

## EXPLANATORY STATEMENT

Issued by the authority of the Australian Public Service Commissioner  
*Public Service Act 1999*

Australian Public Service Commissioner's Amendment (Performance Management) 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. 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

Section 10A of the Act sets out the APS Employment Principles, and includes at paragraph 10A(1)(d) that the APS "is a career-based public service that ... requires effective performance from each employee" ( the effective performance Employment Principle).

The *Australian Public Service Commissioner's Directions 2013* (Commissioner's Directions) made under the Act elaborate on the standards required of APS agency heads and APS employees under the Act, and prescribe details in respect of matters underpinning the Act including the APS Values, the APS Employment Principles and conduct matters.

Chapter 4 of the Commissioner's Directions deals with performance management in the APS, with a view to ensuring the APS upholds the effective performance Employment Principle and elaborating on the requirements of 10A(1)(d).

### Purpose of the amendments

The purpose of Australian Public Service Commissioner's Amendment (Performance Management) Direction 2014 (the Amendment Direction) is to amend the Commissioner's Directions to:

- a. strengthen the obligations on agency heads with respect to the effective performance Employment Principle;
- b. make provision for certain obligations on supervisors and employees relevant to the effective performance Employment Principle;
- c. encourage APS best or better practice by including a requirement to periodically assess and compare an agency's performance management policy, and associated processes and practices.

Further detail about the provisions are provided at Attachment A to this Explanatory Statement.

### Reasons

Case studies of APS agencies, agency self-assessments, capability reviews and results of the APS employee census all indicate that the effective management of individual employee performance (both talented performers and underperformers) remains a serious challenge for the APS.

Australian Public Service Commission (APSC) research indicates that the management of employees who are not performing effectively, in particular, was severely hampered by the absence of a formal or relevant record setting out the performance expectations in relation to an employee's duties, the lack of timely feedback on employee performance, and the absence of clear measurable goals, the importance of

which had not been effectively communicated to employees. In addition, employees have failed to engage constructively with management in remedying performance issues.

Further, performance management has tended to focus on managing underperformance to the exclusion of nurturing talent. Studies suggest the APS should be focusing attention on “high performance” and lifting the bar on what is expected of the performance management system.

Improving the skills and authority of supervisors to support more effective performance management is likely to lead not just to the better management of poor performers, but also better talent identification and development, and more systematic identification and development of appropriate skills and capabilities in the APS workforce.

Reform of the legal framework for employee performance management is part of a broader drive for improvement of APS performance systems. The implementation of the *Public Governance, Performance & Accountability Act 2013* (PGPA Act) has strengthened the requirements around institutional performance.

### **Impact and effect**

Prior to the Amendment Direction, the focus of clause 4.1 of the Commissioner’s Directions was on the obligations of agency heads in supporting employees to achieve effective performance. Expectations of the role of supervisors and individual employees was expressed in agency policies and procedures as well as enterprise agreements. Recognising that effective performance is primarily an employee obligation under the Act, and in reality a shared responsibility of the agency head, supervisors and individual employees, the revised clause 4.1A provides a minimum set of obligations that agency heads, supervisors and employees need to fulfil. The imposition of obligations in the Commissioner’s Directions provides clarity for supervisors and employees around what is expected of them.

The Amendment Direction obliges agency heads, supervisors and employees to engage the full range of activity encompassed within performance management. This includes managing for high performance, as well as dealing with unsatisfactory performance.

The new Amendment Direction will also oblige agency heads to look beyond their organisation to inform periodic reviews of agency policies, processes and practices.

The aggregate effect will be to encourage all actors to be mindful of the APS-wide context in which performance is managed.

The Amendment Direction has a delayed commencement date (1 July 2015) to allow time for agencies to make any necessary adjustments.

### **Consultation**

The APSC has consulted a representative sample of APS agencies about the Amendment Direction. In addition, the Secretaries Board and Deputy Secretaries Reference Group have been consulted about particular aspects of the Amendment Direction.

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

A Statement of Compatibility with Human Rights 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 July 2015.

**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 Schedule 1** repeals subclause 4.1 of the Commissioner's Directions and replaces it with a new subclause 4.1 which outlines the purpose of Chapter 4 of the Directions relating to performance management. The amendment occurs in the context of a broader agenda for reform of performance management across the APS. Research conducted by the Australian Public Service Commission, including the APS employee census, has affirmed that the effective management of performance is a continuing challenge for many APS supervisors and agencies. Strengthening the legal framework pertaining to performance management is a critical success factor for improvement in this area.

The subclause details the three key purposes of Chapter 4 of the Directions:

- To strengthen the obligations on agency heads with respect to the effective performance Employment Principle – the amendment seeks to build on, and expand the previous provisions;
- To make provision for certain obligations on supervisors and employees relevant to the effective performance Employment Principle – the amendment includes obligations for two new actors, supervisors and APS employees, bringing the Directions for performance management closer in line with how responsibilities and authority are attributed in practice within APS agencies;
- To encourage APS best or better practice by requiring Agency Heads to ensure that his or her Agency's performance management policy and associated policies and practices are periodically reviewed and benchmarked against APS best practice – the amendment seeks to encourage and support agencies in the task of raising the bar on performance management.

Subclause 4.1 also notes "the spectrum of management issues associated with effective performance management across the APS, from encouraging high performance to managing unsatisfactory performance". Inclusion of this statement seeks to give fuller meaning to the practice of managing for effective performance. In practice, managing for effective performance means dealing with a range of activity: excellent or "high" performance, acceptable or "satisfactory" performance, and where expectations are not successfully met, "unsatisfactory" performance.

Subclause 4.1A(1) sets out the basic obligations of an Agency Head in upholding and promoting the effective performance Employment Principle.

Subclause 4.1A(1)(a)(i-v) provides that an Agency Head must ensure that his or her agency has a performance management policy, and associated processes and practices, that includes several features, some of which warrant further explanation.

- Subclause 4.1A(1)(a)(i) requires that agency policy, processes and practices support a "culture of high performance" – A culture of high performance may be understood to mean a working environment in which people are encouraged or empowered to produce or conduct excellent work;
- Subclause 4.1A(1)(a)(v) requires that the agency policy, processes and practices are periodically reviewed and benchmarked against APS best practice. The intention here is to encourage an outward orientation in the development and ongoing maintenance of an agency's performance management systems – to avoid self-referential systems, and the poor quality they can generate. Review and benchmarking could occur at the same time through the one procedure or system, but not necessarily so.

Subclause 4.1A(1)(b) requires that an agency head ensures that his or her agency builds organisational capability. In the context of the effective performance Employment Principle, organisational capability

may refer primarily, but not exclusively, to the totality of individual employee capability within an agency. It is an obligation on an Agency Head to invest in, and develop, employees in the agency so that they can perform the tasks required of them.

Subclause 4.1A(1)(c) requires that employees be given a clear statement of the performance and behaviour expected of them and an opportunity to discuss duties. The subclause refers to a *performance agreement* which is defined at Subclause 4.1A(4). The intention here is to encompass a range of APS documentary systems and artefacts, most of which are, in practice, referred to as “performance agreements”. Functionally they should serve a common purpose: to set out what is expected of an employee, so there is common and prior understanding regarding what an employee’s performance will be measured against over a particular reporting period.

Subclause 4.1A(1)(d) requires an agency head to ensure that each APS employee receives feedback about their performance. In this context, feedback may be understood to mean an indication of a supervisor’s reaction to their employee’s work. It is expected that feedback would normally include both formal (e.g. during an annual performance assessment) as well as informal communication.

Subclause 4.1A(1)(e) requires an agency head to support supervisors, including by training and coaching. It is intended here that training or coaching would normally include formal arrangements for the tuition or instruction of supervisors. This would extend beyond informal workplace arrangements (e.g. “learning on the job”).

Subclause 4.1A(1)(f) refers to the role of performance assessment in determining salary movement and performance payments.

Subclause 4.1A(1)(g)(i-iii) provides for Agency Head obligations specific to the management of unsatisfactory performance (often referred to as “underperformance” across the Service). It requires that agency processes are fair, open and effective, and that information about key aspects of the management of unsatisfactory performance is available. Subclause 4.1A(1)(h) requires an agency head to ensure agency processes and practices for dealing with unsatisfactory performance are applied in a timely manner. The expectation is that unsatisfactory performance will be identified and addressed at the earliest practical opportunity.

Subclause 4.1A(2) sets out the basic obligations of supervisors in APS agencies in respect of the effective performance Employment Principle. Many of the obligations correspond to those applying to Agency Heads under subclause 4.1A(1), creating a cascading line of responsibilities. Correspondence is noted in the points below.

Subclause 4.1A(2)(a) stipulates that a supervisor must promote and foster high performance of duties of the employees under his or her supervision. This obligation corresponds to that of subclause 4.1A(1)(a)(i).

Subclause 4.1A(2)(b) requires that a supervisor ensure each employee has a performance agreement and corresponds to subclause 4.1A(1)(c). The requirement for consistency with work level standards and Agency corporate plans is included to ensure an employee’s performance aligns both with broader APS expectations and the strategic priorities of their agency.

Subclause 4.1A(2)(c) requires that a supervisor provides feedback. This obligation corresponds to that of subclause 4.1A(1)(d).

Subclause 4.1A(2)(d) refers to an obligation on supervisors to manage and assess performance. This obligation arises from the fact that supervisors have a lynchpin role to play in performance management – they are typically the primary actor responsible for judging whether an employee is performing effectively or not.

Subclause 4.1A(2)(e) refers to the responsibility of supervisors to build their own capability in performance management. This obligation corresponds to that of subclause 4.1A(1)(e).

Subclause 4.1A(2)(f)(i-iii) includes supervisor obligations specific to the management of unsatisfactory performance. These obligations correspond to the obligations on agency heads in subclause 4.1A(1)(g)(i-iii). As the key person responsible for managing and assessing the performance of employees, supervisors have front-line responsibility for managing unsatisfactory performance.

Subclause 4.1A(3) sets out the basic obligations of APS employees in respect of the effective performance Employment Principle. Many of the obligations correspond to those applying to both Agency Heads and supervisors, creating a cascading line of responsibilities. Correspondence is noted below.

Subclause 4.1A(3)(a) refers to an obligation on employees to strive to perform to the best of their ability in performing their duties. It encompasses an acknowledgement that capabilities will differ between individuals, but also the notion that to “make an effort”, to genuinely “try” in performing their duties is a necessary part of the job. In part, this obligation corresponds to obligations expressed in subclauses 4.1A(1)(a)(i) and 4.1A(2)(a).

Subclause 4.1A(3)(b) and (c) refer to an obligation on employees to engage constructively in clarifying work expectations and in performance management processes, more generally. This includes an onus on employees to cooperate with their supervisor in the definition and communication of duties. It stems from the reality that in the public sector, task definition and communication can be difficult and it is not exclusively the supervisor’s responsibility to get these activities right. In part, these obligations correspond to obligations expressed in subclauses 4.1A(1)(c) and 4.1A(2)(b).

Subclause 4.1A(3)(d) requires an employee to be open to and respond to feedback and corresponds to subclauses 4.1A(1)(d) and 4.1A(2)(c).

Subclause 4.1A(3)(e) refers to an employee obligation to seek opportunities to improve individual and team performance. This could include training and coaching. This obligation in part corresponds to obligations set out in subclauses 4.1A(1)(e) and 4.1A(2)(e).

Subclause 4.1A(3)(f)(i-ii) includes employee obligations specific to the management of unsatisfactory performance. The obligations correspond to the obligations on agency heads and supervisors in subclauses 4.1A(1)(g)(i-iii) and 4.1A(2)(f)(i-iii).

Subclause 4.1A(4) defines the term “performance agreement” to mean a documentary record that sets out the performance expectations in relation to the duties that have been assigned to an employee.

**Item 2 of Schedule 1** makes a technical amendment to an existing definition of ‘broadband’ in the Dictionary to clarify a link with the *Public Service Classification Rules 2000*.

**Item 3 of Schedule 1** inserts new definitions in the Dictionary to the Directions relevant to the amending Directions.

## STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

*Australian Public Service Commissioner's Amendment (Performance Management) Direction 2014* 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 *Australian Public Service Commissioner's Directions* (the Directions) are a subordinate instrument under the *Public Service Act 1999* (the Act). Among other things, the Act sets out the APS Employment Principles, which include the principle that the APS is a career based public service that “requires effective performance from each employee” (paragraph 10A(1)(d)). Section 11A of the Act provides for the Australian Public Service Commissioner (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 Employment Principles.

Chapter 4 of the Commissioner's Directions sets out directions that elaborate on the APS Employment Principle contained in paragraph 10A(1)(d) of the Act, relating to effective performance.

The purpose of the *Australian Public Service Commissioner's Amendment (Performance Management) Direction 2014* (the Amendment Direction) is to amend clause 4.1 of the Commissioner's Directions to:

- a. strengthen the obligations on agency heads with respect to the effective performance Employment Principle;
- b. make provision for certain obligations on supervisors and employees relevant to the effective performance Employment Principle;
- c. encourage APS best or better practice by including a requirement to periodically assess and compare an agency's performance management policy, and associated processes and practices.

### Human rights implications

The Amendment Direction engages the right to work and rights in work.

The right to work and rights in work are contained in articles 6(1) and 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 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. Furthermore, Article 6(2) of the ICESCR provides that a party to the convention should take steps to provide guidance and training to assist with the right to work.

The Amendment Direction supports these rights by requiring agencies to provide for fair, open, and effective management of employees' performance in accordance with policies and practices that are clearly communicated to employees and periodically reviewed and benchmarked against best practice. The Amendment Direction includes requirements for supervisors to promote and foster high performance by employees and to engage with underperforming employees to understand the nature of any underlying problem, and for employees to engage productively in the performance management process.

As such, the Amendment Direction provides for just and favourable conditions in work by providing for a process in which the performance of employees is assessed fairly and promptly within a best-practice framework, with the cooperation of all parties, and by providing for APS employees (including supervisors and managers) and agency heads to pursue and support training and development to improve capability.

The amended Directions are supported by other provisions of the Commissioner's Directions, and the broader APS legislative framework, in a way that advances the protection of human rights. The APS Values include the Value of “Respectful”, at subsection 10(3) of the Act, which provides that the APS “respects all people, their rights and their heritage”. The APS Employment Principle at paragraph

10A(1)(f) of the Act provides that the APS is a career based public service that “provides workplaces that are free from discrimination, patronage, and favouritism”.

The performance management policies, processes and practices referred to in the Amendment Direction must be applied in agencies, consistent with the APS Values and Employment Principles. These are consistent with the rights of equality and non-discrimination set out in Article 26 of the International Covenant on Civil and Political Rights (ICCPR) and Article 2(2) of the ICESCR,.

Employees who are not satisfied with the management of their performance under the agency processes and practices, referred to in the Amendment Direction, may seek review within their agency or by the Merit Protection Commissioner in accordance with section 33 of the Act, which provides APS employees with a right of review of “any APS action that relates to his or her APS employment”. This provision supports the right to an effective remedy contained in article 2(3) of the ICCPR.

### ***Conclusion***

The Amendment Direction is compatible with human rights and freedoms because it advances the protection of human rights.