



ACT
Government

Chief Minister and Treasury

ACTPS GUIDELINES FOR INDEPENDANT REVIEWERS AND APPEAL PANELS

Workforce Capability and Governance Division
Phone number: +61 2 620 50358
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Table of Contents

- Table of Contents 2
- INTRODUCTION..... 4
- PART 1..... 5
- Employment in the ACTPS..... 5
 - Legislative Employment Framework..... 5
 - Other relevant legislation 6
 - General Principles 7
 - Procedural Fairness 7
 - Impartiality..... 9
 - ACT Public Service Code of Ethics 9
 - Confidentiality..... 10
 - Methodology 11
- PART 2..... 15
- The Internal Review Mechanism 15
 - Definitions..... 15
 - Who may seek a review?..... 15
 - Objective of the Internal Review mechanism..... 15
 - Initiating a Review..... 15
 - Choosing an Independent Reviewer..... 16
 - Conducting an Internal Review 16
 - Reporting Procedures for the Independent Reviewer 17
 - Protection of Independent Reviewers 18
- PART 3..... 19
- The Appeal Mechanism..... 19
 - Objective of an Appeal Panel 19
 - Initiating an Appeal 19
 - Composition of the Appeal Panel 20
 - Conducting an Appeal 21
 - Powers of an Appeal Panel 21

Appeals about Disciplinary Action.....	23
Appeals about suspension without pay (Discipline).....	23
Appeals about Under-Performance	23
Appeals about Employee Eligibility for Benefits Relating to Voluntary Redundancy	24
Reporting Procedures for the Appeal Panel	25
Protection of Appeal Panel Members	25
FURTHER INFORMATION	27
Commonwealth legislation	27
Fair Work Act 2009 (Cth)	27
ACT Legislation.....	27
Human Rights Act	27
Public Sector Management Act 1994.....	27
Public Sector Management Standards.....	27
Employee Relations website	27
Public Sector Management website	27
Agency Collective Agreements	27
INDEPENDENT REVIEWER	28
DECLARATION OF IMPARTIALITY	28
APPEAL PANEL	30
DECLARATION OF IMPARTIALITY	30

INTRODUCTION

The *ACTPS Guidelines for Independent Reviewers and Appeal Panels* (the *Guidelines*) outline the roles and responsibilities of agencies, independent reviewers and appeal panel members in conducting a review or an appeal in the ACT Public Service (ACTPS). The *Guidelines* also reiterate general principles that independent reviewers and appeal panel members should be aware of and adhere to in conducting a review or appeal.

These *Guidelines* will provide the reader with:

in PART 1

- background information on the ACTPS legislative employment framework
- general principles that independent reviewers and appeal panel members should be familiar with and apply

in PART 2

- an overview of the independent review mechanism
- how a review is initiated
- the role of the independent reviewer
- guidance on considering internal reviews
- reporting procedures

in PART 3

- minimum requirements for initiating an appeal
- the establishment and composition of an appeal panel
- roles and duties of panel members
- guidance on considering appeals
- reporting procedures

These *Guidelines* do not displace relevant legislative provisions or other industrial laws. Agency staff, independent reviewers and panel members are encouraged to read this document in conjunction with relevant legislation and industrial instruments referenced throughout the *Guidelines*.

All Territory legislation can be found on the ACT Legislation Register at <http://www.legislation.act.gov.au>

Where doubt arises, it is recommended that advice be sought from the ACT Government Solicitor. Consultants must do so via their contact officer(s) nominated in the letter of engagement.

A list of references pointing the reader to recommended further reading is provided on the final page.

PART 1

Employment in the ACTPS

This part places reviews and appeals within the ACTPS employment framework.

It will:

- give an overview of what comprises the legislative employment framework;
- introduce other relevant legislation that independent reviewers and appeal panel members should be aware of; and
- provide some information about the principles forming minimum standards that are expected of independent reviewers and appeal panels.

In Parts 2 and 3 that follow, the specifics of the Independent Review Procedures and Appeal Mechanism will be dealt with in detail.

Legislative Employment Framework

The main elements covering employment in the ACTPS are:

- a) the *Public Sector Management Act 1994* (the PSM Act) and Public Sector Management Standards 2006 (the Standards); and
- b) agency industrial agreements (agency agreements):
 - template agreement comprising common core conditions and schedules which set out any agency specific conditions; and
 - non-template agreements (occupational specific agreements).

The following diagram represents a basic view of the employment framework:



Industrial agreements are made under Commonwealth law. They include collective agreements and Australian workplace agreements made under the *Workplace Relations Act 1996* (Cth) (the WR Act), and enterprise agreements made under the

Fair Work Act 2009 (Cth) (FW Act). Where any Australian workplace agreements exist, they were made under the Commonwealth's WR Act. The ACT Government's current policy is not to enter into any new individual workplace agreements. While agreements are agency based, government policy requires that agencies adopt a centrally negotiated template agreement as part of their agreement.

The template agreement includes a set of core conditions for staff in the administrative, professional, technical, and general service officer classifications. Schedules to the agreements are negotiated on an agency by agency basis and include agency specific conditions.

Note: *Government policy does not force occupational specific agreements (which cover the nurse, doctor, teacher, fire-fighter and ambulance classifications) to incorporate the template agreement into their agreement, however, in practice they generally do, with some modifications.*

The PSM Act establishes and sets out general provisions (e.g. values and principles) and primary employment issues including categories of employment and conditions of promotion and transfer.

The PSM Act is supported by the Standards (subordinate law). Because the Standards are delegated legislation, if any inconsistency arises between the PSM Act and the Standards, the Act prevails.

Remember that the PSM Act and Standards are both subordinate to industrial agreements. This is because agreements are made under Commonwealth law and Commonwealth law overrides ACT law to the extent of any inconsistency.

Other relevant legislation

The primary pieces of legislation in force in the Territory and providing the framework around which other laws are built include:

- the *Australian Capital Territory (Self-Government) Act 1988* (Cth), which is a Commonwealth law that establishes the Territory as an independent body-politic, separate from NSW or the Commonwealth. It also establishes the ACT Legislative Assembly to make laws for the peace, order and good government of the Territory, and establishes the Chief Minister and ACT Executive to govern the Territory.
- the *Legislation Act 2001*, which goes into great detail about the making of laws for the Territory and their interpretation, but also contains some important administrative and machinery provisions.

Additionally, the *Human Rights Act 2004* requires all ACT legislation, including the PSM Act, to be interpreted consistently with human rights as far as possible. Relevant human rights include recognition and equality before the law, protection of

the family, privacy, and the right to take part in public life, which means having equal access to employment in the public service.

Readers should also be familiar with and adhere to the *Privacy Act 1988 (Cth)*, and ensure that all records associated with a review or appeal are maintained in accordance with the *Territory Records Act 2002*.

Other laws such as those dealing with discrimination, work safety, and workers compensation also regulate aspects of the legislative employment framework. References are provided on the final page of the *Guidelines*.

General Principles

In addition to the legislation discussed above, other administrative law principles apply to the conduct of reviews and appeals. These include:

- procedural fairness;
- impartiality;
- codes of ethics; and
- confidentiality.

Methodology is also briefly discussed below, including the principles covering:

- when and how to develop terms of reference;
- best practice fact finding — gathering more evidence; and
- how to record, store and secure evidence.

Procedural Fairness

The principle of procedural fairness, also called natural justice, applies to any decision that can directly affect the rights, interests or expectations of an individual. Natural justice gives people the right to expect that any decisions made about them are taken by an unbiased decision maker and are based on open, fair and reasoned decision making processes that includes giving them the opportunity to respond to decisions made.

The principle requires a decision maker to invite, listen to, and take into account an individual's point of view on any matter that adversely affects them. Any decision affecting an individual that has been made without affording that individual procedural fairness is liable to be challenged and set aside. In all of the circumstances, it must be considered whether procedural fairness was afforded to the applicant (and where relevant, other parties).

The courts have interpreted the principle of natural justice to extend from the initiation of a matter right through to its implementation, not just to the reporting stage or once a consequent decision is made.



The need to preserve natural justice extends throughout the above timeline.

Procedural fairness does not require the application of fixed rules but requires that the procedure adopted be fair in all of the circumstances.

Principles essential to the application of procedural fairness include the need to:

- provide a fair hearing;
- not be biased; and
- act on the basis of logically probative evidence (i.e. that the evidence is relevant to the facts in issue).

Procedural fairness is not merely a right that a person has if they become involved in a dispute, but invokes a duty of those involved – parties to the dispute must, as a matter of course, be given a voice during the process.

Giving parties a voice during the process requires an independent reviewer or appeal panel to:

- hear all parties to a matter;
- make reasonable inquiries and consider all matters put to them in reaching a recommendation/decision;
- not give weight to irrelevant matters in reaching a decision;
- inform persons whose interests may be affected by allegations against them (i.e. a decision could be taken against them) or grounds for adverse comments in respect of them. This affords a person the opportunity to respond to allegations; and
- provide persons with a reasonable opportunity to put their case. This period will depend on the circumstances, including the relative urgency and the seriousness of the matters being considered. If it is clear that a person is not able to respond properly without more time or further information, where possible this should be provided (e.g. within legislative boundaries and taking into account the effect a time extension will have on other parties). This may also need to occur if new evidence will be used after the initial opportunity to respond.

Note: *The above does not represent a comprehensive list of factors that if one considers and implements will ensure a fair hearing. It is intended to be indicative of the kinds of procedural fairness consideration to bear in mind when conducting a review or appeal. Individuals should exercise their own judgement and common sense in applying natural justice to each case.*

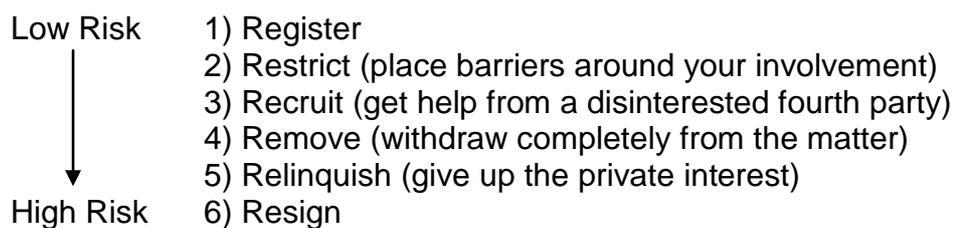
Impartiality

Being unbiased can be seen as a second aspect of procedural fairness. Before accepting to review a case or sit on an appeal panel, you should consider whether you are able to bring an unbiased and independent mind to proceedings. If not, or if in doubt, you should decline to be involved.

Alternatively, and at a minimum, it may be worth discussing any concerns with an officer from Shared Services Employee Relations, who will usually be the officer responsible for the coordination of the review or will act as the appeal panel convenor. Declaring interests is often all that is needed to reassure parties that no conflict will arise.

There are often issues where members will know, or be aware of, one or more persons involved in the matter (e.g. current or past association with a witness). This does not automatically prevent the person from participating in the review or appeal. Each case should be considered in context and on its individual circumstances.

Queensland's Crime and Misconduct Commission and the NSW Independent Commission Against Corruption jointly identified a six-fold management strategy that may help to address conflicts of interest:



Regardless of the strategy employed, at a minimum, conflicts should be registered. The severity of the conflict will determine how far along the spectrum you should progress, and what subsequent actions are appropriate.

Ultimately, if the conflict of interest inhibits the person from bringing an independent mind to the case, they should decline to be involved and inform the parties as soon as possible so a replacement reviewer or appeal panellist can be found.

Note: for employees engaged under the PSM Act, declaration of conflicts is a statutory responsibility. The Code of Ethics at section 9 of the PSM Act requires, among other ethical duties, the declaration of any conflicts of interest that arise in relation to their duties. This includes conflicts relating to reviews and appeals, not only at their inception but also those that arise while the review or appeal is in progress. Contractors are also obliged to declare conflicts as if they were an employee engaged under the PSM Act.

ACT Public Service Code of Ethics

Under the ACTPS Code of Ethics, employees **must**:

- exercise reasonable care and skill;

- act impartially and with probity;
- comply with all Territory laws and any reasonable directions given;
- avoid conflicts of interest;
- report fraud, corruption or instances of maladministration;
- treat others with courtesy and sensitivity to their rights, duties and aspirations; and
- make all reasonable efforts to assist others to understand their rights and obligations.

Additionally, under the Code of Ethics, ACTPS employees **must not**:

- harass or coerce others, sexually or otherwise;
- take improper advantage for personal gain of a position or information obtained in the course of employment;
- disclose any information acquired in the course of employment;
- make comment if not authorised to do so where in the circumstances the comment would be judged to be an official comment; or
- use Territory property wastefully or improperly.

Once again, these principles apply to persons engaged under a contractual relationship and employees.

More detailed information on the ACTPS Code of Ethics can be found in the guidebook *Ethics in the ACT Public Service*, available from the Chief Minister's Website at <http://www.cmd.act.gov.au/governance/public/publications> .

Confidentiality

Inevitably, issues being dealt with will concern sensitive matters. The confidentiality of personal information is paramount to the integrity of any process.

As identified above, the ACTPS Code of Ethics includes several obligations specifically prohibiting the use or disclosure of information without proper authority.

A key element of maintaining confidentiality is ensuring that all documents, recordings and other items relating to review or appeal proceedings are kept in a physically safe environment.

Maintaining confidentiality:

- minimises the risk of harm to relevant parties;
- reduces the opportunity for evidence to become contaminated;
- encourages witnesses to be forthcoming with evidence; and
- protects you from potential legal action (e.g. defamation).

You must also ensure that any other persons involved in a review or appeal understand their obligation to keep details confidential (e.g. witnesses in gathering evidence).

Note: While confidentiality must be maintained, this does not negate procedural fairness requirements to tell people what other parties may have said in relation to the matters before them.

Guarantees of confidentiality should never be given. Documents produced in the course of an investigation may be subject to the *Freedom of Information Act 1989* and their confidentiality therefore cannot be guaranteed.

Methodology

Independent reviewers and appeal panels typically need to determine the best approach to deal with a matter before them. Recommendations may be made based on the initial documentary evidence alone. If all of the relevant material is not available, however, further statements may be sought or individuals may be invited to interview to assist the reviewer or appeal panel to develop a complete picture.

In each case, an opinion about the information at hand and what subsequent steps may be needed in the review or appeal will be formed. In forming this opinion, an independent reviewer or appeal panel member should draw on their general knowledge and experience to identify issues, analyse information and assess the merits and completeness of evidence in hand.

Terms of Reference

Terms of Reference should be developed early in the process to ensure that all parties understand what matters will be considered, and what falls outside the scope of the review or appeal. The Terms of Reference should include:

- the method by which the review or appeal will be dealt with;
- timeframes, including ensuring that the applicant and employer have sufficient time to respond after reviewing the other parties' submissions; and
- any other relevant matter.

The Terms of Reference should be circulated before commencing the process.

Note: that for promotion appeals, Terms of Reference are not required as the decision can only be reviewed on the basis of greater efficiency.

Fact Finding

It should be noted that the complex rules about the admissibility of evidence that apply in a court of law do not apply to these matters. Information should be assessed as either relevant and reliable, or otherwise and discarded.

The fundamental principle to be aware of is that all evidence must be relevant to the facts or matters in issue.

Ultimately, decisions often turn on one person's word against another's. In deciding which witness is the most credible, a range of factors should be considered, including the demeanour of witnesses, the cooperation they have shown, their possible motives and any inconsistencies. Past behaviour may be taken into account but care must be taken. The criteria that must be satisfied before evidence of past

behaviour should be permitted to influence the finding is where it is identical, relevant, recent and/or serious.

Note: for further information on rules about the admissibility of evidence and whether they apply in particular cases, it is strongly recommended that formal advice be requested from the ACT Government Solicitor.

Gathering Evidence

Gathering evidence is the process of effectively and efficiently obtaining information relevant to the matter in hand.

To determine the facts of the review or appeal, you will need to access the evidence obtained during the investigation or earlier process that led to the current matter. The Agency must provide reviewers or the Convenor of Appeal Panels with all relevant information and evidence to the proceedings. The Convenor will then consolidate and distribute the evidence to relevant parties of the Appeal Panel.

To ensure efficiency and timeliness, unless evidence collected during the initial process is in serious doubt, the reviewer or panellists should not undertake to collect the same evidence again.

However, new evidence relevant to the matter may need to be sought, such as oral statements from witnesses in order to better determine the facts.

Where new evidence will be sought through oral statements from witnesses, it is recommended that the following steps are considered:

Preparation and Planning:

- Set objectives and an agenda for the interview. Consider the timing and location of the interview. Privacy is a major psychological factor which contributes to the success of the interview, and the environment should be free from distraction.
- Set questions or lines of questioning before the interview to use as a checklist to ensure all relevant issues are covered. Of course, an interviewer may need to deviate from the list to ask follow-up questions and take account of unexpected evidence.
- The need for an interpreter or other special arrangements should be determined in advance.

Conduct of interview:

- the interviewer should act fairly, reasonably and in an impartial manner, and the approach adopted by the interviewer should be tailored to suit a witness.

Interview techniques:

- Face-to-face interviewing is the primary method for receiving evidence from a witness. Alternatives include telephone interviews and written requests for information but these methods should be used sparingly.

- Interviewers can use open, closed, strategic, hypothetical, provocative and assertive lines of questioning. Generally, an interview should commence using open questions to encourage narrative responses. Closed questions should only be used to confirm matters after the witness has told their story.

Recording

- It is important that the interview is recorded accurately. This can be achieved by electronic recording, by preparing a record of interview or by creating a witness statement. The manner of recording will largely depend on the purpose for which the record is being taken. The interviewer should inform the witness of the method of recording before the interview commences, and also provide the interviewees with an opportunity to comment on the interview record.

Support Person

- generally witnesses should be permitted to have a third party attend the interview for the purposes of support. The interviewer needs to make clear that the support person is an observer and may not take part in discussions and ensure that they agree to keep the interview confidential.

It is important to interview all witnesses to obtain all relevant facts. As a general rule the person who is the subject of a complaint should be interviewed last.

Securing Evidence and Information

It is important to ensure that all evidence is not only obtained but also stored appropriately.

When evidence is provided to the reviewer or panel members, the movement of documents should be recorded. The record must show where the documents are to be taken including how they will be stored.

During the first stages of compiling the relevant documentary information, original documents should be sourced as they often show information that does not appear in second generation photocopies or print-outs (e.g. pencil notes in the margin).

For subsequent steps, original documentary evidence should be photocopied then stored in a locked facility. To avoid originals being misplaced, damaged or destroyed, only photocopies of original documentary evidence should be used during the course of the review or appeal, for example during interviews.

Where appropriate, the interviewer should use the opportunity of the interview to confirm the authenticity of documents with the person indicated as being the author.

Where documents are provided to third parties, a record should be taken and receipt should be provided, together with the contact details of the person responsible for the evidence in case access to further documents is needed.

Recording and Storing Gathered Information

Any documents that record the information gathered during the conduct of a review or appeal should be handled in accordance with the *Territory Records Act 2002*.

Note that the Act maintains a paper-based, physical records management framework, rather than electronic or digital.

All discussions, phone calls and interviews should result in file notes. These notes should be legible, include relevant dates/times, clearly identify the author of the note, and contain a file reference.

Records should be secured in a lockable cabinet. Documents should be stored to retain their original condition.

All materials provided to or created by the independent reviewer, or appeal panel pertaining to the issue of the process of review or appeal are to be returned to the Territory in accordance with the Administrative Review and Investigations Panel Services Agreement.

PART 2

The Internal Review Mechanism

Definitions

For the purposes of internal reviews, an *action* includes a decision as well as the refusal or failure to make a decision.

Employee means an officer or a casual employee or a temporary employee who is employed or engaged under the PSM Act, excluding executives or chief executives.

Who may seek a review?

Employees covered under an ACTPS industrial agreement are entitled to seek a review (so long as the agreement contains the clauses setting out the review mechanism).

Objective of the Internal Review mechanism

The internal review mechanism exists to offer recourse to employees where they feel aggrieved by management actions which directly affect them. Generally, where an employee is affected by a management action, the employee is entitled to seek a review of that action.

However, not all management actions can be reviewed. Decisions to terminate employment, for example, are only handled by Fair Work Australia (formerly the Australian Industrial Relations Commission). The Internal Review Procedures within agency agreements include a list of management actions which are excluded from the right of review.

Initiating a Review

ACTPS industrial agreements establish procedures for employees to seek an internal review of management actions that affect them. An internal review may be initiated by an employee or employee's representative by making an application to the relevant Chief Executive that is in writing, describes the reasons the application is being made and the outcome sought.

Applications for a review should be made as soon as possible after the employee is made aware of the action/decision or within 28 days.

Where an application for internal review is received by the Chief Executive within the timeframe, the Chief Executive must consider mediation as an option before arranging for an investigation of the matter.

Where mediation does not take place, the Chief Executive must arrange for an independent person to investigate the application in accordance with agency agreements.

Choosing an Independent Reviewer

When choosing an appropriate independent person to conduct a review, agencies have three options for deciding who will investigate the request

1. Agencies may arrange for an appropriate internal independent person to conduct the review (a senior officer from within the Agency - Grade C or above - with no previous involvement in the matter).
2. Agencies may engage an appropriate external independent person (someone from the panel) to conduct the review.
3. Agencies may refer the request to Shared Services Employee Relations. Once receiving a request Employee Relations will consider the request, the topic(s) in question, and decide on an appropriate independent person to conduct the review or engage an appropriate panellist on behalf of the Agency

Conducting an Internal Review

The purpose of the independent person in considering an application for review is to make a recommendation to the Chief Executive on whether the action that led to the application should be confirmed or varied or that other action should be taken.

While the Chief Executive and the reviewer have discretion in relation to the procedure for considering an application for internal review, agency agreements set out minimum requirements that independent reviewers must follow in conducting an investigation.

In considering the application the independent reviewer must have regard to the principles of natural justice and procedural fairness and act with as little formality and as quickly as practicable consistent with a fair and proper consideration of the issues. The independent reviewer should avoid an overly legalistic approach and where interviews are required, the applicant has a right to be accompanied by an employee representative.

Reviewers may recommend to the Chief Executive that an application should not be considered, if in the reviewer's opinion:

- a) the application concerns a decision or action that is excluded under the Internal Review Procedures within agency agreements;
- b) a period of twenty-eight days has elapsed since the employee was advised of the decision (except in extenuating circumstances);

- c) the employee has made an application regarding the decision to a court or tribunal, or where the Reviewer believes it is more appropriate that such an application be made; or
- d) the application is frivolous or vexatious, is misconceived or lacks substance or there is some other compelling reason that the application not proceed.

Where the reviewer does not recommend to the relevant Chief Executive that the application should not proceed, the reviewer is obliged to investigate the matter.

In considering the application for review the investigation should address whether:

- a) any legislative provision was relevant to the action and was complied with;
- b) any whole of government or agency policy, guideline or procedure for dealing with the particular matter in question were substantially complied with;
- c) the requirements of procedural fairness were observed in relation to the matter; and
- d) the action under review was appropriate or reasonable in the circumstances and on the basis of the information available to the person taking the action or making the decision at the time.

Reporting Procedures for the Independent Reviewer

After investigating an application for review, the Independent Reviewer will make a written report containing recommendations to the Chief Executive.

Note: *where the subject of an application made under the Internal Review Mechanism is an action of a Chief Executive then the independent reviewer will make a written report containing recommendations to the Commissioner for Public Administration.*

The written investigation report prepared by the Independent Reviewer:

- a) must contain recommendations on whether the action that led to the application should be confirmed or varied or that other action be taken; and
- b) must be provided to the applicant at the same time it is provided to the Chief Executive or Commissioner.

Note: *agencies need to be aware that there are additional provisions in agency agreements that detail the requirements of the Chief Executive and/or the Commissioner for Public Administration after receiving the report of the independent reviewer. However, they are not detailed in this document as they do not involve the Independent Reviewer.*

If at any time the reviewer is unsure of what course of action to take, they should contact the relevant Agency or Shared Services Employee Relations. This includes where the reviewer considers that legal advice is required. (In these circumstances, the relevant Agency or Shared Services Employee Relations will write to the ACT Government Solicitor seeking their advice.)

Protection of Independent Reviewers

Where an independent reviewer is engaged under the PSM Act, the Territory indemnifies these persons for action/omissions made while involved in Internal Review proceedings, provided the person acts in good faith within the powers conferred by the position. This indemnity covers public liability, professional indemnity and directors and officers' risks, where they act in good faith.

This Territory indemnity does not extend to a person nominated by the unions, unless they are employed in the ACTPS (i.e. engaged under the PSM Act).

Independent reviewers not engaged under the PSM Act should ensure they are covered by appropriate insurance, including professional indemnity insurance.

PART 3

The Appeal Mechanism

Objective of an Appeal Panel

Agency agreements set out an Appeal Mechanism for an employee where that employee is not satisfied with the outcome of decisions in relation to the following matters:

- a) promotion or temporary performance (for periods more than six months) decisions below SOG C level affecting the officer where the officer was an applicant for the position (excluding unanimous decisions by a joint selection committee);
- b) decisions to promote an officer to a non-advertised vacancy at or below the Administrative Service Officer 6 level where the employee is suitably qualified for the non-advertised position;
- c) decisions arising from disciplinary action under the Misconduct and Discipline provisions within agency agreements, except a decision to terminate the person's employment, or suspend an employee with pay;
- d) decisions arising from under-performance action under the Managing Under-performance provisions of agency agreements, except a decision to terminate a person's employment; and
- e) decisions taken in relation to employees' eligibility for voluntary redundancy, severance benefit, and redeployment benefits under the Redeployment and Redundancy provisions within agency agreements, the amount of such benefits, the amount payable by way of income maintenance under, and the giving of an involuntary notice of redundancy or notice of reduction in classification.

Appeal Panels do not have the power to review a decision in respect of termination of employment. An employee may have an entitlement to bring an action under the *Fair Work Act 2009* in respect of any termination of employment under the Misconduct and Discipline provisions within agency agreements.

Initiating an Appeal

The Chief Executive will nominate a person or a position to be the Convenor of Appeal Panels, who may be from the relevant agency or from another ACTPS agency. Two positions within Shared Services have been nominated by Chief Executives of most agencies to be the Convenor of Appeal Panels.

An appeal may be initiated by an employee or employee's representative by making an application to the Convenor of Appeal Panels that is in writing, describes the action taken or to be taken, the reasons for the application and the outcome sought.

Under the Appeal Mechanism provisions, for an application to be considered by the Convenor, the application must be received by the Convenor within:

- seven days of the applicant being notified of the decision (including for temporary performance) which they are appealing; or
- 14 days of the promotion being notified in the ACT Gazette.

Where an application is received by the Convenor of Appeal Panels within these timeframes, the Convenor of Appeal Panels will set up an Appeal Panel.

Composition of the Appeal Panel

The composition of an Appeal Panel is prescribed within the Appeal Mechanism provisions within agency agreements and is to comprise an employer nominee, an employee nominee and a chairperson.

The chairperson is chosen from the ACTPS Administrative Review and Investigations Panel, or, in the case of an appeal relating to a promotion or temporary performance decision, an agreed person chosen by the parties to the Agreement.

The employer nominee should be a person who has appropriate experience relevant to the appeal matter, and has an understanding of broader legislative, management, human resource policy and practices.

The employee nominee will be nominated by the relevant party to the agency agreement. This person should have appropriate expertise relevant to the appeal matter and an understanding of the workplace industry.

Note: *prospective panel members should consider whether they are able to bring an unbiased and independent mind to proceedings before they accept a role on the Panel. If not, or if they are in doubt, they should decline the nomination.*

Before proceedings commence, panel members *must complete* a Declaration of Impartiality and Code of Ethics (Attachment A) to declare they have no conflicts of interest in the matter before the panel. The signed Declaration must be provided to the Convenor.

Agencies should be aware that the Appeal Mechanism *expressly prohibits* a person who was involved in the decision that is the subject of the application from being a member of the Appeal Panel.

The Appeal Mechanism also provides that the Convenor will only be a member of the panel if the applicant agrees. However, if it is agreed that the Convenor will be a panel member, the Chief Executive must be satisfied that there are procedures in

place to ensure a clear delineation between the roles of the Convenor and the panel member.

Conducting an Appeal

The purpose of the panel in considering appeals other than against a promotion or temporary performance is to make a recommendation to the Chief Executive or Commissioner on whether a decision (in relation to matters listed above) is fair and equitable in all of the circumstances, and that administrative law requirements for decision-making were complied with, for example, that procedural fairness (also known as natural justice) were afforded. However, procedures will differ depending on the type of appeal being made.

While the Appeal Panel has discretion in relation to the procedure for considering an application for appeal, the Appeal Mechanism within agency agreements sets out minimum requirements that Panel members must follow in conducting an appeal.

In considering an application, the Appeal Panel must act in accordance with the principle of procedural fairness.

Proceedings are to be conducted with as little formality and as quickly as practicable consistent with a fair and proper consideration of the issues.

The panel should avoid an overly legalistic approach. The applicant may be represented by an employee representative, or, with the consent of the Appeal Panel, by a legally qualified person. The panel should consider each application for legal representation on its merits.

The panel has the power not to investigate an application or if it has commenced investigating the application, not proceed further, if, in the panel's opinion:

- a) the application is frivolous, vexatious, or not made in good faith;
- b) the employee may apply to another person or authority about the application and it would be more appropriate for it to deal with the action; or
- c) an investigation or further investigation of the application is not warranted.

Powers of an Appeal Panel

While the panel has responsibility for its own procedures, members should, in considering any procedural matter, keep in mind:

- a) the stresses upon parties to an appeal;
- b) time requirements and the time that needs to be allocated to the matter;
- c) the desirability of informality;
- d) the need for the recommendation to be made to the Chief Executive or Commissioner in a timely manner after the application (consistent with a fair and proper consideration of the issues); and
- e) any other matter that the Panel considers relevant to promoting a fair and transparent process.

The panel should not institute any process that may operate directly or indirectly to discriminate against relevant parties to the appeal.

Panel proceedings are to be conducted in private. However panel members should be aware that the confidentiality of documents produced in the course of the appeal cannot be guaranteed and may be subject to the *Freedom of Information Act 1989*. As such, panel members should avoid giving applicants guarantees of confidentiality.

All panel members must act in all panel proceedings with fairness, equity and impartiality, independent of other interests, including those from the body that has nominated them, for example, the employer or union. If a member feels pressure from anybody or person they should declare it, in writing, to the Chairperson or Convenor.

Appeals about Promotion or Temporary Performance

When considering promotion or temporary performance appeals, the only ground on which the Appeal Panel may review the decision is that the officer making the appeal would be more efficient in performing the duties of the position than the person promoted or selected for temporary performance.

Note: Only permanent ACT Public Service employees (officers) are eligible for promotion.

For these appeals the panel may not review procedural matters, as this review right is provided under Internal Review Procedures.

In considering whether the applicant would be 'more efficient', the panel should have regard to:

- a) the abilities, qualifications, experience, standard of work performance and personal qualities of each relevant party² to the appeal to the extent that the Panel considers they are relevant to performing the duties of that position;
- b) if the Chief Executive or delegate who made the promotion decision had regard to, the potential for further career development, relevant to the position, in making the merit based decision; and
- c) any other matter the panel considers relevant.

Note: Relevant parties include the person selected for the promotion and any applicants that applied for that position and have lodged an appeal.

After investigating an application about promotion or temporary performance affecting the applicant, the Appeal Panel will either:

- a) confirm the decision and inform the applicant of this decision and the reasons for the decision – preferably in writing; or
- b) make recommendations to the Chief Executive to substitute another decision.

The Convenor should notify other parties to the appeal of the outcome.

Appeals about Disciplinary Action

When dealing with appeals relating to disciplinary action taken under the Misconduct and Discipline provisions within agency agreements, the panel will need to consider whether the penalty reflects the severity of the breach of conduct.

Fairness and equity require that the penalty be appropriate to the conduct but also that all relevant factors are taken into consideration in determining the penalty. The Misconduct and Discipline provisions provide for the following factors to be considered in determining appropriate disciplinary action:

- the nature and seriousness of the misconduct;
- the degree of relevance to the employee's duties or to the reputation of the Agency;
- the circumstances of the misconduct;
- any mitigating factors; and
- the previous employment history and the general conduct of the employee.

The panel will need to ensure that every element of the Misconduct and Discipline provisions are complied with during panel proceedings, and it is advisable that panel members familiarise themselves with these provisions before the Appeal Panel commences its processes.

Appeals about suspension without pay (Discipline)

When considering appeals against a decision to suspend an employee without pay under the Misconduct and Discipline provisions within agency agreements, the panel may consider the following:

- Was procedural fairness afforded to the employee?
- Was the employee given an opportunity to respond before the action was taken to suspend the employee without pay?
- If not, did reasonable grounds exist for taking this action (e.g. there was an imminent serious threat to the safety of other employees or a real possibility that the employee would have destroyed or tampered with evidence if suspension had been delayed)?
- Did the alleged misconduct constitute serious misconduct or otherwise justify the decision to suspend without pay?
- Is suspension with pay or temporary transfer to alternative duties more appropriate?
- Suspension while an investigation is proceeding should not be characterised as a sanction in itself.

Appeals about Under-Performance

When dealing with appeals in relation to the Managing Under-Performance provisions of agency agreements, the panel will need to consider whether the penalty reflects the level of under-performance.

The panel may consider some of the following factors:

- Was the employee afforded procedural fairness?
- Has a genuine attempt been made to rectify the areas of under-performance?
- The seriousness and degree of under-performance;
- The circumstances of the under-performance;
- Whether there is previous history of that same/similar under-performance;
- The employee's length and record of service;
- The employee's personal circumstances;
- The nature of employment and the employee's duties;
- Whether there is ongoing risk to the public, clients or work colleagues;
- Whether the effectiveness of the department and the public service, in general, is compromised by continued employment;
- Any injury, loss or damage resulting from the under-performance;
- Any other relevant matter or mitigating circumstances.

The panel will need to ensure that every element of the Managing Under-Performance provisions are complied with during panel proceedings, and it is advisable that panel members familiarise themselves with these provisions before the Appeal Panel commences its processes.

Appeals about Employee Eligibility for Benefits Relating to Voluntary Redundancy

When dealing with appeals under in relation to the Redeployment and Redundancy provisions within agency agreements, the panel may be required to consider:

- An employee's eligibility to benefits in relation to voluntary redundancy and the amount of such benefits. Appeals in this area may involve, but are not limited to, the length of the notice period (whether 4 weeks or 5 weeks), the number of years of continuous service, and calculations in relation to the inclusion of other allowances.
- The amount payable to an employee by way of income maintenance. Appeals in this area may involve, but are not limited to, the maintenance of income at the rate received while performing higher duties.
- The giving of an involuntary notice of redundancy or notice of reduction in classification. Appeals in this area may involve, but are not limited to, whether or not involuntary notices of redundancy should be given if the employee does not wish to accept a transfer to another position; or whether or not the notice of reduction in classification should be given if the employee has not applied for at least 3 separate positions for which they could be reasonably expected to be qualified to perform.

The panel will need to ensure that every element of the Redeployment and Redundancy provisions within agency agreements are complied with during panel

proceedings, and it is advisable that panel members familiarise themselves with these provisions before the Appeal Panel commences its processes.

Reporting Procedures for the Appeal Panel

After investigating any application for a decision made under the Misconduct and Discipline, Managing Under-Performance or Redeployment and Redundancy provisions, the Appeal Panel will make a written report containing recommendations to the Chief Executive.

Note: where the subject of an application made under the Appeal Mechanism is a decision of the Chief Executive then the Appeal Panel will make a written report containing recommendations to the Commissioner.

The written report prepared by the Appeal Panel:

- a) must provide the reasons for its recommendations; and
- b) may request the Chief Executive or the Commissioner, whichever is applicable, inform other relevant parties of its recommendations.

In circumstances where the panel is recommending the original action be varied in the case of discipline and under-performance appeals, the panel should have regard to the available actions under agency agreements when framing its recommendations.

The Appeal Panel must provide a copy of the report to the applicant at the same time that it is provided to the Chief Executive or the Commissioner.

Note: Agencies need to be aware that there are additional provisions in the Template Agreement that detail the requirements of the Chief Executive and/or the Commissioner after receiving the Appeal Panel's written report. However, they are not detailed in this document as they do not involve panel members.

The Appeal Panel should consider the desirability and appropriateness of providing a copy of the draft report to relevant parties to the appeal prior to its finalisation. In considering this, the panel should have regard to the principles of procedural fairness and the need to finalise the report in a timely manner. It is at the panel's discretion whether to amend the report, however written responses should be provided to the Chief Executive or Commissioner.

Protection of Appeal Panel Members

Where a panel member is engaged under the PSM Act, the Territory indemnifies these persons for action/omissions made while involved in Panel proceedings, provided the person acts in good faith within the powers conferred by the position. This indemnity covers public liability, professional indemnity and directors and officers' risks, where they act in good faith.

This Territory indemnity does not extend to a person nominated by the unions, unless they are employed in the ACTPS (i.e. engaged under the PSM Act). Panel members not engaged under the PSM Act should ensure they are covered by appropriate insurance, including professional indemnity insurance.

FURTHER INFORMATION

Any issues that arise during the course of a review or appeal should be discussed with Shared Services Employee Relations, who act as the contact for internal reviews and also convene appeal panels.

Phone: (02) 6207 6413

Email: sharedserviceser@act.gov.au

Commonwealth legislation

<http://www.comlaw.gov.au>

Fair Work Act 2009 (Cth)

<http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/current/bytitle/BE85568F51875E8CA2576080001E3A4?OpenDocument&mostrecent=1>

ACT Legislation

www.legislation.act.gov.au

Human Rights Act

<http://www.legislation.act.gov.au/a/2004-5/default.asp>

Public Sector Management Act 1994

<http://www.legislation.act.gov.au/a/1994-37/default.asp>

Public Sector Management Standards

<http://www.legislation.act.gov.au/di/2006-187/default.asp>

Employee Relations website

<http://sharedservices/actgovt/HRservices.asp#er>

Public Sector Management website

cmd.act.gov.au/governance

Agency Collective Agreements

sharedservices.act.gov.au/docs/agreements/

INDEPENDENT REVIEWER DECLARATION OF IMPARTIALITY

The purpose of this document is to facilitate proper, fair and efficient operation of Internal Reviews conducted under ACTPS Agency Agreements. The [insert agency], on advice of the Public Sector Management Group, requires all persons nominated as Independent Reviewers to make this declaration. If any person feels that they are unable to comply with this requirement, they should discuss the matter with the engaging Agency and their nominating body to determine whether or not, in all of the circumstances, they should decline nomination as an Independent Reviewer.

I,.....
(full name)

of
(work/ other address)

Independent Reviewer in the matter of

.....
.....
.....

DECLARE:

1. I do not have and have not had a relationship with a party related to the Internal Review of a kind that may cause a reasonable person to suspect that I may be biased, including:
 - A family relationship;
 - A close personal relationship;
 - A relationship involving personal hostility; or a
 - Business or employment relationship.
2. I do not have or have not had any other personal or professional involvement in the matter to be considered (e.g. pecuniary or non pecuniary interest in the matter – such as acting as a party's adviser in the matter).
3. I understand that, while acting as an Independent Reviewer, I am not subject to direction by, nor should I act on instructions from, any person, body or authority other than legal directions (e.g. from a court of law).

4. I will conduct my duties as an Independent Reviewer in accordance with ACTPS Agency Agreements with fairness, equity and impartiality independent of any interests of the body which nominated me.
5. I will contribute to the identification of the key issues of the review and participate in the analysis and assessment of those issues based on my own opinions on the merits and the information before me.
6. After making this declaration, should a relationship, involvement or interest of a kind described in this declaration develop, and there are grounds for reasonable suspicion of bias or prejudice on my part, I will disqualify myself from considering the review.
7. I will ensure that the all evidence and associated materials used in the deliberation of the review remain strictly confidential.
8. I acknowledge that the written recommendation is confidential and (subject to ACTPS Agency Agreements) is only made available to the applicant and Chief Executive and/or Commissioner (as relevant).
9. I acknowledge that if I fail to comply with the requirements of this declaration, I may not be nominated for future Internal Review proceedings.

Signature.....

Date.....

APPEAL PANEL

DECLARATION OF IMPARTIALITY

The purpose of this document is to facilitate proper, fair and efficient operation of Appeal Panels constituted under the Appeal Mechanism of ACTPS Agency Agreements. The [insert agency], on advice of the Public Sector Management Group, requires all persons nominated as members of Appeal Panels to make this declaration. If any member feels that they are unable to comply with this requirement, they should discuss the matter with the Convenor of Appeal Panels and their nominating body to determine whether or not, in all of the circumstances, they should decline nomination to the Panel.

I,.....
(full name)

of
(work/ other address)

a member of the Appeal Panel in the matter of
.....
.....
.....

DECLARE:

1. I do not have and have not had a relationship with a party before the Appeal Panel of a kind that may cause a reasonable person to suspect that I may be biased, including:
 - A family relationship;
 - A close personal relationship;
 - A relationship involving personal hostility; or a
 - Business or employment relationship.

2. I do not have or have not had any other personal or professional involvement in the matter to be considered by the Appeal Panel (e.g. pecuniary or non pecuniary interest in the matter – such as acting as a party’s adviser in the matter).
3. I understand that, while acting as a member of the Appeal Panel, I am not subject to direction by, nor should I act on instructions from, any person, body or authority other than legal directions (e.g. from a court of law).
4. I will conduct my duties as a member of the Appeal Panel in accordance with the Template Agreement with fairness, equity and impartiality independent of any interests of the body which nominated me.
5. I will contribute to the identification of the key issues of the appeal and participate in the analysis and assessment of those issues based on my own opinions on the merits and the information before the Panel.
6. After making this declaration, should a relationship, involvement or interest of a kind described in this declaration develop, and there are grounds for reasonable suspicion of bias or prejudice on my part, I will disqualify myself from considering the appeal.
7. I will ensure that the free and frank discussion of views of the Panel in deliberating the evidence and matters before the Appeal Panel remain strictly confidential.
8. I acknowledge that the written recommendation is confidential and (subject to the Template Agreement) is only made available to the applicant and Chief Executive and/or Commissioner (as relevant).
9. I acknowledge that if I fail to comply with the requirements of this declaration, I may not be nominated for future Appeal Panel proceedings.

Signature.....

Date.....