

# **PUBLIC AND HEALTH SECTOR LEGISLATION AMENDMENT (RIGHT OF RETURN) BILL 2018**

## **EXPLANATORY MEMORANDUM**

### **OUTLINE**

The principal purpose of the Bill is to amend the *Public Sector Management Act 1994* and the *Health Services Act 2016* to restrict the right of return for officers in the Senior Executive Service (SES) and the Health Executive Service (HES) to the first two years of their initial executive contract, and to reduce the maximum amount of compensation which these officers may be eligible to receive in the event of the early cessation of their contract of employment.

### **PART 1 – PRELIMINARY**

#### **Clause 1      Short title**

Clause 1 cites the title of the Bill – the *Public and Health Sector Legislation Amendment (Right of Return) Act 2018* (the Act).

#### **Clause 2      Commencement**

Clause 2 provides for:

- Part 1 to come into operation on the day the Bill receives the Royal Assent.
- The rest of the Bill to come into operation on a day to be fixed by proclamation. Different days may be fixed for different provisions.

### **PART 2 – PUBLIC SECTOR MANAGEMENT ACT 1994 AMENDED**

#### **Clause 3      Act amended**

Clause 3 specifies that the Bill amends the *Public Sector Management Act 1994* (the PSM Act).

#### **Clause 4      Section 57 amended**

Clause 4 amends section 57(1)(c), which currently requires contracts of employment for executive officers (defined as CEOs or senior executive officers) to include any election by the officer to retain the right of return provided for under section 58. This amendment is to specifically reference subsection 58(7) in which the right of return is defined, as opposed to the more general reference to section 58 currently provided. This change reflects contemporary drafting practices in respect of referring to terms defined in other sections of an Act.

## **Clause 5     Section 58 amended**

The heading to section 58 is changed to “Right of return for executive officers under first appointment” to reflect the more limited operation of the section.

Clause 5(1) inserts new section 58(1A) which sets out the executive officers to whom section 58 will apply from commencement. It limits the future entitlement to a right of return to only those executive officers appointed on their first executive contract of employment. In the case of all other executive officer appointments, a right of return will no longer be available.

Clause 5(2) amends section 58(1), which sets out the circumstances in which an executive officer is eligible to retain a right of return. This amendment includes a cross reference to new subsection (1A)(a) referred to above, to limit the eligibility to elect to retain a right of return to an executive’s first contract of employment.

Clause 5(3) deletes existing section 58(2) which sets out when and how elections and revocations of the right of return may be made within an SES officer’s contract of employment and currently includes provision for an executive officer’s subsequent contracts of employment to retain the right of return. The clause substitutes a new subsection 58(2) to reflect the new arrangement whereby a right of return is available only in the first contract.

It also inserts new subsection 58(2A) to confirm that the bar on electing to retain a right of return in subsequent executive contracts provided by new subsection 58(2)(d) applies whether the first contract expired by effluxion of time or was terminated.

Clause 5(4) amends section 58(3), which currently provides that the right of return entitles an executive officer to employment in a department or organisation. This amendment specifies that, subject to new subsection (3A) below, an executive officer who exercises their right of return will be entitled to employment in their “SES place of employment” (a new term defined in section 58(7) inserted by Clause 5(6) below).

Clause 5(5) inserts new subsection 58(3A) which sets out the circumstances under which the right of return provided by subsection (3) ceases to apply to an executive officer. It achieves the Bill’s objective of restricting the right of return to the first two years of an officer’s first executive engagement, or such shorter period where the contract expires within that two year period by virtue of the effluxion of time or termination.

It also inserts new subsection 58(3B) to confirm that, when subsection (3) ceases to apply, the executive officer’s existing election to retain a right of return ceases to have any effect and no further election to retain such a right may be made in the same or a subsequent contract of employment.

Clause 5(6) inserts the new definition of “SES place of employment” in section 58(7). For an executive officer who is not a chief executive officer (CEO) this is defined as the department or organisation in which they were employed immediately before they ceased to be an executive officer, while for a CEO their SES place of employment is defined as the department principally assisting in the administration of the PSM Act (currently the Public Sector Commission).

Clause 5(7) amends the definition of “right of return” provided in section 58(7) to include reference to the executive officer’s “SES place of employment”, as defined by the preceding amendment.

#### **Clause 6      Section 59 amended**

Clause 6(1) amends section 59(1)(b), which relates to the entitlement to compensation for executive officers who do not have a right of return, to specifically reference subsection 58(7) in which the definition of “right of return” is provided, replacing the current broader reference to section 58. As with Clause 4 above, this change reflects contemporary drafting practices in respect of referring to terms defined in other sections of an Act.

Clause 6(2) achieves the Bill’s objective of limiting the maximum amount of compensation to which an SES officer may become eligible in the event of the early termination of a contract by replacing references to “remuneration” in section 59(2) and (3) with “salary”.

#### **Clause 7      Part 9 Division 4 inserted**

Clause 7 inserts new Division 4 and section 115 at the end of Part 9 to provide for the application of the transitional provisions contained in new Schedule 9.

#### **Clause 8      Schedule 9 inserted**

Clause 8 inserts Schedule 9 which sets out the transitional provisions applying to SES officers who have an existing right of return immediately prior to the Bill’s commencement.

##### 1 – Terms used

Clause 1 of Schedule 9 defines the terms used in new Schedule 9.

##### 2 – Right of return for executive officers on initial contracts not exceeding 2 years

Clause 2 of Schedule 9 sets out the transitional arrangements applying to executive officers who, immediately before commencement day, were employed on their initial executive contract which has a term of two years or less and which contains a right of return.

It entitles those executive officers to whom the clause applies to the same right of return as that provided by new section 58(3) to (7). In effect, this means that their elected right of return remains available for the unexpired term of their contract).

### 3 – Right of return for executive officers on initial contracts exceeding 2 years

Clause 3 of Schedule 9 sets out the transitional arrangements applying to executive officers who, immediately before commencement day, were already employed on their initial executive contract which has a term of more than two years and which contains a right of return.

Executive officers to whom the clause applies are separated further into two categories:

- Those who have not yet completed the initial two years of that contract's total length (sub clause 3(2)) – the right of return remains available to these officers for the transitional period of 6 months from the date of commencement of the Bill or the unexpired portion of the contract's first two years (whichever is the later), subject to the expiry or termination of the contract within that period.
- Those who have already completed the initial two years of that contract's total length (sub clause 3(3)) – for these officers the right of return ceases to apply six months from the date of commencement, subject to the expiry or termination of the contract within that period.

### 4 – Right of return for executive officers on other contracts

Clause 4 of Schedule 9 sets out the transitional arrangements applying to executive officers already employed at the time of commencement but not captured by clauses 2 and 3 above, that is those executive officers not appointed on their initial contract of employment but who have maintained an ongoing election to retain a right of return.

The transitional arrangements provide these officers with a maximum period of six months from the date of commencement or the remaining term of their contract, whichever is the lesser, within which to exercise their right of return.

### 5 – Executive officers may elect to take compensation

Clause 5 of Schedule 9 provides that an executive officer who has an entitlement to exercise a right of return during the transitional period in accordance with Clause 2, 3 or 4 of Schedule 9 above, may elect to forego that right and become entitled instead to compensation under section 59 as amended by the Bill.

This mirrors the right for executive officers to elect to take compensation in lieu of the right of return which is already available under section 60 of the PSM Act.

## 6 – No other right of return under s.58 or contract for executive officers on existing contracts

Clause 6 of Schedule 9 provides that apart from the executive officers to whom the transitional provisions apply by virtue of Clauses 2, 3 and 4 of Schedule 9, no other executive officer on an existing contract has a right of return under either the old or amended section 58.

Similar to new subsection 58(3B) inserted by clause 5(5) above, it also confirms that, when clause (3) or (4) of Schedule 9 cease to apply to an executive officer, the executive officer's existing election to retain a right of return ceases to have any effect and that no further election to retain such a right may be made in the same or a subsequent contract of employment.

It is included to put beyond doubt that any existing statutory right of return that an executive officer on an existing contract has under section 58 prior to commencement will not continue after commencement, except to the extent that the transitional provisions allow it to continue.

## 7 – Entitlements arising under section 59 before commencement day

Clause 7 of Schedule 9 provides that if the Public Sector Commissioner is yet to determine the compensation payable to an executive officer who became entitled to such compensation under section 59 immediately before the Bill's commencement, the determination is to be made under amended section 59 (i.e. limited to a maximum of 12 months' salary).

## **PART 3 – HEALTH SERVICES ACT 2016 AMENDED**

### **Clause 9     Act amended**

Clause 9 specifies that the Bill amends the *Health Services Act 2016* (the HS Act).

### **Clause 10    Section 129 amended**

Clause 10 amends section 129(1)(c) to specifically refer to the definition of "right of return" provided by subsection 132(1). As with clauses 4 and 6(1) above, this change reflects contemporary drafting practices in respect of referring to terms defined in other sections of an Act.

### **Clause 11    Section 132 amended**

The heading to section 132 is changed to "Right of return for executives under first appointment" to reflect the more limited operation of the section.

Clause 11(1) inserts a new definition for “HES place of employment” in section 132(1) for a health executive entitled to a right of return under section 132(4). For a health executive who is not a chief executive this is defined as the health service provider (HSP) in which the executive was employed immediately before they ceased to be a health executive, while for a chief executive their HES place of employment is the department principally assisting in the administration of the HS Act (currently the Department of Health).

Clause 11(2) amends the definition of “right of return” set out in section 132(1) by updating it to refer to the new definition of “HES place of employment” inserted by the clause above.

Clause 11(3) inserts new section 132(1A) which sets out the health executives to whom the right of return provided in section 132 will be available following commencement. It limits the future entitlement to a right of return to only those health executives appointed on their first executive contract of employment. In the case of all other health executive appointments, a right of return will no longer be available.

Clause 11(4) amends section 132(2) to cross reference the new section 132(1A)(a) in establishing the circumstances in which a health executive is eligible to elect to retain a right of return, and to remove the reference to “originating place of employment”. This reflects changes made by the Bill whereby a health executive’s right of return under new section 132(4) will now be to their HES place of employment as defined in amended section 132(1).

Clause 11(5) amends section 132(3), which sets out when and how elections and revocations of the right of return may be made within a health executive’s contract of employment. Changes to this section were required to reflect the new arrangements whereby a right of return is available only on first contracts.

It also inserts new subsection 132(3A), to confirm that the bar on electing to retain a right of return in subsequent health executive contracts provided by new subsection 132(3)(d) applies whether the first contract expired by effluxion of time or was terminated.

Clause 11(6) amends section 132(4) to provide that a health executive who exercises their right of return will be entitled to employment in their “HES place of employment” (a new term inserted by clause 12(1) above). Currently, section 132(4) provides that the right of return entitles the HES officer to employment in their “originating place of employment”.

Clause 11(7) inserts new subsection 132(4A) which sets out the circumstances under which the right of return provided by subsection (4) ceases to apply to a health executive. It achieves the Bill’s objective of limiting the right of return to the first two years of a health executive’s first contract, or such shorter period where their

contract expires within that two year period by virtue of the effluxion of time or termination.

It also inserts new subsection 132(4B) which clarifies that, when subsection (4) ceases to apply, the health executive's existing election to retain a right of return ceases to have any effect and that no further election to retain such a right may be made in the same or a subsequent contract of employment.

#### **Clause 12    Section 133 amended**

Clause 12(1) amends section 133(1)(b) to specifically reference the definition of "right of return" provided by subsection 132(1). As with clauses 4, 6(1) and 10 above, this change reflects contemporary drafting practices in respect of referring to terms defined in other sections of an Act.

Clause 12(2) achieves the Bill's objective of limiting the maximum amount of compensation to which a health executive may become eligible in the event of the early termination of a contract by replacing references to "remuneration" in section 133(3) and (4) with "salary".

#### **Clause 13    Part 19 Division 8 inserted**

Clause 13 inserts new Division 8 – *Public and Health Sector Legislation Amendment (Right of Return) Act 2018* Part 3 – at the end of Part 19 of the HS Act. This division sets out the transitional arrangements for health executives with an existing right of return immediately prior to the Bill's commencement.

##### Section 258A – Terms used

Section 258A defines the terms used in new Division 8.

##### Section 258B – Right of return for executives on initial contracts not exceeding 2 years

Section 258B sets out the transitional arrangements applying to health executives who, immediately before commencement day, were employed on their initial health executive contract which has been made for a period of two years or less and which contains a right of return.

It entitles those health executives to which the section applies to the same right of return as that provided by amended section 132(1) and (4) to (8). In effect, this means that their elected right of return remains available for the unexpired term of their contract).

### Section 258C – Right of return for executives on initial contracts exceeding 2 years

Section 258C sets out the transitional arrangements applying to health executives who, immediately before commencement day, were already employed on their initial executive contract which has a term of more than two years and which contains a right of return.

Health executives to whom the clause applies are separated further into two categories:

- Those who have not yet completed the initial two years of that contract's total length (subsection 2) – the right of return remains available to these officers for the transitional period of 6 months from the date of commencement of the Bill or the unexpired portion of the contract's first two years (whichever is the later), subject to the expiry or termination of the contract within that period.
- Those who have already completed the initial two years of that contract's total length (subsection 3) – for these officers the right of return ceases to apply six months from the date of commencement, subject to the expiry or termination of the contract within that period.

### Section 258D – Right of return for executives on other contracts

Section 258D sets out the transitional arrangements applying to health executives already employed at the time of commencement but not captured by sections 258C and 258D above, that is those health executives not appointed on their initial contract of employment but who have maintained an ongoing election to retain a right of return.

Health executives to which this clause applies are entitled to exercise their right of return within six months of the commencement date or the remaining term of their contract, whichever is the lesser.

### Section 258E – Executives may elect to take compensation

Section 258E provides that a health executive who has a right of return in accordance with new sections 258B, 258C, and 258D above, may elect to forego that right and become entitled to compensation under section 133 as amended.

This mirrors the right for health executives to elect to take compensation in lieu of the right of return which is already available under section 135 of the HS Act.

### Section 258F – No other right of return under s.132 or contract for executives on existing contracts

Section 258F confirms that apart from the health executives to whom the transitional provisions apply by virtue of section 258B, 258C and 258D, no other health



executive on an existing contract has a right of return under either the old or amended section 132.

Similar to new subsection 132(4B) inserted by clause 11(7) above, it also sets out that when section 258(C) or 258(D) ceases to apply to a health executive, the health executive's existing election to retain a right of return ceases to have any effect, and that no further election to retain such a right may be made in the same or a subsequent contract of employment.

This section is included to put beyond doubt that any existing statutory right of return that a health executive on an existing contract has under section 132 prior to commencement will not continue after commencement, except to the extent that the transitional provisions allow it to continue.

#### Section 258G – Entitlements arising under s 133 before commencement day

Section 258G applies to the Department CEO when determining the compensation to which a health executive may be entitled within the context of the amendments to section 133, which cap compensation payments to 12 months' salary.

It provides that if the Department CEO is yet to determine the compensation payable to a health executive who became entitled such compensation immediately before commencement Bill's commencement, the determination is to be made under amended section 133 (i.e. limited to a maximum of 12 months' salary).