



**Preliminary analysis of the consultation draft
Government Sector Employment Regulation 2014 and
the consultation draft Government Sector
Employment Rules 2014**

Prepared by PSA Research team
Public Service Association of NSW
Level 7, 160 Clarence Street Sydney NSW 2000
research@psa.asn.au
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EXECUTIVE SUMMARY

Set out below is a brief summary of the key areas of change and concern identified from our initial analysis of the consultation draft GSE Regulation and GSE Rules.

Draft GSE Regulation 2014

- For excess employees the obligation for departments to redeploy staff is reduced
- Issue: if re-engaged in the public sector the calculation to repay severance pay remains unclear
- Extended leave provisions remain substantially unchanged
- Incremental progression now directly linked with agency performance system along with the satisfactory conduct of the employee

Draft GSE Rules 2014

- The Rules are new instruments, the Public Service Commissioner appears to have made only the Rules necessary for the GSE Act to commence on 24 February 2014
- It is likely that further Rules will need to be made, PSA has been guaranteed consultation
- Issue: the compliance mechanisms are inadequate
- Issue: the enforcement of Rules is unclear
- The new system for merit is linked to the capability framework
- Four new concepts introduced: capability-based assessment, comparative assessment, suitability assessment and talent pools. Certain concepts incorporate existing provisions
- Issue: the ability to undertake internal recruitment during restructures has been removed, potentially reducing the opportunity to place existing staff
- The maximum period of temporary employment has been extended from 3 years to 4 years
- Issue: the lack of transitional arrangements for current temporaries
- Issue: the more stringent requirements around temporary employment may drive an expansion of the use of labour hire
- The GSE Act abolished promotional appeals; the new process aims to replace it with an internal review procedure
- Issue: the reviewer is not permitted to consider the merit of the decision
- Issue: there are inadequate checks to ensure the review process is independent and fair and perceived to be so
- New review process for employer-initiated transfer decisions
- Revised process for dealing with unsatisfactory performance directly linked to performance development framework
- Issue: the lack of detailed guidelines dealing with unsatisfactory performance and misconduct procedure
- Senior executives have their work arrangements set out in the model contract
- Issue: the inadequate protections against termination of senior executives without reason and the hours provisions being unreasonable and undermining the ability to achieve a work/life balance

BACKGROUND

The *Government Sector Employment Bill 2013* passed both Houses of Parliament and received assent to become law on 25 June 2013. This is the *Government Sector Employment Act 2013 (GSE Act)*.

The *GSE Act* empowers the Governor to make Regulations with respect to any matter that the Act permits.¹

Further, the *GSE Act* empowers the Public Service Commissioner to make, amend or repeal Rules on any matter for which any such Rules are authorised to be made.²

The *GSE Act*, together with the GSE Regulation and GSE Rules will commence operation on 24 February 2014 and will replace the existing *Public Sector Employment and Management Act 2002*.

Reform agenda

The legislative changes are underpinned by other key reforms across the sector: the Capability framework, the Performance Development framework and Senior Executive reform. Further information can be found on the Public Service Commission website.

Consultation drafts

PSA received the consultation draft GSE Regulation and Rules on 2 December 2013. This was later than was originally envisaged. The opportunity for thorough consultation has been compromised as the final draft of the Rules and Regulation need to be settled in time for the commencement on 24 February 2014.

A PSA news email was sent to members on 3 December, with a link to the draft Regulation and Rules on the PSA website, followed by another email on 13 December 2013.

Representatives from PSA met with the Public Service Commissioner on 3 December and again on 17 December 2013 to discuss our initial concerns with the consultation drafts.

Feedback

PSA will provide a formal submission on the consultation drafts to the Public Service Commission by Monday 13 January 2014. Members are invited to provide feedback for inclusion in our submission to research@psa.asn.au no later than 8 January 2014.

A PSA briefing on the draft Rules and Regulation is offered to members who are willing to organise at least eight people in their workplace (members or non-members). Interest can be registered via the survey monkey link located in the PSA news emails.

Further information

Further information referred to in this report can be found at www.psa.asn.au

¹ GSE Act, s88

² GSE Act, s12

DRAFT GSE REGULATION 2014

The *Government Sector Employment Regulation 2014 (Regulation)* generally incorporates many of the existing provisions in the *Public Sector Employment and Management Regulation 2009* as well as replicating a number of mechanical sections of the *Public Sector Employment and Management Act 2002*.

Excess Employees

A major area that departs from existing arrangements relates to excess employees. The draft provisions³ further erode the general legislative protections that currently exist⁴ for excess employees.

The obligation on departments to redeploy excess staff is reduced. The requirement on Department Heads to take 'all practicable steps' is now lowered to 'take reasonable steps' to redeploy staff. The new provisions are largely consistent with the overall policy direction of the Government which relies more on redundancy and retrenchment rather than trying to redeploy excess staff.

Repayment of Redundancy

The Managing Excess Employees policy stipulates that employees who accept a voluntary redundancy cannot be re-employed or re-engaged in any capacity in any NSW public sector agency within the period covered by their severance payment, without first repaying the relevant proportion of their severance pay.⁵

The Regulation formalises this provision⁶, however it is unclear what advantage is gained by placing these arrangements in the Regulation. Arguably these provisions should be revisited in light of the shift to forced retrenchment.

When calculating how this repayment system will work, it is still unclear which elements of the severance payment or redundancy should be taken into account in the calculation.

Extended Leave

Consistent with the undertaking provided by Government in relation to extended leave provisions, the current arrangements set out in Schedules 3 and 3A of the *Public Sector Employment Management Act* have been replicated in Schedules 1 and 2 respectively of the draft Regulation.

There are a number of minor changes to the wording which require further examination and discussions with the Public Service Commissioner but there is no reason to believe that there is any intention to change the entitlement.

³ GSE Reg, cl8, cl24, cl25

⁴ PSEMA, s56

⁵ MEE Policy, cl5.3

⁶ GSE Reg, cl25

Increments

Incremental progression is now subject to performance requirements under the agency's performance management system *and* the satisfactory conduct of the employee.⁷

The change is intended to provide further structural support for the push by the Public Service Commission for the implementation of its Performance Development framework.

The Public Service Commissioner has undertaken to provide advice to agencies to ensure that an employee is not disadvantaged in incremental progression where the performance management system has not applied for the relevant period during the transition.

⁷ GSE Reg, cl12

DRAFT GSE RULES 2014

The *Government Sector Employment Rules 2014 (Rules)* generally deal with the operational and procedural employment matters which may be applied to the Government Sector or more narrowly to the Public Service.

A failure to comply with the obligations under the Rules may be treated as misconduct.

The introduction of a new system of merit appointment

The Rules create a new framework for recruitment and appointment on merit. These provisions fill the gap that was created by the *GSE Act* and its removal of the existing guarantees of merit.

The new system links recruitment directly to the Capability Framework with the aim to improve merit selection in the sector. Many of the loopholes that have enabled dubious appointments could be closed with the adoption of this system.

It introduces four new concepts:

Capability-based assessment⁸

This means a process that assesses a person's capabilities against those required for a role. This process is incorporated in both the comparative and suitability assessment processes.

Comparative assessment⁹

This is most closely aligned to the existing system of competitive selection based on external advertising and interviewing. With the added requirement that the process will involve other forms of capability based assessments in addition to an interview. It is a process of assessing a person against the pre-established standards for the role and the claims of others.

Suitability assessment¹⁰

This is similar to the process currently applied to priority assessments for the purposes of redeployment. It is an appraisal against the pre-established standards for a role and *not* against other persons. It involves capability assessments in addition to an interview but does not require external advertising.

Talent pools¹¹

These are in essence renamed eligibility lists. The arrangements retain the ability for these lists to operate across multiple agencies and allow a talent pool to operate for up to twelve months. It is unclear if these will work on the basis of rank order or whether agencies will be able to select any one from the pool.

⁸ GSE Rules, cl 13(2)

⁹ GSE Rules, cl15

¹⁰ GSE Rules, cl16

¹¹ GSE Rules, cl17

Potential issues

While it is recognised that the new process will impose greater rigour on the system of selection, it may result in a more time consuming recruitment process and might lead to unintended consequences.

PSA is concerned with the difficulty in implementing these reforms with so little lead time and a lack of preparedness in the sector.

The Public Service Commission (PSC) have advised they are considering a transitional regulation that will provide for a transition period of up to 6 months to facilitate the shift to the new system of merit appointment.

It is unclear how this system will interact with restructuring within agencies. Under the provisions of the existing legislation an agency is able to obtain an exemption from the requirement for external advertising. This then allows for the filling of positions within an agency, or part thereof, to maximise the opportunity for existing staff. PSC have advised that Guidelines relating to assignment to roles may address this issue.

Temporary employment

Significant changes are made in relation to the management of temporary employment in the sector. The maximum period of appointment for a temporary has been extended from 3 years to 4, with a 1 year extension available with approval from the Commissioner.¹²

Temporaries will no longer be able to be employed for a period beyond 6 months without being subject to a merit selection involving external advertising.¹³ Appointment for an initial 6 month period must conform to merit principles.¹⁴

Temporaries can be converted to on-going employment after twelve months subject to a performance assessment that is linked to the performance management system.¹⁵ They must also have been through a comparative assessment involving external advertising.

Potential issues

It is uncertain how these changes will be applied to existing temporary employees on transition. Many temporaries have been employment for extended periods well beyond the proposed six months maximum. On a strict reading of the Rules, agencies will be forced to spill these staff immediately on 24 February 2014 if they are to comply with the requirements. PSC have advised that transitional arrangements for temporary staff are under consideration.

PSA is also concerned that these arrangements may entrench or extend the use of contract/labour hire staff as departments seek to bypass the more onerous recruitment requirements imposed by the new Rules, developing the path for potential privatisation. It seems inconsistent to highly regulate the use of temporary employees while failing to put in place a mechanism to apply the same standards to contract staff engaged through a labour hire company.

¹² GSE Rules, cl11

¹³ GSE Rules, cl20

¹⁴ GSE Rules, cl19

¹⁵ GSE Rules, cl21

Review of promotion decisions

The *GSE Act* abolished promotional appeals to the Industrial Relations Commission. The Public Service Commissioner proposes to replace this with an internal review procedure¹⁶ similar to the review system that operates under the NSW freedom of information legislation.¹⁷

It provides for a less formal process undertaken by a person at arm's length from the original decision. This will result in a speedier resolution and provide certainty for both parties. It is an important improvement as often both sides of a promotional appeal are members.

Potential issues

PSA is concerned that the proposed arrangements for the review may not be immune from the exercise of improper influence to distort the outcome. A further issue is that the reviewer is only able to look at the process to guarantee that it was not 'improper or irregular' and cannot examine whether the merit considerations in selection procedure were correct or appropriately balanced.

Review of transfer decisions

The Rules introduce a new mechanism for a review of employer-initiated transfer decisions.¹⁸ It affords employees the right to have a transfer decision re-assessed.

The process is similar to the proposed review process for promotional decisions and applies to matters in relation to forced transfers or temporary secondments.

Unsatisfactory performance and misconduct

The Rules dealing with performance management¹⁹ are underpinned by the Performance Development framework. It is mandatory for agencies to have such systems in place.

The Rules establish a link between the management of unsatisfactory performance and the agency's performance management system. This provides the framework for an agency head to make a judgement on unsatisfactory performance.

The Rules remove the existing two-step process of remedial action followed by disciplinary action.²⁰ However, there is a requirement for all performance management systems to include a mechanism for resolving unsatisfactory performance of employees.²¹ This imposes an obligation to include remedial action.

The changes to the misconduct provisions²² improve the readability of the requirements without eroding the procedural fairness elements that are incorporated in the current provisions.²³

¹⁶ GSE Rules, cl26, cl 27

¹⁷ *Government Information (Public Access) Act 2009*

¹⁸ GSE Rules, cl32

¹⁹ GSE Rules, cl33, cl34

²⁰ *PSEMA*, s47

²¹ GSE Rules, cl33(f)

²² GSE Rules, cl36

²³ *PSEMA*, s46

Potential issues

The existing system for managing unsatisfactory performance and misconduct is underpinned by detailed Procedural Guidelines which hold the force of law and apply across the entire public service.²⁴

PSA is concerned that the proposed Rules are not as comprehensive as what currently applies across the public service and the reliance on performance management systems at an agency level may lead to significant disparities in the way unsatisfactory performance and misconduct are dealt with. It may be that the PSC intend to issue guidelines in relation to this but at this point in time we have no indication that this is the case. These guidelines will have no statutory force.

Public service senior executives

The Rules set out a number of arrangements in relation to Public Service senior executives, including a model contract of employment for senior executives other than agency heads.²⁵

Termination

PSA has always held grave concerns about provisions that enable senior executives to have their employment terminated without reason²⁶ and the associated potential for corruption.

To a limited extent, the Rules²⁷ seek to address the concerns PSA has identified by requiring the employer to prepare a report on the process of termination along with the reasons for the termination. However, it is not clear how this will operate where an employee is terminated for no stated reason.

Hours provisions

The Rules specifically preclude senior executives from access to flex leave and overtime payments.²⁸ This is combined with a mandatory contract term that stipulates this cohort must work the hours necessary to perform the duties and responsibilities of the role without specifying any limit on hours.²⁹

While these arrangements are common for current members of the senior executive service, the extension to employees who were formerly senior officers may lead to an exacerbation of the current gender imbalance that exists in the senior executive cohort.

Potential issues

The Rules rob senior executives of the opportunity for a work/life balance. There is presently no room for negotiation, consultation or agreement in relation to hours of work, other than for part time work arrangements. The model contract fails to take into account the possible work health and safety risks of having no limit on the number of hours. The contract should include a term that enables senior executives to reach agreement on arrangements for hours of work.

²⁴ *PSEMA*, s44

²⁵ GSE Rules, Schedule 1

²⁶ *GSE Act*, s41(1)

²⁷ GSE Rules, cl40

²⁸ GSE Rules, cl49

²⁹ GSE Rules, Schedule 1, Hours of duty