practitioner's report.

Subclause (6) prescribes that the health practitioner's report must be released to the employee, unless the health practitioner advises against releasing the report directly to the employee.

Subclause (7) provides that if a health practitioner recommends against releasing a medical report directly to an employee, the CEO must not release the report to the employee, however the CEO must give the report to another health practitioner if one is nominated by the employee.

Clause 62 — Disciplinary action, describes the actions available to the CEO if an employee has committed a breach of discipline. The CEO can implement more than one disciplinary action under subclause (1)(b).

Subclause (2) requires an employee to comply with an order under subclause (1)(b)(ii) or pay a fine under subclause(1)(b)(iv). If the employee does not comply the CEO may take other action under the Act, for example further disciplinary action.

Subclause (3) specifies that a transfer implemented as a disciplinary action under subclause (1)(b)(vi) is not subject to the merit principle and it is not necessary for the employee to consent to the transfer.

Subclause (4) provides that an employee does not accrue leave while suspended.

Clause 63 – Disciplinary action where employee transferred or redeployed, provides power to the CEO to still take disciplinary action even if an employee has transferred to another part of the public service away from where any alleged breach of discipline occurred before such transfer.

Clause 64 — Employee may be suspended pending decision, provides the CEO with the ability to suspend an employee from duty if the CEO suspects the breach of discipline is of such a serious nature as to require the removal of the employee from the workplace pending a decision under clause 60(1).

Subclause (2) provides the CEO with the ability to suspend an employee for one or more periods together not exceeding 6 months with or without remuneration.

Subclause (3) provides the Commissioner with the ability during any review or appeal to extend an employee's period of suspension for any further periods necessary.

Subclause (4) provides that a suspension will cease when the suspension period expires, the CEO makes a decision under clause 60(1), or the CEO or the Commissioner revokes the suspension.

Subclause (5) prescribes that an employee does not accrue any sick leave, recreation leave or long service leave during a period of suspension; however an employee may, during the period of suspension, use any recreation or long service leave entitlement that the employee accrued prior to being suspended. The use of recreation or long service leave during a suspension does not affect the status of the suspension.

Subclause (6) provides that, subject to subclause (7), once the CEO makes a decision under clause 62(1)(a) to take no disciplinary action under clause 62, an employee's suspension is lifted and any leave that would have accrued to an employee during the period of suspension will be credited to the employee. If any period of suspension was without remuneration the employee will be paid what he would have been entitled to during that period as if they hadn't been suspended and if an employee had used recreation or long service leave during a period of suspension that leave will be re-credited.

Subclause (7) prescribes that if a discipline action is to impose a period of suspension without remuneration or terminating an employee's employment, subclause (6) does not apply.

Clause 65 — Summary dismissal provides for the CEO to terminate an employee's employment notwithstanding the rules of natural justice if, in the CEO's opinion, the breach of discipline is misconduct of such a nature that it is in the public interest to immediately dismiss the employee.

Subclause (2) prescribes that as soon as the CEO makes a decision to summary dismiss an employee the CEO shall notify the employee in writing.

Subclause (3) prescribes that the CEO's notice must include the reasons for the decision and the employee's right to appeal under clause 69 of the Act.

Subclause (4) provides that a decision of the CEO takes effect on the day the notice is given to the employee or a later day specified in the notice. It is to be noted that the employee retains the right to appeal or seek a review of the CEO's decision. If a person is terminated, they appeal and their appeal is successful, the person's employment can be reinstated by the Commissioner.

Clause 66 — Payment of fines provides that a fine imposed under Part 9 is a debt due to the Administration.

Clause 67 — Abandonment of employment, provides for the CEO to terminate an employee's employment where an employee is absent from duty without authorisation for a period of at least 10 consecutive working days thus enabling the CEO to take action quickly.

Subclause (2) prevents the CEO from terminating an employee's employment under subclause (1) unless the CEO has notified the employee in writing of the proposed action and the reasons for taking that action and the employee has been given an opportunity to respond as to why the action should not be taken, that is that natural justice has been accorded. The CEO may also take action if all reasonable steps have been taken without success.

Subclause (3) defines working day for the employee concerned.

Part 10 — Review of grievances and appeals

Division 1 – Grievances

Clause 68 — Review of grievances, provides that an employee may, within 14 days of receipt of the decision of the CEO to terminate employment while on or at the end of probation or aggrieved in respect of another decision, seek a review by the Commissioner of the decision.

Subclause (2) requires the Commissioner to review the matter within 28 days where the matter is one relating to probation or an order for training or counselling or caution, loss of entitlements or payment of a fine, and within 3 months in any other case.

Subclause (3) empowers the Commissioner to refer the matter back to the CEO if it appears that the employee has not adequately taken other steps to redress the grievance.

Subclause (4) provides the powers to the Commissioner necessary to deal with a request under this clause.

Subclause (5) sets out the kind of order the Commissioner may make.

Subclause (6) entitles the Commissioner to decline the review an action under the circumstances there set out.

Division 2 — appeals

Clause 69 — Appeals about certain decisions establishes that an employee who is subject to an appealable decision (as set out in the provision including a decision to select a person for employment) may appeal against the decision. Appealable decisions are essentially those decisions that have an ongoing impact on an employee's salary, or termination or relate to an employment selection decision where the appellant in that situation is an eligible appellant prescribed under the regulations.

Subclause (2) provides the person with the right to appeal against the decision.

Subclause (3) provides that a person has 14 days after receiving the written notice of the decision to lodge an appeal with the Commissioner.

Subclause (4) provides that the CEO's decision is not affected by the lodging of an appeal.

Clause 70 — Appeals about selection, sets out the conditions and actions that apply to selection appeals.

Clause 71 — Commissioner to deal with appeal, provides if an appeal is lodged the Commissioner must deal with any appeal either by the Commissioner or a review delegate sitting alone although the Commissioner may appoint a suitably qualified person to assist the Commissioner or a review delegate in the conduct of a hearing such as a legal advisor but that person must take no part in the appeal decision. This provision also allows for an appeal to be dealt with on the papers so that costs are reduced by no oral hearing having to be held or by the Commissioner or review delegate conducting interviews or in such other manner as the Commissioner may decide.

Clause 72 — Commissioner may decline to deal with certain appeals, provides the Commissioner with the discretion not to review an action, intended action or decision if the request is considered to be frivolous, vexatious or not made in good faith; or if the employee or his or her advocate has commenced alternative proceedings under another Act or in another legal jurisdiction that may have application to Norfolk Island and those proceedings have not been withdrawn or failed for want of jurisdiction.

Subclause (2) defines "alternative proceedings" for the purpose of subclause (1).

Clause 73 — Determination of appeal, provides that the appeal must be conducted as a new hearing of the decision and is not limited to the information taken into account by the CEO when making the decision.

Subclause (2) sets out the decision options for the Commissioner, i.e. to affirm, vary or set aside the decision, set aside the decision and return the matter to the CEO for reconsideration or set aside the decision and replace it with the appeal decision.

Subclause (3) provides that the Commissioner in returning a decision may give directions to the CEO as to how the matter is to be dealt with.

Subclause (4) limits an appeal decision to those actions available to the CEO under the relevant Part for which the appeal is being heard.

Subclause (5) provides that the appeal decision will be provided to the CEO and appellant in writing and with reasons.

Clause 74 — Conduct of appeal, provides that the procedure for constituting an appeal is at the discretion of the Commissioner. It should be noted that this is consistent with the way in which promotion, inability and disciplinary appeals operated under the existing provisions of the Act.

Subclause (2) provides that an appeal will be conducted with as much expedition as a fair and proper consideration of the matters permits, and with as little formality and technicality as possible. It also provides that a hearing will be open only if all parties agree and it allows the regulations to prescribe any requirements that might be deemed necessary. This provision ensures that appeal hearings are conducted quickly, are not unnecessarily technical in nature, and can be understood by the participants to an appeal without the need to engage legal counsel in specified matters at potentially significant cost whilst allowing for proper consideration of the matters.

Subclause (3) provides in conducting the appeal the Commissioner is not bound by the rules of evidence but must comply with natural justice, and is not required to hold a hearing.

Subclause (4) provides that the Commissioner may obtain relevant information from persons in a way considered appropriate, consult with appropriate persons, and make any appropriate inquiries.

Subclause (5) provides that the Commissioner, in gathering information and evidence, may require a person to appear before the appeal board, give information on oath or otherwise, produce information or documents to the appeal board and verify information or a document by statutory declaration.

Subclause (6) provides that a person appearing before the Commissioner may only be represented by a legal practitioner or agent with the leave of the Commissioner.

Subclause (7) requires a person to comply with a requirement under subclause (5) and imposes a penalty if the person does not comply.

Subclause (8) expresses an offence against subclause (7) as an offence of strict liability (that is, no fault elements apply).

Sub-clause (9) provides that a person who has a reasonable excuse for not complying with sub-clause (7) can use this as a defence to a prosecution.

Subclause (10) provides that, without limiting subclause (9), it is a reasonable excuse if complying might tend to incriminate a person.

Clause 75 — Protection from liability, provides that the Commissioner, a review delegate or person appointed to assist a review board is not civilly or criminally liable for an act done or omitted to be done in good faith in the exercise of a power or performance of a function as a member of or in assisting an appeal board.

Subclause (2) provides that a person is not civilly or criminally liable for anything done or omitted to be done by the Commissioner in any appeal.

Subclause (3) provides that any liability the Administration might have apart from subclauses (1) and (2) is not affected.

Subclause (4) defines exercise of a power and performance of a function for the section.

Part 11 — Enterprise agreement

This Part broadly reproduces the former provisions of the 2000 Act except that the bargaining process will be as prescribed by regulation and that the system does not apply to employees who are fixed term employees or employed under an Executive Contract of Employment.

Clause 76 — Interpretation, defines “relevant employee” for the purposes of Part 11.

Clause 77 — Approval of enterprise agreement by Public Sector Remuneration Tribunal provides for approval of an enterprise agreement.

Clause 78 — Effect of enterprise agreement, provides, as previously that an enterprise agreement operates from when it is approved by the Public Sector Remuneration Tribunal and continues for 2 years or earlier as may be provided by the Agreement. The agreement must not be inconsistent with the human resources management principle.

Clause 79 — Initiation of enterprise bargaining is a process to be provided by regulation

Clause 80 — Employee representation will be as prescribed by regulation.

Clause 81 — Process for making an enterprise agreement will be as provided by regulation.

Part 12 – Miscellaneous

Clause 82 – Employment Instructions and Code of Conduct provides power for the CEO to determine rules to be known as “Employment Instructions” which Instructions will deal with a range of issues and matters as set out and which will include a Code of Conduct to be observed in the public service.

Subclause (3) establishes the Code of Conduct to be observed in the public service and indicates that the Code of Conduct is found in Schedule 5 of the Act.

Clause 83 — Publication of documents relating to the public service provides a requirement for publishing of appropriate public service documents. This provision provides the power and obligation to comply with the Information Publication Scheme requirements of the Freedom of Information Act 1982 (Commonwealth) so far as they now relate to Norfolk Island.

Clause 84 – Business or employment outside public service provides that an employee must not engage in paid employment or business activities outside his or her duties without the approval of the CEO which approval must not be given unless the CEO is satisfied that

such employment would not interfere or create any conflict of interest with the performance of the employee's duties.

Clause 85 — Work on public holidays provides that the CEO may require the whole or part of the public service to be kept open for the whole or part of a day that is a public holiday and require the attendance and services of an employee on that day.

Clause 86 — Performance of duties of statutory office holder applies in respect of employees who hold a statutory office or perform a function under another Act and prevents the CEO from directing such office holders when they are engaged on the duties of their other statutory office or function.

Clause 87 — Consultative Committee

Provides a special regulation making power to establish a consultative committee to provide advice and guidance in matters concerning the public service but the Committee cannot deal with any grievances of or connected to employees in general or specifically.

Clause 88 — Protection from liability – employee reports provides that no civil or criminal liability lies against a person who conducts an investigation for the Commissioner or an employee or former employee in respect of any report prepared in good faith for the Act or in the course of his or her employment about matters described.

Clause 89 — Regulations provides that the Administrator may make regulations for the Act and that fines of not more than 20 penalty units may be imposed.

Clause 90 — Amendments provides that Acts in Schedule 3 are amended as provided therein.

Clause 91 — Repeal provides for repeal of the Act named in Schedule 4.

Part 13 — Transitional matters for *Public Sector Management Act 2000*

Clause 92 — Definitions defines expressions used in Part 12.

Clause 93 — Chief Executive Officer provides that the CEO under the *2000 Act* at the time this Act becomes law is the CEO under this Act.

Clause 94 — Delegations continues delegations made under the *2000 Act* as being made under this Act.

Clause 95 — Categorisation of employment sets out the nomenclature of employees under the *2000 Act* and as they are to be under this Act.

Clause 96 — Policies and guidelines under *2000 Act* provides that the Human Resources Policies Manual made under the *2000 Act* continues so far as they are applicable to and consistent with, this Act.

Clause 97 — Discipline and appeals provides that decisions that have been made or matters under consideration at the time this Bill becomes law have effect or proceed as if made under

the new Act with the exception that if a matter has commenced to be heard by the Public Service Board, it must continue to hear the matter but if the Board has not entered upon the hearing and consideration of the matter, it must be referred to the Commissioner under the new provisions.

Clause 98 — The Public Service Board will continue only so long as necessary for it to complete the hearing and determination of a matter before it at the commencement.

Clause 99 — Continuation provides that the public service under the new Act is the successor in all respects to the public service established by the 2000 Act.

Clause 100 — Public Service under the 2000 Act provides that references to the public service under the 2000 Act are references to the public service under the new Act and is intended to ensure that no confusion can arise as to continuity following the commencement.

Part 14 — Review of the Act

Clause 101 — Review of the Act provides for the CEO to examine and report to the Chief Minister on the operation of the Act during its first 12 months of operation having regard to any matters that may improve its effectiveness. The CEO is required to present an annual report on the public service in accordance with the *Annual Reports Act 2004* as well as under section 36.

Schedule 1 — Persons excluded from the public service sets out a list of persons who are excluded from the public service.

Schedule 2 — Qualifications, etc of the Commissioner sets out the qualifications that may be expected of a person who may be appointed as Commissioner.

Schedule 3 — Amendment of other Acts makes some consequential amendments to the *Provident Account Act 1958*, the *Public Sector Remuneration Tribunal Act 1992*, the *Legal Aid Act 1995* and the *Interpretation Act 1979*.

Schedule 4 — Act repealed, repeals the *Public Sector Management Act 2000*.

Schedule 5 — Code of Conduct, sets out the Code of Conduct that must be observed in the public service under section 82(3) of this Act.

21 May 2013