



Workplace Relations Framework
Productivity Commission
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Submission to Productivity Commission Workplace Relations Framework Inquiry

Thank you for the opportunity to make a submission.

My submission is relevant to Issues Paper 5— *Workplace Relations Framework: Other Workplace Relations Issues* which refers to administrative and merits review in the public sector. This submission provides the Inquiry with information on the role and function of the Merit Protection Commissioner in the Australian Public Service (APS).

The Merit Protection Commissioner and public administration

The office of the Merit Protection Commissioner is located within the Australian Public Service Commission. The staff who support the Merit Protection Commissioner are employed by the Australian Public Service Commissioner and are made available in accordance with section 49 of the *Public Service Act 1999* (PS Act).

The role of the Merit Protection Commissioner is fundamentally about supporting sound public administration in a low cost and effective manner. The Merit Protection Commissioner does this through the performance of statutory functions and by using the insights gained to improve existing practices.

The general intent of review processes within the APS is for employees' concerns to be dealt with quickly, impartially and fairly. The office of the Merit Protection Commissioner provides feedback to agencies on whether agency decisions are legally and technically correct and also on the capacity of agency decision-makers to make discretionary judgements in a devolved and principles-based framework. Decisions by the Merit Protection Commissioner assist agencies to identify: 'hot spots' in their enterprise agreements and people management frameworks; and integrity and business risks in functional areas, including testing employees' engagement with the public and other stakeholders and their understanding of accountability arrangements. The Merit Protection Commissioner helps to ensure consistent standards of decision-making and improves people-management practice across the APS.

When reviewing entrenched employment disputes, the Merit Protection Commissioner manages relationships that are in danger, helps agencies and employees to consider and address concerns, and assists the workplace to return to productive equilibrium. In addition, review by an independent statutory office-holder, such as the Merit Protection Commissioner, reduces the risk of legal challenge, including the risk that the courts, through a highly procedural approach to decision making, will reduce the flexibility inherent in the APS employment framework.



Independent merits review by the Merit Protection Commissioner is a cost-effective way of resolving employment disputes. Research conducted in 2014 on the 'cost of conflict' in the APS workplace identified that using non-legal approaches, such as early intervention strategies can lead to better outcomes for all parties.

I have seen no evidence that there is duplication of review avenues. Employees concerned about their entitlements under enterprise agreements also have access to the dispute resolution provisions in those agreements. Research undertaken in April 2014 using a snapshot of agency review cases demonstrated that employees who sought review by the Merit Protection Commissioner had not also taken their case to the Fair Work Commission.

The Role and Function of the Merit Protection Commissioner

The office of the Merit Protection Commissioner is established by the PS Act. The office replaced the functions of the Merit Protection and Review Agency which was abolished when the PS Act came into effect on 4 December 1999.

The Merit Protection Commissioner has the following main functions:

- overseeing the APS review of actions scheme provided for in section 33 of the PS Act. This primarily involves reviewing:
 - agency determinations of breaches of the Code of Conduct and any resulting sanctions, save termination of employment, for non-Senior Executive Service employees;
 - any other agency decision affecting a non-Senior Executive Service employee's employment, unless excluded from review by the Public Service Regulations 1999 (PS Regs). Decisions must generally be reviewed first by the agency. Public Service Regulation 5.23 and Schedule 1 to the PS Regs set out some circumstances when a matter is not reviewable, including applications submitted out of time, where the matter could be dealt with by other jurisdiction such as the Australian Human Rights Commission or where review is not justified in the circumstances. The policy on when review is not justified can be accessed on the Merit Protection Commissioner's webpage: <http://www.apsc.gov.au/aps-employment-policy-and-advice/merit/review-of-actions>;
 - review of agency promotion decisions at the APS1–6 classifications.
- working with APS agencies to deliver effective, merit-based selection processes through establishing Independent Selection Advisory Committees to assist agency recruitment programs;
- supporting public sector agencies more broadly, and other organisations with employment-related services on a fee for service basis;
- since 1 July 2013, undertaking an inquiry into and making a determination of a breach of the Code of Conduct by an APS employee at the request of an agency head and with the agreement of APS employee. In these circumstances, the employee would not have a right of review within the APS to that decision.

The Merit Protection Commissioner's functions are set out in sections 50 and 50A of the PS Act and Parts 2, 4, 5 and 7 of the Regulations.

The Merit Protection Commissioner is required to submit an Annual Report to Parliament. The 2013–14 report can be accessed through the Commissioner's website: <http://www.apsc.gov.au/aps-employment-policy-and-advice/merit/publications>. A statistical overview of the Merit Protection Commissioner's review activities is at Attachment A.

The Merit Protection Commissioner is also appointed to the statutory office of Parliamentary Service Merit Protection Commissioner and performs a similar role for the Parliamentary Service.

Review function—further detail

Making an application for review does not prevent an agency from proceeding with an action, or implementing a decision, that is subject to a review application. If an APS employee resigns or their employment is terminated, any review of action that is underway lapses.

Reviews conducted by the Merit Protection Commissioner are required to have due regard to procedural fairness, be conducted in private and be finished as quickly, and with as little formality, as a proper consideration of the matter allows.

Time limits apply to the making of applications.

The outcome of reviews of promotion decisions are binding on agency heads. For reviews of Code of Conduct decisions and other employment-related decisions, the Merit Protection Commissioner makes a recommendation to the agency head. Decisions to vary or set aside an agency decision are not made lightly. Such recommendations usually reflect either substantial procedural flaws, which mean the outcome was likely to have been unfair to the employee, or a fuller consideration of the evidence and the employee's case.

In 2013–14, all recommendations were accepted by the agency head. However, if the Merit Protection Commissioner is not satisfied with the response to recommendations, s/he may, after consulting the Public Service Minister, give a report on the matter to the responsible Agency Minister and to the Presiding Officers for presentation to the Parliament and/or the Prime Minister.

Of the non-Code of Conduct reviews finalised in 2013–14, five main subject matters accounted for over 50% of cases reviewed. These were attendance/leave, hours of work, performance appraisal, bullying and harassment, and management practices.

Matters may be referred to other jurisdictions such as the Australian Human Rights Commission or the Privacy Commissioner if it is clear that the matter could be better dealt with by that jurisdiction.

Promotion reviews

A promotion is the ongoing movement of an APS employee to a job at a higher classification level.

Employees may apply for promotion reviews for jobs at the APS 1 to 6 classifications. Certain decisions involving the engagement of Parliamentary Service employees in the APS are also subject to review.

Promotion reviews are conducted quickly by a three-party promotion review committee (PRC) established by the Merit Protection Commissioner.

The PRC assesses the relative merit of the person promoted and each person who has validly applied for review of that promotion decision. The PRC does not review the original selection process but makes an independent decision about which person(s) shall be promoted using all information available at the time the PRC convenes. The PRC decision is binding and takes effect four weeks after the agency has been notified, unless another arrangement is reached.

As promotion reviews are based on employee-identified concerns with a staff selection exercise, they provide a targeted and efficient audit assurance process against nepotism and cronyism in the APS.

Annwyn Godwill
12 March 2015.

ATTACHMENT A—STATISTICAL OVERVIEW 2013–14

Estimates based on data obtained as part of compiling the Australian Public Service Commissioner's 2013–14 State of the Service report¹ suggest that:

- around 20% of all agency Code of Conduct decisions are referred to the Merit Protection Commission each year and around 7–10% of those Code decisions are reviewed
- around 26% of agency reviews (non-Code matters) are referred to the Merit Protection Commission for review of which around 11% were reviewed.

Code of Conduct Reviews

In 2013–14, the Merit Protection Commissioner:

- handled 98 requests from employees seeking a review of a determination by an agency that they had breached the Code and/or the subsequent sanction—79 applications were received and 19 were on hand at the start of the year
- reviewed 35 of these cases and recommended in around 26% of cases that the agency decision be varied or set aside
- did not accept 11 applications for review and 24 applications lapsed or were withdrawn.

Other review of employment-related actions

In 2013–14, the Merit Protection Commissioner:

- handled 180 requests for a review of action not involving Code of Conduct applications—147 applications were received and 33 were on hand at the start of the year
- reviewed 50 of these cases and recommended in around 15% of cases that the agency decision be varied or set aside
- did not accept 86 applications for review and 21 applications lapsed or were withdrawn.

Promotion reviews

In 2013–14, the Merit Protection Commissioner:

- handled 44 promotion review cases, involving [233] promotion decisions—43 cases were received and one was on hand at the start of the year
- established PRCs for 34 of these cases
- did not accept four applications for promotion review and five cases lapsed or were withdrawn
- PRCs varied only two (0.9%) of the 233 promotions reviewed. This is the lowest rate of variation in recent years, with the exception of 2012–13 where the variation rate was 0.6%.

Since the introduction of the interim recruitment guidelines in November 2013, the APS has significantly reduced the number of recruitment processes.

¹ The Australian Public Service Commissioner's State of the Service Report 2013–14 can be accessed at (<http://www.apsc.gov.au/home/current-priorities/state-of-the-service-2013-14>).