



Australian Government
Merit Protection Commissioner



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OFFICIAL

15 October 2020

Secretary
Senate Finance and Public Administration Legislation Committee
Parliament House
CANBERRA ACT 2600

By email: fpa.sen@aph.gov.au

Dear Secretary,

Re: Inquiry into the operation and management of the Department of Parliamentary Services

The following is my submission to the inquiry in response to the Committee's invitation.

Of relevance to the matters referred to the Committee, I outline:

- my role and functions as Parliamentary Service Merit Protection Commissioner.
- the data on the level of activity my office engages in for the Parliamentary Service and
- observations with respect to recruitment and work place culture arising from the work of my office.

My role and functions

The Parliamentary Service Merit Protection Commissioner (Merit Protection Commissioner) is an independent statutory officer appointed under section 47 of the *Parliamentary Service Act 1999* (the Act).

I was appointed as the Merit Protection Commissioner in June 2018 by the Presiding Officers following my appointment as the Australian Public Service Merit Protection Commissioner.

The Merit Protection Commissioner's functions under the Act are set out in section 48(1) and in Parts 8, 9, 11 and 12 of the *Parliamentary Service Determination 2013* (the Determination).

The Merit Protection Commissioner is an independent statutory office holder with functions aimed at ensuring accountability and integrity in employment decision-making in the Parliamentary Service. In particular, the Merit Protection Commissioner is responsible for:

- providing independent reviews of employment actions.
- providing recruitment services and Code of Conduct inquiry services to departments.

The review system, established under section 33 of the Act and by the Determination, allows Parliamentary Service employees to seek review of a broad range of employment actions. The major exception is termination of the employee's employment. The Determination sets out a number of further exceptions to the entitlement to review.

The review scheme is a two-tiered. For most employment actions Parliamentary Service employees must first seek review by their Secretary. This is known as a primary review (clauses 74(a) and 96(1) of the Determination). If the employee is not satisfied with the outcome of the department's review they may seek secondary review by the Merit Protection Commissioner (clause 101 of the Determination).

Parliamentary Service employees however are able to apply directly to the Merit Protection Commissioner for a review of a determination that they have breached the Code of Conduct, and/or any resulting sanction (clause 96(2) of the Determination). Employees are also able to apply directly to the Merit Protection Commissioner for review of other employment decisions where:

- the Secretary was directly involved in the action.
- the matter is so serious or sensitive that it would be inappropriate for the department to review it or
- the action is claimed to be victimisation or harassment of the employee for having made a previous application for review (clause 96(3) of the Determination).

The Secretary may also refer a primary review to the Merit Protection Commissioner on the first two grounds only (clause 97 of the Determination).

Employees may also apply directly to the Merit Protection Commissioner for review of the actions of statutory office holders that relate to the employee's Parliamentary Service employment (clause 124 of the Determination).

Former Parliamentary Service employees are able to apply directly to the Merit Protection Commissioner to investigate a complaint that relates to the employee's final entitlements on separation from the Parliamentary Service (clause 115 of the Determination). Former employees are also apply directly to the Merit Protection Commissioner for review of a determination they breached the Code of Conduct made after their employment ceased (clause 116 of the Determination).

Parliamentary Service employees can also apply to the Merit Protection Commissioner for review of promotion decisions for jobs in Parliamentary classification groups 1 to 6 (Division 2 of the Determination). When an eligible application is made, the Merit Protection Commissioner establishes Promotion Review Committees (PRCs) to conduct merits review of promotion decisions. The only ground for a review of a promotion decision is merit. The PRC makes a new decision about who should be promoted and this decision is binding on the department or office.

The Merit Protection Commissioner may also establish an Independent Selection Advisory Committee (ISAC) at the request of a Secretary (clause 59 of the Determination). An ISAC is an independent three-member committee that makes recommendations to a Secretary about the suitability of candidates for job vacancies at the Parliamentary Service classification groups 1 to 6. An ISAC's recommendation is not binding on a Secretary. However, if it is accepted, any resulting promotion decisions are not subject to promotion review.

The functions of the Merit Protection Commissioner also include:

1. inquiring into and determining whether a Parliamentary Service employee, or former employee, has breached the Code of Conduct (section 48A of the Act). The request is made by the relevant Secretary and must have the written agreement of the employee or former employee. This is because the employee or former employee is unable to seek review of the Merit Protection Commissioner's findings.
2. inquiring into Public Interest Disclosures, to the extent that the disclosures relate to alleged breaches of the Code of Conduct (subsection 48(1)(a) of the Act)
3. inquiring into alleged breaches of the Code of Conduct by the Parliamentary Service Commissioner and reporting to the Presiding Officers on the results of such inquiries (subsection 48(1)(b) of the Act)
4. inquiring into a Parliamentary Service action, at the request of the Presiding Officers, and reporting to the Presiding Officers on the results of the inquiry (subsection 48(1)(c) of the Act).

My office received one request in 2015-16 from the Secretary of the Department of Parliamentary Services to inquire into the conduct of a Parliamentary Service employee with the inquiry completed in 2016-17. Other than this request, the Merit Protection Commissioner has not been asked to exercise the inquiry functions referred to under points 2 to 4 above in the past five years.

Parliamentary Service case work over the past five years

In the five financial years from 2015-16 to 2019-20, my office:

- received 10 applications from Parliamentary Service employees for review of a general employment action or decision
- reviewed seven (7) matters comprising two (2) secondary reviews, four (4) Code of Conduct decisions and one (1) primary review (other) case upholding the department's decisions in all seven cases
- received applications for review of five (5) promotion decisions and formed three (3) Promotion Review Committees
- received no requests for the formation of an Independent Selection Advisory Committee and
- as indicated above received and finalised an inquiry into whether a Parliamentary Service employee had breached the Code of Conduct – in this case we found that the employee had breached the Parliamentary Service Code of Conduct.

Observations from the caseload

The review casework for the Parliamentary Service indicates a low level of disputation when considering the size of the workforce (a workforce of around 1,500 employees from the 2018-19 annual reports of the relevant departments and entities). Over the past five years, the largest number of general review applications we received in a single year was six in 2016-17. Otherwise the application rate was between zero and three per year. All review applications, except one, were from employees of the Department of Parliamentary Services.

In the past five years, of the seven matters reviewed, the reviewers and delegates in my office have recommended that all decisions be upheld. This includes four Code of Conduct decisions. The absence of recommendations to set aside or vary decisions, including in significant areas of decision making such as the Code of Conduct, is an indicator of good quality decision making by managers in the Department of Parliamentary Services.

There are no patterns in the casework that point to particular areas of concerns in terms of workplace culture and the application of the Parliamentary Service Values and Employment Principles.

If you require further information please contact me on _____ or by email

Yours sincerely,

Linda Waugh
Parliamentary Service Merit Protection Commissioner