

## EXPLANATORY STATEMENT

Issued by the authority of the Australian Public Service Commissioner

*Public Service Act 1999*

### **Australian Public Service Commissioner's Amendment (2019 Measures No. 1) Direction 2019**

#### **Authority**

Subsection 11A(1) of the *Public Service Act 1999* (the Act) provides that the Australian Public Service Commissioner (the Commissioner) may issue directions in writing about employment matters relating to Australian Public Service (APS) employees. Subsection 11A(2) of the Act provides that the Commissioner may issue directions in writing 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 the Act.

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

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

#### **Legislative framework**

The *Australian Public Service Commissioner's Directions 2016* (the Commissioner's Directions), made under the Act, provide for the standards required of APS Agency Heads and APS employees and prescribe details in respect of matters underpinning the Act including the APS Employment Principles.

Section 10A of the Act sets out the seven APS Employment Principles. Paragraph 10A(1)(d) provides that the APS is a career-based public service that requires effective performance from each employee.

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

#### **Purpose of the amendments**

The purpose of the *Australian Public Service Commissioner's Amendment (2019 Measures No. 1) Direction 2019* (the Amendment Direction) is to amend the Commissioner's Directions to clarify the expectations of APS Agency Heads, supervisors and employees in relation to performance management and culture.

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

## **Consultation**

The Australian Public Service Commission (the Commission) consulted with all APS Departments, through the Secretaries Board, on the amendments.

## **Reasons**

The amendments to the Commissioner's Directions to insert sections 39, 39A and 39B broaden the responsibility for achieving effective performance from Agency Heads to include supervisors and APS employees. They also set out the expectation for Agency Heads and supervisors to proactively identify and develop high potential APS employees, including by engaging in career conversations.

## NOTES ON CLAUSES

### Operative clauses

**Clause 1** sets out the name of the Amendment Direction.

**Clause 2** provides that the Amendment Direction commences on the day after it is registered.

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

**Clause 4** provides that Schedule 1 amends the Commissioner's Directions.

### Schedule 1—Amendments

**Item 1** repeals the current heading of Division 2 of Part 4 of the Commissioner's Directions and replaces it with 'Performance management and culture'.

**Item 2** repeals section 39 of the Commissioner's Directions and replaces it with new section 39 which clarifies Agency Heads' obligations to uphold APS Employment Principle 10A(1)(d). New subsection 39(1) provides that an Agency Head meets this obligation by ensuring the following:

- the Agency has performance management policies and processes that:
  - support a high performance culture; and
  - proactively identify, foster and develop APS employees to fulfil their potential; and
  - provide for effective performance management and
  - are fair, open and effective; and
  - are clearly communicated to APS employees;
- the Agency builds the organisational capability necessary to achieve outcomes of the Agency properly expected by the Government;
- each APS employee in the Agency is given:
  - a clear statement of performance and behaviour expected of the employee; and
  - opportunities to discuss performance;
- each APS employee in the Agency receives feedback from supervisors about their performance consistent with the Agency's performance management policies and processes;
- the Agency requires supervisors to manage the performance of APS employees under their supervision effectively, including by engaging in career conversations;
- the Agency supports supervisors to manage the performance of APS employees under their supervision, including by providing appropriate training in performance management;
- the Agency's performance management policies and processes are used to guide salary movement – this will include performance pay arrangements.

New subsection 39(2) provides that an Agency Head upholds APS Employment Principle 10A(1)(d) by ensuring the following:

- the Agency's performance management policies and processes dealing with unsatisfactory performance are available to supervisors and APS employees in the Agency, and include information that clearly sets out:
  - the responsibilities of supervisors; and

- the possible outcomes if an APS employee's performance is considered unsatisfactory; and
- that if an APS employee's performance is considered to be unsatisfactory, the employee has a responsibility to engage constructively with his or her supervisor and other relevant persons (including the Agency's human resources area) in resolving the performance issues and acting on performance feedback;
- those policies and processes are applied in a timely manner if an APS employee's performance is considered unsatisfactory.

This item also inserts new section 39A which provides that a supervisor upholds APS Employment Principle 10A(1)(d) by doing the following:

- promoting and fostering high performance by the APS employee;
- conducting regular (at least annual) career conversations that deal with the APS employee's performance, potential, aspirations, organisational fit and future opportunities;
- ensuring that each APS employee has a performance agreement consistent with the Agency's corporate plan and the work level standards for the APS employee's classification;
- ensuring that the APS employee is provided with clear, honest and timely feedback about the employee's performance;
- managing and assessing the APS employee's performance in accordance with the Agency's performance management policies and processes;
- working to improve the supervisor's capability in effectively managing the performance of APS employees, including through appropriate training;
- promptly and actively managing unsatisfactory performance by the APS employee in accordance with the Agency's performance management policies and processes, including by:
  - identifying the nature of the unsatisfactory performance at the earliest opportunity; and
  - maintaining appropriate records; and
  - engaging with the APS employee and other relevant persons (including the Agency's human resources area and the supervisor's manager) to discuss the unsatisfactory performance, and facilitate a collective understanding about the nature of the unsatisfactory performance.

Item 2 also inserts new Section 39B which provides that an APS employee upholds APS Employment Principle 10A(1)(d) by doing the following:

- striving to perform to the best of their ability, at the work level standard for the APS employee's classification and consistent with the APS employee's performance agreement;
- engaging constructively with their supervisor to clarify work expectations and what is required to perform effectively;
- participating constructively in the Agency's performance management processes, including career conversations;
- being open to receiving feedback and acting on feedback in a timely manner;
- seeking opportunities to improve individual and team performance;

- if informed that the APS employee's performance is unsatisfactory, engaging constructively by:
  - cooperating with their supervisor and other relevant persons (including the Agency's human resources area) to resolve the issues relating to the unsatisfactory performance in a timely manner; and
  - undertaking any necessary training or remedial or corrective measures as directed.

Item 2 of the Schedule also inserts an additional Note at the end of each section as a reminder 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'*.

## **STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS**

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

The *Australian Public Service Commissioner's Amendment (2019 Measures No. 1) Direction 2016* (the Amendment Direction) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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

The *Australian Public Service Commissioner's Directions* (the Commissioner's Directions) is a legislative instrument under the *Public Service Act 1999*. Among other things, the Act sets out the Australian Public Service (APS) Employment Principles, which include the principle that the APS is a career based public service that '*requires effective performance from each employee*' (paragraph 10A(1)(d)).

Section 11A of the Act provides that the Australian Public Service Commissioner (the Commissioner) may issue directions in writing in relation to the APS Employment Principles for the purposes of ensuring that the APS incorporates and upholds the APS Employment Principles, and to determine, where necessary, the scope or application of the APS Employment Principles.

The purpose of the Amendment Direction is to amend the Commissioner's Directions to clarify the expectations of APS Agency Heads, supervisors and employees in relation to performance management.

### **Human rights implications**

The Amendment Direction engages the following rights:

#### ***Right to work and rights in work***

The Amendment Direction advances a person's rights in work.

The Amendment Direction clarifies the responsibilities of Agency Heads in relation to effective performance management and culture. This includes proactively identifying and developing high potential APS employees.

In addition, the Amendment Direction broadens the responsibility for effective performance management and culture to include supervisors of APS employees and APS employees themselves. It includes a requirement to ensure that an Agency's performance management policies and processes are clearly communicated to APS employees and that supervisors of APS employees are supported as managers.

These broadened and clarified responsibilities will advance a person's rights in work by not only dealing with effective management of unsatisfactory performance, but also ensuring that Agency Heads and supervisors of APS employees support, promote and foster a culture of high performance.

### **Conclusion**

The Amendment Direction is compatible with human rights. It advances a person's rights in work.