

EXPLANATORY STATEMENT

Issued by the authority of the Presiding Officers

Parliamentary Service Act 1999

Parliamentary Service Determination 2024

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

Section 11A of the Act also empowers the Presiding Officers to make determinations under section 71 of the Act in relation to any of the Parliamentary Service Values and section 11C empowers the Presiding Officers to make determinations under section 71 about employment matters relating to Parliamentary Service employees.

The *Parliamentary Service Determination 2024* (this Determination) repeals the *Parliamentary Service Determination 2013* (the 2013 Determination). Pursuant to section 50 of the *Legislation Act 2003* (Cth) the 2013 Determination was scheduled to sunset on 1 October 2023. Pursuant to section 4 of the *Legislation (Deferral of Sunsetting—Parliamentary Service Determination) Certificate 2023*, the 2013 Determination will now sunset on 1 October 2024.

Overview of Determination

The purpose of this Determination is to fill out the framework established by the Act and to support its effective operation. The Determination aligns with equivalent instruments such as the *Australian Public Service Commissioner's Directions 2022* and the *Public Service Regulations 2023* where possible and appropriate, and as required under the Act.

New provisions have been added to this Determination, including:

- Section 15 - Mandatory integrity training for Parliamentary Service employees;
- Section 16 - Consulting Parliamentary Service Commissioner before entering into agreement settling dispute about sexual harassment including non-disclosure or confidentiality provision;
- Section 17 - Notifying the Parliamentary Service Commissioner of agreements that are for settling disputes about employment matters and include non-disclosure or confidentiality provisions;
- Section 30 - Affirmative measure—RecruitAbility Scheme;
- Section 37 - Parliamentary Service employees to be engaged on probation;
- Section 97 - Inquiries into public interest disclosures relating to alleged breaches of the Code of Conduct;
- Section 98 - Inquiries into Merit Protection Commissioner's behaviour;
- Section 99 - Inquiries into alleged breaches of Code of Conduct by statutory office holders; and
- Section 100 - Inquiries into public interest disclosures that relate to alleged breaches of the Code of Conduct.

The Determination is broadly consistent with the equivalent instruments in place for the Australian Public Service, the *Australian Public Service Commissioner Directions 2022* and the *Public Service Regulations 2023*. These instruments reflect the reviews and reports into public administration including:

- the *Independent Review of the Australian Public Service* (Thodey review);
- the *Report into consultations regarding APS approach 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).

Regulation Impact Statement

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

Statement of Compatibility with Human Rights

A Statement of Compatibility with Human Rights has been completed for this Determination, in accordance with the *Human Rights (Parliamentary Scrutiny) Act 2011*. The Statement's assessment is that this Determination 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*. A full statement of compatibility is set out in Attachment A.

Consultation

The Act specifies several conditions that need to be satisfied before exercising the power to make determinations:

- paragraph 11A(2)(b) specifies that the Presiding Officers must have regard to advice from the Parliamentary Service Commissioner given under section 11 before making determinations in relation to the Parliamentary Service Values (subsection 11A(4) requires this advice to be tabled if the Presiding Officers make relevant determinations);
- paragraph 11C(3)(b) specifies that the Presiding Officers must have regard to advice from the Parliamentary Service Commissioner given under subsection 11B(2) before making determinations in relation to the Parliamentary Service Employment Principles (subsection 11C(5) requires this advice to be tabled if the Presiding Officers make relevant determinations); and
- subsection 71(1) specifies that the Presiding Officers may make determinations after consulting the Parliamentary Service Commissioner.

This Determination was made by the Presiding Officers after they had received advice from, and consulted with, the Commissioner, in accordance with the requirements mentioned above.

This Determination was prepared following consultation with the following entities.

- Australian Public Service Commission;
- Attorney-General's Department;

- National Indigenous Australians Agency;
- Parliamentary Service Commissioner;
- Merit Protection Commissioner;
- Commonwealth Ombudsman; and
- Office of Parliamentary Counsel.

This Determination was also provided to the following Unions, in draft, for their comments:

- Community and Public Sector Union;
- Electrical Trades Union;
- Construction, Forestry and Maritime Employees Union; and
- Australian Manufacturing Workers' Union.

Consultation with the entities listed above allowed for the drafting of the Determination to draw on comments from persons likely to be affected by the Determination: section 17(2)(b) of the *Legislation Act 2003* as well as comments from persons with expertise in fields relevant to the Determination: section 17(2)(a) of the *Legislation Act 2003*.

Description of consultations

Section 15J(2)(d) of the *Legislation Act 2003* provides that the explanatory statement for a legislative instrument must contain a description of the nature of any consultation undertaken, if consultation was undertaken under section 17 of the *Legislation Act 2003*.

When consulted, the following entities confirmed that they had no comments or concerns with the Determination:

- Commonwealth Ombudsman;
- Courts and Tribunals Branch of the Attorney-General's Department; and
- Information Law Branch of the Attorney-General's Department.

Whilst not raising any specific concerns, the Human Rights Branch of the Attorney-General's Department did refer to the Australian Human Rights Commission's *Guidelines on the Use of Confidentiality Clauses in the Resolution of Workplace Sexual Harassment Complaints* in the context of sections 16 and 17

Consultation with the National Indigenous Australians Agency (NIAA) resulted in the exclusion, from section 29, of the tripartite test used in the 2013 Determination. NIAA's view was that it was not strictly necessary noting that 'cultural identity of First Nations people is a very personal issue.' After consultation, subsection 29(2) simply refers to the affirmative measure in section 29 applying to 'an Aboriginal person or a Torres Strait Islander.'

The Australian Public Service Commission (APSC) was consulted and commented on various matters concerning alignment of the Determination with the *Public Service Regulations 2023* and the *Australian Public Service Commissioner's Directions 2022*. Following consideration of those comments, a number of amendments were made to the draft Determination. The APSC will continue to be consulted regarding future amendments to the Determination, including in relation to aligning the Determination with any Regulations and Directions made under the *Public Service Act 1999* where appropriate.

The Parliamentary Service Commissioner was consulted as required by section 71(1) of the Parliamentary Service Act 1999 by letter dated 12 September 2024. The Commissioner confirmed he did not have any significant concerns with the proposed draft Determination, but did note some discrepancies between the Determination and the *Australian Public Service Commissioner's Directions 2022*, which he requested be considered for future amendment.

Consultation with the Merit Protection Commissioner raised the issue of the effect that the commencement of the Determination would have on the Promotion Review Committee instructions that the Merit Protection Commissioner had issued under section 87 of the 2013 Determination. However, the transitional provisions of the Determination permit those instructions to remain in effect after the repeal of the 2013 Determination. The Merit Protection Commissioner confirmed that he would issue new instructions under section 74 of the Determination soon after the commencement of the Determination.

Consultation with the Office of International Law at the Attorney-General's Department highlighted some of the provisions that engaged the right to privacy. A recommendation was received to include an explanation in the Statement of Compatibility with Human Rights about how the right to privacy was engaged and limited by the Determination and how those limitations were according to law and not arbitrary. Those measures were taken, and the Statement of Compatibility with Human Rights addresses the impact of the Determination on the right to privacy.

Consultation with the National Security Information Branch (**NSI Branch**) of the Attorney-General's Department included whether section 59 should not be included in light of the Attorney-General's report on Review of Secrecy Provisions. The NSI Branch supported the provision being included in the Determination but noted that it may be appropriate to repeal that provision if and when a new general secrecy offence applicable to current or former Commonwealth employees was enacted in accordance with Principle 3 of the report on Review of Secrecy Provisions.

In consultation with the Human Rights Branch of the Attorney-General's Department they advised, in particular, that affirmative measures for employment of persons with disability did not impact the principle that employment decision should be made on merit. This is so because the assessment of merit is still relevant to recruitment processes for affirmative measures, it is simply that assessment of those criteria is applied to a smaller cohort.

In consultation with the Administrative Law Section of the Attorney-General's Department, they advised that delegation powers should only be as wide as necessary and that where wide delegation powers were conferred, they should be well justified. Additional safeguards were drafted, and extensive justification was provided for the delegation powers in the explanatory materials.

No further consultation was required in relation to the Determination.

This Determination is a legislative instrument for the purposes of the *Legislation Act 2003*.

This Determination commences on 1 October 2024.

Authority: Subsection 71(1) of the *Parliamentary Service Act 1999*.

Details of Parliamentary Service Determination 2024

Notes on sections

Part 1 – Preliminary

Section 1 – Name of Determination

Section 1 provides that the name of this instrument is the *Parliamentary Service Determination 2024*.

Section 2 – Commencement

Section 2 provides that the instrument will commence on 1 October 2024.

Section 3 – Authority

Section 3 provides that the instrument is made pursuant to powers set out in the Act .

Section 4 – Schedules

Section 4 provides for the repeal of each instrument specified in a Schedule to the Determination. The Determination only contains one Schedule, which specifies the *Parliamentary Service Determination 2013*.

Section 5 – Definitions

Section 5 defines certain words and expressions used in the Determination that have a particular meaning in the context of the Determination.

A note to the dictionary identifies that several expressions used in the Determination are already defined in the Act.

“Aboriginal person” has the same meaning as in the *Aboriginal and Torres Strait Islander Act 2005*.

“Act” means the *Parliamentary Service Act 1999*.

“affected employee” has the meaning given by subsection 80(1) of the Determination.

“affected former employee” has the meaning given by subsection 115(1) of the Determination.

“Agency Head” has the same meaning as in the *Public Service Act 1999*.

“APS Agency” means an Agency within the meaning of the *Public Service Act 1999*.

“Broadband” has the same meaning as in subrule 9(4) of the Parliamentary Service Classification Rules.

“Classification” means an approved classification within the meaning of either the *Public Service Classification Rules 2000* or the *Parliamentary Service Classification Rules 2010* as in force at the commencement of the Determination, depending on whether the relevant employee is a Parliamentary Service employee or an APS employee.

“Comparable Classification or Lower” has the meaning given by section 6 of this Determination.

“Debtor” means a Secretary or a Parliamentary Service employee who owes a judgment debt.

“Discloser” has the same meaning as in the *Public Interest Disclosure Act 2013*.

“Eligible Employee” has the meaning given by subsection 23(9) of this Determination.

“Employer Powers” means the rights, duties and powers of a Secretary conferred by section 21 of the Act, as an employer in respect of Parliamentary Service employees.

“Employment” means Parliamentary Service employment.

“External review body” is defined as not including a court or tribunal.

“Higher classification” has the meaning given by section 7 of this Determination.

“Independent Selection Advisory Committee” means a committee established pursuant to section 102 of this Determination.

“Intelligence agency” is defined as an organisation established pursuant to the *Australian Security Intelligence Organisation Act 1979* or sections 16 or 27A of the *Intelligence Services Act 2001*.

“ISAC” has the same meaning as the term ‘Independent Selection Advisory Committee’.

“Judgment debt” has the meaning given by section 67 of the Act. Section 67 provides that a judgment debt includes interest on a judgment debt.

“Medical practitioner” means a person who is registered or licensed as a health practitioner under a State or Territory law that allows for the registration and licensing of medical practitioners.

“Net salary” means the debtor’s total gross salary, less amounts deducted to pay income tax, child support or a minimum contribution to a super fund to which the debtor is required to contribute regarding their engagement in the Department.

“Parliamentary Service action” has the meaning given by section 33(7) of the Act. That is, a Parliamentary Service action means action by a person in the capacity of a Secretary or Parliamentary Service employee.

“Parliamentary Service Classification Rules” means the *Parliamentary Service Classification Rules 2010* as in force at the commencement of the Determination.

“Parliamentary Service Commissioner” means the Parliamentary Service Commissioner appointed under the Act.

“Paying officer” means a person appointed in relation to a debtor pursuant to section 128 of this Determination.

“Personal information” has the same meaning as in the *Privacy Act 1988*.

“PRC” has the same meaning as the term ‘Promotion Review Committee’ (defined later in this section of the Determination).

“PRC review” means a review by a Promotion Review Committee under Division 2 of Part 7 of this Determination.

“Promotion” means the ongoing assignment of duties at a higher classification to an ongoing Parliamentary Service employee in the same or another Department. The definition does not include:

- a. the allocation of a higher classification within the same broadband in the same Department; or
- b. the allocation of a classification to a trainee under rule 11 of the Parliamentary Service Classification Rules.

“Promotion Review Committee or PRC” means a committee appointed pursuant to section 69 of this Determination.

“Public interest disclosure” has the same meaning as in the *Public Interest Disclosure Act 2013*.

“Public Service Gazette” means the Australian Public Service Gazette published in electronic form.

“Relevant employment” means employment as an ongoing Parliamentary Service employee at a classification referenced in Groups 1 to 6 of Schedule 1 of the *Parliamentary Service Classification Rules 2010*.

“relevant Secretary” means either the Secretary of the Department in which an employee seeking a review of a Parliamentary Service action was employed or the Secretary who undertook the action under review.

“Reviewable action” has the meaning given by section 81 of this Determination.

“SES vacancy” means a vacancy at a classification described as ‘SES’ in the *Classification Rules*.

“Sexually harass” has the same meaning as in the *Sex Discrimination Act 1984*.

“Similar vacancy” has the meaning given by section 8 of this Determination.

"Statutory office holder" has the same meaning given by section 14(3) of the Act. That is, a statutory office holder means a person who holds any office or appointment under this Act, being an office or appointment that is prescribed by the determinations for the purposes of this definition. Section 60 of the Determination sets out prescribed offices and prescribed appointments for the purposes of subsection 14(3) of the Act.

“Torres Strait Islander” has the same meaning as in the *Aboriginal and Torres Strait Islander Act 2005*.

“Total gross salary” means the total of the amount of the debtor’s salary and the amount of allowances in the nature of salary that are regularly paid to the debtor less any reduction for arrangements such as salary sacrifice.

“Training classification” is a classification mentioned in column 2 of Schedule 2 to the Classification Rules.

“Tribunal” means a tribunal constituted under an enactment.

“Vacancy” means a situation in which a decision has been made that specified duties within a Department need to be performed, and that it is appropriate to consider engaging a person to perform those duties or promoting or assigning those duties to a Parliamentary Service employee.

“Work level standards” means the standards set out in rule 10 of the Classification Rules.

"Work-related qualities include in relation to a person:

- 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.

Section 6– Meaning of *comparable classification or lower*

Section 6 provides a definition of the term ‘comparable classification or lower.’ The section sets out, with reference to a table included in the provision, that a person will be engaged at a comparable classification or lower if the employee is engaged as an ongoing Parliamentary Service employee at a classification mentioned in column 1 of the table and immediately before they were engaged was an ongoing APS employee at the corresponding classification mentioned in column 2 of the table.

Section 7 – Meaning of *higher classification*

Section 7 provides a definition of the term ‘higher classification.’ The section sets out, with reference to a table included in the provision, that a person will be engaged at a higher classification than their APS classification immediately before their engagement if the employee is engaged as an ongoing Parliamentary Service employee at a classification mentioned in column 1 of the table and immediately before the engagement the person was engaged as an ongoing APS employee at the corresponding classification mentioned in column 2 of the Table.

Section 8 – Meaning of *similar vacancy*

Section 8 provides a definition of ‘similar vacancy.’ A ‘vacancy’ is similar to a vacancy notified in the Public Service *Gazette* if the vacancy and the notified vacancy are of the same category of employment, require similar work-related qualities, are at the same classification, are to be performed in the same location and any of the criteria in paragraph 8(1)(e) apply.

The criteria in paragraph 8(1)(e) are that the vacancy is an SES vacancy, the vacancy is in a centrally coordinated entry-level program, the vacancy is in the same Department as the notified vacancy, or the relevant Agency Head, Director-General or Secretary of the organisation in which the notified vacancy existed and a Secretary agree, in writing that the vacancy is similar to the notified vacancy.

Subsection 8(2) states that a notified vacancy may be a vacancy that exists in a Department, an APS agency or an intelligence agency.

Part 2 – Parliamentary Service Values

Division 1 - Preliminary

Section 9 – Purpose of this Part

Section 9 states that this Part of the Determination is made for the purposes of section 11A(1) of the Act. Section 11A(1) of the Act empowers the Presiding Officers to make determinations under section 71 of the Act in relation to any of the Parliamentary Service Values for the purpose of ensuring that the Parliamentary Service incorporates and upholds the Parliamentary Service Values and determining where necessary the scope or application of the Parliamentary Service Values.

The Presiding Officers made this Determination after receiving advice from the Parliamentary Service Commissioner under section 11 of the Act and having regard to that advice as required by section 11A(2) of the Act.

Division 2 - Parliamentary Service Values

Section 10 – Parliamentary Service Value 1 – Committed to Service

Section 10 sets out the requirements, having regard to the individual’s duties and responsibilities, for upholding the Parliamentary Service Value in subsection 10(1) of the Act, namely:

Committed to service: The Parliamentary Service is professional, objective, innovative and efficient and works collaboratively to achieve the best results for the Parliament.

Paragraph 10(a) provides that the requirements include engaging effectively and providing responsive, client-focussed service delivery.

Paragraph 10(b) provides that the requirements include ensuring that decisions and interactions are objective and impartial.

Paragraph 10(c) provides that the requirements include encouraging innovative thought and supporting innovative solutions.

Paragraph 10(d) provides that the requirements include supporting collaboration and teamwork, both within a Department and with other Departments and APS agencies and the wider community.

Paragraph 10(e) provides that the requirements include promoting continuous improvement and managing change effectively.

Paragraph 10(f) provides that the requirements include identifying and managing areas of potential risk.

Paragraph 10(g) provides that the requirements include pursuing and supporting training and development to improve capability.

Paragraph 10(h) provides that the requirements include being responsive to the needs of the Parliament and understanding the environment in which it operates.

Section 11 – Parliamentary Service Value 2 – Ethical

Section 11 sets out the requirements, having regard to the individual's duties and responsibilities, for upholding the Parliamentary Service Value in subsection 10(2) of the Act, namely:

Ethical: The Parliamentary Service demonstrates leadership, is trustworthy and acts with integrity, in all that it does.

Paragraph 11(a) provides that the requirements include acting in a way that models and promotes the highest standard of ethical behaviour.

Paragraph 11(b) provides that the requirements include following through on commitments made.

Paragraph 11(c) provides that the requirements include having the courage to address difficult issues.

Paragraph 11(d) provides that the requirements include complying with all relevant laws, appropriate professional standards and the Code of Conduct.

Paragraph 11(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 11(f) provides that the requirements include reporting and addressing misconduct and other unacceptable behaviour by Parliamentary Service employees in a fair, timely and effective way.

Paragraph 11(g) provides that the requirements include providing leadership in supporting the Parliament.

Paragraph 11(h) provides that the requirements include supporting systems that give Parliamentary Service employees appropriate opportunities to develop and demonstrate leadership qualities.

Section 12 - Parliamentary Service Value 3 – Respectful

Section 12 sets out the requirements, having regard to the individual's duties and responsibilities, for upholding the Parliamentary Service Value in subsection 10(3) of the Act, namely:

Respectful: The Parliamentary Service respects the Parliament and all people, including their rights and their heritage.

Paragraph 12(a) provides that the requirements include treating all people with dignity and recognising that all people have value.

Paragraph 12(b) provides that the requirements include dealing with all people honestly and with integrity.

Paragraph 12(c) provides that the requirements include recognising the importance of human rights and understanding Australia's human rights obligations.

Paragraph 12(d) provides that the requirements include recognising and fostering diversity.

Paragraph 12(e) provides that the requirements include contributing to an inclusive workplace culture.

Paragraph 12(f) provides that the requirements include collaborating and being open to ideas in supporting the Parliament.

Paragraph 12(g) provides that the requirements include complying with all relevant anti-discrimination laws.

Section 13 – Parliamentary Service Value 4 – Accountable

Section 13 sets out the requirements, having regard to the individual's duties and responsibilities, for upholding the Parliamentary Service Value in subsection 10(4) of the Act, namely:

Accountable: The Parliamentary Service performs its functions with probity and is open and accountable for its actions to the Parliament and the Australian community.

Paragraph 13(a) provides that the requirements include being answerable to the Presiding Officers and to the Parliament.

Paragraph 13(b) provides that the requirements include being open to scrutiny and being transparent in decision making.

Paragraph 13(c) provides that the requirements include being able to demonstrate that actions and decisions have been made with appropriate consideration.

Paragraph 13(d) provides that the requirements include being able to explain actions and decisions to the people affected by them.

Paragraph 13(e) provides that the requirements include being accountable for actions and decisions through statutory and administrative reporting systems.

Paragraph 13(f) provides that the requirements include being able to demonstrate clearly that resources have been used efficiently, effectively, economically and ethically.

Paragraph 13(g) provides that the requirements include being answerable for individual performance.

Section 14 – Parliamentary Service Value 5 – Impartial

Section 14 sets out the requirements, having regard to the individual's duties and responsibilities, for upholding the Parliamentary Service Value in subsection 10(5) of the Act, namely:

Impartial: The Parliamentary Service is non-partisan and provides advice that is frank, honest, timely and based on the best available evidence.

Paragraph 14(a) provides that the requirements include providing the same standard of high-quality professional support to the Parliament, irrespective of which political party is in power and of personal political beliefs.

Paragraph 14(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 Parliament impartially.

Paragraph 14(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 14(d) provides that the requirements include understanding the needs of the Parliament and providing it with the best objective, non-partisan advice based on the best evidence available.

Paragraph 14(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 14(f) provides that the requirements include providing advice and support in a way that takes account of the context in which the advice and support needs to be implemented, the broader needs of the Parliament and, where appropriate, implications for the longer term.

Paragraph 14(g) provides that the requirements include implementing or providing advice and support in a way that is free from bias and in accordance with the law.

Division 3 - Integrity of the Parliamentary Service

Section 15 - Mandatory integrity training for Parliamentary Service employees

Section 15 sets out obligations on the relevant Secretary to ensure that Parliamentary Service employees undergo mandatory integrity training.

Subsection 15(1) requires a Secretary who engages a person as an ongoing Parliamentary Service employee to make arrangements for the employee to undergo integrity training within 6 months of the employee being engaged.

Subsection 15(2) requires a Secretary who engages a person as a non-ongoing Parliamentary Service employee to make arrangements for the employee to undergo integrity training as soon as practicable after the employee has been engaged.

Subsection 15(3) clarifies that the requirements in subsections 15(1) and 15(2) do not apply if a person has previously been engaged as a Parliamentary Service employee and they have otherwise completed a program of training about integrity in accordance with the requirements in section 15 of the Determination.

Section 16 - Consulting Parliamentary Service Commissioner before entering into agreement settling dispute about sexual harassment including non-disclosure or confidentiality provision

Section 16 requires a Secretary to consult the Parliamentary Service Commissioner before entering into an agreement with a person who is or was a Parliamentary Service 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 17 - Notifying the Parliamentary Service Commissioner of agreements that are for settling disputes about employment matters and include non-disclosure or confidentiality provisions

Subsection 17(1) imposes an obligation on the relevant Secretary to advise the Parliamentary Service Commissioner of the number of agreements entered into with current or former Parliamentary Service employees which settled a dispute about matters that relate to their Parliamentary Service employment and limited the person's freedom to disclose information about the matter, the dispute or its settlement.

Subsection 17(2) requires the relevant Secretary to notify the Commissioner of the number of agreements meeting the description in subsection 17(2) entered into during a financial year.

Subsection 17(3) provides that this notification is required to be given to the Parliamentary Service Commissioner within 31 days after the end of the financial year or within such longer period that the Parliamentary Service Commissioner allows.

Part 3 – Parliamentary Service Employment

Division 1 – Engagement of non-ongoing employees

Section 18 – Engagement of SES employee for a specified term

Section 18 sets out the circumstances in which a person may be engaged as an SES employee for a specified term in accordance with subsection 22(4) of the Act. Subsection 22(4) provides that determinations may prescribe the circumstances in which persons may be engaged as mentioned in paragraph 22(2)(b) or (c) of the Act (engagement for a specified term or for the duration of a specified task or engagement for duties that are irregular or intermittent).

The first note below this subsection provides that the usual basis for engagement of a Parliamentary Service employee is as an ongoing Parliamentary Service employee and that a Secretary is expected to have regard to paragraph 10A(1)(b) of the Act, which recognises that the usual basis for engagement is as an ongoing Parliamentary Service employee, before engaging a person as a non-ongoing Parliamentary Service employee.

The second note below this subsection provides that paragraph 10A(1)(c) of the Act requires engagement and promotion decisions to be based on merit and Division 2 of Part 3 explains how this employment principle is to be applied.

Subsection 18(2) provides that a person may be engaged for a specified term if the term does not exceed 5 years.

Subsection 18(3) provides that engagement may be extended once or more than once, but the engagement may be extended only to the extent that the total term does not exceed 5 years.

Subsection 18(4) provides that a Secretary may engage a person under a contract of employment as an SES employee for a specified term only if the Secretary is reasonably satisfied that entering into the contract would not contravene subsection 333E(1) of the *Fair Work Act 2009*.

The note below this subsection refers the reader to subsection 333E(1) of the *Fair Work Act 2009* which is about limitations on fixed terms contracts.

Section 19 – Engagement of a non-ongoing non-SES employee

Subsection 19(1) prescribes circumstances, for the purposes of subsection 22(4) of the Act, in which a Secretary may engage a person as a non-SES employee for a specified term or for the duration of a specified task. Subsection 22(4) of the Act provides that determinations may prescribe the circumstances in which persons may be engaged as mentioned in paragraph 22(2)(b) or (c) of the Act (engagement for a specified term or for the duration of a specified task or engagement for duties that are irregular or intermittent).

Note: Section 25 of the Determination also provides for the engagement of non-ongoing Parliamentary Service employees, using a modified merit process. However, unlike section 19 engagements, engagements under section 25 (other than irregular or intermittent engagements) are limited to an initial employment period of 12 month or less, which may be extended up to a total period of 18 months.

The first note below this subsection provides that the usual basis for engagement of a Parliamentary Service employee is as an ongoing Parliamentary Service employee and that a

Secretary is expected to have regard to paragraph 10A(1)(b) of the Act, which provides that the Parliamentary Service recognises that the usual basis for engagement is as an ongoing Parliamentary Service employee, before engaging a person as a non-ongoing Parliamentary Service employee.

The second note below this subsection provides that paragraph 10A(1)(c) of the Act requires engagement and promotion decisions to be based on merit and Division 2 of Part 3 explains how this employment principle is to be applied.

Subsection 19(2) provides, under the heading 'Engagement for duration of specified task' that a Secretary may engage a person under a contract of employment as a non-ongoing non-SES employee for the duration of a specified task only if the Secretary is reasonably satisfied that entering into the contract would not contravene subsection 333E(1) of the *Fair Work Act 2009*.

The note below this subsection refers the reader to subsection 333E(1) of the Fair Work Act which is about limitations on fixed terms contracts.

Subsection 19(3) provides that if a Secretary engages a person as a non-ongoing non-SES employee for the duration of a specified task (whether or not under a contract of employment), the Secretary must, at the time of the engagement be able to reasonably estimate the duration of the task and be satisfied that the services of the person are unlikely to be required after the task is complete.

Subsection 19(4) provides, under the heading 'Engagement for specified term' that, subject to subsection 19(8), a Secretary may engage a person as a non-ongoing non-SES employee for a specified term if:

- a. the duties to be performed are for a limited period and the performance of those duties by that person is unlikely to be required after that period;
- b. the particular skills, knowledge or experience required to perform the duties of the employment can best be met by employing a person who has recently worked in the industry that corresponds to the employment for which the person is being engaged;
- c. the purpose of the employment is to assist the person to gain:
 - i. skills and experience, by participating in the workforce under a scheme approved by the Secretary or by the Australian Public Service Commissioner; or
 - ii. a formal occupational qualification, licence, accreditation or registration;
- d. the person has received a written offer of ongoing Parliamentary Service employment, but prefers to be engaged as a non-ongoing Parliamentary Service employee; or
- e. the person is an ongoing APS employee.

The note below this subsection provides that for the purposes of paragraph 19(4)(a), the Department may, for example have a temporary increase in its workload or have a temporary demand for employees with particular skills or needs to replace an ongoing Parliamentary Service employee who is on leave or who is assigned to other duties.

Subsection 19(5) provides that subject to subsection 19(8) if a Secretary engages a person as a non-ongoing non-SES employee for a specified term as described in subsection 19(4), the

period of the engagement must be a period that represents a reasonable estimate of the time required for the performance of the duties; and subject to subsections 19(6) and 19(8), the total period must not exceed 3 years.

Subsection 19(6) provides that subject to subsection 19(8) the period of 3 years mentioned in paragraph 19(5)(b) may be extended, for a period of not more than 12 months, if the Secretary considers that the engagement is necessary for the Department's operations and the Parliamentary Service Commissioner is satisfied that special circumstances exist and authorises the Secretary to extend the engagement.

Subsection 19(7) provides that subject to subsection 19(8) a Secretary may engage a person as a non-ongoing non-SES employee for a specified term if the person is an employee of a State or Territory or of authority of a State or Territory, and the Secretary has entered into an agreement with the State or Territory or the authority, to engage the person as a non-ongoing employee for that specified term.

Subsection 19(8) provides that a Secretary may engage a person under a contract of employment as a non-ongoing non-SES employee for a specified term as described in subsection 19(4) or 19(7) only if the Secretary is reasonably satisfied that entering into the contract would not contravene subsection 333E(1) of the *Fair Work Act 2009*.

The note below this subsection refers the reader to subsection 333E(1) of the *Fair Work Act 2009* which is about limitations on fixed terms contracts.

Division 2 - Merit in engagement and promotion

Subdivision A – Preliminary

Section 20 - Purpose of this Division

Section 20 provides that Division 2 of Part 3 of the Determination is made for the purposes of subsection 11C(2) of the Act. Subsection 11C(2) of the Act empowers the Presiding Officers to make determinations under section 71 of the Act in relation to any of the Parliamentary Service Employment Principles for the purposes of ensuring that the Parliamentary Service incorporates and upholds the Parliamentary Service Employment Principles and determining where necessary the scope or application of the Parliamentary Service Employment Principles. The Presiding Officers made this Determination after receiving advice from the Parliamentary Service Commissioner given under subsection 11B(2) and having regard to that advice as required by section 11C(3) of the Act.

Section 21 – How a Secretary upholds the principle of merit-based decision-making

Section 21 provides that a Secretary upholds the Parliamentary Service Employment Principle mentioned in paragraph 10A(1)(c) of the Act when deciding whether to engage or promote a person if the Secretary ensures that the decision is based on a selection process that meets the requirements of Subdivision B or a provision in Subdivision C. Paragraph 10A(1)(c) of the Act provides that the Parliamentary Service is a career-based service that makes decisions relating to engagement and promotion that are based on merit;

The first note below this subsection provides that paragraph 10A(1)(c) of the Act requires decisions relating to engagement and promotion to be based on merit.

The second note below this subsection refers the reader to sections 26 and 26A of the Act for the engagement of an ongoing APS employee as an ongoing or non-ongoing Parliamentary Service employee.

Subdivision B – Merit-based decision-making: standard provisions

Section 22 – Merit-based selection process for engagement or promotion

Section 22 provides for requirements for a merit-based selection process for engagement and promotion decisions.

Subsection 22(1) provides, under the heading 'Elements of merit-based selection process' that a selection process meets the requirements of this Subdivision if all of the following apply:

- 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; and
- d. the selection process is transparent and appropriately documented.

The note below this section highlights section 18 and 19, which provide for matters regarding the engagement of non-ongoing Parliamentary Service employees.

Subsection 22(2) provides, under the heading 'Decision-making considerations' that when making a decision in relation to an eligible candidate using a selection process described in subsection 22(1) merit is a primary consideration and if the candidate is otherwise equal on merit with another candidate—secondary considerations may be taken into account if they relate to matters within the control of the candidate.

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 23 – Notification of vacancy in Public Service Gazette

Subsection 23(1) provides, under a heading 'Basic requirement for notification of vacancy', that a selection process for a decision to fill a vacancy meets the requirements of Subdivision B only if the circumstances in subparagraphs 23(1)(a) or 23(1)(b) are satisfied.

Paragraph 23(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 23(2) are met.

Paragraph 23(1)(b) requires that the vacancy (the new vacancy) is a similar vacancy to another vacancy 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.

The note below this subsection provides that the meaning of similar vacancy can be found in section 8.

Subsection 23(2) sets out the requirements to be met for the purposes of subparagraph 23(1)(a)(ii). Paragraph 23(2)(a) requires the vacancy to be notified as open to all eligible members of the community.

Paragraph 23(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 relevant Secretary is satisfied that special circumstances support approval of a shorter period – the end of that shorter period.

Paragraph 23(2)(c) relates to the notification of a vacancy where the Commissioner has required that a Secretary seek the Parliamentary Service Commissioner's approval before notifying the vacancy or a class of vacancies including the vacancy, in accordance with subsection 23(3).

Subsection 23(3) provides, under a heading 'Parliamentary Service Commissioner may require notification of vacancy, or class of vacancies, to be approved', that the Parliamentary Service Commissioner may by written notice in the Public Service Gazette require Secretaries to seek the Parliamentary Service Commissioner's approval before notifying a specified vacancy or a specified class of vacancies. This subsection enables the Parliamentary Service Commissioner to for example halt a Parliamentary Service recruitment activity, for example where a 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 Parliamentary Service is maintained at appropriate levels.

Subsection 23(4) provides, under a heading 'Restricting applications to eligible employees (other than Parliamentary Service Level 1 and training classifications)', that if a Secretary 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 23(5) provides that subsection 23(4) does not apply in relation to a vacancy at the Parliamentary Service Level 1 classification or a training classification, and that these vacancies must always be notified as open to all eligible members of the community.

Subsection 23(6) provides, under a heading 'Multiple Department notification', 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*.

Subsection 23(7) provides, under a heading 'External advertising', 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 and with the same closing date for applications as the day specified in the *Gazette* notification.

The example below this subsection provides that a vacancy may be advertised externally on a recruitment website.

Subsection 23(8) provides that if a vacancy is notified in the *Public Service Gazette* as open only to persons who are eligible 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.

Subsection 23(9) provides, under a heading ‘Eligible employee’, the meaning of an eligible employee in this instrument. It provides that 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 24 – Additional requirements for SES engagement or promotion decisions

Section 24 sets out requirements, in addition to sections 22 and 23 of the Determination, for a merit-based selection process for the engagement or promotion of a person as an SES employee.

Paragraph 24(a) requires the Parliamentary Service Commissioner, or a representative of the Parliamentary Service Commissioner, to be a full participant in the selection process.

Paragraph 24(b) requires that, at the end of the process, if a representative of the Parliamentary Service Commissioner participated in the selection process, that representative has certified that the selection process complied with the Act and the Determination.

Subdivision C – Selection processes for certain types of engagements and promotions

Subdivision C provides directions on the Parliamentary Service Employment Principle that the Parliamentary Service 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 25 - Engagement on a short-term, irregular or intermittent basis

The purpose of this provision is to provide greater flexibility where Secretaries 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 22(2)(c) of the Act gives the relevant Secretary power to engage a Parliamentary Service employee, *inter alia*, for duties that are irregular or intermittent.

Subsection 25(1) provides that a Secretary may engage a person to perform duties as a non-ongoing employee if the engagement is for a specified term or the duration of a specified task and the period of employment is 12 months or less, or if the engagement is for duties that are irregular and intermittent.

Subsection 25(2) provides that a Secretary 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 18 months.

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 Secretary 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 25(3) provides that a Secretary must ensure as far as practicable that a vacancy 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 employment registers.

Subsection 25(4) provides that as a minimum requirement, for a vacancy to be filled under this section, the Secretary must be satisfied that the person to be engaged has the work-related qualities genuinely required to perform the relevant duties.

The note below this subsection highlights sections 18 and 19, which provide for matters regarding the engagement of non-ongoing Parliamentary Service employees.

Section 26 – Engagement of person from State or Territory jurisdiction

Section 26 provides that a Secretary may engage a person as a non-ongoing Parliamentary Service employee for a specified term, if the person is an employee of a State or Territory, or of a State or Territory authority, and the Secretary 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 sections 18 and 19, which provide for matters regarding the engagement of non-ongoing Parliamentary Service employees, would apply to such an engagement.

Section 27 – Engagement of ongoing Parliamentary Service employee as non-ongoing Parliamentary Service employee

Section 27 provides for a Secretary to engage an ongoing Parliamentary Service employee to perform duties as a non-ongoing Parliamentary Service 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;
- b. the person resigns as an ongoing Parliamentary Service employee in order to commence the engagement; and
- c. the engagement as a non-ongoing Parliamentary Service employee is at the same classification as the person's current classification, or at a lower classification.

This provision may allow, for example, a Secretary to support a Parliamentary Service employee who is a member of the Commonwealth Superannuation Scheme to voluntarily enter into transition to retirement arrangements, where the Secretary chooses to support such an arrangement.

The note below this subsection highlights that sections 18 and 19, which provide for matters regarding the engagement of non-ongoing Parliamentary Service employees, would apply to such an engagement.

Section 28 – Engagement of non-ongoing Parliamentary Service employee as ongoing employee in exceptional circumstances

Subsection 28(1) provides that a Secretary may, in writing, seek the Parliamentary Service Commissioner’s authorisation of the engagement by the Secretary of a non-ongoing employee as an ongoing employee. The Parliamentary Service Commissioner may only authorise the engagement by the Secretary if the Parliamentary Service Commissioner is satisfied that exceptional circumstances justify such an engagement.

Subsection 28(2) provides that a Secretary may only make such a request if the Secretary is satisfied that:

- a. the relevant duties are more appropriately undertaken by an ongoing Parliamentary Service employee;
- b. the person to be engaged as an ongoing Parliamentary Service employee has the work-related qualities genuinely required to perform the relevant duties;
- c. the engagement as an ongoing Parliamentary Service employee is at the person’s classification (or equivalent) as a non-ongoing Parliamentary Service employee;
- d. the original engagement of the person, or an extension of the engagement of the person, as a non-ongoing Parliamentary Service employee, complied with all aspects of Subdivision B; and
- e. the engagement is necessary for the Department’s operations.

Section 29 – Affirmative measure – Aboriginal and Torres Strait Islander employment

Section 29 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 29(1) provides that a Secretary, consistent with Commonwealth law, can identify a vacancy as open only to Aboriginal persons and/or Torres Strait Islanders .

Paragraph 29(2)(a) provides that the Secretary must ensure that for a vacancy identified under subsection 29(1) each candidate is an Aboriginal and/or Torres Strait Islander persons.

Paragraph 29(2)(b) provides that the Secretary must ensure a selection process with eligible candidates under this provision otherwise satisfies the criteria for a selection process set out in Subdivision B, or satisfies the criteria for a short-term, irregular or intermittent engagement in section 25.

The note below this subsection highlights sections 18 and 19, which provide for matters regarding the engagement of non-ongoing Parliamentary Service employees.

Section 30 – Affirmative measure – RecruitAbility Scheme

RecruitAbility is a major initiative of the Australian Public Service Disability Employment Strategy 2020-2025 and the diversity and inclusion programs of the Parliamentary Departments. The scheme aims to attract and develop applicants with disability and facilitate cultural change in selection panels and agency recruitment.

RecruitAbility can be applied to all vacancies, including Senior Executive Service roles. Job applicants with disability who opt into the scheme, declare they have disability and meet the minimum requirements of a vacancy, are advanced to a further stage in the selection process. Merit will still remain the basis for engagement and promotion.

Subsection 30(1) states that, for the purposes of subsection 22(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 23 and that notification specifies that the RecruitAbility Scheme (the Scheme) applies to the selection process;
- 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 has the work-related qualities required to perform the relevant duties and meets the 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 30(2) clarifies that for the avoidance of doubt, 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 31 – Affirmative measure - disability

This section facilitates particular positions being open only to persons who have a disability or a particular type of disability. It is designed to address the under-representation of people with disability in the Parliamentary Service. Use of this measure is consistent with the *Disability Discrimination Act 1992*.

The provisions attempt to give effect to the following aims:

- promote the right to equality and non-discrimination in employment for people with disability;
- acknowledge that all individuals have the right to employment and that some groups need additional support to achieve this right;
- increase the number of people with disability employed in the Parliamentary Service.

Subsection 31(1) provides that a Secretary, consistent with Commonwealth law, can identify a vacancy as being open only to persons with disability, or a particular type of disability.

Paragraph 31(2)(a) provides that the relevant Secretary must ensure that eligible candidates are only persons described in subsection 31(1), namely persons with disability or a particular type of disability

Paragraph 31(2)(b) provides that the relevant Secretary must ensure that one of the following circumstances apply in relation to the vacancy:

- a. a selection process with eligible candidates under this provision otherwise satisfies the criteria in Subdivision B;
- b. a selection process with eligible candidates under this provision otherwise satisfies the criteria for a short-term, irregular or intermittent engagement in section 25; or
- c. an assessment by an organisation that facilitates access to employment for persons with disability has determined each candidate is likely to be unable to compete successfully on merit in a competitive selection process.

The note below this subsection highlights sections 18 and 19, which provide for matters regarding the engagement of non-ongoing Parliamentary Service employees.

Section 32 – Promotion after appointment to a statutory office

Subsection 32(1) allows a Secretary to seek the Parliamentary Service Commissioner's authorisation in writing to promote an ongoing Parliamentary Service employee 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;
- 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;
- c. the duties to which the employee is to be assigned are assessed by the Secretary as being at a Parliamentary Service classification that is equivalent to, or lower than, the duties of the statutory office; and
- d. the Secretary is satisfied that the employee has the necessary work-related qualities to perform duties at the Parliamentary Service classification to which the employee is to be promoted.

Subsection 32(2) provides that the Parliamentary Service Commissioner may authorise the promotion. In making such a decision, The Parliamentary Service Commissioner may take into account the length of the appointment to the statutory office, the selection process conducted for that appointment, and any other matters the Commissioner considers relevant.

In exercising the power in section 32(2), the Parliamentary Service Commissioner will be guided by the request made by the relevant Secretary who will need to be satisfied that the employee has the work-related qualities needed to perform the duties of the position.

The 'other matters' contemplated by paragraph 32(2)(c) of the Determination may include the factors that the Secretary considered, if the Parliamentary Service Commissioner considers any such factor relevant. These other matters may also include the work-related qualities of the employee such as the skills, qualifications, personal qualities such as honesty and integrity and the ability to contribute to team performance of the employee.

The Parliamentary Service Commissioner will not be permitted to take into account matters that could not reasonably be considered relevant to the promotion having regard to the scope, purpose and subject matter of the Act. This power is also contained within a Division that is made to ensure the Parliamentary Service incorporates and upholds the Parliamentary Service

Employment Principles, which provide context in which powers under this Division should be exercised.

Subsection 32(3) provides that, if the Parliamentary Service Commissioner authorises the promotion, the Secretary may then promote the employee.

Section 33 – Engagement of an ongoing APS employee as an ongoing Parliamentary Service employee

Section 33 allows Secretaries to engage an ongoing APS employee as an ongoing Parliamentary Service employee at a classification comparable to their APS classification or lower.

The first note refers the reader to the meaning of comparable classification or lower in section 6.

The second note below this subsection refers the reader to sections 26 and 26A of the Act which provide for the engagement of an ongoing APS employee as an ongoing or non-ongoing Parliamentary Service employee.

Section 34 – 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 a Parliamentary Service employee in order to contest an election that is specified in the Determination, 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 a Parliamentary Service employee, in accordance with the relevant provisions of the Determination.

Subsection 34(1) provides, under the heading ‘Person may apply to be re-engaged as a Parliamentary Service employee’, that a Secretary may re-engage a person as a Parliamentary Service employee, if:

- a. the person is a former Parliamentary Service employee, 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; and
 - 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*;
- b. section 32 of the Act (concerning an entitlement of failed election candidates to again be engaged) applies to the person;
- c. the person applies to the relevant Secretary to be engaged pursuant to section 32 of the Act and within the time limit identified at subsection 34(2) of the Determination; and
- d. if the former employment was non-ongoing;

- i. the employment would not have ended except for the resignation; and
- ii. the person applies to the relevant Secretary to be engaged before the employment would have ended if the person had not resigned.

Subsection 34(2) provides that a former employee identified by paragraph 34(1)(a) who resigned to contest an election, must apply for re-engagement to the relevant Secretary 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;
- 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 Parliamentary Service Commissioner has made a declaration under subsection 34(3)—as soon as practicable after receiving a notice of the declaration.

Subsection 34(3) provides that the Parliamentary Service Commissioner may declare that a person is taken to be a former Parliamentary Service employee for the purposes of paragraph 34(2)(c) if the Parliamentary Service Commissioner is satisfied that it is appropriate to do so.

The example under this subsection clarifies that the Parliamentary Service Commissioner may make a declaration under paragraph 34(2)(c) if the department in which the person was employed at the time of resignation no longer exists, or the department is no longer responsible for duties that were previously carried out by the employee.

Subsection 34(4) provides, under the heading ‘Basis on which person may be re-engaged as a Parliamentary Service employee’, that where the relevant Secretary engages the person as a Parliamentary Service 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;
- 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
 - i. the same terms and conditions of employment that applied to the person when the person resigned, or,
 - ii. 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 34(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 a Parliamentary Service employee, but that period does not count as service for the purposes of the National Employment Standards, or an employment arrangement such as a written contract of employment 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.

Subsection 34(6) provides, under the heading ‘Specified elections’, that the elections specified at paragraph 34(1)(a) are specified for the purposes of paragraph 32(1)(a) of the Act, which authorises the prescribing or specifying of elections by determinations.

Section 35 – Re-engagement of a former Parliamentary Service employee

Subsection 35(1) provides that a Secretary may engage a former employee as an ongoing or non-ongoing employee if:

- a. the Secretary is satisfied that the person’s former employment should not have ended;
- 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 below this subsection identifies examples of an appropriate authority, for the purpose of paragraph 35(1)(c), as including the Federal Court of Australia, the Fair Work Commission, or the Australian Human Rights Commission.

Subsection 35(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 3 – Engagement on probation

Section 36 – Purpose of this Division

Section 36 provides that Division 3 of Part 3 is made for the purpose of subsection 11C(1) of the Act. Subsection 11C(1) of the Act empowers the Presiding Officers to make determinations under section 71 about employment matters relating to Parliamentary Service employees.

Section 37 – Parliamentary Service employees to be engaged on probation

Subsection 37(1) states that subject to subsection 37(2), Secretaries that engage a Parliamentary Service employee must ensure that the employee is engaged on probation. This provision formalises current recruitment practices in the Parliamentary Service.

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

Subsection 37(2) permits Secretaries to waive the requirement at subsection 37(1) if the Secretary is satisfied that there are reasonable circumstances justifying the waiver. It is expected that Secretary will only waive the probation requirement in limited circumstances such as where an employee is only being engaged for a short period.

Subsection 37(3) requires Secretaries to ensure that, during the probation period, there are appropriate processes in place to assess the suitability of the Parliamentary Service employee to perform the duties they have been engaged for. A note below this subsection specifies that the Parliamentary Service Commissioner may, from time to time, issue guidance on matters

relating to probation. It is expected that Secretaries will have regard to this guidance in complying with subsection 37(3) of the Determination.

Division 4 - Assignment of duties and movement between Departments

This division makes provision for ongoing Parliamentary Service employees to move between departments subject to written agreement between the heads of those departments.

Section 38 – Purpose of this Division

Section 38 sets out that Division 4 of Part 3 of the Determination is made for the purposes of section 11C(1) of the Act. Subsection 11C(1) of the Act empowers the Presiding Officers to make determinations under section 71 of the Act about employment matters relating to Parliamentary Service employees.

Section 39 – Moves between Departments not associated with promotion

Subsection 39(1) provides that this section applies where a Secretary agrees in writing to the movement of a Parliamentary Service employee to another Secretary's department that is not associated with a promotion.

Paragraph 39(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 Secretaries, or otherwise four weeks after the employee informs the original Secretary in writing.

Paragraph 39(2)(b) provides that if the agreement relates to a temporary move and if the original Secretary approves the proposed temporary move in writing, the move takes effect on the agreed date of effect. If the original Secretary does not approve the proposed temporary move in writing and the employee commences duties in the new department, the move takes effect as an ongoing move to the new department at the employee's existing classification from the date the employee commences duties in the new department.

Subsection 39(3) provides that if an agreement relates to a temporary move and the new Secretary and the Parliamentary Service employee agree to vary the period of the move, then, if the original Secretary approves the variation in writing, the variation has effect according to its terms. If the original Secretary does not approve the variation in writing, the variation has no effect.

Subsection 39(4) clarifies that an agreement to which this section applies does not constitute an engagement of the Parliamentary Service employee by a Secretary for the purposes of section 22 of the Act. Section 22 of the Act provides for engagement of Parliamentary Service employees by a Secretary on behalf of the Commonwealth.

Subsection 39(5) provides, under the heading 'Movement in cases of a suspected breach of the Code of Conduct', that despite subsection 39(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 Secretaries agree otherwise. This provision addresses a perception that an employee can avoid or frustrate a misconduct enquiry by moving to another department.

Subsection 39(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 Secretary of the gaining department must determine the appropriate sanction in accordance with procedures established under the Act.

Section 40 – Moves between Departments on promotion

Subsection 40(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 Secretaries agree otherwise.

It should be noted that paragraphs 40(1)(a) and 40(1)(b) need not occur in that order.

Subsection 40(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.

Section 41 – Movement from an APS agency in cases of a suspected breach of the APS Code of Conduct

Section 41 provides that if an APS employee has been advised that an APS Code of Conduct inquiry has commenced in accordance with procedures established under the *Public Service Act 1999*, the move between from the APS to the Parliamentary Service will not take effect until the matter to which the suspected breach relates is resolved, unless the Agency Head of the APS agency and the relevant Secretary agree otherwise.

Subsection 41(2) provides that the matter is taken to be resolved when a determination is made as to whether the employee has breached the APS Code of Conduct, or such a determination is decided to be unnecessary.

Subsection 41(3) provides that the reference to the APS Code of Conduct in subsection 41(2) is a reference to the rules in section 13 of the *Public Service Act 1999*.

Division 5 – Notification and date of effect of certain employment decisions

Section 42 – Purpose of Division

Section 42 provides that Division 5 of Part 3 is made for the purpose of subsection 11C(1) of the Act. Subsection 11C(1) of the Act empowers the Presiding Officers to make determinations under section 71 of the Act about employment matters relating to Parliamentary Service employees.

Section 43 – Gazettal of employment decisions

Subsection 43(1) provides, under the heading ‘Decisions that must be notified’, that certain employment decisions must be notified in the *Public Service Gazette*. The decisions are:

- a. the promotion of an ongoing Parliamentary Service employee;
- b. the promotion of an ongoing Parliamentary Service employee, following the decision of a Promotion Review Committee under subparagraph 77(2)(a)(ii) that has not been notified under paragraph (a) of this subsection;

- c. the engagement, promotion or assignment of duties of a person made in accordance with the recommendation of an Independent Selection Advisory Committee;
- d. the engagement of an ongoing APS employee as an ongoing Parliamentary Service employee at a higher classification than the person's current classification as an APS employee; and
- e. the termination of the employment of an ongoing Parliamentary Service employee on the ground mentioned in paragraph 29(3)(g) of the Act, which is concerned with breach of the Code of Conduct as a ground for termination.

Subsection 43(2) provides, under the heading 'Time within which notification must be made', 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 Parliamentary Service Commissioner agrees to a different arrangement. The Parliamentary Service Commissioner may agree to a different timeframe should that be necessary in particular circumstances.

Subsection 43(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 it taking effect is conditional on satisfying an eligibility requirement. The note below this subsection provides security or character clearance as examples of eligibility requirements.

Subsection 43(4) provides, under the heading 'When a notification may exclude an employee's name', that a notification in the Public Service *Gazette* must include the employee's name, unless:

- a. the relevant Secretary decides that the name should not be included because of the person's work-related or personal circumstances. Circumstances may include if the person has a legal protection order; or
- b. if the notification is under paragraph 43(1)(e), the Secretary decides that including the name is not necessary to ensure public confidence in the integrity of the Parliamentary Service. This provides Secretaries 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 Parliamentary Service. Secretaries are expected to utilise this provision to exclude a person's name from a notification under paragraph 43(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 43(5) provides that if a notification that does not include the employee's name and the Merit Protection Commissioner requests the Secretary to provide the employee's name, the Secretary must advise the Merit Protection Commissioner of the name of the employee as soon as practicable after the request is received.

Subsection 43(6) provides that if a notification does not include the employee's name, the relevant Secretary must advise the Parliamentary Service Commissioner of the employee's name as soon as practicable after the notification is published.

Subsection 43(7) provides, under the heading ‘Notification relating to a former ongoing APS employee’, that if a person whose engagement is notified under this section was an ongoing APS employee immediately before the engagement and was engaged at a higher classification than the person’s APS 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 7 of this Determination.

Section 44 – Gazettal when decisions previously notified are cancelled

Subsection 44(1) provides, under the heading ‘Decisions that must be notified’, that a Secretary must notify in the Public Service *Gazette* a decision to cancel certain kinds of decisions. The decisions are:

- a. a promotion notified under paragraph 43(1)(a) where the cancellation decision is made by a relevant Secretary;
- b. a promotion notified under paragraph 43(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 43(1)(c);
- d. an engagement of an ongoing APS employee notified under paragraph 43(1)(d); or
- e. a termination of employment notified under paragraph 43(1)(e).

Subsection 43(2) provides, under the heading ‘Time within which notification must be made’, that a cancellation decision must be notified in the Public Service *Gazette* within 3 months after the cancellation decision is made.

Subsection 43(3) provides, under the heading ‘Requirements of notification’, 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 45 – When promotion and engagement decisions take effect – general case

Section 45 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 7 of the Determination.

For the purposes of this section:

- a. ‘relevant parties’ is taken to mean the employee, the Secretary, and, if the employee is moving from another department, the original Secretary;
- 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 43; and
- d. ‘PRC review’ is taken to mean review by a Promotion Review Committee under Part 7 of the Determination.

Subsection 45(1) provides that this section applies to a promotion decision, which is a decision to promote an ongoing Parliamentary Service employee to a higher classification, or a decision to engage an ongoing APS employee as an ongoing Parliamentary employee at a higher classification than the employee’s APS classification.

The note under this subsection highlights section 7 which refers to what higher classification means.

Subsection 45(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 45(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 45(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 45(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 Secretary is notified of the withdrawal of the application.

Item 3 of subsection 45(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 Secretary is notified of the lapse of the application, or otherwise two weeks after the Secretary is notified of the lapse of the application.

Item 4 of subsection 45(3) provides that where an application for review is made before the end of the application period, but the Merit Protection Commissioner decides under section 69 that it is not necessary to appoint a PRC, the promotion decision takes effect either, on an agreed date that is after the Secretary is notified of the Merit Protection Commissioner's decision, or otherwise the later of the day the Secretary is notified and four weeks after the notification in the *Public Service Gazette*.

Item 5 of subsection 45(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 Secretary is notified of the decision of the PRC, or otherwise four weeks after the Secretary is notified of the PRC decision.

Item 6 of subsection 45(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 Secretary is notified of the decision of the PRC, or otherwise four weeks after the Secretary is notified of the PRC decision.

Division 6 – Employer powers of Secretaries

This Division outlines several powers which are granted to the relevant Secretary pursuant to subsection 21(1) of the Act. Subsection 21(1) relevantly outlines that a Secretary '...on behalf of the Commonwealth, has all the rights, duties and powers of an employer in respect of Parliamentary Service employees in the relevant Department.'

Subsection 21(2) of the Act then provides that without limiting subsection 21(1), a Secretary '...has, in respect of Parliamentary Service employees in the relevant Department, the rights, duties and powers that are prescribed by the determinations.'

Section 46 – Condition of engagement – health clearance

Section 46 provides that in accordance with paragraph 22(6)(e) of the Act (which allows for Parliamentary Service employees to be made subject to conditions dealing with 'health clearances'), the relevant Secretary may direct an employee in writing to undergo an examination by a medical practitioner nominated by the Secretary to assess their fitness for duty. The provision also sets out that either the employee or the nominated medical practitioner may give the relevant Secretary a report of the examination.

The necessary or convenient power in section 71(1)(b) of the Act allows for the making of subordinate legislation with respect to matters that are incidental or ancillary to the Act. To this end the Determination uses this power to fill out the framework established by the Act and to support its effective operation. The Determination, however, does not widen the operation of the Act, does not add new or different means of carrying out the Act and does not depart from or vary the Act or its purposes.

The subject matter dealt with in section 46, which is described below in more detail, is incidental or ancillary to paragraph 22(6)(e) of the Act which makes 'health clearances' a condition to which a Parliament Service employee may be subject. For example, health clearances would not be able to be imposed as an employment condition, without the relevant Secretary having the power to require the obtaining of a medical report about a particular employee which would be necessary to inform whether that employee meets a health clearance condition.

Subsection 46(1) applies to Parliamentary Service employees whose engagement in a department is subject to a condition dealing with health clearances, in accordance with paragraph 22(6)(e) of the Act.

Subsection 46(2) provides that, while the engagement is subject to that condition, the Secretary may direct the employee to undergo a medical examination by a nominated medical practitioner, for an assessment of the employee's fitness for duty, and may require the employee to give to the Secretary a medical report of the examination.

Paragraph 46(2)(b), which provides that the nominated medical practitioner may give the Secretary a report of the examination, is supported by section 71(1)(b) of the Act, which provides for the making of determinations addressing matters 'necessary or convenient ... for carrying out or giving effect to' the Act. In order for a Parliamentary Service employee to be made subject to a health clearance condition of employment, the relevant Secretary will be required to know the outcome of the relevant report of the examination. If the employee is unwilling to provide the report under paragraph 46(2)(a), paragraph 46(2)(b) gives the nominated practitioner permission to give the report directly to the Secretary. In the event

that the employee is unwilling to provide the report, the purpose of subsection 22(6)(e) could be thwarted, if paragraph 46(2)(b) was not included in the Determination. The note below this subsection provides that arrangements will be made in departments to ensure that employees know the period in which an engagement is subject to such a condition.

Section 47 – Direction to attend medical examination

Subsection 47(1) provides that section 47 applies to a Parliamentary Service employee if a Secretary reasonably believes that the state of health of the employee in the relevant department;

- a. may be affecting the employee's work performance;
- b. has caused the employee to have an extended absence from work;
- c. may be a danger to the employee;
- d. has caused or may cause the employee to be a danger to other employees or members of the public; or
- e. may be affecting the employee's standard of conduct.

The note below subsection 47(1) provides examples that could be treated as extended absences.

Subsection 47(2) provides that a relevant Secretary may direct the employee to undergo a medical examination by a nominated medical practitioner, for an assessment of the employee's health and physical fitness and may require the employee to give to the Secretary a medical report of the examination.

Subsection 47(3) provides that a direction may be given under paragraph 47(2)(b) in the same notice as a direction given under paragraph 47(2)(a) or in a later notice.

Subsection 47(4) provides that subsection 47(2) does not limit the authority of a Secretary to give any other lawful and reasonable direction.

Subsection 47(5) provides that the nominated medical practitioner may give the Secretary a report of the examination.

Section 48 – Suspension from duties

Subsection 48(1) provides that the section is made for the purposes of section 28 of the Act. Section 28 of the Act provides that determinations may make provision in relation to the suspension from duties of Parliamentary Service employees, with or without remuneration.

Subsection 48(2) provides that a Secretary may suspend from duties a Parliamentary Service employee for a breach, or possible breach of the Code of Conduct, where the employee's suspension is in the public, or the Department's, interest.

Subsection 48(3) provides that suspension may be with or without remuneration.

Subsection 48(4) provides that if the suspension is without remuneration, it is to be for not more than 30 days, unless exceptional circumstances apply.

Subsection 48(5) requires the Secretary to review the suspension at reasonable intervals.

Subsection 48(6) provides that the Secretary must immediately end the suspension if the Secretary no longer believes on reasonable grounds that the Parliamentary Service employee

has, or may have, breached the Code of Conduct or the Parliamentary Service employee's suspension is in the public, or the Department's, interest.

Subsection 48(7) provides that the Secretary must immediately end the suspension if a sanction has been imposed on the Parliamentary Service employee for the relevant breach of the Code of Conduct.

Subsection 48(8) provides that, in exercising powers under this section, the relevant Secretary must have due regard to procedural fairness, unless the Secretary is satisfied, on reasonable grounds that, in the particular circumstances, it would not be appropriate.

Section 49 – Termination of employment

Subsection 49(1) provides that this section is made for the purposes of paragraph 29(3)(h) (which is concerned with other grounds of termination that may be prescribed) and subsection 29(4) of the Act (which authorises the prescribing of the grounds for termination of the employment of a non-ongoing Parliamentary Service employee by determination).

Subsection 49(2) provides that an investigation report, within the meaning of the *National Anti-Corruption Commission Act 2022*, which includes a recommendation to terminate the employment of the Parliamentary Service employee is a ground for the termination of the employment of an ongoing Parliamentary Service employee or a non-ongoing Parliamentary Service employee.

Part 4 – Performance Management

Section 50 – Purpose of this Part

Section 50 notes that Part 4 is made for the purposes of subsection 11C(2) of the Act. Subsection 11C(2) of the Act empowers the Presiding Officers to make determinations under section 71 of the Act in relation to any of the Parliamentary Service Employment Principles for the purposes of ensuring that the Parliamentary Service incorporates and upholds the Parliamentary Service Employment Principles and determining where necessary the scope or application of the Parliamentary Service Employment Principles.

The Presiding Officers made this Determination after receiving advice from the Parliamentary Service Commissioner given under subsection 11B(2) and having regard to that advice as required by section 11C(3) of the Act.

Section 10A of the Act sets out the Parliamentary Service Employment Principles, including a requirement for effective performance.

Section 51 – Achieving effective performance – Secretaries

Subsection 51(1) provides that a Secretary upholds the obligation in Parliamentary Service Employment Principle 10A(1)(d) by ensuring:

- a. the Department has performance management policies and processes that:
 - i. support a high-performance culture;
 - ii. proactively identify, foster and develop Parliamentary Service employees to fulfil their potential;
 - iii. provide for effective performance management;
 - iv. are fair, open and effective; and
 - v. are clearly communicated to Parliamentary Service employees;

- b. the Department builds the organisational capability necessary to achieve outcomes of the Department properly expected by the Parliament;
- c. each Parliamentary Service employee in the Department is given:
 - i. a clear statement of performance and behaviour expected of the employee; and
 - ii. opportunities to discuss performance;
- d. each Parliamentary Service employee in the Department receives feedback from supervisors about their performance consistent with the Department's performance management policies and processes;
- e. the Department requires supervisors to manage the performance of Parliamentary Service employees under their supervision effectively, including by engaging in career conversations;
- f. the Department supports supervisors to manage the performance of Parliamentary Service employees under their supervision, including by providing appropriate training in performance management; and
- g. the Department's performance management policies and processes are used to guide salary movement – this will include performance pay arrangements.

Subsection 51(2) provides, under the heading 'Dealing with unsatisfactory performance' that a Secretary upholds Parliamentary Service Employment Principle 10A(1)(d) by ensuring the following:

- a. the Department's performance management policies and processes dealing with unsatisfactory performance are available to supervisors and Parliamentary Service employees in the Department, and include information that clearly sets out:
 - i. the responsibilities of supervisors;
 - ii. the possible outcomes if a Parliamentary Service employee's performance is considered unsatisfactory; and
 - iii. that if a Parliamentary Service 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 Department's human resources area) in resolving the performance issues and acting on performance feedback; and
- b. those policies and processes are applied in a timely manner if a Parliamentary Service employee's performance is considered unsatisfactory.

A note below this subsection includes a reminder that paragraph 10A(1)(d) of the Act provides that the Parliamentary Service is a career-based public service that requires effective performance from each employee.

Section 52 – Achieving effective performance – supervisors

Section 52 provides that a supervisor upholds Parliamentary Service Employment Principle 10A(1)(d) by doing the following:

- a. promoting and fostering effective performance by the Parliamentary Service employee;
- b. conducting regular (at least annual) career conversations that deal with the Parliamentary Service employee's performance, potential, aspirations, organisational fit and future opportunities;

- c. ensuring that each Parliamentary Service employee has a performance agreement consistent with the Agency's corporate plan and the work level standards for the employee's classification;
- d. ensuring that the Parliamentary Service employee is provided with clear, honest and timely feedback about the employee's performance;
- e. managing and assessing the Parliamentary Service employee's performance in accordance with the Department's performance management policies and processes;
- f. working to improve the supervisor's capability in effectively managing the performance of Parliamentary Service employees, including through appropriate training; and
- g. promptly and actively managing unsatisfactory performance by the Parliamentary Service employee in accordance with the Department's performance management policies and processes, including by:
 - i. identifying the nature of the unsatisfactory performance at the earliest opportunity;
 - ii. maintaining appropriate records; and
 - iii. engaging with the Parliamentary Service employee and other relevant persons (including the Department'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 Parliamentary Service is a career-based public service that requires effective performance from each employee.

Section 53 – Achieving effective performance – Parliamentary Service employees

Section 53 provides that a Parliamentary Service employee upholds Parliamentary Service 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 Parliamentary Service employee's classification and consistent with the Parliamentary Service 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 Department'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; and
- f. if informed that the Parliamentary Service employee's performance is unsatisfactory, engaging constructively by:
 - i. cooperating with their supervisor and other relevant persons (including the Department'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 Parliamentary Service is a career-based public service that requires effective performance from each employee.

Section 54 – Managing performance in cases of a potential breach of the Code of Conduct

Section 54 recognises that circumstances may arise in which it is not clear whether an occurrence of poor behaviour by a Parliamentary Service employee is more appropriately dealt with under a Department's performance management processes or as a potential breach of the Code of Conduct.

Section 54 provides that, where the behaviour of a Parliamentary Service employee raises concerns that may relate both to performance and to conduct, the employee's Secretary must have regard to any relevant standards and guidance issued by the Parliamentary Service 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. Subsection 15(3) of the Act provides the procedures for determining whether a Parliamentary Service employee, or former Parliamentary Service employee, has breached the Code of Conduct.

Part 5 – Employment-related information

Section 55– Purpose of this Part

Section 55 notes that Part 5 is made for the purposes of subsection 11C(1) of the Act, which permits the Presiding Officers to make determinations about employment matters relating to Parliamentary Service employees. Subsection 11C(1) of the Act empowers the Presiding Officers to make determinations under section 71 of the Act about employment matters relating to Parliamentary Service employees.

Section 56 – Requirement to give information, or documents, about workplace relations to the Commissioner

Subsection 56(1) states that if the Parliamentary Service Commissioner requires a Secretary to give them particular information, or documents, about workplace relations relating to Parliamentary Service employees in the Secretary's department, the Secretary must comply with the requirement.

Subsection 56(2) notes that subsection 56(1) does not require a Secretary to provide the Parliamentary Service Commissioner with personal information.

Subsection 56(2) modifies the scope of the information that the Secretary is to provide under subsection 56(1), to the extent that it carves out personal information within the meaning of the *Privacy Act 1988* from the required information. This is a safeguard that promotes consistency with the *Privacy Act 1988*.

Section 57 – Prompt, accurate giving of information to the Commissioner

Subsection 57(1) provides that a Secretary must ensure that there are measures in place to promptly give the Parliamentary Service Commissioner any information required under section 56 of the Determination.

Subsection 57(2) notes that Secretaries must have measures in place to provide the Parliamentary Service Commissioner with the relevant information in a particular form, where the Parliamentary Service Commissioner requests the Secretary to do so.

Part 6 - Code of Conduct

Part 6 is supported by section 71(1)(b) of the Act, which provides for the making of determinations addressing matters 'necessary or convenient ... for carrying out or giving effect to' the Act.

The necessary or convenient power in section 71(1)(b) of the Act allows for the making of subordinate legislation with respect to matters that are incidental or ancillary to the Act. To this end the Determination uses this power to fill out the framework established by the Act and to support its effective operation. The Determination, however, does not widen the operation of the Act, does not add new or different means of carrying out the Act and does not depart from or vary the Act or its purposes. The subject matter dealt with in Part 6 is incidental or ancillary to section 13 of the Act which provides for 'the Parliamentary Service Code of Conduct.' For example, section 58 allows for referral of allegations of breaches of the Code of Conduct to the Presiding Officers. That referral duty is incidental or ancillary to the section 13 of the Act.

Section 58 - Allegations of breach of Code of Conduct by Secretary or statutory office holder

This section provides more specific provision for the broad subject matter contemplated by paragraph 40(1)(b) of the Act. The subject matter contemplated by paragraph 40(1)(b) is 'matters relating to the Parliamentary Service.' The specific subject matter contemplated by section 58 of the Determination, which includes breaches of the Code of Conduct falls squarely within the broader subject matter contemplated by the Act.

Subsection 58(1) provides that, if an allegation, other than a whistleblower's report, is made about conduct by a Secretary or a statutory office holder amounting to a breach of the Code of Conduct, the allegation must be referred to the Presiding Officers.

Subsection 58(2) provides that if the Presiding Officers consider that the matter may warrant investigation, the Presiding Officers may refer the matter to the Commissioner for advice or for inquiry and a report in accordance with paragraph 40(1)(b) of the Act.

Subsection 58(3) enables the Presiding Officers to request the Commissioner to include recommendations in the report, in accordance with subsection 40(2) of the Act.

Note: Section 40 of the Act provides for the functions of the Parliamentary Service Commissioner.

Section 59 - Duty to disclose information

Subsection 59(1) provides that this section is made for the purposes of subsection 13(13) of the Act, which requires a Parliamentary Service employee to comply with any other conduct requirement that is made by determinations.

Subsection 59(2) provides that this section does not affect other restrictions on the disclosure of information.

Subsection 59(3) provides that a Parliamentary Service employee must not disclose information which the employee obtains or generates in connection with their employment if the information:

- a. was, or is to be, communicated in confidence: to or by the Presiding Officers, a committee of either House or a joint committee, a Senator or a Member of the House of Representatives; or within the Parliamentary Service; or
- b. was received in confidence from a person or persons outside the Parliament or the Parliamentary Service who has not, or have not, given permission for the disclosure;

whether or not the disclosure would found an action for breach of confidence.

Subsection 59(4) provides that subsection 59(3) does not prevent a disclosure of information by a Parliamentary Service employee if:

- a. the information is disclosed in the course of the employee's duties;
- b. the information is disclosed in accordance with an authorisation given by a Secretary, or by the Parliamentary Librarian in relation to information acquired or created in connection with the functions of the Parliamentary Librarian as set out in section 38B of the Act (which provides for the functions of the Parliamentary Librarian);
- c. the disclosure is otherwise authorised by law; or
- d. the information that is disclosed is already in the public domain as the result of a disclosure of information that is lawful under this determination or another law and can be disclosed without disclosing, expressly or by implication, other information to which subsection 59(3) applies.

Subsection 59(5) provides that subsection 59(3) does not limit the authority of a Secretary to give lawful and reasonable directions in relation to the disclosure of information.

Subsection 59(6) provides that nothing in this section affects the provision of advice to a House, a committee or a member of either House by a Parliamentary Service employee for the purpose of the performance of the duties or functions of a House, a committee or a member of either House.

Section 60 - Statutory office holder bound by Code of Conduct

Subsection 60(1) provides that a statutory office holder is bound by the Code of Conduct only to the extent to which the statutory office holder is assisted by, or deals with, Parliamentary Service employees in a supervisory capacity or in another capacity related to the statutory office holder's day-to-day working relationship with Parliamentary Service employees.

It further provides that a statutory office holder is not bound by the Code of Conduct to the extent of any inconsistency between the requirements of the Code of Conduct and a law of the Commonwealth, or a State or Territory law that relates to the statutory office holder's office or appointment.

Subsection 60(2) provides that a statutory office holder is bound by the Code of Conduct to the extent to which the Code can apply to the statutory office holder if a reference in the Code to a Parliamentary Service employee were taken to include a reference to a statutory office holder and a reference in the Code to Parliamentary Service employment were taken to include matters related to the statutory office holder's office or appointment.

Subsection 14(3) of the Act provides that an office or appointment under the Act can be prescribed by the determinations for the purposes of defining the term 'statutory office holder'.

Subsection 60(3) provides that an office is prescribed for the purposes of defining the term ‘statutory office holder’ if the office is held by a person who is engaged or employed under the Act (except for an office of Secretary), and the person is assisted by or has dealings with Parliamentary Service employees in a supervisory capacity or in another capacity related to their day-to-day working relationship with Parliamentary Service employees and the office is not an office of Secretary

Subsection 60(4) provides that an appointment is prescribed for the purposes of defining the term ‘statutory office holder’ if the appointment is held by a person who is engaged or employed under the Act (except for an appointment as Secretary), and the person is assisted by or has dealings with Parliamentary Service employees in a supervisory capacity or in another capacity related to their day-to-day working relationship with Parliamentary Service employees and the appointment is not an appointment as Secretary.

Part 7 - Review of actions

Division 1 - Statement of intent and outline

Section 61 - General policy about review

Part 7 of the Determination deals with review, in accordance with section 33 of the Act (which provides for review of actions), of a Parliamentary Service action relating to the employment of a Parliamentary Service employee except for the termination of the employee’s employment.

Part 7 is made under section 71 of the Act, which empowers the Presiding Officers to make determinations prescribing matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed by determinations for carrying out or giving effect to the Act.

The necessary or convenient power in paragraph 71(1)(b) of the Act allows for the making of subordinate legislation with respect to matters that are incidental or ancillary to the Act. To this end the Determination uses this power to fill out the framework established by the Act and to support its effective operation. The Determination, however, does not widen the operation of the Act, does not add new or different means of carrying out the Act and does not depart from or vary the Act or its purposes.

The subject matter dealt with in Part 7 is incidental or ancillary to section 33 of the Act which deals with review of actions. For example, section 62 allows for applications for review of certain promotion and engagement decisions to be made to the Merit Protection Commissioner for review by the Promotion Review Committee. This provision confers a right to review which is incidental and ancillary to section 33 of the Act which provides for review of actions.

Pursuant to paragraph 48(1)(e) of the Act, the Determination can prescribe other functions to the Merit Protection Commissioner. Review of decisions in Part 7 is accordingly one of the prescribed functions of the Merit Protection Commissioner.

Subsection 61(1) contains a statement of general policy concerning review of actions, indicating that the Parliamentary Service should achieve and maintain workplaces that encourage productive and harmonious working environments.

Subsection 61(2) provides that for the purposes of section 33 of the Act, this Part aims to provide a fair system of review for certain Parliamentary Service actions.

Subsection 61(3) provides that employees concerns are intended to be dealt with quickly, impartially and fairly.

Subsection 61(4) provides that, if appropriate, the review processes are intended to be consistent with the use of alternative dispute resolution methods to reach satisfactory outcomes.

Section 62 - Review of Parliamentary Service actions - certain promotion decisions and engagement decisions

Section 62 provides that applications for review of certain promotion decisions are to be made to the Merit Protection Commissioner for review by a Promotion Review Committee.

Section 63 - Review of other Parliamentary Service action

Section 63 states that Division 3 of Part 7 of the Determination provides for:

- a. applications for primary review of other Parliamentary Service actions to be made to the relevant Secretary or, in certain circumstances, to the Merit Protection Commissioner; and
- b. applications for secondary review of a Parliamentary Service action if:
 - i. the relevant Secretary told the employee under section 84 that the action is not reviewable action; or
 - ii. the employee is dissatisfied with the outcome of the relevant Secretary's review of the action under section 85.

The note below paragraph 63(b) provides that a recommendation on an application to the Merit Protection Commissioner for primary or secondary review is not binding on the relevant Secretary.

Division 2 - Review of certain Parliamentary Service promotion decisions and engagement decisions (including decisions involving APS employees)

Section 64 - Application of this Division

Subsection 64(1) provides that Division 2 of Part 7 applies if a decision (a promotion decision) is made by a Secretary to promote an ongoing Parliamentary Service employee to employment at a classification mentioned in any of Groups 1 to 6 set out in Schedule 1 to the *Parliamentary Service Classification Rules 2010*, the promotion decision is not made in accordance with the recommendation of an Independent Selection Advisory Committee (ISAC) and the promotion decision was not made in accordance with a PRC decision.

Subsection 64(2) provides that Division 2 of Part 7 also applies if a decision (engagement decision) to engage an ongoing APS employee at a classification mentioned in any of Groups 1 to 6 set out in Schedule 1 to the *Parliamentary Service Classification Rules 2010*, the engagement decision is not made in accordance with the recommendation of an Independent Selection Advisory Committee (ISAC) and the engagement decision was not made in accordance with a PRC decision.

Subsection 64(3) provides that a decision to engage an ongoing APS employee is an engagement decision if the engagement is at a higher classification than the ongoing APS employee's classification as an APS employee.

The note below subsection 64(3) refers the reader to definition of higher classification contained in section 7.

Section 65 - Entitlement for review - promotion decisions

Subsection 65(1) provides that if an ongoing Parliamentary Service employee applied for promotion to the relevant employment, and a decision is made in relation to the relevant employment, the ongoing Parliamentary Service employee is entitled to apply to the Merit Protection Commissioner to have the promotion decision reviewed by a PRC.

Subsection 65(2) provides that if an ongoing APS employee applied for engagement to the relevant employment at a higher classification than the APS employee's classification as an APS employee, and a decision has been made in relation to the relevant employment, the ongoing APS employee is entitled to apply to the Merit Protection Commissioner to have the decision reviewed by a PRC.

The first note below subsection 65(2) provides that the Merit Protection Commissioner may appoint a PRC under section 69 to deal with applications from Parliamentary Service and APS employees in relation to the same promotion decision and applications relating to promotion decisions and engagement decisions.

The second note below subsection 65(2) refers the reader to section 64 for definitions.

Section 66 - Entitlement to review - engagement decisions involving APS employees

Subsection 66(1) provides that if an ongoing Parliamentary Service employee applied for promotion to the relevant employment, and an engagement decision is made in relation to the relevant employment, the ongoing Parliamentary Service employee is entitled to apply to the Merit Protection Commissioner to have the engagement reviewed by the PRC.

Subsection 66(2) provides that if an ongoing APS employee applied for engagement to the relevant employment at a higher classification than the APS employee's classification as an APS employee, and a decision has been made in relation to the relevant employment, the ongoing APS employee is entitled to apply to the Merit Protection Commissioner to have the decision reviewed by a PRC.

The first note below subsection 66(2) provides that the Merit Protection Commissioner may appoint a PRC under section 69 to deal with applications from Parliamentary Service and APS employees in relation to the same promotion decision and applications relating to promotion decisions and engagement decisions.

The second note below subsection 66(2) refers the reader to section 64.

Section 67 - Grounds for review

Section 67 provides that a promotion decision can only be reviewed under Division 2 on the grounds of merit. Subsection 10A(2) of the Act provides that a decision relating to engagement or promotion is based on merit if the matters set out in that subsection are satisfied.

Section 68 - Application for review

Subsection 68(1) provides that an application for review must be in writing.

Subsection 68(2) provides that an application for review under this Division must be received by the Merit Protection Commissioner within the period specified in the *Public Service Gazette* as part of notifying the promotion or engagement or within the extended period if the Merit Protection Commissioner extends the period for a class of employees that includes the applicant before the end of the period specified in the *Public Service Gazette* and at the place notified in the *Public Service Gazette*.

Subsection 68(3) provides that, if an application for review is made, it operates to stay the decision being reviewed until it takes effect in accordance with Part 3.

Section 69 - Appointment of PRC

Subsection 69(1) provides that, if the Merit Protection Commissioner receives an application for review under Division 2, the Merit Protection Commissioner must consider the circumstances in which the application was made and if the Merit Protection Commissioner believes a review is necessary, appoint a Promotion Review Committee (**PRC**) to deal with that application.

Subsection 69(2) provides that a PRC may be appointed to deal with the following applications:

- a. applications by ongoing Parliamentary Service employees and ongoing APS employees (or both) for review of a promotion decision;
- b. applications by ongoing Parliamentary Service employees and ongoing APS employees (or both) for review of an engagement decision; and
- c. applications in relation to more than one promotion decision or engagement decision.

The note below subsection 69(2) refers the reader to section 64.

Section 70 - Constitution of PRC

Subsection 70(1) provides that a PRC must comprise:

- a. a Convenor nominated by the Merit Protection Commissioner;
- b. a Parliamentary Service employee nominated by the relevant Secretary; and
- c. a Parliamentary Service employee nominated by the Merit Protection Commissioner.

Subsection 70(2) provides that the Merit Protection Commissioner must be satisfied that the Parliamentary Service employee nominated under paragraph 70(1)(c) has the necessary skills and personal qualities to perform the Parliamentary Service employee's duties as a member of the PRC independently and impartially.

Subsection 70(3) provides that the Parliamentary Service employee nominated under paragraph (1)(c) must be made available for the purposes of the PRC, subject to the operational efficiency of the Department in which the Parliamentary Service employee is employed.

Subsection 70(4) provides that if a member of a PRC ceases to act as a member before the PRC makes its recommendation to the relevant Secretary, the PRC must be reconstituted by the remaining members and another member nominated in accordance with subsection 70(1).

Subsection 70(5) provides that the reconstituted PRC must have regard to matters put before, or decided by, the PRC as previously constituted.

Subsection (6) provides that a person is not subject to direction in carrying out his or her duties as a member of a PRC, except by a Court or as specified in instructions issued under section 74.

Section 71 - Statement by parties

Subsection 71(1) provides that an applicant for review of a promotion decision, and the person promoted, or an applicant for review of an engagement decision, and the person engaged, may each give the Merit Protection Commissioner a statement in writing setting out his or her claims for promotion or engagement to the relevant employment if invited to do so by the Merit Protection Commissioner by written notice.

Subsection 71(2) provides that a statement under subsection 71(1) must be given to the Merit Protection Commissioner within 14 days after a notice under subsection 71(1) is given or if a longer period is requested within that 14-day period by the applicant for review or the person promoted or engaged, and the longer period is agreed to by the Merit Protection Commissioner.

Subsection 71(3) provides that if a statement under subsection 71(1) is not given within the required time, the PRC may consider and decide the application without the statement.

Subsection 71(4) provides that subject to paragraph 73(1)(a), neither an applicant for review, nor a person promoted or engaged, as mentioned in paragraph 71(1)(a) or 71(1)(b) is entitled to have access to a statement that is given to the Merit Protection Commissioner by someone else under subsection 71(1).

Section 72 - Frivolous or vexatious applications

Section 72 provides that a PRC may refuse to consider, or further consider, an application for review if each member of the PRC is satisfied that the application is frivolous or vexatious.

Section 73 - PRC procedures - minimum requirements

Subsection 73(1) specifies the minimum requirements for PRC review procedures. Those minimum requirements are that due regard must be given to procedural fairness, the review must be conducted in private, and the review must be finished, as quickly and with as little formality as a proper consideration of the matter allows.

Subsection 73(2) provides that a person appearing before a PRC must do so without representation, unless the Merit Protection Commissioner decides in the circumstances that it would be reasonable to allow the person to be represented.

Section 74 - PRC procedures - Merit Protection Commissioner's instructions

Subsection 74(1) provides that the Merit Protection Commissioner must issue as soon as practicable after the commencement of this Determination instructions about the procedures to be followed by a PRC in performing its functions under this Division.

Subsection 74(2) provides that instructions issued under subsection 74(1) must not be inconsistent with the Act or this Determination.

Subsection 74(3) provides that a PRC must comply with the instructions issued under subsection 74(1).

Section 75 - Assistance to PRC

Section 75 requires the Merit Protection Commissioner to take all reasonable steps ensure that a PRC is provided with supporting staff to ensure that it can carry out its functions properly and efficiently.

Section 76 - Requirement to provide information or documents

Subsection 76(1) provides that a PRC may require a Secretary to give to the PRC specified information or documents that are relevant to the review

Subsection 76(2) provides that the information or documents referred to in subsection 76(1) must be given in the way and at or within the time stated in the notice.

Section 77 - Conduct of review by PRC

Subsection 77(1), under the heading 'Assessment of relative merits' provides that in conducting a review of a promotion decision or an engagement decision, a PRC must assess the relative merits of the person promoted or engaged, and each applicant for review of the decision, on the basis of:

- a. the relative suitability of each person to perform the duties (the relevant duties) relating to the relevant employment; and
- b. the relationship between each person's work-related qualities and the work-related qualities genuinely required for the relevant duties; and
- c. the relative capacity of each person to achieve outcomes related to the relevant duties.

Subsection 77(2) under the heading 'Decision relating to applicant who is a Parliamentary Service employee' provides that if an applicant for the review is a Parliamentary Service employee, the PRC must decide, primarily on the basis of the assessment conducted under subsection 77(1), that the promotion decision or engagement decision should be upheld or the applicant for review should be promoted to the relevant employment and inform the relevant Secretary, in writing, of its decision.

The note below subsection 77(2) provides that the decision made under subsection 77(2) is binding on the Secretary.

Subsection 77(3) provides that if an applicant for review is an APS employee, the PRC must recommend, primarily on the basis of the assessment conducted under subsection 77(1) that the promotion decision or engagement decision should be upheld or the applicant for review

should be promoted or engaged to the relevant employment and inform the relevant Secretary, in writing, of its decision.

The note below subsection 77(2) provides that the recommendation made under subsection 77(3) is not binding on the Secretary.

Section 78 - Non-agreement on a decision or recommendation by PRC

Subsection 78(1) provides that this section applies if all members of a PRC do not agree on a decision or a recommendation in relation to an application for review of a promotion decision or an engagement decision

Subsection 78(2) under the heading 'Decision relating to applicant who is a Parliamentary Service employee' provides that if two members agree on a decision, the decision is taken to be the decision of the PRC.

Subsection 78(3) provides that there is no agreement on a decision between any of the members, the Convenor's decision is taken to be the decision of the PRC.

Subsection 78(4) under the heading 'Recommendation relating to applicant who is an APS employee' provides that if two members agree on a recommendation, the recommendation is taken to be the recommendation of the PRC.

Subsection 78(5) provides that if there is no agreement on a recommendation between any of the members, the Convenor's recommendation is taken to be the recommendation of the PRC.

Section 79 - Effect of PRC decision or PRC recommendation

Subsection 79(1) under the heading 'Application for review by a Parliamentary Service employee' provides that if an application for review of a promotion decision or an engagement decision was made by a Parliamentary Service employee and a PRC conducts a review of the decision under section 77, the decision of the PRC under subsection 77(2) is binding on the relevant Secretary.

Subsection 79(2) provides that a decision of the PRC is not affected by a defect in the nomination of a member of the PRC or a failure to comply with instructions issued under section 74.

Subsection 79(3) provides that if the PRC decides that the applicant for review should be promoted to the relevant employment, the applicant is taken to have been promoted to the relevant employment.

The note below subsection 79(3) refers the reader to section 45 which is in relation to the date of effect of a decision to promote an ongoing Parliamentary Service employee if the decision is subject to PRC review.

Subsection 79(4) under the heading 'Application for review by an APS employee' provides that if an application for review of a promotion decision or an engagement decision was made

by an APS employee and a PRC conducts a review of the decision under section 77, the recommendation of the PRC under subsection 77(3) is not binding on the relevant Secretary.

Subsection 79(5) provides that a recommendation is not affected by a defect in the nomination of a member of the PRC or a failure to comply with the instructions issued under section 74.

Subsection 79(6) provides that if the PRC recommends that the applicant for the review should be engaged to the relevant employment, the Secretary must, as soon as practicable after being informed of the recommendation consider the recommendation, make a decision about the recommendation and inform the applicant for review, the Merit Protection Commissioner and (if the review is in relation to a promotion decision) the person promoted of the decision and the reasons for the decision.

Subsection 79(7) provides that before the Secretary decides to act otherwise than in accordance with the recommendation, the Secretary must seek the views of the applicant for the review and (if the review is in relation to a promotion decision) the person promoted about the decision the Secretary proposes to make about the recommendation.

The note below subsection 79(7) refers the reader to section 45 which is in relation to the date of effect of a decision to engage an ongoing APS employee as a Parliamentary Service employee at a higher classification than the employee's classification as an ongoing APS employee if the decision is subject to PRC review.

Division 3 - Review of other Parliamentary Service actions

Subdivision A - Reviewable actions

Section 80 - Entitlement to review

Subsection 80(1) provides that for the purposes of subsections 33(1) and 33(2) of the Act (which provide for review of actions), an affected non-SES employee is entitled to review of a reviewable action under Division 3 if the action is an action by a person who is a Secretary or Parliamentary Service Employee and is a reviewable action.

The note below subsection 80(1) refers the reader to section 81 which sets out what is a 'reviewable action.'

Subsection 80(2) provides that if an affected employee applies for review under this Division of a Parliamentary Service action, the affected employee ceases to be entitled to review under this Division if, after the application is made:

- a. the employee ceases to be employed;
- b. the employee is promoted to an SES position; or
- c. the action ceases to be a reviewable action.

Subsection 80(3) provides that a former Parliamentary Service employee is not entitled to review under this Division.

The note below subsection 80(3) provides that for the rights of former Parliamentary Service employees the reader should refer to Subdivision D of Division 2 of Part 10 of this Determination.

Section 81 - What Parliamentary Service actions are reviewable actions

The purpose of this section is to set out the circumstances in which a Parliamentary Service action is a reviewable action. ‘Reviewable action’ effectively means any Parliamentary Service action which an affected employee is entitled to review under subsection 33(1) of the Act that is not excluded from being a reviewable action. Subsections 81(2) and 81(5) include tables of actions that are not, or that cease to be, reviewable actions in particular circumstances.

Subsection 81(1) provides that an action is reviewable if the affected employee is entitled to review of the action under subsection 33(1) of the Act and the action is not excluded from being a reviewable action by any of the subsections 81(2) to 81(6).

Subsection 81(2) provides that an action is not, or ceases to be, reviewable if it is an action mentioned in the table available at subsection 81(2).

The exemptions set out in subsection 81(2) are fit for purpose because they contribute to the efficient and effective operation of Part 7 which provides for the review of actions in accordance with section 33 of the Act. Items 1-6 in the table in subsection 81(2) are high-level strategic decisions which are beyond the scope of an individual employee's employment. Items 7-11 in the table in subsection 81(2) relate to the administration of the Department and are designed to provide Secretaries with flexibility available to employers more generally, in taking employees and deploying them in accordance with operational requirements. It is not appropriate for decisions such as these to be subject to challenge or review.

Subsection 81(3) provides that the action is not, or ceases to, be reviewable if the affected employee has applied to have the action dealt with by a court of tribunal with jurisdiction to review or deal with the action.

Subsection 81(4) provides that the action is not, or ceases to be reviewable, if the person who would be conducting the review considers that the action should not be reviewable for any of the following reasons:

- a. the application by the affected employee for review of the action is misconceived or lacking in substance;
- b. the application by the affected employee for review of the action is frivolous or vexatious;
- c. the affected employee has previously applied for review of the action under this Division;
- d. the affected employee has applied to have the action reviewed under Division 2 of this Part;
- e. the affected employee has applied, or could apply, to have the action reviewed by an external review body and review by the external review body would be more appropriate than review under this Division;
- f. the affected employee does not have sufficient direct personal interest in review of the action; and
- g. review, or further review, of the action is not otherwise justified in all the circumstances.

The first note below subsection 81(4) provides that the purposes of paragraph 81(4)(e), examples of external review bodies include the Commonwealth Ombudsman, the Australian Information Commissioner and the Australian Human Rights Commission.

The second note below subsection 81(4) provides that for the purposes of paragraph (g), a review may not be justified because the applicant did not respond to a request under section 92 for further information about why the review is sought.

With respect to the terminology used in paragraphs 81(4)(a)-(b) the following meaning can be derived from the terminology used.

‘Misconceived’ refers to those situations where an applicant is mistaken in their views, have misinterpreted or failed to understand a matter or have put a false construction on a matter. ‘Lacking in substance’ refers to applications for review that lack essential elements such as not identifying an action or decision. ‘Frivolous’ is generally taken to mean that the case is ‘obviously unsustainable’. ‘Vexatious’ means an application made for a collateral purpose, as a means of obtaining some advantage for which these review processes were not designed; in other words, an application made for some ulterior purpose (for example, as a bargaining chip). Applications that meet one of these criteria may involve decisions where there is no appropriate remedy, or the dispute may be best addressed through other means

The reference in paragraph 81(4)(c) refers only to applications made seeking review of an action that has already been subject of review under this Division.

Paragraph 81(4)(c) uses the words ‘the action’ and it cannot prevent an APS employee from making an application for review in relation to a different action. In this regard, it should be noted that subsection 82(3)(c) provides for a direct application for primary review to be made to the Merit Protection Commissioner in circumstances such as where the applicant is claiming the action for which review is sought is victimisation or harassment for having made a previous application for review of a different action.

Paragraph 81(4)(d) excludes from review, under Division 3 of Part 7, those actions that comprise a promotion or engagement decision where the applicant has applied for a review by a Promotion Review Committee under Division 2 of the Part 7

Paragraph 81(4)(e) relates to applications for review of actions where the subject matter of the application falls within the jurisdiction of a specialist and expert review body that exists to consider such complaints. This can include actions about discrimination on a number of grounds, including sex, race and disability (the Australian Human Rights Commission).

It would be an ineffective use of public resources to duplicate a review process that has already occurred or is ongoing. For example, if the affected employee has already applied for review of the action, including under the Act, or by another review body, Part 7 should not provide employees with multiple opportunities to appeal the same action. Further, if the affected employee has already applied for review of the action, reviewing the action again may not be an appropriate way of resolving the dispute

Paragraph 81(4)(f) relates to complaints about an action or decision taken in relation to another employee that has marginal or no effect on the employee who has made the complaint.

Paragraph 81(4)(f) is necessary to ensure the objective of the effective allocation of public resources, as expressed above. Section 33(1) of the Act (concerning review of actions) is too

broad to achieve this objective. A decision to transfer another employee into an employee's team may be interpreted to 'relate' to the second employee's employment, by virtue of the employees being employed now within the same team. Accordingly, section 33(2) of the Act provides that the determinations may prescribe exceptions to this entitlement, such as there being no entitlement to review if the application is frivolous or vexatious.

Paragraph 81(4)(f) is necessary to create a closer nexus between the employee applying for review, and the action under review. The scheme in Part 7 is not intended to provide open standing to employees to appeal decisions made about other employees, which may not directly affect them but may be broadly interpreted to 'relate' to their employment, within the meaning of section 33(1) of the Act. A provision such as paragraph 81(4)(f) is required to provide further clarity that the review applicant needs to be seeking review of something in which they have a direct personal interest, rather than for example seeking a review of an action about how for a Secretary handled allegations that a colleague was harassed, or where the applicant is not affected by a decision that another employee did not breach the Code of Conduct.

In relation to paragraph 81(4)(g), the circumstances in which this provision could apply include: the matter has already been reviewed but the review applicant is dissatisfied and has re-phrased their old complaint as if it were a new and different complaint, the applicant does not respond to a request for further information about why the review is sought, the outcome sought by the review applicant has already been achieved or has been overtaken by another event or decision or that event or decision nullifies the original decision.

It is generally not appropriate to exercise this discretion for the following reasons: the delegate has formed a preliminary view, without reviewing the action, that the merits of the review applicant's case are weak; the decision for which review is being sought was consistent with the agency's policy (for example, a manager's discretion to refuse a leave without pay application).

If a decision maker makes a decision under subsection 81(4)(g), which means that the action ceases to be a reviewable action, then the affected employee is entitled by virtue of section 87 of the Determination to apply to the Merit Protection Commissioner for secondary review of the action once they have been given notice in writing under section 84 of the Determination that the action is not a reviewable action.

A review applicant who is dissatisfied with the outcome of their review may also seek relief from the Federal Courts under the *Administrative Decisions (Judicial Review) Act 1977*.

Subsection 81(5) provides that the action is not or ceases to be reviewable if the circumstances mentioned in column 2 of the item applies in relation to the action.

Subsection 81(6) provides that a Parliamentary Service action mentioned in column 1 of an item in subsection 81(5) is a reviewable action if the person who is, or would be, conducting the review considers that there are exceptional circumstances explaining the failure to make an application for review of the Parliamentary Service action within the period mentioned in column 2 of the item.

Subsections 81(2) to 81(6) are made pursuant to section 33 of the Act and have the effect of prescribing exceptions to the entitlement to review as contemplated in subsection 33(2) of the Act.

Subdivision B - Primary review

Section 82 - Application for primary review

Subsection 82(1) provides that an affected employee may apply to the relevant Secretary for primary review of the Parliamentary Service action.

Subsection 82(2) provides that an application under subsection 82(1) must be made to the Merit Protection Commissioner if the application for review is for review of a determination that the affected employee has breached the Code of Conduct, or for review of a sanction imposed for a breach of the Code.

Subsection 82(3) provides that an affected employee may also apply in writing to the Merit Protection Commissioner for review of the action if the Secretary was directly involved in the action or it is not appropriate, because of the seriousness or sensitivity of the action, for the Secretary to deal with the application or the action is claimed to be victimisation or harassment of the employee for having made a previous application for review of a Parliamentary Service action.

Subsection 82(4) provides that the application made under subsection 82(1) must state briefly why the review is sought and if a particular outcome is sought, the outcome sought.

The note below subsection 82(4) provides that for the purposes of subsection 82(4)(b) examples of outcomes that might be sought include reconsideration of the action and reassignment of duties.

Section 83 - Referral to Merit Protection Commissioner

Subsection 83(1) provides that if an affected employee makes an application for review of a Parliamentary Service action to the relevant Secretary under subsection 82(1), the Secretary may, with the Merit Protection Commissioner's agreement, refer the application to the Merit Protection Commissioner.

Subsection 83(2) provides that the Secretary may refer the application to the Merit Protection Commissioner if the Secretary was directly involved in the action or the Secretary thinks that it is not appropriate, because of the seriousness or sensitivity of the action, for the Secretary to deal with the application.

Subsection 83(3) provides that if the Secretary refers the application to the Merit Protection Commissioner, the Secretary must tell the affected employee in writing.

The note below subsection 83(3) provides that section 86 deals with review of applications referred to the Merit Protection Commissioner by a Secretary.

Section 84 - Notice that Parliamentary Service action is not a reviewable action

Section 84 provides that, if an action is not reviewable in accordance with subsection 81(2) to (6), the person who would have conducted the review sought by the affected employee under section 82 must inform the employee that the action is not reviewable and the reasons why it is considered that the action is not reviewable and if the application was not made or referred to the Merit Protection Commissioner, of any right of the employee to apply to the Merit Protection Commissioner for secondary review of the action in accordance with section 87.

Section 85 - Conduct of review by relevant secretary

Subsection 85(1) provides that a relevant Secretary who does not refer the application to the Merit Protection Commissioner and considers that the employee is entitled to review under Division 3 must review the action and attempt to resolve the employee's concerns.

Subsection 85(2) provides that subject to meeting the minimum requirements for review procedures in subsection 91(1) of the Determination, the Secretary may conduct the review in any manner the Secretary thinks fit.

Subsection 85(3) provides that the Secretary may confirm or vary the action or set the action aside and substitute a new action.

Subsection 85(4) provides that subsection 85(3) does not, however, limit the employer powers of the Secretary in relation to the matter.

The example below subsection 85(4) provides that the Secretary may take other appropriate action to rectify effects of the action or restore the affected employee to the position in which the employee would have been if the action had not been taken.

Subsection 85(5) requires the Secretary to tell the employee in writing of the decision made on the application, the reasons for the decision, any action to be taken as a result of the review, and of the right of the applicant to apply to the Merit Protection Commissioner, under section 87, for secondary review of the decision.

Section 86 - Conduct of review by Merit Protection Commissioner

Subsection 86(1) provides that this section applies if the application for review of a Parliamentary Service action is made to the Merit Protection Commissioner under subsection 82(2) or 82(3) or referred to the Merit Protection Commissioner under subsection 83(1).

Subsection 86(2) provides that if the Merit Protection Commissioner considers that the affected employee is entitled to review of the action under this Division, the Merit Protection Commissioner:

- a. must conduct a de novo review of the action;
- b. may, subject to the minimum requirements mentioned in subsection 91(1), conduct the review in any manner the Merit Protection Commissioner thinks fit;
- c. must make a recommendation to the relevant Secretary, in writing, about the action;
- d. must tell the relevant Secretary, in writing, the reasons for the recommendation; and
- e. must tell the affected employee, in writing, of the recommendation and reasons given to the relevant Secretary.

The note below subsection 86(2) provides that the recommendation is not binding on the Secretary.

Subdivision C - Secondary review

Section 87 - Application for secondary review

Subsection 87(1) provides that an affected employee may apply in writing to the Merit Protection Commissioner for secondary review of a Parliamentary Service action if the relevant Secretary told the employee under section 84 that the action is not a reviewable

action, or the employee is dissatisfied with the outcome of the relevant Secretary's review of the action under section 85.

Subsection 87(2) provides that an application under subsection 87(1) must be made through the relevant Secretary.

Subsection 87(3) provides that the application must state briefly why the review is sought.

Section 88 - Secretary to give documents to Merit Protection Commissioner

Subsection 88(1) provides that if an application is made under section 87, the relevant Secretary must give to the Merit Protection Commissioner the application and any relevant documents relating to the primary review of the action within 14 days after receiving the application from the affected employee.

Subsection 88(2) provides that the Secretary must give to the affected employee a copy of any documents given to the Merit Protection Commissioner under paragraph (1)(b).

Section 89 - Conduct of review by Merit Protection Commissioner

Subsection 89(1) provides that if the Merit Protection Commissioner receives an application for secondary review of a Parliamentary Service action under section 88 and the Merit Protection Commissioner considers that the affected employee is entitled to review of the action under this Division, the Merit Protection Commissioner:

- a. must conduct a de novo review of the action; and
- b. may, subject to the minimum requirements mentioned in subsection 91(1), conduct the review in any manner the Merit Protection Commissioner thinks fit; and
- c. must make a recommendation to the relevant Secretary, in writing, about the action; and
- d. must tell the relevant Secretary, in writing, the reasons for the recommendation; and
- e. must tell the affected employee, in writing, of the recommendation and reasons given to the relevant Secretary.

The note below subsection 86(2) provides that the recommendation is not binding on the Secretary.

Subdivision D - Action following recommendation to Secretary

Section 90 - Action by Secretary

Subsection 90(1) provides that if a Secretary receives a recommendation under section 86 or 89 following a review of a Parliamentary Service action, the Secretary must, as soon as reasonably practicable after receiving the recommendation consider the recommendation and make a decision about the recommendation.

Subsection 90(2) provides that for the purposes of paragraph 90(1)(b) the Secretary may confirm the action, vary the action or set the action aside and substitute a new action.

Subsection 90(3) provides that if the Secretary acts in accordance with the recommendation, the Secretary is not required to seek the view of the affected employee before acting on the recommendation.

The note below subsection 90(3) provides that the views of the affected employee should have been sought by the Merit Protection Commissioner during the review in accordance with the principles of procedural fairness.

Subsection 90(4) provides that subsection 90(2) does not limit the employer powers of the Secretary in relation to the action or the affected employee.

The example below subsection 90(4) provides that the Secretary may take other appropriate action to rectify the effects of the action or restore the affected employee to the position in which the employee would have been if the action had not been taken.

Subsection 90(5) provides that if after considering the recommendation, the Secretary considers making a finding of a breach of the Code of Conduct, the Secretary had not made the finding before the recommendation was made, and the finding was not mentioned in the recommendation, the Secretary must comply with the procedures established under subsection 15(3) of the Act before deciding whether to make the finding. Subsection 15(3) of the Act requires written procedures to be established for determining whether a Parliamentary Service employee, or former Parliamentary Service employee, has breached the Code of Conduct.

Subsection 90(6) provides that if after considering the recommendation, the Secretary considers imposing a sanction for breach of the Code of Conduct that the Secretary had not imposed before the recommendation was made and the sanction was not mentioned in the recommendation, the Secretary must comply with the procedures established under subsection 15(3) of the Act before deciding whether to impose the sanction. Subsection 15(3) of the Act requires written procedures to be established for determining whether a Parliamentary Service employee, or former Parliamentary Service employee, has breached the Code of Conduct.

Subsection 90(7) explains that the Secretary must tell the affected employee and the Merit Protection Commissioner in writing of the decision mentioned in paragraph 90(1)(b) and the reasons for the decision.

The note below subsection 90(7) provides that subsection 33(6) of the Act allows for matters to be reported to the Secretary of the relevant Department and to the Presiding Officers, for presentation to the Parliament, if the Merit Protection Commissioner is not satisfied with the response to recommendations contained in a report to a Secretary.

Section 90 confers a discretionary power on the Secretary, which is necessary to enable the Secretary to make decisions in relation to affected employees who have made an application to either the Parliamentary Service Commissioner or the Merit Protection Commissioner. The power is to be exercised by the Secretary or the Secretary's delegate, who would possess the appropriate qualifications and necessary skills for exercising the discretion. Appropriate safeguards are contained in subsections 90(5) and 90(6), and there is a requirement for the Secretary to provide reasons for exercising the discretion, in subsection 90(7).

Subdivision E - Action following recommendation to Secretary

Section 91 - Review procedures - minimum requirements

Subsection 91(1) provides that the procedures used for a review conducted under this Division must meet the following minimum requirements:

- a. the procedures must have due regard to procedural fairness;
- b. the review must be conducted in private; and
- c. the review must be finished as quickly, and with as little formality, as a proper consideration of the matter allows.

Subsection 91(2) provides that a person appearing before the Merit Protection Commissioner must do so without representation unless the Merit Protection Commissioner decides that, in all the circumstances, it would be reasonable to allow the person to be represented.

Section 92 - Requirement to provide information or documents

Section 92 is made in accordance with section 33 of the Act, which at subsection 33(3) allows determinations to provide 'for the powers available to the Merit Protection Commissioner, or any other person or body, when conducting a review under the determinations.'

Subsection 92(1) provides that a person or committee carrying out a review under this Division may, by written notice given to a Secretary or Parliamentary Service employee, require the Secretary or Parliamentary Service employee to give the person or committee stated information or documents relevant to the review.

Subsection 92(2) provides that the Secretary or Parliamentary Service employee must give the information or documents in the way, and at or within the time, stated in the notice.

Section 93 - Making of application does not operate as stay

Section 93 provides that the making of an application for review under this Division does not operate to stay the action for which review is sought.

Part 8 - Other employment matters

Section 94 - Purpose of this Part

Section 94 provides that this Part is made for the purposes of subsection 11C(1) of the Act. Subsection 11C(1) of the Act empowers the Presiding Officers to make determinations under section 71 of the Act about employment matters relating to Parliamentary Service employees.

Section 95 - Knowledge of Act and this instrument

Section 95 provides that Parliamentary Service employees must inform themselves about the Act and the Determination.

Section 96 - Restrictions on engaging a person who has received a redundancy benefit

Section 96 provides that a Secretary may engage as a Parliamentary Service employee a person who has received a redundancy benefit where the Secretary considers that the person's engagement is essential for the relevant Department's operations having regard to the nature of the duties to be performed and the work-related qualities of the person, and the Parliamentary Service Commissioner has approved the person's engagement as either an ongoing Parliamentary Service employee or as a non-ongoing SES employee.

Subsection 96(2) provides that a person from a Department or an APS Agency, and for which the redundancy benefit period has not ended is a person who has received a redundancy benefit.

Subsection 96(2) also provides that a redundancy benefit means a payment in the form of a severance payment or similar payment, a payment made as a result of the shortening of a retention period or in the form of an incentive to retire payment under section 37 of the Act or section 37 of the *Public Service Act 1999* (which deal with incentives to retire). This section sets out that the definition of redundancy benefit does not include a payment made to a person in lieu of notice of termination of employment or a payment made to an employee as redundancy pay under section 119 of the *Fair Work Act 2009*.

Subsection 96(2) also defines a redundancy benefit period as the period beginning on the day after the person's employment ends and ending on the last day at the end of the relevant number of weeks using the formula set out in the provision. The formula provides for the calculation of the number of weeks by dividing the gross amount of the employee's redundancy benefit by the employee's weekly salary. This section also provides that the term 'weekly salary' means the weekly salary used to calculate the redundancy benefit or, in the case of a person who has periods of full-time and part-time service and whose redundancy benefit is calculated on the basis of a part-time weekly salary, the full-time equivalent of the part-time weekly salary.

Part 9 - The Parliamentary Service Commissioner—functions

Division 1—Inquiries into public interest disclosures relating to alleged breaches of Code of Conduct

Section 97 - Inquiries into public interest disclosures relating to alleged breaches of the Code of Conduct

Subsection 97(1) provides that for the purposes of paragraph 40(1)(c) of the Act, the function of the Parliamentary Service Commissioner to inquire into public interest disclosures to the extent that they relate to one or more alleged breaches of the Code of Conduct is subject to this section. Paragraph 40(1)(c) of the Act provides that the Parliamentary Service Commissioner's functions include inquiring, subject to determinations, into public interest disclosures to the extent that the disclosures relate to alleged breaches of the Code of Conduct.

Subsection 97(2), under the heading 'Inquiry into disclosure', provides that the Parliamentary Service Commissioner may inquire into the public interest disclosure if the Parliamentary Service Commissioner is satisfied that it would be inappropriate for the disclosure to be made to a Secretary.

Subsection 97(3) provides that the Parliamentary Service Commissioner may inquire into the disclosure if the disclosure was made to a Secretary and the Parliamentary Service Commissioner reasonably believes that the disclosure was not satisfactorily handled by the Secretary.

Subsection 97(4), under the heading 'Parliamentary Service Commissioner may decline to conduct, or discontinue, inquiry' provides that the Parliamentary Service Commissioner may

decide to decline to inquire into the disclosure, or to decline to inquire further, if, in all the circumstances, conducting or continuing the inquiry would not be justified.

Subsection 97(5), provides that when deciding whether to decline to conduct, or to discontinue, an inquiry into the disclosure, the Parliamentary Service Commissioner may have regard to the following:

- a. whether the disclosure would be more appropriately dealt with by other means;
- b. whether the disclosure is vexatious, frivolous, misconceived or lacking in substance;
- c. whether sufficient detail about the alleged breaches to which the disclosure relates has been provided;
- d. whether the disclosure refers to specific decisions or actions by a Parliamentary Service employee;
- e. whether the disclosure identifies conduct which, if proven, would constitute a breach of the Code of Conduct;
- f. whether the disclosure relates to a decision properly taken, or to policy properly followed, by a Parliamentary Service employee, with which the discloser disagrees; and
- g. whether the cost of conducting an inquiry is justified in the circumstances.

Subsection 97(6), under the heading 'Process of inquiry' provides that if the Parliamentary Service Commissioner inquires into a disclosure, the Parliamentary Service Commissioner must consider, having regard to all the circumstances, whether to give a person about whom the disclosure has been made an opportunity to be heard in relation to the disclosure and take reasonable steps to report the outcome of the inquiry to the discloser and the relevant Secretary.

The note below this subsection highlights section 65AA of the Act, which deals with circumstances in which the Parliamentary Service Commissioner may make a record of, disclose or otherwise use certain information for the purposes of, or in connection with, the performance of the Parliamentary Service Commissioner's functions. The note also provides that if the Parliamentary Service Commissioner gives a person about whom a disclosure has been made an opportunity to be heard in relation to the disclosure, the Parliamentary Service Commissioner may give the person information identifying the discloser to the extent the Parliamentary Service Commissioner considers appropriate in the circumstances.

Section 98 - Inquiries into Merit Protection Commissioner's behaviour

Subsection 98(1) provides that for the purpose of paragraph 40(1)(d) of the Act, a function of the Parliamentary Service Commissioner is to inquire into alleged breaches of the Code of Conduct by the Merit Protection Commissioner and to report to the Presiding Officers on the results of such inquiries, including, if relevant, recommendations for sanctions. Paragraph 40(1)(d) of the Act provides that the Parliamentary Service Commissioner's functions include such other functions as are conferred on the Commissioner by the Act, the determinations or any other law.

Subsection 98(2), under the heading 'Parliamentary Service Commissioner may decline to conduct, or discontinue, inquiry' provides that if the Parliamentary Service Commissioner decides that conducting, or continuing, an inquiry under subsection 98(1) would not be

justified in all the circumstances, the Parliamentary Service Commissioner may decline to conduct or discontinue the inquiry.

Subsection 98(3), provides that the Parliamentary Service Commissioner may have regard to the following factors when deciding whether to decline to conduct or discontinue an inquiry:

- a. whether the allegation is vexatious, frivolous, misconceived or lacking in substance;
- b. whether sufficient detail about the allegation has been provided;
- c. whether the allegation refers to specific decisions or actions by the Merit Protection Commissioner;
- d. whether the allegation identifies conduct which, if proven, would constitute a breach of the Code of Conduct;
- e. whether the allegation relates to a decision properly taken, or to policy properly adopted, by the Merit Protection Commissioner, with which the person making the allegation disagrees; and
- f. whether the cost of conducting an inquiry is justified in the circumstances.

Section 99 - Inquiries into alleged breaches of Code of Conduct by statutory office holders

Subsection 99(1) provides that for the purposes of paragraph 40(1)(d) of the Act, a function of the Parliamentary Service Commissioner is to inquire into alleged breaches of the Code of Conduct by a statutory office holder. Subsection 40(1) of the Act specifies certain functions of the Parliamentary Service Commissioner. In addition to those specified functions, paragraph 40(1)(d) of the Act provides that the Parliamentary Service Commissioner's functions include such other functions as are conferred on the Commissioner by the Act, the determinations or any other law.

Subsection 99(2), under the heading 'Parliamentary Service Commissioner may decline to conduct, or discontinue, inquiry' provides that the Parliamentary Service Commissioner may decline to conduct or discontinue an inquiry under subsection 99(1).

Subsection 99(3) provides that in deciding whether to decline to conduct or discontinue an inquiry, the Parliamentary Service Commissioner must have regard to the following:

- a. whether the subject matter of the inquiry is addressed in another law relating to the statutory office holder;
- b. whether the statutory office holder is bound by rules that require behavioural standards similar to those required by the Code of Conduct;
- c. any existing reporting and inquiry mechanisms that apply to the statutory office holder;
- d. whether sufficient detail about the allegation has been provided;
- e. whether the allegation refers to specific decisions or actions by the statutory office holder; and
- f. whether the allegation is vexatious, frivolous, misconceived, or lacking in substance.

The example below paragraph 99(3)(b) notes that an Act may include provisions for dealing with a conflict of interest relating to a statutory office holder.

Subsection 99(4), under the heading 'Process of inquiry' provides that if the Parliamentary Service Commissioner inquires into an alleged breach of the Code of Conduct, the

Parliamentary Service Commissioner may determine whether a breach of the Code of Conduct has occurred and make recommendations.

Subsection 99(5) provides that a determination or recommendation mentioned in subsection 99(4) forms part of the results of the inquiry.

Subsection 99(6), under the heading 'Results of the inquiry' provides that the Parliamentary Service Commissioner must tell the statutory office holder the results of an inquiry.

Subsection 99(7) provides that the Parliamentary Service Commissioner must inform the relevant Secretary of the results of an inquiry unless the Parliamentary Service Commissioner is satisfied that it would be inappropriate to do so.

The example below subsection 99(7) of where it would be inappropriate to do so, is where the Secretary is personally involved in the matter.

Subsection 99(8) provides that if the Parliamentary Service Commissioner is satisfied that the results of the inquiry are sufficiently serious, the Parliamentary Service Commissioner must tell the Presiding Officers the results of the inquiry.

Subsection 99(9) provides that if the Parliamentary Service Commissioner has not told the Presiding Officers the results of the inquiry as provided for in subsection 99(8) and the Parliamentary Service Commissioner is not satisfied with the statutory office holder's response to the Parliamentary Service Commissioner, the Parliamentary Service Commissioner may tell the Presiding Officers the results of the inquiry and give an explanation of why the Parliamentary Service Commissioner is not satisfied with the statutory office holder's response the Parliamentary Service Commissioner.

Part 10—The Merit Protection Commissioner—functions

Section 100 - Inquiries into public interest disclosures that relate to alleged breaches of the Code of Conduct

Subsection 100(1) provides that for the purposes of paragraph 48(1)(a) of the Act (which specifies the functions of the Merit Protection Commissioner, including a function of inquiring into public interest disclosures to the extent that they relate to alleged breaches of the Code of Conduct), the function of the Merit Protection Commissioner to inquire into public interest disclosures is subject to this section.

Subsection 100(2), under the heading 'Inquiry into disclosure', provides that the Merit Protection Commissioner may inquire into the public interest disclosure if the Merit Protection Commissioner is satisfied that it would be inappropriate for the disclosure to be disclosed to a Secretary.

Subsection 100(3) provides that the Merit Protection Commissioner may inquire into the disclosure if the disclosure was made to a Secretary and the Merit Protection Commissioner reasonably believes that the disclosure was not satisfactorily handled by the Secretary.

Subsection 100(4), under the heading 'Merit Protection Commissioner may decline to conduct, or discontinue, inquiry' provides that the Merit Protection Commissioner may decide to decline to inquire into the disclosure, or to decline to inquire further, if in all the circumstances, conducting or continuing the inquiry would not be justified.

Subsection 100(5), provides that when deciding whether to decline to conduct, or to discontinue, an inquiry into the disclosure, the Merit Protection Commissioner may have regard to the following:

- a. whether the disclosure would be more appropriately dealt with by other means;
- b. whether the disclosure is vexatious, frivolous, misconceived or lacking in substance;
- c. whether sufficient detail about the alleged breaches to which the disclosure relates has been provided;
- d. whether the disclosure refers to specific decisions or actions by a Parliamentary Service employee;
- e. whether the disclosure identifies conduct which, if proven, would constitute a breach of the Code of Conduct;
- f. whether the disclosure relates to a decision properly taken, or to policy properly followed, by a Parliamentary Service employee, with which the discloser disagrees; and
- g. whether the cost of conducting an inquiry is justified in the circumstances.

Subsection 100(6), under the heading 'Process of inquiry' provides that if the Merit Protection Commissioner inquires into a disclosure, the Merit Protection Commissioner must consider, having regard to all the circumstances, whether to give a person about whom the disclosure was made an opportunity to be heard in relation to the disclosure and take reasonable steps to report the outcome of the inquiry to the discloser and the relevant Secretary.

The note below this subsection highlights section 65AB of the Act, which deals with circumstances in which the Merit Protection Commissioner may make a record of, disclose or otherwise use certain information for the purposes of, or in connection with, the performance of the Merit Protection Commissioner's functions. The note also provides that if the Merit Protection Commissioner gives a person about whom a disclosure has been made an opportunity to be heard in relation to the disclosure, the Merit Protection Commissioner may give the person information identifying the discloser to the extent the Merit Protection Commissioner considers appropriate in the circumstances.

Division 2 - Other Functions

Division 2 is also supported by section 71(1)(b) of the Act, which provides for the making of determinations addressing matters 'necessary or convenient ... for carrying out or giving effect to' the Act.

The necessary and convenient power in section 71(1)(b) of the Act allows for the making of subordinate legislation with respect to matters that are incidental or ancillary to the Act. To this end the Determination uses this power to fill out the framework established by the Act and to support its effective operation. The Determination, however, does not widen the operation of the Act, does not add new or different means of carrying out the Act and does not depart from or vary the Act or its purposes.

The subject matter dealt with in Division 2 of Part 10 is incidental or ancillary to section 48 of the Act which deals with the Merit Protection Commissioner's functions. For example, section 102 allows for the establishment of the Independent Selection Advisory Committee which performs some of the Merit Protection Commissioner's functions. Therefore, the

establishment of the Independent Selection Advisory Committee is incidental or ancillary to section 48 of the Act.

Subdivision A - Purpose of this Division

Section 101- Purpose of this Division

Section 101 provides that Division 2 of Part 10 prescribes for the purposes of paragraph 48(1)(e) of the Act, other functions of the Merit Protection Commissioner and makes other provision in relation to those functions. Paragraph 48(1)(e) of the Act provides that the Merit Protection Commissioner's functions include functions prescribed by the determinations.

A note below this section outlines that the Merit Protection Commissioner also has the functions prescribed by determinations made for the purposes of section 33 of the Act (see paragraph 48(1)(d) of the Act and Part 7 of this instrument).

Subdivision B—Independent Selection Advisory Committees

Section 102 - Establishment of ISAC

Section 102 provides that the Merit Protection Commissioner may establish an ISAC at the request of a Secretary.

Section 103 - Function of ISAC

Subsection 103(1) sets out that the function of an ISAC is to make recommendations to a Secretary about the suitability of candidates for:

- a. engagement connected with employment in the Department; or
- b. promotion to employment in the Department; or
- c. assignment to duties in connection with employment in the Department.

Subsection 103(2) provides that the employment must be at a classification mentioned in any of Groups 1 to 6 set out in Schedule 1 to the Parliamentary Service Classification Rules, as in force at the commencement of this Determination.

Section 104 - Constitution of ISAC

Subsection 104(1) provides that an ISAC must consist of the following members:

- a. a Convenor nominated by the Merit Protection Commissioner; and
- b. a Parliamentary Service employee nominated by the Merit Protection Commissioner; and
- c. a person nominated by the relevant Secretary.

Subsection 104(2) provides that the Merit Protection Commissioner must be satisfied that the Parliamentary Service employee nominated under paragraph 104(1)(b) will undertake the role independently and impartially.

Subsection 104(3) requires the Parliamentary Service employee nominated under paragraph 104(1)(b) must be made available for the purposes of the ISAC, subject to the operational efficiency of the Department in which they are employed.

Subsection 104(4) provides that the Merit Protection Commissioner may, in writing, reject a Secretary's nomination under paragraph 104(1)(c) if the Merit Protection Commissioner is not satisfied that the person nominated will undertake the role independently and impartially

Subsection 104(5) provides that, if a member of an ISAC ceases to act as a member before the ISAC has made its recommendation to the relevant Secretary, the ISAC is to be reconstituted by the remaining members and another member nominated in accordance with subsection 104(1).

Subsection 104(6) requires the reconstituted ISAC to have regard to matters put before, or decided by, the ISAC as previously constituted.

Subsection 104(7) provides that a person is not subject to direction in carrying out their duties as a member of an ISAC, except by a court or by instructions issued under section 106.

Section 105 - ISAC procedures—minimum requirements

Section 105 prescribes minimum requirements for an ISAC in carrying out its functions.

Subsection 105(1) provides that the procedures used by an ISAC in performing its functions under Subdivision B must meet the following minimum requirements:

- a. the procedures must have due regard to procedural fairness;
- b. the functions must be carried out in private;
- c. the functions of the ISAC must be finished as quickly, and with as little formality, as a proper consideration of the matter allows.

Subsection 105(2) requires that a person appearing before an ISAC must do so without representation unless the Merit Protection Commissioner decides that, in all the circumstances, it would be reasonable to allow the person to be represented.

Section 106 - ISAC procedures—Merit Protection Commissioner's instructions

Section 106 sets out requirements in relation to instructions to be issued by the Merit Protection Commissioner.

Subsection 106(1) requires the Merit Protection Commissioner to issue, as soon as practicable after the commencement of this Determination, instructions about the procedures to be followed by an ISAC in performing its functions under this Subdivision.

Subsection 106(2) enables the Merit Protection Commissioner to issue instructions, in writing, about the procedures to be followed by a Secretary who is appointed, under subsection 108(3), to act on behalf of an ISAC in performing the functions of the ISAC under this Subdivision.

Subsection 106(3) provides that the instructions must not be inconsistent with the Act or this determination.

Subsection 106(4) provides that an ISAC, or a Secretary appointed under subsection 108(3) to act on behalf of an ISAC, must comply with the instructions.

Section 107 - Assistance to ISAC

Section 107 provides that the Merit Protection Commissioner must take all reasonable steps to ensure that staff and other resources are available to assist an ISAC to carry out its functions efficiently and effectively.

Section 108 - Assessment and recommendation by ISAC

Subsection 108(1) provides that, if an ISAC is established in respect of a vacancy, the ISAC must:

- a. assess the relative merits of the candidates for the relevant employment on the basis of the relative suitability of the candidates for the duties; the relationship between the candidates' work-related qualities and the work-related qualities genuinely required for the duties; and the relative capacity of the candidates to achieve outcomes related to the duties; and
- b. report on the assessment to the relevant Secretary; and
- c. make a recommendation to the Secretary, primarily on the basis of the assessment, as to which candidate it considers to be the most suitable for the relevant employment.

Subsection 108(2) enables an ISAC, in conducting an assessment under subsection (1), to seek and accept expert opinion about the work-related qualities and capabilities of candidates.

Subsection 108(3) provides that the ISAC may appoint the relevant Secretary to act on behalf of the ISAC in conducting some or all of an assessment under subsection 108(1).

Subsection 108(4) requires the Secretary who is appointed to act on behalf of the ISAC under subsection 108(3) to act in accordance with instructions given to the Secretary by the ISAC and to act in accordance with instructions from the Merit Protection Commissioner only to the extent that the Secretary is appointed to act on behalf of the ISAC under subsection 108(3).

Subsection 108(5) provides that, if the ISAC considers that none of the candidates is suitable for the relevant employment, the ISAC must make a recommendation to the Secretary to that effect.

Section 109 - Non agreement on recommendation by ISAC

Subsection 109(1) provides that this section applies if all members of an ISAC do not agree on a recommendation.

Subsection 109(2) provides that, if two members agree on a recommendation, that recommendation is taken to be the recommendation of the ISAC.

Subsection 109(3) provides that, if there is no agreement between any of the members, the Convenor's recommendation is taken to be the recommendation of the ISAC.

Section 110 - ISAC recommendation not binding

Section 110 provides that the recommendation of an ISAC is not binding on a Secretary.

Section 111 - Effect of acting on ISAC recommendation

Subsection 111(1) provides that an engagement, promotion or assignment of duties made in accordance with an ISAC recommendation is not subject to review under Part 7.

Subsection 111(2) provides that the engagement, promotion or assignment of duties must be notified in the *Public Service Gazette* as having been made in accordance with an ISAC recommendation.

The note under subsection 111(2) advises that the subsection also applies to later promotion or engagement made by a Secretary in accordance with an ISAC recommendation.

Subsection 111(3) provides that the engagement, promotion or assignment of duties is not affected by a defect in the nomination of a member of the ISAC or a failure to comply with the instructions issued under section 106.

Section 112 - Effect of not acting in accordance with ISAC recommendation

Subsection 112(1) provides that, if, instead of acting in accordance with an ISAC recommendation of a candidate in respect of a vacancy, a Secretary promotes another ongoing Parliamentary Service employee, or engages an APS employee, the relevant promotion decision or engagement decision is subject to review under Division 2 of Part 7.

Subsection 112(2) provides that the notice of the promotion or engagement published in the Public Service *Gazette* must state that the promotion decision or engagement decision is subject to review under Division 2 of Part 7.

Subsection 112(3) however, provides that subsections 112(1) and 112(2) do not apply if:

- a. after the ISAC has made its recommendation, the candidate is found to have breached the Code of Conduct (and the Secretary believes that the candidate is no longer suitable for the vacancy), or the candidate has lost a qualification which is essential for the candidate's suitability for the vacancy;
- b. the Secretary has consulted with the Merit Protection Commissioner about the candidate; and
- c. the Secretary acts in accordance with the recommendation of the ISAC in relation to the next suitable candidate.

The note below highlights that an example for the purposes of subparagraph 112(3)(a)(ii) is the loss of a security clearance.

Section 113 - Merit Protection Commissioner authorised to charge fees

Section 113 provides that for the purposes of subsection 48(3) of the Act (which provides for the Merit Protection Commissioner's functions), the Merit Protection Commissioner is authorised to charge a Secretary a fee (on behalf of the Commonwealth) for performing functions for the Secretary under this Subdivision.

Subdivision C—Investigation of complaints by former employees

Section 114 - Investigation of complaints by former employees

Subsection 114(1) provides that the Merit Protection Commissioner may investigate a complaint by a former Parliamentary Service employee that relates to the employee's entitlements on separation from the Parliamentary Service and may make recommendations to the employee's former Secretary in relation to the complaint.

Subsection 114(2) provides that if a Secretary receives a recommendation under subsection (1), the Secretary must, as soon as reasonably practicable after receiving the recommendation consider the recommendation and make a decision about the recommendation.

Subsection 114(2) confers a discretionary power on the Secretary, which is necessary to enable the Secretary to make decisions in relation to complaints made by former Parliamentary Service employees in relation to entitlements on separation from the Parliamentary Service. The power is to be exercised by the Secretary or the Secretary's

delegate, who would possess the appropriate qualifications and necessary skills for exercising the discretion. Appropriate safeguards are provided for in subsection 114(1), as the Secretary's discretion can only be exercised on recommendation from the Merit Protection Commissioner.

Subdivision D—Review of determination of breach of Code of Conduct by former Parliamentary Service employee

Section 115 - Review by Merit Protection Commissioner if former Parliamentary Service employee is entitled to review

Subsection 115(1) provides that section 115 applies in relation to a person if the person is a former Parliamentary Service employee and at the time the person's Parliamentary Service employment ceased, the person was not an SES employee and after the person's Parliamentary Service employment ceased, a Secretary determined that the person breached the Code of Conduct.

Subsection 115(2) provides that the Merit Protection Commissioner may conduct a de novo review of the Secretary's determination if the affected former employee is entitled to a review of the determination under this section.

Subsection 115(3) provides that the affected former employee is not, or ceases to be, entitled to review of the determination mentioned in subsection 115(1) if:

- a. the affected former employee has applied to have the determination reviewed by a Court or a Tribunal and the determination may be reviewed by that Court or Tribunal; or
- b. the Merit Protection Commissioner considers that the determination should not be reviewable for any of the following reasons:
 - i. the affected former employee has previously applied for review of the determination under this Division;
 - ii. the affected former employee has applied, or could apply, to have the determination reviewed by an external review body and review by the review body would be more appropriate than review under this Subdivision;
 - iii. review, or further review, of the determination is not otherwise justified in all the circumstances.

The note below subsection 115(3) provides examples of external review bodies, which include the Commonwealth Ombudsman, the Australian Information Commissioner and the Australian Human Rights Commission

Subsection 115(4) provides that the affected former employee is not, or ceases to be, entitled to review of the determination if an application for review of the determination is not made under 116 within 60 days after the determination is made.

Subsection 115(5) provides, however, that an affected former employee is entitled to review of the determination if the Merit Protection Commissioner considers that there are exceptional circumstances explaining the failure to make an application within the period mentioned in subsection 115(4).

Section 116 - Application for review

Subsection 116(1) provides that an affected former employee mentioned in paragraph 115(1)(c) may apply, in writing, to the Merit Protection Commissioner for review of a determination that the person breached the Code of Conduct.

Subsection 116(2) provides that the application must state briefly why the review is sought and, if a particular outcome is sought, the outcome that is sought.

Section 117 - Notice that action not reviewable

Section 117 provides that, if an application for review of a determination is made and the determination is not reviewable because of paragraph 115(3)(b) or subsection 115(4), the Merit Protection Commissioner must tell the affected former employee in writing that the affected former employee is not entitled to review of the determination and the reasons why the affected employee is not so entitled.

Section 118 - Conduct of review

Section 118 sets out what the Merit Protection Commissioner must or may do if they consider that the affected former employee is entitled to review under this Subdivision. Those actions are that the Merit Protection Commissioner:

- a. must conduct a de novo review of the determination; and
- b. may, subject to the minimum requirements mentioned in section 120, conduct the review in any manner the Merit Protection Commissioner thinks fit; and
- c. must make a recommendation to the Secretary, in writing, about the determination; and
- d. must tell the Secretary, in writing, the reasons for the recommendation; and
- e. must tell the affected former employee in writing of the recommendation and reasons given to the Secretary.

Section 119 - Action by Secretary

Subsection 119(1) provides that if a Secretary receives a recommendation in relation to a determination under section 118, the Secretary must, as soon as reasonably practicable after receiving the recommendation consider it and make a decision about it.

Subsection 119(2) provides that for the purposes of paragraph 119(1)(b), the Secretary may confirm, vary or set aside and substitute a new determination.

Subsection 119(3) provides that if the Secretary acts in accordance with the recommendation, the Secretary is not required to seek the view of the affected former employee before acting on the recommendation.

The note below this subsection states that the views of the affected former employee should have been sought by the Merit Protection Commissioner during the review in accordance with the principles of procedural fairness

Subsection 119(4) provides that subsection 119(2) does not limit the employer powers of the Secretary in relation to the determination or the affected former employee.

The note below this subsection states that the Secretary may take other appropriate action to rectify effects of the determination or restore the affected former employee to the position in which the affected former employee would have been if the determination had not been made.

Subsection 119(5) provides that if after considering a recommendation, the Secretary considers making a finding of a breach of the Code of Conduct and the Secretary had not made the finding before the recommendation was made and the finding was not mentioned in the recommendation, the Secretary must comply with the procedures established under subsection 15(3) of the Act before deciding whether to make the finding. Subsection 15(3) of the Act provides that a Secretary must establish written procedures for determining whether a Parliamentary Service employee, or former Parliamentary Service employee, has breached the Code of Conduct. As per subsection 15(7) of the Act, a Secretary must ensure that the written procedures established under subsection 15(3) are made publicly available. These written procedures are publicly available through the Australian Parliament House website: Other Employment Practices – Parliament of Australia (aph.gov.au).

Subsection 119(6) provides that the Secretary must tell the affected former employee and the Merit Protection Commissioner in writing of the decision mentioned in paragraph 119(1)(b) and the reasons for the decision.

Section 120 - Review procedures—minimum requirements

Subsection 120(1) sets out minimum requirements for a review conducted under this Subdivision. These are that:

- a. the procedures must have due regard to procedural fairness;
- b. the review must be conducted in private;
- c. the review must be finished as quickly, and with as little formality, as a proper consideration of the matter allows.

Subsection 120(2) requires that a person appearing before the Merit Protection Commissioner must do so without representation unless the Merit Protection Commissioner decides that, in all the circumstances, it would be reasonable to allow the person to be represented.

Section 121 - Requirement to provide information or documents

Subsection 121(1) enables the Merit Protection Commissioner to, by written notice given to a Secretary or Parliamentary Service employee, require the Secretary or Parliamentary Service employee to give the Merit Protection Commissioner stated information or documents relevant to the review.

Subsection 121(2) requires the Secretary or employee to provide the information or documents and to do so in the way, and at or within the time, stated in the notice.

Section 122 - Making of an application does not operate as stay

Section 122 provides that the making of an application for review of a determination under this Subdivision does not operate to stay the determination.

Subdivision E—Review of actions of statutory office holders

Section 123 - Review of actions of statutory office holders other than Secretaries

Section 123 makes provisions about the review of actions of statutory office holders who are not Secretaries.

Subsection 123(1) provides that a non-SES employee may apply to the Merit Protection Commissioner for review of an action of a statutory office holder that:

- a. relates to the employee’s Parliamentary Service employment; and
- b. is not a termination of the employee’s employment; and
- c. if the statutory office holder were a Secretary, would be reviewable action.

Subsection 123(2) enables the Merit Protection Commissioner to, by written notice given to the statutory office holder, require the statutory office holder to give the Merit Protection Commissioner a report about the action and other stated information or documents relevant to the review.

Subsection 123(3) requires the statutory office holder to provide the report about and other stated information or documents in the way, and at or within the time, stated in the notice.

Subsection 123(4) provides that the Merit Protection Commissioner must:

- a. conduct a de novo review of the action; and
- b. make a recommendation to the statutory office holder in writing about the action; and
- c. tell the statutory office holder in writing of the reasons for the recommendation; and
- d. tell the employee in writing of the recommendation and reasons given to the statutory office holder.

Subsection 123(5) provides that, if the Merit Protection Commissioner is not satisfied with the statutory office holder’s response to the Merit Protection Commissioner’s recommendation, the Merit Protection Commissioner may give a report on the matter to the Presiding Officers.

Division 3—Basic requirements for procedures for determining alleged breach of Code of Conduct by Parliamentary Service employee or former Parliamentary Service employee

Section 124 - Basic requirements for procedures for determining breach of Code of Conduct by Parliamentary Service employee or former Parliamentary Service employee

Subsection 124(1) provides that, for paragraph 48A(2)(a) of the Act (which is concerned with compliance with basic procedural requirements prescribed by determinations), section 124 prescribes basic requirements that the Merit Protection Commissioner’s written procedures must comply with when inquiring into and determining whether a Parliamentary Service employee, or a former Parliamentary Service employee, has breached the Code of Conduct.

Subsection 124(2) provides that the procedures must require that the Merit Protection Commissioner not make a determination in relation to an alleged breach of the Code of Conduct by a Parliamentary Service employee or a former Parliamentary Service employee unless:

- a. the Merit Protection Commissioner has taken reasonable steps to tell the employee or former employee the details of the suspected breach (including any variation of those details); and
- b. the employee or former employee has been given a reasonable opportunity to make a statement in relation to the alleged breach; and
- c. if the alleged breach is by a Parliamentary Service employee—the Merit Protection Commissioner has taken reasonable steps to inform the employee of the sanctions that may be imposed on the employee under subsection 15(1) of the Act which provides

for the sanctions that may be imposed on a Parliamentary Service employee who is found to have breached the Code of Conduct.

Subsection 124(3) provides that the procedures must require that the process for determining whether a Parliamentary Service employee or a former Parliamentary Service employee has breached the Code of Conduct be carried out as quickly and with as little formality as a proper consideration of the matter allows.

Subsection 124(4) provides that the procedures must require that reasonable steps be taken to ensure that any person authorised under the Merit Protection Commissioner's written procedures to determine whether a Parliamentary Service employee or a former Parliamentary Service employee has breached the Code of Conduct is, and appears to be, independent and unbiased.

Subsection 124(5) provides that the procedures must require that a written record be prepared stating whether it has been determined that the Parliamentary Service employee or a former Parliamentary Service employee has breached the Code of Conduct.

Division 4—Other provisions

125 - Independence of Merit Protection Commissioner

Section 125 provides that the Merit Protection Commissioner is not subject to direction in carrying out their duties under Part 7 or Subdivision B of Division 2 of this Part, except by a Court.

Part 11—Attachment of salaries to satisfy judgment debts

Section 126 - Application of this Part

Subsection 126(1) sets out that this Part is made the purposes of section 67 of the Act which provides for the making of determinations to provide for the deductions to be made from the salary of relevant persons to satisfy a judgment debt.

Subsection 126(2) provides that the Part does not apply to a debtor whose estate has been sequestrated, either voluntarily or compulsorily, for the benefit of creditors and who has not yet obtained a certificate of discharge.

The note below this subsection states that the definition of debtor can be found in section 5.

Section 127 - Application of State and Territory law

Section 127 sets out that a law of a State or Territory that deals with satisfying a judgment debt:

- a. applies to a debtor's judgment debt to the extent that the law deals with the calculation of interest on the debt; and
- b. does not apply to the judgment debt for any other purpose.

Section 128 - Paying officer

Section 128 provides for the appointment of one or more persons as paying officers.

Subsection 128(1) sets out that if a Secretary believes that the making of deductions from a debtor's salary is required, they must appoint one or more persons as paying officers for the purpose of making those deductions.

Subsection 128(2) provides that, if the debtor is the Secretary:

- a. the Secretary must not appoint a paying officer under subsection 128(1);
- b. the Secretary must act under this subsection without considering whether the making of deductions from the Secretary's salary is required;
- c. the Secretary must delegate in writing, their power under subsection 128(1) to appoint a paying officer to an SES employee in the Department;
- d. the SES employee must decide whether the making of deductions from the Secretary's salary is required and, if the SES employee decides that the making of deductions is required—appoint a person as a paying officer for the purpose of making those deductions; and
- e. the Secretary must not take any action, or make any arrangement, in relation to the administration under this Part of the Secretary's debt, other than making the delegation mentioned above and, if a paying officer is appointed, assisting the paying officer in the repayment of the debt.

Subsection 128(3) sets out that if a person is appointed as a paying officer:

- a. the appointment authorises the person to act as a paying officer only in relation to the debtor to whom the appointment relates; and
- b. the person is responsible for making deductions from the debtor's salary to satisfy the judgment debt against the debtor.

Subsection 128(4) provides that a debtor is not authorised to be the debtor's paying officer.

Section 129 - Authority to make deductions

Section 129 sets out the circumstances in which deductions from a debtor's salary in order to satisfy a judgment debt may be started.

Subsection 129(1) lists these circumstances as:

- a. the paying officer has received a statutory declaration, made by the judgment creditor, that the judgment debt exists and has not been discharged;
- b. the paying officer has received a copy of the judgment to which the judgment debt relates, certified by the Registrar or other appropriate officer of the relevant court;
- c. the paying officer has received the fee (if any) required under section 130;
- d. the paying officer has given the debtor a notice in accordance with subsection 129(2); and
- e. the debtor does not, within the time specified in the notice given under subsection 129(2), satisfy the paying officer that the judgment debt has been satisfied.

The note below this subsection refers the reader to section 131 which deals with cases where there are two or more judgments debts against a debtor.

Subsection 129(2) requires the paying officer to notify the debtor, as soon as practicable after receiving the document mentioned in paragraphs 129(1)(a) and 129(1)(b) and the fee (if any) referred to in paragraph 129(1)(c), that it is proposed to make the deductions to satisfy a judgment debt and require that the debtor to state, in writing, by a time specified in the notice, whether the judgment debt has been satisfied. Additionally, where the judgment debt has been satisfied, evidence in support of that fact is to be provided in writing and where the judgment debt has not been satisfied, the debtor must state the amount due under the judgment at the time the statement is made.

Subsection 129(3) provides that, if the debtor does not give the paying officer evidence that the judgment debt has been satisfied by the time specified in the notice under subsection 129(2), the paying officer must deduct from the debtor's salary on each pay day for the debtor, an amount equal to:

- a. the deduction required under section 133, or
- b. a lesser amount that, in the paying officer's opinion, is needed to satisfy the balance of the judgment debt.

Subsection 129(4) provides that, after making the first deduction, the paying officer is authorised to continue to make deductions only if the paying officer has no reason to believe that the judgment debt has been discharged.

Subsection 129(5) requires the paying officer to ensure that the amount of each deduction is paid to the judgment creditor.

Section 130 - Administration fee

Subsection 130(1) provides that a judgment creditor (other than the Commonwealth) who requests the payment of a judgment debt must pay a fee of \$38 for the making of deductions.

Subsection 130(2) provides that the fee is the price of the supply of a service for the purposes of the *A New Tax System (Goods and Services Tax) Act 1999*.

Subsection 130(3) provides that, if a judgment creditor (other than the Commonwealth) requests the payment of a judgment debt but does not pay the fee when making the request, the paying officer must notify the judgment creditor that the fee is payable for making the deductions and that no deductions will be made unless the fee is paid.

Section 131 - More than one judgment debt

Section 131 deals with the order in which judgment debts are to be dealt with where more than one judgment debt exists against a debtor.

Subsection 131(1) provides that, if more than one judgment debt exists against a debtor, the paying officer must deal with the judgment debts in the order in which requests were received and must not make a deduction for the purposes of a particular judgment debt until all judgment debts for which earlier requests were made have been satisfied.

Subsection 131(2) requires that, if the paying officer receives two or more requests at the same time for the payment of judgment debts against a debtor, the paying officer must deal with them in the order of the dates and times at which judgment was given for each debt, starting with the earliest judgment.

Section 132 - Effect of deductions

Section 132 provides that, if an amount is paid to a judgment creditor after a deduction is made from the debtor's salary on a pay day for the debtor:

- a. an amount equal to that amount is taken to have been paid by the Commonwealth to the debtor on account of salary payable to the debtor on that pay day; and
- b. an amount equal to that amount is taken to have been paid by the debtor to the judgment creditor for the purposes of the judgment debt.

Section 133 - Rate of deductions

Section 133 sets out how the rate of deductions from a debtor's salary is to be determined.

Subsection 133(1) provides that for paragraph 129(3)(a), the rate at which a deduction is to be made from the debtor's net salary on a pay day for the debtor is 20% unless subsection 133(2), (3) or (4) applies.

Subsection 133(2) provides that, if the paying officer is satisfied that the debtor is suffering serious financial hardship or would suffer serious financial hardship if the rate of deduction is not reduced, the paying officer may reduce the rate at which deductions are to be made.

Subsection 133(3) provides that, if the debtor asks the paying officer, in writing, to make deductions at a rate greater than 20% of the debtor's net salary, the paying officer must comply with the request as soon as practicable.

Subsection 133(4) provides that, if deductions are being made at a rate greater than 20% of the debtor's net salary and the debtor asks a paying officer, in writing, to reduce the rate of the deductions, the paying officer must reduce the rate as soon as practicable but is not required to reduce the rate to less than 20%.

Section 134 - Move to another Department

Section 134 sets out the arrangements to apply if a debtor moves between departments.

Subsection 134(1) provides that, if a debtor moves from a Department (*Department 1*) to another Department (*Department 2*), the debtor's paying officer in Department 1 must notify the Secretary of Department 2 of:

- a. the existence of each judgment debt against the debtor;
- b. the arrangements in Department 1 for making deductions from the debtor's salary; and
- c. any deductions already made for the purposes of each of those judgment debts.

Subsection 134(2) provides that, if more than one judgement debt exists against the debtor:

- a. the debtor's paying officer in Department 1 must advise the Secretary of the order in which the judgment debts were to have been dealt with in accordance with section 131; and
- b. the paying officer who is appointed in Department 2 in relation to the debtor must deal with the judgment debts in that order.

Subsection 134(3) provides that the debtor's paying officer in Department 1 must transfer the following to the paying officer in Department 2:

- a. the statutory declaration mentioned in paragraph 129(1)(a);
- b. a copy of the judgment mentioned in paragraph 129(1)(b); and
- c. each notice in respect of the debtor that was given to the debtor's paying officer in Department 1 by a paying officer in another Department.

Subsection 134(4) provides that the paying officer in Department 2 is taken:

- a. to have received the fee (if any) required under section 130; and
- b. to have given to the debtor any notice that was given, in respect of the debtor, by a paying officer in another Department.

Subsection 134(5) provides that the paying officer in Department 2 must notify the judgment creditor of the move, and the deductions that the paying officer will make.

Subsection 134(6) provides that the judgment creditor is not required to pay another fee for the making of deductions.

Section 135 - Administration of deductions

Subsection 135(1) provides that a paying officer in relation to a debtor may require the judgment creditor to confirm that the judgment debt has not been discharged and suspend the making of deductions until the paying officer receives the confirmation.

Subsection 135(2) provides that, if a debtor's employment ceases, or is terminated, for any reason (including the debtor's death) the paying officer must notify the judgment creditor of the cessation or termination as soon as practicable.

Section 136 - Recovery of overpayment

Section 136 provides that, if a payment made to a judgment creditor for the purposes of a judgment debt exceeds the amount due under the judgment, the excess is repayable by the judgment creditor to the debtor.

Part 12—Protection of information

Section 137 - Parliamentary Service Commissioner's functions

Section 137 provides that section 98 (inquiries into Merit Protection Commissioner's behaviour) and section 99 (inquiries into alleged breaches of Code of Conduct by statutory office holders) are provisions of this instrument which are prescribed for the purposes of paragraph (c) of the definition of *protected information* in subsection 65AA(1) of the Act. Paragraph (c) of the definition of *protected information* provides that it means information that was obtained by an entrusted person in connection with performance of functions or duties, or the exercise of powers under any other provision of the Act or the determinations prescribed by the determinations for the purposes of the paragraph.

Section 138 - Merit Protection Commissioner's functions

Subsection 138(1) provides, under the heading 'Prescribed entrusted person' that an entrusted person who is a member of a committee established or appointed by the Merit Protection Commissioner under this instrument is prescribed for the purposes of subsection 65AB(1) of the Act. The definition of *prescribed entrusted person* at subsection 65AB(1) of the Act provides that it means an entrusted person of a kind prescribed by determinations for the purposes of the definition.

Subsection 138(2) provides, under the heading 'Protected information' that section 123 of this instrument (review of actions of statutory office holders other than Secretaries) is prescribed for the purpose of paragraph (c) of the definition of *protected information* in subsection 65AB(1) of the Act. Paragraph (c) of the definition of *protected information* provides that it means information that was obtained by an entrusted person in connection with performance of functions or duties, or the exercise of powers under any other provision of the Act or the determinations prescribed by the determinations for the purposes of the paragraph.

Subsection 138(3) provides, under the heading 'Compellability of entrusted persons to give evidence' that section 123 of the Determination (review of actions of statutory office holders other than Secretaries) is prescribed for the purposes of paragraph 65AB(7)(d) of the Act. Paragraph 65AB(7)(d) of the Act provides that a person who is, or was, an entrusted person (other than a prescribed entrusted person) is not compellable in any relevant proceeding to disclose protected information that was obtained in connection with the performance of functions or duties, or the exercise of powers under any other provision of the Act or the determinations prescribed by the determinations for the purposes of the paragraph.

Section 139 - Giving information or producing documents to Parliamentary Service Commissioner not admissible in evidence etc

Section 139 provides that section 98 (inquiries into Merit protection Commissioner's behaviour) and section 99 (inquiries into alleged breaches of Code of Conduct by statutory office holders) are prescribed for the purposes of paragraph 65AC(2)(c) of the Act. Paragraph 65AC(2)(c) of the Act provides that the provisions referred to in subparagraphs 65AC(1)(a)(i) and (ii) include any other provision of the Act or the determinations prescribed by the determinations for the purposes of the paragraph.

Section 140 - Giving information or producing documents to Merit Protection Commissioner not admissible in evidence etc

Section 140 provides that section 123 of this Determination (review of statutory office holders other than Secretaries) is prescribed for the purposes of paragraph 65AD(2)(b) of the Act. Paragraph 65AD(2)(b) of the Act provides that the provisions referred to in subparagraphs 65AD(1)(a)(i) and (ii) include any other provision of the Act or the determinations prescribed by the determinations for the purposes of the paragraph.

Section 141 - Use and disclosure of personal information

Section 141 authorises the use or disclosure of personal information by a Secretary, the Parliamentary Service Commissioner or the Merit Protection Commissioner in specific circumstances, for the purposes of paragraph 65AE(a) of the Act which authorises the use or disclosure, in specific circumstances, of personal information (within the meaning of the *Privacy Act 1988*).

A Secretary may disclose personal information that is in the possession, or under the control, of the Secretary in any of the following circumstances:

- a. disclosure or use is necessary for the exercise of the employer powers of the Secretary;
- b. disclosure is necessary for the performance of a function of the Parliamentary Service Commissioner or the Merit Protection Commissioner; or
- c. disclosure is necessary for the performance of a function of an Independent Selection Advisory Committee.

The Parliamentary Service Commissioner may disclose or use personal information that is in their possession, or under their control, if:

- a. if the information obtained was part of the Parliamentary Service Commissioner's review or inquiry functions; and
- b. for use – the use is necessary for, or relevant to, an inquiry relating to the Code of Conduct conducted by the Parliamentary Service Commissioner; or
- c. for disclosure – the disclosure is necessary, or relevant to, a Secretary's consideration of alleged misconduct by a Parliamentary Service employee.

The Merit Protection Commissioner may disclose information that is in their possession, or under their control, if the information was obtained by the Merit Protection Commissioner during a review of an action conducted by a PRC or the Merit Protection Commissioner, or in the performance of the Merit Protection Commissioner's inquiry functions. The disclosure must be necessary for, or relevant to, a Secretary's consideration of alleged misconduct.

Part 13—Miscellaneous

Section 142 - Delegation by Parliamentary Service Commissioner

Subsection 142(1) provides that the Parliamentary Service Commissioner may delegate any of the Parliamentary Service Commissioner's powers or functions under the Determination (other than under section 142 or section 97) to an SES employee. The measures that are in place to safeguard the proper exercise of this delegation are as follows:

- the delegated power can only be conferred on SES employees that have the appropriate work-related qualities to exercise the power or perform the function;
- the delegation must be made in writing; and
- the person who is delegated the power must comply with any directions of the Parliamentary Service Commissioner.

Subsection 142(2) provides that the Parliamentary Service Commissioner must not delegate a power or function to an SES employee unless the Parliamentary Service Commissioner is reasonably satisfied that the SES employee has the appropriate work-related qualities to exercise the power or perform the function.

Subsection 142(3) provides that a person exercising powers or functions under a delegation under this section must comply with any directions of the Parliamentary Service Commissioner.

Section 143 - Delegation by Merit Protection Commissioner

Subsection 143(1) provides that the Merit Protection Commissioner may delegate any of the Merit Protection Commissioner's powers or functions under this instrument (other than under section 143) to an APS employee made available to the Merit Protection Commissioner by an Agency Head or a Parliamentary Service employee made available to the Merit Protection Commissioner by the Secretary of the Department in which the employee is employed. The measures that are in place to safeguard the proper exercise of this delegation are as follows:

- the Merit Protection Commissioner must not delegate a power or function to an APS employee or a Parliamentary Service employee unless the Merit Protection Commissioner is reasonably satisfied that the employee has the appropriate work-related qualities to exercise the power or perform the function; and
- the person who is delegate the power must comply with any directions of the Merit Protection Commissioner.

Subsection 143(2) provides that the Merit Protection Commissioner must not delegate a power or function to an APS employee or a Parliamentary Service employee unless the Merit Protection Commissioner is reasonably satisfied that the employee has the appropriate work-related qualities to exercise the power or perform the function.

Subsection 143(3) provides that a person exercising powers or functions under a delegation under this section must comply with any directions of the Merit Protection Commissioner.

The delegation power provided in section 143 is not limited in scope to SES employees like the delegation power in section 142. The reason for this is that the Merit Protection

Commissioner is the person who is best placed to determine which person is most appropriate to exercise the delegated power or perform the delegated function. Additionally functions conferred on the Merit Protection Commissioner are also subject to limitations such as those expressed in section 70 of this Determination.

Section 144 - Delegation by Secretary

Subsection 144(1), under the heading 'Delegations by Secretary' provides that a Secretary may delegate to a Parliamentary Service employee any of the Secretary's powers or functions under this instrument (other than under section 144).

Subsection 144(2) provides that a Secretary may delegate to the Parliamentary Librarian any of the Secretary's powers or functions under this instrument (other than under section 144).

Subsection 144(3) provides that a Secretary may, with the prior written consent of the Parliamentary Service Commissioner, delegate to a person who is not a Parliamentary Service employee any of the Secretary's powers or functions under this instrument (other than under section 144). Subsection 144(3) contains an additional safeguarding measure, being the requirement to obtain the written consent of the Parliamentary Service Commissioner, where a Secretary is seeking to delegate a power or function to a non-Parliamentary Service employee.

Subsection 144(4), under the heading 'Subdelegations' provides that if a Parliamentary Service employee (the first delegate) to whom powers or functions are delegated under subsection 144(1) is an SES employee or acting SES employee, the first delegate may, in writing, delegate any of those powers or functions to another Parliamentary Service employee (the second delegate).

Subsection 144(5) however provides that if the first delegate is subject to directions in relation to the exercise of a power or function delegated under subsection 144(1), the first delegate must give corresponding directions to the second delegate. The effect of subsection 144(5) is that subdelegation by an SES employee to a second delegate must be accompanied by a direction to the second delegate where the first delegation (to the SES employee) was accompanied by such a direction.

Subsection 144(6) provides that if powers or functions have been delegated under subsection 144(2), the Parliamentary Librarian may, in writing, delegate any of those powers or functions to a Parliamentary Service employee.

Subsection 144(7) however provides that if the Parliamentary Librarian is subject to directions in relation to the exercise of a power or function delegated under subsection 144(2), the Parliamentary Librarian must give corresponding directions to the Parliamentary Service employee to whom a delegation is given under subsection 144(6). The effect of subsection 144(7) is that subdelegation by the Parliamentary Librarian to a second delegate must be accompanied by a direction to the second delegate where the first delegation (to the Parliamentary Librarian) was accompanied by such a direction.

Subsection 144(8) provides that a power or function that is exercised or performed by a person under a delegation under subsection 144(4) or 144(6) is taken, for the purposes of this instrument, to have been exercised or performed by the person who originally delegated the corresponding power or function under subsection 144(1) or 144(2).

Subsection 144(9) provides, under the heading 'Appropriate work-related qualities' that a delegator must not delegate under section 144 a power or function to another person unless the delegator is reasonably satisfied that the other person has the appropriate work-related qualities to exercise the power or perform the function. Subsection 144(9) provides a safeguarding measure that prohibits a Secretary or a first delegate from delegating a power or function to another person unless the delegator is reasonably satisfied that the person to whom the power or function is to be delegated has the appropriate work-related qualities to exercise the power or perform the function.

Subsection 144(10), under the heading 'Directions' provides that a person exercising powers or functions under a delegation under section 144 must comply with any directions of the person who delegated the power or function. Subsection 144(10) is an additional safeguarding measure in place for delegations under section 144.

Section 145 - Immunity from civil proceedings in relation to Parliamentary Service Commissioner's functions

Section 145 provides that for the purposes of paragraph 70A(1)(f) of the Act (which provides for the prescribing of provisions), section 98 (inquiries into Merit Protection Commissioner's behaviour) and section 99 (inquiries into alleged breaches of Code of Conduct by statutory office holders) are prescribed provisions.

Section 70A of the Act was inserted on 1 March 2013 by *Parliamentary Service Amendment Act 2013* (No. 4, 2013). Section 70A of the Act provides an immunity from civil proceedings in section 70A in respect of acts or omissions in relation to certain functions of the Commissioner and the Merit Protection Commissioner. Section 70A of the Act applies only in relation to a thing done, or omitted to be done, at or after the commencement time.

Section 145 'prescribes' section 98 of the Determination such that the Parliamentary Service Commissioner's function of inquiring into alleged breaches of the Code of Conduct by the Merit Protection Commissioner and reporting to the Presiding Officers on the results of such inquiries cannot be the subject of a civil suit because of the immunity provision in section 70A of the Act. This is necessary and appropriate to give the Parliamentary Service Commissioner the freedom to properly investigate alleged breaches of this kind. To leave open the possibility of civil suit for conduct engaged in throughout the course of such an inquiry would fetter the Parliamentary Service Commissioner's investigative powers and functions.

Section 145 also 'prescribes' section 99 of the Determination such that the Parliamentary Service Commissioner's function of inquiring into alleged breaches of the Code of Conduct cannot be the subject of a civil suit because of the immunity provision in section 70A of the Act. This is necessary and appropriate to give the Parliamentary Service Commissioner the

freedom to properly investigate alleged breaches of this kind. To leave open the possibility of civil suit for conduct engaged in throughout the course of such an inquiry would fetter the Parliamentary Service Commissioner's investigative powers and functions.

Part 14—Transitional arrangements

Division 1—Transitional arrangements in relation to the commencement of this instrument

Section 146 - Definitions

Section 146 provides that for the purposes of Division 1 of Part 14, the term 'old determination' means the Parliamentary Service Determination 2013 as in force immediately before 1 October 2024.

The note below section 146 provides that the Determination commenced, and the old determination was repealed on 1 October 2024.

Section 147 - Instruments made and other things done under the old determination

Subsection 147(1) provides that if an instrument (the subordinate instrument) was made for a particular purpose under a provision of the old determination and the subordinate instrument was in effect or in force immediately before 1 October 2024 and the subordinate instrument could be made for that purpose under a provision of the Determination, then the subordinate instrument continues to have effect, on and after 1 October 2024, as if it were made for that purpose under that provision of this Determination.

The example below subsection 147(1) provides that a delegation by a Secretary under clause 146 of the old determination that was in force immediately before the commencement of the Determination will continue in force after that commencement as if it were made under section 144 of the Determination.

Subsection 147(2) provides that if any other thing was done for a particular purpose under the old determination and the thing could be done for that purpose under the Determination the thing has effect for the purpose of the Determination as if it had been done for that purpose under the Determination.

Subsection 147(3) provides that a reference in subsection 147(2) to a thing being done includes a reference to a notice being given and an investigation being undertaken.

Section 148 - Conduct, event, circumstances occurring before commencement

Subsection 148(1) provides that a function or duty may be performed, or a power exercised, under the Determination in relation to conduct engaged in, an event that occurred, or a circumstance that arose, before 1 October 2024.

The example below subsection 148(1) provides that deductions may be made under Part 11 in relation to judgment debts arising before commencement.

Subsection 148(2) provides that subsection 148(1) does not limit anything in Division 1 of Part 14 or section 7 of the *Acts Interpretation Act 1901* (as that Act applies in relation to the Determination because of paragraph 13(1)(a) of the *Legislation Act 2003*).

An example of the conduct, event or circumstance to which section 148 applies is where a person is placed on a merit list for an APS agency before the commencement of the Determination. That conduct, event or circumstance will be covered by the Determination, notwithstanding that the merit listing occurred before 1 October 2024. As such, such a merit listed person will be available to the Parliamentary Departments to fill a similar vacancy to the position for which they were merit listed in accordance with the relevant provisions of the Determination.

Section 149 - Notification of employment decisions

Section 149 provides that Division 5 of Part 3 of the Determination applies in relation to an employment decision made on or after 1 October 2024 and an employment decision made, but not notified under Division 5 of Part 3 of the old determination, before 1 October 2024.

For example, an employment decision made under the 2013 Determination that is not notified under the 2013 Determination before 1 October 2024 will be considered an employment decision for the purposes of Division 5 of Part 3 of the Determination.

Section 150 - Review of promotion notified before commencement

Subsection 150(1) provides that subsection 150(2) applies to a promotion that was notified before 1 October 2024 in accordance with the old determination.

Subsection 150(2) provides that despite the repeal of the old determination, the old determination will continue to apply on or after 1 October 2024 in relation to the promotion and any entitlement to have access to a statement given as part of a review of the promotion.

Section 151 - Review of actions where application for review made before commencement day

Subsection 151(1) provides that section 151 applies if, before 1 October 2024, a Parliamentary Service employee applied under Division 3 of Part 9 and the review has not been completed in accordance with that Division before 1 October 2024.

The note below subsection 151(1) provides that the application for review may have been made to a Secretary or the Merit Protection Commissioner. The note below this subsection also includes applications for review that may have been referred to the Merit Protection Commissioner by the Secretary.

Subsection 151(2) provides that despite the repeal of the old determination, the old determination continues to apply on or after 1 October 2024 in relation to the review.

Schedule 1—Repeals

Schedule 1 repeals the whole of the *Parliamentary Service Determination 2013*.

Attachment A

Statement of Compatibility with Human Rights

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

Parliamentary Service Determination 2024

The Determination 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*.

The Determination engages the following rights:

- Right to work and rights at work. These are general rights recognised by Article 6(1), Article 7 and Article 8(1)(a) of the *International Covenant on Economic, Social and Cultural Rights (ICESCR)*. Other conventions provide for this right with respect to specific groups, for example;
 - 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)*; and
 - Article 27 of the *Convention on the Rights of Persons with Disabilities (CRPD)*;
- Right to privacy and reputation. This right is recognised by Article 17 of the *International Covenant on Civil and Political Rights (ICCPR)*;
- Right to freedom of expression. This right is contained in Articles 19 and 20 of the ICCPR;
- Right to equality and non-discrimination. This right is recognised by Article 26 of the ICCPR and Article 2(2) of the ICESCR and Article 1(4) of the ICERD;
- Right to enjoy and benefit from culture. This right is recognised by Article 27 of the ICCPR and Article 15 of the ICESCR; and
- Right to take part in public affairs and elections. This right is recognised by 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 Determination promotes these rights.

Section 22 provides direction and guidance on the ‘merit principle’ in section 10A(1)(c) of the Act and provides that the primary consideration in making selection decisions is merit. This section aims to ensure workplaces are free from discrimination, patronage and favouritism. This section promotes the right to have an opportunity to gain a living by work

which one chooses or accepts and the right to be promoted to an appropriate higher level subject to no considerations other than seniority and competence.

Section 23 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. This section allows Secretaries to access merit lists and merit pools from a previously notified APS vacancy in certain circumstances to fill a new Parliamentary Service vacancy that is a similar 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. This section promotes the opportunity of everyone to have an opportunity to gain their living by work which they choose or accept and the right of everyone to be promoted to an appropriate higher level subject to no considerations other than seniority and competence.

Part 4 provides direction and guidance on the employment principle in section 10A(1)(d) of the Act that the Parliamentary Service is a career-based public service that 'requires effective performance from each employee.' This part therefore limits the right in Article 6 of the ICESCR, but that limitation is justified on the basis that the Parliamentary Service requires effective performance from each employee. Further, this part promotes Article 7 of the ICESCR.

Sections 51 to 53 provide for how Secretaries, supervisors and Parliamentary Service employees can ensure effective performance including by dealing with unsatisfactory performance in constructive and transparent ways. This part promotes the right of everyone to have an opportunity to gain their living by work which they choose or accept and the right of everyone to be promoted to an appropriate higher level subject to no considerations other than seniority and competence.

Section 58, Subdivision D of Division 2 of Part 10 and Division 3 of Part 10 are all concerned with allegations of breaches of the Code of Conduct and the process for making determinations of such breaches as well as reviews of such determinations. For example, section 58 provides that where an allegation of a breach of the Code of Conduct by a Secretary or a statutory office holder is such that the Presiding Officers considers that the allegation warrants investigation, the Presiding Officers can refer the matter to the Parliamentary Service Commissioner. Disciplinary measures for breaches of the Code of Conduct impact on a person's right to choose their work (Article 6 of the ICESCR). However, this is a reasonable and proportionate measure to maintain just and favourable conditions of work which promotes the right contained in Article 7 of the ICESCR.

Division 2 of Part 10 contains the procedures for the operation of Independent Selection Advisory Committees (ISACs). An ISAC is an independent committee established by the Merit Protection Commissioner at the request of a Secretary to make recommendations about the suitability of candidates in a staff recruitment exercise. The provisions of Division 2 of Part 10 provide an ISAC with the flexibility to use modern recruitment methods and help to ensure that the independence of an ISAC is maintained for the benefit of parliamentary departments and Parliamentary Service employees.

Part 7 contains the procedures for review of actions in the Parliamentary Service. Section 33 of the Act provides that a Parliamentary Service employee is entitled to review of any

Parliamentary Service action that relates to his or her Parliamentary Service employment, subject to exceptions prescribed in this Determination. The right to review is supported by the Employment Principles in section 10A of the Act, which provides that the Parliamentary Service is a career-based service that makes fair employment decisions with a fair system of review. The provisions in Part 7 seek to improve the operational efficiency and effectiveness of the review of actions framework, including in relation to promotion review. This part promotes the opportunity of everyone to have an opportunity to gain their living by work which they choose or accept and the right of everyone to be promoted to an appropriate higher level subject to no considerations other than seniority and competence.

The procedures prescribed by this Determination reflect and promote the central requirements of procedural fairness and promote Parliamentary Service employees' rights in work. Where a determination that a Parliamentary Service employee has breached the Code of Conduct may operate to limit a Parliamentary Service employee's right in work, this limitation is not arbitrary, and is for a legitimate purpose—namely, to correct individuals' behaviour, to reinforce the expected standards of conduct for Parliamentary Service employees and thereby, to maintain public confidence in parliamentary administration. For example, where an employee who has been determined to have breached the Code of Conduct does not agree with this finding, or with any consequent sanction that has been imposed, he or she may seek review by the Merit Protection Commissioner of the determination or sanction decision, in accordance with section 33 of the Act.

Right to work and rights at work for specific groups

Article 5(e)(i) of the 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 on the basis of disability with regard to all forms of employment and for the promotion of employment opportunities for persons with disability.

The Determination promotes these rights and insofar as the Determination limits these rights, that limitation is reasonable, necessary and proportionate.

Sections 29, 30 and 31 promote the right to work for those whose rights are protected by the ICERD and persons with a disability.

Section 29 provides for affirmative measures targeted at Aboriginal and Torres Strait Islander persons which are intended to increase their representation in the Parliamentary Service workforce.

Sections 30 and 31 provide for affirmative measures targeted at persons with disability which are intended to increase their representation in the Parliamentary Service workforce.

The affirmative measures in 30 and 31 are a form of positive discrimination however this does not mean that they are an exception to the merit principle. If that was the case, these provisions might limit Article 6(1) of the ICESCR. Rather, the assessment of merit is still relevant to recruitment processes for affirmative measures, it is simply that assessment of those criteria is applied to a smaller cohort.

Article 11 of the 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 Determination promotes these 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.'

Sections 16 may promote the right to work for women by requiring Secretaries to consult with the Parliamentary Service 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. As an additional oversight measure, section 17 provides that the Secretary is required to notify the Parliamentary Service Commissioner of the number of non-disclosure agreements (referred to in section 16) entered into in each financial year.

Right to privacy and reputation

Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with their privacy. The right to privacy prohibits unlawful or arbitrary interferences with a person's privacy, family, home and correspondence. It also prohibits unlawful attacks on a person's reputation.

The Determination promotes these rights and insofar as the Determination limits these rights, that limitation is reasonable, necessary and proportionate.

Section 16 and 17 may limit a person's right to privacy by requiring that the details of relevant non-disclosure agreements are disclosed to the Parliamentary Service Commissioner for the purpose of consultation and oversight. To the extent that such disclosure would involve the disclosure of personal information, the measures contained in this section are reasonable, necessary and appropriate in order to ensure that sexual harassment claims are dealt with in a transparent way.

Section 43 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 Parliamentary Service are transparent and capable of being subject to public scrutiny. There are exceptions to the general requirement that decisions be notified.

Paragraph 43(4)(a) provides that the Secretary may decide that the employee's name should not be included because of the person's work-related or personal circumstances.

Paragraph 43(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 Secretary

decides that including the name is not necessary to ensure public confidence in the integrity of the Parliamentary Service. This exception is in place to ensure that any limitation on the right to privacy is necessary, having regard to the particular circumstances of the employee's termination. This paragraph promotes the right to privacy.

Where a name is not notified in the *Gazette* in accordance with subsection 43(4), then under subsection 43(6), the name must still be provided to the Parliamentary Service Commissioner. This requirement reflects the importance of the Commission retaining data on Parliamentary Service employment matters such as engagements, promotions, movements and terminations, and supports the integrity of the Parliamentary Service as an institution.

Sections 46 and 47 allow a Secretary to direct an employee to attend a medical examination, either to satisfy a condition of the employee's engagement or to assess the employee's fitness for continued employment. Subsections 46(2) and 47(5) make clear that the person conducting the medical examination may give a report of the examination to the Secretary, without seeking or confirming the agreement of the employee.

Subsection 56(2) modifies the scope of the information that the Secretary will be required to provide under subsection 56(1), to the extent that it carves out personal information within the meaning of the *Privacy Act 1988* from the required information. This is a safeguard that promotes the right to privacy.

Although these subsections will result in personal information being disclosed to a parliamentary department without an employee's specific agreement—and thus engage and limit the right to privacy under Article 17 of the ICCPR—the limitations are not arbitrary, are for a legitimate objective, and are reasonable in the particular circumstances. Where a Secretary directs an employee to attend a medical examination for a valid reason, it is necessary for the Secretary to receive a report of the examination in order to make an informed assessment of the employee's fitness for engagement or continued employment.

It is expected that the power to direct employees to attend a medical assessment will be exercised responsibly, in good faith, and in a way that is consistent with the Parliamentary Service Values, Employment Principles and Code of Conduct, the requirements of which include, among other things, that:

- the Parliamentary Service demonstrates leadership, is trustworthy and acts with integrity, in all that it does (section 10(2) of the Act);
- the Parliamentary Service respects all people, including their rights and their heritage (section 10(3));
- the Parliamentary Service provides flexible, safe and rewarding workplaces where communication, consultation, cooperation and input from employees on matters that affect their workplace is valued (section 10A(1)(e)); and
- a Parliamentary Service employee, when acting in connection with Parliamentary Service employment, must treat everyone with respect and courtesy and without harassment (section 13(3)).

The power to refer employees for medical assessment is a significant one, and it exists for good reasons. It provides departments with a flexible tool that allows them to manage

genuine cases of illness, including mental illness, with compassion for both the individual employee and their colleagues.

In some circumstances it may be difficult for departments to meet their duty of care to employees without recourse to such steps. In coming to a decision as to whether to refer an employee for a medical assessment, a manager must weigh several concerns, including those of the employee and the requirement under the *Work Health and Safety Act 2011* to ensure that their ‘acts or omissions do not adversely affect the health and safety of other persons’, which includes those in the direct team and the wider work environment. Sections 46 and 47 infringes on the right to privacy. However, they do so for a good reason and in a proportional way.

Section 33 of the Act provides a check on this decision-making power by providing that Parliamentary Service employees have rights of review about matters affecting them in their employment, including actions taken under sections 43 and 44.

Sections 115 to 122 extend to former Parliamentary Service employees a right to review of a determination that they had breached the Parliamentary Service Code of Conduct, in circumstances where that determination was made after they had ceased Parliamentary Service employment. Specifically, paragraph 120(1)(b) provides that reviews must be conducted in private. This paragraph promotes the right to privacy.

Section 71 provides that the parties to a review of a promotion decision are not entitled to statements submitted by other parties under section 71. This protects the privacy of personal information. This paragraph promotes the right to privacy.

Section 65AE of the Act provides for determinations to authorise the use and disclosure of personal information in specific circumstances.

Section 141 provides for disclosure or use of personal information where the disclosure is necessary for, or relevant to, the performance of the Secretary’s employer powers and gives greater clarity to parliamentary departments about the circumstances in which employee information may legitimately be disclosed and used. Wherever possible, the Departments determine how they collect, hold, use and disclose personal information in accordance with the Australian Privacy Principles (APPs) contained in Schedule 1 of the Privacy Act.

This approach is consistent with several existing sources of authority that permit the disclosure and use of employee information in parliamentary departments in a wide range of circumstances. For example, the common law duty of loyalty and fidelity owed by an employee to their employer implies an obligation on employees in some circumstances to report to the employer on matters of importance that could impact adversely on an employer: *Blyth Chemicals Ltd v Bushnell* (1933) 49 CLR 66; *Turner v Carpet Call (Victoria) Pty Ltd* [1994] IRCA 188. Additionally, under the general law, an employer has the power to inform itself of any information held by it which is relevant to the exercise of any employer related powers: *C v Commonwealth Agency* [2005] PrivCmrA 3.

Section 141 of this Determination may have the effect of limiting the right to privacy in some circumstances. However, the limitations are not arbitrary, are for a legitimate objective, and are reasonable in the particular circumstances.

There are some circumstances where employee information needs to be disclosed or used to maintain public confidence in Parliamentary administration and the integrity of the Parliamentary Service. Such use and disclosure may be required to promote and uphold the Parliamentary Service Values, Employment Principles and Code of Conduct by, for example, passing information between parliamentary departments to support proper Code of Conduct inquiries.

Right to freedom of expression

The right to freedom of opinion and expression is contained in Articles 19 and 20 of the ICCPR.

The Determination promotes this right and insofar as the Determination limits these rights, that limitation is reasonable, necessary and proportionate.

Section 59 imposes a duty on Parliamentary Service employees to not disclose information that they obtain or generate in connection with their employment if the information was or is to be communicated in confidence, to the Presiding Officers, a committee of either House, a joint committee or a Senator or Member. The duty not to disclose is not at large but rather is limited by various exceptions.

Additionally, section 97 provides that the Presiding Officers are empowered to refer a public interest disclosure allegation that amounts to a breach of the Code of Conduct to the Parliamentary Service Commissioner who is able to provide advice or inquire and report on the matter.

Section 100 confers similar powers on the Merit Protection Commissioner who is required to afford prescribed procedural fairness requirements when conducting inquiries. These procedures, described in 100(6), are required to reflect and promote the central requirements of procedural fairness.

Whilst these provisions are likely, in some circumstances, to limit the right of Parliamentary Service employees to freedom of expression, they are in place for a good reason, including ensuring the integrity of and public confidence in the Parliamentary Service.

Right to equality and non-discrimination

Article 26 of the ICCPR and Article 2(2) of the ICESCR provide for the right to equality and non-discrimination. These Articles prohibit discrimination on the basis of a prohibited ground including race, colour, sex, language and religion, and provide that all individuals have the same rights and deserve the same level of respect, while recognising that it is sometimes necessary to provide some groups in the community with additional support in order for them to enjoy their right to equality.

This Determination promotes this right by providing direction and guidance on the meaning and application of the Employment Principles set out in section 10A of the Act. The Employment Principles promote equality, non-discrimination and work rights by stipulating, among other things, that the Parliamentary Service is a career-based public service that makes fair employment decisions with a fair system of review; makes decisions relating to engagement and promotion that are based on merit and provides workplaces that are free from discrimination, patronage and favouritism.

Article 27 of the CRPD prohibits discrimination on the basis of disability with regard to all forms of employment; promotes employment opportunities and career advancement for persons with disability in the labour market; and promotes the employment of persons with disability in the public sector.

The Committee on Economic, Social and Cultural Rights has stated in *General Comment No 5: Persons with disabilities* at [5] that insofar as special treatment of persons with disabilities is necessary, parties to the convention are required to take appropriate measures to enable such persons to seek to overcome any disadvantages, in terms of the enjoyment of the rights specified in the Covenant, such as Article 27 of the CRPD, flowing from their disability.

Article 1(4) of the ICERD allows for special measures to be taken in order to redress inequitable employment outcomes and realise the right to employment.

Articles 1(4) and 2(2) of the ICERD allow parties to the convention to take special measures for the purpose of advancing the fulfilment of rights and freedoms of certain racial or ethnic groups.

This Determination promotes these rights.

Section 29 to 31 promotes the social inclusion of key disadvantaged groups in the Australian community by affirmative measures. Key disadvantaged groups covered by affirmative measures include:

- Aboriginal and Torres Strait Islander people; and
- people with disabilities.

These measures engage the rights to equality and non-discrimination in that affirmative measures only apply to Aboriginal and Torres Strait Islanders and persons with a disability. Such differences in treatment on the basis of race or disability do not amount to discrimination if the reasons for such differentiation are reasonable and objective and if the aim is to achieve a legitimate purpose.

These measures are designed to enhance the employment prospects of a person with a disability, who would otherwise be unlikely to obtain employment through the standard recruitment and selection arrangements, but who have the capacity to contribute to the work of a parliamentary department. The measures are also designed to assist such persons to gain skills and experience that will further their ability to participate in the workforce. Further, they are intended to counter the underrepresentation of persons with disabilities and Aboriginal and Torres Strait Islander people in the Parliamentary Service workforce. These measures promote diversity by use of affirmative measures.

Right 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.

This Determination promotes these rights.

Under section 11A of the Act, the Parliamentary Service Commissioner may make Determinations to determine the scope and application of the Parliamentary Service 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 12 of the Determination promotes these rights to take part in cultural life and to enjoy and benefit from cultural life by requiring Parliamentary Service employees, having regard to their duties and responsibilities, to:

- treat people with dignity and recognise that all people have value;
- deal with all people honestly and with integrity;
- recognise the importance of human rights and understand Australia's human rights obligations;
- recognise and foster diversity;
- contribute to an inclusive workplace;
- collaborate and be open to ideas in supporting Parliament; and
- comply with all relevant anti-discrimination laws.

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.

This Determination promotes this right.

Section 34 promotes Article 25 of the ICCPR by providing that where a Parliamentary Service employee has resigned to contest an election, they may be re-engaged in their former department on the same basis (ongoing or non-ongoing), performing the same or similar duties 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 a Parliamentary Service employee contest an election unsuccessfully.

Conclusion

The Determination is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* 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.