

EXPLANATORY STATEMENT

Issued by the authority of the Public Service Commissioner

Public Service Act 1999

Australian Public Service Commissioner's Amendment Direction 2013 (No. 1)

Overview

The *Australian Public Service Commissioner's Directions 2013* (Commissioner's Directions) are made under the *Public Service Act 1999* (the Act). They prescribe mandatory standards for Australian Public Service (APS) agency heads and APS employees to meet their obligations under the Act, and support agency heads to fulfil their employer responsibilities. The Commissioner's Directions come into effect on 1 July 2013, following amendments to the Act which also commence on that date, and they replace the *Public Service Commissioner's Directions 1999* (the 1999 Directions).

The Act provides at subsections 11(1), 11A(1), 11A(2), and 15(4) for the Australian Public Service Commissioner (the Commissioner) to issue directions. The Commissioner's Directions are a legislative instrument for the purposes of the *Legislative Instruments Act 2003*.

Section 10A of the Act sets out the APS Employment Principles, and includes at paragraph 10A(1)(c) that the APS is a career based public service that '*makes decisions relating to engagement and promotion that are based on merit*'. Subsection 10A(2) defines 'merit' for engagement and promotion decisions in the APS.

Subsection 11A(1) of the Act provides that the Commissioner may issue directions about employment matters relating to APS employees.

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

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

Subsection 11A(3) of the Act provides that the APS Employment Principles have effect subject to the restrictions (if any) in directions made under subsection 11A(1).

Chapter 2 of the Commissioner's Directions sets out matters relating to recruitment and selection in the APS and relate in particular to matters associated with the Employment Principle on merit.

Chapter 7 of the Commissioner's Directions sets out directions on a range of employment matters that apply in the APS.

Clause 2.19 and Schedule 1 of the Commissioner's Directions set out certain arrangements that apply when persons who resign from the APS to contest an election seek to be again engaged as an APS employee.

Clause 4.3C of the 1999 Directions sets out the detail of the RecruitAbility Scheme, an affirmative action employment measure applying to people with disability, as it applied before 1 July 2013.

Purpose of these amendments

The purpose of *Australian Public Service Commissioner's Amendment Direction 2013 (No.1)* (the Amendment Direction) is to amend the Commissioner's Directions to:

- (a) continue to enable an agency head to put in place the measures set out in the RecruitAbility Scheme which are designed to address aspects of the employment related disadvantage experienced by people with disability (Item 3);

- (b) provide that an agency head must ensure that measures are put in place to collect certain personal information from each employee of the agency and to provide that information to the Commissioner (Items 6 and 7);
- (c) amend the requirement that mandates the notification of certain employment decisions in the Public Service *Gazette* within 3 months of the decision being made to vary the time when this 3 month period commences in certain circumstances (Item 5);
- (d) correct a drafting error in Schedule 1 of the Commissioner's Directions in relation to the provisions dealing with the subsequent employment of persons who have resigned to contest an election (Item 9);
- (e) make a number of other minor drafting amendments to the Commissioner's Directions that are designed to clarify the operation of the relevant provisions (Items 1, 2 and 4); and
- (f) include transitional provisions in relation to APS vacancies that had already been advertised prior to the commencement of the Commissioner's Directions on 1 July 2013 and in relation to the notification of certain employment decisions in the Public Service *Gazette* (Item 8).

Consultation

The Australian Public Service Commission (the Commission) has not undertaken specific consultations on the Amendment Direction other than in relation to the amendment to clause 2.29 (item 5) where the views of a number of agencies were sought and taken into account.

However, the Commission did consult broadly across the APS and with the Community and Public Sector Union (CPSU) on the recent amendments to the APS legislative framework, including in relation to the making of the *Australian Public Service Commissioner's Directions 2013*. In addition, the Commission consulted with a representative sample of APS agencies and the CPSU prior to amending the old Directions to insert provisions relating to the recruitment of people with disability under the RecruitAbility scheme.

Statement of compatibility with Human Rights

A statement of compatibility is included at Attachment A to this Explanatory Statement.

Notes on clauses

Clause 1 sets out the name of the direction.

Clause 2 provides that the Amendment Direction commences on 1 July 2013.

Clause 3 specifies the authority for making the Amendment Direction.

Clause 4 provides a link to Schedule 1 which contains the amendments to the Commissioner's Directions.

Items 1 and 2 of Schedule 1 of the Amendment Direction insert a Note below clause 2.15 and clause 2.16 - these clauses deal with with affirmative measures relating to the recruitment of Aboriginal or Torres Strait Islander applicants and persons with an intellectual disability respectively.

The purpose of these notes is to make it clear that when an engagement of a person that is made in accordance with either of these affirmative measures is to be as a non-ongoing APS employee, the normal rules applying to such engagements, as set out in regulation 3.5 of the *Public Service Regulations 1999*, apply. This regulation prescribes certain conditions which apply to the engagement of non-ongoing APS employees e.g. the circumstances in which an Agency Head may engage a non-ongoing employee for a specified period.

Item 3 of Schedule 1 of the Amendment Direction inserts a new clause 2.17A which permits an Agency Head to put in place measures consistent with the RecruitAbility Scheme (the Scheme), which is an affirmative employment measure applicable to applicants for APS employment who have a disability.

Under subclause 11A(2) of the Act, the Commissioner may issue directions which determine the scope or application of the APS Employment Principles. In effect, clause 2.17A modifies the application of the Employment Principle relating to merit in engagement and promotion decisions by allowing agency heads to adopt a special process for considering applications where it has been notified that the Scheme will apply to the filling of specified vacancies in the agency.

The Scheme provides an opportunity for job applicants with disability to progress to further recruitment assessment stages, if they meet certain conditions. Clause 2.17A continues the arrangements set out in clause 4.3C of the 1999 Directions, which will be repealed on 1 July 2013. The Scheme under the new Commissioner's Directions has a slightly broader application in that it now includes Senior Executive classifications in the arrangements.

The Scheme is a measure under the *As One: APS Disability Employment Strategy* to support the employment of people with disability in the APS. Improving APS recruitment processes to enable better access for candidates with disability will build the confidence and capability of candidates and also improve the ability of hiring managers and selection panel members to assess the merits of candidates with disability.

The Scheme provides an opportunity for people with disability to progress to further recruitment assessment stages, if they:

- apply under the Scheme;
- declare they have a disability; and
- are assessed as meeting the minimum requirements for the position.

Under the Scheme, while there is preferred status given to applicants at the consideration stage, prior to the ultimate selection decision, there is to be no displacement of applicants who would otherwise have been shortlisted to attend an interview (or other final assessment) and the ultimate selection decision remains a decision based on merit, as required under the Act.

The Scheme is initially being conducted as a pilot which allows participating agencies to determine whether or not to apply the RecruitAbility Scheme to particular recruitment exercises. Where the agency has determined that the Scheme will apply in relation to a vacancy, the agency must include

reference to the applicability of the Scheme in the relevant notification in the *Public Service Gazette*.

Item 4 of Schedule 1 of the Amendment Direction substitutes a new paragraph 2.25(2)(a). Clause 2.25 prescribes minimum requirements relating to the temporary assignment of duties to an employee at a higher classification level. The revised clause makes a minor technical amendment by substituting a reference to ‘duties’ for the reference to ‘vacancy’ – vacancy is a defined term in clause 2.3 of the Commissioner’s Directions and is inappropriate in the context of temporary assignment of higher duties.

Item 5 of schedule 1 of the Amendment Direction substitutes a new clause 2.29 substantially the same as the previous clause 2.29 but with minor amendment to the time frame referred to therein. Clause 2.29 prior to this amendment provides that Agency Heads must notify certain employment decisions (as specified in the clause) in the *Public Service Gazette* and requires that decisions be notified within 3 months of being made.

The revised clause does not change the type of employment decisions that are required to be notified in the *Public Service Gazette* but rather allows some flexibility as to when this 3 month period commences in certain circumstances. The Commission now realises that there are practical difficulties with the current provisions when an employment decision (and in particular an engagement, movement or promotion decision) is made, but its taking effect is conditional on satisfying an eligibility requirement (such as attaining a security clearance). Such eligibility requirements can take some time to complete. The changed arrangements (as set out in new subclauses 2.29(2) and (3)) provide that where an employment decision is made on the basis that the person is required to satisfy an eligibility requirement before the decision becomes operational, the 3 month period in which the decision must be gazetted is taken to commence at the time the eligibility requirement is met. It also introduces additional flexibility for the Commissioner to agree to a different gazettal timeframe should that be necessary in particular circumstances.

The Commission is separately undertaking a review of this provision as it applies to gazetting termination of employment decisions to investigate concerns expressed about its impact on the privacy of individuals.

Item 6 of schedule 1 of the Amendment Direction includes an amended summary to Chapter 7 of the Commissioner’s Directions to reflect the addition of clause 7.6 (see item 7 below).

Item 7 of Schedule 1 of the Amendment Direction inserts a new clause 7.6 in the Directions that requires an Agency Head to ensure that measures are put in place to collect certain personal information from each employee of the agency and to provide that information to the Commissioner.

The Commissioner already collects a broad range of data from agencies about their employees for retention in the APS Employment Database (APSED). APSED is used by the Commissioner to perform his functions. Some of this data has always been provided on a mandatory basis—name, AGS number, classification, type of employment, sex, and several other fields.

As part of the Commissioner’s role on reporting to Parliament on the state of the APS through his State of the Service Report (SoSR), other data is required particularly around disability and indigenous status but also in relation to other matters such as educational qualifications. For example, at 30 June 2012, there was no data about the Indigenous status of approximately 24% of the APS workforce, and none about the disability status of approximately 30% of the APS workforce.

High quality data is essential for understanding trends in APS employment including those associated with the employment of Indigenous Australians and people with disability in the APS.

It is understood that poor data quality may be partly due to agencies failing to ask the questions of their employees. This is supported by the fact that in the annual confidential employee census conducted by the Australian Public Service Commission for the 2011-12 SoSR, the proportion of

employees identifying as having a disability was 6.9%. This compares to the overall APS statistical figure of 2.9% collected via agency human resources information system data.

The Commissioner's Directions are being amended to compel agencies to put in place measures to seek/collect data from employees and provide such data to the Commissioner. Given the sensitive nature of this data, subclause 7.6(2) provides that in seeking the information the agency measures must allow employees a "choose not to give this information" option (which can also be reported).

Item 8 of Schedule 1 of the Amendment Direction includes a new Chapter 9 to the Commissioner's Directions which includes transitional matters relating to the repeal of the 1999 Directions and the making of the replacement Commissioner's Directions.

New subclause 9.1(1) provides that where an APS agency advertised a vacancy prior to 1 July 2013 (the commencement date of the Commissioner's Directions), clause 2.9 of the Commissioner's Directions does not apply in relation to that action and the relevant rules applying to advertising as set out in the 1999 Directions continue to apply. This will make it clear that an agency head can continue to fill such vacancies in accordance with the rules that applied at the time the vacancy was advertised.

New subclause 9.1(2) relates to the new requirements in subclauses 2.29 and 2.30 of the Commissioner's Directions to notify certain employment decisions (and the cancellation of certain employment decisions) in the *Public Service Gazette* within a 3 month period. It provides that for a decision made before 1 July 2013, the 3 month period commences on 1 July 2013.

Item 9 of Schedule 1 of the Amendment Direction amends Schedule 1 of the Commissioner's Directions to correct a drafting error in the arrangements relating to APS employees who resign to contest an election.

Under section 32 of the Act, a person who resigns as an APS employee to contest a prescribed election is entitled to be again engaged as an APS employee subject to certain conditions set out in the Commissioner's Directions. Clause 2.19 and Schedule 1 of the Commissioner's Directions sets out these conditions and are intended to replicate provisions which have been in place for some time and were formerly set out in the *Public Service Regulations 1999*.

Prior to this amending Direction the drafting of paragraph 1(2)(a) of Schedule 1 of the Commissioner's Directions provided that persons in this situation are entitled to be engaged at their former APS classification or at a lower classification. This is incorrect and does not accord with longstanding APS policy, reflected in relevant legislation—failed election candidates are entitled to be engaged at their former classification (not at a lower classification), subject to their satisfying the other provisions set out in the Commissioner's Directions. This amendment will make it clear that former employees who are engaged in these circumstances are entitled to be engaged at the classification they held prior to resigning.

Statement of Compatibility with Human Rights

The Amendment Direction engages a number of human rights as set out below.

Right to equality and non-discrimination and affirmative measures

Article 27 of the Convention on the Rights of Persons with Disabilities (CRPD) prohibits discrimination on the basis of disability in employment; promotes employment opportunities and career advancement for people with disability in the labour market; and promotes the employment of people with disability in the public sector.

Article 26 of the International Covenant on Civil and Political Rights (ICCPR) prohibits discrimination on the basis of a prohibited ground including race, colour, sex, language, and religion, and provides that all individuals have the same rights and deserve the same level of respect, while recognising that it is sometimes necessary to provide some groups in the community with additional support for them to enjoy their right to equality.

Additionally, the Committee on Economic, Social and Cultural Rights has stated in General Comment No 5 that insofar as special treatment of people with disability is necessary, parties to the Convention are required to take appropriate measures to enable such people to seek to overcome any disadvantages, in terms of the enjoyment of the rights, such as Article 27 of the CRPD.

Item 3 of Schedule 1 of the Amendment Direction advances the employment of people with disability and is therefore compatible with these human rights and freedoms.

Right to protection against arbitrary and unlawful interferences with privacy; right to freedom of expression

Items 5 and 7 of Schedule 1 of the Amendment Direction engage the right to privacy in Article 17, and the right to freedom of expression in Article 19, of the ICCPR. The right to freedom of expression also includes the freedom to seek and receive information.

As noted earlier, Item 5 of Schedule 1 of the Amendment Direction does not change the type of employment decisions that are required to be notified in the *Public Service Gazette*. Rather its focus is to introduce some flexibility in the requirement to gazette certain employment decisions within 3 months of their being made. The Australian Public Service Commission is separately undertaking a review of this provision as it applies to gazetting termination of employment decisions.

While item 7 of Schedule 1 of the Amendment Direction requires agency heads to ensure there are measures in place to collect certain information from APS employees in the agency, the Commissioner's Directions also provide that employees must be given the option of choosing not to answer the questions that have been asked. This provision is designed to enhance the ability for the Commissioner to collect and analyse employment data in relation to APS employees which is critical to the Commissioner's functions. At the same time it also achieves the legitimate aim of promoting APS employees' right to privacy by recognising that employees can choose not to provide this information.

Right to take part in public affairs and elections

Item 3 of Schedule 1 of the Amendment Direction promotes the right to take part in public affairs and elections contained in article 25 of the ICCPR. The Directions provide that where an APS employee has resigned to contest an election, they have the right to be re-engaged in their former agency on the same basis, performing the same or similar duties, and on the same terms and conditions, as before they resigned. These provisions promote the right to take part in public affairs and elections by ensuring security and continuity of employment should an APS employee contest an election unsuccessfully.

This Legislative Instrument is compatible with human rights and freedoms because it advances the protection of human rights.