



Outreach Program Talking Points

Workshop Structure

- The purpose of today's session is increase your understanding of the use and application of merit pools/lists.
- We intend for today to be interactive and fun (we hope!). As you can see from the slide we have set a structure to the session to keep us on track and allow time at the end for you to raise any questions.
- I will provide a brief summary of the employment framework, how it applies to merit pools and lists, and then will provide insight into the best practice approach for merit pools.
- About half way through the workshop we will shift to an interactive discussion on scenarios. A shared learning experience is only valuable where people share, so please be prepared to engage and discuss the scenarios with us.
- I hope you have had time to read over the rules of engagement for today.
 - Camera on, microphone muted when not speaking – please use the chat function if you have any questions throughout the first half of the workshop.
 - Reminder to be respectful and 'Chatham House' rule applies in any discussion of people's own situation.

The Employment Framework

- All employment in Australia is regulated by the *Fair Work Act 2009*.
- The principle Act governing the operation of the public service is the *Public Service Act 1999*.
- As outlined on the slide, it is supported by: *Public Service Regulations 1999*; *Australian Public Service Commissioner's Directions 2016*; and the *Public Service Classification Rules 2000*.

- The *Public Service Act 1999* and the subordinate legislation add a statutory overlay to the employment landscape of the APS.
- Under the Public Service Act, APS agency heads have the responsibility for employment decisions, including recruitment and selection decisions within their agency.
- The green boxes on the slide reflect the legislation that the APSC has responsibility for.
- Your own agency workplace arrangements and supporting policies also play an important supporting role in the employment framework.

APS Employment Principles

- As I am sure you are all aware, the Public Service Act has defined employment principles outlined in s10(A) of the Act.
- We are not going to delve into these today in any great detail, however for context when discussing merit it is worth noting the principles and reminding yourself of them as they apply specifically to all recruitment in the APS.

Recruitment in the APS

- Under the *Public Service Act 1999* (the Act), APS agency heads have responsibility for employment decisions, including recruitment and selection decisions, in their agency.
- Agency heads have the power to engage an APS employee in one of three categories: ongoing employment; for the duration of a specified term or specified task; or irregular and intermittent duties.
- Recruitment is about attracting and selecting the right person for the job.
- Recruitment processes do not need to be complex, however they do need to support sound, evidence-based decision making.
- There is a legal requirement in the Act that engagement and promotion decisions are based on merit.
- And there are additional responsibilities in relation to fairness and transparency to meet community expectations on the way the APS operates.

APS Merit Principle

- Merit is the cornerstone of APS employment decisions and is underpinned by legislation.
- As outlined in section 10(A)(2) of the Act, a decision to engage or promote a person is only considered to be based on merit if the all of the points on the slide apply.

All eligible members of the community are given a reasonable opportunity to apply

- This means that job vacancies which may result in the engagement or promotion of an ongoing employee must be notified in the Public Service Gazette within a period of 12 months before the written decision to engage or promote the person is made.
- This also applies to the engagement of a non-ongoing employee for an initial period of more than 18 months.
- However, non-ongoing opportunities of 18 months or less are not required to be notified in the Gazette. Although they must be brought to the attention of the community in a manner that provides a reasonable opportunity to apply.
- Bringing something to the attention of the community can include through an agency's internal communications, website or social media, direct contact with agency networks, or through external recruitment providers.

An assessment is made of the relative suitability of candidates, using a competitive selection process

- What makes a competitive selection process, it:
 - is determined in advance and information about the process is readily available to all applicants;
 - includes notification of the vacancy in accordance with the Directions;
 - is applied fairly in relation to each eligible applicant;
 - is appropriately documented; and
 - is free from discrimination, patronage and favouritism.

The assessment is based on the relationship between the candidates' work-related qualities and the qualities genuinely required to perform the relevant duties

- The work-related qualities that may be taken into account when making an assessment of a candidate's suitability include:
 - skills and abilities; qualifications, training and competencies;
 - standard of work performance;
 - capacity to produce outcomes by effective performance at the level required;
 - relevant personal qualities, such as honesty and integrity;
 - potential for further development; and
 - ability to contribute to team performance and culture.

The assessment focuses on the relative capacity of candidates to achieve outcomes related to the relevant duties

- Secondary considerations may be taken into account if they relate to matters within the control of the applicant.
 - This may include: ability to start by a particular date, willingness to relocate, or ability to meet other reasonable agency requirements.
- Any secondary selection considerations should be directly related to the relative suitability of a person to perform the duties or the work-related qualities needed to perform the duties.

The assessment is the primary consideration in making the employment decision.

- Agencies must ensure that merit is still the primary consideration in making the decision.
- Any secondary consideration needs to be consistent with other elements of the APS Employment Principles (as outlined on the previous slide) and not used in a way that constitutes or implies patronage or favouritism, or direct or indirect discrimination under anti-discrimination law.

Merit pools/lists

- Following a selection process an agency may identify candidates that are suitable to fill the vacancy, but who may not be offered a role.
- A pool/list of suitable candidates may be established where an agency has conducted a competitive selection process – referred to as a 'merit pool' or 'merit list'.

- A merit pool or list allows for a decision to be made to employ a person who has been found to be suitable for a vacancy or similar vacancy if the decision is made within 12 months of the original vacancy being notified in the Public Service Gazette.
- This is provided by section 20(1) of the Directions.

Merit pool v merit list

What is the difference between merit pools and merit lists?

- A merit pool is where all suitable candidates are grouped together and considered to have equal merit.
- Any of the suitable candidates may be offered a role.
- It also means any subsequent offer of employment, using the merit pool to fill the same of a similar vacancy can be made to any of the suitable candidates.
- This means that other areas/agencies can offer their job to the person who best meets the specific work-related requirements of that particular vacancy.
- Important to note though that if the agency groups the suitable candidates within the merit pool, for example 'highly suitable' and 'suitable', that those ranked in the higher pool must be made offers before those in lower ranked pools.
- Additionally, where a ranked pool is utilised, the higher ranked pool(s) must be exhausted before moving to candidates in lower ranked pools. For example, you must completely exhaust a 'highly suitable' group before moving the 'suitable' group. There are no exceptions or exemptions to this requirement.
- Merit lists on the other hand indicate the relative suitability of candidates for a vacancy in a ranked order of merit, for example 1 to 5.
- When a ranked merit list is established the highest ranked candidate must be offered the role first.
- It also means that any subsequent offer of employment using the merit list to fill the same or a similar vacancy must follow the merit list ranking. For example, if there are 4 remaining in the list, and candidate 1 has accepted a job. The offer must be made to candidate 2 first.
- It is the APSC position that best practice is use of a merit pool where all suitable candidates receive the ranking 'suitable' only.

- This provides the greatest possible flexibility for subsequent utilisation of the pool, both within and external to the advertising agency.
- Regardless of whether it is a merit pool or a list, a candidate who declines an offer of employment remains in the merit pool/on the merit list while it remains in use. This, of course, is unless they formally advise that they wish to withdraw from any further consideration.
- Declining an offer at a particular point in time does not affect the candidate's suitability for similar opportunities that may arise while the pool is active.
- Similarly, if the candidate accepts a non-ongoing job for a period of time, they remain in the merit pool for any ongoing vacancies that arise.

Similar vacancy

- As we have determined agencies are able to use merit pools created by other agencies to fill vacant jobs where the duties are similar and certain requirements are met.
- But what does this mean in practice?
- As outlined on the top of the slide there are specific requirements outlined in section 9 of the Directions for a vacancy to be considered similar:
 - It must be in the same category of employment (ongoing or non-ongoing)
 - It must comprise similar duties
 - It is at the same classification
 - It is in a similar location
- Similar duties may be comprised of roles which require similar skills and abilities, qualifications, outputs or outcomes
- In deciding what constitutes a 'similar location', agencies should consider whether relocation would be required to undertake the job if it were to be filled in the different locations. Importantly, you should consider whether advertising the vacancy as available in the different locations would attract a different field of applicants.

- Additionally, one of the requirements of Section 9(a) of the Directions, outlined on the lower half of the slide, must be met in addition to all of the above requirements for a vacancy to be considered similar.

Creating and accessing merit pools/lists

- Agencies must ensure their recruitment processes allow applicants to 'opt out' of consideration for other similar vacancies, both internally and externally to the advertising agency.
- Agencies should also ensure their privacy policy addresses the handling of and access to personal information of job applicants (in accordance with Australian Privacy Principle 6).
- For vacancies at the Senior Executive Service (SES) level, and for centrally-coordinated entry level recruitment programs, such as Indigenous Pathways, agencies may draw on a merit pool/list created by another agency, provided the merit pool/list is still current and the vacancy meets all other relevant criteria.
- For all other vacancies, agencies may access a merit pool/list on a case-by-case basis with the written agreement of the agency that notified the original vacancy in the gazette. Appropriate delegates from both agencies must agree that the vacancies are similar.
- Keep in mind that even if your agency utilises an external recruitment firm or third party provider, such as an executive search firm, you are still required to provide access to any merit pool/list created, particularly for SES vacancies and centrally coordinated entry-level programs.
- And as a general reminder, before accessing a shared merit list, agencies are required to check the APS Redeployment Register to see if there are suitable candidates available and conduct appropriate assessment of those candidates.

Sharing and accessing merit pools/lists

- There are a number of ways that merit pools/lists can be shared and accessed by agencies. This includes, but is not limited to:
 - Internally within your agency – some agencies have a central coordination point of active merit pools that can be shared and accessed by work areas where they have a similar vacancy.
 - Likewise, for smaller agencies they may be able to access merit pool/lists from their portfolio agency.

- Professions Streams are a good way of sharing merit pools/lists that your agency may create. This may enable better sharing across the profession and provide greater access to merit pools/lists for occupations within their stream.
 - Small Agency Forum is another great way to share merit pools/lists with peers.
 - As are your own networks, let them know if you have/are undertaking a competitive selection process that they may be interested in accessing your merit pool/list for their own similar vacancies.
 - Individuals may notify someone directly of being rated suitable in a merit pool. Care will need to be taken here around considerations such as ranked lists or grouped pools.
 - Finally, APS jobs, there is search capability on the platform to find roles advertised in the gazette that may be similar to your vacancy. For further information on this please contact our colleagues who look after APSJobs– contact@apsjobs.gov.au.
- It is important to remind you that while there are all of these ways of sharing and accessing merit pools/lists, agencies must ensure they have delegate approval to first share merit pool; and that there was agreement from the applicant to be consider for other positions.

Non-APS merit pool/list

- Our team regularly received queries about the accessing non-APS merit pools/lists.
- The short answer is that an APS agency cannot use a non-APS merit pool/list.
- This is because the definition of ‘similar vacancy’ in section 9 of the Commissioner’s Directions does not cover non-APS agencies: ‘Agency’ as used in that definition has the same meaning as in the Public Service Act – that is, an APS agency; similarly, ‘SES’ means classified as SES under the Act.
- The only exception applies to transfers at level.
- There are limited circumstances for non-APS intelligence agencies and Parliamentary Service agencies where utilisation of merit pools is possible for movements at level. We encourage you to contact the APSC team to discuss in further detail if these situations occur at your agency.
- Intelligence agencies (ASIO, ASIS, ASD) have provisions in their legislation allowing for employees to move from their agencies to the APS ‘as if’ they were moving under section 26 of the Public Service Act; however, those provisions do not affect the interpretation of section 9 of the Directions.

- Intelligence agency employees can move at level without a merit process, and an APS agency may use a merit pool/list to identify a suitable candidate for such a move, but the APS agency would need to seek approval from the intelligence to access their pool/list.
- Similarly, section 31 of the Directions allows ongoing Parliamentary Service employees to be engaged as APS employees without a merit process, as long as it is at level. This also does not affect the interpretation of section 9, so it does not allow the use of a Parliamentary Service merit list to engage or promote a person in the APS. Again, an APS agency may seek to use a Parliamentary list to identify a candidate to engage at level.

Now it's your turn

- We acknowledge that was a lot of information to take in – hopefully it was a good refresher and we are now going to put into practice with some scenarios for discussion.
- We encourage you to openly discuss and ask questions about the scenario – we will have time for general questions at the end too.
- Shared learning only works people are willing to share.
- Use the chat function to ask questions or raise your hand so we can unmute you.

Scenario – Ranked list

- Was there approval from agency X and agreement that the role was a similar vacancy?
- Was there an assessment of similar duties between the vacancy and the merit list position?
- Was there agreement from candidates for their information to be shared for other roles?
- What consideration was there of candidates 1 & 2?
- Does it matter that candidate 2 is already an employee within their agency?
- Consideration of whether agency X was an APS agency?

Scenario – Merit pool grouped

- What if agency Y decide to access a grouped merit pool, what would the process be?
- Was there agreement from the candidates for their information to be shared?
- Was there approval to access the merit pool? Contact officer may not be the delegate.

- Should all the candidates be considered for agency Y's vacancy?
- What is they preferred one of the suitable candidates over the 3 highly suitable?

Policy position – Ranked or grouped

- The APSC policy position in regard to the first two scenarios is:
- Where candidates are ranked in order of merit, they must be offered a job in that same order.
- Candidates rated 'highly suitable' must be offered a job before candidates rated 'suitable'.
- From the first scenario, let us assume, that candidate 1 was offered a job with agency Z. They accepted the role and no one else has accessed the merit list prior to agency Z.
- Therefore agency Z must make an offer to the highest rated candidate on the merit list, candidate 2.
- Regardless of whether the individual is an employee of agency already they must be offered the role in the order in which the merit list is ranked.
- If candidate 2 declined the offer, they would remain in the merit list for future vacancies and then agency Z may move down the list.
- For the grouped merit pool, the contact officer may not be the delegate and agency Y needs to ensure they have delegate approval.
- The 3 highly suitable candidates must be offered the role in agency Y first.
- Only if all 3 decline – and return to the merit pool, could agency Y offer their role to a suitable candidate.
- Where a candidate has advised that they do not wish to be considered by other agencies, agencies must not provide that candidate's details to another agency. That candidate's details are to be removed before sharing the merit list, and the other agency is able to offer a job to the next highest rated candidate.
- Where candidates are ranked in order of merit, relevant details of only the highest ranked candidate (such as their job application and extract from the selection report) are to be provided.
- Where candidates are grouped in a merit pool, relevant details of all applicants remaining in the highest rated pool are to be provided. The second agency would then undertake its own

comparative assessment to identify the most suitable candidate for its similar vacancy. Another full merit selection process is not required.

Best practice – Merit pool

- These two scenarios reinforce what our best practice approach is to the use merit pools.
- This is because unranked pools rather than lists or grouped pools provide greater flexibility when filling the same or a similar vacancy.
- Even the grouping of candidates within a merit pool i.e. highly suitable, can limit the flexibility and may prevent agencies from accessing the merit pool.
- Merit pools provide one of the greatest tools for flexibility when filling vacancies in the APS. We strongly encourage their utilisation and want to highlight their flexibility to encourage you to consider the best practice when conducting recruitment activities within your agency.

Scenario – Similar vacancy

- What are the differences in the duties?
- Why or why not are they similar? How might you determine and record this decision?
- If the role was advertised would it attract a similar pool of applicants?
- Was there approval from agency X and agreement that the role was a similar vacancy?
- What is the location?
- Assuming it was ACT Canberra merit pool and the project support officer was in VIC Melbourne?
- What if it was NSW Queanbeyan and ACT Canberra?
- What if the situation was flipped and the merit pool was for a project support officer and the vacancy was the executive assistant? Would this change your assessment of similar duties?

Policy position – Similar vacancy

- Utilising the Executive Assistant merit pool to engage or employ a Project Support Officer would not be in keeping with the principles of APSC policy and guidance on merit lists or with the Australian Public Service Commissioner's Directions 2016 on what constitutes a similar vacancy.
- All eligible members of the community must be given a reasonable opportunity to apply.

Scenario – Expiry of merit pool/list

- We are assuming for this scenario that Agency X have accessed a merit pool and assessed the duties as similar to their vacancy. There was one candidate remaining in the pool and the panel have discussed the individual's suitability in the position.
- What constitutes a decision to engage or promote?
- Does the decision have to be in writing?
- Can it be verbal?
- How might this affect the use of a merit pool?

Scenario – Expiry of merit pool/list – email to panel members

- Would this email be considered a written decision to engage or promote?
- Was it within the 12 months from the date the vacancy was originally advertised?
- Is this sufficient to constitute a written decision for a fair, transparent and meritorious process?

Scenario – Expiry of merit pool/list – email to candidate

- How is the email different to the first email?
- Does it constitute a written decision to engage?
- Was the decision made within the 12 months from the date the vacancy was originally advertised?
- Are there other considerations that need to be taken into account?

Policy position – Expiry

- We strongly recommend an approach requiring a prospective employee to sign a notice of agreement. Today, this could be effected electronically by email. This will avoid potential confusion and provide sufficient evidence base for proving a fair and appropriate process.
- Division 1 of Part 3 of the Directions sets out the requirements that agencies must comply with in order to uphold APS Employment Principle 10A(1)(c) 'merit principle'.

- Section 20(1)(a) of the Directions details that an engagement following a merit selection process must be made in writing and within the 12 month period the original vacancy was notified in the Public Service Gazette.
- This is not acceptance of an offer by the individual, however the better practice to confirm the person still wishes to be engaged for your position prior before the delegate decides to engage them.
- Ultimately, the question is whether a delegate has exercised the power at section 22 of the Public Service Act and whether there is evidence of the decision in writing. Your agency head, and their delegate where such powers have been delegated, must be satisfied that appropriate and due process has been followed that meets all relevant requirements of the Act and its subordinate legislation, including your agency's EA, internal policies and processes.
- There could be various points in time when engagement in writing formally occurs. For example, a delegate could conceivably make a file note, engaging several people as APS employees, but the HR team might not send offers of employment until later in the week.

Questions & closing

- That concludes the interactive scenario discussion, thank you for your involvement in this.
- Team have collated the questions asked in the chat function throughout the session that that we will now work through together.
- If you have any further questions, please raise your hand and we will get through as many as we can.
- Any questions we don't have the opportunity to discuss today will be answered by the team and shared in the Govteams group so make sure to turn alerts on so you can view those as they're available.
- We are very keen to get your feedback on today's session and what you would like the program to look like in the future.
- In the chat function we have shared a link to a quick survey/evaluation tool that we would really appreciate you taking the time to complete now.
- You should have all been added to GovTeams community for the outreach program. This site will be used to share resources, information on future sessions and have a team conversations page for you to raise questions with each other or for the team.

- The team have created a frequently asked question document that will be shared on GovTeams following today's session. We will review the questions asked to today to ensure they are also included in this document.
- We will be in touch in early 2021 in relation to future sessions.
- If you have any further question and/or would like to discuss the program you can contact the team via employmentpolicy@apsc.gov.au or 02 6202 3857.
- Thank you for your participation 😊