

## EXPLANATORY STATEMENT

Issued by the authority of the Australian Public Service Commissioner

*Public Service Act 1999*

*Australian Public Service Commissioner's Amendment (2025 Measures No.1) Directions 2025*

### **Purpose**

The *Australian Public Service Commissioner's Directions 2022* (the Directions) are made under the *Public Service Act 1999* (the PS Act), and are necessary for its effective operation.

The Directions are a legislative instrument for the purposes of the *Legislation Act 2003*. They prescribe standards with which Australian Public Service (APS) Agency Heads and employees must comply to meet their obligations under the PS Act, and support Agency Heads to fulfil their responsibilities in respect of their employer powers. The *Australian Public Service Commissioner's Amendment (2025 Measures No.1) Directions 2025* (the instrument) amends the Directions. The amendments to the Directions made by the instrument are to dis-apply two APS Values (Impartial and Committed to Service) to APS employees who take leave without pay (LWOP) to become separately employed under the *Members of Parliament (Staff) Act 1984* (the MOPS Act). For these employees, the two values are dis-applied for the duration of their employment under the MOPS Act.

There is an important public policy interest in ensuring trusted relationships between the APS, the Government and the Parliament. The Directions provide a mechanism to facilitate this by enabling the mobility of APS employees to perform roles in a ministerial or parliamentarian's office for a period of time, for example to serve as an adviser in a Minister's office, or provide administrative support. From time to time, APS employees may also be engaged to support non-ministerial parliamentarians. This occurs through APS employees voluntarily taking LWOP to be separately employed under the MOPS Act. Paragraph 67(1)(b) of the Directions provides that an Agency Head must grant LWOP to an ongoing APS employee who applies for the leave to undertake or continue employment under the MOPS Act.

The *Members of Parliament (Staff) Amendment Act 2023* inserted new provisions into the MOPS Act, including new section 11 relating to the employment of electorate employees and personal employees.

Section 11 of the MOPS Act provides for a person to be employed:

- by a parliamentarian, on behalf of the Commonwealth, as an electorate employee;
- by a Minister, on behalf of the Commonwealth, as a personal employee (Ministerial); and
- by an office holder, other than a Minister, on behalf of the Commonwealth, as a personal employee (non-Ministerial).

Following the 2023 amendment to the MOPS Act, APS employees employed in a ministerial or parliamentarian office are engaged under section 11 of the MOPS Act, rather than under sections 13 or 20 of the MOPS Act, as was the case previously.

Section 13 of the MOPS Act now outlines the terms and conditions of employment for a person employed under the MOPS Act.

Section 20 of the MOPS Act now applies in the event the Commissioner of the Independent Parliamentary Standards Commission recommends that an employing individual for a person employed under the MOPS Act take certain employment actions (which are listed in paragraph 20(1)(a) of the MOPS Act) in relation to that person.

A consequential amendment to paragraph 67(1)(b) of the Directions removes the reference to sections 13 and 20 of the MOPS Act (in line with the 2023 amendments to the MOPS Act outlined above). Technical amendments to subsection 67(2) have also been made in line with the paragraph 67(1)(b) changes to the

Directions.

The APS Code of Conduct (in section 13 of the PS Act) outlines the standard of behaviour expected of Agency Heads and APS employees. Paragraph 13(11)(a) of the PS Act requires that APS employees must ‘at all times’ behave in a way that upholds the APS Values, which reflect the public’s expectations of the APS in terms of performance and behaviour.

Section 10 of the PS Act sets out the APS Values:

- Committed to service;
- Ethical;
- Respectful;
- Accountable;
- Impartial; and
- Stewardship.

The requirement to uphold the APS Values applies to an APS employee who is on LWOP, including in circumstances where the employee is separately employed under the MOPS Act to perform work for a Minister or other parliamentarian.

The APS Values in section 10 include ‘Impartial’ (see subsection 10(5)), which amongst other things states that the APS is ‘apolitical’; and ‘Committed to Service’ (subsection 10(1)), which amongst other things states that the APS ‘works collaboratively to achieve the best results for the Australian community and the Government’.

Following the establishment of the Independent Parliamentary Standards Commission on 1 October 2024, persons employed under the MOPS Act are subject to the Behaviour Code for Parliamentarian Staff (Behaviour Code) and Behaviour Standards for Commonwealth Parliamentary Workplaces (Behaviour Standards). The purpose of the Behaviour Code is to ensure MOPS Act employees work with high standards of integrity, dignity, safety and mutual respect. The Behaviour Standards, though applying to all people in a parliamentary workplace (including the public), require people to uphold a standard of behaviour including but not limited to supporting respectful and safe workplaces, professionalism, and encouragement of diverse perspectives. APS employees who are on LWOP and employed under the MOPS Act are subject to the APS Code of Conduct and the Behaviour Code and Behaviour Standards.

A MOPS Act employee working with or in the office of a Minister or other parliamentarian may be required to perform duties that are political in nature, or which are reflective of the political affiliation of the Minister or parliamentarian. Consequently, the proper and effective performance of a MOPS Act role may be seen as inconsistent with a requirement to ‘at all times’ uphold the APS Value of ‘Impartial’ as it may not be possible for an individual to behave in a way that is apolitical while conducting work of a political nature at the proper direction of their employing parliamentarian. Further and similarly, an APS employee employed under the MOPS Act may be unable to ‘at all times’ uphold the APS Value of ‘Committed to Service’ where they undertake work that does not align with the government’s agenda if working at the proper direction of a non-government parliamentarian. Thus, to the extent described above, the APS Values may be seen as inconsistent with aspects of MOPS Act employment that are otherwise lawful and proper.

The amendments to the Directions ensure APS employees who are employed under the MOPS Act have certainty about their obligations, including the extent to which they are required to continue to act in accordance with the APS Values, in alignment with integrity behaviour expectations of all public sector officials. It is reasonable to expect public sector officials to adhere to general obligations of accountability, acting ethically—including taking reasonable steps to avoid conflicts of interest which might give rise to corrupt conduct—and treating others with respect. It is also reasonable for APS employees to be mindful of the broader stewardship obligations of APS employees to support the public interest. However, to ensure attraction and mobility from the APS to the parliamentary adviser roles and their return, APS employees employed under the MOPS Act should not be required to manage real and apparent conflicts with APS Values if doing so would unreasonably hinder the effective performance of their MOPS Act role.

The amendments made by the instrument ensure that when on LWOP and employed under the MOPS Act, APS employees can undertake work, as directed by their employing Minister or other parliamentarian, without the risk of non-compliance with these particular APS Values, potentially breaching the APS Code of Conduct.

## **Legislative framework**

Section 10 of the PS Act sets out the APS Values.

Subsection 10(1) of the PS Act and section 13 of the Directions outline the Value of ‘Committed to Service’.

Subsection 10(5) of the PS Act and section 17 of the Directions outline the Value of ‘Impartial’.

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

Subsection 11(1) of the PS Act provides that the Commissioner may issue directions in writing in relation to any of the APS Values for the purpose of:

- a. ensuring that the APS incorporates and upholds the APS Values; and
- b. determining, where necessary, the scope or application of the APS Values.

Subsection 11(2) of the PS Act provides that the APS Values have effect subject to the restrictions (if any) in directions made under subsection 11(1).

Subsection 11A(1) of the PS Act provides that the Commissioner may issue directions about employment matters relating to APS employees, including engagement, promotion, redeployment, mobility, training schemes and termination.

Subsection 11A(2) of the PS Act provides that the Commissioner may issue directions in relation to any of the APS Employment Principles for the purpose of:

- a. ensuring that the APS incorporates and upholds the APS Employment Principles; and
- b. determining, where necessary, the scope or application of the APS Employment Principles.

Subsection 13(11) of the PS Act provides that APS employees must ‘at all times’ behave in a way that upholds the APS Values.

Subsection 15(6) of the PS Act provides that the Commissioner must issue directions in writing for the purposes of paragraph 15(4)(a) of the PS Act. This paragraph notes that procedures established by Agency Heads for determining breaches of the Code of Conduct and associated sanctions must comply with basic procedural requirements set out in the Directions.

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

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

Section 11 of the MOPS Act provides for the employment of electorate employees and both Ministerial and non-Ministerial personal employees.

Paragraph 67(1)(b) of the Directions provides that an Agency Head must grant leave without pay to an ongoing APS employee who applies for the leave to undertake or continue employment under the MOPS Act.

## **APS Values**

The Directions include directions in relation to each of the APS Values. Agency Heads and all APS employees are required by the PS Act to uphold the APS Values. Agency Heads and SES employees have an additional responsibility under the PS Act to promote them.

The Directions set out the scope or application of each of the APS Values, and the requirements for upholding each of the APS Values, having regard to an individual's duties and responsibilities.

## **Breaches of the Code of Conduct**

Agency Heads are required to establish procedures for determining whether an APS employee, or former employee, of the agency has breached the Code of Conduct, and for imposing sanctions on APS employees. These procedures are required to comply with basic procedural requirements prescribed by the Directions, and are set out in Part 7.

## **Commencement**

The instrument commences on the day after this instrument is registered on the Federal Register of Legislation.

## **Consultation**

The following stakeholders were consulted during the development of this instrument:

- Department of the Prime Minister and Cabinet;
- Department of Finance;
- Attorney-General's Department;
- Merit Protection Commissioner;
- Parliamentary Workplace Support Service;
- National Anti-Corruption Commission;
- Other APS agencies through the Chief Operating Officers' Committee; and
- Community and Public Sector Union.

## **Impact Analysis**

The amendments to the Directions do not require Impact Analysis (OIA24-07537) as they have minor regulatory impact and do not substantially alter existing arrangements for people, businesses, or community organisations.

## **Explanation of the Provisions**

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

## **Statement of Compatibility with Human Rights**

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

## **EXPLANATION OF THE PROVISIONS**

### Section 1 – Name

**Section 1** sets out the name of the instrument, being the *Australian Public Service Commissioner’s Amendment (2025 Measures No.1) Directions 2025* (the instrument).

### Section 2 – Commencement

**Section 2** provides that the instrument commences the day after registration.

### Section 3 – Authority

**Section 3** provides that the instrument is made under subsection 11(1) of the *Public Service Act 1999* (the PS Act).

### Section 4 – Schedule

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

## **Schedule 1-Amendments**

### ***Australian Public Service Commissioner’s Directions 2022***

#### Item 1 (section 17B – At the end of Part 2)

**Item 1** inserts new section 17B at the end of Part 2 of the Directions. Section 17B provides that the APS Values of ‘Committed to Service’ and ‘Impartial’ (contained respectively in subsections 10(1) and (5) of the PS Act) do not apply to APS employee individuals who are on leave without pay from the individual’s APS employment, and are employed under the *Members of Parliament (Staff) Act 1984* (MOPS Act).

#### Item 2 (Paragraph 67(1)(b) – At the end of Part 8)

**Item 2** repeals paragraph 67(1)(b) of the Directions and substitutes it with new paragraph 67(1)(b) ‘under the *Members of Parliament (Staff) Act 1984*.’

This amendment is consequential to amendments made to the MOPS Act by the *Members of Parliament (Staff) Amendment Act 2023* which inserted new section 11 relating to the employment of electorate employees and personal employees. APS employees employed in a ministerial or parliamentary office are now engaged under section 11 of the MOPS Act, rather than under sections 13 or 20 of the MOPS Act, as was the case previously.

The amendment of paragraph 67(1)(b) of the Directions to refer to employment under the MOPS Act allows for the coexistence of arrangements for any APS employees performing roles in a parliamentary office who were engaged under section 13 or 20 of the MOPS Act, prior to the insertion of and engagement under section 11 of the MOPS Act and reduces the need for consequential amendments following any further changes to the employment provisions of MOPS Act.

#### Item 3 (Paragraph 67(2) – At the end of Part 8)

**Item 3** omits from subsection 67(2) of the Directions the words “for the purposes mentioned in” and substitutes these words with “covered by”. This amendment is consequential to the amendment to paragraph 67(1)(b) of the Directions.

#### Item 4 - in the appropriate position in Part 10

**Item 4** inserts a new heading ‘Division 4—Amendments made by the Australian Public Service Commissioner’s Amendment (2025 Measures No. 1) Directions 2025’ and a new section 79 at the end of

Part 10 of the Directions. Section 79 provides that the operation of section 17B (inserted by Item 1 of the instrument) applies on and after the commencement of Schedule 1 to the instrument, and applies when an individual meets the criteria outlined in paragraphs 79(a), (b) and (c).

Paragraph 79(a) of the Directions requires that firstly, the individual must be an APS employee before, on or after the commencement of the Schedule. For example, John has been an APS employee since 2020 and the instrument commences on 14 February 2025. John has met the first criteria for section 17B to apply.

Paragraph 79(b) of the Directions requires that secondly, the same individual APS employee must be on leave without pay from the individual's APS employment whether the leave commenced before, on or after commencement of the Schedule. For the same example, John has been granted leave without pay from his APS employment. John has met the second criteria for section 17B to apply.

Paragraph 79(c) of the Directions requires that thirdly, the same individual APS employee has been employed under the MOPS Act before, on or after commencement of Schedule 1 to the instrument. For example, John commenced his leave without pay from his APS employment in December 2024. John commences employment under the MOPS Act from 15 January 2025 until December 2025. John has met the third criteria for section 17B to apply.

If Schedule 1 to the instrument commences on 14 February 2025, between 15 January 2025 and 13 February 2025 inclusive, the APS Values of 'Committed to Service' and 'Impartial' apply to John. However, the APS Values of 'Committed to Service' and 'Impartial' do not apply to John from 14 February 2025 and during the remainder of his employment under the MOPS Act.

## Statement of Compatibility with Human Rights

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

### ***Australian Public Service Commissioner's Amendment (2025 Measures No.1) Directions 2025***

The *Australian Public Service Commissioner's Directions 2022* (the Directions) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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

The *Australian Public Service Commissioner's Directions 2022* (the Directions) are made under the *Public Service Act 1999* (the PS Act), and are necessary for its effective operation.

The Directions are a legislative instrument for the purposes of the *Legislation Act 2003*. They prescribe standards with which Australian Public Service (APS) Agency Heads and employees must comply to meet their obligations under the PS Act, and support Agency Heads to fulfil their responsibilities in respect of their employer powers. The *Australian Public Service Commissioner's Amendment (2025 Measures No.1) Directions 2025* (the instrument) amends the Directions. The amendments to the Directions made by the instrument are to dis-apply two APS Values (Impartial and Committed to Service) to APS employees who take leave without pay (LWOP) to become separately employed under the *Members of Parliament (Staff) Act 1984* (the MOPS Act). For these employees, the two Values are dis-applied for the duration of their employment under the MOPS Act.

There is an important public policy interest in ensuring trusted relationships between the APS, the Government and the Parliament. The Directions provide a mechanism to facilitate this by enabling the mobility of APS employees to perform roles in a ministerial or parliamentarian's office for a period of time, for example to serve as an adviser in a Minister's office, or provide administrative support. From time to time, APS employees may also be engaged to support non-ministerial parliamentarians. This occurs through APS employees voluntarily taking LWOP to be separately employed under the MOPS Act. Paragraph 67(1)(b) of the Directions provides that an Agency Head must grant LWOP to an ongoing APS employee who applies for the leave to undertake or continue employment under the MOPS Act.

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A consequential amendment to paragraph 67(1)(b) of the Directions removes the reference to sections 13 and 20 of the MOPS Act (in line with the 2023 amendments to the MOPS Act).

The APS Code of Conduct (in section 13 of the PS Act) outlines the standard of behaviour expected of Agency Heads and APS employees. Paragraph 13(11)(a) of the PS Act requires that APS employees must ‘at all times’ behave in a way that upholds the APS Values, which reflect the public’s expectations of the APS in terms of performance and behaviour.

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The APS Values in section 10 include ‘Impartial’ (see subsection 10(5)), which amongst other things states that the APS is ‘apolitical’; and ‘Committed to Service’ (subsection 10(1)), which amongst other things states that the APS ‘works collaboratively to achieve the best results for the Australian community and the Government’.

Following the establishment of the Independent Parliamentary Standards Commission on 1 October 2024, persons employed under the MOPS Act are subject to the Behaviour Code for Parliamentarian Staff (Behaviour Code) and Behaviour Standards for Commonwealth Parliamentary Workplaces (Behaviour Standards). The purpose of the Behaviour Code is to ensure MOPS Act employees work with high standards of integrity, dignity, safety and mutual respect. The Behaviour Standards, though applying to all people in a parliamentary workplace (including the public), require people to uphold a standard of behaviour including but not limited to supporting respectful and safe workplaces, professionalism, and encouragement of diverse perspectives. APS employees who are on LWOP and employed under the MOPS Act are subject to the APS Code of Conduct and the Behaviour Code and Behaviour Standards.

A MOPS Act employee working with or in the office of a Minister or other parliamentarian may be required to perform duties that are political in nature, or which are reflective of the political affiliation of the Minister or parliamentarian. Consequently, the proper and effective performance of a MOPS Act role may be seen as inconsistent with a requirement to ‘at all times’ uphold the APS Value of ‘Impartial’ as it may not be possible for an individual to behave in a way that is apolitical while conducting work of a political nature at the proper direction of their employing parliamentarian. Further and similarly, an APS employee employed under the MOPS Act may be unable to ‘at all times’ uphold the APS Value of ‘Committed to Service’ where they undertake work that does not align with the government’s agenda if working at the proper direction of a non-government parliamentarian. Thus, to the extent described above, the APS Values may be seen as inconsistent with aspects of MOPS Act employment that are otherwise lawful and proper.

The amendments to the Directions ensure APS employees who are employed under the MOPS Act have certainty about their obligations, including the extent to which they are required to continue to act in accordance with the APS Values, in alignment with integrity behaviour expectations of all public sector officials. It is reasonable to expect public sector officials to adhere to general obligations of accountability, acting ethically—including taking reasonable steps to avoid conflicts of interest which might give rise to corrupt conduct—and treating others with respect. It is also reasonable for APS employees to be mindful of the broader stewardship obligations of APS employees to support the public interest. However, to ensure attraction and mobility from the APS to the parliamentary adviser roles and their return, APS



employees employed under the MOPS Act should not be required to manage real and apparent conflicts with APS Values if doing so would unreasonably hinder the effective performance of their MOPS Act role.

The amendments made by the instrument ensure that when on LWOP and employed under the MOPS Act, APS employees can undertake work, as directed by their employing Minister or other parliamentarian, without the risk of non-compliance with particular APS Values, potentially breaching the APS Code of Conduct.

### **Human rights implications**

This instrument engages the following human rights:

- Right to work and rights at work – general right recognised by Article 6(1) and Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
- Right to take part in public affairs and elections – Article 25 of the International Covenant on Civil and Political Rights (ICCPR).

#### ***Right to work and rights at work***

Article 6(1) of the ICESCR provides that everyone should have the opportunity to gain their living by work which they choose or accept. Article 7 of the ICESCR recognises the right of everyone to just and favourable conditions of work which ensures an equal opportunity for everyone to be promoted in employment to an appropriate higher level subject to no considerations other than seniority and competence.

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

##### *Section 17B – Application of certain APS Values*

This section provides that the APS Values ‘Impartial’ and ‘Committed to Service’ (see section 10 of the PS Act) do not apply to an APS employee that is on LWOP and employed under the MOPS Act. This section ensures that the APS Values do not discourage an APS employee from this work or prevent an APS employee from undertaking MOPS Act work effectively, to the extent that the Values might be inconsistent with the types of work a MOPS Act employee might be required to engage in.

This amendment engages effective performance and the right to enjoyment of just and favourable work conditions by providing APS employees certainty about their obligations. This amendment also supports employee rights by removing the possibility of conflicting obligations and inadvertent breach of the APS Code of Conduct.

##### *Paragraph 67(1)(b) – Matters relating to leave without pay*

This section provides that an Agency Head must grant leave without pay to an ongoing APS employee who applies for leave to undertake or continue work under the MOPS Act.

This amendment engages the general right to work by creating a wider scope of circumstances which allow ongoing APS employees the opportunity to be granted LWOP and undertake employment under the MOPS Act.

#### ***Right to take part in public affairs and elections***

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

##### *Section 17B – Application of certain APS Values*

This amendment promotes the right to take part in public affairs and elections by allowing APS employees the opportunity to engage in separate employment under the MOPS Act, while concurrently meeting their ongoing APS obligations.

### **Conclusion**

The instrument is compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* because it promotes the protection of human rights. It does not introduce any limitations on human rights. To the

extent that a provision operates to limit a right or freedom, those limitations are reasonable, necessary and proportionate.