

EXPLANATORY STATEMENT

Public Service Amendment Act 2013

Australian Public Service Commissioner's Directions 2013

Issued by the authority of the Australian Public Service Commissioner

List of abbreviations used

APS	Australian Public Service
The Act	<i>Public Service Act 1999</i> , as amended by the <i>Public Service Amendment Act 2013</i>
The Amendment Act	<i>Public Service Amendment Act 2013</i>
The Classification Rules	The Classification Rules made under section 23 of the <i>Public Service Act 1999</i>
The Commissioner	The Australian Public Service Commissioner
The Directions	<i>Australian Public Service Commissioner's Directions 2013</i>
The MPC	The Merit Protection Commissioner
The Regulations	<i>Public Service Regulations 1999</i>
SES	Senior Executive Service

Overview

The Commissioner's Directions are made under the Act, and are necessary for its effective implementation.

The Directions are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*. They prescribe standards with which agency heads and APS employees must comply in order to meet their obligations under the Act, and support agency heads to fulfil their responsibilities in respect of their employer powers.

The Amendment Act revised the Commissioner's direction-making powers to provide the Commissioner with the power to issue directions on any of the APS Values, and to confer a similar power in respect of the new APS Employment Principles.

Section 11A of the Amendment Act inserts a new direction-making power for the Commissioner to issue directions on a broad range of matters relating to APS employment, such that information about the requirements of particular aspects of APS employment—for example, recruitment and selection matters—may be found in a single instrument. In addition, a number of employment-related provisions have been moved from regulations to the Directions to enable the consolidation of like provisions in one legislative instrument. This is intended to provide clarity for agencies, and to improve understanding and ease of use in applying the Act, the Regulations and the Directions.

The Act no longer provides specifically for directions to be made in relation to SES employment, but the capacity to make such directions remains under the Commissioner's general direction-making power.

Statutory Basis

The Act, as amended by the Amendment Act, provides at subsections 11(1), 11A(1), 11A(2), and 15(4) for the Commissioner to issue directions.

Section 10 of the Act sets out the APS Values. Section 10A of the Act sets out the APS Employment Principles and includes a definition of 'merit' for engagement and promotion decisions.

Agency heads are required, under section 12 of the Act, to uphold and promote the APS Values and Employment Principles.

SES employees are required, under paragraph 35(3)(c) of the Act, to promote the APS Values and Employment Principles by personal example and other appropriate means.

Subsection 11(1) of the Act provides that the Commissioner may issue directions in writing in relation to any of the APS Values for the purpose of:

- (a) ensuring that the APS incorporates and upholds the APS Values; and
- (b) determining, where necessary, the scope or application of the APS Values.

Subsection 11(2) of the Act provides that the APS Values have effect subject to the restrictions (if any) in directions made under subsection 11(1).

Subsection 11A(1) of the Act provides that the Commissioner may issue directions about employment matters relating to APS employees, including the following:

- (a) engagement
- (b) promotion
- (c) redeployment
- (d) mobility
- (e) training schemes
- (f) termination.

Subsection 11A(2) of the Act provides that the Commissioner may issue directions in relation to any of the APS Employment Principles for the purpose of:

- (a) ensuring that the APS incorporates and upholds the APS Employment Principles; and
- (b) determining, where necessary, the scope or application of the APS Employment Principles.

Subsection 11A(3) of the Act provides that the APS Employment Principles have effect subject to the restrictions (if any) in directions made under subsection 11A(1).

Subsection 11A(4) of the Act provides that a direction under section 11A has no effect to the extent that it is inconsistent with a direction issued by the Prime Minister under section 21 of the Act ('Prime Minister's Directions to agency heads').

Subsection 13(11) of the Act provides that APS employees must at all times behave in a way that upholds the APS Values and APS Employment Principles, and the integrity and good reputation of the employee's agency and the APS.

Paragraph 15(3)(a) of the Act provides that agency heads must establish procedures for determining whether an APS employee, or former employee, in the agency has breached the Code of Conduct, including by engaging in conduct referred to in subsection 15(2A) of the Act ('Providing false or misleading information etc. in connection with engagement as an APS employee').

Paragraph 15(3)(b) of the Act provides that agency heads must establish procedures for determining the sanction (if any) that is to be imposed under subsection 15(1) of the Act ('Sanctions that may be imposed') on an APS employee in the agency who is found to have breached the Code of Conduct, including by engaging in conduct referred to in subsection 15(2A) of the Act.

Paragraph 15(4)(a) of the Act provides that procedures established under subsection 15(3) must comply with basic procedural requirements set out in Commissioner's directions.

Subsection 15(6) of the Act provides that the Commissioner must issue directions in writing for the purposes of paragraph 15(4)(a) of the Act.

Subsection 18 of the Act requires agency heads to establish a workplace diversity program to assist in giving effect to the APS Employment Principles.

Subsection 42(1) of the Act provides that directions issued by the Commissioner cannot create offences or impose penalties.

Subsection 42(2) of the Act provides that agency heads and APS employees must comply with directions issued by the Commissioner.

Subsection 42(3) of the Act provides that directions issued by the Commissioner may apply, adopt, or incorporate (with or without modifications) any matter in the Classification Rules, or a direction issued by the Prime Minister under section 21 of the Act, either as in force or existing at a particular time, or as in force or existing from time to time.

Subsection 42(4) of the Act provides that directions issued by the Commissioner are legislative instruments.

APS Values

The Directions include directions in relation to each of the APS Values. Agency heads and all APS employees are required by the Act to uphold the APS Values. Agency heads and SES employees have an additional responsibility under the Act to promote them.

The Directions set out the scope or application of each of the Values, and the requirements for upholding each the Values, having regard to an individual's duties and responsibilities.

The directions also set out requirements for agency heads and SES employees in promoting the APS Values.

APS Employment Principles

The Commissioner has issued directions on most, but not all, of the APS Employment Principles.

Merit-based employment decisions

Merit is a fundamental principle that applies to promotion and engagement decisions in the APS. The application of the merit principle is described in subsection 10A(2) of the Act. The directions on recruitment and selection—in particular, in Chapter 2 of the Directions—set out the way in which the merit principle applies to engagement and promotion decisions to allow for a reasonable balance between the protection of public interest and the efficient operation of an agency.

Workplace diversity

The Commissioner has issued directions in relation to the Employment Principles that stipulate that the APS is a career-based service which ‘provides workplaces that are free from discrimination, patronage and favouritism’, and ‘recognises the diversity of the Australian community and fosters diversity in the workplace’. These directions seek to ensure that the APS workforce reflects and makes best use of the broad cross-section of Australian society.

Section 18 of the Act requires an agency head to establish a workplace diversity program to give effect to the APS Employment Principles.

The Directions require workplace diversity programs to be published, and for agency heads to develop performance indicators to evaluate the effectiveness and outcomes of the agency’s workplace diversity program. Workplace diversity programs must be reviewed at least once every four years.

It is expected that agency workplace diversity plans will include measures directed at eliminating employment-related disadvantages in the agency on the basis of being Aboriginal and/or Torres Strait Islander; gender; race or ethnicity; disability; or being a member of a group that, from time to time, is identified as having an employment-related disadvantage.

The Directions require agency heads to give the Commissioner information necessary for the evaluation and assessment of the effectiveness of agencies’ workplace diversity programs for the purposes of the State of the Service report prepared under section 44 of the Act.

Performance management

The Commissioner has issued directions in relation to the Employment Principle that provides that the APS is a career-based service which ‘requires effective performance from each employee’.

Safe workplaces

The Commissioner has issued directions in relation to the Employment Principle that provides for safe workplaces in the APS.

Breaches of the Code of Conduct

Agency heads are required to establish procedures for determining whether an APS employee, or former employee, in the agency has breached the Code of Conduct, including by knowingly providing false or misleading information in connection with their engagement as an APS employee. Agency heads are also required to establish procedures for imposing sanctions on APS employees. These procedures are required to comply with basic procedural requirements prescribed by the Directions, and these are set out in Chapter 6.

Consultation

The Australian Public Service Commission has consulted a representative sample of APS agencies, and the Community and Public Sector Union, about the Directions. In addition, the Secretaries Board has been consulted about particular aspects of the Directions.

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights has been completed for the Directions, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the Directions are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

The Statement of Compatibility with Human Rights for the Directions is at Attachment A.

Notes on clauses

Notes on the clauses of the Directions are set out at Attachment B.

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

Overview of the Legislative Instrument

The Australian Public Service Commissioner's Directions ('the Directions') are a subordinate instrument of the *Public Service Act 1999* ('the Act'). They prescribe minimum standards with which agency heads and APS employees must comply in order to meet their obligations under the Act, and support agency heads to fulfil their responsibilities in respect of their employer powers.

Human rights implications

The Directions engage the following rights.

Right to work and rights in work

The rights to work and rights in work are set out in Article 6(1) and Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). Article 6(1) provides that everyone should have the opportunity to gain their living by work which they choose or accept. Article 6(2) provides that a party to the convention should take steps to provide guidance and training to assist with the right to work. Article 7 of the ICESCR recognises the right of everyone to just and favourable conditions of work which ensure equal opportunity for everyone to be promoted in employment to an appropriate higher level subject to no considerations other than seniority and competence. It also requires the provision of safe and healthy working conditions.

Under section 15 of the Act, agency heads are required to establish written procedures to determine whether an APS employee in the agency, or a former APS employee, has breached the Code of Conduct, and the sanction (if any) that is to be imposed after such a determination has been made.

Section 15(4) of the Act requires that those procedures comply with basic procedural requirements set out in the Directions, and have due regard to procedural fairness.

Chapter 6 of the Directions sets out these prescribed requirements for procedures for agency inquiries into alleged breaches of the Code of Conduct. These procedural requirements promote APS employees' rights in work by providing that a determination may not be made in relation to an alleged breach of the Code of Conduct by an APS employee, or a former APS employee, unless reasonable steps have been taken to:

- notify the employee, or former employee, of the details of the suspected breach
- give the employee, or former employee, a reasonable opportunity to make a statement in relation to the alleged breach, and
- notify the employee of the sanctions that may be imposed in the event that it is determined that the employee, or former employee, has breached the Code.

A sanction may not be imposed on an employee consequent on any determination of a breach of the Code of Conduct:

- unless reasonable steps have been taken to inform the employee of the determination, the sanction(s) being contemplated,
- unless reasonable steps have been taken to inform the employee of the factors under consideration in determining any sanction(s) to be imposed, and
- before the employee is given a reasonable opportunity to make a statement in relation to the sanction or sanctions under consideration.

Further, an agency head is required to take reasonable steps to ensure that any person authorised to make a determination that there has been a breach of the Code of Conduct, or to determine what sanction (if any) will be imposed, is, and appears to be, independent and unbiased.

The procedures prescribed by the Directions reflect and promote the central requirements of procedural fairness, and promote APS employees' rights in work. Where a Code of Conduct inquiry may operate to limit an APS employee's rights in work, this limitation is not arbitrary, and is for a legitimate purpose—namely, to correct individuals' behaviour, to reinforce the expected standards of conduct for APS employees, and, thereby, to maintain public confidence in public administration. Where an employee who has been determined to have breached the Code of Conduct does not agree with this finding, or with any consequent sanction that has been imposed, he or she may seek review by the Merit Protection Commissioner of the determination or sanction decision, in accordance with s.33 of the Act. This right of review also engages the right to a fair hearing under Article 14(1) of the ICCPR.

Chapter 5 of the Directions sets out the responsibilities of APS agency heads and employees in fostering a safe workplace that complies with all applicable work health and safety legislation. The Directions require agency heads to put in place measures in their agencies to ensure compliance with such legislation, and to require employees, in the context of their duties and responsibilities, to take proper steps to support those measures. These provisions are consistent with Article 7 of the ICESCR, which requires the provision of safe and healthy working conditions.

Article 6(2) of the ICESCR provides that the party to the convention should take steps to provide guidance and training to assist with the right to work. The Commissioner's Directions support this right by providing for APS employees (including supervisors and managers) and agency heads to pursue and support training and development to improve capability.

Right to protection against arbitrary and unlawful interferences with privacy; right to freedom of expression

The Directions engage the right to privacy in Article 17 of the International Covenant on Civil and Political Rights (ICCPR), and the right to freedom of expression in Article 19 of the ICCPR. The right to freedom of expression also includes the freedom to seek and receive information. Chapter 2 of the Directions provides, among other things, for notification in the Public Service *Gazette* of certain employment decisions. Subclause 2.29(2) of the Directions provides that such a notification must include the employee's name, unless the agency head decides that the name should not be included because of the person's work-related or personal circumstances (for

example, if the agency is a security agency, or if the individual has a legal protection order). This provision has the effect of promoting APS employees' right to privacy.

Subclause 2.29(4) provides that if a notification that does not include the employee's name relates to a promotion that is subject to review, the agency must, on or before the day of the notification, notify all parties who are eligible to seek review of the promotion so they are aware of their rights of review, and must advise the Merit Protection Commissioner that eligible parties have been notified.

As such, where the right to freedom of expression is limited (in particular, by limiting employees' access to information), the limitation achieves the legitimate aim of promoting APS employees' right to privacy.

Rights to equality and non-discrimination

The Directions promote the right to equality and non-discrimination in Article 26 of the ICCPR and Article 2(2) of the ICESCR, which prohibit discrimination on the basis of a prohibited ground including race, colour, sex, language, and religion, and provides that all individuals have the same rights and deserve the same level of respect, while recognising that it is sometimes necessary to provide some groups in the community with additional support in order for them to enjoy their right to equality.

The Directions promote this right by providing direction and guidance on the meaning and application of the Employment Principles set out in section 10A of the Act. The Employment Principles promote equality, non-discrimination, and work rights by stipulating, among other things, that the APS is a career-based public service that makes fair employment decisions with a fair system of review; makes decisions relating to engagement and promotion that are based on merit (the 'merit principle'); and provides workplaces that are free from discrimination, patronage and favouritism.

The merit principle provides, among other things, that a decision relating to engagement and promotion is based on merit if all eligible members of the community are given a reasonable opportunity to apply to perform the duties, and that the primary consideration in making a selection decision is an assessment of the work-related qualities of the candidates and the work-related qualities genuinely required to perform the duties.

Chapter 3 of the Directions also promotes the right to equality and non-discrimination by requiring agency heads to put in place measures in the agency directed at ensuring that the diversity of APS employees is recognised, fostered and made best use of within the workplace. Chapter 3 articulates an expectation that agencies' workplace diversity programs will include measures directed at eliminating employment-related disadvantages in the agency on the basis of being Aboriginal and/or Torres Strait Islander; or gender; or race or ethnicity; or disability; or being a member of a group that, from time to time, is identified as having an employment-related disadvantage.

Chapter 3 of the Directions also requires agency heads to put in place measures that help APS employees to balance their work, family, and other caring responsibilities effectively.

Affirmative measures

Article 27 of the International Covenant on the Rights of Persons with Disabilities (ICRPD) prohibits discrimination on the basis of disability with regard to all forms of employment; promotes employment opportunities and career advancement for persons with disability in the labour market; and promotes the employment of persons with disability in the public sector.

Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) allows for special measures to be taken in order to redress inequitable employment outcomes and realise the right to employment.

Articles 1(4) and 2(2) of the ICERD allow parties to the convention to take special measures for the purpose of advancing the fulfilment of rights and freedoms of certain racial or ethnic groups. According to the Committee on the Elimination of Racial Discrimination in its General Recommendation No 32, special measures should be appropriate to the situation to be remedied, be legitimate, necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary.

Additionally, the Committee on Economic, Social and Cultural Rights has stated in General Comment No 5 that insofar as special treatment of persons with disabilities is necessary, parties to the convention are required to take appropriate measures to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, such as Article 27 of the ICRPD, flowing from their disability.

The Directions promote these rights.

Clauses 2.15 to 2.17 of the Directions promote the social inclusion of key disadvantaged groups in the Australian community by affirmative measures. Key disadvantaged groups covered by affirmative measures include:

- Indigenous people,
- people with intellectual disability, and
- people with disability whom a disability employment service provider has assessed as being unable to compete on merit due to disability.

These measures engage the rights to equality and non-discrimination in that affirmative measures only apply to Aboriginal and Torres Strait Islanders and persons with a disability. Such differences in treatment on the basis of race or disability do not amount to discrimination if the reasons for such differentiation are reasonable and objective and if the aim is to achieve a legitimate purpose.

These measures are designed to enhance the employment prospects in the APS of persons with an intellectual disability, and persons with a severe disability, who would otherwise be unlikely to obtain APS employment through the standard APS recruitment and selection arrangements, but who have the capacity to contribute to the work of an agency. The measures are also designed to assist such persons to gain skills and experience that will further their ability to participate in the workforce.

The measures are also intended to counter the underrepresentation of both persons with disability and Indigenous people in the APS workforce.

While the exceptions to the merit principle provided in these measures may limit the right under Article 6(1) of ICESCR that everyone should have the opportunity to gain

their living by work which they choose or accept, this is outweighed by the competing interest of promoting diversity by affirmative measures.

Right to enjoy and benefit from culture

Under section 11 of the Act, the Australian Public Service Commissioner may make Directions to determine the scope and application of the APS Values set out in section 10 of the Act. The Act, as amended, provides a new APS Value: *Respectful: The APS respects all people, including their rights and their heritage.*

These provisions promote the right in Article 15 of the ICESCR to take part in cultural life, and the right conferred by Article 27 of the ICCPR on persons belonging to ethnic, religious or linguistic minorities not to be denied the right to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Clause 1.4 of the Directions requires all APS employees, having regard to their duties and responsibilities, to:

- treat people with dignity, and recognise that all people have value,
- recognise the importance of human rights, and understand human rights obligations. This provision will promote the human rights under all of the treaties to which Australia is a party,
- recognise and foster diversity, and
- comply with all relevant anti-discrimination laws.

Directions made by the Commissioner in relation to this Value also promote the rights to equality and non-discrimination.

Right to take part in public affairs and elections

The Directions promote the right to take part in public affairs and elections contained in article 25 of the ICCPR. The Directions provide that where an APS employee has resigned to contest an election, they have the right to be re-engaged in their former agency on the same basis, performing the same or similar duties, and on the same terms and conditions, as before they resigned. These provisions promote the right to take part in public affairs and elections by ensuring security and continuity of employment should an APS employee contest an election unsuccessfully.

Conclusion

This legislative instrument is compatible with human rights and freedoms because it advances the protection of human rights.

NOTES ON CLAUSES

Preliminary

Clause 1 sets out the name of the Directions.

Clause 2 provides for the commencement of the Directions with effect from the commencement of the *Public Service Amendment Act 2013*.

Clause 3 revokes the *Public Service Commissioner's Directions 1999*.

Clause 4 provides that certain words and expressions are defined in the Dictionary at the end of the Directions.

Chapter 1—APS Values

Introduction

The APS Values are set out in section 10 of the Act.

Section 11 of the Act provides for the Commissioner to issue directions to ensure that the APS incorporates and upholds the APS Values, and to determine, where necessary, the scope or application of the Values.

The introductory statement in the text box in Chapter 1 of the Directions sets out context for the Directions on the APS Values.

The importance of the APS Values

The introduction explains the importance of the APS Values and notes, among other things, that the APS Values and Employment Principles define the APS as an institution and guide it in its dealings with everyone and in everything that it does.

The requirements of the law

The introduction describes the legislative framework that applies to APS employees and agency heads in relation to the APS Values.

The application of the APS Values

The introduction describes the application of the APS Values, explaining, among other things, that the Values can be applied to the variety of functions undertaken across agencies; that actions can involve the application of more than one Value; and that there is no hierarchy of Values.

How the APS Values are enforced

The introduction explains how the APS Values are enforced. The introduction notes that subsection 13(11) of the Act provides, among other things, that APS employees must behave at all times in a way that upholds the APS Values and Employment Principles, but that not every failure to uphold the APS Values or Employment Principles must be dealt with under an agency's misconduct procedures. Such matters may, for example, be dealt with in accordance with an agency's performance management framework.

Clause 1.1 Purpose of Chapter 1

Clause 1.1 sets out the purpose of Chapter 1 of the Directions. That purpose is to ensure that the APS incorporates and upholds the APS Values, and to determine, where necessary, the scope or application of the APS Values.

This clause establishes that Chapter 1 of the Directions sets out the directions issued by the Commissioner for the purposes of section 11 of the Act.

Clause 1.2 Committed to Service

Clause 1.2 makes directions in relation to the APS Value in section 10(1) of the Act, namely:

Committed to service: The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.

This clause sets out the requirements for upholding the APS Value in subsection 10(1) of the Act, having regard to the individual's duties and responsibilities.

Paragraph 1.2(a) provides that a requirement includes engaging effectively with the community and working actively to provide responsive, client-focussed service delivery.

Paragraph 1.2(b) provides that a requirement includes providing appropriate information to clients and the community about rights and entitlements, and the process for gaining access to them.

Paragraph 1.2(c) provides that a requirement includes ensuring that decisions and interactions with clients are objective and impartial, and in accordance with Government policy.

Paragraph 1.2(d) provides that a requirement includes encouraging innovative thought and supporting innovative solutions.

Paragraph 1.2(e) provides that a requirement includes supporting collaboration and teamwork, both internally (within an agency), and externally (with other agencies and the wider community).

Paragraph 1.2(f) provides that a requirement includes promoting continuous improvement and managing change effectively.

Paragraph 1.2(g) provides that a requirement includes contributing to a culture of achievement.

Paragraph 1.2(h) provides that a requirement includes identifying and managing areas of potential risk.

Paragraph 1.2(i) provides that a requirement includes supporting a unified APS that is determined to serve the Government of the day and the Australian community.

Paragraph 1.2(j) provides that a requirement includes pursuing and supporting training and development to improve capability.

Paragraph 1.2(k) provides that a requirement includes planning time and priorities to deliver intended results.

Paragraph 1.2(l) provides that a requirement includes being responsive to Ministers (taking account of resource and time constraints), including being knowledgeable about the Government's policies, understanding the relevant issues and options; and being knowledgeable about the Government's objectives and the environment in which it operates.

Clause 1.3 Ethical

Clause 1.3 makes directions in relation to the APS Value in section 10(2) of the Act, namely:

Ethical: The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

This clause sets out the requirements for upholding the APS Value in subsection 10(2) of the Act, having regard to the individual's duties and responsibilities.

Paragraph 1.3(a) provides that a requirement includes acting in a way that models and promotes the highest standard of ethical behaviour.

Paragraph 1.3(b) provides that a requirement includes following through on commitments made.

Paragraph 1.3(c) provides that a requirement includes having the courage to address difficult issues.

Paragraph 1.3(d) provides that a requirement includes complying with all relevant laws, appropriate professional standards, and the APS Code of Conduct.

Paragraph 1.3(e) provides that a requirement includes acting in a way that is right and proper, as well as technically and legally correct or preferable.

Paragraph 1.3(f) provides that a requirement includes reporting and addressing misconduct and other unacceptable behaviour by public servants in a fair, timely and effective way.

Paragraph 1.3(g) provides that a requirement includes supporting the strategic objectives of the agency.

Paragraph 1.3(h) provides that a requirement includes providing leadership in policy development, implementation, program management and regulation;

Paragraph 1.3(i) provides that a requirement includes taking account of whole of government issues and concerns in developing and implementing policies and programs.

Paragraph 1.3(j) provides that a requirement includes supporting systems that give APS employees appropriate opportunities to develop and demonstrate leadership qualities.

Clause 1.4 Respectful

Clause 1.4 makes directions in relation to the APS Value in section 10(3) of the Act, namely:

Respectful: The APS respects all people, including their rights and heritage.

This clause sets out the requirements for upholding the APS Value in subsection 10(3) of the Act, having regard to the individual's duties and responsibilities.

Paragraph 1.4(a) provides that a requirement includes treating all people with dignity and recognising that all people have value.

Paragraph 1.4(b) provides that a requirement includes dealing with all people honestly and with integrity.

Paragraph 1.4(c) provides that a requirement includes recognising the importance of human rights and understanding Australia's human rights obligations.

Paragraph 1.4(d) provides that a requirement includes recognising and fostering diversity.

Paragraph 1.4(e) provides that a requirement includes collaborating and being open to ideas in policy development, implementation, program management and regulation.

Paragraph 1.4(f) provides that a requirement includes complying with all relevant anti-discrimination laws.

Clause 1.5 **Accountable**

Clause 1.5 makes directions in relation to the APS Value in section 10(4) of the Act, namely:

Accountable: The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.

This clause sets out the requirements for upholding the APS Value in subsection 10(4) of the Act, having regard to the individual's duties and responsibilities of the .

Paragraph 1.5(a) provides that a requirement includes being answerable to Ministers for the exercise of delegated authority, and, through them, to Parliament.

Paragraph 1.5(b) provides that a requirement includes being open to scrutiny and being transparent in decision making.

Paragraph 1.5(c) provides that a requirement includes being able to demonstrate that actions and decisions have been made with appropriate consideration.

Paragraph 1.5(d) provides that a requirement includes being able to explain actions and decisions to the people affected by them.

Paragraph 1.5(e) provides that a requirement includes being accountable for actions and decisions through statutory and administrative reporting systems;

Paragraph 1.5(f) provides that a requirement includes being able to demonstrate clearly that resources have been used efficiently, effectively, economically and ethically.

Paragraph 1.5(g) provides that a requirement includes being answerable for individual performance through performance management systems.

Clause 1.6 **Impartial**

Clause 1.6 makes directions in relation to the APS Value in section 10(5) of the Act, namely:

Impartial: The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.

This clause sets out the requirements for upholding the APS Value in subsection 10(5) of the Act, having regard to the individual's duties and responsibilities.

Paragraph 1.6(a) provides that a requirement includes serving the Government of the day, providing the same standard of high quality policy advice and implementation, and the same high quality professional support, irrespective of which political party is in power and of personal political beliefs.

Paragraph 1.6(b) provides that a requirement includes ensuring that the individual's actions do not provide grounds for a reasonable person to question the ability of the individual to serve the Government of the day.

Paragraph 1.6(c) provides that a requirement includes ensuring that management and staffing decisions are made on a basis that is independent of the political party system, free from political bias and not influenced by the individual's political beliefs.

Paragraph 1.6(d) provides that a requirement includes understanding the needs of the Government and providing it with the best objective, non-partisan advice based on the best evidence available.

Paragraph 1.6(e) provides that a requirement includes providing advice that is relevant and comprehensive, is not affected by fear of consequences, and does not withhold important facts or bad news.

Paragraph 1.6(f) provides that a requirement includes providing advice that takes account of the context in which policy needs to be implemented, the broader policy directions set by Government, and, where appropriate, implications for the longer term.

Paragraph 1.6(g) provides that a requirement includes implementing Government policies in a way that is free from bias, and in accordance with the law.

Clause 1.7 Promoting the APS Values—Agency Heads

Clause 1.7 provides directions in relation to agency heads and the APS Values.

Clause 1.7 requires agency heads to take steps to integrate the APS Values into the agency's culture and decision-making processes, and to support employees to make decisions based on the APS Values.

This clause also requires agency heads to reflect the APS Values consistently in their behaviour.

A note below clause 1.7 explains that section 12 of the Act requires agency heads to uphold and promote the APS Values.

Clause 1.8 Promoting the Values—SES employees

Clause 1.8 provides directions in relation to SES employees and the APS Values.

Clause 1.8 requires SES employees, having regard to their duties and responsibilities, to take steps to integrate the APS Values into their agency's culture and decision-making processes, guide employees to make decisions based on the APS Values, and consistently reflect the APS Values in their behaviour.

A note below clause 1.8 explains that subsection 35(3)(c) of the Act requires SES employees to promote the APS Values by personal example and other appropriate means.

Chapter 2 Recruitment and selection

Introduction

The APS Employment Principles are set out in section 10A of the Act.

Subsection 11A(1) of the Act provides for the Commissioner to issue directions about employment matters relating to APS employees (including engagement, promotion, redeployment, mobility, training schemes and termination of employment).

Subsection 11A(2) of the Act provides for the Commissioner to issue directions to ensure that the APS incorporates and upholds the APS Employment Principles, and to determine, where necessary, the scope or application of the Employment Principles.

The introductory statement in the text box in Chapter 2 of the Directions sets out the APS Employment Principles and notes that implicit in the introductory phrase to the Employment Principles that the APS is a ‘career-based public service’ is the expectation that agency heads will put in place measures to ensure that the agency is staffed on a basis that sustains core knowledge, expertise, and standards of professionalism and behaviour.

The introduction also summarises Chapter 2 of the Directions.

The introduction explains that Part 2.1 provides directions on the APS Employment Principle that the APS is a ‘career-based public service that makes decisions relating to engagement and promotion that are based on merit’ (to ensure that the merit principle is incorporated and upheld and to determine its scope and application) in relation to most promotions and most ongoing and long-term non-ongoing engagements. The introduction explains that Part 2.1 defines relevant terms and outlines the requirements of a merit-based competitive selection process, which includes notification in the Public Service *Gazette*, and sets out additional requirements for filling SES vacancies.

The introduction explains that Part 2.2 provides directions on the APS Employment Principle that the APS is a ‘career-based public service that makes decisions relating to engagement and promotion that are based on merit’ (to ensure that the merit principle is incorporated and upheld and to determine its scope and application) in relation to short-term engagements and in other circumstances where the principle is modified.

The introduction explains that Part 2.3 provides directions in relation to the ongoing and temporary assignment of duties under section 25 of the Act (other than promotion) and ongoing or temporary moves between agencies under section 26 of the Act.

The introduction explains that Part 2.4 provides directions in relation to the gazettal of employment decisions and the dates of effect of promotions.

Part 2.1: Engagement and promotion—standard provisions

The introductory statement in the text box to Part 2.1 explains that Part 2.1 determines the scope and application of the APS Employment Principle that the APS is a ‘career-based public service that makes decisions relating to engagement and promotion that are based on merit’, in circumstances relating to most promotions and most ongoing and long-term non-ongoing engagements.

The introduction also sets out subsection 10A(2) of the Act which explains the meaning of merit in the APS.

Division 1 Preliminary

Clauses 2.1 to 2.6 are set out in Division 1 of Part 2.1, which is headed ‘Preliminary’.

Clause 2.1 Purpose of Part 2.1

Clause 2.1 sets out the purpose of Part 2.1 of the Directions. That purpose is to determine the scope or application of the APS Employment Principle in paragraph 10A(1)(c) of the Act, relating to engagement and promotion decisions based on merit, in circumstances relating to most promotion and most ongoing and long-term non-ongoing engagements, and to determine the minimum requirements that an agency head must meet in upholding that Employment Principle.

A note below clause 2.1 explains that Part 2.2 provides modifications of, and exceptions to, the requirements in Part 2.1 for certain kinds of engagement and promotion decisions.

Clause 2.2 Meaning of ‘promotion’

Clause 2.2 sets out the meaning of a promotion for the purposes of the Directions. For the Directions, a reference to a promotion is a reference to the ongoing assignment of duties to an ongoing APS employee at a higher classification than the employee’s current classification, in the same or another agency, with the exception of the circumstances in paragraphs 1(a) and 1(b) of Clause 2.2.

Paragraph 2.2(1)(a) sets out the circumstance of the allocation of a higher classification in a broadband to an ongoing APS employee already within the same broadband in the same agency.

Paragraph 2.2(1)(b) sets out the circumstance of the allocation of an operational classification to a trainee under the Classification Rules.

A note below clause 2.2 makes clear two circumstances that are not promotions. The first is where, following a voluntary temporary reduction in an ongoing APS employee’s classification, the employee is assigned duties on an ongoing basis at their classification before the temporary reduction. The second is the temporary assignment of duties to an APS employee at a higher classification than the employee’s current classification.

Clause 2.3 Meaning of ‘vacancy’

Clause 2.3 defines the meaning of a vacancy for the purposes of the Directions. For the Directions, a vacancy exists in an agency when a decision has been made that a specified group of duties need to be performed, and it is appropriate to consider engaging a person or promoting an APS employee to perform the duties.

A note below Clause 2.2 explains that a vacancy may also be filled by the movement of an APS employee at the employee’s current classification.

Clause 2.4 Meaning of Senior Executive Service vacancy ('SES vacancy')

Clause 2.4 defines the meaning of an SES vacancy for the purposes of the Directions. An SES vacancy means a vacancy at a SES classification as set out in the Classification Rules.

Clause 2.5 Meaning of 'similar vacancy'

Clause 2.5 defines the meaning of 'similar vacancy' for the purposes of the Directions.

For the Directions, provided that all the requirements of paragraphs 2.5(b) to (e) are met, a 'vacancy' is similar to a notified vacancy if it is in the same agency as the notified vacancy, or if it is in the agency to which a function has moved, if the notified vacancy relates to a function that was moved to another agency by a machinery of government change after the notification.

Paragraph 2.5(b) requires the vacancy to be in the same category of employment (ongoing or non-ongoing) as the notified vacancy.

Paragraph 2.5(c) requires the vacancy to comprise similar duties to the notified vacancy.

Paragraph 2.5(d) requires the vacancy to be at the same classification as the notified vacancy.

Paragraph 2.5(e) requires the vacancy to be performed in a similar location as the notified vacancy.

Clause 2.6 Meaning of 'work-related qualities'

Clause 2.6 defines the meaning of work-related qualities for the purposes of the Directions.

For the Directions, work-related qualities that may be taken into account in making an assessment of candidates' suitability to perform duties in accordance with paragraph 10A(2)(c) of the Act include: skills and abilities; qualifications; training and competencies; standard of work performance; capacity to produce outcomes by effective performance at the level required; relevant personal qualities, such as honesty and integrity; potential for further development; and ability to contribute to team performance. This list is not exhaustive.

Division 2 Merit in engagement and promotion—application of APS Employment Principle 10A(1)(c)

Clauses 2.7 to 2.10 are set out in Division 2 of Part 2.1, which is headed 'Merit in engagement and promotion—application of APS Employment Principle 10A(1)(c)'.

Clause 2.7 How an agency head upholds APS Employment Principle 10A(1)(c)

Clause 2.7 provides that an agency head upholds APS Employment Principle 10A(1)(c) in relation to a decision to engage or promote a person by ensuring that the decision is based on a selection processes that meet the requirements of Division 2 of Part 2.1 of the Directions, or, for decisions to which Part 2.2 of the Directions applies, the requirements of Division 2 as modified by Part 2.2.

A note to Clause 2.7 explains that Division 2 of Part 2.1 of the Directions sets standards for merit-based selection and requires a vacancy, or a similar vacancy, to have been notified in the Public Service *Gazette* within the previous 12 months.

Clause 2.8 Merit-based selection process for engagement or promotion

Clause 2.8 sets out requirements for a merit-based selection process for engagement and promotion decisions. These requirements are well established and have been in place since the Public Service Act came into effect in 1999. Subclause 2.8(1) of the Directions provides that a competitive selection process for a decision to engage or promote a person to fill a vacancy meets the requirements of Division 2 of Part 2.1 of the Directions only if the circumstances in paragraphs 2.8(1)(a) to (g) apply. The circumstances are that:

- the aim and purpose of the selection process is determined in advance and information about the process is readily available to applicants.
- the vacancy is notified in accordance with Clause 2.9.
- the selection process is applied fairly in relation to each eligible applicant.
- the selection process is transparent and appropriately documented.
- merit is the primary consideration in making the engagement or promotion decision, in accordance with subsection 10A(2) of the Act.
- the selection process is free from discrimination, patronage and favouritism, consistent with APS Employment Principle 10A(1)(f).
- in the case of a decision to engage a person—the engagement would comply with the restrictions on engagement of redundancy benefit recipients in clause 7.1.

There are two notes below subclause 2.8(1). The first note explains that part 2.2 of the Directions provides modifications of, and exceptions to, the requirements in Part 2.1 for certain kinds of engagement and promotion decisions. The second note explains that the *Public Service Regulations 1999* (the Regulations)—in particular, regulations 3.4 and 3.5—provide for matters regarding the engagement of non-ongoing employees.

Subclause 2.8(2) provides that for the purposes of paragraph 2.8(1)(e) secondary considerations that may be relevant to the selection decision include such factors as a candidate’s ability to commence by a particular date, their willingness to relocate, or their ability to meet other reasonable agency requirements. (Subsection 10A(2) of the Act provides, among other things, that a merit-based engagement or promotion decision requires that the assessment referred to in that subsection is the primary consideration in making an engagement or promotion decision.)

Clause 2.9 Notification of vacancy in the Public Service Gazette

Clause 2.9 sets out minimum requirements concerning notification in the Public Service *Gazette* in order to meet the ‘reasonable opportunity to apply’ component of paragraph 10A(2)(a) of the Act.

Under a heading ‘Basic requirement for notification of vacancy’, subclause 2.9(1) provides that, subject to Clause 2.9, a selection process for a decision to fill a vacancy meets the requirements of Division 2 of Part 2.1 only if the circumstances in paragraphs 2.9(1)(a) to (c) apply.

Paragraph 2.9(1)(a) requires that the vacancy, or similar vacancy, in the agency be notified in the Public Service *Gazette* within a period of 12 months before the written decision to engage or promote the person.

Paragraph 2.9(1)(b) requires that the vacancy be notified as open to all eligible members of the community (see also subclause 2.9(3)).

Paragraph 2.9(1)(c) requires the vacancy to be notified with a closing date for applications of at least seven calendar days after the notification, unless otherwise approved by the Commissioner. (In practice, vacancies generally remain open for longer than seven days; two weeks is common.)

A note to subclause 2.9(1) explains that Part 2.2 of Chapter 2 of the Directions provides modifications of, and exceptions to, the requirements in Part 2.1 for certain kinds of engagement and promotion decisions.

Under a heading ‘Notification of SES vacancies—external advertising’, subclause 2.9(2) provides that a vacancy at an SES classification must be notified in the Public Service *Gazette* and advertised externally (for example, on a recruitment website) as open to all eligible members of the community. This continues an existing requirement.

A note to subclause 2.9(2) states that the Department of Finance and Deregulation has issued a policy on non-campaign advertising.

Under a heading, ‘Restricting applications to APS employees (other than APS Level 1 and training classifications)’, subclause 2.9(3) provides that if an agency head decides that, for reasons of cost or operational efficiency, a vacancy at a non-SES classification should be filled by a person who is already an APS employee, the vacancy may, with the agreement of the Commissioner, be notified in the Public Service *Gazette* as open only to persons who are APS employees at the time of the notification.

Under the same heading, subclause 2.9(4) provides that subclause 2.9(3) does not apply in relation to a vacancy at the APS Level 1 classification or a training classification, and that these vacancies must be notified as open to all eligible members of the community.

Under a heading, ‘Multiple Agency notification’, subclause 2.9(5) provides that an agency participating in a multiple agency selection process must ensure that there is adequate notification of the vacancy under its own agency name in the Public Service *Gazette* (for example, a heading followed by a link to multiple agency notification).

Under a heading, ‘External advertising’, subclause 2.9(6) provides that if a vacancy notified in the Public Service *Gazette* as open to all eligible members of the community is also advertised externally (for example on a recruitment website) the external advertising must take place within four weeks before or four weeks after the Public Service *Gazette* notification.

Under the same heading, subclause 2.9(7) provides that if a vacancy is notified in the Public Service *Gazette* as open only to persons who are APS employees; and it is subsequently decided to advertise the vacancy externally as open to all eligible members of the community, the vacancy must be re-notified in the Public Service *Gazette* with the changed eligibility provision.

Under a heading, ‘Meaning of APS employee’, subclause 2.9(8) defines the meaning of an APS employee for the purpose of Clause 2.9. For this purpose an APS employee means a person who is a current ongoing APS employee or ongoing Parliamentary Service employee, or who was, at the time of the relevant Public Service *Gazette*

notification, a non-ongoing APS employee or non-ongoing Parliamentary Service employee.

Clause 2.10 Additional requirement for SES engagement or promotion decisions

Clause 2.10 sets out additional requirements for a merit-based selection process for engagement and promotion of a person as an SES employee.

Paragraph 2.10(a) requires a representative of the Commissioner to be a full participant in the selection process.

Paragraph 2.10(b) requires that, at the end of the process, the representative has certified that the selection process complied with the Act and the Directions, and that the Commissioner endorsed the representative's certification of the process.

A note below Clause 2.10 explains that Clause 2.9 requires the decision to be made within 12 months after the vacancy notification in the *Public Service Gazette* on which the selection process was based, including in relation to the same, or similar, vacancies. In relation to SES engagement or promotion decisions, the Commissioner must have endorsed the certification of that process before any engagement or promotion action may proceed.

Part 2.2: Engagement and promotion—exceptions to standard provisions

The introductory statement in the text box to Part 2.2 explains that Part 2.2 determines the circumstances in which the merit principle in engagement and promotion (Employment Principle 10A(1)(c)) may be modified. The introduction sets out a list of such circumstances.

Clause 2.11 Purpose of Part 2.2

Clause 2.11 sets out the purpose of Part 2.2 of the Directions. That purpose is to modify the requirements of Part 2.1 of the Directions and the scope and application of Employment Principle 10A(1)(c) in relation to engagement and promotion decisions in specific circumstances where this is appropriate.

Clause 2.12 Engagement on a short-term, irregular or intermittent basis

Subclause 2.12(1) provides that an agency head may engage a person to perform duties as a non-ongoing employee without complying with Part 2.1 of the Directions if the engagement is for a specified term or the duration of a specified task and the period of employment is 12 months or less, and, taking into account any expected extension of the engagement, the period of employment will not be for more than 12 months.

Subclause 2.12(2) provides that an agency head may engage a person to perform duties as a non-ongoing employee without complying with Part 2.1 of the Directions if the engagement is for duties that are irregular or intermittent.

Subclause 2.12(3) provides that an agency head must ensure as far as practicable that a vacancy in the agency to which Clause 2.12 applies is brought to the notice of the community in a way that gives eligible members of the community a reasonable opportunity to apply for it; for example, by advertising and providing access to non-ongoing employment registers.

Subclause 2.12(4) provides that as a minimum requirement, the agency head must be satisfied that the person to be engaged has the work-related qualities genuinely required to perform the relevant duties.

Clause 2.12 sets a new minimum requirement for these engagements. This better supports the Employment Principle in paragraph 10A(1)(c) of the Act.

Clause 2.13 Engagement of non-ongoing APS employee as ongoing employee in exceptional circumstances

Clause 2.13 provides for an agency head to seek the Commissioner's authorisation of an engagement by the agency head of a non-ongoing APS employee as an ongoing employee, without the need to notify a vacancy or conduct a competitive merit selection process, in certain exceptional circumstances. This provision may apply, for example, if a person engaged through a competitive merit selection process as a non-ongoing employee is regarded as eminent in their field and the agency head believes that the duties are more appropriately undertaken by an ongoing employee.

Subclause 2.13(1) provides that an agency head may, in writing, seek the Commissioner's authorisation of the engagement by the agency head of a non-ongoing employee as an ongoing employee without complying with Part 2.1 of the Directions if the agency head is satisfied that:

- the relevant duties are more appropriately undertaken by an ongoing APS employee; and
- the person to be engaged as an ongoing APS employee has the work-related qualities genuinely required to perform the relevant duties; and
- the engagement as an ongoing APS employee is at the person's classification (or equivalent) as a non-ongoing APS employee; and
- the original engagement of the person as a non-ongoing APS employee, or an extension of the engagement of the person as a non-ongoing APS employee, complied with all aspects of Part 2.1 of the Directions; and
- the engagement is necessary for the agency's operations.

Clause 2.14 Engagement of ongoing SES employee as non-ongoing SES employee

Clause 2.14 provides for an agency head to engage an ongoing SES employee to perform duties as a non-ongoing SES employee, in certain circumstances, without the need to notify a vacancy or conduct a competitive merit selection process. Such a non-ongoing engagement would be subject to the time limits specified in Regulation 3.4 of the Regulations, and must be at the same classification as the person's current SES classification or at a lower SES classification. The circumstances are:

- the person is to be engaged for a specified term or specified task; and
- the person resigns as an ongoing SES employee in order to commence the engagement as a non-ongoing SES employee for a specified term or specified task; and
- the engagement as a non-ongoing SES employee for a specified term or specified task is at the same classification as the person's current SES classification, or at a lower SES classification.

Clause 2.15 Affirmative measure—Indigenous employment

Clause 2.15 provides for an agency head to identify a vacancy as open only to Aboriginals or Torres Strait Islanders within the meaning of the *Racial*

Discrimination Act 1975. The vacancy must be notified in the *Public Service Gazette* with that restriction, and a competitive merit selection process conducted with eligible candidates. The clause contains conditions which clarify the eligibility requirements.

Subclause 2.15(1) provides that in notifying a vacancy in accordance with clause 2.9 of the Directions, an agency head may, consistent with Commonwealth law, identify a vacancy as open only to Aboriginals or Torres Strait Islanders within the meaning of the *Racial Discrimination Act 1975*.

Subclause 2.15(2) provides that the agency head must ensure that, in all other respects, a decision to fill the vacancy is made in a way that meets the requirements of Part 2.1 of the Directions.

Subclause 2.15(3) provides that the agency head must ensure that a selection process for a vacancy identified under clause 2.15 accepts as applicants only persons who are of Aboriginal and/or Torres Strait Islander descent; and identify as Aboriginal and/or Torres Strait Islander; and are accepted by their community as being Aboriginal and/or Torres Strait Islander.

Clause 2.16 Affirmative measure—intellectual disability

Clause 2.15 provides for an agency head to identify a vacancy as open only to people with intellectual disability, as assessed by a registered medical practitioner or a disability employment service provider. The vacancy must be notified in the *Public Service Gazette* with that restriction, and a competitive merit selection process conducted with eligible candidates. The clause contains conditions which clarify the eligibility requirements.

Clause 2.16 provides for an agency head to notify a vacancy as being open only to persons with intellectual disability.

Subclause 2.16(1) provides that in notifying a vacancy in accordance with clause 2.9 of the Directions, an agency head may, consistent with Commonwealth law, identify a vacancy as open only to persons with intellectual disability.

Subclause 2.16(2) provides that the agency head must ensure that, in all other respects, a decision to fill the vacancy is made in a way that meets the requirements of Part 2.1 of the Directions.

Subclause 2.16(3) provides that the agency head must ensure that a selection process for a vacancy identified under clause 2.16 accepts as applicants only persons with an appropriate referral or assessment by a registered medical practitioner or a disability employment service provider.

Clause 2.17 Affirmative measure—engagement of person with disability unable to participate in competitive selection process

Clause 2.17 provides for the engagement of persons with disability who have been assessed as being unable to participate in a competitive selection process.

Subclause 2.17(1) provides that clause 2.17 applies in relation to a person with disability who has been assessed by a disability employment service provider as being likely to be unable, due to their disability, to compete successfully on merit in a competitive selection process that complies with Part 2.1 of the Directions.

Subclause 2.17(2) provides that an agency head may engage the person as an APS employee to fill a vacancy that has been designed for, or identified as suitable for, the

person, in consultation with the disability employment service provider. The vacancy is not required to be notified in the Public Service *Gazette*, and no competitive merit selection process is required.

A note below subclause 2.17(2) explains that if the engagement is to be as a non-ongoing APS employee for a specified term, or for the duration of a specified task, the requirements of regulation 3.5 of the Regulations apply to the engagement, including requirements relating to the grounds for the engagement and the term of the engagement.

Clause 2.18 Engagement of person from state or territory jurisdiction

Clause 2.18 provides that an agency head may engage a person as a non-ongoing APS employee for a specified term without notifying a vacancy in the Public Service *Gazette* or conducting a competitive merit selection process if the person is an employee of a State or Territory, or of an authority of a State or Territory, and the agency has entered into an agreement with the State or Territory, or relevant authority, to engage the person as a non-ongoing employee for a specified term.

Clause 2.19 Re-engagement of election candidates

Clause 2.19 provides for the re-engagement, in certain circumstances, of APS employees who have resigned to contest an election.

Subclause 2.19(1) provides that, if an agency head acts under section 32 of the Act (right of return for election candidates), a person may be re-engaged as an APS employee without a vacancy being notified in the Public Service *Gazette* or a competitive merit selection process being undertaken.

Subclause 2.19(2) provides that, for paragraph 32(1)(a) of the Act, the following elections are specified:

- an election for a member of a House of the Parliament of the Commonwealth or of a State;
- an election for a member of the Legislative Assembly of the Australian Capital Territory or the Northern Territory;
- an election for a member of the Torres Strait Regional Authority established under Division 5 of Part 3A of the *Aboriginal and Torres Strait Islander Act 2005*.

Other provisions relating to the re-engagement of election candidates are set out in Schedule 1 to the Directions.

Clause 2.20 Promotion on completion of an appointment to a statutory office

Clause 2.20 provides for the promotion without a competitive merit selection process or notification of a vacancy in the Public Service *Gazette*, in certain circumstances, of an ongoing APS employee who has completed an appointment to a statutory office.

Subclause 2.20(1) allows an agency head to request the Commissioner to authorise the promotion of an ongoing APS employee without complying with Part 2.1 of the Directions if:

- the employee was granted leave without pay for appointment to a statutory office of a kind that requires the Commissioner, or a representative of the Commissioner, to be a participant in the selection process for the office, and

- the employee's appointment to the statutory office has not expired, or expired no more than 3 months before the Commissioner was asked to authorise the promotion, and
- the duties to which the employee is to be assigned are assessed by the agency head as being at an APS classification that is equivalent to, or lower than, the duties of the statutory office, and
- the agency head is satisfied that the employee has the necessary work-related qualities to perform duties at the APS classification to which the employee is to be promoted.

Subclause 2.20(2) provides that the Commissioner may authorise the promotion after considering the length of the appointment to the statutory office, the selection process conducted for that process, and any other relevant matters. There is no requirement to notify a vacancy in the Public Service *Gazette* or conduct a competitive merit selection process.

Subclause 2.20(3) provides that, if the Commissioner authorises the promotion, the agency head may promote the employee.

Clause 2.21 Engagement of non-APS employee following a machinery of government change

Clause 2.21 provides that when the Commissioner acts under paragraph 72(1)(c) or (d) of the Act to engage a person, or determine that a person becomes engaged, in a specified agency following a machinery of government change, the requirements to notify a vacancy in the Public Service *Gazette* and conduct a competitive merit selection process do not apply.

Clause 2.22 Engagement of an ongoing Parliamentary Service employee as an ongoing APS employee

Clause 2.22 continues longstanding mobility arrangements that apply to persons employed under the *Parliamentary Service Act 1999*. It allows agency heads to engage an ongoing Parliamentary Service employee as ongoing APS employee at a classification comparable to their Parliamentary Service classification or lower (set out in Schedule 2 to the Directions) without notifying a vacancy in the Public Service *Gazette* or conducting a competitive merit selection process.

Clause 2.23 Re-engagement of a former APS employee

Clause 2.23 provides for an agency head to re-engage a former APS employee, in certain circumstances, without notifying a vacancy in the Public Service *Gazette* and conducting a competitive merit selection process.

Subclause 2.23(1) provides that an agency head may engage a former employee as an ongoing or non-ongoing APS employee without complying with Part 2.1 of the Directions if the agency head is satisfied that doing so is appropriate because:

- (a) following an investigation of the circumstances in which the person's former employment ended, the agency head is satisfied that it should not have ended; or
- (b) the engagement gives effect to a settlement of an application for relief in relation to the termination of the employee's employment; or

- (c) an appropriate authority has recommended or ordered the reinstatement of the person (for example the Federal Court of Australia, the Fair Work Commission, or the Australian Human Rights Commission).

Subclause 2.23(2) provides that an engagement under clause 2.23 must be on the same basis (ongoing or non-ongoing) as the person's former employment, and must be at the same classification or a lower classification.

Part 2.3 Assignment of duties and movement of employees between agencies

The introductory statement in the text box to Part 2.3 of the Directions explains that Part 2.3 makes Directions under 11A of the Act, and that these directions deal with the assignment of duties to employees under section 25 of the Act, other than promotions, and the movement of employees under section 26 of the Act.

The introductory statement also notes that, in making decisions in these matters, agency heads must comply with the APS Values and the APS Employment Principles.

Clause 2.24 Minimum requirements for decisions relating to assignment of duties at or below classification

Clause 2.24 sets out the minimum requirements for decisions relating to the ongoing or temporary assignment of duties to an employee under section 25 of the Act, at or below the employee's classification level (including where this involves a temporary movement from another APS Agency).

This clause requires agency heads to ensure that such decisions are based on an assessment of the employee's work-related qualities and the work-related qualities genuinely required to perform the relevant duties, and that they take into account efficient and effective organisational performance.

Note 1 to clause 2.24 explains that subsection 23(4) of the Act restricts the circumstances in which an employee's classification may be reduced without their consent. Note 2 explains that Part 2.1 of the Directions imposes additional obligations in relation to promotions.

Clause 2.25 Minimum requirements for decisions relating to the temporary assignment of higher duties

Clause 2.25 sets out the minimum requirements for decisions relating to the temporary assignment of duties to an employee at a higher classification level, including where this involves a temporary movement from another APS agency.

Subclause 2.25(1) provides that an agency head must ensure that such decisions are based on an assessment of the employee's work-related qualities and the work-related qualities genuinely required to perform the relevant duties, and that they take into account efficient and effective organisational performance.

Subclause 2.25(2) provides that decisions under this clause 2.25 must also take into account:

- (a) the duration of the vacancy and whether it would be more appropriate to fill the vacancy on an ongoing basis;
- (b) the relative importance to the agency of the duties to be performed at the higher classification and the other duties to be performed in the agency;

- (c) the expected cost to the agency of the employee performing duties at the higher classification;
- (d) the need for APS employees to be given the opportunity to gain experience in performing duties at a higher classification.

A note to clause 2.25 explains that Part 2.1 of the Directions imposes additional obligations in relation to promotions.

2.26 Assignment from non-SES classification to SES classification

Clause 2.26 provides that a decision may be made, subject to the Commissioner's agreement, to assign duties on an ongoing basis at an SES classification to an employee who is not an SES employee, provided that the employee's classification is in the same classification group as the SES classification as set out in the Classification Rules.

A note to clause 2.26 explains that the Classification Rules, which contain the SES Band 1, 2 and 3 classifications, also include a number of classifications in the same Groups as the SES classifications which are not within the SES.

2.27 Moves between agencies

Clause 2.27 makes provision for APS employees to move between agencies subject to a written agreement between the heads of those agencies.

Subclause 2.27(1) provides that clause 2.27 applies to moves between APS agencies, under section 26 of the Act, that are not associated with a promotion.

Subclause 2.27(2) provides that agreements between an agency head and an ongoing APS employee for the employee to move to a new agency from their original agency are to be in writing and take effect subject to this clause and subclause 6.8 (which deals with the date of effect of a move where the employee is under investigation for a breach of the Code of Conduct).

Under a heading, 'Agreement for ongoing move', subclause 2.27(3) provides that if the agreement relates to an ongoing move, the move takes effect on a date agreed in writing by all parties, or otherwise four weeks after the employee informs the original agency head in writing.

Under a heading, 'Agreement for temporary move', subclause 2.27(4) provides that if the agreement relates to a temporary move and if the original agency head approves the proposed temporary move in writing, the move takes effect on the agreed date of effect. If the original agency head did not approve the proposed temporary move in writing and the employee commences duties in the new agency, the move takes effect as an ongoing move to the new agency at the employee's existing classification from the date the employee commences duties in the new agency.

Under a heading, 'Variation of period of agreement', subclause 2.27(5) provides that if an agreement relates to an ongoing move and the date of effect of the move is agreed in writing between the APS employee and the original and new agency heads, and the new agency head and the APS employee agree to vary the period of the move, then, if the original agency head approves the variation in writing, the variation has effect according to its terms, but that if the original agency head does not approve the variation in writing, the variation has no effect.

Part 2.4 Gazettal of employment decisions and date of effect of promotions

Clause 2.28 Purpose of Part 2.4

Clause 2.28 establishes that the purpose of Part 2.4 of the Directions is to set out requirements for notifying certain employment decisions in the *Public Service Gazette*, and to provide for the date of effect of promotion decisions.

Clause 2.29 Decisions that must be notified in the Gazette

Clause 2.29 makes provision for certain decisions to be notified in the *Public Service Gazette*.

Subclause 2.29(1) provides that certain employment decisions must be notified in the *Public Service Gazette* within three months after the decision is made. The decisions are:

- (a) an engagement of a person as an ongoing APS employee (including under paragraph 72(1)(c) or (d) of the Act);
- (b) an engagement of a person as an APS employee for a specified term of more than 12 months or for the duration of a specified task that is reasonably expected to take more than 12 months (including under paragraph 72(1)(c) or (d) of the Act);
- (c) in relation to a person who is engaged as an APS employee for a specified term of 12 months or less—an extension of the engagement that results in the term of engagement being more than 12 months;
- (d) a movement (other than a temporary movement) by an ongoing APS employee to perform duties in another agency, if the vacancy was notified in the *Public Service Gazette*;
- (e) an assignment of duties (other than a temporary assignment of duties) to an ongoing APS employee in an Agency, if the vacancy was notified in the *Public Service Gazette*;
- (f) the promotion of an ongoing APS employee;
- (g) the promotion of an ongoing APS employee, following the decision of a Promotion Review Committee under subparagraph 5.18(1)(b)(ii) of the Regulations that has not been notified under paragraph (f);
- (h) the engagement of an ongoing Parliamentary Service employee as an ongoing APS employee if the engagement:
 - (i) follows a decision of a Promotion Review Committee mentioned in subparagraph 5.18(1)(b)(iii) of the Regulations; and
 - (ii) has not been notified under paragraph (a);
- (i) the termination, and the grounds for termination, of the employment of an ongoing APS employee under section 29 of the Act;
- (j) the retirement of an SES employee with the payment of an incentive under section 37 of the Act.

Subclause 2.29(2) provides that a notification must include the employee's name, unless the agency head decides that the name should not be included because of the

person's work-related or personal circumstances (for example, if the person performs security-related duties in a security agency, or has a legal protection order).

Subclause 2.29(3) provides that the agency head may not make a decision under subclause 2.29(2) without the approval of the Commissioner, who will consult the Merit Protection Commissioner in the case of a non-SES employee.

Subclause 2.29(4) provides that if a notification that does not include the employee's name relates to a promotion that is subject to review, the agency head must, on or before the day of the notification, notify all parties who are eligible to seek review of the promotion so they are aware of their rights of review, and must advise the Merit Protection Commissioner that eligible parties have been notified.

Subclause 2.29(5) provides that if an engagement or promotion decision was made as a result of a selection process that complied with Part 2.1 in relation to a 'similar' vacancy, the notification of the decision must include a statement to that effect.

Subclause 2.29(6) provides that if a person whose engagement is notified under paragraph 2.29(1)(a) was an ongoing Parliamentary Service employee immediately before the engagement and was engaged at a higher classification than the person's classification as a Parliamentary Service employee, the notification of the decision must include a statement to that effect and must note that the engagement may be subject to review by a Promotion Review Committee in accordance with Part 5 of the regulations.

Subclause 2.29(7) provides that if an engagement notified under paragraph 2.29(1)(a) was made under clause 2.13 (engagement of non-ongoing APS employee as ongoing employee in exceptional circumstances), the notification of the decision must include a statement to that effect.

Clause 2.30 Cancellation decisions that must be notified in the Gazette

Clause 2.30 makes provision for the notification in the Public Service *Gazette* of the cancellation of certain decisions.

Subclause 2.30(1) provides that an agency head must notify in the Public Service *Gazette* a decision to cancel certain kinds of decisions, within 3 months after the cancellation decision is made. The decisions are:

- an engagement of a person notified under paragraph 2.29(1)(a) or (b);
- an extension of an engagement notified under paragraph 2.29(1)(c);
- a movement notified under paragraph 2.29(1)(d);
- an assignment of duties notified under paragraph 2.29(1)(e);
- a promotion notified under paragraph 2.29(1)(f) (whether the cancellation decision is made by the agency head, or is the result of a decision of a Promotion Review Committee);
- a termination notified under paragraph 2.29(1)(i);
- a retirement notified under paragraph 2.29(1)(j).

Subclause 2.30(2) provides that the notification of a cancellation decision must include the date of effect of the cancellation decision.

Subclause 2.30(3) provides that the notification of a cancellation decision must include the person's name unless the original notification did not include the name.

Clause 2.31 Date of effect of promotions

Cause 2.31 establishes the dates of effect of promotions, subject to the notification of a promotion decision in the Public Service *Gazette* and whether the promotion may be subject to review by a Promotion Review Committee in accordance with Part 5 of the Regulations.

Subclause 2.31(1) provides that, subject to clause 6.8—which deals with the date of effect of a promotion where the employee is under investigation for a breach of the Code of Conduct—clause 2.31 applies to a promotion decision, defined to mean a decision to promote an ongoing APS employee, or to engage an ongoing Parliamentary Service employee as an ongoing APS employee at a higher classification than the employee's Parliamentary Service classification.

Subclause 2.31(2) defines:

- 'application period' to mean (for a promotion decision) the period in which an application for PRC review of the decision may be made (including any extension of that period)
- 'notification' to mean (for a promotion decision) the notification of the decision under clause 2.29
- 'PRC review' to mean review by a Promotion Review Committee under Part 5 of the Regulations.

Subclause 2.31(3) provides that in clause 2.31 a reference to a date of effect on which a promotion decision has been agreed is a reference to a date that has been agreed as the date of effect by the employee, the agency head, and, if the employee is moving from another agency, the original agency head.

Subclause 2.31(4) provides that, if the promotion decision is not subject to PRC review, the decision takes effect either, if a date of effect has been agreed that is not earlier than the notification, on that date; or, otherwise, four weeks after notification.

Subclause 2.31(5) provides that, if the promotion decision is subject to PRC review, but no application for review is made before the end of the application period, the decision takes effect either, if a date of effect has been agreed that is not earlier than the end of the application period, on that date, or, otherwise, two weeks after the end of the application period.

Subclause 2.31(6) provides that, if the promotion decision is subject to PRC review and an application for review is made before the end of the application period, but is withdrawn before the PRC makes a decision on the application, the decision takes effect either, if a date of effect has been agreed that is not earlier than the end of the application period, on that date, or, otherwise, two weeks after the agency head is notified of the withdrawal of the application.

Subclause 2.31(7) provides that, if the promotion decision is subject to PRC review, an application for review is made before the end of the application period and a PRC is appointed, but the application lapses before the PRC completes the review, the decision takes effect either, if a date of effect has been agreed that is after the agency head is notified of the lapse of the application, on that date, or, otherwise, two weeks after the agency head is notified.

Subclause 2.31(8) provides that, if the promotion decision is subject to PRC review, an application for review is made before the end of the application period, but the Merit Protection Commissioner decides under subregulation 5.10 (1) that it is not necessary to appoint a PRC to deal with the application, the decision takes effect either, if a date of effect has been agreed that is after the agency head is notified of the decision of the Merit Protection Commissioner, on that date, or, otherwise, the later of the day the agency head is notified and four weeks after the notification.

Subclause 2.31(9) provides that, if the promotion decision is subject to PRC review, an application for review is made before the end of the application period and a PRC is appointed, and the PRC upholds the decision, the promotion decision takes effect either, if a date of effect has been agreed that is after the agency head is notified of the decision of the PRC, on that date, or, otherwise, four weeks after the agency head is notified.

Subclause 2.31(10) provides that, if the promotion decision is subject to PRC review, an application for review is made before the end of the application period and a PRC is appointed, and the PRC varies the decision, the promotion decision takes effect either, if a date of effect has been agreed that is after the agency head is notified of the decision of the PRC, on that date, or otherwise, four weeks after the agency head is notified.

Chapter 3 Workplace Diversity

Section 10A of the Act sets out the APS Employment Principles. Paragraphs 10A(1)(f) and (g) provide that the APS is a career-based public service that provides workplaces that are free from discrimination, patronage, or favouritism, and which recognises the diversity of the Australian community and fosters diversity in the workplace.

Section 11A of the Act provides for the Commissioner to issue directions in writing in relation to the APS Employment Principles for the purposes of ensuring that the APS incorporates and upholds the APS Employment Principles, and to determine, where necessary, the scope or application of the APS Employment Principles.

Chapter 3 of the Directions provides directions that determine the scope and application of the Employment Principles at paragraphs 10A(1)(f) and (g) of the Act.

The introduction to Chapter 3 of the Directions states that it is expected that an agency workplace diversity program will include measures directed at eliminating employment-related disadvantages in the agency on the basis of being Aboriginal and/or Torres Strait Islander; or gender; or race or ethnicity; or disability; or being a member of a group that, from time to time, is identified as having an employment-related disadvantage.

Clause 3.1 How an Agency head upholds APS Employment Principle 10A(1)(f) (non-discrimination)

Clause 3.1 provides that, in upholding APS Employment Principle 10A(1)(f), an agency head is required to put in place measures in the agency directed at ensuring that all relevant anti-discrimination laws are complied with.

Clause 3.2 How an Agency head upholds APS Employment Principle 10A(1)(g) (diversity)

Clause 3.2 provides that, in upholding APS Employment Principle 10A(1)(g), an agency head is required to put in place measures in the agency directed at ensuring that:

- the diversity of APS employees is recognised, fostered, and made best use of within the workplace, taking into account the organisation and business goals of the agency and the skills required to perform the relevant duties, and
- APS employees are helped to balance their work, family and their caring responsibilities effectively.

Clause 3.3 Measures for workplace diversity programs

A note to Clause 3.3 explains that section 18 of the Act requires an agency head to establish a workplace diversity program to assist in giving effect to the APS Employment Principles. The note also states that the content and scope of a workplace diversity program may vary depending on the kind of agency, and its size and resources, and that the Commissioner will provide guidance for agencies to assist them in determining the appropriate content and scope for such programs. Some agencies, by virtue of their small size and limited capacity, may be unable to develop a comprehensive workplace diversity program. In these circumstances, it is expected that, in the absence of a comprehensive workplace diversity program, small agencies publish a commitment to workplace diversity that includes a commitment to fostering

a diverse workforce; to attracting and recruiting people from diverse backgrounds; and, wherever possible, participating in whole of APS recruitment programs.

Clause 3.3 provides that an agency's workplace diversity program must include measures directed at ensuring that:

- the corporate, business, and human resource plans of the agency demonstrate that the agency values the diverse backgrounds of its employees, and values, and is able to access and make use of, the diverse skills and experience of its employees, and
- workplace structures, systems, and procedures assist employees in balancing their work, family, and other caring responsibilities effectively, and
- the diversity of the Australian community is reflected in strategies to attract, recruit, and retain employees, in line with the organisational and business goals of the Agency and the skills required to perform the relevant duties.

Clause 3.4 Workplace diversity program to be published

Clause 3.4 provides for the publication of an agency's workplace diversity program.

Subclause 3.4(1) provides that, as soon as practicable after establishing a workplace diversity program for an agency, the agency head must publish the program on the agency's website.

Subclause 3.4(2) provides that if the agency head revises the workplace diversity program in any way, the agency head must, as soon as practicable after revising the program, publish the revised program on the agency website.

Clause 3.5 Evaluation and assessment of effectiveness and outcomes of workplace diversity program

Clause 3.5 provides for the evaluation and assessment of agencies' workplace diversity programs.

Subclause 3.5(1) provides that an agency head must develop performance indicators to evaluate the effectiveness and outcomes of the agency's workplace diversity program, and must evaluate and report on the effectiveness and outcomes of the program annually.

Subclause 3.5(2) provides that an agency head must give the Commissioner the information the Commissioner requires to enable the Commissioner to evaluate and make an assessment of the effectiveness of agencies' workplace diversity programs, including for the purposes of the Commissioner's annual report under section 44 of the Act.

A note to subclause 3.5(2) explains that the requirement in that subclause to give the Commissioner information is in addition to an agency head's duty (i.e. under subsection 44(3) of the Act) to give the Commissioner information for the Commissioner to prepare an annual report.

Clause 3.6 Review of workplace diversity programs

Clause 3.6 provides that at least once every four years an agency head must review the agency's workplace diversity program to ensure that it continues to assist in giving effect to the relevant APS Employment Principles and achieving the outcomes set out in clause 3.3.

Chapter 4 Performance Management

Section 11A of the Act provides for the Commissioner to issue directions in writing about employment matters relating to APS employees. It also provides for the Commissioner to issue directions in writing in relation to the APS Employment Principles for the purposes of ensuring that the APS incorporates and upholds the APS Employment Principles, and to determine, where necessary, the scope or application of the APS Employment Principles.

Section 10A of the Act sets out the APS Employment Principles. Paragraph 10A(1)(d) provides that the APS is a career-based public service that requires effective performance from each employee.

The Code of Conduct provides, among other things, that APS employees and agency heads behave at all times in a way that upholds the APS Employment Principles (subsection 13(11) of the Act).

Clause 4.1 How an Agency Head upholds APS Employment Principle 10A(1)(d)

Clause 4.1 provides that in upholding and promoting the Employment Principle in 10A(1)(d) of the Act, an agency head will support employees to achieve effective performance by ensuring that their agency:

- builds the capability necessary to achieve the outcomes properly expected by the Government;
- has fair and open performance management processes and practices that support a culture of high performance, in which all performance is effectively managed;
- provides each APS employee with a clear statement of the performance and behaviour expected of him or her, and an opportunity to discuss his or her responsibilities;
- requires employees to participate constructively in agency-based performance management processes and practices;
- agency invests in building the capability of managers to manage performance effectively; and
- uses its performance management processes to guide salary movement and reward.

Clause 4.2 Initiating Code of Conduct proceedings in relation to effective performance

Clause 4.2 recognises that circumstances may arise in which it is not clear whether an example of poor behaviour by an APS employee is more appropriately dealt with under an agency's performance management processes or as a potential breach of the Code of Conduct.

Clause 4.2 provides that, where the behaviour of an APS employee raises concerns that may relate both to performance and to conduct, the employee's agency head must have regard to any relevant standards and guidance issued by the Commissioner before making a decision as to whether to deal with the matter as a potential breach of the Code of Conduct under procedures established under subsection 15(3) of the Act.

Chapter 5 Safe Workplaces

Clause 5.1 Providing a safe workplace

This Chapter makes directions in relation to paragraph 10A(1)(e) of the Act, which provides, among other things, that the APS is a career-based public service that provides safe workplaces.

Subsection 11A(2) of the Act provides for the Commissioner to issue directions to ensure that the APS incorporates and upholds the APS Employment Principles, and to determine, where necessary, the scope or application of the Employment Principles.

Subclause 5.1(1) of the Directions imposes an obligation on agency heads to put in place measures in their agency to ensure that the agency complies with all applicable work health and safety legislation. This would include, for example, the *Work Health and Safety Act 2011*.

Subclause 5.1(2) reinforces the responsibility of each individual APS employee, having regard to their particular duties and responsibilities, to take proper steps to support the measures put in place by his or her agency head under subclause 5.1(1).

Chapter 6 Agency Head handling of suspected Code of Conduct breaches

Clause 6.1 Purpose of Chapter 6

Under subsection 15(3) of the Act, agency heads are required to establish procedures ('the procedures') for determining whether an APS employee, or former employee, has breached the Code of Conduct, and, if so, what sanction (if any) should be imposed.

Subsection 15(4) of the Act provides that the procedures must comply with basic procedural requirements set out in Commissioner's Directions, and must have due regard to procedural fairness.

Clause 6.1 of the Directions provides that the purpose of Chapter 6 is to set out the basic procedural requirements for the procedures.

A note to clause 6.1 explains that the requirements set out in Chapter 6 and the procedures apply only in relation to a suspected Code of Conduct breach by an APS employee in respect of which a determination may be made.

The note also explains that not all suspected breaches of the Code of Conduct need to be dealt with under the procedures; in many cases another way of dealing with the suspected breach, such as counselling, may be more appropriate. The note refers to clause 4.2, which provides for circumstances in which the behaviour of an APS employee raises concerns that relate both to performance and to conduct.

Clause 6.2 Application to former employees

Subclause 6.2(1) provides that, for the purposes of Chapter 6, any reference to an APS employee in an agency should be taken to include a former employee of that agency who is suspected of having breached the Code of Conduct while employed by the agency.

Subclause 6.2(2) provides that subparagraph 6.3(a)(ii) and clause 6.4 do not apply in relation to a former employee. The relevant subparagraph and clause relate to sanctions under subsection 15(1) of the Act, which cannot be imposed on a former employee.

Clause 6.3 Employees must be informed that a determination is being considered

Clause 6.3 provides that, before any determination is made that an APS employee has breached the Code of Conduct, reasonable steps must have been taken to:

- inform the employee of the details of the suspected breach of the Code and the sanctions that may be imposed on the employee under section 15(1) of the Act, and
- give the employee reasonable opportunity to make a statement in relation to the suspected breach.

This clause provides for employees and former employees who are suspected of having breached the Code of Conduct to be afforded two of the central elements of the principles of procedural fairness—namely, the right to know the case against them, and the right to provide a relevant statement, accompanied by supporting evidence (if any), before a decision is made.

Clause 6.4 Employees must be informed before a sanction is imposed

Under section 15(1) of the Act, a sanction or sanctions may be imposed on an APS employee (but not a former employee), where it has been determined in accordance with the procedures that the employee has breached the Code of Conduct. The range of sanctions available is set out in section 15(1).

Clause 6.4 provides that, before any sanction is imposed on an APS employee, reasonable steps must have been taken to:

- inform the employee of the determination that he or she had breached the Code of Conduct,
- inform the employee of the sanction or sanctions that are under consideration, and the factors being considered by the delegate in determining any sanction to be imposed, and
- give the employee reasonable opportunity to make a statement in relation to the sanction or sanctions under consideration.

This clause provides for employees who may be subject to a sanction for a determined breach of the Code of Conduct to be afforded two of the central elements of the principles of procedural fairness—namely, the right to know of the factors being weighed in the decision, and the right to provide a relevant statement of their views, accompanied by supporting evidence (if any), before a decision is made.

Clause 6.5 Person making determination to be independent and unbiased

Paragraph 6.5(a) imposes an obligation on agency heads to take reasonable steps to ensure that any person who makes a determination under the procedures as to whether an employee or former employee has breached the Code of Conduct is, and appears to be, independent and unbiased.

Paragraph 6.5(b) imposes a similar obligation on agency heads to take reasonable steps to ensure that any person who makes a determination under the procedures as to the sanction (if any) to be imposed on an employee under section 15(1) of the Act is, and appears to be, independent and unbiased.

A central principle of procedural fairness is that a decision-maker should be independent and unbiased. These provisions guarantee that valid procedures established by agency heads will reflect that principle.

Clause 6.6 Determination process to be informal

Clause 6.6 provides that the process for determining whether an APS employee, or former employee, has breached the Code of Conduct must be carried out with as little formality and as much expedition as a proper consideration of the matter allows.

Clause 6.7 Record of determination and sanctions

Clause 6.7 regulates the records to be kept in cases where it is determined that an employee or former employee has breached the Code of Conduct. This clause provides that a written record must be made of:

- the suspected breach; and
- the determination (which may be a determination that there was no breach of the Code of Conduct); and

- any sanctions imposed consequent upon a determination of a breach of the Code of Conduct; and
- if a statement of reasons was given to the employee, the statement of reasons.

A note to the clause also explains that records created under this clause are also regulated by the *Archives Act 1983* and the *Privacy Act 1988*.

Clause 6.8 Procedure when an employee is to move to another Agency during an investigation

Clause 6.8 provides that where:

- an ongoing APS employee is suspected of having breached the Code of Conduct, and
- the employee has been informed of the details of the suspected breach and the sanctions that may be imposed if it is determined that he or she has breached the Code, and
- the matter has not yet been resolved, and
- a decision has been made which, in the absence of clause 6.8, would result in the movement of the employee under section 26 of the Act to another agency (including on promotion), then

the movement (including on promotion) does not take effect until the matter is resolved (that is, until a determination is made in relation to a suspected breach of the Code of Conduct, or it is decided that a determination is not necessary).

However, clause 6.8 also allows the agency heads of the original and new agencies to come to an agreement that the movement decision should be given earlier effect, notwithstanding the possibility that there is an unfinished inquiry within the original agency to determine whether there has been a breach of the Code of Conduct. In such cases, it would be open to the new agency to commence in its own right a similar inquiry into the suspect behaviour.

This provision should be read with subclause 2.27(3)(b), which provides that where the agency heads of the original and new agencies agree on a different date of effect then the date of effect shall be that agreed date.

Chapter 7 Other employment matters

Chapter 7 provides Directions on a range of employment matters, including the restrictions on engaging redundancy benefit recipients; the termination of employment of non-ongoing employees; and minimum requirements relating to employees who apply for leave without pay to undertake employment under the *Governor-General Act 1974* or the *Members of Parliament (Staff) Act 1984*.

Clause 7.1 Restrictions on engaging redundancy benefit recipients

Clause 7.1 sets out the arrangements applying to the engagement of a person as an APS employee, or as a locally engaged employee to perform duties overseas under section 74 of the Act, in circumstances where the person was formerly employed by an APS agency or the Australian Parliamentary Service, and received a redundancy benefit on cessation of that previous employment.

This clause limits the capacity of an agency head to engage such persons (called ‘redundancy benefit recipients’ for the purposes of this clause) for a prescribed period following the cessation of their previous APS or Parliamentary Service employment. The clause also sets out the types of payment that constitute a ‘redundancy benefit’ and explains the way in which the redundancy benefit period (or restriction period) is to be calculated. This period is based on the value of the redundancy benefit received by the person.

Subclause 7.1(1) defines a ‘redundancy benefit recipient’ as a person who has received a redundancy benefit from an APS agency or the parliamentary service and the redundancy benefit period had not elapsed.

Subclause 7.1(2) provides that, for the purposes of clause 7.1(1), a ‘redundancy benefit’ is to be taken to mean a severance payment, or similar payment, made to an employee on the ending of their employment, or a payment made to an employee as a result of shortening a retention period, or an incentive to retire payment under section 37 of the Act or section 37 of the *Parliamentary Service Act 1999*.

Subclause 7.1(3) sets out payments that are not to be taken to be redundancy benefits for the purposes of clause 7.1. these are a payment made to an employee as redundancy pay under section 119 of the *Fair Work Act 2009*; or a payment made to a person engaged for a specified term or the duration of a specified task, as compensation for the early termination of the person’s employment; or a payment made to a person if the person was engaged overseas in accordance with section 74 of the Act and the person’s employment ended otherwise than at the initiative of the employer; or a payment made to a person in lieu of a notice of termination of employment.

Subclause 7.1(4) provides for the calculation of a redundancy benefit period such that the gross amount of an employee’s redundancy benefit is divided by the weekly salary used to calculate the redundancy benefit. The subclause provides that the period begins when the APS employee’s employment ends and lasts for the number of weeks and days that are the result of the calculation.

Subclause 7.1(5) provides that, in calculating the redundancy benefit period where an employee has periods of full-time and part-time service, and the period of part-time service falls last (so that the redundancy benefit is calculated on the basis of the part-time weekly salary), then the weekly salary to be used is the full-time equivalent of

the part-time weekly salary, and, where the calculation results in a period that includes part days, the period is to be rounded down to the nearest whole day.

Subclauses 7.1(6) and (7) provide agency heads with the discretion to engage a redundancy benefit recipient in certain circumstances prior to the expiry of their restriction period. The steps that an agency head must follow prior to engaging such a person are set out, including the circumstances in which it is necessary either to gain the approval of the Commissioner, or to consult the Commissioner, prior to the engagement.

Paragraph 7.1(7)(a) requires the Commissioner's approval to be obtained prior to engaging a redundancy benefit recipient as either an ongoing APS employee or a non-ongoing SES employee.

Paragraph 7.1(7)(b) requires the Commissioner to be consulted before a redundancy benefit recipient is engaged as a non-ongoing non-SES employee for a period of more than 6 months, or is engaged to perform duties overseas in accordance with section 74 of the Act.

Paragraph 7.1(7)(c) requires the Commissioner to be consulted before the engagement of a non-ongoing non-SES employee is extended to a period that will exceed six months.

These arrangements are consistent with those that were contained in clauses 4.4 and 4.4A of the *Public Service Commissioner's Directions 1999*.

Clause 7.2 Termination of employment of non-ongoing APS employees

Clause 7.2 sets out the procedures that apply to the termination of employment of non-ongoing APS employees.

Such procedures have been prescribed in regulations. Amendment to subsection 29(4) of the Act made by the Amendment Act provides that the regulations may set out grounds for termination of non-ongoing employees, rather than grounds and procedures. Procedures for the termination of employment of a non-ongoing employee are therefore set out in the Directions as a result of the inclusion of the broader direction making power in section 11A of the Act.

Subclause 7.2(2) provides that where an 'employment arrangement' (for example an enterprise agreement) sets out procedures that apply to the termination of a non-ongoing APS employee, those procedures must be followed unless they are unlawful or prohibited under the fair work legislation. The term 'employment arrangement' is defined in the Dictionary to the Directions.

Note 1 below subclause 7.2(2) explains that the engagement of a non-ongoing APS employee may be terminated on the grounds of a breach of the Code of Conduct only in accordance with procedures established by an agency head under subsection 15(3) of the Act.

Note 2 below subclause 7.2(2) explains that the *Fair Work Act 2009* has rules and entitlements that apply to termination of employment.

Note 3 below subclause 7.2(2) explains that an agency head cannot terminate the employment of an SES employee unless the Commissioner has issued a certificate under s.38 of the Act to the effect that the termination has satisfied the requirements if the Directions and is in the public interest.

Note 4 below subclause 7.2(2) explains that the Dictionary to the Directions defines the term ‘employment arrangement’.

Clause 7.3 Incentive to retire—SES employee

Clause 7.3 replicates clause 6.7 of the *Public Service Commissioner’s Directions 1999*. It sets out requirements that agency heads must meet before giving an ongoing SES employee a notice to retire under section 37 of the Act, including that the Commissioner must agree to the amount to be paid to the employee as an incentive to retire.

This requirement assists in maintaining consistency in the levels of such payments across APS agencies.

Clause 7.3 provides that an agency head must not give an SES employee a notice under section 37 of the Act unless the Commissioner is satisfied that the employee is an ongoing SES employee; that the employee is advised of possible options of reassignment, including assignment to a group of duties at a lower classification; that the employee has been given reasonable access to independent financial advice and career counselling; and the Commissioner has agreed to the amount to be paid to the employee by the agency head if the employee retires within the period specified in the notice.

Note 1 below clause 7.3 explains that a notice given to an SES employee under subsection 37(1) of the Act must be in writing, and must state that the employee will become entitled to a payment of a specified amount if the employee retires within the period specified in the notice.

Note 2 below clause 7.3 explains that, under clause 2.29 of the Directions, the retirement of the SES employee within the period specified in a notice given under section 37 of the Act must be notified in the *Public Service Gazette*.

Clauses 7.4 and 7.5 Matters relating to leave without pay, including transitional provisions

Clauses 7.4 and 7.5 provide for:

- the mandatory granting of leave without pay by an agency head to an ongoing APS employee who applies for such leave to take up employment under certain provisions of the *Members of Parliament (Staff) Act 1984* or the *Governor-General Act 1974*, or to extend a current period of employment under either of these Acts;
- rights of return to the APS (at the same or an equivalent classification) for employees granted such leave (including where leave is granted before the commencement of these Directions); and
- transitional provisions which provide that employees who, prior to amendments made to the *Prime Minister’s Public Service Directions 1999* on 19 October 2005, were on approved leave without pay to take up a full time statutory appointment are entitled to remain on leave without pay for the duration of their existing period of leave without pay, and to exercise their right of return to the APS (at the same or an equivalent classification) at any time during, or at the expiration of, the period of approved leave without pay.

Chapter 8 Delegation

Chapter 8 of the Directions provides for the Commissioner and for agency heads to delegate their powers or functions under the Directions. Clauses 8.1 and 8.2 of Chapter 8 include subdelegation provisions and related provisions concerning the operation of delegations, similar to the delegation provisions in section 78 of the Act.

These provisions are unchanged from the *Public Service Commissioner's Directions 1999*.

Clause 8.1 Delegation by the Commissioner

Clause 8.1 provides for the delegation of the Commissioner's powers or functions.

Subclause 8.1(1) provides for the Commissioner to delegate to a senior official any of the Commissioner's powers or functions under the Directions (other than the delegation power itself). The term 'senior official' is defined in the subclause 8.1(6) to mean a person who holds any office or appointment under an Act, or an SES employee or acting SES employee.

Subclause 8.1(2) provides that a person to whom powers or functions are delegated under subclause 8.1(1)—the first delegate—may, in writing, delegate any of those powers or functions to another person (the second delegate).

Subclause 8.1(3) provides that if the first delegate is subject to directions about the exercise of a power or function delegated under subclause 8.1(2), the first delegate must give corresponding directions to the second delegate.

Subclause 8.1(4) provides that a power or function exercised or performed by a person under a delegation in accordance with subclause 8.1(2) is taken for the purposes of the Directions to have been exercised or performed by the Commissioner.

Subclause 8.1(5) provides that a person exercising powers or functions under a delegation under clause 8.1 must comply with any directions given by the Commissioner.

Subclause 8.1(6) defines the term 'senior official' for the purposes of subclause 8.1(1).

Clause 8.2 Delegation by Agency Head

Clause 8.2 provides for the delegation of an agency head's powers or functions.

Subclause 8.2(1) provides for an agency head to delegate to another person the agency head's powers or functions under the Directions, other than the delegation power itself.

Subclause 8.2(2) provides that an agency head cannot delegate powers or functions to an outsider without the prior written consent of the Commissioner. An 'outsider' is defined in subclause 8.2(7) to mean a person other than an APS employee or a person appointed to an office by the Governor-General, or by a Minister, under a law of the Commonwealth.

Subclause 8.2(3) provides that a person to whom powers or functions are delegated under subclause 8.2(1)—the first delegate—may, in writing, delegate any of those powers or functions to another person (the second delegate).

Subclause 8.2(4) provides that if the first delegate is subject to directions about the exercise of a power or function delegated under subclause 8.2(3), the first delegate must give corresponding directions to the second delegate.

Subclause 8.2(5) provides that a power or function exercised or performed by a person under a delegation in accordance with subclause 8.2(3) is taken for the purposes of the Directions to have been exercised or performed by the person who delegated the corresponding power or function under subclause 8.2(1).

Subclause 8.2(6) provides that a person exercising powers or functions under a delegation under clause 8.2 must comply with any directions given by the agency head who delegated the power or function.

Subclause 8.2(7) defines the term ‘outsider’ for the purposes of subclause 8.2(2).

Schedule 1 Re-engagement of election candidates

1 Entitlement to return to APS employment

Subsection 44(iv) of the Commonwealth of Australia Constitution Act provides, in part, that a person who holds an office of profit under the Crown is incapable of being chosen, or of sitting, as a Senator or Member of the House of Representatives.

Section 32 of the Act provides that if a person resigned as an APS employee in order to contest an election that is specified in the Commissioner's Directions, then, provided that the resignation took effect not earlier than six months before the closing date for nominations, and the person was a candidate in the election and failed to be elected, the person is entitled to be engaged again as an APS employee, in accordance with the relevant provisions of the Commissioner's Directions.

This schedule relates to clause 2.19 of the Directions and section 32 of the Act.

Subclause (1) establishes that this schedule applies to a person if:

- (a) the person is a former APS employee in the agency, whose employment ended because he or she resigned to contest an election; and
- (b) section 32 of the Act applies to the person; and
- (c) the person applies to the agency head to be engaged pursuant to section 32 of the Act and clause 2.19 within the time limit, or, if the Commissioner has made a declaration under subclause 4, as soon as practicable after receiving notice of the declaration; and
- (d) if the former employment was non-ongoing, the employment would not have ended except for the resignation, and the person applies to the agency head to be engaged before the employment would have ended if the person had not resigned.

Subclause (2) provides that where the agency head engages the person as an APS employee pursuant to section 32 of the Act and clause 2.19, the person must be:

- (a) engaged on the same basis (ongoing or non-ongoing) as the person's employment before resigning and at the same or a lower classification;
- (b) assigned duties that are the same as, or similar to, the duties the person had immediately before the resignation or, if such duties are unavailable, other duties at the same classification; and
- (c) engaged on the same terms and conditions of employment that applied to the person when the person resigned, or, if the remuneration, or another term or condition, applying to the person's previous classification, has changed since the person resigned, the changed terms and conditions.

Subclause (3) provides that the continuity of the service of the person is taken not to have been broken by the period between the person's resignation and the person's re-engagement as an APS employee, but that period does not count as service for the purposes of the National Employment Standards, or an employment arrangement that applies to the employee. A note under this subclause refers to *the Long Service Leave (Commonwealth Employees) Act 1976* and the *Maternity Leave (Commonwealth Employees) Act 1973* for entitlements to long service leave and paid maternity leave respectively.

Subclause (4) provides that if the Commissioner is satisfied that it is appropriate to do so, the Commissioner may declare that the person is taken to be a former employee of a specified agency for the purposes of this Schedule (for example because the agency in which the person was employed at the time of resignation is no longer responsible for those duties, or no longer exists).

Subclause (5) provides that the time limit in relation to this Schedule for a person who contested an election is:

(a) if the result of the election is not disputed—2 months after the declaration of the result of the election; and

(b) if the result of the election is disputed—2 months after a court of disputed returns decides the petition disputing the result, or the petition is withdrawn or lapses.

Schedule 2 Comparison with Parliamentary Service classifications

This Schedule relates to clauses 2.22 and 2.29.

1 Meaning of *comparable classification or lower*

Subclause (1) provides that, for clause 2.22, a person who is an ongoing Parliamentary Service employee is engaged as an ongoing APS employee at a comparable classification or lower if:

- (a) the person is engaged as an ongoing APS employee at a classification mentioned in the table attached to the Schedule; and
- (b) immediately before the engagement, the person was engaged as an ongoing Parliamentary Service employee at one of the corresponding classifications mentioned in the table.

2 Meaning of *higher classification*

Subclause (2) provides that, for clause 2.29, a person who is an ongoing Parliamentary Service employee is engaged as an ongoing APS employee at a higher classification if:

- (a) the person is engaged as an ongoing APS employee at a classification mentioned in the table attached to Schedule; and
- (b) immediately before the engagement, the person was engaged as an ongoing Parliamentary Service employee at the corresponding classification mentioned in the table.

Dictionary

The Dictionary to the Directions defines certain words and expressions that have particular meaning in APS employment.

‘Act’ is defined to mean the *Public Service Act 1999*.

‘Agency’ is defined to mean a Department, or an Executive Agency, or a Statutory Agency. This term has the same meaning as in the Act.

‘Agency Head’ is defined to mean the Secretary of a Department, or the head of an Executive Agency, or the Head of a Statutory Agency. This term has the same meaning as in the Act.

‘APS’ is defined to mean the Australian Public Service established by section 9 of the Act. This term has the same meaning as in the Act.

‘APS employee’ is defined to mean a person engaged under section 22 of the Act, or a person who is engaged as an APS employee under section 72 of the Act. This term has the same meaning as in the Act.

‘APS employment’ is defined to mean employment as an APS employee. This term has the same meaning as in the Act.

‘APS employment principles’ is defined to mean the principles set out in subsection 10A(1) of the Act. This term has the same meaning as in the Act.

‘APS Values’ is defined to mean the Values set out in section 10 of the Act. This term has the same meaning as in the Act.

‘Broadband’ is defined as having the meaning given in the Classification Rules.

‘Classification’ is defined to mean an approved classification within the meaning of the Classification Rules.

‘Classification group’ is defined to mean a group of classifications mentioned in Schedule 1 to the Classification Rules.

‘Classification Rules’ is defined to mean rules about classifications of APS employees made under section 23 of the Act from time to time.

‘Code of Conduct’ (or ‘Code’) is defined to mean the rules made under section 13 of the Act. This term has the same meaning as in the Act.

‘Commissioner’ is defined to mean the Australian Public Service Commissioner appointed under the Act. This term has the same meaning as in the Act.

‘Disability employment service provider’ is defined to mean an organisation that facilitates access to employment for persons with disabilities.

‘Employee’ is defined to mean an APS employee.

‘Employment arrangement’ is defined to mean a fair work instrument; or a transitional instrument; or a determination under subsections 24 (1) or (3) of the Act; or a written contract of employment.

‘Fair work instrument’ is defined as having the same meaning as in the *Fair Work Act 2009*. This term has the same meaning as in the Act.

‘Higher classification’, for an employee, is defined to mean a classification that is in a higher classification group than the employee’s current classification.

‘Lower classification’, for an employee, is defined to mean a classification that is in a lower classification group than the employee’s current classification.

‘Merit’ is defined by reference to subsection 10A(2) of the Act.

‘Merit Protection Commissioner’ is defined to mean the Merit Protection Commissioner appointed under the Act. This term has the same meaning as in the Act.

‘National Employment Standards’ is defined as having the same meaning as in the *Fair Work Act 2009*. This term has the same meaning as in the Act.

‘Non-SES employee’ is defined to mean an APS employee other than an SES employee. This term has the same meaning as in the Act.

‘Ongoing APS employee’ is defined to mean a person engaged as an ongoing APS employee, as mentioned in paragraph 22(2)(a) of the Act. This term has the same meaning as in the Act.

‘Ongoing Parliamentary Service employee’ is defined as having the same meaning as in the *Parliamentary Service Act 1999*.

‘Operational classification’ is defined as having the same meaning as in the Classification Rules.

‘Parliamentary Service employee’ is defined as having the same meaning as in the *Parliamentary Service Act 1999*.

‘Prohibited content’ is defined as having the same meaning as in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

Note 1 to this definition explains that prohibited content is mentioned in Schedule 8 to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*; for example, in item 30 of Schedule 8.

Note 2 to this definition explains that an expression used in a transitional Schedule to the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009* that was defined in the *Workplace Relations Act 1996* has the same meaning in the transitional schedule as it had in that Act. The note refers to paragraph 4(1)(a) of the *Fair Work (Transitional Provisions and Consequential Amendments Act) 2009*.

‘Promotion’, for an ongoing APS employee is defined by reference to clause 2.2 of the Directions.

‘Public Service Gazette’ is defined to mean the *Gazette* published in electronic form.

A note to this definition states that the Public Service *Gazette* may be accessed at www.APSjobs.gov.au.

‘Redundancy benefit’ is defined by reference to clause 7.1 of the Directions.

‘Redundancy benefit recipient’ is defined by reference to clause 7.1 of the Directions.

‘Regulations’ is defined to mean the *Public Service Regulations 1999*.

‘SES’ is defined to mean the Senior Executive Service established by section 35 of the Act. This term has the same meaning as in the Act.

‘SES employee’ is defined as having the meaning given by section 34 of the Act. This term has the same meaning as in the Act. A note to this definition refers to the Classification Rules in relation to the classification of SES employees.

‘SES vacancy’ is defined by reference to clause 2.4 of the Directions.

‘Similar vacancy’ is defined by reference to clause 2.5 of the Directions.

‘Training classification’ is defined as having the same meaning as in the Classification Rules.

‘Transitional instrument’ is defined as having the same meaning as in the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*.

‘Unlawful term’ is defined as having the same meaning as in the *Fair Work Act 2009*.

‘Vacancy’ is defined by reference to clause 2.3 of the Directions.

‘Workplace diversity program’ is defined to mean a program established by an agency head under section 18 of the Act.

‘Work-related qualities’ is defined by reference to clause 2.6 of the Directions.