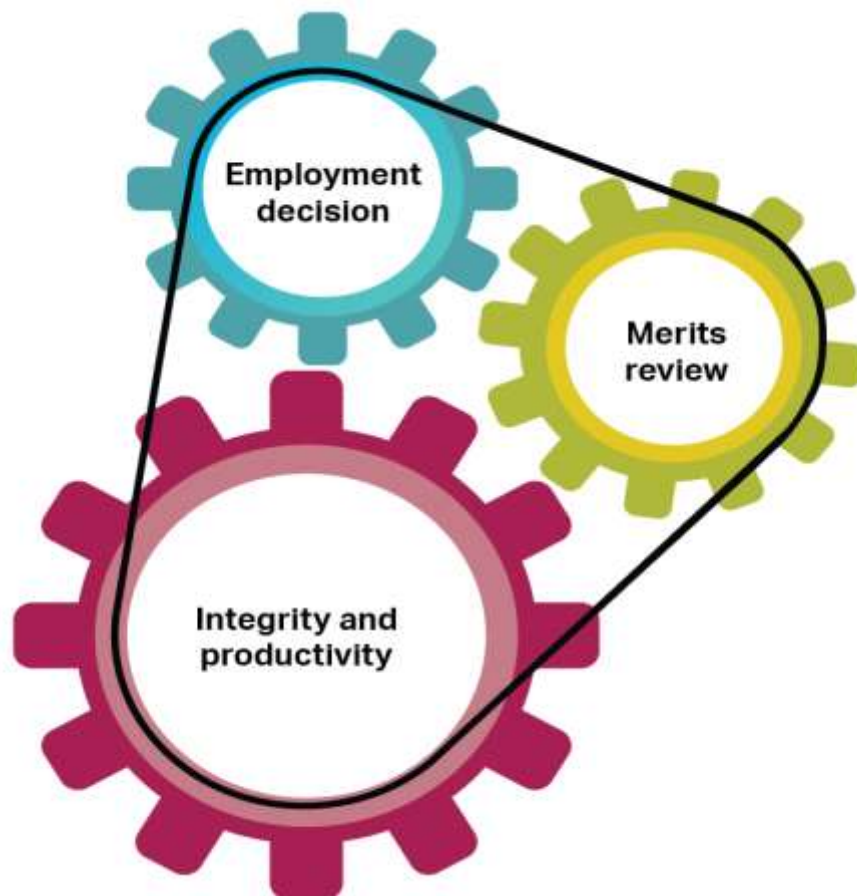


Part 3: Practice

Part 3 is the final part of the MPC Guidance. It is a practical tool that walks you through each step of the review process.

Figure C The scheme in practice



Step 1: Delegations

The first step is to check your agency's instrument of delegation to confirm who has the power to make a review decision. There are limits on who may be delegated a power or function. Whoever it is, make sure there is formal written record of the delegation on file.

The decision-maker should be a suitably experienced and independent person in the agency. It can also be someone from another APS agency. Wherever possible, the decision maker should have had no previous involvement in the original decision – such as providing advice to any person involved in the decision under review.

Consider the seniority of the original decision maker when delegating decision making powers - to avoid any perception of influence or questions about objectivity.

The decision maker can have another person to assist with gathering evidence, complying policy documents and making a recommendation.

If required, the decision-making power may be given to a person external to the APS, however this requires approval from the APS Commissioner.

Step 2: Assess for eligibility

Assessing a request for a review of an employment related decision can often be complex and may take time to consider the factors and apply the exclusions. Your procedures should reflect this and allow for a careful and considered assessment to be conducted and which take account of all the individual circumstances. The MPC has a tip sheet on [determining review eligibility](#).

An application form with clear instructions can collect all the relevant information needed to assess eligibility and determine if a review is justified in the circumstances. Ask for relevant dates, times, who is involved, details of the decision, why the applicant is seeking a review and what outcome is being sought.

Have a secure and confidential group inbox or portal to receive the application forms. This is a simple way to reduce barriers to seeking a review and ensure the privacy principles are being met.

2.1 Initial contact with the applicant

Contact the applicant to clarify and verify information needed to complete the assessment.

If it's clear that an application is not eligible for review from the outset, provide that advice to the applicant as soon as practical, with reasons why.

This is the stage when you can begin to manage expectations on timeframes. You can also consider whether some form of dispute resolution may be an option. (See 2.8 Is resolution an option).

If the applicant seeks to have a support person or lawyer to act for them, refer to your agency's review policy for guidance.

2.2 Establish eligibility to seek a review

Assessing an application under this section only applies to those employees who have an entitlement to seek a review under the scheme. For employees such as SES who are excluded from the scheme, you can still apply similar rules and requirements to afford consistency and transparency across all staff.

Under the scheme there is review entitlement where:

- the application is made by an APS employee (excludes SES)
- the application is about an APS action, which
- is related to their individual employment.

The assessment process is not always a simple tick-box process. There are many variables, and individual factors to consider and legislative requirements to apply.

Table 1 – 3 steps you through the initial checks to be conducted to determine eligibility.

Table 1 APS employee

| Must be | Description |
|---|--|
| An APS employee | <p>Is a person employed as an APS employee under the Act.</p> <p>If the employee has resigned, been terminated before the review is completed, or if a non-ongoing contract comes to an end, they will no longer have an entitlement to a review.</p> <p>A decision to terminate a person’s employment is specifically excluded from review by s 33(1) of the Act. Decisions to terminate an employee’s employment (for whatever reason) can only be reviewed by the Fair Work Commission.</p> |
| Ongoing, non-ongoing or casual employee | Ongoing, non-ongoing or casual APS employees are eligible for review under this part of the scheme. |
| Not a Senior Executive Service (SES) employee | <p>Only employees with a classification of APS1- 6, EL1 - EL2 can apply under the Regulations.</p> <p>APS employees in acting SES roles can apply for review of a decision.</p> <p>A decision made by an SES officer can be a reviewable decision.</p> |

Table 2: APS action

| Must be | Description |
|--|--|
| An APS action | An action is a thing done or said, a process followed and/or decision that has been made. The Macquarie Dictionary defines an action as ‘Something done; an act; deed ... conduct’. |
| Includes a refusal or failure to act | <p>An action or a decision includes a positive action and a decision <i>not</i> to take an action or make a decision.</p> <p>For example, a failure to act on a complaint about bullying or a delay in making a decision can be an APS action.</p> |
| Made by an Agency Head or APS employee | An action must be made by the Agency Head or an APS employee. An action or decision made by consultants or contractors working alongside APS employees are not reviewable. |

| Must be | Description |
|---------|--|
| | <p>Note: An action of a consultant or a contractor may be included in certain contexts. For example, if an APS employee complains to an agency about the actions of a consultant, contractor or statutory office holder, the agency’s response to that complaint may be a reviewable action.</p> |

Table 3 In ‘relation to their employment’

| Must be | Description |
|--|--|
| <p>A decision must have some impact or bearing on the applicant’s employment</p> | <p>An APS employee can only seek review of something in which they have a direct personal interest. This excludes seeking a review of a decision that has affected a colleague (for example, seeking review of an agency’s handling of allegations that a colleague was harassed).</p> |

2.3 Was the application made in time

Section 37 of the Regulations require an application for review to be made within ‘60 days from when the original decision was communicated to the employee. An application made outside the 60 days is not eligible for review unless there is evidence of ‘exceptional circumstances’ to explain the delay.

Determining the date of an action or decision can sometimes be difficult. An application of review may involve a series of, or multiple decisions, some of which may have been made outside the 60-day limit. In these (limited) types of cases, the individual circumstances and context may be relevant. If the last decision or action is within time, it may be necessary to consider all previous decisions in order to conduct a meaningful review.

What are exceptional circumstances?

The employee must be able to demonstrate the exceptional circumstances that prevented them from applying within the 60 days. As a guide, if an employee is fit for work and able to attend usual duties then it is reasonable to expect they can apply for a review within 60 days - the application process is simple and does not require detailed information to be supplied at the outset.

Whatever the reason, the applicant will need to provide evidence to support their claim of exceptional circumstances.

Here are some examples of what an exceptional circumstance may be:

- where the applicant has been on a period of extended sick leave which significantly hindered their ability to apply
- if the significance or main impact of the decision or action under dispute only became known after 60 days from the date of the decision

MPC Guidance on building an effective system of review

The following circumstances are unlikely to be exceptional:

- the applicant forgot to apply or was too busy to apply
- a circumstance that was ordinary or usual for example moving to a new job or taking recreation or long service leave.

This is a [case study](#) on how the MPC determines exceptional circumstances.

2.4 Is the action or decision 'reviewable'

Under the scheme not all employment related actions or decisions are reviewable. Section 37 of the Regulations lists the types of actions and decisions that are not included in the scheme.

The following table provides a description of each type.

Table 4(a) General actions or decisions that are not reviewable

| General actions excluded | Description |
|---|--|
| A strategic, policy or resourcing decision or a direction of the APS or an agency | <p>These are actions and decisions that relate to high-level administration of an agency are not reviewable. For example - closing an office, relocation of a branch, declaring a function to be excess, a change of policy position or strategic direction.</p> <p>Employees can seek review of how a policy has impacted their individual circumstances. While the level of resources an agency gives to a function is not reviewable, it <i>may</i> be relevant if the employee argues that they are unable to meet performance targets because of inadequate resourcing.</p> |
| Action taken, or not taken, in accordance with a direction or reference given by a Minister under the Act or another Act | This refers to matters other than the exercise of an employer power by the Agency Head or their delegate. For example, a direction from a Minister to an Agency Head on a high-level matter (not about an individual employee). |
| A direction by the APS Commissioner under the Act | The APS Commissioner can set standards for Agency Heads and APS employees on performance management, Code of Conduct breaches and the application of APS values. These decisions are not reviewable. |
| Actions and determinations related to a special inquiry or inquiry under section 43 or section 50 or section 50A of the Act | <p>The APS Commissioner and the MPC have Inquiry functions under the Act.</p> <p>An employee is not able to seek a review of any recommendation or finding made as a result of an Inquiry under this part of the Act.</p> |

MPC Guidance on building an effective system of review

| General actions excluded | Description |
|---|--|
| Decisions made under section 72 of the Act – usually called Machinery of Government decisions | There is no right of review of decisions made by a government that relate to a machinery of government – such as the creating, merging, and closing of agencies, the shifting functions between agencies and creation of new public policies. |
| Actions made under the following Acts: <ul style="list-style-type: none"> • The <i>Australian Service Intelligence Organisation Act 1979</i> • The <i>Safety, Rehabilitation and Compensation Act 1988</i> • All in force Superannuation legislation | Actions taken in respect to an employee’s security clearances are reviewable unless it is a clearance that involves a decision by ASIO. These are not reviewable (though may be in the jurisdiction of the Administrative Reviews Tribunal (ART)). Workers Compensation decisions are not reviewable under the scheme. The actions taken by an agency in relation to administering superannuation contributions under any of the different scheme are also not reviewable. |

Table 4(b) Employment actions and conditions that are not reviewable

| Actions of employment and conditions that are excluded | Description |
|--|--|
| Actions relating to the engagement of an APS employee | Engagement refers to the employment of a person from outside of the APS. This includes all aspects of the selection exercise leading to an engagement are not reviewable. |
| Action of a reviewer who has undertaken a review under Division 2 of Part 4 of the Regulations | The MPC can review certain APS selection exercises and promotion decisions to determine if the process was merit based. Any actions arising from this process is excluded from the scheme. |
| An action that relates to a promotion decision of an APS employee as an SES employee | Any action about a decision to promote an APS employee to a senior executive role is not reviewable. |

| Actions of employment and conditions that are excluded | Description |
|--|---|
| <p>Action relating to the determination of duties of an APS is not reviewable</p> | <p>An Agency Head has the power to determine the duties of their employees and the place at which those duties are to be performed. These types of decisions are not reviewable under the scheme.</p> <p>See APSC guidance on the types of decisions which are an assignment of duties:</p> <ul style="list-style-type: none"> • setting day to day tasks and the duties an employee is to perform • promotion decision (which is an ongoing assignment of duties at a higher classification) • advancement through a broadband • temporary move to a higher classification • moving employees to jobs at the same classification level • assigning employees higher duties temporarily for business and or career development purposes. <p>Exceptions</p> <p>There are some actions which relate to the assignment of duties which are reviewable. These include:</p> <ul style="list-style-type: none"> • a decision to reduce an employee’s classification (unless under section 23(4) of the Act) • an employer-initiated decision to relocate to another place • where an EL1 or EL2 (or equivalent) applied for a promotion and there were serious defects in the selection process • the employee is assigned duties that they could not reasonably be expected to perform. |
| <p>Action relating to an Agency Head decision to not include the name of an APS employee in a notice in the Public Service Gazette</p> | <p>An employee’s name must be included in the Public Service Gazette except in certain circumstances. These decisions are not reviewable under the scheme.</p> |

MPC primary review

In limited circumstances the MPC **may** agree to accept an application for a primary review, and only when:

- the Agency Head was directly involved in the action or decision, or
- it is not appropriate for the Agency Head to deal with the decision due to its sensitivity or seriousness, or
- it involves allegations of victimisation for making a previous application for review.

The [MPC explains](#) when an application may be accepted and the evidence required to support the application for review. An agency may refer a matter to the MPC, or an applicant may apply directly to the MPC.

2.5 Determine if the action ‘ceases to be’ reviewable

At any time during the review process, a decision or action can ‘cease to be reviewable’ in accordance with [section 37\(3\) and \(4\) of the Regulations](#).

In determining whether a decision, or action is no longer reviewable requires careful consideration of all the circumstances and must take the policy objectives of the scheme into account. The assessment process must be well-documented, and reasons given to the applicant to explain the decision.

While the Regulations do not require you to seek the view of the applicant at this stage, the applicant must be given reasons, in writing, why your agency has decided not to conduct a review. The applicant is then entitled to apply to the MPC for a secondary review of the original decision.

Table 5(a) explains the circumstances where an action or decision ceases to be reviewable. Table 5(b) has the circumstances where the person conducting the review considers the action should not be reviewable.

Table 5(a) When an action ceases to be reviewable

| Reasons an action ceases to be reviewable | Description |
|---|---|
| The applicant <i>has</i> applied to have the action reviewed by a court or tribunal | If an applicant has already applied to a court or tribunal which has the jurisdiction to deal with the action, then it ceases to be reviewable. |

Table 5(b) Considerations for when an action may cease to be reviewable

| Considerations to take into account | Description |
|--|--|
| The application for review is misconceived or lacking in substance | Misconceived is when an applicant has been mistaken, has failed to understand or has misinterpreted or misconstrued the circumstances of the decision. |

MPC Guidance on building an effective system of review

| Considerations to take into account | Description |
|---|--|
| | Lacking in substance means the decision is without significant meaning, detail or importance. |
| The application for review is frivolous or vexatious | <p>Frivolous is where the application is baseless, has no grounds or the argument being made is incorrect. It lacks merit, has a lack of serious purpose and not made in good faith.</p> <p>A vexatious application is intended to cause trouble, annoy or embarrass another party, is repetitive and/or an abuse of the review or a complaints process.</p> |
| The action or decision has previously been reviewed | Once a decision has been reviewed (or assessed as not being reviewable) that decision by the delegate is final. There is no power that allows your Agency to conduct another review under the scheme. |
| Where a review by a different external body would be more appropriate | There are expert bodies set up under legislation to handle complaints about certain issues such as privacy breaches (the Office of the Australian Information Commissioner) or allegations of discrimination in the workplace (the Australian Human Rights Commission). The Fair Work Commission is also able to handle issues related to bullying and sexual harassment. |
| Where the applicant does not have sufficient interest | Establishing whether an employee has sufficient interest is not always clear. If an employee has witnessed and been affected by conduct of a colleague, they may be able to establish sufficient direct personal interest to be eligible for review. |
| A review is <i>not otherwise justified</i> in the circumstances. | <p>In exercising this discretion, the reasons are not confined to the merits of the matter – it can take individual circumstances and external factors into account.</p> <p>The MPC has a tip sheet on applying this test of <i>not otherwise justified</i>.</p> <p>The types of situations where this section may apply include the following:</p> <ul style="list-style-type: none"> • the outcome would not warrant the cost, resources or potential impact of a review • the applicant’s concern is negligible or minor when considered against the time and resources needed to complete a review |

| Considerations to take into account | Description |
|-------------------------------------|---|
| | <ul style="list-style-type: none"> • the original decision or action has been overtaken by events • the applicant’s desired outcome has already been achieved through other means • the applicant is not assisting with the review process or engages in a pattern of behaviour which is undermining the completion of a review within a reasonable timeframe. |

2.6 Advise applicant of assessment outcome

Inform the applicant of the assessment outcome as soon as practicable after the decision is made.

Where it has been determined not to accept the application for review, provide the applicant reasons and details of how they can apply to the MPC for a secondary review of the original decision and the 60-day timeframe.

Where a review is to be undertaken, explain next steps, timeframes and commit to provide updates if the review outcome is delayed for any reason. Give the applicant an opportunity to raise any concerns they may have about the reviewer or delegate prior to starting the review so that any perceptions of bias can be mitigated or managed. Applicants must have confidence the review process is fair and unbiased.

2.7 Is resolution an option?

An application for review is an expression of disagreement with a decision about something that has impacted the applicant’s employment. Each application requires a response under the legislation, and one of those options is resolution. It is not a pre-requisite to conducting a review.

Referring a matter for resolution is not to downplay or minimise a dispute. It can be suitable for when:

- there is the potential for clarification of an issue
- you can give clearer reasons or explanations for how a decision was reached
- where there is a clear middle ground.

Before proceeding, there must be a process of consultation with the original decision maker and applicant and any other relevant parties. All parties need to agree to the process of resolution.

There are circumstances where resolution may not be an option. Consider the interests, relationships and behaviours of the individuals involved. It will depend on the nature of the matter, the capability of the individual manager/delegate and level of employees’ trust in the process.

Eligibility checklist

- check review decision maker has delegations
- make initial contact applicant
- assess if entitled to review
- determine if action is reviewable
- contact applicant with advice on outcome of assessment and next steps
- if applicable, advise applicant about role of MPC and how to apply for secondary review
- file and maintain record of decision

Step 3: Work out the terms of reference

The reviewer gets to define the scope and should be given the resources needed to complete the review as quickly and effectively as possible.

The first step is to check the original decision-maker had the authority to make the decision. For example – a decision to suspend an employee can only be made by a person with the appropriate delegation. If not, then the decision must be set-aside.

3.1 Determine the scope

Define the limitations and purpose of the review process. Work out:

- what will be included, and what will not be considered
- any time critical issues
- how long you expect the review will take.

Try to have contact with the applicant early in the process to clarify the key issues and if there has been any subsequent action taken that may have addressed or resolved their concerns.

Some disputes will involve multiple issues and cross over jurisdictions that may be out of scope – such as public interest disclosures and privacy breaches. Have those discussions early with the applicant about what will be included in the review.

3.2 Identify what evidence is needed and how to get it

Almost all decisions subject to review will have been made under an existing policy - such as performance management guidelines, bullying and harassment policy, leave policies, and flexible work policies.

At the start of a review, get access to the relevant policy, instruction, guidelines or operating procedures that relate to the decision. Take time to understand its contents and purpose. Check it is the correct year / version under which the decision was made.

MPC Guidance on building an effective system of review

If the evidence is clear and uncontested, or the consequences are not serious, a review may simply involve talking to the applicant, looking at existing documents and writing a review decision.

However, a review will often be looking at a decision where the facts are in dispute and where there are contradictory witness statements of the same incident, such as:

- an employee's level of performance
- a manager's behaviour where the employee has said that they were bullied by the manager
- an employee's record of attendance
- the appropriateness of behaviour between co-workers.

Make sure to:

- check the facts – names, dates, location, times
- only look at information relevant to the decision under review
- evaluate the evidence, apply logic, common-sense and experience - not all evidence, information or points of view are of equal weight
- check the original decision maker did not apply irrelevant considerations.

A reviewer looks at all the relevant information that was before the original decision maker. In some cases, new information can be considered – such as fresh evidence or factors that have arisen or occurred since the original decision was made.

Consideration of new evidence can result in the reviewer making a different decision to the original one - even if the original decision was correct at the time.

Did you know?

A reviewer can rely on common knowledge, their own judgement and apply their personal experience and knowledge when reaching their own decision. This can include general knowledge of good people management practice or acceptable standards of behaviour in a professional workplace.

3.3 Procedural fairness requirements

The Regulations require reviewers to 'have due regard to procedural fairness'.

A procedurally fair process is where

- decisions are based on facts and made without bias
- the applicant understands the evidence that supports the decision and has been given a chance to respond to adverse or supporting evidence being considered by the reviewer
- there is evidence the applicant's response was genuinely considered before a review decision was made – make a record how the information was or was not taken into account, with reasons.

Procedural fairness does not mean the applicant gets access to every document, piece of evidence or its source. If the substance of the evidence is put to the applicant – it can meet the requirements.

Unresolved questions or concerns about procedural fairness can corrupt an otherwise fair process, so address any conflict of interest quickly. Always make a record of any disclosure and its management and mitigation. A material defect in the procedural fairness of a review process can be result in a recommendation that a decision is set aside by the MPC or a decision by a court.

Step 4: Make a fair decision

A review is an opportunity to critically analyse evidence, query how a policy was applied, and have regard to the applicants concerns and individual circumstances. The reviewer can confirm the original decision, vary it in some way or set it aside.

However, a review is also an opportunity to make suggestions for improvements – even if confirming the decision.

Changing the original decision

The reasons for changing the original decision may include

- where there has been an error or mistake
- there was a procedural flaw, such as a failure to afford procedural fairness
- new facts or evidence have emerged or been located
- there has been a change in circumstances
- the original decision was based on a misrepresentation or a factual misunderstanding
- the original decision was not fair or reasonable in the circumstances.

Important practice note

Allow for flexibility when applying a policy or operational procedure. For example, the following circumstances may warrant changing the original decision:

- the decision under review was made in accordance with your Agency's policy, however it resulted in an outcome that was unfair and not the intention of the policy
- the applicant's personal circumstances were unique and compelling, with circumstances that invite a different, more compassionate response than was standard procedure
- the decision maker had a discretion to make a different decision but followed standard practice without thinking what was fair and reasonable in the circumstances.

Step 5: Write a report

The Regulations require the delegate to notify the applicant, in writing, of the:

- the decision
- the reasons for the decision

MPC Guidance on building an effective system of review

- any action taken as result

It is good practice to inform the applicant about their right to apply to the MPC for a secondary review and the 60-day time frame.

The level of detail and length of the report will be determined by the complexity and nature of the decision.

An outline of what is expected in a report can include:

- summary of the complaint/concern and the outcome the applicant is seeking
- a short description of the decision or action under review
- reference to the relevant policy framework and procedures
- the steps taken to conduct the review (interviews, contact with the applicant etc)
- the information / evidence that was gathered and considered
- details of how the original decision:
 - was or was not consistent with relevant policy
 - was or was not procedurally fair
 - if another decision was more appropriate in the circumstances.

The Regulation require Agencies to give the applicant all the relevant evidence and information the reviewer relied on to make the decision.

Step 6: Communicate the decision to all parties

Depending on the circumstances, and before issuing the decision, consider whether the employee may need support to engage with their team or their manager / original decision maker after the decision is issued. An applicant experiencing anxiety or other mental health challenges may also need to be supported to receive the outcome in a particular way.

It is also important to inform the original decision maker, especially when varying or setting aside their decision. Communicate the changes and include reasoning that led to the new or varied decision. Promote this as an opportunity to learn and improve.

Give managers clear expectations on how you expect them to respond to a decision to set aside or vary their decision.

Step 7: Hold and retain accurate records

The personal information about an applicant will be treated as a Commonwealth record. There are legislative requirements for how personal information and employment records should be kept, used and disclosed under the [Archives Act 1983](#), the [Freedom of Information Act 1982](#) and [Privacy Act 1988](#).

Access to information for management purposes should be on a need-to-know basis. Where you have engaged an external delegate to make the decision, request copies of the documentation, and evidence relevant to the decision – including the employee responses – to hold on your own record management system.

MPC Guidance on building an effective system of review

Remember that the process may need to hold up to external scrutiny – such as secondary review by the MPC or judicial review. This will mean transferring all the documentation relevant to the original decision in an accessible and organised format.