

**Senate Finance and Public Administration Legislation Committee**  
**ANSWERS TO QUESTIONS ON NOTICE**  
**BUDGET ESTIMATES 2011-2012**

Prime Minister and Cabinet Portfolio

**Department/Agency:** Australian Public Service Commission

**Outcome/Program:**

**Topic:** Termination of employment of Ms Wolfe

**Senator:** Senator Ronaldson

**Question reference number:** Question Number 93

**Type of question:** Hansard, F&PA, p 26-27, 24 May

**Date set by the committee for the return of answer:** 8 July 2011

**Number of pages:** 3

**Question:**

1. What are the grounds for issuing a certificate of dismissal?
2. What has to be satisfied?
3. What is the time line?
4. Is formal counselling required?
5. Are a fixed number of written warnings or sanctions required prior to issue?
6. Once a certificate has been issued what are the conditions?
7. How long does the certificate give an officer before their dismissal is actioned?
8. What are the terms of a dismissal certificate regarding payment of accrued leave and entitlements etc...?
9. Does the officer have the opportunity to explain their situation or action?
10. Provide the committee with a breakdown of requests made and those granted by month and agency since November 2007

**Answer:**

1. Questions 1 and 2 are seeking the same information.

A section 38 certificate is not a certificate of dismissal. A decision under section 38 of the *Public Service Act 1999* (the Act) does not effect termination of employment.

The decision of a Public Service Commissioner (the Commissioner) under section 38 is separate and distinct from a decision of an Agency Head to terminate employment under

section 29 of the Act. The relevant considerations mandated by section 38 are different to those required under section 29.

If a request is received from an Agency Head to consider a matter under section 38 of the Act, the Commissioner is required to consider whether:

- (a) the relevant requirements of the Public Service Commissioner's Directions 1999 (the Directions) under section 36 of the Act have been satisfied in respect of the proposed termination, and
- (b) whether in the Commissioner's opinion the proposed termination is in the public interest.

The Directions were tabled at the Senate hearing. Direction 6.8 is the primary Direction to which the Commissioner must have regard when considering whether the relevant requirements of the Directions are satisfied, although Directions 6.1 and 6.2 are also relevant.

Direction 6.8 sets out certain minimum requirements for a decision terminating the employment of an SES employee under section 29 of the Act. Direction 6.8 requires an assessment to be made, having due regard to procedural fairness, that termination of the employee's employment is justified on one or more of the grounds in section 29(3) of the Act, and that the employee has been given information about other employment in the agency that the Agency Head considers could be made available to the employee.

2. Answered under 1 above.
3. The legislation does not prescribe a time line for the issuing of a section 38 certificate.
4. The legislation does not prescribe that formal counselling is required.
5. The legislation does not prescribe that a fixed number of warnings or sanctions are required prior to a section 38 certificate being issued.
6. Once the Commissioner has issued a section 38 certificate the Agency Head may proceed with the termination process under section 29 of the Act if he or she wishes to proceed. The Agency Head must provide the affected employee with a notice in writing terminating employment and stating the grounds for the termination. Public Service Regulation 3.12 requires that a decision to terminate the employment of an SES employee under section 29 of the Act must be notified in the electronic APS Employment Gazette.
7. A section 38 certificate is a precondition to the termination of employment by the Agency Head. It does not prescribe any time lines in relation to termination of employment.
8. A section 38 certificate does not determine the payment of entitlements on separation. These matters are determined by the relevant agency in accordance with the appropriate authority, eg legislation, contracts and determinations.
9. In considering a request from an Agency Head to issue a section 38 certificate, the Commissioner would in most circumstances offer the SES employee the opportunity to be heard on the relevant matters by presenting their case as to why a certificate should not be

issued. In circumstances where the employee has indicated clear agreement with the proposed termination action the Commissioner may not seek further comment.

10. Since November 2007 the following section 38 certificates have been issued:

- March 2008 in the Great Barrier Reef Marine Park Authority
- March 2008 in the Department of Treasury
- August 2008 in the Australian Research Council
- December 2008 in the Department of Innovation, Industry, Science and Research
- March 2009 in the Defence Material Organisation
- March 2009 in the Department Foreign Affairs and Trade
- August 2009 in the Australian Taxation Office
- December 2010 in the Department of Families, Housing, Community Services and Indigenous Affairs
- January 2011 in AusAID
- February 2011 in the Department of Education, Employment and Workplace Relations.