

EXPLANATORY STATEMENT

Issued by the authority of the Australian Public Service
Commissioner

Public Service Act 1999

*Australian Public Service Commissioner's Amendment (2024
Measures No.1) Directions 2024*

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 *Australian Public Service Commissioner's Amendment (2024 Measures No.1) Directions 2024* (the instrument) amends the Directions. The amendments to the Directions made by the instrument are to:

- include a new direction on the scope and application of the APS Values to reflect the new Value of Stewardship;
- clarify the interaction between requirements for changing from casual to permanent employment under the *Fair Work Act 2009* (Fair Work Act) and the merit-based selection process requirements under the Act in relation to casual employees seeking to convert to permanent APS employment;
- amend the definition of promotion to clarify its operation and effect;
- amend the meaning of similar vacancy in section 9 of the Directions by removing the requirement that the vacancy and the notified vacancy are for duties to be performed in a similar location.

Legislative framework

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(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 42(2) of the Act provides 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 the 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 4 of the *Acts Interpretation Act 1901* (the Acts Interpretation Act) provides that a legislative instrument may be made under provisions of an Act that have not yet come into effect, although such legislative instrument cannot come into effect before the provisions under which they are made.

Under subsection 33(3) of the Acts Interpretation Act, 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.

Commencement

Sections 1 to 4 and anything in the instrument not covered elsewhere in the Commencement table, commences the day after the instrument is registered.

Schedule 1, Part 1 commences at the same time as the *Public Service Amendment Act 2024*.

Schedule 1, Part 2 commences on 26 August 2024.

Schedule 1, Part 3 commences on 1 November 2024.

Consultation

The instrument was released as an Exposure Draft for a two week period. The Exposure Draft was sent to 35 APS agencies, the Community and Public Sector Union (CPSU) and the Australian Services Union (ASU).

Only a few comments were received in relation to the text for the proposed changes. Two amendments were made to further clarify:

- the drafting of 25A(3), and
- the definition of promotion.

The Exposure Draft consultation process resulted in a few comments regarding implementation of the amendments which will be addressed in guidance materials to be issued by the Australian Public Service Commission. In addition, early consultation was undertaken to support development of the instrument including:

- Schedule 1, Part 1 – APS Values – Extensive agency and stakeholder consultation, including with the CPSU and ASU, was undertaken on an initial draft of the Stewardship directions between August and October 2023, focusing on creating a suite of practical requirements to operationalise the new Value through the APS Code of Conduct. Based on this consultation the original text was revised and iterated to the current version in the instrument.
- Schedule 1, Part 2 – Employee choice, and Schedule 1, Part 3, Section 8-9 –Other matters, consultation occurred with a cross section of APS agencies and the CPSU in 2023 and early 2024 to determine and refine the policy position.
- The early consultation undertaken on Part 2 assisted in refining the policy position on the application of the provisions and enabled consideration of additional provisions required in the instrument including provisions relating to circumstances where a casual employee has previously been rated as unsuitable in a merit-based selection process.

- The early consultation on Part 3, resulted in agencies raising issues regarding implementation of the amendments and therefore based on the feedback received, a commencement date of 1 November 2024 has been selected to provide sufficient opportunity for agencies to implement the provisions.

Impact Analysis

Following consultation with the Office of Impact Analysis, Impact Analysis is not required for the instrument (OIA24-07537) as there is no more than minor regulatory impact on businesses, community organisations or individuals.

Explanation of the provisions

An explanation of the provisions are set out in [Attachment A](#).

Statement of Compatibility with Human Rights

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

EXPLANATION OF THE PROVISIONS

Section 1 – Name

Section 1 sets out the name of the instrument, being the *Australian Public Service Commissioner’s Amendment (2024 Measures No.1) Directions 2024* (the instrument).

Section 2 – Commencement

Section 2 states when each provision of the instrument commences.

Items 1 and 2 in the table in subsection 2(1) provide that sections 1 to 4 and anything else in the instrument not covered by the table, commence on the day after the instrument is registered on the Federal Register of Legislation. Item 2 in the table in subsection 2(1) provides that Schedule 1, Part 1 commences at the same time as the *Public Service Amendment Act 2024* (PS Amendment Act). Item 3 in the table in subsection 2(1) provides that Schedule 1, Part 2 commences on 26 August 2024. Item 4 in the table in subsection 2(1) provides that Schedule 1, Part 3 commences on 1 November 2024.

Section 3 – Authority

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

Section 4 – Schedules

Section 4 provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in that Schedule, and any other item in a Schedule to the instrument has effect according to its terms.

Schedule 1 - Part 1-APS values- Amendments commencing at the same time as the *Public Service Amendment Act 2024*

Schedule 1, Part 1 to the instrument contains amendments to the Directions that commence at the same time as the PS Amendment Act commences.

The PS Amendment Act inserted the value ‘Stewardship’ into the APS Values set out in section 10 of the Act.

The purpose of Part 1 of Schedule 1 of the instrument is to provide for the scope or application of the new APS Value of Stewardship, setting out the behaviours that individuals must demonstrate, having regard to their duties and responsibilities, in order to uphold the Stewardship Value at section 10(6) of the Act.

Item 1 inserts new section 17A at the end of Part 2 of the Directions. Section 17A determines the scope or application of the new APS Value of Stewardship by setting out the behaviours that individuals must demonstrate, having regard to their duties and responsibilities, in order to uphold the Stewardship Value.

As all APS Values are enforceable for APS employees and Agency Heads through the APS Code of Conduct under section 13(11) of the Act, the instrument provides for the scope and application of the Stewardship Value.

Schedule 1 - Part 2- Employee choice - Amendments commencing 26 August 2024

Schedule 1, Part 2 to the instrument contains amendments to the Directions that commence 26 August 2024.

Schedule 1, Part 2 of the instrument makes changes to the Directions to clarify the interaction between the employee choice notification requirements under the *Fair Work Act 2009* (Fair Work Act) and the merit-based selection process requirements under the Act. These provisions prescribe the responsibilities of APS agencies in relation to casual APS employees seeking to convert to permanent employment.

Under section 22 of the Act an Agency Head may engage persons as employees, and such engagement must be:

- as an ongoing APS employee; or
- for a specified term or for the duration of a specified task; or
- for duties that are irregular or intermittent (this is referred to as casual employment and employees engaged on this basis are considered casual employees).

Paragraph 10A(1)(c) of the Act provides the APS Employment Principle that decisions relating to engagement and promotion are to be based on merit. Decisions are based on merit if the requirements in subsection 10A(2) of the Act are met.

Subsection 11A(2) of the Act provides the Commissioner may issue directions in writing in relation to any of the Employment Principles. The application of these provisions in relation to this APS Employment Principle is provided by paragraph 23(a) and Subdivision B, Division 1, Part 4 of the Directions which have the effect that a person must have been found suitable through a merit-based selection process to be engaged or promoted as an ongoing APS employee.

Paragraph 23(b) and Subdivision C of Part 4, Division 1 of the Directions provides circumstances in which merit-based selection processes are modified or do not apply. Under section 27 an Agency Head may engage on a short-term, irregular or intermittent basis a person to perform the duties of a non-ongoing APS employee without a full merit-based selection process provided the vacancy is brought to the notice of the community and the Agency Head is satisfied that the person has the work-related qualities genuinely required to perform the role.

As a result of these provisions, it is possible for a casual employee engaged under paragraph 22(2)(c) of the Act to be engaged without having been subject to a merit-based selection process.

Relevant Fair Work Act provisions

Prior to amendments by the *Fair Work Legislation Amendment (Closing Loopholes No.2) Act 2024*, (Closing Loopholes Act No. 2), the Fair Work Act provided an employee who is engaged as a casual employee (as defined in section 15A of the Fair Work Act) may be eligible to be offered or to request permanent employment. This is referred to as casual conversion.

Following commencement of the Closing Loopholes Act No. 2, a new pathway will be introduced for eligible employees to change to permanent employment if they want to. This will replace the current rules for changing to permanent employment and will commence 26 August 2024.

The Closing Loopholes Act No. 2 also inserted new provisions into the Fair Work Act whereby a casual employee may notify an employer that the employee believes that the employee is no longer a casual employee. This is referred to as an employee choice notification.

New section 66AAC, inserted by the Closing Loopholes Act No. 2, sets out how an employer must respond to an employee notification under section 66AAB, including details of how the employee's employment will convert to ongoing employment. Under paragraph 66AAC(4)(c) an employer has grounds to *not* accept a notification given under section 66AAB if accepting it would result in the employer not complying with a recruitment or selection process required by or under a law of the Commonwealth or a State or a Territory.

Interaction of Public Service legislation and Fair Work Act

In order to be eligible to convert to permanent employment, an APS casual employee must meet the requirements under both the Fair Work Act (that is, the employee choice notification requirements noted above) and the Act (that is, they have been found suitable in a merit-based selection process for an ongoing vacancy notified in the Public Service Gazette within the 18 month period before the day the Agency Head receives the employee choice notification).

The amendments made by the instrument ensure that an agency is required to complete a merit-based selection process where a casual employee submits an employee choice notification under section 66AAB of the Fair Work Act and otherwise meets the requirements to convert from casual to permanent employment but has not yet had the opportunity to be assessed as suitable through a merit-based selection process for the same or similar role.

Where an employee has already been assessed as suitable for an ongoing vacancy advertised in the Public Service Gazette, through a merit-based selection process in the preceding 18 months, for a similar vacancy and otherwise meets the criteria for to change from casual to permanent employment, they will not be required to undertake a new merit-based assessment. In addition, where an employee has been assessed as unsuitable in a merit-based recruitment process for a similar vacancy in the preceding 6 months, the agency will not be required to undertake a new merit-based assessment or accept the employee choice notification.

Item 2 (Section 5)

Item 2 inserts a definition for the term *employee choice notification* into section 5 of the Directions. The definition refers to subsection 25A(1) of the instrument, which provides that an employee choice notification is a written notification given to an Agency Head under section 66AAB of the Fair Work Act by a non-ongoing APS employee. This notification can be provided by an employee to their employer if the employee believes they are no longer a casual employee (as defined in section 15A the Fair Work Act).

Item 3 (Section 7)

Item 3 repeals section 7 of the Directions and substitutes it with new section 7 which provides that, for the Directions, a reference to a vacancy in an agency is a reference to a specified group of duties that are, or need to be, performed in that agency in respect of which:

- it has been decided that it is appropriate to engage a person to perform the duties, or promote an APS employee to perform the duties, or assign the duties to an APS employee; or
- the Agency Head is required under new subsection 25A(3) to conduct a merit-based selection process.

The effect of the meaning of vacancy in this substituted section 7 is to ensure a vacancy exists where a non-ongoing employee meets the criteria to convert from casual to permanent employment under the Fair Work Act, described above, and has been found suitable for an ongoing vacancy through a merit-based selection process.

This amendment implements the findings of the Fair Work Commission in *CPSU v Commonwealth of Australia (Services Australia)* [2022] FWC 1246 that there does not need to be an ongoing vacancy for casual conversion to be required under the Act. That is, the provisions relating to conversion from casual to permanent employment acts to change the nature of the existing employment, not to create a new role.

Item 4 (After section 25)

Item 4 inserts, after section 25 of the Directions, a new section; 25A- Requirement to conduct merit-based selection processes for non-ongoing APS employees exercising employee choice.

Subsection 25A(1) clarifies that section 25A applies if an Agency Head receives a written notification under section 66AAB of the Fair Work Act from a person who is engaged under subsection 22(2)(c) of the Act as

an APS employee for duties that are irregular or intermittent. The written notification is called an *employee choice notification* for Subdivision B, Division 1, Part 4 of the Directions.

Under section 66AAB of the Fair Work Act a casual employee may notify an employer that the employee believes that the employee is no longer a casual employee. The term casual employee is defined in section 15A of the Fair Work Act.

Subsection 25A(2) sets out the circumstances in which an employee has been assessed as suitable in accordance with Subdivision B, Division 1, Part 4 of the Directions. Noting that paragraph 66AAC(4)(c) of the Fair Work Act provides an employer with grounds to not accept an employee choice notification if a merit-based selection process to engage the notifying employee as ongoing has not been undertaken, paragraphs 25A(2)(a) and (b) together provide that an Agency Head complies with the requirement to undertake a merit based selection process in respect of the notifying employee if:

- the employee was assessed as suitable for a vacancy by a recruitment process that was a merit-based selection process notified in the Public Service Gazette within the 18 month period before the day the Agency head receives the employee choice notification; and
- the group of duties performed by the employee, if they were taken to be a vacancy (as defined in section 7 of the Directions), for an ongoing category of employment would be a similar vacancy to the vacancy mentioned in paragraph 25A(2)(a).

The effect of this provision is that should an employee have been assessed as suitable for the vacancy or a similar vacancy for a merit-based selection process notified in the Public Service Gazette in the 18 months prior to the Agency Head receiving the employee choice notification, the grounds under paragraph 66AAC(4)(c) of the Fair Work Act will not be available, precluding an Agency Head from not accepting an employee choice notification on this ground.

Subsections 25A(3) to (4) together require a merit-based selection to be conducted if an employee who has given an employee choice notification in accordance with subsection 25A(1) has not been assessed as suitable through a merit-based selection, such that subsections 25A(2) does not apply to the employee.

Under subsection 25A(3) of the instrument, where an Agency Head does not accept an employee choice notification on the ground referred to in paragraph 66AAC(4)(c) of the Fair Work Act but would have accepted it but for that ground, the Agency Head must conduct a merit-based selection process in accordance with Subdivision B of Division 1, Part 4 of the Directions.

The effect of subsection 25A(3) is that a merit-based selection process must be conducted if a non-ongoing APS employee makes an employee choice notification in respect of the group of duties performed by the employee. Subsection 25A(3) is subject to subsection 25A(5).

Under subsection 25A(4) the vacancy in respect of the notifying employee must have been notified in the Public Service Gazette within 3 months of the day on which the Agency head receives the employee choice notification.

Subsection 25A(5) provides that the requirement to conduct a merit-based selection process under subsection 25A(3) does not apply if the notifying employee was assessed through a merit-based selection process as unsuitable for a similar vacancy to the vacancy in the 6 months before the day the Agency Head received the employee's employee choice notification.

Merit is a fundamental principle of the APS. The intent of subsection 25A is to ensure that all decisions to engage an ongoing employee in the APS are merit-based whilst ensuring that APS casual employees have an opportunity to access the employee choice provisions in the Fair Work Act.

Schedule 1 - Part 3- Other Matters- Amendments commencing 1 November 2024

Schedule 1, Part 3 to the instrument contains amendments to the Directions that commence 1 November 2024.

Schedule 1, Part 3 to the instrument makes clarifying changes to the Directions.

Paragraph 10A(1)(c) of the Act provides the APS Employment Principle that decisions relating to engagement and promotion are to be based on merit. Division 2 of Part 4 of the *Public Service Regulations 2023* sets out provisions relating to review of promotion decisions. Section 6 of the Directions sets out the meaning of promotion.

Items 5, 6 and 7 of the instrument clarify the definition of promotion to ensure decisions:

- from a training classification to a higher operational classification are based on merit; and
- where a role is notified in the Gazette, any resulting movements to a higher classification are subject to review.

Item 5 (section 6)

Item 5 repeals section 6 of the Directions and substitutes it with a new section 6 to clarify the definition of promotion.

As a result of the amendments any movement to a higher classification that is a result of a merit-based selection process advertised in the Public Service Gazette is a promotion, subject to promotion review.

In respect of the allocation of an operational classification to a trainee, the amendments to section 6 clarify that any movement to an operational classification that is a higher classification than the operational classification that corresponds to the training classification in column 2 of the table at Schedule 2 of the *Public Service Classification Rules 2000*, is a promotion and must be the result of a merit-based selection process.

Item 6 (Paragraph 9(1)(d))

Item 6 repeals paragraph 9(1)(d) of the definition of similar vacancy in the Directions. The repeal of the similar location requirement supports a more flexible use of merit lists or merit pools and to recognise that:

- while some positions need to be located in a specific location, many can be performed from multiple locations or any location. Limiting ‘similar vacancies’ to those in a similar location does not reflect the changing nature of work and inhibits merit list sharing and mobility; and
- the needs of the employee and the agency can change substantively over time, given that merit lists remain accessible for 18 months after the notification of the original vacancy.

Amending the definition of ‘similar vacancy’ to remove similar location will mean that agencies will not be limited in using merit lists/pools to fill vacancies in different locations from the notified vacancy, including for circumstances where an employee works remotely, unless the agency specifies in the vacancy notification that future use of the merit list/pool is limited to the location of the notified vacancy.

Item 7 (At the end of subsection 9(1))

Item 7 adds two notes at the end of subsection 9(1) of the Directions. The first note flags that when considering whether a vacancy is similar that any decision must be based on merit in accordance with paragraph 10A(1)(c) of the Act and Subdivision B of Division 1 of Part 4 of the Directions. That is, if a vacancy has been notified with any limiting criteria (for example, location, requirement to hold a qualification etc.), and the limiting criteria does not apply to a second vacancy, then even if the second vacancy otherwise meets the criteria for similar vacancy, any promotion or engagement decision would not be merit-based.

The second note provides that the Commissioner may, from time to time, issue guidance on matters relating to similar vacancies.

This guidance will be provided if the Commissioner has made an assessment that guidance is necessary. Any guidance document provided by the Commissioner is not incorporated by reference into the Directions. Any such guidance will not alter an agency's obligation to make promotion and engagement decisions based on merit, in accordance with the APS Employment Principles.

Item 8 (In the appropriate position in Part 10)

Item 8 adds application provisions to provide that the amendments to section 6 of the Directions apply to the classification of an employee on or after 1 November 2024, and that the amendments to section 9 of the Direction only apply to vacancies notified in the Public Service Gazette on or after 1 November 2024.

These provisions have the effect of ensuring the provisions cannot be applied retrospectively and similar location would remain applicable for any merit list/pool created for a vacancy notified prior to 1 November 2024.

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 Amendment (2024 Measures No.1) Directions 2024

The *Australian Public Service Commissioner's Amendment (2024 Measures No.1) Directions 2024* (the instrument) is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The instrument is made under the *Public Service Act 1999* (the Act), and is necessary for its effective operation.

The instrument is a legislative instrument for the purposes of the *Legislation Act 2003*. The Directions 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 instrument amends the Directions. Sections 1 to 4 and anything in the instrument not covered elsewhere in the commencement table, commences the day after the instrument is registered. Schedule 1, Part 1 commences at the same time as the *Public Service Amendment Act 2024*. Schedule 1, Part 2 commences on 26 August 2024. Schedule 1, Part 3 commences on 1 November 2024.

The amendments to the Directions made by the instrument are to:

- include a new direction on the scope and application of the APS Values to reflect the new Value of Stewardship;
- clarify the interaction between requirements for changing from casual to permanent employment under the *Fair Work Act 2009* (Fair Work Act) and the merit-based selection process requirements under the Act in relation to casual employees seeking to convert to permanent APS employment;
- amend the definition of promotion to clarify its operation and effect;
- amend the meaning of similar vacancy in section 9 of the Directions by removing the requirement that the vacancy and the notified vacancy are for duties to be performed in a similar location.

Human rights implications

The instrument engages the following rights:

- Right to work and rights at work – general rights recognised by Article 6(1) and Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Right to take part in public affairs and elections – Article 25 of the International Covenant on Civil and Political Rights (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 25A – Requirement to conduct Merit-based selection process for non-ongoing APS employees exercising employee choice

This section provides direction and guidance if an Agency Head is given written notification (an employee choice notification) under section 66AAB of the *Fair Work Act 2009* (Fair Work Act) by a non-ongoing APS employee. Section 25A provides, among other things, that if an Agency does not accept the employee choice notification on the ground referred to in paragraph 66AAC(4)(c) of the Fair Work Act, and but for that ground, the Agency Head would have accepted the notification, the Agency Head must conduct a merit-based selection process.

This ensures 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 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 25A positively engages the right to enjoyment of just and favourable conditions by ensuring that a decision relating to engagement or promotion is based on merit.

Section 9 – Meaning of similar vacancy – repealing paragraph 9(1)(d)

This change amends the definitional criteria for ‘similar vacancy’ in section 9 of the Directions to remove ‘similar location’. The effect of this change is that APS agencies will not be limited in using merit lists for ‘similar vacancies’ where the location is different. The other criteria for ‘similar vacancy’ will still apply (similar employment type, similar work-related qualities, same classification and agreement that the vacancies are similar). Agencies will be asked to be transparent in the job advertisement where the position is located, whether remote working is available and how the merit list/pool will be used.

The amendment improves employee rights by removing barriers to employment due to location and increases transparency regarding location requirements.

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, on general terms of equality, to public service in their country.

Section 25A – Requirement to conduct Merit based selection process for non-ongoing APS employees exercising employee choice

Section 25A generally promotes this right by ensuring decisions relating to engagement and promotion are based on merit; in which all eligible members of the community are considered and a selection decision is based on an assessment of work-related qualities of the candidates.

Conclusion

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