

Review of actions

Role of the Parliamentary Service Merit Protection Commissioner

The office of Parliamentary Service Merit Protection Commissioner (Merit Protection Commissioner) is an independent statutory office established under section 47 of the *Parliamentary Service Act 1999* (the Act). The Merit Protection Commissioner also holds the office the Merit Protection Commissioner in the Australian Public Service. Parliamentary Service reviews of actions are handled by staff in the Australian Public Service Commission who support the Merit Protection Commissioner.

What actions or decisions are reviewable?

Under section 33 of the Act, employees are entitled to reviews of actions or decisions that relate to their Parliamentary Service employment. However, not all employment actions or decisions are subject to review:

- section 33 of the Act provides that action to terminate employment is not subject to review; and
- *Parliamentary Service Determination 2013* (the Determination) exempts certain other employment actions and decisions from review and provides that review rights are not available to Senior Executive Service (SES) employees.

Note: The *Fair Work Act 2009* has rules and entitlements that apply to termination of employment.

For further information on the limits on review see clause 95 and Schedule 3 of the Determination. A copy of the Determination is at <http://www.comlaw.gov.au/Series/F2013L01201>.

Making an application for review does not prevent a parliamentary department from proceeding with an action or implementing a decision.

Primary and secondary reviews

For the majority of employment-related decisions and actions, the Determination requires an employee to apply to their department head, or delegated officer, for review in the first instance.

Reviews conducted within departments are called primary reviews. Applications for primary reviews are made under clause 96 of the Determination.

When a department receives a valid application for a review of actions or decisions it is required to:

- review the action and attempt to resolve the employee's concerns;
- advise the employee in writing of:
 - the outcome;
 - the reasons for the decision; and

- any action the department intends to take; and
- advise the employee of their right of review by the Merit Protection Commissioner.

If the employee is dissatisfied with the outcome of the department's review, or the department has advised that the matter is not reviewable, the employee may apply to the Merit Protection Commissioner for secondary review. Applications for secondary review are made under clause 101 of the Determination.

Applications for primary review can be made directly to the Merit Protection Commissioner in certain circumstances prescribed in clause 96 of the Determination. These are:

- for review of a decision that the employee has breached the Parliamentary Service Code of Conduct (the Code of Conduct)—each parliamentary department has procedures for determining suspected breaches of the Code of Conduct);
- for review of a sanction imposed for a breach of the Code of Conduct—other than the sanction of termination of employment, which is not reviewable under section 33 (see above);
- if the employee's department head was directly involved in the relevant action or decision;
- where it is not appropriate, because of the seriousness or sensitivity of the action, for the department head to deal with the review application; or
- where the employee claims that the relevant action or decision is victimisation or harassment because of having made a previous application for review.

Time limits for review applications

There are time limits in clause 95 of the Determination for making applications for review. Applications received outside the time limits will be reviewed only if the Merit Protection Commissioner or the department head considers there are exceptional circumstances to explain the delay in making the application for review. These time limits are:

- primary review by a department;
 - 120 days from the date of the action to lodge an application for primary review with a department; or
- primary review by the Merit Protection Commissioner;
 - 60 days from the determination of a breach of the Code of Conduct (see note below);
 - 60 days from the imposition of the sanction; or
 - 60 days from the date of the action (for example where the department head was directly involved in the action); or
- secondary review by the Merit Protection Commissioner
 - 60 days from the date the department tells the employee of either the outcome of the primary review or that the matter is not reviewable.

A decision by a department head to accept an out-of-time primary review application does not oblige the Merit Protection Commissioner to accept a subsequent request for a secondary review even if it is

within 60 days from the department's decision. The two decisions are separate and the exceptional circumstances consideration must be met on both occasions.

Note: The Merit Protection Commissioner has observed that employees who are under investigation for suspected misconduct frequently wait until they have received a sanction decision before making an application for review. The decision that an employee has breached the Code of Conduct and the sanction decision are separate decisions and a separate time limit for review applies to each decision.

If there is a delay between the department's breach decision and sanction decision, an application for review of the breach decision may be outside the 60 day time limit. In this case, the Merit Protection Commissioner may be able to review only the sanction decision and not the decision that the employee has breached the Code of Conduct.

How do you apply for review?

Contact your department's human resources or corporate services section for advice on how to make a review application to your department head.

Applications for primary review by the Merit Protection Commissioner (see primary and secondary review above) can be made directly to the Merit Protection Commissioner. These should be addressed to:

The Parliamentary Service Merit Protection Commissioner
Australian Public Service Commission
PO Box 20636
World Square Post Office
SYDNEY NSW 2002

or by email to review@apsc.gov.au.

Applications for secondary review by the Merit Protection Commissioner must be made through your department head. This means that you need to address the application to your department head advising that you wish the matter to be reviewed by the Merit Protection Commissioner. Your department should then forward your application and the relevant department papers to the address above.

All applications must:

- be made in writing (including by email);
- state why the review is sought; and
- state the outcome sought.

How will your application for review be handled?

Reviews conducted by the Merit Protection Commissioner are required to have 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.

As a first step, your application will be assessed for eligibility. You will be contacted if your application is not eligible for review. An eligible application will be allocated to a review adviser who assists the Merit Protection Commissioner's delegates with the review. The review adviser is not the decision maker. They are the contact point for you and your department. The review adviser also gathers information so that your application can be properly considered by the delegate who is the decision maker.

During the review you may be offered the opportunity to make further submissions about your application, either in writing **or during a telephone discussion with the review adviser**. You should only provide material that is directly relevant to the matters under review when making a written submission. Where the delegate considers the material is not relevant, the review adviser will ask you to explain how it is relevant and may return it to you if the delegate considers it is not relevant to the matters under review.

For a telephone discussion, you will be given a record of discussion for any comment you wish to make. Your comments will be attached to the record of discussion or the record may be amended in light of your comments.

A review may be conducted solely by an examination of the papers.

The review adviser may contact you to clarify particular matters from time to time by telephone or email, or to put additional material to you for your response. Asking questions does not mean the review adviser is taking sides, or pre-judging any aspect of your review. The review adviser may speak with other people, including witnesses or people suggested by you. The delegate decides who needs to be contacted.

Any new, relevant information obtained from you and/or your department or others may be shown to another party to ensure procedural fairness, including any records of discussion.

The review adviser will gather the information for the delegate. The delegate may seek further information before making their recommendation. The report you receive will set out the reasons for the delegate's recommendation. In some cases the reasons may be set out in a letter rather than a report.

The Merit Protection Commissioner's record of the review consists of relevant information gathered in the review, communications with you, your department and any third parties, the delegate's report and correspondence containing the delegate's recommendation.

The Merit Protection Commissioner operates an Electronic Document Records Management System and does not keep a paper or hardcopy file. Any hardcopy papers received by the Merit Protection Commissioner will be scanned into digital format, retained on the digital file and the hardcopy destroyed (see for example <http://www.naa.gov.au/information-management/digital-transition-and-digital-continuity/scanning-incoming-paper.aspx>).

The Merit Protection Commissioner will primarily use email to communicate with you throughout the progress of the review and in advising you of the outcome. For security and privacy reasons, we will write to you through your gov.au email address unless you have a reason for using an alternative address.

While you are welcome to have a person support you throughout the review, you are only able to be represented by another person with the approval of the Merit Protection Commissioner. If you wish to have someone represent you, you will need to make a formal request to the Merit Protection Commissioner stating your reasons.

In most cases, a review by the Merit Protection Commissioner will address the following issues:

- whether your department's procedures for dealing with the particular matter in question were substantially complied with in your case;
- whether the requirements of procedural fairness were substantially observed in your case; and
- whether the action or decision under review was appropriate or reasonable in the circumstances of the case.

A review of a Code of Conduct determination and/or sanction will also address the following issues as appropriate:

- On the balance of probabilities, was there enough evidence that you did what you are alleged to have done and if so, did it amount to a breach of the Code of Conduct?
- If you breached the Code of Conduct, was the sanction/s imposed on you appropriate in all the circumstances of the case, including any mitigating factors?

Further detail

These guidelines cover the more significant provisions about review of actions. Employees considering applications for review of actions are encouraged to read clauses 94 to 108 of the Determination. There is further information on the review process in the Australian Public Service on the Merit Protection Commissioner's website. The review processes are similar for both Services.

What outcome can I expect from my review?

At the conclusion of the review, the delegate makes a recommendation to your department about the original action/decision and provides reasons for the recommendation. You will be given a copy of the delegate's recommendations and reasons.

In making a recommendation the delegate is not limited to the outcomes that you seek but will consider what the appropriate outcome is in all the circumstances.

The delegate makes a recommendation that the department confirms, vary or set aside the action under review.

The delegate's recommendation and reasons concludes their role in the review process

Your department then considers the delegate's recommendation and may decide to confirm the action, vary the action, or set aside and substitute a new action. The department advises the Merit Protection Commissioner and you of their decision in writing and the reasons for it.

In most cases, recommendations made by the Merit Protection Commissioner are confirmed (i.e. accepted) by the department. However, if the department does not accept the recommendation, the Merit Protection Commissioner will discuss the outcome with the department. If the Merit Protection Commissioner is not satisfied with the final response she may report the matter to the relevant Presiding Officer, or Presiding Officers, for presentation to the Parliament.

What if you are still not satisfied?

The delegate's recommendation cannot be revisited by the Merit Protection Commissioner, and you do not have any further administrative review rights under the *Parliamentary Service Act 1999* and the Determination. For this reason it is important to provide all relevant information about your application to the review adviser.

If you are not satisfied with the outcome you may apply to a court for judicial review, generally on a question of law, rather than the merits of the decision. There are time limits for lodging an application to the courts. Further information about judicial review will be contained in the delegate's final correspondence to you.

Additional information

Information on the review of action scheme can be accessed from the Merit Protection Commissioner's website (<http://meritprotectioncommission.gov.au>) under the box headings *Applying for review* and *Reviews in practice*.