

## Chapter 2

### Concluded matters

2.1 This chapter considers the responses of legislation proponents to matters raised previously by the committee. The committee has concluded its examination of these matters on the basis of the responses received.

2.2 Correspondence relating to these matters is included at Appendix 1.

### **Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 [F2014L01426]**

*Portfolio: Prime Minister and Cabinet*

*Authorising legislation: Public Service Act 1999*

*Last day to disallow: 2 March 2015*

#### **Purpose**

2.3 The Australian Public Service Commissioner's Amendment (Notification of Decisions and Other Measures) Direction 2014 (the direction) amends the Australian Public Service Commissioner's Directions 2013 (the directions) to remove the requirement that certain employment decisions need to be notified in the *Public Service Gazette*, and makes some unrelated technical amendments.

#### **Background**

2.4 The committee reported on the directions in its *Sixth Report of 2013*.<sup>1</sup> The direction was introduced in October 2014 to amend the directions in response to the committee's report; and was initially reported on in the committee's *Eighteenth Report of the 44<sup>th</sup> Parliament*.<sup>2</sup>

#### **Notification of termination decisions in the *Gazette***

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

2.5 In its previous report, the committee considered that publishing termination decisions for breach of the Code of Conduct limited the right to privacy. The committee considered that the statement of compatibility did not clearly establish that the limitation was in pursuit of a legitimate objective, and therefore sought the advice of the Australian Public Service Commissioner as to:

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1 Parliamentary Joint Committee on Human Rights, *Sixth Report of 2013* (15 May 2013) 133-134.

2 Parliamentary Joint Committee on Human Rights, *Eighteenth Report of the 44th Parliament* (10 February 2015) 65-67.

- whether there is reasoning or evidence that establishes that the stated objective addresses a pressing or substantial concern or whether the proposed changes are otherwise aimed at achieving a legitimate objective;
- whether there is a rational connection between the limitation and that objective; and
- whether the limitation is a reasonable and proportionate measure for the achievement of that objective.

### **Australian Public Service Commissioner's response**

I have considered the comments of the Parliamentary Joint Committee made in its *Eighteenth Report of the 44<sup>th</sup> Parliament* that relate to Direction 2.29(l)(i). That Direction requires agencies to notify in the Public Service *Gazette* decisions to terminate the employment of an Australian Public Service (APS) employee on the grounds of breach of the Code of Conduct.

The Committee's comments have been made in the light of Article 17 of the International Covenant on Civil and Political Rights which protects people against arbitrary interference with their privacy.

Strong public interest exists in ensuring that the APS has a robust and effective Code of Conduct that sets high standards for its employees and deals properly with people that do not meet those standards. The Australian community must be confident that its public service meets exemplary standards of behaviour in the way that it serves the Government and delivers services to the community.

I believe that the balance of the public interest lies in continuing to publish in the Public Service *Gazette* decisions of this kind and that that does not represent an arbitrary interference with privacy. In coming to this view I have considered carefully the competing considerations identified by the Committee in its report as well as the arguments made in 43 submissions by agencies and other interested parties to the then Commissioner, Mr Stephen Sedgwick. In particular, I have had regard to the fact that:

- By publishing these decisions, the APS creates a public record that it deals with serious misconduct appropriately, and that there are significant penalties for misconduct. Publication helps to maintain public confidence in the good management and the integrity of the APS.
- It is not uncommon for former employees who have been terminated from their employment with the APS to seek subsequently to regain employment with the APS. If an APS agency were to rehire an employee who had recently been dismissed for serious misconduct, that would be likely to damage public confidence in the integrity of the public service and in the effectiveness of our conduct regime.

- Publishing termination of employment decisions in the *Public Service Gazette* is not a new practice. In my view it is consistent with the provisions of the *Privacy Act 1988* that allow for the disclosure of personal information either where that is authorised by law, where the affected individual has consented to the disclosure, or where the individual would reasonably expect the employing agency to disclose the information in that way.<sup>3</sup>

### **Committee response**

#### **2.6 The committee thanks the Australian Public Service Commissioner for his response.**

2.7 The committee notes the commissioner's advice as to the public interest considerations underlying the requirement to publish information about when an Australian Public Service (APS) employee's employment has been terminated on Code of Conduct grounds.

2.8 However, while the committee notes that maintaining public confidence in the good management and integrity of the APS is likely to be a legitimate objective for the purposes of international human rights law, the committee remains concerned that the measure may not be proportionate to this objective.

2.9 The committee notes that measures limiting human rights must have a rational connection to their stated objective to be regarded as proportionate. That is, a measure must be likely to be effective in achieving the objective being sought. In this respect, the committee notes that the commissioner's response does not provide significant evidence as to how publishing personal information would achieve its stated objective of helping to ensure the APS has a robust and effective Code of Conduct. Despite this, the committee accepts that the publishing of personal information could be argued to contribute to maintaining public confidence in the APS as a public demonstration of the APS's commitment to, and enforcement of, the Code of Conduct.

2.10 However, the committee remains concerned that the measure may not be proportionate to the objective sought, specifically in relation to whether there are other, less restrictive ways to achieve the same aim.

2.11 First, the committee notes the Commissioner's advice that publishing the information in the *Gazette* is required because if 'an APS agency were to rehire an employee who had recently been dismissed for serious misconduct, that would be likely to damage public confidence in the integrity of the public service and in the effectiveness of our conduct regime'. However, while the rehiring of such an employee could well damage public confidence, the committee notes there are other

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3 See Appendix 1, Letter from John Lloyd PSM, Australian Public Service Commissioner, to Senator Dean Smith (dated 4 March 2015) 1-2.

methods to determine whether a person has been dismissed from the APS than publishing their details in the *Gazette*. For example, it would be possible for the APS to maintain centralised, internal records of dismissed employees, or to use referees, to ensure that a previously dismissed employee is not rehired. Further, the committee understands that it is common for agencies and departments to require potential employees to explicitly provide information about former APS employment, including in relation to any Code of Conduct inquiries in connection with that employment. The committee also notes that if an APS employee were dismissed due to concerns relating to children or other vulnerable people, there are other checks available under existing legislation relating to working with vulnerable people that would ensure that any such issues are brought to the attention of a potential employer.

2.12 Second, the committee also notes the Commissioner's advice that publishing information in relation to termination of employment for breaches of the APS Code of Conduct demonstrates the commitment of the APS to dealing appropriately with serious misconduct, and thereby helps to maintain public confidence in the APS. However, the committee notes that it would be possible to publish this information without the need to name the affected employee (the limitation on the right to privacy occurs because the name of the person whose employment has been terminated is listed in the *Gazette*). The committee notes that the Commissioner's advice does explain why other, less rights-restrictive ways cannot be used to minimise the risks raised by the Commissioner.

2.13 The committee also notes the Commissioner's advice that publishing termination of employment decisions in the *Public Service Gazette* is a longstanding practice, and is consistent with the *Privacy Act 1988* (Privacy Act). However, the duration of the practice, and consistency with the Privacy Act, are not relevant to the requirement for the committee to assess the direction in accordance with the terms of the *Human Rights (Parliamentary Scrutiny) Act 2011*. Further, as noted in the committee's initial analysis of the instrument, any interference with the right to privacy arising from the past practice of publishing personal information in the *Gazette* was likely to be less than it is today, given that this information is made available on a public website (with search results able to be linked to search engines).

**2.14 The committee considers that publishing details of an APS employee when their employment has been terminated on Code of Conduct grounds limits the right to privacy. While the committee accepts that maintaining public confidence in the good management and integrity of the APS is a legitimate objective, it considers that publishing this information on a publicly accessible website is not proportionate to achieving that objective, as there are other less restrictive methods available to achieve the objective. The committee is therefore unable to conclude that the measure is compatible with the right to privacy.**

**The Hon Philip Ruddock MP**

**Chair**

