

EXPLANATORY STATEMENT

Issued by the authority of the Minister for the Public Service

Public Service Act 1999

Public Service Amendment (2024 Measures No. 2) Regulations 2024

Purpose and operation

The *Public Service Act 1999* (the Act) provides for the establishment and management of the Australian Public Service (APS), including providing for the functions of the Merit Protection Commissioner. The primary purpose of the *Public Service Regulations 2023* (Regulations) is to provide further detail on the establishment and management of the APS. The Regulations prescribe details on the Code of Conduct; employer powers of Agency Heads; review of actions; the functions of the Australian Public Service Commissioner; the functions of the Merit Protection Commissioner (the MPC); administrative arrangements and re-organisations; attachment of salaries to satisfy judgment debts; and protection of information.

The purpose of the *Public Service Amendment (2024 Measures No. 2) Regulations 2024* (Amendment Regulations) is to repeal and replace provisions in Part 4 of the Regulations relating to the review of promotion and engagement decisions by the MPC, to:

- improve the MPC review mechanism by expanding the regulatory model to consider the merits of the entire process
- incorporate audit and investigation strategies through the inclusion of own motion powers for the MPC
- reduce the timeframe within which specified APS actions are reviewable actions.

The APS Reform is a government initiative to strengthen the Australian Public Service to deliver better outcomes for the community. The Amendment Regulations are an initiative of the APS Reform agenda to support the positioning of the APS workforce for the future to ensure it meets the demands and expectations of the Australian Government, Parliament and people.

Details and Effect

The Amendment Regulations are a legislative instrument for the purposes of the *Legislation Act 2003*.

The Amendment Regulations will commence on 1 April 2025. Details of the Amendment Regulations are set out in Attachment A.

Consultation

The Amendment Regulations were released as an Exposure Draft to all APS agencies and the APS Consultative Committee for a three-week period. The APS Consultative Committee includes representatives from APS agencies, and seven unions including:

- Australian Manufacturing Workers Union
- Australian Nursing and Midwifery Federation
- Australian Salaried Medical Officers' Federation

- Australian Services Union, Tax Officers' Branch
- Commonwealth Public Sector Union
- Professionals Australia
- United Workers Union

The majority of responses received from stakeholders were supportive of the amendments. Following consultation amendments were made to clarify:

- the drafting of paragraph 20(4)(b),
- that where an application for a promotion review under Subdivision A is made the relevant merit pool/list cannot be used (by the agency that created the merit list or another agency) until the MPC has completed the review (or determined it will not undertake a review),
- that where MPC determines an applicant is not entitled to a promotion review, they will notify the applicant in writing of the reason,
- that MPC can conduct a review on their own motion for any selection process with a classification of Group 2 to 6 of Schedule 1 of the *Public Service Classification Rules 2000*,
- that where the MPC nominates a reviewer, the MPC must be satisfied that the person has the necessary skills and personal qualities to perform the duties as a reviewer independently and impartially, and
- that section 72B of the Act provides the circumstances in which the MPC may or may not disclose information in relation to individuals.

During the consultation process, stakeholders raised questions about the implementation of the Amendment Regulations. As a result the Australian Public Service Commission will issue guidance materials to support implementation. In addition, agencies raised the need for sufficient time to implement the Amendment Regulations. Consequently, a commencement date of 1 April 2025 was selected which was supported by the majority of agencies. Public consultation was not considered necessary as the amendments would apply only to APS and Parliamentary Service employees.

Authority

Section 79 of the Act provides that the Governor-General may make regulations prescribing matters required or permitted by the Act to be prescribed or necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Section 33 provides for the review of APS actions relating to the employment of an APS employee in accordance with the regulations and paragraph 50(1)(e) of the Act provides that functions of the MPC may be prescribed by the regulations.

Impact Analysis

Following consultation with the Office of Impact Analysis, an Impact Analysis is not required for the instrument (OIA24-07537). An Impact Analysis is not required because the instrument does not result in a more than minor change in behaviour or impact for people outside the APS, businesses or community organisations.

Statement of Compatibility with Human Rights

The Amendment Regulations are compatible with the human rights and freedoms recognised or declared in accordance with the Human Rights (Parliamentary Scrutiny) Act 2011. A Statement of Compatibility with Human Rights for the regulations is at Attachment B.

Details of the *Public Service Amendment (2024 Measures No. 2) Regulations 2024*

Section 1 – Name

This section provides that the title of the regulations is the *Public Service Amendment (2024 Measures No. 2) Regulations 2024* (the Amendment Regulations).

Section 2 – Commencement

This section provides that the instrument commences on 1 April 2025.

Section 3 – Authority

This section provides that the instrument is made under the *Public Service Act 1999* (the Act).

Section 4 – Schedule 1

This section provides that each instrument that is specified in a Schedule to the instrument is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this instrument has effect according to its terms.

Schedule 1 – Amendments

Public Service Regulations 2023

The purpose of the Amendment Regulations is to make changes to the *Public Service Regulations 2023* (the Regulations) to support a modern Australian Public Service (APS) by improving the review mechanism in undertaking recruitment, supporting the integrity of merit-based recruitment by expanding the regulatory model for promotion reviews and making other changes to clarify or simplify provisions. These changes form part of the APS Reform agenda to support the positioning of the APS workforce for the future to ensure it meets the demands and expectations of the Australian Government, Parliament and people.

The Amendment Regulations provide sustained opportunities to educate and uplift APS recruitment practices, strengthen service-wide regulation of Agencies' compliance with the merit principle and boost a pro-integrity culture in APS recruitment.

Items 1 to 4 - Section 5

Items 1 to 4 amend section 5 of the Regulations, which sets out definitions for expressions used in the Regulations. These changes repeal two definitions and insert four new definitions, as follows:

Repeal of the definition of *Classification Rules*

The Act contains a definition of *Classification Rules* in section 7, which provides that the expression means the rules made under section 23 of the Act. The note in section 5 of the Regulations provides that a number of expressions used in the instrument are defined in the Act, this includes the Classification Rules. Item 1 repeals the definition of *Classification Rules* in section 5 of the Regulations, as it is redundant.

Repeal of the definition of *Promotion Review Committee*

Item 3 repeals the definition of Promotion Review Committee as it is not required following amendments to Part 4—Review of actions relating to APS employment, described below.

Insertion of the definitions of *merit pool*; *ranked merit list*; *ranked merit pool*; *similar vacancy* and *vacancy*

Items 2 and 4 insert five new defined terms to the definitions provided in section 5 of the Regulations. These new terms are relevant to amendments made to Part 4 of the Regulations—Review of actions relating to APS employment, described in detail below.

The new defined term *merit pool* means a pool of candidates for a vacancy, as a result of a selection process, in respect of which each candidate included in the pool has been assessed as being equally suitable for the vacancy.

The new defined term *ranked merit list* means a list of candidates for a vacancy, created as a result of a selection process, in respect of which each candidate included in the list:

- a) has been assessed as suitable for the vacancy; and
- b) has been ranked in order of suitability.

The new defined term *ranked merit pool* means a pool of candidates for a vacancy created as a result of a selection process in respect of which each candidate included in the pool;

- a) has been assessed as suitable for the vacancy; and
- b) has been included in a group of candidates that has been ranked in order of suitability.

The above terms are included for the purpose of a selection process that is intended to be a merit-based selection process.

The new defined terms *similar vacancy* and *vacancy* have the same meaning as provided in the *Australian Public Service Commissioner's Directions 2022* (the Directions). The Directions are a disallowable legislative instrument freely available on the Federal Register of Legislation on its website legislation.gov.au. They are incorporated as existing from time to time. This means any change to the defined terms in the Directions will be made automatically to those terms where they are used in the Regulations.

The intent of inserting these definitions into the Regulations is to ensure there is an understanding of these terms and the terms are consistently applied, which will support the outcome of the review process.

Item 5 - Part 4 (heading)

This item repeals and substitutes the heading of Part 4 of the Regulations with a new heading consistent with the substantive amendments to Part 4 described below.

Item 6 - Division 1 of Part 4 (heading)

This item repeals and substitutes the heading of Division 1 of Part 4 of the Regulations with a new heading consistent with the substantive amendments to Part 4 described below.

Item 7 - Before section 17

This item inserts new section 16A into the Statement of intent and outline provided under Division 1 of Part 4 of the Regulations. New section 16A provides further detail about the purpose of Part 4 of the Regulations, to provide for matters relating to:

- a) The entitlement of APS employees to seek review of APS actions that affect their APS employment. These entitlements are prescribed in section 33 of the Act, which provides an APS employee is entitled to review of any action that relates to the employee's APS employment, in accordance with the regulations.
- b) The entitlement of ongoing Parliamentary Service employees to seek reviews of certain engagement or promotion decisions. These entitlements are prescribed under paragraph 79(1)(b) of the Act, which provides the Governor-General may make regulations prescribing matters necessary or convenient to be prescribed for carrying out or giving effect to the Act.

Item 8 - Subsection 17(2)

This item repeals subsection 17(2) of the Regulations and substitutes it with new subsection 17(2) which confirms the intention of the Part is about a fair system of review of certain APS actions and other engagement or promotion decisions. New subsection 17(2) does not contain a reference to section 33 of the Act, to reflect the amendments to Part 4 which provide for new powers of the MPC prescribed under paragraph 50(1)(e) of the Act. These are in addition to provisions in Part 4 which are prescribed for section 33 of the Act.

Item 9 - Section 18 (heading)

This item repeals and substitutes the heading of section 18 of the Regulations with a new heading that refers to certain engagement and promotion decisions. This confirms section 18 applies to engagement decisions relating to Parliamentary Service employees as well as APS actions (as defined in section 33 of the Act).

Item 10 - Section 18

This item amends section 18 of the Regulations to remove reference to the Promotion Review Committee (PRC). This reflects the substantive amendments to Part 4 which include repeal of provisions relating to the PRC. The intent of repealing the requirement for a PRC in the review of certain APS actions and other engagement or promotion decisions is to allow greater flexibility and efficiency for the MPC to decide how a review may be undertaken. A review will determine whether a selection process was based on merit rather than comparing one applicant against another to determine which candidate is most meritorious.

Item 11 - Division 2 of Part 4

Overview

This item repeals the whole of Division 2 of Part 4 of the Regulations and substitutes new Division 2—Review of certain engagement and promotion decisions. The following are new provisions which provide for amendments to the review of certain engagement and promotion decisions or process which will enable consideration of whether a recruitment process was merit-based, including consideration of all candidates instead of only considering the applicant and the successful candidate, to bring greater efficiency in the review process.

Subdivision A—Reviews on application by affected employees

An APS and Parliamentary Service employee's entitlement to review were previously set out in sections 21 and 22 of the Regulations respectively.

New Subdivision A includes new sections 20 to 23 which provide for the review of decisions affecting APS employees and Parliamentary Service employees, to determine whether those decisions were merit-based. A review of a decision considers whether the selection process resulted in a merit-based decision.

Section 20 provides detail of when a person is entitled to seek a review of certain engagement and promotion decisions.

An ongoing:

- a) APS employee who has applied for promotion to an APS 2 to 6 classification or
- b) a Parliamentary Service employee who has applied for engagement to an APS 2 to 6 classification and the engagement is a higher classification than their current Parliamentary Service classification,

is entitled to seek a review if the APS or Parliamentary Service employee believes the decision to:

- a) engage an ongoing Parliamentary Service employee to a higher classification or promote an APS employee to the vacancy, or
- b) a decision made to engage or promote a person from a merit pool, ranked merit pool or ranked merit list as a result of the selection process,

was not merit-based or was not undertaken in accordance with the requirements for conducting a merit-based selection process specified by the Directions.

The intent of these provisions is to ensure the review of a selection process considers whether the decision was based on merit. Additionally, this amendment is intended to improve the efficiency of the MPC in undertaking reviews.

Section 21 specifies that an eligible person must apply for a review of a decision to the MPC in writing within 14 days after a decision is notified in the Public Service Gazette and must detail the reasons that the applicant believes the decision was not merit-based. This section also provides for circumstances where the MPC may decide a person is not eligible for a review.

The intent of these provisions is to clarify how an eligible person can apply for a review of a decision and in what circumstances MPC may determine a person is not entitled to a review. Additionally, this provision is intended to prevent review requests that are ill-considered or where the MPC has previously conducted a review of a selection process which they determined as being merit-based or where the decision was not found to be merit-based, but it would not have resulted in materially different outcomes.

Section 22 provides more information about the person or persons conducting the review, also known as the *reviewer*, the reviewer's role and the requirements for an Agency Head in providing the reviewer with information or documents required for the review.

Similar requirements were set out in sections 25, 26, 29 and 32 of the Regulations.

The intent of this amendment is to provide clear and succinct information about the reviewer's role.

The provisions provide more flexibility in the way a promotion review is undertaken. As a result a PRC is no longer the primary mechanism for undertaking promotion reviews.

Section 23 provides information about the decision the reviewer must reach, how the reviewer conducts its review and that the MPC must consider any findings or recommendations made by the reviewer if it is not conducted by the MPC.

Similar requirements were previously set out in sections 33, 34 and 35 of the Regulations.

The intent of this amendment is to provide clarity on how the reviewer must reach their decision and what the MPC must do with the reviewer's findings or recommendations.

Section 20 Entitlement to review under this Subdivision

New section 20 sets out the entitlement of APS employees and Parliamentary Service employees to review of certain engagement and promotion decisions.

Decisions affecting ongoing APS employees

Under new subsection 20(1) a person who is an ongoing APS employee who has applied to be promoted to a vacancy in an Agency with a classification in any of Groups 2 to 6 in Schedule 1 to the *Public Service Classification Rules 2000* (Classification Rules) is entitled to review of a decision by an Agency Head (or its delegate) to engage or promote another person, if the decision is to:

- a) engage or promote an ongoing Parliamentary Service employee in the circumstance mentioned in subsection (3) or to promote another APS employee to the vacancy; or
- b) if, as a result of the selection process, a merit pool, a ranked merit pool or a ranked merit list has been created, to engage or promote a person from the merit pool, ranked merit pool or ranked merit list to a similar vacancy,

and the APS employee believes the decision was not based on merit (within the meaning of subsection 10A(2) of the Act) or was not undertaken in accordance with the requirements for conducting merit-based selection processes specified by the Directions (referred to in this explanatory statement as a '*merit-based decision*').

Decisions affecting ongoing Parliamentary Service employees

Under new subsection 20(2) a person who is an ongoing Parliamentary Service employee who has applied to be engaged as an APS employee in a vacancy with a classification in any of Groups 2 to 6 in Schedule 1 to the Classification Rules which is a higher classification than the employee's Parliamentary Service classification, may apply for a review of a decision to engage or promote another person if the decision is to:

- a) engage or promote an ongoing Parliamentary Service employee in the circumstance mentioned in subsection (3) or to promote another APS employee to the vacancy; or
- b) if, as a result of the selection process, a merit pool, a ranked merit pool or a ranked merit list has been created, to engage or promote a person from the merit pool, ranked merit pool or ranked merit list to a similar vacancy,

and the Parliamentary Service employee believes the decision is not based on merit (within the meaning of subsection 10A(2) of the Act).

The note to new section 20 refers to section 6 of the Regulations, which provides the meaning of ‘higher classification’ in relation to an ongoing Parliamentary Service employee.

The entitlements in new section 20 are similar to those of repealed section 20 of the Regulations, with the following changes:

- a) reference to the Classification Rules is to classifications mentioned in any of Groups 2 to 6, rather than Groups 1 to 6. This technical change reflects that classification in Group 1 is the first level of classification possible.

Circumstances in which engagement of ongoing Parliamentary Service employee is relevant

For the purposes of subparagraphs (1)(b)(i) and (ii) and (2)(c)(i) and (ii), the circumstances in which the engagement of a Parliamentary Service employee is relevant is if the classification of the position to which the employee is engaged is a higher classification than the employee’s classification as a Parliamentary Service employee.

Decisions that are not reviewable under the Subdivision

Under new subsection (4), a person is not entitled to review of a decision mentioned in subsections (1) and (2) in relation to the engagement or promotion of another person in certain circumstances. Those circumstances are if:

- the other person was engaged or promoted to the vacancy on the recommendation of an Independent Selection Advisory Committee;
- the other person was engaged or promoted to the vacancy (including from a merit pool, ranked merit pool or ranked merit list) as a result of a selection process that the MPC has decided following a review under this Division:
 - in accordance with subsection 24(1), that the decision met the requirements in subsection 23(1); or
 - in accordance with subsection 24(3), that the decision resulted in outcomes that would not have been materially different had the selection process met the requirements in subsection 23(1); or
 - in accordance with subsection 29(1), that the decision met the requirements in subsection 28(1); or
 - in accordance with subsection 29(3), that the decision, resulted in outcomes that would not have been materially different had the selection process met the requirements in subsection 28(1); or
- the other person was engaged or promoted to the vacancy from a merit pool, ranked merit pool or ranked merit list created on the recommendation of the MPC under subsection 24(4).

The intent of this provision is to clearly specify the circumstances in which decisions are not reviewable.

The effect of paragraph 20(4)(b) is that where MPC has already undertaken a promotion review for a selection process and the outcome of the review was that the process was merit-based, or

that the outcome would not be materially different, any further promotions or engagements are excluded from promotion review as the outcome of a review would not be different.

Section 21 Application for review of a decision

Under new section 21 a person may apply directly to the MPC for a review of a decision. An application must be in the form specified in new subsection 21(2), that is, it must:

- a) be in writing; and
- b) state the reasons the applicant considers the decision was not a merit-based decision; and
- c) be made within 14 days after the decision is notified in the Public Service Gazette, or a longer period agreed by the MPC before the end of that period.

New subsection 21(3) confirms an application operates as a stay of both:

- a) the decision; and
- b) if the decision involves the engagement or promotion of a person from a merit pool, a ranked merit pool or a ranked merit list—the engagement or promotion of any other person from the merit pool, ranked merit pool or ranked merit list,

until the decision takes effect in accordance with Part 4 of the Directions. Division 2A of Part 4 of the Directions sets out when promotion decisions subject to an application for review take effect.

New subsection 21(4) provides the MPC may decide a person is not entitled to review of a decision under new Division 2 of Part 4 if:

- a) the application is misconceived, lacking in substance, frivolous or vexatious; or
- b) the applicant has previously applied for a review of the same decision or of a decision relating to the same selection process; or
- c) the MPC considers that, in all the circumstances, a review of the decision is not justified.

The MPC will be issuing guidance on paragraph 21(4)(c) with information on how it will be applied by the MPC.

Should the MPC decide under subsection 21(4) that a person is not entitled to a review of a decision, the person does not have the right of review of the MPC's decision. The MPC's decision under subsection 21(4) is not reviewable as it is a procedural decision that may be made in the course of a substantive decision following review of a decision.

Review of a decision of the MPC made under subsection 21(4) may cause unnecessary frustration or delay in the operation of the review process provided under new Division 2. The beneficial effect of merits review of this type of decision is limited by the fact that such decisions would not generally have substantive consequences. Further, the availability of merits review of decisions of the MPC under subsection 21(4) may encourage further applications of this type creating further frustration of process, delay and direction of resources away from other applications. In this situation the availability of merits review may not be appropriate, consistent with clauses 4.3 to 4.7 of the Administrative Review Council 1999 guidance document '*What decisions should be subject to merit review?*' (the ARC Guidance).

The exclusions in subsection 21(4) ensure the effective allocation of MPC resources in matters involving decisions where there is no appropriate remedy, and decisions that have such limited impact that the costs of review cannot be justified. These are situations where the availability of merits review may not be appropriate, consistent with clauses 4.49 to 4.56 of the ARC Guidance.

Regarding the exclusions under proposed paragraph 21(4)(a):

- ‘Misconceived’ refers to situations in which an applicant is mistaken in their views, has misinterpreted or failed to understand a matter or has put a false construction on a matter.
- ‘Lacking in substance’ refers to applications that lack essential elements such as an identified promotion decision or engagement decision.
- ‘Frivolous’ is generally taken to mean that the case is ‘obviously unsustainable’.
- ‘Vexatious’ means an application made for a collateral purpose, such as to gain an advantage or as a bargaining chip, for which Subdivision A was not designed.

Applications of this nature may involve decisions where there is no appropriate remedy, decisions that have no substantial consequences, or have such limited impact that the costs of review cannot be justified.

Where an applicant has previously applied for a review of the same decision or a review of a decision relating to the same selection process (proposed paragraphs 24(1)(b)) it would be an ineffective use of MPC resources to duplicate a review process under proposed Subdivision A that has already occurred or is ongoing. Review under proposed Subdivision A should not provide employees with multiple opportunities for review of the same selection process.

A note under proposed new subsection 21(4) provides, for paragraph 21(4)(b), an example of a decision that would relate to the same selection process, being a decision to promote a person to a similar vacancy from a merit pool created as a result of that selection process.

The MPC may decide to apply the exclusion under paragraph 24(1)(c) in circumstances such as where the selection process has already been reviewed but the applicant is dissatisfied and has re-phrased their initial complaint as if it were a new and different complaint, or where the applicant does not respond to a request for further information about why the review has been sought.

Applications that meet one of the criteria in paragraphs 24(4)(b) or (c) may involve decisions where there is no appropriate remedy or that have such limited impact that the cost of review cannot be justified.

Subsection 21(5) provides that where the MPC makes a determination under 21(4) that the applicant is not entitled to a review of the promotion decision, the MPC must notify the applicant, by written notice, of the reasons for the decision.

An applicant who is dissatisfied with the outcome of a review may seek relief from the Federal Courts under the *Administrative Decisions (Judicial Review) Act 1977*.

Section 22 Review of decision on application by affected person—requirements for conducting reviews

Under new section 22, if the MPC considers a person who has made an application under new section 21 is entitled to a review of a decision, the MPC or one or more persons nominated by the MPC must conduct the review. The person or persons conducting the review is the *reviewer*. The purpose of nominating a reviewer is to allow the MPC to process a higher volume of applications, increasing efficiency and effectiveness.

New section 22(3) provides the MPC may nominate a person under paragraph 22(2)(b) only if the MPC is satisfied that the person has the necessary skills and personal qualities to perform the duties as a reviewer, independently and impartially. The MPC will nominate persons who possess appropriate training, qualifications, skills and experience for the review of applications. Typically these persons will be experienced APS employees with the necessary skills and personal qualities to perform the role. New subsection 22(4) requires the MPC to notify the Agency Head of the Agency, in writing, of the review.

New subsections 22(5) and (6) have the effect that a reviewer can require the relevant Agency Head to give information or documents by written notice to the Agency Head, and the Agency Head is required to give the information or documents to the reviewer in the manner and within the time required by the notice.

Section 23 Review of decision on application by affected person—requirements for conducting reviews

Review of decision

New subsection 23(1) provides that the reviewer must consider whether the selection process that led to one or more decisions that was a merit-based decision and met the requirements for conducting merit-based selection processes in the Directions. In accordance with new subsection (2), the reviewer may conduct the review in any manner the reviewer thinks fit.

New subsection 23(3) provides that the reviewer may consider information in relation to the decision only if the information was available at the time the selection process was undertaken or known to the Agency, but not provided to the decision-maker.

These provisions prevent the reviewer from considering new information, such as further experience gained by a candidate or information a candidate did not provide during the selection process. Any new information is not relevant to whether the selection process conducted was merit-based and therefore is not relevant to the review. However the provisions do not exclude information being considered that was known to the agency but not provided to the delegate, for example a referee report conducted but not included in the selection report for consideration by the delegate.

New subsection 23(4) provides a reviewer must make one or more findings, and the recommendations required for making a determination under section 24 (which is about the outcome of the review) and any other recommendation that the review considers suitable.

New subsection 23(5) provides that if the reviewer is not the MPC, the MPC must take into account any findings or recommendations made by the reviewer under subsection (4).

Section 24 Review of decision on application by affected person—outcomes of reviews

Outcome of review

New subsection 24(1) requires that the MPC must determine whether a selection process resulting in a reviewed decision meets the requirements in subsection 23(1) or does not meet those requirements.

New subsection 24(2) sets out what the MPC must do if the selection process did not meet the requirements in subsection 23(1). If the applicant is an APS employee, the MPC must determine that the decision to engage or promote a person to the vacancy does not take effect. If the applicant is an ongoing Parliamentary Service employee, the MPC must recommend that the decision to engage or promote the person to the vacancy does not take effect. The MPC must also take action under subsection (4) or (5) as applicable. But subsection (2) does not apply if, in accordance with subsection (3), the MPC is satisfied that the outcome of the selection process would not have been materially different if the requirements in section 23(1) had been met.

Under new subsection 24(4) if the MPC determines that the requirements of subsection 23(1) were not met and has sufficient information to do so, and depending on whether the selection process resulted in the creation of a merit pool, or a ranked merit pool or a ranked merit list or none of those, the MPC must either recommend a new merit pool, a new ranked merit pool or a new ranked merit list, or rank all candidates for a vacancy, respectively.

Under new subsection 24(5) if the MPC determines that the requirements of subsection 23(1) were not met and does not have sufficient information to take any of the actions under new subsection 24(4), the MPC must inform the Agency responsible for the decision of the MPC's decision and the reasons for it. The MPC must recommend that the selection process should not be used to fill a vacancy other than a vacancy that has already been filled and in respect of which a determination has not been made under paragraph 24(2)(a). If appropriate, the MPC must recommend a new selection process be undertaken.

The intent of these provisions is to ensure that where the MPC determines that a selection process was not merit-based, that the MPC is able to recommend to the agency that they cease using the merit list or merit pool to fill future vacancies. This assists in ensuring paragraph 10A(1)(c) of the Act is upheld.

New subsection 24(6) provides that a decision or other action taken by the MPC under paragraph 24(2)(a) is binding on the responsible Agency if the applicant for review is an APS employee.

Section 25 Review of decision on application by affected person—notification requirements

New section 25 requires the MPC to notify the applicant for a review of the outcome of the review by written notice. The notice must be made within a reasonable period after the outcome is determined. Section 25 includes a note to explain that section 72B of the Act provides the circumstances in which the MPC may or may not disclose information in relation to individuals.

The intent of this section is to ensure the review applicant is notified of the outcome of the review.

Subdivision B—Reviews on own motion of Merit Protection Commissioner

New Subdivision B includes new sections 26 to 29 which provide new powers for the MPC to cause a review of certain decisions relating to the engagement or promotion of ongoing APS employees or Parliamentary Service employees without an application being made for review.

This addition to the Regulations empowers the MPC to undertake reviews of selection processes without the requirement for an applicant to submit a promotion review. This provides greater visibility of service-wide compliance with the merit principle and provides opportunities to educate and uplift recruitment capability across the APS.

Section 26 Engagement or promotion decisions subject to review under this Subdivision

New subsection 26(1) provides that the MPC may, at any time, cause a review of a selection process conducted by an Agency Head or an APS employee of an Agency that is to engage or promote a candidate for a vacancy or to create a merit pool, a ranked merit pool or ranked merit list from which a candidate for a vacancy may be engaged or promoted. The review is limited to selection processes with a classification of Group 2 to 6 in Schedule 1 of Classification Rules. Subsection (2) makes clear that such a review may be undertaken whether or not the selection process has resulted in a decision, and on or after the day the vacancy for which the selection process is being conducted is notified in the Public Service Gazette.

The provisions provide that the MPC can initiate a review at any stage of a selection process. This inclusion ensures that where a selection process has been finalised but has not yet made any engagements or promotions decisions, the process can still be reviewed.

Section 27 Own motion reviews—requirements for conducting reviews

New section 27 concerns the conduct of reviews carried out under new section 26. Under new subsection 27(2), if the MPC exercises its power to review a decision under new section 26, either the MPC or one or more persons nominated by the MPC must conduct the review. The purpose of nominating a reviewer is to allow the MPC to process a higher volume of applications, increasing efficiency and effectiveness. New subsection 27(3) provides the MPC may nominate a person under paragraph 27(2)(b) only if the MPC is satisfied that the person has the necessary skills and personal qualities to perform the duties as a reviewer, independently and impartially. Typically these persons will be experienced APS employees with the necessary skills and personal qualities to perform the role.

New subsection 27(4) requires the MPC to notify the Agency Head of the Agency, in writing, of the review.

New subsections 27(5) and (6) have the effect that a reviewer, can by written notice to the Agency Head, require the relevant Agency Head to give information or documents, and the Agency Head is required to give the information or documents to the reviewer in the manner and at or within the time required by the notice.

These provisions provide the requirements for conducting reviews, including ensuring that the relevant Agency Head is provided notice of the review and is required to provide any relevant information or documents to enable MPC to conduct the review.

Section 28 Own motion reviews—conduct of reviews

New section 28 provides for the way in which an MPC own motion review under new Subdivision B must be conducted.

New subsection 28(1) provides that the reviewer must consider whether the selection process that led to one or more decisions was merit-based. In accordance with new subsection (2), the reviewer may conduct the review in any manner the reviewer thinks fit.

New subsection 28(3) provides that the reviewer may consider information in relation to the decision only if the information was available at the time the selection process was undertaken or known to the Agency, but not provided to the decision-maker.

These provisions provide that when undertaking a review of a selection process, MPC must consider whether the selection process was consistent with the requirements of:

- subsection 10A(2) of the Act; and
- Subdivision B of Part 4 of the Directions.

These provisions also prevent the reviewer from considering new information, such as further experience gained by a candidate or information a candidate did not provide during the selection process. Any new information is not relevant to whether the selection process conducted was merit-based and therefore is not relevant to the review. However the provisions do not exclude information being considered that was known to the agency but not provided to the delegate, for example a referee report conducted but not included in the selection report for consideration by the delegate.

New subsection 28(4) provides a reviewer must make one or more findings, the recommendations required for making a determination under section 24 (which is about the outcome of the review), and any other recommendation that the reviewer considers suitable.

New subsection 28(5) provides that if the reviewer's findings or recommendations will be adverse to the relevant Agency, then the reviewer must provide a summary of them to the Agency Head, who must be invited to provide any submissions on them within a specified period, which must not be less than 14 days. Any submissions of the Agency Head must be taken into consideration by the MPC in determining the outcome of the review under section 29.

New subsection 28(6) provides that if the reviewer is not the MPC, the MPC must take into account any findings or recommendations made by the reviewer under subsection (4).

The intent of this subsection is to ensure that where MPC appoints a reviewer to undertake the review the MPC must consider the reviewer's findings.

Section 29 Own motion reviews—outcomes of reviews

New subsection 29(1) requires the MPC to prepare a written report of a review that includes one or more findings including whether the selection process met the requirements in subsection 28(1), and if it did not, whether the MPC is satisfied that if the requirements had been met, the outcome would not have been materially different. The report must also include the recommendations required by subsection 29(2) and any other recommendations that the MPC considers suitable to include.

If the MPC determines that the selection process did not meet the requirements in subsection 28(1), subsection 29(2) requires the MPC to include one or more recommendations in the written report in relation to the requirements that were not met. If a merit pool, ranked merit pool or a ranked merit list were created as a result of the selection process, the MPC must recommend that the selection process should not be used to fill a vacancy other than a vacancy that has already been filled. The MPC must also include in the report a recommendation that, on or after the day the report is given to the Agency Head, a person should not be engaged or promoted to a vacancy from the merit pool, ranked merit pool or ranked merit list (except where the MPC is satisfied that the outcomes of the selection process would not have been materially different had the requirements in subsection 28(1) been met, in accordance with subsection 29(3)).

Under subsections 29(4) and (5), the MPC must provide the report to the Agency Head of the Agency responsible for the decision that was reviewed, and may also publish findings or recommendations from the report in the MPC annual report or on the MPC's website. Section 29 includes a note to explain that section 72B of the Act provides the circumstances in which the MPC may or may not disclose information in relation to individuals.

The intent of these provisions is to ensure that, where the MPC determines that a selection process was not merit-based, that the MPC is able to recommend to the agency that they cease using the merit list or merit pool to fill future vacancies. This assists in ensuring paragraph 10A(1)(c) of the Act is upheld. The provisions also ensure that the Agency Head is provided notification of the outcome. Where the report includes a recommendation that the merit list or merit pool should not be used in future, the Agency Head is responsible for implementing the recommendation and any process improvements resulting from the recommendations made. Enabling the MPC to publish findings or recommendations from a review report assists in ensuring transparency.

Subdivision C—Other matters

Subdivision C sets out certain other matters in relation to reviews that may be conducted under the Division.

Section 30 Requirement for Agency Heads to respond to review outcomes

New section 30 applies where a review of a selection process has been conducted under Division 2 of Part 4.

New subsection 30(2) requires that an Agency Head notify the MPC of certain matters following a review, namely, certain actions taken in response to a determination under paragraph 24(2)(a) (if a determination was made under that paragraph) and whether the Agency Head accepts recommendations arising from the review. If the Agency Head does not accept a recommendation, the Agency Head is required to give the reasons why.

New subsection 30(3) requires the Agency Head to give the notice required by subsection (2) by 5pm of the 14th day after the day the Agency Head is informed of the outcomes of the review, or such a longer period as has been agreed by the MPC.

Where a recommendation is not accepted, the MPC must notify the Commissioner that it was not accepted and provide the reasons given by the Agency Head for non-acceptance to the Commissioner in accordance with new subsection 30(4).

The intent of these provisions is to ensure any recommendation made by the MPC to an Agency Head is genuinely considered by the Agency Head. The provisions also ensure that where an Agency Head does not accept a recommendation by the MPC, the Australian Public Service Commissioner is notified, ensuring visibility of the Agency Head's decision.

Where an Agency Head continues to use a merit pool, ranked merit pool or a ranked merit list that the MPC has determined was not merit-based, the MPC may review future engagement or promotion decisions using the merit pool, ranked merit pool or a ranked merit list.

Section 31 Timeframes for conducting reviews

New section 31 requires the MPC to make guidelines specifying timeframes by which reviews under Division 2 of Part 4 must be conducted and ensure that such guidelines are available on the MPC's website. The guidelines will ensure the MPC and reviewers conduct reviews in a timely manner, and in line with the general policy about review at subsection 17(3) of the Regulations. Subsection 17(3) provides that employee's concerns are intended to be dealt with quickly, impartially and fairly. Timeframes specified will not exclude or limit an applicant's right to procedural fairness.

Item 12 - Subsection 37(2) (table item 9, column headed "Non-reviewable APS actions")

This item makes a consequential amendment to item 9 in the table in subsection 37(2) of the Regulations, to refer to a reviewer under Division 2 of Part 4 rather than to a PRC.

This amendment is consequential to the repeal of provisions relating to a PRC in the Regulations and amendments to Division 2 of Part 4 in the Amendment Regulations described above.

The effect of this amendment is that a review undertaken under new Subdivision A or B of Division 2 of Part 4 is an APS action that is not a reviewable action for Division 3 of Part 4 of the Regulations.

Item 13 - Subsection 37(5) (table item 1, column 2)

Subsection 37(5) of the Regulations provides a list of APS actions and the circumstances in which each of those APS actions are not, or cease to be, a reviewable action for Division 3 of Part 4 of the Regulations. The circumstances include the application for review under section 38 of the Regulations not being made within specified timeframes.

This item amends the number of days specified in column 2 of item 1 in the table at subsection 37(5) of the Regulations, from 120 days to 60 days. The effect of this amendment is that if an application for primary review of an APS action under subsection 38(1) of the Regulations was not made to the Agency Head of the responsible Agency within 60 days of the APS action occurring, it ceases to be a reviewable action.

Items 2 to 6 of the table at subsection 37(5) provide for several other APS actions in respect of which an application has been made to cease to be reviewable actions if the application is not made within 60 days of a specified event or process step.

The previous timeframe of 120 days was relatively long, particularly when compared with comparative review and appeal timeframes in other legislation. For example, under section 394 of the *Fair Work Act 2009*, an application for unfair dismissal remedy must be made within 21 days after the dismissal took effect.

The timeframes of 120 and 60 days respectively were fit for purpose at the time of their implementation in 1999 when communication systems were not as accessible and instantaneous as they are today. The current use of online application forms and email mean that applications can be received at the time they are made, rather than by post as was the usual practice in 1999.

Section 17 of the Regulations provides that employee's concerns are to be dealt with quickly and as informally as possible. The current timeframes no longer support this requirement. Shorter (more immediate) application timeframes can increase the opportunity to resolve disputes and concerns early, and reduce negative impacts on applicants and the workplace.

Under subsection 37(3) of the Regulations, an APS action can still be considered a reviewable action if the person conducting the review considers there are exceptional circumstances that explain the failure to make an application for review within the timeframes provided in the table in subsection 37(5) of the Regulations.

Item 14 - At the end of Division 2 of Part 6

This item inserts new Subdivision G—Review of engagement and promotion decisions and contains two new provisions.

Section 82A Functions of the Merit Protection Commissioner to review engagement and promotion decisions

New section 82A is a technical provision which confirms paragraph 50(1)(e) of the Act is the legislative basis of the MPC's function to review engagement and promotion decisions affecting APS employees and Parliamentary Service employees in accordance with Division 2 of Part 4.

Section 82B Reporting requirements

Under new subsection 82B(1) the MPC must give a written report to the Australian Public Service Commissioner at least twice per financial year about the MPC's function of review of engagement and promotion decisions under Subdivision G.

The MPC's report must, under subsections 82B(2) and (3), state the period in the financial year covered and include the following:

- a) for applications for review made under Subdivision A of Division 2 of Part 4 – the number of applications made; and the number of reviews completed and a summary of the outcomes of the completed reviews.
- b) for own motion reviews made under Subdivision B or Division 2 of Part 4 – the number of reviews completed and a summary of the outcomes of the completed reviews.

Subsection 82B(4) provides that any other information the MPC considers relevant may be included in the report. Section 82B includes a note to explain that section 72B of the Act provides the circumstances in which the MPC may or may not disclose information in relation to individuals.

Item 15 - Subparagraph 103(6)(a)(i)

This item makes a consequential amendment to subparagraph 103(6)(a)(i) of the Regulations, to omit a reference to ‘a PRC or Merit Protection Commissioner’ and substitute it with a reference to ‘the Merit Protection Commissioner, or a person nominated by the Merit Protection Commissioner as the reviewer of the action,’.

This amendment is consequential to the repeal of provisions relating to the PRC in the Regulations and amendments to Division 2 of Part 4 in the Amendment Regulations described above.

The effect of this amendment is that the MPC may disclose personal information in circumstances where the MPC obtained the information during a review of an action conducted by the MPC or a person nominated by the MPC to review the action (rather than a PRC), or in the performance of the MPC’s inquiry functions, where the disclosure is necessary for or relevant to an Agency Head’s consideration of alleged misconduct by an APS employee.

Item 16 - In the appropriate position at the end of Part 11

Item 16 inserts new Division 3 – Transitional arrangements in relation to the amendments made by the Public Service Amendment (2024 Measures No.2) Regulations 2024 into Part 11, which sets out transitional arrangements in relation to the amendments. It contains two new provisions which are summarised below.

Section 114 Savings provision—saving of previous review process

New section 114 has the effect that Division 2 of Part 4 as previously in force before 1 April 2025 (and any provision necessary for the effectual operation of the former Division) continues to apply in relation to a decision in respect of a vacancy notified in the Public Service Gazette before that date.

Section 115 Application provision—own motion reviews

New section 115 has the effect that new Subdivision B (which is about own motion reviews) applies in relation to a selection process for a vacancy notified in the Public Service Gazette on or after 1 April 2025.

Statement of Compatibility with Human Rights

Prepared in accordance with Part 3 of the Human Rights (Parliamentary Scrutiny) Act 2011.

Public Service Amendment (2024 Measures No. 2) Regulations 2024

The *Public Service Amendment (2024 Measures No. 2) Regulations 2024* (Amendment Regulations) are compatible with the human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011*.

Overview of the Legislative Instrument

The *Public Service Act 1999* (the Act) provides for the establishment and management of the Australian Public Service (APS). The primary purpose of the *Public Service Regulations 2023* (Regulations) is to provide further detail on the establishment and management of the APS. The Regulations prescribe details on the Code of Conduct; employer powers of Agency Heads; review of actions; the functions of the Australian Public Service Commissioner; the functions of the Merit Protection Commissioner (the MPC); administrative arrangements and re-organisations; attachment of salaries to satisfy judgment debts; and protection of information.

The purpose of the *Public Service Amendment (2024 Measures No. 2) Regulations 2024* (Amendment Regulations) is to repeal and replace provisions in Part 4 of the Regulations relating to the review of promotion and engagement decisions by the MPC, to:

- improve the MPC review mechanism by expanding the regulatory model to consider the merits of the entire process,
- incorporate audit and investigation strategies through the inclusion of own motion powers for the MPC, and
- reduce the timeframe within which specified APS actions are reviewable actions.

The APS Reform agenda is a government initiative to strengthen the Australian Public Service to deliver better outcomes for the community. The Amendment Regulations are an initiative of the APS Reform agenda to support the positioning of the APS workforce for the future to ensure it meets the demands and expectations of the Australian Government, Parliament and people.

Human rights implications

The Amendment Regulations engage the following rights:

- The right to work and rights at work – as recognised by article 6(1) and article 7 of the International Covenant on Economic, Social and Cultural Rights (ICESCR).
- The right to equal access to public service of a person’s country, recognised generally by article 25(c) of the International Covenant on Civil and Political Rights (ICCPR).
- The right to privacy and reputation, recognised generally in article 17 of the ICCPR.
- The right to freedom of expression under Article 19 of the ICCPR.

The right to work and rights at work

Article 6(1) of ICESCR provides that everyone should have the opportunity to gain their living by work which they freely choose or accept. Article 7 of the ICESCR recognises the right of everyone to just and favourable conditions of work which ensures an equal opportunity for everyone to be promoted in employment to an appropriate higher level, subject to no considerations other than seniority and competence.

The general right to work and rights at work are promoted by Division 2 of Part 4 of the Regulations, as discussed below.

Part 4 provides for review of APS actions. Division 2 of Part 4 provides for review of certain engagement and promotion decisions after an application to the MPC or through the MPC's own motion. It seeks to create an efficient system of review of certain decisions relating to engagement and promotion which ensures consideration of whether a recruitment process was merit-based, including consideration of all candidates. In doing so it promotes the right to work and rights at work.

The right to take part in public affairs

Article 25 of the ICCPR provides that every citizen shall have the opportunity to take part in the conduct of public affairs and to have access to the public service in their country.

The Amendment Regulations provide for the repeal and replacement of Division 2 of Part 4. New Division 2 of Part 4 generally promotes this right by creating a system for the review of certain APS actions, including engagement and promotion decisions, to further the objective of merit-based selection.

The right to privacy

Article 17 of the ICCPR relevantly states that no one shall be subjected to arbitrary or unlawful interference with their privacy. Further, that everyone has the right to the protection of the law against such interference or attacks.

New subsection 25(2) requires the MPC to notify an applicant for review of a decision under new Division 2 of Part 4 of the outcome of the review. A note following section 25(2) highlights the responsibilities the MPC has regarding protection of information under section 72B of the Act when notifying the applicant. The note states Section 72B of the Act provides the circumstances in which the MPC may or may not disclose information in relation to individuals.

Similarly, a note under new subsection 82B(5) highlights the responsibilities of the MPC under section 72B of the Act when providing a written report to the Australian Public Service Commissioner in relation to the MPC's functions under new Subdivision B of Part 4.

These notes confirm that in complying with these provisions the MPC will also comply with statutory requirements concerning personal information that is protected information for the purpose of section 72B of the Act. This enables the MPC to respect the rights or reputations of others, particularly the right to privacy as set out in Article 17 in the course of undertaking the functions under new subsection 25(2) and 82B(5).

The right to opinion and freedom of expression

Article 19 of the ICCPR provides the right to hold opinions without interference (Article 19(1)) and to freedom of expression (Article 19(2)). The right to freedom of expression includes the freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.

The Human Rights Committee in its General Comment 34 states that Article 19(2) “embraces a right of access to information held by public bodies. Such information includes records held by a public body, regardless of the form in which the information is stored, its source and the date of production.”

Article 19(3) acknowledges that exercise of the rights provided in Article 19(2) carries with it special duties and responsibilities and that it may therefore be subject to certain restrictions. These restrictions can only those provided by law and be necessary for the respect of the rights or reputations of others or for the protection of national security or of public order, or of public health or morals.

As noted above, new subsection 25(2) requires MPC to notify an applicant for a review of the outcome of the review. A note following section 25(2) highlights the responsibilities the MPC has regarding protection of information under section 72B of the Act when notifying the applicant for a review, by written notice, of the outcome of the review. The note states Section 72B of the Act provides the circumstances in which the MPC may or may not disclose information in relation to individuals.

The same note under subsection 82B(5) highlights the responsibilities of the MPC under section 72B of the Act when providing a written report to the Australian Public Service Commissioner in relation to the MPC’s functions under new Subdivision B of Part 4.

These notes confirm the MPC is required to comply with the requirements of section 72B of the Act regarding the disclosure of protected information. This may engage the right to freedom of expression under Article 19, and affect a person’s right of access to information held by the MPC. However, the restrictions created by the non-disclosure duties in section 72B of the Act have the legitimate objective of respecting the rights or reputations of others, particularly the right to privacy as set out in Article 17.

Conclusion

The amendments are compatible with human rights and freedoms recognised or declared in the international instruments listed in section 3 of the *Human Rights (Parliamentary Scrutiny) Act 2011* because it promotes the protection of human rights (in particular, the right to privacy and the right to work, the right take part in public affairs and freedom of expression). To the extent that a provision operates to limit a right or freedom, those limitations are reasonable, necessary and proportionate.