

## **EXPLANATORY STATEMENT**

Issued by the authority of the Parliamentary Service Commissioner

*Parliamentary Service Act 1999*

*Parliamentary Service Commissioner's Direction 2014*

The *Parliamentary Service Act 1999* ('the Act') establishes the Parliamentary Service. Subsection 15(6) of the Act, as relevantly amended with effect from 1 July 2013, provides that the Parliamentary Service Commissioner must, by legislative instrument, issue directions for the purposes of procedures made by Parliamentary Service Secretaries ('Secretaries') under subsection 15(3) for determining whether a Parliamentary Service employee, or a former Parliamentary Service employee, has breached the Parliamentary Service Code of Conduct ('the Code of Conduct') and any sanctions to be imposed on a Parliamentary Service employee who is found to have breached the Code of Conduct.

This Direction closely follows Chapter 6 of the *Australian Public Service Commissioner's Directions 2013*, which sets out basic procedural requirements for procedures established by Australian Public Service ('APS') agency heads for determining whether an APS employee or former employee has breached the APS Code of Conduct and any sanctions to be imposed on an APS employee found to have breached that Code.

This Direction will revoke the *Parliamentary Service Commissioner's Direction 2000/1* made on 16 March 2000.

### **Overview**

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

Paragraph 15(3)(b) of the Act provides that Secretaries must establish procedures for determining any sanctions to be imposed under subsection 15(1) of the Act ('Sanctions that may be imposed') on a Parliamentary Service employee in the relevant department 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, by legislative instrument, issue directions for the purposes of paragraph 15(4)(a) of the Act.

This Direction sets out, in accordance with subsection 15(6) of the Act, the basic procedural requirements with which these procedures established by Secretaries must comply.

## **Consultation**

This Direction is similar to Directions issued by the Australian Public Service Commissioner on the handling by agency heads of suspected breaches of the APS Code of Conduct, after consultation. The parliamentary departments have been consulted.

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

A Statement of Compatibility with Human Rights has been completed for this Direction, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the Direction 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*.

The Statement of Compatibility with Human Rights for the Direction is at [Attachment A](#).

## **Notes on clauses**

Notes on the clauses of this Direction are set out at [Attachment B](#).

## **Attachment A**

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

#### **Overview of the Legislative Instrument**

The Parliamentary Service Commissioner's Direction 2014 (the Direction) is a legislative instrument issued under the *Parliamentary Service Act 1999* (the Act). The Direction prescribes basic procedural requirements for procedures established by a Secretary of a parliamentary department under subsection 15(3) of the Act for determining whether a Parliamentary Service employee in the department, or a former Parliamentary Service employee, has breached the Code of Conduct, and for determining any sanctions to be imposed on a Parliamentary Service employee for a breach of the Code of Conduct.

#### **Human rights implications**

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

Under section 15 of the Act, Secretaries are required to establish written procedures to determine whether a Parliamentary Service employee in the relevant department, or a former Parliamentary Service employee, has breached the Code of Conduct, and any sanctions to be imposed on a Parliamentary Service employee 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 directions issued by the Parliamentary Service Commissioner, and have due regard to procedural fairness.

The Direction sets out these prescribed requirements for procedures for departmental inquiries into suspected breaches of the Code of Conduct. These procedural requirements promote Parliamentary Service employees' rights in work by providing that a determination may not be made in relation to a suspected breach of the Code of Conduct by a Parliamentary Service employee, or a former Parliamentary Service 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 suspected breach, and
- notify the employee of the sanctions that may be imposed in the event that it is determined that the employee has breached the Code of Conduct (sanctions may not be imposed on former employees).

Sanctions 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 and 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, a Secretary 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 any sanctions to be imposed, is, and appears to be, independent and unbiased.

The procedures prescribed by the Direction reflect and promote the central requirements of procedural fairness, and promote Parliamentary Service employees' rights in work. Where a Code of Conduct inquiry may operate to limit a Parliamentary Service 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 Parliamentary Service employees, and, thereby, to maintain public confidence in parliamentary 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 (other than termination of employment), he or she may seek review by the Parliamentary Service Merit Protection Commissioner of the determination or sanction decision, in accordance with section 33 of the Act. Other options such as judicial review may also exist. Where a sanction of termination of employment has been imposed, an employee may apply to the Fair Work Commission for review of the termination decision under unfair dismissal provisions of the *Fair Work Act 2009*. This right of review also engages the right to a fair hearing under Article 14(1) of the International Covenant on Civil and Political Rights (ICCPR).

### ***Conclusion***

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

## **Attachment B**

### **Notes on clauses**

#### **Part 1—Preliminary**

##### **Clause 1**

This clause names this Direction as the *Parliamentary Service Commissioner's Direction 2014*.

##### **Clause 2**

This clause provides that this Direction is made under subsection 15(6) of the *Parliamentary Service Act 1999*.

##### **Clause 3**

This clause provides that this Direction commences on the day after it is registered on the Federal Register of Legislative Instruments.

##### **Clause 4**

This clause provides that this Direction revokes the *Parliamentary Service Commissioner's Direction 2000/1*.

#### **Part 2—Secretary handling of suspected Code of Conduct breaches**

##### **Clause 1**

Under subsection 15(3) of the Act, Secretaries are required to establish procedures ('the procedures') for determining whether a Parliamentary Service employee, or former employee, has breached the Code of Conduct, and, if so, any sanctions that should be imposed.

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

Clause 1 of the Direction provides that the purpose of the Direction is to set out the basic procedural requirements for the procedures.

A note to clause 1 explains that the requirements set out in the Direction and the procedures apply only in relation to a suspected Code of Conduct breach by a Parliamentary Service employee, or former Parliamentary Service 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; other ways of dealing with the suspected breach, such as counselling, may be more appropriate. The note refers to clause 52 of *Parliamentary Service Determination 2013*, which provides for circumstances in which the behaviour of a Parliamentary Service employee raises concerns that relate to both performance and conduct.

##### **Clause 2**

Subclause 2(1) provides that, for the purposes of this Direction, any reference to a Parliamentary Service employee in a department should be taken to include a former employee of that department who is suspected of having breached the Code of Conduct while employed by the department.

Subclause 2(2) provides that subparagraph 3(a)(ii) and clause 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 3**

Clause 3 provides that, before any determination is made that a Parliamentary Service 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 sub 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 4**

Under subsection 15(1) of the Act, a sanction, or sanctions, may be imposed on a Parliamentary Service 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 subsection 15(1).

Clause 4 provides that before any sanction is imposed on a Parliamentary Service employee, reasonable steps must have been taken to:

- inform the employee of the determination that he or she has 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, or sanctions, 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 5**

Paragraph 5(a) imposes an obligation on Secretaries 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 5(b) imposes a similar obligation on Secretaries to take reasonable steps to ensure that any person who makes a determination under the procedures as to the sanction(s) (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 Secretaries will reflect that principle.

#### **Clause 6**

Clause 6 provides that the process for determining whether a Parliamentary Service 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 7**

Clause 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*.