

## Part 2: Policy design

This chapter sets out how to draft a review policy that is accessible, fair and takes a strategic approach to managing reviews. The policy should build on the principles in Part 1 and interact with the procedures set out in Part 3.

*Figure B: The steps of an effective system of review*



### Explain the purpose of the policy

The purpose of the policy is to explain how reviews will be conducted in accordance with the [Public Service Act 1999](#) (the Act) and [Public Service Regulations 2023](#) (the Regulations). It should explain roles and responsibilities, set behavioural expectations for all parties, and commit to a set of principles to guide practice.

Use the key components discussed in Part 1 to show your commitment to:

- deal with employee's concerns informally, quickly, and fairly
- build a workplace culture that encourages employees to raise concerns
- make information about the review process easy to find when it is needed
- inform staff that when they raise issues, they will be protected from reprisal action
- use insights, data and information to continuously improve by identifying good practice in decision making and resolving disputes.

If there are recommendations, observations or suggestions for improvement, provide those details to the relevant parties. Where appropriate, actively promote that those improvements were a result of a review.

### Delegations

The management of delegations is crucial to the legitimacy of employment decisions and actions made in the APS.

The Regulations give the power to review a decision to the Agency Head. This decision-making power can be delegated to a person in your agency, or a suitable person in another APS agency. Information about the power to delegate and delegation instruments can be located on the [APSC website](#).

As an APS agency you should have an instrument of delegation, with a policy to regularly review and update the instrument as roles change. Provide links to the instrument in

your review policy to embed the process of checking who has the authority to review a decision. If a decision is made to outsource the review, formalise and record the process of delegating those powers as soon as possible.

The policy can set the expectations on when and how a delegated decision maker can seek assistance from another staff member or someone external from your agency to assist with the review.

## Document what is in and out of scope

Section 33 of the Act gives the broad entitlement to seek a review. The Regulations then place limits on the types of decisions and actions that can be reviewed. Part 3 of the MPC Guidance has practical advice for review practitioners on how to assess which types of actions and decisions are reviewable under this part of the Regulations.

However, your policy and procedure can include actions that may otherwise be excluded from the scheme. For example, you may decide to extend your review policy to include SES employees. There are benefits to this approach. It offers a fair and transparent process to all staff on how a complaint or concern will be treated and a clear path to de-escalate or address grievances.

In that situation, the policy will need to be noticeably clear that the eligibility criteria set out in Part 3 of the MPC Guidance only applies to employees who have the status under the Act to seek secondary review by the MPC and judicial review.

The policy can not apply to a Code of Conduct breach or sanction decision. These matters can only be reviewed by the MPC or, where a sanction is termination of employment, the Fair Work Commission.

Some concerns may also be resolved through dispute resolution provisions in your agency's Enterprise Agreement. Have the policy set expectations that serious concerns about criminal and corrupt conduct are referred to the relevant authority.

## Provide links to legislation, resources and key-terms

Highlight the Employment Principles which provide for fair employment decision-making with a fair system of review.

Include links to relevant references, resources and legislation including the [Public Service Act 1999](#), [Public Service Regulations 2023](#) and [Australian Public Service Commissioner's Directions 2022](#).

Have a section for agencies with links to resources that educate and inform staff of their obligations and responsibilities. For employees, they will need information on understanding how to exercise their rights, escalate their concerns or resolve their problem.

Useful information includes policies relating to your agency's performance management framework, links to the Enterprise Agreement, policies on the management of complaints about harassment and bullying, safe workplace culture frameworks. Include information about other complaint and resolution processes such as [MPC](#), the [Fair Work Commission](#), the [Australian Human Rights Commission](#) and the

[Office of the Australian Information Commissioner](#). Provide a definition of key terms and acronyms to assist with accessibility.

## Options to resolve a dispute

The policy should specifically note that a concern or dispute can be resolved at any time in the review process. For example, where there is a clear middle ground or there is potential for simple clarification of the issue.

Resolution however is not a requirement or a mandatory first step in the process – an employee has the right not to accept an offer of dispute resolution.

## Explain merits review

Your review policy can explain ‘merits review’, while noting the Regulations requires the process to be completed as quickly and informally as the circumstances allow.

It will be useful to include a short, high-level explanation of merits review and the rules, requirements and non-discretionary elements underpinning the process of review.

At a minimum, the policy should refer to the key characteristics of merits review, which are:

Merits review is where an independent person ‘stands in the shoes’ of the original decision maker, to have another look at the decision and decide if it was fair and reasonable in the circumstances.

The reviewer will consider all the relevant information - which may include new information that was not before the original decision maker. The reviewer takes the applicant’s individual circumstances into account and then decides what is the correct and preferable decision.

The decision subject to review will continue as though an application for review has not been made. It will only be changed if the review outcome varies or sets aside the decision.

Under the scheme, review outcomes are limited to:

- confirming the original decision (so the decision remains), or
- varying aspects of the decision, or
- setting aside the decision.

Your policy should explain that, once the review is completed, the employee will be advised, in writing, of the outcome and the reasons for the decision.

Applicants will be informed how they can seek a secondary review of the original decision by the MPC and of the 60-day deadline to making an application. This entitlement to seek a secondary review by the MPC extends to those decisions that you have assessed as not being eligible for review.

Further explanation and instructions on how to conduct a lawful and valid merits review are in Part 3 of the MPC Guidance materials.

## Milestones and updates

Commit to completing reviews in a reasonable time, noting that this will depend on the nature and circumstances of the decision subject to review. If there are delays to completing the process of review, your policy should assure that progress updates will be given at regular intervals.

On a practical level, an applicant's frustration with delay or a lack of advice on the progress of their application will increase with time – especially if there has been no progress updates or reasons for delays. Keep track of the process of each review until it has been finalised. Have a system to monitor the progress of the reviews and build in milestones to provide progress reports

If an applicant's expectations about time are well managed from the outset, and updates are provided regularly, it will likely reduce the number of contact or enquiries about the progress of the review.

## Procedural obligations

While the review process is required to be completed as quickly and informally as possible, it must also be conducted in accordance with principles of procedural fairness. Your policy should make it clear that there is a non-negotiable obligation to provide procedural fairness and explain how this will be achieved.

For example, the policy will provide for:

- a process that is fair
- where decision makers are free from bias, and
- anyone whose interests might be adversely affected is given an opportunity to respond and have their response considered before a decision is made

Make it clear that reviewers must actively consider (and make a record) of why the employee believes the decision under review was unfair, unreasonable or inconsistent with a policy or procedure.

## Protecting everyone's privacy

The Regulations require all reviews to be conducted in private. This means the application and all information related to the review are not shared with anyone who does not have a 'need to know'.

The policy should refer to how you will hold personal information and protect it from loss, misuse interference and unauthorised disclosure. You are bound by the *Archives Act 1983* to retain Commonwealth records until it can be lawfully disposed of. Have links to your agency retention policy.

Important privacy requirements to include in the policy are:

- reference where review records are stored and who can access those records
- advice on how long records are kept on file
- information on how to request access to personal information on a review file – and the details of the agency Privacy Officer

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- advise how the *Privacy Act 1988* and the *Freedom of Information Act 1982* (FOI Act) may apply.

## Representatives, advocates and support people

An applicant may seek to involve a lawyer or union delegate to act on their behalf during the review process. Your agency’s policy can set expectations on the role of legal representatives in the review process and have clear guidance for reviewers on how to manage an adversarial representative.

Applicants may also seek to be supported by a union representatives or support person. Your policy can give advice on the responsibilities, the boundaries and expected behaviours of a support person.

## Review your policy

Review your policy as necessary to ensure it remains aligned with legislation, government policy, organisational changes or changes to the working environment.

Take note of amendments to legislation. Be proactive in updating information when there have been changes and share information about those changes at team meetings, weekly emails or internal newsletters.

It is good practice to maintain a version history.

| Version | Authorised by | Revision date | Author | Description of change |
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