

## **EXPLANATORY STATEMENT**

Issued by the authority of the Parliamentary Service Commissioner

*Parliamentary Service Act 1999*

### **Purpose**

The *Parliamentary Service Commissioner's Directions 2025* (the Directions) are made under the *Parliamentary Service Act 1999* (the Act), and are necessary for its effective operation.

The Directions are a legislative instrument for the purposes of the *Legislation Act 2003*. Subsection 15(3) of the Act provides that a Secretary of a Parliamentary Department must establish written procedures for determining whether a Parliamentary Service employee, or a former Parliamentary Service employee, has breached the Parliamentary Service Code of Conduct ('the Code of Conduct') and the sanctions (if any) to be imposed. Under paragraph 15(4)(a), those procedures must comply with 'basic procedural requirements' set out in directions issued under subsection 15(6).

Subsection 15(6) provides that the Commissioner must, by legislative instrument, issue directions setting out those basic procedural requirements. These Directions are made for that purpose.

The Directions closely follow Part 7, Division 2 ('Basic procedural requirements') of the *Australian Public Service Commissioner's Directions 2022* (APS Directions), which sets out basic procedural requirements for procedures to be established by Australian Public Service ('APS') Agency Heads for determining whether an APS employee or former employee has breached the APS Code of Conduct and any sanctions to be imposed on an APS employee found to have breached the Code.

The Directions replace and largely re-make the *Parliamentary Service Commissioner's Direction 2014* (2014 Direction), which sunsets on 1 April 2025.

New provisions have been added to the Directions, including:

- Section 12 – a Secretary must consult with the Commissioner on process for determining a breach if a Senior Executive Service ('SES') employee in a relevant department is suspected of breaching the Code of Conduct and before imposing a sanction on an SES employee who is determined to have breached the Code of Conduct.
- Section 13 ('Application provision') – the requirement in section 12 for a Secretary to consult with the Commissioner on the process for determining a breach applies in relation to a suspicion formed on or after the commencement of this section, whether the suspicion relates to the conduct of an SES employee occurring before, on or after the commencement of this section. The requirement for a Secretary to consult with the Commissioner before imposing a sanction on an SES employee who is determined to have breached the Code applies in relation to a determination made on or after the commencement of this section.

Section 12 is equivalent to section 64 of the APS Directions.

Section 64 of the APS Directions was introduced into the Public Service legislative framework to address the perception there was an inconsistent approach to allegations of breaches of the Code of Conduct made against SES employees compared with other APS employees, as outlined in the Report into consultations regarding APS approaches to institutional integrity (the Sedgwick Report).

This perception has the potential to damage trust in senior management and undermine their role as integrity stewards. This provision strengthens institutional integrity across the APS.

The addition of a consultation requirement will increase visibility for the Commissioner of all SES Parliamentary Service Code of Conduct allegations on an ongoing basis, supporting greater consistency in how misconduct investigations are undertaken and sanctions imposed. This will in turn strengthen trust in the SES Parliamentary Service cohort.

## **Legislative framework**

Section 15 of the Act concerns breaches of the Code of Conduct and procedures for determining whether a Parliamentary Service employee, or former Parliamentary Service employee, has breached the Code of Conduct.

Paragraph 15(3)(a) of the Act provides that a Secretary must establish written procedures for determining whether a Parliamentary Service employee, or former Parliamentary Service employee, in the relevant department has breached the Code of Conduct.

Paragraph 15(3)(b) of the Act provides that a Secretary must establish written procedures for determining any sanctions to be imposed under subsection 15(1) of the Act ('Sanctions that may be imposed') on a Parliamentary Service employee in the relevant department who is found to have breached the Code of Conduct.

Paragraph 15(4)(a) of the Act provides that procedures established under 15(3) must comply with basic procedural requirements set out in the Commissioner's directions.

Paragraph 15(4)(b) of the Act requires that the procedures established under 15(3) must have due regard to procedural fairness.

Subsection 15(6) of the Act provides that the Commissioner must, by legislative instrument, issue directions for the purposes of paragraph 15(4)(a) of the Act.

The Directions set out, in accordance with subsection 15(6), the basic procedural requirements with which these procedures established by a Secretary must comply.

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

## **Commencement**

The Directions commence on 1 April 2025.

## **Consultation**

The following departments and officeholders were consulted during the development of the Directions:

- a. Department of Parliamentary Services;
- b. Department of the Senate;
- c. Department of the House of Representatives;
- d. Parliamentary Budget Office;
- e. Department of the Prime Minister and Cabinet: and
- f. Merit Protection Commissioner.

The departments and officeholders were supportive of the remaking of the 2014 Direction.

## **Impact Analysis**

Following consultation with the Office of Impact Analysis, Impact Analysis is not required for the Directions (OIA25-09232) as there is no more than minor regulatory impact on business, community organisations or individuals.

## **Explanation of the Provisions**

An explanation of the provisions of the Directions is set out at [Attachment A](#).

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

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

## EXPLANATION OF THE PROVISIONS

### **Part 1 - Preliminary**

#### Section 1 – Name

**Section 1** sets out the name of the instrument, being the *Parliamentary Service Commissioner's Directions 2025* (the Directions).

#### Section 2 - Commencement

**Section 2** states the whole of the Directions commence on 1 April 2025.

#### Section 3 – Authority

**Section 3** provides the authority for the making of the Directions is the *Parliamentary Service Act 1999* (the Act).

#### Section 4 - Schedules

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

#### Section 5 - Definitions

**Section 5** defines certain words and expressions used in the Directions that have a particular meaning in the Parliamentary Service Code of Conduct context.

A note to section 5 states that a number of expressions used in the Directions are defined in the Act. These include:

- a. Code of Conduct;
- b. Commissioner;
- c. former Parliamentary Service employee;
- d. Parliamentary Service employee;
- e. relevant Department;
- f. Secretary;
- g. SES employee.

‘Act’ is defined to mean the *Parliamentary Service Act 1999*.

### **Part 2 – Basic Procedural requirements for handling suspected breaches of the Code of Conduct**

#### ***Division 1 – Introduction***

#### Section 6 - Purpose of this Part

**Section 6** provides that Part 2 of the Directions is made for the purposes of subsection 15(6) and paragraph 15(4)(a) of the Act.

Subsection 15(6) of the Act provides that the Commissioner must issue Directions setting out the basic procedural requirements with which procedures established by a Secretary under subsection 15(3) of the Act must comply.

Paragraph 15(4)(a) of the Act provides the procedures established by a Secretary under subsection 15(3) of the Act must comply with basic procedural requirements set out in the Directions issued by the Commissioner

under subsection 15(6) of the Act.

A note to section 6 sets out the requirements of subsection 15(3) of the Act.

A second note refers to section 54 of the *Parliamentary Service Determination 2024* ('the Determination', which deals with managing performance in cases of a potential breach of the Code of Conduct).

## ***Division 2 – Procedural Requirements***

### **Section 7 - Employee must be informed that a determination is being considered**

**Section 7** provides that, before any determination is made that a Parliamentary Service employee or former Parliamentary Service employee has breached the Code of Conduct, reasonable steps must have been taken to:

- a. inform the employee or former employee of the details of the suspected breach of the Code (including any subsequent variation to those details) and the sanctions that may be imposed on the employee under section 15(1) of the Act; and
- b. give the employee or former employee a reasonable opportunity to make a statement in relation to the suspected breach.

This section ensures employees and former employees who are suspected of having breached the Code of Conduct are afforded two of the central elements of the principles of procedural fairness – namely, the right to know the factors being weighed in the decision, and the right to provide a relevant statement, before a decision is made. This is in line with paragraph 15(4)(b) of the Act which requires that procedures established by Secretaries for the purposes of section 15(3), must have due regard to procedural fairness.

### **Section 8 - Employee must be informed before a sanction is imposed**

Under subsection 15(1) of the Act, a sanction or sanctions may be imposed on a Parliamentary Service employee, where it has been determined in accordance with the procedures that the employee has breached the Code of Conduct. The range of sanctions available are set out in section 15(1) of the Act. A sanction cannot be imposed on a former employee.

**Section 8** provides that, before any sanction is imposed on a Parliamentary Service employee, reasonable steps must have been taken to:

- a. inform the employee of the determination that they have breached the Code of Conduct; and
- b. inform the employee of the sanction that is under consideration, and the factors being considered by the delegate in determining the sanction to be imposed; and
- c. give the employee reasonable opportunity to make a statement in relation to the sanction under consideration.

This section ensures employees who may be subject to a sanction or sanctions, when a breach of the Code of Conduct has been determined, are afforded two of the central elements of the principles of procedural fairness – namely, the right to know the factors being weighed in the decision, and the right to provide a relevant statement, before a decision is made. This is in line with paragraph 15(4)(b) of the Act which requires that procedures established by Secretaries for the purposes of section 15(3), must have due regard to procedural fairness.

### **Section 9 - Person making determination to be independent and unbiased**

**Paragraph 9(a)** imposes an obligation on Secretaries to take reasonable steps to ensure that any person who makes a determination under the procedures as to whether an employee has breached the Code of Conduct is, and appears to be, independent and unbiased.

**Paragraph 9(b)** imposes an obligation on Secretaries to take reasonable steps to ensure that any person who makes a determination under the procedures as to the sanction (if any) to be imposed on an employee under subsection 15(1) of the Act is, and appears to be, independent and unbiased.

A central principle of procedural fairness is that a decision-maker should be independent and unbiased. These provisions require that procedures established by Secretaries will reflect that principle.

#### Section 10 - Determination process to be informal

**Section 10** provides that the process for determining whether a Parliamentary Service employee or former Parliamentary Service employee has breached the Code of Conduct must be carried out with as little formality and as much expedition as a proper consideration of the matter allows.

#### Section 11 - Record of determination and sanctions

**Section 11** sets out the records to be kept in cases where a determination is made in relation to a Parliamentary Service employee or former Parliamentary Service suspected of breaching the Code of Conduct. This clause provides that a written record must be made of:

- a. the suspected breach; and
- b. the determination (which may be a determination that there was no breach of the Code of Conduct); and
- c. any sanction imposed consequent upon a determination of a breach of the Code of Conduct; and
- d. if a statement of reasons was given to the employee or former employee, the statement of reasons.

The note to this section explains that records created under this section are also regulated by the *Archives Act 1983*, which imposes record-keeping obligations in respect of Commonwealth records.

### **Division 3 – Additional procedural requirements for SES employees**

#### Section 12 - Role of Secretary and Commissioner

**Section 12** sets out specific obligations for a Secretary if an SES employee in a relevant Department is suspected of breaching the Code of Conduct.

Under subsection 12(1), the Secretary is required to consult with the Commissioner on the process for determining whether an SES employee in a relevant department has breached the Code of Conduct if a person suspects the SES employee of doing so.

Under subsection 12(2), if a Secretary or delegate is considering imposing a sanction on an SES employee who is determined to have breached the Code of Conduct, the Secretary must consult with the Commissioner before the sanction is imposed by the Secretary or delegate. This requirement to consult will apply whether the SES employee has been determined to have breached the Code of Conduct under procedures established by a Secretary under subsection 15(3) or procedures established by the Merit Protection Commissioner under subsection 48A(2) of the Act.

A note to section 12 specifies that the Commissioner may, from time to time, issue guidance about matters relating to breaches of the Code of Conduct.

The addition of a consultation requirement will increase visibility of the Parliamentary Service Commissioner of all SES Parliamentary Service Code of Conduct allegations on an ongoing basis, supporting greater consistency in how misconduct investigations are undertaken and sanctions imposed. This will in turn strengthen trust in the SES Parliamentary Service cohort and institutional integrity across the Parliamentary Service.

Section 65AE of the Act provides that the Determination may authorise the use or disclosure of personal information in specific circumstances. Section 141 of the Determination provides the circumstances in which a Secretary may or may not use or disclose personal information in relation to individuals.

## **Part 3 – Application provisions**

### Section 13 - Application provisions

**Section 13** provides for the application of section 12 of the Directions.

The effect of sections 12 and 13 is:

- a. the requirement for the Secretary to consult with the Commissioner on the process for determining whether an SES employee has breached the Code of Conduct under subsection 13(1) applies in relation to a suspicion that an SES employee has breached the Code of Conduct that is formed on or after 1 April 2025, whether the suspicion relates to the conduct of the SES employee that occurred before, on or after 1 April 2025.
- b. The requirement for the Secretary to consult with the Commissioner before the Secretary or delegate imposes a sanction on an SES employee in a relevant department under subsection 13(2) applies in relation to a determination made on or after 1 April 2025 that the SES employee has breached the Code of Conduct, whether the determination relates to the conduct of the SES employee that occurred before, on or after 1 April 2025.

### Schedule 1 – Repeals

**Schedule 1** relates to section 4, which provides that an instrument set out in a Schedule to these Directions is amended or repealed according to the terms of the Schedule.

As a result, the *Parliamentary Service Commissioner's Direction 2014* is repealed in its entirety by commencement of these Directions.

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

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

### **Parliamentary Service Commissioner's Directions 2025**

The *Parliamentary Service Commissioner's Directions 2025* (the Directions) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

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

The Directions are made under the *Parliamentary Service Act 1999* (the Act), and are necessary for its effective operation.

The Directions are a legislative instrument for the purposes of the *Legislation Act 2003*. Subsection 15(3) of the Act provides that a Secretary of a Parliamentary Department must establish written procedures for determining whether a Parliamentary Service employee, or a former Parliamentary Service employee, has breached the Parliamentary Service Code of Conduct ('the Code of Conduct') and the sanctions (if any) to be imposed. Under paragraph 15(4)(a), those procedures must comply with 'basic procedural requirements' set out in directions issued under subsection 15(6).

Subsection 15(6) provides that the Commissioner must, by legislative instrument, issue directions setting out those basic procedural requirements. These Directions are made for that purpose.

The Directions closely follow Part 7, Division 2 ('Basic procedural requirements') of the *Australian Public Service Commissioner's Directions 2022* (APS Directions), which set out basic procedural requirements for procedures to be established by Australian Public Service ('APS') Agency Heads for determining whether an APS employee or former employee has breached the APS Code of Conduct and any sanctions to be imposed on an APS employee found to have breached the Code.

The Directions replace and largely re-make the *Parliamentary Service Commissioner's Direction 2014* (2014 Direction), which sunsets on 1 April 2025.

New provisions have been added to the Directions, including:

- Section 12 – a Secretary must consult with the Commissioner on process for determining a breach if an SES employee in a relevant department is suspected of breaching the Code of Conduct and before imposing a sanction on an SES employee who is determined to have breached the Code of Conduct.
- Section 13 ('Application provision') – the requirement in section 12 for a Secretary to consult with the Commissioner on process for determining a breach applies in relation to a suspicion formed on or after the commencement of this section, whether the suspicion relates to the conduct of an SES employee occurring before, on or after the commencement of this section. The requirement for a Secretary to consult with the Commissioner before imposing a sanction on an SES employee who is determined to have breached the Code applies in relation to a determination made on or after the commencement of this section.

Section 12 is equivalent to section 64 of the APS Directions.

Section 64 of the APS Directions was introduced into the Public Service legislative framework to address the perception there was an inconsistent approach to allegations of breaches of the Code of Conduct made against SES employees, compared with other APS employees, as outlined in the *Report into consultations regarding APS approaches to institutional integrity* (the Sedgwick Report).

This perception has the potential to damage trust in senior management and undermine their role as integrity stewards. This provision aims to strengthen institutional integrity across the APS and strengthen

the SES cohort's ability to shape a positive workplace culture centred on integrity.

The addition of a consultation requirement will increase visibility for the Commissioner of all SES Parliamentary Service Code of Conduct allegations on an ongoing basis, supporting greater consistency in how misconduct investigations are undertaken and sanctions imposed. This will in turn strengthen trust in the SES Parliamentary Service cohort.

### **Human rights implications**

The Directions engage the following rights:

- Right to work and rights at work – general right recognised by Article 6(1) and Article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
- Right to privacy – Article 17 of the International Covenant on Civil and Political Rights (ICCPR).

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

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

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

#### ***Part 2 – Basic procedural requirement for handling suspected breaches of the Code of Conduct***

Part 2 of the Directions sets out the basic procedural requirements with which Secretaries must comply when establishing written procedures to determine whether a Parliamentary Service employee in a relevant department, or a former Parliamentary Service employee, has breached the Code of Conduct, and any sanctions to be for procedures for departmental inquiries into suspected breaches of the Code of Conduct. These procedural requirements promote Parliamentary Service employees' rights at work by providing that a determination may not be made in relation to a suspected breach of the Code of Conduct by a Parliamentary Service employee, or a former Parliamentary Service employee, unless reasonable steps are taken to:

- Notify the employee, or former employee, of the details of the suspected breach
- Give the employee, or former employee, a reasonable opportunity to make a statement in relation to the suspected breach, and
- Notify the employee of the sanctions that may be imposed in the event that it is determined that the employee has breached the Code of Conduct (sanctions may not be imposed on former employees).

Sanctions may not be imposed on an employee consequent on any determination of a breach of the Code of Conduct:

- Unless reasonable steps have been taken to inform the employee of the determination and the sanction(s) being contemplated
- Unless reasonable steps have been taken to inform the employee of the factors under consideration in determining any sanction(s) to be imposed, and
- Before the employee is given a reasonable opportunity to make a statement in relation to the sanction or sanctions under consideration.

Further, a Secretary is required to take reasonable steps to ensure that any person authorised to make a determination that there has been a breach of the Code of Conduct, or to determine any sanctions to be imposed, is, and appears to be, independent and unbiased.

The procedures prescribed by the Directions reflect and promote the central requirements of procedural fairness, and promote Parliamentary Service employees' right to work. Where a Code of Conduct investigation may operate to limit a Parliamentary Service employee's rights in work, this limitation is not arbitrary, and is for a legitimate purpose – namely, to address individuals' behaviour, to reinforce the



expected standards of conduct for Parliamentary Service employees, and, thereby, to maintain public confidence in parliamentary administration.

Where a non-SES employee who has been determined to have breached the Code of Conduct does not agree with this finding, or with any consequent sanction that has been imposed (other than termination of employment), he or she may seek review by the Parliamentary Service Merit Protection Commissioner of the determination or sanction decision, in accordance with section 33 of the Act. Other options such as judicial review may also exist. Where a sanction of termination of employment has been imposed, an employee may be able to apply to the Fair Work Commission for review of the termination decision under unfair dismissal provisions of the *Fair Work Act 2009*. This right of review also engages the right to a fair hearing under Article 14(1) of the ICCPR.

The requirement for a Secretary to consult with the Commissioner on the process for determining whether an SES employee has breached the Code of Conduct and, where a breach has been determined, before imposing a sanction, ensures that Parliamentary Service SES employees subject to a Code of Conduct investigation are subject to fair and transparent processes and procedures. The consultation requirement promotes consistency for all Parliamentary Service SES employees in the process for determining a breach and any subsequent imposition of a sanction (should a breach be determined), and ensures determination of breach of the Code of Conduct is evidence-based.

### ***Right to privacy***

Article 17 of the ICCPR states that no one shall be subjected to arbitrary or unlawful interference with their privacy.

#### ***Record of determination process***

Section 11 requires if a determination is made in relation to a suspected breach of the Code of Conduct by a Parliamentary Service employee, a written record must be made. This may limit a person's right to privacy, if the personal information contained in the written record is not held correctly.

However, the limitation is reasonable, necessary and proportionate to ensure proper records are maintained and principles underpinning the Code of Conduct framework are upheld. The creation of a written record in relation to a suspected breach of the Code of Conduct facilitates accountability for decision making. Accurate record keeping may provide useful insight into decisions, and assist in the context of a review of action for such a determination. The note to Section 11 specifies that the *Archives Act 1983* applies to a record made under Section 11, ensuring proper record keeping procedures are upheld. Part 7A of the Act also safeguards as 'protected information' information obtained in Code of Conduct processes, and limits the circumstances in which it can be disclosed.

#### ***Role of Secretary and Commissioner***

Section 12 requires that if an SES employee in a relevant Department is suspected of breaching the Code of Conduct, the Secretary must consult with the Parliamentary Service Commissioner. It also requires the Secretary to consult with the Commissioner before a sanction is imposed on an SES employee who is determined to have breached the Code of Conduct. This may limit a person's right to privacy, as personal information will be disclosed by the Department to the Commissioner. However, the limitation is reasonable, necessary and proportionate, to ensure that the Commissioner has visibility on an ongoing basis of all SES Parliamentary Service Code of Conduct matters and supports greater consistency and improvements in the integrity in Code of Conduct processes.

### **Conclusion**

The Directions are compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* because it promotes the protection of human rights. To the extent that a provision operates to limit a right or freedom, those limitations are reasonable, necessary and proportionate.