

## **EXPLANATORY STATEMENT**

Issued by the authority of the Presiding Officers

*Parliamentary Service Act 1999*

*Parliamentary Service Amendment (Notification of Decisions and Other Measures) Determination 2016*

The *Parliamentary Service Act 1999* (the **Act**) establishes the Parliamentary Service. Subsection 71(1) of the Act provides that the Presiding Officers may make determinations prescribing matters required or permitted by the Act to be prescribed, or necessary or convenient to be prescribed, for carrying out or giving effect to the Act. Subsection 71(1) specifies that the Presiding Officers may make determinations after consulting the Parliamentary Service Commissioner (the **Commissioner**).

### **Overview of the amendments**

The main purpose of the *Parliamentary Service Amendment (Notification of Decisions and Other Measures) Determination 2016* (the **Amendment Determination**) is to amend the *Parliamentary Service Determination 2013* (the **Determination**) to

- remove the requirement for the Commissioner to endorse a particular certification in relation to the selection process for SES vacancies;
- remove the requirement for the Commissioner to be satisfied that certain requirements have been met before a Secretary may give notice to an SES employee under section 37 of the Act; and
- remove the requirement that certain employment decisions are to be notified in the *Public Service Gazette* (the **Gazette**).

The Amendment Determination also corrects a minor drafting error in the Determination.

### **Reasons**

The removal of the requirement for the Commissioner's certification in relation to the SES selection process, and for the Commissioner to be satisfied that certain requirements have been met before a Parliamentary Service department head may give notice to an SES employee under section 37 of the Act, is to reduce internal red tape and to give Parliamentary Service department heads the ability to make employment-related decisions promptly and efficiently, without additional processes.

The requirement to obtain the Commissioners approval prior to the engagement of a redundancy benefit recipient as an ongoing APS employee or a non-ongoing SES employee remains.

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

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

Relevant provisions in the Act and the Determination are modelled on equivalent provisions in the *Public Service Act 1999* and delegated legislation under that Act.

In scrutinising the Determination and the *Australian Public Service Commissioner's Directions 2013* (the **APS Directions**), the Parliamentary Joint Committee on Human Rights (the **Committee**) queried the requirement to notify certain employment-related decisions in the *Gazette*. The Committee was particularly concerned about the notification of certain termination of employment

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

In light of these concerns, the Public Service Commissioner conducted a review of the requirement to notify termination of employment decisions and retirement decisions for SES employees and, following the review, amended the APS Directions so that:

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

The Amendment Determination makes equivalent changes to the Parliamentary Service requirements for notifying employment decisions.

Further details about the provisions are provided at Attachment A.

### **Consultation**

As the changes made by the Amendment Determination reflect changes made to the APS Directions following the Public Service Commissioner's review, no further consultation was undertaken other than the Presiding Officers' consultation with the Parliamentary Service Commissioner.

### **Regulation Impact Statement**

No regulation impact statement is required for the measures contained in the Amendment Determination.

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

The Statement of Compatibility with Human Rights at Attachment B has been completed for the Amendment Determination, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that the Amendment Determination 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*.

## Notes on clauses

### Operative clauses

**Clause 1** sets out the name of the Determination.

**Clause 2** provides that the Amendment Determination commences on the day after registration.

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

**Clause 4** provides that Schedule 1 amends the Determination.

### Schedule 1

**Item 1 of Schedule 1** substitutes a new clause 21 which includes minor amendments to existing clause 21 and clarifies that the Commissioner may be a full participant in an SES selection process.

This item also removes the requirement at paragraph 21(b)(ii) for the Commissioner to endorse the representative's certification of the selection process for SES vacancies. The requirement for the Commissioner's representative to certify that the selection process complied with the Act and the Determination remains at subclause 21(b).

This item also makes consequential amendments to the Note at clause 21.

**Item 2 of Schedule 1** substitutes "person" for "employee" to correct a minor drafting error. Clause 30 deals with the re-engagement of a person who has resigned as a Parliamentary Service employee in order to contest an election.

**Item 3 of Schedule 1** amends subclause 39(1) of the Determination by repealing paragraphs (i) and (j) and substituting a new paragraph (i).

The effect of repealing paragraphs (i) and (j) is to remove the requirement to notify any decision to terminate the employment of an ongoing Parliamentary Service employee, and the grounds for the termination, together with the requirement to notify the retirement of an SES employee with an incentive payment. Item 1 substitutes new paragraph (i) to provide that a decision to terminate the employment of an ongoing Parliamentary Service employee on the grounds mentioned in paragraph 29(3)(g) of the Act (breach of the Code of Conduct) is required to be notified in the *Gazette*. The effect of this amendment is that public notification of the termination of employment of a Parliamentary Service employee is required only where termination relates to a breach of the Code of Conduct.

**Items 4 and 5 of Schedule 1** amend subclause 40(1) of the Determination by omitting paragraph (g).

Clause 40 deals with the requirement to notify the cancellation of certain employment decisions (including termination decisions and SES retirements) and effectively requires that where a particular employment decision has been made and notified in the *Gazette*, and a decision is subsequently made to cancel the decision, then the cancellation decision must also be notified in the *Gazette*.

Items 2 and 3 make consequential changes to subclause 40(1) to take account of the amendments to subclause 39(1) referred to in item 1.

**Item 6 of Schedule 1** repeals clause 112 of the Determination.

The repeal of clause 112 removes the requirement for the Commissioner to be satisfied certain requirements have been met before a Secretary may give notice to an SES employee under section 37 of the Act.

This amendment reduces internal red tape and gives a Secretary greater flexibility to manage their SES separations promptly and efficiently, without additional processes.

**Item 7 of Schedule 1** repeals existing Part 16 of the Determination and substitutes a new Part 16 containing appropriate transitional provisions associated with the Amendment Determination.

Prior to the Amendment Determination, Part 16 of the Determination set out transitional provisions relating to certain matters on foot at 1 July 2013 when the Determination commenced. These transitional provisions no longer have any application.

New Part 16 sets out transitional provisions in relation to the changed notification requirements outlined in Items 3, 4 and 5 of the Amendment Determination.

- Clause 148 provides that where a Secretary had made a decision, prior to the commencement of the Amendment Determination, to terminate the employment of an ongoing Parliamentary Service employee on any of the grounds specified in subsection 29(3) of the Act and the termination had taken effect prior to that date, but the termination had not been notified in the *Gazette*, then, notwithstanding the changed notification requirements made by the Amendment Determination, the Secretary is still required to notify the termination decision.
- Clause 149 provides that where a Secretary makes a decision to cancel a decision to terminate the employment of an ongoing Parliamentary Service employee, and that termination decision had been notified in the *Gazette* prior to the commencement of the Amendment Determination, then, notwithstanding the changed notification requirements, the cancellation decision is required to be notified in the *Gazette*.
- Clause 150 provides that where an SES employee retires from his her Parliamentary Service employment in accordance with section 37 of the Act and the date of effect of the retirement is before the commencement of the Amendment Determination, but the retirement has not been notified in the *Gazette*, then, notwithstanding the changed notification requirements made by the Amendment Determination, the Secretary is still required to notify the retirement.

## Statement of Compatibility with Human Rights

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

*Parliamentary Service Amendment (Notification of Decisions and Other Measures)*

*Determination 2016*

### Overview of the Legislative Instrument

The purpose of the *Parliamentary Service Amendment (Notification of Decisions and Other Measures) Determination 2016* (the **Amendment Determination**) is to amend the *Parliamentary Service Determination 2013* (the **Determination**) to:

- remove the requirement for the Commissioner to endorse a particular certification in relation to the selection process for SES vacancies;
- remove the requirement that certain Parliamentary Service employment decisions be notified in the *Public Service Gazette* (the **Gazette**); and
- correct an unrelated drafting error.

### Human rights implications

The removal of the requirement for the Commissioner's certification in relation to the SES selection process, and for the Commissioner to be satisfied that certain requirements have been met before a Parliamentary Service department head may give notice to an SES employee under section 37 of the Act, is to reduce internal red tape and to give Parliamentary Service department heads the ability to make employment-related decisions promptly and efficiently, without additional processes. It does not raise human rights implications.

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

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

The Amendment Determination replicates in the Determination the amendments made to the APS Directions. As a result, public notification of the name of any Parliamentary Service SES employee who has retired with a payment of an incentive under section 37 of the *Parliamentary Service Act 1999*, or of any Parliamentary Service employee whose employment has been terminated, and the grounds for termination, will no longer be required, except where the termination is on misconduct grounds.

The notification will refer to the particular statutory ground of termination in paragraph 29(3)(g) – breach of the Parliamentary Service Code of Conduct – but will not include particulars about the conduct engaged in by the employee. Notifications will continue to include the name of the relevant

employee, although there will also continue to be flexibility for a person's name not to be included because of the person's work-related or personal circumstances, subject to the agreement of the Commissioner.

Public notification of these decisions does not represent an arbitrary interference with privacy. It serves the public interest by enabling Parliamentary Service departments, APS agencies and other employers to check the employment record of applicants for employment for any history of serious misconduct. Publishing these decisions also creates a public record that shows that serious misconduct is dealt with properly.

The Amendment Determination positively affects:

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

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

The Presiding Officers wrote to the Chair of the Committee on 25 January 2016 about the Committee's concerns with the notification requirements in the Determination.

### **Conclusion**

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

The Presiding Officers