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

ELEVENTH ASSEMBLY

**GOVERNMENT AMENDMENTS TO THE PUBLIC SECTOR (CLOSING THE GAP)
LEGISLATION AMENDMENT BILL 2025**

SUPPLEMENTARY EXPLANATORY STATEMENT

**Presented by
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Chief Minister
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PUBLIC SECTOR (CLOSING THE GAP) LEGISLATION AMENDMENT BILL 2025

This explanatory statement relates to the Public Sector (Closing the Gap) Legislation Amendment Bill 2025 (the Bill) – Government amendments as presented to the Legislative Assembly.

OVERVIEW OF GOVERNMENT AMENDMENTS

This supplementary explanatory statement outlines Government amendments to the Bill as presented to the Legislative Assembly by Mr Thomas Emerson MLA.

Intent of the Bill

As explained in the explanatory statement that accompanied introduction of the Bill on 26 June 2025, the Bill would amend the *Annual Reports (Government Agencies) Act 2004* (Annual Reports Act) and *Public Sector Management Act 1994* (PSM Act) to legislate mechanisms to support the ACT Government's commitments under the National Agreement on Closing the Gap (National Agreement) and specifically Essential Actions 3.5 and 4.3 of the Productivity Commission's 2024 Review of the National Agreement on Closing the Gap – Study report Volume 1 (the Productivity Commission Report):

- a) Essential Action 3.5 is to embed responsibility for improving cultural capability and relationships with Aboriginal and Torres Strait Islander people into public sector employment requirements.
- b) Essential Action 4.3 is to include a statement on Closing the Gap in every government organisation's annual report.

The Bill as presented seeks to give effect to these recommendations by:

- requiring all public servants to do their job in accordance with a new 'closing the gap principle', which includes demonstrating cultural capability and working to develop cultural capability in their workplace; implementing the principles of the National Agreement throughout their work; promoting cultural safety; and eliminating institutional racism in the administrative unit they work in; and
- requiring directors-general to report (in a form agreed by the Minister and the Aboriginal and Torres Strait Islander Elected Body) on the actions taken by their administrative unit to implement the priority reform areas of the National Agreement, the recommendations in the Productivity Commission Review, and the recommendations in the Aboriginal and Torres Strait Islander-led review.

Committee Inquiry

On 21 October 2025, the Standing Committee on Public Accounts and Administration tabled their report on the inquiry into the Bill, making five recommendations as follows:

- Recommendation 1 - That the Assembly pass the Bill with amendments
- Recommendation 2 - That the Assembly pass the amendments provided in Mr Emerson's submission, that restrict the closing the gap principle obligation to SES members
- Recommendation 3 - That the Assembly pass an amendment to the Bill to change the commencement date to 1 July 2026
- Recommendation 4 - That the Assembly consider supporting any further minor technical amendments to the Bill
- Recommendation 5 - That a post-implementation review is undertaken 12 months after commencement to evaluate the effectiveness and consequences of the legislation.

The Government amendments address these recommendations and propose further minor technical amendments (as foreshadowed in recommendation 4) to ensure the intent of the Bill can be realised practically by clarifying arrangements for setting reporting requirements in consultation with the Elected Body, in the same terms as provided to the relevant committee of the Legislative Assembly, as well as introducing definitions of key terms and reframing the obligations relating to the 'closing the gap principle'.

The Government amendments are summarised as follows.

Commencement

The Bill provides that amendments to the PSM Act and Annual Reports Act will commence on notification.

The Government submission to the Inquiry into the Bill recommended delayed commencement of the Bill to ensure that Government is ready to implement the Bill with appropriate implementation and compliance mechanisms in place.

Recommendation 3 of the Committee in their report was to change the commencement date to 1 July 2026.

The Government amendments set commencement at 1 July 2026, to align with the financial year, budget cycle and annual reporting requirements. This approach also supports the Annual Report Act changes applying from the start of the new reporting period in 2026.

Annual Reports Act

The Government amendments remove proposed s 7E from the Bill and instead apply the reporting requirements in a way that conforms with the current structure of Part 2 of the Act.

The Government amendments also align the reporting requirements with the expected implementation of the new closing the gap principle in the PSM Act.

The State of the Service report will be required to include a statement describing the measures taken within the public sector to assist SES members and statutory office-holders to do their jobs in accordance with the closing the gap principle (section 5).

Director-general and public sector body annual reports must include information about progress against the National Agreement, including priority reform areas and relevant review recommendations (noting the expectation of enhanced cultural capability of SES members and statutory office-holders arising from the equivalent PSM Act obligation) (sections 6-7).

The Government amendments distinguish the application of the reporting requirement in the Act, providing that territory entities must only report if the annual report directions provide it (section 8). This will allow setting reporting for territory entities under the directions based on the most appropriate format given the range of such small agencies, their functions and leadership structures. This approach does not prevent the annual report directions from providing additional detail to prescribe requirements for reporting under sections 5, 6, and 7, as long as the directions add to the obligations, rather than seek to vary or reduce the requirements in the Act.

The Government amendments also include an amendment to s 9, requiring that the Minister give a copy of a proposed annual report direction relating to reporting on the National Agreement to the Elected Body and allowing 30 days for them to provide any recommendations, and for the Minister to consider these recommendations before making the direction. This differs from the approach taken in the Bill (per s7E(3), aligning it with the current requirement for the Minister to consult the relevant Assembly Committee before making a direction, but retaining the Ministers authority to make the directions. The Minister may undertake a range of engagement in development of the Directions prior to their issuance.

PSM Act

Definitions

Certain key terms in the Bill require greater certainty, these include the terms “closing the gap principle”, “institutional racism”, and “Aboriginal and Torres Strait Islander cultural capability”.

The definitions of these terms should align with work currently underway within Government, in consultation with key stakeholders, to settle definitions of key terms. This will ensure that efforts across the ACT Government to respond to commitments made under the National Agreement and ACT Agreement are coordinated, noting that standard definitions are critical in progressing the development of cultural capability performance assessment methodology.

The Government amendments clarify or insert definitions of key terms and seek to present the definitions in a way that aligns with best-practice legislative drafting, framing the obligations as actionable, measurable and ongoing.

The '**closing the gap principle**' has been amended to more precisely capture the nature of cultural capability as a process of lifelong, continuous learning, referred to as "continual development" in an employment context. This echoes the description used in the National Agreement. It would require an SES member or statutory office-holder to actively embed the objectives of Priority Reform 3 – to transform government institutions – by doing their job in accordance with the closing the gap principle by:

- a) Continually developing and demonstrating their own cultural capability;
- b) Continually developing the cultural capability of their administrative unit;
- c) Promoting cultural safety in the workplace at all times;
- d) Working to eliminate institutional racism in relation to Aboriginal and Torres Strait Islander peoples; and

For other provisions of the National Agreement that relate to the SES member's job, the SES member does their job in accordance with the closing the gap principle if they:

- e) Implement those provisions of the Agreement; or
- f) Provide advice to the Minister responsible for the SES member's administrative unit about implementing those provisions of the Agreement.

In relation to the terms used within the '**closing the gap principle**' definition:

- a) '**Cultural safety**' is defined with reference to the National Agreement, part 12 (Definitions).
- b) '**Institutional racism**' is defined based on Tasmania's "*Embracing Diversity, Fostering Belonging: Tasmania's Multicultural Action Plan 2025-2029*", which acknowledges that the definitions draw on the terminology used in the Australian Government's "*Towards Fairness: A Multicultural Australia for All*", and the Australian Human Rights Commission's "*National Anti-Racism Framework: a roadmap to eliminating racism in Australia*".

Mitigating liability

The Bill, with the additional amendments to be moved by Mr Emerson in accordance with recommendation 2 of the Committee, will require an SES member and statutory office-holder to do their job in accordance with the "closing the gap principle".

To mitigate potential legal risk or civil action against the Territory arising from an alleged failure to comply with the closing the gap principle, the Government amendments make it clear beyond all doubt that:

- a) An act or decision is not invalid merely because a person fails to comply with the "closing the gap principle"; and

- b) Nothing in the new “closing the gap principle” requirement creates in any person a legal right or gives rise to a civil cause of action.

This will make it clear that an act or decision made by a SES member or statutory office-holder is not invalid merely because the person fails to comply with the new “closing the gap principle” requirement, and that the new “closing the gap principle” requirement does not create a legal right or gives rise to a civil cause of action.

This seeks to ensure that SES members and statutory office-holders are motivated to take positive steps to meet the new obligation without fear of liability, which may serve as a disincentive to genuine change. It also means that where regulatory action, or statutory decisions result in consequences related to the National Agreement there will not be an issue of conflict in the proper application of relevant laws.

Statutory review

Recommendation 5 of the Committee in their report on the Inquiry into the Bill was that a post-implementation review is undertaken twelve months after commencement to evaluate the effectiveness and consequences of the legislation.

The Government amendments include a provision requiring a review to be initiated 18 months after commencement (i.e. as soon as practicable after 1 January 2028). This allows a reasonable time for implementation, evaluation and measurement, enabling the collection of an evidence base to support a review to be undertaken and tabled before the end of this term of Government.

CONSULTATION ON THE PROPOSED APPROACH

The government consulted with the ACT Aboriginal and Torres Strait Islander Elected Body in developing these amendments and took guidance from the Standing Committee on Public Accounts and Administration recommendations arising from their Inquiry into the Bill.

CLIMATE IMPACT

The Government amendments do not have a climate impact.

CONSISTENCY WITH HUMAN RIGHTS

During the development of the Bill and the Amendments due regard was given to compatibility with human rights as set out in the *Human Rights Act 2004* (ACT) (the HR Act).

The Amendments engage, promote and impose limitations on certain human rights under the HR Act.

The explanatory statement that accompanied the presentation of the Bill notes that the Bill engages the following rights under the HR Act:

- Section 8 - Recognition and equality before the law
- Section 17 - Taking part in public life
- Section 27 - Cultural and other rights of Aboriginal and Torres Strait Islander peoples and other minorities
- Section 27B - Right to work and other work-related rights

In its Scrutiny Report 8, the Standing Committee on Legal Affairs (Legislative Scrutiny Role) (the Scrutiny Committee) requested the Member to amend the explanatory statement to address the possible limitation on the right to work (section 27B HRA) and to explain why it is not limited or, alternatively, to explain why the limitation should be considered reasonable and proportionate using the framework set out in section 28 of the HRA. In Scrutiny Report 10, the Scrutiny Committee noted that Mr Emerson has amended the explanatory statement to respond to the Committee's request.

The Government amendments to the Bill will not limit any rights.

However, the insertion of a PSM Act provision providing that an act or decision is not invalid merely because a person fails to comply with section 8 could be viewed as reducing the extent to which the Bill promotes human rights. Notwithstanding this, Government is of the view that the amendment is not of itself a limitation of rights.

CLAUSE NOTES

1 Clause 2, Page 2, line 6

This clause amends the commencement clause in the Bill so that instead of commencing on the day after notification, the Bill will commence on 1 July 2026. This will align the operative amendments with appropriate reporting periods.

2 Clause 4, Page 3, line 3

This clause omits clause 4 of the Bill (new section 7E of the Annual Reports Act) and substitutes it with amendments to sections 5, 6, 7, 8 and 9 of the Annual Reports Act.

The effect of each amendment is set out below.

The State of the Service report, prepared by the Head of Service about the operation of the public service, must include a report on measures introduced for developing cultural capability of SES members and statutory office-holders, noting their responsibility to do their jobs in accordance with the closing the gap principle (section 5).

A director-general annual report, prepared by each director-general of an administrative unit, must include a report on progress against the National Agreement, including measures taken to implement priority reforms (however described) in the agreement and in response to any recommendations (however described) in any review of progress under the agreement (section 6).

A public sector body annual report, prepared by the responsible director-general, chief executive officer, statutory office-holder or agency head, must include a report on progress against the National Agreement, including measures taken to implement priority reforms (however described) in the agreement and in response to any recommendations (however described) in any review of progress under the agreement (section 7). Public sector bodies include entities such as the Legal Aid Commission or ACT Architects Board, for example.

A territory entity annual report, which must comply with an annual report direction, may be required to include a report on progress against the National Agreement, depending on the annual report direction made for the relevant reporting year. Territory entity annual reports are not covered by the same obligation in the Act as other annual reports as they are not ordinarily led by someone who is bound by the closing the gap principle (i.e. an SES member or statutory office-holder).

Officer of the Legislative Assembly annual reports and Office of the Legislative Assembly annual reports are not covered for the same reason, and are also not bound by the directions, so will not be impacted by these changes.

An annual report direction may add detail to the substantive obligations that apply to the State of the Service report, director-general annual reports or public sector body reports, as long as the direction does not seek to substantively vary or reduce the obligations in the Act.

This clause also amends current section 9 of the Annual Reports Act, which provides for consultation about an annual report direction. It requires the Minister to give a copy of a proposed annual report direction to the Aboriginal and Torres Strait Islander Elected Body (Elected Body). New section 9(1)(ba) requires that the Minister must ask the Elected Body, in writing, for any recommendation about the proposed annual report direction for matters relating to Aboriginal and Torres Strait Islander peoples.

This seeks to address Essential Action 4.3 by ensuring the Elected Body, as representatives of the Aboriginal and Torres Strait Islander community, have a legislated role in supporting the Government to appropriately report on progress against the National Agreement. There is no limit to the consultation and engagement the Minister may undertake in development of the Directions prior to their issuance in relation to seeking community views.

Finally, this clause defines the National Agreement in the Dictionary for the Annual Reports Act. The definition proposed in the Bill as presented by Mr Emerson is retained.

3 Clause 6, Page 5, line 7

This clause omits clause 6 of the Bill (introduction of the new ‘closing the gap principle’) and replaces it with new section 8(3A) to clarify that an SES member (rather than ‘public servant’) must do their job in accordance with the ‘closing the gap principle’.

The clause also introduces new section 8(3B) to clarify that subsection 3A does not affect the operation of any other Act or create or affect any other legal right. It includes a note to clarify that failing to act in a way that is consistent with subsection 3A may be misconduct under section 9 of the PSM Act. This seeks to ensure that SES members and statutory office-holders are motivated to take positive steps to meet the new obligation without fear of liability, which may serve as a disincentive to genuine change. It also means that where regulatory action, or statutory decisions result in consequences related to the National Agreement there will not be an issue of conflict in the proper application of relevant laws

4 Clause 7, Proposed section 8 (4), new definition of *closing the gap principle*, Page 5, line 21

This clause replaces the definition in the Bill with a new definition of the closing the gap principle.

The ‘closing the gap principle’ has been amended to more precisely capture the nature of cultural capability as a process of lifelong, continuous learning, referred to as “continual development” in an employment context. This echoes the description used in the National Agreement. It would require an SES member or statutory office-holder to actively embed the objectives of Priority Reform 3 – to transform government institutions by:

- Continually developing and demonstrating their own cultural capability;
- Continually developing the cultural capability of their administrative unit;
- Promoting cultural safety in the workplace at all times;
- Actively doing, or requiring they stop doing, things that the National Agreement expresses as important to eliminate institutional racism in relation to Aboriginal and Torres Strait Islander peoples; and
- Advising government how to implement the National Agreement, within the area of expertise that SES member or statutory office-holder holds.

Subsection (a) of the definition has been framed to logically interact with the terms of provisions of the Agreement that relate to the transformation, governance and operations of government agencies. These are the things that are more directly in the control of an SES member or statutory office-holder and therefore reasonable to expect compliance with.

Subsection (b) goes to all other obligations in the National Agreement and is framed to require the SES member or statutory office-holder to either implement the parts of the Agreement that are relevant to their role, or recommend the government do so. It is specifically drafted to align with the expression of other functions of public servants, to ensure that SES members and statutory office-holders can readily understand what the obligation requires them to do in the exercise of their functions.

In relation to the terms used within the ‘closing the gap principle’ definition, “cultural safety” is defined with reference to the National Agreement, part 12 (Definitions). This does not change the effect of the Bill, but ensures there is a clear signpost to indicate that cultural safety should be understood with reference to the National Agreement.

5 Clause 7, Proposed section 8 (4), new definition of *institutional racism*, Page 6, line 12

The Bill does not currently contain a definition of “institutional racism”. This makes it challenging for an SES member or statutory office-holder to understand what is expected of them in fulfilling their obligations under the closing the gap principle.

This clause introduces a definition of “institutional racism”. The definition has been informed by the National Agreement, but it is noted that the National Agreement does not offer a definition of systemic or institutional racism. Instead, the definition

draws on the definitions of 'systemic racism' and 'institutional racism' included in the Australian Human Rights Commission's "*National Anti-Racism Framework: a roadmap to eliminating racism in Australia*".

6 Proposed new clauses 8 and 9, Page 6, line 24

This clause inserts new section 151(1A) to clarify that section 8(3A) applies to applies to a statutory office-holder as if they were an SES member.

The clause also inserts new section 253, which requires the Minister to review the amendments made by the Bill as soon as practicable after 1 January 2028. The Minister must present a report of the review to the Legislative Assembly within 6 months after the review is started. This seeks to ensure the outcome of the review is tabled before the end of this term of government.