



**Australian Government**  
**Australian Institute of Criminology**

# Review of Action Policy and Procedures

**2013**

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# Part 1 - AIC Procedures

## Commitment

The Australian Institute of Criminology (the AIC) is committed to providing a workplace that values consultation, participation and cooperation and makes decisions that are fair, consistent and impartial. The AIC's Management is committed to maintaining this by applying a policy for employees to seek a review of a decision.

## Purpose and Context

Broadly speaking, under section 33 of the *Public Service Act 1999* (the PS Act), Australian Public Service (APS) employees (other than Senior Executive Service (SES) employees) are entitled to apply for a review of actions or decisions that relate to their APS employment. Some actions or decisions are excluded from review and time limits apply to the making of applications for both primary and secondary reviews. The types of actions that may be reviewed ("reviewable actions") and the types of actions that are excluded from review ("non-reviewable actions") are discussed further below.

Part 5 of the *Public Service Regulations 1999* (the PS Regulations) relates to review of actions. The definition of an "action" includes a refusal or failure to act. An initial review is called a "primary review". Applications for primary review are made under PS Regulation 5.24. If an employee is dissatisfied with the outcome of a primary review, they may make an application for "secondary review" under PS Regulation 5.29.

Consistent with the APS Values, the APS Employment Principles and Code of Conduct, the AIC considers communication, consultation and co-operation as essential elements of our people management and expects that all employees will treat others with respect and courtesy. Before making a formal request for a review of actions, employees and managers are strongly encouraged to use their best endeavours to resolve issues through informal, amicable discussions wherever possible.

This policy does not apply to appointment or termination of employment, matters being considered under code of conduct or underperformance, or where a formal appeal process is in place. Allegations of harassment or bullying are more appropriately dealt with under Preventing Bullying and Harassment at the AIC, Procedures for determining breaches of the Code of Conduct and for determining sanction or Procedures for dealing with Whistleblower reports, or any procedures that supersedes them.

## Coverage

This policy applies to actions and decisions affecting current APS employees employed under the PS Act. This policy does not apply to actions or decision affecting the Senior Executive Service (SES) employees, unless the SES employee is acting in the role and their substantive classification is below SES and the action is regarding their substantive level.

This Review of Actions Policy has been updated to reflect the amendments to the PS Act and PS Regulations which commenced on 1 July 2013.

## Definitions

<b>AIC</b>	Australian Institute of Criminology
<b>Acting SES employee</b>	a non-SES employee who is acting in a position usually occupied by an SES employee
<b>Action</b>	includes a refusal or failure to act
<b>Agency Agreement</b>	The current AIC Agency Enterprise Agreement
<b>APS action</b>	a) action by a person in the capacity of an Agency Head or APS employee; or b) action by the APS Commissioner under section 41B (including a finding that an APS employee has breached the Code of Conduct)
<b>APS</b>	The Australian Public Service established by section 9 of the <i>Public Service Act 1999</i>
<b>APS employee</b>	(a) a person engaged under section 22 of the <i>Public Service Act 1999</i> ; or (b) a person who is engaged as an APS employee under section 72 of the <i>Public Service Act 1999</i>
<b>APS Employment Principles</b>	The principles in section 10A of the <i>Public Service Act 1999</i>
<b>APS Values</b>	The values in section 10 of the <i>Public Service Act 1999</i>
<b>Code of Conduct</b>	The rules in section 13 of the <i>Public Service Act 1999</i>
<b>APS Commissioner</b>	The Australian Public Service Commissioner appointed under the <i>Public Service Act 1999</i>
<b>APS Commissioner's Directions</b>	The directions issued by the APS Commissioner under section 11, 11A or 15 of the <i>Public Service Act 1999</i>
<b>Director</b>	The Chief Executive of the AIC
<b>Delegate</b>	An AIC employee who has the appropriate delegation as specified in the AIC HR Delegations.
<b>DDC</b>	The AIC's Deputy Director Corporate
<b>Former APS employee</b>	A person who was, but is no longer, an APS employee
<b>HR Manager</b>	The AIC's Manager Human Resources and Administration
<b>Merit Protection Commissioner (MPCr)</b>	Merit Protection Commissioner appointed under this <i>Public Service Act 1999</i>
<b>Merit Protection Commission (MPC)</b>	Merit Protection Commission
<b>Non-SES employee</b>	An APS employee other than an SES employee.
<b>PS Act</b>	The <i>Public Service Act 1999</i>
<b>PS Regulations</b>	The <i>Public Service Regulations 1999</i>
<b>Primary Review</b>	The first review of an action or decision
<b>Responsible Agency</b>	In relation to APS action, means the Agency in which the person who did the action was at the time of the action
<b>Reviewer</b>	Person appointed by the Delegate to undertake the review/ investigation
<b>Secondary Review</b>	The second review (conducted by the MPCr)
<b>Special review</b>	A review conducted by the APS Commissioner under subsection 41D(1) of the <i>Public Service Act 1999</i>
<b>Systems review</b>	A review conducted by the APS Commissioner under subsection 41C(1) of the <i>Public Service Act 1999</i>

## Systems reviews

Section 41C of the PS Act provides for the APS Commissioner to undertake 'systems reviews'. The Prime Minister may direct the APS Commissioner to conduct a systems review of any matter relating to an agency, including:

- the processes and or the management and organisational systems, structures or processes in an Agency
- the functional relationships between two or more agencies.

An Agency Minister or the Agency Head may seek a review but must have the Prime Minister's agreement.

## Special reviews

Section 41D of the PS Act provides for the APS Commissioner to undertake 'special reviews'. The Prime Minister may direct the APSC to conduct a special review of:

- any matter relating to an agency
- the functional relationship between two or more agencies.

Special reviews may only be initiated at the direction of the Prime Minister. The APS Commissioner will have available similar information gathering powers as those available to the Auditor-General to undertake special reviews (paragraph 43(1)(d) of the PS Act).

## Special Commissioners

To assist the APS Commissioner to conduct reviews, section 48A of the PS Act provides for the Governor General to appoint, on the recommendation of the Prime Minister, one or more Special Commissioners to assist the APS Commissioner in conducting a specified systems review or special review, or a part of such a review.

The Prime Minister must consult the APS Commissioner about the appointment before making a recommendation (subsection 48A(2)).

Special Commissioner's report through the APS Commissioner.

## Principles applying to the Review of Actions process

As a minimum, the review process must be:

- conducted with due regard to procedural fairness
- conducted in private, and
- completed as quickly, and with as little formality, as a proper consideration of the matter allows.

A Reviewer should endeavour to provide employees with procedural fairness having regard to the following principles:

- **Fair hearing**—a Decision-maker should give a person whose interests may be adversely affected by the decision, an opportunity to be heard before a decision is made.
- **Absence of actual or apprehended bias**— a Decision-maker must be impartial or unbiased in the matter to be decided and must not reasonably be suspected of bias.
- **Evidence**—a Decision maker should ensure that any decisions are made on the basis of logically probative evidence.
- **Reasons**—a Decision maker should give reasons for any decision made.

These procedures are based on a fair system of review to encourage a productive and harmonious working environment. The principles that underpin the process are that:

- A request for review of action will be undertaken fairly, impartially and as quickly as practicable.
- Complaints will be dealt with within the workplace and resolved between the Employee and the other person concerned wherever possible (consistent with dispute resolution provisions within the *AIC Agency Agreement 2011-14*).

- The Employee must establish their case, in writing, outline the issues they see as relevant, and specify the outcome(s) they are seeking.
- Complaints which are considered to be frivolous or vexatious will not be reviewed.
- As far as possible, requests by employees for information to be treated confidentially will be respected, subject to the disclosure of information on relevant files under freedom of information, and the need for transparency in the resolution process.
- Where it becomes apparent that the complaint relates to an allegation of a breach of the Code of Conduct, the matter will be considered under the relevant AIC policy

## Informal Action

The first step in any review of action is to attempt to resolve the matter informally, in the workplace and without recourse to the more formal review of action procedures consistent with dispute resolution provisions within the *AIC Agency Agreement 2011-14*.

## Resolution between both parties

Where possible, an employee should raise their concerns directly with the person involved to seek a resolution. However, prior to doing this they are encouraged to familiarise themselves with the relevant policy and procedures for the condition of employment which they consider may have not been appropriately applied.

## Resolution through a Manager

If the Employee feels uncomfortable in discussing the matter with the person involved, the Employee should approach either, their Manager, the Manager, HR and Administration (HR Manager) or the Deputy Director Corporate (DDC). The purpose is to open communication between the Employee and the person the complaint relates too. The Manager's role in this instance is to offer independent advice, not to represent either party in the resolution of the issue, rather to support the people involved and facilitate a resolution. The Manager should discuss the concerns with both parties in line with relevant policy to try to resolve the issue. The Manager may seek advice from the HR Manager or the DDC to ensure the resolution does not set a precedent.

## Conciliation or Mediation

In the first instance the review officer will generally seek to resolve the matter by conciliation or mediation. The person engaged to provide mediation must have the appropriate independence and competence to fulfil this role. The AIC will bear the costs incurred for mediation services.

## Employee Support

Throughout the review of action process an employee or group of employees may choose to be represented by a nominated person, including employee representatives, to facilitate a resolution. An employee who makes such a choice will inform their Manager/Supervisor and/or any other relevant level of management of their choice. A Manager/Supervisor must not refuse to deal with a nominated representative.

Employees may also wish to seek support from the AIC's Employee Assistance Provider (EAP). It is not the EAP's role and it is not intended that the EAP will represent the Employee at any stage of the review process.

Whilst an employee may have a person support them throughout a review by the Merit Protection Commission (MPC), they are not able to be represented by another person. Employees who wish to have someone represent them must make a formal request to the MPC stating their reasons.

# Part 2 - Review of Actions

## Actions that may be reviewed

A non-SES APS employee may seek a review of a range of actions which affect his or her employment where the action is by the Director or an APS employee and is a reviewable action. The PS Regulations define reviewable and non-reviewable actions.

The actions reviewed by the AIC cover a diverse range of employment matters, including but are not limited to:

- the management of an employee's performance, pay, conditions, health or behaviour;
- decisions on leave, allowances or reimbursements and other entitlements;
- access to training and other development opportunities;
- decisions to suspend an employee from duty while under investigation for suspected misconduct, determination that an employee has breached the APS Code of Conduct; the imposition of a sanction following a determination that an employee has breached the Code of Conduct;
- inappropriate behaviour in the workplace (for example, involving alleged discrimination or harassment); or
- the way a particular change is managed in the workplace and its effect on an employee.

Concerns about conditions of employment such as salary, allowances and leave may be raised both in the review of actions context or through the dispute resolution provisions in the current AIC Agency Agreement.

## Actions which are not reviewable

Some actions are specifically excluded from review by the PS Regulations. These include certain **general actions**, including:

- actions about the policy, strategy, nature, scope, resources or direction of the APS or an APS agency
- action taken, or not taken, in accordance with a direction or reference given by the Minister under the PS Act or another Act
- the giving of a direction by the APS Commissioner under sections 11, 11A or 15 of the PS Act (relating to the APS Values, the APS Employment Principles or breaches of the APS Code of Conduct)
- action taken, or not taken, under section 43 or 50 of the PS Act (relating to special inquiries by the APS Commissioner or the MPCr)
- a determination made by the MPCr under section 50A of the PS Act (relating to an inquiry by the MPCr into an alleged breach of the Code of Conduct by a current or former APS employee)
- actions where the Employee has lodged a valid application for review with a Court or Tribunal
- action taken, or not taken, under section 72 of the PS Act (relating to machinery of government changes)
- action arising under the *Australian Security Intelligence Organisation Act 1979*, the *Safety, Rehabilitation and Compensation Act 1988*, the *Superannuation Act 1976*, the *Superannuation Act 1990* or the *Superannuation Act 2005*.

In addition, the following **actions in relation to employment and conditions** have been excluded from review by the PS Regulations:

- termination of employment
- action relating to the engagement of an APS employee
- action taken by a Promotion Review Committee (that is, an independent and impartial committee established by the MPC to review promotions based on merit)

- action taken in accordance with a recommendation made by an Independent Selection Advisory Committee (that is, a committee established by the MPC under Part 4 of the PS Regulations to make recommendations about the suitability of candidates in certain recruitment exercises)
- action relating to the promotion of an APS employee to the SES level, whether or not the Employee was already an SES employee; and
- action relating to the determination of the duties of an APS employee, **unless** the action involves:
  - a reduction in classification, or
  - relocation to another place, or
  - a promotion that meets the following criteria:
    - the Employee was an applicant for the promotion
    - the promotion was to employment at the level of Executive Level 1 or 2 or equivalent; and
    - there were serious defects in the selection process, or
  - the assignment of duties to an employee that the Employee cannot be reasonably expected to perform
- action relating to a decision by the Director under Chapter 2 of the APS Commissioner's Directions to not include an employee's name in the Public Service *Gazette*.

### Actions which the AIC or MPCr may decline to review

Under PS Regulation 5.23, an action ceases to be a reviewable action if the Director (or a Delegate) or the MPCr finds that any of the following circumstances to exist:

- the application for review is made outside the time periods specified in the PS Regulations (see further below), and there are no exceptional circumstances explaining the delay
- the application for review is misconceived or lacking in substance
- the application for review is frivolous or vexatious
- the Employee has previously applied for a review of the action (and the application is therefore a second or further application regarding the same matter)
- the Employee has applied to have the action reviewed by a Promotion Review Committee
- the Employee has applied, or could apply, to have the action reviewed by an external review body (such as the Commonwealth Ombudsman, the Australian Information Commissioner, or the Australian Human Rights Commission), and review by that body would be more appropriate
- the Employee does not have sufficient direct personal interest in review of the action, or
- a review of the action is not justified in all the circumstances. For example, review may not be justified where the Employee does not respond to a request for further information about why the Employee is seeking review.

If a decision is made to decline a review for any of the above reasons, the Employee must be notified in writing of the decision, the reasons for not reviewing the actions and (where applicable) the Employee's right to apply to the MPC for secondary review of the action.

### Time periods for review applications

To ensure that reviews are conducted quickly, PS Regulation 5.23(4) specifies when applications for review must be made. Applications received outside the timeframes specified below will only be reviewed if there are exceptional circumstances to explain the delay in making the application:

- Applications for primary review made to the Director—120 calendar days from the date of action.
- Applications for primary review of a determination that the Employee has breached the Code of Conduct made to the MPC—60 calendar days from the determination of the breach.
- Applications for primary review of a sanction imposed for breach of the Code of Conduct made to the MPC—60 calendar days from the imposition of the sanction.
- Applications for primary review made to the MPC where:
  - the Director was directly involved in the action; or

- it is not appropriate, because of the seriousness or sensitivity of the action, for the Director to deal with the application, or
- the action is claimed to be victimisation or harassment of the Employee for having made a previous application for review of actions,  
—60 calendar days from the date of the action
- Applications for secondary review made to the MPC—60 calendar days from the date the AIC tells the Employee the action is not reviewable or tells the Employee of the outcome of the primary review. An application to the MPC for secondary review is not available, if the Employee did not make an application for primary review to the Director within the 120 calendar day timeframe for making the primary application and there are no exceptional circumstances to explain the delay in making the application.

## Part 3 - Primary Review

### Applications for Primary Review

With the exception of applications which must or may be made to the MPC (see below), all applications for a primary review should be made to the Manager, HR and Administration (HR Manager). The HR Manager will either conduct a review or refer the matter to an appropriate, authorised person. In determining an appropriate person, the HR Manager will take reasonable steps to ensure that the person conducting a review is independent and seen to be independent.

#### Applications to MPC

An application for primary review must be made to the MPC if the application is for review of:

- a determination that the Employee has breached the Code of Conduct; or
- a sanction imposed for a breach of the Code of Conduct.

An employee can choose to apply to the MPCr for primary review of action if:

- the action involves the Director, or
- the Employee believes that it is not appropriate, due to the seriousness or sensitivity of the action, for the AIC to deal with the application, or
- the action is claimed to be victimisation or harassment of the Employee for having made a previous application for review of actions.

### Form of the application

Applications must be in writing in the form of a minute or letter and may be sent by mail or email. If the application is sent by email, the subject should be clearly marked “Application for review of actions”.

The application must state briefly:

- why the review is being sought
- background on any informal procedures (including outcomes) taken in relation to the matter, and
- any specific outcome that the Employee is hoping to achieve by having the action reviewed (for example, the desired outcome might be reconsideration of the action, or reassignment of duties).

### Action taken on receipt of an application for review

When the Delegate (usually the HR Manager) receives an application for a review of actions, there are three possible courses of action:

1. They may decide that the action is not reviewable, or should not be reviewed, having regard to the criteria specified in the PS Regulations and set out above.
2. They may conduct a review of the action.
3. They may seek to refer the application to the MPCr for external review.

If the Delegate decides that the action is not reviewable, or should not be reviewed, the application will be returned to the Employee. In this situation, the Delegate will advise the Employee in writing of:

- the decision that the action is not reviewable;
- the reasons for that decision; and
- the Employee's right to apply to the MPCr for a secondary review of the action.

If the Delegate decides that an application does concern a reviewable action and that a review should be conducted within the AIC, the action will be reviewed in line with the general principles mentioned in this policy, and an attempt will be made to resolve the Employee's concerns.

The Delegate may, with the agreement of the MPCr, refer the application to the MPCr for review. This will usually occur when:

- the Director was directly involved in the action; or
- the Delegate believes that it is not appropriate, due to the seriousness or sensitivity of the action, for the AIC to deal with the application.

If the Delegate refers the application to the MPCr, they will advise the Employee in writing accordingly.

## **The Review Process**

A Delegate may personally investigate an application, or assign a person (referred to in this policy as the "Reviewer") who will be responsible for investigating the matter and making appropriate recommendations to the Delegate so that the Delegate can make a decision.

The Reviewer will investigate the matter as he/she believes appropriate. It is important to remember that conciliation can be sought and reached at any time; in which case, the review process need not proceed any further. Otherwise, the review process will continue until the Reviewer considers he or she can make reasonable conclusions about the matter.

The Reviewer may review the matter on the basis of the application alone or, if more information is required, for further enquiries to be made. For example, the Reviewer may interview the applicant and ask him/her to elaborate on the written application or to provide answers to some specific questions. Any other relevant persons may also be interviewed or asked to provide statements, although they are not obliged to do so. If necessary for procedural fairness purposes, the applicant and any other relevant persons will be given an opportunity to comment on any preliminary conclusions before a decision is made in relation to the application.

An employee may choose to be accompanied by a person of their choice to support them in discussions but not to formally represent them. The supporting role can include providing advice, information and options, seeking clarification of issues and ensuring that the process is conducted in a fair and reasonable way.

The PS Regulations make it an offence to obstruct a person who is conducting a review in carrying out his or her functions.

## **Report and recommendations**

The Reviewer will forward a report on the matter to the Delegate, with a copy sent to the Employee and any other directly affected party. The report must include recommendations to the Delegate regarding what the Reviewer considers are the appropriate outcomes of the review. If conciliation has been reached during the review process, the Reviewer would simply recommend to the Delegate that the resolution agreed to by all parties be endorsed and implemented.

## **Decision-making**

The Delegate will make a decision as soon as possible. The Delegate's decision will have regard to the report, but will not necessarily be in accordance with the Reviewer's recommendations. It is important to note that the Delegate remains the Decision-maker, even when a Reviewer is authorised to investigate.

## Outcomes of the review

The usual outcomes of the review involve the Delegate:

- confirming the action;
- varying the action; or
- setting the action aside, and substituting a new action.

The Delegate may also decide to take other appropriate action to rectify the effects of the action, or to restore the Employee to the situation in which he/she would have been but for the action being taken.

The Delegate will advise the Employee in writing of:

- the decision(s) made as a result of the application and report;
- the reasons for the decision;
- any action to be taken as a result of the review; and
- the Employee's right to apply to the MPCr for a secondary review of the action.

## Part 4 - Secondary Applications for Review

In cases where a primary review of an employment action is conducted by the AIC's Delegate (or by a Delegate and Reviewer), the Employee concerned may apply for a secondary review by the MPC.

An employee may apply in writing to the MPCr for a secondary review of the action, if:

- the Delegate has advised the Employee that the action is not reviewable; or
- the Employee is dissatisfied with the outcome of the Delegate's review of an action.

The application must be made to the MPC through the HR Manager, and it must state briefly why the secondary review is being sought.

Within 14 days of receiving the secondary review application, the HR Manager must forward it to the MPC, together with any relevant documents relating to the initial review.

Information about how the MPCr manages secondary reviews is available from the Australian Public Service Commission (APSC).

## Action Taken on Receipt of Primary or Secondary Review Report and Recommendations from the MPC

As soon as possible after receiving a recommendation from the MPCr, the Director or Delegate must consider and make a decision about the recommendation and may:

- confirm the relevant action; or
- vary the relevant action;
- set the action aside and substitute a new action

If the Director or Delegate acts in accordance with a recommendation made by the MPCr, he or she is not required to seek the views of the review applicant. The Director or Delegate may also decide to take other appropriate action to rectify the effects of the action, or to restore the Employee to the situation in which he/she would have been but for the action being taken.

The Director or Delegate must advise the Employee and the MPC in writing of:

- the decision, and
- the reasons for the decision.

It should be noted that subsection 33(6) of the PS Act allows for the MPCr, after consulting the Public Service Minister, to give a report on a matter to the portfolio Minister and/or the Prime Minister and the Parliament if the MPCr is not satisfied with the response to recommendations contained in a report to a Director or Delegate.

## **Period pending the outcome of a review**

The making of an application for a review of an employment action does not in itself prevent or suspend the original action. For example, if the application for review relates to a direction given to the Employee by their Manager/Supervisor, the Employee must carry out the direction until the application for review is determined, unless a person with appropriate authority directs them otherwise.

## **Applications for review by former employees**

Employees who have separated from the APS do not have the same rights to review of actions as current employees, as they are no longer covered by section 33 of the PS Act or PS Regulations.

If an employee has made an application for review and then ceases APS employment, the review lapses on the cessation of employment.

Former employees are generally not entitled to make an application for review under this policy. However, a former employee:

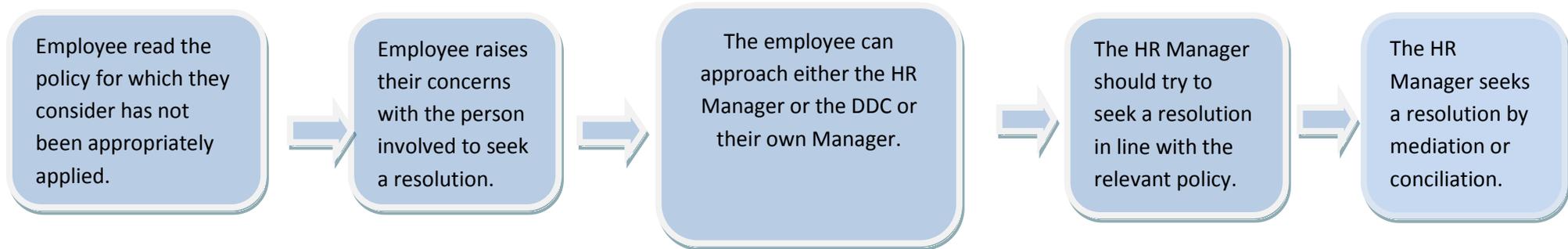
- may make a complaint to the MPCr under PS Regulation 7.2 relating to the entitlements due to the Employee on separation; or
- is entitled to seek review under PS Regulation 7.2A of a determination by the Director, made after the former employee's APS employment ceased, that the former employee breached the Code of Conduct.

## **Promotion to SES employment**

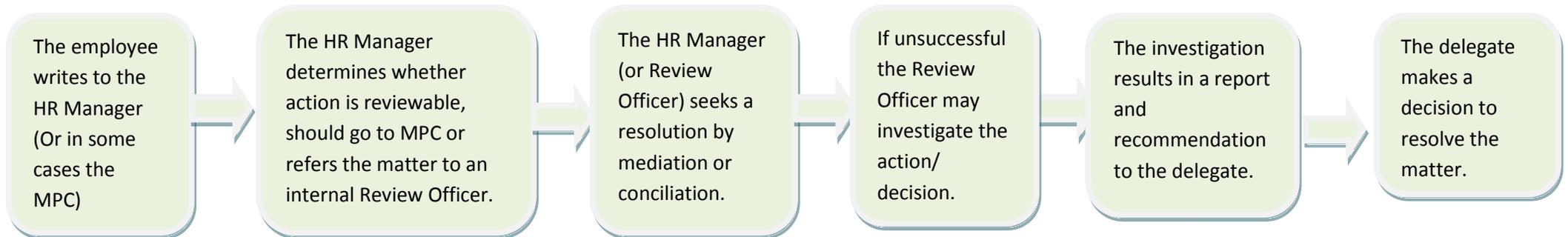
When an employee is promoted to SES after making an application for review, the application for review lapses from the date the promotion takes place.

# ATTACHMENT 'A' – PROCESS FLOW CHART

## Informal Process



## Primary Process



## Secondary Review

