

## **EXPLANATORY STATEMENT**

Issued by the authority of the Australian Public Service Commissioner

*Public Service Act 1999*

### **Australian Public Service Commissioner's Amendment Direction 2013 (No. 2)**

#### **Authority**

Subsection 11A(1) of the *Public Service Act 1999* (the Act) provides that the Australian Public Service Commissioner (the Commissioner) may issue directions in writing about employment matters relating to Australian Public Service (APS) employees. Subsection 11A(2) of the Act provides that the Commissioner may issue directions in writing 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(2).

Directions issued by the Commissioner are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

#### **Legislative framework**

The *Australian Public Service Commissioner's Directions 2013* (Commissioner's Directions) are made under the Act. They prescribe mandatory standards for APS agency heads and APS employees to meet their obligations under the Act, and support agency heads to fulfil their employer responsibilities.

Section 10A of the Act sets out the APS Employment Principles, and includes at paragraph 10A(1)(c) that the APS is a career based public service that '*makes decisions relating to engagement and promotion that are based on merit*' (the Merit Employment Principle).

Subsection 10A(2) of the Act defines 'merit' for engagement and promotion decisions in the APS and includes a requirement that '*all eligible members of the community were given a reasonable opportunity to apply to perform the relevant duties*'.

Chapter 2 of the Commissioner's Directions sets out matters relating to recruitment and selection in the APS and relate in particular to matters associated with the Merit Employment Principle, including material relating to how a vacancy is to be notified in order to invite persons to apply.

Clause 2.3 defines 'vacancy' for the purposes of the Commissioner's Directions in the following terms:

*'a vacancy exists in an agency when a decision has been made that:*

- (a) a specified group of duties need to be performed; and*
- (b) it is appropriate to consider engaging a person or promoting an APS employee to perform the duties.'*

#### **Purpose of these amendments**

The purpose of *Australian Public Service Commissioner's Amendment Direction 2013 (No.2)* (the Amendment Direction) is to amend the Commissioner's Directions to:

- provide that vacancies notified in the *Public Service Gazette* (the *Gazette*) on or after 5 November 2013 must be notified as being open only to APS employees except in certain prescribed circumstances; and
- correct two minor unrelated drafting errors.

## **Reasons**

The Government has made a commitment to reduce the number of employees in the APS through natural attrition. In order to achieve the proposed reduction of the APS workforce, it will be necessary to provide a whole-of-APS approach to reducing its size.

Under the new arrangements there will be an increased emphasis on the redeployment of displaced employees within agencies and across the APS as the first priority when filling vacancies. In the past, APS agencies have been required as a matter of policy to consider the claims of displaced employees either prior to advertising a vacancy or during the application stage, and these amendments to the Commissioner's Directions will reinforce this arrangement. The Amendment Direction operates in conjunction with policy advice to agencies on APS recruitment and selection arrangements. The Australian Public Service Commission (the Commission) has been operating an Redeployment Register since May 2011 to assist with the redeployment of displaced APS employees and has issued policy and operational guidance to agencies on redeployment matters.

## **Impact and Effect**

The amendments will contribute to the Government's commitment to reduce the size of the APS workforce by requiring agencies to demonstrate that they have considered existing APS employees for vacancies that arise, and allowing agencies to invite applications from outside the APS only with the approval of the Commissioner. This approach focuses on the redeployment of excess employees as the first priority when filling vacancies and utilises the Commission's existing APS Redeployment Register and supporting processes.

Prior to this amendment, the Directions provided that unless the Commissioner agreed otherwise, vacancies were to be notified in the *Gazette* as open to all eligible members of the community. The Amendment Direction provides that in most cases, vacancies will be notified as open only to APS employees, although there will be provision for vacancies to be advertised as being open to the broader community in certain circumstances:

- Specifically, where the Commissioner is satisfied that special circumstances exist, then a vacancy or class of vacancies may be advertised as being open to all eligible members of the community, including persons who are not currently APS employees.
- In seeking the Commissioner's approval, an agency will need to demonstrate that filling a vacancy is critical to maintaining its capability and that it cannot be staffed from within the APS, including through redeployment action.

The amendments include provisions to ensure that where offers of employment were made before 5 November 2013, these offers will be honoured.

In relation to selection exercises commenced before 5 November 2013, but where no offer of employment has been made, agencies may continue those selection exercises provided the Commissioner is satisfied it is not appropriate to re-notify the vacancies.

It is intended that these amendments will only operate on an interim basis until the Government's commitments have been achieved. The operation and effectiveness of these provisions will be reviewed on an ongoing basis.

Further details about the provisions are provided below.

## **Consultation**

The Commissioner consulted with the Secretaries Board and selected APS agencies on the revised arrangements for APS recruitment, including the changes to APS vacancy notification requirements as set out in the Amendment Direction, prior to their implementation. Unions covering employees in the APS have also been advised of the changes to recruitment arrangements.

## **Statement of Compatibility with Human Rights**

A Statement of Compatibility is included at Attachment B to this Explanatory Statement.

## Notes on clauses

### Operative clauses

**Clause 1** sets out the name of the Direction.

**Clause 2** provides that the Amendment Direction commences on 5 November 2013.

**Clause 3** specifies the authority for making the Amendment Direction.

**Clause 4** provides that Schedule 1 amends the Commissioner's Directions.

### Schedule 1

**Item [1]** of the Schedule amends clause 2.8 of the Commissioner's Directions by substituting a new paragraph (b). Clause 2.8 sets out the requirements that must be satisfied when conducting a competitive selection process, and includes a requirement that a vacancy must be notified in a particular manner as set out in Direction 2.9 or 2.9A.

New paragraph 2.8(1)(b) recognises that some notifications of vacancies made before 5 November 2013 must be considered valid for the purposes of the Merit Employment Principle in order to honour existing offers of employment and to recognise that agencies may have invested considerable resources in a current competitive selection process.

Where the vacancy was notified before 5 November 2013 in accordance with clause 2.9 of the Commissioner's Directions (as in force prior to this Amendment Direction) and either the offer of engagement or promotion was made to the person before 5 November 2013, or the Commissioner is satisfied that it is not appropriate to require re-notification of the vacancy in accordance with the new requirements as set out in clause 2.9A, the notification is considered to meet the requirements of the Commissioner's Directions.

**Item [2]** of the Schedule amends the heading to clause 2.9 to make it clear that the arrangements set out in that clause apply to vacancies notified before 5 November 2013.

**Item [3]** of the Schedule amends subclause 2.9(1) by including a reference to subparagraph 2.8(1)(b)(i). This is also intended to make it clear that Direction 2.9, which requires notification of vacancies as open to all eligible members of the community, only applies to vacancies notified before 5 November 2013 where an offer of engagement or promotion was made to the person before that date, or where the Commissioner is satisfied that it is not appropriate to require re-notification of the vacancy in accordance with the new requirements as set out in clause 2.9A.

**Item [4]** of the Schedule inserts a new clause 2.9A which applies to a selection process to fill a vacancy that is notified in the *Gazette* on or after 5 November 2013.

Subclause 2.9A(1) sets out the basic requirements for notifying a vacancy which are the same as those set out in clause 2.9 – i.e the vacancy, or a similar vacancy, in the Agency must be notified in the *Gazette* within 12 months of the written decision to engage or promote the person and must have a closing date for applications of at least 7 days after the notification.

Subclause 2.9A(2) sets out the new arrangement that, subject to certain exceptions, the vacancy must be notified in the *Gazette* as open only to persons who are APS employees. Subclauses 2.9A (3) to (7) set out the exceptions to this requirement and provide that:

- an Agency Head may seek the Commissioner's approval to advertise a vacancy or a class of vacancies in the *Gazette* as open to all eligible members of the community;
- the Commissioner may approve the proposal if satisfied that special circumstances exist;
- where approval is given, and the vacancy has previously been advertised as open only to APS employees, the vacancy must be re-notified in the *Gazette* with the changed eligibility requirement;

- in these circumstances, the vacancy may also be advertised externally (e.g on a recruitment website) and
- where external advertising occurs, it must take place within 4 weeks of the *Gazette* notification that sought applications from eligible members of the community.

Subclause 2.9A(8) deals with multiple agency notifications and is the same as the former requirement in subclause 2.9(5).

Subclauses 2.9A(9) and (10) provide that for the purposes of this clause, a reference to an APS employee means a person who is an ongoing APS employee, or an ongoing Parliamentary Service employee at the time of the relevant *Gazette* notification. However, a person who was such an employee at the time of the relevant notification, and who subsequently ceases to be an employee during the selection process, ceases to be an eligible applicant for the vacancy.

**Items [5], [6], [7] and [8]** of the Schedule are consequential amendments necessary because of the inclusion of clause 2.9A.

**Item [9]** of the Schedule amends clause 2.24 of the Commissioner's Directions. This clause sets out the minimum requirements relating to the assignment of duties to an employee at the same or a lower classification level. The clause previously provided that it applied to all such assignments *'including where this involves a temporary movement from another APS Agency'*. The amendment makes a minor technical amendment by removing the word 'temporary' from the clause to make it clear that the clause has application to all inter-agency moves (ongoing or temporary) in circumstances where there is also an assignment of duties at or below the employee's classification level.

**Item [10]** of the Schedule amends subclause 2.27(5) of the Commissioner's Directions to correct a drafting error. Clause 2.27 deals with the movement of employees between agencies under section 26 of the Act and includes separate arrangements for ongoing moves (subclause 2.27(3)) and temporary moves (subclause 2.27(4)).

Subclause 2.27(5) deals specifically with the variation of an employee's inter-agency temporary movement agreement. The amendment corrects an error in the drafting of this subclause by substituting the reference to paragraph 2.25(3)(a), which relates to ongoing moves, with the correct reference to paragraph 2.25(4)(a).

## Statement of Compatibility with Human Rights

*Australian Public Service Commissioner's Amendment Direction 2013 (No. 2)* is 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*.

### Overview of the Legislative Instrument

The purpose of *Australian Public Service Commissioner's Amendment Direction 2013 (No.2)* (the Amendment Direction) is to amend the *Australian Public Service Commissioner's Directions 2013* (Commissioner's Directions) to:

- provide that vacancies notified in the *Public Service Gazette* on or after 5 November 2013 must be notified as being open only to Australian Public Service (APS) employees except in certain prescribed circumstances; and
- correct two minor unrelated drafting errors.

### Human rights implications

This Legislative Instrument does not engage any of the applicable rights or freedoms.

The United Nations Committee on Economic Social and Cultural Rights has stated that the right to work in article 6(1) of *International Covenant on Economic, Social and Cultural Rights* (ICESCR) encompasses four elements, including:

*'The labour market must be open to everyone. In particular, there can be no discrimination in access to and maintenance of employment on the grounds enumerated in article 2 of ICESCR, namely race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or **other status**, which has the intention or effect of impairing or nullifying exercise of the right to work. Age should be considered to be a status on which discrimination under article 2 of ICESCR is prohibited. Limiting the work entitlements of non-citizens would not constitute unlawful discrimination under article 2 of ICESCR'* (emphasis added).

The Government has made a commitment to reduce the number of employees in the APS through natural attrition. It is the policy of the Australian Government that existing APS employees who are excess to the requirements of one area of the APS be redeployed to another area wherever possible. Prior to the present amendments, the Australian Public Service Commission had already established a Redeployment Register and associated arrangements to support this policy.

At face value, the effect of the Amendment Direction may be seen by some to discriminate against persons who are not already APS employees by denying that group the right to apply for specific APS vacancies.

However, at a whole-of-APS level, the redeployment of an existing employee to another area of the APS does not involve the filling of an employment opportunity open to the labour market and, therefore, does not affect the labour market as a whole. Consequently, no particular group is discriminated against in the availability of employment in the APS where an existing APS employee is redeployed.

The arrangements effected by the Amendment Direction provide for the Australian Public Service Commissioner to approve external advertising where a need is identified. Thus, in circumstances where a vacancy is unable to be filled from within the APS, the vacancy may be made available to all eligible members of the community.

### Conclusion

This Bill/Legislative Instrument is compatible with human rights as it does not raise any human rights issues.