

EXPLANATORY STATEMENT

Issued by the authority of the Australian Public Service Commissioner

Public Service Act 1999

Australian Public Service Commissioner's Directions 2022

Purpose

The *Australian Public Service Commissioner's Directions 2022* (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 the day after they are registered and they replace and largely re-make the *Australian Public Service Commissioner's Directions 2016*.

New provisions have been added to the Directions, including:

- section 19 – general requirement that APS employees undertake integrity training
- section 20 – an Agency Head must consult with the Commissioner before entering into an agreement settling a dispute about sexual harassment which includes a non-disclosure or confidentiality provision
- section 21 – an Agency Head must notify the Commissioner of agreements that are for settling disputes about employment matters and include non-disclosure or confidentiality provisions
- section 44 – an Agency Head must engage an APS employee on probation
- sections 54–56 – an Agency Head must provide certain information to the Commissioner relating to APS employees in their Agency
- section 64 – an Agency Head must consult with the Commissioner if an SES employee in an Agency is suspected of breaching the Code of Conduct.

The Directions reflect reviews and reports into public administration including the *Independent Review of the Australian Public Service* (Thodey review), the *Report into consultations regarding APS approaches to ensure institutional integrity* (Sedgwick report), 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 and clarify the operation of existing provisions and enhance APS integrity and capability measures.

Legislative framework

Subsections 11(1), 11A(1), 11A(2), and 15(6) of the Act give the Commissioner power to issue directions in writing about specified matters.

Subsection 42(2) of the Act states that Agency Heads and APS employees must comply with the Directions.

Subsection 42(3) of the Act provides that the Directions may apply, adopt or incorporate any matter contained in Classification Rules (made under s 23 of the Act – i.e. the *Public Service Classification Rules 2000*) or a direction issued by the Prime Minister under section 21 of the Act, either as in force or existing at a particular time, or as in force or existing from time to time.

Section 10 of the Act sets out the APS Values. Section 10A of the Act sets out the APS Employment Principles and explains when a decision relating to engagement or promotion is based on merit.

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(2).

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. This paragraph notes that procedures established by Agency Heads for determining breaches of the Code of Conduct and associated sanctions must comply with basic procedural requirements set out in the Directions.

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 of 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 4—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 the 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 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 7.

Commencement

The instrument will commence the day after it is registered.

Consultation

Many of the new provisions in the Directions have arisen from recommendations in the Thodey review and Sedgwick report, for which Agency Heads, Chief Operating Officers and employees across the APS were consulted extensively.

Regulation Impact Statement

Following consultation with the Office of Best Practice Regulation, a RIS is not required for the instrument (OBPR ID 13837).

Explanation of the Provisions

An Explanation of the Provisions is set out at [Attachment A](#).

Statement of Compatibility with Human Rights

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

EXPLANATION OF THE PROVISIONS

Part 1 - Introduction

Division 1 – Introduction

Section 1 sets out the name of the Directions, being the *Australian Public Service Commissioner’s Directions 2022*.

Section 2 provides that the Directions will commence on the day after they are registered.

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 and any other item in a Schedule has effect according to its terms.

Division 2 - Definitions

Section 5 Definitions

Section 5 defines certain words and expressions used in the Directions that have a particular meaning in the APS employment context.

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

‘Aboriginal person’ is defined to mean a person of the Aboriginal race of Australia. This aligns the definition of ‘Aboriginal person’ in the Directions with the definition in the *Aboriginal and Torres Strait Islander Act 2005*.

‘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 Rules).

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

‘Classification group’ is defined as having the same meaning as in the Classification Rules, as in force from time to time.

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

‘Eligible employee’ is defined by reference to subsection 25(9) of the Directions.

‘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 *Public Service Regulations 1999* (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 Regulations.

‘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 66(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.

‘Sexually harass’ is defined to have the same meaning as in section 28A of the *Sex Discrimination Act 1984*. A note to this definition states that other parts of speech and grammatical forms of “sexually harass” (for example, “sexual harassment”) have a corresponding meaning in accordance with section 18A of the *Acts Interpretation Act 1901*.

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

‘Torres Strait Islander’ is defined as a descendant of an Indigenous inhabitant of the Torres Strait Islands. This aligns the definition of ‘Torres Strait Islander’ in the Directions with the definition in the *Aboriginal and Torres Strait Islander Act 2005*.

‘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, is defined to mean the work level standards for the classification, as referred to in subrule 9(2A) or rule 10 of the Classification Rules (as the case requires).

‘Work-related qualities’, in relation to a person, is defined to include:

- a. the person’s skills and abilities
- b. the person’s qualifications, training and competencies
- c. the person’s standard of work performance
- d. the person’s capacity to produce outcomes by effective performance at the level required
- e. the person’s relevant personal qualities, such as honesty and integrity
- f. the person’s potential for further development
- g. the person’s ability to contribute to team performance.

This list of matters included in the definition of ‘work-related qualities’ is not exhaustive.

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 classification that is in a higher classification group than the classification group that includes 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 6(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 6(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 needs 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 SES vacancy

Section 8 defines the meaning of a Senior Executive Service (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. 'Similar vacancy' is used in section 25 of the Directions to set out the circumstances in which a new vacancy can be filled by selecting a person that has already been deemed suitable and placed in an existing APS or Parliamentary Service merit list or merit pool. For the Directions, provided that all of the requirements of paragraph (a) and one of the elements of paragraph (b) are met, a 'vacancy' is similar to a vacancy (within the meaning of the Directions or Part 3 of the *Parliamentary Services Determination 2013*) that has been notified in the Public Service Gazette (notified vacancy).

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

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

Subparagraph (a)(iii) requires the vacancy to be at the same classification as the notified vacancy or, if the notified vacancy is in a Department of the Parliament (established under the *Parliamentary Service Act 1999*), a corresponding classification under rules about classification made under section 23 of that Act.

Subparagraph (a)(iv) requires the duties for the vacancies to be performed in a similar location. A similar location is one where relocation would not be required to undertake the duties.

If all of the requirements in paragraph (a) are met, then at least one of the elements in paragraph (b) must be met for the vacancy to be a similar vacancy.

Subparagraph (b)(i) specifies that the vacancy is at the SES level in accordance with the Classification Rules. Agency Heads are expected to provide access to merit lists and merit pools established for SES vacancies.

Subparagraph (b)(ii) specifies that the vacancy is in a centrally coordinated entry-level program. This 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 (b)(iii) specifies that the Agency Head of the agency in which the notified vacancy existed and another Agency Head must agree, in writing, that the vacancy is a similar vacancy to the notified vacancy. The effect of this provision is that an Agency Head (the first Agency Head) must provide consent prior to another Agency Head accessing a merit list or merit pool established for a vacancy in the agency of the first Agency Head.

Subparagraph (b)(iv) specifies that Secretary of a Department (within the meaning of the *Parliamentary Services Act 1999*) in which the notified vacancy existed and an Agency Head must agree, in writing, that the vacancy is a similar vacancy to the notified vacancy. Where such an agreement is reached, it will permit the sharing of merit lists and pools from a notified Parliamentary Service vacancy, which can be used to fill a similar APS vacancy.

Part 2 - APS Values

Section 10 Purpose of this Part

Section 10 notes that Part 2 of the Directions is made for the purposes of subsection 11(1) of the Act.

Subsection 11(1) 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.

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).

Section 11 Overview of this Part

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 of the Directions 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 subsection 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 and accessible 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 subsection 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 subsection 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) is a new paragraph that provides that the requirements include contributing to an inclusive workplace culture.

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

Paragraph 15(g) 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 subsection 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 subsection 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 – Integrity of the APS

Division 1 – Purpose of this Part

Section 18 Purpose of this Part

Section 18 sets out that Part 3 of the Directions is made for the purposes of subsection 11(1) of the Act. Specifically, Part 3 is for the purpose of ensuring that the APS incorporates and upholds the APS Value of 'Ethical' in subsection 10(2) of the Act.

Division 2 – Mandatory integrity training

Section 19 Integrity training for APS employees

Subsection 10(2) of the Act sets out the APS Value of 'Ethical' which states that the APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

Section 19 of the Directions sets out obligations on Agency Heads to ensure that APS employees engaged in their Agency undergo mandatory integrity training.

Subsection 19(1) requires Agency Heads who engage a person as an ongoing APS employee to make arrangements for the employee to undergo integrity training within 6 months of the employee being engaged.

Subsection 19(2) requires Agency Heads who engage a person as a non-ongoing APS employee to make arrangements for the employee to undergo integrity training as soon as practicable after the employee has been engaged.

The Commission has made available an e-learning module that Agency Heads are generally expected to use for the purposes of ensuring that new APS employees in their agency undergo this mandatory integrity training. As some APS agencies already provide similar and/or equivalent integrity training, the Commission has also established a process to enable APS agencies to seek the Commissioner's approval to use their equivalent program of integrity training.

Subsection 19(3) clarifies that the requirements in subsections 19(1) and 19(2) do not apply if a person has previously been engaged as an APS employee and they have otherwise completed a program of

training about integrity in accordance with the requirements in subsections 19(1) and (2) of the Directions.

Division 3 – Consultation and reporting on non-disclosure and confidentiality provisions in agreements settling disputes about employment matters

Section 20 Consulting Commissioner before entering into agreement settling dispute about sexual harassment including non-disclosure or confidentiality provision

Section 20 requires Agency Heads to consult the Commissioner before entering into an agreement with a person who is or was an APS employee, which settles a dispute about a matter that relates to sexual harassment of or by the person, or an allegation of sexual harassment of or by the person and which limits the person's freedom to disclose information about the matter, the dispute or its settlement.

Section 21 Notifying the Commissioner of agreements that are for settling disputes about employment matters and include non-disclosure or confidentiality provisions

Section 21 requires Agency Heads to notify the Commissioner of the number of agreements entered into during a financial year where the agreement is with a person who is or was an APS employee, which settles a dispute about matters relating to the person's APS employment and which limits the person's freedom to disclose information about the matter, the dispute or its settlement.

Subsection 21(3) provides that this notification is required to be given to the Commissioner within 31 days after the end of the financial year or within such longer period that the Commissioner allows. Unless otherwise advised by the Commissioner, Agency Heads are expected to provide the relevant notification for each financial year through the annual APS Agency Survey, which is generally sent to agencies for completion in July of each year.

Part 4 - Recruitment and selection

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

Subdivision A – Introduction

Section 22 Purpose of this Division

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

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.

Section 22 provides that Division 1 of Part 4 of the Directions is made for the purposes of subsection 11A(2) of the Act.

Section 23 How an Agency Head upholds APS Employment Principle 10(A)(1)(c)

Implicit in the Employment Principle 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 23 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 24 Merit-based selection process for engagement or promotion

Section 24 sets out requirements for a merit-based selection process for engagement and promotion decisions. Subsection 24(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 all 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 24(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 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 25 Notification of vacancy in the Public Service Gazette

Section 25 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 25(1) provides that a selection process for a decision to fill a vacancy meets the requirements of Subdivision B only if the circumstances in subparagraphs (1)(a) or (b) are satisfied.

Paragraph 25(1)(a) requires the vacancy to be notified in the *Public Service Gazette* within a period of 18 months before the written decision to engage or promote the successful candidate for the vacancy, and the requirements in subsection 25(2) to be met

Paragraph 25(1)(b) requires that the vacancy (the new vacancy) is a similar vacancy to another vacancy (as described in section 9) that was notified in the *Public Service Gazette* within the period of 18 months before the written decision to engage or promote the successful candidate for the new vacancy. This provision permits agencies to access merit lists (from a previously notified vacancy) to fill a new similar

vacancy in circumstances where the previously notified vacancy was notified in the *Gazette* no more than 18 months before the written decision to fill the new similar vacancy.

For a vacancy filled in accordance with paragraph 25(1)(b), the requirements in subsection 25(2) do not apply.

Subsection 25(2) sets out the requirements to be met for the purposes of subparagraph 25(1)(a).

Paragraph 25(2)(a) requires the vacancy to be notified as open to all eligible members of the community.

Paragraph 25(2)(b) requires:

- a. the vacancy to be notified with a closing date for applications of at least seven calendar days after the notification; or
- b. if the Agency Head is satisfied that special circumstances support approval of a shorter period – the end of that shorter period.

Paragraph 25(2)(c) 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 25(3).

Under a heading 'Commissioner may require notification of vacancy, or class of vacancies, to be approved by Commissioner', subsection 25(3) 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 and 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 eligible employees (other than APS Level 1 and training classifications)', subsection 25(4) 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 eligible employee, the vacancy may be notified in the Public Service *Gazette* as open only to persons who are eligible employees at the time of the notification.

Subsection 25(5) provides that subsection 25(4) 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 25(6) 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 25(7) 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 25(8) 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 'Eligible employee', subsection 25(9) defines the meaning of an eligible employee for the purpose of section 25. For this purpose, an eligible 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 26 ***Additional requirements for SES engagement or promotion decisions***

Section 26 sets out requirements, in addition to sections 24 and 25 of the Directions, for a merit-based selection process for the engagement or promotion of a person as an SES employee.

Paragraph 26(a) requires the Commissioner, or a representative of the Commissioner, to be a full participant in the selection process.

Paragraph 26(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 27 ***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 27(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).

Subsection 27(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 27(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 27(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 first note below this subsection highlights Regulations 3.4 and 3.5, which provide for matters regarding the engagement of non-ongoing APS employees. The second note refers to section 5 for the meaning of *work-related qualities*.

Section 28 Engagement of person from State or Territory jurisdiction

Section 28 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 29 Engagement of ongoing APS employee as non-ongoing APS employee

Section 29 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 30 Engagement of non-ongoing APS employee as ongoing employee in exceptional circumstances

Subsection 30(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 30(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.

A note below subsection 30(2) refers to section 5 for the meaning of *work-related qualities*.

Section 31 Affirmative measure – Aboriginal and Torres Strait Islander 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 31(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.

The Commission has published the Aboriginal and Torres Strait Islander Recruitment Guide on the APSC website (www.apsc.gov.au) to provide Agency Heads with practical assistance in determining whether applicants meet the criteria in paragraph 31(2)(a). Section 5 of the publication sets out evidentiary requirements for confirming Aboriginal and/or Torres Strait Islander heritage.

Paragraph 31(2)(a) provides that the Agency Head must ensure that a vacancy identified under section 31 accepts applicants who are Aboriginal and/or Torres Strait Islander persons; who identify as Aboriginal and/or Torres Strait Islander; and are accepted by their community as being Aboriginal and/or Torres Strait Islander.

Paragraph 31(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 27.

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 32 *Affirmative measure—RecruitAbility Scheme*

Section 32 explains how the merit-based selection process applies to the RecruitAbility Scheme (the Scheme). Section 28 of the 2016 Directions provided for the Scheme.

Subsection 32 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 will apply to the selection process for specified vacancies in the agency.

Subsection 32(1) states that, for the purposes of subsection 24(1), a selection process that involves short-listing candidates before deciding to engage or promote the short-listed candidates to fill a vacancy is applied fairly if:

- a. the vacancy is notified in accordance with section 25 and specifies that the Scheme applies to the selection process; and
- b. a candidate with disability opts into the Scheme for the vacancy; and
- c. under the Scheme, the candidate is short-listed for progression to the next stage of the selection process because the candidate meets the minimum requirements and eligibility requirements (if any) for the vacancy.

A note below this subsection explains that the Scheme is a measure to make arrangements for persons with disability to be considered for engagement or promotion.

Subsection 32(2) clarifies that for the avoidance of doubt, merit remains the key consideration for the selection process and this section does not:

- a. require the successful applicant to be a person who applied in accordance with the Scheme; and
- b. does not limit the circumstances in which the selection process is to be applied fairly in relation to each eligible candidate.

Section 33 *Affirmative measure—disability employment*

Subsection 33(1) provides that an Agency Head, consistent with Commonwealth law, 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, 2018 (cat. no. 4430.0), which can be found at: <https://www.abs.gov.au/statistics/health/disability/disability-ageing-and-carers-australia-summary-findings/latest-release#disability>).

Paragraph 33(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.

The Commission has published the Affirmative Measure for Recruiting People with Disability: Guide for Agencies on the APSC website (www.apsc.gov.au) to provide Agency Heads with practical assistance with respect to the definition and evidence of disability. This publication refers to the definition of ‘disability’ provided by the Australian Bureau of Statistics in their Survey of Disability, Ageing and Carers.

Paragraph 33(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 26; 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 34 Promotion after appointment to a statutory office

Subsection 34(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.

A note under subsection 34(1) refers to section 5 for the meaning of *work-related qualities*.

Subsection 34(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 matters the Commissioner considers relevant.

Subsection 34(3) provides that, if the Commissioner authorises the promotion, the Agency Head may then promote the employee.

Section 35 Engagement of non-APS employee following a machinery of government change

Section 35 is to the effect 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 36 Engagement of an ongoing Parliamentary Service employee as an ongoing APS employee

Section 36 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 37 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 37(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 37(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 37(2) provides that a former employee identified by subsection 37(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 37(3)—as soon as practicable after receiving a notice of the declaration.

Subsection 37(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 37(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 37(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 37(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 37(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 37(6) provides that the elections specified at paragraph 37(1)(a) are specified for the purposes of paragraph 32(1)(a) of the Act.

Section 38 Re-engagement of a former APS employee

Subsection 38(1) is to the effect 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 38(1)(c), as including the Federal Court of Australia, the Fair Work Commission, or the Australian Human Rights Commission.

Subsection 38(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 39 Purpose of this Division

Section 39 provides that Division 2 of Part 4 is made for the purpose of subsection 11A(1) of the Act, which permits the Commissioner to issue directions about employment matters relating to APS employees.

Section 40 Gazettal of employment decisions

Under the heading 'Decisions that must be notified', subsection 40(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 40(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 40(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 'When a notification may exclude an employee's name', subsection 40(4) provides that a notification in the Public Service *Gazette* must include the employee's name, unless:

- a. 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; or
- b. if the notification is under paragraph 40(1)(e), the Agency Head decides that including the name is not necessary to ensure public confidence in the integrity of the APS. This provides Agency Heads with the flexibility to exclude a person's name in circumstances where publication of the person's name would not be rationally connected or proportionate to achieving the objective of maintaining confidence in the integrity of the APS. Agency Heads are expected to utilise this provision to exclude a person's name from a notification under paragraph 40(1)(e) where the circumstances may warrant it - for example, where a person's safety may be compromised by the publication of their name.

Subsection 40(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.

Subsection 40(6) provides that if a notification does not include the employee's name, the Agency Head must advise the Commissioner of the employee's name as soon as practicable after the notification is published. This requirement reflects the importance of the Commission retaining data on APS employment matters (including those not published in the Public Service *Gazette*) such as engagements, promotions, movements and terminations.

Under the heading 'Notification relating to a former ongoing Parliamentary Service employee', subsection 40(7) 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 41 Gazettal when decisions previously notified are cancelled

Under the heading 'Decisions that must be notified', subsection 41(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 40(1)(a) where the cancellation decision is made by the Agency Head
- b. a promotion notified under paragraph 40(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 40(1)(c)
- d. an engagement of an ongoing Parliamentary Service employee notified under paragraph 40(1)(d)
- e. a termination of employment notified under paragraph 40(1)(e).

Under the heading ‘Time within which notification must be made’, subsection 41(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 41(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 42 *When promotion decisions take effect*

Section 42 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 40
- d. ‘PRC review’ is taken to mean review by a Promotion Review Committee under Part 5 of the Regulations.

Subsection 42(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 42(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 42(3) sets out the date of effect for promotion decisions that are subject to PRC review. Column 2 specifies when a promotion decision takes effect when the circumstances set out in column 1 are met.

Item 1 of subsection 42(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 42(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 42(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 42(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 42(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 42(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 42(4) provides that this section is subject to section 47, 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.

Division 3 – Engagement on Probation

Section 43 Purpose of this Division

Section 43 notes that Division 3 of Part 4 is made for the purposes of subsection 11A(1) of the Act, which permits the Commissioner to issue directions about employment matters relating to APS employees. This relevantly includes matters pertaining to probation.

Section 44 APS employees to be engaged on probation

Subsection 44(1) states that subject to subsection 44(2), Agency Heads that engage an APS employee must ensure that the employee is engaged on probation. This provision formalises current recruitment practices in the APS.

A note below the subsection states that subsection 22(6) of the Act allows the engagement of an APS employee to be made subject to conditions dealing with probation.

Subsection 44(2) permits Agency Heads to waive the requirement at subsection 44(1) if the Agency Head is satisfied that there are reasonable circumstances justifying the waiver. It is expected that Agency Heads will only waive the probation requirement in limited circumstances such as where an employee is only being engaged for a short period.

Subsection 44(3) requires Agency Heads to ensure that, during the probation period, there are appropriate processes in place to assess the suitability of the APS employee to perform the duties they have been engaged for. A note below this subsection specifies that the Commissioner may, from time to time, issue guidance on matters relating to probation. It is expected that Agency Heads have regard to this guidance in complying with subsection 44(3) of the Directions.

Part 5 – 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 45 Purpose of this Division

Section 45 notes that Division 3 of Part 4 is made for the purposes of subsection 11A(1) of the Act, which permits the Commissioner to issue directions about employment matters relating to APS employees.

Section 46 Moves between agencies not associated with promotion

Subsection 46(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 46(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 46(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 46(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.

Subsection 46(4) clarifies that an agreement to which section 46 applies does not constitute an engagement of the APS employee by an Agency Head for the purposes of section 22 of the Act.

Under the heading 'Movement in cases of a suspected breach of the Code of Conduct', subsection 46(5) provides that despite subsection 46(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 46(6) 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 47 Moves between agencies on promotion

The standard provisions for date of effect of a promotion are set out in section 42. Section 47 provides for moves between agencies on promotion where the employee is suspected of having breached the Code of Conduct.

Subsection 47(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 47(1)(a) and 47(1)(b) need not occur in that order.

Subsection 47(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 and culture

Section 48 Purpose of this Division

Section 48 notes that Division 2 of Part 5 is made for the purposes of subsection 11A(2) of the Act.

Subsection 11A(2) of the Act 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 49 Achieving effective performance – Agency Heads

Subsection 49(1) provides that an Agency Head upholds the obligation in APS Employment Principle 10A(1)(d) by ensuring:

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

Subsection 49(2) provides that an Agency Head upholds APS Employment Principle 10A(1)(d) by ensuring the following:

- a. 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:
 - i. the responsibilities of supervisors; and

- ii. the possible outcomes if an APS employee's performance is considered unsatisfactory; and
- iii. 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;
- b. those policies and processes are applied in a timely manner if an APS employee's performance is considered unsatisfactory.

A note below this section includes 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*'.

Section 50 Achieving effective performance – supervisors

Section 50 provides that a supervisor upholds APS Employment Principle 10A(1)(d) by doing the following:

- a. promoting and fostering high performance by the APS employee
- b. conducting regular (at least annual) career conversations that deal with the APS employee's performance, potential, aspirations, organisational fit and future opportunities
- c. 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
- d. ensuring that the APS employee is provided with clear, honest and timely feedback about the employee's performance
- e. managing and assessing the APS employee's performance in accordance with the Agency's performance management policies and processes
- f. working to improve the supervisor's capability in effectively managing the performance of APS employees, including through appropriate training
- g. promptly and actively managing unsatisfactory performance by the APS employee in accordance with the Agency's performance management policies and processes, including by:
 - i. identifying the nature of the unsatisfactory performance at the earliest opportunity; and
 - ii. maintaining appropriate records; and
 - iii. 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.

A note below this section includes 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'.

Section 51 Achieving effective performance – APS employees

Section 51 provides that an APS employee upholds APS Employment Principle 10A(1)(d) by doing the following:

- a. 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
- b. engaging constructively with their supervisor to clarify work expectations and what is required to perform effectively
- c. participating constructively in the Agency's performance management processes, including career conversations
- d. being open to receiving feedback and acting on feedback in a timely manner
- e. seeking opportunities to improve individual and team performance
- f. if informed that the APS employee's performance is unsatisfactory, engaging constructively by:
 - i. 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

- ii. undertaking any necessary training or remedial or corrective measures as directed.

A note below this section includes 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’.

Section 52 Managing performance in cases of a potential breach of the Code of Conduct

Section 52 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 52 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 7, which provides for handling suspected breaches of the Code of Conduct.

Part 6 – Employment-related information

Section 53 Purpose of this Part

Section 53 notes that Part 6 is made for the purposes of subsection 11A(1) of the Act, which permits the Commissioner to issue directions about employment matters relating to APS employees.

Section 54 Collection of employment-related information

Subsection 54(1) states that Agency Heads must ensure there are measures in place to collect from each APS employee in the Agency information set out in subsection 54(2). This section reflects section 50 of the 2016 Directions.

Subsection 54(2) specifies that for the purpose of subsection 54(1), the relevant information is:

- a. the information required by the data specifications for the database known as the Australian Public Service Employment Database, as set out in the Australian Public Service Employment Database (APSED) Specifications 2013, as existing at the commencement of this section
- b. the information required by the data specifications for the database known as the Australian Public Service Remuneration Survey, as set out in the Australian Public Service Remuneration Survey Data (APSRSD) Specifications 2021, as existing at the commencement of this section.

A note under this subsection states that in 2022, the relevant specifications mentioned in subsection 54(2) could be viewed on the APSC website (www.apsc.gov.au). Specifically, the APSED specifications are located at <https://www.apsc.gov.au/initiatives-and-programs/workforce-information/workforce-data/aps-employment-database-apsed> and the APSRSD specifications are located at <https://www.apsc.gov.au/initiatives-and-programs/workplace-relations/aps-remuneration-survey>.

Subsection 54(3) 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 in relation to the following information: whether the APS employee is a person with disability, is an Aboriginal and/or Torres Strait Islander person or from a culturally and linguistically diverse background, and their educational qualifications or prior employment.

Section 55 Requirement to give certain information, or documents, about workplace relations to the Commissioner

Subsection 55(1) states that if the Commissioner requires an Agency Head to give the Commissioner particular information, or documents, about workplace relations relating to APS employees in the agency, the Agency Head must comply with the requirement.

Subsection 55(2) notes that subsection 55(1) does not require an Agency Head to provide the Commissioner with personal information. A note under this subsection clarifies that the *Privacy Act 1988* applies to personal information given by an Agency Head under this section.

Section 56 ***Prompt, accurate giving of information to the Commissioner***

Subsection 56(1) provides that an Agency Head must ensure that there are measures in place to promptly give the Commissioner any information required under sections 54 and 55 of the Directions.

Subsection 56(2) notes that Agency Heads must have measures in place to provide the Commissioner with the relevant information in a particular form, where the Commissioner requests the Agency Head to do so.

Part 7 – Handling suspected breaches of the Code of Conduct

Division 1 – Introduction

Section 57 ***Purpose of this Part***

Section 57 provides that the purpose of Part 7 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 in the case of an APS employee, 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 Part 7 and section 52, which provides for managing performance in cases of a potential breach of the Code of Conduct.

Section 58 ***Application to former APS employees***

Section 58 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 59(a)(ii) and section 60, 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 59 ***Employee must be informed that a determination is being considered***

Section 59 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 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 60 Employee must be informed before a sanction is imposed

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) of the Act. A sanction cannot be imposed on a former employee.

Section 60 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 they 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 61 Person making determination to be independent and unbiased

Paragraph 61(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 has breached the Code of Conduct is, and appears to be, independent and unbiased.

Paragraph 61(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 62 Determination process to be informal

Section 62 provides that the process for determining whether an 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 63 Record of determination and sanctions

Section 63 regulates the records to be kept in cases where a determination is made in relation to an 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*.

Division 2 – Basic procedural requirements

Section 64 Role of the Commissioner for suspected breaches by SES employees

Section 64 sets out specific obligations for Agency Heads if an SES employee in their Agency is suspected of breaching the Code of Conduct.

Under paragraph 64(a), Agency Heads are required to consult with the Commissioner on the process for determining whether an SES employee has breached the Code of Conduct. This includes consultation on the decision on whether to investigate the matter in accordance with Agency procedures established under subsection 15(3) of the Act.

Under paragraph 64(b), if Agency Heads are considering imposing a sanction on an SES employee who is determined to have breached the Code of Conduct, they must consult with the Commissioner before the sanction is imposed.

A note under this section specifies that the Commissioner may, from time to time, issue guidance about matters relating to the Code of Conduct. Agency Heads are expected to have regard to such guidance.

Part 8 – Other employment matters

Section 65 Purpose of this Part

Section 65 states that Part 8 is made for the purposes of subsection 11A(1) of the Act, which permits the Commissioner to issue directions about employment matters.

Section 66 Restrictions on engaging person who has received a redundancy benefit

Section 66 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 66(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 66(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 66(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 that the term ‘work-related qualities’ is defined at section 5.

Subsection 66(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 67 ***Matters relating to leave without pay***

Subsection 67(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 67(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*.

Part 9 - Delegation

Part 9 provides for the Commissioner and for Agency Heads to delegate their powers or functions under the Directions. Sections 68 and 69 include subdelegation provisions and related provisions concerning the operation of delegations which are authorised by section 78 of the Act.

Section 68 ***Delegation by the Commissioner***

Section 68 provides for the delegation of the Commissioner's powers or functions.

Subsection 68(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.

This subsection restricts delegations to higher-level officials as it is limited to a person who holds any office or appointment under an Act; or an SES employee or acting SES employee. The Commissioner will ensure that any person delegated such powers or functions has the appropriate skills, qualifications and experience to exercise those powers or functions.

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

Subsection 68(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 68(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 68(4) provides that a person exercising powers or functions under a delegation under this section must comply with any directions given by the Commissioner. The Commissioner will determine whether directions are needed at the time the delegations are made. Section 69 Delegation by Agency Head

Section 69 provides for the delegation of an Agency Head's powers or functions.

Subsection 69(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.

This subsection reflects that the APS consists of many agencies of different sizes and differing operational requirements. The relevant Agency Head is best placed to determine who may exercise the powers or functions, and to which level their powers and functions are appropriate to delegate. It is in the interest of each Agency Head to ensure that the persons to whom their powers or functions have been delegated have the appropriate skills, qualifications, and experience to exercise the powers or functions. Further information is provided in guidance titled Delegations under the Public Service Act 1999 and Subordinate Legislation, which is available on the APSC website (www.apsc.gov.au).

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

Subsection 69(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 69(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 69(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 69(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. The Agency Head will consider the needs of the agency and determine whether directions are necessary and appropriate at the time the delegation is made.

Part 10 – Application and transitional provisions

Part 10 sets out application and transitional provisions for when certain sections of the Directions commence and where sections of the old Directions may continue to apply.

Division 1 – Provisions for this instrument as originally made

Section 70 Definitions

Section 70 provides that for the purposes of this Division, certain terms have a specified meaning.

‘Commencement time’ means the time section 70 commences (i.e. the day after the Directions are registered).

‘Old law’ means the *Australian Public Service Commissioner’s Directions 2016* (the 2016 Directions) (as in force immediately before the day this instrument commences).

Section 71 Things done under old directions

Section 71 is a transitional provision. Subsection 71(1) provides that if a thing was done for a particular purpose under the old Directions before commencement and the thing could be done for that purposes under this instrument, that thing has effect under this instrument as if it was done under this instrument.

Subsection 71(2) provides that a reference in subsection 71(1) to a thing being done includes a reference to a notice, application or other instrument being given or made.

Section 72 Conduct, event or circumstance occurring before commencement time

Section 72 is a transitional provision. Subsection 72(2) states that for the avoidance of doubt, a function or duty may be performed, or a power exercised, under this instrument in relation to conduct engaged in, an event that occurred, or a circumstance that arose, before the commencement of this instrument.

Subsection 72(2) states that section 72 does not limit Division 1 of Part 10 or section 7 of the *Acts Interpretation Act 1901* (as that Act applies in relation to this instrument).

Section 73 Integrity of the APS

Section 73 is an application provision. Subsection 73(1) states that Division 2 of Part 3 of the Directions applies to APS employees engaged after the commencement date. Subsection 73(2) states that Division 3 of Part 3 of the Directions applies in relation to agreements entered into after the commencement time (whether the dispute to which the agreement relates arose before or after the commencement time).

Section 74 Recruitment and selection

Subsection 74(1) provides that Part 4 applies in relation to selection processes for vacancies that first exist after the commencement time.

Subsection 74(2) provides that despite the repeal of the old directions by this instrument, Division 1 of Part 3 of the old directions continue to apply, as if the repeal had not happened, in relation to selection processes for vacancies that first exist before the commencement time.

Section 75 Delegations

Section 75 is a savings provision. Subsection 75(1) provides that a delegation made under section 51 of the 2016 Directions in force on commencement of these Directions will continue in force after commencement as if it had been made under section 68 of these Directions. Subsection 75(2) is to the same effect for delegations made under section 52 of the 2016 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.

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 2016* are repealed in their entirety by commencement of these Directions.

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 2022

The *Australian Public Service Commissioner's Directions 2022* (the Directions) are 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 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 the day after they are registered and they replace and largely re-make the *Australian Public Service Commissioner's Directions 2016*.

New provisions have been added to the Directions, including:

- section 19 – general requirement that APS employees undertake integrity training
- section 20 – an Agency Head must consult with the Commissioner before entering into an agreement settling a dispute about sexual harassment which includes a non-disclosure or confidentiality provision
- section 21 – an Agency Head must notify the Commissioner of agreements that are for settling disputes about employment matters and include non-disclosure or confidentiality provisions
- section 44 – an Agency Head must engage an APS employee on probation
- sections 54–56 – an Agency Head must provide certain information to the Commissioner relating to APS employees in their Agency
- section 64 – an Agency Head must consult with the Commissioner if an SES employee in an Agency is suspected of breaching the Code of Conduct.

The Directions reflect reviews and reports into public administration including the *Independent Review of the Australian Public Service* (Thodey review), the *Report into consultations regarding APS approaches to ensure institutional integrity* (Sedgwick report), 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 and clarify the operation of existing provisions and enhance APS integrity and capability measures.

Human rights implications

The Directions engage the following rights:

- Right to work and rights at work – general right recognised by Article 6(1) and Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and, for specific groups:
 - Articles 5(1)(i) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD)
 - Articles 11 of the Convention on the Elimination of All Forms of Discrimination against Woman (CEDAW);
 - Article 27 of the Convention on the Rights of Persons with Disabilities (CRPD).
- Right to privacy – Article 17 of the International Covenant on Civil and Political Rights (ICCPR);

- Right to enjoy and benefit from culture – Article 27 of the ICCPR and Article 15 of ICESCR;
- Right to take part in public affairs and elections – Article 25 of the ICCPR.

Right to work and rights at work

Article 6(1) of the ICESCR 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 ensures an equal opportunity for everyone to be promoted in employment to an appropriate higher level subject to no considerations other than seniority and competence.

The general right to work and rights at work are promoted by:

Section 24 – Merit based selection process for engagement and promotion

This section provides direction and guidance on the ‘merit principle’ in section 10A(1)(c) of the Act, which aims to ensure workplaces are free from discrimination, patronage and favouritism. Section 24 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.

Section 25 – Notification of vacancy

This section broadens (by comparison to the 2016 Directions) the basis on which decisions to fill vacancies in the APS can be made to give agencies more flexibility in making promotion and engagement decisions. Agency Heads may now access merit lists and merit pools from a previously notified Parliamentary Service vacancy in certain circumstances to fill a new APS vacancy that is similar to a Parliamentary Service vacancy. The section also extends the period for which a decision can be made to fill a vacancy from 12 to 18 months from the date the vacancy was advertised.

Division 2 of Part 5 – Performance management and culture

This Division provides direction and guidance on the employment principle in section 10A(1)(d) of the Act that the APS is a career-based public service that ‘requires effective performance from each employee’. Sections 49–51 provide for how Agency Heads, supervisors and APS employees can ensure effective performance including by dealing with unsatisfactory performance in constructive and transparent ways.

Part 7 – Handling suspected breaches of the Code of Conduct

This Part sets out procedures for agency inquiries into alleged breaches of the Code of Conduct which ensure that employees subject to an inquiry are subject to fair and transparent processes and procedures.

Right to work and rights at work for specific groups

ICERD and CRPD

Article 5(e)(i) of ICERD provides for the elimination of racial discrimination to guarantee the right of everyone to the enjoyment of their rights to work. Article 27 of the CRPD prohibits discrimination of the basis of disability with regard to all forms of employment and for the promotion of employment opportunities for persons with disability.

Sections 31, 32 and 33 of the Directions promote the right to work for those whose rights are protected by the ICERD and persons with a disability. Section 31 of the Directions provides for affirmative measures targeted at Aboriginal and Torres Strait Islander persons which are intended to increase their representation in the APS workforce. Sections 32 and 33 of the Directions provide for affirmative measures targeted at persons with disability which intend to increase their representation in the APS workforce.

While the exceptions to the merit principle provided in the affirmative 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 the right to work for specific groups.

CEDAW

Article 11 of CEDAW provides for the elimination of discrimination against women in the field of employment in order to ensure, on a basis of equality of men and women, the same rights.

The Sex Discrimination Commissioner's Respect@Work report (March 2020) noted there could be benefits for non-disclosure agreements in sexual harassment matters in protecting the confidentiality and privacy of victims and helping to provide closure. However, the report also highlighted ways in which non-disclosure agreements have been used to reinforce harmful workplace practices, such as protecting the reputation of business/harassers or creating a 'culture of silence'

Section 20 of the Directions may promote the right to work for women by requiring agencies to consult with the Commissioner prior to entering into a non-disclosure agreement with an employee that is settling a dispute about sexual harassment. This promotes the right to work for women by ensuring these agreements are used fairly and reasonably, and not to silence women subject to sexual harassment at work.

Right to privacy

Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with their privacy.

Gazette notification requirements

Section 40 of the Directions limits a person's right to privacy by imposing a general requirement that employment and promotion decisions be notified in the *Gazette*. However, the limitation is reasonable, necessary and proportionate.

The purpose of the requirement is to ensure that employment decisions about the public service are transparent and capable of being subject to public scrutiny. There are exceptions to the general requirement that decisions be notified. Paragraph 40(4)(a) provides that the Agency Head may decide that the name should not be included because of the person's work-related or personal circumstances. Paragraph 40(4)(b) provides that where the notification is for a termination of employment for breach of the Code of Conduct, an employee's name may not be included if the Agency Head decides that including the name is not necessary to ensure public confidence in the integrity of the APS. This new exception (that was not in the 2016 Directions) is to ensure that any limitation on the right to privacy is necessary, having regard to the particular circumstances of the employee's termination.

Where a name is not notified in the *Gazette* in accordance with subsection 40(4), then under subsection 40(6), the name must still be provided to the Australian Public Service Commissioner. This requirement reflects the importance of the Commission retaining data on APS employment matters (including those not published in the Public Service *Gazette*) such as engagements, promotions, movements and terminations, and supports the integrity of the APS as an institution.

Collection of employee information by Agency Heads

Section 54 requires Agency Heads to ensure there are measures in place to collect certain information from employees in the agency. This may limit a person's right to privacy. However, the limitation is reasonable, necessary and proportionate. The Commissioner needs to be able to collect employee information to properly administer and make policy decisions about the public service. Subsection 54(3) provides that employees must be given the option of choosing not to answer certain questions that would involve disclosing personal information, including questions about disability, ethnicity and education.

Section 55 states that the Commissioner may require an Agency Head to give the Commissioner information or documents about workplace relations relating to APS employees in the Agency. The Commissioner may, from time to time, require oversight of workplace relations matters relating to APS employees to properly perform their role. Subsection 55(2) ensures this privacy limitation is reasonable, necessary and proportionate by specifying that an Agency Head is not required to give the Commissioner personal information (within the meaning of the *Privacy Act 1988*).

Rights to enjoy and benefit from culture

Article 15 of the ICESCR provides for the right to take part in cultural life. Article 27 of the ICCPR provides that persons belonging to ethnic, religious or linguistic minorities are not to be denied the right to enjoy their own culture, to profess and practise their own religion, or to use their own language.

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*. Section 14 of the Directions promotes the rights to take part in cultural life and to enjoy and benefit from cultural life by requiring APS employees, having regard to their duties and responsibilities, to recognise and foster diversity and ‘contribute to an inclusive workplace culture’.

Right to take part in public affairs and elections

Article 25 of the ICCPR provides that every citizen shall have the opportunity to take part in the conduct of public affairs and to have access to public service in their country.

Section 37 of the Directions promotes Article 25 by providing that where an APS employee has resigned to contest an election, they may 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 permitting circumstances for security and continuity of employment should an APS employee contest an election unsuccessfully.

Conclusion

The Directions are 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.