

PUBLIC SERVICE AMENDMENT (2024 MEASURES NO. 1) REGULATIONS 2024

EXPLANATORY STATEMENT

Issued by authority of the Minister for the Public Service, Senator the Hon Katy Gallagher
under section 79 of the *Public Service Act 1999*.

PURPOSE AND OPERATION OF THE INSTRUMENT

The Public Service Amendment (2024 Measures No. 1) Regulations 2024 (the Regulations) amend the Public Service Regulations 2023 (Public Service Regulations) to support amendments to the *Public Service Act 1999* made by the *Public Service Amendment Act (No. 2) 2024* (the Amendment Act). The Amendment Act received Royal Assent on 26 August 2024, and commenced the following day.

Section 79 of the Public Service Act provides that the Governor-General may make regulations prescribing matters required or permitted by that Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to that Act.

The Amendment Act inserted new subsection 41A(1A) into the Public Service Act, which requires the Australian Public Service Commissioner (the Commissioner) to establish written procedures for inquiring into and determining whether an Agency Head, or a former Agency Head, has breached the Australian Public Service Code of Conduct (Code of Conduct), which is prescribed under section 13 of that Act. The written procedures must comply with the basic procedural requirements prescribed by the regulations.

The Regulations prescribe the basic procedural requirements for written procedures made under subsection 41A(1A) of the Public Service Act. These basic procedural requirements are largely consistent with the existing basic procedural requirements for inquiries and determinations in relation to alleged Code of Conduct breaches by APS employees in section 52 of the Public Service Regulations.

The Commissioner will establish written procedures in accordance with subsection 41A(1A) of the Public Service Act, which must comply with the procedural requirements prescribed in the Regulations. The Commissioner's written procedures are not legislative instruments, as provided for by subsection 41A(1D) of the Act.

The Amendment Act also inserted a new definition of 'former Agency Head'. Accordingly, the Regulations make minor and consequential amendments to the Public Service Regulations to reflect that new definition.

CONSULTATION

The Australian Public Service Commission and the Merit Protection Commission were consulted extensively in the development of the Regulations to ensure that the basic procedural requirements are adequately prescribed in the Regulations and that consequential

amendments operate with the intended effect.

No further consultation was undertaken. The Regulations do not substantively alter existing arrangements for Agency Heads or former Agency Heads.

REGULATION IMPACT STATEMENT

An assessment was made under guidelines issued by the Office of Impact Analysis (OIA). The OIA advises that a detailed impact analysis is not required (OIA24-08416).

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

Public Service Amendment (2024 Measures No. 1) Regulations 2024

This instrument is compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview

The Public Service Amendment (2024 Measures No. 1) Regulations 2024 (the Regulations) amends the Public Service Regulations 2023 (Public Service Regulations) to support amendments to the *Public Service Act 1999* (Public Service Act) made by the *Public Service Amendment Act (No. 2) 2024* (the Amendment Act).

The Amendment Act inserted new subsection 41A(1A) into the Public Service Act, which requires the Australian Public Service Commissioner (the Commissioner) to establish written procedures for inquiring into and determining whether an Agency Head, or a former Agency Head, has breached the Australian Public Service Code of Conduct (Code of Conduct), which is prescribed under section 13 of that Act. The written procedures must comply with the basic procedural requirements prescribed by the regulations.

The Regulations prescribe the basic procedural requirements for the written procedures that are made under subsection 41A(1A), in relation to Agency Heads and former Agency Heads. These basic procedural requirements are largely consistent with the existing basic procedural requirements for inquiries and determinations in relation to alleged Code of Conduct breaches by APS employees in section 52 of the Public Service Regulations.

The Regulations provide that the written procedures must deal with various things, including requiring that the relevant Agency Head or former Agency Head is given a reasonable opportunity to make a statement in relation to the alleged breach, and requiring a written record to be prepared stating whether it has been determined that the Agency Head or former Agency has breached the Code of Conduct. The Regulations provide that:

- The procedures must require the Commissioner not to make a determination in relation to an alleged breach of the Code of Conduct by an Agency Head, or a former Agency Head, unless the Commissioner has taken reasonable steps to tell the Agency Head or former Agency Head of the details of the suspected breach.
- The procedures must require the process for determining whether an Agency Head or a former Agency Head has breached the Code of Conduct to be carried out as quickly and with as little formality as a proper consideration of the matter allows.
- The procedures must require reasonable steps to be taken to ensure that any person authorised under the Commissioner's written procedures to determine whether an Agency Head, or a former Agency Head, has breached the Code of Conduct is, and appears to be, independent and unbiased.

Furthermore, the Amendment Act inserted a new definition of ‘former Agency Head’ and clarified that the Commissioner is empowered to conduct inquiries and make determinations with respect to alleged breaches of the Code of Conduct by Agency Heads and former Agency Heads. This instrument makes consequential and minor amendments to the Public Service Regulations to reflect these amendments, including:

- References to ‘former Agency Head’ are inserted in section 51 of the Regulations, relating to the circumstances in which the Commissioner may decline to conduct, or discontinue, an inquiry into an alleged breach of the Code of Conduct by an Agency Head or a former Agency Head.
- A minor amendment to paragraph 72(1)(b) substitutes the reference to ‘employee’s former Agency Head’ with ‘Agency Head of the employee’s former Agency’, to avoid confusion given ‘former Agency Head’ is a defined term in *Public Service Act 1999*.

Human rights implications

The Regulations engage rights at work – general rights recognised by Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).

Rights at work

Article 7 of the ICESCR recognises the right of everyone to the enjoyment of just and favourable conditions of work which ensures safe and healthy working conditions.

The Regulations positively engage with these rights by prescribing basic procedural requirements to which the Commissioner must comply when establishing written procedures for inquiring into and determining whether an Agency Head, or a former Agency Head, has breached the Code of Conduct.

These proposed requirements seek to enhance overall procedural fairness in a Code of Conduct investigation, while recognising the impact such an investigation can have on individuals and their career.

The basic requirements in the Regulations support just conditions at work, including the requirements for the Commissioner to provide an Agency Head or a former Agency Head with sufficient information and a reasonable opportunity to respond, and requirements regarding independence of decision-makers and written records of determinations.

Conclusion

This Regulation 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*.

NOTES ON SECTIONS

Preliminary

Section 1 – Name

This clause provides that the title of the instrument is the *Public Service Amendment (2024 Measures No. 1) Regulations 2024*.

Section 2 – Commencement

This clause provides that the whole of the instrument will commence the day after the instrument is registered.

Section 3 – Authority

This clause provides that this instrument is made under the *Public Service Act 1999* (Public Service Act).

Section 4 – Schedules

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

Schedule 1 – Amendments

Public Service Regulations 2023

Item 1 – Section 5 (after paragraph (e) of the note to the heading)

This item inserts two new paragraphs into the note in section 5 of the Public Service Regulations 2023 (Public Service Regulations). The note in section 5 provides that a number of expressions used in the Public Service Regulations are defined in the Public Service Act, including the listed terms. This item inserts two new paragraphs, which will clarify that the terms ‘former Agency Head’ and ‘former APS employee’, as used in the Public Service Regulations, are defined in the Public Service Act.

Item 2 – Division 1 of Part 5 (at the end of the heading)

This item amends the heading of Division 1 of Part 5 of the Public Service Regulations to state ‘Inquiries into alleged breach of Code of Conduct by Agency Head or former Agency Head’. This change reflects the amendments made by items 3 to 6 of this Schedule, which amend provisions in Division 1 to relate to former Agency Heads, in addition to Agency Heads.

Item 3 – Before section 50

This item inserts new section 50A into the Public Service Regulations to prescribe the basic procedural requirements for the Australian Public Service Commissioner’s (the Commissioner) written procedures for inquiring into and determining whether an Agency Head, or a former Agency Head, has breached the Australian Public Service (APS) Code of Conduct (Code of Conduct).

This section is made for the purposes of paragraph 41A(1A)(a) of the Public Service Act. Subsection 41A(1A), as inserted by the *Public Service Amendment Act (No. 2) 2024*, requires the Commissioner to establish written procedures for Code of Conduct inquiries into Agency Heads or former Agency Heads, which must comply with the basic procedural requirements prescribed by the regulations.

New subsections 50A(2) to (5) provide basic procedural requirements for inquiries into Agency Heads or former Agency Heads, which are largely consistent with the existing basic procedural requirements for inquiries and determinations in relation to APS employees, or former APS employees, in section 52 of the Public Service Regulations.

In summary, these subsections set out the following basic procedural requirements for the Commissioner’s written procedures, including:

- The procedures must require the Commissioner not to make a determination in relation to an alleged breach of the Code of Conduct by an Agency Head, or a former Agency Head, unless the Commissioner has taken reasonable steps to tell the Agency Head or former Agency Head of the details of the suspected breach and the Agency Head or former Agency Head has been given a reasonable opportunity to make a statement in relation to the alleged breach. These provisions support procedural fairness by ensuring the Agency Head or former Agency Head is informed of the allegation and given a reasonable opportunity to respond.
- The procedures must require the process for determining whether an Agency Head or a former Agency Head has breached the Code of Conduct to be carried out as quickly and with as little formality as a proper consideration of the matter allows. Recognising the effect on individuals and wellbeing of those involved in a Code of Conduct investigation, this provision encourages the quick resolution of matters and favours less formality where appropriate.
- The procedures must require reasonable steps to be taken to ensure that any person authorised under the Commissioner’s written procedures to determine whether an Agency Head, or a former Agency Head, has breached the Code of Conduct is, and appears to be, independent and unbiased. This provision recognises the importance of actual and perceived independence and lack of bias to ensure trust in the Commissioner’s inquiry process.
- The procedures must require a written record to be prepared stating whether it has been determined that the Agency Head, or former Agency Head, has breached the Code of Conduct. It is consistent with general principles of administrative law to require a

written record of the decision from a decision-maker and will support transparency and certainty for the Agency Head, or former Agency Head.

The Regulations will not include a provision equivalent to paragraph 52(2)(c) of the Public Service Regulations. That paragraph is in relation to APS employees and requires the Commissioner to take reasonable steps to inform the employee of sanctions that may be imposed under subsection 15(1) of the Public Service Act. Sanctions under subsection 15(1) of the Public Service Act apply to APS employees, but do not apply to Agency Heads.

Nevertheless, there will still be a requirement in the written procedures for the Commissioner to take reasonable steps to inform an Agency Head of any sanctions that may be recommended following an inquiry and determination of an alleged breach of the Code of Conduct. This requirement will ensure that in practice, there is consistency in the way APS employees and Agency Heads are informed of sanctions that may be imposed or recommended.

Item 4 – Subsection 51(1)

Item 4 amends subsection 51(1) of the Public Service Regulations to include reference to a former Agency Head, in addition to an Agency Head.

Section 51 outlines circumstances in which the Commissioner may decline to continue, or discontinue, an inquiry into an alleged breach of the Code of Conduct. The amendment clarifies the provision also captures inquiries into former Agency Heads. This means the Commissioner may decline to continue, or discontinue, an inquiry into an alleged breach of the Code of Conduct by a former Agency Head where the Commissioner concludes that conducting or continuing the inquiry would not be justified in the circumstances.

This clarifies that the circumstances in which the Commissioner may decline to conduct, or discontinue, inquiries into breaches of the APS Code of Conduct for former Agency Heads are consistent with those for Agency Heads.

Item 5 – At the end of paragraph 51(2)(c)

Item 5 amends paragraph 51(2)(c) of the Public Service Regulations to include reference to a former Agency Head, in addition to an Agency Head. This has the effect that, in deciding whether to decline to conduct, or to discontinue, an inquiry into an alleged breach of the Code of Conduct by an Agency Head, the Commissioner may have regard to whether the allegation refers to specific decisions or actions by the former Agency Head. This clarifies that the matters the Commissioner may have regard to in making such a decision in relation to former Agency Heads are consistent with those for Agency Heads.

Item 6 – Paragraph 51(2)(e)

Item 6 amends paragraph 51(2)(e) of the Public Service Regulations to include reference to a former Agency Head, in addition to an Agency Head. This has the effect that, in deciding

whether to decline to conduct, or to discontinue, an inquiry into an alleged breach of the Code of Conduct by an Agency Head, the Commissioner may have regard to whether the allegation relates to a decision properly taken, or to policy properly adopted, by the former Agency Head, with which the person making the allegation disagrees. This clarifies that the matters the Commissioner may have regard to in making such a decision in relation to former Agency Heads are consistent with those for Agency Heads.

Item 7 – Paragraph 72(1)(b)

Item 7 amends paragraph 72(1)(b) of the Public Service Regulations to replace the reference to an ‘employee’s former Agency Head’ with a reference to the ‘Agency Head of the employee’s former Agency’. This amendment reflects that the term ‘former Agency Head’ is now a defined term in the Public Service Act. Section 7 of that Act defines the term ‘former Agency Head’ as a person who was, but is no longer, an Agency Head, rather than the Agency Head of an employee’s previous employer, as contemplated by section 72. This item maintains the existing operation of paragraph 72(1)(b) in relation to the Merit Protection Commissioner’s powers and ensures that it is not affected by the new definition of ‘former Agency Head’ in the Public Service Act.