

EXPLANATORY STATEMENT

Public Service Act 1999

Australian Public Service Commissioner's Directions 2016

Issued by the authority of the Australian Public Service Commissioner

Overview

The *Australian Public Service Commissioner's Directions 2016* (the Directions) are made under the *Public Service Act 1999* (the Act), and are necessary for its effective operation.

The Directions are a legislative instrument for the purposes of the *Legislation Act 2003*. They prescribe standards with which Agency Heads and Australian Public Service (APS) employees must comply in order to meet their obligations under the Act, and support Agency Heads to fulfil their responsibilities in respect of their employer powers. The Directions commence on 1 December 2016 and they replace the *Australian Public Service Commissioner's Directions 2013*.

The Directions reflect recent reviews into public administration including the *Independent Review of Whole-of-Government Internal Regulation* (Belcher Red Tape review) and the *Unlocking potential—APS workforce management contestability review* (McPhee review). They provide additional flexibility for APS Agency Heads and reduce red tape by streamlining processes. The opportunity has also been taken to improve access to affirmative measures for Indigenous Australians and persons with a disability.

Legislative framework

The Act provides at subsections 11(1), 11A(1), 11A(2), and 15(4) for the Commissioner to issue directions in writing.

Section 10 of the Act sets out the APS Values. Section 10A of the Act sets out the APS Employment Principles and includes a definition of 'merit' for engagement and promotion decisions.

Subsection 11(1) of the Act provides that the Commissioner may issue directions in writing in relation to any of the APS Values for the purpose of:

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

Subsection 11(2) of the Act provides that the APS Values have effect subject to the restrictions (if any) in directions made under subsection 11(1).

Subsection 11A(1) of the Act provides that the Commissioner may issue directions about employment matters relating to APS employees, including engagement, promotion, redeployment, mobility, training schemes and termination.

Subsection 11A(2) of the Act provides that the Commissioner may issue directions 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(1).

Subsection 15(6) of the Act provides that the Commissioner must issue directions in writing for the purposes of paragraph 15(4)(a) of the Act.

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.

APS Values

The Directions include directions in relation to each of the APS Values. Agency Heads and all APS employees are required by the Act to uphold the APS Values. Agency Heads and SES employees have an additional responsibility under the Act to promote them.

The Directions set out the scope or application of each of the Values, and the requirements for upholding each the Values, having regard to an individual's duties and responsibilities.

APS Employment Principles

The Commissioner has issued directions on most, but not all, of the APS Employment Principles.

Merit-based employment decisions

Merit is a fundamental principle that applies to promotion and engagement decisions in the APS. The application of the merit principle is described in subsection 10A(2) of the Act. The directions on recruitment and selection—in particular, in Part 3—set out the way in which the merit principle applies to engagement and promotion decisions to allow for a reasonable balance between the protection of public interest and the efficient operation of an agency.

Performance management

The Commissioner has issued directions in relation to the Employment Principle that provides that the APS is a career-based service which 'requires effective performance from each employee'.

Breaches of the Code of Conduct

Agency Heads are required to establish procedures for determining whether an APS employee, or former employee, in the agency has breached the Code of Conduct, including by knowingly providing false or misleading information in connection with their engagement as an APS employee. Agency Heads are also required to establish procedures for imposing sanctions on APS employees. These procedures are required to comply with basic procedural requirements prescribed by the Directions, and these are set out in Part 5.

Consultation

The Australian Public Service Commission has consulted all agencies with employing powers under the Act, during development of the Directions. This includes Departments of State, Statutory Agencies, Executive Agencies, and other bodies with staff employed under the Act. In addition, the Secretaries Board and Deputy Secretaries Reference Group have been consulted about particular aspects of the Directions.

Stakeholders appreciate any action that removes the administrative burden of unnecessary red tape.

Particular support was noted for broader affirmative measures to allow agencies greater flexibility in supporting employment opportunities for disadvantaged groups.

Statement of Compatibility with Human Rights

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

Notes on clauses

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

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 Directions 2016

This Disallowable 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 Disallowable Legislative Instrument

The *Australian Public Service Commissioner's Directions 2016* (the Directions) are a subordinate instrument of the *Public Service Act 1999* (the Act). They prescribe minimum standards with which Agency Heads and Australian Public Service (APS) employees must comply in order to meet their obligations under the Act, and support Agency Heads to fulfil their responsibilities in respect of their employer powers.

Human rights implications

The Directions engage the following rights.

Right to work and rights in work

The right to work and rights in work are 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, Agency Heads are required to establish written procedures to determine whether an APS employee in the agency, or a former APS employee, has breached the Code of Conduct, and the sanction (if any) that is to be imposed 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 the Directions, and have due regard to procedural fairness.

Part 5 of the Directions sets out these prescribed requirements for procedures for agency inquiries into alleged breaches of the Code of Conduct. The prescribed requirements set out in the previous instrument, the *Australian Public Service Commissioner's Directions 2013*, are unchanged.

Right to protection against arbitrary and unlawful interferences with privacy; right to freedom of expression

The Directions engage the right to privacy in Article 17 of the ICCPR, and the right to freedom of expression in Article 19 of the ICCPR. The right to freedom of expression also includes the freedom to seek and receive information. Part 3 of the Directions provides, among other things, for notification in the *Public Service Gazette* of certain employment decisions. Subsection 34(4) provides that such a notification must include the employee's name, unless the Agency Head decides that the name should not be included because of the person's work-related or personal circumstances (for example, if the agency is a security agency, or if the individual has a legal protection order). This provision has the effect of promoting APS employees' right to privacy.

It should be noted that the requirements of Part 3 have reduced the type of employment decisions that are required to be notified in the *Gazette*, when compared to the 2013 Directions.

Subsection 34(5) provides that if a notification that does not include the employee's name relates to a promotion that is subject to review, the agency must, on or before the day of the notification, notify all

parties who are eligible to seek review of the promotion so they are aware of their rights of review, and must advise the Merit Protection Commissioner that eligible parties have been notified.

As such, where the right to freedom of expression is limited (in particular, by limiting employees' access to information), the limitation achieves the legitimate aim of promoting APS employees' right to privacy.

Section 50 requires Agency Heads to ensure there are measures in place to collect certain information from employees in the agency. However, the Directions also provide that employees must be given the option of choosing not to answer the questions that have been asked. These provisions are unchanged from the 2013 Directions.

Rights to equality and non-discrimination

The Directions promote the right to equality and non-discrimination in Article 26 of the ICCPR and Article 2(2) of the ICESCR, which prohibit discrimination on the basis of a prohibited ground, 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 Directions promote this right by providing direction and guidance on the meaning and application of the Employment Principles set out in section 10A of the Act. The Employment Principles promote equality, non-discrimination, and work rights by stipulating, among other things, that the APS: is a career-based public service that makes fair employment decisions with a fair system of review; makes decisions relating to engagement and promotion that are based on merit (the 'merit principle'); and provides workplaces that are free from discrimination, patronage and favouritism.

The merit principle provides, among other things, that a decision relating to engagement and promotion is based on merit if all eligible members of the community are given a reasonable opportunity to apply to perform the duties, and that the primary consideration in making a selection decision is an assessment of the work-related qualities of the candidates and the work-related qualities genuinely required to perform the duties.

Affirmative measures

Article 27 of the Convention on the Rights of Persons with Disabilities (CRPD) prohibits discrimination on the basis of disability with regard to all forms of employment; promotes employment opportunities and career advancement for persons with disability in the labour market; and promotes the employment of persons with disability in the public sector.

Article 1(4) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) allows for special measures to be taken in order to redress inequitable employment outcomes and realise the right to employment.

Articles 1(4) and 2(2) of the ICERD allow parties to the convention to take special measures for the purpose of advancing the fulfilment of rights and freedoms of certain racial or ethnic groups. According to the Committee on the Elimination of Racial Discrimination in its General Recommendation No 32, special measures should be appropriate to the situation to be remedied, be legitimate, be necessary in a democratic society, respect the principles of fairness and proportionality, and be temporary.

Additionally, the Committee on Economic, Social and Cultural Rights has stated in General Comment No 5 that insofar as special treatment of persons with disabilities is necessary, parties to the convention are required to take appropriate measures to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Convention, such as Article 27 of the CRPD, flowing from their disability.

The Directions promote these rights.

Sections 26 and 27 of the Directions promote the social inclusion of key disadvantaged groups in the Australian community. Key disadvantaged groups covered by affirmative measures include:

- Indigenous persons,
- people with disability who suffer work-related disadvantage, and

- people with disability whom a disability employment service provider has assessed as being unable to compete on merit due to disability.

These measures engage the rights to equality and non-discrimination in that affirmative measures apply only to Aboriginal and Torres Strait Islander persons and persons with disability. Such differences in treatment on the basis of race or disability do not amount to discrimination if the reasons for such differentiation are reasonable and objective and if the aim is to achieve a legitimate purpose.

These measures are designed to enhance the employment prospects in the APS of persons with work-related disadvantage through disability, who would otherwise be unlikely to obtain APS employment through standard APS selection arrangements, but who have the capacity to contribute to the work of an agency. The measures are also designed to assist such persons to gain skills and experience that will further their ability to participate in the workforce.

The measures are also intended to increase the representation of both people with disability and Indigenous persons in the APS workforce.

While the exceptions to the merit principle provided in these measures may limit the right under Article 6(1) of ICESCR that everyone should have the opportunity to gain their living by work which they choose or accept this is outweighed by the competing interest of promoting diversity by affirmative measures.

Right to enjoy and benefit from culture

Under section 11 of the Act, the Australian Public Service Commissioner may make Directions to determine the scope and application of the APS Values set out in section 10 of the Act. The Values include *Respectful: The APS respects all people, including their rights and their heritage*.

These provisions promote the right in Article 15 of the ICESCR to take part in cultural life, and the right conferred by Article 27 of the ICCPR on persons belonging to ethnic, religious or linguistic minorities not to be denied the right to enjoy their own culture, to profess and practise their own religion, or to use their own language.

Section 15 of the Directions requires all APS employees, having regard to their duties and responsibilities, to:

- treat people with dignity, and recognise that all people have value,
- recognise the importance of human rights, and understand human rights obligations,
- recognise and foster diversity, and
- comply with all relevant anti-discrimination laws.

Directions made by the Commissioner in relation to this Value also promote the rights to equality and non-discrimination.

Right to take part in public affairs and elections

The Directions promote the right to take part in public affairs and elections contained in Article 25 of the ICCPR. The Directions provide that where an APS employee has resigned to contest an election, they have the right to be re-engaged in their former agency on the same basis, performing the same or similar duties, and on the same terms and conditions, as before they resigned. These provisions promote the right to take part in public affairs and elections by ensuring security and continuity of employment should an APS employee contest an election unsuccessfully.

Conclusion

This Legislative Instrument is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* because it promotes the protection of human rights. To the extent that a provision operates to limit a right or freedom, those limitations are reasonable, necessary and proportionate.

NOTES ON CLAUSES

Part 1 - Introduction

Division 1 – Introduction

Section 1 sets out the name of the Directions.

Section 2 provides that the Directions will commence on 1 December 2016.

Section 3 provides the authority for the making of the Directions, namely subsections 11(1), 11A(1) and (2) and 15(6) of the *Public Service Act 1999*.

Section 4 provides that an instrument set out in a Schedule to these Directions is amended or repealed according to the terms of the Schedule.

Division 2 - Definitions

Section 5 Definitions

Section 5 defines certain words and expressions that have particular meaning in APS employment.

A note to the dictionary identifies that a number of expressions used in the Directions are defined in the Act.

‘Act’ is defined to mean the *Public Service Act 1999*.

‘Broadband’ is defined as having the meaning given in subrule 9(4) of the Public Service Classification Rules 2000.

‘Classification’ is defined to mean an approved classification within the meaning of the Classification Rules.

‘Disability employment service provider’ is defined to mean an organisation that facilitates access to employment for persons with disability.

‘Employment arrangement’ is defined to mean a fair work instrument within the meaning of the *Fair Work Act 2009*; or a transitional instrument within the meaning of the *Fair Work (Transitional Provisions and Consequential Amendments) Act 2009*; or a determination under subsection 24(1) or 24(3) of the Act; or a written contract of employment.

‘Independent Selection Advisory Committee’ is defined as having the same meaning as in the Regulations.

‘Merit’ is defined by reference to subsection 10A(2) of the Act.

‘Ongoing Parliamentary Service employee’ is defined as having the same meaning as in the *Parliamentary Service Act 1999*.

‘Parliamentary Service employee’ is defined as having the same meaning as in the *Parliamentary Service Act 1999*.

‘PRC review’ is defined to mean a review by a Promotion Review Committee under Part 5 of the *Public Service Regulations 1999*.

‘Promotion’, for an ongoing APS employee, is defined by reference to section 6 of the Directions.

‘Promotion Review Committee’ or ‘PRC’ is defined as having the same meaning as in the Regulations.

‘Public Service Gazette’ is defined to mean the *Gazette* published in electronic form.

A note to this definition states that the Public Service *Gazette* may be accessed at www.apsjobs.gov.au.

‘Redundancy benefit’ is defined by reference to subsection 48(2) of the Directions.

‘Regulations’ is defined to mean the *Public Service Regulations 1999*.

‘SES vacancy’ is defined by reference to section 8 of the Directions.

‘Similar vacancy’ is defined by reference to section 9 of the Directions.

‘Torres Strait Regional Authority’ is defined to mean the Authority established by section 142 of the *Aboriginal and Torres Strait Islander Act 2005*.

‘Training classification’ is defined as having the same meaning as in the Classification Rules.

‘Vacancy’ is defined by reference to section 7 of the Directions.

‘Work level standards’, for a classification, means the work level standards for the classification, as referred to in subrule 9(2A) of the Classification Rules or rule 10 of those Rules (as the case requires).

‘Work-related qualities’ is defined by reference to section 10 of the Directions.

Section 6 *Meaning of promotion*

Section 6 sets out the meaning of a promotion for the purposes of the Directions. For the Directions, a reference to a promotion is a reference to the ongoing assignment of duties under section 25 of the Act, to an ongoing APS employee at a higher classification than the employee’s current classification, in the same or another APS agency, with the exception of the circumstances in paragraphs 6(a) and 6(b).

Paragraph (a) sets out the circumstance of the allocation of a higher classification in a broadband to an ongoing APS employee already within the same broadband in the same agency.

Paragraph (b) sets out the circumstance of the allocation of an operational classification within the meaning of the Classification Rules, to a trainee under those Rules.

A note below this section makes clear two circumstances that are not promotions. The first is where, following a voluntary temporary reduction in an ongoing APS employee’s classification, the employee is assigned duties on an ongoing basis at their classification before the temporary reduction. The second is the temporary assignment of duties to an APS employee at a higher classification than the employee’s current classification.

Section 7 *Meaning of vacancy*

Section 7 defines the meaning of a vacancy for the purposes of the Directions. For the Directions, a vacancy exists in an agency when a decision has been made that a specified group of duties need to be performed, and it is appropriate to consider engaging a person or promoting an APS employee to perform the duties.

A note below this section explains that a vacancy may also be filled by the movement of an APS employee at the employee’s current classification, in accordance with section 26 of the Act.

Section 8 *Meaning of Senior Executive Service (SES) vacancy*

Section 8 defines the meaning of an SES vacancy for the purposes of the Directions. An SES vacancy means a vacancy at an SES classification as set out in the Classification Rules. An SES vacancy does not include an SES-equivalent classification in the same group as an SES classification.

Section 9 Meaning of similar vacancy

Section 9 defines the meaning of ‘similar vacancy’ for the purposes of the Directions. For the Directions, provided that one of the elements of paragraph (a) and all of the requirements of paragraph (b) are met, a ‘vacancy’ is similar to a notified vacancy.

Subparagraph (a)(i) provides for a vacancy to be in the same agency as the notified vacancy.

Subparagraphs (a)(ii) to (v) provide for the filling of vacancies in an agency other than the notified vacancy.

Subparagraph (a)(ii) specifies that the notified vacancy is at the SES level in accordance with the Classification Rules, in any agency. Agency Heads are expected to provide access to merit lists established for SES vacancies.

Subparagraph (a)(iii) specifies that the notified vacancy is in a centrally coordinated entry level program, in any agency. ‘Entry level program’ refers to a centrally coordinated recruitment program where the vacancy notification makes clear that the selection process is being undertaken by an agency for the purpose of identifying suitable candidates for engagement across multiple agencies. Training or equivalent entry level classifications may be used.

Subparagraph (a)(iv) specifies that an Agency Head with a notified vacancy, another Agency Head and an individual candidate who was found suitable as a result of the notified vacancy, agree in writing that the vacancy is a similar vacancy.

Subparagraph (a)(v) specifies that if the notified vacancy is for a function that was moved to another agency by a machinery of government change after the notification, the vacancy is in the Agency to which the function was moved.

Subparagraph (b)(i) requires the vacancy to be in the same category of employment (ongoing or non-ongoing) as the notified vacancy.

Subparagraph (b)(ii) requires the vacancy to comprise similar duties to the notified vacancy.

Subparagraph (b)(iii) requires the vacancy to be at the same classification as the notified vacancy.

Subparagraph (b)(iv) requires the vacancy to be performed in a similar location as the notified vacancy.

Section 10 Meaning of work-related qualities

Section 10 defines the meaning of work-related qualities for the purposes of the Directions. For the Directions, the work-related qualities that may be taken into account in making an assessment of candidates’ suitability to perform duties in accordance with paragraph 10A(2)(c) of the Act include: skills and abilities; qualifications; training and competencies; standard of work performance; capacity to produce outcomes by effective performance at the level required; relevant personal qualities, such as honesty and integrity; potential for further development; and ability to contribute to team performance. This list is not exhaustive.

Part 2 - APS Values

Section 11 Overview

The APS Values are set out in section 10 of the Act.

Section 11 of the Act provides for the Commissioner to issue directions to ensure that the APS incorporates and upholds the APS Values, and to determine, where necessary, the scope or application of the Values.

The introductory statement in the text box at Section 11 makes clear that the Directions are to support the Act in determining the standards and outcomes expected of APS employees and Agency Heads. The

statement explains that the Values can overlap, actions can involve the application of more than one Value, and each Value is of equal importance.

Section 12 *APS to incorporate and uphold APS values*

Section 12 highlights the obligation on APS employees and Agency Heads to incorporate and uphold the APS Values, and indicates the provisions in Part 2 determine the scope or application of the APS Values.

Section 13 *Committed to Service*

Section 13 sets out the requirements, having regard to the individual's duties and responsibilities, for upholding the APS Value in section 10(1) of the Act, namely:

Committed to service: The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.

Paragraph 13(a) provides that the requirements include engaging effectively with the community and providing responsive, client-focussed service delivery.

Paragraph 13(b) provides that the requirements include providing appropriate information to clients and the community about rights and entitlements, and the process for gaining access to them.

Paragraph 13(c) provides that the requirements include ensuring that decisions and interactions with clients are objective and impartial, and in accordance with Government policy.

Paragraph 13(d) provides that the requirements include encouraging innovative thought and supporting innovative solutions.

Paragraph 13(e) provides that the requirements include managing data to enhance evidence-based policy advice, ensuring information is readily available to the community.

Paragraph 13(f) provides that the requirements include supporting collaboration and teamwork, both within an agency, and with other agencies and the wider community.

Paragraph 13(g) provides that the requirements include promoting continuous improvement and managing change effectively.

Paragraph 13(h) provides that the requirements include identifying and managing areas of potential risk.

Paragraph 13(i) provides that the requirements include pursuing and supporting training and development to improve capability.

Paragraph 13(j) provides that the requirements include being responsive to Ministers, including being knowledgeable about the Government's policies and understanding the relevant issues and options, the Government's objectives and the environment in which it operates.

Section 14 *Ethical*

Section 14 sets out the requirements, having regard to the individual's duties and responsibilities, for upholding the APS Value in section 10(2) of the Act, namely:

Ethical: The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

Paragraph 14(a) provides that the requirements include acting in a way that models and promotes the highest standard of ethical behaviour.

Paragraph 14(b) provides that the requirements include following through on commitments made.

Paragraph 14(c) provides that the requirements include having the courage to address difficult issues.

Paragraph 14(d) provides that the requirements include complying with all relevant laws, appropriate professional standards, and the APS Code of Conduct.

Paragraph 14(e) provides that the requirements include acting in a way that is right and proper, as well as technically and legally correct or preferable.

Paragraph 14(f) provides that the requirements include reporting and addressing misconduct and other unacceptable behaviour by public servants in a fair, timely and effective way.

Paragraph 14(g) provides that the requirements include providing leadership in policy development, implementation, program management and regulation.

Paragraph 14(h) provides that the requirements include supporting systems that give APS employees appropriate opportunities to develop and demonstrate leadership qualities.

Section 15 *Respectful*

Section 15 sets out the requirements, having regard to the individual's duties and responsibilities, for upholding the APS Value in section 10(3) of the Act, namely:

Respectful: The APS respects all people, including their rights and their heritage.

Paragraph 15(a) provides that the requirements include treating all people with dignity and recognising that all people have value.

Paragraph 15(b) provides that the requirements include dealing with all people honestly and with integrity.

Paragraph 15(c) provides that the requirements include recognising the importance of human rights and understanding Australia's human rights obligations.

Paragraph 15(d) provides that the requirements include recognising and fostering diversity.

Paragraph 15(e) provides that the requirements include collaborating and being open to ideas in policy development, implementation, program management and regulation.

Paragraph 15(f) provides that the requirements include complying with all relevant anti-discrimination laws.

Section 16 *Accountable*

Section 16 sets out the requirements, having regard to the individual's duties and responsibilities, for upholding the APS Value in section 10(4) of the Act, namely:

Accountable: The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.

Paragraph 16(a) provides that the requirements include being answerable to Ministers for the exercise of delegated authority, and, through them, to Parliament.

Paragraph 16(b) provides that the requirements include being open to scrutiny and being transparent in decision making.

Paragraph 16(c) provides that the requirements include being able to demonstrate that actions and decisions have been made with appropriate consideration.

Paragraph 16(d) provides that the requirements include being able to explain actions and decisions to the people affected by them.

Paragraph 16(e) provides that the requirements include being accountable for actions and decisions through statutory and administrative reporting systems.

Paragraph 16(f) provides that the requirements include being able to demonstrate clearly that resources have been used efficiently, effectively, economically and ethically.

Paragraph 16(g) provides that the requirements include being answerable for individual performance.

Section 17 Impartial

Section 17 sets out the requirements, having regard to the individual's duties and responsibilities, for upholding the APS Value in section 10(5) of the Act, namely:

Impartial: The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.

Paragraph 17(a) provides that the requirements include serving the Government of the day with high quality professional support, irrespective of which political party is in power and of personal political beliefs.

Paragraph 17(b) provides that the requirements include ensuring that the individual's actions do not provide grounds for a reasonable person to conclude that the individual could not serve the Government of the day impartially.

Paragraph 17(c) provides that the requirements include ensuring that management and staffing decisions are made on a basis that is independent of the political party system, free from political bias and not influenced by the individual's political beliefs.

Paragraph 17(d) provides that the requirements include understanding the needs of the Government and providing it with the best objective, non-partisan advice based on the best evidence available.

Paragraph 17(e) provides that the requirements include providing advice that is relevant and comprehensive, is not affected by fear of consequences, and does not withhold important facts or bad news.

Paragraph 17(f) provides that the requirements include providing advice that takes account of the context in which policy needs to be implemented, the broader policy directions set by Government, and, where appropriate, implications for the longer term.

Paragraph 17(g) provides that the requirements include implementing Government policies in a way that is free from bias, and in accordance with the law.

Part 3 - Recruitment and selection

Division 1 – Upholding APS Employment Principle 10A(1)(c)

Subdivision A – Introduction

Section 18 How an Agency Head upholds APS Employment Principle 10(A)(1)(c)

The APS Employment Principles are set out in section 10A of the Act.

Subsection 11A(1) of the Act provides for the Commissioner to issue directions about employment matters relating to APS employees, including engagement, promotion, redeployment, mobility, training schemes and termination of employment.

Subsection 11A(2) of the Act provides for the Commissioner to issue directions to ensure that the APS incorporates and upholds the APS Employment Principles, and to determine, where necessary, the scope or application of the Employment Principles.

Implicit in the Employment Principles that the APS is a 'career-based public service' is the expectation that Agency Heads will put in place measures to ensure that the agency is staffed on a basis that sustains core knowledge, expertise, and standards of professionalism and behaviour.

This Part determines the scope or application of the APS Employment Principle in paragraph 10A(1)(c) of the Act, relating to engagement and promotion decisions based on merit, and the minimum requirements that an Agency Head must meet in upholding that Employment Principle.

Section 18 provides that an Agency Head upholds APS Employment Principle 10A(1)(c) when deciding whether to engage or promote a person by ensuring that the decision is based on a selection process that meets the requirements of Subdivision B for merit-based selection processes, or requirements for exceptions where the standard provisions are modified or do not apply, as set out in Subdivision C.

A note to this section explains that paragraph 10A(1)(c) of the Act requires decisions relating to engagement and promotion to be based on merit.

Subdivision B – Merit-based selection processes

Subdivision B provides directions on the APS Employment Principle that the APS is a ‘career-based public service that makes decisions relating to engagement and promotion that are based on merit’ in relation to most promotions and most ongoing and long-term non-ongoing engagements.

Section 19 Merit-based selection process for engagement or promotion

Section 19 sets out requirements for a merit-based selection process for engagement and promotion decisions. Subsection 19(1) provides that a competitive selection process for a decision to engage or promote a person to fill a vacancy meets the requirements of Subdivision B if the circumstances in paragraphs 1(a) to (d) apply. The circumstances are that:

- a. the aim and purpose of the selection process is determined in advance
- b. information about the selection process is readily available to applicants
- c. the selection process is applied fairly in relation to each eligible applicant
- d. the selection process is transparent and appropriately documented.

These are specific obligations that apply in order to uphold paragraph 10A(1)(c) of the Act, and are in addition to requirements under section 10A of the Act, for example at paragraph 10A(1)(f) to provide workplaces free from discrimination, patronage and favouritism.

The note below this subsection highlights Regulations 3.4 and 3.5, which provide for matters regarding the engagement of non-ongoing employees.

Subsection 19(2) provides that when making an engagement or promotion decision, merit must be the primary consideration underpinning that decision. Where any suitable candidates are found to be equal on merit, secondary considerations that may be relevant to the selection decision must relate to factors within the candidate’s ability to control.

The note below this subsection explains that matters within the control of the candidate include the applicant’s ability to start by a particular date, their willingness to relocate, or their ability to meet other reasonable agency requirements.

Section 20 Notification of vacancy in the Public Service Gazette

Section 20 sets out minimum requirements concerning notification of a vacancy in the *Public Service Gazette* in order to meet the ‘reasonable opportunity to apply’ component of paragraph 10A(2)(a) of the Act.

Under a heading ‘Basic requirement for notification of vacancy’, subsection 20(1) provides that a selection process for a decision to fill a vacancy meets the requirements of Subdivision B only if the circumstances in paragraphs (1)(a) to (d) are satisfied.

Paragraph 20(1)(a) requires that the vacancy, or similar vacancy, be notified in the *Public Service Gazette* within a period of 12 months before the written decision to engage or promote the person.

Paragraph 20(1)(b) requires that the vacancy be notified as open to all eligible members of the community (see also subsection 20(3)).

Paragraph 20(1)(c) requires the vacancy to be notified with a closing date for applications of at least seven calendar days after the notification, unless the Agency Head is satisfied that special circumstances support approval of a shorter period.

Paragraph 20(1)(d) 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, in accordance with subsection 20(2).

Under a heading 'Commissioner may require notification of vacancy, or class of vacancies, to be approved by Commissioner', subsection 20(2) allows the Commissioner to require Agency Heads to seek the Commissioner's approval before notifying APS vacancies. This subsection enables 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.

Under a heading 'Restricting applications to APS employees (other than APS Level 1 and training classifications)', subsection 20(3) provides that if an Agency Head decides that, for reasons of cost or operational efficiency, a vacancy at a non-SES classification should be filled by a person who is already an APS employee, the vacancy may be notified in the Public Service *Gazette* as open only to persons who are APS employees at the time of the notification.

Subsection 20(4) provides that subsection 20(3) does not apply in relation to a vacancy at the APS Level 1 classification or a training classification, and that these vacancies must always be notified as open to all eligible members of the community.

Under a heading 'Multiple Agency notification', subsection 20(5) provides that an agency participating in a multiple agency selection process must ensure that, as far as practicable, a specified vacancy is brought to the notice of the community in a way that gives eligible members of the community a reasonable opportunity to apply for it. Adequate notification of the vacancy could include, for example, separate notices by each agency or a single notice listing the agencies involved in the Public Service *Gazette*.

Under a heading 'External advertising', subsection 20(6) provides that if a vacancy notified in the Public Service *Gazette* as open to all eligible members of the community is also advertised externally, the external advertising must take place within four weeks before or four weeks after the Gazette notification.

The example below this subsection provides that a vacancy may be advertised externally on a recruitment website.

Subsection 20(7) provides that if a vacancy is notified in the Public Service *Gazette* as open only to persons who are APS employees; and it is subsequently decided to advertise the vacancy externally as open to all eligible members of the community, the vacancy must be re-notified in the Gazette with the changed eligibility provision.

Under a heading 'Meaning of APS employee', subsection 20(8) defines the meaning of an APS employee for the purpose of section 20. For this purpose an APS employee means a person who is a current ongoing APS employee or current ongoing Parliamentary Service employee, or who was, at the time of the relevant Gazette notification, a non-ongoing APS employee or non-ongoing Parliamentary Service employee.

Section 21 Additional requirements for SES engagement or promotion decisions

Section 21 sets out requirements, in addition to sections 19 and 20 of the Directions, for a merit-based selection process for the engagement or promotion of a person as an SES employee.

Paragraph 21(a) requires the Commissioner, or a representative of the Commissioner, to be a full participant in the selection process.

Paragraph 21(b) requires that, at the end of the process, if a representative of the Commissioner participated in the selection process, that representative has certified that the selection process complied with the Act and the Directions.

Subdivision C – Engagement and promotion in certain circumstances

Subdivision C provides directions on the APS Employment Principle that the APS is a ‘career-based public service that makes decisions relating to engagement and promotion that are based on merit’ in relation to short-term engagements and other circumstances where it is appropriate to modify the requirements of Subdivision B.

Section 22 Engagement on a short-term, irregular or intermittent basis

The purpose of this provision is to provide greater flexibility where Agency Heads have determined that non-ongoing engagement is most appropriate in the circumstances. These provisions are to be used where duties performed are required for a specific period of time or where there is a specified task to complete.

Paragraph 10A(1)(b) of the Act requires the usual basis for engagement to be ongoing.

Subsection 22(1) provides that an Agency Head may engage a person to perform duties as a non-ongoing employee without complying with Subdivision B if the engagement is for a specified term or the duration of a specified task and the period of employment is 18 months or less, or if the engagement is for duties that are irregular and intermittent (commonly referred to as casual engagement). In these circumstances, an Agency Head is required to bring a vacancy to the attention of the community and be satisfied that the person to be engaged has the work-related qualities genuinely required to perform the relevant duties.

Subsection 22(2) provides that an Agency Head may extend such a specified term or specified task engagement one or more times provided that there is a continuing need for the duties to be performed. Any extension of the engagement cannot exceed three years.

This provides flexibility where the duties or tasks are required beyond the initial timeframe. The provisions include that the person engaged must be performing the duties to a satisfactory standard or better, the Agency Head is satisfied that it remains appropriate for the duties to be performed on a non-ongoing basis, and the extension(s) will contribute to efficient and effective organisational performance.

Subsection 22(3) provides that an Agency Head must ensure as far as practicable that a vacancy in the agency to which this section applies is brought to the notice of the community in a way that gives eligible members of the community a reasonable opportunity to apply for it.

The example below this subsection provides that a vacancy may be brought to the notice of the community by being advertised in the Gazette, or access being provided to non-ongoing APS employment registers.

Subsection 22(4) provides that as a minimum requirement, for a vacancy to be filled under this section, the Agency Head must be satisfied that the person to be engaged has the work-related qualities genuinely required to perform the relevant duties.

The note below this subsection highlights Regulations 3.4 and 3.5, which provide for matters regarding the engagement of non-ongoing APS employees.

Section 23 Engagement of person from state or territory jurisdiction

Section 23 provides that an Agency Head may engage a person as a non-ongoing APS employee for a specified term without notifying a vacancy in the Public Service *Gazette* or conducting a competitive merit selection process, if the person is an employee of a State or Territory, or of a State or Territory authority, and the Agency Head has entered into an agreement with the State or Territory, or relevant authority, to engage the person as a non-ongoing employee for a specified term.

The note below this subsection highlights that Regulations 3.4 and 3.5, which provide for matters regarding the engagement of non-ongoing APS employees, would apply to such an engagement.

Section 24 Engagement of ongoing APS employee as non-ongoing APS employee

Section 24 provides for an Agency Head to engage an ongoing APS employee to perform duties as a non-ongoing APS employee, in certain circumstances, without the need to notify a vacancy or conduct a competitive selection process. The circumstances are:

- a. the person is to be engaged for a specified term or specified task; and
- b. the person resigns as an ongoing APS employee in order to commence the engagement as a non-ongoing APS employee for a specified term or specified task; and
- c. the engagement as a non-ongoing APS employee is at the same classification as the person's current classification, or at a lower classification.

This provision may allow, for example, an Agency Head to support an APS employee who is a member of the Commonwealth Superannuation Scheme to voluntarily enter into transition to retirement arrangements, where the Agency Head chooses to support such an arrangement.

The note below this subsection highlights that Regulations 3.4 and 3.5, which provide for matters regarding the engagement of non-ongoing APS employees, would apply to such an engagement.

Section 25 Engagement of non-ongoing APS employee as ongoing employee in exceptional circumstances

Subsection 25(1) provides that an Agency Head may, in writing, seek the Commissioner's authorisation of the engagement by the Agency Head of a non-ongoing employee as an ongoing employee without complying with Subdivision B. The Commissioner may only authorise the engagement by the Agency Head if the Commissioner is satisfied that exceptional circumstances justify such an engagement.

Subsection 25(2) provides that an Agency Head may only make such a request if the Agency Head is satisfied that:

- a. the relevant duties are more appropriately undertaken by an ongoing APS employee; and
- b. the person to be engaged as an ongoing APS employee has the work-related qualities genuinely required to perform the relevant duties; and
- c. the engagement as an ongoing APS employee is at the person's classification (or equivalent) as a non-ongoing APS employee; and
- d. the original engagement of the person, or an extension of the engagement of the person, as a non-ongoing APS employee, complied with all aspects of Subdivision B; and
- e. the engagement is necessary for the agency's operations.

Section 26 Affirmative measure—Indigenous employment

This section provides that a vacancy may be notified in the Public Service *Gazette* or otherwise brought to the attention of the community with an eligibility restriction. The section contains conditions which clarify the eligibility requirements.

Subsection 26(1) provides that an Agency Head, consistent with Commonwealth law, can identify a vacancy as open only to Aboriginal and/or Torres Strait Islander persons.

Paragraph 26(2)(a) provides that the Agency Head must ensure that a vacancy identified under section 26 accepts as applicants only persons who are of Aboriginal and/or Torres Strait Islander descent; who identify as Aboriginal and/or Torres Strait Islander; and are accepted by their community as being Aboriginal and/or Torres Strait Islander.

Paragraph 26(2)(b) provides that the Agency Head must ensure a selection process with eligible candidates under this provision satisfies the criteria for a competitive selection process in accordance with

Subdivision B, or satisfies the criteria for a short-term, irregular or intermittent engagement in accordance with section 22.

The note below this subsection highlights Regulations 3.4 and 3.5, which provide for matters regarding the engagement of non-ongoing APS employees.

Subsection 26(3) provides that in this section, the terms ‘Aboriginal’ and ‘Torres Strait Islander’ have the same meaning as in the *Racial Discrimination Act 1975*.

Section 27 *Affirmative measure—disability*

Subsection 27(1) provides that an Agency Head can identify a vacancy as being open only to persons who have a disability, or a particular type of disability.

For the purposes of this section, ‘disability’ may be as defined by the Australian Bureau of Statistics in their Survey of Disability, Ageing and Carers (Disability, Ageing and Carers, Australia: Summary of Findings, 2012 (cat. no. 4430.0)).

Paragraph 27(2)(a) provides that the Agency Head must ensure that a selection process for a vacancy identified under this section accepts only eligible persons as applicants, as defined at subsection (1). That is, applicants must have a disability, or particular type of disability, to be eligible.

Paragraph 27(2)(b) provides that the Agency Head must ensure:

- a. a selection process with eligible candidates under this provision otherwise satisfies the criteria for a competitive selection process in accordance with Subdivision B; or
- b. a selection process with eligible candidates under this provision otherwise satisfies the criteria for a short-term, irregular or intermittent engagement in accordance with section 22; or
- c. an engagement or promotion decision is based on a disability employment service provider assessing an individual as being unable to successfully compete on merit in a competitive selection process.

The note below this subsection highlights Regulations 3.4 and 3.5, which provide for matters regarding the engagement of non-ongoing APS employees.

Section 28 *Affirmative measure—RecruitAbility Scheme*

Section 28 modifies the application of the Employment Principle relating to merit in engagement and promotion decisions by allowing Agency Heads to adopt a special process for considering applications where it has been notified in the *Gazette* that the RecruitAbility Scheme (the Scheme) will apply to the selection process for specified vacancies in the agency.

Subsection 28(1) provides that an Agency Head may notify a vacancy in accordance with section 20 and specify that the Scheme applies to the selection process. Where the agency has determined that the Scheme will apply in relation to a vacancy, the agency must include reference to the Scheme in the relevant notification in the *Gazette*.

The note below this subsection explains that the Scheme is an affirmative measure to make arrangements for people with disability to be considered for engagement or promotion.

Subsection 28(2) provides that the Agency Head must ensure a selection process under this provision otherwise satisfies the criteria for a competitive selection process in accordance with Subdivision B.

Subsection 28(3) clarifies that specifying that the Scheme applies to a vacancy does not require the successful applicant to be a person who applied under the Scheme. The successful applicant may be a person who does not have, or has not declared, a disability.

Section 29 Promotion after appointment to a statutory office

Subsection 29(1) allows an Agency Head to request the Commissioner to authorise the promotion of an ongoing APS employee, without complying with Subdivision B, if:

- a. the employee was granted leave without pay for appointment to a statutory office of a kind that requires the Commissioner, or a representative of the Commissioner, to be a participant in the selection process for the office, and
- b. the employee's appointment to the statutory office has not expired, or expired no more than three months before the Commissioner was asked to authorise the promotion, and
- c. the duties to which the employee is to be assigned are assessed by the Agency Head as being at an APS classification that is equivalent to, or lower than, the duties of the statutory office, and
- d. the Agency Head is satisfied that the employee has the necessary work-related qualities to perform duties at the APS classification to which the employee is to be promoted.

Subsection 29(2) provides that the Commissioner may authorise the promotion. In making such a decision, consideration may be given to the length of the appointment to the statutory office, the selection process conducted for that appointment, and any other relevant matters.

Subsection 29(3) provides that, if the Commissioner authorises the promotion, the Agency Head may then promote the employee.

Section 30 Engagement of non-APS employee following a machinery of government change

Section 30 provides that when the Commissioner acts under paragraph 72(1)(c) or (d) of the Act to engage a person, or determine that a person becomes engaged, in a specified agency following a machinery of government change, the requirements of Subdivision B do not apply.

Section 31 Engagement of an ongoing Parliamentary Service employee as an ongoing APS employee

Section 31 continues longstanding mobility arrangements that apply to persons employed under the *Parliamentary Service Act 1999*. It allows Agency Heads to engage an ongoing Parliamentary Service employee as ongoing APS employee at a classification comparable to their Parliamentary Service classification or lower, without satisfying the requirements of Subdivision B.

The example under this section demonstrates a comparable classification between the Parliamentary Service and the APS. A comparable classification for Parliamentary Service Group classification level 5 is APS Group classification level 5. A lower classification for Parliamentary Service Group classification level 5 is APS Group classification level 1, 2, 3 or 4.

Section 32 Re-engagement of election candidates

Section 44(iv) of the *Constitution* provides, in part, that a person who holds an office of profit under the Crown is incapable of being chosen, or of sitting, as a Senator or Member of the House of Representatives.

Section 32 of the Act provides that if a person resigned as an APS employee in order to contest an election that is specified in the Directions, then, provided that the resignation took effect not earlier than six months before the closing date for nominations, and the person was a candidate in the election and failed to be elected, the person is entitled to be engaged again as an APS employee, in accordance with the relevant provisions of the Directions.

Under the heading 'Person may apply to be re-engaged as an APS employee', subsection 32(1) provides that an Agency Head may re-engage a person as an APS employee without complying with Subdivision B, if:

- a. the person is a former APS employee in the agency, whose employment ended because the person resigned to contest:
 - i. an election for a member of a House of the Parliament of the Commonwealth or of a State;
 - ii. an election for a member of the Legislative Assembly of the Australian Capital Territory or the Northern Territory;
 - iii. an election for a member of the Torres Strait Regional Authority, as established under Division 5 of Part 3A of the *Aboriginal and Torres Strait Islander Act 2005*, and
- b. section 32 of the Act applies to the person, and
- c. the person applies to the Agency Head to be engaged pursuant to section 32 of the Act and within the time limit identified at subsection 32(2) of the Directions, and
- d. if the former employment was non-ongoing, the employment would not have ended except for the resignation, and the person applies to the Agency Head to be engaged before the employment would have ended if the person had not resigned.

Subsection 32(2) provides that a former employee identified by subsection 32(1)(a) who resigned to contest an election, must apply for re-engagement to the relevant Agency Head within the following time limits:

- a. if the result of the election is not disputed—within two months after the declaration of the result of the election; or
- b. if the result of the election is disputed—within two months after a court of disputed returns decides the petition disputing the result, or the petition is withdrawn or lapses; or
- c. if the Commissioner has made a declaration under subsection 32(3)—as soon as practicable after receiving a notice of the declaration.

Subsection 32(3) provides that the Commissioner may declare that a person is taken to be a former APS employee of a specified agency for the purposes of paragraph 32(2)(c) if the Commissioner is satisfied that it is appropriate to do so.

The example under this subsection clarifies that the Commissioner may make a declaration under paragraph 32(2)(c) if the agency in which the person was employed at the time of resignation no longer exists, or the agency is no longer responsible for duties that were previously carried out by the employee.

Under the heading ‘Basis on which person may be re-engaged as an APS employee’, subsection 32(4) provides that where the Agency Head engages the person as an APS employee pursuant to section 32 of the Act and this section, the person must be:

- a. engaged on the same basis (ongoing or non-ongoing) as the person’s employment before resigning, and at the same classification; and
- b. assigned duties that are the same as, or similar to, the duties the person had immediately before the resignation or, if such duties are unavailable, other duties at the same classification; and
- c. engaged on the same terms and conditions of employment that applied to the person when the person resigned, or, if the remuneration, or another term or condition, applying to the person’s previous classification, has changed since the person resigned, the changed terms and conditions.

Subsection 32(5) provides that continuity of the service of the person is taken not to have been broken by the period between the person’s resignation and the person’s re-engagement as an APS employee, but that period does not count as service for the purposes of the National Employment Standards, or an employment arrangement that applies to the person.

The note under this subsection refers to the *Long Service Leave (Commonwealth Employees) Act 1976* and the *Maternity Leave (Commonwealth Employees) Act 1973* for long service leave and paid maternity leave entitlements.

Under the heading ‘Specified elections’, subsection 32(6) provides that the elections specified at subsection 32(1) are specified for the purposes of paragraph 32(1)(a) of the Act.

Section 33 Re-engagement of a former APS employee

Subsection 33(1) provides that an Agency Head may engage a former employee as an ongoing or non-ongoing employee, without complying with Subdivision B, if:

- a. the Agency Head is satisfied that the person’s former employment should not have ended; or
- b. the engagement will settle legal action relating to the termination of the employee’s employment; or
- c. an appropriate authority has recommended or ordered the reinstatement of the person.

The note under this subsection identifies examples of an appropriate authority, for the purpose of paragraph 33(1)(c), as including the Federal Court of Australia, the Fair Work Commission, or the Australian Human Rights Commission.

Subsection 33(2) provides that an engagement under this section must be on the same basis (ongoing or non-ongoing) as the person’s former employment, and must be at the same classification or a lower classification.

Division 2 – Gazettal of certain employment decisions and promotions

Section 34 Gazettal of employment decisions

Under the heading ‘Decisions that must be notified’, subsection 34(1) provides that certain employment decisions must be notified in the Public Service *Gazette*. The decisions are:

- a. the promotion of an ongoing APS employee;
- b. the promotion of an ongoing APS employee, following the decision of a Promotion Review Committee under subparagraph 5.18(1)(b)(ii) of the Regulations that has not been notified under paragraph (a);
- c. the engagement, promotion or assignment of duties of a person made in accordance with the recommendation of an Independent Selection Advisory Committee, under subregulation 4.10(2) of the Regulations
- d. the engagement of an ongoing Parliamentary Service employee as an ongoing APS employee at a higher classification than the person’s current classification as a Parliamentary Service employee; and
- e. the termination of the employment of an ongoing APS employee on the ground mentioned in paragraph 29(3)(g) of the Act (breach of the Code of Conduct).

Under the heading ‘Time within which notification must be made’, subsection 34(2) provides that a decision that must be notified in the Public Service *Gazette* must be notified within three months after the decision is made, unless the Commissioner agrees to a different arrangement. The Commissioner may agree to a different timeframe should that be necessary in particular circumstances.

Subsection 34(3) provides that where an employment decision is made on the basis that the person is required to satisfy an eligibility requirement before the decision becomes operational, the three month period in which the decision must be gazetted is taken to commence at the time the eligibility requirement is met. This subsection recognises there can be practical difficulties with the standard notification provisions when a decision is made, but its taking effect is conditional on satisfying an eligibility requirement. The note under this subsection provides security or character clearance as examples of eligibility requirements.

Under the heading ‘Notification generally to include employee’s name’, subsection 34(4) provides that a notification in the Public Service *Gazette* must include the employee’s name, unless the Agency Head decides that the name should not be included because of the person’s work-related or personal

circumstances. Circumstances may include if the person performs security-related duties in a security agency, or has a legal protection order.

Subsection 34(5) provides that if a notification that does not include the employee's name relates to a promotion that is subject to review, the Agency Head must, on or before the day of the notification, notify all parties who are eligible to seek review of the promotion of their rights of review, and advise the Merit Protection Commissioner that eligible parties have been notified.

Under the heading 'Notification relating to a former ongoing Parliamentary Service employee', subsection 34(6) provides that if a person whose engagement is notified under this section was an ongoing Parliamentary Service employee immediately before the engagement and was engaged at a higher classification than the person's Parliamentary Service classification, the notification in the Public Service *Gazette* of the decision must include a statement to that effect and must note that the engagement may be subject to review by a Promotion Review Committee in accordance with Part 5 of the Regulations.

Section 35 Gazettal when decisions previously notified are cancelled

Under the heading 'Decisions that must be notified', subsection 35(1) provides that an Agency Head must notify in the Public Service *Gazette* a decision to cancel certain kinds of decisions. The decisions are:

- a. a promotion notified under paragraph 34(1)(a) where the cancellation decision is made by the Agency Head
- b. a promotion notified under paragraph 34(1)(a) or (b) where the cancellation decision is the result of a decision of a Promotion Review Committee;
- c. an engagement, promotion or assignment of duties notified under paragraph 34(1)(c)
- d. an engagement notified under paragraph 34(1)(d);
- e. a termination of employment notified under paragraph 34(1)(e);

Under the heading 'Time within which notification must be made', subsection 35(2) provides that a cancellation decision must be notified in the Public Service *Gazette* within 3 months after the cancellation decision is made.

Under the heading 'Requirements of notification', subsection 35(3) provides that the notification of a cancellation decision must include the date of effect of the cancellation decision and the person's name, unless the original notification did not include the name.

Section 36 When promotion decisions take effect

Section 36 establishes the dates of effect of promotions, subject to the notification of a promotion decision in the Public Service *Gazette* and whether the promotion may be subject to review by a Promotion Review Committee in accordance with Part 5 of the Regulations.

For the purposes of this section:

- a. 'relevant parties' is taken to mean the employee, the Agency Head, and, if the employee is moving from another agency, the original Agency Head
- b. 'application period' is taken to mean (for a promotion decision) the period in which an application for PRC review of the decision may be made, including any extension of that period
- c. 'notification' is taken to mean (for a promotion decision) the notification of the decision under section 34
- d. 'PRC review' is taken to mean review by a Promotion Review Committee under Part 5 of the Regulations.

Subsection 36(1) provides that this section applies to a promotion decision, which is a decision to promote an ongoing APS employee to a higher classification, or a decision to engage an ongoing

Parliamentary Service employee as an ongoing APS employee at a higher classification than the employee's Parliamentary Service classification.

The note under this subsection explains that Regulation 5.9 sets out requirements for applications for review of promotion decisions.

Subsection 36(2) provides that, if the promotion decision is not subject to PRC review, the decision takes effect either, on a date that has been agreed by the relevant parties that is after the decision is notified in the Public Service *Gazette* or, otherwise, four weeks after Gazette notification.

Subsection 36(3) sets out the date of effect for promotion decisions that are subject to PRC review. Column 3 specifies when a promotion decision takes effect when the circumstances set out in column 2 are met.

Item 1 of subsection 36(3) provides that where no application for review is made before the end of the application period, the promotion decision takes effect either, on an agreed date that is not earlier than the end of the application period, or otherwise two weeks after the end of the application period.

Item 2 of subsection 36(3) provides that where an application for review is made before the end of the application period, but is withdrawn before the PRC makes a decision, the promotion decision takes effect either, on an agreed date that is not earlier than the end of the application period, or otherwise two weeks after the Agency Head is notified of the withdrawal of the application.

Item 3 of subsection 36(3) provides that where an application for review is made before the end of the application period and a PRC is appointed, but the application lapses before the PRC completes the review, the decision takes effect either, on an agreed date that is after the Agency Head is notified of the lapse of the application, or otherwise two weeks after the Agency Head is notified of the lapse of the application.

Item 4 of subsection 36(3) provides that where an application for review is made before the end of the application period, but the Merit Protection Commissioner decides under subregulation 5.10(1) that it is not necessary to appoint a PRC, the promotion decision takes effect either, on an agreed date that is after the Agency Head is notified of the Merit Protection Commissioner's decision, or otherwise the later of the day the Agency Head is notified and four weeks after the notification in the Public Service *Gazette*.

Item 5 of subsection 36(3) provides that where an application for review is made before the end of the application period and a PRC is appointed, and the PRC upholds the decision, the promotion decision takes effect either, on an agreed date that is after the Agency Head is notified of the decision of the PRC, or otherwise four weeks after the Agency Head is notified of the PRC decision.

Item 6 of subsection 36(3) provides that where an application for review is made before the end of the application period and a PRC is appointed, and the PRC varies the decision, the promotion decision takes effect either, on an agreed date that is after the Agency Head is notified of the decision of the PRC, or otherwise four weeks after the Agency Head is notified of the PRC decision.

Subsection 36(4) provides that this section is subject to section 38, which deals with the date of effect of a promotion where the employee is under investigation for a suspected breach of the Code of Conduct and the promotion is in another agency.

Part 4 – Working in the APS

Division 1 – Movement of APS employees between agencies

This division makes provision for ongoing APS employees to move between agencies subject to written agreement between the heads of those agencies.

Section 37 Moves between agencies not associated with promotion

Subsection 37(1) provides that this section applies where an Agency Head agrees in writing to the movement of an APS employee to another APS agency that is not associated with a promotion.

The note under this section explains that section 26 of the Act provides the power to enter into agreements of this kind.

Paragraph 37(2)(a) provides that if the agreement relates to an ongoing move, the move takes effect on a date agreed in writing by the employee and the two Agency Heads, or otherwise four weeks after the employee informs the original Agency Head in writing.

Paragraph 37(2)(b) provides that if the agreement relates to a temporary move and if the original Agency Head approves the proposed temporary move in writing, the move takes effect on the agreed date of effect. If the original Agency Head does not approve the proposed temporary move in writing and the employee commences duties in the new agency, the move takes effect as an ongoing move to the new agency at the employee's existing classification from the date the employee commences duties in the new agency.

Subsection 37(3) provides that if an agreement relates to a temporary move and the new Agency Head and the APS employee agree to vary the period of the move, then, if the original Agency Head approves the variation in writing, the variation has effect according to its terms. If the original Agency Head does not approve the variation in writing, the variation has no effect.

Under the heading 'Movement in cases of a suspected breach of the Code of Conduct', subsection 37(4) provides that despite subsection 37(2), if an employee has been advised that a Code of Conduct inquiry has commenced in accordance with procedures established under the Act, the move between agencies will not take effect until the matter to which the suspected breach relates is resolved, unless the two Agency Heads agree otherwise. This provision addresses a perception that an employee can avoid or frustrate a misconduct enquiry by moving to another agency.

Subsection 37(5) provides that the matter is taken to be resolved when a determination is made as to whether the employee has breached the Code of Conduct, or such a determination is decided to be unnecessary.

Where an employee has been found to have breached the Code of Conduct, the Agency Head of the gaining agency must determine the appropriate sanction in accordance with procedures established under the Act.

Section 38 Moves between agencies on promotion

The standard provisions for date of effect of a promotion are set out in Section 36. Section 38 provides for moves between agencies on promotion where the employee is suspected of having breached the Code of Conduct.

Subsection 38(1) provides that if an employee has been advised that a Code of Conduct inquiry has commenced in accordance with procedures established under the Act, the move between agencies will not take effect until the matter to which the suspected breach relates is resolved, unless the two Agency Heads agree otherwise.

It should be noted that paragraphs 38(1)(a) and 38(1)(b) need not occur in that order.

Subsection 38(2) provides that a suspected breach matter is taken to be resolved when a determination is made as to whether the employee has breached the Code of Conduct, or such a determination is decided to be unnecessary.

Division 2 – Performance management

Section 11A of the Act provides for the Commissioner to issue directions in writing about employment matters relating to APS employees. It also provides for 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 APS Employment Principles.

Section 10A of the Act sets out the APS Employment Principles, including a requirement for effective performance. The Code of Conduct provides, among other things, that APS employees and Agency Heads behave at all times in a way that upholds the APS Employment Principles (subsection 13(11) of the Act).

Section 39 Achieving effective performance

Section 39 provides that in upholding and promoting the Employment Principle in paragraph 10A(1)(d) of the Act, an Agency Head will support employees to achieve effective performance by ensuring that:

- a. the agency has performance management policies and processes that support a culture of high performance; and
- b. performance by employees is effectively managed; and
- c. each employee is given a clear statement of the performance and behaviour expected of them, and an opportunity to discuss their duties; and
- d. each employee is required to participate constructively in performance management processes; and
- e. fair and effective measures are in place to address underperformance by an employee.

The note below this section explains that paragraph 10A(1)(d) of the Act provides that the APS is a career-based public service that requires effective performance from each employee.

Section 40 Managing performance in cases of a potential breach of the Code of Conduct

Section 40 recognises that circumstances may arise in which it is not clear whether an occurrence of poor behaviour by an APS employee is more appropriately dealt with under an agency's performance management processes or as a potential breach of the Code of Conduct.

Section 40 provides that, where the behaviour of an APS employee raises concerns that may relate both to performance and to conduct, the employee's Agency Head must have regard to any relevant standards and guidance issued by the Commissioner before making a decision as to whether to deal with the matter as a potential breach of the Code of Conduct under procedures established under subsection 15(3) of the Act.

The note under this section highlights the connection between this section and Part 5, which provides for handling suspected breaches of the Code of Conduct.

Part 5 – Handling suspected breaches of the Code of Conduct

Division 1 – Introduction

Section 41 Purpose

Section 41 provides that the purpose of this Part is to set out the basic procedural requirements for the procedures established by an Agency Head for determining breaches of the Code of Conduct.

A note under this section explains that under subsection 15(3) of the Act, Agency Heads are required to establish written procedures for determining whether an APS employee, or former employee, has breached the Code of Conduct, and, if so, what sanction, if any, should be imposed.

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

central elements of the principles of procedural fairness are the right of the person to know the case against them, and the right of the person to provide a relevant statement, accompanied by supporting evidence, if any, before a decision is made.

A second note under this section highlights the connection between this Part and section 40, which provides for managing performance in cases of a potential breach of the Code of Conduct.

Section 42 Application to former APS employees

Section 42 provides that, for the purposes of Division 2 of this Part, any reference to an APS employee in an agency should be taken to include a former employee of that agency who is suspected of having breached the Code of Conduct while employed by the agency. The exceptions to this are subparagraph 43(a)(ii) and section 44, as these two provisions relate to sanctions under subsection 15(1) of the Act, which cannot be imposed on a former employee.

Division 2 – Basic procedural requirements

Section 43 Employee must be informed that a determination is being considered

Section 43 provides that, before any determination is made that an APS employee has breached the Code of Conduct, reasonable steps must have been taken to:

- a. inform the employee, or former employee, of the details of the suspected breach of the Code and the sanctions that may be imposed on the employee under section 15(1) of the Act; and
- b. give the employee reasonable opportunity to make a statement in relation to the suspected breach.

Section 44 Employee must be informed before a sanction is imposed

Under section 15(1) of the Act, a sanction or sanctions may be imposed on an APS 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 section 15(1). A sanction cannot be imposed on a former employee.

Section 44 provides that, before any sanction is imposed on an APS employee, reasonable steps must have been taken to:

- a. inform the employee of the determination that he or she had breached the Code of Conduct;
- b. 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
- c. give the employee reasonable opportunity to make a statement in relation to the sanction or sanctions under consideration.

Section 45 Person making determination to be independent and unbiased

Paragraph 45(a) imposes an obligation on Agency Heads 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 45(b) imposes a similar obligation on Agency Heads to take reasonable steps to ensure that any person who makes a determination under the procedures as to the sanction (if any) to be imposed on an employee under subsection 15(1) of the Act is, and appears to be, independent and unbiased.

Section 46 Determination process to be informal

Section 46 provides that the process for determining whether an 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.

Section 47 *Record of determination and sanctions*

Section 47 regulates the records to be kept in cases where a determination is made in relation to an employee or former employee suspected of breaching the Code of Conduct. This clause provides that a written record must be made of:

- a. the suspected breach; and
- b. the determination (which may be a determination that there was no breach of the Code of Conduct); and
- c. any sanctions imposed consequent upon a determination of a breach of the Code of Conduct; and
- d. if a statement of reasons was given to the employee, the statement of reasons.

The note below this section explains that records created under this section are also regulated by the *Archives Act 1983* and the *Privacy Act 1988*.

Part 6 – Other employment matters

Section 48 *Restrictions on engaging person who has received a redundancy benefit*

Section 48 sets out the arrangements applying to the engagement of a person as an APS employee in circumstances where the person was formerly employed by an APS agency or the Australian Parliamentary Service, and received a redundancy benefit on cessation of that employment.

This section limits the capacity of an Agency Head to engage such persons for a prescribed period following the cessation of their previous APS or Parliamentary Service employment. The section also sets out the types of payment that constitute a ‘redundancy benefit’ and explains the way in which the redundancy benefit period (or restriction period) is to be calculated. This period is based on the value of the redundancy benefit received by the person.

Subsection 48(1) provides Agency Heads with the discretion to engage a person who has received a redundancy benefit in certain circumstances prior to the expiry of their restriction period.

Paragraph 48(1)(a) requires the Agency Head to consider the person’s engagement as essential for the agency’s operation, having regard to the nature of the duties to be performed and the work-related qualities of the person.

Paragraph 48(1)(b) requires the Commissioner’s approval be obtained prior to engaging a redundancy benefit recipient as either an ongoing APS employee or a non-ongoing SES employee. The Commissioner’s approval is not required for an Agency Head to engage a person who is still within their restriction period as a non-ongoing non-SES employee.

The note below this subsection highlights the term ‘work-related qualities’ is defined at section 10.

Subsection 48(2) provides that for the purposes of this section, certain terms have a specified meaning.

‘Person who has received a redundancy benefit’ is taken to mean a person formerly employed by an APS agency or the Australian Parliamentary Service, who received a redundancy benefit on cessation of that employment, and for which the redundancy benefit period has not yet ended.

‘Redundancy benefit’ is taken to mean a severance payment, or similar payment, made to an employee on the ending of their employment; or a payment made to an employee as a result of shortening a retention period; or an incentive to retire payment made under section 37 of the Act or section 37 of the *Parliamentary Service Act 1999*.

Payments that are not to be taken to be redundancy benefits for the purposes of this section are: a payment made to an employee as redundancy pay under section 119 of the *Fair Work Act 2009*; or a payment made to a person in lieu of notice of termination of employment. For clarity, the following payments are not taken to be a redundancy benefit as they are not paid to an ongoing APS or Parliamentary Service

employee: payment made to a person engaged for a specified term or the duration of a specified task, as compensation for the early termination of the person's employment; or a payment made to a person if the person was engaged overseas in accordance with section 74 of the Act and the person's employment ended otherwise than at the initiative of the employer.

The note below this definition explains the payment made to an employee under section 119 of the *Fair Work Act 2009* is known as the National Employment Standards redundancy amount.

'Redundancy benefit period' is taken to mean the period which begins on the day after the employee's employment ends and lasts for the number of weeks and days that are the result of the redundancy benefit period calculation. Where the calculation results in a period that includes part days, the period is to be rounded down to the nearest whole day. The calculation of a redundancy benefit period is determined by dividing the gross amount of an employee's redundancy benefit by the weekly salary used to calculate the redundancy benefit.

'weekly salary' for the purposes of calculating the redundancy benefit period is taken to mean where an employee has periods of full-time and part-time service, and the period of part-time service falls last (so that the redundancy benefit is calculated on the basis of the part-time weekly salary), then the weekly salary to be used is the full-time equivalent of the part-time weekly salary, otherwise the weekly salary used to calculate the redundancy benefit is to be used.

Section 49 *Matters relating to leave without pay*

Subsection 49(1) provides for the mandatory granting of leave without pay by an Agency Head to an ongoing APS employee who applies for such leave to take up employment under section 13 of the *Governor-General Act 1974*, or sections 13 or 20 of the *Members of Parliament (Staff) Act 1984*, or to extend a current period of employment under either of these Acts.

Subsection 49(2) provides for the rights of return to the APS for employees granted such leave. Where the employee notifies the Agency Head in writing of their intention to return to the agency, the Agency Head must arrange for the employee to resume duties as soon as practicable and for the duties to be at the same classification the employee was at before commencing leave without pay, or an equivalent classification if that classification no longer exists.

A note under this subsection explains the right of return also applies to leave without pay that was granted prior to commencement of these Directions.

A second note under this subsection highlights APS employees may also have certain rights of return from leave granted under the *Australian Civilian Corps Act 2011*, which are set out in the *Prime Minister's Australian Civilian Corps Directions 2012*.

Section 50 *Collection of employment-related data*

Subsection 50(1) requires Agency Heads to ensure that measures are put in place to collect certain personal information from each employee of the agency, and to provide that information to the Commissioner. High quality data is essential for understanding trends in APS employment.

A note under this subsection explains the requirement to provide employment-related data to the Commissioner is in addition to the Agency Head's duty under section 44 of the Act to furnish the Commissioner with information for the annual report on the state of the APS.

A second note under this subsection explains that the information collected in this section will be included in the Australian Public Service Employment Database (APSED).

A third note under this subsection explains that in collecting information under this section, an Agency Head must have regard to the specifications in relation to the collection of information that are set out in the APSED Manual, published on the website of the Commission.

Subsection 50(2) provides that, given the sensitive nature of employment-related data, the agency measures for seeking such information must allow employees a 'choose not to give this information' option, which can also be reported.

Part 7 - Delegation

Part 7 provides for the Commissioner and for Agency Heads to delegate their powers or functions under the Directions. Subsections 51(2) and 52(3) include subdelegation provisions and related provisions concerning the operation of delegations, similar to the delegation provisions in section 78 of the Act.

Section 51 Delegation by the Commissioner

Section 51 provides for the delegation of the Commissioner's powers or functions.

Subsection 51(1) provides for the Commissioner to delegate, in writing, any of the Commissioner's powers or functions under the Directions (other than the delegation power itself), to a person who holds any office or appointment under an Act, or to an SES employee or acting SES employee.

The note under this subsection explains that sections 34AA and 34AB of the *Acts Interpretation Act 1901* are also relevant.

Subsection 51(2) provides that a person to whom powers or functions are delegated under subsection (1) (the first delegate) may, in writing, delegate any of those powers or functions to another person (the second delegate).

Subsection 51(3) provides that if the first delegate is subject to directions about the exercise of a power or function delegated under subsection (2), the first delegate must give corresponding directions to the second delegate.

Subsection 51(4) provides that a person exercising powers or functions under a delegation under this section must comply with any directions given by the Commissioner.

Section 52 Delegation by Agency Head

Section 52 provides for the delegation of an Agency Head's powers or functions.

Subsection 52(1) provides for an Agency Head to delegate their powers or functions under the Directions (other than the delegation power itself), in writing, to another person.

The note under this subsection explains that sections 34AA and 34AB of the *Acts Interpretation Act 1901* are also relevant.

Subsection 52(2) provides that an Agency Head cannot delegate powers or functions to an outsider without the prior written consent of the Commissioner. An 'outsider' for the purposes of this section is any person other than an APS employee or a person appointed to an office by the Governor-General, or by a Minister, under a law of the Commonwealth..

Subsection 52(3) provides that a person to whom powers or functions are delegated under subsection (1) (the first delegate) may, in writing, delegate any of those powers or functions to another person (the second delegate).

Subsection 52(4) provides that if the first delegate is subject to directions about the exercise of a power or function delegated under subsection (3), the first delegate must give corresponding directions to the second delegate.

Subsection 52(5) provides that a person exercising powers or functions under a delegation under this section must comply with any directions given by the Agency Head who delegated the power or function.

Part 8 – Application and transitional provisions

Division 1 – Application and transitional provisions relating to this instrument

Section 53 Definitions

Section 53 provides that for the purposes of this Division, certain terms have a specified meaning.

‘Commencement’ is taken to mean the day this instrument commences.

‘Old law’ is taken to refer to the *Australian Public Service Commissioner’s Directions 2013* (the 2013 Directions) as in force immediately before the day this instrument commences.

Section 54 Application—Gazettal of certain employment decisions and promotions

Section 54 is a transitional provision. It enables Division 2 of Part 3 to apply to employment decisions made on or after commencement of these Directions; and to an employment decision made before commencement of these Directions but that had not been notified under Part 2.4 of the 2013 Directions. This provision is designed to ensure selection processes that have not been completed at the time these Directions commence can be notified in accordance with the new gazettal requirements of these Directions once the decisions have been finalised.

Section 55 Transitional—use of merit lists

Section 55 is a transitional provision. It provides that a vacancy advertised in the 12 month period prior to commencement of these Directions will be considered a similar vacancy under these Directions if it otherwise satisfies the requirements of section 9. For example, SES selection processes conducted prior to the commencement of these Directions may be used for similar vacancies in other agencies.

Section 56 Transitional—vacancies notified before commencement

Section 56 is a transitional provision. Subject to the specific transitional arrangements set out in this Division, this provision provides that the 2013 Directions continue to apply if a vacancy has been notified and a decision has not been made to fill the vacancy when these Directions commence. This provision is designed to ensure an Agency Head can continue to fill vacancies in accordance with the rules that applied at the time the vacancy was advertised. Selection processes commenced under the 2013 Directions will be unaffected by changes in these Directions, for example changes to provisions relating to the employment of Indigenous persons or persons with a disability.

Section 57 Transitional—engagement on a short-term, irregular or intermittent basis

Section 57 is a transitional provision. It provides that an employee engaged as a non-ongoing employee under clause 2.12 of the 2013 Directions is taken to be engaged under section 22 of these Directions, and section 22 applies to their engagement. This provision is designed to extend the provisions under these Directions pertaining to the duration of engagement on a short-term, irregular or intermittent basis to be applied to existing non-ongoing employees who had been engaged under the 2013 Directions.

Section 58 Transitional—managing effective performance

Section 58 is a transitional provision. It provides that the 2013 Directions continue to apply where performance management action was being undertaken under chapter 4 of the 2013 Directions and it has not been concluded on commencement of these Directions. This provision is designed to allow performance management action to be concluded without impact by changes made to these provisions under these Directions.

Section 59 Savings—Delegations

Section 59 is a savings provision. It provides that a delegation made under the 2013 Directions in force on commencement of these Directions will continue in force after commencement as if it had been made

under these Directions. This provision is designed to ensure decisions made by a delegate continue to be valid until the Commissioner or an Agency Head issues new delegations under these Directions.

Division 2 – Amendments made by the Prime Minister’s Public Service Amendment Directions 2005 (No. 1)

Section 60 Transitional—Prime Minister’s Public Service Amendment Directions 2005 (No. 1)

Section 60 is a transitional provision. It provides that employees who, prior to amendments made to the *Prime Minister’s Public Service Directions 1999* on 19 October 2005, were on approved leave without pay to take up a full time statutory appointment, are entitled to remain on leave without pay for the duration of their existing period of leave without pay, to apply in writing for further leave without pay to continue in the appointment, and to exercise their right of return to the APS (at the same or an equivalent classification) at any time during, or at the expiration of, the period of approved leave without pay.

Schedule 1 - Repeals

This schedule relates to section 4, which provides that an instrument set out in a Schedule to these Directions is amended or repealed according to the terms of the Schedule.

As such, the *Australian Public Service Commissioner’s Directions 2013* are repealed in their entirety by commencement of these Directions.