Public Service Amendment Bill 2012

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Public Service Amendment Bill 2012

Date introduced: 1 March 2012

House: House of Representatives

Portfolio: Prime Minister

Commencement: Sections 1–3 commence on the day the Act receives Royal Assent. Schedules 1-4 commence on a day to be fixed by Proclamation, or on the day after six months from Royal Assent, whichever occurs first.

Links: The links to the Bill, its Explanatory Memorandum and second reading speech can be found on the Bill’s home page, or through http://www.aph.gov.au/Parliamentary_Business/Bills_Legislation. When Bills have been passed and have received Royal Assent, they become Acts, which can be found at the ComLaw website at http://www.comlaw.gov.au/.

Purpose

The main purpose of the Bill is to amend the Public Service Act 1999 (Cth) (‘the Act’) and related legislation so as to:

- delineate the roles and responsibilities of departmental secretaries and provide for annual reviews of secretaries’ performance
- establish new arrangements for the appointment and termination of secretaries and for the engagement of former secretaries
- establish the Secretaries Board as the Australian Public Service (APS) agency head forum
- further define the functions of the Senior Executive Service (SES)
- expand the functions and powers of the Public Service Commissioner (to be renamed the Australian Public Service Commissioner)
- introduce a framework to protect the confidentiality of information provided to the Public Service Commissioner and the Merit Protection Commissioner in connection with their functions
- revise and rationalise the current APS Values, insert new APS Employment Principles, amend the scope of the Code of Conduct, and extend current provisions relating to breaches of the Code
- establish two categories only of APS employees—ongoing and temporary employees
- establish a procedural framework in the Act for whistleblower reports and
- make a range of technical changes and amendments to existing arrangements including those for machinery of government changes and the legislative instrument status of directions and rules made under the Act.¹

Background

In September 2009 then Prime Minister Rudd announced the establishment of an Advisory Group to be tasked with developing a ‘blueprint for reform’ of the APS. The Advisory Group on Reform of Australian Government Administration completed its final report, Ahead of the Game: Blueprint for the Reform of Australian Government Administration (‘Blueprint’) in March 2010 and proposed a number of reforms including restructuring and augmenting the role of the Australian Public Service Commission (APSC) and reviewing employment arrangements for departmental secretaries. In May 2010 the Prime Minister announced that the Government had accepted the Advisory Group’s recommendations in full.

The Special Minister of State has indicated that the amendments in the Bill ‘implement the recommendations’ of the Blueprint. While the Blueprint is clearly the major source document for many provisions in the Bill, the Bill does not adopt every recommendation of the Blueprint (a number are progressively being implemented through other means), and those recommendations taken up by the Bill are not necessarily reproduced in the exact terms set out in the Blueprint. A substantial focus of the Bill is the leadership stratum of the APS (departmental secretaries, the SES, and the Public Service Commissioner). The following recommendations from the Blueprint comprise the main policy background to the Bill:

- ‘Revise the APS Values to a smaller set of core values that are meaningful, memorable and effective in driving change’ and ‘[e]mbed the revised values into the work of the APS through senior leadership and learning and development and performance management frameworks’
- ‘Amend the Public Service Act 1999 to recognise the roles and responsibilities of Secretaries and the Public Service Commissioner’ and ‘Strengthen the performance framework to assess individual and collective performance against the … roles and responsibilities’

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• ‘Revise the processes for appointing and terminating Secretaries’ and ‘Reinforce the terms for appointment for Secretaries to provide for a five year term’
• ‘Establish a new APS leadership group, the Secretaries Board’ and ‘Require leaders at all levels to act as role models and drive reforms in their agencies’
• ‘Revise the Public Service Act 1999 to reflect reforms to the APSC’ and
• ‘Conduct periodic external reviews of agencies’ institutional capabilities, covering strategy, leadership, workforce capability, delivery and organisational effectiveness’.

A number of proposed measures in the Bill are not based in the Blueprint, for example the amendments relating to categories of APS employees, whistleblower provisions, and legislative instruments. The Explanatory Memorandum to the Bill states that amendments not based in the Blueprint ‘are consistent with the objectives of the Blueprint’, although this is not elaborated.

**Committee Consideration**

This Bill was referred to the Senate Standing Committee for the Scrutiny of Bills. The Committee’s comments are noted below in the discussion of relevant amendments.

**Financial implications**

The Explanatory Memorandum states that the Bill ‘has low financial impact’ and that ‘[t]he proposals are either cost neutral or would be met from within the existing resources of the Australian Public Service Commission’. The Explanatory Memorandum also anticipates that the measures in the Bill should result in ‘more efficient, effective, economical and ethical use of the Commonwealth’s resources,’ though no further information is provided in support of this. Departmental secretaries are required to promote such use of Commonwealth resources in the course of their management of agencies under section 44 of the Financial Management and Accountability Act 1997 (Cth).

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8. Ibid.

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Main issues and key provisions

Schedule 1—Amendment of the Public Service Act 1999

Departmental secretaries and the Senior Executive Service

Departmental secretaries

The Bill proposes to repeal the existing provisions of the Act dealing with the responsibilities, appointment and termination of departmental secretaries, and with the engagement of former secretaries, and introduce new arrangements.

Roles and responsibilities

Currently under section 57 of the Act the responsibilities of secretaries are briefly and broadly delineated: secretaries are responsible for managing their departments and advising their minister(s) in matters relating to their departments. Secretaries are also required to assist their minister(s) to fulfil the minister’s accountability obligations to the Parliament to provide factual information, as required by the Parliament, in relation to the operation and administration of their departments.

The Bill addresses the ostensible need for a clearer articulation of roles and responsibilities by proposing to introduce an expanded and detailed (but not exhaustive) listing of secretaries’ roles and responsibilities (item 1, proposed subsections 57(1) and (2)). The Special Minister of State has indicated that the revised descriptions are meant to ‘clarify the service and performance expected of secretaries and strengthen secretaries’ accountability to ministers in performing their roles and discharging their responsibilities’, as well as restoring the arrangements in place prior to 1999.

Under the amendments the roles of secretaries would include: principal official policy advisers to their ministers; managers ensuring delivery of government programs and collaboration to achieve outcomes within their portfolios and across government with other secretaries; leaders providing stewardship in their departments across the APS with the Secretaries’ Board; and any other roles as prescribed by the Regulations (item 1, proposed subsection 57(1)).

The proposed amendments would preserve current secretaries’ responsibilities with added explicit requirements to manage departmental affairs efficiently, effectively, economically and ethically and in a way not inconsistent with the policies of the Commonwealth and the interests of the APS as a whole (item 1, proposed paragraphs 57(2)(a) and (g)). The amendments also propose new responsibilities to provide leadership and strategic direction; implement measures relating to departments’ legal compliance; ensure strong portfolio strategic policy capability that can consider whole-of-government issues; maintain clear lines of communication within portfolios; engage with stakeholders; and other responsibilities as prescribed by the Regulations (item 1, proposed

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10. G Gray (Special Minister of State and Minister for the Public Service and Integrity), ‘Second reading speech: Public Service Amendment Bill 2012’, op. cit., p. 2443.
11. Ibid.

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paragraphs 57(2)(c)–(f), (h), and (j)). It is noteworthy—that these fundamental responsibilities have been absent from the existing list of secretaries’ responsibilities in the Act (in section 57), particularly given that one of the objects of the Act is to ‘to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public’ (paragraph 3(a)).

Appointments, termination and annual performance reviews; engagement of former secretaries

Currently under section 58 of the Act secretaries are appointed by the Prime Minister for up to five years. Prior to making an appointment the Prime Minister must receive a report concerning the vacancy either from the Public Service Commissioner (PSC) (if the appointment is of the Secretary of the Department of the Prime Minister and Cabinet (DPMC)) or from the Secretary of the DPMC for appointments of other secretaries. Preparation of reports must involve consultation with the relevant agency minister. Section 58 also provides that one person may hold more than one office of secretary.

Currently under section 59 of the Act secretaries’ appointments can be terminated by the Prime Minister at any time by notice in writing. Prior to termination the Prime Minister must receive a report concerning the proposed termination either from the PSC (if the proposed termination is of the Secretary of the DPMC) or from the Secretary of the DPMC for proposed terminations of other secretaries.

Under the proposed amendments secretaries would be appointed in writing by the Governor-General on the recommendation of the Prime Minister (item 1, proposed subsection 58(1)). Appointments would be for five years unless the appointee requested a shorter period; reappointments would be for any period not exceeding five years (item 1, proposed subsections 58(3) and 58(4)). In his second reading speech the Special Minister for State stated that the proposed five-year appointment period ‘strengthens the integrity of the appointment process’, although the linkage between length of tenure and integrity of appointment processes is not made clear.

The Bill would maintain the existing requirement for the Prime Minister (prior to making recommendations to the Governor-General) to receive reports from either the PSC (for an appointment of the Secretary of the DPMC) or from the Secretary of the DPMC (for appointments of other secretaries), with a change that consultation requirements would only apply in relation to reports from the Secretary of the DPMC (item 1, proposed subsections 58(6)–(8)). The existing provision enabling one person to hold more than one office of secretary would be repealed and it

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12. Emphasis added. The other objects of the Act as listed in Section 3 are: (b) to provide a legal framework for the effective and fair employment, management and leadership of APS employees; (c) to define the powers, functions and responsibilities of Agency Heads, the Public Service Commissioner and the Merit Protection Commissioner; and (d) to establish rights and obligations of APS employees.

would be specified that secretaries hold office on a full-time basis (item 1, proposed subsection 58(5)).

Under the application, saving and transitional provisions of the Bill, on commencement current secretaries would continue to hold office for the remainder of their existing appointment periods under their existing employment terms and conditions (Schedule 4 item 3).

In relation to terminations, the under the proposed amendments the Governor-General would be able to terminate a secretary’s appointment by notice in writing at any time on the recommendation of the Prime Minister (item 1, proposed subsection 59(1)). The Bill would maintain the existing requirement for the Prime Minister (prior to making recommendations to the Governor-General) to receive reports from either the PSC (for the termination of the appointment of the Secretary of the DPMC) or from the Secretary of the DPMC (for terminations of appointments of other secretaries), with additional consultation requirements in relation to reports from the Secretary of the DPMC (item 1, proposed subsections 59(2)–(4)).

The Bill further proposes to introduce a new requirement for annual performance reviews of secretaries to be conducted in accordance with a framework established by the Secretary of the DPMC and the PSC (item 2, proposed section 61A).

Currently under section 60 of the Act secretaries whose employment has been terminated, or whose office has been abolished due the abolition of their Department, may be engaged by the Prime Minister for specified duties (other than as an APS employee) on terms and conditions determined by the Prime Minister. The Bill proposes to maintain the Prime Minister’s power to engage former secretaries, but also proposes to remove the reference to ‘specified duties’ and to introduce a new definition of ‘former secretary’ as secretaries whose office has been abolished or whose appointment has been terminated; secretaries who have resigned; and secretaries whose period of appointment has concluded (item 1, proposed section 60).

The Explanatory Memorandum indicates that the purpose of the new provisions for the engagement of former secretaries is to broaden the pool of former secretaries who can be engaged, thereby ‘enhanc[ing] leadership capability … by making it easier to draw on the talents and experience of former Secretaries’. The purpose of removing the reference to ‘specified duties’ is to widen ‘the 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’. The new provisions may also have been formulated in response to concerns raised over the Governor-General’s April 2011 appointment, under section 67

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15. Ibid.
of the Commonwealth Constitution, of former Treasury Secretary Dr Ken Henry as a Special Advisor to the Government.16

The Secretaries Board

The Bill proposes to formally establish a Secretaries Board (item 4, proposed subsection 64(1)), although it appears that the Board has been functioning in some form since 2010.17 The Secretaries Board would consist of the Secretary of the DPMC as Chair, all other secretaries, the PSC, and others nominated by the Secretary of the DPMC (item 4, proposed subsection 64(2)). The Secretaries Board would have a range of high-level APS leadership and development functions including stewardship; identification of strategic APS priorities; modelling leadership behaviours; the development of strategies to address APS-wide issues; and drawing together advice from senior leadership in government, business and the community (item 4, proposed subsection 64(3)). The Board would also be able to establish one or more senior leadership groups to assist it in performing its functions (item 4, proposed subsection 64(4)). Given the Board’s stated function of drawing together advice from senior leadership in government, business and the community, it may be desirable for the Bill to specifically allow for the appointment of business and community representatives to these senior leadership groups.

The Secretaries Board would replace the Management Advisory Committee, which has been the agency heads’ forum since 1999 with responsibility for advising the government on APS management issues. The Bill would abolish the Management Advisory Committee by repealing its current establishing provisions in the Act (item 4).

The Senior Executive Service

The Bill proposes to further define and expand the functions of SES employees. Currently under section 35 of the Act the function of the SES is to provide a group of APS employees who individually provide one or more of the following at a high level: professional expertise, policy advice, and management. SES employees also promote the APS Values, compliance with the Code of Conduct, and cooperation with other agencies.

The Bill would repeal the existing SES function provisions in the Act and recast the base function of the SES group as providing APS-wide strategic leadership of the highest quality that contributes to an effective and cohesive APS (item 5, proposed subsection 35(2)). In terms of the functions of individual SES employees, the Bill would require SES employees to provide one or more of the

16. The instrument of appointment can be accessed at:
17. See for example T Moran, ‘Citizens, culture and leadership: speech to the Institute of Public Administration Australia’, Canberra, 8 December 2010, p. 6, viewed 2 August 2012,
   http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F433014%22

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following at a high level: professional or specialist expertise, policy advice, program or service delivery, and regulatory administration (item 5, proposed paragraph 35(3)(a)).

The Bill would retain the function of promoting the APS Values and compliance with the Code of Conduct, with the addition of also promoting the APS Employment Principles (to be inserted by the amendments) (item 5, proposed paragraph 35(3)(c)). The function of promoting cooperation with other agencies would be expanded to promoting cooperation within and between agencies, including to deliver outcomes across agency and portfolio boundaries (item 5, proposed paragraph 35(3)(b)).

Under the application, saving and transitional provisions of the Bill the new specified functions for individual SES employees would apply on commencement to existing SES employees (Schedule 4 item 7).

The Public Service Commissioner

The Bill proposes to make changes to the existing framework for the office of the PSC in a number of areas including the Commissioner’s functions, confidentiality of information, and legal immunity. The Bill would also rename the PSC the Australian Public Service Commissioner. The second reading speech states that:

> The bill specifically recognises the commissioner’s role as the central authority for APS workforce development and reform, an authority that will take a leading role in ensuring that the service has the organisational and workforce capability to meet future needs.\(^{18}\)

Under the application, saving and transitional provisions of the Bill the existing PSC would become the Australian Public Service Commissioner on commencement and would continue to hold office for the remainder of the existing appointment period under the existing employment terms and conditions (Schedule 4 item 8). Saving provisions would also apply to acts or things done by or in relation to the PSC prior to commencement and to references to the PSC in instruments in force immediately prior to commencement (Schedule 4 item 8).

Functions

The Bill seeks to expand the functions of the Public Service Commissioner. The Explanatory Memorandum states that the aim of the amendments is to ‘modernise and clarify the functions of the Commissioner’ and that they ‘are not intended to diminish the Commissioner’s current functions, powers or independence.’\(^{19}\)

Currently under section 41 of the Act the PSC has a range of functions including evaluating the incorporation and upholding of the APS Values in agencies; promoting the APS Values and Code of

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18. G Gray (Special Minister of State and Minister for the Public Service and Integrity), ‘Second reading speech: Public Service Amendment Bill 2012’, op. cit., p. 2444.

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Conduct; inquiring into and reporting on alleged breaches of the Code of Conduct by agency heads; developing, promoting, reviewing and evaluating APS employment policies and practices; facilitating continuous improvement in people management throughout the APS; coordinating and supporting APS-wide training and APS career development opportunities; and contributing to and fostering leadership in the APS.

The Bill would introduce a range of new functions for the office including:

- strengthening APS professionalism and upholding high standards of integrity and conduct in the APS
- monitoring, reviewing and reporting on APS capabilities within and between agencies to promote high standards of accountability, effectiveness and performance
- leading the thinking about, providing advice on, and driving reforms to workforce management policies to ready the APS for future demands
- fostering an APS workforce that reflects the diversity of the Australian population
- partnering with secretaries in the stewardship of the APS
- working with other governments, including foreign governments, on matters relating to public sector workforce management, leadership and career development
- inquiring into and determining possible Code of Conduct breaches by current and former APS employees if requested by the relevant agency head or the Prime Minister, and where the Commissioner considered it appropriate
- conducting systems reviews and special reviews into matters relating to agencies
- reviewing any matter relating to the APS and
- other functions as directed by the Prime Minister by legislative instrument.

The proposed functions are set out in item 16, proposed section 41. Some of the new functions are detailed further below.

Most of the PSC’s existing functions in section 41 of the Act would be retained, often with some augmentation—for example the existing function of promoting the APS Values and Code of Conduct would be recast as promoting the APS Values, the Code of Conduct, and the APS Employment Principles (to be inserted by the amendments). Another example is the current function of contributing to and fostering leadership in the APS, which would be recast as fostering and contributing to leadership, high-quality learning and development and career management in the APS. Provision would also be made for the Regulations to authorise the PSC to charge fees for the performance, on request, of its functions.

Currently under section 43 of the Act the PSC, when discharging certain evaluation, review or inquiry functions under section 41, has the same information-gathering powers as those possessed by the Auditor-General under the Auditor-General Act 1997 (Cth). The Bill would maintain these powers for related functions set out in the proposed section 41 and would also give the PSC the same powers for the conduct of special reviews (see below) (items 17–20, proposed paragraphs 43(1)(a), (b), (c) and (d)).
The Bill would empower the PSC to delegate in writing (item 23, proposed subsection 78(5A)):

- inquiries into possible breaches of the Code of Conduct by current and former APS employees and agency heads (item 16, proposed paragraphs 41(2)(m) and (n))
- inquiries into whistleblower reports (item 16, proposed paragraph 41(2)(o), see below) and
- issuing of certificates in relation to proposed terminations of SES employment

to former senior officials. ‘Former senior official’ would be defined as a person who previously held, but does not currently hold, an office or appointment under legislation, or a former SES employee who does not currently hold an office or appointment under legislation (item 24, proposed subsection 78(12)). Currently under subsection 78(5) of the Act the PSC may delegate in writing any powers or functions under the Act (except the power to delegate) to a senior official (a person currently holding an office or appointment under legislation or a current or acting SES employee).

Inquiries by the Public Service Commissioner into possible APS Code of Conduct breaches by agency heads and by current and former APS employees

The existing power in the Act for the PSC to inquire into possible breaches of the Code of Conduct by agency heads would be supplemented by provision for the Regulations to prescribe circumstances where the PSC could decline to inquire into alleged breaches or discontinue an inquiry without an obligation to report (item 16, proposed subsection 41A(3)). The second reading speech states that ‘[t]his element of discretion is desirable to deal with trivial or futile matters or matters that have previously been dealt with’. The Explanatory Memorandum offers no guidance as to what may constitute a ‘trivial or futile’ matter. If the Regulations are amended so as to enable the PSC to discontinue inquiries into possible breaches by agency heads without having to make any report, this could potentially impact on accountability and confidence in the PSC and APS leadership, particularly given that under the Bill the PSC would be required to report on inquiries into possible breaches by current or former APS employees whether completed or not (see below).

The PSC’s new function of inquiring into and determining possible breaches of the Code of Conduct by current or former APS employees (item 16, proposed subsection 41B(1)) would sit alongside the existing requirement in the Act for agency heads to establish procedures for determining breaches of the Code of Conduct (see below). Under the amendments, the PSC would have the same powers as agency heads in conducting inquiries (item 16, proposed subsection 41B(7)). As currently the Act only provides for determining whether current APS employees have committed a breach, the extension of the PSC’s powers to deal with possible breaches by former APS employees is a notable change and is presumably intended to deal with the situation of employees resigning in order to avoid investigation and potential adverse findings. As is noted below, the Bill does not seek to extend the application of sanctions for breach to former APS employees.

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20. ‘Agency Head’ is defined in section 7 of the Act to mean the Secretary of a Department, the Head of an Executive Agency, or the Head of a Statutory Agency.
21. G Gray (Special Minister of State and Minister for the Public Service and Integrity), ‘Second reading speech: Public Service Amendment Bill 2012’, op. cit., p. 2445.

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The Prime Minister would be able to request inquiries into possible breaches in connection with systems reviews or special reviews conducted by the PSC (item 16, proposed subsection 41B(2); see below regarding systems reviews and special reviews). The PSC would be required to establish written procedures for inquiries; these procedures would have to be publicly available, comply with procedural requirements prescribed by the Regulations, and have due regard to procedural fairness (item 16, proposed subsections 41B(3) and (5)). The procedures could vary for different categories of current or former APS employee and for current or former APS employees found to have committed/been convicted of offences in respect of conduct alleged to constitute a breach of the Code of Conduct (item 16, proposed subsection 41B(4)). Despite the preservation of a requirement for due regard to procedural fairness, the ability to vary procedures that apply to different categories of APS employees may be in tension with broader considerations of fairness.

The Regulations would be able to prescribe circumstances where the PSC could discontinue a breach inquiry (item 16, proposed subsection 41B(10)); the PSC would be required to report on the results of breach inquiries, whether completed or not, to either the relevant agency head or the Prime Minister (item 16, proposed subsection 41B(8)), and would be able to recommend any of the sanctions specified in the Act (for example termination of employment, reduction in salary, reprimand) for current APS employees if a breach was found and if requested to do so by the agency head or the Prime Minister (item 16, proposed subsection 41B(9)).

Systems reviews and special reviews of agencies and agency relationships by the Public Service Commissioner

Among the PSC’s proposed new functions would be the undertaking of systems reviews and special reviews in relation to agencies. Systems reviews (item 16, proposed section 41C), conducted upon direction by the Prime Minister, could review any matter relating to an agency including its management, organisational systems, structures or processes, and the functional relationships between two or more agencies. An agency minister would be able to request the Prime Minister to direct that a systems review be conducted in relation to an agency, as would a departmental secretary in relation to their department or other agencies in their portfolios. Once the review was conducted the PSC would be required to provide a review report to the Prime Minister and, where the review had been requested by an agency minister or secretary, to the minister or secretary.

Special reviews (item 16, proposed section 41D), conducted upon direction by the Prime Minister, could review any matter relating to an agency or the functional relationships between two or more agencies. Once the review was conducted the PSC would be required to provide a review report to the Prime Minister and to the agency minister of each agency to which the review relates. The Bill would not require the tabling in Parliament of either systems review reports or special review reports.

The Bill specifies that written prime ministerial directions to conduct systems and special reviews would not constitute legislative instruments (item 16, proposed subsections 41C(5) and 41D(3)).
Special Commissioners

The Bill also provides for the appointment of Special Commissioners to assist the PSC in conducting systems reviews or special reviews (item 26, proposed section 48A). Special Commissioners would be appointed in writing by the Governor-General on the recommendation of the Prime Minister; the Prime Minister would be required to consult with the PSC prior to making a recommendation for an appointment (item 26, proposed subsections 48A(1) and (2)). Special Commissioners would be appointed, on a full or part-time basis, for a specified period; appointments could be terminated in writing by the Governor-General at any time on the recommendation of the Prime Minister (the Prime Minister would be required to consult with the PSC before making a recommendation for a termination) (item 26, proposed subsections 48A(3) and (4) and proposed section 48C).

Public Service Commissioner’s directions

Currently under section 11 of the Act the PSC must issue directions in relation to each of the APS Values; this requirement would be removed and replaced with a discretionary power to issue directions in relation to any of the new APS Values (item 29, proposed subsection 11(1)). Under section 42 of the Act Commissioner’s directions are binding on agency heads and APS employees.

The Bill would also provide the PSC with a discretionary power to issue directions about employment matters relating to APS employees (including engagement, promotion, redeployment, mobility, training schemes, termination) (item 74, proposed subsection 11A(1)). The current requirement, under section 36 of the Act, for the PSC to issue written directions about employment matters relating to SES employees (including engagement, promotion, redeployment, mobility and termination) would be repealed, although under the application, saving and transitional provisions of the Bill existing Commissioner’s directions on SES employment matters would continue in force at and after commencement (Schedule 4 item 46).

Under the amendments the PSC would also have the power to issue directions in relation to the proposed APS Employment Principles (see further below) for the purpose of:

• ensuring that the APS incorporates and upholds the Principles and
• determining where necessary the scope or application of the Principles (item 74, proposed subsection 11A(2)).

Commissioner’s directions about employment matters and the Employment Principles would have no effect to the extent of any inconsistency with directions issued by the Prime Minister (item 74, proposed subsection 11A(4)).

The Public Service Commissioner and confidentiality of information

The Bill proposes to introduce a framework to protect the confidentiality of information provided to the PSC in connection with several of the PSC’s review and inquiry functions. The proposed framework resembles, but does not reproduce, the existing framework for information confidentiality in the Public Service Regulations 1999.

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A category of information, protected information, would be established (item 70, proposed subsection 72A(1)). Protected information would be information obtained by entrusted persons (being the PSC, the PSC’s delegates, those acting under the PSC’s direction or authority, Special Commissioners, and members of staff assisting the PSC or Special Commissioners) in connection with the performance or exercise of the following of the PSC’s review and inquiry functions:

- reviews into APS matters
- inquiries into breaches of the APS Code of Conduct by agency heads and current/former APS employees
- inquiries into whistleblower reports
- systems reviews and special reviews and
- any other functions, duties or powers under the Act or Regulations as prescribed by the Regulations (item 70, proposed subsection 72A(1)).

Under the amendments current and former entrusted persons would be prohibited from directly or indirectly making a record of, disclosing, or otherwise using protected information except as authorised by that provision or the Regulations (item 70, proposed subsection 72A(2)). Entrusted persons would be authorised to make records of, disclose, or otherwise use protected information for the purposes of, or in connection with, the performance or exercise of their functions, duties or powers under the Act or Regulations; or for the purposes of or in connection with the performance or exercise of the PSC’s functions or powers under the Act or Regulations (item 70, proposed subsection 72A(3)).

The PSC would be authorised to disclose protected information:

- in reports prepared for purposes connected with the performance or exercise of the PSC’s functions or powers if the PSC was satisfied that the disclosure was necessary for setting out grounds for report conclusions and recommendations (item 70, proposed subsection 72A(4)) and
- to persons, the public or sections of the public if the PSC was satisfied that the disclosure was in the interests of an agency or person, or in the public interest, and the disclosure was not likely to interfere with a review or inquiry under the Act or the Regulations (item 70, proposed subsection 72A(5)). In making such a disclosure, the PSC would be prohibited from disclosing individuals’ names or any material that would enable an individual to be identified unless satisfied that such a disclosure was fair and reasonable in all the circumstances (item 70, proposed subsection 72A(6)).

Under the Bill current and former entrusted persons would not be compellable, in any proceedings before courts or persons authorised by law or party consent to hear, receive and examine evidence, to disclose protected information obtained in connection with the performance or exercise of the following of the PSC’s functions:

- reviews into APS matters
- inquiries into breaches of the APS Code of Conduct by agency heads
- inquiries into whistleblower reports

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• systems reviews and special reviews and
• any other functions, duties or powers under the Act or Regulations as prescribed by the Regulations (item 70, proposed subsection 72A(7)).

This mirrors the types of information that are specified to be within the category of protected information in proposed subsection 72A(1), with the omission of information obtained in relation to inquiries into breaches of the APS Code of Conduct by current/former APS employees. Under proposed subsection 72A(7) this particular type of information would not be covered by the non-compellability provisions.

Inadmissibility of providing information or documents to the Public Service Commissioner

The Bill (item 70, proposed section 72C) would also make the provision of information and documents to the PSC inadmissible as evidence against a person in proceedings (other than in proceedings for certain criminal offences) where:

• the PSC requested information or a document from a person for purposes connected with the performance or exercise of the PSC’s inquiry and review functions as listed in proposed subsection 72A(1) (or any other functions, duties or powers under the Act or Regulations as prescribed by the Regulations)
• a person reasonably believed that information or a document was relevant for purposes connected with the performance or exercise of the PSC’s inquiry and review functions as listed in proposed subsection 72A(1) (or any other functions, duties or powers under the Act or Regulations as prescribed by the Regulations)
• the information or document was obtained lawfully by the person and provided to the PSC and
• by providing the information or document to the PSC, the person
  − contravened any other law
  − might have tended to self-incriminate or incur liability to a penalty
  − disclosed legal advice given to a minister or an agency
  − disclosed a communication between a person performing or exercising functions, duties or powers in an agency and another person or body, and the communication was protected against disclosure by legal professional privilege or
  − otherwise acted contrary to the public interest (item 70, proposed subsections 72C(1)–(3)).

The amendments would also exempt persons from any penalty under any other law by reason of providing the information or document to the PSC and to the extent that providing the information or document to the PSC involved a disclosure of personal information, the disclosure would be taken to be authorised for the purposes of the Privacy Act 1988 (Cth) (item 70, proposed subsections 72C(4) and (5)).

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The Explanatory Memorandum states that the purpose of these provisions is to ‘protect Agencies and APS employees who provide information to the Commissioner to assist in the performance of certain of the Commissioner’s functions’. 22

Immunity from civil proceedings for the Public Service Commissioner

Currently the Regulations (regulation 6.4) provide immunity from civil proceedings for the PSC and related personnel in relation to the exercise of the PSC’s statutory function of inquiring into whistleblower reports regarding breaches of the APS Code of Conduct.

The Bill proposes to embed immunity for the PSC and related personnel in the Act and widen its coverage (item 72, proposed subsection 78A(1)). Immunity would apply to the PSC and the PSC’s delegates, those acting under the PSC’s direction or authority, Special Commissioners, and members of staff assisting the PSC or Special Commissioners in relation to anything done or omitted to be done in good faith in the performance or exercise of several of the PSC’s review and inquiry functions including reviews into APS matters; inquiries into breaches of the APS Code of Conduct by agency heads and current/former APS employees; inquiries into whistleblower reports; and any other functions, duties or powers under the Act or Regulations as prescribed by the Regulations.

The Merit Protection Commissioner

The Bill proposes to make changes to the existing framework for the office of the Merit Protection Commissioner (MPC). Some of these changes are related to those proposed for the PSC.

Functions

Inquiries by the Merit Protection Commissioner into possible APS Code of Conduct breaches by current and former APS employees

Related to the proposed inquiry function for the PSC, the Bill would confer the function of inquiring into and determining possible Code of Conduct breaches by current and former APS employees on the MPC where this was requested by the relevant agency head, where the current/former employee agreed in writing, and where the MPC considered it appropriate (item 47, proposed subsection 50A(1)). The MPC would have the same powers as agency heads in conducting inquiries (item 47, proposed subsection 50A(6)).

The MPC would be required to establish written procedures for inquiries; these procedures would have to be publicly available, comply with procedural requirements prescribed by the Regulations, and have due regard to procedural fairness (item 47, proposed subsections 50A(2) and (4)). The procedures could vary for different categories of current or former APS employee and for current or former APS employees found to have committed/been convicted of offences in respect of conduct alleged to constitute a breach of the Code of Conduct (item 47, proposed subsection 50A(3)).


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MPC would be required to report on the results of inquiries to requesting agency heads (item 47, proposed subsection 50A(7)). Despite the preservation of a requirement for due regard to procedural fairness, the ability to vary procedures that apply to different categories of APS employees may be in tension with broader considerations of fairness.

Review of actions relating to employment by the Merit Protection Commissioner

Currently section 33 of the Act requires the Regulations to provide that, where a review of an ‘APS action’ (an action, including a refusal or failure to act, by a person in the capacity of an agency head or APS employee) relating to an APS employee’s employment follows an application or referral to the MPC, the review must be conducted by a person nominated by the MPC or by a three-member committee constituted in accordance with the Regulations.

The Bill would amend this requirement by adding the MPC as one of the possible parties able to conduct such reviews under the Regulations (the other options of a person nominated by the MPC or a three-member committee would be preserved) (item 55, proposed paragraph 33(4)(d)).

The Bill would also repeal the current definition of ‘APS action’ and insert a new definition which would maintain the current element of action by a person in the capacity of an agency head or APS employee. In addition, it would add a new element of action by the PSC in relation to the PSC’s new power to inquire into and determine possible breaches of the APS Code of Conduct by current or former APS employees (including a finding of a breach) (item 56, proposed subsection 33(7)).

The Merit Protection Commissioner and confidentiality of information

The Bill proposes to introduce a framework to protect the confidentiality of information provided to the MPC in connection with the MPC’s functions. The proposed framework resembles, but does not reproduce, the existing framework for information confidentiality in the Regulations.

A category of information, protected information, would be established (item 70, proposed subsection 72B(1)). Protected information would be information obtained by entrusted persons (being the MPC, the MPC’s delegates, those acting under the MPC’s direction or authority, members of staff assisting the MPC, members of a committee established or appointed by the MPC, or any other person prescribed by the Regulations) in connection with the performance or exercise of the MPC’s functions (including the new function of inquiring into breaches of the APS Code of Conduct by current/former APS employees) and any other functions, duties or powers under the Act or Regulations as prescribed by the Regulations. The Regulations would also be able to prescribe a second category of entrusted persons (prescribed entrusted persons) for the confidentiality provisions relating to the MPC (item 70, proposed subsection 72B(1)).

Current and former entrusted persons would be prohibited from directly or indirectly making a record of, disclosing, or otherwise using protected information excepted as authorised by that section or the Regulations (item 70, proposed subsection 72B(2)). Entrusted persons would be authorised to make records of, disclose, or otherwise use protected information for the purposes of, or in connection with, the performance or exercise of their functions, duties or powers under the Act.
or Regulations; or for the purposes of or in connection with the performance or exercise of the MPC’s functions or powers under the Act or Regulations (item 70, proposed subsection 72B(3)).

The MPC would be authorised to disclose protected information:

- in reports prepared for purposes connected with the performance or exercise of the MPC’s functions or powers if the MPC was satisfied that the disclosure was necessary for setting out grounds for report conclusions and recommendations (item 70, proposed subsection 72B(4)) and
- to persons, the public or sections of the public if the MPC was satisfied that the disclosure was in the interests of an agency or person, or in the public interest, and the disclosure was not likely to interfere with a review or inquiry under the Act or the Regulations (item 70, proposed subsection 72B(5)). In making such a disclosure, the MPC would be prohibited from disclosing individuals’ names or any material that would enable an individual to be identified unless satisfied that such a disclosure was fair and reasonable in all the circumstances (item 70, proposed subsection 72B(6)).

Under the Bill current and former entrusted persons would not be compellable, in any proceedings before courts or persons authorised by law or party consent to hear, receive and examine evidence, to disclose protected information obtained in connection with the performance or exercise of the following of the MPC’s functions:

- inquiries into whistleblower reports
- inquiries into breaches of the APS Code of Conduct by the PSC
- inquiries into APS actions by agency heads or APS employees relating to employment
- functions prescribed by the Regulations for the purposes of reviews of APS actions by those in the capacity of agency heads or APS employees relating to employment and
- any other functions, duties or powers under the Act or Regulations as prescribed by the Regulations (item 70, proposed subsection 72B(7)).

In addition, current and former prescribed entrusted persons would not be competent, and could not be compelled, to disclose protected information in any proceedings before courts or persons authorised by law or party consent to hear, receive and examine evidence (item 70, proposed subsection 72B(8)).

Inadmissibility of providing information or documents to the Merit Protection Commissioner

The Bill would also make the provision of information and documents to the MPC inadmissible as evidence against a person in proceedings (other than in proceedings for certain criminal offences) in the same terms as for the PSC (see above) in connection with the MPC’s functions (including the new function of inquiring into breaches of the APS Code of Conduct by current/former APS employees) and any other functions, duties or powers under the Act or Regulations as prescribed by the Regulations (item 70, proposed section 72D).
Immunity from civil proceedings for the Merit Protection Commissioner

Currently the Regulations provide immunity from civil proceedings for the MPC and related personnel in the exercise of any power or authority conferred by the Act.

As for the PSC, the Bill proposes to embed immunity for the MPC and related personnel in the Act. Immunity would apply to the MPC and the MPC’s delegates, those acting under the MPC’s direction or authority, staff assisting the MPC, members of committees established or appointed under the Regulations by the MPC, and any other person prescribed by the Regulations in relation to anything done or omitted to be done in good faith in the performance or exercise of functions, duties and powers conferred by the Act or the Regulations (item 72, proposed subsection 78A(2)).

Whistleblower reports

Currently sections 41 and 50 of the Act empower the PSC and the MPC to inquire into APS employees’ reports of breaches of the APS Code of Conduct (whistleblower reports). The Act also prohibits victimisation of or discrimination against APS employees who report Code of Conduct breaches to agency heads, the PSC, or the MPC (section 16). Currently the Regulations set out a procedural framework for whistleblower reports including a requirement for agency heads to establish procedures for dealing with reports.

The Bill proposes to insert into the Act some of the basic elements of the current procedural framework in the Regulations for whistleblower reports. The Bill would insert into the Act the requirement for agency heads to establish procedures for dealing with whistleblower reports and another existing requirement for the procedures to provide a pathway for the making of reports by APS employees to agency heads or authorised persons (item 52, proposed subsection 16(2)). The procedures established by agency heads would have to comply with basic procedural requirements (if any) prescribed by the Regulations (currently the Regulations specify a range of further requirements for whistleblower report procedures) (item 52, proposed subsection 16(3)). The Bill specifies that procedures established by agency heads would not be legislative instruments (item 52, proposed subsection 16(4)).

The Bill would also authorise the Regulations to prescribe procedures for APS employees to make whistleblower reports to the PSC or MPC or to their authorised persons, and also to prescribe procedural requirements that the PSC and MPC would have to comply with in dealing with whistleblower reports (item 52, proposed subsection 16(5)). Currently the Regulations require procedures established by agency heads for dealing with whistleblower reports to allow APS employees to make reports to the PSC or the MPC in certain circumstances, and also prescribe requirements regarding the investigation of reports by agency heads, the PSC or the MPC.

Under the amendments the Regulations would also be authorised to prescribe circumstances in which agency heads, the PSC, or the MPC could decline to conduct an inquiry into a whistleblower report or discontinue an existing inquiry (item 52, proposed subsection 16(6)). Currently the only
basis in the Regulations for non-investigation of whistleblower reports is where they are considered to be frivolous or vexatious.

The Bill would modify the current power for the PSC and the MPC to inquire into reports of breaches so as to subject this power to Regulations made for the purposes of the whistleblower report provisions (items 16 and 53, proposed paragraphs 41(2)(o) and 50(1)(a)). Under the amendments the MPC would have the same information-gathering powers as those possessed by the PSC when conducting whistleblower report inquiries (item 54, proposed subsection 50(2)).

The second reading speech states that the amendments relating to whistleblower reports will allow ‘matters to be excluded from inquiry, including those that relate to an employee’s own employment’ as ‘[s]uch complaints are better directed to the existing review of action scheme’. No such exclusions appear to be specified in the amendments; the Government may be signalling its intention here regarding changes to the Regulations.

The APS Values and APS Employment Principles

The Bill proposes to repeal the existing 15 APS Values in section 10 of the Act and in their place insert five new Values together with seven new APS Employment Principles relating to employment decisions and workplace standards. The second reading speech states that the five new Values ‘are more succinct and memorable’ than the existing 15 Values, and that ‘[t]he values and employment principles together capture the essence of the existing 15 values … [n]o important concepts have been lost’.

The 15 APS Values currently specified in section 10 of the Act are as follows:

- the APS is apolitical, performing its functions in an impartial and professional manner
- the APS is a public service in which employment decisions are based on merit
- the APS provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves
- the APS has the highest ethical standards
- the APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public
- the APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government’s policies and programs
- the APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public
- the APS has leadership of the highest quality

23. G Gray (Special Minister of State and Minister for the Public Service and Integrity), ‘Second reading speech: Public Service Amendment Bill 2012’, op. cit., p. 2446.

24. G Gray (Special Minister of State and Minister for the Public Service and Integrity), ‘Second reading speech: Public Service Amendment Bill 2012’, op. cit., p. 2445.

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• the APS establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace
• the APS provides a fair, flexible, safe and rewarding workplace
• the APS focuses on achieving results and managing performance
• the APS promotes equity in employment
• the APS provides a reasonable opportunity to all eligible members of the community to apply for APS employment
• the APS is a career-based service to enhance the effectiveness and cohesion of Australia’s democratic system of government and
• the APS provides a fair system of review of decisions taken in respect of APS employees.

The proposed five new APS Values are:

• Committed to service—the APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government
• Ethical—the APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does
• Respectful—the APS respects all people, including their rights and their heritage
• Accountable—the APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility and
• Impartial—the APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence (item 28, proposed section 10).

While the second reading speech states that ‘[n]o important concepts have been lost’ in the proposed rationalisation of the Values, it is important to note that some of the substance of the existing Values would not be retained in the proposed Values. The proposed ‘Ethical’ Value, for example, states that ‘the APS demonstrates leadership’, but does not specify ‘leadership of the highest quality’ or ‘the highest ethical standards’ as the current Values do. Similarly, the proposed ‘Committed to service’ Value makes no mention of actual service delivery as the current Values do—a noteworthy omission given that the APS delivers extensive and crucial services to the Australian community.

These omissions are not insignificant and may render the proposed Values less comprehensive, and less meaningful, as an articulation of the ethos of the APS. For the same reason the proposed Values may also be less effective in fostering a shared understanding and culture among APS employees, and of less worth in providing APS-wide, high-level guidance regarding expectations of behaviour and the performance of roles and responsibilities. In this light, a judicious retention of more of the content of the existing Values, or indeed an examination of analogous values in overseas jurisdictions, may be of real value.25


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The proposed APS Employment Principles would state that ‘[t]he APS is a career-based public service that’:

- makes fair employment decisions with a fair system of review
- recognises that the usual basis for engagement is as an ongoing APS employee
- makes decisions relating to engagement and promotion that are based on merit
- requires effective performance from each employee
- provides flexible, safe and rewarding workplaces where communication, consultation, cooperation and input from employees on matters that affect their workplaces are valued
- provides workplaces that are free from discrimination, patronage and favouritism and
- recognises the diversity of the Australian community and fosters diversity in the workplace (item 28, proposed section 10A).

The Employment Principles would operate subject to any restrictions in the Commissioner’s directions relating to the Employment Principles (see above). Agency heads would be required to uphold and promote the Employment Principles in addition to the existing requirement to uphold and promote the APS Values (item 31, proposed section 12).

In light of the proposed Principle concerning the provision of workplaces that are free from discrimination, patronage and favouritism, the Bill would repeal a current prohibition in section 17 of the Act on exercising powers under the Act or the Regulations in relation to engagement of APS employees, or otherwise, with patronage or favouritism (item 32). Given that favouritism and patronage are improper, it would perhaps be desirable to retain the prohibition. A broad APS-wide principle concerning the provision of workplaces free from discrimination, patronage and favouritism may not necessarily operate with the same strength and guidance as an explicitly stated prohibition against favouritism and patronage.

The amendments also largely reproduce existing provisions in subsection 10(2) of the Act providing that engagement or promotion decisions are merit-based if they involve, as the primary consideration, focused assessments of candidates’ relative suitability to perform the duties using competitive selection processes; this would be augmented by the addition of another element (currently a separate Value) of having given all eligible members of the community a reasonable opportunity to apply (item 28, proposed section 10A). In re-visiting the operation of the current provisions, it seems that the opportunity was not taken to consider the efficacy of the current approach of agencies in determining selection criteria. For example, what constitutes a focused assessment of candidates’ relative suitability might have been worthy of guidance by way of providing a power for the minister to make Regulations about such matters. Such Regulations could dovetail with the provisions dealing with merit selection, favouritism and patronage, and the goal of a ‘more efficient, effective, economical and ethical use of the Commonwealth’s resources’. 26

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The APS Code of Conduct

The Bill proposes to amend the scope of the APS Code of Conduct and extend current provisions regarding breaches of the Code.

Scope of the APS Code of Conduct

Currently four elements of the APS Code of Conduct in the Act require APS employees, in the course of their APS employment, to behave honestly and with integrity; to act with care and diligence; to treat everyone with respect and courtesy and without harassment; and to comply with all applicable Australian laws (subsections 13(1)–(4)). The amendments would replace ‘the course of’ with ‘connection with’ in these four elements of the Code, thereby broadening their application beyond behaviour and actions occurring in the course of APS employment. These elements would apply to conduct having a connection with APS employment (item 37, proposed subsections 13(1)–(4)).

A further element of the Code currently requires APS employees to behave at all times in a way that upholds the APS Values and the integrity and good reputation of the APS (subsection 13(11)); this would be amended by the insertion of additional requirements to uphold the APS Employment Principles and the integrity and good reputation of APS employees’ agencies (item 38, proposed subsection 13(11)). These additions would appear to provide useful clarification and guidance.

Currently the Act stipulates that agency heads and statutory office holders are bound by the Code of Conduct in the same way as APS employees (section 14). The Bill would amend this provision to specify that statutory office holders are bound by the Code subject to any Regulations (item 40, proposed subsection 14(2)). The Regulations would be able to prescribe the extent to which office holders are bound by the Code, and prescribe differently with respect to different statutory office holders or different classes of statutory office holders (item 40, proposed subsection 14(2A)). Currently the Regulations prescribe the class of office holders that are included within the definition of statutory office holder in the Act.

Breaches of the Code of Conduct

The Bill proposes to extend the capacity for agency heads to impose sanctions on APS employees for APS Code of Conduct breaches to include situations where the PSC or the MPC had found a breach through their own inquiry processes (see above) (item 42, proposed subsection 15(1)). The Bill does not seek to extend the range of sanctions or extend their application to former APS employees who have breached the Code of Conduct; sanctions currently provided for in the Act are termination of employment, reduction in classification, reassignment of duties, reduction in salary, salary deductions by way of fine, and reprimand (section 15).

The Bill would create a new liability for breaching the Code of Conduct where a current or former APS employee, prior to engagement in the APS and in connection with their engagement, was found on investigation to have:

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• knowingly provided false or misleading information to another APS employee or to a person acting on behalf of the Commonwealth
• wilfully failed to disclose to another APS employee or to a person acting on behalf of the Commonwealth information that the person knew or ought to have reasonably known was relevant or
• otherwise failed to behave honestly and with integrity (item 44, proposed subsection 15(2A)).

Where a current APS employee was found to have committed such a breach agency heads would be empowered to impose sanctions permitted by section 15 (item 44, proposed subsection 15(2A)).

The basic current requirement for agency heads to establish procedures for determining breaches by APS employees would be retained with some additional elements. Agency heads would be required to establish written procedures for determining breaches by both current and former APS employees and for the imposition of sanctions on APS employees (item 44, proposed subsection 15(3)). The procedures could vary for different categories of current or former APS employee and for current or former APS employees found to have committed/been convicted of offences in respect of conduct alleged to constitute a breach of the Code of Conduct (item 44, proposed subsection 15(5)). As is the case currently, the procedures would need to have due regard to procedural fairness and comply with basic procedural requirements set out in Commissioner’s directions; the current requirement for the PSC to issue such directions would also be preserved (item 44, proposed subsections 15(4) and (6)). Despite the preservation of a requirement for due regard to procedural fairness, the ability to vary procedures according to different categories of APS employees may be in tension with broader considerations of fairness.

The amendments specify that the procedures would not constitute legislative instruments and would require agency heads to ensure that the procedures would be publicly available (item 44, proposed subsections 15(7) and (8)). Currently under the Act agency heads are required to take reasonable steps to ensure that all APS employees in their agencies have ready access to the procedures (subsection 15(5)); this would no longer be a requirement due to the new requirement for procedures to be made public. Given the importance of these procedures in determining breaches of the Code of Conduct, a provision enabling the Regulations to require agency heads to take steps to familiarise their employees with their procedures might be desirable.

Categorisation of ongoing and temporary APS employees

Currently the Act defines three categories of APS employee: ongoing employees, employees engaged for a specified term or for the duration of a specified task, and employees engaged for irregular or intermittent duties (section 7). The Act also defines ‘non-ongoing APS employee’ as an APS employee who is not ongoing. Under section 22 of the Act APS employees must be engaged in one of the three categories (section 22 also states that the usual basis for engagement is as an ongoing APS employee; under the amendments this would be maintained as one of the new APS Employment Principles).
The Bill proposes to replace the two categories of non-ongoing employment (engagement for a specified term or for the duration of a specified task and engagement for irregular or intermittent duties) with the single category of ‘temporary APS employees’, thus resulting in two categories of APS employee in the Act: ongoing and temporary employees (the Bill would also repeal the definition of ‘non-ongoing APS employee’) (items 57–59, proposed section 7). APS employees would be required to be engaged in one of these two categories (item 60, proposed paragraph 22(2)(b)).

Currently the Act enables the Regulations to limit the circumstances of non-ongoing employment and extensions to engagements for a specified term (section 22). The proposed amendments would repeal and replace these provisions with broader provisions authorising the Regulations to prescribe the circumstances and maximum period of engagement of temporary APS employees together with any limitations on extensions to a period of temporary APS employment (item 61, proposed subsection 22(4)). A further existing provision authorising the Regulations to prescribe grounds or procedures applicable to the termination of non-ongoing APS employment would be repealed and replaced by a provision authorising the Regulations to prescribe the grounds only for termination of temporary APS employment (item 62, proposed subsection 29(4)). As noted elsewhere, the Bill also proposes to provide the PSC with a power to issue directions about employment matters relating to APS employees including termination.

Under the application, saving and transitional provisions of the Bill a number of circumstances concerning non-ongoing APS employees would be dealt with including:

- non-ongoing employees prior to commencement continuing in their employment after commencement would become temporary employees at commencement and would retain their existing employment terms and conditions
- those engaged as non-ongoing employees prior to commencement but due to start work after commencement would be taken to have been engaged as temporary employees and retain the terms and conditions under which they were engaged
- processes underway to engage non-ongoing employees prior to commencement would continue after commencement as processes to engage temporary employees and
- terminations of non-ongoing employment occurring prior to commencement but due to take effect after commencement would be subject to the relevant legislative provisions as applying prior to commencement (Schedule 4, items 32–36).

**Machinery of government**

The Bill proposes to make some amendments to current provisions in the Act concerned with machinery of government changes. The APSC notes that machinery of government—or MoG—changes are ‘terms that are commonly used to describe organisational or functional changes affecting the Commonwealth’. The APSC also notes some examples as follows:

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... changes to the Administrative Arrangements Order (AAO) following a decision by the Prime Minister to abolish or create a department, or to move functions/responsibilities between Australian Public Service (APS) departments/agencies (these often occur after an election but can also happen at other times)

... the creation of a new statutory agency or executive agency, or the abolition of such agencies

... other movements of functions between agencies or into, or out of, the APS. 28

Section 72 of the Act deals with the movement of employees affected by a machinery of government changes. Under this section the PSC may, if satisfied that it is necessary or desirable in order to give effect to an administrative re-arrangement:

- move APS employees to another APS agency
- determine that APS employees cease to be APS employees and become employees of a Commonwealth authority
- determine that non-APS employees become APS employees in an agency and
- engage any person as an APS employee in a specified agency.

The proposed amendments in the Bill include:

- providing for the preservation of employment conditions under written employment contracts (where relevant) for APS employees who become non-APS employees of Commonwealth bodies or Commonwealth authorities due to machinery of government changes (item 66, proposed paragraph 72(3)(d)) and

- empowering the PSC, where an APS employee is moved by the PSC from one agency to another and prescribed circumstances existed in relation to the employee’s employment in the sending agency, to determine measures to be taken (if any) in relation to those prescribed circumstances after the employee has moved to the new agency (item 69, proposed subsection 72(5A)). The Regulations would set out such prescribed circumstances. 29

**Legislative instruments**

The amendments would introduce a number of changes regarding legislative instruments under the Act.

As noted above, the PSC would be given a discretionary power to issue Commissioner’s directions about employment matters relating to APS employees (including engagement, promotion, redeployment, mobility, training schemes, and termination) and in relation to the APS Employment Principles for specified purposes (item 74, proposed subsections 11A(1) and (2)).

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28. Ibid.
29. Explanatory Memorandum, p. 35.

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In addition, currently under sections 26 and 32 of the Act agreements for voluntary moves by APS employees between agencies and the right of return for APS employees after contesting elections are subject to the Regulations; the amendments would provide that these matters would be subject in the main to Commissioner’s directions instead of the Regulations (items 80–83, proposed subsections 26(2) and 32(2) and paragraph 32(1)(a)). The Explanatory Memorandum offers no explanation for this change and why it may be preferable or superior to the current arrangement. Under the application, saving and transitional provisions of the Bill any agreements for voluntary moves by APS employees would continue after commencement; the right of return would also continue to apply for APS employees who resigned to contest an election in accordance with requirements prior to commencement (Schedule 4, items 44 and 45).

Classification of directions, rules and determinations as legislative instruments

Currently under the Act:

- the Prime Minister may issue general written directions to agency heads relating to the management and leadership of APS employees (such directions must be published in the Gazette) (section 21)
- the public service minister may, by notice in the Gazette, make rules concerning classifications of APS employees (section 23) and
- the public service minister may, by notice in the Gazette, determine the remuneration and other terms and conditions of employment relating to APS employees if the minister is of the opinion that it is desirable to do so because of exceptional circumstances (section 24).

The amendments would provide that Prime Minister’s directions and public service minister’s determinations regarding employment terms and conditions, would be legislative instruments not requiring gazettal (items 75 and 78, proposed subsections 21(2) and 24(3)). Classification Rules would be made by the PSC rather than by the public service minister and would similarly be legislative instruments not requiring gazettal (item 76, proposed subsection 23(1)). Under the application, saving and transitional provisions of the Bill the Classification Rules in force at commencement would remain in force at and after commencement (Schedule 4, item 43).

The Bill would also insert notes specifying that Prime Minister’s directions, PSC Classification Rules, and public service minister’s employment terms and conditions determinations would not be subject to the disallowance or sunsetting provisions of the Legislative Instruments Act 2003 (Cth) (items 75–76 and 79, proposed subsections 21(2), 23(1), and 24(3)). In March 2012 the Senate Standing Committee for the Scrutiny of Bills raised a concern that this may constitute an inappropriate delegation of legislative power. In March 2012 the Special Minister of State responded to the Committee:

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30. Prime Minister’s Directions and Classification Rules are currently in force.
31. Senate Standing Committee for the Scrutiny of Bills (SSCSB), Alert Digest No. 3 of 2012, SSCSB, Canberra, 14 March 2012, p. 13, viewed 2 August 2012,

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The main aim of items 75, 76, 78 and 79 of the Public Service Amendment Bill 2012 is to replace the obsolete references to the need to gazette these three instruments (and in the case of item 76, to provide that the Public Service Commissioner, rather than the Public Service Minister, may make rules about the classifications of Australian Public Service employees).

In addition, it is proposed that a note be included in each of the relevant provisions which makes clear that the three instruments in question are not subject to the disallowance and sunsetting provisions of the LI Act [Legislative Instruments Act 2003 (Cth)]. This is because the PM’s Directions, Classification Rules and section 24(3) determinations are all currently exempt from the disallowance and sunsetting provisions of the LI Act (and have been since the introduction of the LI Act)—see items 32 and 33 of the table in subsection 44(2) of the LI Act (in relation to disallowance), and items 37 and 38 of the table in subsection 54(2) of the LI Act (in relation to sunsetting).

The inclusion of these notes in the PS Act is simply intended to clarify the current situation by including cross references to the relevant provisions of the LI Act.32

The Bill would also specify that Commissioner’s directions are legislative instruments (the Explanatory Memorandum states that under the proposed provision Commissioner’s Directions would be disallowable instruments) (item 86, proposed subsection 42(4)).33 Commissioner’s directions would be permitted to apply, adopt or incorporate any matter contained in the Classification Rules or Prime Minister’s directions (item 86, proposed subsection 42(3)).

**Reduction in APS employees’ classifications**

Currently subsection 23(4) of the Act provides that agency heads cannot reduce APS employees’ classifications without employee consent except in specified circumstances. The Bill would re-word this so as to provide that agency heads may reduce APS employees’ classifications without consent only in the specified circumstances (item 88, proposed subsection 23(4)). The Explanatory Memorandum states that:

> 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.34

One of the current circumstances where classification can be reduced without employee consent is where the reduction is in accordance with Commissioner’s directions; the Bill would repeal this,

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33. Explanatory Memorandum, p. 42.
34. Explanatory Memorandum, p. 43.

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replacing it with a requirement that agency heads could not reduce SES employees’ classifications without employee consent except in accordance with Commissioner’s directions relating to employment matters issued under the new power proposed by the Bill (item 77, proposed paragraph 23(4)(b)).

Release of personal information

Existing provisions in the Act (section 76) enable the Regulations to authorise the disclosure of personal information in specific circumstances and to impose restrictions on the collection, storage, access use or further disclosure of personal information so disclosed.

The Bill would repeal section 76 (item 71) in order to relocate and amend the provisions so as to enable the Regulations to authorise the disclosure or use of personal information and to impose restrictions on the collection, storage, access, further use or further disclosure of personal information so disclosed (item 70, proposed section 72E).

In March 2012 the Senate Standing Committee for the Scrutiny of Bills raised a concern that enabling the Regulations to authorise the use or disclosure of personal information may constitute an inappropriate delegation of legislative power.\(^{35}\) However, the Act currently enables the Regulations to authorise disclosure. In March 2012 the Special Minister of State responded to the Committee:

Proposed section 72E of the amended Act largely replicates section 76 of the PS Act which is proposed for repeal (item 71, Schedule 1). It also broadens the regulation-making provision to encompass regulations authorising the ‘use’ as well as the ‘disclosure’ of personal information in specific circumstances. A note to proposed section 72E states that the Privacy Act and the Freedom of Information Act 1982 have rules about the use and disclosure of personal information.

While the use and disclosure of personal information by agency heads are serious matters, the proposed approach of setting out the circumstances where it may be appropriate to use or disclose the personal information of employees in the Public Service Regulations is consistent with the current provisions (Public Service Regulation 9.2).

The proposed approach is also consistent with the outline in the explanatory memorandum of the PS Act which made clear that the new Act sought to remedy deficiencies in the 1922 Act, including that Act's excessively complex and fragmented nature (paragraphs 8 and 9). The explanatory memorandum also referred to the support of the then Joint Committee of Public Accounts for a new Public Service Act which was simple, modern and in a more accessible format (paragraph 17).

Having use and disclosure of information matters provided for in regulations would also allow them to be amended more easily by the Parliament. The management of employee performance and interpersonal workplace relationships has become increasingly complex over recent years and it is difficult to anticipate every situation where it may be desirable to use and disclose the

\(^{35}\) Senate Standing Committee for the Scrutiny of Bills, Alert Digest No. 3 of 2012, op. cit., p. 12.

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personal information of employees. The proposed regulations will seek to deal with known circumstances and the proposed approach will continue to provide the flexibility to deal with unforeseen needs more effectively than if these provisions were in the primary legislation.

Any regulation made under proposed section 72E would be subject to the usual tabling and disallowance regime under the *Legislative Instruments Act 2003* (LI Act) and subject to scrutiny by the Senate Standing Committee on Regulations and Ordinances.  

### Miscellaneous amendments

The Bill would make a number of miscellaneous amendments to the Act including:

- repealing a provision in the Act (subsection 6(2)) that provides that Australian Secret Intelligence Service (ASIS) employees are an exception to the requirement that persons engaged as Commonwealth employees to perform functions in a Department or Executive Agency must be engaged under the Act or another Act. Separate specific legislation regulates the employment of ASIS employees, therefore the exception is no longer necessary (*item 87, proposed subsection 6(2)*)
- providing the PSC and the MPC with explicit powers to engage consultants to assist in the performance of their functions (*items 95 and 96, proposed subsections 40(4) and 49(3)*)
- removing a specified maximum for payments that the Public Service Minister may authorise in special circumstances (currently $100 000) in order to enable the Regulations to set the maximum (*item 98, proposed subsection 73(4)) and
- increasing the maximum penalty that the Regulations can prescribe for offences against the Regulations from 10 penalty units to 50 penalty units (*item 99, proposed subsection 79(2)).

### Schedule 2—Repeal of legislation

The Bill would repeal the *Public Employment (Consequential and Transitional) Amendment Act 1999* in its entirety (*Schedule 2 item 1*). The Explanatory Memorandum states that this Act ‘was the accompanying legislation to the current PS Act when it was introduced in 1999 and is now largely redundant ... [s]ome provisions with continuing application will be retained through the Regulations’.  

### Schedule 3—Amendments of other legislation

The Bill proposes to amend the following Commonwealth legislation:

- *Australian Federal Police Act 1979*
- *Australian Law Reform Commission Act 1996*

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37. Under section 4AA of the *Crimes Act 1914* (Cth) a ‘penalty unit’ is currently $110, thus the maximum fine that the Regulations could prescribe would increase from $1100 to $5500.
38. Explanatory Memorandum, p. 45.

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Most of the amendments seek to ensure consistency in these Acts with the proposed changes to the Public Service Act 1999, for example the renaming of the PSC as the Australian Public Service Commissioner and the categorisation of ongoing and temporary APS employees (Schedule 3 items 1–2, 5–18).

Subsection 26(2A) of the Australian Law Reform Commission Act 1996 requires that in the capacity of Chief Executive Officer of the Commission, the President must act in accordance with any policies determined, and comply with any directions given, in writing by the Attorney-General. The note to subsection 26(2A) states that section 19 of the Public Service Act 1999 has the effect that the President is not subject to direction by any Minister in relation to the exercise of powers by the President under Division 1 or 2 of Part 4 of the Public Service Act 1999 in relation to particular individuals. The Bill proposes to amend section 19 of the Public Service Act 1999 to include reference to section 15 and 16, to ensure that an Agency Head is not subject to direction by a Minister in relation to suspected breaches of the APS Code of Conduct (section 15) or to the protection of whistleblowers (section 16)(Schedule 1, item 45). The Bill also proposes to amend the note to subsection 26(2A) of the Australian Law Reform Commission Act 1996 so as to replicate the amendments to section 19 of the PS Act (Schedule 3 item 3, proposed subsection 26(2A)).

The Family Law Act 1975 (Cth) currently prohibits agency heads from taking action under the Public Service Act 1999 against the Principal Registrar, a Registrar or a Deputy Registrar in relation to breaches of the APS Code of Conduct unless such action is requested by the Chief Judge of the Family Court. The Bill would preserve this prohibition and extend it to the PSC or MPC unless such action was requested by the Chief Judge; the prohibition would not apply if the Prime Minister requested the PSC to take such action under the proposed provisions relating to inquiries into breaches of the APS Code of Conduct (Schedule 3 item 4, proposed subsections 37B(4) and 37B(4A)).

39. Division 1 deals with matters relating to APS employees including: engagement of APS employees, classification rules, remuneration and other conditions, assignment of duties, voluntary moves between agencies, suspension and termination of employment, retirement, right of return for election candidates, review of actions. Division 2 deals with matters relating to the SES including: the constitution and role of the SES, Commissioner’s Directions on SES matters, incentive to retire, Commissioner’s certificate required for termination of SES employment.

40. Explanatory Memorandum, p. 46.
Schedule 4—Application, saving and transitional provisions

In addition to the application, saving and transitional provisions noted above, the Bill contains a range of application, saving and transitional provisions intended to deal with a variety of other circumstances including:

- inquiries being conducted by the PSC or MPC at commencement (including inquiries into breaches of the APS Code of Conduct by agency heads) or inquiries announced by the PSC or MPC at commencement but not begun (Schedule 4 items 9–10, 14, 25)
- investigations being conducted by agency heads into breaches of the Code of Conduct prior to commencement (Schedule 4 items 22 and 23)
- allegations of breaches of the Code of Conduct made prior to commencement, or breaches alleged to have been committed by employees who are APS employees at commencement or who become APS employees (or former APS employees) after commencement (Schedule 4 items 15, 17, 24, 26, 27)
- matters relating to the APS under consideration by, or under referral to, the PSC at commencement (Schedule 4 items 11–13)
- the application of procedures for dealing with alleged breaches of the Code of Conduct and for determining breaches (Schedule 4 items 20 and 21)
- workplace diversity programs in effect at commencement (Schedule 4 item 18)
- whistleblower reports made or referred prior to commencement (and inquiries being conducted into whistleblower reports prior to commencement), and whistleblower reports made after commencement referring to breaches occurring prior to commencement (Schedule 4 items 28–30)
- machinery of government changes in relation to employees ceasing to be APS employees and becoming Commonwealth authority employees (Schedule 4 item 37)
- the application of the PSC’s and MPC’s new function and disclosure provisions to protect information obtained at or after commencement, and the application of the Regulations to protect information obtained prior to commencement (Schedule 4 items 38 and 39)
- the application of the new immunity provisions to acts or omissions at or after commencement, and the application of the Regulations to provide civil immunity for acts or omissions prior to commencement (Schedule 4 items 41 and 42)
- the application of Regulations prescribing penalties for offences against the Regulations at and after commencement (Schedule 4 item 50) and
- the engagement of consultants by the PSC and MPC prior to commencement (Schedule 4 item 49).

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