

EXPLANATORY STATEMENT

Issued by the authority of the Presiding Officers

Parliamentary Service Act 1999

*Parliamentary Service Amendment (Managing Recruitment Activity and Other Measures)
Determination 2017*

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 (Managing Recruitment Activity and Other Measures) Determination 2017* (the **Amendment Determination**) is to amend the *Parliamentary Service Determination 2013* (the **Determination**) to:

- provide additional flexibility for Secretaries and reduce red tape by streamlining processes;
- streamline content, including removing redundant or unnecessarily prescriptive directions and content better provided in guidance; and
- further support indigenous and disability employment affirmative measures.

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

Reasons

The Amendment Determination makes changes to streamline and simplify the Determination, including:

- making existing requirements clearer and simpler; and
- removing content that is covered in other legislation or is better provided for in policy or guidance material.

Relevant provisions in the Determination are modelled on equivalent provisions in the *Australian Public Service Commissioner's Directions 2016* (the **APSC Directions**). The APSC 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 was also been taken to improve access to affirmative measures for Indigenous Australians and persons with a disability. The Amendment Determination makes equivalent changes to the Determination.

Consultation

As the changes made by the Amendment Determination reflect changes made to the APS Directions following the Public Service Commissioner's review and consultation, 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

A Statement of Compatibility with Human Rights is included at [Attachment B](#).

Notes on clauses

Operative clauses

Clause 1 sets out the name of the Amendment 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 repeals the existing clause 6 and substitutes a new clause 6. Clause 6 sets out the requirements, having regard to the individual's duties and responsibilities, for upholding the Parliamentary Service Value in section 10(1) of the Act, namely "Committed to Service". This amendment streamlines content and removes duplication with other legislation.

Item 2 of Schedule 1 amends clause 7 by omitting paragraph (g). This amendment removes duplication with other legislation.

Item 3 of Schedule 1 amends clause 9 of the Determination by omitting the reference to "performance management systems" in paragraph (g). This amendment expands accountability for actions and decisions beyond formal performance management systems.

Item 4 of Schedule 1 amends clause 10 of the Determination by substituting text in paragraph (b). This amendment clarifies the scope and application of Parliamentary Service Value 5-Impartial.

Item 5 of Schedule 1 repeals the existing clause 13 and substitutes a new clause 13. Clause 13 defines the meaning of 'similar vacancy' for the purposes of the Determination and the new clause allows sharing of merit lists in specified circumstances.

Item 6 of Schedule 1 inserts a new definition of Senior Executive Service (SES) vacancy.

Item 7 of Schedule 1 repeals the existing clause 19 of the Determination and substitutes a new clause 19. This amendment removes elements that are reflected in other legislation.

Item 8 of Schedule 1 repeals the existing clause 20 of the Determination and substitutes a new clause 20 that:

- allows for participation in multiple agency selection processes by providing reasonable opportunities to apply (without advertising separately in the Gazette);
- removes the requirement to seek the Commissioner's approval to notify vacancies closing in less than 7 days.

Item 9 of Schedule 1 repeals the existing clause 21 and substitutes a new clause 21 to simplify and streamline content.

Item 10 of Schedule 1 repeals the existing clause 23 and substitutes a new clause 23 to allow for non-ongoing employees to be engaged for 18 months rather than 12 months and allow for an extension by the Secretary up to three years.

Item 11 of Schedule 1 repeals the existing clause 24 and substitutes a new clause 24 to simplify and streamline content.

Item 12 of Schedule 1 repeals the existing clause 25 and substitutes a new clause 25 to allow Secretaries to support a Parliamentary Service employee to voluntarily enter into transition to retirement arrangements. The amendment does not provide an avenue for Secretaries to compel an employee to relinquish their ongoing status for any purpose.

Item 13 repeals the existing clause 26 and substitutes a new clause 26 to expand the application of Indigenous employment measures to any vacancy, not only those notified in the Gazette.

Items 14 and 15 of Schedule 1 repeal the existing clauses 27 and 28 and substitute a new clause 27 to support broad disability employment measures (rather than just intellectual disability) and allow promotion through disability employment services providers.

Item 16 of Schedule 1 repeals the existing clause 29 and substitutes a new clause 29 to simplify and streamline content.

Item 17 of Schedule 1 repeals the existing clause 30 and substitutes a new clause 30 to simplify and streamline content.

Item 18 of Schedule 1 repeals the existing clause 32 and substitutes a new clause 32 to simplify and streamline content.

Item 19 of Schedule 1 repeals the existing clause 33 and substitutes a new clause 33 to simplify and streamline content.

Items 20 and 21 of Schedule 1 repeal clauses 34 and 35 as the relevant information is provided in guidance material.

Items 22 and 23 of Schedule 1 repeal the existing clause 35A and substitute new clauses 35A, 35B and 35C that incorporate the existing clause 55 and brings provisions relating to employee movement together.

Item 24 of Schedule 1 repeals clause 36 as the relevant information is provided in guidance material.

Item 25 of Schedule 1 repeals the existing clause 37.

Item 26 of Schedule 1 repeals the existing clause 39 and substitutes a new clause 39.

The new clause removes the requirement for the following employment decisions to be notified in the Gazette:

- the engagement of a person as an ongoing Parliamentary Service employee, unless the engagement is in accordance with an Independent Selection Advisory Committee recommendation;
- the engagement of a person as an ongoing Parliamentary Service employee for a specified term of more than 12 months;
- the extension of an engagement that was for 12 months or less;
- the movement of an employee to duties in another Department;
- the assignment of duties to an employee.

New paragraph 39(1)(d) requires notification in the Gazette of engagement of an ongoing APS employee as an ongoing Parliamentary Service employee at a higher classification than the current classification.

Item 27 of Schedule 1 repeals the existing clause 40 and substitutes a new clause 40 that reflects the new notification obligations in subclause 39(1).

Item 28 of Schedule 1 repeals the existing clause 41 and substitutes a new clause 41 to simplify and streamline content.

Item 29 of Schedule 1 repeals Part 4 as guidance relating to workplace diversity is to be provided by the Australian Public Service Commission.

Item 30 of Schedule 1 repeals the existing clause 51 and replaces it with a new clause 51 to remove redundant material and to clearly state that fair and effective measures must be in place to address underperformance by an employee.

Item 31 of Schedule 1 repeals the existing clause 52 and replaces it with a new clause 52 to simply and streamline content.

Item 32 of Schedule 1 repeals Part 6 as this part duplicated requirements set out in Workplace Health and Safety legislation.

Item 33 of Schedule 1 amends subclause 54(1) to refer to the *Public Interest Disclosure Act 2013*.

Item 34 of Schedule 1 repeals clause 55 as the contents of this clause are incorporated into new clauses 35A, 35B and 35C.

Item 35 of Schedule 1 repeals the existing clause 110 and substitutes a new clause 110. The new clause removes the requirement for Secretaries to consult the Commissioner prior to engaging a non-ongoing non-SES redundancy benefit recipient.

Item 36 of Schedule 1 repeals clause 111 as this clause had no practical effect.

Item 37 of Schedule 1 repeals Part 16 and substitutes a new Part 16 providing a number of application and transitional provisions:

- Clause 148 defines the meaning of ‘commencement’ for the purposes of the Part.
- Clause 149 enables Division 5 of Part 3 as amended by the Amendment Determination to apply to employment decisions made on or after commencement of the Amendment Determination; and to an employment decision made before commencement of the Amendment Determination but that had not been notified under Division 5 of the Determination as it was in force immediately before commencement of the Amendment Determination. This provision is designed to ensure selection processes that have not been completed at the time the Amendment Determination commences can be notified in accordance with the new gazettal requirements once the decisions have been finalised.
- Clause 150 provides that a vacancy advertised in the 12 month period prior to commencement of the Amendment Determination will be considered a similar vacancy under the Determination as amended by the Amending Determination if it otherwise satisfies the requirements of section 13. For example, SES selection processes conducted prior to the commencement of the Amendment Determination may be used for similar vacancies in other agencies.
- Clause 151 provides that the Determination as it was in force immediately before commencement of the Amendment Determination continues to apply if a vacancy has been notified and a decision has not been made to fill the vacancy when the Amendment Determination commences. This provision is designed to ensure a Secretary can continue to fill vacancies in accordance with the rules that applied at the time the vacancy was advertised. Selection processes commenced under the Determination as it was in force immediately before commencement of the Amendment Determination will be unaffected by changes in the Amendment Determination, for example changes to provisions relating to the employment of Indigenous persons or persons with a disability.
- Clause 152 provides that an employee engaged as a non-ongoing employee under clause 23 of the Determination as it was in force immediately before commencement of the Amendment Determination is taken to be engaged under clause 23 of the Determination as amended by the Amendment Determination. This provision is designed to extend the provisions under the Amendment Determination pertaining to the duration of engagement on a short-term, irregular or intermittent basis to existing non-ongoing employees who had been engaged under the Determination.
- Clause 153 provides that the Determination as it was in force immediately before commencement of the Amendment Determination continues to apply where performance management action was being undertaken under Part 5 of the Determination and it has not been concluded on commencement of the Amendment Determination. This provision is designed to allow performance management action to be concluded without impact by changes made to these provisions by the Amendment Determination.

Statement of Compatibility with Human Rights

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

Parliamentary Service Amendment (Managing Recruitment Activity and Other Measures)

Determination 2017

Overview of the Legislative Instrument

The purpose of the *Parliamentary Service Amendment (Managing Recruitment Activity and Other Measures) Determination 2017* (the **Amendment Determination**) is to amend the *Parliamentary Service Determination 2013* (the **Determination**) to:

- provide additional flexibility for Secretaries and reduce red tape by streamlining processes;
- streamline content, including removing redundant or unnecessarily prescriptive directions and content better provided in guidance; and
- further support indigenous and disability employment affirmative measures.

Human rights implications

Rights to equality and non-discrimination

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 Amendment Determination promotes these rights by the insertion of new clauses 26 and 27. These clauses 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 parliamentary service of persons with work-related disadvantage through disability, who would otherwise be unlikely to obtain parliamentary service employment through standard parliamentary service selection arrangements, but who have the capacity to contribute to the work of a department. 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 parliamentary service 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 protection against arbitrary and unlawful interferences with privacy; right to freedom of expression

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 Amendment Determination replicates in the Determination the amendments made to the APS Directions to address these concerns.

The Determination engages 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 Determination provides, among other things, for notification in the Public Service *Gazette* of certain employment decisions.

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