Not just about process: the review of actions scheme

Office of the Merit Protection Commissioner
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A human resources practitioner’s guide to responding to and managing employee complaints and disputes

Office of the Merit Protection Commissioner
Foreword

As Merit Protection Commissioner I am constantly seeking ways to improve the support I provide the Australian Public Service (APS) to maintain high standards of decision-making and people management practices. I publish case studies of my reviews on my website and share lessons learned in my Annual Report. However, feedback from agencies has identified a gap in the resources available to assist them in handling applications for review of employment decisions at the primary review stage.

The statutory review of actions scheme gives agencies considerable flexibility to conduct reviews in a way that suits their culture and operating environment. This flexibility sits within a devolved management environment guided by the APS Values. The Values are the professional standards for the APS and are the principles upon which all people management decisions should be based.

The way that reviews are handled, and their outcome, offers agencies the opportunity for systematic feedback not only on whether a decision was legally or technically correct, but also on the capacity of decision-makers to make discretionary judgements in a values-based framework. Lessons learned from individual cases, or from analysis of cases across an agency, can help identify broader issues about internal workplace relationships, the engagement of employees with the public, or employees' understanding of accountability requirements. Improved accountability and decision-making is a theme consistent with the thrust of the reforms in Ahead of the Game: Blueprint for the Reform of Australian Government Administration.

This guide is aimed at helping Agency Heads and managers implement best practice in handling applications for review of employment decisions. It is based on the practical experience of six agencies, a review of the literature on best practice dispute management and the experience of my office in conducting external reviews in recent years. The lessons learned from the evaluation suggest that a high performing agency in this area would have:

- values-based procedures that commit to a fair and independent review process
- arrangements for routinely advising employees of their right to review
- clear and accessible processes for lodging a review application
- systems that support the effective management of the relationship with the review applicant
- systems that result in fair, evidence-based and clear reasons for the outcome of the review.

An application for review may be the final stage in a history of workplace issues. As an executive manager, I have seen how clumsy or ineffective handling of a problem when it first emerges magnifies a dispute and colours the perceptions of the people involved—perceptions that can last for some time and have a negative impact on engagement and productivity. While the
outcome of a review application can provide some limited redress, it cannot substitute for effective people management in the first place. For this reason, the guide also suggests strategies for managing complaints and disputes in the workplace in a way that minimises the need for statutory review.

I am particularly grateful to the agencies that made a substantial contribution to this guide —the Australian Taxation Office; Comcare; the Department of Defence; the Department of Education, Employment and Workplace Relations; the Department of Finance and Deregulation; and the National Library.

Further information about the guide may be obtained from the Director Review Policy on 02 6202 3840 or by email to review@apsc.gov.au.

Annwyn Godwin
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Introduction

This good practice guide has been developed to assist human resource practitioners respond to and manage employee complaints and disputes in the context of the Australian Public Service (APS) Values and good people management practice.

The APS Values in section 10 of the Public Service Act 1999 require a fair system of review of employment decisions. Section 33 of the Public Service Act establishes a review of actions scheme and allows non-Senior Executive Service employees to seek review where they have a complaint about an action or decision relating to their employment. Much of the detail of the scheme is in Part 5 of the Public Service Regulations 1999.

The review of actions scheme is premised on review applications generally being made to the agency in the first instance (primary review). If the employee is dissatisfied with the outcome of the agency’s review, they can refer the matter to an independent statutory officer, the Merit Protection Commissioner (secondary review).

The scheme covers decisions on a broad range of employment matters, including:

- the management of an employee’s performance, health or behaviour
- allegations of bullying and harassment
- decisions on leave and other entitlements
- access to training and other development opportunities
- decisions to suspend an employee from duty while they are under investigation for suspected misconduct
- the way in which a particular change is managed in the workplace and its effect on individual employees.

Agencies received 391 applications for reviews of actions in 2009–10, with 43 per cent of agencies reporting receiving at least one application for primary review. The largest agencies—the Department of Defence, the Australian Taxation Office and Centrelink—accounted for 58 per cent of applications1.

The Merit Protection Commissioner received 196 applications for review in 2009–10, of which 112 (57 per cent) were applications for secondary review of matters already considered within the agency.2

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The guide does not address management of reviews of determinations of breaches of the APS Code of Conduct and/or any sanction imposed as a result. These are reviewed by the Merit Protection Commissioner as a primary review or by Fair Work Australia, where the sanction is termination of employment.

Some of the matters considered under the review of actions scheme can also be pursued under other employment processes. For example, allegations of bullying and harassment may also be made as a whistleblowing report under section 16 of the Public Service Act. Concerns about conditions of employment such as salary, allowances and leave may be raised in the review of actions context and through the dispute resolution provisions in enterprise agreements.

A summary of the legislative framework for review of actions is in Appendix 1.

Other Australian Public Service Commission (the Commission) guides provide better practice advice on people management issues that complement the information provided in this guide, including:

- *Respect: Promoting a Culture Free from Harassment and Bullying in the APS*, 2011
- *Sharpening the Focus: Managing Performance in the APS*, 2006
- *Fostering an Attendance Culture: A Guide for APS Agencies* (undated)

These publications are available on the Commission’s website at www.apsc.gov.au/publications.

### 1.1 Outline

The guide is in seven sections.

The underlying theme of the guide is enabling human resource practitioners to manage review of actions in particular, and employee complaints and disputes more generally, in a way that is consistent with a commitment to the APS Values.

Sections 2 and 3 describe how ‘healthy’ organisations respond to complaints and conflict and the policy and legislative framework underpinning the review of actions scheme.

Sections 4 and 5 deal with the management of complaints and disputes before they become formal reviews, including how to use alternative dispute resolution methods.

Section 6 provides better practice advice on review of actions procedures and processes, while Section 7 sets out the key steps in conducting a review inquiry.

Appendix 1 outlines the legislative scheme for review to assist human resource practitioners and reviewers to interpret legislative provisions and determine whether an application is eligible for review.
Appendix 2 provides a model for human resource practitioners to follow when establishing or reviewing policies and procedures for the review of actions scheme.

1.2 Further advice and sources of information

This guide draws together information and ideas from a range of sources and jurisdictions. The following websites in particular provide information and resources for practitioners interested in employee complaints resolution.

The Department of Defence website through its personnel portal at <http://www.defence.gov.au/dpe/> provides a wide range of information about the department’s people management framework, including its strategic reform agenda and complaints resolution processes.

The Victorian State Service Authority’s website at <http://www.ssa.vic.gov.au/> provides information and resources for human resource practitioners and managers, including a better practice guide on building conflict resilient workplaces.

The website of the National Alternative Dispute Resolution Advisory Council at www.nadrac.gov.au provides information about alternative dispute resolution, including information on providers, industry associations and accreditation standards.


The Commonwealth Ombudsman’s website at <http://www.ombudsman.gov.au> provides better practice guides on complaints handling, including on managing unreasonable complainant conduct.

1.3 Terminology

This guide uses the terms employee ‘grievance’, ‘complaint’, ‘conflict’ and ‘dispute’. These terms may be used interchangeably. However, the term ‘grievance’ has historically been applied to formal complaints by employees. Its focus can be narrow if it implies that the complainant believes that they have been subject to an unjust act that requires a formal response, including some form of redress. The term ‘grievance’ does not fit easily with alternative forms of resolution and it is not used as a preferred term in this guide.

The term ‘dispute’ is a general reference to open disagreement between an individual and the agency that employs them, or between colleagues. It is not intended to cover disputes arising from the interpretation of agency enterprise agreements made under the Fair Work Act 2009.

The term ‘alternative dispute resolution’ refers to a range of processes or techniques by which an impartial person assists those in dispute to resolve the issues between them. Section 5 of this guide discusses the role of alternative dispute resolution in resolving employee complaints and disputes. At times this guide refers to alternative forms of resolution. This means informal
interventions in the workplace by managers or human resource practitioners, without involving accredited alternative dispute resolution practitioners.

1.4 Acknowledgements

This guide draws on an evaluation of agency practice in 2009 and 2010 by the Office of the Merit Protection Commissioner and work done in a range of jurisdictions and agencies on better practice in people management and the handling of complaints and disputes more generally.

The Merit Protection Commissioner acknowledges the support and assistance provided by the six agencies who participated in the evaluation—the Department of Defence; the Australian Taxation Office; the Department of Education, Employment and Workplace Relations; the Department of Finance and Deregulation; Comcare; and the National Library of Australia.

Figure 1 shows the three supporting elements that are key to an agency’s successful integration of the APS Values into its management and culture. These elements are commitment, management and assurance.

Each APS Value sits in one of the four relationships illustrated in the circle. The APS Value ‘a fair system of review’ sits with Workplace Relationships.

The review of actions scheme provides an opportunity for agencies to improve their commitment to the Values by improving their management of workplace conflict and strengthening their review procedures and processes. The review of actions scheme also provides an assurance mechanism in relation to the quality and fairness of an agency’s decisions about employment matters.
The APS Values Framework

**APS VALUES**

- **ASSURANCE**: Demonstrating the Values are being upheld through the accountability and assurance mechanisms.
- **COMMITMENT**: Building a values-based culture through leadership, strategic direction-setting and learning and development.
- **MANAGEMENT**: Fostering the judgement and integrity through values-based management policies, instructions and guidance.

**RELATIONSHIPS**

- **RELATIONSHIP WITH GOVERNMENT AND PARLIAMENT**
- **RELATIONSHIP WITH THE PUBLIC**
- **WORKPLACE RELATIONSHIPS**
- **PERSONAL BEHAVIOUR**

Figure 1
More than a process: taking a strategic approach

Healthy organisations are open, transparent and accountable. They take a positive approach to complaints and give employees the opportunity to raise issues of concern. When employees raise concerns, a healthy organisation responds in an open, respectful way, consistent with its values framework. A healthy organisation recognises that complaints provide it with opportunities to acknowledge and rectify mistakes, to learn from critiques of performance and to apply the lessons learned to improve decision-making, policy and procedures.

Employees need to know that they have both the right and the opportunity to raise issues, including the right to seek a review, and that they will not be criticised for doing so when they behave professionally and in good faith.

Agencies can give employees this opportunity without creating a ‘grievance culture’. Treating reviews of actions as a process imposed by legislation, and conducting a ‘tick the box’ review, can encourage a grievance culture. This is because employees are discouraged from raising issues early and pursue them only when they are frustrated and their positions have become entrenched.

Employees will more easily understand the values framework within which they make complaints when agencies integrate their review of actions policy and procedures into their strategic people management framework. Part of the strategic people management framework is the agency’s culture which may include an inclusive and collaborative working environment, and respectful, positive behaviours that encourage employees to take responsibility for their actions. Employees will understand better that when they make a complaint they have responsibilities as well as rights.

It is also important that employees and managers see that the way in which employee complaints are handled is consistent with the values the agency espouses i.e. the APS Values and any agency-specific values.

A healthy organisation deals with employees’ misunderstandings promptly so those misunderstandings are not allowed to influence employees’ perceptions of future management actions. A positive culture encourages employees to bring forward issues of concern and facilitates early intervention and more flexible approaches. Early intervention has a number of benefits, including ensuring that conflicts do not escalate and negatively impact on productivity and performance.

The next section gives an overview of the policy and legislative framework underpinning the review of actions scheme and its contribution to employee engagement.
The APS provides a fair system of review of decisions taken in respect of APS employees.

An APS employee is entitled to review... of any APS action that relates to his or her employment.

Does the complaint invoke statutory obligations
- an application for review or
- a whistleblowing report or
- a dispute under the Fair Work Act 2009?

Primary Review
(Agency)
s. 33

Secondary Review
(Merit Protection Commissioner)

Agency procedures for whistleblowing under s. 16 of the Public Service Act.
Dispute resolution provisions in the agency's enterprise agreement.
Framework

The review of actions scheme assists in improving the quality of the working environment by encouraging the fair resolution of employees’ concerns. It is part of the broader APS employment framework and derives from the APS Values in section 10 of the Public Service Act 1999. The Values include employment principles that describe the workplace that all agencies should be aspiring to—one that is fair, based on merit, ethical, focused on results, values consultation and cooperation.

Section 33 of the Public Service Act establishes the review of actions scheme and the Public Service Regulations 1999 outline the scheme and detail its intent.

Figure 2 shows the broad legislative framework in which the review of actions scheme operates.

3.1 Policy

The policy intent of the review of actions scheme is expressed in regulation 5.1, which requires APS agencies to have in place arrangements that encourage productive and harmonious working environments where:

- employees’ concerns are dealt with quickly, impartially and fairly
- review processes are consistent with alternative dispute resolution methods.

3.2 Requirements on agencies

The review of actions scheme is a statutory process. If an employee makes an application for review, an agency head must review the action and make a decision. However, agencies have few constraints on the way in which they can conduct reviews. Regulation 5.27 provides that an agency head may conduct a review in any manner he or she sees fit.

If the review concerns matters about which the facts are in dispute it is usual for some sort of inquiry to be conducted to establish the facts before the review is completed. However, a review may simply involve listening to and considering the employee’s concerns, or reviewing a decision on the basis of available documents and relevant argument. In fact, formal reviews of actions form only a small proportion of agencies’ people management caseload. The overwhelming majority of employee complaints and disputes are resolved informally through discussion with the affected employee(s) or through a management-imposed resolution.

Regardless of the approach taken, the focus of the review should be to resolve the employee’s concerns, consistent with regulation 5.27.
3.3 Why dispute resolution is important

What employees observe about the handling of complaints and disputes influences their perceptions of the fairness and integrity of their workplace and the culture of the organisation for which they work. Those perceptions contribute to overall levels of employee engagement and disengagement. Employee engagement refers to how much an employee supports the purpose and values of their employer and demonstrates that commitment through their behaviour and attitudes at work. Levels of employee engagement drive direct business costs such as employee turnover and contribute to productivity through increased discretionary effort by employees.

Section 4 provides an overview of how human resource practitioners might approach the resolution of employees’ complaints more strategically and flexibly, using the broad range of tools at their disposal to deal with issues before they become a formal dispute or review of actions.

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3 Unpublished data from the *State of the Service Report 2009–10* shows a moderate positive correlation between employee confidence in grievance processes and levels of employee engagement across agencies.
Managing complaints and disputes

Formal applications for review represent only a small percentage of the problems that can emerge in the workplace arising from interpersonal conflict, miscommunication and a lack of trust.

Tensions and disagreement leading to conflict and disputes are an inevitable feature of the workplace. People bring to the workplace different experiences, capabilities, personalities and values that can result in conflict. However, if dealt with appropriately, conflict can be positive, leading to fresh approaches to problems and innovative solutions.

Some agencies in the Commonwealth and in other jurisdictions have invested in strategies to respond positively to conflict in their workplaces. For example, the Department of Defence Enterprise Collective Agreement 2009 has made responding constructively to conflict a corporate capability. As team members, Defence employees are required to:

- accept that differing points of view are a natural part of the workplace that can lead to new ideas and improvements
- identify areas of possible conflict and work to reduce or eliminate the potential for problems
- act quickly to address issues, problems and conflict as they arise
- consider alternative resolution methods as the first option
- resolve conflict as close to the source as possible
- actively participate in resolution.4

The State Services Authority of Victoria’s guide for managers and teams Developing Conflict Resilient Workplaces proposes a conflict management model, incorporating both alternative dispute resolution and formal grievance resolution processes, and provides tools that agencies can use when dealing with conflict. The report recognises:

A conflict resilient workplace does not rely solely on formal dispute processes, but emphasises positive relationships and strong communication so that conflict is managed early, at the lowest possible level and with the most appropriate response.5

The Australian Taxation Office has an internal complaints resolution service, ATOconcern, whose role, in part, is to assist complainants to make an informed choice about the nature of their complaint and the options for addressing it. ATOconcern is described as a workplace ombudsman—an independent office within the ATO whose role is to listen to employee concerns and provide a safe venue in which to raise and address issues.

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4 The Defence Enterprise Agreement is available on the Department of Defence website at the following address http://www.defence.gov.au/dpe/pac/

ATOconcern
ATOconcern is an independent, safe, confidential and impartial complaint resolution service for ATO employees that is described by the ATO as an organisational ombudsman.

ATOconcern provides service for all staff who have concerns about issues in the workplace. ATOconcern not only provides advice but can also intervene where appropriate, including arranging alternative dispute resolution. This arrangement is long-standing, having been in place since 1998. The independence and authority of the service is guaranteed by the Commissioner of Taxation.

ATOconcern responded to 1,163 approaches in 2009–10.

Human resource practitioners can draw on the resources developed by other agencies when developing strategies, or improving existing practices, for responding to employee complaints and disputes. In this broader context, conducting a formal inquiry becomes just one possible response to a complaint or workplace dispute.

4.1 Roles and responsibilities

Over the past decade and more, the respective roles of the line manager and human resource practitioner have changed with the evolution of the APS from a centrally regulated, rules-focused employment framework to an outcomes-focused framework. Line managers are expected to take ownership of people issues in their area of control as part of their business responsibilities and human resource practitioners are increasingly taking on a consultancy role.

Part of the human resource practitioner’s role is to assist managers to resolve workplace conflict and to deal with complaints. Human resource practitioners are now providing case management support to managers and facilitating their access to professional expertise; for example to ‘conflict coaches’ or organisational psychologists through the agency’s employee assistance program. With particularly difficult cases, including protracted performance and health issues or a significant relationship breakdown in a team, the manager may need extensive support. Such support could include:

- assistance in developing a strategy to manage the problem (which may need to be informed by a professional diagnosis of the cause of the problem and ongoing support and advice from human resource practitioners as the strategy is implemented)
- the engagement and support of more senior managers in the business line.

The remainder of this section provides suggestions on how human resource practitioners might work through complaints and conflict and the kinds of issues to consider when advising managers.
4.2 Informed diagnosis

Resolving a workplace issue effectively requires managers, and human resource practitioners supporting them, to have an informed understanding of the underlying causes of a conflict or dispute in order to decide how best to respond.

There are a range of options for improving the diagnosis of the cause of a problem. In many cases, a manager talking to an individual or group of individuals to try to establish what is driving the complaint or dispute is an effective approach.

However, when dealing with an employee with a complex set of health, performance and behavioural issues, or a breakdown in relationships in a team in a way that is threatening productivity, professional advice can assist in identifying causes and inform the strategy for resolving the problem. This might include, for example, obtaining the services of a psychologist to talk to team members and observe the workplace so that they can identify the issues and recommend remedies. Another approach might be to engage the services of a mediator. A mediator will assess the causes of the dispute and the motivation and capacity of the parties to resolve the problem themselves with professional assistance.

The option chosen will depend on the complexity of the matter to be addressed, the capability of the individual manager, and level of employees’ trust.

Professional advice is important

A common pitfall is to ask people with insufficient expertise to suggest strategies for resolving workplace dysfunction where complaints of harassment or bullying have been made. Managers or consultants engaged by agencies to conduct harassment investigations may be asked, as an adjunct to their initial task, to advise on the causes of the problem and to suggest remedies. Where these people have no professional expertise to draw on, the interventions they propose may not contribute to resolving the issues underlying the complaint.

4.3 Possible approaches

Managers and human resource practitioners can choose from a number of ways of settling complaints or resolving workplace disputes. Their choice will depend on the complexity of the matter, including whether the employee has invoked statutory processes such as a review of actions or made a whistleblowing report.

Some of the dispute resolution approaches are addressed below. Case studies illustrate the kinds of issues that might arise and possible responses to those.
Discussion
In many cases, a manager having an informal discussion with the complainant, or a group of colleagues, will assist in resolving a complaint or dispute particularly if the employee considers that their concerns have been listened to respectfully and if commitments given as a result of the discussion are followed through.

Case Study 1
A group of women complain that they are uncomfortable working with a male colleague whose behaviour is a little unnerving in that he does not make eye contact and appears to be leering at them.

The manager has an informal discussion with the employee about his colleagues’ concerns. After the meeting, the employee’s support person reveals to the manager that the employee has a condition that means that he is unaware of the impact of his mannerisms on his colleagues. The manager encourages the employee to be open about this with colleagues and to share information about it.

Alternative dispute resolution
Alternative dispute resolution is a more structured response in which the discussion between people in dispute is assisted by an independent third party with professional expertise in dispute resolution. Section 5 of this guide discusses the use of alternative dispute resolution techniques in resolving employee complaints and disputes.

Case Study 2
A team is fracturing and not meeting its outputs. There is inter-personal conflict among team members including complaints of harassment and discourteous behaviour. The team leader has problems with her attendance and does not have the respect of her team. She has not advised her agency that she has any ongoing health issues or other circumstances that might impact on her attendance.

In circumstances like this, where the causes of any problem in the team could be multifactorial, there may be value in engaging an organisational psychologist to diagnose problems and recommend a range of responses to get the team back on track. The team leader could have health or other issues that have not been revealed to the agency. There may also be problems with the behaviour of individual team members arising from conflicts in values and personalities.

As well as addressing individual health, performance and behavioural issues, the management response might include alternative dispute resolution techniques such as a
team conference with a facilitator to enable team members to discuss what has happened, the effects on people and the best way forward to resolve the issues in the team.

A formal review

A formal review of actions is an appropriate response, or part of a response to a complaint, where the employee has specifically requested a review as a statutory entitlement. If an employee seeks a review and is not interested in pursuing other options for resolving their concerns, the matter must be reviewed, providing the actions are reviewable under the regulations. Section 6 of this guide provides guidance on the procedures and processes for handling reviews of actions.

A formal review can also assist in resolving a complaint where there is a dispute about factual issues that requires someone independent to look at the evidence. Section 7 of this guide provides information on how to conduct a fact-finding inquiry as part of a review of actions.

Other statutory processes

An employee’s complaint may also invoke other statutory obligations. For example, an agency will be required to conduct a whistleblowing inquiry where an employee has made allegations of misconduct, which are not frivolous or vexatious, and invoked the whistleblowing provisions in section 16 of the Public Service Act. Advice about an agency’s obligation when it receives a whistleblowing report is available on the Commission’s website at www.apsc.gov.au.

An agency may also consider that an employee’s complaint raises concerns about the behaviour of another employee that should be investigated under the agency’s procedures for investigating suspected misconduct. Handling Misconduct, which is available from the Commission website, provides guidance on the circumstances in which an agency may wish to investigate alleged behaviour as possible misconduct.

Case Study 3

A woman complains to human resources about sexual harassment by a male colleague (the respondent) involving unwelcome physical contact and inappropriate social and sexual invitations. She feels afraid of reporting the behaviour as the male colleague is very friendly with the manager of the area. Her complaints are corroborated by another female colleague who has witnessed the original complainant’s distress and also experienced low level harassment from the same person.

The original complainant advises that she is so uncomfortable and distressed that she is seeing a doctor and has started applying for jobs elsewhere.
This is not a scenario in which alternative dispute or informal resolution would be the appropriate response. It involves serious allegations of misconduct and is more properly dealt with through the agency’s procedures for investigating suspected misconduct.

However the response to this issue may also involve other management interventions. These include referral of the complainants to support services and could also include a direction to the respondent about contact with the complainants and temporary changes to supervisor and reporting arrangements to deal with the complainant’s lack of confidence in the independence of their manager.

4.4 What is the best response?

The best response to a complaint is one that balances the interests of the agency with the views and interests of the complainant or parties.

It is in the interests of both the agency and employees to resolve a complaint in a way that addresses the underlying motivation and interests of the employee or the parties to the dispute. It is also in the interests of both the agency and the employee that the process for resolving the complaint is quick, fair and transparent.

In many cases this may require no more than a facilitated discussion that brings the parties together. If the parties need the assistance of a qualified third party to reach resolution, then alternative dispute resolution assisted by a professional practitioner may be the most effective strategy.

A review of actions may be the best way to resolve elements of particular complaints. For example, a dispute over whether an employee’s performance is at a satisfactory standard is largely a factual issue and may be best resolved by a fact-finding inquiry as part of a review of actions.

There will be other circumstances in which a formal response, including an investigation, is required. This is the case in particular where the employee has invoked the whistleblowing provisions in the Public Service Act or where the agency has decided that it is necessary to conduct an investigation into suspected misconduct. The primary consideration in deciding to conduct an investigation into suspected misconduct is the agency’s need to uphold appropriate standards of behaviour. In some cases, the complainant may wish to resolve the matter less formally, but this should not be a deciding factor in determining whether or not to investigate a complaint as suspected misconduct.

While an investigation under an agency’s whistleblowing procedures, or procedures for investigating suspected misconduct, may deal with the immediate issue, it may be necessary for other interventions to operate in parallel to ensure a return to a productive workplace. This could include, for example, implementing arrangements to support both the complainant and the person they have complained about; keep the team settled while a member of the team is under investigation; or rebuild the team after the misconduct investigation has been completed.
Similarly, a review of actions may run alongside other interventions aimed at improving the relationship and levels of trust between a manager and employee.

Complainants may have a strong preference for pursuing a matter formally through an inquiry by invoking statutory processes such as whistleblowing or a review of actions. They may refuse to participate in mediation or facilitated discussions designed to bring the parties together, even where it appears that this would be the most appropriate response to the substance of their complaint (for example where the complaint appears to be the result of interpersonal conflict and misunderstandings).

Human resource practitioners have a role in assisting the complainant to make an informed choice about the options available to them, the advantages and disadvantages of each approach and the likely outcomes. This requires a discussion with the complainant about what is motivating them and what they are seeking to achieve. Human resource practitioners should inform complainants that they:

• will have more opportunity to influence the outcome if they choose to resolve issues informally or by alternative dispute resolution processes
• are more likely to have ownership of the process and responsibility for managing their own issues if they do not hand that responsibility to a third party (for example an investigator or a delegate)
• will not have a driving role when their complaint is investigated under agency procedures for investigating whistleblowing reports or suspected misconduct—their status is as a witness and their view of the seriousness of what they are alleging will not necessarily influence the outcome.
Alternative dispute resolution

Alternative dispute resolution (ADR) is an umbrella term for processes in which an impartial person assists those in dispute to resolve the issues between them.

ADR processes may be facilitative, advisory or determinative with the process selected to best suit the nature of the dispute.

The Public Service Regulations 1999 acknowledge ADR as a means of resolving employee complaints\(^6\). Agencies are increasingly using ADR in conjunction with the review of actions scheme by, for example, offering mediation as the first step when employees make inquiries about lodging an application for review.

Some larger agencies, in particular the Department of Defence, have invested significantly in ADR and have formalised it as a strategy for responding to workplace conflict.

ADR in the Department of Defence

The Department of Defence employs ADR as the preferred method for the resolution of workplace conflict. The ADR and equity programs are delivered through Fairness and Resolution centres in each mainland capital city.

These centres are staffed by practitioners trained in conflict coaching, mediation and group facilitation processes. They also employ a technique unique to Defence called interactive problem solving. Interactive problem solving requires a practitioner to work with a commander, manager or employee to explore and examine all aspects of a conflict or dispute, to consider options for resolution and to make a choice on a course of action.

Fairness and Resolution practitioners also provide awareness and skills training in equity and diversity and the prevention and early resolution of workplace conflict.

The department has 55 mediators (who hold accreditation under the National Mediator Accreditation Scheme), 25 accredited conflict coaches and 11 qualified group facilitators.

Evaluation of the programs shows that there is increasing acceptance and trust within the organisation of ADR processes and that the practitioners who deliver the services are held in high regard.

\(^6\) Regulation 5.1(4)
5.1 Alternative dispute resolution methods

Mediation is a voluntary process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify issues, consider alternatives, develop options and endeavour to reach agreement. The mediator has no advisory or determinative role on the content or outcome of the dispute but may advise on the process for resolving the dispute. Mediation is usually conducted in private and the outcomes are confidential to the parties to the mediation.

Workplace conferencing brings a group of colleagues together with a neutral and qualified facilitator in situations where there is conflict in the workplace or past disputes that have not been adequately resolved. The intention of the conference is to enable everyone affected by the dispute to consider what happened, the effects on people and the best way forward to resolve the issue.

Conciliation is a process in which the parties, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives and endeavour to reach agreement. A conciliator will provide advice on the matters in dispute and/or options for resolution, but does not make a determination. The conciliator is responsible for managing the conciliation process.

Arbitration is a process in which the participants to a dispute present arguments and evidence to a dispute resolution practitioner (the arbitrator) who makes a binding decision.

5.2 Professionalisation

ADR is becoming increasingly professionalised with professional associations, codes of practice and national accreditation standards.

An industry-based national accreditation scheme for mediation commenced in January 2008. The National Alternative Dispute Resolution Advisory Council (NADRAC), which advises the Attorney-General on the development and promotion of alternative dispute resolution, was involved in the development of the scheme.

Some agencies have invested in training their human resources staff in mediation. Where agencies are offering mediation for workplace disputes, it is recommended that the people providing these services meet national accreditation standards.

5.3 Using alternative dispute resolution appropriately

Agencies are being encouraged through the work of NADRAC to adopt a strategic approach to managing and resolving disputes and to shift from using adversarial processes. Looking at alternative ways of resolving workplace disputes is consistent with this approach.
However, the principles underpinning ADR interventions may place some constraints on using particular methods in particular disputes. For example, when suggesting mediation, human resource practitioners need to consider the following:

- participation in mediation has to be voluntary
- some disputes are suited to mediation and some are not
- the neutrality and independence of the mediator are important for the credibility and success of the process.

Mediation is not suitable for all forms of disputes. For example, disputes that raise behavioural issues serious enough to be considered under the agency's procedures for investigating suspected misconduct should not be dealt with through mediation. In these circumstances the agency must be seen to publicly reinforce appropriate standards of behaviour. The private agreements reached through mediation do not allow for this.

Both parties need to feel that mediation is a safe process in which their concerns can be aired and listened to respectfully. The interests and behaviours of the parties to a dispute may mean the dispute is not suited to mediation. Skilled mediators conduct pre-mediation screening (intake assessments) to determine whether mediation is likely to be successful given the values, interests and behaviours of the parties.

In addition, it is important to the success of mediation that the mediator is seen to be neutral and independent. Conflict resolution skills are a useful part of the package of skills of human resource practitioners. However, unless an agency is large enough to provide a service that is independent of the consultancy and management advisory function of the human resources area, it may be more appropriate to source mediation from the industry than to develop expertise in-house.

While mediation may not always be the most appropriate response to a workplace dispute, ADR processes provide a suite of options. In addition, where formal statutory interventions are necessary, such as an investigation of suspected misconduct, once the investigation process has run its course, ADR can assist in rebuilding relationships in the workplace. While participation is voluntary, ADR is particularly helpful where there is a need to deal with the emotional impact of workplace conflict, and where the restoration of workplace harmony, teamwork and improved productivity is the goal.

Section 6 of this guide discusses what agencies can do to strengthen their review of actions procedures and processes, reflecting back to the discussion on the strategic and legislative framework for the review of actions scheme in Sections 2 and 3.
Procedures and processes

Better practice review of actions procedures should seek to:

• reflect the legislative provisions in the context of the general policy on review in regulation 5.1 and the focus on attempting to resolve employees’ concerns
• articulate the links between the legislative scheme and the agency’s broader people management framework and ensure that the handling of employee complaints is consistent with the APS Values and any other espoused values
• provide for a fair, independent and effective review process where a complaint becomes a formal request for review.

A set of model review of actions procedures is provided in Appendix 2 of this guide.

6.1 Values-based procedures

Agencies can link the APS Values and the review of actions scheme in their procedures by:

• making a commitment to a fair and independent review process as a part of a broader commitment to integrity in agency decision-making, including employment decision-making
• articulating the rights and responsibilities of employees who are concerned about issues in the workplace, including issues that affect them personally
• making a commitment to learning the lessons from the review process.

Fair and independent review process

Agency procedures should provide employees with an assurance that the review process is fair and unbiased. In particular, employees need to be confident that the reviewer and delegate have open minds about the review applicant and the review application. The reviewer is the person who assists the delegate, for example, by investigating the review applicant’s concerns. The delegate is the person who is the delegate of the agency head for the purposes of section 33 of the Public Service Act and who is the decision maker on the review application.

The delegations to make decisions on applications for review under the scheme are held in business areas in some agencies, while in others the function is centralised in human resources. The choice of reviewer also varies and may include a person in the business line, an agency legal officer, a human resources practitioner or a contractor.

If delegations are held in the business areas it is important that the position is sufficiently senior. By choosing senior managers to be delegates, the agency assures its employees that their concerns will be taken seriously.
In some agencies, the reviews are conducted by human resource practitioners, usually in the employee case management support area. While there is benefit in having a central oversight of the review process, this arrangement can be problematic where these staff are also advising the employee's manager about other issues (health, behaviour or performance). This can create a perception that the reviewer has a preconceived view of the employee. In these circumstances, it is preferable for the reviewer and delegate to be independent of the human resource case management function.

It is good practice for agency review procedures to give review applicants the opportunity to raise any concerns they may have about the reviewer or delegate before starting the review so that any perceptions of bias can be addressed.

**Rights and responsibilities**

Employees need to know that they have both the right and the opportunity to raise concerns about matters affecting them in their employment, including seeking review, and that they will not attract criticism for doing so, when they behave professionally and in good faith. Behaving professionally includes raising concerns in a respectful, courteous, constructive and factual manner and cooperating with the review process. It does not include unreasonably labelling colleagues' behaviour as unethical or attributing unethical or dishonest motives to colleagues and managers.

**Learning the lessons**

Employees’ complaints provide valuable feedback to the agency about the quality of its working environment and employment decision-making. Better practice agency procedures emphasise the value the agency places on these feedback loops. For example, the Department of Defence in the *Joint Directive 1/2006* on the resolution of workplace complaints and disputes requires the Fairness and Resolution Branch (which manages this work) to ensure that the lessons learned from the outcomes of complaints and other disputes are applied, where appropriate, to achieve improvements in policies, processes and practices across Defence.

It is important that such statements are put into effect. Central oversight and monitoring of the review function by human resource managers enables the lessons learned from reviews to be brought to the attention of managers to improve decision-making and the development of people management policy. One way of doing this is to provide briefings on the lessons learned from review work and an analysis of any emerging trends to strategic people management committees.
6.2 Enhancing the effectiveness of the review process

Advising of the right of review

For the review of actions scheme to operate effectively in resolving employees’ concerns, employees need to know that they have an opportunity to seek review. At a minimum, information about the review process, including how to apply for review, should be easily accessible, including through the agency’s intranet.

It is equally important that employees know they have a right of review when they receive decisions that they want to contest. One way of doing this is to require managers to advise employees of their review rights when making a decision that is likely to be contested. This requirement can be expressed in people management policies (for example, agency guidelines on the performance management scheme).

Application process

The process for applying for a review should be clear to employees. Some agencies decentralise this process, requiring employees to make applications to managers at senior levels within the employee’s reporting line. Other agencies require applications to be lodged with their human resources function.

Employees are less likely to be confused about the process for making an application for review if the agency has a central point for such applications. Some agencies have established an appropriately named mailbox, accessible through the intranet, for this purpose.

Indicative timeframes

Adopting and publishing indicative timeframes for responding to and completing reviews assures employees that their agency is committed to resolving their concerns quickly, consistent with regulation 5.33.

The Australian Taxation Office has a review of actions mailbox to which employees can submit applications for review, links to which are available on the intranet. Applications received in the mailbox are acknowledged within 24 hours. The published timeframe for finalising reviews is three months, with a commitment to contact employees to explain and discuss if it appears likely the review will exceed this timeframe.
6.3 Review processes

Arguably, an employee’s experience of the review process is as important as the content of agency procedures in demonstrating the agency’s commitment to the APS Values.

Managing the relationship

Effective relationship management serves two purposes. It contributes to a relationship of trust, assuring employees that their concerns are being dealt with fairly and professionally. It also makes the review process more efficient by reducing the need for progress inquiries. Managing the relationship with the employee effectively through the review process will have implications for the longer term relationship between the agency and the employee.

Central to this is personal contact between the reviewer and the review applicant. Many review applicants feel the need to tell their story to an impartial person. For example, some review applicants have informed the Merit Protection Commissioner that it was not until they applied for secondary review that someone had listened to them. While this may be only a perception, it highlights the importance of managing the employee’s experience of how their review is handled.

Typically, there are three key stages during the review process where engaging effectively with the review applicant helps to manage perceptions. These are:

- the discussion at the start of the review
- updates provided to the review applicant during the review process
- the discussion at the end of the review.

Initial discussion

A discussion between the reviewer and review applicant at the start of a review serves a variety of purposes.

- It helps the reviewer clarify the key issues, determine their significance and consider the best way of responding to them.
- The matters covered by applications for review can vary significantly. For example, complaints arising from a misunderstanding or miscommunication may be resolved fairly quickly or by alternative forms of resolution. A range of responses may be needed to the issues raised by a review application — an inquiry into factual issues as well as alternative forms of resolution to address relationship issues in the workplace.
- A discussion provides the opportunity to raise alternative forms of resolution as a means of resolving all or part of the employee’s concerns.
- The Australian Taxation Office procedures require human resource practitioners to contact review applicants to discuss what they are seeking to achieve and to give them the option of alternative forms of resolution.
- A discussion allows the reviewer to communicate information which can help manage the review applicant’s expectations about timeframes, scope of the review and possible outcomes.
The Department of Defence procedures require the reviewer to clarify the scope of the review with applicants at the start of the review process, including identifying any matters that will not be reviewed.

**Updates during the review process**

Regular updates from the reviewer assist in building a relationship of trust and reduce the incidence of progress inquiries.

**Discussion at the end of the review**

An important part of the review process is the discussion at the end of the review. It provides an opportunity for the reviewer to explain the decision to the review applicant and to advise of the right to seek a secondary review from the Merit Protection Commissioner. Even where an employee is unhappy with the review outcome, the review decision is more likely to be accepted where the review process has actively engaged with the employee and has been undertaken in an independent and credible way.

Reviews also provide an opportunity to assess the working relationship between the review applicant and the agency. At the end of the review process it is helpful to consider the extent to which the employee’s level of trust and engagement has been affected by the issues that prompted the review application and whether there are any matters to be addressed and the scope for doing so.

The Australian Taxation Office requires the delegate, as part of the review process, to consider whether there are strategies that will assist in re-engaging the employee and overcoming any loss of morale from the experience that led to the review of actions request. This approach puts an emphasis on valuing employees, resolving their concerns and establishing a basis for avoiding future disputes.
Conducting a fact-finding review

A review will involve a fact-finding inquiry where there are factual issues that need to be determined to support the delegate’s decision on the review application.

This will be relatively straightforward where the evidence relating to the employee’s complaint is clear and uncontested, or where the matters do not involve serious consequences for the employee or others. It may be simply a matter of talking to the employee, looking at documentary evidence and forming a conclusion.

However, some review applications are multi-facetted. In some cases, such as bullying and harassment, the evidence may be contested. In others, the employee has significant interests at stake (for example, where their level of performance is being questioned or where they are seeking leave for personal reasons that are important to them).

Many agencies have information to assist reviewers and delegates in inquiring into and making decisions on reviews of actions applications. This often focuses on the procedural requirements in regulation 5.33—the review must be procedurally fair, quick, informal and private. The reviewer’s fundamental task is to attempt to resolve the employee’s concerns (regulation 5.27). To do this, the reviewer must address not only procedural issues but also the substance of the employee’s complaint.

The table commencing on page thirty explains some key steps in a review inquiry. It draws on the Administrative Review Council (ARC) best practice guides on decision-making, which cover making lawful decisions; natural justice; evidence, facts and findings; giving reasons for decisions; and accountability.

Guide No. 3 Evidence, Facts and Findings is an important reference tool for people undertaking administrative inquiries and is a useful supplement to information that agencies provide reviewers and delegates on their role and functions. The Guide covers both the legal and practical issues associated with gathering evidence, determining its significance and relevance, and using evidence to reach findings of fact.7

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7 These publications are found on the ARC website at http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Publications_Reports _Other_Documents
<table>
<thead>
<tr>
<th>Key steps in a review inquiry</th>
<th>Discussion</th>
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<tr>
<td><strong>Step 1 — Identifying the key issues</strong></td>
<td>Identifying the key issues involves:</td>
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<tr>
<td></td>
<td>• understanding the basis of the employee’s complaint</td>
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<td>• identifying the policies, instructions and guidelines that provide the framework within which the action occurred.</td>
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<td></td>
<td>This can be challenging where the review applicant has a long list of complaints over an extended period. In this case the reviewer may need to focus on recent complaints to avoid confusion and unnecessary complexity.</td>
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<td></td>
<td>The reviewer’s role is to identify the key themes in the complaint and the key incidents that characterise the review applicant’s substantive concerns. While historical issues might provide context, the time limits applying to review usually preclude inquiring into historical issues.</td>
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<td>This does not mean that the reviewer only reviews what they feel confident in reviewing with the consequence that the review applicant’s substantive concerns are overlooked.</td>
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<td></td>
<td>The initial discussion with the review applicant (see Section 4.3) can help clarify the key issues and themes, historical concerns and whether they are relevant. It also helps in reaching an understanding on the scope of the review.</td>
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<td><strong>Example:</strong> In bullying and harassment cases a review applicant may list a large number of incidents where they consider they were treated inappropriately. They may also make general allegations of bullying behaviour that are not linked to specific incidents. It is appropriate in this context for the reviewer, in discussion with the applicant, to identify, and gather evidence on, some key incidents that are characteristic of the employee’s concerns, without investigating every specific incident.</td>
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<tr>
<td><strong>Step 2 — Planning the review</strong></td>
<td>For more complex reviews, it is good practice to develop a plan with indicative timeframes, particularly for the evidence-gathering stage. It is also good practice for the reviewer to advise the review applicant of what is planned and how long it is anticipated to take. This will assist in managing expectations about when the review applicant may have a response.</td>
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### Step 3 — Gathering the evidence

The reviewer should identify:

- the facts that need to be established in order to make a decision on the review application
- the evidence that is needed to establish those facts.

Evidence may come from documents (emails, letters, minutes, file notes, system notes, diary notes) or oral evidence (for example, from witnesses to an incident).

#### Recording the evidence

All the evidence considered by the reviewer should be documented and kept on file. This includes keeping records of interviews with the review applicant or other people spoken to as part of the review. Interviewees should be given the opportunity to accept the content of the record of interview and to clarify the reviewer’s understanding of what they said at interview.

#### Transparency

Having a record of the evidence considered in the review is important if the review applicant wishes to apply for secondary review by the Merit Protection Commissioner. Regulation 5.30 requires agencies to make available to the review applicant all relevant documents relied on in the primary review when an application for secondary review is received.

The reviewer should be open with the review applicant about the evidence they are considering so that there are no surprises for the review applicant when it comes to secondary review.

#### Interviewing

Providing the review applicant with the opportunity to have a support person is good practice when interviewing. Not being given this opportunity may be the basis of a complaint when the matter comes to secondary review. A support person is particularly important when the review concerns allegations of harassment. In these cases, the offer may also need to be made to respondents and witnesses.

The general practice is that a support person is there to provide support and is not an advocate for the employee. It is important for review applicants to tell their story in their own words.

#### Confidentiality

It is not appropriate to give guarantees of confidentiality when gathering evidence for the review because, consistent with regulation 5.30, information gathered in the primary review will be made available to the Merit Protection Commissioner and review applicants if they apply for secondary review.

#### Privacy issues

Review applicants and witnesses should be given information about the likely use and disclosure of personal information gathered in the course of a review, consistent with the *Privacy Act 1988*. 
Step 4 — Assessing the evidence

The following material draws on ARC Guide No. 3 and on work done in the Australian Public Service Commission to support review officers conducting inquiries on behalf of the Merit Protection Commissioner.

Evidence is used to establish the facts

Employment situations where the facts may be in dispute include:

- an employee’s level of performance
- a manager’s behaviour during a specific incident where the employee has said that they were bullied by the manager
- an employee’s record of attendance for the purpose of determining whether the imposition of an attendance management plan was justified.

Evidence must be relevant to the facts that need to be determined and must logically support the reviewer’s conclusions about the facts.

Where the evidence is disputed (for example, in a harassment case) no—one has an obligation to ‘prove their case’. However, as a matter of practicality, if a person is making an accusation they have a responsibility to provide at least some evidence in support of that accusation.

Value of evidence

Not all evidence is of equal weight. The reviewer’s role is to evaluate the evidence, applying logic, commonsense and their experience. A reviewer should consider the following.

Reliability

Evidence is more likely to be reliable if it:

- can be confirmed or verified from another independent source
- is contemporaneous with the event (a diary note made close to the time of a conversation is likely to be more reliable than someone trying to recall the details of the conversation several months after it occurred)
- first hand evidence rather than hearsay (first hand evidence of an event is what a witness to the event relates, while hearsay evidence is what someone says they were told about an event by someone who witnessed it).

Example: In harassment cases, a review applicant may complain of incidences of behaviour for which there are no direct witnesses. A reviewer may nevertheless be able to identify evidence that corroborates one or other of the parties to the incident. This can include contemporary records kept of a conversation, the accounts of people who spoke to either party immediately after the incident and observed their behaviour, or evidence of behaviour in other situations that might point to a propensity to behave in a particular way.
Step 4 — Assessing the evidence

**Expert opinion**

An opinion has greater weight if it is given by someone with expertise on the matter. An example is a medical practitioner’s diagnosis of a person’s state of health. Reviewers may evaluate expert evidence; for example, by looking at the expert’s area of expertise and whether the expert is venturing an opinion about something that is not in their area of expertise. However, a reviewer should be wary of relying on their own non-expert opinion in a matter that requires expert judgement.

**Absence of evidence**

A reviewer does not need positive evidence of each and every matter. If there is no evidence it may be reasonable to conclude that something did not occur. However, the absence of evidence is unlikely to support a conclusion that something did occur.

**Example:** If an employee claims that a manager has created a bullying culture but there is no evidence of this, it would be reasonable to conclude that this was not the case. However, a lack of witness statements about bullying is not in itself evidence of a workplace where people are afraid to speak out about bullying.

**Evenly balanced evidence**

In some cases, the evidence may be evenly balanced or inconclusive. In this circumstance, a reviewer can either make no finding or see if there are other lines of inquiry that would generate evidence that might throw light on the matters in contention. If the review applicant suggests lines of inquiry that appear to be relevant, these should be pursued if it is practical to do so.

**Example:** In performance management review cases, the review applicant may be disputing the rating given to their performance. It can be difficult for someone outside the business area to form a view on whether the review applicant is performing at an acceptable level. Depending on the seriousness of the dispute, particularly where there is the potential for the employee to be managed for under-performance, it is appropriate for a reviewer to seek informed views about the quality of the review applicant’s output from a manager who has relevant experience but who is not working in the same area as the review applicant, or from an external expert.

**Conflicts in evidence**

Conflicting versions of an event do not mean that someone is lying. It is possible for people to perceive and remember events differently. It is generally better to focus on what the balance of evidence suggests is the truth of the matter (for example, is one person’s account consistent with other evidence) rather than focusing on whose account is to be believed.
Step 5 — Making a decision

Standard of proof
When coming to conclusions about disputed facts arising from an application for review, the standard of proof is the ‘balance of probabilities’ i.e. it is more likely than not that the fact is true.

Whilst the standard of proof does not change, in certain circumstances better evidence may be required to satisfy a reviewer about a particular fact. Such circumstances could include:

- allegations of serious wrongdoing
- where a fact is inherently unlikely
- where the consequences of making a finding one way or the other are serious.

Lawfulness
The decisions and actions reviewed under the review of actions scheme are usually made, or done, under employment policies such as performance management guidelines and leave policies. They do not usually involve determining legislative entitlements. However, there may be some circumstances in which a reviewer needs to check that the decision was lawful. For example, when reviewing decisions to suspend an employee from duties under regulation 3.10, it is appropriate for the reviewer to check that the person who made the suspension decision had the appropriate delegation to do so.

Procedural fairness
Procedural fairness requires that a decision be:

- free from bias (or an apprehension of bias) on the part of the decision-maker (the bias rule)
- rational, in that it is based on evidence that is logically capable of supporting the facts (the evidence rule)
- fair, in that a person likely to be adversely affected by the decision has an opportunity to present their case and to have their response taken into consideration before the decision is made (the hearing rule).

When complaining about the action that is the subject of the review, review applicants frequently argue that they were denied procedural fairness or natural justice. By this they generally mean that they did not have sufficient opportunity to state their case before a decision was made. However, not every decision requires a hearing. A hearing is unlikely to be necessary in the following circumstances:

- The outcome does not affect a person’s individual rights or their legitimate expectations. For example, a person complaining of being harassed does not have a right to a hearing about whether Code of Conduct action is taken against the person about whom they have complained. This is because their individual rights are not affected by this decision.
- The decision involves the application of a benefit (for example, a decision not to send an employee on a training program for career development purposes or to award a performance bonus on the basis of exceptional performance). A hearing is only likely to be necessary in this case if the evidence suggests that the employee had a legitimate expectation that they would receive the benefit.
Step 5 — Making a decision

- The decision affects employees generally rather than the individual specifically (for example, a decision to cease paying an on-call allowance to a group of employees).

While many of the decisions and actions that employees seek to have reviewed under the review of actions scheme do not have strict procedural fairness requirements, it is nevertheless good practice for managers to provide employees with an opportunity to state their case, before making a decision that an employee is likely to be concerned about.

However, the failure to give an employee the opportunity to state their case (where procedural fairness obligations do not apply) does not necessarily mean that the decision should be set aside on review. In some cases it may not have been practical for this to occur or the employee may have had earlier opportunities to state their case before the decision was made.

Example: A manager holds the view that an employee should not advance a salary point at the end of the performance management cycle because of poor performance. The manager is unable to communicate their intentions to the employee for comment because the employee is on sick leave and the agency has medical opinion about the contribution of work-related stress to his/her medical condition.

The employee is arguing that there has been a breach of procedural fairness. However, if the employee had notice during the performance management cycle that there were concerns about their performance and had been given the opportunity to comment and respond to these concerns, it may be reasonable to conclude that the manager’s decision was fair notwithstanding that the employee was not given an opportunity to comment before the final decision was made.

Applying policy

An employee may seek review arguing that a decision is unfair in their circumstances even though the decision is in accordance with the agency’s policy guidelines. In general, policy should not be applied inflexibly and it is important to recognise that decision-makers sometimes see cases that present exceptional and compelling circumstances. For example, there may be cases where:

- the employee’s claims are very compelling even though what the employee is seeking is not consistent with an agency’s policy
- a broader view of the agency’s business interests might suggest a favourable consideration of the employee’s case.

Example: Agencies’ leave policies may give complete discretion to managers to decide applications for extended leave without pay in circumstances where employees are seeking leave to meet family responsibilities (other than parental leave) or to pursue alternative careers. The policy may indicate that the primary consideration is operational priorities of the business unit in which the employee works.
Where employees’ leave applications are refused in this circumstance, a review provides an opportunity to consider more fully any exceptional and compelling circumstances put forward by the employee. These could include family circumstances that suggest a compassionate response would be appropriate. They could also include employment opportunities outside the APS that may be in the broader interests of the agency.

Where such claims are put forward, it would not normally be sufficient for a review decision to assert the policy without giving any regard to the claims put forward by the employee.

Whether or not a decision-maker is able to exercise discretion will depend on the legal authority for the policy (for example, whether what is termed a policy is in fact mandatory procedures under legislation or is limited by the terms of the agency’s enterprise agreement).

Reaching the right outcome
Having collected the information and evidence, considered the context and the review applicant’s concerns, the reviewer has to reach a view about:

- the facts in dispute (for example, was an employee’s performance at an acceptable standard)
- the action itself.

The regulations do not prescribe any tests that need to be applied to the action itself. An appropriate test, in the context of the policy intent of the review of actions scheme, is whether the action was fair and reasonable.

All the circumstances of the case will be relevant in determining whether the decision was fair and reasonable. A fair and reasonable decision does not simply mean that the decision was procedurally fair or that it complied with agency policy. In making a judgement as to whether the decision was fair and reasonable, the reviewer should consider:

- the circumstances of the review applicant which may include both their employment history and personal circumstances (in doing this it is useful for the reviewer to ask ‘if I were in this person’s position how would I like to be treated by my employer?’)
- the operating environment in which the review applicant works (which may include consideration of operational pressures and management expectations)
- the interests of the agency (its values framework, its people management framework and its broader objectives)
- good people management practice.8

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8 The Australian Public Service Commission website has copies of better practice publications on a range of topics including recruitment, managing performance, behaviour and attendance. These are available from the publications page or the employment advice page at www.apsc.gov.au
Step 6 — Recording the decision: the review report

Regulation 5.27(5) requires the agency head to tell the employee in writing of:

- any decision made on the review application
- the reasons for the decision
- any action to be taken as a result of the review
- the right to apply for secondary review to the Merit Protection Commissioner.

The review report is usually the way to comply with this statutory obligation.

Where the reviewer is not also the decision-maker, their role usually includes preparing a report that details the review and recommends a decision to the delegate. In doing this it is important that the reviewer explains their reasoning. It is not sufficient simply to list all the documents and submissions that were considered. Nor should a reader be left guessing why the reviewer has reached the conclusions they have.

In addition, a well-argued and logical review report assists:

- the review applicant to understand that the issue was seriously considered by the agency
- in improving employment decision-making and supporting the agency in learning lessons from the review process.

A review report would ideally cover the following material:

1. a summary of the review applicant’s complaint and the outcome they are seeking
2. background information, which includes key undisputed facts such as the review applicant’s classification level and job, and undisputed history such as the date of particular incidents
3. the actions that are being reviewed
4. the facts that are in dispute, the findings on those facts and the evidence that was relied on to make those findings (where conflicting evidence is involved, the reasons for preferring one lot of evidence over the other should also be set out)
5. the policy framework within which the actions occurred
6. other issues relevant to the review applicant’s concerns such as whether or not there has been a breach of procedural fairness in the course of the decision-making process
7. the decision (that is whether to confirm, vary or set aside the actions under review) and the response to the outcomes the review applicant is seeking from the review
8. the reasons for the decision detailing the steps in the reasoning process (in other words, a chain of reasoning that leads logically from the relevant facts to the decision)—in doing this it may assist reviewers to discuss their reasoning with a senior colleague and possibly, depending on the circumstances, a legal adviser
9. advice about the option of seeking secondary review by the Merit Protection Commissioner.
Legislation

Agencies can use this appendix to assist them to interpret the legislative provisions related to reviews of actions and to decide whether an application is eligible for review. This appendix does not cover reviews of promotions under Division 5.2 of the Public Service Regulations 1999, nor is it intended to be a prescriptive guide or a substitute for legal advice.

1 Policy framework

One of the APS Values at sub-section 10(1)(o) of the Public Service Act 1999 (the Public Service Act) is: The APS provides a fair system of review of decisions taken in respect of APS employees. This ‘fair system of review’ is in practice the review of actions scheme and is set out in section 33 of the Public Service Act 1999 and Part 5 of the regulations. While the Public Service Act provides the basic entitlement to review, much of the detail of the scheme is contained in Division 5.3 of the regulations.

A statement of the policy intent of the review of actions scheme is in regulation 5.1 which requires agencies to have in place arrangements that encourage productive and harmonious working environments where:

- employees concerns are dealt with quickly, impartially and fairly
- review processes are consistent with alternative dispute resolution methods.

2 Two tiers of review

There are two tiers of review. The first tier involves an internal review by the employee’s agency. This is known generally as a primary review (regulation 5.24). If the employee is dissatisfied with the outcome of that process, he or she has access to a second tier of review known as a secondary review (regulation 5.29), conducted by the Merit Protection Commissioner, an independent statutory officer located with the Australian Public Service Commission.

Employees may make an application for primary review in the first instance to the Merit Protection Commissioner in the circumstances prescribed in regulation 5.24. These are:

- for review of a decision that an employee has breached the APS Code of Conduct and/or of the resulting sanction
- if the employee’s agency head was directly involved in the relevant action or decision
- where it is not appropriate, because of the seriousness or sensitivity of the action, for the agency head to deal with the review application
- where the employee claims that the relevant action or decision is victimisation or harassment for having made a previous application for review.
3 Responsibilities of the agency when conducting reviews

In accordance with regulation 5.27(1), if an agency head receives an application for review of an action, the agency head must review the action. This is unless:

- the agency head refers the application for review to the Merit Protection Commissioner or
- the action is not, or ceases to be, reviewable.

The agency head must attempt to resolve the employee's concerns about the action (regulation 5.27(1)).

The review may be conducted in any manner the agency head thinks fit (regulation 5.27(2)). There is, however, the requirement to give reasons in writing for any decision (regulation 5.27(5)). This may require a fact-finding process to support the decision. Most agencies appoint someone to gather and consider evidence and make recommendations to a delegate.

An agency head may confirm, vary or set aside the action under review (regulation 5.27(3)). However, consistent with the requirement to attempt to resolve the employee's concerns, this is not the limit of what an agency head can do in response to a review of actions. The agency head can take any action, within the limits of his or her employment powers, to rectify an action or restore the employee to the position they would have been in, but for the action (regulation 5.27(4)).

Regulation 5.33 requires that the procedures used to conduct a review comply with some minimum requirements:

- the procedures must have due regard to procedural fairness
- the review must be conducted in private
- the review must be finished as quickly, and with as little formality, as proper consideration of the matter allows.

Making an application under the scheme is an entitlement for APS employees under the Public Service Act. There is an implied prohibition on victimisation or harassment of an employee for making an application for review as employees have the entitlement to seek a primary review by the Merit Protection Commissioner under regulation 5.24(3)(c) on this basis.

4 Responsibilities of the agency when the application is referred to the Merit Protection Commissioner

Under regulation 5.29, an employee may apply to the Merit Protection Commissioner for secondary review where the agency head:

- has told the employee that the action is not a reviewable action under subregulation 5.23(3) or
- reviews the matter and the employee is dissatisfied with the outcome.
The employee must submit the application for secondary review through the agency (regulation 5.29(2)).

Upon receiving the application, the agency must give the Merit Protection Commissioner the application and any documents relevant to the primary review within 14 days of receipt of the application (regulation 5.30(1)).

The agency must provide copies of all the documents given to the Merit Protection Commissioner to the employee (regulation 5.30(2)). This provision compels agencies to provide this information to the employee and is the authority for the disclosure of any personal information in these documents in accordance with the Privacy Act 1988.

Agencies may sometimes be concerned about releasing information to the employee if it was gathered ‘confidentially’ or is subject to legal professional privilege. Even where information was gathered confidentially, agencies will be required to provide it to the employee seeking secondary review, in accordance with regulation 5.30(2), if it is a ‘relevant document relating to the primary review’. Agencies should avoid giving undertakings of confidentiality when conducting reviews.

Where agencies have concerns about the releasing information subject to legal professional privilege they should raise them with the staff in the Commission who assist the Merit Protection Commissioner or consider seeking legal advice.

Agencies should note that regulation 5.30(2) does not apply in the case of primary reviews conducted by the Merit Protection Commissioner. In this circumstance, the Merit Protection Commissioner asks agencies to provide the documents relevant to the review to the employee. It will generally be necessary for the employee to have the documents provided to the Merit Protection Commissioner, or the substance of the information relied upon by the Merit Protection Commissioner, in order to be accorded procedural fairness. Where agencies are concerned about the confidentiality of such information or that it may be subject to legal professional privilege, they should raise these concerns with the staff in the Commission who assist the Merit Protection Commissioner.

5 Eligibility for review

Section 33 of the Public Service Act provides a broad entitlement to review. Subsection 33(1) provides:

An **APS employee** is entitled to review, in accordance with the regulations, of any **APS action that relates to his or her APS employment** (highlight added).

Subsection 33(2) provides for the regulations to prescribe exceptions to the entitlement to review.

This section of the appendix discusses the meaning of the following terms in the context of the entitlement to review:

• ‘APS employee’
• ‘APS action’
• ‘relating to the employee’s APS employment’. 
This is followed by a discussion in Section 6 of the appendix of the exceptions to the entitlement to review in regulation 5.23.

It is important to note that agencies generally have an administrative discretion to reconsider or investigate any employment matter they wish even if the matter is not reviewable under the Public Service Act. However, if the agency exercises a discretion to reconsider a matter that is not reviewable under the review of actions scheme, the Merit Protection Commissioner will have no power to conduct a secondary review.

**APS employee**

An ‘APS employee’ is entitled to review under section 33.

<table>
<thead>
<tr>
<th>An APS employee means …</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>A current not a former employee of the APS</td>
<td>If an APS employee resigns, or their employment is terminated, and a review application has been lodged but the review has not been completed, their review application lapses as they are no longer a person entitled to review. The regulations make separate provision for former employees. Former employees may apply for review of one matter only — their entitlements on separation from the Australian Public Service. These applications must be made directly to the Merit Protection Commissioner under regulation 7.2.</td>
</tr>
<tr>
<td>Both ongoing and non ongoing employees</td>
<td>A person’s employment status under section 22 of the Public Service Act does not affect their entitlement to seek review.</td>
</tr>
<tr>
<td>Employees who are not Senior Executive Service (SES) employees</td>
<td>Regulation 5.22 restricts the right of review to non-SES employees i.e. employees in the classification levels APS1 to Executive Level 2. Employees who are acting in the SES and whose substantive classification is below the SES are able to apply for review.</td>
</tr>
</tbody>
</table>
**APS action**

An employee is entitled to review of an ‘APS action’. One significant exception is termination of employment which is excluded from the review of actions scheme by subsection 33(1) of the Public Service Act. A decision to terminate an employee’s employment is reviewable under the *Fair Work Act 2009*.

<table>
<thead>
<tr>
<th>An APS action means …</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Things done or said, processes followed and/or decisions that have been made</td>
<td>According to the Macquarie Dictionary an action is ‘something done; an act; deed … conduct’.</td>
</tr>
<tr>
<td>A refusal or failure to act</td>
<td>An action includes a refusal or failure to act (subsection 33(7) of the Public Service Act). This includes, for example, a failure to act on a complaint made by the employee or delays in making decisions.</td>
</tr>
<tr>
<td>Action by an agency head or APS employee</td>
<td>Regulation 5.22 restricts the entitlement to review to actions by an agency head or APS employee. This means that actions by consultants, contractors and statutory office holders working alongside APS employees are not reviewable under the review of actions scheme. However, employees’ concerns about the actions of consultant, contractors and statutory office holders may still be considered in a review context. For example, if an employee complains to an APS manager about the actions of a consultant, contractor or statutory office holder, the agency’s response to that complaint may be a reviewable action. In addition, under regulation 7.3, non–SES employees may apply directly to the Merit Protection Commissioner for a review of the actions of a statutory office holder.</td>
</tr>
<tr>
<td>Action by a person in the capacity of an agency head or an APS employee</td>
<td>See subsection 33(7) of the Public Service Act. This means that APS actions are actions by an agency head or APS employee as it concerns their relationship with the employee in the context of employment.</td>
</tr>
</tbody>
</table>
The action must relate to APS employment

An employee is entitled to review of an action that ‘relates to his or her APS employment’, subject to any exceptions in the regulations.

<table>
<thead>
<tr>
<th>An action relating to employment means …</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>Actions relating to the employee’s employment and not someone else’s employment</td>
<td>This means that the review applicant needs to be seeking review of something in which they have a direct personal interest. This would exclude seeking a review of actions affecting a colleague (for example, seeking review of an agency’s handling of allegations that a colleague was harassed). However, establishing whether an employee has a direct personal interest in a matter is not always clear. If an employee has witnessed and been affected by the bullying and harassment of a colleague, they may be able to establish sufficient direct personal interest to be eligible for review.</td>
</tr>
<tr>
<td>Actions relating to employment and not to the employee’s status as a client of an APS agency</td>
<td>For example, an APS employee who applies to Centrelink for payment of a sickness allowance is a client of that agency and not able to seek a review of actions taken by Centrelink in relation to their handling of the employee as a client.</td>
</tr>
</tbody>
</table>

6 Additional exceptions to the entitlement to review in the regulation 5.23

Although there is a broad entitlement to review, the Public Service Act provides for the regulations to prescribe exceptions to the entitlement to review. Regulation 5.23 provides a number of grounds for refusing to review an action.

These are:

- where the review applicant has applied to have the action reviewed by a court or tribunal which has jurisdiction to consider the review application (regulation 5.23(2)(b)). This would include, for example, applications to Fair Work Australia or the Federal Court.

- where the action is a non-reviewable action in accordance with Schedule 1 of the regulations (regulation 5.23(2)(a) — for more information see Table 2 in section 8 of this appendix)

- in the circumstances prescribed in regulation 5.23(3), the decision-maker may decide not to review. These circumstances include when the application for review is made outside the timeframes in regulation 5.23A (see section 7 of this appendix).
7 Timeframes for making review applications

Timeframes for review applications are specified in regulation 5.23A. Where an employee makes an application for review outside these timeframes, and there are no exceptional circumstances that explain why the application was not made in time, the decision-maker may decide that the action is not reviewable.

Timeframes for review applications are necessary because it becomes more difficult to review a matter and implement a satisfactory outcome as time passes. This is because people’s recollections fade or become influenced by subsequent events and because circumstances change.

New timeframes for making review applications were introduced on 2 August 2010. From 2 August 2010 to 2 August 2011, two timeframes will apply to review applications. If the action occurred prior to 2 August 2010, the timeframe is one year from the date of the action to make an application for review. If the action occurred on or after 2 August 2010, the timeframes in regulation 5.23A apply.

Timeframe for seeking review of actions that occurred before 2 August 2010

The timeframe for submitting an application for review of actions that occurred before 2 August 2010 is one year from the date of the action.

Timeframes for seeking review of actions that occurred on or after 2 August 2010 (regulation 5.23A)

The timeframes for seeking review of actions that occurred on or after 2 August 2010 are:

- 120 days (from the date of the action the employee wishes to have reviewed) to make an application for primary review to the agency
- 60 days (from the date of the action the employee wishes to have reviewed) to make an application for primary review to the Merit Protection Commissioner
- 60 days (from the decision date) to make an application for primary review to the Merit Protection Commissioner of a determination that an employee has breached the Code of Conduct, or of a sanction imposed for a breach
- 60 days (from the affected employee being told of the decision) to make an application to the Merit Protection Commissioner for a secondary review.

Date of action

It can be difficult to establish clearly the date on which an action occurred for the purpose of calculating the timeframe. An employee may identify a series of actions for which they are seeking review ranging over a period of time, only some of which are within the timeframe when the employee makes the review application.
It is important not to take a too prescriptive approach to timeframes in this context. If the last action in a chain of events is within time, it may be necessary to consider the process that led to the last action to ensure that any review meaningfully addresses the employee’s concerns about that action. This does not mean that an agency needs to go back and review events and processes that occurred some years ago because the review applicant considers them relevant to their concerns about the current action.

**Example: An employee may be concerned about the fairness of a performance management process where the final rating on their performance is in time but actions taken to improve performance during that performance management cycle were done outside the timeframe for review.**

In considering whether ‘exceptional circumstances’ exist, it is appropriate for the decision-maker to consider whether looking at the rating decision, but not the process leading up to it would enable the action to be effectively reviewed and to determine whether the outcome was fair and reasonable in the circumstances.

However, it is not likely to be necessary in this context also to review actions taken in performance management processes that were finalised prior to the most recent process, none of which are within the timeframe for review.

**Exceptional circumstances**

Whether ‘exceptional circumstances’ exist is a matter which will turn on the particular facts of each case. Exceptional circumstances may include:

- cases where extended sick leave significantly hinders an employee’s ability to consider making a review application
- where the significance or main effects of the action only became known some time after the action.

An exceptional circumstance would not usually include:

- an employee arguing that they were not aware that they had a right to review (APS employees have an obligation under regulation 3.16 to inform themselves of the Public Service Act, regulations and the Public Service Commissioner’s Directions)
- a circumstance that was ordinary or usual, for example moving to a new job or taking recreation or long service leave.
8 Other non-reviewable actions

Other discretionary grounds for refusing to review an action under regulation 5.23(3) are reviewed in Table 1 below. Table 2 lists actions in Schedule 1 that are not reviewable and provides examples of those.

Table 1: Discretionary grounds in regulation 5.23(3)

An action is not reviewable where the person conducting the review considers that the action should not be reviewable for any of the following reasons.

<table>
<thead>
<tr>
<th>No.</th>
<th>Type of action</th>
<th>Legislative provision</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Where the application for review is frivolous or vexatious</td>
<td>Regulation 5.23(3)(b)</td>
<td>‘Frivolous’ is generally taken to mean that the case is ‘obviously unsustainable’. ‘Vexatious’ means an application made ‘for a collateral purpose, as a means of obtaining some advantage for which the proceedings were not designed’. In other words this mean an application made for some other purpose (for example, as a bargaining chip). Agencies are encouraged to follow the lead of the courts, which are generally very hesitant to dismiss a case on the grounds that it is frivolous or vexatious.</td>
</tr>
<tr>
<td>2</td>
<td>Where the applicant has previously applied to have the matter reviewed under the review of actions provisions</td>
<td>Regulation 5.23(3)(c)</td>
<td>Self explanatory.</td>
</tr>
<tr>
<td>3</td>
<td>Where the applicant has applied for a promotion review by a promotion review committee under Division 5.2 of the regulations</td>
<td>Regulation 5.23(3)(d)</td>
<td>For a discussion of the review arrangements for promotion decisions, see number 10 in Table 2.</td>
</tr>
</tbody>
</table>


10 Goodson v Grierson [1908] 1 KB 761.
<table>
<thead>
<tr>
<th>No.</th>
<th>Type of action</th>
<th>Legislative provision</th>
<th>Comment</th>
</tr>
</thead>
</table>
| 4   | Where review by an external review body would be more appropriate             | Regulation 5.23(3)(e) | **Expert bodies exist to consider complaints about privacy (the Privacy Commissioner) and discrimination on a number of grounds, including sex, race and disability (the Australian Human Rights Commission).**  
The Merit Protection Commissioner would generally be reluctant to review allegations of breaches of privacy or discrimination that falls within the expertise of specialist review bodies.  
However, agencies may wish to look at how they handled matters subject to privacy or discrimination complaints to satisfy themselves that they were not in breach of legislative obligations. |
<p>| 5   | Where the employee does not have sufficient direct interest                  | Regulation 5.23(3)(f) | <strong>This includes, for example, complaints about an action or decision taken in relation to another APS employee that has marginal or no effect on the APS employee who has made the complaint.</strong> |</p>
<table>
<thead>
<tr>
<th></th>
<th>Where review or further review is not justified in all the circumstances</th>
<th>Regulation 5.23(3)(g)</th>
<th>Circumstances in which this provision could apply include:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
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<td>• The matter has already been reviewed but the review applicant is dissatisfied and has re-phrased their old complaint as if it were a new and different complaint</td>
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<td></td>
<td>• The applicant does not respond to a request for further information about why the review is sought. Paragraph (g) should not be interpreted as an open discretion not to review matters. The presumption in the legislation is that actions that meet the eligibility criteria should be reviewed unless there is a good reason not to do so.</td>
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<tr>
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<td></td>
<td>• It is generally not appropriate to exercise this discretion for the following reasons:</td>
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<td>– the delegate has formed a preliminary view, without reviewing the action, that the merits of the review applicant’s case are weak</td>
</tr>
<tr>
<td></td>
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<td></td>
<td>– the outcomes the employee is seeking are not achievable—this may be the case but other outcomes may emerge during the review that are achievable</td>
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<td></td>
<td>– the decision for which review is being sought was consistent with the agency’s policy (for example, a manager’s discretion to refuse a leave without pay application)—this is an argument about the merits of the review applicant’s case without doing a review</td>
</tr>
<tr>
<td></td>
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<td></td>
<td>– the delegate does not consider they have the technical competence to assess the merits of the employee’s case — this possibly represents a refusal to make a decision on something that the delegate is required to decide (the exception is matters more appropriately reviewed by an external review body (see no. 4 in this table)).</td>
</tr>
</tbody>
</table>
Table 2: Non-reviewable actions in Schedule 1 (non-discretionary)

<table>
<thead>
<tr>
<th>No.</th>
<th>Type of action</th>
<th>Legislative provision</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Action about the policy, strategy, nature, scope, resources or direction of the APS or an agency</td>
<td>Item 1 Schedule 1</td>
<td>For example, employees are not able to seek a review of the agency’s employment policies or government policies that affect the level of resourcing for an agency. Employees are able to seek review of the application of an employment policy to their individual circumstances. In addition, while the amount of resources an agency commits to a function is not reviewable, it may be relevant when considering the merits of the employee’s case; for example, if the employee is arguing that he or she is unable to meet performance targets because of inadequate resourcing.</td>
</tr>
<tr>
<td>2</td>
<td>Action taken, or not taken, in accordance with a direction or reference given by a Minister under the Public Service Act or another Act</td>
<td>Item 2 Schedule 1</td>
<td>Ministers are not able to direct agency heads about individual staffing matters (section 19 of the Public Service Act). However, they may have powers to give directions to the agencies for which they are responsible that affect the way the agency conducts its business. APS employees are not able to seek review of actions taken in accordance with these directions.</td>
</tr>
<tr>
<td>3</td>
<td>The giving of a direction by the Public Service Commissioner under sections 11, 15 or 36 of the Public Service Act</td>
<td>Item 3 Schedule 1</td>
<td>The Public Service Act empowers the Public Service Commissioner to issue directions concerning the APS Values, the Code of Conduct and SES employment.</td>
</tr>
<tr>
<td>4</td>
<td>Action taken, or not taken, for a special inquiry under sections 43 or 50 of the Public Service Act</td>
<td>Item 4 Schedule 1</td>
<td>The Public Service Commissioner has a number of inquiry functions under section 41 of the Public Service Act (for example, whistleblowing inquiries and inquiries into allegations that an agency head has breached the Code of Conduct) which are special inquiries for the purposes of section 43. Section 43 gives the Public Service Commissioner specific powers when conducting those inquiries. Likewise, the Merit Protection Commissioner’s function under subsection 50(1)(c) to inquire into a matter referred to her by the Public Service Minister is a special inquiry.</td>
</tr>
<tr>
<td>Item</td>
<td>Description</td>
<td>Section</td>
<td>Details</td>
</tr>
<tr>
<td>------</td>
<td>-------------</td>
<td>---------</td>
<td>---------</td>
</tr>
<tr>
<td>5</td>
<td>Action taken, or not taken, under section 72 of the Public Service Act</td>
<td>Item 5</td>
<td>Section 72 of the Public Service Act concerns machinery of government changes. Employees have no right of review with respect to actions affecting their employment as a result of machinery of government changes.</td>
</tr>
<tr>
<td>6</td>
<td>Action arising under the: Australian Security Intelligence Organisation Act 1979 Safety, Rehabilitation and Compensation Act 1988 Superannuation Act 1976 Superannuation Act 1990</td>
<td>Item 6</td>
<td>1. Actions taken by an agency in relation to an employee’s security clearance are reviewable under the review of actions. However, if the security clearance involved an assessment by ASIO, the ASIO assessment is not reviewable under the review of actions scheme. Certain adverse decisions relating to security clearances conducted by ASIO are reviewable by the Administrative Appeals Tribunal. 2. Actions taken by an agency in response to an application for workers’ compensation are not reviewable under review of actions. Separate review arrangements are available under the Safety, Rehabilitation and Compensation Act 1988, including access to the Administrative Appeals Tribunal. 3. The actions taken by agencies in administering superannuation contributions to the CSS and PSS are not reviewable as these are decisions made under the relevant regulations, including, for example, the calculation of salary for superannuation purposes, and whether employees are able to contribute during periods of leave.</td>
</tr>
<tr>
<td>7</td>
<td>Action relating to the engagement of an APS employee</td>
<td>Item 7</td>
<td>Engagement refers to the employment of a person from outside the APS. ‘Action relating to engagement’ is to be interpreted broadly. All aspects of the selection process leading to the engagement are non-reviewable including concerns about the merits of candidates and the process followed in selecting them.</td>
</tr>
<tr>
<td>No.</td>
<td>Type of action</td>
<td>Legislative provision</td>
<td>Comment</td>
</tr>
<tr>
<td>-----</td>
<td>-------------------------------------------------------------------------------</td>
<td>-----------------------</td>
<td>--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
</tbody>
</table>
| 8   | Action of a promotion review committee                                        | Item 8                | This includes complaints about the way a promotion review committee conducted its review or the outcome of that review.  
While not reviewable, the Merit Protection Commissioner will, in the interests of transparency, look into complaints made about the conduct of a promotion review process for the purpose of improving the administration of promotion reviews. |
<p>| 9   | Action relating to the promotion of an ongoing APS employee as an SES employee | Item 9                | This item refers to complaints about the promotion of a person to the SES and within the SES. Again, consistent with the discussion above under number 7, ‘action relating to promotion’ is to be interpreted broadly. |</p>
<table>
<thead>
<tr>
<th>Item 10 Schedule 1</th>
</tr>
</thead>
<tbody>
<tr>
<td>A decision to assign duties to an employee under section 25 of the Public Service Act is not reviewable. Section 25 provides that an agency head may, from time to time, determine the duties of an employee and the place or places at which the duties are to be performed. A range of employment decisions come within the assignment of duties power. These include:</td>
</tr>
</tbody>
</table>

- 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.

‘Determines’ should be interpreted narrowly as referring to a decision. This means that employees may seek a review, not of the decision, but of the process that has led to the assignment of duties.

In addition, Item 10 contains a list of exceptions i.e. actions that are reviewable although they are assignments of duty.

<table>
<thead>
<tr>
<th>Item 10 Schedule 1</th>
</tr>
</thead>
<tbody>
<tr>
<td>Action that determines, under section 25 of the Public Service Act, the duties of an APS employee, or the place(s) where they are to be performed, unless the action involves:</td>
</tr>
</tbody>
</table>

(a) a reduction in classification; or
(b) a relocation to another place; or
(c) a promotion that meets the following criteria:
   (i) the affected employee was an applicant for the promotion
   (ii) the promotion was to employment at a classification mentioned in Group 7 or 8 in Schedule 1 to the Classification Rules
   (iii) there were serious defects in the selection process
   (d) the assignment to an employee of duties that the employee could not reasonably be expected to perform |
<table>
<thead>
<tr>
<th>No.</th>
<th>Type of action</th>
<th>Legislative provision</th>
<th>Comment</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>(a) a reduction in classification</td>
<td>Item 10(a) Schedule 1</td>
<td>A reduction in classification without an employee’s consent can occur only in the circumstances described in section 23(4) of the Public Service Act, including:</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• a sanction for a breach of the Code of Conduct by the employee</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• if the employee is excess</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• if the employee has lost an essential qualification</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• for unsatisfactory performance of duties by the employee</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• if the employee is unable to perform duties at the higher level due to a physical or mental incapacity.</td>
</tr>
<tr>
<td></td>
<td>(b) a relocation to another place</td>
<td>Item 10(b) Schedule 1</td>
<td>The presumption underlying this exception is that employees have a review right with respect to relocation to another place. There is no definition of ‘another place’ and it is possible that a geographic relocation (including to another suburb in the same city) could cause an employee substantial hardship, in relation to their commitments out of work.</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>The Merit Protection Commissioner has observed situations where a reasonable person might conclude that the relocation of an employee has had no adverse effect on the employee (for example, relocation to a building in close proximity to the employee’s original workplace). In such circumstances, an agency may take the view that the matter is not reviewable under regulation 5.23(3), for example, because review is not justified in the circumstances.</td>
</tr>
</tbody>
</table>
| (c) a promotion that meets the following criteria: | Item 10(c) Schedule 1 | Promotion decisions made for classification levels from APS 2 to 6 are subject to merits review by promotion review committees established by the Merit Protection Commissioner under Division 5.2 of the regulations. These committees review the merits of review applicants and promotees and determine who should have been promoted. They do not review the process by which the original promotion decision was made. A promotion review committee may uphold the original promotion decision or overturn it and promote a review applicant to the position.

Promotion decisions to the Executive Level 1 and 2 classifications are not reviewable on the grounds of merit. An employee can apply for review of the process conducted to promote a person to the Executive Level 1 or 2 only on the grounds that there were substantial defects in the selection process. This is a high standard. Serious defects need to be such as would compel the selection process to be done again.

An application for review of an Executive Level promotion on the grounds of a substantial defect in the process cannot undo the promotion decision. If the promotion has already taken effect, the promotion decision stands. If a review found substantial defects in the promotion decision, the agency may take the lessons learned from the review to improve its selection processes or (in cases suggesting misconduct) may investigate suspected misconduct with respect to the individuals involved in the selection process. |
| (i) the affected employee was an applicant for the promotion | | |
| (ii) the promotion was to employment at a classification mentioned in Group 7 or 8 in Schedule 1 to the Classification Rules | | |
| (iii) there were serious defects in the selection process | | |
| (d) the assignment to an employee of duties that the employee could not reasonably be expected to perform | Item 10(d) Schedule 1 | Self-explanatory |
Model review of actions procedures

Agencies are encouraged to consider the following key content areas in their review of actions policies and procedures.

<table>
<thead>
<tr>
<th>Policy and legislative context</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>A policy statement that …</strong></td>
</tr>
<tr>
<td>• operationalises and references the APS Values and the agency’s values framework (for example, fairness and transparency in decision-making, openness and accountability)</td>
</tr>
<tr>
<td>• links to the agency’s people management framework (for example, the working environment and culture that the agency wants to establish)</td>
</tr>
<tr>
<td>• acknowledges the value of the review process in providing feedback on:</td>
</tr>
<tr>
<td>    • the quality of employment decision-making in the agency</td>
</tr>
<tr>
<td>    • problems with the application of agency people management policies</td>
</tr>
<tr>
<td>    • the quality of the working environment of the agency</td>
</tr>
<tr>
<td>• commits the agency to responding to issues identified through the review process.</td>
</tr>
</tbody>
</table>

| **A facilitative statement that acknowledges …** |
| • the legitimacy of raising concerns about the workplace |
| • the right of employees to make complaints professionally and in good faith and to have them received and considered fairly. |

In this context, it is worth noting the implied prohibition on discrimination and victimisation for making an application for review.11

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11 Discrimination or victimisation for making a review of actions application is one of the grounds for seeking a primary review by the Merit Protection Commissioner under regulation 5.24(3).
An explanation of the legislative framework

Agencies may wish to link this element of their procedures with Appendix 1 of this guide which contains an explanation of the review provisions in legislation.

It is useful also to reference other review processes available under legislation, including, for example, discrimination law and the Human Rights Commissioner.

<table>
<thead>
<tr>
<th>An outline of related policies and inquiry processes such as …</th>
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<tr>
<td>• the dispute resolution provisions in the agency’s enterprise agreement</td>
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<tr>
<td>• workplace behaviour policies</td>
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<tr>
<td>• whistleblowing procedures</td>
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<tr>
<td>• procedures for reporting and investigating suspected misconduct.</td>
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</tbody>
</table>

There is value in agency review of actions procedures making clear that, in contrast to the review of action scheme, the primary focus of misconduct and whistleblower inquiries is not to resolve the complainant’s concerns but to investigate the allegations. For a discussion of this issue see Section 4.3 and 4.4 of this guide.

An explanation of the role of alternative forms of resolution and how to access it

Agency procedures may provide for alternative forms of resolution to be part of the review process.

However, they are not an alternative to a written decision on a review application nor a necessary first step before a matter is reviewed.

(See also Section 5 of this guide.)
A description of the roles and responsibilities of the parties to the review, including …

• the review applicant
• the manager
• the human resources function
• the reviewer
• the delegate
• the Merit Protection Commissioner.

Such descriptions can be expanded to explain the rights and responsibilities of the parties to the review. For information about the reviewer and delegate see reviewer and delegate on page 60 of this guide.

This includes the responsibilities of managers when making and giving decisions such as the need to:

• give reasons for decisions
• advise of review rights when making decisions that are likely to be adverse or contested.

It also includes the responsibilities of employees when engaging with managers and colleagues and receiving decisions such as:

• communicating honestly, openly and respectfully
• addressing problems in the workplace in a constructive and respectful way.

The review process

Advice on how to make an application, including …

How and where to make an application.

For a discussion see Section 6.2 of this guide.

Information on timeframes and performance standards

Indicative timeframes for the completion of reviews assist in managing employee’s expectations and may reduce the incidence of progress inquiries.

There is value in agencies committing to responding to applications within an established timeframe to indicate receipt of the application.

For a discussion see Section 6.2 of this guide.
**Information about the reviewer and delegate**

The reviewer is the person who assists the delegate to make a decision on the review. This may involve conducting an inquiry to establish factual issues to support the decision.

The delegate is the person or position holding a delegation from the agency head to decide reviews of actions.

As a matter of good practice, agency procedures should commit to the independence of the people chosen as reviewer and delegate and give employees the opportunity to raise any concerns they have about the independence or impartiality of these people.

**Information about how any inquiry will be conducted including ...**

- a commitment that the substance of the employee’s complaint will be considered
- gathering additional evidence where necessary and relevant.

Agencies may wish to include procedural guidance for the reviewer and delegate on better practice in conducting fact finding inquiries and lawful decision–making.

A discussion of better practice in conducting fact finding reviews is in Section 7 of this guide.

In this context, and consistent with agencies’ responsibilities under the *Privacy Act 1988*, employees should be advised how information gathered during the course of the review will be used, and the circumstances in which it will be disclosed (consistent with Information Privacy Principle 2).

**Information on what the review applicant can expect during the review including...**

- status updates, particularly when unexpected delays occur
- that other less formal options for resolution will be pursued with the review applicant during the inquiry process if the review officer considers that is appropriate.

**Information on the outcome of the review**

A explanation of what the review applicant can expect to get out the review process including:

- the recommendations available to the delegate
- a review report explaining the reasons for the decision
- an expectation that managers will respond promptly to the findings of the review delegate.