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THE PARLIAMENT OF THE COMMONWEALTH OF AUSTRALIA

HOUSE OF REPRESENTATIVES

PUBLIC SERVICE AMENDMENT BILL 2012

EXPLANATORY MEMORANDUM

(Circulated by authority of the
Minister for the Public Service and Integrity,
the Honourable Gary Gray AO MP)

PUBLIC SERVICE AMENDMENT BILL 2012

OUTLINE

The Public Service Amendment Bill 2012 ('Bill') amends the *Public Service Act 1999* ('the PS Act') to ensure the Australian Public Service ('APS') is able to continue serving the Australian Government ('the Government'), the Parliament and the Australian public to a high standard of ethics, efficiency and effectiveness. This will be achieved by:

- (a) revising the APS Values, clarifying the roles and responsibilities of Secretaries and amending their employment arrangements, and establishing APS leadership groups;
- (b) revising and clarifying the roles and functions of the Public Service Commissioner ('the Commissioner'); and
- (c) improving the day-to-day workforce management of the APS through a range of operational amendments.

Ahead of the Game: Blueprint for the Reform of Australian Government Administration ('the Blueprint') outlined a broad reform agenda to position the APS to continue to serve the Government to a high standard and equip it to meet current and future challenges and the expectations of the Government and the Australian community. The Government has accepted all of the recommendations in the Blueprint.

Some of the Blueprint's recommendations require legislative change in order to be implemented, and the Bill reflects this necessity. The recommendations requiring legislative change relate to the roles and responsibilities of, and employment arrangements for, Secretaries; the establishment of leadership groups; the roles and responsibilities of the Senior Executive Service ('SES'); revision of the APS Values and the roles and responsibilities of the Commissioner.

Other amendments are consistent with the objectives of the Blueprint.

The Bill contains consequential and transitional provisions to:

- validate actions and decisions taken before commencement;
- cover aspects of the transition to the new employment framework (e.g. staffing actions in train at the time of commencement); and
- make consequential amendments to other legislation where appropriate.

FINANCIAL IMPACT STATEMENT

The Bill has low financial impact.

The proposals are either cost neutral or would be met from within the existing resources of the Australian Public Service Commission (APSC).

However, as the Bill is intended to improve the quality of workforce management in the APS it is expected that this will translate into:

- more efficient, effective, economical and ethical use of the Commonwealth's resources (cf. *Financial Management and Accountability Act 1997* s.44)
- stronger, more collaborative leadership, enhanced policy capability and better services for the Australian public.

REGULATION IMPACT STATEMENT

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

STATEMENT OF COMPATIBILITY WITH HUMAN RIGHTS

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

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

Overview of the Bill

As set out in the Outline of this Explanatory Memorandum, the Bill amends the PS Act to ensure the APS is able to continue serving the Government, the Parliament and the Australian public to a high standard of ethics, efficiency and effectiveness.

The purpose of the Bill is to implement recommendations in the Blueprint that require legislative change and to improve the overall operation of the PS Act.

The Bill also contains consequential and transitional provisions as set out in the Outline of this Explanatory Memorandum.

Human rights implications

The Bill engages the following human rights:

Right to equality and non-discrimination

The right to equality and non-discrimination engages Article 2 of the International Covenant on Civil and Political Rights (ICCPR). Article 2 respects and recognises individuals' rights regardless of race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

The right to equality and non-discrimination is reflected in the new APS Value, *Respectful*, which provides that the APS respects all people, including their rights and their heritage (proposed section 10(3)). The APS Employment Principles further provide that the APS is a career-based public service that provides workplaces that are free from discrimination, patronage and favouritism (proposed section 10A(1)(f)) and recognises the diversity of the Australian community and fosters diversity in the workplace (proposed section 10A(1)(g)).

All APS employees are required to uphold the APS Values and Employment Principles and agency heads are required to uphold and promote the Values and Employment Principles. These provisions promote and advance the right to equality and non-discrimination.

Right to a fair trial and fair hearing rights

The right to a fair trial is protected in Article 14 of the ICCPR and is aimed at ensuring the proper administration of justice by upholding, among other things, the right to a fair hearing. This includes a reasonable opportunity for both parties to present his or her case, including the presentation of evidence.

Proposed sections 72C and 72D allow for information to be given or documents to be produced either to the Public Service Commissioner (the Commissioner) or the Merit Protection Commissioner (MPC) in the course of one of their review or inquiry functions. Proposed subsections 72C(3) and 72D(3) provide that giving the information or producing the document to the Commissioner or MPC is not admissible in evidence in certain proceedings. The information or document itself remains subject to the normal rules of evidence.

This allows both Commissioners access to sensitive, confidential information which may be relevant to the performance of their functions, while providing a level of protection to potentially vulnerable witnesses. Accordingly, the right to a fair trial will not be prejudiced by these amendments.

Right to privacy

The prohibition on interference with privacy and attacks on reputation is contained in Article 17 of the ICCPR.

Proposed sections 72A and 72B protect information obtained by the Commissioner or MPC in the course of one of their review or inquiry functions. There is a general prohibition on the disclosure or other use of this protected information. Personal information must not be disclosed unless the relevant Commissioner is satisfied that the disclosure is fair and reasonable in all the circumstances (proposed sections 72A(6) and 72B(6)). This amendment is consistent with the right to privacy.

Where information is given or documents produced to the relevant Commissioner under proposed sections 72C and 72D, and the information given or documents produced involves a disclosure of personal information, the disclosure is authorised by law for the purposes of the *Privacy Act 1988*. The prohibition on interference with privacy is engaged but not restricted by these amendments.

Right to work and rights in work

The right to work is protected in Article 6 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The right to just and favourable conditions of work are protected in Article 7 of the ICESCR.

The Bill provides that the Governor-General, on the recommendation of the Prime Minister, may appoint Special Commissioners to assist the Commissioner in conducting all or part of a systems review or special review. The remuneration and other allowances, including leave entitlements, for Special Commissioners (set out in proposed section 48B) are to be determined by the Remuneration Tribunal. The Remuneration Tribunal is the independent statutory body that handles the remuneration of key Commonwealth offices.

The right to work and to just and favourable conditions of work are therefore protected.

The right to just and favourable work conditions is promoted through the APS Employment Principles. One of the APS Employment Principles is that the APS is a career-based public service that provides flexible, safe and rewarding workplaces where communication, consultation, cooperation and input from employees on matters that affect their workplace are valued (proposed section 10A(1)(e)).

Conclusions

This Bill is compatible with human rights because it advances the protection of human rights.

NOTES ON INDIVIDUAL CLAUSES

List of abbreviations used

APS	Australian Public Service
PS Act	<i>Public Service Act 1999</i>
PECTA Act	<i>Public Employment (Consequential and Transitional) Amendment Act 1999</i>
The Blueprint	<i>Ahead of the Game: Blueprint for the Reform of Australian Government Administration</i>
The Prime Minister's Department	The Department of the Prime Minister and Cabinet
The Commissioner	The Australian Public Service Commissioner
MPC	The Merit Protection Commissioner
SES	Senior Executive Service
APSC	Australian Public Service Commission
Regulations	<i>Public Service Regulations 1999</i>
Commissioner's Directions	<i>Public Service Commissioner's Directions 1999</i>

Clause 1: Short title

The Bill, when passed, may be cited as the *Public Service Amendment Act 2011*.

Clause 2: Commencement

The Bill will commence as follows:

- (a) sections 1 to 3 will commence on Royal Assent; and
- (b) schedules 1, 2, 3 and 4 will commence on a single day to be fixed by Proclamation. If the provision(s) do not commence within the period of 6 months beginning on the day this Bill receives Royal Assent, they commence on the day after the end of the 6 month period.

Clause 3: Schedules

The Bill specifies Acts in a Schedule to the Bill. Each Act in the Schedule is amended or repealed as set out in the applicable items in the Schedule. In addition, any other item in a Schedule to this Bill has effect according to its terms.

SCHEDULE 1—Amendment of the *Public Service Act 1999*

Part 1—Secretaries

Public Service Act 1999

Item 1—sections 57, 58, 59 and 60

This item repeals the existing provisions of the PS Act and replaces these with proposed sections 57, 58, 59 and 60.

Section 57—Roles and responsibilities of Secretaries

Proposed section 57 describes the roles and responsibilities of Secretaries. The proposal would implement Recommendation 4.2.1 from the Blueprint by providing an authoritative statement of the roles and responsibilities of Secretaries, against which they could be held accountable. The purpose of section 57 is to define better the position of Secretary and clarify the service and performance expected of Secretaries.

Proposed subsection 57(1) provides the roles of Secretaries. The roles of Secretaries are based closely on Blueprint recommendations, and articulate roles in addition to the traditional management role.

Proposed paragraph 57(1)(a) provides that the Secretary of a Department is the main source of policy advice from the public service to the Agency Minister. Some Secretaries may share this role—such as the Secretary of the Department of Defence, who shares policy responsibility with the Chief of the Defence Force.

Proposed paragraph 57(1)(b) provides that the Secretary of a Department has a role as a manager to ensure the delivery of government programs. Part of this role is to ensure collaboration, where there is shared portfolio responsibility, for achieving whole-of-government outcomes.

Proposed paragraph 57(1)(c) provides that the Secretary of a Department has a role as a leader, including a longer term stewardship role both within the Department and more broadly across the APS in partnership with their colleagues on the Secretaries Board (see Part 2, Schedule 1).

Proposed paragraph 57(1)(d) provides that the Secretary of a Department also has any other role prescribed by the Regulations. The roles of a Secretary of a Department are not exclusive and could be added to, but not diminished, by regulation.

Proposed subsection 57(2) provides the responsibilities of Secretaries. This expands on the responsibilities of Secretaries set out in the existing section 57. The proposed subsection retains the responsibilities currently set out, and includes additional responsibilities based closely on the Blueprint recommendations. The additional responsibilities involve core management functions.

Proposed paragraph 57(2)(a) provides that the Secretary of a Department must manage the Agency efficiently, effectively, economically and ethically, in accordance with the APS

Values, Employment Principles and Code of Conduct set out in Parts 6 and 7 respectively of Schedule 1.

Proposed paragraph 57(2)(b) provides that the Secretary of a Department has a responsibility to advise the Agency Minister about Departmental matters.

Proposed paragraph 57(2)(c) provides that the Secretary of a Department must put in place measures to ensure that the Department complies with the law.

Proposed paragraph 57(2)(d) provides that the Secretary of a Department must provide leadership, strategic direction and a focus on outcomes for their Department.

Proposed paragraph 57(2)(e) provides that the Secretary of a Department must maintain clear lines of communication within a portfolio, as determined between the Secretary and Agency Heads within the portfolio.

Proposed paragraph 57(2)(f) provides that the Secretary of a Department has a responsibility to engage with stakeholders about matters relating to their Department.

Proposed paragraph 57(2)(g) provides that when discharging their duties, the Secretary of a Department must manage the affairs of the Department in a way that is not inconsistent with the policies of the Commonwealth and the interests of the APS as a whole.

Proposed paragraph 57(2)(h) provides that the Secretary of a Department must ensure that the portfolio has a strong strategic policy capability to consider complex, whole-of-government issues.

Proposed paragraph 57(2)(i) provides that the Secretary of a Department must assist the Agency Minister to fulfil the Agency Minister's accountability obligations to the Parliament to provide factual information, as required by the Parliament, in relation to the operation and administration of the Department. This responsibility of the Secretary will reinforce the APS Value of *Accountability* (see subsection 10(4)). This replicates existing subsection 57(2).

Proposed paragraph 57(2)(j) provides that the Secretary of a Department also has any other responsibility determined in the Regulations. The responsibilities of a Secretary of a Department are not exclusive and could be added to, but not diminished, by regulation.

Proposed subsection 57(3) makes it clear that subsection 57(2) *Responsibilities of Secretaries* does not affect the other statutory accountabilities of a Secretary of a Department under any other law.

Section 58—Appointment

Proposed section 58 amends the arrangements for appointing Secretaries.

Proposed subsection 58(1) provides that the Secretary of a Department is to be appointed by the Governor-General, by written instrument, on the recommendation of the Prime Minister.

A note to the subsection makes clear that the Secretary of a Department is eligible for reappointment as the Secretary of that Department (see section 33AA of the *Acts Interpretation Act 1901*).

Proposed subsection 58(2) provides that the Secretary of a Department holds office for the period specified in the appointment instrument.

Proposed subsection 58(3) provides the period of appointment for a Secretary of a Department. The purpose of this subsection is to make five years the usual term of appointment and to reinforce the longer term stewardship aspect of the role. A person is able to be appointed for a shorter term if the person has requested it.

Proposed subsection 58(4) provides that Secretaries may be reappointed for a further period of up to five years. The subsection makes clear that there are no limitations on reappointments of Secretaries.

Proposed subsection 58(5) provides that Secretaries hold office on a full time basis.

Proposed subsection 58(6) provides that before recommending to the Governor-General that a person be appointed as the Secretary of the Prime Minister's Department, the Prime Minister must have received a report about the appointment from the Commissioner.

Proposed subsection 58(7) provides that before recommending to the Governor-General that a person be appointed as the Secretary of a Department other than the Prime Minister's Department, the Prime Minister must have received a report about the appointment from the Secretary of the Prime Minister's Department.

Proposed subsection 58(8) provides the requirements that must be satisfied by the report required by subsection 58(7).

Proposed paragraph 58(8)(a) requires that the report to the Prime Minister by the Secretary of the Prime Minister's Department must be prepared in consultation with the Commissioner and the person who is expected to be the Agency Minister of the other Department at the time the appointment is made.

Proposed paragraph 58(8)(b) requires that if there is any disagreement about the proposed appointment between the Commissioner and the Secretary of the Prime Minister's Department the report must reflect this and explain the substance of the disagreement.

Section 59—Termination of appointment

Proposed subsection 59(1) provides that the appointment of a Secretary of a Department may be terminated by the Governor-General on the recommendation of the Prime Minister.

A note to subsection 59(1) draws attention to the decision in the Federal Court case of *Barratt v Howard* [1999] FCA 1132 which described the basis on which requirements of procedural fairness applied to the termination of an appointment of a Secretary under section 37 of the *Public Service Act 1922*.

Proposed subsection 59(2) provides that before recommending to the Governor-General that the appointment of the Secretary of the Prime Minister's Department be terminated, the Prime Minister must have received a report about the proposed termination from the Commissioner.

Proposed subsection 59(3) provides that before recommending to the Governor-General the termination of appointment of a person as the Secretary of a Department other than the Prime

Minister's Department, the Prime Minister must have received a report from the Secretary of the Prime Minister's Department about the proposed termination.

Proposed subsection 59(4) provides the requirements that must be satisfied by the report required by subsection 59(3).

Proposed paragraph 59(4)(a) requires that the report to the Prime Minister by the Secretary of the Prime Minister's Department about the proposed termination must be prepared in consultation with the Commissioner.

Proposed paragraph 59(4)(b) requires that if there is any disagreement about the proposed termination between the Commissioner and the Secretary of the Prime Minister's Department the report must reflect this and explain the substance of the disagreement.

Section 60—Engagement of former Secretaries

Proposed section 60 details the process for the Prime Minister to engage a former Secretary. The purpose of this section is to increase the flexibility of section 60 in the PS Act by extending coverage to Secretaries who have resigned or whose term of appointment has expired. This would enhance leadership capability, a key Blueprint objective, by making it easier to draw on the talents and experience of former Secretaries.

Proposed subsection 60(1) provides that the Prime Minister may, on behalf of the Commonwealth, engage (otherwise than as an APS employee) a person who is a former Secretary on terms and conditions determined by the Prime Minister.

The deletion of the phrase 'to perform specified duties' from section 60 in the PS Act is a technical change to allow for circumstances where there may be a need for a Secretary to be engaged but not to perform specified duties, such as where a Secretary agrees to vacate their office in order to undertake an extended sabbatical or take sick leave; or where a retiring Secretary has accrued leave credits and wishes to use them prior to leaving and the incoming Secretary needs to commence immediately and with full authority; or where there is a mismatch between the expiry of the term of a well performing Secretary and a suitable vacancy to which the individual is to be appointed.

Proposed subsection 60(2) defines a person as a 'former Secretary' for the purposes of subsection 60(1), stating that a person is a 'former Secretary' if:

- (a) the office of Secretary to which the person was appointed has been abolished under subsection 56(2); or
- (b) the person's appointment as Secretary has been terminated under section 59; or
- (c) the persons has resigned his or her appointment as Secretary; or
- (d) the period of the person's appointment as Secretary has ended.

Item 2—after section 61

This item inserts a new section after section 61 of the PS Act.

Proposed section 61A provides for an annual review of the performance of a Secretary which must be carried out in accordance with a framework established by the Secretary of the Prime Minister's Department and the Commissioner.

Part 2—Secretaries Board

Public Service Act 1999

Item 3—section 7

This item inserts a definition of the ‘Secretaries Board’.

Item 4—part 8

This part in the current PS Act is to be repealed, with the effect of abolishing the Management Advisory Committee, and is to be replaced by the proposed part 8.

Part 8—Secretaries Board

Section 64—Secretaries Board

The proposed section 64 implements Blueprint Recommendation 4.4 by establishing the Secretaries Board as the principal APS senior leadership group, and gives the Secretaries Board key service-wide collegiate roles and responsibilities that complement Secretaries’ individual roles and responsibilities (see proposed section 57).

The proposed subsection 64(2) outlines the membership of the Secretaries Board. It is to be comprised of the Secretaries of all Departments; the Commissioner; and such others as may be nominated by the Secretary of the Prime Minister’s Department. The Secretary of the Prime Minister’s Department is Chair. The membership criteria for the Secretaries Board are the same as for the Management Advisory Committee under subsection 64(2) of the current PS Act.

The proposed paragraph 64(2)(d) gives the Secretary of the Prime Minister’s Department the power to nominate persons other than the Secretaries and the Commissioner to the Secretaries Board. This is similar to arrangements available for the Management Advisory Committee under paragraph 64(2)(d) of the current PS Act. The purpose of this paragraph is to provide flexibility to the Chair of the Secretaries Board, for example, to call upon people with specialised skills from time to time to enhance the Board’s expertise.

The proposed subsection 64(3) outlines the functions of the Secretaries Board. These draw upon those proposed by Blueprint Recommendation 4.4.

Proposed paragraph 64(3)(a) provides that the Secretaries Board has responsibility for the stewardship of the APS and for developing and implementing strategies to improve the APS.

Proposed paragraph 64(3)(b) provides that the Secretaries Board is to identify strategic priorities for the APS and consider issues that affect the APS.

Proposed paragraph 64(3)(c) provides that the Secretaries Board is to set an annual work program, and direct subcommittees to develop strategies to address APS-wide issues and make recommendations to the Secretaries Board.

Proposed paragraph 64(3)(d) provides that the Secretaries Board is to draw together advice from senior leaders in government, business and the community.

Proposed paragraph 64(3)(e) provides that the Secretaries Board is to work collaboratively and model leadership behaviours.

Proposed subsection 64(4) provides the Secretaries Board with the ability to establish senior leadership groups with responsibility for assisting the Secretaries Board to discharge its responsibilities. The subsection allows the Secretaries Board to determine the membership of these senior leadership groups.

An example of one such group is the APS 200, which comprises the Secretaries Board itself, Band 3 SES employees and selected Agency Heads (equivalent to SES Band 3). The Secretaries Board would have the flexibility to vary the composition, responsibilities and tasks of the APS 200 depending on particular priorities and concerns.

Part 3—Senior Executive Service

Public Service Act 1999

Item 5—subsection 35(2)

This item repeals subsection 35(2), and replaces it with proposed subsections 35(2) and 35(3).

Proposed subsections 35(2) and 35(3) expand the current description of SES leadership responsibilities (current subsection 35(2)) to support the objective of Recommendation 4.4 of the Blueprint to reinvigorate strategic leadership of the APS and promote collaboration and development of whole-of-government responses to issues.

Proposed subsection 35(2) requires SES staff to provide APS-wide strategic leadership of the highest quality to contribute to an effective and cohesive APS.

Proposed subsection 35(3) builds on the existing functions of each SES employee under the current subsection 35(2).

Proposed paragraph 35(3)(a) provides that each SES employee is to provide at least one of four high-level responsibilities (which are aligned with the four APS SES Work Level Standards)—program or service delivery, public policy, regulatory administration, and professional or specialist expertise.

Proposed paragraph 35(3)(b) provides that each SES employee is to promote cooperation within and between Agencies and deliver outcomes across Agency and portfolio boundaries.

Proposed paragraph 35(3)(c) provides that each SES employee is to promote the APS Values, the APS Employment Principles (set out in Part 6 of Schedule 1) and compliance with the Code of Conduct (as amended by Part 7 of Schedule 1).

Item 6—after subsection 37(1)

This item inserts proposed subsection 37(1A), which provides that a notice may be given to an SES employee under subsection 37(1) whether or not the employee has reached the minimum retirement age under section 30. The purpose of this item is to make clear that the retirement of an SES employee under section 30 is valid even in cases where the employee has not attained the minimum retirement age specified in the PS Act.

Item 7—paragraph 32(7)(b)

This item replaces ‘compulsorily retired’ in paragraph 32(7)(b) in the current PS Act with ‘retired involuntarily’. The purpose of this provision is to ensure consistency with terminology used in superannuation legislation (see *Superannuation Act 1976* and *Superannuation Act 1990*).

Part 4—The Australian Public Service Commissioner

Public Service Act 1999

Proposed section 41 describes the functions of the Commissioner. The purpose of section 41 is to modernise and clarify the functions of the Commissioner. The proposed amendments are not intended to diminish the Commissioner’s current functions, powers or independence.

Item 8—paragraph 3(c)

This item proposes to amend the title of the Commissioner to the ‘Australian Public Service Commissioner’ in the section of the PS Act that sets out the Objects of the PS Act.

Item 9—section 7 (definition of Commissioner)

This item proposes to amend the definition of Commissioner in Part 2 of the PS Act (Interpretation) to the ‘Australian Public Service Commissioner’.

Item 10—section 7

This item proposes to insert a definition of a ‘former APS employee’.

Item 11—section 7

This item proposes to insert a definition of a ‘special review’. A special review is outlined in the proposed section 41D.

Item 12—section 7

This item proposes to insert a definition of a ‘systems review’. A systems review is outlined in the proposed section 41C.

Item 13—part 5 (heading)

This item proposes to change the title of part 5 in the PS Act from ‘The Public Service Commissioner’ to ‘The Australian Public Service Commissioner’.

Item 14—section 40 (heading)

This item proposes to change the title of section 40 in the PS Act from ‘Public Service Commissioner’ to ‘Australian Public Service Commissioner’.

Item 15—subsection 40(1)

This item proposes to change subsection 40(1) of the PS Act from ‘a Public Service Commissioner’ to ‘an Australian Public Service Commissioner’.

Item 16—section 41

This item repeals section 41 of the PS Act and replaces it with a revised set of Commissioner’s functions.

Section 41—Commissioner’s functions

Proposed subsection 41(1) sets out the functions of the Commissioner under three broad headings.

Proposed paragraph 41(1)(a) provides that one of the functions of the Commissioner is to strengthen the professionalism of the APS and facilitate continuous improvement in workforce management in the APS.

Proposed paragraph 41(1)(b) provides that one of the functions of the Commissioner is to uphold high standards of integrity and conduct in the APS.

Proposed paragraph 41(1)(c) provides that one of the functions of the Commissioner is to monitor, review and report on APS capabilities within and between agencies to promote high standards of accountability, effectiveness and performance.

Proposed subsection 41(2) provides that, without limiting proposed subsection 41(1), the Commissioner’s functions include other functions that are set out in proposed subsection 41(2).

Proposed paragraph 41(2)(a) provides that the Commissioner’s functions include fostering, and contributing to, leadership, high quality learning and development and career management in the APS.

Proposed paragraph 41(2)(b) provides that the Commissioner’s functions include leading the thinking about, providing advice on, and driving reforms to workforce management policies so that the APS is ready for future demands.

Proposed paragraph 41(2)(c) provides that the Commissioner’s functions include developing, reviewing and evaluating APS workforce management policies and practices, and maintaining appropriate databases.

Proposed paragraph 41(2)(d) provides that the Commissioner’s functions include fostering an APS workforce that reflects the diversity of the Australian population.

Proposed paragraph 41(2)(e) provides that the Commissioner’s functions include promoting the proposed APS Values (see section 10, part 6 of Schedule 1), the proposed APS Employment Principles (see section 10A, part 6 of Schedule 1) and the Code of Conduct (as amended by part 7 of Schedule 1).

Proposed paragraph 41(2)(f) provides that the Commissioner’s functions include evaluating the extent to which Agencies incorporate and uphold the APS Values (see proposed section 10, part 6 of Schedule 1) and the APS Employment Principles (see proposed section 10A, part 6 of Schedule 1).

Proposed paragraph 41(2)(g) provides that the Commissioner’s functions include stewardship of the APS in partnership with Secretaries (see proposed section 57, part 1 of Schedule 1 for the roles and responsibilities of Secretaries).

Proposed paragraph 41(2)(h) provides that the Commissioner’s functions include providing advice and assistance to Agencies on public service matters.

Proposed paragraph 41(2)(i) provides that the Commissioner's functions include working with other governments (including foreign governments) on matters relating to public sector workforce management, leadership and career management.

Proposed paragraph 41(2)(j) provides that the Commissioner's functions include reviewing any matter relating to the APS.

Proposed paragraph 41(2)(k) provides that the Commissioner's functions include reviewing any matter relating to the APS referred to the Commissioner by the Public Service Minister, and reporting on that matter to the Public Service Minister.

Proposed paragraph 41(2)(l) provides that the Commissioner's functions include evaluating the adequacy of systems and procedures in Agencies for ensuring compliance with the Code of Conduct (see section 13 of the PS Act as amended by part 7 of Schedule 1).

Proposed paragraph 41(2)(m) provides that the Commissioner's functions include inquiring into alleged breaches of the Code of Conduct by Agency Heads (see proposed section 41A below).

Proposed paragraph 41(2)(n) provides that the Commissioner's functions include inquiring into and determining whether an APS employee, or a former APS employee, has breached the Code of Conduct (see proposed section 41B below).

Proposed paragraph 41(2)(o) provides that the Commissioner's functions include inquiring into whistleblower reports made to the Commissioner, or to a person authorised by the Commissioner, for the purposes of section 16 of the PS Act (see also Part 8 of Schedule 1—whistleblower reports).

Proposed paragraph 41(2)(p) provides that the Commissioner's functions include other functions conferred on the Commissioner by the PS Act, the Regulations or any other law.

Proposed paragraph 41(2)(q) provides that the Commissioner's functions include other functions as directed by the Prime Minister by legislative instrument. This proposed paragraph would allow the Prime Minister to direct the Commissioner to perform functions that would not be disallowable by the Parliament.

Proposed paragraph 41(2)(r) provides that the Commissioner's functions include doing anything incidental to or conducive to the performance of any of the Commissioner's functions.

Reports may include recommendations

Proposed subsection 41(3) provides that reports made by the Commissioner in performing his or her duties may include recommendations.

Fees

Proposed subsection 41(4) provides that the Regulations may authorise the Commissioner to charge fees (on behalf of the Commonwealth) for the performance, on request, of the Commissioner's functions.

Section 41A—Inquiry into alleged breach of Code of Conduct by Agency Head

Proposed subsection 41A(1) provides that the Commissioner may inquire into an alleged breach of the Code of Conduct by an Agency Head for the purposes of proposed paragraph 41(2)(m) of the Commissioner's functions.

Proposed subsection 41A(2) provides that the Commissioner must report on the results of an inquiry under proposed subsection 41A(1), including, if relevant, recommendations for sanctions, and sets out to whom the Commissioner must report. If the Agency Head is a Secretary, the Commissioner must report to the Prime Minister. If the Agency Head is the Head of an Executive Agency, the Commissioner must report to the Agency Minister. If the Agency Head is the Head of a Statutory Agency that is prescribed by the Regulations for the purposes of paragraph (c) of proposed subsection 41A(2), the Commissioner must report to the Presiding Officers. If the Agency Head is the Head of a Statutory Agency that is not prescribed by the Regulations for the purposes of paragraph (c) of proposed subsection 41A(2), the Commissioner must report to the Agency Minister.

Proposed subsection 41A(3) provides that the Regulations may prescribe circumstances in which the Commissioner may decline to conduct an inquiry into an alleged breach of the Code of Conduct by an Agency Head, or may discontinue such an inquiry without making a report.

Section 41B—Inquiry into alleged breach of Code of Conduct by APS employee or former APS employee

Request for inquiry

Proposed subsection 41B(1) provides that the Commissioner may, for the purposes of paragraph (n) of proposed subsection 41(2), inquire into and determine whether an APS employee, or a former APS employee, in an Agency has breached the Code of Conduct, if the Commissioner has been requested by the Agency Head or the Prime Minister to do so and considers that it would be appropriate to do so.

Proposed subsection 41B(2) provides that the Prime Minister may make a request under paragraph (1)(a) of proposed section 41B in relation to an alleged breach of the Code of Conduct of which the Prime Minister has become aware as a result of, or in the course of, a systems review (outlined in proposed section 41C below) or a special review (outlined in proposed section 41D below).

Procedures for inquiry

Proposed subsection 41B(3) provides that the Commissioner must establish written procedures for inquiring into and determining whether an APS employee, or a former APS employee, in an Agency has breached the Code of Conduct (including by engaging in conduct referred to in proposed subsection 15(2A)). The procedures established by the Commissioner must comply with basic procedural requirements prescribed by the Regulations and must have due regard to procedural fairness.

Proposed subsection 41B(4) provides that in addition, and without affecting proposed subsection 41B(3), the procedures may differ for different categories of APS employees or former APS employees. The procedures may also be different for APS employees or former

APS employees who have been convicted of an offence against a Commonwealth, State or Territory law in respect of conduct that is alleged to constitute a breach of the Code of Conduct, or who have been found to have committed such an offence but no conviction has been recorded.

Proposed subsection 41B(5) provides that the Commissioner must make the procedures established under proposed subsection 41B(3) publicly available.

Proposed subsection 41B(6) makes clear that the procedures established under proposed subsection 41B(3) are not legislative instruments. Section 41B(6) is included to assist readers, as the instrument is not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Commissioner's powers

Proposed subsection 41B(7) provides that the Commissioner may exercise the same powers as the Agency Head may exercise in determining whether an APS employee, or a former APS employee, in the Agency has breached the Code of Conduct, when the Commissioner is conducting an inquiry into a suspected breach of the Code of Conduct by an APS employee or a former APS employee.

Report on results of inquiry

Proposed subsection 41B(8) provides that the Commissioner must report on the results of an inquiry and determination under proposed section 41B (including an inquiry that is discontinued) in relation to an APS employee, or a former APS employee, in an Agency to the Agency Head, and, if the Prime Minister requested the inquiry, to the Prime Minister.

Recommendation of sanctions

Proposed subsection 41B(9) provides that the Commissioner may recommend any of the sanctions referred to in subsection 15(1) of the PS Act if the Commissioner finds that an APS employee in an Agency has breached the Code of Conduct and if the Commissioner is requested by the Agency Head to recommend sanctions in respect of the breach (or, if the Prime Minister requested the inquiry, by the Prime Minister).

A note to proposed subsection 41B(9) makes clear that a sanction referred to in subsection 15(1) of the PS Act would be imposed on the APS employee by the Agency Head, not by the Commissioner.

Discontinuation of inquiry

Proposed subsection 41B(10) provides that the Regulations may prescribe the circumstances in which the Commissioner may discontinue an inquiry under proposed section 41B.

Section 41C—Systems reviews

Proposed subsection 41C(1) would enable the Prime Minister to direct the Commissioner to conduct a review (a 'systems review') of any matter relating to an APS Agency, including the management and organisational systems, structures or processes in an Agency, and the functional relationship between two or more agencies.

Proposed subsection 41C(2) provides that an Agency Minister may request the Prime Minister to make a direction under proposed subsection 41C(1) that relates to an Agency.

Proposed subsection 41C(3) provides that the Secretary of a Department may request the Prime Minister to make a direction under proposed subsection 41C(1) that relates to the Department or any other Agency in the same portfolio as the Department.

Proposed subsections 41C(4) provides that the Commissioner must report on the results of a systems review to the Prime Minister and, if the review was conducted because of a request by an Agency Minister or a Secretary, to the Agency Minister or the Secretary.

Proposed subsection 41C(5) makes clear that if a direction given under proposed subsection 41C(1) from the Prime Minister to the Commissioner to conduct a systems review is made in writing, the direction is not a legislative instrument. This proposed subsection is included to assist readers as the instruments are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Section 41D—Special reviews

Proposed subsection 41D(1) would enable the Prime Minister to direct the Commissioner to conduct a review (a ‘special review’) of any matter relating to an APS Agency or the functional relationship between two or more agencies.

Proposed subsection 41D(2) provides that the Commissioner must report on the results of a systems review to the Prime Minister and the Agency Minister of each Agency to which the review relates.

Proposed subsection 41D(3) makes clear that if a direction given under proposed subsection 41D(1) from the Prime Minister to the Commissioner to conduct a special review is made in writing, the direction is not a legislative instrument. This proposed subsection is included to assist readers as the instruments are not legislative instruments within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 17—paragraph 43(1)(a), item 18—paragraph 43(1)(b) and item 19—paragraph 43(1)(c)

These items amend paragraph references in subsection 43(1) of the PS Act (Commissioner’s inquiry powers). Each of the following would be a special inquiry for the purposes of section 43 of the PS Act:

- (a) an inquiry that is conducted by the Commissioner for the purposes of paragraph (c), (f), or (l) of proposed subsection 41(2), and notified by the Commissioner in the *Gazette*;
- (b) an inquiry that is conducted by the Commissioner for the purposes of paragraph (m) or (o) of proposed subsection 41(2); and
- (c) an inquiry on a matter referred to the Commissioner under paragraph (k) of proposed subsection 41(2) , by notice in the *Gazette*.

Item 20—at the end of subsection 43(1)

This item amends section 43 of the PS Act to provide for a special review (see proposed subsection 41D) to be a special inquiry for the purposes of section 43.

The Prime Minister would not be required to publish a notice in the *Gazette* of a direction to the Commissioner to conduct a special review under proposed subsection 41D(1) but could publish such a notice if she or he wished to do so.

Item 21—subsection 49(2) and item 22—subsection 51(3)

These items amend references to the Commissioner in subsections 49(2) and 51(3) of the PS Act to refer to the ‘Australian Public Service Commissioner’.

Item 23—after subsection 78(5)

This item amends section 78 of the PS Act to insert an additional subsection such that the Commissioner may, in writing, delegate to a former senior official any of the Commissioner’s powers or functions under section 38 of the PS Act (Commissioner’s certificate required for termination of SES employment) and paragraphs (m), (n) or (o) of proposed subsection 41(2).

Item 24—subsection 78(12)

This item amends subsection 78(12) of the PS Act to insert a definition of a ‘former senior official’ to whom the Commissioner may delegate powers or functions under proposed subsection 78(5A).

‘Former senior official’ is defined as a person who held, but no longer holds, an office or appointment under an Act, or a person who was, but is no longer, an SES employee, and who does not hold an office or appointment under an Act.

Part 5—Special Commissioners

Public Service Act 1999

Item 25—section 7

This item proposes to insert a definition of a Special Commissioner, which means a Special Commissioner appointed under proposed section 48A.

Item 26—at the end of Part 5

This item proposes to insert Division 3 at the end of Part 5 of the PS Act.

Division 3—Special Commissioners

Section 48A—Appointment of Special Commissioners

The proposed section 48A outlines the arrangements for the appointment of Special Commissioners.

Proposed subsection 48A(1) provides that the Governor-General may, by written instrument, on the recommendation of the Prime Minister, appoint one or more Special Commissioners to assist the Commissioner in conducting a specified systems review or special review, or a part of such a review.

Proposed subsection 48A(2) provides that the Prime Minister must not recommend that a person be appointed as a Special Commissioner unless he or she has consulted the Commissioner about the appointment.

Proposed subsection 48A(3) provides that a Special Commissioner may be appointed on a full time or part time basis.

Proposed subsection 48A(4) provides that a Special Commissioner holds office for the period specified in the instrument of appointment.

Section 48B—Remuneration and other terms and conditions of appointment

The proposed section 48B outlines the arrangements for the remuneration and the terms and conditions of appointment of Special Commissioners.

Remuneration and allowances

Proposed subsection 48B(1) provides that a Special Commissioner is to be paid the remuneration that is determined by the Remuneration Tribunal. If no determination of that remuneration by the Remuneration Tribunal is in operation, a Special Commissioner is to be paid the remuneration that is prescribed by the Regulations.

Proposed subsection 48B(2) provides that the allowances to be paid to a Special Commissioner are prescribed by the Regulations.

Proposed subsection 48B(3) provides that proposed subsections 48B(1) and 48B(2) have effect subject to the *Remuneration Tribunal Act 1973*.

Leave of absence

Proposed subsection 48B(4) provides that a full-time Special Commissioner has the recreation leave entitlements that are determined by the Remuneration Tribunal.

Proposed subsection 48B(5) provides that the Prime Minister may grant a full-time Special Commissioner leave of absence, other than recreation leave, on the terms and conditions as to remuneration or otherwise that the Prime Minister determines.

Proposed subsection 48B(6) provides that the Prime Minister may grant leave of absence to a part-time Special Commissioner on the terms and conditions that the Prime Minister determines.

Other terms and conditions

Proposed subsection 48B(7) provides that a Special Commissioner holds office on the terms and conditions (if any) in relation to matters not covered by the PS Act that are determined by the Prime Minister.

An instrument determining terms and conditions of appointment of Special Commissioners or granting leave of absence is not a legislative instrument owing to item 11 of Part 1 of Schedule 1 to the *Legislative Instruments Regulations 2004*.

Section 48C—Termination of appointment

Proposed subsection 48C(1) provides that the Governor-General may, by notice in writing, on the recommendation of the Prime Minister, terminate the appointment of a Special Commissioner at any time.

Proposed subsection 48C(2) provides that the Prime Minister must consult the Commissioner before recommending that the appointment of a Special Commissioner be terminated.

As the Governor-General may terminate the appointment of a Special Commissioner at any time there is no equivalent in relation to Special Commissioners of subsections 47(2) or 54(2) of the PS Act, which relate to the removal from office of the Commissioner and the MPC.

Part 6—APS Values and APS Employment Principles

Public Service Act 1999

The purpose of the proposed amendments in Part 6 is to revise the APS Values and introduce a set of Employment Principles. The proposed five APS Values, together with the APS Employment Principles, capture the essence of the existing 15 APS Values under the PS Act.

The APS Values and Employment Principles are intended to:

- provide the philosophical underpinning for the APS;
- reflect public expectations of the relationship between public servants and the Government, the Parliament and the Australian community;
- articulate the culture and operating ethos of the APS; and
- support and inform the Commissioner’s Directions to be issued under the authority of the Bill.

The Values and Employment Principles are statements about the essential character and philosophy of the APS, defining what the APS is, and how it should operate. The proposed Employment Principles will guide employment and workplace relationships in the APS, and substantially replicate existing provisions within the PS Act.

Item 27—section 7

This item inserts a definition of ‘APS Employment Principles’.

Item 28—section 10

This item repeals existing section 10 of the PS Act, which is to be replaced by proposed sections 10 and 10A.

Section 10—APS Values

Proposed section 10 outlines the five APS Values: ‘Committed to Service’; ‘Ethical’; ‘Respectful’; ‘Accountable’; and ‘Impartial’.

Each headline Value is clarified in the section by a supporting statement. The scope and application of individual Values may also be set in binding Directions issued by the Commissioner under section 11 of the PS Act.

Proposed subsection 10(1) provides that the ‘Committed to Service’ Value means that the APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.

Proposed subsection 10(2) provides that the ‘Ethical’ Value means that the APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

Proposed subsection 10(3) provides that the ‘Respectful’ Value means that the APS respects all people, including their rights and their heritage.

Proposed subsection 10(4) provides that the ‘Accountable’ Value means that the APS is open

and accountable to the Australian community under the law and within the framework of Ministerial responsibility.

Proposed subsection 10(5) provides that the ‘Impartial’ Value means that the APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.

Section 10A—APS Employment Principles

Proposed section 10A introduces a set of APS Employment Principles and ensures that decisions relating to engagement or promotion are based on merit.

The APS Employment Principles, set out in proposed subsection 10A(1), largely comprise the existing APS Values that relate to workplace relationships, and stipulate that the APS is a career-based public service that:

- (a) makes fair employment decisions with a fair system of review;
- (b) recognises that the usual basis for engagement is as an ongoing APS employee;
- (c) makes decisions relating to engagement and promotion that are based on merit (further detail on merit is set out at proposed section 10A(2));
- (d) requires effective performance from each employee;
- (e) provides flexible, safe and rewarding workplaces where communication, consultation, cooperation and input from employees on matters that affect their workplaces are valued;
- (f) provides workplaces that are free from discrimination, patronage and favouritism; and
- (g) recognises the diversity of the Australian community and fosters diversity in the workplace.

The Commissioner’s Directions may determine the scope or application of the APS Employment Principles (see proposed subsections 11A(2) and (3), part 14 of Schedule 1).

Proposed subsection 10A(2) provides further detail on merit based engagement and promotion in the APS to proposed paragraph 10A(1)(c). The subsection stipulates that for the APS, a decision is merit-based if:

- (a) all eligible members of the community were given a reasonable opportunity to apply to perform the relevant duties; and
- (b) an assessment is made of the relative suitability of the candidates to perform the relevant duties, using a competitive selection process; and
- (c) the assessment is based on the relationship between the candidates’ work-related qualities and the work-related qualities genuinely required to perform the relevant duties; and

- (d) the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the relevant duties; and
- (e) the assessment is the primary consideration in making the decision.

Item 29—subsection 11(1)

This item amends section 11 of the PS Act so that the Commissioner ‘may issue directions in relation to any of the APS Values’ rather than ‘must issue directions in relation to each of the APS Values’. This amendment will allow the Commissioner to issue directions on each APS Value unless there is no practical need to do so.

Item 30—subsection 11(1)

This item adds a note to refer to section 42 for general provisions relating to Commissioner’s Directions. Among other things, section 42 clearly states that the Commissioner’s Directions are binding on APS Agency Heads and employees.

Item 31—section 12

This item proposes that the existing section 12 of the PS Act be repealed and replaced by proposed section 12, which requires Agency Heads to promote the new APS Employment Principles in addition to the APS Values.

Item 32—section 17

This item repeals the existing section 17 of the PS Act, ‘prohibition on patronage and favouritism’, which has been incorporated into the APS Employment Principles (see proposed paragraph 10A(1)(f)).

Item 33—section 18

This item provides that Agency Heads must establish a workplace diversity program to assist in giving effect to the APS Employment Principles. This reflects that the relevant provisions will be contained in the APS Employment Principles rather than the APS Values as is currently the situation.

Item 34—section 22(2)

This item adds a note to refer to the Employment Principle in paragraph 10A(1)(b), which provides that the usual basis for engagement is as an ongoing APS employee.

Item 35—subsection 22(3)

This item repeals the existing subsection 22(3) of the PS Act, which provides that engagement of APS employees is usually in an ongoing capacity, as this has been incorporated into the APS Employment Principles (see proposed paragraph 10A(1)(b)).

Item 36—at the end of section 39

This item broadens section 39 so that an Agency Head does not need to uphold the proposed APS Employment Principles when complying with a direction by an Agency Minister under

section 39(2) regarding appointments of Heads of Mission. Currently such appointments are exempt from the prohibition on patronage and favouritism (see section 17(2) of the PS Act), and this amendment would maintain that position. This item also makes it clear that the APS Employment Principles, including that decisions relating to engagement and promotion are based on merit (see proposed section 10A(1)(c)), do not apply to the appointment of Heads of Mission.

Part 7—Code of Conduct

Public Service Act 1999

Item 37—subsections 13(1) to (4)

This item amends the first four elements of the APS Code of Conduct (section 13) so that they apply to conduct where there is a connection between that conduct and the employee's employment.

Item 38—subsection 13(11)

This item amends subsection 13(11) of the PS Act to require employees to behave in a way that upholds the integrity and good reputation of their Agency (as well as of the APS, which is currently required), and to comply with the proposed APS Values and APS Employment Principles (see Part 6 of Schedule 1).

Item 39—section 14 (heading)

This item replaces the existing section 14 heading to clarify that statutory office holders are also bound by the Code of Conduct for prescribed purposes.

Item 40—subsection 14(2)

This item replaces the existing subsection 14(2) and proposes that statutory office holders are bound by the Code of Conduct subject to the extent prescribed in the regulations. The provisions may differ for different statutory office holders or different classes of statutory office holders.

Item 41—before subsection 15(1)

This item inserts the subheading 'Sanctions that may be imposed'.

Item 42—subsection 15(1)

This item amends subsection 15(1) to provide that an Agency Head may impose sanctions on an APS employee in the Agency who is found through an inquiry of the Commissioner (see proposed subsection 41B(3)) or the MPC (see proposed subsection 50A(2)) to have breached the Code of Conduct.

Item 43—at the end of subsection 15(1)

This item proposes to add a note to refer to sections 29 and 38 for detail in relation to terminating an APS employee's employment.

Item 44—subsections 15(3), (4) and (5)

This item repeals the existing provisions of the PS Act, to be replaced by proposed subsections 15(2A), (3), (4), (5), (6), (7) and (8).

Providing false or misleading information etc. in connection with engagement as an APS employee

Proposed subsection 15(2A) allows action to be taken in relation to APS employees who have, before engagement in the APS, provided false or misleading information, wilfully failed to disclose information, or otherwise failed to act with honesty or integrity, in connection with their engagement in the circumstances set out in the proposed subsection. This provision is intended to deal with these circumstances in the same way as a suspected breach of the Code of Conduct (as per subsection 15(1)).

Procedures for determining whether APS employee, or former APS employee, has breached the Code of Conduct etc.

Proposed subsections 15(3), (4), (5), (6), (7) and (8) prescribe the procedures that an Agency Head must follow when undertaking inquiries into suspected breaches of the Code of Conduct by APS employees or former APS employees.

Proposed subsection 15(3) provides that an Agency Head must establish written procedures to determine whether an APS employee or former employee in their Agency has breached the Code of Conduct and the sanction that is to be imposed. Proposed subsection 15(4) provides that these procedures must comply with basic procedural requirements set out in the Commissioner's Directions, and must have due regard to procedural fairness.

Proposed subsection 15(5) provides that in addition to and without affecting the requirements of proposed subsection 15(4), the procedures may differ for different categories of APS employees or former APS employees. This will make it clear that a determination of a breach of the Code of Conduct may be made after an employee has separated from the APS.

Proposed paragraph 15(5)(b) provides that the procedures may also differ for APS employees or former APS employees who have been convicted of an offence against a Commonwealth, State or Territory law in respect of conduct that is alleged to constitute a breach of the Code of Conduct, or who have been found to have committed such an offence but no conviction has been recorded.

Proposed subsection 15(6) requires that the Commissioner issue Directions about the basic procedural requirements required by proposed paragraph 15(4)(a).

Proposed subsection 15(7) requires that an Agency Head make the procedures established under proposed subsection (3) publicly available. The intention of this is to promote transparency and accountability in investigating alleged breaches of the Code of Conduct.

Proposed subsection 15(8) is included to assist readers, as written procedures under proposed subsection (3) would not be a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Item 45—section 19

This item ensures that an Agency Head is not subject to direction by any Minister in relation to breaches of the Code of Conduct (proposed amended section 15) or to the protection of whistleblowers (proposed amended section 16). The purpose of this is to clarify that Agency Heads are not subject to Ministerial direction in relation to action taken under the Code of

Conduct, as is already the case in relation to other staffing powers (see Division 1 or 2 of Part 4 of the PS Act).

Item 46—after paragraph 50(1)(c)

This item adds an additional function of the MPC to inquire into and determine, in accordance with the requirements outlined in proposed section 50A (below), suspected breaches of the Code of Conduct by APS employees or former APS employees.

Item 47—after section 50

This item inserts proposed section 50A, which outlines the requirements for the MPC to conduct an inquiry into alleged breaches of the Code of Conduct by APS employees or former APS employees.

Proposed subsection 50A(1) outlines the process for an Agency Head to request such an inquiry by the MPC. The MPC may, when requested to do so by an Agency Head and with the written consent of the employee concerned, determine whether there has been a breach of the Code of Conduct. The decision would not be subject to further administrative review under the PS Act.

The MPC would have the discretion to decline such a request.

Proposed subsections 50A(2), (3), (4) and (5) prescribe a number of matters relating to the procedures that the MPC must follow when undertaking inquiries into suspected breaches of the Code of Conduct by APS employees or former APS employees.

Proposed subsection 50A(2) provides that the MPC must establish written procedures for inquiring into and determining whether an APS employee or former APS employee has breached the Code of Conduct. These procedures are similar to those the Commissioner (proposed section 41B) and Agency Heads (proposed section 15) must follow, and must comply with basic procedural requirements prescribed by the regulations and have due regard to procedural fairness.

Proposed subsection 50A(3) provides that in addition to and without affecting the requirements of proposed subsection 50A(2), the procedures may differ for different categories of APS employees or former APS employees. This is to make clear that a determination of a breach of the Code may be made after an employee has separated from the APS.

Proposed paragraph 50A(3)(b) provides that the procedures may also be different for APS employees or former APS employees who have been convicted of an offence against a Commonwealth, State or Territory law in respect of conduct that is alleged to constitute a breach of the Code of Conduct, or who have been found to have committed such an offence but no conviction has been recorded.

Proposed subsection 50A(4) requires the MPC to ensure that the procedures established under proposed subsection 50A(2) are made publicly available.

Proposed subsection 50A(5) is included to assist readers, as the written procedures would not be not a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

MPC's powers

Proposed subsection 50A(6) provides that the MPC may, when conducting an inquiry into a suspected breach of the Code of Conduct, exercise the same powers as the Agency Head may exercise in determining whether an APS employee, or a former APS employee, in the Agency has breached the Code of Conduct.

Report on results of inquiry

Proposed subsections 50A(7) provides that the MPC must report on the results of an inquiry and determination under proposed section 50A to the Agency Head who requested the inquiry.

Part 8—Whistleblower reports

Public Service Act 1999

Item 48—section 16 (heading)

Item 48 changes the heading of section 16 from ‘Protection for whistleblowers’ to ‘Whistleblower reports’ to reflect the proposed amendments to require Agency Heads to establish procedures for an APS employee to make a whistleblower report and for Agency Heads to deal with those reports (see item 52).

Item 49—section 16 (after the heading)

Item 49 inserts the sub-heading ‘Protection for whistleblowers’.

Item 50—section 16

Item 50 changes the current provisions in section 16 of the PS Act to subsection 16(1) to reflect the proposed additional subsections 16(2) to (6) outlined below.

Item 51—paragraph 16(b)

Item 51 corrects a grammatical error in the current PS Act.

Item 52—at the end of section 16

Item 52 proposes to insert sections 16(2) to (6) to require Agency Heads to establish procedures for an APS employee to make a whistleblower report and for Agency Heads to deal with those reports.

Whistleblower reports made to Agency Heads etc.

Proposed paragraph 16(2)(a) requires that an Agency Head must establish procedures for an APS employee to make a whistleblower report of an alleged breach of the Code of Conduct to an Agency Head or a person authorised by an Agency Head to receive whistleblower reports. An APS employee may make a whistleblower report to any Agency Head.

Proposed paragraph 16(2)(b) requires that an Agency Head must establish procedures to deal with a whistleblower report.

Proposed subsection 16(3) requires that the procedures established by an Agency Head under proposed subsection 16(2) must comply with basic procedural requirements (if any) prescribed by the Regulations.

Proposed subsection 16(4) is included to assist readers, as the procedures under proposed subsection 16(2) would not be a legislative instrument within the meaning of section 5 of the *Legislative Instruments Act 2003*.

Whistleblower reports made to the Commissioner or MPC etc.

Proposed paragraph 16(5)(a) provides a regulation-making power to prescribe procedures for an APS employee to make a whistleblower report of an alleged breach of the Code of

Conduct to the Commissioner or the MPC or to a person authorised by the Commissioner or the MPC to receive whistleblower reports.

Proposed paragraph 16(5)(b) provides a regulation-making power to prescribe basic procedural requirements that are to be complied with by the Commissioner or MPC in dealing with whistleblower reports.

Circumstances for declining to inquire, or discontinuing an inquiry, into a whistleblower report

Proposed subsection 16(6) provides that the Regulations may prescribe circumstances in which Agency Heads, the Commissioner or MPC may decline to conduct, or may discontinue, an inquiry into a whistleblower report.

Item 53—paragraph 50(1)(a)

Item 53 repeals the current paragraph 50(1)(a) and replaces it such that it is a function of the MPC to inquire, subject to the Regulations, into whistleblower reports made to the MPC or to a person authorised by the MPC to receive whistleblower reports (see proposed amended section 16 above).

Item 54—subsection 50(2)

Item 54 proposes to extend the current provisions which apply to inquiries under paragraph 50(1)(c) to inquiries under the proposed paragraph 50(1)(a) as part of the MPC's functions to include whistleblower reports (see proposed section 16). The proposed amendment would give the MPC equivalent powers to those currently available to the Commissioner when investigating whistleblower reports. The functions performed by the Commissioner and MPC in relation to APS whistleblowing are identical, and the current arrangements are inconsistent.

Part 9—Review of actions

Public Service Act 1999

Item 55—paragraph 33(4)(d)

Item 55 proposes to amend paragraph 33(4)(d) so that reviews of action will be able to be conducted by the MPC, in addition to the current arrangements which provide that the MPC must nominate another person or establish a three-member committee to conduct a review.

Item 56—subsection 33(7) (definition of APS action)

Item 56 proposes to expand the definition of an APS action (i.e. a reviewable action) to include action by the Commissioner under proposed section 41B, including a finding by the Commissioner that an APS employee has breached the Code of Conduct (see proposed section 41B, part 4 of Schedule 1).

Part 10—Temporary APS employees

Public Service Act 1999

The purpose of the proposed amendments is to amend the PS Act to provide for two categories of employees—ongoing and temporary. The provisions setting out the sub-categories of temporary employees will be moved from the PS Act to the Regulations.

The principle that ongoing employment is the usual basis for engagement is retained, and has been incorporated into the APS Employment Principles (see proposed paragraph 10A(1)(b), part 6 of Schedule 1).

Item 57—section 7 (paragraph (b) and (c) of the definition of category of APS employee)

Item 57 proposes to redefine the categories of APS employees as ‘ongoing’ and ‘temporary’, with ‘temporary employees’ covering those engaged for a specified term or specified task, and those engaged for irregular or intermittent duties. The different categories of temporary employment will continue to be recognised in the regulations.

Item 58—section 7 (definition of non-ongoing APS employee)

Item 58 proposes to repeal the definition of a non-ongoing APS employee, to be replaced by the temporary APS employee category (see item 59 below for the proposed interpretation).

Item 59—section 7

Item 59 proposes to insert a definition of a temporary APS employee to mean a person engaged as a temporary APS employee, as mentioned in paragraph 22(2)(b) below.

Item 60—paragraphs 22(b) and (c)

Item 60 proposes to amend subsection 22(2) to provide that the engagement of an APS employee is to be either as an ongoing APS employee or as a temporary APS employee.

Item 61—subsections 22(4) and (5)

Item 61 proposes to repeal the subsections to amend the regulation-making power to ‘prescribe’ rather than ‘limit’ the current circumstances applying to temporary APS employment. As is the case currently, the Regulations will prescribe the circumstances in which persons may be engaged as temporary APS employees, the maximum periods of engagement, and limits on extension of employment.

Item 62—subsection 29(4)

Item 62 proposes to replace the reference to ‘non-ongoing employees’ in this subsection with ‘temporary employees’. In addition, it is proposed to amend the regulation making power in subsection 29(4) so that it is limited to specifying grounds for termination of temporary employees (rather than grounds or procedures as is specified currently). An associated change to the Commissioner’s direction-making power (see item 74, Part 14 of Schedule 1) will enable procedures relating to termination of both ongoing and temporary employees to be set out in the Commissioner’s Directions.

Item 63—subsection 29(5)

Item 63 proposes to substitute the term ‘temporary employee’ for ‘non-ongoing employee’ in this subsection.

Part 11—Machinery of government changes

Public Service Act 1999

Item 64—paragraph 72(1)(b) and item 65—subsection 72(3)

Items 64 and 65 propose to change references to ‘employees of a specified Commonwealth authority’ to ‘non-APS employees of a specified Commonwealth body or Commonwealth authority’.

The purpose of this change is to remove any doubt that the Commissioner’s power to move staff out of the APS in order to give effect to a Machinery of Government change covers those non-APS Commonwealth bodies that do not have separate legal identity, such as the Australian Federal Police.

Item 66—at the end of subsection 72(3)

Item 66 proposes to add to the protection of employee entitlements provided by subsection 72(3) the case where an APS employee’s terms and conditions of employment are set by a written contract of employment.

Item 67—subsection 72(4)

Item 67 proposes to amend the PS Act to recognise that terms and conditions of employment in the APS may be set through written contracts of employment.

Item 68—subsection 72(5)

Item 68 proposes to amend the subsection to refer to ‘terms and conditions of employment’ rather than ‘remuneration and other conditions of employment’. Similar amendments are to be made to section 24 of the PS Act (see items 90 and 91 of Part 15, Schedule 1) so as to standardise the wording used in the PS Act relating to protection of employee entitlements.

Item 69—after subsection 72(5)

Item 69 inserts proposed subsection 72(5A), which provides the Commissioner with discretion to determine whether employment-related matters can continue if the employee has moved from an APS Agency to another APS Agency following a Machinery of Government change (as outlined in paragraph 72(1)(a)). The particular employment-related matters covered by this provision would be identified in the Regulations.

A determination referred to in proposed section 72(5A) would not be a legislative instrument because of item 13 of the table in subsection 7(1) of the *Legislative Instruments Act 2003*.

Part 12—Confidentiality of information

Public Service Act 1999

Item 70—after Part 10

This item inserts Part 10A which outlines the protection of information provisions relating to the Commissioner's functions and the MPC's functions.

Protection of information

Proposed subsection 72A(1) defines the terms 'entrusted person' (which is the Commissioner or a person acting on behalf of or assisting the Commissioner) and 'protected information' (which is information obtained by an entrusted person in the conduct of one of the Commissioner's review or inquiry functions) for the purposes of section 72A.

Proposed subsection 72A(2) sets out a general prohibition on the disclosure or use of protected information by an entrusted person.

Proposed subsection 72A(3) provides that an entrusted person may make a record of, disclose or otherwise use protected information for the purposes of or in connection with the performance of their duties or functions, or in exercising their powers under the PS Act or Regulations.

Proposed subsections 72A(4), (5) and (6) set out the circumstances in which the Commissioner may disclose protected information.

Proposed subsection 72A(4) provides that the Commissioner is authorised to disclose protected information in a report prepared for purposes connected with the performance of the Commissioner's functions or the exercise of the Commissioner's powers under the PS Act or Regulations, where the Commissioner is satisfied that the disclosure is necessary for setting out the report's conclusions and recommendations. The proposed subsection is intended to authorise disclosure of protected information within the report itself, rather than authorising broad disclosure of information that is contained in a report.

Proposed subsection 72A(5) provides that the Commissioner may disclose protected information if that disclosure is in the interests of an Agency, or a person, or is in the public interest. The Commissioner must also be satisfied that the disclosure is not likely to interfere with a review or inquiry under the PS Act or Regulations.

Proposed subsection 72A(6) provides that the Commissioner must not disclose personal information when making a disclosure under subsection 72A(5) unless the Commissioner is satisfied that the disclosure is fair and reasonable in all the circumstances.

Proposed subsection 72A(7) provides that a person who is or was an entrusted person cannot be compelled to disclose protected information obtained in the conduct of any of the Commissioner's review or inquiry functions or as prescribed by the Regulations.

Proposed section 72A is intended to apply to disclosure of information by the Commissioner in the same way as the current scheme does under the Regulations.

Proposed subsection 72B(1) defines the terms ‘entrusted person’ (which is the MPC or a person acting on behalf of or assisting the MPC, including a member of a Promotion Review Committee or an Independent Selection Advisory Committee), ‘prescribed entrusted person’ (which means an entrusted person prescribed by the Regulations, and is to include a member of a Promotion Review Committee or an Independent Selection Advisory Committee) and ‘protected information’ (which is information obtained for the purposes of or in connection with the performance of the MPC’s functions or the exercise of the MPC’s powers).

Proposed subsection 72B(2) sets out a general prohibition on the disclosure or use of protected information by an entrusted person.

Proposed subsection 72B(3) provides that an entrusted person may make a record of, disclose or otherwise use protected information if it is required for the purposes of or in connection with the performance of their duties or functions or the exercise of their powers under the PS Act or Regulations.

Proposed subsections 72B(4), (5) and (6) set out the circumstances in which the MPC may disclose protected information.

Proposed subsection 72B(4) provides that the MPC is authorised to disclose protected information in a report prepared for purposes connected with the performance of the MPC’s functions or the exercise of the MPC’s powers under the PS Act or Regulations where the MPC is satisfied that the disclosure is necessary for setting out the report’s conclusions and recommendations. The proposed subsection is intended to authorise disclosure of protected information within the report itself, rather than authorising broad disclosure of information that is contained in a report.

Proposed subsection 72B(5) provides that the MPC may disclose protected information if that disclosure is in the interests of an Agency, or a person, or is in the public interest. The MPC must also be satisfied that the disclosure is not likely to interfere with a review or inquiry under the PS Act or Regulations.

Proposed subsection 72B(6) provides that the MPC must not disclose personal information when making a disclosure under subsection 72B(5) unless the MPC is satisfied that the disclosure is fair and reasonable in all the circumstances.

Proposed subsection 72B(7) provides that a person who is or was an entrusted person (other than a prescribed entrusted person) cannot be compelled to disclose protected information obtained in the conduct of any of the MPC’s review or inquiry functions or as prescribed by the Regulations.

Proposed subsection 72B(8) provides that a person who is or was a prescribed entrusted person is not competent and cannot be compelled to disclose protected information.

Proposed section 72B is intended to apply to disclosure of information by the MPC in the same way as the current scheme does under the Regulations.

Production of information

Proposed subsection 72C has a similar intent to section 8 of the *Ombudsman Act 1976* and aims to protect Agencies and APS employees who provide information to the Commissioner to assist in the performance of certain of the Commissioner’s functions.

Proposed subsections 72C(1) and (2) provide that section 72C applies where the Commissioner requests information or the production of a document, or a person reasonably believes that the information or document is relevant, in the context of any of the Commissioner's review or inquiry functions, and the person obtained that information or document lawfully and provides that information or document to the Commissioner.

Proposed subsection 72C(3) provides that if, by giving the information or producing a document, the person contravenes a law; might tend to incriminate themselves; discloses certain legal advice; breaches legal professional privilege; or acts contrary to the public interest, the giving of the information or production of the document is not admissible in evidence against the person, except in proceedings as set out in the subsection.

Proposed subsection 72C(4) provides that a person is not liable to penalty under any other law by virtue of providing the information or producing the document to the Commissioner. This does not include Code of Conduct action against an APS employee taken as a result of their providing the information.

Proposed subsection 72C(5) provides that giving information or producing the document to the Commissioner which includes a disclosure of personal information constitutes an authorised disclosure for the purposes of the *Privacy Act 1988*.

Proposed subsection 72C(6) provides that, outside the parameters of subsection (3), legal professional privilege in relation to the information or document is not otherwise affected.

Proposed subsection 72D has a similar intent to section 8 of the *Ombudsman Act 1976* and aims to protect Agencies and APS employees who provide information to the MPC to assist in the performance of the MPC's functions.

Proposed subsections 72D(1) and (2) provide that section 72D applies where the MPC requests information or the production of documents, or a person reasonably believes that the information or document is relevant, in the context of any of the MPC's functions, and the person obtained that information or document lawfully and provides that information or document to the MPC.

Proposed subsection 72D(3) provides that if, by giving the information or producing a document, the person contravenes a law; might tend to incriminate themselves; discloses certain legal advice; breaches legal professional privilege; or acts contrary to the public interest, the giving of the information or production of the document is not admissible in evidence against the person, except as in proceedings as set out in the subsection.

Proposed subsection 72D(4) provides that a person is not liable to penalty under any other law by virtue of providing the information or producing the document to the MPC. This does not include Code of Conduct action against an APS employee taken as a result of their providing the information.

Proposed subsection 72D(5) provides that giving information or producing a document to the MPC which includes a disclosure of personal information constitutes an authorised disclosure for the purposes of the *Privacy Act 1988*.

Proposed subsection 72D(6) provides that, outside the parameters of subsection (3), legal professional privilege in relation to the information or document is not otherwise affected.

Release of personal information

Proposed subsection 72E provides that the Regulations may specify the circumstances in which personal information may be used or disclosed, including imposing restrictions. These circumstances are authorised by law for the purposes of the *Privacy Act 1988*.

Item 71—Section 76

This item repeals section 76. This provision will be contained in proposed subsection 72E.

Part 13—Immunity from suit

Public Service Act 1999

Item 72—After section 78

This item inserts proposed subsection 78A which outlines the circumstances in which the Commissioner and MPC (and those acting on their authority) are immune from civil proceedings.

Proposed subsection 78A(1) provides that the Commissioner or a person acting on behalf of or assisting the Commissioner is immune from civil action in relation to anything done, or omitted to be done, in good faith in the performance of any of the Commissioner's inquiry or review functions.

Proposed subsection 78A(2) provides that the MPC or a person acting on behalf of or assisting the MPC is immune from civil action in relation to anything done, or omitted to be done, in good faith in the performance of any of the MPC's functions.

Part 14—Legislative instruments

Public Service Act 1999

Item 73—Section 7 (definition of Commissioner’s Directions)

This item amends the definition of the Commissioner’s Directions to reflect the revised direction-making provisions as set out below.

Item 74—after section 11

Proposed section 11A sets out the Commissioner’s general direction-making powers about employment matters and those relating to the APS Employment Principles.

Proposed subsection 11A(1) provides that the Commissioner may issue directions about employment matters relating to APS employees, including SES employees. The proposed subsection incorporates the current direction making provision in section 36 of the PS Act in relation to SES employees, which is to be repealed (see item 84, below). This will allow the Commissioner to issue directions on each APS Employment Principle, unless there is no practical need to do so.

Proposed subsection 11A(2) provides that the Commissioner may issue directions in relation to any of the APS Employment Principles in order to ensure the APS incorporates and upholds the Employment Principles, and to determine the scope and application of the Employment Principles where necessary. Proposed subsection 11A(3) provides that the APS Employment Principles have effect subject to any restrictions contained in the directions issues under proposed subsection 11A(2).

Proposed subsection 11A(4) provides that the Commissioner’s Directions have no effect to the extent that they are inconsistent with the Prime Minister’s Public Service Directions.

Item 75—subsection 21(2)

Proposed subsection 21(2) recognises that the Prime Minister’s Public Service Directions are now legislative instruments, registered in accordance with the *Legislative Instruments Act 2003*. Accordingly, it is no longer necessary to gazette these Directions.

Item 76—subsection 23(1)

Proposed subsection 23(1) provides that the Commissioner may make Classification Rules, registered in accordance with the *Legislative Instruments Act 2003*.

The Classification Rules, which prescribe an APS-wide framework for the classification of APS employees, will be made by the Commissioner, reflecting the movement of this function from the Department of Education, Employment and Workplace Relations to the Commission in July 2010. Registration under the *Legislative Instruments Act 2003* means that gazettal of the Classification Rules is no longer necessary.

Item 77—paragraph 23(4)(b)

This item reflects the introduction of the new general direction-making power of the Commissioner under proposed section 11A.

Item 78—Subsection 24(3), Item 79—At the end of subsection 24(3)

These items reflect that determinations made by the Public Service Minister under subsection 24(3) of the PS Act are now legislative instruments for the purposes of the *Legislative Instruments Act 2003*. It is no longer necessary to gazette these determinations.

Item 80—Subsection 26(2), Item 81—Paragraph 32(1)(a), Item 82—Subsection 32(2), Item 83—subsection 32(2),

These items reflect the introduction of the new general direction-making power of the Commissioner under proposed section 11A. It is proposed that matters covered by sections 26 and 32 of the PS Act (which relate to voluntary moves between APS agencies and the right of return of election candidates) that are currently set out in the Regulations will, in the future, be set out in the Commissioner's Directions.

Item 84—Section 36, Item 85—Paragraph 38(a)

These items reflect the introduction of the new general direction-making power of the Commissioner under proposed section 11A.

Item 86—Subsections 42(3) and (4)

Proposed subsection 42(4) provides that the Commissioner's Directions are disallowable legislative instruments, registered in accordance with the *Legislative Instruments Act 2003*. This corrects an oversight when that Act was introduced.

Proposed subsection 42(3) provides that the Commissioner's Directions may apply, adopt or incorporate matters contained in both the Prime Minister's Public Service Directions and the Classification Rules as in force from time to time, or at a particular time. As both the Classification Rules and the Prime Minister's Public Service Directions are not subject to disallowance, the *Legislative Instruments Act 2003* requires this express provision.

Part 15—Miscellaneous amendments

Public Service Act 1999

Item 87—subsection 6(2)

Proposed subsection 6(2) removes reference to persons engaged to perform services in the Australian Secret Intelligence Service (ASIS).

Since the introduction of the PS Act in December 1999, separate specific legislation has been proclaimed regulating the employment of persons in ASIS—the *Intelligence Services Act 2001*—with the result that ASIS is now a statutory authority. As a result, the continued reference to ASIS employees in this section is no longer necessary.

Item 88—subsection 23(4)

Proposed subsection 23(4) provides a clear power for an Agency Head to reduce classification in certain prescribed circumstances.

The provision currently does not provide a power for Agency Heads to reduce the classification of an employee without consent—rather, it is a prohibition on reduction except in certain defined circumstances. This has caused some confusion for Agencies, especially in relation to delegations of the exercise of the power.

Item 89—Subsection 23(5)

This item recognises that employees' terms and conditions of employment can be set other than by an 'industrial instrument'. The protections afforded by subsection 23(5) in relation to following any procedures applying to reduction in classification should also apply to such procedures that are included in these other mechanisms for setting terms and conditions.

Item 90—Section 24 (heading), Item 91—subsection 24(1), Item 92—subsection 24(3)

This item standardises the wording relating to protection of employee entitlements to the phrase 'terms and conditions of employment'.

Item 93—subsection 29(1) (note), Item 94—At the end of subsection 29(1)

This item reflects the new general direction-making power of the Commissioner under proposed section 11A in relation to the procedures to be followed in terminating the employment of an APS employee.

Item 95—At the end of section 40

This item provides the Commissioner with the explicit power to engage consultants rather than rely on an inherent power.

Item 96—At the end of section 49

This item provides the MPC with the explicit power to engage consultants rather than rely on an inherent power.

Item 97—Subsection 51(3)

This item provides that the MPC's annual report be included in the Commissioner's annual report, rather than the Commissioner's State of the Service report. This corrects a drafting error in the original PS Act.

Item 98—Subsection 73(4)

This item provides that the amount the Public Service Minister may authorise in relation to payments in special circumstances relating to matters arising from Commonwealth employment be prescribed by the regulations. This would enable the amount (currently capped at \$100,000) to be adjusted to align it to the amount that is available under similar provisions in the *Financial Management and Accountability Act 1997* and associated regulations.

Item 99—subsection 79(2)

This item increases the maximum number of penalty units for offences against regulations to be consistent with the usual restriction in accordance with the Criminal Law Guide published by the Attorney-General's Department.

It also repeals paragraphs 79(2)(a) and (b) as these matters are now to be dealt with in the PS Act (see parts 12 and 13 of Schedule 1).

SCHEDULE 2—Repeal

Public Employment (Consequential and Transitional) Amendment Act 1999

Item 1—the whole of the Act

The PECTA Act was the accompanying legislation to the current PS Act when it was introduced in 1999 and is now largely redundant. For this reason, it is proposed to repeal the PECTA Act. Some provisions with continuing application will be retained through the Regulations.

SCHEDULE 3—Amendments of other Acts

Australian Federal Police Act 1979

Items 1 – 2

The proposed amendments to the *Australian Federal Police Act 1979* replace references to the office of the ‘Public Service Commissioner’ with the ‘Australian Public Service Commissioner’.

Australian Law Reform Commission Act 1996

Item 3—Subsection 26(2A) (note)

Subsection 26(2A) of the *Australian Law Reform Commission Act 1996* requires the Australian Law Reform Commission and its President to comply with certain requirements and directions. The note to this subsection notes that section 19 of the PS Act has the effect that the President is not subject to any direction by a Minister in relation to the exercise of the President’s employer powers under Division 1 or 2 of Part 4 of the PS Act. Section 19 of the PS Act is proposed to be amended to include section 15 or 16, relating to suspected breaches of the APS Code of Conduct. It is proposed to amend the note in the ALRC Act to replicate the amendments to section 19 of the PS Act.

Family Law Act 1975

Item 4—Subsection 37B(4)

Subsection 37B(4) of the *Family Law Act 1975* currently provides that the Agency Head cannot take action under section 15 of the PS Act against the Principal Registrar, a Registrar or a Deputy Registrar unless such action is requested by the Chief Judge. Amendments to the PS Act provide that the MPC may investigate and determine a breach of the APS Code of Conduct by APS employees if requested to do so by an Agency Head, if the MPC considers it appropriate, and if the employee consents. It is further proposed that the Commissioner may investigate and determine a breach of the APS Code of Conduct by an APS employee if requested to do so by an Agency Head or the Prime Minister, and the Commissioner considers it appropriate to do so. The Prime Minister may only request such an inquiry if he or she becomes aware of suspected misconduct as a result of, or in the course of, a systems review or special review conducted by the Commissioner.

In order for the Prime Minister to be able to ask the Commissioner to inquire into suspected misconduct directly, it is proposed to amend section 37B(4) of the Family Law Act to also provide that a Code of Conduct investigation against the Principal Registrar, Registrar or Deputy Registrar cannot be undertaken by the MPC or the Commissioner unless an investigation is requested by the Chief Judge, except where the Commissioner was requested to conduct such an investigation by the Prime Minister.

The Commissioner would only investigate the actions or conduct of a Registrar in regard to the APS Code of Conduct, and not any judicial or quasi-judicial functions exercised by a Registrar. It is not the intention of the amendments to derogate from the inquiry functions of other statutory officers.

Ombudsman Act 1976

Items 5 – 6

The proposed amendments to the *Ombudsman Act 1976* replace references to the office of the ‘Public Service Commissioner’ with the ‘Australian Public Service Commissioner’.

Parliamentary Service Act 1999

Item 7—section 7

The proposed amendment to the *Parliamentary Service Act 1999* inserts a new definition for the ‘Australian Public Service Commissioner’.

Item 8—section 7

The proposed amendment to the *Parliamentary Service Act 1999* repeals the definition of ‘non-ongoing APS employee’.

Item 9—section 7

The proposed amendment to the *Parliamentary Service Act 1999* repeals the definition of ‘Public Service Commissioner’.

Item 10—section 7

The proposed amendment to the *Parliamentary Service Act 1999* inserts the definition of ‘temporary APS employee’.

Item 11—subsection 26A(1)

The proposed amendment to the *Parliamentary Service Act 1999* removes reference to ‘non-ongoing APS employee’ and replaces it with reference to ‘temporary APS employee’.

Items 12 – 13

The proposed amendments to the *Parliamentary Service Act* replace references to the office of the ‘Public Service Commissioner’ with the ‘Australian Public Service Commissioner’.

Privacy Act 1988

Items 14 – 15

The proposed amendments to the *Privacy Act 1988* replace references to the office of the ‘Public Service Commissioner’ with the ‘Australian Public Service Commissioner’.

Remuneration Tribunal Act 1973

Items 16 – 18

The proposed amendments to the *Remuneration Tribunal Act 1973* replace references to the office of the ‘Public Service Commissioner’ with the ‘Australian Public Service Commissioner’.

Superannuation Act 1976

Item 19—Paragraph 58(3)(f)

The proposed amendment to the *Superannuation Act 1976* relates to paragraph 58(3)(f) which deems a former unattached Secretary who retired under subsection 76F(1B) or section 76FA of the *Public Service Act 1922*, in its continued application because of section 8 of the PECTA Act, to have been retired involuntarily. It is proposed to repeal this section as the provision is no longer relevant and the PECTA Act is being repealed.

Superannuation Act 1990

Item 20—Subparagraph 6(1)(h)(i)

The proposed amendment to the *Superannuation Act 1990* relates to subparagraph 6(1)(h)(i) which provides that people who were in ‘eligible public employment’ as defined by the *Public Service Act 1922* and continued in that employment because of the PECTA Act, are eligible for membership in the Public Sector Superannuation Scheme. As this provision still has relevance, it is proposed to amend this section to refer to the PECTA Act as in force immediately before its repeal.

SCHEDULE 4—Application, saving and transitional provisions

Part 1—Preliminary

Item 1—Definitions

Item 1 defines a number of terms used throughout Schedule 4. The term ‘commencement time’ is defined to mean the day on which the proposed amendments in Schedule 1 commence.

Item 2—Alleged breaches of the Code of Conduct that occur before and after commencement time

The effect of this item is to provide that if a breach of the Code of Conduct is alleged to have occurred between two dates, one before and one after the commencement time, the breach is alleged to have occurred before the commencement time.

Part 2—Secretaries

Item 3—Existing appointments of Secretaries

The effect of this item is to preserve the appointment and terms and conditions of existing Secretaries for the remainder of their term.

Items 4 – 5

These items relate to the transition of appointments and terminations of appointments of Secretaries.

Item 6—Engagements of former Secretaries

The effect of this item is to preserve the engagement and terms and conditions of former Secretaries for the remainder of their term.

Part 3—Senior Executive Service

Item 7—Function of the SES

The effect of this item is to make clear that the revised functions and roles for SES employees apply to existing SES employees at the commencement time.

Part 4—The Australian Public Service Commissioner

Item 8—Public Service Commissioner becomes Australian Public Service Commissioner at commencement time

The effect of this item is to preserve the appointment of the Commissioner for the remainder of the Commissioner’s term. Subitem 8(3) ensures that things being done can be continued to be done. Subitem 8(4) provides that any instruments in force before the commencement time that refer to the ‘Public Service Commissioner’ have effect as if the reference was to the ‘Australian Public Service Commissioner’.

Items 9 – 13

These items relate to the transition of inquiries by the Commissioner that are in progress.

Items 14 – 15

These items relate to the transition of inquiries by the Commissioner into an alleged breach of the Code of Conduct by an Agency Head.

Item 16—Regulations prescribing Statutory Agencies

The effect of this item is to preserve the regulations that prescribe statutory agencies for the purposes of an inquiry by the Commissioner into an alleged breach of the Code of Conduct by an Agency Head.

Item 17—Inquiries into alleged breaches of the Code of Conduct by APS employees or former APS employees

The effect of this item is to provide that the Commissioner may conduct an inquiry into an alleged breach of the Code of Conduct by an APS employee or former APS employee where the alleged breach occurred before the commencement time.

Part 5—APS Values and APS Employment Principles

Item 18—workplace diversity programs

The effect of this item is to preserve existing workplace diversity programs.

Part 6—Code of Conduct

Item 19—amendment of Code of Conduct

This item provides that the changes to the Code of Conduct apply to conduct occurring after the commencement time.

Item 20—procedures for dealing with alleged breaches of Code of Conduct

This item provides that procedures established after the commencement time for dealing with alleged breaches of the Code of Conduct apply whether the alleged misconduct occurred before or after the commencement time.

Item 21—procedures and directions for determining whether Code of Conduct has been breached

This item preserves the procedures established by an Agency Head for determining alleged breaches of the Code of Conduct and the Commissioner's Directions relating to these procedures.

Items 22 – 24

These items provide for various transitional matters related to Agency Head investigations into alleged breaches of the Code of Conduct by APS employees.

Items 25 – 26

These items provide for various transitional matters related to MPC inquiries into alleged breaches of the Code of Conduct by the Commissioner.

Item 27—Inquiries by Merit Protection Commissioner into alleged breaches of Code of Conduct by APS employees or former APS employees

The effect of this is to provide that the Merit Protection Commissioner may conduct an inquiry into an alleged breach of the Code of Conduct by an APS employee or former APS employee where the alleged breach occurred before the commencement time.

Part 7—Whistleblower reports

Item 28 – 30

These items provide for various transitional matters related to whistleblower reports.

Part 8—Review of actions

Item 31—regulations providing for review of APS action

The effect of this item is to preserve regulations providing for reviews of APS actions.

Part 9—Temporary APS employees

Item 32—non-ongoing employees become temporary APS employees at commencement time

The effect of this item is to deem non-ongoing employees to be temporary employees at the commencement time, thereby preserving the existing terms of employment of non-ongoing employees.

Item 33—Engagement processes in progress before commencement time

This item provides for transitional matters for non-ongoing employee engagement processes in progress.

Item 34—circumstances for engagement of non-ongoing APS employees

This item preserves the circumstances under which a non-ongoing employee is engaged.

Items 35 – 36

These items provide for transitional matters for the termination of employment of non-ongoing APS employees.

Part 10—Machinery of government changes

Item 37—determinations that APS employees become non-APS employees of Commonwealth authority

This item provides for transitional matters for determinations that APS employees become non-APS employees of a Commonwealth authority.

Part 11—Confidentiality of information

Item 38—Protected information obtained at or after commencement time

The effect of this item is that protected information obtained at or after commencement time is subject to the relevant provisions of the new PS Act.

Item 39—regulations providing for protection of information obtained before commencement time

This item preserves regulations which provide for protection of information obtained before the commencement time.

Item 40—regulations providing for release of personal information

This item preserves regulations which provide for the release of personal information.

Part 12—Immunity from suit

Item 41—immunity from civil proceedings for actions or omissions at or after commencement time

The effect of this item is that the immunity from suit provisions of the new PS Act relate to anything done or omitted to be done at or after commencement time.

Item 41—regulations providing for immunity from civil proceedings

This item preserves regulations providing for immunity from civil proceedings.

Part 13—Legislative instruments

Item 43—Classification Rules

This item preserves the Classification Rules.

Item 44—agreements for APS employees to move between agencies

This item preserves agreements made under subsection 26(2) of the PS Act.

Item 45—right of return for election candidates

This item preserves the right of an APS employee to return to the APS if the person resigned in order to contest an election.

Item 46—Commissioner’s Directions on SES matters

This item preserves the Commissioner’s Directions on SES matters.

Part 14—Miscellaneous

Item 47—Reduction in classification of APS employee

The effect of this item is that reduction in classification procedures contained in a PS Act determination or written contract of employment apply to reductions in classification which occur at or after commencement time.

Item 48—Determinations of terms and conditions of employment

This item preserves determinations of terms and conditions of employment.

Item 49—engagement of consultants

This item preserves the engagement of consultants by the Commissioner or MPC.

Item 50—regulations prescribing penalties for offences against the regulations

This item preserves the regulations prescribing penalties for offences against the regulations.

Part 15—Regulations

Item 51—Regulations may deal with transitional matters

This item provides for regulations to be made on matters of a transitional nature relating to the Bill.