

Public Sector Reform Reforming the Public Sector to Deliver Improved Services to the NSW Community

Government Sector Employment Bill 2013

This document has been prepared following the introduction of the Government Sector Employment Bill 2013 to the NSW Parliament on 23 May 2013.

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Note: This is the third set in a series of NSW Public Service Commission questions and answers on the new legislation. Previous question and answer documents were published in February 2013 and May 2013 and can be found on the Commission website.

7 June 2013

1. Why is this new legislation proposed?

The *Government Sector Employment (GSE) Bill 2013* sets the foundation for a modern NSW Government workforce that is both highly capable and agile in responding to service delivery priorities and an attractive career choice within the wider labour market.

The *GSE Bill 2013* reflects and builds on the Government's reform program for the public sector, which began with the establishment of the Office of Public Service Commissioner and the Public Service Commission Advisory Board, the introduction of an ethical framework for the Government sector, mandated performance management, and the establishment of the Commission of Audit, which reported on Government sector management in 2012.

The current legislation, the *Public Sector and Employment (PSEM) Act 2002* has not been substantially changed since the 1980s. The *GSE Bill 2013*:

- Creates a clearer and more appropriate legislative framework;
- Modernises the Government sector in NSW, aligning it with modern management practices in other public sectors and in the private sector;
- Improves the quality and consistency of Public Service leadership through new structural and employment arrangements for all NSW Public Service Senior Executives;
- Facilitates a common approach to workforce management across the sector in key areas, including mobility, capability development and career progression;
- Addresses a range of deficiencies identified in the 2012 interim report of the Commission of Audit into the public sector.

2. When will the legislation commence and how will it be implemented?

It is envisaged that the *GSE Bill 2013* will commence in late 2013, subject to passage of the Bill by the Parliament in June 2013. The provisions of the *PSEM Act 2002* will continue to apply until the commencement of the *GSE Bill 2013*.

The transitional arrangements are set out in Schedule 4 of the *GSE Bill 2013*. These arrangements are intended to support a smooth change from the *PSEM Act 2002* arrangements to the new employment framework under the *GSE Bill 2013*.

Key features of the transitional arrangements are

- A person employed in the Government Service under the *PSEM Act 2002* is, on repeal of the *PSEM Act 2002*, taken to be employed under the *GSE Act 2013* in the *Public Service of New South Wales* in the equivalent kind of employment and a corresponding role or classification of work;

- Existing Directors-General will be appointed as Secretaries so they have authority to direct and manage the transition from the outset;
- There will be a staged implementation process for new executive employment arrangements;
- Excepting changes to the executive structure, conditions of employment under industrial awards and instruments are not affected;

Implementation of the new executive arrangements across the Public Service will be undertaken over three years. Most departments and their related agencies are expected to complete those changes within two years.

The Public Service Commission has commenced preparation of regulations for approval by the Government and work will commence on the Government Sector Employment Rules following the passage of the legislation. A temporary transition team is being established to assist departments and agencies in implementing the reforms established by the legislation.

3. What makes up the new Government Sector and the Public Service under the GSE Bill 2013?

The GSE Bill 2013 creates two employment structures: the *government sector* which employs about 400,000 people, and the *public service* which is subset of the Government sector and employs about 70,000 people.

The *government sector* encompasses most New South Wales government employees. It includes the Public Service; Teaching Service; NSW Police Force; NSW Health Service; Transport Service of the New South Wales; any other service of the Crown (including the service of any NSW government agency); and other services such as those constituted under an Act which are prescribed by regulations.

The Government Sector *does not include* judicial officers, the Parliament, the Judicial Commission, the Independent Commission Against Corruption or the Auditor General's Office as they largely have their own employment provisions in enabling legislation.

The *public service* will comprise Departments, Public Service executive agencies related to Departments, and separate public service agencies. These bodies will be listed in Schedule 1 of the Act which is to be implemented by Administrative Arrangements Orders (now made and published under the new Part 7 of the *Constitution Act 1902*).

Separate public service agencies appear at Schedule 1 Part 3. Due to their independent functions these agencies require a greater level of autonomy in their employment arrangements at arm's length from departments and the Bill includes a number of specific provisions concerning these agencies which support their independence. Examples include the Independent Transport Safety Regulator, the NSW Crime Commission, the NSW Police Integrity Commission and the Ombudsman.

The Bill includes provisions setting out the following employment related functions:

- The term Director General of a department will be replaced with that of Secretary.
- Secretaries will be the employers of all staff within their department, and the employers of all senior executives in their departments, and in addition they will be the employers of all Public Service executives in the agencies related to their departments;
- The Head of a *public service executive agency* will hold the employer functions for all non-executive employees in their agency;
- Heads of *separate public service agencies* will hold the employer functions for all their employees, including senior executives;
- The Industrial Relations Secretary will remain the employer for industrial purposes and proceedings for the new public service, and retains powers to make determinations fixing conditions of employment for the public service;
- People employed in the Teaching Service will continue to be employed by the Government of NSW in the service of the Crown, and the Secretary of the Department of Education and Communities will continue to be the employer for industrial purposes and proceedings.

4. Why is the concept of an employee position being replaced by the concept of employment within a classification and assignment to a role? What kinds of employment will apply in the public service?

The concept of an employee “owning” a position is not consistent with modern management practice. This approach tends to result in employees having a narrow range of capabilities specific to a position, can limit development opportunities for employees, and restrict the ability of a department or agency to respond quickly to changing government priorities or community needs.

The Bill provides for a new approach which will result in a non-executive Public Service employee being employed in a classification of work (and a Senior Executive being employed in a band), and then assigned to a role within that classification or band. Employees may later be re-assigned to a different role within the classification or band in which they are employed, following consultation.

The Bill defines a role as “the duties and responsibilities of the employee”. Employees of the public service will move from positions to roles under transitional provisions (Clause 5 of Schedule 4). These provisions provide that the previous position or work in the public service is to be taken to be the new role or classification of work under the new Act. That role or classification of work is to correspond to the kind and grade of work under the former Act. For

example an employee graded as a Clerk Grade 7/8 will continue to be graded the same, however under the new Act they will be employed at the Grade 7/8 level and assigned to a 'role' at that level, as opposed to appointed to a 'position' which they own.

Both executive and non-executive employees may be assigned to roles to enable the flexible deployment of staff resources within the agency and to develop the capabilities of staff. The Bill explicitly states that employees must be consulted before assignment to a different role.

The kinds of employment available under the Bill are largely unchanged, except that out-dated terminology such as 'officer' has been replaced. The Bill provides for three kinds of employment for non-executive employees in the public service (Section 43): ongoing employment, temporary employment and casual employment. The term 'permanent employee' or 'permanent officer' has been replaced with the more modern term of 'ongoing employee'. Temporary employment is available where the employment is for a temporary purpose, as is currently the case. Casual employment continues to be available for use where the employment is to carry out irregular, intermittent, short-term, urgent or other work as and when required.

5. Will recruitment still be based on the merit principle?

The provisions in the *GSE Bill 2013* strengthen the application of the principle of merit for government sector recruitment and selection processes.

The Bill specifically provides for an ethical framework founded on a merit-based, apolitical and professional government sector, and for the inclusion of recruitment and promotion of employees on merit as a Government sector core value. In addition, one of the Public Service Commissioner's principle objectives is to ensure that "government sector recruitment and selection processes comply with the merit principle and adhere to professional standards".

The Bill provides for the Public Service Commissioner to make Government Sector Employment Rules on the recruitment of non-executive employees, including the application of the principle of employment on merit. These rules will have the status of instruments made under the Act. It will be mandatory for employers and employees in the Government sector to comply with the Government Sector Employment Rules established by the Commissioner.

The Public Service Commissioner is completing a major review of existing recruitment processes in the sector, leading to the development of best practice guidance on merit-based recruitment and selection methodologies due to be released in the second half of 2013.

6. What are the changes to performance management and misconduct processes?

The existing PSEM Act 2002 (section 101A) requirement that heads of public service agencies develop and implement a performance management system for their employees is brought forward into the new Bill (Clause 47).

To support implementation, the Public Service Commission has been working with agencies to develop a Performance Development Framework which defines the core requirements for a staff performance development system. The Framework is expected to be issued in the near future.

Existing unsatisfactory performance provisions are also brought forward into the Bill though its management has been separated from the management of misconduct and the term “disciplinary action” is no longer used. It is intended that the Rules and associated documentation will provide the procedure for dealing with unsatisfactory performance, including ensuring a procedurally fair process. As is the case under the PSEM Act 2002 provisions, the Bill provides for a range of options for dealing with persistent unsatisfactory performance, including reduction in remuneration, reduction in classification or grade or assignment to a different role, and termination (Clause 68).

Management of misconduct by an employee will now be dealt with quite separately from management of unsatisfactory performance. The Bill provides for rules to be made in respect of misconduct or an employee’s conviction for a serious offence, and the procedural requirements for dealing with allegations of misconduct. Where there is a finding of misconduct in accordance with those rules, the Bill provides various options to the head of a public sector agency including imposing a fine, reducing remuneration, classification or grade, assigning the employee to a different role, cautioning or reprimanding the employee, or terminating employment (Clause 69). These are the same options as are currently available under the *PSEM Act 2002*.

7. Will the reforms affect leave entitlements?

The new legislative framework preserves accrued leave entitlements of all Government employees and these entitlements will remain unchanged.

One of the key reform goals is to have a simplified Government Sector Employment Act, and to achieve this, detailed provisions previously contained in the *PSEM Act 2002* will be relocated to Regulations or rules. The *GSE Bill 2013* provides for the Regulations to include provisions for entitlements to extended leave and other forms of leave. The existing provisions in the *PSEM Act 2002* (s.55 and Schedule 3) on extended leave and other leave entitlements will be preserved and continued in the Regulations under the *GSE Bill 2013* (Clause 54).

The *GSE Bill 2013* provides for the continued employment of persons moving from the existing Government service under the *PSEM Act 2002* into the public

service under the GSE Bill 2013. Transitional provisions provide for accrued leave rights and continuity of service with leave entitlements to continue in the same terms as under the *PSEM Act 2002* (see *GSE Bill Schedule 4(5) (1) and 4(5) (3)*). The GSE Regulations will also prescribe matters relating to cross-sector leave matters currently located in ss92-99 of the *PSEM Act 2002*.

Award-based Senior Officers and their equivalents within other industrial awards who convert to Senior Executive contracts will no longer be entitled to flex leave.

8. Why have promotional appeals been removed?

Today, there are very few public sector appeals on the merits of a promotional appointment lodged with the Industrial Relations Commission (IRC) and few, if any, are allowed. The application of the merit principle in promotional appointments will be reinforced by the Bill through:

- The Commissioner's statutory function to lead the strategic development and management of the public sector workforce in relation recruitment, particularly compliance with the requirements relating to appointment and promotion on merit (Clause 3F);
- Guidance by the Public Service Commissioner to agencies to ensure that agencies establish and implement an internal review procedure, to deal with employee concerns regarding the application of fair process;
- Periodic review by the Commissioner of an agency's application of the merit principle in recruitment and promotion; and
- Provision for Government Sector employment rules concerning recruitment, including the application of the principle of employment on merit.

Transitional provisions in the Regulations will provide that promotional appeals currently pending will be concluded under the provisions of the *PSEM Act 2002*.

9. Have the grounds for terminating an employee been extended?

The GSE Bill 2013 brings all of the existing grounds for termination of a non-executive employee together in a new single Clause 47. The grounds for termination listed in Clause 47 are equivalent to provisions or actions currently available under the *PSEM Act 2002* and the *PSEM Regulation 2009*.

Other termination provisions apply to executives. The grounds for termination of executives set out in the GSE Bill 2013 (Clause 41) are equivalent to those set out in the *PSEM Act 2002* (section 77).

10. Will the Managing Excess Employees policy change?

The head of a public service agency will determine excess employees in accordance with the Regulations and government sector employment rules,

Managing Excess Employee (MEE) Policy, and the Agency Change Management Guidelines.

The *MEE Policy*, August 2011, and the *Agency Change Management Guidelines*, September 2011, will be adapted to apply to roles in much the same way as they currently do to positions.

Agencies will continue to manage excess employees under the *MEE Policy and Case Management and Redeployment Guidelines* which will be updated to reflect the new concept of role which represents the duties and responsibilities of an employee.

The *MEE Policy* and the *Agency Change Management Guidelines* will continue to be key mechanisms by which public service agencies adapt to changing priorities and implement organisation reform to optimise service delivery.

11. Is the Industrial Relations Commission role changed? Are award conditions affected?

The role and jurisdiction of the NSW Industrial Relations Commission (IRC) is unchanged for non-executive employees, except that the IRC will no longer hear appeals against merit-based promotions.

Contract-based Public Service executives do not currently have access to the NSW IRC. The Bill does not change arrangements for executive employees.

Industrial awards are not affected by the *GSE Bill 2013* as the previous provisions of the *PSEM Act 2002* are carried over into the Bill. Accordingly, the Bill does not affect the operation of the *Industrial Relations Act 1996* (see *GSE Bill 2013* Clause 85 and Schedule 4 – Clause 9) and industrial instruments.

12. Have workforce diversity and equal opportunity arrangements changed?

The *GSE Bill 2013* establishes new arrangements for workforce diversity and amends the *Anti-Discrimination Act* by removing Part 9A which sets out provisions for Equal Opportunity in Public Employment.

The Bill provides for workforce diversity employment strategies to be integrated within each agency's workforce planning. The Bill provides that:

- Workforce diversity is to include but not be limited to diversity of the workforce in respect of gender, cultural and linguistic background, Aboriginal people and people with a disability;
- Agency heads are responsible for workforce diversity within the agency and for ensuring that workforce diversity is integrated into workforce planning for the agency;

- The Public Service Commissioner is to lead the strategic development and management of the public sector workforce in relation to equity and diversity, including strategies to ensure the public sector reflects the diversity of the wider community (Clause 11);
- Government sector employment rules may deal with workforce diversity in any government agency and the head of the agency is to ensure these rule are complied with; and
- The Commissioner is to include in annual or other reports, periodic reports on workforce diversity across Government sector agencies.

13. What are the government sector employment rules? How will they be enforced?

The *GSE Bill 2013* provides for Regulations which will generally deal with matters of government policy, employee entitlements and other matters that do not change frequently and are necessary to support the statutory regime; Government sector employment rules made by the Commissioner which will deal with, for example, implementation of employment policies, and procedural and operational matters across the Government Sector or the Public Service. The Public Service Commissioner may issue directions to Government sector agency heads, either individually or as a group.

The GSE Bill 2013 provides that the Public Service Commissioner may make, (including amend or repeal) government sector employment rules of a general nature or on specific matters. The Bill provides for the Commissioner to make rules in the following areas: contracts of employment of a senior executive, conditions of engagement of a non-executive employee, recruitment, kinds of employment, work level standards, capabilities for roles, assignment to roles, termination and dealing with excess employees, workforce diversity, transfers and secondments, temporary assignments, performance management systems, unsatisfactory performance, and misconduct.

It will be mandatory for employers and employees to comply with the applicable rules established by the Public Service Commissioner in the public service or across the wider Government sector. The Bill therefore establishes a clear framework for the Public Service Commissioner to ensure compliance by all government sector agencies.

The PSC website will be kept up to date with developments at www.psc.nsw.gov.au/publicsectorreform

Regular updates will also be provided in the PSC e-newsletter, [WorkWise](#).

You may also email any questions to publicsectorreform@psc.nsw.gov.au