



## Determining review eligibility Tip sheet

This guidance is for agency decision makers who hold a delegation to determine whether an application from an employee for a review of an action under section 33 of the *Public Service Act 1999* or *Parliamentary Service Act 1999* is reviewable.

This tip sheet will guide decision makers on how to determine if an application for review is eligible, including specific advice on how to interpret the exceptions in the schedules.

### The Review of Actions scheme

Section 33 of both the Public Service Act and the Parliamentary Service Act provides an employee an entitlement to seek review of any action that relates to his or her employment. However, the Public Service Regulations and the Parliamentary Service Determination prescribe exceptions to this entitlement.

This means, APS and Parliamentary Service employees (but not ongoing SES employees) can seek review of many actions (decisions or omissions) that relate to their employment. This includes performance management decisions, leave applications, certain flexible work applications, misconduct and sanction decisions and the handling of bullying and harassment complaints.

There are some key areas which are excluded from the scheme. These include termination decisions, matters already before a Court or Tribunal and matters outlined in subsections 37(2) to (6) of the Public Service Regulations and Schedule 3 of the Parliamentary Service Determination.



### What matters are reviewable?

Section 33 provides a very broad scope of review, which encompasses a wide range of possible actions. In considering review eligibility, there are a number of key elements to consider, which are set out below:

#### Acts or omissions

It is important to remember that an 'action' includes both a positive action, as well as a lack of action, or omission.

For example, an employee may seek review of a decision to decline certain types of flexible work applications, or may seek review of a manager's action in failing to decide the application in a timely manner (an omission).

### In relation to their employment

For a matter to be reviewable, it must relate to the employee's APS or Parliamentary Service employment. That is, the application must have some bearing on the employee's employment. An employee cannot seek review of something they observe in the workplace which does not impact their employment directly.

For example, an employee cannot seek review of a leave application or part-time work application granted to another employee, in another team, which has no impact on their own employment.

This may be relevant in a situation where an employee is unhappy that an agency has not taken misconduct action against a third-party employee. In our view, a decision to commence a misconduct process is a decision of the agency, and is primarily a matter between the agency and the relevant employee, and not relevant to the employment of a third party. That third-party employee, however, may seek review of how the agency handled their grievance or complaint, if relevant.

### On time, or with exceptional circumstances to explain the delay

An eligible application must be lodged within the statutory time period, or if late, must demonstrate exceptional circumstances to explain the delay in lodgement.

This means an employee must lodge a primary review application to the agency within 60 days of the action.

If the employee seeks primary review by the MPC (for conduct and sanction decisions, and matters that are so serious or sensitive they cannot be lodged with the agency) they must be lodged within 60 days of the action.

If the employee seeks secondary review by the MPC, after receiving a primary review outcome from the agency (including a decision that the application is not eligible for review), they must lodge that application with the agency within 60 days of receiving the primary review outcome. The agency must then send

the application to us with all the relevant paperwork. We ask agencies to do this within 5 business days.

Any review application that is lodged out of time is not eligible for review, unless the applicant can demonstrate exceptional circumstances to explain the delay in lodgement. The term 'exceptional circumstances' is not defined in the Act, and must therefore be given its plain and ordinary meaning.

Our view is that exceptional circumstances is a high threshold, and the employee must demonstrate circumstances that significantly prevented them from lodging their application on time. This may include a medical condition which prevented them lodging the application, or a mental health condition which meant they were unable to turn their mind to the matter in the relevant period. It may also include situations where the employee only became aware of information or circumstances after the fact, and promptly lodged an application once they became aware. It is the responsibility of the employee to provide supporting information to assist their application.

If an employee is fit for work and able to attend to their normal duties, we generally consider they are also fit to lodge an application. We note the application process is a simple form which does not require detailed information or reasoning.

We do not consider the following matters would usually meet the standard of 'exceptional circumstances':

- the employee forgot to lodge the application on time
- the employee was otherwise busy at work or home
- the employee had a mild illness or was experiencing a medical condition, but was otherwise fit for duty and at work.

It is important, however, to assess each application on its own merits, taking into account all of the particular circumstances of the case.

## Examples of reviewable actions

If the employee has met the criteria as set out above, their application is likely reviewable if it is about any of the following matters:

- a mid-cycle or end-cycle performance rating
- a decision to place the employee on a performance improvement program
- the handling of a work-related grievance or complaint, including a bullying or harassment complaint
- a behavioural or attendance direction issued to the employee
- a misconduct decision or sanction decision (NB: this is reviewable directly by the MPC)
- a decision to suspend an employee with or without pay
- a decision on a leave application, including discretionary leave such as miscellaneous leave
- a decision to declare an absence unauthorised
- certain types of flexible work applications, part-time work agreement, rostered hours or overtime decision
- salary points, including performance based salary advancement
- allowances and penalties
- applications for study leave, training courses, or work-related travel
- concerns about serious defects in the selection process of an Executive Level 1 or 2 promotion decision.

The above list is non-exhaustive and are some examples of the broad scope of reviewable actions.

Employees are also eligible to seek review of certain promotion decisions, if they are an ongoing employee at classification levels 1 to 5 who sought promotion to APS/PS level 2 to APS/PS level 6. More information about promotion reviews is available on the [MPC website](https://www.mpc.gov.au).

## What matters are not reviewable?

### Assignment of duties and places of work power

It is useful to begin by considering the assignment of duties power set out in section 25 of the Act. This power provides that an agency head, or department head, has the authority to determine the duties of their employees and the place(s) at which the duties are to be performed.

This assignment of duties power encompasses:

- recruitment and selection decisions
- setting the employee's day-to-day tasks and the duties they are to perform
- assigning the employee with a location of work
- moving employees to jobs at the same classification level in the same or different locations
- assigning employees higher duties temporarily for business and/or career development purposes
- reducing an employee's classification level
- promoting an employee.

Further information about this power can be obtained from the Australian Public Service Commission (APSC): <https://www.apsc.gov.au/assignment-duties-within-aps-agency>

Most decisions relating to the assignment of duties power are not reviewable. This is set out in Item 11 of the table in subsection 37(2) Regulations and Schedule 3 of the Determination.

This means an employee cannot seek review of the reasonable duties assigned to them, a change in assignment of duties in the same location and at the same classification, a recruitment or selection decision (with some limited exceptions) and any higher duties or EOI processes or decisions.

Additionally, an employee-initiated request to work from a different place (e.g. a different office or from home) either exclusively, or some of the time, as part of a hybrid working arrangement is also not reviewable.

The Regulations and Determination provide a small number of exceptions where a decision made under the assignment of duties and places of work power can be reviewed:

- a reduction in classification
- a decision by the employer to relocate a staff member to another place
- an assignment of duties that the employee cannot reasonably be expected to perform.

The only matters relating to recruitment, selection or promotions that are reviewable are:

- a promotion decision, where an ongoing APS/PS level 1 to APS/PS level 5 employee seeks promotion to a higher level, from APS/PS level 2 to APS/PS level 6, were unsuccessful, and the successful applicant was a promotee (i.e. not an external engagement or assigned at-level)
- an Executive Level 1 or 2 promotion process that contained serious defects (NB: this review is of the process, not the comparative merit of the applicants).

### Strategic, policy or resourcing decisions

Action about the policy, strategy, nature, scope, resources or direction of the APS, the Parliamentary Service, or of an agency are not reviewable actions. This is set out in Item 1 of the table in subsection 37(2) of the Regulations, or Item 1 of Schedule 3 of the Determination.

An agency head is responsible to the government for the implementation of relevant policy, and for the proper administration of their agency. This includes setting the agency's strategic direction, and policy priorities. This also means making resourcing decisions and setting the agency's direction.

Actions falling within Item 1 are confined to matters of policy, strategy, nature, scope resources or direction that are connected to the highest level of administration of the APS or the Parliamentary service, or of the Agency or Department. Typically they are actions that affect the Service or the Agency as an aggregate. Such matters are beyond the scope

of a single employee's employment, and are not matters suitable for review.

Examples may include a decision to close an office, relocate a division, declare a function excess to requirements or to shift in strategic direction. These matters are not eligible for review.

If an entire branch, division or program is declared excess to requirements, this is likely a strategic or resourcing decision that is not eligible for review. However if a single position is declared redundant, and the employee seeks review of that decision, in some circumstances that application may be reviewable. Careful consideration of the reasons for the action will be needed to determine whether Item 1 of the table in subsection 37(2) of the Regulations or Item 1 of Schedule 3 of the Determination may apply.

Related to this for APS employees, an action taken as a result of a Machinery of Government (MOG) change is also not reviewable. This is stated in Item 6 of the table in subsection 37(2) of the Regulations and Item 5 of Schedule 3 of the Determination.

### Out of time, with no exceptional circumstances

As outlined above, applications lodged out of time, without exceptional circumstances to explain the delay in lodgement will not be reviewable.

If an agency declines to conduct the review on this basis, the applicant may lodge a secondary review application for MPC review with their agency (i.e. sent to the MPC via the agency). We will consider afresh the circumstances put forward to decide if they may meet the threshold of exceptional.

### Review by more appropriate external review body

An application for review of a matter already before or that could potentially be before a more appropriate external review body such as a court or tribunal is not reviewable.

This means an applicant will need to carefully consider the forum they wish to raise their concerns, whether via the review of actions scheme, or through another avenue available through the Courts, the Fair

Work Commission, the Australian Human Rights Commission, or Comcare.

### When APS or Parliamentary Service employment ends

An employee cannot seek a review after their employment has ended. If the employee had an ongoing review, and their employment ceases, that review will lapse. This includes if the employee resigns, retires or is terminated.

There is one exception. If an agency makes a determination that an employee has breached the Code of Conduct after the employee has left the service, the former employee may lodge a review with the MPC. All other review entitlements lapse when an employee leaves the service.

Former employees can also lodge a complaint with the MPC about the final entitlements they received on their departure from the service.

Of course, if an agency wishes to conduct an informal review, or continue with a review and provide the employee with an informal outcome, they may do so. The matter cannot be referred to the MPC for a secondary review.

### Additional examples of reviewable actions

#### ☑ Employer initiated decisions to relocate an employee to a new work location

'Relocation' is not defined in the legislation and should therefore be taken at its usual or ordinary meaning.

We consider 'relocation' means moving an employee's place of work from one place to another. This may include to an office in a different town, in a different street in the same city, or to another state.

Reasons for relocating an employee may be:

- for business reasons i.e. moving functions or closing an office
- because of their personal situation i.e. in response to behavioural or performance concerns.

Where a relocation is not significant, such as a move to another office in the same street or to another floor

of the same building, and there is no change to an employee's commute or working hours, and no other negative impacts on the employee, this move is unlikely to have an adverse impact on the employee. As such, an agency may take the view that a review is not justified in all the circumstances, and determine the application is not reviewable under subsection 37(4)(g) of the Regulations or Determination section 95(3) (g). An employee may ask their employer to send this decision to the Merit Protection Commissioner if they disagree and believe the decision should be reviewed.

### Case example

An agency decides as a matter of budget and strategic priority to relocate a business function from one office to another.

This decision is not reviewable due to Item 1 of the table in subsection 37(2) of the Regulations, which provides 'Action about the policy, strategy, nature, scope, resources or direction of the APS or an Agency' is not reviewable.

What is reviewable however is how the circumstances of an individual employee are affected by that move.

For example, an application by an affected employee will be eligible for review if they do not wish to be relocated to the new site, but instead seek review of an application:

- ☑ to instead be moved to a third location
- ☑ for a change in rostered hours or bandwidth due to increased travel time
- ☑ for relocation allowance (where provided in an Enterprise Agreement)
- ☑ to work from home with more frequency.

Agencies who are considering relocating staff need to ensure such decisions are done fairly and reasonably, taking into account both the individual needs of the employee as well as the agency's business needs.

#### ☑ Flexible work applications

Applications for a flexible work arrangement may be made by an employee under a provision of an Enterprise Agreement, agency policy or in accordance

with section 65 of the *Fair Work Act 2009*. Certain applications are reviewable.

Examples of applications for a flexible work arrangement include:

- ✓ a request to work flexible hours to assist with school pick up or drop off
- ✓ requests for part time work
- ✓ requests to job share
- ✓ requests to vary the bandwidth of working hours
- ✓ requests to change hours of work, including when in a rostered environment.

A category of flexible work that is not reviewable is an employee-initiated request to work from a different place part-time as part of a hybrid working arrangement (e.g. at home or another office for 1-2 days per week). A decision about the place(s) where an employee performs their duties is made under Section 25 of the Act and an employee-initiated application to work in a different place does not fall into one of the exceptions which permit review.

#### ✓ **Applicants for promotion to Executive Level 1 or Executive Level 2, alleging serious defects in the selection process**

Applicants for promotion to an Executive Level classification are not eligible for review on the grounds of merit. If a review applicant seeks review of a promotion decision on the ground they consider they were the better skilled applicant, or had more capability than the promoted person, this is not an application that is eligible for review.

Candidates for promotion to Executive Level 1 or Executive Level 2 are not eligible for review via a Promotion Review Committee, as their more junior colleagues are. (More information is available on the [MPC website](#)).

If an employee was an applicant for promotion to an Executive Level classification, they can apply for review of the selection process only, and only on the ground of 'serious defects'.

The legislation does not specify what is meant by 'serious defects'. We consider 'serious defects' to

equate to a high standard of error, such as would compel the selection process to be done again. For example, where a selection panel member failed to declare or mitigate a significant conflict of interest, resulting in an unfair and inappropriate outcome.

Any review will consider the process conducted by the agency to promote an employee to Executive Level 1 or 2, however the review does not operate to overturn a promotion decision that has already been made, i.e. published in the APS Gazette.

Outcomes of a review of this type may include recommendations to improve future selection processes, change recruitment procedures, or increase education and training of selection panellists. In cases suggesting misconduct, such as a selection panellist failing to disclose or mitigate a conflict of interest, the review outcome may include a recommendation that the agency consider conducting a misconduct investigation.

#### ✓ **Unreasonable assignments of duties**

What is meant by 'the assignment to an employee of duties that the employee could not reasonably be expected to perform' is not defined in the legislation.

Decision makers should take a common-sense approach to considering what may be an unreasonable assignment of duties, taking into account all of the circumstances of the employee's situation, including their capabilities, experience and preferences.

Assigning an employee duties in an area they have no experience or training in, could be an unreasonable assignment of duties, for example, assigning a customer service officer to a role as manager of an operational compliance team without providing any training, support or coaching. In such circumstances, this action would likely be a reviewable action.

## Additional examples of non-reviewable actions

### ☒ Employee-initiated application to work from home under flexible work arrangements

Employees may make applications to work from home under the flexible work policy of their agency. While many flexible work requests are reviewable, a request to work from home on a part-time basis as part of a hybrid working arrangement (e.g. 1 or 2 days per week) is not. A decision about the place(s) where an employee performs their duties is made under Section 25 of the Act and an employee initiated application to work in a different place does not fall into one of the exceptions which permit review.

### ☒ Employee initiated request to relocate to a new work location

Unlike an employer initiated decision to relocate an employee which is reviewable, an employee initiated request to be relocated to a new work location (e.g. to another office or to work exclusively from their home) is not. A decision about the place(s) where an employee performs their duties is made under Section 25 of the Act and an employee-initiated application to work in a different place does not fall into one of the exceptions which permit review.

### ☒ Day to day tasking of an employee by a supervisor

Supervisors may task their employees in accordance with the operational needs of the agency. Such actions are not reviewable unless the assigned tasks are unreasonable or the employee has raised concerns about whether the assigned tasks are lawful or ethical.

### ☒ Reassignment of duties at level within the same work location

At-level reassignment of duties within the same work location are not reviewable. Such actions are based on changes in an agency's operational need and are not likely to have significant adverse impacts on the employee.

Such actions may however be reviewable if they are an assignment of duties that the employee could not reasonably be expected to perform.

### ☒ Temporary assignments of duty (i.e. internal EOs) within the same work location, whether at level or at a higher level

The APS and Parliamentary Service Employment Principles provide that the usual basis for engagement of employees is as ongoing employees, selected or promoted on the basis of merit. However, having a flexible and responsive workforce is essential to good workplace management. Temporary assignments of duties usually occur to fulfil a short-term absence, a surge in demand or a short-term project. These actions fall within the general assignment of duties power of an agency head and are not reviewable.

### ☒ Employee-initiated requests for reclassification

If an employee considers their work should be reclassified at a higher level, and a classification review confirms the existing classification of the employee, this would generally not be reviewable. This will be subject to the exception around unreasonable assignment of duties.

### ☒ Resourcing decisions to close a branch office, or reprioritise the agency's strategic direction

High-level decisions of this type usually affect a large number of employees, and are decisions made for significant policy, strategic or resourcing reasons. These matters are excluded from review by Item 1 of the table in subsection 37(2) of the Regulations and Schedule 3 of the Determination.

## What if I am still unsure?

You can contact our review enquiry service on (02) 8239 5330 or send an email to [review@mpc.gov.au](mailto:review@mpc.gov.au).

You can find more information on our website at [www.mpc.gov.au](http://www.mpc.gov.au).