



**Annual report of the
Merit Protection Commissioner**



MERIT PROTECTION COMMISSIONER

The Hon Malcolm Turnbull MP
Prime Minister
Parliament House
Canberra ACT 2600

Dear Prime Minister

I am pleased to present the Merit Protection Commissioner's report for the period 1 July 2016 to 30 June 2017. As required by section 51 of the *Public Service Act 1999*, my report is included in the Australian Public Service Commissioner's annual report.

This report is prepared in accordance with *Resource Management Guide No. 135 Annual reports for non-corporate Commonwealth entities* approved on behalf of the parliament by the Joint Committee of Public Accounts and Audit in May 2017.

In presenting this report, I also thank the staff of the Australian Public Service Commission for the service they have provided during the time I have held this office. I have appreciated their assistance in what has been another productive year.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Annwyn Godwin', with a small flourish at the end.

Annwyn Godwin

Merit Protection Commissioner
22 September 2017

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Annwyn Godwin
Merit Protection
Commissioner

OVERVIEW

During my nine-and-a-half years as Merit Protection Commissioner I have seen big changes to the Australian Public Service (APS) and the environment in which we operate. My role and my Office (OMPC) have adapted to reflect these changes.

During times of change and uncertainty, there is a greater emphasis on trust and integrity. The APS is a stable institution on which the Australian public can rely, but the legitimacy entrusted to it by the government and the public should not be taken for granted. The APS is fortunate to have a number of mature public institutions—commonly known as the integrity agencies—to oversee its integrity, accountability and probity. In addition to my Office, these institutions include the Auditor-General, the Integrity Commissioner, the Australian Public Service Commissioner, the Privacy Commissioner, the Inspector-General of Intelligence and Security and the Commonwealth Ombudsman. In the past decade I have worked closely with all these agencies to share insights and perspectives.

Individually and collectively, integrity agencies and other statutory officers have unique insights into the workings of the APS that may not be obvious to line or central policy agencies. The APS should take note of our observations on trends, issues and learnings and value our contribution when formulating policy or developing better practice. Conversely, statutory office holders have a responsibility to use their roles wisely and to the long-term benefit of good public administration.

Integrity, including merit, is integral to how the APS operates. Promoting and upholding merit, in its widest sense, is where my Office and I provide value.

BALANCING EFFICIENCY AND INTEGRITY

Over the past 10 years, there has been an increased emphasis on improving the flexibility of APS operations and the deployment of staff. Major studies—such as the Committee of Audit report in 2014,¹ the Belcher report² and the McPhee report³ in 2015—have referred to unnecessary prescription in the employment framework. At the same time, the workplace relations framework has required APS agencies to negotiate enterprise agreements that enable them to operate more efficiently and flexibly. This includes the removal of restrictive clauses and onerous process requirements. APS agencies are continuing to focus on reviewing core operational priorities, but are increasingly contracting out non-core aspects of their work. The use of technology is also growing.

Increased flexibility and less red tape should lead to a more cost-effective, more streamlined APS. These are admirable aspirations, but there are risks that need to be acknowledged and mitigated.

When considering changes to the law, policy-makers need to consider the original purpose behind particular provisions. In modernising, the APS needs to:

- understand ‘why’ a particular regulation or piece of legislation was originally put in place
- assess if the ‘why’ remains relevant
- identify what tools and techniques are available to update and modernise the APS.

For example, the concept of merit was introduced to counter nepotism and cronyism (the ‘why’). Merit, and what it represents, is the key Employment Principle in the APS. We must operate without patronage, nepotism or favouritism to sustain public confidence and trust by employing and promoting the most capable people. The relevance of the ‘why’ is implicitly understood.

Recruitment and promotion decisions are one of the clearest ways to send organisational and cultural messages about what behaviours are valued and rewarded. I believe promotion reviews are an important and undervalued assurance mechanism. They make managers reflect on the behaviours they are rewarding by their promotion decisions.

Qualitative data confirms that our investment in working with agencies which receive large numbers of promotion reviews has reaped benefits. The overturn rate of 0.5% of promotion decisions is the lowest since the *Public Service Act 1999* (the Public Service Act) was introduced. However, the agencies that experienced promotion reviews this year were generally large, geographically dispersed, and involved in service delivery. We have limited line of sight on the application of merit in small to medium, policy or regulatory agencies since they are under-represented in the promotion review caseload.

1 *Towards responsible government: the report of the National Commission of Audit*, National Commission of Audit, 2014.

2 *Independent review of whole-of-government internal regulation*, B Belcher, August 2015.

3 *Unlocking potential—APS workforce management contestability review*, S McPhee, December 2015.

As promotion reviews are not evenly spread across agencies, I cannot confirm whether merit is consistently applied across the APS. Drawing on my observations and on overseas experience, I believe there is scope to move to an audit assurance model for reviewing recruitment and promotion decisions. In doing so we can extend the fundamental integrity protection against patronage, nepotism and favouritism provided by the existing review process while improving the cost and efficiency of process.

Managers have said to me that just knowing their decision could be subject to my oversight has influenced their decision-making processes.

(Annwyn Godwin, June 2017)

CONTINUOUS IMPROVEMENT

The APS must demonstrate:

- apolitical service to the government of the day
- high ethical standards with no tolerance for fraud and corruption
- fair and consistent delivery of high-quality public services, without discrimination or favouritism
- open and transparent accountability for expenditure of taxpayers' money
- clear and comprehensive explanations for actions and decisions to Parliament arising from community and media scrutiny.

My Office has responded to these principles through a combination of:

- making doing the right thing easy—reducing compliance costs and improving ease of access and understanding
- bringing stakeholders with us—addressing the immediate issue and providing sustainable solutions
- providing integrity of message and delivery—we are exemplars of what we say.

The Government's reforms of the Public Service Act and Regulations in 2013 streamlined reviews of employment actions. My Office has applied the legislation flexibly to ensure that concerns are dealt with quickly and fairly and to promote consistency of agency decision-making.

Too often the process of continuous improvement concentrates on policies, practices and technology. It overlooks the continuing need to improve professional understanding, flexibility and judgment. Without these skills and capabilities the best technical systems fail to realise their full potential. It takes time and persistence to build credibility, trust and integrity. In a ‘throw-away’ society, the value of varied life and work experience and the nuances of complex judgement are considered expendable—but not in the OMPC. My Office is an example of what can happen when technical and professional improvements occur at the same time.

In 2008 I recognised that technical improvements were needed. Some policies, procedures and delegations were out of date, our technology needed updating, our decision-making was inconsistent because the function was spread across offices, and standards (time and quality) were not being met. These issues were addressed.

Now in 2017 the OMPC demonstrates flexible work practices that enhance our performance and professionalism. Of our core 12 staff, four job-share, and wherever possible we supplement our work through panels of staff trained and mentored by my Office. Data-based project management of casework and working remotely have quietly revolutionised the Office. Our internal timeframes have continually been met since 2013–14.

We have removed unnecessary administrative steps and have concentrated on sound reasoning and plain English writing. We have revised the website and our correspondence so they are easier to understand. In response to recent feedback we will focus on better managing review expectations and being clearer about review processes. In response to the needs of our clients I now use the internet and social media. *We are* exemplars of what we say.

Our reputation for quality, credibility and expertise has attracted interest elsewhere. In recent years I have been asked to assist other jurisdictions, including the Norfolk Island Government, and to address many international delegations. I have represented the Australian Public Service Commissioner at the South Pacific Public Service Commissioner Conference and helped the OECD on an integrity review of the Mexican public service. In June 2017 I was invited to attend the China Australia Dialogue on Public Administration Workshop in Hong Kong and to present a paper entitled ‘*Public accountability and performance for non-core agencies: lessons learned from Australia*’.



The Merit Protection Commissioner meeting a member of a delegation from Thailand

WORKING WITH AGENCIES TO ADD VALUE

I work with agencies to encourage productive and harmonious working environments. Our reviews help employees understand management decisions and manage expectations about what can reasonably be expected of their managers and their agency. Our intervention can prevent employment disputes from becoming entrenched and help disgruntled employees become engaged and contributing members of the workforce. As I noted in my annual report last year, I want employees and managers to learn from mistakes and to create the type of workplace envisaged by the APS Values.

The way I work with agencies has also changed. In the past few years, I have promoted the review process as a way to support an engaged and productive workplace, and have encouraged agencies to use complaint management to identify systemic deficiencies in policy or practice. At the same time, rather than mainly focusing on the outcome of individual cases, I have placed a greater focus on improving people management practice across the APS. I am a trusted adviser to senior echelons of the APS.

My focus means highlighting issues with policies, and interpretation of agency enterprise agreements that become evident in casework. We work flexibly with agencies, targeting different management levels. For example, in response to agency requests we are examining how we can better use de-identified case summaries to guide agencies and better manage employees' expectations of the review process.

We are also a source of reliable advice. The staff turnover in corporate areas within agencies means that policies and practices often need explaining—for example, merit in recruitment, effective employee case-management and integrity risks. Managers have acknowledged that our consistency of decision-making and the case studies on our website have given them confidence to take action and better understand their responsibilities and good practice. Employees and agencies have identified the impartiality and expertise of the Merit Protection Commissioner as being important factors in allowing my Office to undertake investigations into breaches of the Code of Conduct where the individual must relinquish their Public Service Act review rights.

I am giving greater focus to presenting at forums and engaging in workshops when working with agencies. Smaller agencies, in particular, struggle to maintain capability and wherever possible, these agencies are a priority. For example, smaller agencies are increasingly requesting assistance with both operational (Code of Conduct inquiries) and strategic (alignment of policies on performance management, bullying and harassment and Code of Conduct) issues. My observations and input, and those of my delegates, are regularly sought on integrity and risks within review and employment frameworks through presentations to agencies, the Australian Government Leadership Network, small agency forums and training programs.

Box M1: Observations on the policy framework

The Merit Protection Commissioner encourages agencies to make principles-based employment decisions in the context of the broader APS policy framework.

Two policies received focus in casework during the reporting period. The first is the As One—APS Disability Employment Strategy, which produced the guide *Working together: promoting mental health and wellbeing at work*.⁴ The strategy aims to build an inclusive workplace culture for people with mental illness. Mental illness can feature in both performance management and Code of Conduct matters. There is a single standard of behaviour for APS employees. The usual approach during a Code of Conduct investigation is to consider mental illness as a possible mitigating factor when making a decision on sanction.

However, in keeping with the strategy, agencies are encouraged to consider whether a Code of Conduct investigation is the most effective and appropriate response to inappropriate behaviour resulting from mental illness. In some cases, working with the employee and their treating doctors to assist the employee in managing the impact of their illness on the workplace may be a more effective and appropriate response. These cases might include those where no harm has been done to the agency by the conduct, the behaviour is uncharacteristic and the employee had not, at the time of the behaviour, had a diagnosis of mental illness.

The second policy is the Gender Equality Strategy;⁵ we need to consider whether longstanding practices may require reconsideration in its light.

Agencies have discretion, in exceptional circumstances, to grant paid maternity leave when an employee is on leave without pay. Agencies generally exercise this discretion only in limited circumstances—for example, where the leave without pay is in the interests of the Commonwealth or the agency was in some way the cause of the employee's loss of entitlement.

This cautious approach to the exercise of the discretion appears in part to reflect past experience and practice, including concerns about employees structuring their leave arrangements so that they obtain an entitlement to paid leave.

The APS Gender Equality Strategy focuses on supportive cultures and flexible working arrangements. It provides a framework for delegates to look more flexibly at the circumstances of individual employees. Paid maternity leave is available only to women who are working. However, in order to balance work and family commitments, APS employees may both be on leave without pay but be working under other contractual arrangements for the Commonwealth. The changing nature of the workplace raises the question of whether delegates should give greater consideration to the beneficial application of the discretion where women are still engaged in employment for the Commonwealth while they are on leave without pay to meet family commitments.

⁴ www.apsc.gov.au/publications-and-media/current-publications/mental-health.

⁵ www.apsc.gov.au/publications-and-media/current-publications/gender-equality-strategy.

Box M2: Application of the legislative framework

The following issues have arisen from the casework.

Where there is an express power in the legislation for an agency to do something—for example direct an employee to undertake a fitness for duty assessment (Regulation 3.2)—agencies are not able to use the general employer powers in section 20 of the Public Service Act to achieve the same end.

Handling misconduct advises that agencies should calculate fines, as a sanction for misconduct, for part-time employees based on the salary they receive for the 'ordinary hours' in their part-time work agreement. On this basis, the fine imposed on a part-time employee should be calculated as a percentage of the employee's part-time salary and not on the basis of the full-time salary for the employee's classification.

FOCUS FOR THE COMING YEAR

My appointment as Merit Protection Commissioner ends in January 2018. My goal is to leave a fully effective and responsive Office that has the necessary staffing, technology and culture to ensure continued operational efficiency.

With this in mind, I have identified three broad objectives for the remainder of 2017:

- identifying legislative or policy changes for consideration by the Government
- contributing to public sector-wide understanding of integrity and risks
- promoting internal gains within the Office.

Government reviews such as the Belcher and McPhee reports have identified the need to examine processes within the APS, including administrative review. The message we will pass to agencies in presentations, briefings and discussions is that it is cost-effective to address employment matters at line manager level, simply because it is at this level where most issues arise and this lessens the risk that disputes will escalate.

In my regular discussions, agencies have requested more information and a greater number of case summaries on my website. An internal working group is considering how best to present case summaries addressing the needs of the different audiences. Ongoing refreshing of the website content will continue my focus on multiple ways of conveying information to clients, such as podcasts or short videos. I will continue issuing my regular newsletter and use my Facebook page to inform agencies of issues of interest and practical 'tips and traps' about employment matters for managers and human resources practitioners.

"The website works really well. Uncluttered and simple. One of the projects on my mind before I leave the [NSW government agency] is to look at revamping our terrible website, and yours looks a great start. Nice video!"

(Feedback from state government office holder)

We will continue to use our observations to work with the Commission to support the Government's legislative reform process. One issue identified is a drafting oversight in Part 7.2A of the Regulations to clarify how an agency head should handle a recommendation following a review of a breach of the Code of Conduct by a former employee.

While I am pleased with the performance of my Office, we are not complacent. I had a larger than usual staff turnover this year as key staff retired. I will continue training and upskilling of all staff.

My delegates and I will continue to examine business processes to determine whether there are potential productivity savings through changing the way reviews are handled and, more effective interaction with applicants to manage expectations and use of information technology. We will be considering the feedback from applicants to help manage expectations of the review process. Work is under way to enable electronic lodgment of applications and papers for reviews, and the automatic generation of emails and correspondence templates. At the same time we will examine our work practices to move to fully electronic recordkeeping. Both initiatives need to be viewed in a whole-of-system way so that work requirements are not just shifted from one area to another.

The work of my Office is largely demand driven. In part, the level of reviews is dependent on how well agencies handle dispute resolution in their agencies. I anticipate that the review casework will continue at similar levels in 2017–18, including inquiries by my Office into breaches of the Code of Conduct. Promotion review and independent selection advisory committee (ISAC) activity are dependent on agency recruitment activity. While it is difficult to predict, I envisage continued demand for promotion review and ISAC services. As noted earlier, during times of change and uncertainty there is greater emphasis on trust and integrity.

REPORTING BY FUNCTION

The Office of the Merit Protection Commissioner's 'Corporate Statement and Priorities for 2016–17' is published on the Commissioner's website. The statement identifies two functions for the Office:

- to review APS employment-related decisions
- to provide a range of fee-related services to the APS and other jurisdictions.

There is qualitative evidence that the Office of the Merit Protection Commissioner is well regarded and is having a positive impact on agency employment decision-making.

Table M1 sets out the Office's performance against its goals for 2016–17. More specific performance information is provided in the next two sections of this report.

Table M1: Office of the Merit Protection Commissioner—goals and achievements, 2016–17

Goals and statement of outcomes	2016–17 audit of achievements
<p>1. Improve agency people management performance by sharing OMPC information and observations.</p> <p>We have made a difference when:</p> <ul style="list-style-type: none"> when our input is actively sought on how to improve agency performance. 	<p>Information published on the website, including case summaries</p> <p>Contributed to the Australian National Audit Office audit of the management of underperformance</p> <p>Presentations to the Australian Government Leadership Network, SES orientations, APS Code of Conduct practitioners forum and other APSC programs</p> <p>Review of two agencies' misconduct and performance management procedures and policies</p> <p>Regular feedback to agencies through review and Code of Conduct decisions and discussions with senior managers</p> <p>Mentored senior staff in five agencies.</p>
<p>2. Contribute to public service-wide understanding and awareness of integrity risks within review and employment frameworks.</p> <p>We have made a difference when:</p> <ul style="list-style-type: none"> our observations and input are specifically requested across jurisdictions. 	<p>Information published on the website, including case summaries</p> <p>Feedback to the Commission on policy issues arising from review casework</p> <p>Participation in the Integrity Agencies Group, including dialogue with individual agencies</p> <p>Participation in OECD integrity forums</p> <p>Presentation to China Australia Dialogue on Public Administration Workshop in Hong Kong</p> <p>Hosted Indonesian secondment and addressed three other international delegations.</p>
<p>3. Progress legislative amendments to enhance the flexibility and efficiency of OMPC and agency functions.</p> <p>We have made a difference when:</p> <ul style="list-style-type: none"> our legislative framework reflects the requirements of a merit-based modern public service. 	<p>Communication with other jurisdictions, including Canada and Ireland, on best practice models for providing review and assurance services</p> <p>Contributed to discussion on changes to the Commissioner's Directions and sought changes to the PS Regulations.</p>
<p>4. Assist clients to interact with us more effectively by building on and maintaining our Clear Communications and website initiatives.</p> <p>We have made a difference when:</p> <ul style="list-style-type: none"> feedback on our communication through multiple forums is positive our clients understand our role and how we can assist. 	<p>Major update of the website and continual refreshing</p> <p>Newsletters and information sheets distributed</p> <p>Facebook account established and shared</p> <p>Updated and conducted client feedback survey</p> <p>Project to examine the use made of case studies by agencies and ways of presenting to suit audience needs.</p>

Goals and statement of outcomes	2016–17 audit of achievements
<p>5. Promote internal gains in productivity, quality and timeliness of reviews and apply technological solutions where appropriate.</p> <p>We have made a difference when:</p> <ul style="list-style-type: none"> we consistently meet reasonable standards of timeliness and quality for demand-led reviews. 	<p>Target timeframes met</p> <p>Trialled electronic lodgment of review applications with an agency</p> <p>Refreshed panels for MPC and agency nominees on committees</p> <p>Implemented flexibility initiatives such as job-sharing and working from home</p> <p>Promoted mental health awareness and developed resilience surveys within the Office</p> <p>Training of new staff and upskilling of existing staff</p> <p>Review of case management system upgrade in progress.</p>

REVIEW OF EMPLOYMENT-RELATED DECISIONS

Reviews of action performance

The Corporate Statement commits the Office to gains in productivity, quality and timeliness of reviews. The key target is that 75% of reviews will be completed within target timeframes. The target timeframe to complete reviews of actions is 14 calendar weeks—it is eight or 12 weeks for promotion reviews, depending on the size of the applicant field.

The Office again met its performance targets this year, although there was a reduction in the proportion of review of action cases finalised within the target timeframe (77.4% compared to 91% in 2015–16). This is still a good result given the number of large complex cases and the largest turnover of staff in the Office since its relocation to Sydney in 2010–11. The majority of promotion reviews (92%) continued to be completed within the relevant timeframes despite a 30% increase in the number of completed reviews.

This year we gave presentations to stakeholders to support improvements in decision-making. These presentations included addresses to the Australian Government Leadership Network in three states on *'The right way to investigate wrongdoing'*; a presentation to the APS Code of Conduct Practitioners' Network on *'Challenges in Code of Conduct decision-making'*; and presentations to three agencies on *'Gender equality and merit reviews as a strategic lever'*. The Merit Protection Commissioner and delegates continued a commitment to educating SES managers through presenting on *'Leading with integrity—APS Values, Employment Principles and ethics'* to orientation sessions for new SES officers.

‘Colleagues who attended the Tas [sic] People Management Network meeting last Friday also attended your AGLN presentation on 21 July. When asked for their thoughts re any takeaways etc., feedback was: dynamic speaker; engaging; interesting presentation re recruitment/selection processes; flexibility in the recruitment regs was noted—something to make better use of; and consensus was that speaking for 1.5 hours and not progressing beyond the first slide was impressive.

We have had previous sessions like this before but no one was able to explain it as well and in depth and apply it to situations as Annwyn.’

(Feedback from Australian Government Leadership Network forums)

The Office seeks feedback through a survey of review clients once their review applications have been finalised. The survey responses are anonymous, so they cannot be linked to specific cases. The client survey was updated and relaunched in 2016–17. The survey period covered reviews finalised from April 2016 to March 2017 and had a disappointing response rate of 18% compared with 45% for 2015–16. The survey is voluntary and we do not know why the response rate was so low.

The survey feedback confirmed that the MPC website was the primary source of information about review rights for clients, followed by information provided by the employing agency. The majority of clients found the website easy to navigate. However, 30% of survey respondents would have liked more information from the MPC’s review advisers about the scope of the review and the review process.

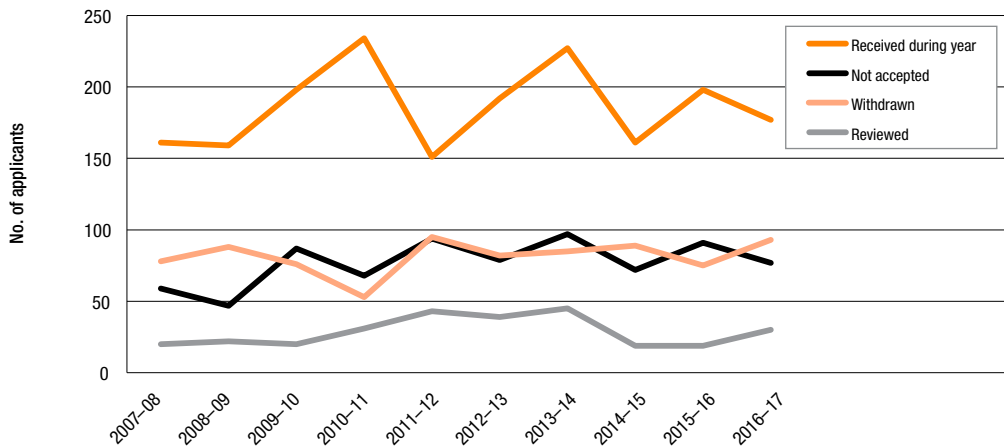
Only one survey respondent thought the reasons for decision difficult to understand. This reflects the Office’s investment in previous years in communicating decisions in plain English. Survey respondents’ most common complaint was that their views about their case had not been sufficiently taken into account by the delegate. This indicates that more work is needed on explaining and managing the expectations of employees—in particular, the balance between a clear, concise report and referencing all evidence.

‘I really want to extend my deepest appreciation to your team ... for taking the time to assess what was a complex matter. I have had a great experience with the MPC ... and your fairness in making your judgements by allowing both sides the right of reply throughout the process has been exemplary.’

(Feedback from review applicant, June 2017)

Figure M1 shows the trends in review casework in the past 10 years.

Figure M1: Trends in review caseload, 2007–08 to 2016–17



REVIEW CASELOAD

Table M2 (see appendix) provides information on the number of applications for review (other than promotion review) received, and reviews completed, in 2016–17, as compared with 2015–16.

In 2016–17, the number of cases subject to a full review on the merits increased by 24%. A total of 200 cases were finalised, of which 93 were subject to a full merits review. The remainder were ruled ineligible for reasons discussed below. The total included 47 carried over from 2015–16 and finalised.

This increase in the output of the Office occurred against a backdrop of a 10% reduction in applications for review (177) compared with the previous year. The decrease was across all review categories, including a 19% decrease in applications for review of Code of Conduct decisions. We attribute this decrease to our investment in sharing lessons and clarifying approaches with both agencies and individuals.

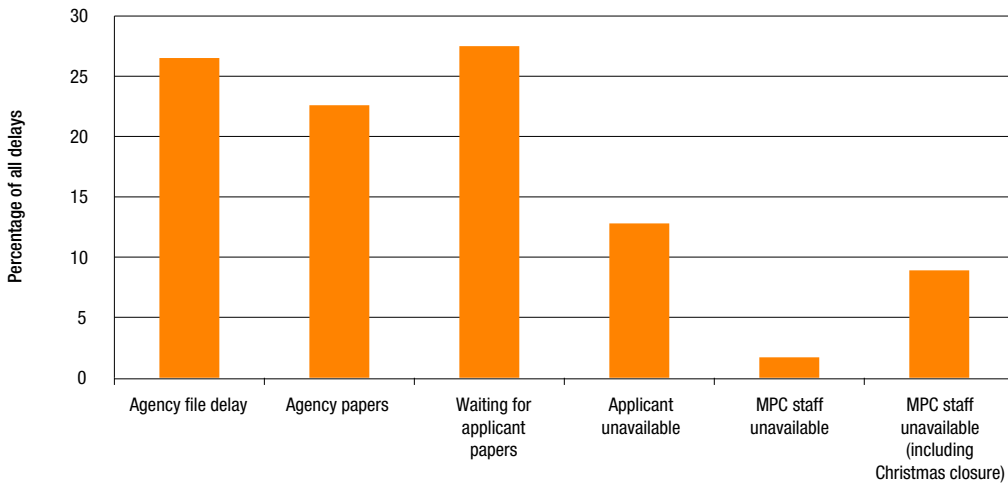
Table M3 in the appendix provides information on the timeliness with which the review function was performed. The table compares results for 2016–17 with those of 2015–16.

As noted, 77.4% of review cases were completed within target times. The average time taken to finalise a case can be influenced by its complexity, as was evident this year. The average time taken to finalise a case was 14.6 weeks, but if five large, complex cases are excluded, the average is 13.4 weeks—well within the 14-week target.

Review cases are put ‘on hold’ when the review is not able to progress. This is usually because the Office is waiting for information or because of the unavailability of parties to the review. Time on hold is not accounted for in timeliness statistics.

In 2016–17, on average 33% of the time between the date an application was received and the date the review was finalised was spent on hold; that is, the review was not being actively worked on. The average time on hold for a finalised review was 7.2 weeks, compared with 6.4 weeks in 2015–16. Figure M2 shows the reasons for delays. Improved information for agencies about identifying the relevant documents required for the review appears to have been a factor in reducing how agency processes delay finalising cases. Delays in receiving agency papers (24.8%) have reduced by more than half since 2014–15.

Figure M2: Reasons for delays in reviews, 2016–17



APPLICATIONS NOT ACCEPTED FOR REVIEW

In 2016–17, 35% of cases were not accepted for review, compared with 39% in 2015–16. The main reasons for not accepting reviews of Code of Conduct decisions were that the application was made out of time or the application did not concern a Code of Conduct breach or sanction decision. The four main reasons for not accepting applications for review of matters other than Code of Conduct decisions were as follows:

- Review or further review by the Merit Protection Commissioner was not justified, including because nothing useful would be achieved by continuing to review a matter (35%).
- The application was out of time (23%).

- The application was about a matter that fell into one of the categories of non-reviewable actions set out in Regulation 5.23 or Schedule 1 to the Regulations (21%).
- The applicant needed first to seek a review from their agency (13%).

Some of these cases are resolved quickly but cases involving the exercise of discretion can take a long time because consultation with the applicant is usually required. The average time taken to decide to decline an application was seven weeks.

NUMBER OF REVIEWS BY AGENCY

Table M4 (see appendix) details the number of reviews by agency. We completed reviews in 22 agencies. The Department of Human Services accounted for nearly 52% of the completed reviews. The Departments of Defence and Immigration and Border Protection and the Australian Taxation Office together accounted for a further 25%.

REVIEW OUTCOMES

The Merit Protection Commissioner may recommend to an agency head that a decision be set aside, varied or upheld.

In 2016–17, there was an increase in the number and proportion of cases in which we recommended that the agency decision be varied or set aside—26% (or 24 cases) compared with 12% in 2015–16. This reversed a trend in the past few years towards an increase in the number of recommendations to uphold the original agency decision. I am more likely to recommend that Code of Conduct decisions be varied or set aside than for other types of reviews—this year one third of all reviewed Code of Conduct cases (41) were set aside or varied. In comparison, I recommended in 18% of secondary reviews that the agency's decision be varied or set aside. The nature of the cases this year has been particularly complex and challenging and involved exercise of discretion.

Agencies still face challenges in analysing evidence and establishing clearly the facts of a case, particularly in complex cases. The analysis and reasoning in agency reports is sometimes unsophisticated and of poor quality. This is an area where agencies need to improve the capability of employees undertaking this work, including identifying employees with the appropriate skill set to make quality administrative decisions, providing tools and advice, and ensuring that this work is quality assured.

Box M3: Procedural concerns

The quality of agencies' written work in Code of Conduct cases can create procedural concerns. A failure to put allegations clearly, in a way that is readily understood by a general reader, can adversely affect an employee's capacity to respond, denying the employee a fair hearing.

The following are examples from cases:

- Allegations were put to the employee in a long and confusing document, so that it was difficult for the employee to understand the case they had to answer.
- Serious allegations were put to the employee but less serious findings were made. However, the agency had failed to put the less serious matters to the employee as an allegation.
- An agency redacted witness evidence so extensively in the written notice of the allegations that the employee, and a general reader, would have had difficulty following the evidence, including being unable to identify which witness had given which evidence.

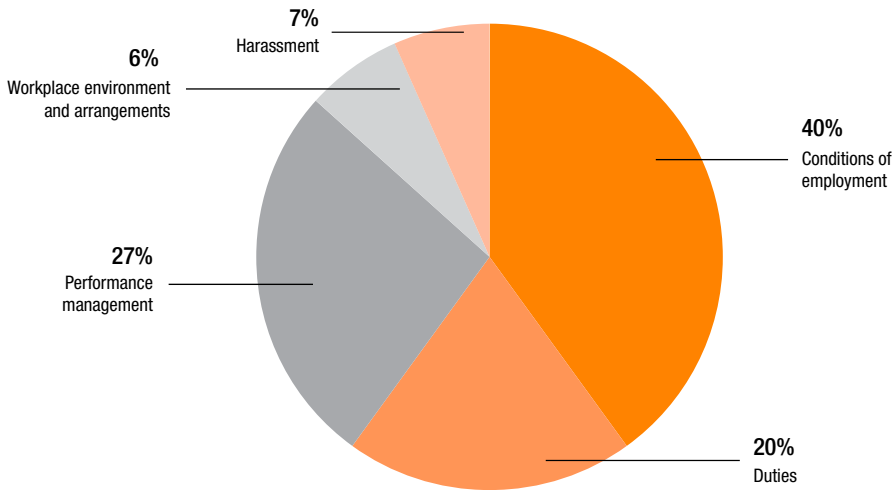
Two reviews were conducted under Part 7 of the Regulations of findings that a former APS employee had breached the Code of Conduct. In one case, the Merit Protection Commissioner recommended that the agency decision be set aside on the basis of a concern about procedural fairness; in the other case, she recommended that the decision be upheld.

There is an expectation that an agency would accept the recommendations of an independent and expert statutory office holder, except in exceptional circumstances. Section 33(6) of the Public Service Act enables the Merit Protection Commissioner to raise an agency's response to a delegate's recommendations with the relevant agency minister and with the Prime Minister or the presiding officers. At the end of the reporting period, agencies had accepted all review recommendations.

SUBJECT MATTER

In 2016–17, Code of Conduct cases accounted for 54% of all cases reviewed—a greater proportion than in 2015–16 and 2014–15 (41% and 45% respectively).

Figure M3 and Table M5 (see appendix) provide a breakdown of cases reviewed by subject matter, excluding Code of Conduct reviews.

Figure M3: Cases reviewed by subject, 2016–17

Note: Excludes Code of Conduct cases.

BREACHES OF THE CODE OF CONDUCT

APS employees who are found to have breached the Code of Conduct can apply to the Merit Protection Commissioner for a review of the determination that there has been a breach and any sanction imposed for that breach.

Based on data in the Commissioner's annual State of the Service Report over the last three years, it is estimated that the Merit Protection Commissioner reviews between 4% and 10% of agency Code of Conduct decisions.⁶ Review by the Office provides an assurance check on this important area of employment decision-making.

There were 58 applications for review of a decision that an employee had breached the Code of Conduct and/or the sanction, and 28 cases on hand at the start of the reporting period. Fifty cases were reviewed during the year, involving 41 employees.⁷ Two applications from former employees were also reviewed.

⁶ The *State of the Service Report 2015–16* reported that 87% of the 717 employees investigated were found to have breached the Code of Conduct in 2015–16. In 2015–16, the Merit Protection Commissioner reviewed applications from 28 employees relating to breaches of the Code of Conduct and a further 28 were on hand. While the two sets of data do not include the same employees, a comparison over time provides an estimate that between 4% and 10% of agency decisions are reviewed.

⁷ Employees may apply separately for a review of a breach determination and the consequential sanction decision. If employees do this, their application for review is counted as two cases. It is for this reason that there are more cases than there are employees.

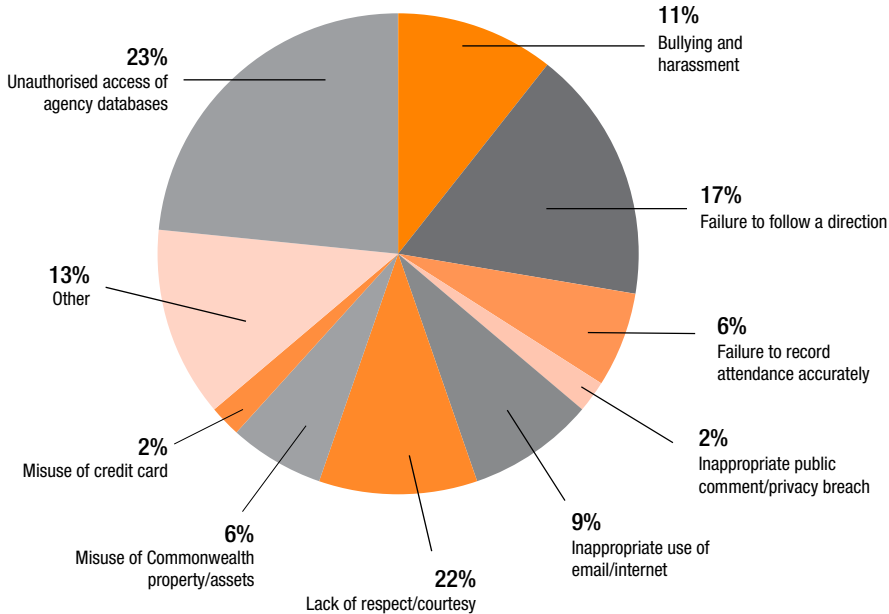
In five cases we recommended that the findings of misconduct, and/or the sanctions, be set aside. In two of those cases, the agency had not established that the employee had engaged in misconduct. In one other case, we concluded that the agency should not have proceeded to a finding of misconduct once it had learnt about the employee's mental health.

In the two remaining cases, we recommended that agencies set aside the decisions because of concerns about procedural fairness. In one of these cases, the agency had denied the employee a hearing, and in the other, the agency had failed to put adverse information to the employee before it made its decision.

In a further nine cases the breach and/or sanction decision was varied. In four of these cases the findings of breach were varied. This was a result of problems with the agency's analysis of evidence and the reasoning in investigation reports and decisions. In particular, some of the alleged breaches could not be sustained on the facts and/or the decision-maker had applied the wrong elements of the Code of Conduct to the employee's behaviour, with the effect of exaggerating the seriousness of the behaviour. In another of the cases, the agency failed to apply the most relevant element of the Code of Conduct to the employee's behaviour, and we recommended an additional finding of breach.

Three sanction decisions were varied with a recommendation to reduce the severity of the sanction, including a recommendation that a reduction in classification be reduced to a reassignment of duties. In the remaining case, we recommended both a variation of a breach decision and a reduction in sanction.

Figure M4 and Table M6 (see appendix) provide a breakdown of the types of employment matters in Code of Conduct reviews.

Figure M4: Code of Conduct cases reviewed, by subject, 2016–17

The range of alleged misconduct we reviewed in 2016–17 was varied. Unauthorised accessing of client databases and inappropriate personal behaviour involving bullying, harassment and/or other discourteous behaviour accounted for the largest number of cases. Four of the nine unauthorised access cases involved access to the employee’s own records. In seven of these cases, the employee suffered a financial penalty and all sanctions were upheld on review. In two cases, we recommended that the decisions be set aside because of procedural flaws.

Examples of inappropriate use of agency ICT resources included an employee who used a text replacement ‘plug-in’ to disguise use of inappropriate language in a departmental chat room. In another case the employee was found to have written discriminatory and derogatory comments about customers and colleagues in emails and on the department’s internal messaging software. In this case, we upheld the sanction decision of a reduction in classification.

Allegations of bullying and other discourteous and disrespectful behaviour (11 cases) represented a further 26% of cases (compared with 36% in 2015–16). These cases included employee behaviour towards managers, colleagues and the public ranging from threatening physical harm to making inappropriate comments about colleagues in emails or in conversations. In one case, an employee was found to have failed to stop contacting a work colleague outside work and the sanction of a reduction in classification was upheld. One manager was reduced in classification from Executive

Level 2 to Executive Level 1 having been found to have engaged in bullying behaviour towards subordinate staff and colleagues in other teams.

Failure to accurately record attendance and failure to follow a direction concerning attendance represented another significant area of the review caseload.

There were three cases where employees failed to perform their client service duties in accordance with agency procedures, including one case where the employee provided a benefit to a client to which the client was not entitled, in circumstances where the employee had a conflict of interest.

There were two cases where an employee's behaviour outside work became the subject of a misconduct finding. One of these involved the employee's behaviour as a client of the agency and the failure to provide accurate information to determine the employee's entitlements.

There were three cases where employees argued that their mental health should have been taken into consideration before making a finding of misconduct. In two of those cases, the employee's mental health was taken into consideration when reviewing sanction. That consideration resulted in no change to the sanction decision. In the third case, we recommended that the misconduct finding be set aside.

The two reviews of findings of a breach of the Code of Conduct by a former employee (under Part 7 of the Regulations) involved misuse of Commonwealth information and a conflict of interest with respect to recruitment.

Promotion review performance

APS employees can seek a review of an agency's decision to promote an employee to jobs at the APS 1 to 6 classification levels by demonstrating that they are more meritorious than the employees who were promoted.

The promotion review application rate remained high in 2016–17. There were 177 applications received, one more than in 2015–16. The number of applications in 2015–16 had increased by 274% over the previous year, the second highest number of promotions reviewed since 2001–02. In 2016–17, large recruitment exercises in the Australian Taxation Office, the Department of Human Services and the Department of Immigration and Border Protection accounted for 89% of finalised promotion reviews.

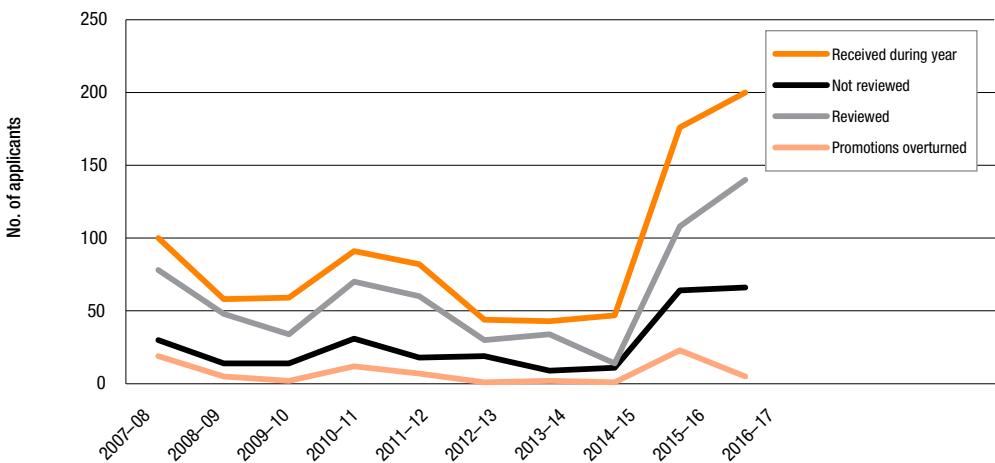
Figure M5 shows how the promotion review casework has fluctuated over the past 10 years. Table M7 (see appendix) sets out the promotion review caseload for 2016–17.

The number of promotion reviews makes it hard for us to identify suitable members to sit on promotion review committees. We sought assistance from agencies to identify independent members for large promotion review exercises. In one agency, a single panel was established and

was able to finalise a number of cases in a single day. The Office refreshed its list of agency nominees for promotion review committees and provided training to new committee members in Canberra, Sydney and Perth during May–June 2017. The participation of a representative range of agency staff on promotion review committees provides practical experience across the APS in merit-based recruitment.

We met with agencies to help them prepare for, and manage, large promotion review processes and to provide feedback on the effectiveness of their recruitment plans. We received feedback from promotion review committees about the poor quality of review applicants' statements made in support of their applications for review. In response our website now includes more guidance to review applications.

Figure M5: Trends in promotion review caseload, 2007–08 to 2016–17



Over the past six years, the promotion review function has exceeded its internal performance targets for timeliness (75% of reviews in time). Despite the continued large number of applications, 97% of promotion reviews with a target timeframe of 12 weeks were completed in time. Ninety-one percent of those with an eight-week target timeframe were completed in time.

We received applications for review of promotion decisions in 13 agencies. Agencies with two or more applications for review are shown in Table M8 (see appendix).

In 2016–17 the largest number of applications for a single finalised promotion review exercise was 57. Twelve exercises had between 21 and 50 applications each and a further 15 had between 10 and 20 applications. The average number of applications per exercise was 6.9. By contrast, the maximum number of promotions considered by a promotion review committee in 2015–16 was 62, while the average number of applications per exercise was 12.6.

Other review-related functions

Under Part 7 of the Regulations the Merit Protection Commissioner may:

- investigate a complaint by a former APS employee that relates to the employee's final entitlements on separation from the APS
- review a determination that a former employee has breached the Code of Conduct.

Table M2 (see appendix) provides information on the number of applications under Part 7 in 2016–17. Four complaints about final entitlements were received. Three of these applications were not accepted; the fourth was withdrawn.

Two review applications received from former employees for determinations of misconduct made after they had ceased APS employment were finalised in 2016–17. We upheld one of these decisions and recommended that the second be set aside on procedural grounds. A third case is still under consideration.

We identified an omission from the Public Service Regulations with respect to the provisions for reviewing a breach of the Code of Conduct by a former APS employee. This concerned the agency head's responsibilities on receiving a recommendation from this Office. In May 2017, I asked the Australian Public Service Commission to consider making an amendment to Part 7 Division 7.3 of the Regulations.

PROVIDE FEE-RELATED SERVICES

The following section reports on the performance of the fee-related services we provided in 2016–17.

Inquiries into breaches of the Code of Conduct

Following amendments to the Public Service Act in 2013 the Merit Protection Commissioner may inquire into and determine, on a fee-for-service basis, whether an APS employee or a former employee has breached the Code of Conduct when a request is made by the agency head (section 50A). An inquiry must have the written agreement of the employee or former employee.

Table M9 (see appendix) sets out the Code of Conduct caseload for 2016–17.

Two cases were on hand at 1 July 2016 and eight more were received during the year. One case was withdrawn because the employee did not consent to the inquiry. In seven of the eight cases that were finalised we determined that the employee or former employee had breached the Code of Conduct. In the remaining case, we found that the employee had not breached the Code of Conduct.

The misconduct cases investigated were serious and complex and included allegations of inappropriate use of social media; aggressive behaviour towards colleagues and managers;

performance of regulatory functions in a way that had the potential to bring the agency into disrepute; conflicts of interest in procurement and arising from a relationship in the workplace; and installing prohibited software on the agency's ICT system, creating an IT security risk. One case was on hand at 30 June 2017.

Feedback from agencies on the timeliness and quality of the inquiry work and decision-making has been positive.

Independent selection advisory committees and fee-for-service activity

The Merit Protection Commissioner establishes independent selection advisory committees (ISACs) to help agencies' recruitment processes. ISACs undertake a staff selection exercise on behalf of an agency and make recommendations about the relative suitability of candidates for jobs at the APS 1–6 classifications.

An ISAC consists of a convenor nominated by the Merit Protection Commissioner and two other members, one nominated by us and one nominated by the agency. ISACs work within agency recruitment policies and can accommodate a range of selection assessment techniques.

Agency demand for ISACs was maintained in 2016–17 reflecting the overall upturn in APS recruitment in 2015–16. Five agencies used ISACs. The 11 ISACs finalised in 2016–17 considered 2,098 candidates, of whom 193 were recommended—an average of 190 candidates and 17 recommendations per ISAC, compared with an average of 215 candidates and 54 recommendations in 2015–16. The largest recruitment exercise was 620 candidates for positions in the Department of Foreign Affairs and Trade.

Table M10 (see appendix) provides information on ISAC activity for 2016–17 compared with that for 2015–16.

OTHER FEE-FOR-SERVICE WORK

In accordance with Regulation 7.4, the Merit Protection Commissioner is able to provide other fee-for-service activities such as staff selection services and investigating grievances to non APS-agencies. In recent years, this work has consisted of providing members of selection panels for the Australian Federal Police (AFP). In 2016–17, employees of the Merit Protection Commissioner conducted two selection exercises for the AFP.

Norfolk Island fee-for-service activity

In December 2015, the Merit Protection Commissioner accepted an appointment as Norfolk Island Public Service Commissioner. Review services were provided on a fee-for-service basis. This appointment ended on 30 June 2016 and reporting requirements under the Norfolk Island *Public Service Act 2014* were fulfilled.

GOVERNANCE, MANAGEMENT AND ACCOUNTABILITY

The Office of the Merit Protection Commissioner, established under section 49 of the Public Service Act, is an independent office located within the Australian Public Service Commission. Ms Annwyn Godwin was reappointed as Merit Protection Commissioner by the Governor-General in January 2013 for a second five-year term.

The Commissioner's functions are set out in sections 50 and 50A of the Act and Parts 2, 4, 5 and 7 of the Regulations. This report and further information about the Merit Protection Commissioner's role and services are available at www.meritprotectioncommission.gov.au.

The respective responsibilities of the Merit Protection Commissioner and the Australian Public Service Commissioner (the Commissioner) are established in the Public Service Act. The two roles are complementary, particularly in relation to maintaining confidence in public administration.

The Commissioner is responsible for upholding high standards of integrity and conduct in the APS. The Merit Protection Commissioner provides an important assurance role for the APS by ensuring consistent standards of decision-making and people management practices across the APS.

Corporate governance

The Commissioner, as the head of the Commission, is responsible for its corporate governance.

During 2016–17, the Merit Protection Commissioner had managerial responsibility for the work of the Commission employees made available to work in the Office of the Merit Protection Commissioner. In 2016–17, the Merit Protection Commissioner was an observer of the Commission's Executive—a senior management group chaired by the Commissioner.

Organisational structure

The staff who support the work of the Merit Protection Commissioner are made available by the Australian Public Service Commissioner in accordance with section 49 of the Public Service Act. The Merit Protection Commissioner and the Commissioner have a memorandum of understanding for the provision of staff. The current memorandum of understanding took effect in June 2015.

The Merit Protection Commissioner's review and fee-related service activities are performed in the Commission's Sydney office. The Merit Review Policy team is based in Canberra. During 2016–17, the Merit Protection Commissioner was supported by four delegates (with two job-sharing the Principal Adviser role), a business manager, a policy officer, four review advisers, a review manager and three administrative staff, two of whom are also job-sharing.

Information Publication Scheme

Information about the Merit Protection Commissioner is included in the Commission's plan, which is available at www.apsc.gov.au/freedom-of-information/ips.

APPENDIX: Review of performance by function

The information on activity and performance provided in this appendix refers to the Merit Protection Commissioner's statutory functions. Information on the Merit Protection Commissioner's functions can be found at www.meritprotectioncommission.gov.au.

Review of employment actions

The Merit Protection Commissioner, under section 33 of the Public Service Act and Part 5 of the Regulations, conducts three main categories of reviews:

- reviews of breaches of the APS Code of Conduct
- reviews of other employment actions
- reviews of promotion decisions.

Table M2 provides information on the number of applications for review (other than promotion review) received and reviews completed in 2016–17. Table M3 provides information on the timeliness with which this function was performed. Both tables compare results for 2016–17 with those for 2015–16.

Table M2: Review of employment actions workload for 2016–17, by type of review, compared with total reviews in 2015–16

Cases	Primary reviews— Code of Conduct	Primary reviews—other	Secondary reviews	Complaints/ reviews by former employees	Total	
					2016– 17	2015– 16
On hand at start of year	28	3	14	1	46	34
Received during the period	58	14	99	6	177	198
Total cases	86	17	113	7	223	232
Reviewed	50	2	39	2	93	75
Not accepted	12	10	52	3	77	91
Lapsed or withdrawn	17	3	9	1	30	19
Total finalised during period	79	15	100	6	200	185
On hand at end of year	7	2	13	1	23	47

Notes: There is a variation in the number of cases on hand at the end of 2015–16 and at the start of 2016–17 because two cases were reassessed and handled as one case.

Primary reviews are reviews conducted by the Merit Protection Commissioner (MPC) without first being reviewed by the agency head. *Secondary reviews* are conducted by the MPC following a review conducted by the agency head or after the agency head decides the matter is not reviewable but the MPC considers it is.

Table M3: Timeliness in handling reviews, 2016–17 compared with 2015–16

Review type	2015–16		2016–17	
	Average time to complete reviews (weeks)	Completed within target timeframes (%)	Average time to complete reviews (weeks)	Completed within target timeframes (%)
Primary reviews—Code of Conduct	13.04	88.57	13.72	78
Primary reviews—other	8.14	100	22.36	50
Secondary reviews	12.58	92.31	15.3	79.5
Reg 7.2/7.2A	NA	NA	16.29	50
Total	12.91	90.67	14.62	77.4

The target timeframe for completion of primary and secondary reviews is 14 weeks from receipt of application.

Table M4 details the number of reviews by agency concerned.

Table M4: Reviews completed, by agency, 2016–17

Agency concerned	Primary reviews—Code of Conduct	Primary reviews—other	Secondary reviews	Reviews/complaints by former employees	Total
Department of Human Services	23	1	24	0	48
Australian Taxation Office	9	0	1	0	10
Department of Defence	6	0	1	0	7
Department of Immigration and Border Protection	2	0	3	1	6
Department of the Prime Minister and Cabinet	2	0	0	0	2
CrimTrac	2	0	0	0	2
Department of Agriculture and Water Resources	0	0	2	0	2
Department of Infrastructure and Regional Development	2	0	0	0	2
Fourteen other agencies (one review each)	4	1	8	1	14
Total	50	2	39	2	93

Table M5 shows the main subject matter and the secondary subject matters for all secondary cases reviewed in 2016–17. The data in Table M5 is not directly comparable with the data in tables M2–M4, because a review may involve more than one subject matter.

Table M5: Subject matter of reviews completed, 2016–17

Subject matter	Secondary subject matter	Number
Conditions of employment	Allowances/other payments	1
	Leave	13
	Hours of work	2
	Other entitlements	2
Subtotal		18
Duties	Assignment/temporary assignment of duties	3
	Relocation	2
	Reclassification	2
	Suspension	1
	Fitness for duty assessment	1
Subtotal		9
Performance management	Counselling	2
	Performance appraisal	3
	Performance pay	1
	Workplace direction	1
	Underperformance	5
Subtotal		12
Workplace environment and arrangements	Discrimination	2
	Management practices	1
Subtotal		3
Harassment	Bullying and harassment	3
Subtotal		3
Total		45

Note: Excludes Code of Conduct cases.

Table M6 shows the subject matter for all Code of Conduct cases reviewed in 2016–17. The data in Table M6 is not directly comparable with that in tables M2–M4, because a review may involve more than one subject matter.

Table M6: Subject matter of Code of Conduct reviews completed, 2016–17

Subject matter identified	Number
Unauthorised access of agency databases	11
Failure to follow a direction	8
Bullying and harassment	5
Lack of respect and courtesy	5
Inappropriate use of email/internet	4
Failure to record attendance accurately	3
Misuse of Commonwealth property/assets	3
Inappropriate public comment/privacy breach	1
Misuse of credit card	1
Other (providing false information, illegal drug use, unreasonable directions)	6
Total number of matters identified	47

Review of promotion decisions

The Merit Protection Commissioner establishes promotion review committees to conduct reviews of promotion decisions for jobs at the APS 1 to 6 classifications.

Details of the promotion review caseload for 2015–16 are in Table M6. In this table, ‘case’ means an application by one or more APS employees for review of a promotion decision or decisions arising from a discrete agency selection exercise.

Table M7: Promotion review caseload, 2016–17 compared with 2015–16

Promotion review cases	2015–16	2016–17
On hand at start of year	23	28
Received during the period	176	177
Total caseload	199	205
Reviewed	108	141
Not accepted	11	13
Lapsed or withdrawn	53	48
Total finalised during period	172	202
On hand at end of year	27	3
Target completion time (weeks)	8 or 12	8 or 12
Completed within target time (number)	104	130
Completed within target time (percentage)	96%	92%

Note: There is a variation in totals for 2015–16 published in the Merit Protection Commissioner's *Annual Report 2015–16* because one case that was subsequently withdrawn was incorrectly recorded as being lodged in 2016–17.

Table M8 lists those agencies whose promotions attracted review applications and the number of promotions considered.

Table M8: Review of promotion decisions, by agency, 2016–17

Agency	Promotion reviews finalised	Total applications received	'Active' applications received	'Protective' applications received	Promotion decisions considered	Promotion decisions varied
Australian Taxation Office	67	607	156	451	622	4
Department of Human Services	40	232	79	153	221	0
Department of Immigration and Border Protection	19	126	27	99	146	1
Department of Veterans' Affairs	3	7	3	4	7	0
Fair Work Ombudsman	3	4	4	0	3	0
Department of Agriculture and Water Resources	2	2	2	0	4	0
Seven other agencies (with one review)	7	7	7	0	11	0
Total	141	985	278	707	1,015	5

Notes: An APS employee may make an application for review of one or more promotion decisions. Not all applications are considered by a promotion review committee. Some applications are withdrawn, are held to be invalid or, in the case of 'protective' applications, do not proceed to review.

Unsuccessful candidates for a promotion may lodge an 'active' application seeking review of a promotion decision.

Employees who have been promoted and whose promotion may be subject to review may lodge a 'protective' application against the promotion of other successful candidates.

Fee-related services

CODE OF CONDUCT INQUIRIES

Section 50A of the Public Service Act enables the Merit Protection Commissioner to inquire into and determine whether an APS employee or former employee has breached the Code of Conduct. Table M9 sets out information on Code of Conduct inquiry activity for 2016–17 compared with that for 2015–16.

Table M9: Code of Conduct inquiries, 2016–17 compared with 2015–16

Status	2015–16	2016–17
On hand at start of year	0	2
Received during the period	5	8
Total workload	5	10
Completed	2	8
Lapsed/withdrawn	1	1
Total finalised during the period	3	9
On hand at end of year	2	1

INDEPENDENT SELECTION ADVISORY COMMITTEES

ISACs are established by the Merit Protection Commissioner at an agency head's request on a fee-for-service basis under Part 4 of the Regulations. Table M10 sets out information on ISAC activity for 2016–17 compared with that for 2015–16.

Table M10: Independent Selection Advisory Committees, 2016–17 compared with 2015–16

	2015–16	2016–17
On hand at start of year	2	6
Received during the period	10	10
Total workload	12	16
Completed	6	11
Lapsed/withdrawn	0	0
Total finalised during the period	6	11
On hand at end of year	6	5

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