

GSE RULES

Cl. No	Proposed Clause	Previous Provision – <i>PSEM Act</i>	Comment and Recommendation
Part 1	Preliminary		
1	<p>Name of Rules These Rules are the <i>Government Sector Employment Rules 2014</i>.</p>		
2	<p>Commencement These Rules commence on 24 February 2014 and are required to be published on the NSW legislation website.</p>		
3	<p>Definitions (1) In these Rules: agency head means: (a) in relation to a Public Service employee—the head of the Public Service agency in which the employee is employed, or (b) in relation to an employee of a government sector agency (other than a Public Service agency)—the head of that agency. government sector employee means a person who is employed in a government sector agency. Public Service non-executive employee means an employee referred to in Division 5 of Part 4 of the Act. the Act means the <i>Government Sector Employment Act 2013</i>. (2) Notes included in these Rules do not form part of these Rules.</p>		<p>The definitions of a number of new and key terms used in the GSE Rules need to be included to improve clarity.</p> <p>A number of terms such as “sector wide”, “external recruitment” “contingent employment” and “secondment” have a very specific meaning in the Rules and do not necessarily accord with the prevailing conventional usage in the sector these need to be clarified through the definitions section.</p>
4	<p>Guidance by Commissioner (1) The Commissioner is to provide guidance to government sector agencies and Public Service agency heads to assist them in exercising functions under the Act, the regulations and these rules. (2) Without limiting the generality of subclause (1), the Commissioner is to</p>		<p>This provision is more appropriately dealt with by way of Regulation as there is no head of power for the Commissioner to make rules on the provision of guidance.</p> <p>It is unclear from this provision what the status of the guidance will be. That is, it is unclear if guidance can be ignored or disregarded by agency heads.</p>

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	provide guidance to Public Service agency heads in relation to the termination of employment of Public Service non-executive employees on any of the grounds referred to in section 47 of the Act.		
Part 2	General Provisions		
5	<p>Limitation on power of delegation by Public Service agency heads</p> <p>The head of a Public Service agency cannot delegate the following functions:</p> <p>(a) the assignment of a Public Service senior executive to a different role under section 38 of the Act,</p> <p>(b) the termination of the employment of a Public Service senior executive under section 41 of the Act,</p> <p>(c) the termination of the employment of a Public Service senior executive for unsatisfactory performance under section 68 of the Act,</p> <p>(d) the termination of the employment of a Public Service senior executive for misconduct under section 69 of the Act.</p>		
Part 3	General Public Service employment provisions		
6	<p>Probation periods</p> <p>(1) This clause applies to a Public Service employee whose engagement in ongoing employment in a Public Service agency is made subject to the condition that the employee is required:</p> <p>(a) to serve a period of probation on commencing his or her employment, and</p> <p>(b) to satisfy the requirements for the role in which the person is employed during that period of probation.</p> <p>(2) The period of probation:</p> <p>(a) for a Public Service senior executive is to be no more than 3 months, or</p>	<p>23 Appointments on probation</p> <p>(1) Subject to this Act, every person admitted to the Public Service as an officer must, in the first instance, be appointed to a position on probation for a period of 6 months or such longer period as the appropriate Department Head directs.</p> <p>(1A) A period of probation may be extended for such further period as the appropriate Department Head directs. Any such direction may be made at any time before the person's appointment is confirmed or annulled under this section.</p> <p>(2) A person may be appointed to a position in the Public Service without being required to serve such a period of probation if the person has previously</p>	<p>While generally supportive of the proposed changes specifically:</p> <p>i) the reduction in the maximum period of probation from two years to 12 months; and</p> <p>ii) the capacity for employment to be confirmed “at any time”.</p> <p>We are concerned that the differential between senior executive and non-executive is inequitable. Historically longer probation periods have been justified on the basis that where jobs are seen as more complex, more time is required to evaluate the suitability of a new employee. The reverse principle is</p>

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	<p>(b) for a Public Service non-executive employee is to be 6 months or such longer period as the agency head directs.</p> <p>(3) A period of probation for a Public service non-executive employee may, before the period expires, be extended for such further period as the agency head directs.</p> <p>(4) However, the probation period for a Public Service non-executive employee cannot exceed 12 months.</p> <p>(5) If a Public Service employee is required to serve a period of probation, the employer may, at any time during or at the end of the probation period:</p> <p>(a) confirm the person's employment, or</p> <p>(b) in the case of a Public Service senior executive—terminate the person's employment under section 41 of the Act, or</p> <p>(c) in the case of a Public Service non-executive employee— terminate the person's employment under section 47 of the Act on the ground that the person has not satisfied the requirements for the role in which the person is employed.</p>	<p>been an officer or the Department Head thinks it appropriate in the particular case.</p> <p>(3) The period for which a person is appointed on probation may not exceed 2 years without the approval of the Commissioner.</p> <p>(4) If a person is appointed to a position on probation, the appropriate Department Head may:</p> <p>(a) after the period of probation—confirm the appointment, or</p> <p>(b) during or after the period of probation—annul the appointment.</p> <p>(5) If a person's appointment is so annulled, the person ceases to be an officer, unless appointed to another position as an officer.</p> <p>(6) Part 2.7 does not prevent a Department Head from exercising at any time the power to annul an appointment under this section.</p> <p>(7) This section does not apply to a chief or senior executive position</p>	<p>being applied in this situation.</p>
7	<p>Citizenship or residency requirements</p> <p>(1) A person is not to be engaged as a Public Service employee unless the person is:</p> <p>(a) an Australian citizen, or</p> <p>(b) a permanent resident of Australia, or</p> <p>(c) a New Zealand citizen with a current New Zealand passport, or</p> <p>(d) a citizen of another country with a current visa that allows the person to work in Australia.</p> <p>(2) A person is not to be offered employment in the Public Service for a period that exceeds any limitation imposed by or in accordance with law as to the time that the person is permitted to work in Australia.</p>	<p>54 Requirements as to citizenship or permanent residency</p> <p>(1) A person is eligible to be appointed as an officer in the Public Service only if the person is:</p> <p>(a) an Australian citizen, or</p> <p>(b) a person resident in Australia whose continued presence in Australia is not subject to any limitation as to time imposed by or in accordance with law.</p> <p>(2) An officer who is not an Australian citizen and who ceases to satisfy or does not satisfy the requirements of subsection (1) (b) is no longer eligible to continue in employment as an officer in the Public Service and is to be dismissed from that employment by the appropriate Department Head.</p> <p>(3) The Commissioner may exempt a person from the operation of this section in any case the Commissioner considers appropriate.</p>	<p>The current provisions of the <i>PSEM Act</i> place a limitation on appointment to a position of "officer" so as to preclude those who are not citizens or permanent residents. This is consistent with the notion that public service and the attendant higher obligations that come with being a public servant, as opposed to an employee in the private sector, should be reserved for those who have an ongoing commitment to the nation and the NSW community. This is consistent with the notion that public service involves a special trust that should not be conferred lightly.</p> <p>The Association opposes the loosening of the citizenship requirements. We are also concerned that this provision may open the door to the expansion of the use of 457 visa employment in the NSW public sector. The current provisions are adequate and allow</p>

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8	<p>Formal qualifications</p> <p>(1) This clause applies to a Public Service employee whose engagement in a Public Service agency is made subject to a condition that the person is required to have such qualifications as the employer may determine to be necessary for performing the duties of the role to which the person is to be assigned.</p> <p>(2) A person who is required to have any such qualifications but who has not provided evidence of the qualifications may be engaged on the condition that the person provides that evidence in the time and manner determined by the employer.</p>		<p>flexibility for exceptional cases.</p> <p>This provision seems unnecessary as this issue should normally be set out as a term of engagement in an employee's letter of offer and would normally be either an explicit or implied term in their contract of employment.</p>
9	<p>Security and other clearances</p> <p>(1) This clause applies to a Public Service employee whose engagement in a Public Service agency is made subject to a condition that the person is required to have such security or other clearances as the employer determines are necessary for performing the duties of the role to which the person is to be assigned.</p> <p>(2) A person who is required to have any such security or other clearances must ensure that those clearances are maintained.</p>		<p>This provision seems unnecessary as this issue should normally be set out as a term of engagement in an employee's letter of offer and would normally be either an explicit or implied term in their contract of employment.</p>
10	<p>Health assessment</p> <p>(1) This clause applies to a Public Service employee whose engagement in a Public Service agency is made subject to a condition that the person's fitness to perform the duties of the role to which the person is assigned has been confirmed by a health assessment.</p> <p>(2) For the purposes of this clause, <i>fitness to perform the duties of a role</i> includes the ability to carry out the role without endangering the health and safety of the public, of other persons employed in the Public Service agency or of the person concerned.</p>	<p>4 Pre-placement health assessments (PSEM Reg)</p> <p>(1) A person may not be appointed to an officer's position before the person's fitness to carry out the duties of the position has been confirmed by a health assessment.</p> <p>(2) Fitness to carry out duties includes the ability to carry out those duties without endangering the health and safety of the public, of other persons employed in the Department and of the person concerned.</p> <p>(3) The health assessment is to be in the form considered necessary by the appropriate</p>	<p>No significant change.</p>

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	<p>(3) The form of the health assessment may include (but is not limited to) any one or more of the following:</p> <p>(a) a declaration (which may be a statutory declaration if required) provided by the person concerning any illness, disability or condition of which the person is aware that might make the person unfit to carry out the role,</p> <p>(b) a medical examination by an approved medical practitioner,</p> <p>(c) an examination, by an approved medical practitioner, optometrist or other appropriately qualified health care professional, of a particular aspect of the person's health likely to detrimentally affect the person's capacity to carry out the role.</p> <p>(4) The employer is to give the health care professional providing a health assessment referred to in subclause (3) (b) or (c) any requested information about the role concerned that is reasonably required for the purpose of providing the assessment.</p> <p>(5) In this clause, approved means approved by the Commissioner.</p>	<p>Department Head.</p> <p>(4) The form of the health assessment may include (but is not limited to) any one or more of the following:</p> <p>(a) a declaration (which may be a statutory declaration if required) provided by the person concerning any illness, disability or condition of which the person is aware that might make the person unfit to carry out the duties of the position,</p> <p>(b) a medical examination by a medical practitioner approved by the appropriate Department Head,</p> <p>(c) an examination by a medical practitioner, an optometrist or other appropriately qualified health care professional, approved by the appropriate Department Head, of a particular aspect of the person's health likely to detrimentally affect the person's capacity to carry out the duties of the position.</p> <p>(5) The appropriate Department Head is to give the health care professional providing a health assessment referred to in subclause (4) (c) any requested information about the duties of the position concerned that is reasonably required for the purpose of providing the assessment.</p> <p>(6) This clause does not limit any requirements made by the appropriate Department Head with respect to health assessments of persons employed as temporary employees.</p>	
11	<p>Maximum period of temporary employment</p> <p>(1) A person may not be employed in temporary employment as a Public Service non-executive employee for a period of more than 4 years.</p> <p>(2) The maximum period of 4 years may, with the approval of the Commissioner, be extended for a further period of up to 12 months.</p>	<p>28 Period of employment</p> <p>(1) The maximum period for which a Departmental temporary employee may be employed under this Part at any one time is 3 years.</p> <p>(2) The re-employment of a Departmental temporary employee is to be in accordance with such guidelines as are issued by the Commissioner from time to time.</p> <p>29 Employment after selection on merit</p> <p>(1) In this section, the selection on merit of a Departmental temporary employee means employment after some form of open competition</p>	<p>The Association opposes the extension of the maximum period of appointment to 5 years from the current 3 years.</p>

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		<p>involving the selection of the employee as the person who, in the opinion of the appropriate Department Head, has the greatest merit among candidates for employment.</p> <p>(2) A Departmental temporary employee may only be employed for a period exceeding 12 months at any one time if the employee is selected on merit.</p> <p>(3) The Commissioner may exempt the employment of a person from subsection (2) if the Commissioner determines that the special circumstances of the case justify the exemption.</p>	
12	<p>Termination of employment</p> <p>(1) The employment of a Public Service non-executive employee may not be terminated under section 47 of the Act unless:</p> <p>(a) the employee is, to the extent that it is reasonably practicable to do so, notified of the proposed termination and given a reasonable opportunity to make submissions in relation to the proposed termination, and</p> <p>(b) the agency head has taken any such submissions into consideration.</p> <p>(2) This clause does not limit any of the other requirements under these Rules that relate to the termination of employment of a Public Service non-executive employee.</p>	<p>45 Requirements relating to procedural guidelines</p> <p>(1) The procedural guidelines must be consistent with the rules for procedural fairness.</p> <p>(2) Without limiting subsection (1), the procedural guidelines are to ensure that:</p> <p>(a) the officer to whom an allegation of misconduct relates is advised in writing of the alleged misconduct and that the allegation may lead to disciplinary action being taken with respect to the officer, and</p> <p>(b) the officer is given an opportunity to respond to the allegation.</p> <p>48 Disciplinary action may be taken if officer is convicted of serious offence</p> <p>(2) Before any disciplinary action is taken with respect to an officer under this section, the officer must be given an opportunity to make a submission in relation to the disciplinary action that the Department Head is considering taking.</p>	
Part 4	Merit-based employment		
13	<p>Application of Part and definitions</p> <p>(1) This Part applies to employment in the Public Service.</p> <p>(2) In this Part:</p>		As previously stated in comments above for clause 3, definitions need to be expanded to include new terms and concepts, particularly where the term has a different meaning to that which would ordinarily apply

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	<p>capability-based assessment means a process that assesses a person’s capabilities against those required for a role.</p> <p>comparative assessment—see clause 15.</p> <p>employment decision means a decision relating to any of the following:</p> <p>(a) the engagement of persons in any kind of employment,</p> <p>(b) the transfer or temporary secondment of an employee,</p> <p>(c) the conversion of an employee’s temporary or term employment to ongoing employment,</p> <p>(d) the conversion of an employee’s temporary secondment to the transfer of the employee.</p> <p>pre-established standards for a role means the capability, knowledge and experience standards for the role.</p> <p>performance management system means a performance management system under section 67 of the Act.</p> <p>role includes a type of role.</p> <p>suitability assessment—see clause 16.</p> <p>talent pool—see clause 17.</p>		<p>in the sector at present.</p>
14	<p>Merit principles to be applied in employment decisions</p> <p>(1) Any employment decision relating to a role in the Public Service is to be based on an assessment of the capabilities, experience and knowledge of the person concerned against the pre-established standards for the role to determine the person best suited to the requirements of the role and the needs of the Public Service agency in which the person is to be employed.</p> <p>(2) Without limiting subclause (1), the following principles apply in relation to employment decisions:</p> <p>(a) any recruitment action (whether for ongoing, temporary, casual or contingent employment purposes) is to take into account:</p> <p>(i) long and short term capability needs to meet the objectives of the agency concerned, and (ii)</p>	<p>5 Selection procedures for officers (PSEM Reg)</p> <p>(1) Unless the appropriate Department Head otherwise determines, a selection committee is to be established to assess the merit of applicants for appointment to a vacant officer’s position.</p> <p>(2) A selection committee should, as far as practicable:</p> <p>(a) consist of at least 2 persons, and</p> <p>(b) include at least one person who does not hold a position in the branch of the Department in which the vacant position exists, and</p> <p>(c) be constituted so as to ensure the fairest consideration of all applicants.</p> <p>(3) A selection committee must, as far as practicable, deal with each applicant in a similar fashion, but the committee is not required to grant an interview to all applicants.</p> <p>(4) A selection committee may use a range of processes as the basis of determining the merit of</p>	<p>The Association is concerned about the use of the term “principle” when the principles are actually overarching procedural requirements.</p> <p>The Association recommends that clause 14(2) be reworded. The word “principles” be replaced with the word “requirements” to read:</p> <p><i>2) Without limiting subclause (1), the following requirements apply in relation to employment decisions:</i></p> <p>This word change clarifies that these provisions are binding.</p> <p>The Association recommends that the term “contingent employment purposes” be defined.</p> <p>The Association is also concerned that the wording in</p>

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	<p>existing workforce capabilities, (b) pre-established standards for a role are to be expressed as levels against each capability or other requirement for the role, (c) any assessment for a role is to include appropriate methods to assess different requirements, (d) a person may only be included in a talent pool or employed in a role if the person meets the pre-established standards for the role, (e) any employment decision is to be made on balance taking into account all the results provided by the assessment process, (f) more than one assessor must be involved in the assessment process. (3) Subclause (2) (d) does not apply in the case of an at-level temporary secondment provided as a development opportunity.</p>	<p>the applicants, including interviews and objective work-related tests. The committee is not obliged to use any particular process. (5) Nothing in this clause requires a Department Head to adopt any recommendation made by a selection committee in relation to the filling of a vacancy.</p>	<p>clause 14(2)(f) may imply that panels can be composed of 1 person.</p> <p>The Association recommends that clause 14(2)(f) be reworded as follows:</p> <p><i>f) no less than two assessors must be involved in each element of the assessment process.</i></p> <p>The Association is also concerned that the provisions do not require gender balance on selection panels nor are any provisions made to require an independent member on the panel.</p>
15	<p>Comparative assessment (1) A comparative assessment for a role is the process of assessing an individual's claim against: (a) the pre-established standards for the role, and (b) the claims of other persons for the role. (2) The process is to include the following: (a) screening for essential requirements such as a qualification or licence, (b) application and resume review, (c) at least 3 capability-based assessments, one of which is an interview, (d) referee checks against the pre-established standards for the role.</p>	<p>Clause 5 - Selection procedures for officers (PSEM Reg) – as above</p> <p>19 Merit appointment (1) A Department Head is, for the purpose of determining the merit of the persons eligible for appointment to a vacant position under this section, to have regard to: (a) the nature of the duties of the position, and (b) the qualifications, experience, standard of work performance and capabilities of those persons that are relevant to the performance of those duties. (2) In deciding to appoint a person to a vacant position that has been advertised in accordance with this Part: (a) the appropriate Department Head may only select a person who has duly applied for appointment to the vacant position, and (b) the appropriate Department Head must, from among the applicants eligible for appointment to the vacant position, select the applicant who has, in the opinion of the Department Head, the greatest merit. (3) In deciding to appoint a person to a vacant position in a Department that has not been advertised in accordance with this Part:</p>	<p>The Association is concerned that the wording in clause 15(1)(b) requires there to be other applicants for comparative assessment to be valid.</p> <p>The Association is also concerned that there are no specifics or parameters in relation to the types of capability-based assessments that can be used and whether they are valid or fair tools for evaluating the merit of candidates.</p> <p>The Association recommends a provision that requires capability-based assessment techniques/methods to be subject to approval by the Public Service Commission.</p>

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		<p>(a) the appropriate Department Head may only select a qualified member of staff of the Department, and</p> <p>(b) the appropriate Department Head must, from among those qualified members of staff, select the member of staff who has, in the opinion of the Department Head, the greatest merit.</p> <p>(3A) For the purposes of subsection (3), a qualified member of staff of a Department is:</p> <p>(a) an officer employed in the Department, or</p> <p>(b) a Departmental temporary employee who is employed in the Department and whose employment as such an employee in that or any other Department falls within a continuous period of at least 2 years, or</p> <p>(c) a person who is employed in a Division of the Government Service specified in Part 3 of Schedule 1 (a Special Employment Division) that is associated with the Department, other than any such person who is employed on a casual basis or, if employed on a temporary basis, has not been employed in the Special Employment Division for a continuous period of at least 2 years.</p> <p>(3B) For the purposes of subsection (3A) (c), a Special Employment Division is taken to be associated with a Department if the Head of that Department is also the Division Head of the Special Employment Division.</p> <p>(4) Despite anything to the contrary in this section, the appropriate Department Head may decide to appoint a person (whether or not a qualified member of staff of the Department within the meaning of subsection (3A)) to a vacant position that has not been advertised if:</p> <p>(a) the person has, in accordance with the regulations, passed a competitive examination prescribed for appointment to vacant positions of the class to which that vacant position belongs, or</p> <p>(b) the person is qualified for appointment in accordance with procedures prescribed by the regulations for entry to positions in the Public Service in special cases.</p> <p>(5) In the case of a vacant senior executive position,</p>	

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		<p>a Department for the purposes of the application of subsection (3) includes all senior executive positions in the Public Service or the Teaching Service and all notional executive positions referred to in section 77 (3) (c) in the Public Service or the Teaching Service.</p>	
16	<p>Suitability assessment (1) A <i>suitability assessment</i> is the process of assessing an individual against the pre-established standards for a role (and not against other persons). (2) The process is to include the following: (a) screening for essential requirements such as a qualification or licence, (b) resume review, (c) at least 2 capability-based assessments, one of which is an interview, (d) referee checks against the pre-established standards for the role.</p>		
17	<p>Talent pools (1) The <i>talent pool</i> for a role is a list of those persons (whether or not existing Public Service employees) who have satisfied the pre-established standards for the role through external advertising and a comparative assessment. (2) A talent pool may apply in relation to a role in any one or more Public Service agencies and the head of any Public Service agency may employ persons from the pool. (3) A person may be included in a talent pool for no longer than the period of 12 months following the completion of the comparative assessment that entitled the person to be included in the talent pool.</p>	<p>20 Eligibility lists (1) When a vacant position is advertised in accordance with this Part, the appropriate Department Head may, in connection with a determination of the merit of the persons eligible for appointment to the position, create an eligibility list for the position. (2) An eligibility list for a position is a list of eligible applicants (namely the persons who duly applied for appointment to the position and who are eligible for appointment but not selected for appointment) arranged in order of merit (with merit determined by the appropriate Department Head in accordance with section 19 (1)). (3) An eligibility list for a position remains current for 12 months after the list was created. (4) An eligibility list need not comprise all the eligible applicants so long as the list contains the applicant</p>	<p>The Association is concerned that the absence of a rank order in a Talent Pool opens the system to being gamed as managers are able to select anyone on the list. This presents a risk for more meritorious candidates being passed over without justification. This is of particular concern as Talent Pools can be used to enable engagement in “ongoing employment” for roles with equivalent capability requirements.</p> <p>The Association recommends that the term “external advertising” be defined.</p>

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		<p>or applicants of greatest merit.</p> <p>(5) An eligibility list is applicable not only to the position in relation to which it was created (<i>the relevant position</i>) but also:</p> <p>(a) to any other position in the Department that the appropriate Department Head determines the list should be applicable to on the basis that the other position is substantially the same as the relevant position, and</p> <p>(b) to any other position in another Department that the Department Head for that Department determines the list should be applicable to on the basis that the other position is substantially the same as the relevant position.</p> <p>(5A) Any such determination by the Department Head may be made at any time during the currency of the eligibility list.</p> <p>(6) In deciding to appoint a person to a vacant position that has not been advertised in accordance with this Part, the appropriate Department Head may, despite section 19 (3), select from among the persons who are on an eligibility list that is current and applicable to the position (and who are available for appointment) the person with the greatest merit according to the order of merit in the eligibility list.</p> <p>(7) (Repealed)</p>	
18	<p>Ongoing employment</p> <p>(1) The decision to employ a person in ongoing employment in a role must be based on a comparative assessment.</p> <p>(2) A person may be employed in ongoing employment only if the person is selected from:</p> <p>(a) a list established as a result of an external recruitment process in which the role was advertised, or</p> <p>(b) the talent pool for the role.</p>	<p>18 Advertising vacancies</p> <p>(1) If it is proposed to make an appointment under this Part to a vacant position in a Department, the Department Head must advertise the vacancy on the NSW Government’s recruitment website and in such publication (if any) as the Department Head determines.</p> <p>(2) The Department Head need not advertise a vacant position if the Commissioner so approves.</p> <p>Section 19 PSEM Act - Merit appointment – outlined above at clause 15 – comparative assessment</p>	<p>The Association is concerned that this provision will compound the difficulties in placing existing staff during a restructure. There are currently no provisions similar to the current s18(2) and s19(3) which enable positions to be advertised internally during restructures.</p> <p>The Association recommends that “external recruitment process” be defined.</p>

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19	<p>Temporary or term employment (up to 6 months)</p> <p>(1) A person cannot be employed in temporary or term employment in a role for a period of up to 6 months unless the person is selected:</p> <p>(a) from the talent pool for the role, or</p> <p>(b) from another list established as a result of expressions of interest being called on a sector wide basis, or</p> <p>(c) on the basis of a suitability assessment.</p> <p>(2) In the case of a person whose employment in any such temporary or term employment is based on a suitability assessment, the person cannot continue in that employment after 6 months unless a comparative assessment, based a list established as result of expressions of interest being called on a sector wide basis, for the role is completed.</p> <p>(3) In the case of any such person who was not comparatively assessed on entry, action to undertake the additional requirements of the comparative assessment should commence after 3 months of the person's temporary or term employment.</p>		<p>While generally supportive of the move to tighten the requirements for merit in the appointment of temporary employees, the Association is concerned that this will create transitional problems for current temporary staff who were recruited in a way that does not conform to the new requirements.</p> <p>The Association is also concerned that the more stringent requirements in relation to temporary staff may drive an increase in the use of contingent employment through labour hire agencies.</p>
20	<p>Temporary or term employment (more than 6 months)</p> <p>(1) The decision to employ a person in temporary or term employment for a period of more than 6 months must be based on a comparative assessment and an externally advertised recruitment process.</p> <p>(2) A person may be employed in any such temporary or term employment only if the person is selected:</p> <p>(a) from the talent pool for the role, or</p> <p>(b) as a result of a separate recruitment process in which the role was advertised.</p>		<p>The Association is concerned that this will create transitional problems for current temporary staff who were recruited in a way that does not conform to the new requirements.</p>

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21	<p>Converting to ongoing employment</p> <p>(1) An agency head may:</p> <p>(a) convert the employment of a person in temporary or term employment in a role to ongoing employment in that role if the person has been employed in the temporary or term employment for a period of at least 12 months, or</p> <p>(b) convert an above-level temporary secondment to ongoing employment at the same level as the temporary secondment if the person has been in that secondment for a period of at least 12 months.</p> <p>(2) Such a conversion is subject to:</p> <p>(a) the outcome of the employee's comparative assessment for the role based on an externally advertised recruitment process, and</p> <p>(b) the results of a performance assessment under a performance management system demonstrating that the person is able to perform at the required level of capabilities for the role.</p>	<p>31 Appointment of long-term employees to officer positions</p> <p>(1) For the purposes of this section, a long-term employee is a Departmental temporary employee whose employment as such an employee falls within a continuous employment period of at least 2 years.</p> <p>(2) A long-term employee may, with the approval of the Commissioner, be appointed to an officer's position (other than a senior executive position) in a Department if the appropriate Department Head has made a recommendation in accordance with this section for the appointment of the employee to the position.</p> <p>(3) A recommendation for the appointment of a long-term employee to an officer's position may be made only if each of the following requirements is satisfied:</p> <p>(a) the employee must, at some stage of the temporary employment, have been selected to perform duties at a grade that is the same as (or similar to) the grade of the position concerned (whether or not the duties of the position are substantially the same as the duties performed during the temporary employment),</p> <p>(a1) the employee was performing duties at that grade following some form of open competition that involved the selection of the employee as the person who, in the opinion of the Department Head, had the greatest merit among the candidates concerned,</p> <p>(b) the rate of salary or wages proposed to be payable to the holder of the position concerned at the time of appointment must not exceed the maximum rate payable for Grade 12, Administrative and Clerical Division, of the Public Service,</p> <p>(c) the appropriate Department Head must be satisfied that ongoing work is available in respect of the employee in the Department,</p> <p>(d) the appropriate Department Head must be satisfied that the employee has the qualifications, experience, standard of work performance and capabilities to enable the employee to perform the duties of the position concerned,</p> <p>(e) (Repealed)</p>	<p>The Association is concerned that the proposed drafting is more limited compared to the existing provisions of the <i>PSEM Act</i> at s31(3)(a).</p> <p>The current provisions allow more flexibility for the conversion to be at similar grade. The proposed provision does not allow for conversion to ongoing employment for similar roles, it only enables conversion to "ongoing employment in that role".</p>

Cl. No	Proposed Clause	Previous Provision – <i>PSEM Act</i>	Comment and Recommendation
		<p>(4) An appointment under this section is not an appointment to which section 19 applies.</p> <p>(5) Section 23 does not apply to an appointment under this section unless the Department Head otherwise directs in a particular case.</p> <p>Section 86 <i>PSEM Act</i>, Temporary staff transfers (secondments between agencies) as outlined below.</p>	
22	<p>At-level temporary secondments An at-level temporary secondment must, unless it is provided as a development opportunity, be based on a suitability assessment.</p>	<p>86 Temporary staff transfers (secondments between agencies)</p> <p>(1) A member of staff of a public sector agency may transfer temporarily to the service of another public sector agency with the approval of the heads of the home agency and the host agency.</p> <p>(2) (Repealed)</p> <p>(3) A temporary transfer under this section may be:</p> <p>(a) at the request, or with the consent, of the member of staff concerned (<i>an employee-initiated temporary transfer</i>), or</p> <p>(b) at the direction of the head of the home agency (<i>an employer-initiated temporary transfer</i>).</p> <p>(4) A person may be temporarily transferred under this section at the person's existing level of remuneration or at a different level of remuneration. However, an employer-initiated temporary transfer cannot be made at a lower level of remuneration.</p> <p>(5) A person who transfers to the service of another public sector agency under this section remains an employee of the home agency.</p> <p>(6) However, in the case of an employee-initiated temporary transfer, the person ceases to be an employee of the home agency and becomes an employee of the host agency if:</p> <p>(a) the transfer has continued for at least 2 years, and</p> <p>(b) the head of the home agency notifies the person of the proposed cessation of employment, and</p> <p>(c) the person decides to remain with the host agency with the consent of the head of that agency.</p> <p>(6A) The head of the host agency may appoint the person who becomes an employee of the agency under subsection (6) (<i>the relevant person</i>) to a</p>	<p>The Association recommends that the terms “development opportunity” and “secondment” be defined.</p>

Cl. No	Proposed Clause	Previous Provision – <i>PSEM Act</i>	Comment and Recommendation
		<p>position in the agency (<i>the new position</i>) that is:</p> <p>(a) at the same grade as (or at a grade similar to) the relevant person's original position in the home agency, or</p> <p>(b) at any grade higher than the relevant person's original position in the home agency.</p> <p>(6B) The new position may, but need not, be advertised. Accordingly, if the new position is a position in the Public Service and it is not advertised, an appointment under subsection (6A) is not an appointment to which section 19 applies.</p> <p>(6C) If the relevant person is appointed to the new position, the head of the host agency may decide to make the appointment without requiring the person to serve any period of probation.</p> <p>(6D) The relevant person may be appointed to the new position only if each of the following requirements is satisfied:</p> <p>(a) the rate of salary or wages payable to the person at the time of appointment to the new position must not exceed the maximum rate payable for Grade 12, Administrative and Clerical Division, of the Public Service,</p> <p>(b) the head of the host agency must be satisfied that ongoing work is available in respect of the person in the agency,</p> <p>(c) the head of the host agency must be satisfied that the person has the qualifications, experience, standard of work performance and capabilities to enable the person to perform the duties of the new position.</p> <p>(6E) Without limiting subsection (6D), if:</p> <p>(a) the grade of the new position is higher than the grade of the relevant person's original position in the home agency, and</p> <p>(b) the new position has not been advertised, the relevant person may be appointed to the new position only if the person has been performing duties in the host agency at a grade that is the same as (or similar to) the grade of the new position and was performing those duties following some form of open competition that involved the selection of the person as the person who, in the opinion of the head</p>	

Cl. No	Proposed Clause	Previous Provision – <i>PSEM Act</i>	Comment and Recommendation
		<p>of the host agency, had the greatest merit among the candidates concerned.</p> <p>(7) In the case of an employee-initiated temporary transfer, a permanent appointment may be made to the original position of the person (and without the person ceasing to be employed by the agency) if:</p> <p>(a) the transfer has continued or is likely to continue for more than 12 months, and</p> <p>(b) the person is advised of the proposed appointment, and</p> <p>(c) the person is given a reasonable opportunity to terminate the transfer and return to his or her original position.</p> <p>(8) In the case of an employer-initiated temporary transfer, a permanent appointment cannot be made to the person's original position except with the consent of the person.</p> <p>(9) The following is to be determined in accordance with such guidelines as are issued from time to time by the Commissioner:</p> <p>(a) the procedures for obtaining the consent of an employee under this section,</p> <p>(b) the circumstances in which an employer-initiated temporary transfer to a different workplace location in the State may be made.</p> <p>(10) In this section:</p> <p>home agency means the public sector agency from which the transfer of a member of staff is made under this section.</p> <p>host agency means the public sector agency to which the transfer of a member of staff of another agency is made under this section.</p> <p>Note. See also section 24 for acting appointments to vacant public service positions or where the holder of the position is suspended, sick or absent.</p>	
23	<p>Above-level temporary secondments (up to 6 months)</p> <p>Note for consultation draft: Above-level assignments (the rules for which are still being developed) will require the same assessment processes as above-level temporary</p>		<p>The Association recommends that the proposed provisions be amended to specify a maximum period for above-level secondments.</p>

Cl. No	Proposed Clause	Previous Provision – <i>PSEM Act</i>	Comment and Recommendation
	<p>secondments under this and the following clause.</p> <p>(1) An above-level temporary secondment of up to 6 months must, at a minimum, be based on a suitability assessment.</p> <p>(2) An above-level secondment cannot continue beyond 6 months unless a comparative assessment for the role is completed.</p> <p>(3) In the case of any such person who has not completed a comparative assessment for the role, action to undertake the additional requirements of the comparative assessment should commence after 3 months into the secondment.</p>		
24	<p>Above-level temporary secondments (more than 6 months)</p> <p>An above-level temporary secondment for a period of more than 6 months must be based on a comparative assessment from a sector-wide or externally advertised recruitment process.</p>	<p>Section 86 <i>PSEM Act</i>, Temporary staff transfers (secondments between agencies) as outlined above at clause 22.</p>	<p>The Association recommends that the term "sector-wide" be defined.</p>
25	<p>Transfers at-level</p> <p>An at-level transfer under section 64 of the Act must be based on a suitability assessment.</p>	<p>87 Employer-sponsored permanent transfers</p> <p>(1) The head of a public sector agency may, subject to this section, transfer a member of staff of the agency to the service of another public sector agency:</p> <p>(a) with the approval of the head of the other agency and of the Commissioner, and</p> <p>(b) following consultation with the member of staff.</p> <p>(2) The head of a public sector agency may, subject to this section, transfer a member of staff of the agency to another position or other employment within the agency, following consultation with the member of staff.</p> <p>(3) The following provisions apply to the transfer of a person under this section:</p> <p>(a) the transfer is to be made at the person's existing level of remuneration, unless the person consents to the transfer at a lower level of remuneration,</p> <p>(b) if the person is employed in a staff position or on a temporary basis, the person is to be transferred to</p>	<p>The Association is concerned that the application of this provision is unclear. Does it apply to employer initiated transfers or employee initiated transfers only?</p>

Cl. No	Proposed Clause	Previous Provision – <i>PSEM Act</i>	Comment and Recommendation
		<p>another staff position or to other temporary employment, respectively,</p> <p>(c) the person must possess the qualifications required for the position or employment to which the person is transferred or have the capacity to perform the work after a reasonable period of time in the position or in that employment.</p> <p>(4) In this section, public sector agency includes a State owned corporation.</p>	
Part 5	Review of promotion decisions		
26	<p>Request for review of promotion decision</p> <p>(1) A Public Service non-executive employee (the relevant employee) may request a review of the decision (a promotion decision) to offer, following a selection process, another Public Service non-executive employee ongoing employment in a role for which the relevant employee has unsuccessfully applied (being a role that has a higher remuneration level than the level paid to the both the relevant employee and the other employee immediately before the promotion decision was made).</p> <p>(2) A request for the review of a promotion decision may only be made on the ground that the whole or any part of the selection process for the role concerned was irregular or improper. The review is not a review of the merit of the relevant employee for the role.</p> <p>(3) A request for the review of a promotion decision must be made:</p> <p>(a) in writing to the head of the Public Service agency in which the role to which the promotion decision relates is to be carried out, and</p> <p>(b) no later than 5 business days after the day on which the relevant employee is notified of the decision.</p> <p>(4) If a request for the review of a promotion decision is made, the engagement of the other</p>	<p>21 Appointments subject to promotion appeal</p> <p>(1) This section applies where a person selected for appointment to a position is an officer and some other officer has a right of appeal to the Industrial Relations Commission against the appointment.</p> <p>(2) The appointment must not be made (except by way of acting appointment under this Act):</p> <p>(a) until the expiration of the time for lodging a notice of such an appeal under the Industrial Relations Act 1996 against the Department Head's decision to make the appointment, or</p> <p>(b) if such a notice of appeal is lodged within that time, until the Industrial Relations Commission has determined the appeal or the appeal is withdrawn.</p> <p>Note. See section 93 of the Industrial Relations Act 1996 which requires the appropriate Department Head to cause notice of the proposed appointment to be published and distributed to employees.</p> <p>(3) (Repealed)</p>	<p>The Association is concerned that the proposed arrangements for the review may not be immune from the exercise of improper influence to distort the outcome.</p> <p>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 consistent with the provisions of proposed clause 14(2)(e).</p>

Cl. No	Proposed Clause	Previous Provision – <i>PSEM Act</i>	Comment and Recommendation
	employee in the role to which the decision relates cannot be implemented until the review is completed.		
27	<p>Conduct and findings of review</p> <p>(1) The review of a promotion decision is to be conducted by a Public Service senior executive (the reviewer) who was not involved in the selection process for the role to which the decision relates and who is appointed by the agency head to whom the request for the review is made.</p> <p>(2) The reviewer is to conduct the review within 10 business days after the request for the review is made.</p> <p>(3) The reviewer may make the following findings in conducting a review of a promotion decision:</p> <p>(a) the reviewer may, if satisfied that the selection process was not in any way improper or irregular, confirm the promotion decision,</p> <p>(b) the reviewer may, if satisfied that the selection process was in any way improper or irregular, make a recommendation to the agency head that the agency head revoke the promotion decision and carry out another selection process for the role concerned.</p> <p>(4) The decision of the reviewer in respect of the review is final.</p>	<p>Section 21- Appointments subject to promotion appeal as outlined above.</p>	<p>The Association recommends that there be an explicit requirement for the reviewer to make recommendations in relation to disciplinary action where there is evidence of improper or irregular conduct.</p>
Part 6	Workforce diversity		
28	<p>Employment of eligible persons</p> <p>(1) An eligible person may be employed as a Public Service non-executive employee by the head of a Public Service agency.</p> <p>(2) The agency head must be satisfied that the eligible person employed in a role under this clause is suitable for the role and have the greatest merit of the eligible persons seeking to be employed in the role. For that purpose, Part 4 applies but with such modifications as are necessary to facilitate the employment of eligible</p>	<p>6 Selection in special cases – <i>PSEM Reg</i></p> <p>(1) A person (whether or not an officer) may be appointed to an officer’s position (other than a senior executive position) in accordance with the special procedures prescribed by this clause.</p> <p>(2) The appropriate Department Head may, with the approval of the Public Service Commissioner, recommend the appointment of a person belonging to a disadvantaged group of persons to a position in the Department that the Department Head considers suitable for the person.</p>	<p>The Association is concerned that the designation of eligible persons has been narrowed from the existing reference in clause 6(3)(a) of the <i>PSEM Reg</i> which specifies “Aboriginal or Torres Strait Islanders” to the proposed wording at clause 28(3)(a) of “an Aboriginal person”.</p>

Cl. No	Proposed Clause	Previous Provision – PSEM Act	Comment and Recommendation
	<p>persons.</p> <p>(3) In this clause: eligible person means any of the following:</p> <p>(a) an Aboriginal person, (b) a person with a disability, (c) a person under the age of 25 years, (d) a person who belongs to a group of persons designated by the Commissioner as being disadvantaged in employment.</p>	<p>(3) A disadvantaged group of persons is a group of persons in the community that the Public Service Commissioner has designated as a disadvantaged group for the purposes of this clause. The Public Service Commissioner may so designate any group of persons who suffer a disadvantage in employment, including but not limited to:</p> <p>(a) Aboriginals or Torres Strait Islanders, or (b) persons who have a disability within the meaning of the Anti-Discrimination Act 1977.</p> <p>(4) A person may be recommended for appointment under this clause only if the person belongs to a relevant disadvantaged group and, in the opinion of the appropriate Department Head, has the greatest merit of the eligible persons seeking appointment in accordance with this clause.</p> <p>(5) The Public Service Commissioner is to determine the general or selective advertising or search procedures to be used for the purposes of seeking eligible persons for appointment under this clause and the selection procedures to be used for selecting a person from among the eligible persons seeking appointment.</p>	
29	<p>Information relating to workforce diversity The head of a government sector agency is to ensure that information relating to workforce diversity within the agency is collected and is able to be provided to the Commissioner if required to do so under section 16 of the Act. Note. Under section 16 of the Act, the Commissioner may require the head of a government sector agency (which for the purposes of that section includes SOCs and universities) to provide reports and information relating to workforce diversity in the agency).</p>		
Part 7	Transfers and temporary secondments		
30	Transfer of employees between government sector agencies	Section 87 - Employer-sponsored permanent transfers as outlined at clause 25 above.	The Association is concerned that proposed clause 30(2) prevents the transfer of employees on the basis

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	<p>(1) A government sector employee may be transferred to the service of another government sector agency by agreement between the agency heads.</p> <p>(2) A government sector employee may only be transferred to another agency at the same or equivalent grade or level.</p> <p>(3) A government sector employee who requests a transfer must do so in writing to the head of the agency in which the person is employed.</p> <p>(4) The person (other than the employee) who initiates a transfer must:</p> <p>(a) provide reasonable notice to the employee of the transfer, and</p> <p>(b) advise the employee that the employee may request a review of the transfer within 10 business days after the employee is notified of the transfer.</p> <p>Note. Section 64 (2) of the Act also requires the employee to be consulted.</p> <p>(5) The transfer of a government sector employee to another agency has effect only if it is confirmed in writing by the agency heads concerned.</p> <p>A copy of the confirmation is to be provided to the employee.</p> <p>(6) The head of the government sector agency to which a government sector employee is transferred is to ensure that the employee is subject to a suitability assessment (as referred to in Part 4) for the role, position or work to be assigned to the employee in the other agency.</p>	<p>Section 86 (6E) - Temporary staff transfers (secondments between agencies) as outlined above at clause 22.</p> <p>Without limiting subsection (6D), if:</p> <p>(a) the grade of the new position is higher than the grade of the relevant person's original position in the home agency, and</p> <p>(b) the new position has not been advertised, the relevant person may be appointed to the new position only if the person has been performing duties in the host agency at a grade that is the same as (or similar to) the grade of the new position and was performing those duties following some form of open competition that involved the selection of the person as the person who, in the opinion of the head of the host agency, had the greatest merit among the candidates concerned.</p>	<p>that is currently available under Section 86 (6E) of the PSEMA. That is transferred to a position in a different agency at a higher grade.</p> <p>The new clause may also limit redeployment opportunities where an employee is willing to accept a position in another agency at a lower grade.</p>
31	<p>Temporary secondment of employees between government sector agencies</p> <p>(1) A government sector employee may be seconded, for a period not exceeding 2 years, to the service of another government sector agency by agreement between the agency heads.</p> <p>(2) Any such agreement is to set out the following:</p> <p>(a) the period of the temporary secondment,</p> <p>(b) the financial responsibilities of the agencies in</p>	<p>Section 86 - Temporary staff transfers (secondments between agencies) as outlined at clause 22 above.</p>	<p>The Association recommends the agreements between the agency heads as proposed by clause 31(1) should be considered a determination of conditions under section 52(3) of the GSE Act. As the draft provision currently stands, the employee has no capacity to enforce any term of the agreement despite having a clear interest in its terms</p>

Cl. No	Proposed Clause	Previous Provision – PSEM Act	Comment and Recommendation
	<p>relation to the employee's entitlements, (c) the procedure to be followed on completion of the temporary secondment, (d) the circumstances in which the secondment may be terminated and the form of notice to be given to terminate the temporary secondment before the end of the agreed period. (3) A copy of the agreement must be provided to the employee concerned. (4) A government sector employee who requests a temporary secondment must do so in writing to the head of the agency in which the person is employed. (5) The person (other than the employee) who initiates a temporary secondment must: (a) provide reasonable notice to the employee of the secondment, and (b) advise the employee that the employee may request a review of the secondment within 10 business days after the employee is notified of the secondment. Note. Section 64 (2) of the Act also requires the employee to be consulted. (6) The head of the government sector agency to which a government sector employee is seconded is, unless the secondment is provided as a development opportunity, to ensure that the employee is suitable for the role, position or work to be assigned to the employee in the other agency. (7) A government sector employee who is seconded to another agency is, on completion of the secondment, entitled to return to a suitable role, position or work in the agency from which the employee was seconded.</p>		
32	<p>Review of employer-initiated transfers or temporary secondments (1) This clause applies in relation to the transfer or temporary secondment of a government sector employee that has not been initiated by the employee (referred to in this clause as an employer-initiated transfer or</p>		<p>In proposed clause 32(5) it is unclear whether the reviewer is appointed by the head of the home agency.</p> <p>The tense in clause 32(8) implies that the transfer or secondment has already been put into effect – “to determine whether or not the employer initiated</p>

Cl. No	Proposed Clause	Previous Provision – <i>PSEM Act</i>	Comment and Recommendation
	<p>secondment).</p> <p>(2) The government sector employee in respect of whom an employer-initiated transfer or secondment applies may apply to the head of the government sector agency in which the person is employed for a review of the transfer or secondment.</p> <p>(3) If an application is made for the review of an employer-initiated transfer or secondment, the transfer or temporary secondment (as the case requires) of the employee to the service of another government sector agency does not have effect until the review is completed.</p> <p>(4) An application by an employee for the review of an employer-initiated transfer or secondment must be made:</p> <p>(a) in writing to head of the government sector agency in which the person is employed, and</p> <p>(b) no later than 10 business days after the day on which the employee is notified of the transfer or secondment.</p> <p>(5) The review of an employer-initiated transfer or secondment is to be conducted by a senior executive (the reviewer) who was not involved in the decision to transfer or temporarily second the employee to another government sector agency.</p> <p>(6) The reviewer is to conduct a review of the employer-initiated transfer or secondment within 10 business days after the application for review is made.</p> <p>(7) The employee may make submissions to the reviewer, including reasons why the proposed transfer or temporary secondment would cause undue hardship to the employee.</p> <p>(8) In conducting a review, the reviewer is:</p> <p>(a) to determine whether or not the employer-initiated transfer or secondment was appropriate having regard to all relevant circumstances (including any submissions provided by the employee), and</p> <p>(b) to make such findings as the reviewer thinks appropriate.</p> <p>(9) Any such findings are to be notified to the</p>		<p>transfer or secondment was appropriate”. Clause 32(3) makes it clear that the transfer or secondment does not have effect until after the review is completed.</p> <p>The Association is concerned that there is no guidance in relation to how the review determines whether a transfer is “appropriate” pursuant to clause 32(8)(a).</p>

Cl. No	Proposed Clause	Previous Provision – PSEM Act	Comment and Recommendation
	agency head and the employee concerned. (10) The decision of the reviewer in respect of the matter subject to the review is final.		
Part 8	Performance management		
33	<p>Core requirements of performance management systems</p> <p>The performance management system required to be implemented under section 67 of the Act with respect to the employees of a government sector agency is:</p> <p>(a) to establish and clarify expectations for employees, and</p> <p>(b) to monitor employee performance, and</p> <p>(c) to provide for planning and review of employee performance, and</p> <p>(d) to provide for employee development, and</p> <p>(e) to recognise the achievements of employees, and</p> <p>(f) to provide mechanisms for resolving unsatisfactory performance of employees.</p>	<p>101A Performance management systems for public sector staff</p> <p>(1) The head of a public sector agency is to develop and implement a performance management system with respect to members of staff of the agency.</p> <p>(2) The Commissioner is to issue guidelines to public sector agencies on the essential elements of such a performance management system.</p> <p>Note. See section 3J in connection with directions to agencies by the Commissioner.</p>	
34	<p>Dealing with unsatisfactory performance</p> <p>The head of a government sector agency may not take any action under section 68 (2) of the Act in relation to an employee unless:</p> <p>(a) the employee's performance is determined by the agency head to be unsatisfactory in accordance with the agency's performance management system, and</p> <p>(b) reasonable steps have been taken to advise the employee that the employee's performance is unsatisfactory and the basis on which it is unsatisfactory, and</p> <p>(c) the employee is notified that the agency head is proposing to take specified action under section 68 (2) of the Act in respect of the employee, and</p> <p>(d) the employee is given a reasonable opportunity to respond to the notice, and</p> <p>(e) the agency head has taken any such</p>	<p>47 Dealing with unsatisfactory performance</p> <p>(1) If the appropriate Department Head is of the opinion that an officer is not performing the officer's duties in a satisfactory manner, the Department Head may decide to take remedial action with respect to the officer.</p> <p>(2) If:</p> <p>(a) remedial action is taken with respect to an officer, and</p> <p>(b) the appropriate Department Head is, after the officer has been given a reasonable opportunity in which to improve his or her performance, of the opinion that the officer's performance is still unsatisfactory,</p> <p>the Department Head may notify the officer in writing that the officer's performance is still unsatisfactory and that the officer's performance may lead to disciplinary action being taken with respect to the officer. The officer must be given an opportunity to</p>	<p>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: section 44 PSEMA.</p> <p>The Association 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 guidance in relation to this but at this point in time we have no indication that this is the case. This guidance, unlike current procedural guidelines, will have no statutory force.</p>

Cl. No	Proposed Clause	Previous Provision – <i>PSEM Act</i>	Comment and Recommendation
	<p>response into consideration.</p> <p>Note. Section 68 of the Act does not apply to that part of the NSW Police Force comprising police officers.</p>	<p>respond to the Department Head's opinion about the officer's performance.</p> <p>(3) The Department Head may, after considering any response by the officer, decide to take disciplinary action with respect to the officer.</p> <p>(4) Before any disciplinary action is taken with respect to an officer under this section, the officer must be given an opportunity to make a submission in relation to the disciplinary action that the Department Head is considering taking.</p>	
Part 9	Misconduct – procedural requirements		
35	<p>Application of Part</p> <p>This Part applies in relation to government sector agencies within the meaning of section 69 of the Act.</p> <p>Note. At present only Public Service agencies and administrative employees in the NSW Police Force are covered.</p>		
36	<p>Initial stage for dealing with allegations of misconduct</p> <p>(1) An allegation of misconduct by an employee of a government sector agency (the affected employee) may be made by any person to the agency head.</p> <p>(2) After making an initial assessment of the allegation, the agency head may decide not to proceed with the matter if the agency head is satisfied that:</p> <p>(a) the allegation is vexatious or trivial, or</p> <p>(b) the incident or conduct concerned does not amount to misconduct, or</p> <p>(c) there is likely to be difficulty in establishing the facts of the matter.</p> <p>(3) If, after making an initial assessment, the agency head decides to proceed with the matter, the affected employee is to be advised:</p> <p>(a) of the details of the allegation of misconduct, and</p>	<p>46 Dealing with allegations of misconduct</p> <p>(1) If an allegation is made to the appropriate Department Head that an officer may have engaged in any misconduct, the appropriate Department Head may:</p> <p>(a) decide to deal with the allegation as a disciplinary matter in accordance with the procedural guidelines, or</p> <p>(b) decide that it is appropriate to take remedial action with respect to the officer.</p> <p>(2) After dealing with an allegation of misconduct as a disciplinary matter in accordance with the procedural guidelines, the appropriate Department Head may, if the Department Head is of the opinion that the officer has engaged in any misconduct, decide to take disciplinary action with respect to the officer.</p> <p>(3) Before any disciplinary action is taken with respect to an officer under this section, the officer must be given an opportunity to make a submission</p>	<p>The Association is concerned that the proposed clause 36 replaces the extensive procedural guidelines that have applied in relation to handling of misconduct. The procedural guidelines have had the force of law. It is unclear whether the GSE Rules will also be supported by similar guidance provided by the Commissioner.</p>

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	<p>(b) of the action that may be taken under section 69 (4) of the Act against the employee.</p> <p>(4) The affected employee is to be given a reasonable opportunity to make a statement in relation to the allegation.</p> <p>(5) The agency head may, as a result of any such statement by the affected employee:</p> <p>(a) decide to proceed to deal with the matter in accordance with this Part, or</p> <p>(b) decide not to proceed any further with the matter.</p> <p>The affected employee is to be notified of the agency head's decision.</p> <p>(6) The person making an allegation of misconduct is to be informed of any decision by the agency head under this clause not to proceed with the matter.</p>	<p>in relation to the disciplinary action that the Department Head is considering taking.</p> <p>(4) Even though the appropriate Department Head decides to deal with an allegation of misconduct as a disciplinary matter in accordance with the procedural guidelines, the Department Head may, at any stage of the process:</p> <p>(a) decide to take remedial action with respect to the officer concerned, or</p> <p>(b) decide to dismiss the allegation, or decide that no further action is to be taken in relation to the matter, or both.</p> <p>(5) A decision under this section by the appropriate Department Head to take remedial action with respect to an officer does not, if it appears to the Department Head that the officer may have engaged in any misconduct while the remedial action is being taken, prevent the Department Head from dealing with the alleged misconduct as a disciplinary matter under this section.</p>	
37	<p>Inquiries</p> <p>(1) An agency head may, in dealing with an allegation of misconduct by an employee of the agency, conduct such inquiries as the agency head thinks appropriate for the purposes of determining whether the misconduct has occurred.</p> <p>(2) A formal hearing involving the legal representation of the affected employee or any other person and the calling and cross-examination of witnesses is not to be held in relation to an allegation of misconduct and the taking of any action with respect to the employee.</p>		
38	<p>Findings by agency head</p> <p>(1) An agency head may, in dealing with an allegation of misconduct:</p> <p>(a) make a finding of misconduct by the affected employee (in which case the employee is to be</p>		

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	<p>notified of the finding in writing), or (b) make a finding that misconduct by the affected employee has not occurred (in which case the agency head is to dismiss the allegation and advise the affected employee in writing). (2) The agency head may not take any action under section 69 (4) of the Act in relation to an employee unless: (a) the employee is notified of the proposed action to be taken, and (b) the employee is given a reasonable opportunity to make submissions in relation to the proposed action, and (c) the agency head has taken any such submissions into consideration. (3) If the agency head makes a finding of misconduct in relation to an employee, the agency head may, instead of taking action under section 69 (4) of the Act, require the conduct of the employee to be monitored over a specified period notified to the employee. (4) If, during that specified period, the agency head is satisfied that the employee has engaged in misconduct of the same kind as the misconduct the subject of the previous finding, the agency head may take any action under section 69 (4) of the Act in respect of the employee. (5) In that case, the employee is not required to be given an opportunity to make submissions in relation to the action proposed to be taken by the agency head.</p>		
39	<p>Records relating to misconduct (1) The head of a government sector agency is to keep a written record of the proceedings and action taken in respect of any allegation of misconduct by an employee of the agency. (2) Any personal file kept by the agency head on such an employee is to include information about any finding of misconduct by the employee that is, in the opinion of the agency head, in the public</p>		

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	interest to be included. In forming that opinion, the agency head is to have regard to the nature and seriousness of the misconduct and the need to minimise any unnecessary or prejudicial information being kept on a person's file.		
Part 10	Additional provisions relating to Public Service senior executives		
40	<p>Report on termination of employment of Public Service senior executives</p> <p>(1) If the employment of a Public Service senior executive is terminated by the executive's employer under section 41 of the Act, the employer is, as soon as practicable after terminating the executive's employment, to provide a written report to the Commissioner on the termination.</p> <p>(2) The report is to be signed by the agency head and include the following:</p> <p>(a) a summary of the process taken by the employer in terminating the employment,</p> <p>(b) the reasons for terminating the employment.</p> <p>(3) For the purposes of this clause, the employer of a Public Service senior executive does not include a Minister.</p>		<p>The Association has always held grave concerns about provisions that enable senior executives to have their employment terminated without reason and the associated potential for corruption.</p> <p>To a limited extent, clause 40 of the Rules seeks to address our concerns by requiring the employer to prepare a report on the process of termination along with the reasons for the termination.</p> <p>However, it is not clear how this will operate where an employee is terminated for no stated reason.</p>
41	<p>Model contract of employment for Public Service senior executives</p> <p>(1) This clause applies in relation to a Public Service senior executive other than the Secretary of a Department or the head of any other Public Service agency.</p> <p>(2) The contract of employment specified in Schedule 1 is, for the purposes of section 39 (3) of the Act, prescribed as the model contract of employment for a Public Service senior executive (the senior executive model contract).</p> <p>(3) All the provisions of the senior executive model contract are mandatory (except any provisions that are not applicable as indicated in</p>		

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	the model contract).		
42	<p>Requirement to comply with contract of employment A Public Service senior executive must comply with any of the obligations imposed on the executive under the executive's contract of employment.</p>		
43	<p>Contract of employment subject to conditions of engagement being satisfied The contract of employment of a Public Service senior executive is subject to all the conditions to which the engagement of the executive is subject being satisfied.</p>		
44	<p>On-going conditions of employment (1) A Public Service senior executive must ensure that the executive at all times holds and maintains: (a) the citizenship or other residency requirements for employment as a Public Service employee, and (b) the formal qualifications or clearances (if any) required for his or her role. (2) The employer of a Public Service senior executive may attach a specific condition of employment to a particular role. (3) If the Public Service senior executive assigned to a role to which any such condition is attached is assigned to a different role that does not have the condition of employment attached to it, the condition no longer applies in relation to the executive.</p>		
45	<p>Assignment to other role—payment of allowances If an allowance of a particular kind is payable in relation to the role of a Public Service senior executive and the senior executive is assigned to another role in respect of which the allowance is not payable, the senior executive is no longer</p>		

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	entitled to the allowance.		
46	<p>Part-time work</p> <p>(1) The employer of a Public Service senior executive may approve a request by the executive to undertake work on a part-time basis (namely, that the executive is not available for duty during the whole or part of a normal working day).</p> <p>(2) An agreement between the employer and the Public Service senior executive about part-time work must specify the days or parts of days when the executive is available for duty.</p> <p>(3) The remuneration of the executive is to be calculated on a pro-rata basis (excluding allowances in the nature of reimbursement where the part-time employee will receive the same amount as a full-time employee in the same circumstances).</p>		<p>The Association welcomes the recognition of the option for senior executives to work part time. However, the issue of work life balance is not adequately addressed by the proposed arrangements.</p> <p>The Association recommends that the model contract be modified to enable local arrangements to be negotiated in relation to hours of work.</p> <p>This may incorporate the requirement for part time work or other adjustments to the usual hours of work to accommodate work life balance considerations.</p>
47	<p>Performance management</p> <p>A Public Service senior executive must, in accordance with the performance management system applying to the executive under section 67 of the Act:</p> <p>(a) enter into a performance agreement with his or her employer, and</p> <p>(b) have his or her performance reviewed at least annually.</p>		
48	<p>Capability assessments</p> <p>A Public Service senior executive must participate in:</p> <p>(a) periodic capability assessments, and</p> <p>(b) any assessment relating to the technical requirements of the executive's role.</p>		
49	<p>Certain leave or payments not available</p> <p>A Public Service senior executive is not entitled to any flex leave for working flexible hours or to be paid for working overtime.</p>		<p>The Rules specifically preclude senior executives from access to flex leave and overtime payments. This is combined with a mandatory contract term that stipulates this cohort must work the hours necessary</p>

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			<p>to perform the duties and responsibilities of the role without specifying any limit on hours.</p> <p>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.</p> <p>The Association is concerned that 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.</p>
Schedule 1	Model contract of employment for Public Service senior executives (other than agency heads) –		<p>The Association recommends the amendment of the 'Hours of duty' clause of the model contract in the following terms:</p> <p><i>The Senior Executive must work the hours reasonably necessary to perform the duties and responsibilities of the Senior Executive's role"</i></p>