



Australian Government  
Merit Protection Commissioner



MERIT  
PROTECTION  
COMMISSIONER

# Annual Report 2020–21





The Hon Ben Morton MP  
Minister Assisting the Prime Minister and Cabinet  
Minister for the Public Service  
Special Minister of State  
Parliament House  
CANBERRA ACT 2600

Dear Minister

I am pleased to present the Merit Protection Commissioner Annual Report for the reporting period ending 30 June 2021. As required by section 51 of the *Public Service Act 1999*, my report deals with the activities of the Merit Protection Commissioner and is included in the Australian Public Service Commissioner's Annual Report.

In preparing this report, I have taken into account those requirements relevant to my role as a statutory office holder contained in *Annual Reports for Non-corporate Commonwealth Entities: Resource Management Guide No. 135*, issued by the Department of Finance in April 2021.

Yours sincerely

Linda Waugh  
Merit Protection Commissioner

15 October 2021

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# Merit Protection Commissioner's foreword

This year marks the third year of my five-year term. My report presents an opportunity to reflect on what we have achieved in that time, and what has changed in the way we operate and for the employees of the Australian Public Service (APS). It allows me to report to my stakeholders on how my office's statutory functions have been performed and how we have helped ensure the APS continues to be a career-based organisation that makes fair employment decisions and provides flexible, safe and rewarding workplaces where employees are valued.

Our work and the way we do it continues to evolve, and we are frequently presented with new challenges. One constant has been my staff's commitment to our vision and purpose. I want to recognise how they have adapted to change and thrived during a challenging year. In addition to the COVID-19 pandemic, we saw the departure of senior officers with considerable corporate knowledge and expertise, and we undertook a significant program of work. Throughout the year, my staff members have worked positively and tirelessly, and I thank them for their continued professionalism and commitment. I would also like to thank the Australian Public Service Commission (APSC) staff members who provided the corporate support that has been so essential for the effective operation of my office.



A foundation of my office is its independence, which is a strong focus of the work we do every day. It is a critical element in giving confidence to APS employees and agencies that our work and decisions are fair and impartial. In line with this, and with the support of the APS Commissioner, we began a trial of an in-house legal counsel, who advises me and my reviewers on complex cases and general jurisdictional matters. The counsel has been a welcome addition to my office and has contributed to the independent and effective discharge of my statutory functions.

My principal statutory function—and the one to which most of my resources are directed—is the independent and impartial review of APS actions involving APS employees' employment and their day-to-day work. The purpose of the Review of Actions scheme is to create and maintain workplaces that encourage productive and harmonious working environments. The scheme does this by requiring workplace decisions to be based on merit, to be fair, and to be underpinned by our statutory Values and Employment Principles.

This year, we received 746 applications for a review of an APS action, dealt with 599 telephone enquiries, and undertook a full merits review of 152 promotion decisions and 98 workplace decisions. We also attended or facilitated 40 stakeholder meetings, delivered 16 presentations and supported our Review of Actions and Code of Conduct Community of Practice. This report provides details of many other highlights for the year; however, there are three standouts I want to mention here.

The first standout is our improved timeliness. My staff members and I have listened to feedback and have worked hard over the past three years to continuously improve how we work. When I first commenced in my role, stakeholders told me that while our reviews were thorough and of the highest standard, they sometimes took a long time to complete. We believed we could improve our timeliness, so we introduced short- and long-term initiatives to achieve it. These were about finding efficiencies in our work processes and using our resources better. In 2017–18, we were completing 77% of cases within 14 weeks and taking an average of 11 weeks to complete reviews. In 2020–21, we completed 95% of cases within 14 weeks and took an average of eight weeks to complete reviews. Our timeliness for the review of promotion decisions has been consistently high over the past few years, but this year we met our timeliness targets in 100% of cases.

The second standout relates to the types of review recommendations we were making. In 30.6% of workplace decisions we reviewed, we recommended that the agency decision be set aside or varied—typically due to a significant procedural flaw, or because the decision was not appropriate, based on the merits of the case. While this is an improvement on the previous year, where we set aside or varied recommendations in 38.5% of cases, it indicates that there continues to be room for improvement in decision-making across the APS. Over the coming year, we will continue to work with agencies, deliver practitioner training sessions and develop resources. Our new website, which will be launched early next financial year, will provide targeted resources and information to support good decision-making.

Also significant was the fact that the COVID-19 pandemic was cited as relevant to 22 decisions under review. The number of applications relating to flexible working arrangements increased from 4% last financial year to 18% this year. There is no doubt the impacts of the pandemic will continue to shape how the APS works in the coming year. We will continue to monitor this. Of particular interest will be how APS work practices shift and adapt as the combined effects of the pandemic and technological advancements continue to affect the workplace.

The third and final standout is the completion of important foundational work for delivering a range of initiatives planned for 2021–22, which was additional to the performance of our statutory functions. This behind-the-scenes work focused on providing better information and services to our stakeholders, and included:

- auditing, reviewing and rewriting our entire website content
- developing and piloting information sessions about review entitlements
- developing content for short video explainers, which will provide employees with quick, easy and accessible information on each type of review they are entitled to.

The completion of this foundational work sets up my office for an exciting and productive year ahead. We will deliver on our planned initiatives while continuing to develop resources to assist and support APS agencies in good decision-making, and provide to APS employees with fair and independent reviews of decisions that affect their employment.

A stylized, handwritten signature in black ink, appearing to read 'Linda Waugh'.

Linda Waugh

Merit Protection Commission



# At a glance



**12 staff and Merit Protection Commissioner**



**56** stakeholder engagement opportunities



**114,208** visitors to website



**599** telephone enquiries

## 746 applications under the Review of Actions scheme

**170** applications for review of workplace decisions

### Top 4 agencies

- Services Australia **53**
- Department of Defence **23**
- Department of Home Affairs **20**
- Australian Taxation Office **14**



**576** applications for review of a promotion

**152** promotion decisions subject to review

### Top 4 agencies

- Australian Taxation Office **430**
- Department of Home Affairs **65**
- Services Australia **59**
- Australian Bureau of Statistics **10**

## Review of workplace decisions

**30.6%**

of decisions varied or set aside



## Review of promotion decisions

**0.66%**

of decisions set aside



**95%** of review of workplace decisions completed within 14 weeks

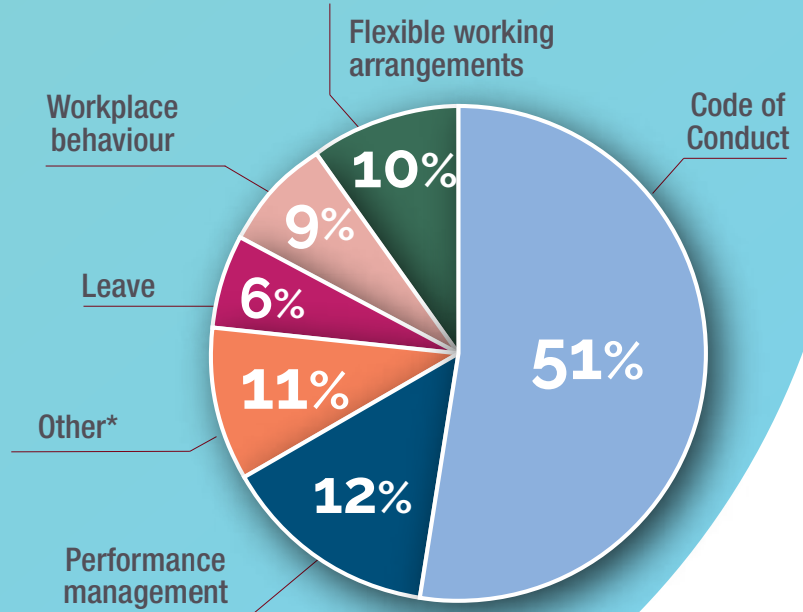
Above the 75% target



**100%** of promotion reviews completed within 8 weeks (or 12 weeks if more than 10 parties)

Above 75% target

## Reviews by subject



\* Note: 'Other' category consists of duties 5.1%; application for outside employment 1%; salary allowances 5.1%

# Overview

1.

## About us

The Merit Protection Commissioner (MPC) is an independent statutory office holder established under Part 6 of the *Public Service Act 1999* to perform a range of functions for the Australian Public Service (APS). Those functions are concerned with the implementation of, and compliance with, the APS employment framework and principles. This is done principally through review of workplace decisions affecting APS employees and through promotion reviews. The MPC also has a range of other complaint and inquiry functions and can provide recruitment and employment-related services to employers.

Ms Linda Waugh is the current MPC and was appointed on 25 June 2018. The staff of the office of the MPC are employees of the Australian Public Service Commission (APSC). Under section 49(2) of the *Public Service Act*, the staff necessary to assist the MPC must be made available by the Australian Public Service Commissioner and be people engaged under that Act. The APSC provides all corporate support, information systems and services to the MPC. The MPC is co-located with the APSC in its Canberra and Sydney offices.

Ms Waugh is also the Parliamentary Service Merit Protection Commissioner. The duties and functions of this role for Parliamentary Service employees mirror those under the *Public Service Act*, and are the subject of a separate annual report.

## Our vision

To be a centre of expertise providing independent, impartial and professional advice and services in relation to people management and workplace issues, and to contribute to the continual improvement of integrity and performance of the APS.

## Our purpose

To provide a fair system of review of APS employment actions that is efficient, timely and informal, and that contributes to productive, safe and harmonious workplaces.

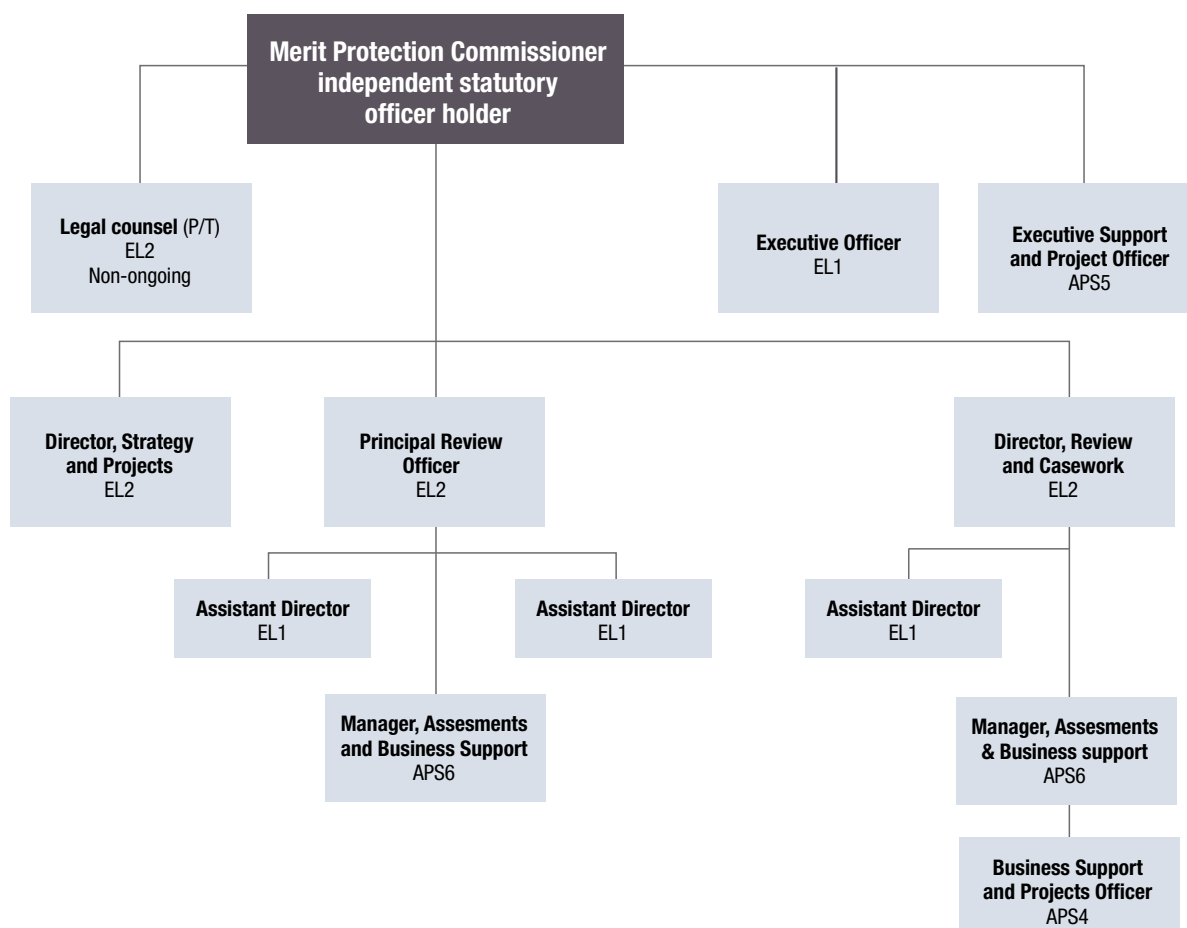
To support effective and fair employment, management and leadership of the APS by upholding and implementing the APS Values, Employment Principles and Code of Conduct.

## Our staff and structure

We operate with an average of 12.7 staff positions, using an organisational structure that supports the performance of our statutory functions.

As noted in Figure 1, our organisational structure currently includes a non-ongoing part-time legal counsel, engaged in May 2021 for a 12-month pilot. This role was introduced by agreement with the Australian Public Service Commissioner in recognition that as an office dealing with applications and cases, we have an ongoing need for legal advice, and that potential conflicts may arise for the legal services unit of the APSC when advising the MPC. At the completion

**Figure 1: Organisational structure**



of the pilot, the role will be evaluated and a decision made as to whether that role becomes an ongoing position in the Office of the MPC.

In May 2021, we also engaged a non-ongoing Executive Level 1 communications specialist to develop our communications strategy and to lead our key communications projects. This role is for a seven-month period, following which communications support and strategy will revert to being provided by the APSC communications team.

We maintain a pool of skilled casual employees, who are engaged on an as-needed basis. The casual pool is utilised when there is a surge in review applications and casework, during periods of staff absence, and to undertake specific activities. These include convening a Promotion Review Committee, sitting on an Independent Selection Advisory Committee or conducting a Code of Conduct investigation. We currently have 15 casual employees.

## Our Minister

The Minister is the Hon Ben Morton MP, Minister Assisting the Prime Minister and Cabinet, Minister for the Public Service and Special Minister of State.

## Our legislation and statutory functions

The MPC's statutory functions are set out under Part 6 of the Public Service Act and Parts 4, 5 and 7 of the Public Service Regulations 1999 (the Regulations).

Additionally, the MPC has a specialised review function for the Australian Federal Police (AFP), which is set out in the *Australian Federal Police Act 1979* (AFP Act) and the Australian Federal Police Regulations 2018.

The specific statutory authorities for each of the MPC's functions are set out in a table at Appendix A. The following sections provide a summary of each of our statutory functions.

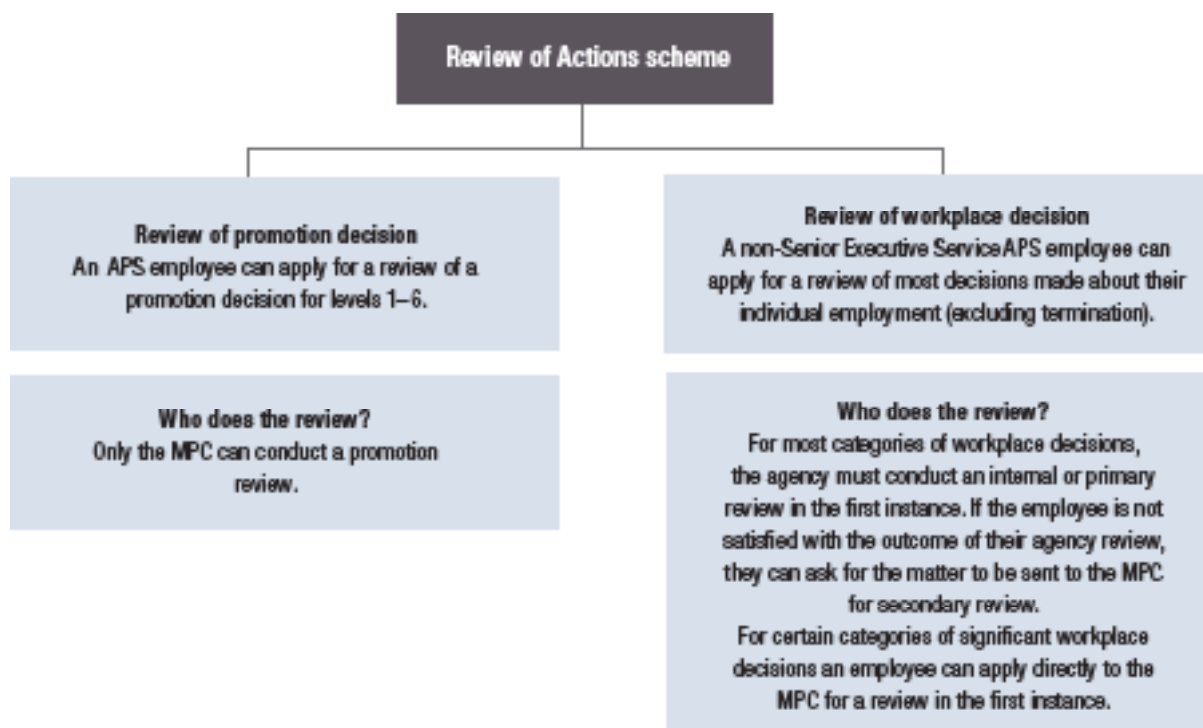
## Review of Actions

Section 33 of the Public Service Act gives APS employees an entitlement to seek a review of an action or decision that relates to their employment (excluding decisions to terminate).

Our reviews are independent, fair and merits based and are conducted in accordance with the Regulations, which state that:

- APS agencies should achieve and maintain workplaces that encourage productive and harmonious working environments
- there should be a fair system of review of APS actions
- an APS employee's concerns should be dealt with quickly, impartially and fairly
- the review process should be consistent with the use of alternative dispute resolution methods to reach satisfactory outcomes where appropriate
- nothing should prevent an application for review from being resolved by conciliation or other means at any time before the review process is completed.

**Figure 2: Types of actions under Review of Actions scheme**



The Review of Actions scheme is concerned with two types of actions that may be reviewed by either the APS agency or the MPC (as shown in Figure 2).

The outcome of an MPC review of a promotion decision is binding and must be accepted by the agency. Promotion reviews are solely concerned with merit—that is, the purpose is to assess the merits of the applicants and the promotee and determine which employee is most meritorious for the role. The review does not consider the process or whether there were faults in the original recruitment process. Promotion review is only available for promotions up to APS6 level and has strict eligibility criteria, which are discussed in the following chapter.

Unlike a promotion review, a review of a workplace decision has a recommendatory outcome. This type of review examines compliance with law, industrial instruments, policy and procedures, and considers whether the decision is the preferred or correct one. The MPC can recommend that the decision be confirmed, varied or set aside. This part of the scheme is two-tiered in that certain decisions must be first reviewed by the agency (for example, rejection of a flexible work application) before they can come to the MPC, while others—those that are especially significant

for the employee (for example, a finding that an employee has breached the Code of Conduct)—can come directly to the MPC. We review a range of different types of workplace decisions that relate to an APS employee's employment. The timeframes and eligibility criteria to seek a review depend on the seriousness and complexity of the matter and on the individual circumstances of the applicant. More information about review of workplace decisions is set out in the following chapter.

## **Review of involuntary retirement decisions for Australian Federal Police employees**

The MPC can conduct merits reviews of certain decisions taken by the AFP Commissioner to compulsorily retire APS employees on invalidity grounds, because of physical or mental incapacity. This review scheme is set out in sections 32 and 33 of the AFP Act and in the AFP Regulations. It applies to all AFP employees, including sworn officers and civilian staff, where the AFP employee has not consented to the compulsory retirement.

Our role is to make sure the retirement decision is correct and preferable in the circumstances.

## **Complaints and inquiries**

A former employee can make a complaint about the calculation of final entitlements on separation from the APS. These complaints often relate to payments made for leave accrued but not taken, delays in receiving final payments, or whether the

agency has provided adequate information to assist the employee to understand the calculation of their final payment.

The MPC can conduct an inquiry into:

- a public interest disclosure that relates to an alleged breach of the Code of Conduct and meets all the requirements of a disclosure in accordance with the *Public Interest Disclosure Act 2013*
- an alleged breach of the APS Code of Conduct by the Australian Public Service Commissioner
- an APS action, refusal or failure to act by a person in the capacity of an APS employee, Secretary or agency head, but only at the request of the Public Service Minister
- whether an APS employee, or former employee, has engaged in conduct that may have breached the Code of Conduct, but only at the request of an agency, and if the employee agrees.

## **Employer services**

We can assist employers by providing recruitment and employment services. These services can assist an employer to make high-quality and timely recruitment decisions or to effectively manage allegations of misconduct or workplace disputes. These services are provided on a fee-for-service basis. The following are the key services the MPC can provide.

### ***Independent Selection Advisory Committees***

The MPC can establish an independent committee of recruitment experts to conduct a selection process on behalf of an APS agency. The establishment of a committee is made under the Public Service Act and is independent, merits based and cost effective. It is a useful option for specialised recruitments, for smaller agencies, or for large or sensitive recruitment processes where confidence in the process, time management or impartiality is a critical factor. Promotions resulting from an Independent Selection Advisory Committee are also not subject to promotion review under the Review of Actions scheme.

### ***Recruitment services***

The MPC can provide specialised recruitment services to APS and non-APS Commonwealth entities and to state and territory agencies and departments. Our services include highly skilled and independent convenors who can manage every stage of a merits-based recruitment process.

### ***Workplace investigations and merits review of workplace decisions***

A core function of the MPC is to conduct independent merits reviews of workplace decisions or actions for the APS. We can provide these services, as well as workplace investigation services, to non-APS agencies, non-APS Commonwealth entities, and state and territory agencies and departments on request.



# Performance in reviewing APS actions

2.

# Year-end totals for all reviews of actions

During 2020–21, the Merit Protection Commissioner (MPC) received 746 applications from Australian Public Service (APS) employees seeking a review of a workplace decision that had affected their employment, or a review of a promotion decision.

Of the 746 applicants:

- 576 applied for a review of a promotion decision
- 69 applied for an MPC direct review of a determination that they had breached the APS Code of Conduct and/or the subsequent sanction decision
- 14 applied for an MPC direct review of a workplace decision on the basis that it was not appropriate for the agency to conduct its own internal review

- 87 applied for a secondary review of a workplace decision that had already been subject to their APS agency’s primary review.

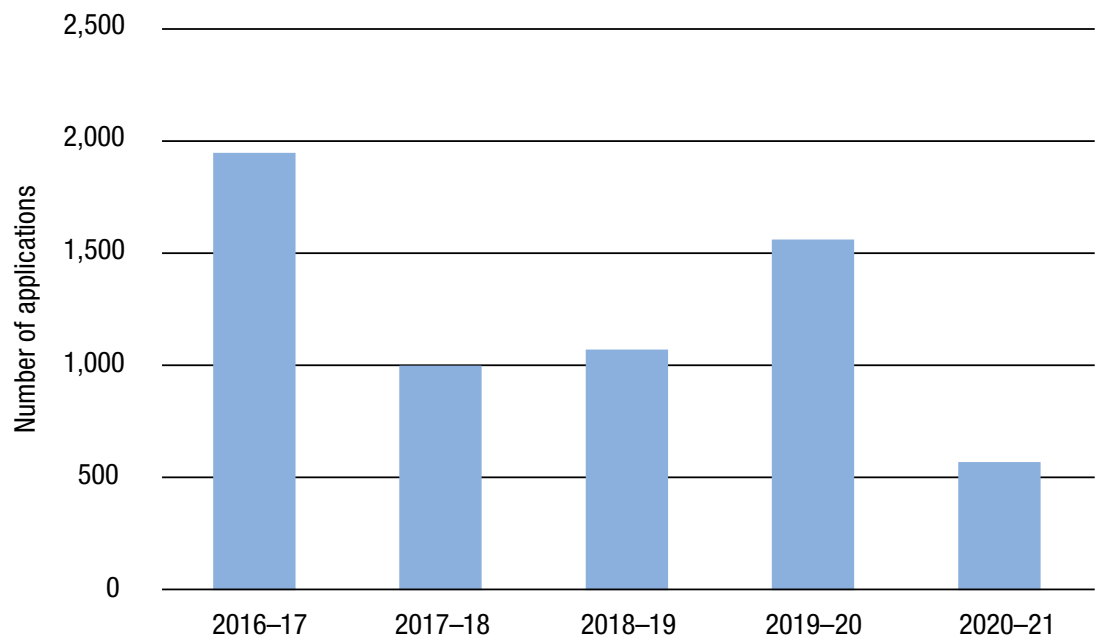
## Trends in application numbers

Figures 3 and 4 show the trend of applications received for promotion reviews and reviews of workplace decisions over a five-year period.

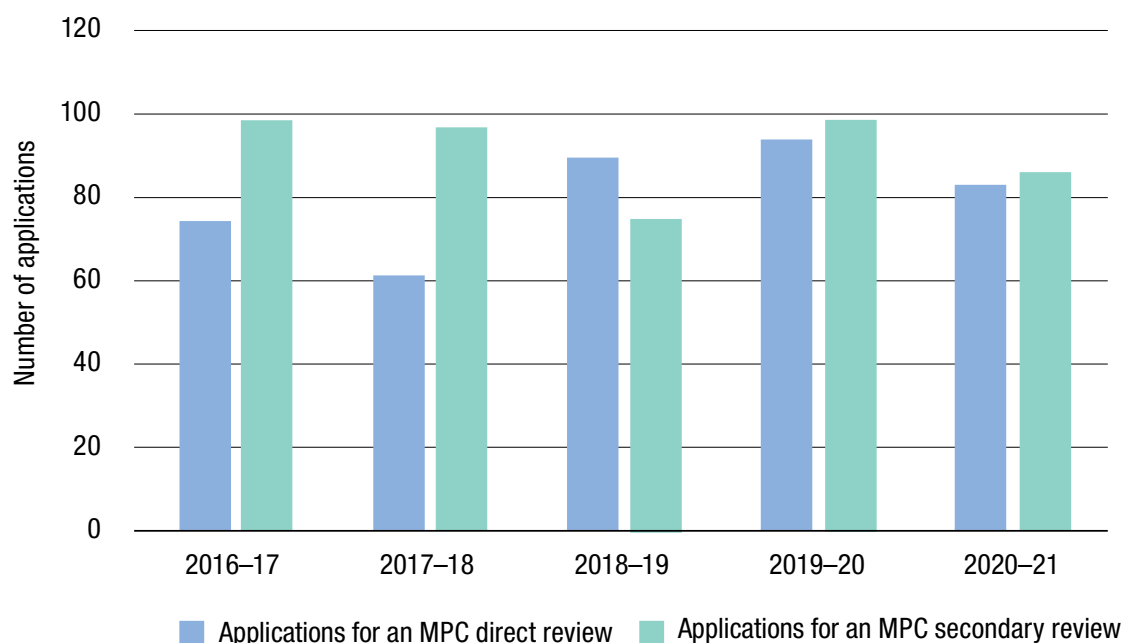
The number of applications for a promotion review varies from year to year. This pattern can also be seen in Figure 6 later in this chapter, which shows application numbers by year and month. The variability in numbers is a direct result of the volume and scale of recruitment activity undertaken by the larger APS agencies during the year. The number of applications was lower in 2020–21 than in previous years and reflects lower recruitment activity across the larger APS agencies.

Based on previous years, we anticipate an increase in applications for a promotion review in the coming financial year.

Figure 3: Applications for a review of a promotion decision, over a five-year period



**Figure 4: Applications for a review of a workplace decision, over a five-year period**



The number of applications for review of workplace decisions has remained relatively stable over time. Note that there has been a gradual increase over time in the number of applications from APS employees seeking an MPC direct review of a workplace decision. The majority of these are reviews of breaches of the Code of Conduct and sanction decisions (see 'Review of workplace decisions' later in the chapter).

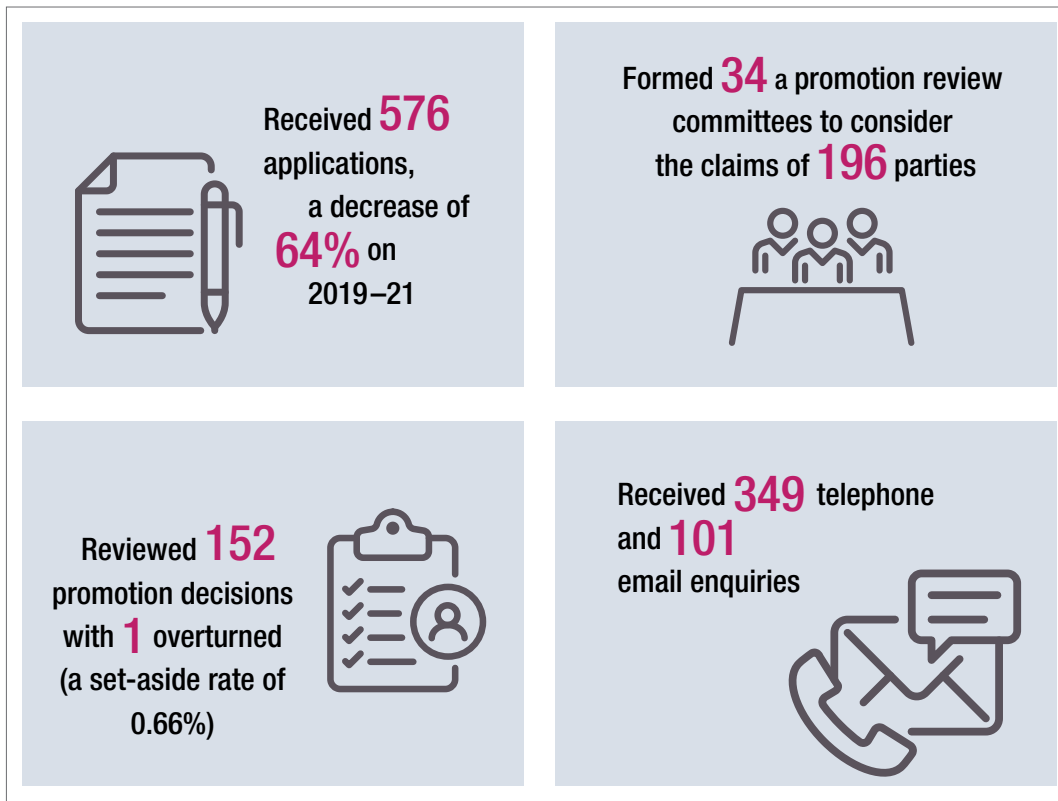
## Contact with us

During 2020-21, we received 975 enquiries through either telephone or email. Of these, 599 were telephone enquiries and 223 were emails. The enquiries were about a range of topics related to our review functions. Most were from employees seeking advice on the eligibility criteria, on how to make

an application and about timeframes. We also received calls from managers and human resources (HR) practitioners seeking guidance on their role and responsibilities in the review process. Wherever possible, we try to help resolve the caller's issue. We aim to provide advice and guidance to assist agencies to make better decisions and meet their procedural requirements.

We also received and responded to 108 calls and 45 emails that were on matters not within our jurisdiction or were misdirected enquiries.

## Review of promotion decisions



### About promotion reviews

#### Who can apply for promotion a review?

The entitlement to seek a review of a promotion decision is limited to certain APS employees and classifications, and can also depend on the location of the role.

To be eligible, an applicant must:

- be an ongoing APS employee, and
- be employed at APS classification level 5 or lower, and
- have applied for a promotion to a role at a higher classification, up to APS classification level 6, and
- have applied to the same location as the successful applicant.

The entitlement only applies in circumstances when:

- the person who won the promotion is an ongoing APS employee, and
- the role is a permanent role at a higher APS classification, and
- the application for review is made within the statutory timeframes.

In many recruitment actions, only one vacancy in one location has been advertised. In this circumstance, only unsuccessful APS job applicants for that vacancy can apply for a promotion review. There are, however, circumstances where a person who has won a promotion, and who meets the eligibility criteria for a review, can also apply for

review of a promotion decision. We call these 'successful applicants' but they are sometimes called 'protective applicants'.

This occurs when an agency conducts a 'bulk' round of recruitment, often advertising multiple roles, across multiple locations are advertised. For example, an employee may have applied for the same role in the Brisbane Mount Gravatt office, the Brisbane central business district (CBD) office, and the Brisbane Logan office. They may have been successfully promoted to a role in the Brisbane Mount Gravatt office, but they are still entitled to lodge a promotion review application for the roles they applied for in the Brisbane CBD office and the Brisbane Logan office. In many cases, a successful applicant for promotion will lodge a 'protective application' just in case another employee makes an application against the promotion. The reasoning is that if the promotion is overturned by a Promotion Review Committee (PRC), the protective applicant will have an opportunity to apply for a review of another employee's promotion, and potentially have it overturned. We had no cases this year where this scenario occurred.

### **Steps in reviewing a promotion decision**

The purpose of conducting reviews of promotion decisions is to make sure the person with the most merit was promoted to a role. There are a number of important steps to completing a review of a promotion decision.

#### **1. PROMOTION IS PUBLISHED IN APS GAZETTE**

APS promotions are published weekly in the APS Gazette and online at [APSjobs.gov.au](https://apsjobs.gov.au).

An employee who seeks to have a promotion reviewed by the MPC has 14 days from the date of this notice to make an application.

#### **2. APPLICATIONS ARE ASSESSED**

Applications are assessed to determine whether the applicant and the circumstances of the promotion meet the eligibility criteria. Ineligible applicants and those who make invalid applications are advised why their application does not proceed to a promotion review.

#### **3. PUBLICATION NOTICE ON MPC WEBSITE**

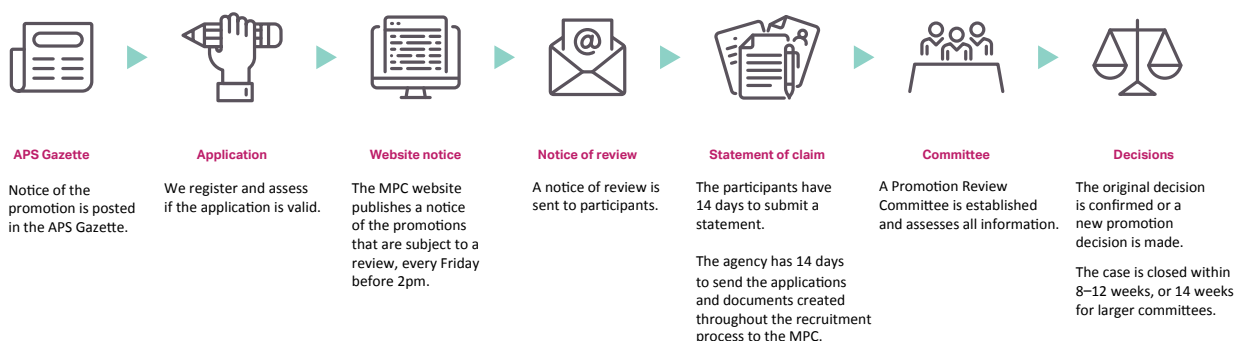
Every Friday a notice is published on the MPC website of the promotions that have been named in an application for promotion review. A case is created, and the applicant(s) and promoted employee now become parties to the case.

#### **4. PARTIES ARE NOTIFIED**

All parties to a case receive a notice that a review is now in progress. This includes the agency that conducted the original recruitment process. This notice has instructions and advice for the parties on the next steps and timeframes.

#### **5. STATEMENT OF CLAIM**

Parties are given an opportunity to submit a statement in support of their claim to the promotion. A statement can include new evidence, or information not otherwise considered in the initial recruitment process. An agency must give us all the documents and evidence relating to how the original recruitment panel reached its decision on who had the most merit. This information is collated and provided to the PRC.

**Figure 5: Stages of a promotion review**

## 6. ESTABLISH A PROMOTION REVIEW COMMITTEE

Members are appointed to a PRC in accordance with the Public Service Regulations 1999, to perform a review of a promotion decision on behalf of the MPC. A PRC has three independent and equal members.

## 7. DECISION

A PRC decides who is the most suitable candidate and has the greatest merit to

perform the duties of the role. The PRC considers all relevant recruitment records, including the role description, essential criteria, referee reports, selection report and statements of claim. A PRC may decide to conduct face-to-face interviews.

Once a decision is reached, the PRC completes a report and provides constructive feedback to unsuccessful applicant(s). The PRC's decision is final and must be complied with by the agency.

## Why do some agencies have more applications than others?

The number of applications will depend on the volume and scale of each agency's recruitment activities.

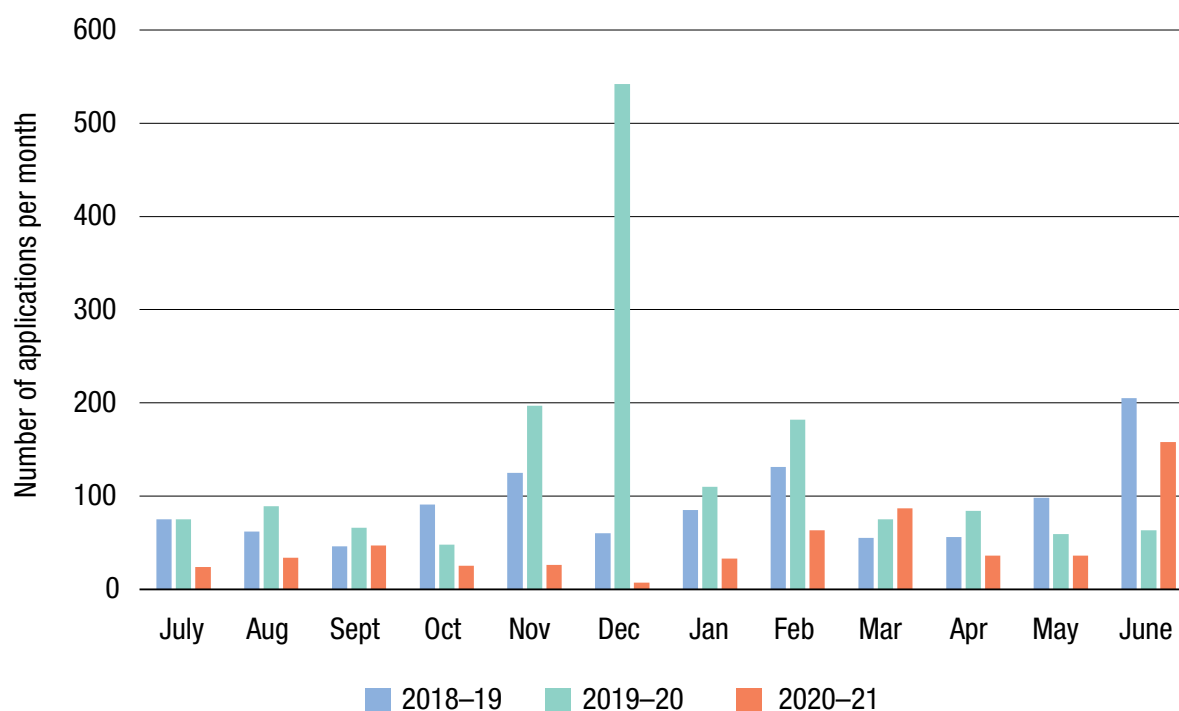
Larger agencies (such as the Australian Taxation Office (ATO)) can conduct recruitment rounds that assess the merits of hundreds of applicants for hundreds of vacancies for the same role in different towns, states and territories. This type of recruitment activity will generate more opportunity for individual employees to exercise their right to seek a review.

Another factor is the culture of the agency and the value it places on its employees' right to know and understand their entitlements.

A positive workplace culture has a commitment to informing employees of their right to seek a review.

Agencies can do this by having senior management send a clear message of support through the human resources (HR) team and by having high-quality induction programs, as well as training and internal communications that assist their staff to understand their entitlements and how to seek a review.

**Figure 6: Applications for a promotion review received, by month, over a three-year period**



## Applications received

In 2020–21, we received 576 applications for a review of a promotion decision. As shown in Figure 6, applications for promotion reviews can fluctuate significantly from month to month, consistent with the level of recruitment activities in APS agencies.

Table 1 includes the number of applications from APS employees who were promoted (successful candidates) but still made a promotion review application against another promotee. In most instances, these applications lapsed after the 14-day timeframe for applications to be received closed. These applications lapsed because no employee made a promotion review application against the successful candidate's promotion.

Table 2 lists the outcomes of the 576 applications for a promotion review received this financial year.

**Table 1: Applications received from successful and unsuccessful applicants**

Applications received	Number
Successful candidate (protective)	433
Unsuccessful candidate	61
<b>Total</b>	<b>494*</b>

\*Note: This total does not include the 82 applications assessed as ineligible, withdrawn or yet to be assessed at 30 June 2021.

**Table 2: Outcomes of applications for a promotion review**

Application outcomes	Number
Lapsed	326
Promotion review case created	168
Ineligible	70
Withdrawn	6
Received, not yet assessed	6
<b>Total</b>	<b>576</b>

## Promotion review cases

When we prepare for a promotion review, we create a 'case'. A case is how we track applications to a particular agency, vacancy and location. A case can include numerous parties seeking to have their merit assessed for a role.

For each case, we gather together statements of claim, role descriptions, referee reports, selection reports and any interview notes created by the agency's recruitment panel. This information is collated to assist the PRC to make its decision.

We handled 60 cases this year. Of those, 21 did not proceed to a promotion review because the applications lapsed or were withdrawn. There were 34 cases where a PRC was established to review a promotion decision, involving a total of 196 individual parties. The remaining five cases were not completed in this financial year (see Table 3).

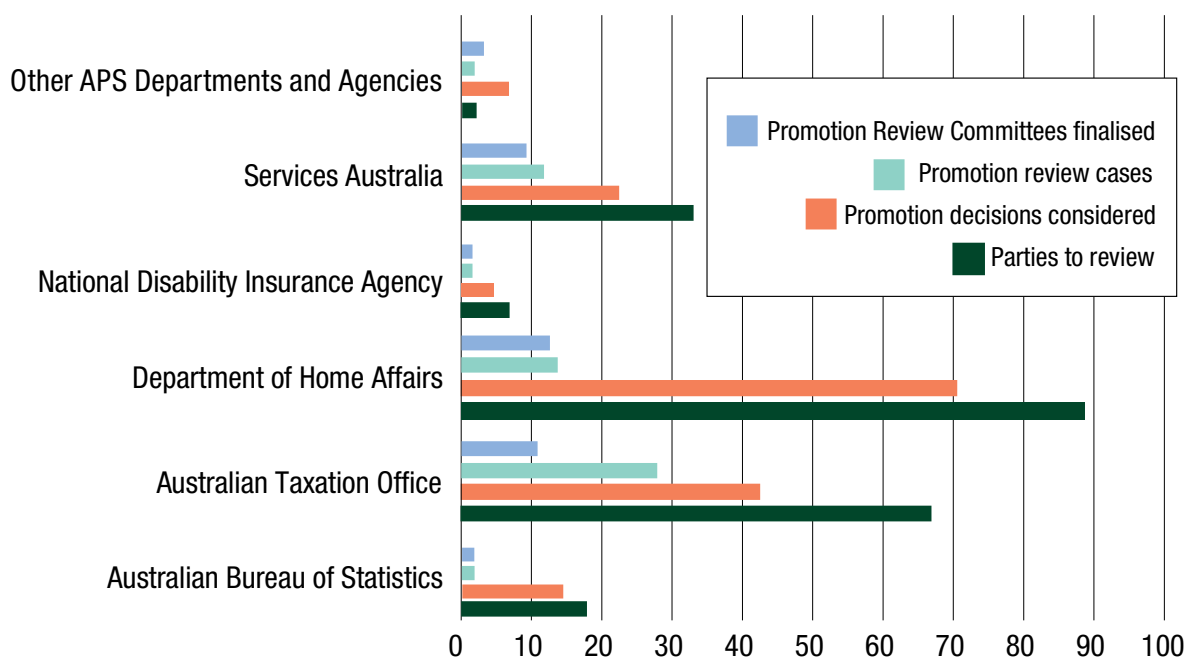
**Table 3: Status of promotion review cases**

PRC cases	Number
Proceeded to promotion review	34
Lapsed or withdrawn	21
Ongoing	5
<b>Total</b>	<b>60</b>
<b>Parties involved</b>	
Number of parties	<b>196</b>

During 2020–21, the largest number of parties to a promotion review for a single recruitment exercise was 19. This compares with 52 in 2019–20 and 71 in 2018–19. Five other promotion review cases had 10 or more promotion review parties, compared with 24 in 2019–20 and nine in 2018–19.

Figure 7 breaks down cases by agency, with the number of decisions considered, the total number of parties involved, and the number of PRCs finalised.

**Figure 7: Promotion review workload by agency**





## Promotion review outcomes

In the vast majority of promotion reviews, a PRC does not vary or change the promotion decision. This year, only one promotion decision was overturned by a PRC, which is similar to previous years (four in 2019–20 and two in 2018–19).

## Timeliness

Our performance target for conducting promotion reviews is for 75% to be completed:

- within eight weeks of the closing date where there are up to 10 parties to the review
- within 12 weeks of the closing date where there are 10 or more parties to the review.

This year, we completed 100% of promotion reviews within our target timeframes. This is

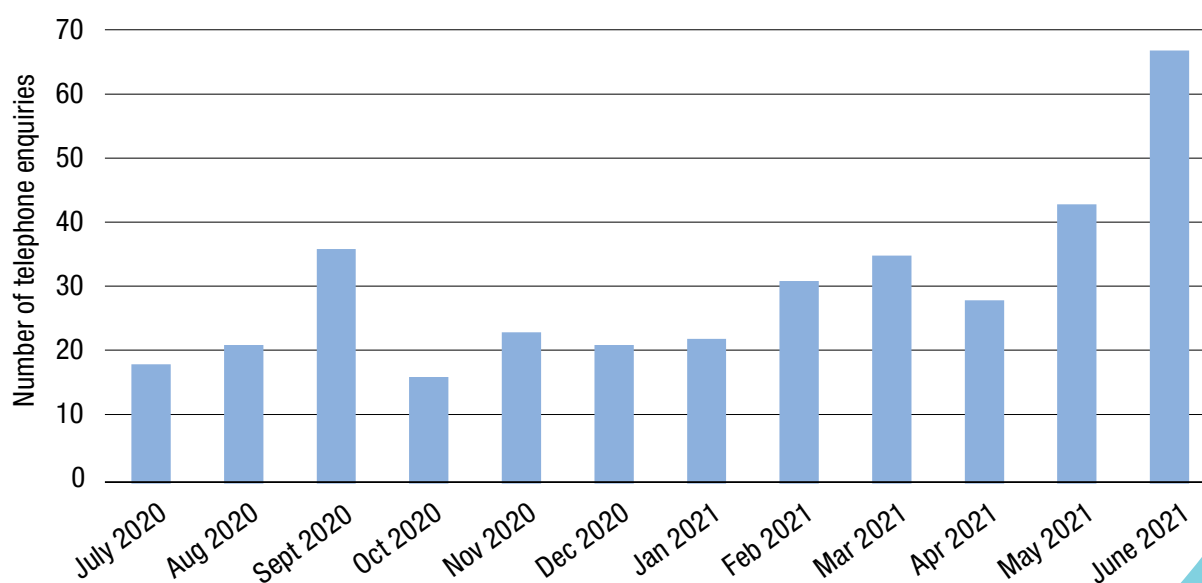
an improvement on last year's result, which was 78%. However, last year we dealt with a significantly higher number of applications, which surged in late 2019 and early 2020. In 2018–19, we completed 95% of cases within our timeliness target.

## Contact with us

We collect data on the number of enquiries we receive from employees, agencies and applicants about promotion reviews. We will continue to improve our collection and analysis of this data and use it to make decisions about where we focus our resources.

Throughout the year, we received 349 telephone enquiries about the promotion review process, which represents 58% of all telephone enquiries received. We received 101 email enquiries about promotion reviews during 2020–21.

**Figure 8: Promotion review telephone enquiries by month**



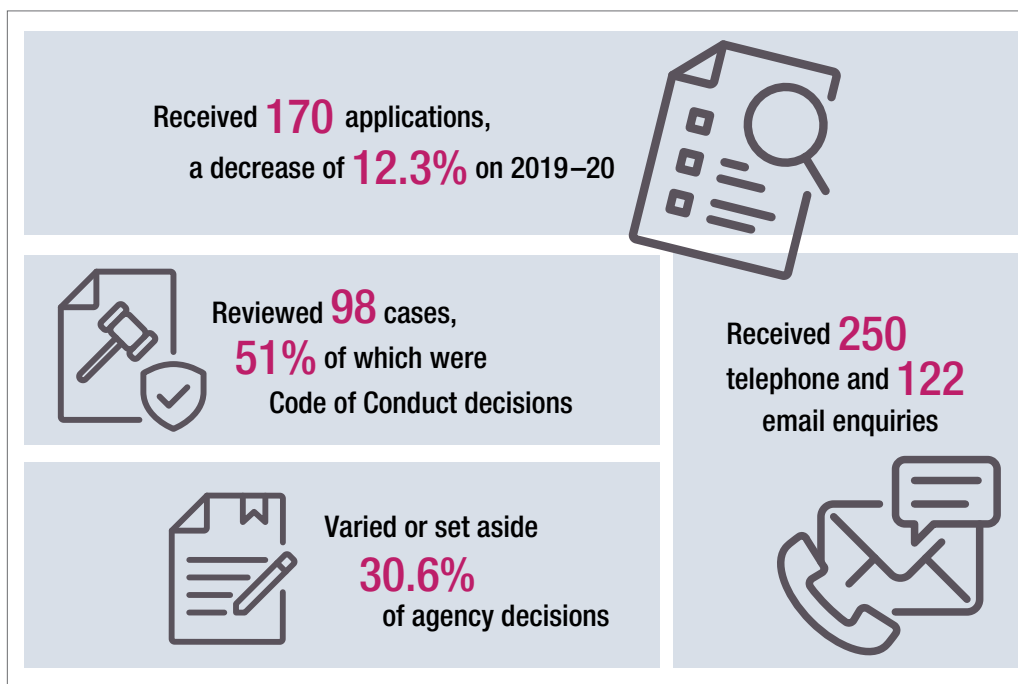
Of the 349 promotion review telephone enquiries received:

- 116 concerned a current promotion review case (33%)
- 211 were general enquiries about promotion reviews (60%)
- two concerned a finalised promotion review case (less than 1%)
- 20 were categorised as 'other' (6%).

By agency, the breakdown of promotion review telephone enquiries was:

- 153 concerning the ATO (43%)
- 41 concerning Services Australia (11%)
- 28 concerning the Department of Home Affairs (8%)
- 127 concerning four other agencies or an undisclosed agency (36%).

## Review of workplace decisions



### About review of workplace decisions

#### Who can apply for a review of a workplace decision?

The entitlement to seek a review of a workplace decision is available to all ongoing and non-ongoing non-Senior Executive Service (SES) APS employees.

A former employee (non-SES) can seek a review in one circumstance: a determination that they have breached the Code of Conduct. This entitlement only applies if the decision was made after the employee left the APS.

### **What workplace decisions can be reviewed?**

We can conduct reviews of a range of workplace decisions that affect a person's employment in the APS. For example, we can review decisions about performance management ratings, improvement plans and leave requests, and the handling of complaints about bullying, sexual harassment or inappropriate workplace behaviour.

We also review determinations that an employee has breached the Code of Conduct and any associated sanction decision, including a reduction in salary or classification, reassignment of duties or a reprimand.

Decisions that we cannot review include decisions that involve high-level strategic and resourcing decisions or the reasonable assignment of duties. These exclusions are set out in Schedule 1 of the Regulations.

### **MPC direct versus secondary review**

As outlined in Part 1, for certain workplace decisions, an employee can apply directly to the MPC to review a workplace decision; for the remainder, the agency must conduct the initial or primary review before it comes to our office. We explain below the difference between an MPC direct review and an MPC secondary review.

#### **MPC direct review**

APS employees can apply directly to the MPC to conduct a review of a workplace decision without first applying to their agency in certain circumstances:

- a. An investigation has determined that the APS employee (or in certain circumstances, a former employee) breached the Code of Conduct and/or the resulting sanction decision.
- b. It is not appropriate for the agency to conduct an internal primary review of the workplace decision because:
  - the agency head was directly involved in making the decision or taking the action that is the subject of the review
  - it is not appropriate due to the seriousness or sensitivity of the decision or the action
  - it is alleged the action or decision is victimisation or harassment of the employee for having made a previous application for review.

APS agencies are also able to refer matters requesting that the MPC conduct a direct review in circumstances where:

- the agency head was directly involved in the decision or the action
- it is not appropriate for the agency to conduct the review due to the seriousness or sensitivity of the matter
- the decision was taken by a statutory officer and that officer is supervising or managing the APS employee.

### MPC secondary review

With the vast majority of decisions, an APS employee must first request that their agency conduct an internal review. This is generally called a 'primary' review. It is designed to give agencies an opportunity to:

- deal with serious or less complex matters quickly and informally
- resolve an issue before it escalates to something more serious
- fix a problem, mistake or error with a decision quickly
- identify and address an emerging issue before it becomes a systemic problem.

If the employee is not satisfied with their agency's primary review, they advise the agency that they request that the MPC conduct a secondary review. The agency must forward the review to the MPC for the secondary review. This means we have a fresh look at the original decision.

Employees are also entitled to apply for an MPC secondary review if their agency head has declined a request to conduct a primary review of a decision.

### Steps in reviewing a workplace decision

Our reviews are independent, fair and merits based. Our role is to stand in the shoes of the original decision maker and to take a fresh look at the relevant facts, law and agency policy to reach a decision. We must have regard to the individual circumstances of each matter. We may also ask for additional supporting documents such as policies, procedures and examples of the applicant's work or rosters. It will depend on the issue or decision we are reviewing. Each review is unique.

Once our review is completed, we make a recommendation that the agency:

- uphold its original decision or action, or
- vary it in some way, or
- set it aside, including in some cases recommending an alternative outcome.

Figure 9 illustrates the steps in reviewing a workplace decision, whether it is reviewed by the agency first or comes directly to the MPC in the first instance.

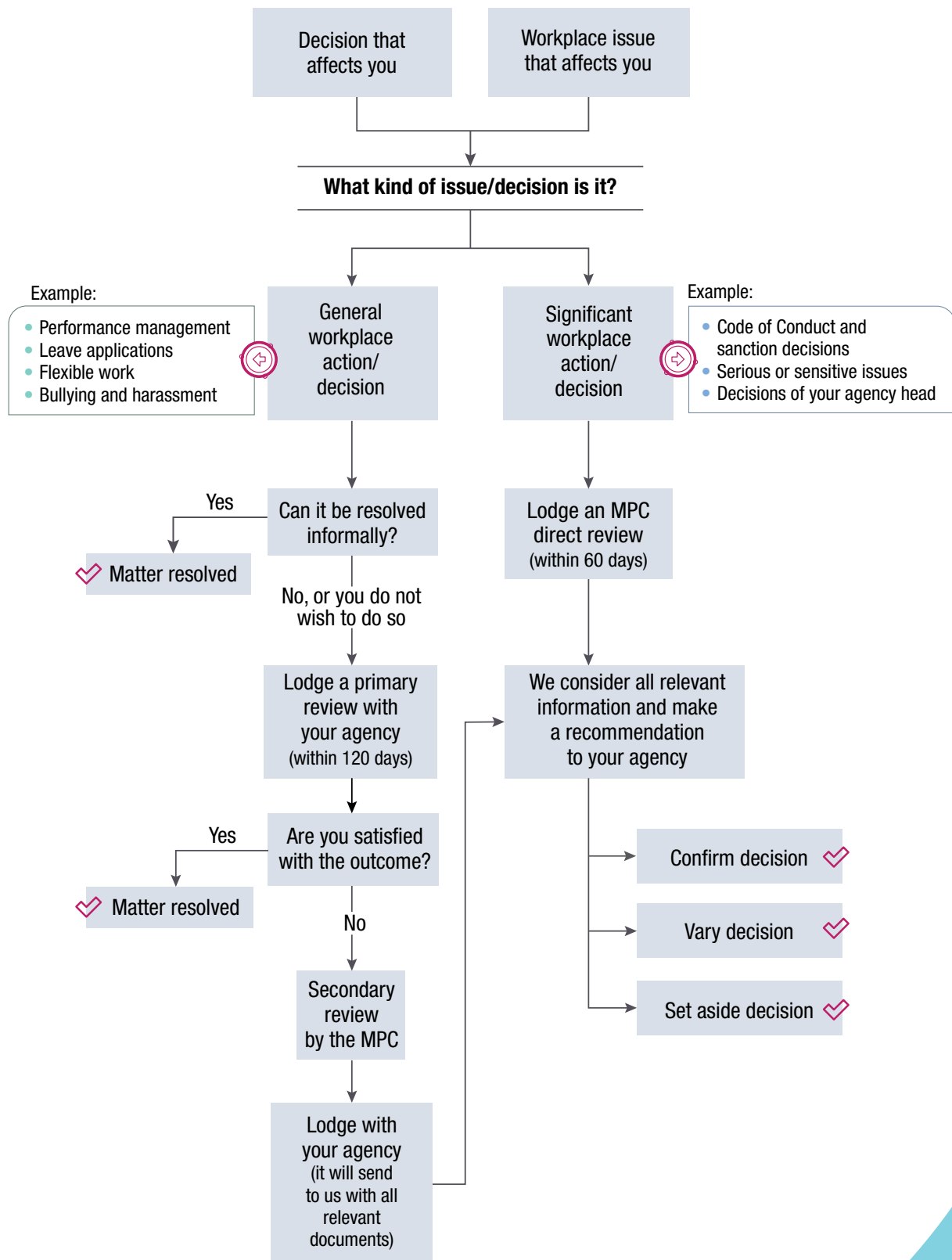
### Applications received

Our total review caseload for 2020/21 was 197 cases, comprising 170 applications received during the year and 26 applications carried over from the previous year. We finalised 177 and the outcomes were:

- 98 proceeded to review
- 49 did not meet the eligibility criteria for review
- 23 were withdrawn prior to a review being finalised
- seven were resolved prior to completion of the review, where parties agreed to an outcome that no longer required our involvement.

Table 4 shows the number of applications for review of a workplace decision we received and finalised this year and the number of agencies whose decisions were subject to an MPC review.

**Figure 9: Flowchart of the life cycle of a review**



**Table 4: Applications received and finalised and the number of agencies involved**

Applications	2020-21
Received	170
Finalised	177
Agencies involved	28

Figure 10 shows the number of applications received over a 10-year period. This year, we had a 12% decrease in the number of applications received, compared last year. Despite this, the numbers have remained relatively stable over a number of years, particularly in relation to applications reviewed (98 applications were reviewed this year compared to 99 last year).

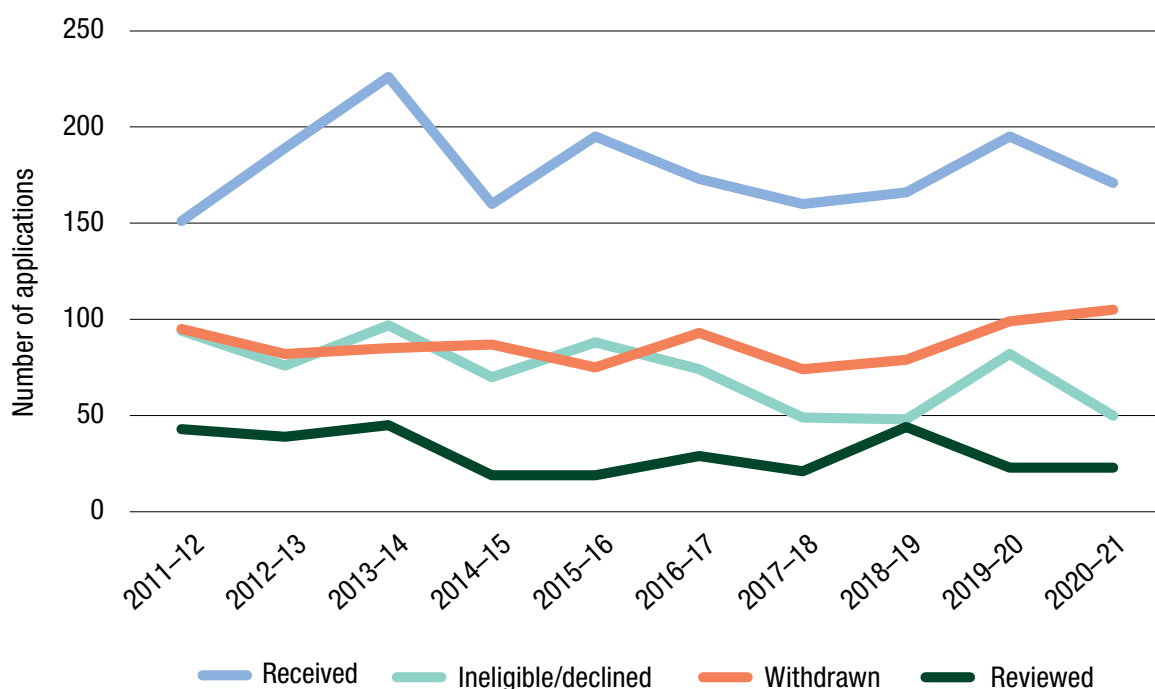
Nearly 30% of all applications for review of a workplace decision did not proceed to review.

The primary reasons for this are:

- the decision was excluded under Schedule 1, item 10 of the Regulations—for example, it was an operational, strategic policy or resourcing decision that did not have a personal impact on the applicant
- there were no special circumstances relating to the decision or the applicant that enabled the MPC to conduct a direct review prior to the agency doing its own internal review
- the applicant made their application out of time, and without evidence of an exceptional circumstance to explain the delay.

For applications that do not proceed to review, we provide written reasons for our decision and advice on other courses of action to resolve the applicant's concerns.

Next year, we will continue to improve how we communicate with and inform APS employees and agencies on how we

**Figure 10: Applications received and outcomes over a 10-year period**

make our decisions, and about timeframes and eligibility criteria. We hope to see a corresponding reduction in the number of ineligible applications in the coming year.

APS employees who have applied for a promotion at Executive Level 1 or 2

classification and allege there was a 'serious defect' in the recruitment process can seek a review. This year, we received three such applications, all of which were declined on the basis that there was insufficient evidence to meet the criteria for serious defect.

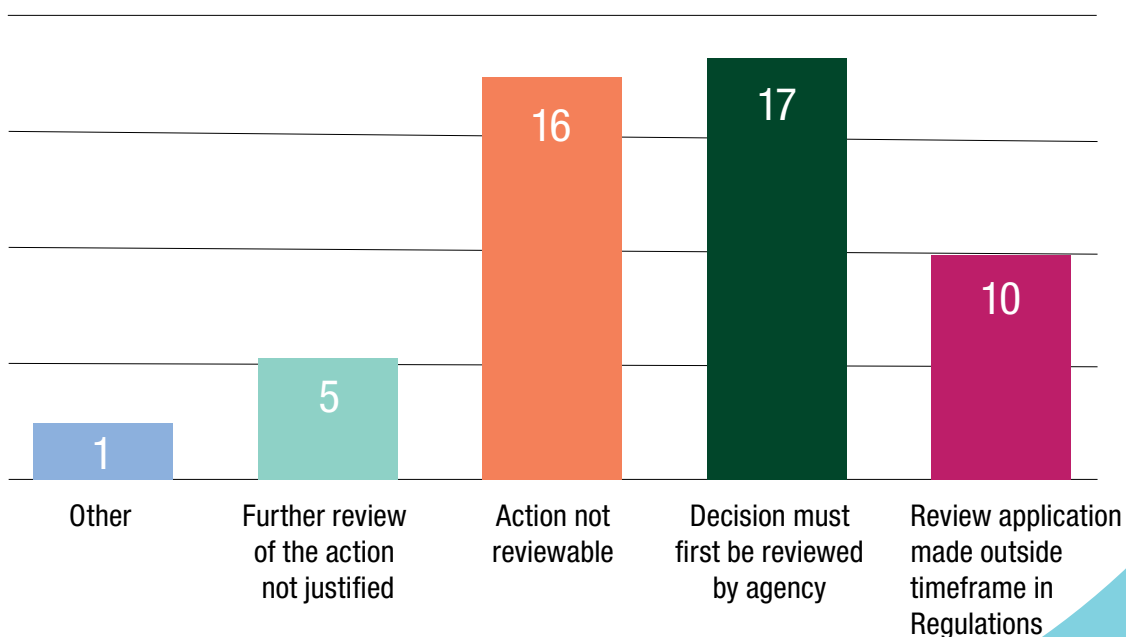
### Reviewing the consistency of the recruitment process

A recruitment process involved only a short interview with each candidate. The applicant considered that it was a serious defect in the selection process for the panel to have rated the suitability of the applicants solely on their performance at the interview.

In the applicant's view, the panel should have had broader consideration of the skills, qualifications and experience outlined in the written application and curriculum vitae. Our review noted that the merit principle in the Public Service Act defines when a decision is based on merit but does not restrict the way in which an agency may assess an applicant's relative suitability for the role. Our review found that each interviewed applicant was afforded the same process and the panel decision was based on an assessment of each candidate's suitability to perform the role.

While we did not consider there were any serious defects, we noted the agency had used different decision makers for different stages of the recruitment process. We wrote to the agency and encouraged it to reconsider this practice in its future selection processes.

**Figure 11: Reasons applications did not proceed to review**



Note: The 'Other' matter was more suitably handled by another agency.

### Applications by agency

There are 112 agencies in the APS, of which only 28 (25%) had employees seek a review by the MPC of a workplace decision. The four largest agencies by number of employees—Services Australia, the ATO, the Department of Defence and the Department of Home Affairs—comprise 56% of APS employees and 65% of review applications made to our office. Table 5 shows the breakdown of applications by agency for 2020–21.

**Table 5: Applications by agency**

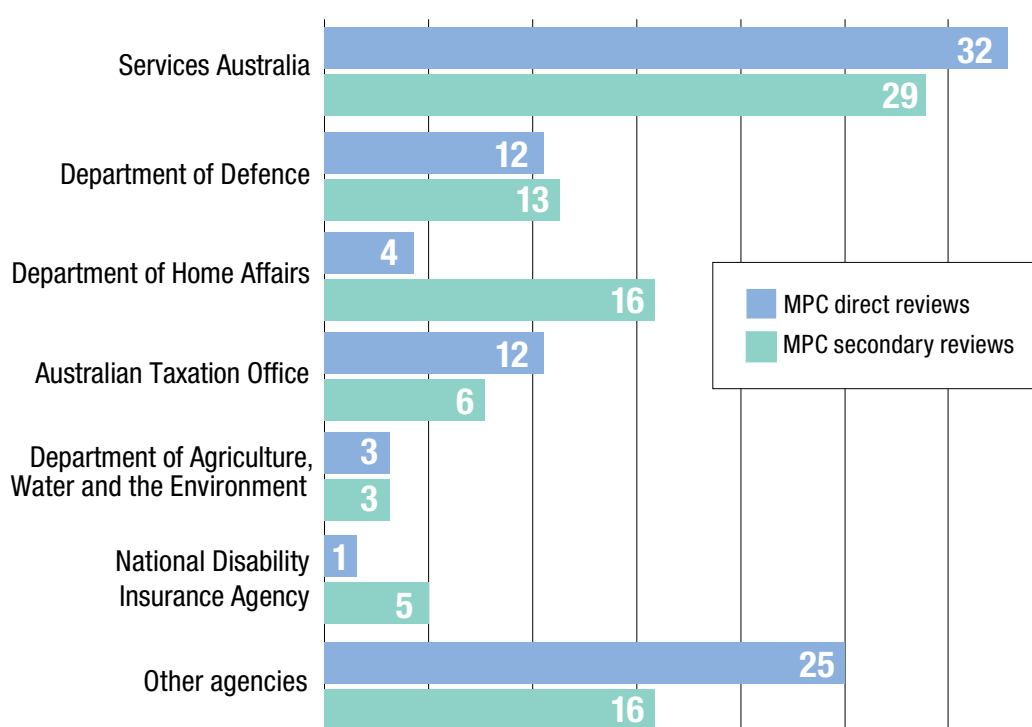
Applications	2020–21
Services Australia	53
Department of Defence	23
Department of Home Affairs	20
ATO	14
All the rest	60

Figure 12 shows the number of applications received for direct review and for secondary review, by agency. About half of the applications from Services Australia, the ATO and Defence employees were made directly to the MPC, meaning the decision was serious, involved the Code of Conduct, or similar.

We received more applications (75%) from Home Affairs employees who were not satisfied with the outcome of the agency's primary review.

The MPC meets senior representatives of these agencies on a regular basis to discuss significant issues, timeliness and any patterns or trends identified during our review work.

**Figure 12: Applications for reviews of workplace decisions, by agency and type**



Note: 'Other agencies' comprises 13 agencies with fewer than five review applications each.



## Review outcomes

In 2020–21, we completed 98 reviews of workplace decisions to determine whether the correct and preferable decision had been made. Conducting a merits review is resource intensive and requires considerable skill as well as a deep understanding of the principles of administrative decision-making.

Of the 98 reviews:

- in 68 (69%) we agreed with the original decision and recommended that the agency decision or action be upheld
- in 30 (31%) we recommended that the decision under review be varied or set aside.

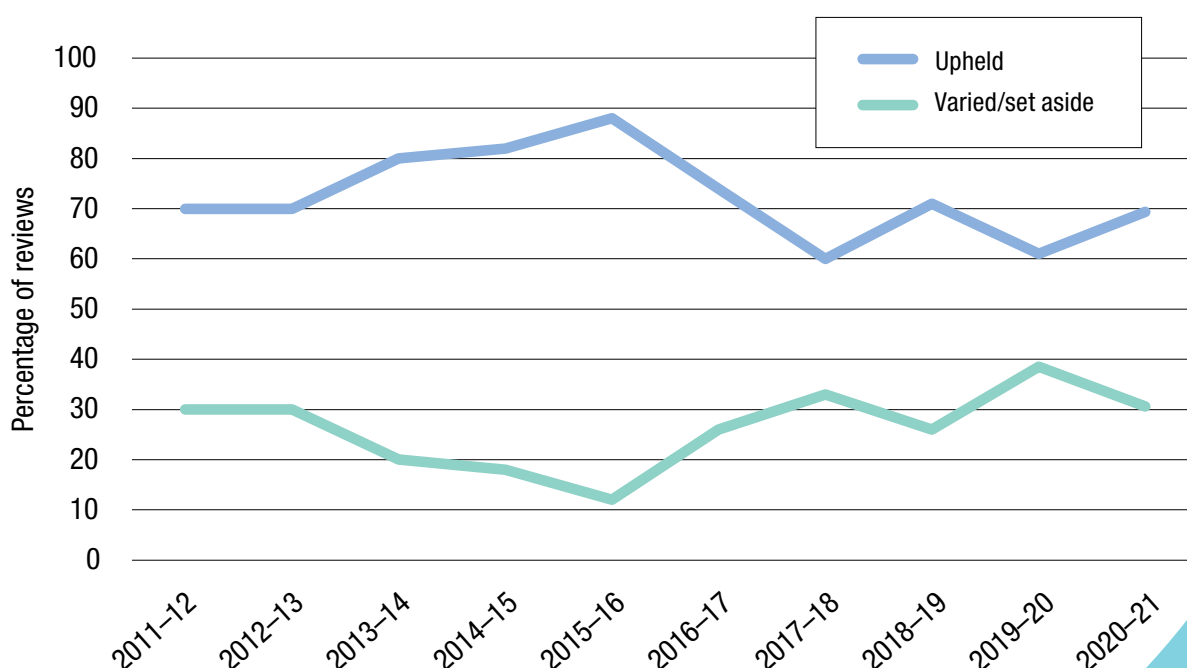
This year, all but one of our recommendations to agencies were accepted.

**Table 6: Percentages and totals of decisions set aside or varied**

Decisions set aside or varied	2020–21
Code of Conduct	15 (30%)
Secondary review of workplace decision	14 (32%)

Figure 13 shows the trend over time in the proportion of cases upheld, varied or set aside. There was a small increase in the number of decisions upheld this year. We will continue to identify areas where we can build capability and capacity in the sector to reduce this rate. We do this through our community of practice forums, having case studies on our website and developing tip sheets for agencies and decision makers on how to make good decisions.

**Figure 13: Percentage of agency actions set aside/varied or upheld, over a 10-year period**



The main reasons why we set aside a decision or recommend that the agency vary it are:

- significant procedural errors
- insufficient evidence to support the decision maker's conclusions about facts relating to the case
- misapplication of a policy or an enterprise agreement

- insufficient weight or consideration given to the individual circumstances of the matter.

The following case studies are examples where an agency did not comply with its procedural obligations, where the individual circumstances of the applicant were not properly considered, and where a delay resulted in an unfair decision being made.

### **A procedurally unfair misconduct investigation**

An employee was found to have engaged in harassing and bullying behaviour towards a co-worker. The employee's conduct was found to have breached the Code of Conduct. The employee sought a review on the basis that the decision was unfair and wrong.

Misconduct investigations in the APS must meet the requirements of procedural fairness and comply with the agency's procedures for handling misconduct investigations, including that:

- the employee must be informed of the allegations against them
- the employee must be given a reasonable opportunity to respond to the allegations
- the person making the decision must be independent and unbiased.

In our view, the decision maker's actions indicated that they had already made up their mind that the employee had engaged in misconduct prior to hearing the applicant's version of events. When putting their preliminary view to the employee, the decision maker invited them to identify which sections of the code were breached, without providing any opportunity to discuss whether they had engaged in the conduct. This supported the view that the decision maker failed to have an open mind, raising a perception of apprehended bias. In addition to this, the allegations lacked sufficient detail for the applicant to fairly and adequately respond.

We recommended that the agency set aside the decision on the basis that the employee did not get a fair or unbiased hearing. The agency accepted this recommendation.

### **Failure to take individual circumstances into account**

An employee applied to work from home for one week to care for their elderly parent following surgery. The agency declined this request on the basis that the employee would be unable to both care for their parent and perform their duties. The agency instead invited the employee to submit an application for carer's leave. The employee did so, and this was granted.

The employee applied for a review as they felt the agency decision was unfair and did not take into account the exceptional circumstances of their situation. On review, we noted the following significant features in the employee's application to work from home:

- the employee's parent required monitoring but minimal actual care
- the need for care was urgent, unexpected and of brief duration.

The agency did not appear to take into account the above considerations in declining to grant the request to work from home. Available evidence indicating that the employee was monitoring their parent rather than providing personal care was a significant consideration in determining whether they were able to perform their duties remotely. In these circumstances, granting the application to work from home would not have negatively impacted the operational requirements of the business.

We recommended that the decision be set aside. The agency accepted this recommendation. The employee's carer's leave was re-credited to them and recorded instead as paid miscellaneous leave.

### **A delayed decision was unfair**

An employee applied to advance within their broadband, from APS level 3 to APS level 4. The application was denied.

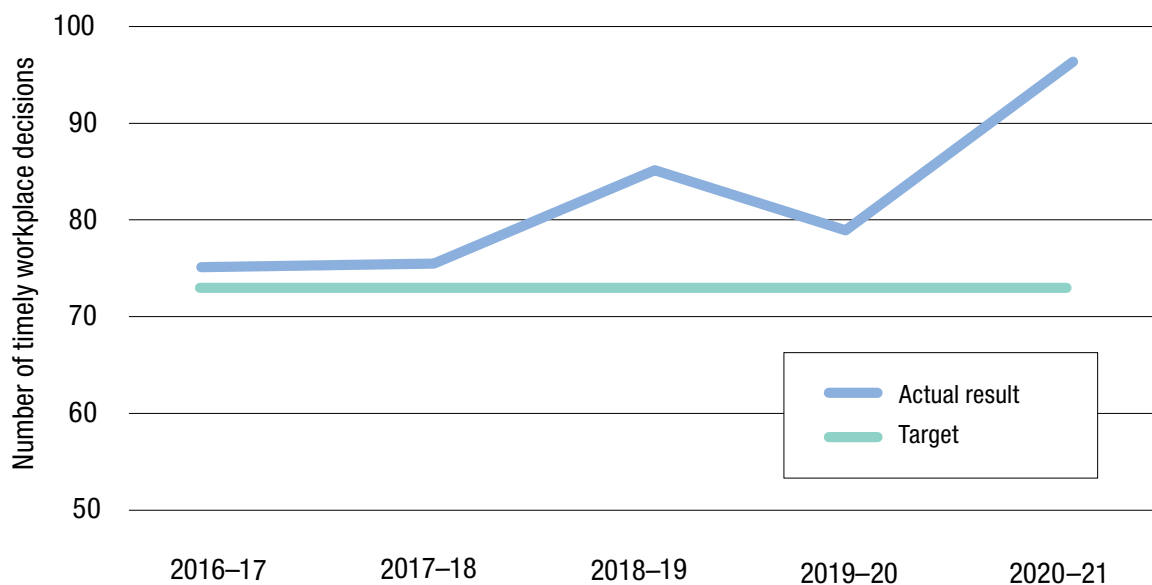
The agency's policy and guidelines required the supervisor to assess the employee's application within 21 days. However, in this case the agency took almost a year to consider the employee's application. In our view, this was an unreasonable delay. A number of changes occurred within that year which the agency attributed the delay to; however, in our view the assessment process was relatively simple and routine, and could have been done within the 21-day time limit.

When the agency did assess the employee's application, it took into account subsequent events including reduced output due to a change in duties while the employee was learning a new role. In our view, this approach was unfair. We considered that the agency should have assessed the employee against their performance at the time of their application (or within the 21 days) and not on the job requirements that were in place almost a year later, after the employee had changed roles.

When we looked at the evidence, we found that the employee had met all the requirements at the time they lodged their application. This included that they demonstrated appropriate capability at the higher APS level 4 and met all the other requirements to advance.

We recommended that the agency set aside the decision and that the employee be approved for broadband advancement. We recommended that this be backdated to the time when it should have been assessed, which was 21 days from the date of the application. The agency agreed to these recommendations.

**Figure 14: Timeliness of reviews of workplace decisions, over five years**

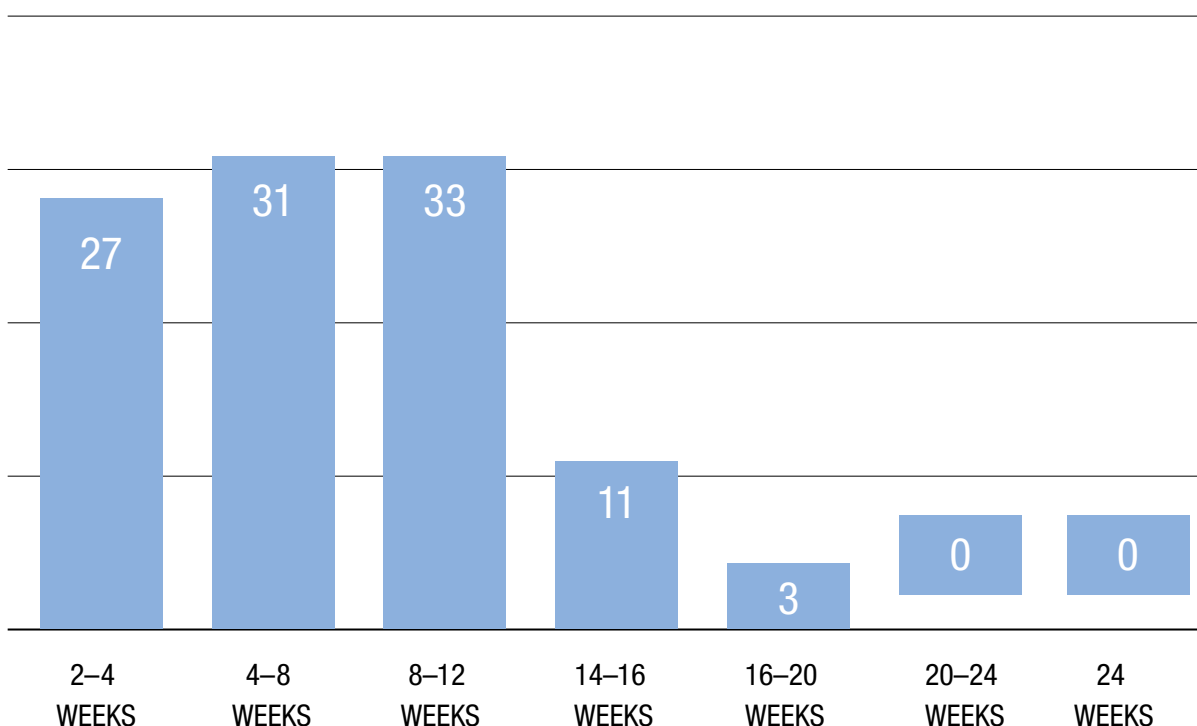


## Timeliness

Our target is to complete 75% of reviews of workplace decisions within 14 weeks from the date of receipt (excluding time 'on hold'). This year, we exceeded this target and completed 95.2% of all our reviews of workplace decisions within that timeframe. As shown in the above figure, this is a significant improvement on previous years.

In specific circumstances we may place a review on hold (for a period that is excluded from the count of weeks to complete a review as shown in Figure 14). We place a review on hold only when we are not able to take action on a matter—for example, because we are waiting for information from either the applicant or the agency. We have internal rules that restrict when a review case can be placed on hold.

**Figure 15: Number of weeks taken to complete reviews of workplace decisions**



Note: The totals in this figure include reviews that were resolved prior to a recommendation being made.

As can be seen in Figure 15, the majority of reviews are completed within eight weeks. This total does not include times when a review is placed on hold. The length of time taken to complete a review reflects the work involved in conducting merits reviews, including adhering to procedural fairness requirements and writing comprehensive reports that clearly explain the reasons for our decision.

## **MPC direct reviews of workplace decisions**

### **Decisions in Code of Conduct matters**

In Code of Conduct matters, we can review a workplace decision that an employee (and sometimes a former employee) has breached the Code of Conduct or a sanction

decision made in relation to a breach. Each decision is counted as a separate review.

We consider the evidence gathered during the agency's own investigation and the employee's version of events. It is our role to reach conclusions about whether:

- the employee did what was alleged
- what the employee did was appropriate in light of the employee's responsibilities, agency policies and the circumstances
- the employee's actions were a breach of the Code of Conduct and, if so, what elements of the Code of Conduct were breached

- the agency substantially complied with relevant procedures, policy or guidelines and with the requirements of procedural fairness.

If a sanction has been imposed, our review will consider whether the sanction is appropriate in the circumstances of the employee's case. Getting sanction decisions right is important to the culture and productivity of a workplace. Our review of sanction decisions provides assurance that decision-making is robust, fair and consistent with the APS Values and Employment Principles.

This year, we received 69 applications for a review of a decision or finding that an employee, or former employee, had breached the Code of Conduct or a sanction decision. Of these, 50 Code of Conduct decisions proceeded to review, involving 40 employees.

Reviewing decisions in Code of Conduct matters accounts for 48% of all our review work. Figure 16 demonstrates that the

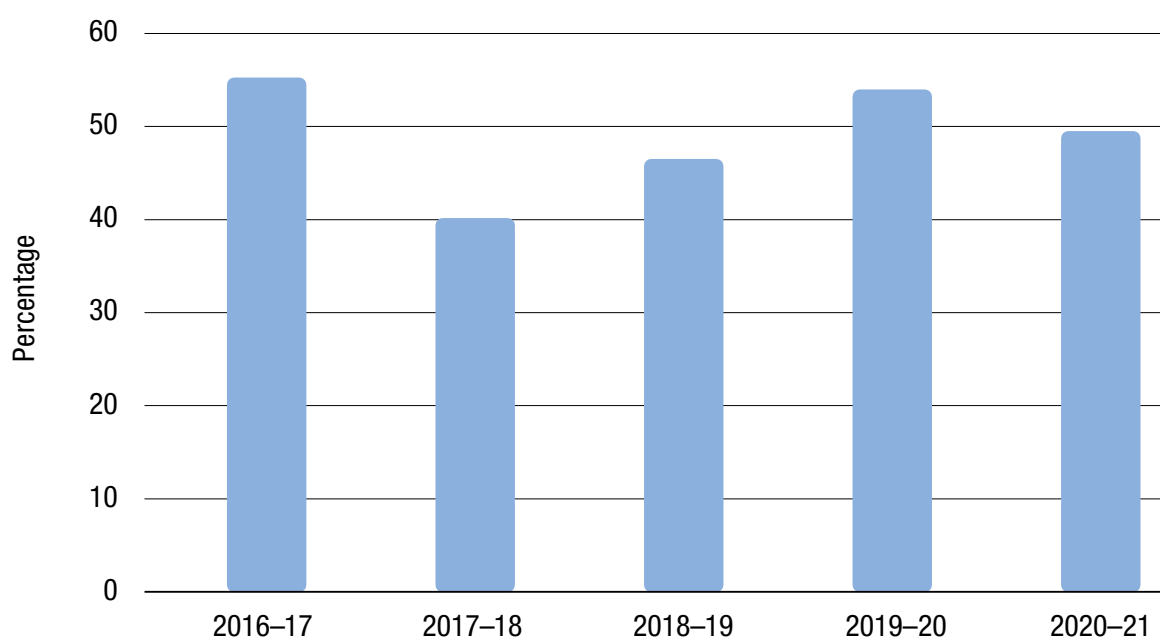
number of reviews of Code of Conduct decisions has been trending upwards since 2017–18 as a proportion of total reviews, despite this year's small decrease in overall applications.

For the 50 reviews of Code of Conduct decisions we conducted, we recommended that:

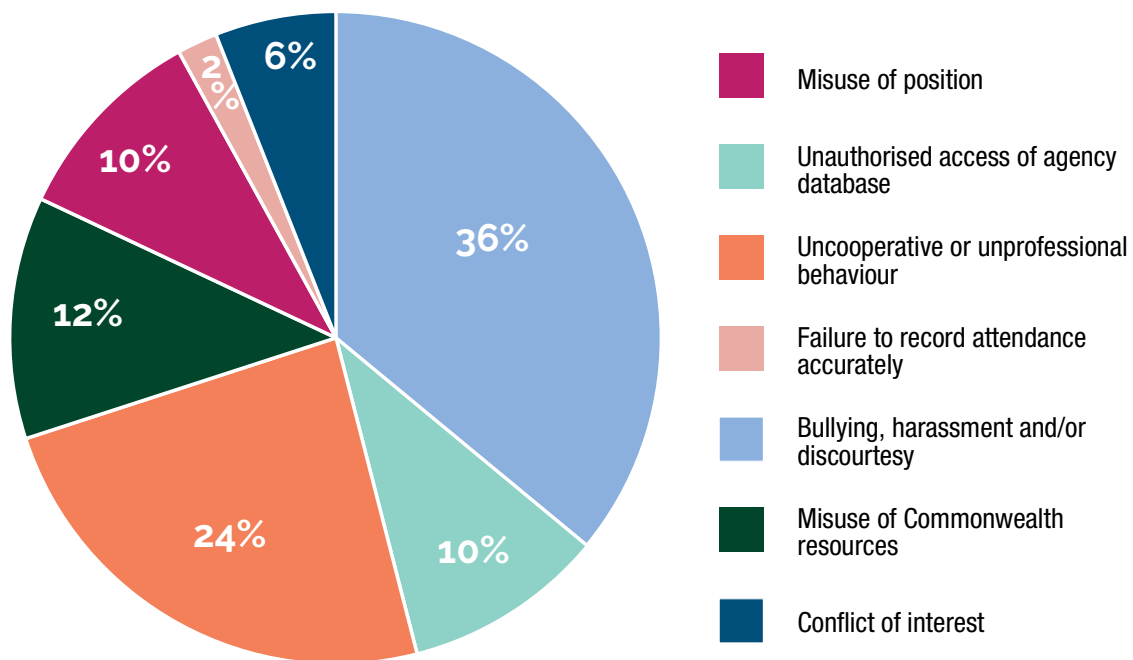
- 35 decisions be upheld
- nine decisions be set aside
- six decisions be varied.

Our reviews of decisions involving the Code of Conduct covered a wide range of behaviour and conduct. Bullying, harassing and discourteous behaviour comprised the largest group of cases, including five cases in which employees were found to have engaged in sexually harassing behaviour. Uncooperative or unprofessional behaviour was the next most significant behaviour. For a comprehensive breakdown of the categories of decisions, see Figure 17 and Appendix B, Table B.7.

**Figure 16: Code of Conduct matters as a proportion of total reviews, 2016–17 to 2020–21**



**Figure 17: Reviews of Code of Conduct decisions by issue**



### **Seniority and culture a factor in a sanction decision**

A senior employee was found to have breached the Code of Conduct by engaging in harassing behaviour towards colleagues. As a result, the agency imposed a sanction of a reduction in classification. The employee applied for review as they considered that a lesser sanction was more appropriate and proportionate in the circumstances.

In support of their application, the employee claimed that the behaviour was uncharacteristic, that there was no likelihood of the behaviour occurring again, and that the sanction imposed would have a significant financial impact.

Our review found evidence that the employee had engaged in aggressive, harassing and unprofessional behaviour towards several colleagues over a number of years. In our view, the behaviour did not demonstrate leadership or set a positive example for more junior colleagues. We were not satisfied that the conduct was uncharacteristic or unlikely to happen again.

Senior APS employees are expected to cultivate and foster positive workplace relationships, set an example of professional workplace behaviour and be conscious of the impact of their behaviour on others.

In determining an appropriate sanction, we considered the seriousness of the conduct, and the impact of the employee's behaviour on others and on the agency.

On balance, we agreed with the agency that the conduct was serious in nature, and recommended that the sanction decision to impose a reduction of classification be confirmed.

### **Decisions that are sensitive, serious or not appropriate for agency review**

We received 14 applications to conduct direct reviews of workplace decisions that would, in usual circumstances, be reviewed first by the agency.

Of those 14 applications, 10 did not proceed to a review. We accepted the remaining four applications for an MPC direct review on the basis that:

- the agency head had some involvement in the decision under review
- the decision was sufficiently serious to warrant our involvement.

The reasons why the other applications did not proceed to review include:

- the applicant had sought an agency primary review and it was not yet complete
- the agency head was not involved in the decision, the action was not serious and sensitive, or the action for which review was sought was not claimed to be victimisation or harassment for previously seeking review
- the application was made outside the statutory timeframe
- the applicant had ceased being an APS employee.

### **MPC secondary reviews of workplace decisions**

We received 97 applications to conduct secondary reviews of workplace decisions this year. Of those, we reviewed 44 decisions, and an additional decision was resolved before the review was completed.

Figure 18 and Appendix B, Table B.7 provide a breakdown by issue of the 44 secondary reviews that we completed this year.

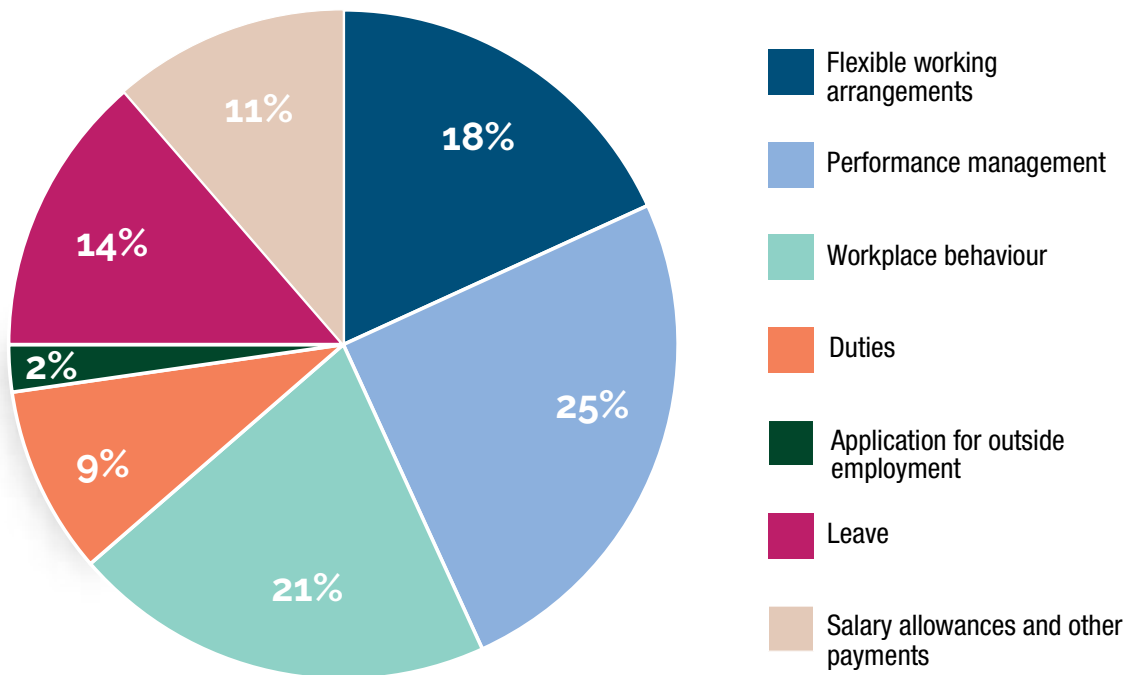
The largest proportion of secondary reviews conducted related to disputes about an employee's performance management. This includes decisions about ratings, underperformance, and salary increments. Conducting reviews about performance management outcomes is usually complex. It requires the reviewer to understand the nature of the employee's duties and role and the operational requirements of the employee's work. Often we are reviewing a manager's opinion on an employee's analytical and problem-solving capabilities, level of output, or skills in communicating with colleagues or members of the public. The remainder of these reviews covered a diverse range of decisions about leave, applications for secondary employment outside the APS, and disputes about duties, salary and allowances.

Another significant proportion of our work relates to complaints about how workplace misbehaviour, such as bullying and harassment, is handled.

There was a rise in the proportion of reviews of decisions about flexible working arrangements this year (18%) compared with last year (4%). This increase in disputes about working arrangements is likely related to the COVID-19 pandemic and the impact of state-based public health orders.



**Figure 18: MPC secondary review by issue**



### Having difficult conversations about underperformance

An employee sought a review of their manager's decision to rate their performance as unsatisfactory following a formal performance management process. This resulted in the employee being reduced in classification. Our review looked at:

- examples of the employee's performance over time
- evidence of support and feedback given to the employee
- a version of events from the supervisor
- the agency's performance management policy
- formal procedural requirements in the agency's enterprise agreement
- relevant sections of the *Public Service Act 1999*.

Reviews about performance are complex and nuanced. We look at the steps taken by a supervisor or manager prior to moving to a formal underperformance process. This includes the level of support provided to assist the employee to improve, the adequacy of notice about the areas of their performance that were not up to standard, and clear direction on what improvement was required.

In this instance, we concluded that the agency had acted fairly and reasonably in how it managed the employee's performance. The supervisor had followed all of the necessary steps set out in the enterprise agreement and given adequate support to the employee to assist them to improve. The agency had also given notice to the employee in advance that, without improvement, the employee's salary or classification could be reduced.

In our view, the evidence indicated that the employee did not meet the requirements of their role and that their work needed an unreasonable amount of revision by the supervisor. We recommended that the decision be confirmed.

### **Balancing mitigating circumstances in a pandemic**

During the pandemic, an employee was found to have failed to comply with a COVID-19 quarantine direction to stay in their home for 14 days following their return from overseas. As a result of this determination, a sanction of a reprimand and a small fine was imposed.

The employee applied for a review because they considered that the decision maker had not fairly taken into account their individual mitigating circumstances.

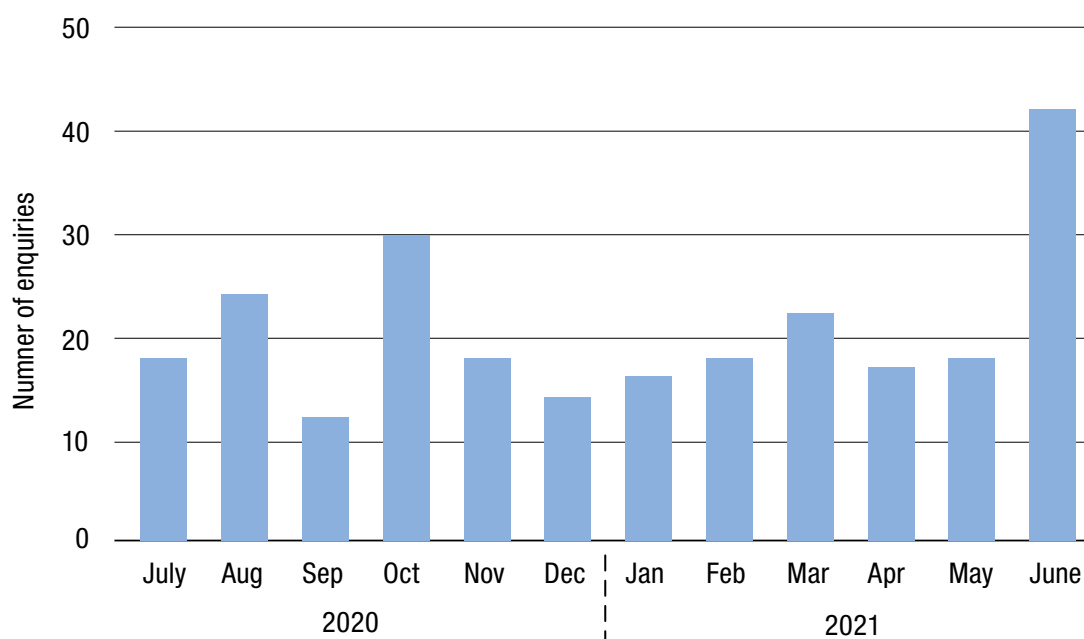
The employee said they had left their home for a short period of time as a coping strategy. The employee described their behaviour as uncharacteristic and attributable to an acute mental health condition.

In this case, we noted the significant mitigating factors to explain the employee's behaviour, such as the stress and anxiety they were experiencing due to COVID-19 and home quarantine. We noted the employee's otherwise good employment record. We also noted that the employee had not been careless or reckless in regard to public safety.

We balanced these mitigating factors with the seriousness of the behaviour and the potential impact on the community. We decided the employee's actions had put the agency's reputation at risk, particularly during the serious public health crisis of the pandemic.

We agreed with the agency that a small financial penalty was warranted to act as a deterrent and to show that the agency expects its employees to comply with public health directives in all circumstances.

**Figure 19: Number of telephone enquiries about reviews of workplace decisions, by month**



## COVID-19 related decisions

In 2020–21, we collected data on review applications where COVID-19 was identified by the applicant as a consideration relevant to the matter under review. Of the 170 applications received, there were 22 applicants who cited COVID-19 as a factor. We recommended to uphold nine COVID-19 related decisions and to set aside or vary three such decisions.

The applications related to home-based work, unscheduled absences from work due to COVID-19 restrictions, compliance with COVID-19 public health orders, and disagreements about leave arrangements.

## Contact with us

We respond to hundreds of enquiries from employees and agencies by phone and email. We have a small team of officers who are responsible for managing and responding to the vast array of questions

and issues arising from individual cases and general enquiries about the MPC and our role. We value the opportunity to engage directly with our stakeholders and use the data we collect to inform our education and communications strategy.

During the reporting period, the office recorded 250 telephone enquiries relating to reviews of workplace decisions, which represents 42% of all telephone enquiries received. We received 122 email enquiries relating to reviews of workplace decisions in 2020–21.

Of the 250 telephone enquiries:

- 34 concerned a current review
- 179 were general enquiries about the Review of Actions scheme
- 21 concerned a finalised review
- 16 were categorised as 'other'.

The vast majority of calls we receive are from employees who wish to remain anonymous.

# Performance of other statutory functions

3.

## Reviews of involuntary retirement decisions for Australian Federal Police employees

Australian Federal Police (AFP) employees employed under the *Australian Federal Police Act 1979* can apply to the Merit Protection Commissioner (MPC) for a review of a decision by the AFP Commissioner to retire the employee due to physical or mental incapacity. When making these types of retirement decisions, the consent of the AFP employee is not required.

All AFP officers and civilian staff members are entitled to a review, but Senior executive AFP employees are not.

Our role is to make sure the retirement decision is based on sound evidence and is the correct and preferred decision, taking into account all the individual circumstances.

The MPC did not receive any applications for review of an AFP retirement decision this year.

## Complaints and inquiries

### Complaints about final entitlements

We take complaints from former Australian Public Service (APS) employees (including Senior Executive Service employees) who are concerned about their final entitlements. Final entitlements are the payments an employee receives when they cease employment. Those payments may include final salary payments including any outstanding payment for overtime, any leave that has been accrued but not taken, and the calculation of redundancy payments and payments in lieu of notice.

Final entitlements are determined by the *Fair Work Act 2009* and the industrial instrument the employee is employed under, such as an agency enterprise agreement or contract of employment.

We can investigate errors in the amount of money received or delays in providing an employee with their final payment. We can also look into whether an agency has provided adequate information about how final entitlements are calculated.

This year, we finalised four complaints involving concerns about final entitlements.

## Inquiries

The MPC can conduct inquiries into:

- a public interest disclosure that relates to an alleged breach of the APS Code of Conduct and meets all the requirements of a disclosure in accordance with the *Public Interest Disclosure Act 2013*
- an alleged breach of the Code of Conduct by the Australian Public Service Commissioner
- an APS action, refusal or failure to act by a person in the capacity of an APS employee, Secretary or agency head, but only at the request of the Public Service Minister
- whether an APS employee, or former employee, has engaged in conduct that may have breached the Code of Conduct, but only at the request of an agency, and if the employee agrees.

We did not conduct any inquiries into any of the above matters this year.

We did receive one request to investigate an alleged breach of the Code of Conduct, which the complainant stated was a public interest disclosure. After carefully considering the complaint, we determined that the information provided was not a public interest disclosure and therefore could not be made to the MPC. We advised the complainant of alternative avenues for making the complaint.

## Employer services

The MPC can provide employer services to APS agencies, non-APS Commonwealth entities, and state and territory agencies and departments to help them make high-quality and timely recruitment and employment-related decisions. The services are provided on a fee-for-service basis and include:

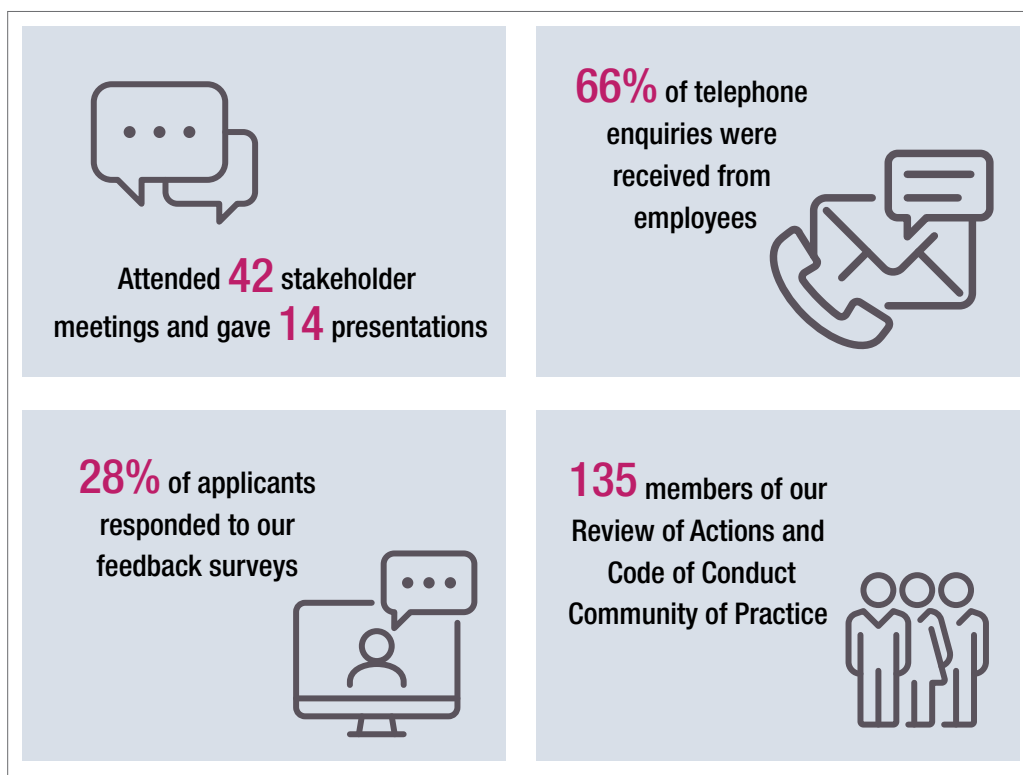
- Independent Selection Advisory Committees (where the MPC forms a selection committee for an APS agency)
- recruitment services (for example, convening selection panels for APS and non-APS entities)
- workplace investigations and merits reviews of workplace decisions for non-APS entities.

This year, we did not have the resources or capability to promote any of these services; consequently we received no requests for them. In 2021–22 we are planning to promote some of these services through our website and as part of our communications strategy.

# Engagement, projects and accountability

4.

## Engagement



We recognise the importance of actively engaging and consulting with our stakeholders, to work together on service improvements to achieve safe, effective and productive workplaces in the Australian Public Service (APS).

We have reflected this in our communications strategy, where we set out to:

- educate the APS on the role of the Merit Protection Commissioner (MPC) and raise awareness of the entitlement to seek a review
- constructively assist APS agencies to continuously improve their practice.

Our stakeholder engagement activities this year are outlined in the following sections.

### Stakeholder meetings

The MPC and her staff attended 42 meetings with external stakeholders and gave 14 presentations this year. Due to the COVID-19 pandemic most of these engagements occurred online or as teleconferences, using a variety of platforms.

- The MPC met with the five largest APS agencies on a quarterly basis throughout the year. These meetings are an opportunity to provide feedback, identify patterns and emerging trends in review outcomes, and discuss



significant, complex or sensitive issues. In November 2020, the MPC also met with representatives from the Australian Federal Police to discuss the operation of the review entitlement set out in the *Australian Federal Police Act 1979*.

- We gave a presentation to the Samoan Public Service Commission on the role of the MPC in the APS. This presentation was in conjunction with the Australian Public Service Commission (APSC) and was very well received.
- In March 2021, the MPC was invited to speak at the Australian Labour and Employment Relations Association (ALERA) ACT annual conference. The conference theme was 'Fair Workplaces: Culture & Values'. This was a great opportunity to present on the role of the MPC in supporting fair and safe workplaces.
- Throughout the year, the MPC and her senior staff participated as guest speakers in 10 sessions on Code of Conduct decision-making, the Review of Actions scheme and the MPC's role as part of the APSC's Senior Executive Service Orientation program.
- The MPC participated in a panel discussion and presented at the Review of Actions and Code of Conduct Community of Practice for APS practitioners.
- In June 2021, we piloted a program of information sessions for APS employees to raise awareness of the entitlements to seek review under the *Public Service Act 1999*. The pilot was conducted with employees of the Australian Taxation Office (ATO). Feedback from the sessions

will inform the rollout of our free webinars in 2021–22. We would like to acknowledge the assistance of the ATO staff in our pilot.

- We invited staff of the Community and Public Sector Union to participate in our staff professional development series. We also had the Behavioural Economics Team from the Department of the Prime Minister and Cabinet talk about using behavioural insights to communicate with employees returning to work after a long period of leave due to illness or injury.
- The MPC presented on the role and functions of her office to the 2021 graduates as part of the APSC's graduate induction.

In addition to meetings and presentations, the MPC engages with stakeholders as an independent member of the Audit Committee for the Office of the Inspector-General of Intelligence and Security. The MPC was also appointed as the Chair of the Audit and Risk Committee for the Australian Human Rights Commission towards the end of the year and chaired one meeting during the year.

The MPC is also a member of the Integrity Agencies Group, chaired by the Australian Public Service Commissioner, which met three times during the year. This group serves to ensure that integrity is at the centre of the work of the APS and that the APS approach to integrity is integrated, capable, agile and transparent.

## Review of Actions and Code of Conduct Community of Practice

We continue to support the Review of Actions and Code of Conduct Community of Practice to raise the quality of reviews and Code of Conduct decisions in the APS and build a network of practitioners who can share information and experiences in a supportive environment.

The community of practice is governed by a steering committee. Our role is currently to provide secretariat support through maintaining the membership list, providing support to agencies where possible, and leading planning for future meetings. The growing membership of the community of practice is sitting at 135 members. As a result of COVID-19, we moved away from in-person meetings to an online forum using a range of platforms to communicate. We look forward to developing a hybrid model that will include online and face-to-face meeting options in the future.

## Surveys and feedback from applicants and agencies

We build on feedback we receive from applicants through a survey instrument sent out to all applicants who have been through an MPC review process. We ask for feedback in order to learn and improve our review processes and how we communicate with applicants. The purpose is to seek feedback on the process, not about the outcome of the review.

The survey is anonymous and conducted online. It is sent to all applicants who have

received a review recommendation. The response rate this year was 28%, compared to 34% in 2019–20. Respondents were generally positive about the application process, with 87% agreeing that the process to apply for review was easy.

Some of the criticism of the review process reflected disappointment with the scope of the MPC's powers and capacity to consider concerns that are important to the review applicant but outside the scope of the review. Some respondents also expressed concern about their agency's delay in responding to the recommendations made by the MPC on their application.

Examples of responses are:

*My contacts were very professional and, I felt, impartial. I had anxiety about going over the investigation again in a sense, but felt much better about it based on my initial dealings with MPC staff.*

*When I [sought] assistance and throughout the commencement of the review, the review officer and delegate were impartial, courteous and respectful.*

In response to this feedback, we have undertaken initiatives to improve the timeliness, frequency and effectiveness of our communication at every stage of the review—particularly at the assessment stage and in explaining the scope of the review to the applicant. We also used the feedback to inform the rebuilding of our website to improve its functionality and improve access to information about timeframes, scope and the eligibility criteria.

During 2020–21, we commenced surveying agencies on a six-monthly basis to seek feedback on the overall experience of the review process and to track changes and

improvements. Respondents were sent an anonymous online survey in December 2020 and June 2021. The response rate was 27% for both survey periods.

## Website visits

In 2020–21, we had 114,208 visitors to our website, with the most visited website pages being:

- our home page—14,469 views
- information on how to manage complaints and disputes—11,225 views
- information on promotion review—7,206 views
- information on procedural fairness in employment decision-making—7,156 views
- applying for review of workplace decisions and promotion reviews—6,448 views.

## Projects

### Reach Out strategy

Increasing awareness of our role in the public sector is critical to achieving our vision: to support and contribute to safe, productive and harmonious workplaces in the APS.

In 2020–21, we piloted an education program, called Reach Out, for APS employees to highlight key information about the review of workplace decisions and promotion decisions. The pilot was very successful and will be developed into a program of webinars and workshops to be rolled out in the coming months. Registration to attend these sessions has been available on the new website at [www.mpc.gov.au](http://www.mpc.gov.au) since September 2021.

## New website

For much of the year we were drafting and designing a new, modern website. It will have short explainer videos and make it easy to register for webinar events. We look forward to reporting on this in next year's annual report.

## Inaugural Promotion Review Committee Convenor Conference

Promotion Review Committee (PRC) convenors perform an important statutory function for the MPC, and many are casual rather than ongoing employees. Many are scattered across the country and do not have the opportunity to attend the office when they do their convening work. This means their opportunities to interact with other convenors and the ongoing staff are minimal. In response to these factors, we convened the inaugural PRC Convenor Conference in March 2021. At that first meeting, we developed terms of reference setting out the broad objectives of the conference and agreed to convene every quarter.

The feedback from attendees was positive and it was clear that this forum will provide an opportunity to improve the way we work, build consistent practices and processes in the conduct of promotion reviews, and provide a platform for convenors to share and discuss their casework experiences arising from complex cases.

## Pilot of application process for promotion review

We have begun a pilot initiative to improve the efficiency of the promotion review process and decrease the amount of time APS employees spend submitting applications for review that do not proceed. As noted in Part 2, most applications for promotion review lapse because no unsuccessful candidate seeks a review of the successful candidate's promotion. Another key driver is to reduce the administrative burden on our small team.

During the pilot, we will use regulation 5.9 of the Public Service Regulations 1999 to extend the time for making an application for a review of a promotion decision. This will allow for successful candidates to only make a 'protective' application if we have received an application against their promotion decision.

We will report on the outcome of the pilot in next year's annual report.

## Development of our services to employers

As noted earlier in this report, the MPC can assist employers by providing recruitment and employment services. These services can assist an employer to make high-quality and timely recruitment decisions or to effectively manage allegations of misconduct or workplace disputes. These services are provided on a fee-for-service basis. To date, we have not had the resources to develop an approach to promoting these services.

This year, we engaged a business development consultant to assist

us in developing a strategy to offer employer services to APS and non-APS Commonwealth entities and to state and territory agencies and departments. The key objectives of the engagement were to undertake competitor analysis, develop a pricing model and develop a marketing strategy, and identify the governance and internal controls needed to ensure work quality. The final report met all the objectives and identified five core services that would complement our current capability. Operationalising the strategy has been incorporated in our business plan and the work associated with that will roll into 2021–22.

## Accountability

The APSC is included in the Department of the Prime Minister and Cabinet's Portfolio Budget Statements. The Australian Public Service Commissioner, as head of the APSC, is responsible for the APSC's financial and human resources and for assessing the level of its achievement against its outcome.

During 2020–21, the MPC had managerial responsibility for the work of the APSC employees who assisted the MPC in the exercise of her functions.

## Financial arrangements and corporate support

The MPC is neither a Commonwealth entity nor an accountable authority for the purposes of the *Public Governance, Performance and Accountability Act 2013*. Rather, the MPC is a statutory officer appointed by the Governor-General under

section 52 of the Public Service Act. Section 49(2) of the Public Service Act requires that the staff necessary to assist the MPC must be persons engaged under that Act and be made available by the Australian Public Service Commissioner. The MPC does not have a separate budget allocation and is dependent on the APSC for staffing and resources to undertake her functions.

In 2020–21, the MPC was allocated an annual budget (excluding corporate costs) of \$2.045 million and an average staffing level of 12.7.

The MPC and the Australian Public Service Commissioner have a memorandum of understanding for the provision of staff and corporate services. The current memorandum of understanding took effect in June 2015. It will be reviewed and updated during 2021–22.

## **Interaction with Australian Public Service Commissioner**

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

The Australian Public Service Commissioner is responsible for upholding high standards of integrity and conduct in the APS. The MPC assists by ensuring consistent standards of decision-making and people management practices across the APS, and also provides an important assurance role for the APS. This assurance is provided by reviewing individual actions or decisions

for consistency with the APS Values and other administrative law requirements, and through reviews of determinations of breaches of the Code of Conduct and/or sanctions.

During the year, the MPC and the Australian Public Service Commissioner met on five occasions.

## **Business planning and risk management**

During 2020–21, we reviewed and updated our two-year business plan, which sets out our objectives and priorities to:

- engage with our stakeholders
- build capacity internally and externally
- innovate for better service delivery and discharge of functions
- enhance our governance and accountability.

We also engaged a risk consultant to update our existing risk register. The key objectives of the engagement were to identify new and emerging risks, review current risks and controls, update the risk register and produce a heat map of key risk areas. The review involved individual interviews with staff as well as a series of risk analysis workshops.

The final report included a number of recommendations, which have been adopted, and an action plan has been developed. Actions that can be treated as projects will be incorporated into our business plan for completion over the next two years.

## Freedom of information and privacy

We received three applications under the *Freedom of Information Act 1982* during 2020–21. These were for papers relating to applicants' reviews of workplace decisions. Two requests were finalised and one request was withdrawn.

We did not notify the Office of the Australian Privacy Commissioner of any privacy breaches.

<https://www.apsc.gov.au/information-publication-scheme-ips>.

Next year the MPC will have its own information publication plan, which will be published on the new MPC website.

## Judicial review and other court decisions

During 2020–21, two unconnected applications for judicial review were filed in the Federal Court of Australia. They were seeking reviews of workplace decisions taken by two APS agencies under the Public Service Act and Regulations. The MPC was joined by the respective APS agencies as a defendant to each of these applications. The applicants are seeking judicial review of the decisions made by the APS agencies in relation to breaches of the APS Code of Conduct. These decisions were confirmed by the APS agencies upon the recommendation of the MPC. Both applications were ongoing in the Federal Court when this report was finalised.

## Information Publication Scheme

In 2020–21, information about the MPC's information publication plan was located on the APSC website and in the APSC information plan, which is available at

# The year ahead

# 5.



## Our key priorities

The COVID-19 pandemic will continue to have an impact on the way Australian Public Service (APS) employees and agencies approach their working environment over the coming year. Key priorities for 2021–22 will be to keep APS employees and agencies aware of the changing landscape, provide guidance on good practice in decision-making and people management during unprecedented times, and continue to provide effective and expert reviews. We will do this through the range of activities listed below.

### Engaging with and supporting our stakeholders

- Maintain the momentum of our engagement with our stakeholders through our website, webinars, videos and information sessions to raise awareness of review entitlements.
- Build on our suite of resources to support agencies, managers and human resources (HR) practitioners to make good employment-related decisions that are timely, fair and embedded in administrative decision-making principles.
- Launch the new Merit Protection Commissioner (MPC) website with refreshed content and improved navigation for our key stakeholders.
- Simplify our online application forms and improve the way employees make an application to the MPC.

### Delivering new services and resources

- Promote the MPC business model, offering expert and high-quality employment-related services to APS and non-APS Commonwealth entities and to state and territory agencies and departments.
- Provide free webinar sessions for all APS employees about their review entitlements, how the Review of Actions scheme operates and what the roles of their agency and the MPC are within that scheme.
- Publish video explainers on our website explaining how promotion review and review of workplace decisions operate.
- Publish new tip sheets, case studies and good practice guides for agency decision makers and applicants.
- Promote our Independent Selection Advisory Committee capabilities to assist agencies to conduct high-quality recruitment processes.

### Improving the way we work

- Maintain staff engagement in professional development through a program of speakers and presentations.
- Monitor the analytics of our new website for functionality, accessibility and usefulness, and use that information to continue to enhance the site.
- Survey stakeholder groups to measure awareness of review entitlements and the role of the MPC in the APS, and use these results to target our communications and develop new resources.



- Contribute to any legislative reforms that will impact or improve how we do our work.
- Support the Australian Public Service Commission's investment in a new fit-for-purpose case management system and design workflows to improve reporting capability and drive efficiencies.
- Continue to receive and use feedback from applicants and agencies to inform our work and continuously improve.
- Assess the outcome of the pilot to engage an MPC legal counsel.
- Complete and report on the pilot of a two-stage Promotion Review Committee application process and assess the benefits to inform potential changes in the future.

# Appendices

# Appendix A:

## The Merit Protection Commissioner's statutory functions

MPC function	Statutory authority—Australian Public Service
<p>Review of Actions scheme—other employment-related actions (workplace decisions)</p> <p>(This includes Code of Conduct reviews, direct reviews of other matters and secondary reviews.)</p>	<p><i>Public Service Act 1999</i> Section 33 and subsection 50(1)(d) Subsection 50(1)(d) (provides for review functions to be prescribed by regulations)</p> <p>Public Service Regulations 1999 Part 5, regulations 5.1, 5.2, 5.4, 5.5, 5.22–5.37 Schedule 1</p>
<p>Review of Actions scheme—promotion and engagement</p> <p>(This involves merits-based promotion reviews and review of engagement decisions relating to certain Parliamentary Service employees.)</p>	<p><i>Public Service Act 1999</i> Section 33 and subsection 50(1)(d)</p> <p>Public Service Regulations 1999 Part 5, regulations 5.1, 5.2, 5.3, 5.5, 5.6–5.21</p>
<p>Review agency's determination that a former employee breached the Code of Conduct for behaviour they engaged in while an employee</p>	<p><i>Public Service Act 1999</i> Section 33 and subsection 50(1)(ca)</p> <p>Public Service Regulations 1999 Part 7, Division 7.3</p>
<p>Review the actions of statutory office holders who are not agency heads that relate to an employee's APS employment</p>	<p><i>Public Service Act 1999</i> Section 33 and subsection 50(1)(d)</p> <p>Public Service Regulations 1999 Part 7, Division 7.4</p>

**MPC function****Statutory authority—Australian Public Service****Inquire into:**

- a public interest disclosure alleging a breach of the Code of Conduct

*Public Service Act 1999*

Subsection 50(1)(a)

Subsection 50(2) (provisions relating to Merit Protection Commissioner's powers when conducting the inquiry)

Public Service Regulations 1999

Part 7, Division 7.1 (regulations 7.1 and 7.1A)

- the Australian Public Service Commissioner for an alleged breach of the Code of Conduct

*Public Service Act 1999*

Subsection 50(1)(b)

- an APS action as requested by the Public Service Minister

*Public Service Act 1999*

Subsection 50(1)(c) and subsection 50(2)

- whether a current or former APS employee has breached the Code of Conduct

*Public Service Act 1999*

Subsection 50(1)(ca) and section 50A

Public Service Regulations 1999

Part 7, Division 7.6 (Merit Protection Commissioner's procedures)

**Investigate complaints by former employees relating to entitlements on separation***Public Service Act 1999*

Subsection 50(1)(e)

Public Service Regulations 1999

Part 7, Division 7.2

**Establish an Independent Selection Advisory Committee**

Public Service Regulations 1999

Part 4

**Provide recruitment and employment-related services to any (non-APS) person or body on a fee-for-service basis***Public Service Act 1999*

Subsections 50(1)(e) and subsection 50(3)

Public Service Regulations 1999

Part 7, regulation 7.4

**Function of the Merit Protection Commissioner****Statutory authority—Australian Federal Police**

Review decisions of the Australian Federal Police Commissioner to compulsorily retire Australian Federal Police employees on invalidity grounds

*Australian Federal Police Act 1979*

Sections 32 and 33

Australian Federal Police Regulations 2018

Part 3, Division 2

# Appendix B:

## Data tables for statutory functions

This appendix provides information on the activity and performance of the statutory functions of the Merit Protection Commissioner (MPC). Information on the MPC's functions can be found at: <https://www.mpc.gov.au>.

### Review of promotion decisions

Table B.1 shows the status of promotion review cases, for 2020–21 as at 30 June 2021, compared with 2019–20.

**Table B.1: Status of promotion review cases 2020–21, compared with 2019–20**

Promotion review cases	2020–21	2019–20
On hand at start of year	9	13
Created during the period	51	151
Total caseload	60	164
Reviewed by Promotion Review Committee	34	108
Invalid (e.g. applicant not an ongoing APS employee)	6	18
Lapsed (e.g. a protective application where no application received from an unsuccessful candidate) or withdrawn	15	29
Total finalised during period	55	155
On hand at end of year	5	9
Target completion time (weeks)	8 or 12	8 or 12
Number completed within target time	55	121
Percentage completed within target time	100	78.06

Table B.2 shows the promotion review caseload by agency for 2020–21.

**Table B.2: Promotion reviews by agency, 2020–21**

Agency	Australian Taxation Office	Services Australia	Department of Home Affairs	Australian Bureau of Statistics	10 other APS departments and agencies	Totals
Number of promotion review applications received	430	59	65	10	12	576
Number of promotion review cases registered (not including cases on hand at the start of the year)	26	8	11	1	5	51
Number of promotion review committees formed and finalised—cases reviewed	10	9	12	1	2	34
Number of parties to a promotion review process where a Promotion Review Committee was formed and finalised	57	31	86	15	7	196
Number of promotion decisions subject to review	42	22	70	14	4	152
Number of promotion decisions varied	1	0	0	0	0	1

## Review of workplace decisions and complaints

Table B.3 provides information on the review of workplace decisions and complaints casework in 2020–21. Table B.4 provides information on the timeliness with which we performed our review and complaints functions. Both tables compare results for 2020–21 with those for 2019–20.

**Table B.3: Review and complaints workload, 2020–21 compared with 2019–20**

Cases	Direct reviews —Code of Conduct	Direct reviews —other	Secondary reviews	Former employee Code of Conduct (regulation 7.2A)	Total reviews	Complaints about final entitlements (regulation 7.2)	Total cases	
	2020–21						2020–21	2019–20
On hand at start of year	16	0	10	0	26	1	27	35
Received during the period	68	14	87	1	170	3	173	200
Total cases	84	14	97	1	196	4	201	235
Reviewed	50	4	44	0	98	3	101	96
Facilitated resolution	5	0	1	1	7	0	7	6
Not accepted	4	9	37	0	49	1	50	83
Lapsed or withdrawn	15	1	7	0	23	0	23	23
Total finalised during period	74	14	89	1	177	4	181	208
On hand at end of year	10	0	9	0	19	0	19	27

Note: Direct reviews are reviews conducted by the 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 B.4: Timeliness in handling reviews and complaints, 2020–21 compared with 2019–20**

Review type	2020–21		2019–20	
	Average time to complete reviews (weeks)	Completed within target timeframes (%)	Average time to complete reviews (weeks)	Completed within target timeframes (%)
Direct reviews— Code of Conduct	7	95.55	11.1	80.4
Former employees —Code of Conduct (regulation 7.2A)	2	100	13.3	100
Direct reviews — other	5	100	12.9	66.7
Secondary reviews	9	95.55	10.7	79.5
Total reviews	8	95.24	11	79.7
Complaints about final entitlements (regulation 7.2)	4.42	100	1.9	100

Note: We have reported separately on reviews of workplace decisions (direct to the MPC and secondary reviews) and complaints about entitlements on separations (regulation 7.2) in this annual report. Previous annual reports included complaints about entitlements in the overall review figures.



Table B.5 details the number of reviews and complaints about entitlements by agency.

**Table B.5: Reviews and complaints completed, by agency, 2020–21**

Agency	Direct review— Code of Conduct	Direct review— non Code	Secondary review	Total	Complaints about entitlement—former employees
Services Australia	21	0	18	39	3
Australian Taxation Office	7	0	3	10	0
Department of Home Affairs	3	1	6	10	0
Department of Defence	6	0	3	9	0
Department of Foreign Affairs and Trade	3	0	1	4	0
National Disability Insurance Agency	0	1	3	4	0
Fourteen agencies with fewer than four each	10	2	10	22	1
<b>Total</b>	<b>50</b>	<b>4</b>	<b>44</b>	<b>98</b>	<b>4</b>

Table B.6 shows the subject matter for all reviews, other than Code of Conduct, completed in 2020–21.

**Table B.6: Subject matter of reviewed cases (other than Code of Conduct cases), 2020–21**

Subject matter	Secondary subject matter	Number
Salary allowances and other payments	Allowances/entitlements	1
	Salary	4
<b>Subtotal</b>		<b>5</b>
Flexible working arrangements	Home-based work	8
	Remote working arrangement	2
<b>Subtotal</b>		<b>10</b>
Performance management	Unsatisfactory performance, including performance rating	6
	Performance appraisal	3
	Process	2
	Probation	1
<b>Subtotal</b>		<b>12</b>
Duties	Hours of work	3
	Relocation	1
	Revoke employment suitability clearance	1
<b>Subtotal</b>		<b>5</b>
Workplace behaviour	Workplace directions or warnings including about attendance	3
	Handling of bullying complaints	3
	Handling/investigation of complaint	3
<b>Subtotal</b>		<b>9</b>
Leave	Personal or carer's leave	3
	Annual leave	1
	Miscellaneous leave	2
<b>Subtotal</b>		<b>6</b>
Other	Outside employment	1
<b>Subtotal</b>		<b>1</b>
<b>Total</b>		<b>48</b>

Table B.7 shows the subject matter of all Code of Conduct cases reviewed in 2020–21.

**Table B.7: Subject matter of Code of Conduct reviews completed, 2020–21**

Subject matter	Number
Bullying, harassment and discourtesy	18
Unauthorised access agency database	5
Uncooperative or unprofessional behaviour	12
Misuse of Commonwealth resources	6
Misuse of position	5
Failure to record attendance accurately	1
Conflict of interest	3
Total number of matters identified	50

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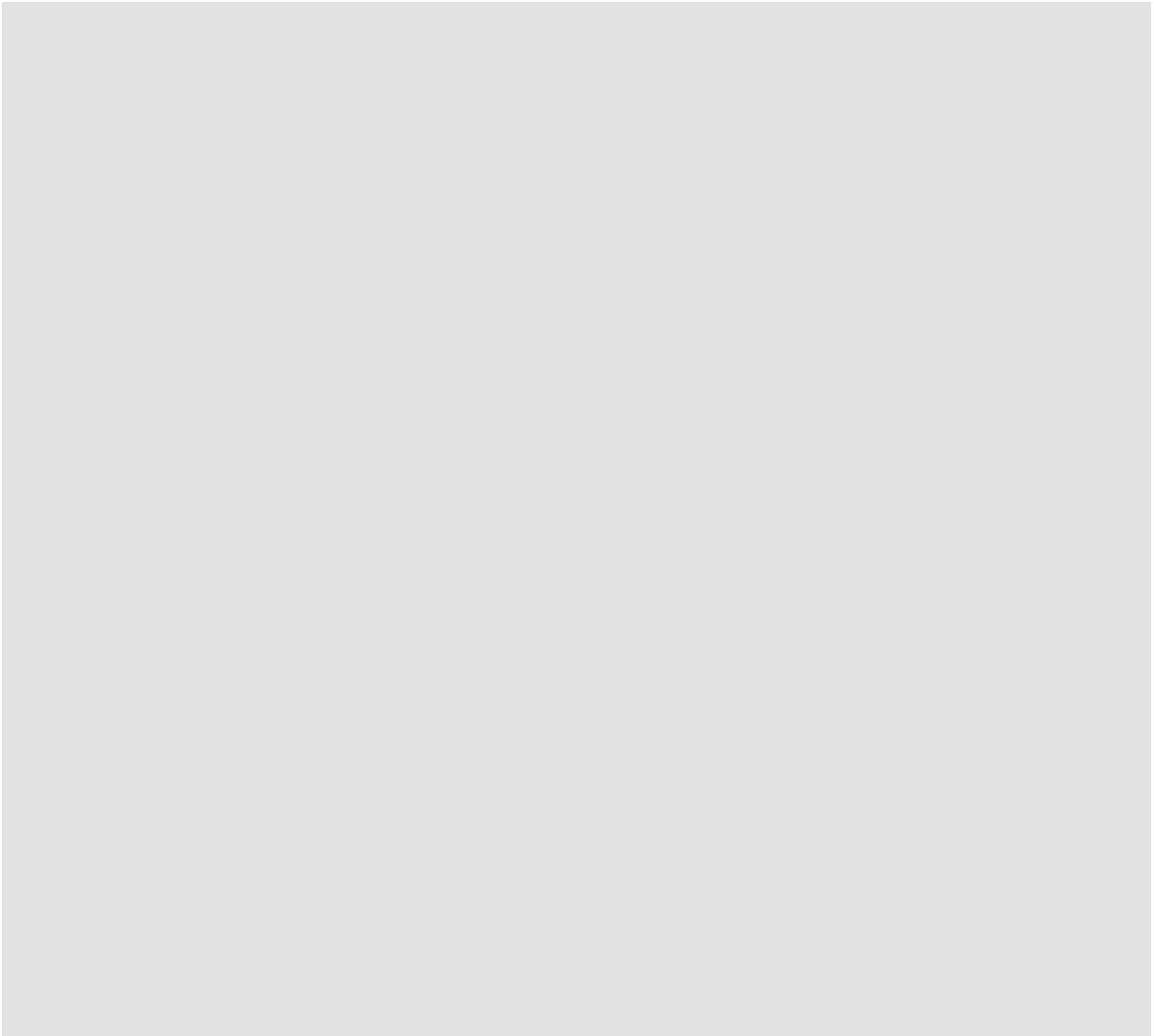
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