

Monitor 7 of 2023 – Ministerial Responses

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Senator the Hon Katy Gallagher

Minister for Finance
Minister for Women
Minister for the Public Service
Senator for the Australian Capital Territory

REF: MC23-000113

Ms Fattimah Imtoul
Acting Committee Secretary
Senate Standing Committee for the Scrutiny of Delegated Legislation
Parliament House
Canberra ACT 2600

Dear Ms Imtoul

I am writing in relation to the technical scrutiny concerns raised by the Senate Standing Committee for the Scrutiny of Delegated Legislation in *Delegated Legislation Monitor 5 of 2023* (the Monitor) in respect of the Public Service Regulations 2023 (2023 Regulations). I appreciate the opportunity to respond to the matters raised by the Committee. Please find a response below.

Delegation of administrative powers and functions

The Committee has asked why delegation powers are required in the Regulations given the existing operation of delegation powers in section 78 of the *Public Service Act 1999* (the Act). Section 78 of the Act only applies to the delegation of functions and powers conferred by that Act and does not extend to the delegation of powers and functions conferred by subordinate legislation made under the Act. Therefore the delegation powers in section 105 of the Regulations are necessary, and the scope of the delegations for which the Regulations provide is not limited by section 78 of the Act.

The delegation powers prescribed in the Regulations are administratively necessary and provide sufficient flexibility to enable Agency Heads, the APS Commissioner and the Merit Protection Commissioner to carry out their functions.

In particular, the delegation power for Agency Heads reflects that the Australian Public Service (APS) consists of many agencies of different sizes and differing operational requirements. The relevant Agency Head is best placed to determine who may exercise their employer powers or functions, and to which level their powers and functions are appropriate to delegate. It is in the interest of each Agency Head to ensure that the persons to whom their employer powers or functions have been delegated have the appropriate skills, qualifications, and experience to exercise the powers or functions.

The scope of the delegation allowed by section 105 of the Regulations and section 78 of the Act is largely the same. However I note that while the Regulations do not limit the persons to whom the APS Commissioner may delegate their powers, the Act and the *Australian Public Service Commissioners Directions 2022* (the Directions) only allow the APS Commissioner's powers to be delegated to a senior official. While this difference has been in existence since the Act and the Regulations were made in 1999, I have asked the Australian Public Service Commission to undertake a review to consider whether the Regulations should be amended in this respect. The review will consider whether it is appropriate to align the scope of the APS Commissioner's power of delegation under the Regulations with the scope of their powers under the Act. If it is determined that an amendment to the Regulations is appropriate, I expect a change to the Regulations will be made later in 2023.

In addition, the definition of 'outsider' for the purpose of an Agency Head's delegation power was amended in the Regulations to exclude members of the Australian Defence Force. This amendment will be incorporated into the Act and the Direction at the earliest opportunity. As outlined in the explanatory statement for the Regulations, the purpose of this change is to allow the Secretary of Defence and other Agency Heads to delegate their functions or powers to members of the Australian Defence Force without first seeking the APS Commissioner's approval to do so. The definition of 'outsider' in the 1999 Regulations, in not excluding members of the Australian Defence Force, created unnecessary administrative burden for APS Agencies.

Consultation with persons affected compliance with Legislation Act 2003

The Committee has asked whether consultation was undertaken in relation to the instrument with persons affected. The *Public Service Regulations 2023* remade the *Public Service Regulations 1999* with minor streamlining, clarification and technical amendments. On this basis consultation was undertaken with persons directly affected by the changes, these being the Merit Protection Commissioner and the Department of Defence. However I acknowledge the importance of undertaking broad consultation with those affected by the legislation even where there are only minor changes. Therefore I have requested the Australian Public Service Commission ensure that, at a minimum, consultation is undertaken with the Community and Public Sector Union on behalf of Australian Public Service employees where the Australian Public Service Commission proposes future changes to the Public Sector legislative framework.

Availability of independent merits review; exemption from the operation of primary legislation

The Committee has asked about the non-reviewable actions listed in subsection 37(2) of the Regulations. The Regulations set out the types of decisions that are not included in the Review of Action scheme. These exceptions are the same as the exceptions provided for in the 1999 Regulations.

Items 1-7 of section 37(2) are high level strategic whole-of-government decisions. These types of decisions typically affect an agency as an aggregate and therefore are beyond the scope of a single employee's employment.

Items 8-12 relate to decisions made by Agency Heads in relation to individual APS employees and are not included in the scheme because they are resourcing and reasonable assignment of duties decisions. The exceptions relate to the administration of the agency, and are designed to provide Agency Heads with flexibility available to employers more generally, in tasking employees and deploying them in accordance with operational requirements, without these decisions being subject to challenge and review.

As the Committee has identified, section 33(2) of the Act provides that any exceptions to the Review of Action scheme are to be specified in the Regulations. The exceptions specified in the Regulations are largely the same as the exceptions that were specified in the 1999 Regulations as originally made. The Explanatory Memorandum for the 1999 Act (at [4.47.6]) expressly anticipated that these specific exceptions should be specified in the Regulations. This reflects the then Parliament's judgment that such exceptions were appropriate for inclusion in the Regulations.

Adequacy of explanatory materials

The Committee has asked whether the explanatory statement can be amended to explain the purpose and operation of the instrument. As the Committee has noted, in addition to signposting the analogous provisions in the previous 1999 Regulations, the explanatory statement includes an explanation of each provision of the Regulations. The signposts to the 1999 Regulations are not intended to be in substitution for the explanation of each provision. The level of detail in the explanatory statement reflects the primary audience for the explanatory statement: APS employees and managers who were familiar with the previous framework. The signposts to the 1999 Regulations are intended to assist APS employees and managers in understanding the limited ways in which the Regulations differ from the 1999 Regulations.

Having said this, I have instructed the Australian Public Service Commission to prepare a replacement explanatory statement including further information on the first 3 issues identified in the Monitor and discussed above, and to advise the Committee once the replacement explanatory statement has been registered.

I trust this information will assist the Committee in its consideration of the Regulations.

Yours sincerely

Katy Gallagher

26 MAY 2023