

## Commissioner's Instruction No. 23

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# Conversion and appointment of fixed term contract and casual employees to permanency

**Commencement date:** 10 August 2018

**Enquiries:** (08) 6552 8648

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admin@psc.wa.gov.au

### Statement of intent

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The Western Australian Government is committed to permanent (ongoing) employment for public sector employees. Practices within employing authorities should support permanent employment wherever possible, and the use of fixed term contract and casual arrangements only where it is appropriate to do so.

This Instruction has been developed in order to provide a framework for the conversion and permanent appointment of current fixed term contract and casual employees, subject to applicable criteria being met. The Instruction provides a mechanism for implementing the Government's policy in a manner that is consistent with relevant principles and standards. It also supports the early identification and resolution of issues arising from agency practices relating to the engagement and extension of fixed term contract and casual employees.

### Scope and application

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This Instruction applies to fixed term contract and casual employees employed by the employing authorities of all public sector bodies as defined in the *Public Sector Management Act 1994* (PSM Act). Its application is limited to persons employed at the time of the commencement of this Instruction.

This Instruction does not apply to:

- any officer who is precluded by legislation or another instrument from being appointed permanently, including:
  - Chief Executives and Health Executives appointed under the *Health Services Act 2016*;
  - Senior Executive Service Officers appointed under section 53 of the PSM Act;
  - Chief Executive Officers and Chief Employees as defined in section 3 of the PSM Act;
  - Ministerial Officers appointed under section 68 of the PSM Act;
- practitioners engaged under the *WA Health System – Medical Practitioners – AMA Industrial Agreement 2016* or Clinical Academics engaged under the *WA Health System – Clinical Academics – Industrial Agreement 2016* or their replacements, and medical officers appointed by the Department of Justice; and

- consultants or persons engaged through service companies or otherwise on contracts for services (labour hire).

To the extent that this Instruction is inconsistent with clause 7 of *Commissioner's Instruction No. 2 – Filling a public sector vacancy* or *Commissioner's Instruction No. 5 – Publishing a public sector notice* this Instruction shall prevail for the purposes of the processes provided in this Instruction.

This Instruction does not override *Commissioner's Instruction No. 22 – Interim arrangements for Colleges constituted under the Vocational Education and Training Act 1996 to appoint certain fixed term contract lecturers to permanent positions*.

The provisions of the relevant industrial instrument(s) will prevail where there is inconsistency between this Instruction and the industrial instrument(s).

## References

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The appointment and conversion of fixed term contract and casual employees by employing authorities must comply with:

- sections 8 and 9 of the PSM Act; and
- *Commissioner's Instruction No. 1 – Employment Standard* as applicable; and
- relevant provisions of *Commissioner's Instruction No. 2 – Filling a public sector vacancy* where those provisions are not inconsistent with this Instruction. Nothing prevents employing authorities from continuing to use the provisions of clause 7 of *Commissioner's Instruction No. 2* to convert a fixed term contract employee to permanency where the employee meets the eligibility criteria of that clause.

Supporting information produced by the Public Sector Commission provides further guidance to employing authorities undertaking the conversion and appointment of current fixed term contract and casual employees, but does not form part of this Instruction.

## Instruction

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### 1 Review of the status of fixed term contract employees

1.1 Employing authorities shall conduct a review of current fixed term contract employee arrangements to:

- (a) identify the reason for the engagement of each fixed term contract employee; and
- (b) determine whether a fixed term contract employee has met the criteria in clause 2 and if so, shall offer to convert or appoint the fixed term employee to permanency in accordance with clause 4.

- 1.2 The employing authority shall commence the review as soon as possible after the commencement of this Instruction, taking into consideration the requirements at 1.3.
- 1.3 The employing authority shall provide the names, business email addresses and work locations of fixed term contract employees who will be subject to the processes in this Instruction to the relevant union/s no less than 30 working days prior to the commencement of the review, or as otherwise agreed to by the employing authority and the relevant union.
- 1.4 The employing authority shall notify fixed term contract employees of the intention to commence the review. This notification shall be in writing and include:
  - (a) the name and contact details of the nominated contact for the review; and
  - (b) the criteria and other conditions in this Instruction that apply to the review; and
  - (c) the date of commencement of the review, and the date by which the decision is anticipated to be made; and
  - (d) that the employee (or their representative) may make a submission to support their conversion or appointment within 30 working days, or as otherwise agreed to by the employing authority and employee (or their representative); and
  - (e) that the relevant union has been advised that the process has begun and provided with the work details of the employees who will be subject to the processes in this Instruction; and
  - (f) that there will be information sessions provided to employees outlining how the review will be undertaken and the processes to be applied.
- 1.5 If, during the review, the employing authority is of the opinion there is insufficient information to determine whether a fixed term contract employee meets the criteria in clause 2.1, the employing authority shall provide the employee (or their representative) with the opportunity to make a submission providing further information in respect of the criteria. This submission shall be provided within 30 working days, or as otherwise agreed by the employing authority and the employee (or their representative).

## **2 Criteria for converting or appointing a fixed term contract employee to a permanent role**

- 2.1 The criteria for conversion or appointment to permanency of a fixed term contract employee are as follows:
  - (a) the reason for engagement on a fixed term contract is not a circumstance mentioned in the relevant industrial instruments; and
  - (b) the employee has completed two or more years of continuous service in the same or similar role; and
  - (c) the employee is not subject to formal disciplinary or substandard performance action at the time of assessment.

2.2 Employing authorities are to also consider ongoing funding as outlined in clause 11.

### **3 Proper assessment of merit for a fixed term contract employee**

3.1 Where all the provisions in clause 2 are met, and the employing authority forms the opinion that the employee has not been subject to a proper assessment of merit for their role, a proper assessment of merit shall be undertaken in accordance with clause 10.

### **4 Outcome of review for fixed term contract employees**

4.1 The employing authority shall notify each fixed term contract employee in writing of the outcome of the review. This notification shall include:

- (a) the reasons for the decision, including funding considerations under clause 11;
- (b) the proposed course of action, subject to clause 12, including:
  - i. whether an offer of conversion or appointment to permanency is or is not to be made; or
  - ii. whether the employing authority intends to advertise and recruit to the role;
- (c) if an offer is to be made, the terms and conditions of employment, including whether ongoing employment is to be full time or part time, consistent with hours regularly worked; and
- (d) that the employee may choose to provide a copy of the notification to their union.

4.2 Subject to clauses 11 and 12 of this Instruction, and if all of the criteria in clause 2.1 and the requirements in clauses 3 and 5 are met, then:

- (a) where the employee is to remain in their current role, the employing authority shall offer to convert or appoint the employee to permanent, at the employee's substantive level of classification; or
- (b) where the current role is not required on an ongoing basis, but a similar role will be, the employing authority shall offer to appoint or employ the employee permanently to that role at the employee's substantive level of classification.

4.3 For a public service employee, an offer referred to in subclauses 4.2(a) and (b) above shall mean an offer of appointment as a permanent officer.

### **5 Advertising and recruitment**

5.1 Subject to clause 12, where an advertising and recruitment process commences, following the review conducted in clauses 1 or 6, only employees who meet all the criteria in clauses 2.1 or 7.1 will be invited to apply.

5.2 A current public service officer who was appointed under section 64(1)(b) of the PSM Act may only be appointed as a permanent officer where:

- (a) the role was advertised as a public sector notice or in a daily newspaper circulating throughout the State; or
- (b) the role was advertised by the employing authority with a possibility of permanency.

5.3 For the purposes of this Instruction, if advertising of a permanent role as a public sector notice, in a daily newspaper or with a possibility of permanency has not yet occurred, a notice published by an employing authority within a public sector body constitutes a public sector notice.

## **6 Review of the status of casual employees**

6.1 Employing authorities shall conduct a review of casual employment arrangements to determine whether a casual employee has met the criteria in clause 7 and if so, shall offer to appoint the casual employee to permanency in accordance with clause 9.

6.2 The employing authority shall commence the review as soon as possible after the commencement of this Instruction, taking into consideration the requirements at 6.3.

6.3 The employing authority shall provide the names, business email addresses and work locations of casual employees who will be subject to the processes in this Instruction to the relevant union/s no less than 30 working days prior to the commencement of the review, or as otherwise agreed to by the employing authority and the relevant union.

6.4 The employing authority shall notify casual employees of the intention to commence the review. This notification shall be in writing and include:

- (a) the name and contact details of the nominated contact for the review; and
- (b) the criteria and other conditions in this Instruction that apply to the review; and
- (c) the date of commencement of the review, and the date by which the decision is anticipated to be made; and
- (d) that the employee (or their representative) may make a submission to support their permanent appointment within 30 working days, or as otherwise agreed to by the employing authority and the employee (or their representative); and
- (e) that the relevant union has been advised that the process has begun and provided with the work details of the employees who will be subject to the processes in this Instruction; and
- (f) that there will be information sessions provided to employees outlining how the review will be undertaken and the processes to be applied.

6.5 If, during the review, the employing authority is of the opinion there is insufficient information to determine whether a casual employee meets the criteria in clause 7.1, the employing authority shall provide the employee (or their representative) with the opportunity to make a submission providing further information in respect of the criteria. This submission shall be provided within 30 working days, or as otherwise agreed to by the employing authority and the employee (or their representative).

## **7 Criteria for appointing a casual employee to a permanent role**

7.1 The criteria for permanent appointment of a casual employee are as follows:

- (a) the employee has completed two or more years in the same or similar role, and the work pattern over the two-year qualifying period has been regular and systematic; and
- (b) the regular and systematic hours worked by the employee over the two-year qualifying period can be performed on a full time or part time arrangement in accordance with the relevant industrial instrument; and
- (c) the employee is not subject to formal disciplinary or substandard performance action at the time of assessment.

7.2 Employing authorities are to also consider ongoing funding as outlined in clause 11.

## **8 Proper assessment of merit for a casual employee**

8.1 Where all the provisions in clause 7 are met, and the employing authority forms the opinion that the employee has not been subject to a proper assessment of merit for their role, a proper assessment of merit shall be undertaken in accordance with clause 10.

## **9. Outcome of review of casual employees**

9.1 The employing authority shall notify each casual employee in writing of the outcome of the review. This notification shall include:

- (a) the reasons for the decision, including funding considerations under clause 11;
- (b) the proposed course of action, subject to clause 12, including:
  - i. whether an offer of appointment to permanency is or is not to be made; or
  - ii. whether the employing authority intends to advertise and recruit to the role;
- (c) if an offer is to be made, the terms and conditions of employment, including whether ongoing employment is to be full time or part time, consistent with hours regularly worked; and
- (d) that the employee may choose to provide a copy of the notification to their union.

9.2 Subject to clauses 11 and 12 of this Instruction, if all the criteria in clause 7.1 are met and the requirements in clauses 5.1 and 8 are met, then the employing authority shall offer to permanently appoint the casual employee.

## 10 Proper assessment of merit

10.1 For the purposes of this Instruction a proper assessment of merit can be an individual assessment of merit, and is one:

- (a) that is impartial and free from bias, nepotism and patronage; and
- (b) that determines that the individual's qualifications, skills, knowledge and abilities are such as to meet all the requirements of the role; and
- (c) where assessment decisions are transparent and capable of review.

## 11 Funding

- (a) The Director General/CEO and the CFO of the employing authority confirm that ongoing funding for the role can reasonably be expected to be accommodated from within the employing authority's approved expense limits over the forward estimates period; or
- (b) Where the position is externally funded, the Director General/CEO and the CFO of the employing authority confirm that, the funding has been consistent on a historical basis and can be reasonably expected to continue beyond the current funding arrangement.

## 12 Redeployment clearance

12.1 Notwithstanding the provisions of this Instruction, the redeployment and redundancy obligations under the *Public Sector Management (Redeployment and Redundancy) Regulations 2014* and associated instruments, continue to apply. An offer of appointment or conversion to permanency cannot be made if a suitable permanent registrable or registered employee is able to undertake the role.

## 13 Dispute settlement procedures and breach of standard claims

13.1 The dispute settlement procedure (DSP) as prescribed in the relevant industrial instrument is to be used where an issue arises in the application of this Instruction.

13.2 Where the employing authority undertakes a recruitment process, the *Public Sector Management (Breaches of Public Sector Standards) Regulations 2005* are to apply.

13.3 Consistent with *Premier's Circular 2017/03 – Coordination and Governance of Public Sector Labour Relations*, employing authorities are to consult with Public Sector Labour Relations where Instruction matters are being dealt with under a DSP.

## 14 Evaluation of implementation of this Instruction

- 14.1 Employing authorities are to maintain records of conversions and appointments to permanency. Such records are to be provided to the Public Sector Commission on request.
- 14.2 Meetings will be held between the Public Sector Commission, Public Sector Labour Relations and Unions WA to evaluate and monitor the implementation of this Instruction. These meetings will be held on a quarterly basis, or as otherwise agreed by the parties.

## Definitions

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### Appointment

An appointment occurs when, as a result of the application of this Instruction:

- (a) a fixed term contract public sector employee will perform his or her usual or similar duties in a role other than the one which he or she currently occupies; or
- (b) a fixed term contract public service employee is appointed as a permanent officer; or
- (c) a casual employee is permanently appointed.

### Continuous service for fixed term contract employees

For the purposes of this Instruction, 'continuous service' in relation to fixed term contract employees means two or more years of continuous service (employment) under the same employing authority without a break in service. Periods of absence not considered to be a break in service include:

- authorised periods of absence and approved leave;
- breaks between fixed term contracts of up to ten working days;
- any period of absence that in accordance with the relevant industrial instrument does not break service; and
- any other period of absence due to a traditional period of reduced staffing such as, a close-down of operations for 'term or semester' breaks.

### Conversion

A conversion occurs where a fixed term contract public sector employee remains in their current role and their employment status is being changed from fixed term to permanent.

### Public sector employee

A current employee of a public sector body not employed under Part 3 of the PSM Act.

### Public service employee

A current officer of a public sector body appointed under Part 3 of the PSM Act.

### **Relevant union/s**

The union or unions which are a party to the industrial instrument or instruments which are applicable to the employee/s.

### **Same employing authority**

Has the meaning given in section 5 of the PSM Act, but includes the successor department or agency where an employing authority is amalgamated with or transferred to another department or agency.

### **Role**

For the purposes of this Instruction, 'role' includes a job in which a person is employed within an employing authority, and includes an office, post, or position with the employing authority.

### **Same role**

Includes any job role undertaken in the same employing authority that has the same duties/responsibilities/tasks and work-related requirements/selection criteria, including a role with a generic job description that involves rotation through different work areas. This does not include situations where the role requires specialist knowledge not specified in the job description, as this would not fit the definition of same role.

### **Similar role**

Job roles undertaken in the same employing authority where the duties and work-related requirements contained in the job description are substantially similar. This does not include situations where the role requires specialist knowledge not specified in the job description, as this would not fit the definition of similar role.

### **Regular**

- usual, normal or customary;
- recurs at a fixed time or periodically; and
- there is a reasonable expectation that work would be available to the employee.

Evidence of a 'regular' pattern of work might include:

- repetitive pattern e.g. regular days or hours of work or the employee is provided with shifts regularly; and/or
- having, showing or involving a system, method or plan.

### **Systematic**

Evidence of a 'systematic' work pattern might include:

- a fixed roster published in advance or predictable hours;
- a degree of certainty about work hours (e.g. consistent start and set finishing times); and/or
- ongoing reliance on the employee's services.