

## **EXPLANATORY STATEMENT**

Issued by the authority of the Australian Public Service Commissioner

*Public Service Act 1999*

### **Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014**

#### **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.

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* (the Commissioner's Directions) made under the Act elaborate on the standards required of APS employees and agency heads and prescribe details in respect of matters underpinning the Act including the APS Values, conduct matters and recruitment and selection.

Chapter 2 of the Commissioner's Directions provides details relating to recruitment and selection in the APS including in relation to:

- the taking effect of an assignment of duties (including where the assignment involves a promotion) to an APS employee in accordance with section 25 of the Act and the movement of an employee between APS agencies under section 26 of the Act; and
- the notification of certain employment decisions in the *Public Service Gazette* (the *Gazette*).

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

The main purposes of the *Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014* (the Amendment Direction) are to amend the Commissioner's Directions to:

- remove the requirement that certain employment decisions need to be notified in the *Gazette*; and
- make a number of unrelated technical amendments to the Commissioner's Directions.

#### **Reasons**

There has been a longstanding requirement in APS-related delegated legislation to publicly notify a range of APS employment decisions in the *Gazette*, including the termination of employment of an ongoing APS employee, and the statutory grounds for the termination, and the retirement of a Senior Executive Service (SES) employee with the payment of a benefit under section 37 of the Act.

Grounds for termination of employment are set out in section 29 of the Act and include termination for breach of the APS Code of Conduct, termination because the employee is excess to requirements, and termination related to physical or mental incapacity. The *Gazette* notification only includes the particular statutory ground of termination as set out in subsection 29(3) of the Act, and does not include any further details about the termination decision.

Changes to the Act which came into effect in 2013 resulted in the specification of the types of decisions that require notification being removed from the *Public Service Regulations 1999* and included in the Commissioner's Directions. In scrutinising these 2013 amendments to the Commissioner's Directions, the Parliamentary Joint Committee on Human Rights (the Committee) queried the requirement to notify certain employment related decisions in the *Gazette*. The Committee was particularly concerned about the notification of certain termination of employment

decisions and the grounds for the termination, having regard to the right to privacy guaranteed in article 17 of the International Covenant on Civil and Political Rights, as well as the Convention on the Rights of Persons with Disabilities in cases where termination is due to physical or mental incapacity.

In light of these concerns, the Commissioner agreed to conduct a review of the requirement to notify termination of employment decisions (and retirement decisions for SES employees). Submissions put to the Commissioner supported continuing to publicly notify termination decisions made as a sanction for a breach of the APS Code of Conduct on both public interest grounds and because the information is useful to prospective APS employers. However, there was general agreement that publication of aggregate data on reasons for other termination decisions, rather than notification of the individual decisions, would be sufficient to maintain confidence in the openness and transparency of the APS.

As a result, the Commissioner's Directions have been amended so that:

- the majority of termination of employment decisions relating to ongoing APS employees will no longer require *Gazette* notification;
- termination on the grounds of breach of the Code of Conduct will continue to require *Gazette* notification; and
- SES retirements with an incentive payment will no longer require notification.

Aggregate information on termination of employment of APS employees will continue to be published annually in the Australian Public Service Statistical Bulletin. This will provide sufficient transparency of information in circumstances where *Gazette* notification is no longer required, while at the same time protecting employees' privacy and reputation.

In accordance with existing arrangements under subclauses 2.29(4) and (5) of the Commissioner's Directions, an agency head will still be able to seek the Commissioner's approval for the name of an employee, whose employment has been terminated on misconduct grounds, not to be published because of the person's work-related or personal circumstances.

Further details about the provisions are provided at Attachment A.

### **Consultation**

The Commissioner issued a public discussion paper on 3 April 2014 seeking the views of APS agencies, APS employees, members of the public and other interested parties about whether employment decisions, and in particular, decisions to terminate APS employees' employment, and the reasons for doing so, should continue to be notified in the *Gazette*. The discussion paper was placed on the Australian Public Service Commission's website and forwarded to APS agencies.

The discussion paper attracted over 40 submissions, mostly from APS agencies.

As these regulatory changes relate to intra-governmental public sector employment and have no effect on business or the not-for-profit sector no further consultation process is required. The Office of Best Practice Regulation has granted a 'carve out' from the requirement to undertake preliminary assessments in these circumstances (OBPR ref 16985).

### **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 1 November 2014.

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

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

### Schedule 1

**Items 1 to 3 of Schedule 1** replace the heading and clauses 1 and 4 with 'Chapter 1A—Preliminary' and clauses 1A.1 and 1A.2.

These are technical drafting amendments and address an anomaly in the drafting style of the Commissioner's Directions.

Clause 4 has been amended by omitting subclause 4(2) and the associated Note. In accordance with current drafting conventions, the Amendment Direction makes technical changes to the Dictionary so that words and expressions that are defined in the Act itself are not to be separately defined in the Commissioner's Directions.

**Items 4 to 8, 15 and 20 of Schedule 1** insert the word 'APS' before the word 'employee', 'employees' or 'employment' (as relevant) to ensure that the Commissioner's Directions use defined terms appropriately. This amendment is linked to the amendments to the Dictionary to the Commissioner's Directions set out in items 21 and 22 to the Amendment Direction.

**Item 9 and 14 of Schedule 1** are consequential changes that have been made as a result of the relocation of former clause 6.8 of the Commissioner's Directions to clause 2.27A (see Items 10 and 16 below).

**Items 10 and 16 of Schedule 1** amend the Commissioner's Directions to repeal clause 6.8 and reflect the policy intention of former clause 6.8 in new clause 2.27A. There are no changes to the substance of the provision, although drafting has been simplified.

Former clause 6.8 was included in the Commissioner's Directions in 2013 to address a perception that an employee could avoid or frustrate a misconduct inquiry by moving to another agency. The policy intent behind former clause 6.8 and clause 2.27A is to prevent the movement of an employee from one APS agency to another APS agency where a Code of Conduct inquiry has commenced in respect of that employee. The movement to another agency is suspended until the matter is 'resolved' (as defined) or the agency heads of the original agency and the new agency agree otherwise. In other words the employee is unable to move between agencies while the matter is unresolved, without the new agency being aware of the matter.

**Item 11 of Schedule 1** amends subclause 2.29(1) of the Commissioner's Directions by repealing paragraphs (i) and (j) and substituting a new paragraph (i).

The effect of repealing paragraphs (i) and (j) is to remove the requirement to notify any decision to terminate the employment of an ongoing APS employee, and the grounds for the termination, as well as the requirement to notify the retirement of an SES employee with an incentive payment. Item 11 substitutes new paragraph (i) to provide that a decision to terminate the employment of an ongoing APS employee on the grounds mentioned in paragraph 29(3)(g) of the Act (breach of the Code of Conduct) is required to be notified in the *Gazette*. The effect of this amendment is that public notification of the termination of employment of an APS employee is only required where termination relates to a breach of the Code of Conduct.

**Items 12 and 13 of Schedule 1** amend subclause 2.30(1) of the Commissioner's Directions by omitting paragraph (g).

Clause 2.30 deals with the requirement to notify the cancellation of certain employment decisions (including termination decisions and SES retirements) and effectively requires that where a particular employment decision has been made and notified in the *Gazette*, and a decision is subsequently made to cancel the decision, then the cancellation decision must also be notified in the *Gazette*.

Items 12 and 13 make consequential changes to subclause 2.30(1) to take account of the amendments to subclause 2.29(1) referred to in item 11.

**Items 17 and 18 of Schedule 1** amend clause 7.3 of the Commissioner's Directions by repealing Note 2 that appears after this clause and renaming Note 1 as Note.

Clause 7.3 deals with incentive to retire payments for SES employees retired in accordance with section 37 of the Act. Note 2 provided that SES retirements had to be notified in the *Gazette* and as a result of the changes being made by Item 11, this Note is no longer relevant.

**Item 19 of Schedule 1** repeals existing Chapter 9 of the Commissioner's Directions and includes a new Chapter 9 containing appropriate transitional provisions associated with the Amendment Direction.

Prior to the Amendment Direction, Chapter 9 of the Commissioner's Directions set out certain transitional provisions resulting from amendments made to the Commissioner's Directions by the *Australian Public Service Commissioner's Amendment Direction 2013 (No 1)*. These transitional provisions no longer have any application.

New Part 9.1 of Chapter 9 inserts transitional provisions in relation to the changed notification requirements outlined in Items 11, 12 and 13 of the Amendment Direction.

- Clause 9.1 provides that where an agency head had made a decision, prior to the commencement of the Amendment Direction (1 November 2014), to terminate the employment of an ongoing APS employee on any of the grounds specified in subsection 29(3) of the Act and the termination had taken effect prior to that date, but the termination had not been notified in the *Gazette*, then, notwithstanding the changed notification requirements made by the Amendment Direction, the agency head is still required to notify the termination decision.
- Clause 9.2 provides that where an agency head makes a decision to cancel a decision to terminate the employment of an ongoing APS employee, and that termination decision had been notified in the *Gazette* prior to 1 November 2014, then, notwithstanding the changed notification requirements, the cancellation decision is required to be notified in the *Gazette*.
- Clause 9.3 provides that where an SES employee retires from his her APS employment in accordance with section 37 of the Act and the date of effect of the retirement is before 1 November 2014, but the retirement has not been notified in the *Gazette*, then, notwithstanding the changed notification requirements made by the Amendment Direction, the agency head is still required to notify the retirement.

**Item 21 of Schedule 1** repeals the current Notes after the Dictionary heading and substitutes new Notes. These changes are consistent with those made in Items 1 to 3 above.

**Item 22 of Schedule 1** repeals a number of definitions included in the Dictionary to the Directions. With the exception of the definition of an 'employee', all the definitions that are being repealed are currently identified in the Commissioner's Directions with an asterisk, which means that they are also terms that are defined in the Act. This reflects current drafting convention which is not to define words or expressions in subordinate legislation where those words or expressions are defined in relevant primary legislation.

The definition of 'employee' has been repealed because the definition was not needed.

## Statement of Compatibility with Human Rights

*Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011*

### **Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014**

This Legislative Instrument 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 the *Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014* (the Amendment Direction) is to amend the *Australian Public Service Commissioner's Directions 2013* (the Commissioner's Directions) to:

- remove the requirement that certain employment decisions be notified in the *Public Service Gazette* (the *Gazette*); and
- make a number of unrelated technical amendments to the Commissioner's Directions.

#### **Human rights implications**

This Legislative Instrument addresses concerns raised by the Parliamentary Joint Committee on Human Rights (the Committee) about the requirement to notify certain decisions in the *Gazette* (*Committee's Sixth Report of 2013*). The Committee was particularly concerned about the notification of certain termination of employment decisions and the grounds for termination, having regard to an individual's right to privacy as set out in article 17 of the International Covenant on Civil and Political Rights, as well as the Convention on the Rights of Persons with Disabilities in cases where termination is due to physical or mental incapacity.

In light of these concerns, the Australian Public Service Commission conducted a review of the current requirement that there be public notification of staffing decisions, in particular termination decisions in relation to ongoing Australian Public Service (APS) employees, including the statutory grounds for termination. Following this review, the Australian Public Service Commissioner (the Commissioner) has amended the Commissioner's Directions to remove the requirement to publicly notify in the *Gazette* retirements of Senior Executive Service (SES) employees and termination of employment decisions, except where the termination is on misconduct grounds.

It is accepted that, for the most part, publication of aggregate data on SES retirements and grounds for termination of employment is sufficient to maintain confidence in the openness and transparency of the APS. As a result, public notification of the name of any SES employee who has been retired, or of any employee whose employment has been terminated, and the grounds for termination, will no longer be required, except where the termination is on misconduct grounds.

Termination of employment is the most serious sanction available where an employee has breached the APS Code of Conduct and should be imposed only for serious misconduct. It has been decided to continue the requirement to publicly notify termination decisions made as a sanction for a breach of the Code Submissions on both public interest grounds and because the information is useful to prospective APS employers. The notification will refer to the particular statutory ground of termination in paragraph 29(3)(g) – breach of the APS Code of Conduct – but will not include particulars about the conduct engaged in by the employee. Such notifications will continue to include the name of the relevant employee, although there will also continue to be flexibility for a person's name not to be included because of the person's work-related or personal circumstances, subject to the agreement of the Commissioner.

The Amendment Direction positively affects:

- **Rights of equality and non-discrimination** by minimising the indirect potential for distinctions being made between individuals on the basis of publication of information about physical or mental incapacity;
- **Privacy and reputation** by ceasing the publication of personal information about individuals' employment status, including grounds of termination of employment; and
- **Rights of people with disability** by minimising the potential for individuals with a disability to be treated differently to other individuals on the basis of publication of information about physical or mental incapacity.

The continued notification of decisions relating to termination on misconduct grounds is considered to be reasonable, necessary and proportionate, having regard to article 17 of the International Covenant on Civil and Political Rights.

The Commissioner wrote to the Chair of the Committee on 5 June 2014 advising of the results of the review and the proposed amendments to the Commissioner's Directions.

### **Conclusion**

The Amendment Direction is compatible with human rights because it advances the protection of human rights. The Amendment Direction does not limit human rights any further than previously limited and, to the extent that it does limit human rights, those limitations are considered reasonable, necessary and proportionate.

Australian Public Service Commissioner