

## EXPLANATORY STATEMENT

Issued by the authority of the Australian Public Service Commissioner

*Public Service Act 1999*

### **Australian Public Service Commissioner's Amendment (2015 Measures No. 1) Direction 2015**

#### **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. Subsections 11(1) and 11A(2) of the Act provide that the Commissioner may issue directions in writing in relation to any of the APS Values or Employment Principles for the purpose of:

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

Subsections 11(2) and 11A(3) of the Act provides that the APS Values and Employment Principles have effect subject to the restrictions (if any) in directions made under the Act.

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

Under subsection 33 (3) of the *Acts Interpretation Act 1901*, where an Act confers a power to make, grant or issue any instrument of a legislative or administrative character (including rules, regulations or by-laws), the power shall be construed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

#### **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 Agency Heads and APS employees and prescribe details in respect of matters underpinning the Act including the APS Employment Principles.

Section 10A of the Act sets out the seven APS Employment Principles. The APS Employment Principles include:

- 10A(1)(c) provides 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);
- 10A(1)(e) provides in part that the APS '*provides flexible, safe and rewarding workplaces*';
- 10A(1)(f) provides in part that the APS '*provides workplaces that are free from discrimination*'; and
- 10A(1)(g) provides that the APS '*recognises the diversity of the Australian community and fosters diversity in the workplace*'.

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*’.

Section 12 of the Act provides that an Agency Head must uphold and promote the APS Values and the APS Employment Principles. Paragraph 13(11)(a) provides that employees must behave in a way that upholds the APS Values and Employment Principles.

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.

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

Chapter 3 of the Commissioner’s Directions elaborates on what an Agency Head must do in upholding and promoting the APS Employment Principles 10A(1)(f) and (g) relating to workplaces that are free from discrimination and which foster diversity.

Chapter 5 of the Commissioner’s Directions relates to APS Employment Principle 10A(1)(e), specifically that the APS ‘*provides...safe...workplaces*’.

### **Purpose of the amendments**

The purpose of the *Australian Public Service Commissioner's Amendment (2015 Measures No. 1) Direction 2015* (the Amendment Direction) is to amend the Commissioner’s Directions to:

- change the requirements for the notification of vacancies in the Public Service *Gazette* (the *Gazette*); and
- streamline content, including removing redundant or unnecessarily prescriptive directions and content better provided in guidance.

Further detail about the Amendment Direction is provided at [Attachment A](#) to this Explanatory Statement.

### **Reasons**

In 2013, the Government committed to reduce the number of employees in the APS. Arrangements were introduced on 5 November 2013 to provide a whole-of-APS approach to reducing the size of the APS workforce. The Commissioner’s Directions were amended at that time to change the requirements for notifying vacancies in the *Gazette* by providing that access to vacancies in the APS would not be open to persons outside the APS except in certain circumstances and where the Commissioner agreed. Those amendments restricted the broader scope of the Merit Employment Principle which had previously applied. Prior to November 2013, the vast majority of vacancies in the APS were notified as open to eligible members of the public as well as APS employees.

While the 2013 amendment to the Commissioner’s Directions was very effective in reducing the size of the APS, it reduced agency flexibility to select employees from a broader field.

In the 2015–16 Budget the Government announced that these interim arrangement would cease from 1 July 2015 to allow APS agencies to notify vacancies as open to eligible members of the community in line with the broader application of the Merit Employment Principle. The Amendment Direction—in items 1 to 3, 8, and 10 to 12—removes the amendments made to the Commissioner’s Directions in November 2013. Transitional arrangements for vacancies notified prior to 1 July 2015 are provided at item 14.

The Amendment Direction, in item 5, includes a mechanism for imposing a check on agency recruitment activity to ensure that the size of the public service is maintained at appropriate levels. It provides discretion for the Commissioner to require an Agency Head, by notice in writing, to seek the Commissioner's approval prior to notifying any vacancy or class of vacancies in the *Gazette*.

The Amendment Direction also makes other changes to streamline and simplify the Commissioner's Directions, including:

- repealing redundant regulation (items 4, 6, 9, 13);
- making existing requirements clearer and simpler (items 7, 15, 17 to 22, and 25 to 27); and
- removing content that is covered in other legislation or is better provided for in policy or guidance material (items 16, 23 and 24).

### **Consultation**

The Commission consulted with all APS departments, Comcare, the Australian Bureau of Statistics and the Australian Taxation Office on these amendments.

### **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 Amendment 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

#### Part 1—Main Amendments

**Item 1** of the Schedule amends subclause 2.8(1) of the Commissioner's Directions by substituting a new paragraph (b). This is a consequential amendment to the repeal of clause 2.9A at item 8. 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.

**Item 2** of the Schedule amends the heading of clause 2.9 consequential to the repeal of clause 2.9A at item 8.

**Item 3** of the Schedule is a consequential amendment to subclause 2.9(1), due to the amendment at items 1 and 8.

**Item 4** of the Schedule substitutes paragraph 2.9(1)(c) with new paragraph 2.9(1)(c) to remove the requirement for the Commissioner to give approval for vacancies to be notified with a closing date of less than seven days. The Agency Head will be permitted to decide a shorter period is appropriate in special circumstances. This amendment gives flexibility to an Agency Head to conduct more efficient and streamlined recruitment activity in accordance with the needs of the agency, while still providing for the standard seven-day notification period.

This item also includes a consequential amendment at paragraph 2.9(1)(d) that relates to the notification of a vacancy where the Commissioner has required that an Agency Head seek the Commissioner's approval before notifying the vacancy, due to the amendment at item 5.

**Item 5** of the Schedule repeals the existing subclause 2.9(2) which required special notification of Senior Executive Service (SES) vacancies. This gives flexibility to agencies in notifying SES vacancies.

Item 5 also substitutes a new subclause at 2.9(2) that allows the Commissioner to require Agency Heads to seek the Commissioner's approval before notifying APS vacancies. This subclause will enable the Commissioner to halt an agency's recruitment activity, for example where an agency's staffing level significantly exceeds its allocated staffing budget. This provides a flexible, yet focused, check on agency recruitment to ensure that the size of the public service is maintained at appropriate levels.

The use of this provision is expected to be rare. Policy advice will be provided to APS agencies outlining the circumstances in which this provision may be used. The use, operation and effectiveness of this provision will be reviewed on an ongoing basis.

**Item 6** of the Schedule amends subclause 2.9(3) to remove the requirement for the Commissioner to give approval in circumstances where an agency wishes to notify a vacancy as open only to APS employees.

This amendment gives flexibility to Agency Heads to manage recruitment activity in line with the needs of the agency. Vacancies at training, APS 1 and SES classifications must still be notified to all eligible members of the community.

**Item 7** of the Schedule is a minor amendment to subclause 2.9(5) to remove the example. The example is no longer required due to planned upgrades to the Public Service *Gazette* system (APSjobs).

**Item 8** of the Schedule repeals clause 2.9A, which provided for the stricter requirements for the notification of APS vacancies that applied from 5 November 2013 to 30 June 2015. In that period clause 2.9A provided that vacancies were notified as open only to APS employees except in limited circumstances.

It is considered appropriate to modify these arrangements from 1 July 2015 to give Agency Heads the flexibility to notify vacancies as open to all eligible members of the community. This essentially returns arrangements to those in place prior to 5 November 2013, in accordance with the broader application of the Merit Employment Principle.

**Item 9** of the Schedule substitutes a new clause 2.10 which includes minor amendments to existing clause 2.10 and clarifies that the Commissioner may be a full participant in a SES selection process.

This item of the Schedule also removes the requirement at paragraph 2.10(b)(ii) for the Commissioner to endorse the representative's certification of the selection process for SES vacancies. The removal of this requirement reduces internal red tape and gives Agency Heads the ability to make employment-related decisions promptly and efficiently, without additional processes. The requirement for the Commissioner's representative to certify that the selection process complied with the Act and these Directions remains at subclause 2.10(b).

This item of the Schedule also makes consequential amendments to the Note at clause 2.10.

**Items 10, 11 and 12** of the Schedule are consequential amendments to remove references to clause 2.9A, due to the repeal of this clause at item 8.

**Item 13** of the Schedule repeals clause 2.26 to remove the Commissioner's role in the assignment of certain employees to an SES classification. This will provide Agency Heads with increased flexibility to deploy senior employees in response to emerging priorities.

**Item 14** of the Schedule provides transitional arrangements for vacancies that were notified before the commencement of the Amendment Direction on 1 July 2015. These arrangements provide that agencies may continue those selection exercises provided the Agency Head is satisfied it is not appropriate to re-notify the vacancy.

## **Part 2—Other Amendments**

**Item 15** of the Schedule substitutes a new Chapter 1 overview at clause 1.1A which simplifies and clarifies the description of the application of the APS Values.

**Item 16** of the Schedule repeals clauses 1.7 and 1.8, as these clauses replicate the requirements of the Act to uphold and promote the APS Values.

**Item 17** of the Schedule substitutes a new Chapter 2 overview at clause 2.1A which omits material duplicating or explaining the provisions of the Act, consistent with current drafting practice and sets out the content provided in each part of Chapter 2.

**Items 18, 20 and 22** of the Schedule remove the overviews for Parts 2.1, 2.2 and 2.3 respectively, consistent with current drafting practice.

**Item 19** of the Schedule inserts an additional Note as a reminder that ‘*Subsection 10A of the Act provides for the circumstances in which a decision relating to engagement or promotion is based on merit*’.

**Item 21** of the Schedule is a minor amendment to clause 2.11, to insert ‘APS’ before ‘Employment Principle’.

**Item 23** of the Schedule repeals Chapter 3 of the Commissioner’s Directions. Clauses 3.1 and 3.2 of Chapter 3 provided an outline of Agency Heads’ responsibilities in upholding APS Employment Principles 10A(1)(f) and (g). Chapter 3, at clauses 3.3 to 3.6, also set out the requirements related to workplace diversity programs, which must be established under section 18 of the Act.

Clauses 3.1 and 3.2 elaborated on how Agency Heads and employees may uphold the APS Employment Principles but added little, if any, value to the overall obligation to uphold and promote the APS Employment Principles.

Under section 18 of the Act, an Agency Head must establish a workplace diversity program to assist in giving effect to the APS Employment Principles. Chapter 3 sets out requirements relating to such programs including detailing links to other agency plans; the requirement to publish the program on the agency’s website; and evaluation and review requirements.

While each of the measures in clauses 3.3 to 3.6 is useful to agencies in guiding the content and operation of workplace diversity programs, it is more appropriate that this information be provided in guidance issued by the APS Commission. This will give Agency Heads the flexibility to develop measures to be included in their workplace diversity programs in response to the individual needs, size, location, and the workforce composition of the agency.

**Item 24** of the Schedule repeals Chapter 5, which set out the responsibilities of Agency Heads and employees in upholding the APS Employment Principle relating to safe workplaces. This Chapter duplicated requirements set out in workplace health and safety legislation.

**Item 25** of the Schedule removes the Chapter 7 overview, consistent with current drafting practice.

**Items 26 and 27** of the Schedule make minor and consequential amendments to the Dictionary.

## 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 (2015 Measures No. 1) Direction 2015

The *Australian Public Service Commissioner's Amendment (2015 Measures No. 1)*

*Direction 2015* (the Amendment 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*.

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

The *Australian Public Service Commissioner's Directions* (the Commissioner's Directions) is a legislative instrument under the *Public Service Act 1999*. 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 '*makes decisions relating to engagement and promotion that are based on merit*' (paragraph 10A(1)(c)), '*provides flexible, safe and rewarding workplaces...*' (10A(1)(e)), '*provides workplaces that are free from discrimination*' (10A(1)(f)) and '*fosters diversity in the workplace*' (10A(1)(g)).

Section 11A of the Act provides that the Australian Public Service Commissioner (the Commissioner) may 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 2 of the Commissioner's Directions sets out directions that elaborate on the APS Employment Principle contained in paragraph 10A(1)(c) of the Act, relating to engagement and promotion decisions.

The main purpose of the Amendment Direction is to amend the Commissioner's Directions to:

- modify requirements for the notification of vacancies in the *Public Service Gazette* (the *Gazette*), effectively opening up the availability of APS vacancies to a broader range of applicants; and
- make other changes to streamline the Commissioner's Directions, removing unnecessarily prescriptive content and content that is already provided for in other legislation or is better provided for in guidance.

### **Human rights implications**

The Amendment Direction engages the following rights.

#### ***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. It also requires the provision of safe and healthy working conditions.

The Amendment Direction removes a restriction on access to APS employment that was put in place in 2013 for the purpose of reducing the size of the APS. Agencies may now notify APS vacancies as open to the wider community, allowing recruitment activity to be unrestricted in the

majority of cases. This advances the ‘right to work’ by giving agencies the flexibility to advertise vacancies to the community as a whole.

The Amendment Direction repeals Chapter 5, which related to Agency Heads’ responsibilities to put in place measures to ensure that their agencies comply with applicable work health and safety legislation; and employees’ responsibilities to comply with these measures. The *Work Health and Safety Act 2011* (Cth) sets out the requirements relating to work health and safety, including specific responsibilities of employers and employees. APS Agency Heads and APS employees must comply with this, and other, health and safety legislation.

The repeal of Chapter 5 does not change or diminish Agency Heads’ and employees’ responsibilities to provide safe workplaces or comply with relevant workplace health and safety legislation.

### ***Rights to equality and non-discrimination***

Article 26 of the ICCPR and Article 2(2) of the ICESCR 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 Amendment Direction repeals Chapter 3, which included directions relating to Agency Heads responsibilities to uphold the following APS Employment Principles:

- 10A(1)(f), which provides that the APS ‘...provides workplaces that are free from discrimination, patronage and favouritism’; and
- 10A(1)(g), which provides that the APS ‘...recognises the diversity of the Australian community and fosters diversity in the workplace.’

The removal of these requirements from the Commissioner’s Directions does not affect the legislated responsibilities of Agency Heads and APS employees to uphold the APS Employment Principles. This requirement is provided in section 12 and paragraph 13(11)(a) of the *Public Service Act 1999*, respectively.

Agency Heads and APS employees must also comply with all relevant Commonwealth anti-discrimination legislation.

### ***Right to respect for the family and rights of parents and children***

The right to respect for the family is contained in articles 23 and 17(1) of the International Covenant on Civil and Political Rights (ICCPR).

The rights of parents and children are contained in article 3 of the Convention of the Rights of the Child (CRC) and article 24(1) of the International Covenant on Civil and Political Rights (ICCPR).

The Amendment Direction repeals Chapter 3 of the Commissioner’s Directions. Chapter 3 set out measures that agencies were required to have in place to support workplace diversity. Paragraph 3.2(b) provided that an Agency Head must put in place measures in the Agency directed at ensuring that APS employees are helped to balance their work, family and other caring responsibilities effectively.

The repeal of paragraph 3.2(b) does not prevent Agency Heads putting in place measures directed at ensuring that APS employees are helped to balance their work, family and other caring responsibilities effectively. These activities are also supported by legislation and industrial instruments.



APS agencies and employees come under the coverage of the *Fair Work Act 2009*, which protects certain employees' rights to request flexible working arrangements, including employees who are parents of young children, carers, people with disability and older workers. APS agencies are also subject to particular requirements related to people who are carers under the *Carers Recognition Act 2010*. The Statement for Australia's Carers under the Carers Recognition Act may be taken to apply to employees who are also carers.

### ***Rights of people with disability***

The rights of people with disability are contained in the Convention on the Rights of Persons with Disabilities (CRPD). These includes rights relating to access to employment.

The repeal of Chapter 3 also removed the directions related to agency workplace diversity programs, including:

- the measures to be included in workplace diversity programs;
- the requirement to publish workplace diversity programs; and
- the requirements to evaluate and review workplace diversity programs.

The removal of this content does not alter the requirement for Agency Heads to establish workplace diversity programs, pursuant to section 18 of the Act.

The requirements in respect of content, publication and review of agency workplace diversity programs is better suited to policy guidance, rather than a legislative instrument. Policy guidance will give Agency Heads the flexibility and authority to develop, implement and review workplace diversity programs that appropriately address the individual needs, size, location, and workforce composition of the relevant agency. Agency Heads will also be able to freely adapt workplace diversity programs in response to changing workforce profiles.

Policy guidance including on content, publication and review of agency workplace diversity programs will be issued by the Australian Public Service Commission.

For these reasons, the Amendment Direction does not engage the relevant human rights and freedoms.

### **Conclusion**

The Amendment Direction is compatible with human rights. It advances the right to work. To the extent that it may limit any human rights, those limitations are reasonable, necessary and proportionate.