



Australian Government
Merit Protection Commissioner

ANNUAL REPORT of the Merit Protection Commissioner



merit



The Hon Greg Hunt MP
Minister Assisting the Prime Minister for the Public Service and Cabinet
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 2019. As required by section 51 of the *Public Service Act 1999*, my report deals with the activities of the Office of the Merit Protection Commission; it is required to be 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: the Resource Management Guide No. 135: issued by the Department of Finance in May 2019.

Yours sincerely

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

Linda Waugh
Merit Protection Commissioner
15 October 2019



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Merit Protection Commissioner's **foreword**



I am pleased to present my second annual report as the Merit Protection Commissioner.

The Merit Protection Commissioner is a

role established under the *Public Service Act 1999* (the Act) which performs a range of statutory functions for the Australian Public Service (APS). Those functions are concerned with the implementation of, and compliance with, the APS employment framework and principles, as well as the operation of the broader integrity framework.

The key way my office does this is through the review of action scheme articulated in the Act and the Public Service Regulations 1999. The scheme allows an APS employee to seek review of almost any APS action taken that relates to his or her employment. This maybe an unreasonable refusal of a leave or flexible work application, a performance rating which the employee disagrees with, or a finding they have breached the code of conduct which the APS employee believes is not warranted or was arrived at through an unfair process. Review can also be sought for certain promotion decisions.

Within that scheme, the Merit Protection Commissioner provides an impartial avenue of review to APS employees which is independent of their department or agency. This is an important if not critical element of an accountable and fair APS employment framework. As noted in a recent decision

of the High Court of Australia, review by the Merit Protection Commissioner of an administrative determination and sanctioning of a breach of the APS Code of Conduct forms part of the comprehensive system of merits review available to APS employees.¹

During 2018–19 we received 171 applications for review of employment actions from APS employees across 18 different departments or agencies. The single largest category of employment action APS employees sought independent review on were Code of Conduct breach determinations or sanction decisions. This was followed by reviews of actions relating to performance management, workplace behaviour and access to flexible working arrangements respectively.

While the majority of agency actions or decisions were upheld, recommendations to set aside or vary a decision were made in 26 per cent of cases. There are many different reasons why we recommend an action or decision be varied or set aside—these include procedural problems, insufficient grounds for a finding of fact, or misapplication of an element of the Code of Conduct, a policy or an enterprise agreement, as well as a decision simply being unfair on its merits. The importance of our work in these matters is twofold—the employee is not subject of an adverse consequence resulting from an unfair or defective process or decision, and the department or agency receives feedback about its processes and practices and the capacity of its decision-makers to meet their obligations to the Employment Principles and Values and to handle the discretionary judgements allowed by the delegations they exercise.

¹ Comcare v Banerji [2019] HCA 23, [106].

We additionally received 1,089 applications for review of promotion decisions up to APS 6, and formed 82 promotion review committees which considered 392 promotion decisions. Only two promotion decisions were varied indicating that agency and department selection processes, at least in those promotion decisions reviewed by my office, result in the most meritorious candidate being appointed. The importance of the promotion review scheme is not in the number of promotion decisions varied, but in the limited assurance it gives to agency and department recruitment and selection processes that the principle of merit has been adhered to. Additionally, the fact that a promotion decision can be subject of independent merits review continually reinforces to departments and agencies to have ongoing fair and effective selection procedures and practices.

Our work is not limited to considering individual employment-related actions and decisions—we can also conduct direct inquiries and have an important role in working with stakeholders to improve employment-related decision-making and the management of misconduct matters more generally within the APS. I consider it a strategic priority to ensure that observations from our case work is translated into better practice advice and guidance that is communicated to APS departments and agencies.

We are small office of 12 employees, so it can at times, be challenging to meet this strategic priority when we have high caseload or when staffing numbers fall below 12 due to leave or attrition. Nevertheless, this year we had 70 contacts with stakeholders, held three Community of Practice sessions, and delivered a number of presentations. I met with senior executives and practitioners through-out the year to discuss specific case outcomes and the

broader practice implications of those matters. We also worked with agencies to help them better manage promotion review processes and to provide feedback on the effectiveness of their selection processes.

We continued this year to improve our internal governance and business processes. We updated our website content, commenced a review of our procedures manual, and trained 82 new nominees for Promotion Review Committees. We also implemented a triage and risk management approach to case management to improve efficiency and timeliness.

While I am very pleased with our achievements for 2018–19 there is still much to do. We will continue to focus on delivering high quality reviews and offering expert advice that supports the integrity and performance of the APS. We will also aim to further promote the review of action scheme to all APS employees, departments and agencies and to work collaboratively with our stakeholders.

Finally, I would like to thank and acknowledge the staff of the Australian Public Service Commission who assisted me in discharging my statutory functions—they are a dedicated group who are committed to the importance of the work of the Merit Protection Commissioner. They have worked diligently through-out the year, ensuring that reviews are completed to the highest standard and offering sound and judicious advice when needed.

I would also like to thank the other staff of the Australian Public Service Commission who provide support for the operation of my office—this includes but is not limited to the corporate and legal areas, as well as the communications and IT areas.

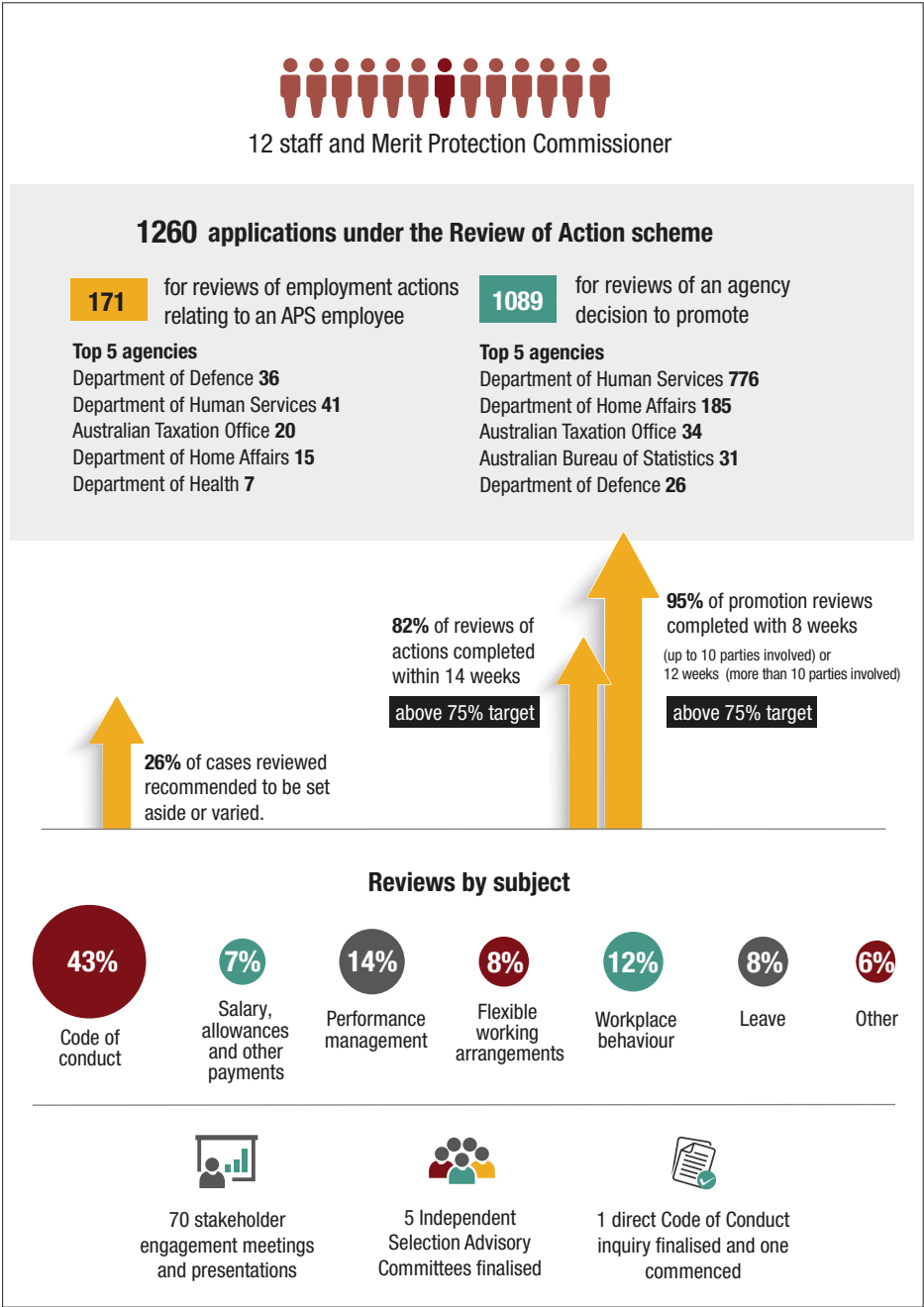
Linda Waugh
Merit Protection Commissioner

1. Overview



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Our year at a glance





Functions and responsibilities

The Merit Protection Commissioner is established under section 49 of the *Public Service Act*. Ms Linda Waugh was appointed to the role on 25 June 2018. Mr Bruce Barbour acted in the role of Merit Protection Commissioner from 28 June to 20 July 2018.

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

The Merit Protection Commissioner is co-located with the Australian Public Service Commission. The Merit Protection Commissioner's functions are set out in sections 50 and 50A of the Public Service Act and Parts 2, 4, 5 and 7 of the Public Service Regulations. The following sections outline each function in detail.

Review of actions scheme

Section 33 of the Public Service Act provides an APS employee an entitlement to review, in accordance with the regulations, of any APS action that relates to his or her APS employment (excluding termination). Agencies are responsible for internal reviews, and the Merit Protection Commissioner provides independent and external merit-based reviews.

The Australian Government general policy (Public Service Regulation 5.1) about the review of actions scheme is 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
- 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 in the operation of the scheme should prevent an application for review from being resolved by conciliation or other means at any time before the review process is completed.

The Merit Protection Commissioner can review three broad categories of employment-related actions within the scheme:

1. Review of Promotion decisions—an ongoing APS employee who applies for promotion to APS levels 1 to 6 and is unsuccessful, and where the person recommended for promotion is another APS employee, may apply for a full merits review of the promotion decision. A Merit Protection Commissioner promotion review decision is binding on the relevant agency head.

2. Primary review of a determination that an APS employee has breached the Code of Conduct, a sanction decision, or where it is not appropriate for the agency to do an internal agency review (for example, if the agency head was directly involved in the action, it is not appropriate due to the seriousness or sensitivity of the action, or the action is claimed to be victimisation or harassment of the employee for having made a previous application for review of action). This is called a primary review because the APS employee does not have to seek an internal agency review. Rather, they can apply directly to the Merit Protection Commissioner for review. Any APS employee at classifications below Senior Executive Service level can seek a primary review. The Merit Protection Commissioner can recommend the agency decision be upheld, varied or set aside.
3. Secondary review of any other employment-related action. This is called a secondary review because the APS employee must seek an internal review by their agency before applying to the Merit Protection Commissioner. An application can also be made when an agency head has rejected the APS employee's application for internal/primary review on the ground that it is not a reviewable action. Examples include performance review ratings, applications for flexible working arrangements and disputes over the type of leave applied for. Any APS employee at classifications below Senior Executive Service level can seek a secondary review. The Merit Protection Commissioner can recommend the agency decision be upheld, varied or set aside.

Inquiry functions

The Merit Protection Commissioner can conduct inquiries into:

- public interest disclosures that relate to alleged breaches of the Code of Conduct
- alleged breaches of the Code of Conduct by the Australian Public Service Commissioner
- an APS action at the request of the Public Service Minister
- alleged breaches of the Code of Conduct by an APS employee, or a former APS employee.

The Merit Protection Commissioner may also investigate a complaint by a former APS employee related to their entitlements on separation from the APS.

Statutory functions provided on fee for service basis

Under section 50A of the Public Service Act, the Merit Protection Commissioner may inquire into and determine, on a fee for service basis, whether an APS employee or a former employee has breached the Code of Conduct, if a request is made by the



agency head. The inquiry must have the written agreement of the employee or former employee. A finding or any action undertaken during an inquiry by the Merit Protection Commissioner cannot be subject of review under the review of actions scheme.

If requested, the Merit Protection Commissioner may establish Independent Selection Advisory Committees to help with agencies' recruitment processes. These committees are independent, three-member bodies that perform a staff selection exercise on behalf of an agency, and make recommendations about the relative suitability of candidates for jobs at the APS 1 to 6 classifications. The convenors are employees working for the Merit Protection Commissioner. A promotion decision by an Independent Selection Advisory Committee cannot be subject of promotion review under the review of actions scheme.

Non-APS fee for service work

Under section 50(1)(e) of the Public Service Act, the Merit Protection Commissioner can perform other such functions as prescribed by the regulations, and charge fees on behalf of the Commonwealth for those other functions (s. 50(3)). Regulation 7.4 lists those functions as:

- reviewing action that relates to the employment of a person by the person or body
- investigating action that relates to the employment of a person by the person or body
- providing advice that relates to the employment of a person by the person or body
- providing services in connection with selection committees used by the person or body for the selection or employment of a person
- providing other services that relate to the employment of a person.

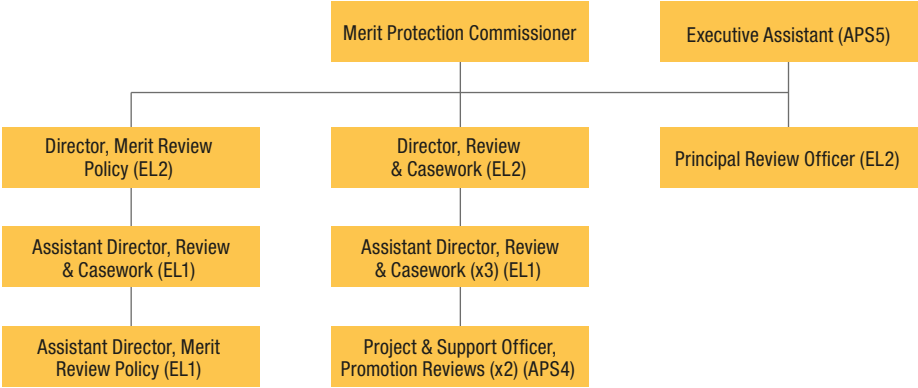
These can be for any non-APS entity including:

- Commonwealth authorities to which the Public Service Act does not apply
- state and territory departments and authorities
- local government bodies
- private corporations and bodies.

Structure

The structure of the Merit Protection Commissioner’s office is shown in the diagram below.

Figure 1: Structure of the office of the Merit Protection Commissioner



We also engage a small number of casual staff on an as-needed basis (usually for a specific activity such as convening a Promotion Review Committee or conducting a Code of Conduct investigation).

2. Report on performance of statutory functions



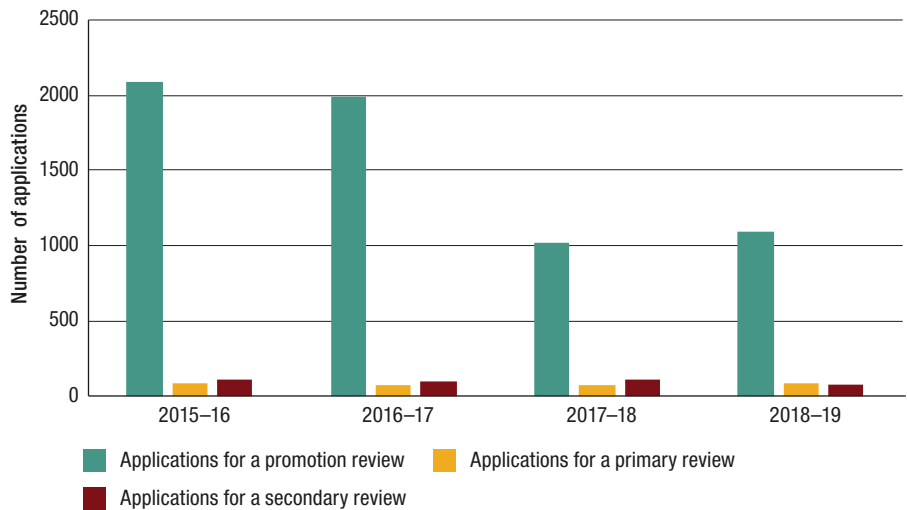
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Year-end totals for all reviews of action

During 2018–19 we received a total of 1,260 applications for a review of an APS action. Of these:

- 1,089 were applications for a promotion review
- 88 were applications for a primary review of a finding that an employee had breached the Code of Conduct, a sanction decision, or cases where it was not appropriate for the agency to conduct the initial review
- 77 were applications for a secondary review of an employment-related action (following dissatisfaction with the internal agency review)
- six were applications by former employees for review of a finding that they had breached the Code of Conduct or for an inquiry into entitlements on separation from the APS.

Figure 2: Trends in total number of review of action applications, 2015–16 to 2018–19



The number of promotion review applications can vary considerably from year-to-year, while primary and secondary reviews have remained relatively stable across time.

Reviews of promotion decisions

An ongoing APS employee can seek a review of an agency’s decision to promote one or more employees to an ongoing job at the APS 1 to 6 classifications. This is a merits-based review and, to be successful, the applicant must demonstrate that their claims to the job have more merit than the employee who was promoted.



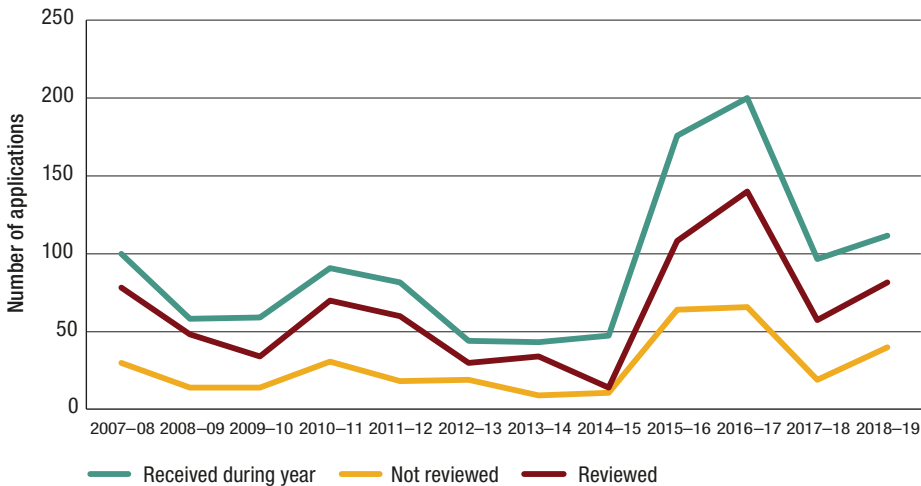
Of the 1,089 applications for a review of a promotion decision we received during the year, 112 were applications from unsuccessful applicants for promotion.

A total of 82 Promotion Review Committees were formed to consider 392 promotion decisions.

Promotion Review Committees also consider applications from individuals who have been promoted but who apply for review of the promotion of another APS employee in the same selection exercise. These are sometimes referred to as ‘protective’ applications. Their purpose is to ensure the employee’s interests are protected if their promotion is overturned on review—that is, if their promotion is set aside by a Promotion Review Committee, their ‘protective’ application will proceed to review. In 2018–19, none of these ‘protective’ applications proceeded to review, either because no unsuccessful applicants from the same selection exercise sought review of their promotion, or there was a review and the Promotion Review Committee upheld their promotion.

Figure 3 shows applications for promotion review from unsuccessful candidates, including how many did and did not proceed to review by a Promotion Review Committee. This shows the number has fluctuated between 2007–08 and 2018–19 (note: Tables 7 and 8 in the Appendix provide a more detailed breakdown of these applications and promotion review caseload).

Figure 3: Trends in applications for a promotion review from unsuccessful candidates considered by Promotion Review Committees, 2007–08 to 2018–19

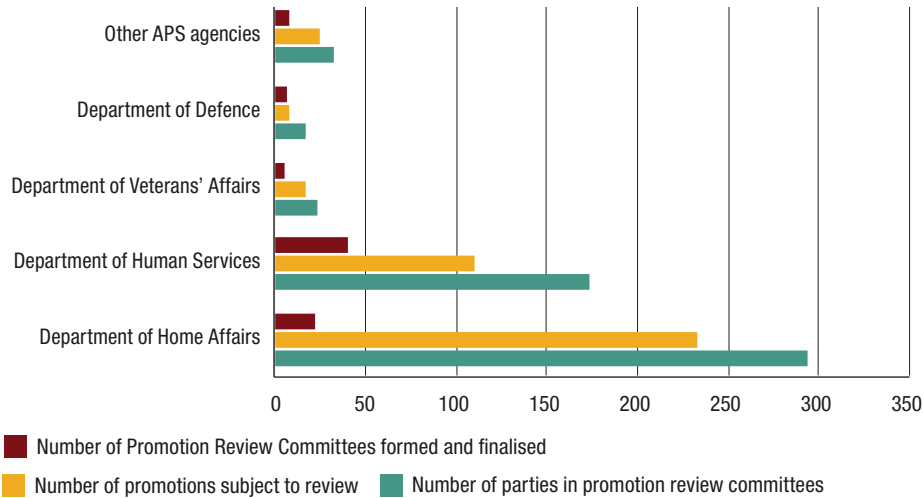


In 2018–19 both the number of applications from unsuccessful applicants and the scale of promotion review exercises increased. This reversed a sharp decrease from the peaks in 2015–16 and 2016–17. These peaks were the result of a significant increase in recruitment activity in large agencies following the lifting of a freeze on recruitment.

The promotion review application rate increased by 15 per cent in 2018–19 following a fall of 45 per cent in 2017–18. We handled 112 applications from unsuccessful applicants in 2018–19 compared with 97 in 2017–18.

These applications related to review of promotion decisions in 11 agencies. Figure 4 shows the number of Promotion Review Committees established and finalised by agency, as well as the number of promotion decisions considered and the number of parties to a promotion review.

Figure 4: Promotion review parties, committees and decisions by agency, 2018–19



As highlighted in Figure 4, the majority of finalised promotion reviews were of promotion decisions made in the Department of Human Services (now called Services Australia) and the Department of Home Affairs.

A party to a promotion review is either an unsuccessful candidate who has applied for promotion review or the person(s) promoted. During 2018–19 the largest number of parties to a promotion review for a single recruitment exercise was 71. This compares with 38 in 2017–18. Nine other recruitment exercises had 10 or more promotion review parties, compared with six in 2017–18. There was also an increase in the average number of applications per recruitment exercise—6.1 in 2018–19 compared with 4.4 in 2017–18.



Promotion Review Committees varied two (0.51%) of the 392 promotion decisions reviewed. This is similar to the percentage of promotion decisions varied in 2017–18 (0.37%) and in 2016–17 (0.49%). When a Promotion Review Committee varies a decision, it means the committee determined on the basis of merit that a review applicant was more meritorious for the position than the APS employee recommended by the selection panel. In these cases the committee's decision is determinative and final. Neither of the two promotion decisions varied involved protective applicants.

The performance target for conducting promotion reviews is that 75 per cent will be completed within either eight or 12 weeks of the closing date for an application, depending on the number of parties to a promotion review. That is, eight weeks for up to 10 parties and 12 weeks for 10 or more parties to a review.

We completed 95 per cent of promotion reviews within target timeframes during 2018–19. Four reviews were not completed within their target time of eight weeks, with only one case more than four days overdue. In this case the promotion review was delayed because a new committee needed to be formed after one member withdrew for unforeseen personal reasons.

Reviews of other actions

Reviews of other actions include:

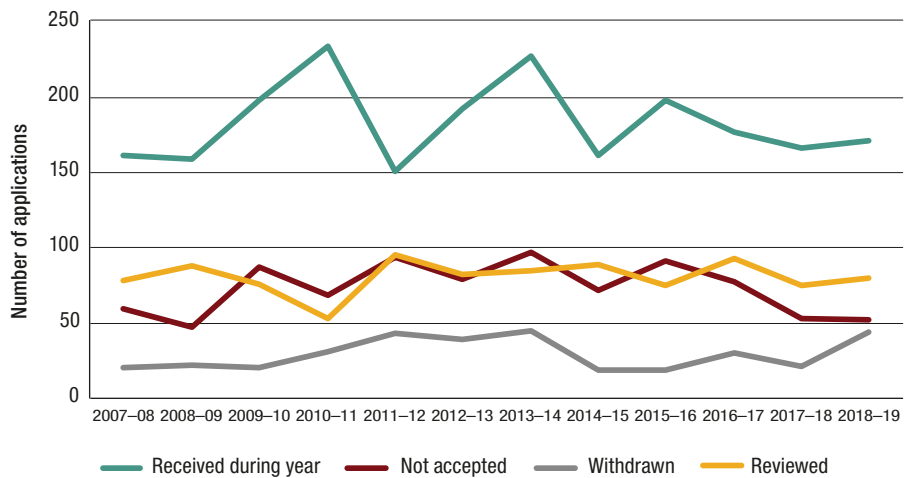
- Primary reviews of a determination that an APS employee has breached the Code of Conduct, a review of a sanction decision, or a review where an internal agency review is not appropriate—in these cases the APS employee does not need to apply for an internal agency review before applying to the Merit Protection Commissioner.
- Secondary reviews of any other employment-related action—in these cases, the APS employee must seek an internal review by their agency before applying to the Merit Protection Commissioner.

These reviews often involve complex decision making and account for the bulk of the work undertaken by staff within the office.

Review caseload and finalisation

Figure 5 shows the trends in review casework in the past 12 years. The total figures have been relatively stable over the last few years, with a slight upward trend this year.

Figure 5: Trends in applications for reviews of other actions, 2007–08 to 2018–19



Note: See Table 2 in the Appendix for information on the number of applications for review (other than promotion review) received and reviews completed in 2018–19 compared with 2017–18.

In 2018–19 we received 171 applications for review, compared with 166 in 2017–18. We finalised 176 cases in 2018–19, including 40 cases carried over from 2017–18. A case is finalised when it is closed for one of the following reasons:

- following a full merits review
- because the application was ineligible or the action was non-reviewable
- because the application was withdrawn
- because the review right lapsed as the applicant left the APS.

Of the 176 finalised cases, 80 were subject to a full merits review. The remainder did not proceed or continue for the other reasons above. The following section provides further information on applications not accepted for review.

Of the matters decided by the Merit Protection Commissioner (that is, where we conducted a review or assessed the application as being ineligible), we finalised 79 per cent during the reporting period. This is an improvement on the previous year where we finalised 68 per cent.

The performance target for reviews of employment actions is that 75 per cent of reviews will be completed within 14 calendar weeks of receipt of an application (excluding time on hold). We exceeded our performance targets in the reporting year, with 82 per cent of review of employment action cases finalised within the target timeframe (compared with 77 per cent in 2017–18).



The average time taken to finalise a case was 10.6 weeks (excluding time on hold). When time on hold is included, the total average time to finalise cases was 17.7 weeks.

Review cases are put on hold when the review is not able to progress. The main reasons are:

- waiting for papers or information from the agency
- waiting for additional information from the applicant
- waiting for an agency to make a sanction decision (an application for review of a decision that an employee has breached the Code of Conduct may be placed on hold pending receipt of an application for review of the sanction arising from the same matter).²

Delays originating in our office, including the 8-day Christmas closure, accounted for a small amount of time cases were placed on hold. Time on hold is not counted against the 14-week performance target.

In 2018–19, on average 40 per cent of the time between the date an application was received and the date the review was finalised was spent on hold. The average time on hold for a finalised review increased slightly from 6.7 weeks in 2017–18 to 7.15 weeks in 2018–19.

Applications not accepted for review

In 2018–19, 25 per cent of applications were not accepted for review. This compares with 28 per cent in 2017–18. The reasons for not accepting applications varied according to the type of review.

The main reasons for not accepting applications for review of Code of Conduct decisions were:

- the application was received outside the timeframe for lodging a review
- the application concerned decisions other than a finding that the employee had breached the Code of Conduct or a sanction decision.

The main reasons for not accepting applications for review of employment action matters other than Code of Conduct decisions were:

- the Merit Protection Commissioner exercised discretion not to review a matter for various reasons, among them that nothing useful would be achieved by continuing to review the matter (28%)
- the applicant needed to first seek a review from their agency (26%)
- the application was about a matter that fell into one of the categories of non-reviewable actions set out in Regulation 5.23 or Schedule 1 to the Regulations (19%)
- the application was out of time (9%).

² In the majority of cases the Merit Protection Commissioner will commence a review of a breach decision irrespective of whether a sanction decision has yet been made. In some cases the Merit Protection Commissioner will wait to commence a review of a breach decision (for example, when the sanction decision is about to be made or at the request of the applicant).

Generally, decisions not to accept applications for review are made quickly—just over half of these decisions are made in two weeks or less. Some decisions can take longer if the decision maker needs to clarify matters of fact with the agency or the review applicant. A total of 36 per cent took four weeks or more. The average time taken to decide to decline an application was just under five weeks.

Case study 1: Further review of an employee's concerns not justified as no useful outcome could be achieved

An employee sought review of their agency's response to allegations made by a colleague about the employee's behaviour, and allegations the employee made about the colleague's behaviour. The background to this matter was historical conflict between staff of two teams whose functions overlapped.

The agency declined to investigate the employee's allegations about the colleague. The agency engaged a consultant to investigate the colleague's allegations about the employee, and a different consultant to conduct a review of the employee's concerns about the investigation and the handling of his allegations. The employee was found to have behaved inappropriately in one incident. This finding was recorded on the employee's personnel file but no other action was taken (for example, action under the performance management or misconduct frameworks).

The Merit Protection Commissioner declined to review the employee's concerns on the basis that further review by either the agency or the Merit Protection Commissioner was not justified in the circumstances. The Merit Protection Commissioner gave the following reasons:

- No substantive adverse outcome for the employee arose from the agency's handling of this matter.
- The employee's allegations about the colleague concerned incidents that were several years old and arose from: workplace gossip; speculation about motives; and differences of opinion about the colleague's authority. The Merit Protection Commissioner considered that further review or investigation was unlikely to prove or disprove the employee's claims.
- The employee had not identified any outcome from further review that would assist in resolving the workplace dispute. In the Merit Protection Commissioner's opinion, the employee wanted to be proven correct and this was an unlikely outcome.

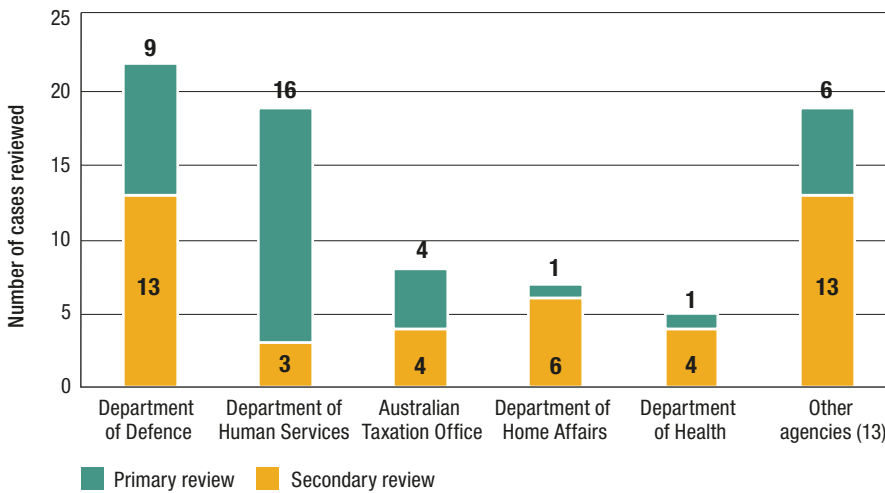
The Merit Protection Commissioner noted that the staff involved in this dispute were relatively senior, and the workplace conflict was ongoing and appeared not to have been resolved by the agency's interventions. The Merit Protection Commissioner suggested the agency incorporate behavioural expectations, including collaborative working, in the performance agreements of the staff involved in the dispute.



Number of reviews by agency

During the year we completed review of other actions in 18 APS agencies.

Figure 6: Review of action other (primary and secondary) by agency, 2018–19



Note: Table 4 in the Appendix provides greater details on the number of reviews by agency. 'Other' agency category is comprised of 13 agencies with less than four review applications for 2018–19.

In 2018–19 the Department of Defence accounted for 27.5 per cent of the completed reviews and the Department of Human Services accounted for 24 per cent. The Department of Home Affairs and the Australian Taxation Office together accounted for a further 19 per cent of reviews. This differs to 2017–18 when the Department of Human Services accounted for 52 per cent of completed reviews.

Case study 2: Applying a subjective test to an employee's behaviour

An employee was found to have breached two elements of the Code of Conduct (respect and courtesy and upholding the APS Values) for a comment she made to a colleague during a conversation. The employee received sanctions of a reprimand and a small fine.

The review material indicated there was a history of conflict between the two employees, which the workplace was managing, including through alternative dispute resolution.

The finding of misconduct arose from a discussion between the employee and her colleague about a workplace matter. The employee was confused by what her colleague told her and made a comment about the colleague's state of mind. The colleague subsequently complained that he found the comment offensive. His complaint was expressed in very strong terms and indicated that he had reflected on, and interpreted, what the employee had said.

The agency decision maker considered that the employee had engaged in misconduct for 'causing offence' to the colleague. The Merit Protection Commissioner concluded the evidence of what the employee had actually said was unclear. Nevertheless, even if the employee had said what was stated in the complaint, the words attributed to her could not reasonably be viewed as offensive or justify such a strongly worded complaint.

The Merit Protection Commissioner recommended that the finding of misconduct be set aside, noting that the test for establishing whether an employee has breached the Code of Conduct is an objective one (the reasonable person test). In this case, the agency decision maker appeared to have applied a subjective test by accepting the colleague's characterisation of the employee's behaviour without making an assessment of whether a fair minded, independent observer would view the employee's words in this way.

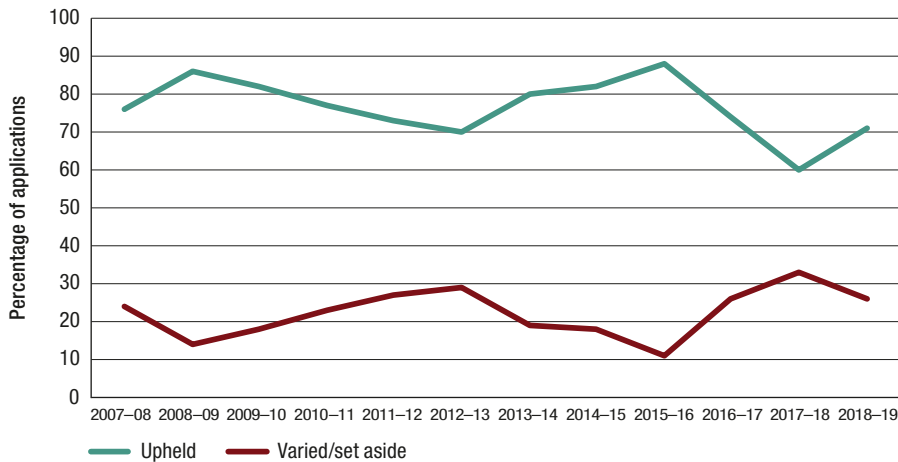
Review outcomes

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

The majority of review of other actions result in the agency decision being upheld. In 2018–19 we upheld 71 per cent of agency decisions or actions in the 80 cases subject to full merits review. As shown in Figure 7, this is higher than the previous year (in 2017–18 we upheld 60 per cent) and similar to the 74 per cent upheld in 2016–17.



Figure 7: Number of agency actions or decisions set aside/varied or upheld, 2007–08 to 2018–19



In 26 per cent of cases we recommended the decision under review be varied or set aside. A further two per cent of cases resulted in a conciliated outcome.

Compared with other types of employment actions, we are more likely to recommend that Code of Conduct decisions be varied or set aside. In the reporting year, 36 per cent of determinations of misconduct or sanctions we reviewed were set aside or varied, compared with 38 per cent in 2017–18. This is higher than for our reviews of other action (that is, secondary reviews where the employment action has been first reviewed by the agency) where we recommended that 19 per cent be varied or set aside, compared with 24 per cent in 2017–18.

Two reviews related to findings that a former APS employee had breached the Code of Conduct. In one case, we recommended the agency decision be varied because one of four breaches was not found, while in the other we upheld the agency decision as it was fair and reasonable.

The main reasons the Merit Protection Commissioner recommends an agency misconduct decision be set aside are:

- procedural problems in the decision making process result in substantive unfairness to the employee
- insufficient evidence to determine that the employee had done what they were found to have done
- assumptions made without sufficient evidence.

The main reasons for recommending an agency misconduct decision be varied are:

- the employee has done only some of what they were found to have done
- the agency has misapplied elements of the Code of Conduct.

The main reasons for recommending other employment decisions (that is, secondary reviews) be set aside or varied are:

- substantial non-compliance with agency policies
- failure to afford procedural fairness in a fact finding inquiry
- insufficient evidence about performance expectations and of the level of performance required
- there has not been proper regard to the employee's personal circumstances in applications for flexible working arrangements.

Thank you for your detailed review. We will take learnings from this matter, including the need for managers to maintain contemporaneous notes [of performance discussions] and clarify directly with the employee when they feel an employee is falling short.

Agency manager—May 2019

Two cases were conciliated during the reporting year, one involving separation entitlements and the other a request for a primary review of the actions of a supervisor. In these cases, the agency or review applicant agreed to act on the Merit Protection Commissioner's preliminary view about an employee's case without the Merit Protection Commissioner making a formal recommendation. By the end of 2018–19, agencies had accepted all our review recommendations. Three agency responses were outstanding at 30 June 2019.



Case study 3: Agency's operating environment a relevant consideration in setting sanction

A level of consistency in sanctions for similar behaviour is desirable across APS agencies. However, because of their operating environment, some agencies view particular behaviours more seriously than might generally be the case.

Integrity agencies with staff employed under the Public Service Act demand the highest standards of integrity and professionalism from their staff because of the nature of their work, the sensitive information they hold and the risk of staff being compromised. These standards are reinforced through processes such as employment suitability screening.

Two employees from different integrity agencies were reduced in classification as a result of a finding of a breach of the Code of Conduct. Both employees argued on review that the sanction they received was unfair, including because the sanction was disproportionate to the objective seriousness of the behaviour.

One employee identified himself on social media as an employee of the agency, in breach of the agency's social media policy, engaging in behaviour that his employer would not approve of. A second employee failed to record her attendance accurately over a six month period accruing a debt to the Commonwealth.

The Merit Protection Commissioner had regard to the sanction decision makers' views of the trustworthiness of both employees. In the first case, the employee was a supervisor and his behaviour demonstrated a lack of mature professional judgement. In the second case, the employee did not demonstrate an intrinsic motivation to do the right thing. The Merit Protection Commissioner also considered the leadership and accountability standards for the employees' classification levels outlined in the APS Work Level Standards.

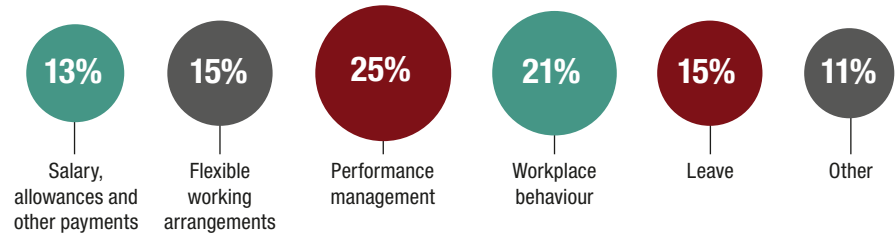
The Merit Protection Commissioner also considered the need for general deterrence—that in these cases the sanctions demonstrated to agency employees more generally that these behaviours were not tolerated. The Merit Protection Commissioner recommended the sanctions be confirmed.

Reviews by subject matter (excluding Code of Conduct)

As noted elsewhere, reviews of actions (excluding Code of Conduct matters) are typically secondary reviews where the applicant must have sought an internal review by their agency before applying to the Merit Protection Commissioner.

Figure 8 (below) and Table 5 in the Appendix provide a breakdown of secondary review cases by subject matter, excluding Code of Conduct reviews. The majority of reviews relate to same three areas of concern as in 2017–18, that is, performance management, workplace behaviour and access to flexible working arrangements.

Figure 8: Secondary review cases by subject, 2018–19



Note: Excludes Code of Conduct cases.

Case study 4: Review of a performance rating and process

An employee disputed a performance rating of ‘not on track’ based both on his output and behaviours. The employee also claimed that his manager was treating him unfairly and his agency had breached his workplace rights in the way he was managed during the performance cycle.

The employee’s performance agreement was goals focused and included no performance expectations. The employee drafted his agreement including only his career goals and his aspiration to pursue a career outside the agency. However, the Merit Protection Commissioner was satisfied that the employee was aware of the performance expectations in his role. The team he was part of had a team expectations document that covered outputs and behaviours.

There were documented discussions between the employee and his manager on the level of output expected and the manager’s concerns about the employee’s output. The employee disputed that the output expected was reasonable. The Merit Protection Commissioner gave weight to the manager’s views, as the manager was accountable for the performance of the team. In addition, the documentary evidence of the way the manager explained the requirements to the employee, and responded to his concerns, did not suggest the manager’s requirements were unfair or arbitrary.

The Merit Protection Commissioner was also satisfied that the manager’s concerns about the employee’s behaviour were valid. The employee displayed a lack of judgement in his email communications with his colleagues and managers, and in his personal behaviour in the workplace. In the Merit Protection Commissioner’s view, the employee’s behaviour was inconsistent with the behavioural requirements for the team, which included collaborative working and respect for colleagues.

The Merit Protection Commissioner observed that, as evidenced by email communications, the manager had responded to the challenges involved in managing the employee with professionalism, patience and courtesy. The Merit Protection Commissioner found the outcome of the performance management process was fair and complied with the agency’s policy framework, and that the employee’s manager had treated him fairly in assessing and rating his performance.

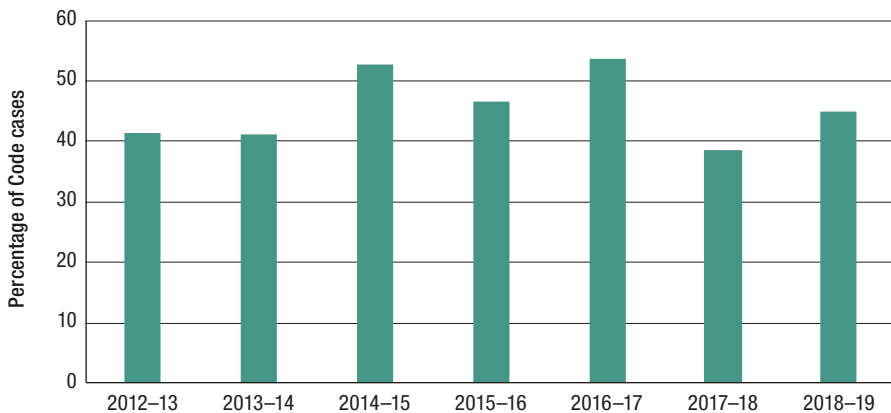


Code of Conduct reviews

APS employees who are found to have breached the Code of Conduct can apply to the Merit Protection Commissioner for a review of the breach finding and/or the sanction imposed. Our review work for Code of Conduct matters provides APS employees with an independent review of an action that is of significance for them. It is also an area of employment decision making that requires monitoring and a degree of oversight.

Data in the Australian Public Service Commissioner's annual *State of the Service Report* for the past three years shows the Merit Protection Commissioner is estimated to review between 4 and 10 per cent of agency Code of Conduct decisions.³ In 2018–19, Code of Conduct cases accounted for 45 per cent of all cases reviewed. Code of Conduct cases had been growing as a proportion of the total caseload (excluding a reduction to 39 per cent in 2017–18).

Figure 9: Trends in proportion of Code of Conduct reviews, 2012–13 to 2018–19



During 2018–19 there were 75 applications for review of a decision that an employee had breached the Code of Conduct and/or the sanction received, and 18 cases on hand on 1 July 2018. We finalised 36 cases during the year, involving 26 employees.⁴ We also reviewed two applications by former employees for review of determinations that they had breached the Code of Conduct.

³ *The State of the Service Report 2017–18* reported 569 employees were found to have breached the Code of Conduct in 2017–18. In 2017–18 we reviewed applications from 23 employees relating to breaches of the Code of Conduct and a further 18 were on hand. While the two sets of data do not include the same employees, a comparison over time provides an estimate that between four to 10 per cent of agency decisions are reviewed.

⁴ Employees may apply separately for a review of a breach determination and the consequential sanction decision. Where this happens, it is counted as two cases, as each is a review of a separate action. This is the reason there are more cases than employees.

Of the 28 cases reviewed (26 current employees and two former employees):

- the decisions were upheld in their entirety in 17 cases
- we recommended the finding of misconduct be set aside in its entirety in four cases
- we recommended that the findings of breach be varied in five cases
- we upheld the breach decision but set aside the sanction decision because of procedural flaws in one case
- we varied the finding that the employee had breached the Code of Conduct but upheld the sanction decision in one case.

We recommended the findings of misconduct be set aside in four cases for the following reasons:

- In one case the employee who worked in an IT security role was found to have breached the Code for inappropriate use of IT resources for gaming, excessive use of Wi-Fi and failure to retain a password that would enable the agency to do a forensic search. We found the agency made assumptions about the employee's activities on insufficient evidence and that the agency policy guidelines did not specify the obligations of staff in specialist IT security roles with respect to password maintenance.
- In one case the agency investigation failed to provide procedural fairness. The employee was provided with a summary rather than the full report into his conduct, thereby withholding credible, relevant and significant evidence.
- In one case the employee had done what the agency accused them of but the agency did not establish that the actions were in breach of the agency's principles-based policy.
- In the final case the employee was found to have engaged in unacceptable personal misconduct in a conversation in the workplace. We found on review that it could not be established what had happened and the complainant's account was neither reliable nor objective. We also found other errors in the decision, such as the use of a subjective, rather than objective, test for establishing a breach and an unenforceable direction.



Case study 5: Failure to give a fair hearing

An employee was found to have breached two elements of the Code of Conduct (respect and courtesy and upholding the APS Values) for his behaviour towards a colleague during a work meeting.

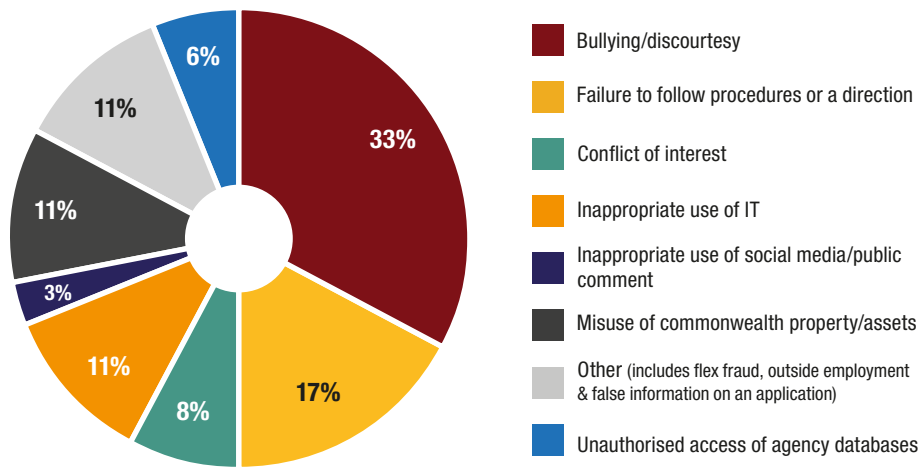
The agency engaged an investigator who interviewed witnesses and prepared an investigation report with findings and recommendations. Because of privacy concerns about the witness evidence, the agency decided to provide the employee with an appendix to the report, which outlined the evidence with respect to the incident, but not the full report. In doing so the agency withheld information in the investigation report, including the witnesses' and investigator's opinions about the employee's general behaviour and witness evidence about the employee's previous behaviour towards the colleague. The agency considered this information was not relevant to the specific facts that needed to be determined, namely the employee's behaviour during the incident.

The Merit Protection Commissioner considered that some of the information withheld from the employee was adverse information relevant to the finding of misconduct. The information indicated the employee had a tendency to behave in the way alleged in the incident. The Merit Protection Commissioner concluded that the employee should have been given an opportunity to comment on this information, or a reasonable summary of it, before the decision was made.

The Merit Protection Commissioner considered that the agency's failure to give the employee a hearing about this information represented a substantive breach of the requirements of procedural fairness and recommended that the Code of Conduct breach determination be set aside on the basis of a serious procedural defect.

Figure 10 (below) and Table 6 in the Appendix provide a breakdown of the types of employment matters dealt with in Code of Conduct reviews.

Figure 10: Code of Conduct cases reviewed, by subject, 2018–19



The largest area of behaviour reviewed as misconduct concerned bullying and discourteous behaviour. The percentage of cases increased this year to 33 per cent, from 24 per cent in 2017–18. In most cases the behaviour was directed at colleagues or managers. However, in two cases managers directed the behaviour at their respective teams.

The conflict of interest matters reviewed concerned employees supporting a friend's business and failing to declare a conflict of interest, using their position with agency clients in such a way as to seek advantages, and being involved in a recruitment exercise where a family member was selected. The social media matter reviewed concerned the employee involving a junior colleague in filming themselves in the workplace and then posting the video on Facebook in breach of the agency's social media policy.



Case study 6: A flawed bullying and harassment investigation

Complaints were made about an employee's behaviour in the workplace. The agency responded with a bullying and harassment investigation rather than a misconduct inquiry. The investigation was undertaken under the agency's policy for responding to complaints of bullying and harassment.

The agency advised the employee that the investigation process was informal and on review, in response to the employee's concerns, advised that the process did not have strict procedural fairness requirements.

The investigation resulted in adverse findings about the employee's behaviour. These findings resulted in the employee being issued with a direction with respect to their future behaviour and the denial of performance-based salary advancement.

The Merit Protection Commissioner concluded that the way the investigation was conducted (including terms of reference, interviewing witnesses and taking statements, and developing a report with recommendations) meant the process was a structured and formal workplace investigation, not an informal tool to assist management decision making.

The Merit Protection Commissioner found the investigation process and final decision were procedurally flawed, including for the following reasons:

- the employee was told specific processes relating to the investigation would be followed and they were not
- the investigator did not supply the employee with a copy of the investigation report with findings or an opportunity to comment before giving the report to the decision maker
- the decision maker did not inform the employee of their proposed decision, or the evidence to support the decision, before issuing the behavioural instruction.

The Merit Protection Commissioner recommended the decision be set aside and a fresh investigation be conducted by people with no connection to the matter.

Consistent with the APS Employment Principles, employees are entitled to have fair decisions made. Processes in the workplace that have an investigatory character are workplace investigations. An employee should be notified of the process to be undertaken, and that process should be followed. Employees are entitled to procedural fairness in workplace investigations and, consistent with the hearing rule, should be given an opportunity to rebut any evidence, statement or proposed finding that is adverse or prejudicial to them, before these findings are presented to the decision maker.

Other review-related functions

Under Part 7 of the Public Service Regulations, the Merit Protection Commissioner may:

- investigate a complaint by a former APS employee that relates to the employee's final entitlements on separation from the APS (Regulation 7.2)
- review a determination that a former employee has breached the Code of Conduct (Regulation 7.2A)
- review the actions of statutory officeholders who are not agency heads (Regulation 7.3).

Table 2 in the Appendix provides information on the number of applications made under Part 7 in 2018–19. We received five applications about final entitlements. Four applications were not accepted. In the fifth case, we resolved the former employee's concerns through discussion with the agency, which decided to make the payment in dispute.

During the year we also finalised two applications from former employees for review of determinations of misconduct made after they had ceased APS employment. We upheld one case relating to failure to declare a conflict of interest. The second case involved four incidents of discourteous behaviour in the workplace. We found misconduct in three of the incidents, but noted that the fourth incident did not meet the threshold of seriousness to constitute misconduct.

There were no cases seeking review of the actions of a non-agency head statutory office holder.

Feedback from review applicants

All applicants with a completed review were given the opportunity to provide anonymous feedback to the Merit Protection Commissioner through an online survey. Applicants whose reviews were finalised between July and December 2018 were surveyed in February 2019 (noting the delay was because the survey instrument was being reviewed and updated). Applicants whose reviews were finalised in 2019 were usually surveyed within two weeks of receiving advice about the outcome of their review.

The response rate for the survey was 26.5 per cent (18 respondents). This compares with 37 per cent in 2017–18 and 18 per cent in 2016–17.

The feedback shows that 50 per cent of respondents found out about their review rights from the Merit Protection Commissioner website. The next most significant source of information was their agencies. Two-thirds of applicants agreed the Merit Protection Commissioner website was easy to navigate, a further 17 per cent did not agree, and 17 per cent were neutral. Suggestions for improving the website included providing a clearer explanation of the process, the scope of reviews and expected timeframes, as well as greater use of case summaries.



There was general satisfaction with the application process. The majority of respondents found:

- the application forms were easy to lodge (72%) and easy to fill in (89%)
- the information sheet provided to them after they made their application was the right length, contained the information they needed, and was relevant and easy to follow and understand (80%).

On contact and dealings with Merit Protection Commissioner staff, approximately three-quarters of respondents reported that they were advised of who they should contact in the office (78%), received adequate information at the beginning of the review to understand how the review would proceed (72 %), had their phone calls and emails responded to in a timely manner (78%) and were given the opportunity to submit information supporting their review application (72%).

However, only two-thirds of respondents reported that they were given appropriate information about the scope of the review, and only half considered they received enough updates about the progress of their review. In addition, only half considered they understood what information they needed to provide in their written submission.

Of the 16 applicants who could recall, 56 per cent (nine) were told how long the review would take and 56 per cent of these reviews were completed within that timeframe.

The above results suggest that at the beginning and throughout the review process, we need to provide applicants with better information about the contact point in the office, the scope of their review, what information is needed (and what is not required), what they can expect to achieve, and the expected timeframes. This will be an area of focus in the coming year.

When it came to feedback on the outcome and satisfaction with the review process, the views of respondents are generally polarised, correlating with their satisfaction with the outcome. Only 39 per cent thought the review was completed in an independent and impartial way, and 44 per cent thought the review process was fair and equitable. A total of 56 per cent stated they would recommend the process to a colleague.

I am very appreciative of the time you have spent going through the whole matter, sourcing all the facts necessary and allowing me to provide my views.

Review applicant—March 2019

The reasons for the negative responses included:

- failure by the Merit Protection Commissioner's office to invite submissions, contact the applicant in person, or allow them to respond to submissions/preliminary view in a similar timeframe given to agencies

- not addressing the applicant's concerns
- the applicant's perceptions that the agency's submissions and views were given greater weight than their views
- the applicant's perception that the process was biased and favoured the agency, which had more resources
- the process was not timely.

Three of the respondents in particular were very disparaging of the Merit Protection Commissioner and their experience of the review process (for example, describing it as 'a waste of time', 'my claims [were] condescendingly dismissed out of hand by your biased and partisan Reviewer'). However, the six respondents who indicated their outcome was a set aside were highly supportive of the review process. Their views on the decision letter/report were all positive and they considered the process to be fair, impartial and unbiased, and would recommend the process to a colleague.

I would like to compliment your team member...in relation to her interaction with me when advising me of the outcome of a recent matter...While it wasn't the outcome I wanted, the way in which [team member] contacted me and spoke to me was far greater than anything I expected from an Australian Government employee.

Review applicant—July 2019

Some of the survey responses suggested the need for improvements in relation to a number of procedures and practices. These included having a greater degree of personal contact with the applicant (and for some applicants, any contact at all), clearer pathways for lodging applications, providing better advice on the scope and timing of the review, and providing progress reports. We will address these matters during 2019–20.

Inquiry functions

Under section 50(1)(b) of the Public Service Act, the Merit Protection Commissioner may:

- inquire into public interest disclosures (within the meaning of the *Public Interest Disclosure Act 2013*) relating to breaches of the Code of Conduct
- inquire into complaints that the Australian Public Service Commissioner has breached the Code of Conduct and report on the results of any inquiry to the Presiding Officers of the Parliament, including any proposed sanction
- at the request of the Public Service Minister, inquire into an APS action.



Provisions were inserted into the Public Service Act to enable the Merit Protection Commissioner to inquire into public interest disclosures. However, the Commissioner was not prescribed in Public Interest Disclosure Rules as an authorised officer, so agencies are unable to refer disclosures to her. The Merit Protection Commissioner may inquire into a disclosure if the disclosure was made to an agency head and the discloser is not satisfied with the outcome. We finalised one such application for an inquiry in 2018–19.

The applicant made a disclosure to their agency. The matter was investigated, however, the applicant considered that the agency head may not have implemented appropriate measures under the Code of Conduct. The Merit Protection Commissioner considered the request and sought further information. The Commissioner declined to inquire into the disclosure, as she was of the opinion that any inquiry would be unlikely to result in any recommendation to the agency to undertake action under the Code of Conduct.

Two complaints that the Australian Public Service Commissioner had breached the Code of Conduct were under investigation at the start of the reporting year. Both matters were concluded on 7 August 2018, when the Merit Protection Commissioner provided the final report to the Presiding Officers of the Parliament.

There was no request from the Public Service Minister to inquire into an APS action during 2018–19.

Statutory services provided on a fee for service basis

Inquiries into breaches of the Code of Conduct

Under section 50A of the Public Service Act, the Merit Protection Commissioner may inquire into and determine whether an APS employee or a former employee has breached the Code of Conduct, if a request is made by the agency head. The inquiry must have the written agreement of the employee or former employee. The Merit Protection Commissioner charges a fee for inquiries done under this section.

Three cases were received during the reporting year. Two cases were withdrawn because the employee did not consent to the inquiry. An inquiry commenced into the third case but was not finalised on 30 June 2019. This matter involved allegations of bullying.

Table 9 in the Appendix sets out further information on inquiries by the Merit Protection Commissioner under section 50A for 2018–19.

Independent Selection Advisory Committees

If requested, the Merit Protection Commissioner may establish Independent Selection Advisory Committees to help with agencies' recruitment processes. These committees are independent three-member bodies that perform a staff selection exercise on behalf of an agency and make recommendations about the relative suitability of candidates for jobs at the APS 1 to 6 classifications. The convenors are employees working for the Merit Protection Commissioner.

Agency demand for the committees was lower in 2018–19, with only one agency requesting the use of Independent Selection Advisory Committees, compared with three in 2017–18. However, the recruitment exercise was large, covering a recruitment campaign for APS 6 vacancies in 11 locations in five states. Five committees were established. They considered 877 candidates and recommended 131 candidates for engagement, transfer or promotion—an average of 175 candidates and 26 recommendations per committee, compared with an average of 39 candidates and eight recommendations in 2017–18.

As the national campaign involved different committees, we worked with the agency and the convenors before the selection process commenced to ensure a consistent approach. We also held regular meetings with the convenors to address common issues including the handling of applicants who applied for multiple vacancies across the states.

Table 10 in the Appendix provides information on Independent Selection Advisory Committee activity for 2018–19, compare with to 2017–18.

Non-APS fee for service work

In accordance with Regulation 7.4, the Merit Protection Commissioner can offer other fee for service activities, such as staff selection services and investigating grievances, to non APS-agencies. No work was carried out under Regulation 7.4 during 2018–19.

3. Stakeholder engagement, business improvement and governance



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Working with stakeholders

In 2018–19 we continued our outreach to APS agencies, human resources practitioners and employees regarding lessons learnt from the review caseload. The aim of working with internal and external stakeholders is to improve employment-related decision making in the APS.

During 2018–19:

- The Merit Protection Commissioner or her staff had 70 contacts with stakeholders—either through meetings or presentations.
- The Merit Protection Commissioner undertook a series of meetings with senior staff in agencies when she started in the role.
- The Merit Protection Commissioner and senior staff met with senior executives and practitioners in agencies to discuss specific case outcomes, including outcomes that raised broader issues about agency policy and practice. These included the largest agencies—the Australian Taxation Office, Department of Defence and Department of Human Services.
- The Sydney-based Review of Action and Code of Conduct Community of Practice for APS practitioners continued to meet. The group held three meetings in 2018–19 (November, February and May), one of which was chaired by the Merit Protection Commissioner. Issues of interest discussed by group members included consistency of sanctions, managing mental health, handling unreasonable complainants, and alternative dispute resolution.
- The Merit Protection Commissioner made a presentation to a Working Together Conference conducted by the Australian Taxation Office in March 2019 and also met with a delegation from Taiwan in November 2018.
- In March 2019 a senior employee represented the Merit Protection Commissioner at three APS-wide graduation development programs focusing on recruitment and staff engagement. The sessions were part of the Australian Public Service Commission's APS graduate program. In April 2019 another staff member gave a presentation to the APS Small Agencies Forum on performance management and the Code of Conduct.

The Merit Protection Commissioner contributes to the ethics and integrity framework as a member of the Integrity Agencies Group. The group enables information sharing and collaboration between statutory office holders and agencies with responsibility for integrity matters. The Merit Protection Commissioner attended two meetings in 2018–19.

Staff also attend the Ethics Contact Officer Network meetings run by the Integrity, Performance and Employment Policy Group within the Australian Public Service Commission. The network promotes the Government's ethical agenda, which focuses



on enhancing ethics and accountability in the APS and is another forum we can use to encourage good decision making.

We also worked with agencies to help them manage promotion review processes and provide feedback on the effectiveness of their selection processes. The focus was agencies conducting bulk promotion exercises, such as the Department of Home Affairs. In addition, we discussed matters related to promotion review with the policy teams in the Australian Public Service Commission, to ensure consistency of advice to agencies.

Business improvements

During the reporting year, the Merit Protection Commissioner began reviewing our strategy and operations. While last year's report stated this should have been completed by this financial year, this work was still ongoing at the end of the reporting period. We held an employee planning day in December 2018, and have done preliminary work to develop a strategic plan and business plan. A marketing and communications strategy was also drafted during the relevant period.

Staff performance and activities

We have worked on documenting role descriptions and standards of performance to strengthen the performance management procedures within our office. We are making greater use of technology in monitoring attendance and leave, and processes for recording staff training and participation in meetings and presentations.

Review procedures manual

In early 2019 we began a project to update our procedural guides and develop decision making tools to support review advisers.

Merit Protection Commissioner's website

The Merit Protection Commissioner's website was moved to the GovCMS platform during the reporting year. As part of this process we reviewed and updated our website content.

Improving papers distribution for Promotion Review Committees

During the year we moved to using Govteams, a collaborative working space administered by the Department of Finance. Govteams facilitates the exchange of information and documents electronically between APS agencies and the office of the Merit Protection Commissioner. Importantly, Govteams allows papers to be provided to Promotion Review Committee members.

Changes to review case management processes

At the start of 2019, we introduced changes to case handling to improve efficiency and timeliness in handling reviews, and to promote a risk management approach to handling reviews.

We introduced a system of triage for handling review cases, which involves a *prima facie* assessment of the significance and risk attached to particular review matters to inform who the case is allocated to and the way it is handled.

The Merit Protection Commissioner has also expanded the number of staff with delegations to perform her functions. Previously only officers at the EL2 were given delegations. However, EL1 officers who have demonstrated an ability to independently conduct reviews have now also been given delegations. We introduced a supervision model in which less experienced delegates are supervised by more experienced delegates.

We also introduced fortnightly case management meetings of review staff to share learnings and identify agency-specific and systemic issues, which were fed back to agencies.

Training for Merit Protection Commissioner's casual staff and Merit Protection Commissioner's nominees

The Merit Protection Commissioner maintains registers of suitably qualified non-ongoing (casual) staff to undertake statutory functions, including convening Promotion Review Committees and Independent Selection Advisory Committees and conducting inquiries into alleged breaches of the Code of Conduct. New contracts were issued to non-ongoing employees in January 2019.

On every Promotion Review Committee there must be a nominee of the Merit Protection Commissioner. These nominees are agency staff from across the APS who have the necessary knowledge and expertise to participate in a promotion review process. The role is important as the Merit Protection Commissioner nominee is, and is seen to be, an impartial and independent APS employee. The APS employees undertake this role on a voluntary basis and their agency head makes them available to perform the role. Our register of Merit Protection Commissioner nominees had not been reviewed or updated for a considerable period of time, and during 2018–19 we refreshed this list.

During November and December 2018 we sought applications from APS employees wanting to be placed on the register of qualified Merit Protection Commissioner nominees, through direct communication to agency heads and other senior executives, and by advertising in the APS Gazette. We received 67 applications, which we assessed for experience and suitability. All applicants were registered as suitable to be a Merit Protection Commissioner nominee on future Promotion Review Committees. We also sought interest from existing nominees to continue to perform the role, and 50 APS employees decided to continue in the voluntary role.



All nominees must be trained by Merit Protection Commissioner or her staff before they can undertake the role on a Promotion Review Committee. The Merit Protection Commissioner and her staff conducted this training across Australia for new and existing nominees during April to June 2019 as set out in Table 1.

Table 1: Attendees at training sessions for Merit Protection Commissioner nominees on Promotion Review Committees

Date	Location	Number of attendees
30 April 2019	Sydney	10
14 May 2019	Canberra	30
15 May 2019	Hobart	5
16 May 2019	Melbourne	18
17 May 2019	Adelaide	2
20 May 2019	Perth	4
22 May 2019	Brisbane	6
5 June 2019	Sydney	7

The Merit Protection Commissioner is grateful to the Australian Taxation Office, the Department of Human Services and the Office of the Australian Information Commissioner for making training rooms available in their premises for the nominee training.

We also provided training to five Independent Selection Advisory Committee panels and to a new employee engaged to conduct Code of Conduct inquiries. The Independent Selection Advisory Committee training was held in March 2019 and involved four sessions for 13 people located in five states, and a discussion with the agency delegate.

Governance and management

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

During 2018–19 the Merit Protection Commissioner had managerial responsibility for the work of the Commission employees made available to work in the Office of the Merit Protection Commissioner.

In 2018–19 the Merit Protection Commissioner was a member/observer of the Australian Public Service Commission's Executive, a senior management group chaired by the Australian Public Service Commissioner.

Staffing and office locations

The staff who support the Merit Protection Commissioner's work are made available by the Australian Public Service Commissioner in accordance with section 49 of the Public Service Act.

The Merit Protection Commissioner is based in the Commission's Sydney office and has staff in the Australian Public Service Commission's Sydney and the Canberra offices. During 2018–19 the Merit Protection Commissioner was supported by 12 staff in 11 ongoing positions. Of these:

- three positions are at the EL2 level with one job-share arrangement
- five positions are at the EL1 level
- one position is at the APS 5 level
- two positions are at the APS 4 level.

The small number of staff means we are organised along functional lines, with staff performing more than one function and reporting to one or more supervisors. The main functional/team areas are: review of action and promotion review casework; policy and projects; fee for service casework; and Merit Protection Commissioner inquiries.

The Merit Protection Commissioner also maintains a register of suitably skilled people who are engaged as casual employees at the EL2 or EL1 level. These staff may be engaged as required for irregular or intermittent duties (for example, to chair a Promotion Review Committee or undertake fee for service activities). There were 14 employees listed as casual employees during 2018–19. Throughout the year, casual employees undertook work equivalent to approximately one ASL.

Financial arrangements and corporate support

The Merit Protection Commissioner is neither a Commonwealth entity nor an accountable authority for the purposes of the *Public Governance, Performance and Accountability Act 2013*. Rather, she is a statutory officer appointed by the Governor-General under section 52 of the *Public Service Act 1999*. Section 49(2) of the Act requires that the staff necessary to assist the Merit Protection Commissioner must be persons engaged under that Act and be made available by the Australian Public Service Commissioner. Consequently the Merit Protection Commissioner does not have a separate budget allocation and depends on the Australian Public Service Commission for its staffing levels and resources more generally to undertake its functions.



For 2018–19 the Merit Protection Commissioner was allocated an annual budget (excluding corporate costs) of \$1.76 million.

The Merit Protection Commissioner 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.

Interaction of the roles of the Merit Protection Commissioner and the Australian Public Service Commissioner

The respective responsibilities of the Merit Protection Commissioner 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 Merit Protection Commissioner 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.

Judicial review of Merit Protection Commissioner reviews

In November 2018 an employee sought review by the Merit Protection Commissioner of a decision to suspend him from employment. We reviewed the case and recommended the agency's decision be upheld. The employee sought review under the *Administrative Decisions (Judicial Review) Act 1977*. The matter was heard in the Federal Circuit Court of Australia and the application was dismissed (*Smith v Australian Criminal Intelligence Commission & Anor* [2019] FCCA 1811 (28 June 2019)).

Freedom of information and privacy

We handled six applications under the *Freedom of Information Act 1982* during 2018–19. Five related to access to review or inquiry papers, including one request from a third party for review of a decision to release their personal information. The remaining application related to the Merit Protection Commissioner's attendance at an event. One decision was made to release information, one staff selection matter was transferred to the employing agency, no papers were located in one case, three requests were withdrawn after the information was released outside the Freedom of Information scheme.

The Australian Information Commissioner released one review of a Merit Protection Commissioner's decision in 2019 (*PU' and Merit Protection Commissioner (Freedom of information) [2019] AICmr 4 (18 January 2019)*). Following a request for documents by a review applicant, the Merit Protection Commissioner decided that a draft review of actions report prepared for a delegate would not be provided in full. The Australian Information Commissioner upheld this decision, considering that the factors against disclosure outweighed the factors in favour of disclosure.

A second review was lodged with the Australian Information Commissioner in 2018–19, and as at 30 June 2019, that review had not been finalised.

Information publication scheme

Information on the Merit Protection Commissioner and her role and functions is available on her website: <https://www.meritprotectioncommission.gov.au>.

Information is also in the Australian Public Service Commission's plan, which is available at: <https://www.apsc.gov.au/information-publication-scheme-ips>.

4. The year ahead



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Priorities in 2019–20

Consistent with previous years, the priorities for next year are:

- raising the profile of the office with APS employees and agencies by implementing the communication plan and redeveloping the Merit Protection Commissioner’s website
- continuously improving the quality and timeliness of our work , including through the supervision model
- supporting agencies to improve their decision making through presentations to practitioners on good practice in decision making and people management
- supporting agencies in complex case management, including through the Code of Conduct inquiry service
- developing decision support tools, in particular procedural manuals accessible to Merit Protection Commissioner staff through a portal on the intranet
- transitioning the Merit Protection Commissioner case management system to the Australian Public Service Commission’s protected network and improving its functionality, including reporting
- working with the Australian Public Service Commission on integrity and people management issues and better integrating lessons learned from review work to inform policy development.

In the year ahead the Merit Protection Commissioner will finalise the review of strategy and operations that commenced in 2018–19. This will focus on priority areas, and on aligning and designing structure and strategy for maximum efficiency and performance of the Merit Protection Commissioner’s functions. The review will also identify or enhance initiatives for working collaboratively with other stakeholders, as well as considering the potential expansion of statutory functions (Code of Conduct inquiries and staff selection) and providing non-statutory employment-related services to non-Commonwealth bodies.



APPENDIX:

DATA TABLES FOR STATUTORY FUNCTIONS

This appendix provides information on the activity and performance of the Merit Protection Commissioner's statutory functions. Information on the Merit Protection Commissioner's functions can be found on her website:
<https://www.meritprotectioncommission.gov.au>.

Review of employment actions

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

- reviews of breaches of the APS Code of Conduct (called a primary review)
- reviews of other employment actions (called a secondary review)
- reviews of promotion decisions.

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

Table 2 provides information on the number of applications for review (other than promotion review) received and completed in 2018–19.

Table 3 provides information on the timeliness of this function.

Both tables compare results for 2018–19 with those for 2017–18.

Table 2: Review of employment actions workload for 2018–19, by type of review, compared with total reviews in 2017–18

Cases	Primary reviews—Code of Conduct	Primary reviews—other	Secondary reviews	Complaints/ reviews by former employees	Total	
	2018–19				2018–19	2017–18
On hand at start of year	18	3	18	1	40	23
Received during the period	75	13	77	6	171	166
Total cases	93	16	95	7	211	189
Reviewed	36	4	37	3	80	75
Not accepted	9	9	30	4	52	53
Lapsed or withdrawn	27	3	14	0	44	21
Total finalised during period	72	16	81	7	176	149
On hand at end of year	21	0	14	0	35	40

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

Table 3: Timeliness in handling reviews, 2018–19 compared with 2017–18

Review type	2017–18		2018–19	
	Average time to complete reviews (weeks)	Completed within target timeframes (%)	Average time to complete reviews (weeks)	Completed within target timeframes (%)
Primary reviews—Code of Conduct	11.96	79	10.94	86.1
Primary reviews—other	14.57	50	14.11	75
Secondary reviews	11.27	78	9.83	81.1
Reg Part 7 casework	7.17	66.7	10.62	66.7
Total	11.48	77.3	10.6	82



Table 4 details the number of reviews by agency concerned.

Table 4: Reviews completed by agency, 2018–19

Agency concerned	Primary reviews— Code of Conduct	Primary reviews— other	Secondary reviews	Reviews/ complaints by former employees	Total
Department of Defence	12	0	9	1	22
Department of Human Services	3	0	16	0	19
Australian Taxation Office	4	0	4	0	8
Department of Home Affairs	6	0	1	0	7
Department of Health	2	0	1	2	5
Department of Social Security	2	1	0	0	3
Department of Veterans' Affairs	3	0	0	0	3
Australian Criminal Intelligence Commission	1	0	1	0	2
National Disability Insurance Agency	0	0	2	0	2
Nine other agencies (one review each)	3	3	3	0	9
Total	36	4	37	3	80

Table 5 shows the main subject matter and the secondary subject matters for all secondary cases reviewed in 2018–19. The data in Table 5 is not directly comparable with the data in the previous tables because a review may involve more than one subject matter.

Table 5: Subject matter of reviews completed (other than Code of Conduct), 2018–19

Subject matter	Secondary subject matter	Number
Salary, allowances and other payments	Allowances/entitlements	2
	Salary	3
	Bonus/special payments	1
Subtotal		6
Flexible working arrangements	Return to work arrangements	1
	Relocation or outposting	2
	Fitness for duty assessment	1
	Hours of work	3
Subtotal		7
Performance management	Unsatisfactory performance	3
	Probation assessment/process	1
	Performance pay	2
	Performance appraisal	6
Subtotal		12
Workplace behaviour	Handling of bullying complaints	4
	Counselling	1
	Suspension	2
	Workplace directions or warnings	3
Subtotal		10
Leave	Leave	7
Subtotal		7
Other	Management practices	2
	Misconduct procedures	2
	Separation entitlements	1
Subtotal		5
Total		47

Note: Excludes Code of Conduct cases.



Table 6 shows the subject matter for all Code of Conduct cases reviewed in 2018–19. The data in Table 6 is not directly comparable with the previous tables because a review may involve more than one main subject, and to avoid double counting of the same behaviour in a review of both the Code of Conduct breach and sanction.

Table 6: Subject matter of Code of Conduct reviews completed, 2018–19

Subject matter identified	Number
Conflict of interest	3
Bullying and discourtesy	12
Unauthorised access of agency databases	2
Inappropriate use of IT resources	4
Inappropriate use of social media/public comment or privacy breach	1
Misuse of Commonwealth property/assets	4
Failure to follow a direction or procedures	6
Other (including financial irregularities and providing false information)	4
Total number of matters identified	36

Review of promotion decisions

The Merit Protection Commissioner establishes Promotion Review Committees to conduct reviews of promotion decisions for jobs at the APS 1 to 6 classifications. The applications that trigger the establishment of a promotion review case are:

- applications from unsuccessful candidates (that is, ongoing APS employees who have applied for a promotion and have been unsuccessful)
- ‘protective applications’ (that is, applications from individuals who been promoted but who apply for review of the promotion of another APS employee in the same selection exercise).

Table 7 shows the 30 June status of applications from unsuccessful candidates for 2018–19 compared with 2017–18.

Table 7: Status of promotion review cases at 30 June 2019, compared with 30 June 2018

Promotion review cases	2017–18	2018–19
On hand at start of year	3	24
Established during the period	97	112
Total caseload	100	136
Reviewed (by Promotion Review Committee)	57	82
Invalid (e.g. applicant not an ongoing APS employee)	5	8
Lapsed (e.g. a protective application where no unsuccessful application received) or withdrawn	14	32
Total finalised during period	76	122
On hand at end of year	24	14
Target completion time (weeks)	8 or 12	8 or 12
Number completed within target time	57	78
Percentage completed within target time	100%	95%

Table 8 shows the promotion review caseload by agency for 2018–19.

Table 8: Promotion review caseload, by agency, 2018–19

Agency	Number of parties to a promotion review process	Number of promotions subject to review	Number of Promotion Review Committees formed and finalised	Number of promotion decisions varied
Department of Home Affairs	294	233	22	0
Department of Human Services	173	110	40	1
Department of Veterans' Affairs	23	17	5	0
Department of Defence	17	8	7	1
Other APS agencies	32	24	8	0
Total	539	392	82	2



Fee-related services

Section 50A of the Public Service Act enables the Merit Protection Commissioner to inquire into and determine whether an APS employee or former employee has breached the Code of Conduct. Table 9 sets out information on Code of Conduct inquiry activity for 2018–19 compared with 2017–18.

Table 9: Code of Conduct inquiries, 2018–19 compared with 2017–18

Status	2017–18	2018–19
On hand at start of year	1	0
Received during the period	4	3
Total caseload	5	3
Completed	4	0
Lapsed/withdrawn	1	2
Total finalised during the period	5	2
On hand at end of year	0	1

ISACs are established by the Merit Protection Commissioner at an agency head's request on a fee for service basis under Part 4 of the Regulations. Table 10 sets out information on Independent Selection Advisory Committee activity for 2018–19 compared with 2017–18.

Table 10: Independent Selection Advisory Committees, 2018–19 compared with 2017–18

Status	2017–18	2018–19
On hand at start of year	5	0
Received during the period	14	5
Total caseload	19	5
Completed	16	5
Lapsed/withdrawn	3	0
Total finalised during the period	19	5
On hand at end of year	0	0

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