



Australian Government
Merit Protection Commissioner

ANNUAL REPORT of the Merit Protection Commissioner





The Hon Ben Morton MP
Assistant Minister to the Prime Minister and Cabinet
Parliament House
Canberra ACT 2600

Dear Assistant Minister

I am pleased to present the Merit Protection Commissioner Annual Report for the reporting period ending 30 June 2020. As required by section 51 of the *Public Service Act 1999*, my report deals with the activities of the Office 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: the Resource Management Guide No. 135*, issued by the Department of Finance in May 2020.

Yours sincerely

Linda Waugh
Merit Protection Commissioner
15 October 2020

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Merit Protection Commissioner's foreword



Over the last year my office has continued to deliver to Australian Public Service (APS) employees a fair and independent process of review of decisions that affect their employment. We have continued to provide support to APS managers and decision makers to make high-quality employment decisions that contribute to the continual improvement of integrity and performance of the APS. This has been in the context of the global COVID-19 pandemic which has impacted all aspects of life and presented a range of challenges to the APS.

Like many APS agencies, I deployed my staff to their homes for an extended period of remote working early in the year as the number of COVID-19 cases increased and following the Prime Minister's announcement of a nation-wide lockdown in March 2020. The transition to working from home full-time required some adjustments for my staff, however our Information Technology capability was remote-working ready and the nature of our work is amenable to these arrangements. This meant we were able to

maintain business continuity and provide uninterrupted services to our stakeholders during this period.

The APS has had to deal with significant challenges this year—redeployment, mobilisation and striving to operate as a united enterprise supporting the response to and recovery from COVID-19. This was combined with ongoing priorities such as data and digital transformation and capacity building. At the centre of all this are our APS employees staying focused on delivering outcomes and achieving the best results for Australians. In such uncertainty and change in the workplace, it is increasingly important that APS agencies and employees have access to our services which assist to maintain harmonious workplaces and uphold our APS Values and Employment Principles as set out in the *Public Service Act 1999* (Public Service Act).

During 2019–20, we received 1,785 applications for review of employment actions from APS employees in 27 APS agencies. Of these, 1,590 were applications for a promotion review which was an increase over the 1,089 applications we received the previous financial year. What made this increase so significant for my office was that it came in the form of an unexpected surge in late 2019 and in early 2020. In November and December 2019 we had a 293 per cent increase in applications compared to the same period

in 2018. The period from January to April 2020 saw a 38 per cent increase in applications compared to the same period in 2019.

This surge in our casework presented significant challenges for our small team of two full-time officers who are responsible for the processing and administration of our promotion review function. We were able to resolve the temporary delays and clear the backlog from the November to January period. We did this through reassigning duties for other staff in the office and increasing the number of casuals able to convene Promotion Review Committees. With welcome funding from the Australian Taxation Office (ATO), from where the bulk of the promotion review applications came, we were also able to engage a temporary administration officer to assist with the surge.

Of the 760 promotion decisions we reviewed, we set aside four decisions. It is very pleasing to see such a volume of high quality and merit-based promotion decisions being made across the APS. The possibility of merits review of a promotion decision continues to reinforce and uphold the Employment Principle that the APS is a career-based public service that makes promotion decisions based on merit.

Although we receive a large number of promotion review applications, the bulk of our resources are dedicated to reviews of other employment actions. Reviews of these types of actions are resource

intensive. They are full merits review and are often complex matters requiring analysis of large volumes of material. Reviewers generally need to consider relevant legislation, enterprise agreements and agency policies when dealing with these matters. The majority of my ongoing staff perform this aspect of our work and the most senior and experienced staff operate independently in these cases as my delegates.

We received 195 applications for reviews of other employment actions, of which 41 per cent were for reviews of misconduct breach or sanction decisions. As with previous years, this category of review saw the highest rate of recommendations to vary or set aside an agency decision, at 48 per cent of cases. In my view the rate at which we recommend variations to these decisions reflects their gravity and the challenges agency decision makers face in weighing evidence, dealing with employees' submissions and articulating clear reasons. It is critically important that agencies manage conduct matters appropriately, proportionately and in accordance with procedural fairness as it is these matters which often have the biggest impact on, and are most adverse to, an employee. We continue to make this a priority area when engaging with our stakeholders and developing resources to assist them.

A large number of the remaining applications related to leave and

performance management decisions. Perhaps due to the impact of COVID-19 changing the way we work across the APS, we saw a decrease in applications for review of flexible work applications. It may well be the case we see different trends in the next financial year. At the close of this year we are still in the midst of COVID-19 with many temporary working arrangements still in place. The APS, like many workplaces, is contemplating what the future of work may look like – particularly in relation to remote, flexible and agile ways of working while continuing to deliver government priorities, achieving outcomes and meeting productivity and efficiency targets.

As part of our ongoing stakeholder engagement work, we published summaries of our case work and tip sheets on other issues arising from our review casework, including on managing conflicts of interest and conducting internal reviews of performance management decisions. I have already referred to the challenges agencies face in making Code

of Conduct decisions. To assist agency decision makers, we published a tip sheet containing advice and guidance on the importance of getting the basics correct when drafting allegations of misconduct and on managing conflicts of interest.

Due to restrictions on travel and the APS's focus on delivering essential services to the Australian community, our focus in the second half of 2019–20 was more internal than external, with key priority areas of improving our internal governance, focusing on staff development and setting clear objectives and project goals for the coming two financial years.

Finally, I would like to thank and acknowledge the staff of the Australian Public Service Commission (APSC) who assisted me in discharging my statutory functions and those that assisted me by providing corporate support for the operation of my office.

Linda Waugh
Merit Protection Commissioner

Our year at a glance



12 staff and Merit Protection Commissioner

1,785 applications under the Reviews of Actions scheme

195 applications for general reviews

1,590 applications for review of a promotion

760 promotion decisions reviewed

Top 5 agencies

- Services Australia **58**
- Australian Taxation Office **37**
- Department of Defence **25**
- Department of Home Affairs **21**
- National Disability Insurance Agency **9**

Top 5 agencies

- Australian Taxation Office **988**
- Services Australia **374**
- Department of Home Affairs **166**
- Department of Agriculture **17**
- National Disability Insurance Agency **17**



General reviews

38.5% of decisions varied or set aside

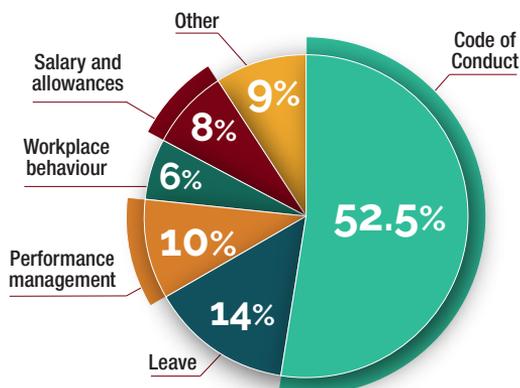


Promotion review

0.53% of decisions varied



Reviews by subject



39 stakeholder engagement opportunities



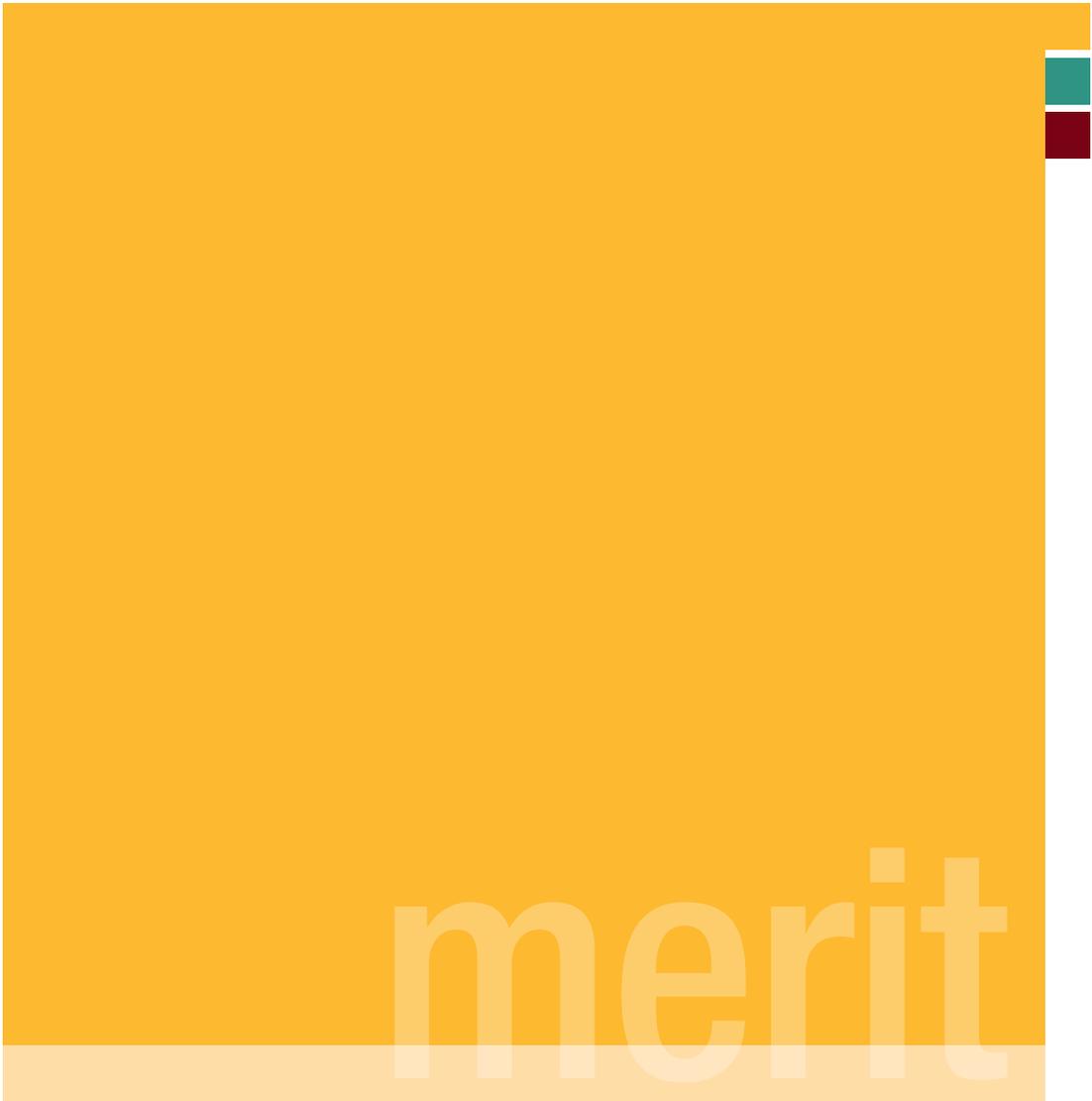
7 new publications on website



4 pieces of policy feedback



1 Overview



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About the Merit Protection Commissioner

The Merit Protection Commissioner (MPC) is an independent statutory office holder established under Part 6 of the Public Service Act who performs a range of statutory functions for the 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. This is done principally through independent reviews of employment-related actions and decisions affecting APS employees. The MPC also has a range of other complaint and inquiry functions and can provide recruitment and employment-related services.

Ms Linda Waugh is the current MPC and was appointed on 25 June 2018. Ms Waugh is also the Parliamentary Service Merit Protection Commissioner. The duties and functions of this role mirror those of the MPC under the Public Service Act, and are the subject of a separate annual report.

The staff of the Office of the Merit Protection Commissioner (OMPC) are employees of the APSC. Under Section 49(2) of the Public Service Act the staff necessary to assist the MPC must be engaged under that Act and made available by the Public Service Commissioner. The APSC provides all corporate support and services to the MPC. The MPC is co-located with the APSC.

The MPC strives to perform all statutory functions independently, efficiently and professionally. Our objectives and priorities when discharging our statutory functions are to:

- engage effectively with our stakeholders
- build our internal capacity and expertise
- innovate for better delivery of services
- enhance our governance and accountability.

Statutory functions and responsibilities

The statutory functions of the MPC 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). The statutory authority for each of the MPC's functions are set out in Appendix A. The following sections explain the operation of each function.

Reviews of employment-related actions and decisions

Section 33 of the Public Service Act provides an APS employee an entitlement to seek review, in accordance with the regulations, of any APS action that relates to their APS employment (excluding termination). The details of the scheme are in parts 5 and 7 of the regulations.

There are two tiers of review, with agencies conducting internal reviews for most types of matters. The MPC provides independent and external merit-based reviews.

The Australian Government general policy (Public Service Regulation 5.1) about the Reviews 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.

There are three broad categories of employment-related actions within the scheme that can be reviewed by the MPC:

1. Review of a promotion decision

An APS employee who applies for promotion to APS levels 1 to 6 and is unsuccessful, and where the person promoted is another APS employee, may apply for a full merits review of the promotion decision. An APS employee who has been promoted can also apply for promotion review. Employees do this to 'protect' their promotion where they anticipate someone might seek review of their promotion. The review eligibility criteria are the same regardless of the reasons the employee submits a promotion review application. An MPC promotion review decision is binding on the relevant agency head. The promotion review scheme is outlined in Division 5.2 of the regulations.

2. MPC direct review of an action (primary review)

There are three types of employment-related actions or decisions for which an APS employee can apply directly to the MPC for review.¹

- a. Review of a determination that an APS employee (and in certain circumstances a former employee) has breached the Code of Conduct and/or the resulting sanction decision. The employee makes the application directly to the MPC without first seeking internal review by their agency. The entitlement to review for a current employee is outlined in Division 5.3 of the regulations and is called a primary review. The entitlement for a former employee is in Division 7.3 of the regulations.
- b. Review of an action or decision where it is not appropriate for the agency to conduct an internal agency review. This applies if:
 - the agency head was directly involved in the action
 - it is not appropriate due to the seriousness or sensitivity of the action
 - the action is claimed to be victimisation or harassment of the employee for having made a previous application for review of an action.

The employee can apply directly to the MPC without first seeking review in the agency for any of the above reasons. Agencies are able to refer matters requesting that the MPC conduct a primary review if:

- the agency head was directly involved in the action
- it is not appropriate due to the seriousness or sensitivity of the action

The provisions outlining the circumstances in which the MPC is able to conduct a primary review of a matter which would ordinarily be reviewed first in the agency are outlined in Division 5.3 of the regulations.

- c. Review of an action or decision taken by a statutory officer. APS employees are able to seek review by the MPC of the actions of a statutory officer holder who is supervising or managing the APS employee. Employees are able to make applications directly to the MPC without first seeking a review in the agency. This entitlement is outlined in Division 7.4 of the regulations.

3. MPC review of an action following internal agency review or consideration (secondary review)

This is called a secondary review because the APS employee must seek an internal review of the employment-related action or decision by their agency before seeking

¹ For ease of reporting we include applications for review under Division 7 of the regulations as 'primary reviews' when referenced in this annual report (noting they are not termed primary reviews under the regulations).

review by the MPC. Disputes concerning leave applications, performance reviews and flexible working arrangements fall within this category. An APS employee will seek secondary review by the MPC because they disagree with the agency action or decision and are not satisfied with the outcome of the internal agency review of that action or decision. An APS employee can also make a secondary review application when an agency head has rejected the APS employee's application for an internal review on the grounds that it is not a reviewable action. The provisions relating to secondary reviews are in Division 5.3 of the regulations.

Only employees at classifications below Senior Executive Service level can seek a primary or secondary by the MPC. The MPC's powers for these reviews are recommendatory, that is the MPC can recommend the agency or statutory office holder decision or action be upheld, varied or set aside.

Complaints about entitlement calculations on separation

Former employees are able to ask the MPC to investigate a complaint about the entitlements they received when leaving APS employment. This usually relates to payments made for leave accrued but not taken. This entitlement is outlined in subsection 50(1)(e) of the Public Service Act and Division 7.2 of the regulations.

Inquiry functions

The MPC can conduct inquiries into:

- public interest disclosures that relate to alleged breaches of the Code of Conduct (Subsection 50(1)(a) and 50(2) of the Public Service Act and Division 7.1 of the regulations)
- alleged breaches of the Code of Conduct by the Australian Public Service Commissioner (Subsection 50(1)(b) of the Public Service Act)
- an APS action at the request of the Public Service Minister (Subsection 50(1)(c) of the Public Service Act)
- an APS employee, or a former APS employee, alleged to have breached the Code of Conduct (Subsection 50(1)(ca) and Section 50A of the Act and Division 7.6 of the regulations).

Statutory services for APS Agencies

The MPC 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. A finding or any action undertaken during an inquiry by the MPC is not subject to review under the Review of Actions scheme. The arrangements for conducting inquiries are outlined in Subsection 50(1)(ca) and Section 50A of the Public Service Act and Division 7.6 of the regulations.

If requested, the MPC 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 MPC. A promotion decision resulting from an Independent Selection Advisory Committee recommendation is not subject to promotion review under the Review of Actions scheme. The arrangements for Independent Selection Advisory Committees are outlined in part 4 of the regulations.

The MPC would usually charge a fee for these services.

Recruitment and employment services for non-APS entities

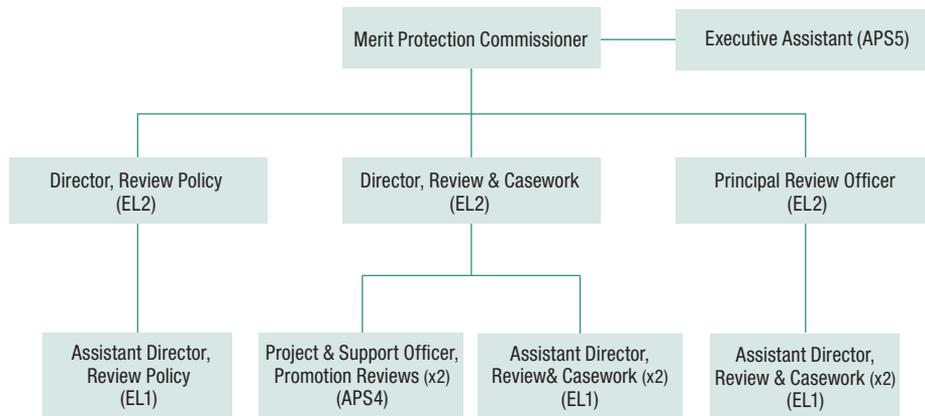
The MPC is able to provide review, investigation and recruitment services to non-APS Commonwealth entities, entities in other jurisdictions, and private corporations and bodies, and charge a fee for these services.

This is provided for under Subsection 50(1)(e) and 50(3) of the Public Service Act. The details of these arrangements are provided for in Regulation 7.4.

Organisational structure

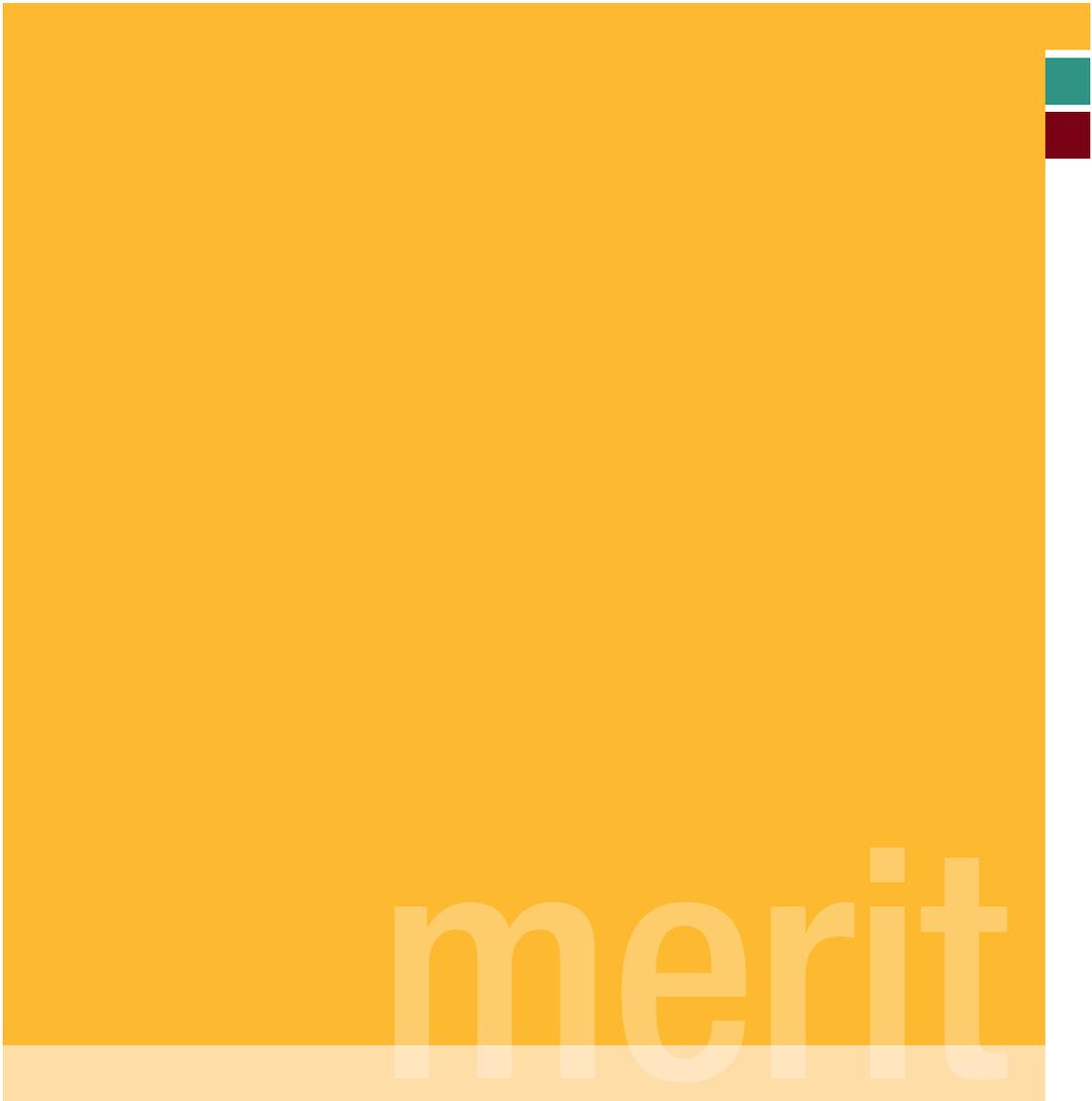
The Office of the MPC has 11 positions occupied by 12 employees (as at 30 June 2020) and is structured as shown in Figure 1.

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



We also engage staff from the MPC pool of casual employees 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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Reviews of employment-related actions

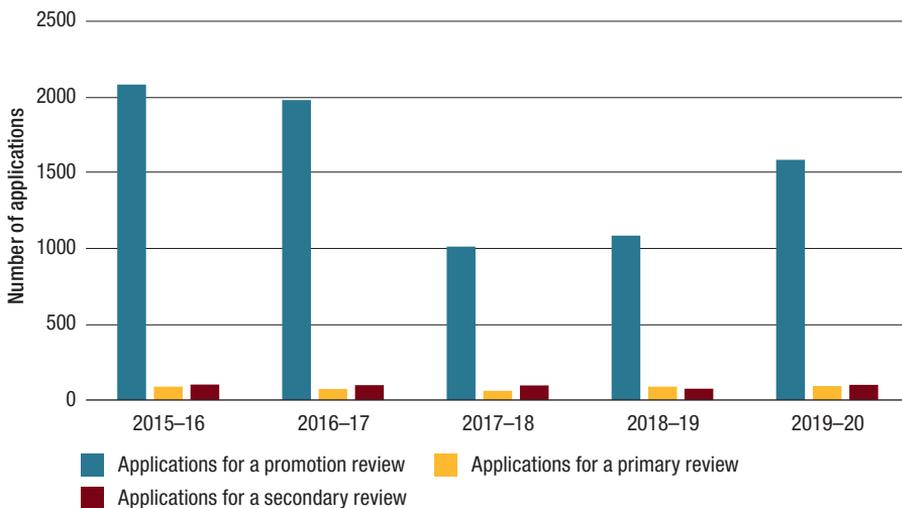
Year-end totals for all reviews of actions

During 2019–20, we received 1,785 applications for a review of a promotion decision or other employment-related actions or decisions. Of these:

- 1,590 were applications for a promotion review
- 80 were applications for a MPC direct (primary) review of a finding that an employee had breached the Code of Conduct or a sanction decision
- 14 were applications for a MPC direct (primary) review of an action or decision where it was not appropriate for the agency to conduct an internal review of the action or decision
- 101 were applications for a MPC (secondary) review following internal agency consideration or review of the action or decision.

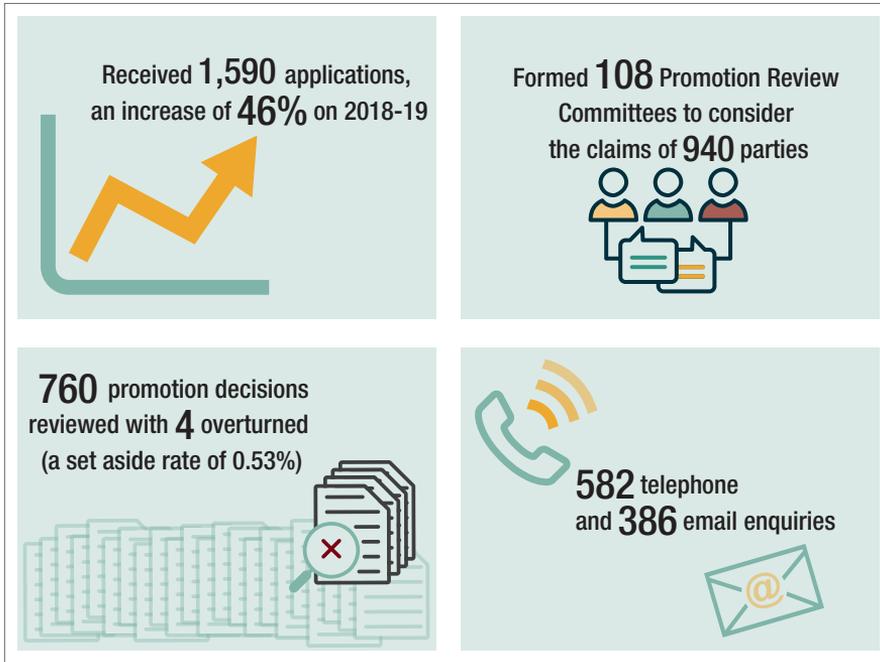
As shown in Figure 2, applications for reviews to be conducted directly by the MPC (primary reviews) and for reviews to be conducted following an internal agency review (secondary reviews) have remained relatively stable across time. The number of promotion review applications varies across time, with a significant increase in applications in 2019–20 compared to the two previous years.

Figure 2: Trends in number of review applications, 2015–16 to 2019–20



We also received 684 telephone enquiries relating to reviews of actions between late January (when we commenced recording this data) and 30 June 2020. Of these, 85 per cent related to promotion reviews.

Reviews of promotion decisions



Ongoing APS employees who have applied for a promotion in the APS may apply to the MPC to have certain promotion decisions reviewed. The entitlement to promotion review is restricted to vacancies for job classifications APS level 1 to APS Level 6 (or equivalent classification levels) that are advertised in the *APS Gazette*. The application can only be made when the person promoted is an ongoing APS or Parliamentary Service employee (that is not an external candidate).

The ground for promotion review is merit. For a promotion to be overturned, the promotion review applicant needs to demonstrate stronger claims and work-related qualities for the position than the person who was promoted.

The promotion review process

Making an application for promotion review

When an APS agency promotes an employee to an ongoing role following a recruitment exercise, the agency must place a promotion notice for that vacancy in the *APS Gazette*. An applicant for review of that promotion must lodge their application within 14 days of the notice being published.

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 promotion review.

Departments and large agencies often undertake large scale recruitment actions (referred to as bulk rounds) in which they advertise multiple vacancies across multiple locations—for example, 20 APS 5 Policy Officer positions across Canberra (10 vacancies), Melbourne (5 vacancies) and Sydney (5 vacancies). In this type of recruitment, the MPC often receives applications from both APS job applicants who were unsuccessful in gaining promotion (called unsuccessful job applicants), and APS job applicants who were successful in being promoted (called promoted job applicants).

Using this example, an unsuccessful job applicant who applied for vacancies in both Canberra and Melbourne can lodge a promotion review application against all promoted applicants in both Canberra and Melbourne but not Sydney. A promoted job applicant who applied for vacancies in both Canberra and Melbourne can do the same (except for their own promotion). A promoted job applicant will generally make a promotion review application so if their promotion is set aside by a Promotion Review Committee, they can still be considered for promotion against the claims of other promoted job applicants.

Assessment of promotion review applications

When a promotion review application is received by the MPC it is assessed to determine if it is eligible. For example, it must be for a promotion that has been published in the Gazette and it must have been received within the two-week timeframe. Applications which are ineligible or which are withdrawn during this process do not proceed any further.

When the two-week timeframe expires, some promotion review applications from promoted job applicants will lapse. This occurs because no APS employee has sought review of their promotion, meaning their promotion can be confirmed and their application for promotion review of another promotee becomes null and void.

Following assessment of an application as eligible, and once the promoting agency has confirmed the accuracy of the application, the application moves to the next stage of the promotion review process.

Proceeding to promotion review

Once applications are confirmed as eligible, they are sorted into groups based on common elements (we may group all applications for promotion review for a vacancy in a particular location). Each grouping of applications is called a promotion review case.

We formally notify the promoting agency and all parties to a promotion review case that it will proceed. The parties to the review are all the promotion review applicants for the vacancy as well as the APS employees promoted to the vacancy. The promoting agency is asked to provide documents which in summary explain how they arrived at the promotion decision. The parties are asked to provide a statement which outlines their claims of merit for the promotion under review.

On occasion an agency will notify promotions from an advertised vacancy (typically where multiple positions are to be filled) over several Gazettes. In these cases we will place the promotion review case on hold until all promotions associated with that vacancy have been notified.

The Promotion Review Committee process and decision

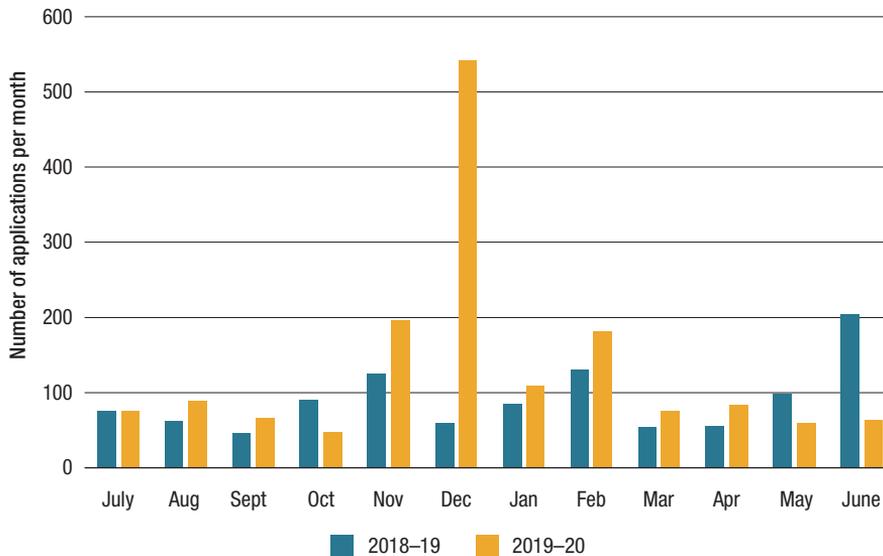
As the processes described above occur, we will form the Promotion Review Committee (PRC) for the case. A PRC comprises a convenor (a staff member of the MPC), an APS employee nominated by the agency known as the agency nominee and an APS employee nominated by the MPC who is a volunteer. There are generally many cases occurring concurrently, so at any given time the MPC will have multiple PRCs operating.

The PRC is provided with all the documents to read and consider and meets to discuss the parties' claims for promotion. If the PRC considers it necessary, they may also conduct interviews with parties to a promotion review. The PRC then decides, on the basis of merit, whether the promotion notified in the APS Gazette stands or if an applicant for promotion review is to be promoted instead. The PRC decision is final and must be implemented by the promoting agency.

Applications received

In 2019–20, the MPC received a total of 1,590 applications for a promotion review. This represents a 46 per cent increase from the 1,089 applications in 2018–19 (see Figure 2).

This increase in the number of applications for promotion review in 2019–20 was associated with a surge in recruitment activity between November 2019 and April 2020, which took place in large agencies (most notably the ATO). Figure 3 shows the number of applications received by month this financial year compared to last financial year.

Figure 3: Promotion review applications received by month, 2018–19 to 2019–20

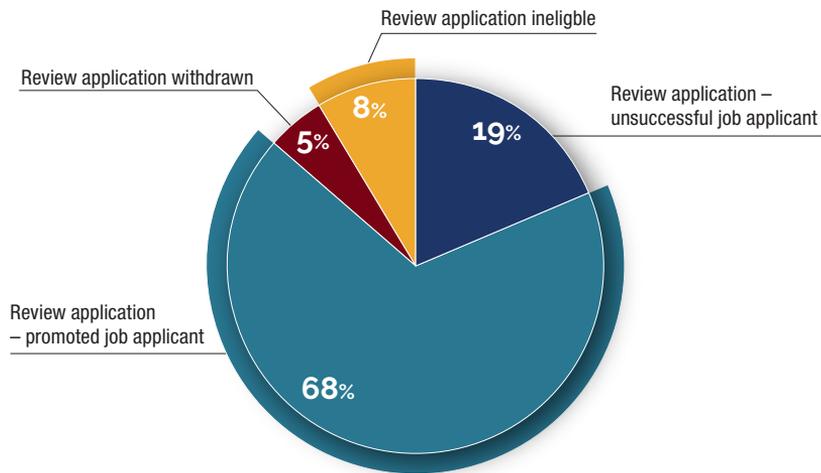
During November and December 2019, we received 739 applications for promotion review compared to 188 applications received for the same period in 2018. This represents an increase of 293 per cent.

Of the 739 applications, 559 were related to promotions notified by the ATO, which represented 75.6 per cent of the total applications received during November and December 2019. This compares to the same period in 2018, where applications for review of ATO promotions represented only four per cent of all applications (eight out of 188).

January to April 2020 was the second period where the office received increased numbers of applications compared to the same period in 2019. In total we received 451 applications for promotion review during this period in 2020, compared to 327 in 2019. This represents an increase of 38 per cent.

In a following section we discuss how the office responded to the steep increase of applications that occurred between November 2019 and April 2020.

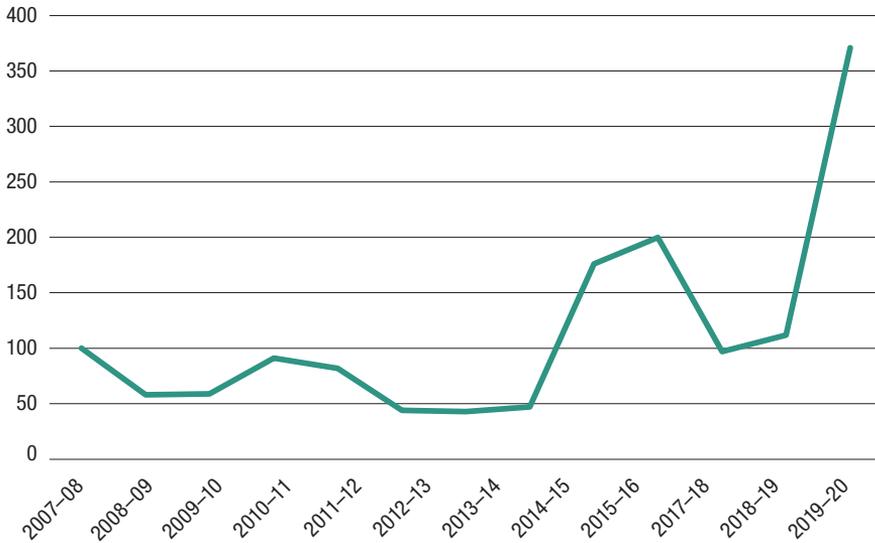
As outlined in ‘The promotion review process’, applications are received from APS job applicants unsuccessful in gaining promotion (called unsuccessful job applicants), and APS job applicants successful in being promoted (called promoted job applicants). A number of these review applications will be assessed as ineligible and some will be withdrawn during the assessment process. The composition of review applications by these types is illustrated in Figure 4.

Figure 4: Promotion review applications by applicant type, 2019–20

As outlined in ‘The promotion review process’, promotion review applications from promoted job applicants will often lapse when the two-week period in which to make applications has closed. This occurs because no APS employee has sought review of their promotion, meaning their promotion can be confirmed and their application for promotion review of another promoted applicant becomes null and void. From October 2019 we commenced recording the number of applications that had lapsed. From 11 October 2019 to 30 June 2020, 293 lapsed applications were recorded.

The number of applications from unsuccessful job applicants increased significantly during 2019–20, compared to previous years as shown in Figure 5.

Figure 5: Trends in promotion review applications from unsuccessful job applicants, 2007–08 to 2019–20

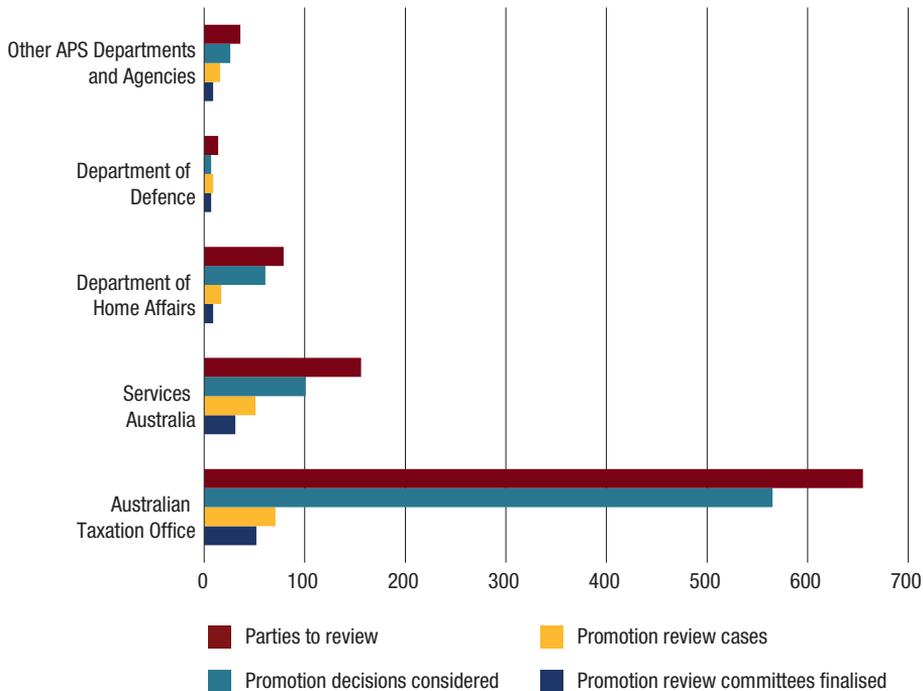


Promotion review caseload

In 2019–20, both the number of applications for promotion review and the scale of promotion review exercises increased. We formed a total of 164 promotion review cases with a total of 1,268 participating parties.

Out of these 164 cases, nine were on hand at the end of 2019–20, and the remaining 155 cases were finalised during 2019–20. Of the 155 cases, 47 did not proceed to review by a Promotion Review Committee because one or more applications were ineligible, lapsed or were withdrawn. The remaining 108 cases were reviewed by 108 Promotion Review Committees involving 940 parties. Of the 940 parties, 180 (19 per cent) were unsuccessful job applicants and 760 (81 per cent) were promoted job applicants.

The promotion review cases involved 10 departments and agencies. Figure 6 shows, by agency, the total number of promotion review cases established for that agency along with the number of promotion review decisions considered, total number of parties involved in the reviews, and the number of Promotion Review Committees finalised.

Figure 6: Promotion review workload by agency, 2019–20

During 2019–20, the largest number of parties to a promotion review for a single recruitment exercise was 52. This compares with 71 in 2018–19 and 38 in 2017–18. Twenty-four other promotion review cases had 10 or more promotion review parties, compared with nine in 2018–19 and six in 2017–18.

Promotion Review Committee outcomes

Promotion Review Committees varied four (0.53 per cent) of the 760 promotion decisions reviewed compared with 2018–19 where two (0.51 per cent) of the 392 promotion decisions reviewed were varied. The percentage of promotion decisions varied in 2017–18 was 0.41 per cent and in 2016–17 was 0.49 per cent. When a Promotion Review Committee varies a decision, it means the committee determines on the basis of merit that a review applicant was more meritorious for the position than the APS employee chosen by the agency's selection panel. In these cases the committee's decision is determinative and final.

Performance against timeliness key performance indicators

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 78.1 per cent of promotion reviews within target timeframes during 2019–20 compared to 95 per cent during 2018–19.

Managing the surge in promotion review applications

As noted above, while we met our key performance indicator for timeliness, there was a notable decrease in the number of promotion reviews completed within the timeframe compared to last financial year. Of particular note, 34 of the 155 reviews finalised were not completed within their target time. Of those 34 reviews, 33 were Promotion Review Committees formed from applications for promotion review received in the period November 2019 to February 2020. In that period we experienced an unexpected increase in applications for review with the majority relating to promotions from the ATO.

The promotion review function in the office is supported by a small team of two administration officers. During November 2019 to February 2020, these two officers were not able to process the volume of applications within our usual timeframes and required assistance. In response to the surge in applications, we took these actions:

- During January 2020, all staff were temporarily reassigned to assist with answering telephone and email enquiries, assessing applications for validity and compiling documents for the relevant Promotion Review Committee as well as other administrative tasks relating to other functions of the MPC normally undertaken by the two Promotion Review administration officers.
- Early engagement with the ATO occurred in January 2020 to open lines of communication and facilitate timely exchange of required information and documentation. This included assisting the ATO with information for an in-house information session for their employees on the promotion review process. MPC staff later gave two presentations to ATO on the promotion review process.
- The MPC’s casual convenors were briefed on the volume of work and their attendance to convening duties.
- A similar briefing was provided to MPC nominees across the APS.
- Suitably qualified and experienced ongoing MPC staff were allocated as convenors and MPC nominees to sit on Promotion Review Committees.

- Casual staff were engaged to assist in administration and logistics, with two further casual staff engaged in the role of convenor on a number of Promotion Review Committees.

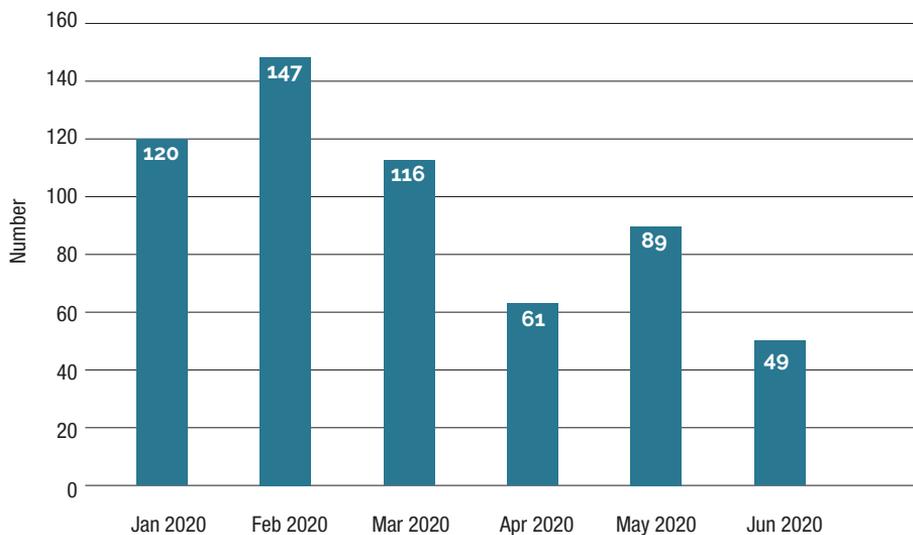
The ATO provided assistance between 11 March to 30 June 2020 by funding an additional administration officer to assist with promotion review administration and logistics.

The ATO now advises the MPC in advance of the intended notifications of promotions in the *APS Gazette* with a focus on those arising from large recruitment actions. The MPC made the same request during meetings with stakeholders from other large APS agencies. During 2020–21, the MPC will write to all Chief Operating Officers of medium to large agencies to request they provide similar advice to the office in advance of intended notifications of promotions from large recruitment actions. This will assist in ensuring we have the right resources, in the right place, at the right time so that applications for promotion review can be dealt with as expeditiously as possible.

Promotion review telephone and email enquiries

In addition to processing, administering and conducting promotion reviews, the office receives a large number of enquiries by phone and email about promotion reviews. This workload has not previously been captured in our caseload numbers but forms an important part of the work done primarily by the two promotion review administration officers.

From 21 January 2020, we began capturing data for incoming telephone enquiries. Between 21 January and 30 June 2020, the office recorded 723 telephone enquiries. Of these, 582 related to promotion reviews, which represents 80 per cent of all telephone enquiries received.

Figure 7: Promotion review telephone enquiries by month (January to June 2020)

Of the 582 promotion review telephone enquiries received:

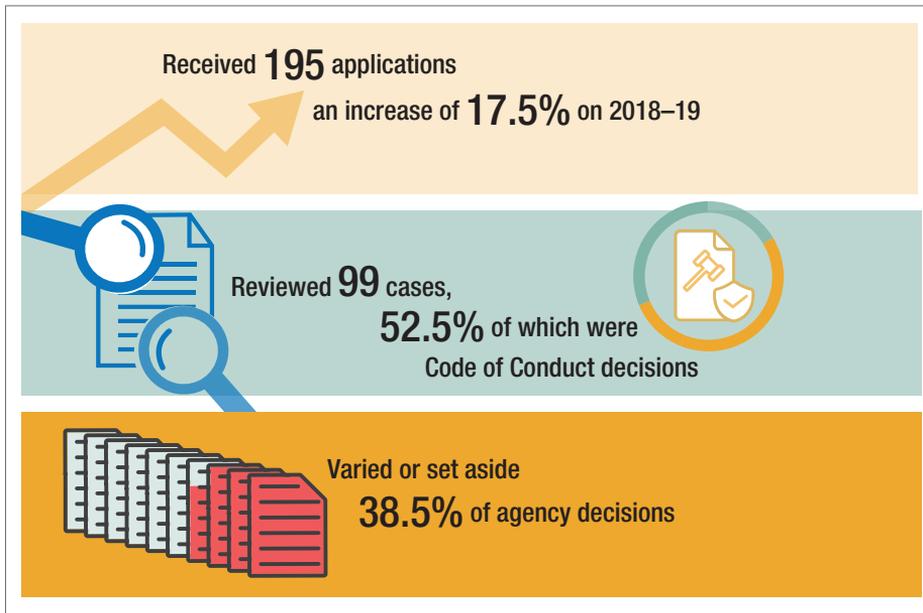
- 357 concerned a current promotion review case (61 per cent)
- 222 were general enquiries about the promotion review scheme (38 per cent)
- 2 concerned a finalised promotion review case (less than 1 per cent)
- 1 was categorised as ‘other’ (less than 1 per cent).

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

- 317 concerned the ATO (54 per cent)
- 77 concerned Services Australia (13 per cent)
- 44 concerned the Department of Home Affairs (8 per cent)
- the remaining 144 phone calls were from employees enquiring about promotions in four other agencies or were callers who did not disclose the identity of the agency (25 per cent).

We received 386 email enquiries about promotion reviews during 2019–20.

Reviews of other actions



Our most resource-intensive function is undertaking reviews of general employment matters where there is some form of disagreement or dispute between the APS employee and their agency. An APS employee can only make an application for review of an employment related action or decision that affects them personally. As described in ‘Statutory functions and responsibilities’, employees can make applications:

- directly to the MPC (primary reviews)
- through their agencies following a request for internal review (secondary reviews).

For most matters, employees must first seek an internal review by their agency before applying to the MPC.

We conduct merits review. This requires the MPC to step into the shoes of the decision maker and reconsider the facts, law and policy aspects of the original decision to determine the correct or preferable decision. The MPC’s powers extend to making recommendations to agencies about the matters under review. Our recommendations consider the rights and interests of the employee together with the operational and business priorities of the agency and are informed by the Australian Public Service Values and Employment Principles and good people management practice.

Applications received

The headcount for the APS in June 2020 was 150,474.² Agencies reported that they finalised 333 internal reviews under the Review of Actions scheme in 2018–19³ (latest data available at the time of writing).

In 2019–20, the MPC received 195 applications for review from employees in 24 of the 112 agencies staffed under the Public Service Act. This represents a 17.5 per cent increase in applications on 2018–19. Of these applications, 101 were secondary review applications, that is, applications that had already been reviewed or considered by the agency.

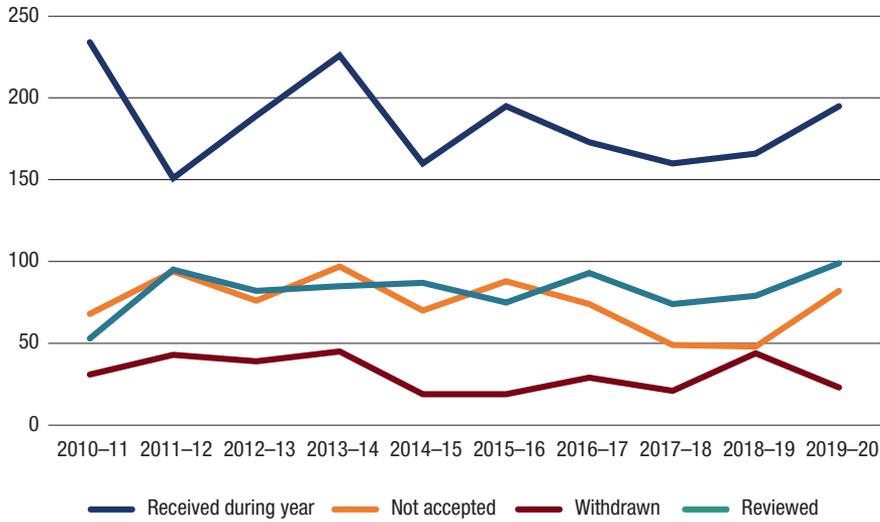
Our total review caseload for 2019–20 was 230 cases comprising 195 applications received during the reporting year and 35 applications carried over from the previous reporting year.

Although only a small proportion of the APS workforce seeks to have actions and decisions formally reviewed, these reviews frequently concern significant issues affecting an individual employee, for example their professional reputation or their capacity to balance the competing demands of work and home. The matters we review may also raise concerns about the effectiveness of decision making and people management practices, in particular workplaces and agencies.

Figure 8 demonstrates the number of applications for review made to the MPC over the past 10 years. It shows that total applications over the decade is variable year to year. After a dip in applications in 2017–18, the total number trended slightly upwards over the last two financial years.

² From the APS Employment Database June 2020 release available at <https://www.apsc.gov.au/aps-employment-data-30-june-2020-0>

³ Agency survey for the 2018–19 *State of the Service* report

Figure 8: Number of review applications, 2010–11 to 2019–20

Note: Table 3 in Appendix B has information on the number of applications for review (other than promotion review) received and reviews completed in 2019–20 compared with 2018–19.

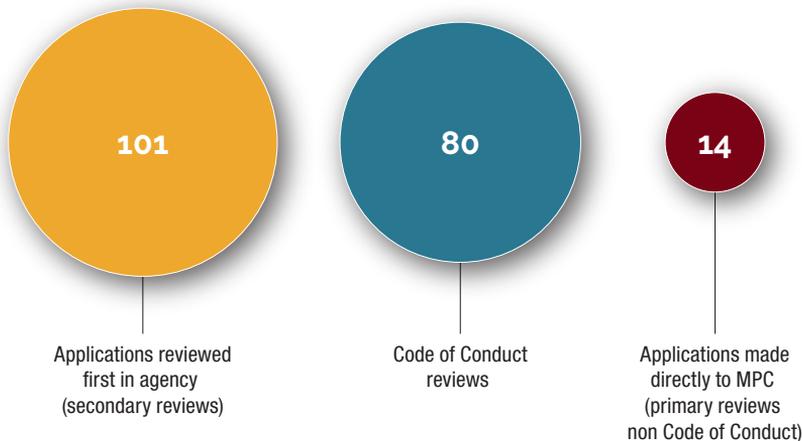
Types of applications

We explain in ‘Statutory functions and responsibilities’, the circumstances in which employees can make applications:

- directly to the MPC (primary reviews) or
- through their agency to the MPC (secondary reviews).

Figure 9 shows the number of applications for the main categories of review made to the MPC in the reporting year.

Figure 9: Applications by category of review, 2019–20



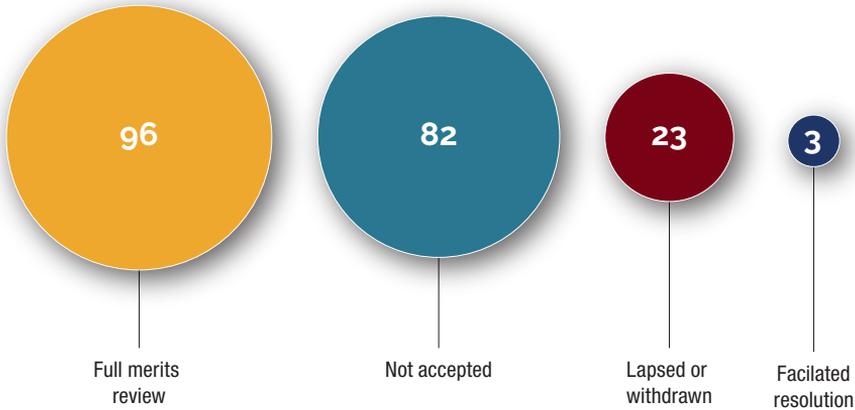
Note: Code of Conduct reviews includes two applications from former employees. Applications made directly to the MPC (primary reviews non Code of Conduct) are matters where it is not appropriate for agency to do internal review.

Treatment of applications

We finalised 204 review applications compared with 171 in 2018–19, an increase of 19 per cent. The increase in applications was matched by the increase in finalised cases. This was a good outcome as the office was at the same time experiencing a surge in promotion review work (see ‘Review of promotion decisions’). We were able to manage the additional promotion review work without creating a backlog or delays in our general review casework.

As shown in Figure 10, 47 per cent of all applications proceeded to full merits review, while 40 per cent were not accepted for review (see ‘Applications not accepted for review’). A smaller number of applications were resolved through facilitated resolution (1.5 per cent) or were withdrawn or lapsed (11 per cent). An application will lapse usually because the applicant left APS employment while the review was underway.

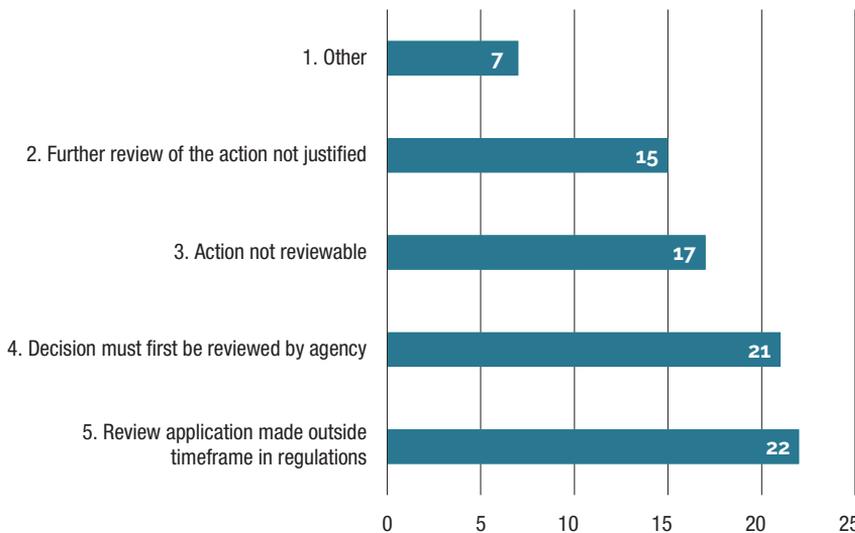
Figure 10: Treatment of applications, 2019–20



Applications not accepted for review

The reasons for not accepting 82 of the 204 applications fall into five categories, as illustrated by Figure 11.

Figure 11: Reasons why applications for review were not accepted, 2019–20



Note: The ‘Other’ category includes cases where applications for review were rejected for other reasons including because the review applicant was not eligible (that is, was a former employee) or was already pursuing their matter in another jurisdiction (for example, at the Fair Work Commission).

Thirty per cent of cases not accepted for review were ineligible because, for example the employee has not first sought review by their agency. In cases of this sort we advise the employee of the correct process for seeking review of their concerns. In the remaining 70 per cent of matters we first assess of the facts of the case against the criteria in the regulations and then give written reasons for our decision not to accept the application (reasons 2, 3 and 5 in Figure 11).

Review or further review is not justified in all the circumstances

Public Service Regulation 5.23(3)(g) gives the MPC a broad discretion not to review matters where review, or further review, is not otherwise justified in all the circumstances. The MPC has published a policy on the exercise of this discretion on www.meritprotectioncommission.gov.au

An employee sought review of comments made by her manager in her end-cycle performance rating. The employee had received a satisfactory rating but was concerned by the manager's reservations about the employee's behaviour in some incidents. The manager advised that he intended to set clearer expectations for the next performance cycle. The employee disputed the manager's assessment of her behaviour and wanted the comments removed from her performance agreement.

We decided not to review this matter on the basis that little would be achieved by conducting a review. The information on the review file did not on face value indicate any reason to be concerned about the manager's behaviour or the fairness of his judgements. We considered that an inquiry into the employee's concerns would be unlikely to prove or disprove the manager's opinions, or the truth of the employee's assertions. In addition, there was no evidence that the employee had been adversely affected by the manager's actions.

As outlined in 'Reviews of a Promotion Decisions,' an employee can only seek review of a promotion for jobs at the APS 1 to 6 classification levels. This review option is not available for jobs at the Executive Level 1 and 2 classifications. However, a review of these promotions can be sought under the Review of Other Actions part of the scheme but can only be made on grounds of an alleged serious defect in the selection process.

Twelve per cent (10) of cases we assessed as ineligible for review raised concerns about the way review applicants were treated in agency recruitment processes for jobs at the Executive Level 1 and 2 classifications. These were from employees who were concerned that their claims to promotion had not been fairly assessed. These applications were not eligible for review as none of the applicants established a *prima facie* case of serious defects in the selection process.

Serious defects in a selection process for an Executive Level role

An employee sought review of the outcome of a selection process for an Executive Level role for which he was an unsuccessful applicant. The employee alleged that there were serious defects in the selection process. The employee was concerned that his suitability was assessed solely on the basis of a 30-minute interview and that other evidence he provided such as his curriculum vitae and application, was not considered.

Schedule 1 of the Public Service Regulations provides that applications for promotion to Executive Level roles are not reviewable except in circumstances where there are serious defects in the selection process.

We sought further information from the agency about the way the selection process was conducted, and considered the records kept by the selection committee. There were several hundred job applicants and the agency adopted a staged recruitment process, including quality assuring a proportion of candidate assessments. We were satisfied that appropriate regard was had to all the evidence about candidates while noting that the way candidates were questioned at interview could have given the impression that the selection panel lacked knowledge of the written information submitted by candidates.

We noted that a serious defect would need to be such that it would compel the selection process to be done again, meaning that any promotion decision arising from such an exercise could not stand. We identified several areas where the selection process could have been improved, including record keeping and candidate care, but considered there was not evidence of serious defects in the selection process.

“While I am unhappy with the outcome (and some of the judgments made in it) I understand your reasoning and what your position is as to why I do not have standing to seek a review. I appreciate the effort you have put into making it clear and understandable, something I feel was missing throughout the recruitment process.”

Review applicant—September 2019

Review applications by agency

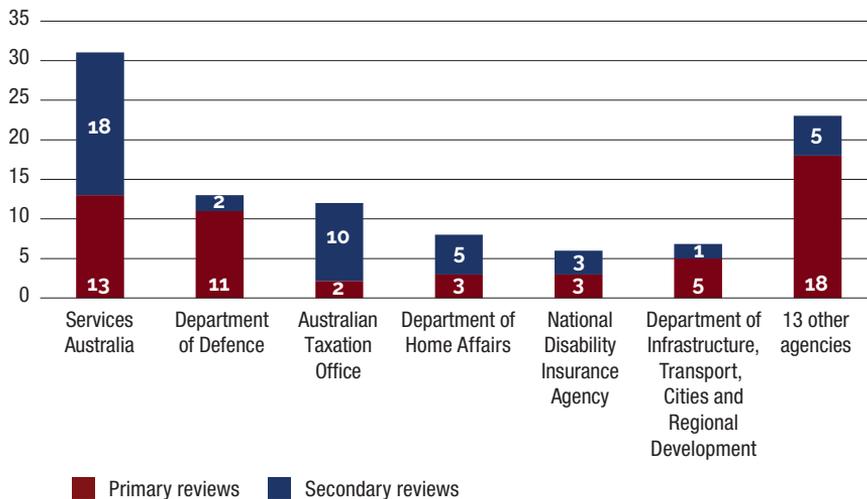
The 195 review applications received during the year were from employees in 24 agencies. The largest agencies by number of employees, Services Australia, the ATO, the Department of Defence and the Department of Home Affairs, comprise almost 55 per cent of APS employees and 72 per cent of review applications made to our office.

The largest number of applications (58) were made by employees in Services Australia, the largest agency in the APS with 30,121 employees.⁴ The comparable figures for the next three largest agencies are:

- ATO—37 applications (18,487 employees)
- Department of Defence—25 applications (16,954 employees)
- Department of Home Affairs—21 applications (13,842 employees).

We reviewed 99 applications (96 by full merits review and three by facilitated resolution) for employees in 20 APS agencies as illustrated in Figure 12.

Figure 12: Finalised reviews by agency, 2019–20



Note: Table 5 in Appendix B provides greater details on the number of reviews by agency. The 'Other' agency category comprises of 13 agencies with less than five review applications each.

Review outcomes

Of the 204 applications finalised for the year, 96 were the subject of a full merits review and a further three were finalised through facilitated resolution. In facilitated resolution matters, the merits review process has generally commenced but is discontinued when an opportunity to otherwise resolve the dispute is identified.

⁴ APSC Statistical Bulletin December 2019

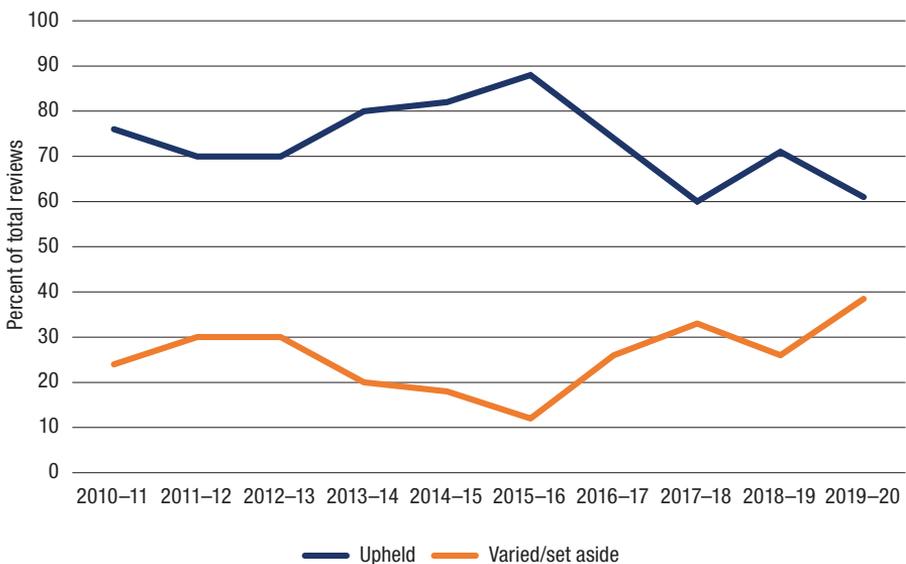
Full merits review

In the 96 cases where we undertook a full merits review, we made a recommendation to the agency to do one of the following:

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

In 61 per cent of these cases (59 cases out of 96), we recommended that the agency decision or action be upheld. In 38.5 per cent of these cases (37 out of 96) we recommended the decision under review be varied or set aside. Figure 13 shows the proportion of cases upheld, varied or set aside over the last 10 financial years. It indicates that the proportion of recommendations to vary or set aside agency decisions has trended upwards over that period.

Figure 13: Percentage of agency actions set aside/varied or upheld, 2010–11 to 2019–20



We recommend that decisions be set aside for two key reasons—either there was a significant procedural error affecting the original decision or the original decision was not the appropriate decision on the merits of the case. This might include because there was insufficient evidence to support the decision maker’s conclusions about factual matters; the decision maker had misapplied an element of the Code of Conduct, an agency policy or enterprise agreement; or because insufficient regard was had to the special circumstances of the employee’s case.

Insufficient evidence to support a finding of misconduct

An employee was found to have breached the Code of Conduct for making false and misleading statements about sustaining a workplace injury which was the subject of an application for workers compensation.

There was an incident after hours in the employee's workplace in which the employee claimed to have tripped and damaged his knee. The agency relied on CCTV footage of the incident, apparently contradictory statements made by the employee about his injury, and medical evidence of pre-existing damage due to wear and tear.

We found that the agency decision maker had misread one piece of evidence in a way that was unfairly adverse to the employee. The decision maker drew negative inferences from other evidence. In our opinion there were other plausible explanations for this evidence that involved no dishonesty on the part of the employee. We considered better evidence was necessary to make a finding that the employee had made false and misleading statements because of the serious nature of this finding. We recommended that the findings that the employee had failed to behave with honesty and integrity, and had improperly sought to obtain a benefit, be set aside.

Recommendations to vary decisions are made for a diverse range of reasons which might include, for example, recommending that an employee be granted additional leave or that the severity of a sanction imposed for a breach of the Code of Conduct be reduced.

New evidence leads to a recommendation to vary a decision

An Executive Level employee sought review of his agency's calculation of his entitlement to time off in lieu (of overtime) for additional hours worked in excess of his ordinary hours of work. The employee had accrued an entitlement in one agency, when his work area moved to another agency as part of a machinery of government change. The new agency questioned the amount of time the employee claimed he had accrued.

The employee presented additional evidence to us about his hours of attendance. We accepted that the entitlement was not as large as the employee claimed, including because there is an expectation in the agency's enterprise agreement that Executive Level employees work reasonable additional hours without recompense. That amount was set at 30 minutes per day. However, on the basis of the evidence presented by the employee, it was clear that the employee's entitlement was a greater amount than offered by his new agency. On this basis we recommended that the entitlement be varied and that 30 hours of time off in lieu be granted.

Review outcomes from applications that proceed to full merits review vary depending on the type of action. In particular, each year we recommend that a higher proportion of Code of Conduct decisions be varied or set aside in comparison with other types of reviews.

In 2019–20, we recommended that 48 per cent (25 decisions) of Code of Conduct decisions be varied or set aside, in contrast with 28 per cent (11 decisions) of secondary reviews. A range of reasons that could explain this difference:

- For secondary reviews (employment matters that have already been considered by the agency), the agency has had an opportunity to correct any errors in a decision or the handling of a workplace issue. Secondary review matters may also be resolved through facilitated resolution, or an error or misstep in the process may not be material or significant enough to warrant the action or decision to be set aside or varied.
- Actions and decisions relating to Code of Conduct investigations and decisions are more formal and are the subject of significant requirements such as procedural fairness. Given the seriousness of consequences for employees, detailed attention is required to ensure fair and proportionate decision making as well as balanced and careful assessment of the evidence. An error or misstep in a code matter is more likely to be material and consequently result in a variation or set aside recommendation.

Agencies accepted all our review recommendations in 2019–20, noting that three responses were outstanding at 30 June 2020. In a small number of cases, agencies sought discussion with the MPC or her delegate on practical or legal issues arising from the recommendation.

Cases finalised through facilitated resolution

In addition to the 96 cases subject to merits review, we finalised three cases through facilitated resolution. The Public Service Regulations⁵ provide for employees' concerns to be resolved through less formal interventions, including alternative dispute resolution. Assisting an employer and employee to resolve a workplace dispute contributes to harmonious and productive workplaces. We have been placing increased emphasis on facilitating outcomes for suitable cases as an alternative to making formal review recommendations and have been formalising and consolidating our approach in this area.

5 The policy on review in Regulation 5.1

Facilitated resolution outcome

An employee sought review of his managers' decision to issue him with a warning, which was to be placed on his personnel file, and to counsel him, following complaints from team members that the employee had behaved discourteously. Some of the behaviour was directed towards the managers. The employee did not accept this action because he did not view the managers as disinterested or objective judges of the workplace situation.

In deciding to counsel and warn the employee, the managers had regard to conflicting evidence from colleagues about the employee's behaviour. They accepted the evidence of colleagues who alleged discourteous behaviour but appeared to disregard the conflicting evidence. The managers did not provide reasons for preferring one version of the events over another.

The agency had a workplace behaviour policy that put in place procedures for taking management action on bullying or discourteous behaviour. This policy required managers to take an informal approach and have a conversation with the employee before issuing warnings. This approach had not been taken in the employee's case. He was issued with a warning without any conversation taking place.

We had a discussion with the agency about inconsistencies between the managers' actions and the agency's policy. In those discussions, we encouraged the employee and agency to adopt a less formal approach to the workplace situation and to discuss the issues raised in the review application in a less adversarial way. In this case, the agency agreed to withdraw the warning and reprimand from the employee's file.

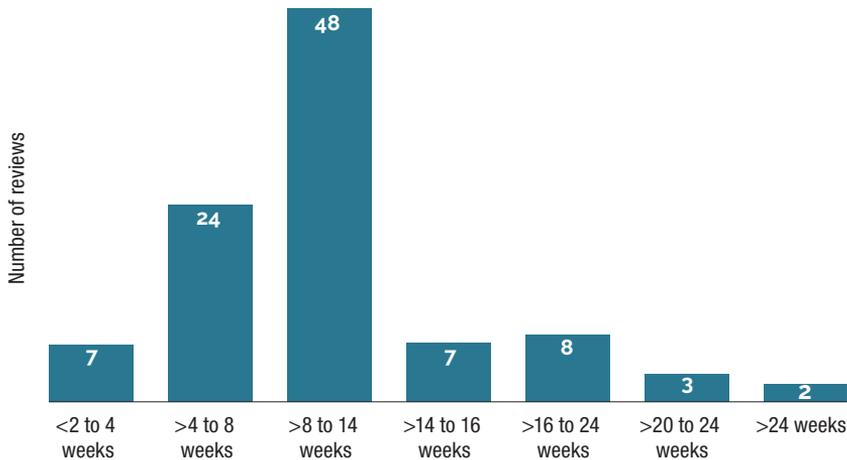
Performance against timeliness key performance indicators

The performance target is that 75 per cent of reviews (other than promotion reviews) will be completed within 14 calendar weeks of receipt of an application (excluding time on hold). Review cases are put on hold when the review is not able to progress. We place cases on hold when we are waiting for information from either the agency or applicant, in the absence of which the review cannot progress. Cases are also put on hold for the APSC office closure over the Christmas and New Year period.

We exceeded our performance target in the reporting year, with 79.7 per cent of review cases finalised within the target timeframe (compared with 82 per cent in 2018–19).

The average time taken to finalise a case from date of application to date of decision was 15.8 weeks. Figure 14 shows the distribution of reviewed cases by length of time to complete the review. The time it takes us to complete reviews reflects our role as a merits review body. We need to consider the perspectives and concerns of both the employee and their agency and give reasons for our recommendations. As Figure 14 shows, 48 of the 99 cases reviewed (48 per cent) took between 8 to 14 weeks to complete.

Figure 14: Distribution of finalised review applications by length of time to complete review (minus time on hold), 2019–20



“Thank you for actioning this so quickly and across the Xmas/NY holiday period, it is appreciated. Whilst I am disappointed a financial sanction still applies I respect the process and your role as the reviewer.”

Review applicant—February 2020

MPC direct review of an action (primary reviews)

As noted earlier, the MPC conducts direct review of three categories of matters:

- Code of Conduct (where review is sought of a breach or sanction decision)
- those where it is not appropriate for the agency to do an internal review and
- those that concern an action taken by a statutory office holder.

Code of Conduct reviews

APS employees and some former employees who are found to have breached the Code of Conduct can apply to the MPC for a review of the breach finding and/or the sanction. We estimate we review annually between five and 12 per cent of cases where employees or former employees are found to have breached the Code of Conduct or have been sanctioned.⁶

Our review work for Code of Conduct matters provides APS employees with independent scrutiny of a decision that can significantly affect an employee’s

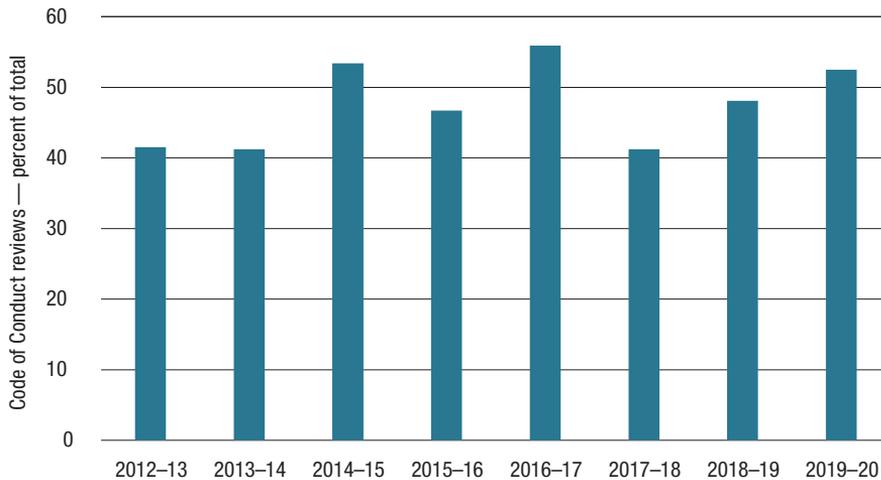
⁶ By comparing the data in the APSC State of the Service reports on numbers of employees subject to disciplinary findings with the number of Code of Conduct reviews we conduct for the four year period from 2015–16 to 2018–19.

reputation and career prospects. Getting disciplinary decisions right is important to an agency’s integrity culture. The reviews conducted by the MPC provide agencies with assurance that their decision making is robust, and consistent with the APS Values and Employment Principles and the policy principles which underpin the disciplinary arrangements in the APS.

During 2019–20, there were 80 applications for review of a decision that an employee had breached the Code of Conduct and/or the sanction received, comprising 78 applications from current employees and two applications from former employees. In addition, 21 cases were on hand on 1 July 2019. We reviewed 52 cases during the year, involving 42 employees.⁷

Code of Conduct cases accounted for 52.5 per cent of the 99 cases either reviewed or resolved through facilitated resolution. As Figure 15 demonstrates, reviews of Conduct decisions have been trending upwards as a proportion of total reviews, with the exception of 2017–18.

Figure 15: Code of Conduct reviews as a proportion of total reviews, 2012–13 to 2019–20



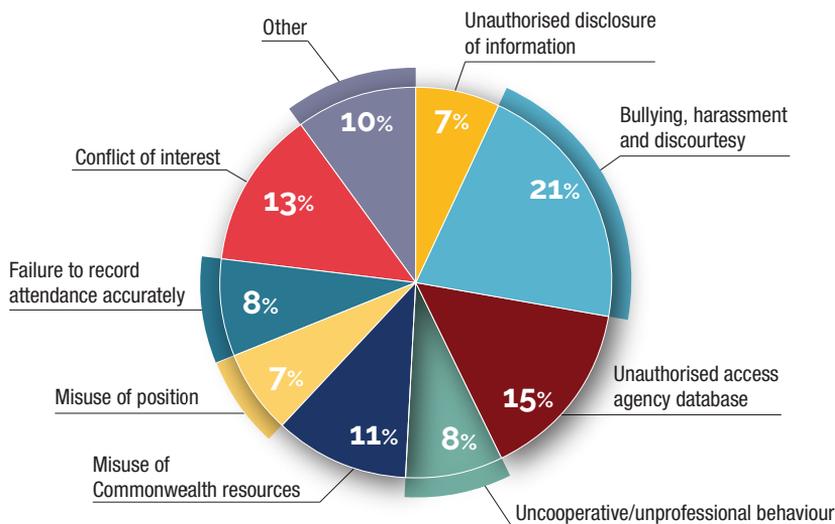
⁷ Employees may apply separately for a review of a breach determination and the consequential sanction decision. Where this happens, it is counted as two cases, as each is a review of a separate action. This is the reason there are more cases than employees.

Of the 52 cases reviewed (40 current employees and one former employee) we recommended:

- decisions be upheld in 27 cases
- the finding of misconduct and/or sanction be set aside in 13 cases
- the findings be varied in 12 cases.

Figure 16 and Table 7 in the Appendix B provide a breakdown of the categories of behavioural concerns that were the subject of Code of Conduct reviews.

Figure 16: Code of Conduct cases reviewed by subject, 2019–20



Code of Conduct reviews considered a broad range of behaviours. Bullying, harassing and discourteous behaviours were the largest group of cases, including three cases in which employees engaged in what was considered to be sexually harassing behaviour. Unauthorised access to customer data in agency databases was the next most significant behaviour.

Sexual harassment

Three employees were breached and sanctioned for behaviours that in our view amounted to sexual harassment. In the first case, the employee, who was in a leadership role, made jokes of a sexual nature on two occasions to two colleagues, including suggesting to one colleague that they get a room in a hotel together at lunch time. The employee was reduced in classification for this behaviour. We were satisfied that the sanction was appropriate in light of the employee's seniority and length of employment in the APS. The employee should have been in no doubt about the expected standards of behaviour. In addition, on review the employee appeared to be diminishing the seriousness of the conduct and his culpability, firstly by submitting that his behaviour was friendly banter with colleagues and secondly by questioning the findings of fact made during the investigation. We recommended that the sanction be confirmed.

In the second case the employee was reduced in salary for comments he made on a messaging platform to a colleague indicating that he was romantically attached to her and wished to pursue a relationship. The colleague asked him to desist but the employee repeated the behaviour after an interval. The employee indicated in his response to the investigation that he understood the seriousness of his behaviour and expressed remorse. We confirmed a reduction in salary as the appropriate sanction.

In the third case we reviewed a finding that an employee had breached the Code of Conduct for engaging in unsolicited and unwanted physical sexual advances to a colleague at a work social function while drunk. We found a procedural error with respect to a finding of fact which had not been put to the employee as an allegation and which concerned behaviour in the workplace after these events. We confirmed the findings of fact and most of the findings of breach in this case. The employee did not seek review of the sanction decision.

Concern about conflict of interest was a feature in a number of cases including cases of unauthorised access to customer databases and outside employment. Conflict of interest is a complex area of judgement and decision making. From our casework, we have observed that some agencies' conflict of interest policies do not provide sufficient guidance to employees and managers on the management of conflicts of interest. We raised the possible need for stronger guidance for agencies on this topic with the APSC as well in discussion with agencies when providing feedback on the lessons learned from review work. We also published a tip sheet on managing conflicts of interest.

Conflict of interest in providing services to clients

An employee working in a client service role was found to have failed to declare a conflict of interest by failing to declare that she had served clients who were family members of her manager and colleagues. The employee argued that she had not done anything inappropriate as she did not know the clients personally and that she was behaving in a way consistent with agency policies.

The agency provides equitable levels of service to the Australian community through call centres, shop fronts and online. The concern was that clients were getting preferential service by being able to ring the employee direct. The agency policy recognised that conflicts of interest arise when family members of employees seek services from offices in which their relatives work and required staff to get approval from their manager before serving such a client and accessing the client's records.

We noted that the agency's policy document did not adequately deal with the situation where the manager is conflicted because it is one of their family members who are seeking a service. We drew this omission to the attention of the agency.

Reviews by the MPC where it was not appropriate for the agency to do internal review

We received 14 applications requesting that the MPC conduct a review for matters that would, in normal circumstances, be reviewed first in the agency. In 13 of these cases, the employee requested the MPC conduct the review and in one case the agency referred the matter to the MPC for review.

In 11 of these cases we declined to conduct the review, including because the:

- review applicant had not made a case for having the review conducted by the MPC rather than the agency
- application was made outside of the statutory timeframe
- action was not reviewable as defined in the Public Service Regulations
- applicant had ceased being an APS employee
- applicant had lodged an application on the same issue in another jurisdiction (for example the Fair Work Commission).

We conducted a review in the remaining three cases. In each of these three cases we accepted the review because the relevant agency head was involved in matters that were the subject of the review.

These cases concerned a dispute about leave entitlements; a dispute about a direction issued to the employee at the request of the agency head about the employee’s attendance and behaviour; and an unsatisfactory performance rating.

We recommended that the agency’s decision in two of the three matters be upheld. We recommended that the unsatisfactory performance rating be set aside because there was insufficient evidence supporting a number of the claims about the employee’s alleged performance deficits and there were significant mitigating factors that explained any shortcomings in the employee’s performance in other areas. The agency accepted the review recommendation in this case.

Reviews of actions by statutory office holders

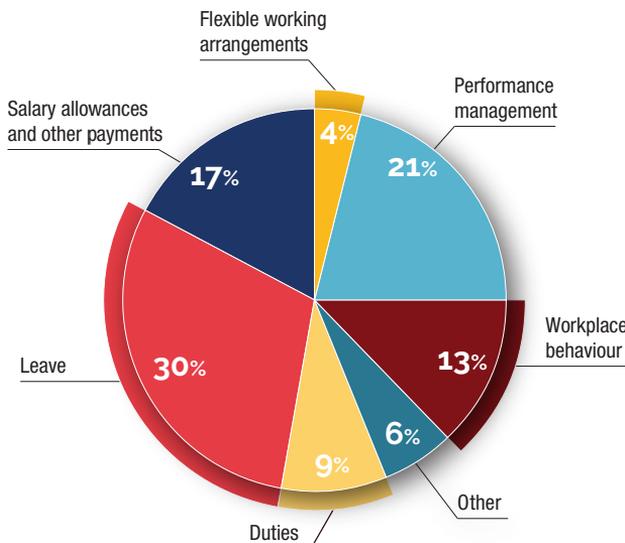
We received no applications from APS employees requesting review of the actions of statutory office holders.

MPC review of an action following internal agency review (secondary reviews)

During 2019–20, there were 101 applications for secondary review of employment matters, with 14 on hand on 1 July 2019. We reviewed 47 applications, 44 of which were the subject of full merits review. Three applications were finalised through facilitated resolution.

Figure 17 provides a breakdown by subject matter of the 44 secondary review applications that were reviewed.

Figure 17: Secondary review cases by subject, 2019–20



Disputes about leave formed the largest proportion of this category of reviews (13 cases out of 44). A number of these concerned employees who had exhausted their entitlements to sick and carers leave. They also concerned cases where managers had refused to grant leave for unscheduled absences and treated the employee's absence as unauthorised.

Leave and unauthorised absence

An unauthorised absence may occur where an employee is absent without approval, including where managers decline to approve leave.

An employee with a history of unscheduled absence due to illness sought review of his manager's decision to treat two absences as unauthorised rather than grant personal leave without pay. The employee had been assessed by an employer-nominated medical practitioner as fit for duty as part of a graduated return to full-time work. The employee was issued a direction by his manager to return to work on this basis. The direction required the employee to provide medical evidence with a particular level of detail in support of absences from work due to illness.

Following the employee's return to work, a second direction was issued by the employee's manager, advising that no future requests for unpaid personal leave would be approved. Thereafter, the employee took additional sick leave for which they had medical certificates.

The agency's enterprise agreement provided a discretion for managers to grant personal leave without pay when an employee has exhausted their entitlement to paid sick leave.

We considered that the manager had effectively withdrawn a future entitlement to leave on each occasion that the need for leave arose. This included leave for illnesses that were unrelated to the medical condition that resulted in the requirement to refer the employee for medical assessment. We considered that the manager's advice about future leave applications was inconsistent with both the enterprise agreement and the principles of administrative law. In particular, a decision maker cannot state that they will decline to consider a current or future application regardless of the employee's circumstances. We recommended that the decision to refuse to grant personal leave without pay and to treat the employee's absences on two days as unauthorised be set aside and that the manager's letter be withdrawn.

In another case, we considered that a manager's decision to treat an employee's absence as unauthorised was fair and reasonable. In this case, the employee was assessed as fit for duty but had failed to comply with a direction to return to work. The employee was no longer responding to communication from the agency, including to offers of alternate work or requests to discuss the issue.

Disputes about performance management outcomes were the next largest category (9 out of 44 cases), all of which concerned judgements that the employee was underperforming. This included two requests for review of decisions to reduce the employee's classification level for unsatisfactory performance. Conducting a merits review of performance management outcomes can be challenging, requiring the reviewer to develop an understanding of the nature of the employee's job and the operational priorities of the work area. A common theme underpinning managers' concerns about employee performance is the employee's general capabilities typically with respect to analytical and problem-solving skills, level of output and communication.

Managing for underperformance

An employee sought review of a decision to commence a managing underperformance process following a 'did not meet expectations' performance rating.

The employee was in a technical role conducting data modelling. The employee considered the performance rating unjustified because of his expertise and technical skills. The manager acknowledged the employee's technical skills but was concerned about the employee's capacity to deliver work in a timely way; work collaboratively with colleagues; and communicate clearly with an understanding of the needs of his audience.

The manager provided our review with a number of examples of the employee's work, explaining where the employee did not provide sufficient explanation of his results or demonstrate the ability to interpret the results in a way that met the needs of his audience. The manager also detailed a number of examples where the employee had not met deadlines.

The manager's detailed examples were persuasive. In addition, the employee was unable to convincingly rebut any of the evidence the manager presented. For these reasons, we were satisfied that the manager's assessment of the employee's performance was fair and reasonable and recommended that the decision to manage the employee for underperformance be upheld.

We published a tip sheet on our website during the reporting year to provide guidance to agency human resources staff on conducting merits review of performance management decisions.

The remainder of our review caseload covered a diverse range of employment concerns, from workplace behaviour, duties, salary and allowances. Access to flexible working arrangements formed a smaller percentage of the case load this reporting year than it did in 2018–19, perhaps reflecting the impact of COVID-19 on the working arrangements of APS employees, and, in particular, that a significant proportion of APS employees were required to work from home due to lockdowns.

Feedback from review applicants

All applicants who receive a review recommendation are given the opportunity to provide feedback about their review experience through an anonymous online survey.

The response rate this reporting year was 34 per cent (32 respondents) compared to 26.5 per cent (18 respondents) in 2018–19.

Respondents were generally positive about the application process. When asked if they found it easy to make an application for review, 84 per cent of respondents said ‘yes’. Fifty-three per cent were positive about the ease with which they were able to access information on the MPC website while 67 per cent stated that, once they found the information they needed, they found it easy to understand.

Responses were more mixed about the review process. Fifty-six per cent of respondents felt they had the opportunity to put their case forward to the MPC but more than half wanted more progress updates. Only 23 per cent of respondents recalled being advised how long the review process was likely to take.

Respondents were generally positive about the way review recommendations were delivered although they indicated that they would have preferred to be given an opportunity to comment on the delegate’s recommendation before it was made. More than over 70 per cent indicated that the language in the letter or report, and its length, was appropriate. There was less enthusiasm for the way reasons were communicated and whether, as review applicants, survey respondents felt heard. Forty-one per cent felt that they were able to understand the reasons for the decision, while 31 per cent felt the information they provided was not taken into account.

While there was some criticism of the review process with only 38 per cent of respondents stating the review was completed in an independent and impartial way, and 34 per cent stating the review process was fair and equitable, 56 per cent stated they would recommend the process to a colleague. Fifty per cent were positive or neutral on whether the review process was worthwhile.

Responses indicating satisfaction with the outcome of the review appear to be influenced by whether the review was favourable to the employee. Every respondent who received a favourable outcome from their review, found the review independent, impartial and fair.

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

Examples of responses

“Much of my initial contact with the MPC office was by phone. Staff were helpful and polite and the matter was concluded within the specified timeframe which rather impressed me.”

“I can only speak of my experience with [review adviser]. She was unbiased and looked thoroughly at all the facts put forward. Something that was not done at my agency’s level.”

“The delegate handling my case was professional, thorough and easy to talk to.”

“I would not recommend seeking review as MPC’s extremely limited scope makes the review redundant.”

“[There was] . . . limited communication from MPC.”

Selection of comments from review applicants—2019–20

The review feedback survey is an important tool for assessing our clients’ experience of the Review of Actions scheme and informs our business process improvements, our communication with clients, including through the website, and our case handling practice. We collate the survey results twice a year and meet to discuss the findings. For example, we identified through the feedback survey that our clients wanted personal contact with the person handling their application. As a result we have introduced case handling standards that require telephone contact with review applicants within 10 days of receiving the application and, at a minimum, the offer of a telephone discussion about the review applicant’s concerns.

Complaints about entitlements on separation

Under Part 7 of the Public Service Regulations, the MPC 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).

We received five complaints, three of which were finalised through facilitated resolution and without the need for an investigation. One application was not accepted and one case was on hand at the end of the reporting year.

Three of the cases concerned the accuracy of leave entitlements paid out to the employee and one concerned a delay in making the final payment. One case concerned a refusal to give the person an Individual Flexibility Arrangement while an employee. As this concerned decisions made while the applicant was still an employee, it was outside the scope of the matters we can consider under Regulation 7.2.

Inquiry functions

In 2019–20, there were no requests for the MPC to conduct an inquiry under any of the provisions outlined in section 50 of the Public Service Act.

Statutory services for APS agencies

There are two statutory services that we can provide to APS agencies when requested—the first is to conduct an inquiry into an alleged breach of the Code of Conduct by an APS employee or former employee (section 50(1)(ca) and the second is to form an Independent Selection Advisory Committee for recruitment purposes (Part 4 of the Public Service Regulations). We charge a fee to provide both services to cover staff and other costs incurred when performing these statutory services.

Inquiries into breaches of the Code of Conduct

We received one request from an agency to inquire into the conduct of three employees regarding their involvement in an issue relating to conflict of interest. Not all the employees gave their consent to the inquiry and we decided it would be impracticable to proceed with an inquiry in this circumstance.

We completed one inquiry into the conduct of an APS employee which was on hand at 1 July 2019. This matter was finalised without a finding of misconduct and with a recommendation that the agency address any behavioural concerns through its performance management procedures.

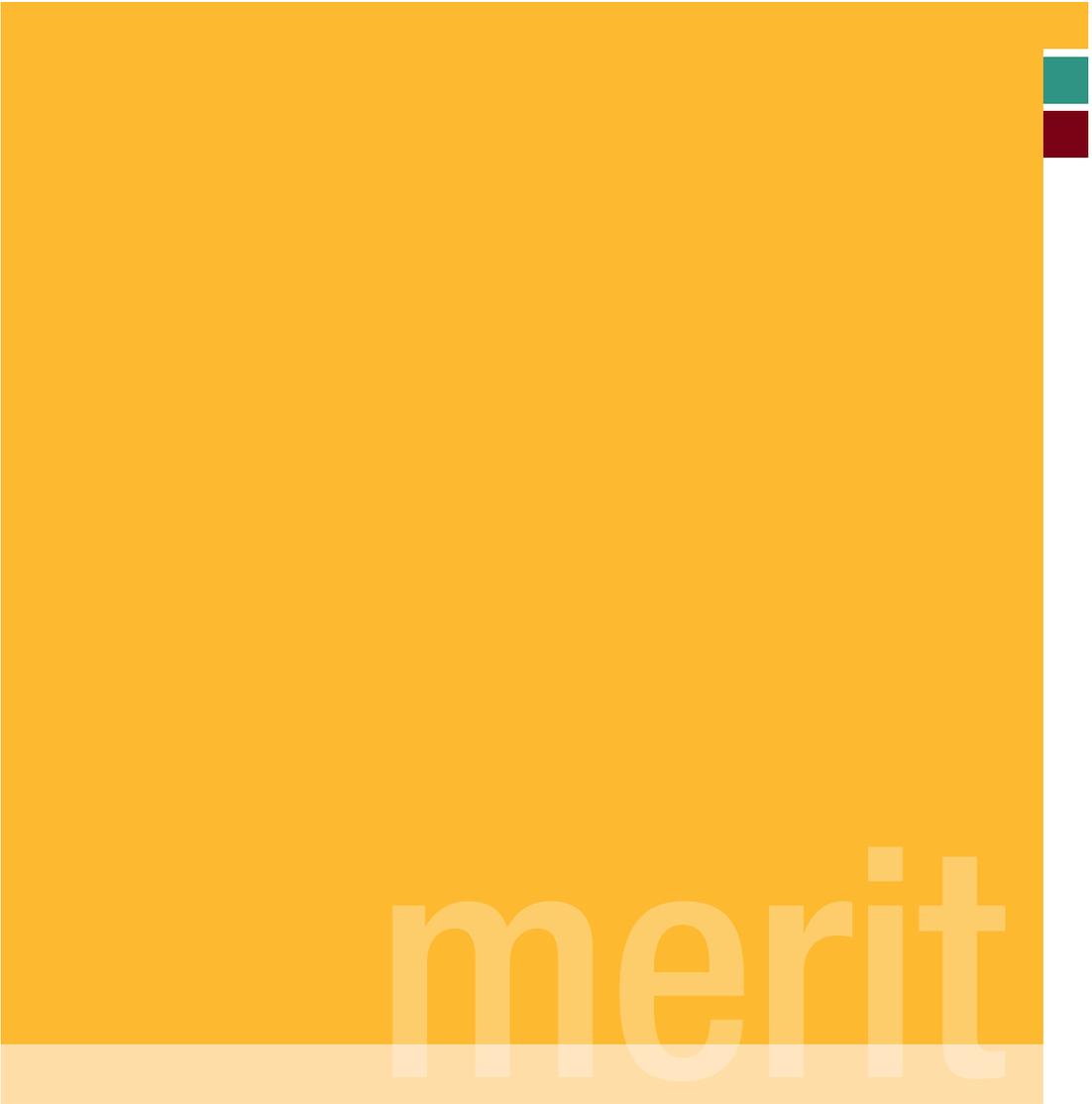
Independent Selection Advisory Committees

We received no requests for Independent Selection Advisory Committees during the reporting period.

Recruitment and employment services for non-APS entities

Under Regulation 7.4, the MPC can provide fee-for-service activities, such as staff selection services and investigation services for grievance and misconduct matters, to non-APS entities. Non-APS entities include non-APS Commonwealth agencies, state and territory government agencies and departments, local government entities, and private sector entities. We received no requests for services from non-APS entities or bodies during the reporting period.

3 Engagement, projects and accountability



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Stakeholder engagement and resources

In 2019–20, we continued our program of engagement and developing resources and publications for our stakeholders. Our key stakeholders are APS agencies, human resources practitioners, fraud and misconduct investigators, and employees.

One of the objectives of merits review is to improve the quality of agency decision making. To this end, the focus of our work with stakeholders is providing feedback and developing information resources on the lessons learned from reviews to assist in improving overall people management practice in the APS. We also aim to promote awareness and provide information about the functions of the MPC and the Review of Actions scheme.

Engaging with our stakeholders

Our total number of contacts with stakeholders was lower than the previous year as a result of COVID-19—this was largely due to travel restrictions and changes in agency priorities (that is, focusing on dealing with pandemic-related issues). Between March and July 2020 many meetings and presentations that would have routinely occurred were cancelled or delayed.

During 2019–20 we:

- had 39 contacts with stakeholders comprising 30 meetings and 9 presentations
- had 19 meetings with senior managers in 10 APS agencies
- participated as guest speaker in four 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
- provided written feedback to two APS agencies on key internal policies
- provided written feedback to the Australian Public Service Commissioner on APS-wide policy matters on two occasions
- held one meeting of the Sydney-based Review of Actions and Code of Conduct Community of Practice for APS practitioners
- received 723 telephone enquiries about the Review of Actions scheme and other matters.

Our Community of Practice for APS practitioners meetings were temporarily suspended as a result of COVID-19. We have worked towards conducting these meetings remotely and in way that is accessible to all attendees. We are also considering long-term changes which may allow expansion of the membership of this Community of Practice which is currently Sydney-based. We will report on these changes in next year’s annual report.

Our review function provides an assurance function for the way agencies are applying the APS Values and Employment Principles in managing their employees. One of our focuses is on the management of integrity issues in the APS. The MPC is a member of the Integrity Agencies Group, chaired by the Australian Public Service Commissioner, which met once during the reporting year. The MPC is also an independent member of the Audit Committee for the Office of the Inspector-General of Intelligence and Security.

The MPC meets quarterly with the four largest agencies in the APS to discuss the issues arising from the review casework. In addition, the MPC meets on an ad hoc basis with other agencies. These meetings provide an opportunity to give feedback on people management policies and integrity issues. They also provide an opportunity to work collaboratively with agencies. The MPC is grateful for the cooperation and assistance provided by the ATO in managing the surge in promotion review applications at the end of 2019, and for the valuable feedback on the draft tip sheets on the promotion review process.

“I just wanted to thank you again for your attendance yesterday and presentations to the teams. Both [agencies’ staff] feedback was that the information and discussions were extremely valuable and provide a better insight into your processes.”

Management of APS Code of Conduct matters presentation—August 2019

The MPC was interviewed for an article published in *The Mandarin* on 17 July 2019—*Underperformance in the public sector is difficult and painful: Linda Waugh talks about how to guide and advise a way through it.*

Resources and information for our stakeholders

Our key statutory function is to conduct independent reviews of employment-related actions and the majority of office resources is directed toward performing this function. While this important work is focused on individual applications and cases, we also look for systemic issues and trends. We then use this information to develop resources and publications to assist our various stakeholder groups which include APS employees who make review applications, senior managers who take actions and make decisions that are reviewable under the legislation, and the agency practitioners who conduct internal agency reviews as well as Code of Conduct investigations.

During 2019–20, we commenced a project to develop tip sheets on topics and issues we identify through our review casework and from stakeholder feedback. We also continued to publish case summaries to illustrate the types of cases received, how they were reviewed, and any emerging issues in those matters. We also commenced a project to review and update our website.

Tip sheets

We developed and published seven tip sheets—four concerning promotion reviews and three concerning reviews of other employment-related actions.

We identified the need for the four promotion review tip sheets from incoming phone enquiries and discussions with key stakeholders, particularly during the period when we received a three-fold increase in promotion review applications.

The tip sheets cover:

- how to apply for a promotion review
- what happens after an employee lodges a promotion review application
- ‘protective’ promotion review applications—what they are and how they work
- a quick guide to promotion review.

The second set of tip sheets arose from observations and issues identified through general review casework. The topics cover:

- issues agencies should consider when conducting internal reviews of performance management decisions
- the importance of managing conflicts of interest effectively and resources available to agencies to assist
- how to frame allegations when conducting a misconduct investigation.

Published case summaries

Each year we identify topics from our review casework that will provide informative and instructive case studies for our stakeholder groups. These may be examples of good-quality decisions made by agencies which we upheld, or examples of errors or incorrectly applied policy resulting in decisions which we have recommended be set aside or varied. We published 12 case summaries during 2019–20 concerning decisions on a range of employment-related issues, including unauthorised absences from work, reviewing performance ratings and Code of Conduct (processes and decisions). The full set of case summaries can be found on our website.

Review of our website

Our website is important to our stakeholders, and, in particular, APS employees who wish to lodge an application for review of a promotion decision or an employment-related action. Our website provides information about the Review of Actions scheme, the functions of the office, and how to lodge a review application for an employment related action, including an online application for promotion reviews. During 2019–20, we had 184,151 visitors to our website with the most visited website pages being:

- home page—23,623 views
- promotion review notifications—23,623 views
- general information on promotion reviews—31,923 views of three pages
- information on procedural fairness in employment decision making—8,527 views
- review application forms—4,712 views.

This year we commenced a major review and update of our website. We will be modernising our website and completing a significant restructure of our content to make it easier for our stakeholders to locate and search for information. We expect this work to be completed in 2020–21.

Improving how we work and deliver services

During 2019–20, we focussed on projects to improve the way we work and how we deliver our services. This included induction programs for new staff and formalising our internal procedures manuals to ensure we have the resources available to our staff to allow them to more efficiently and effectively perform their duties.

Induction program for new reviewers

During 2019–20, we formalised and implemented an induction program for new reviewers. The program is conducted over a two-week period, and provides new staff with the tools needed to ensure they can effectively fulfil their statutory roles and responsibilities. The program focuses on familiarising new reviewers with the employment framework in the APS including relevant legislation and APSC policy advice, the APS Values and Code of Conduct. It provides specific induction on key topics such as Code of Conduct and sanction decision making, performance management, bullying and harassment, workplace entitlements, and flexible work arrangements. The program also provides new reviewers with the fundamentals of privacy, Freedom Of Information, and protected information obligations as well as other governance issues such as the management of conflicts of interest and security briefings.

Participants in the first delivery of the program rated it as excellent and said it was highly relevant to their needs.

Procedures manuals

We completed a comprehensive revision of our internal procedures manuals for reviews of actions, promotion reviews and recruitment activities (Independent Selection Advisory Committees). This was a substantial body of work which we used to review and improve our internal handling practices and to provide further support to staff undertaking these roles so they are able to make decisions and operate independently.

Decision support tools for reviewers

We developed a site on the intranet for staff who conduct reviews. The site provides the resources and decision support tools staff need to manage cases and make decisions in a very diverse and sometimes complex jurisdiction. Staff can access, among other things, procedural manuals, template reports and correspondence, internal procedures, legal advice and case law on the site.

Promotion reviews case management

In last year's annual report, we reported on the development of a GovTeams community to facilitate the digital exchange of information and documents for Promotion Review Committees. That work continued in 2019–20. Promotion Review Committees handle large volumes of personal information about the parties to the promotion review. We are satisfied that we have in place a secure and private document transmission and access process for promotion reviews that meets our responsibilities and accountabilities under the *Privacy Act 1988*.

APS agencies now have a simplified, more reliable and efficient mode of transmitting documentation to our office through uploading the relevant recruitment documentation direct to GovTeams. At present not all APS agencies are using GovTeams for this purpose. During 2020–21, we will work to have all APS agencies sending us information by direct upload to GovTeams. Promotion Review Committee members receive the information they need through GovTeams to perform their functions. Feedback from committee members was highly positive and the move to GovTeams has provided efficiency gains for the office through decreased handling time.

Triage of incoming review applications

Our review of other actions cases are now assessed and allocated in accordance with our case prioritisation and triage model. This involves a *prima facie* assessment of applications for review of actions to determine priority and treatment. This assessment is made on the basis of the information presented in the application and the papers the agency provides to this office.

The assessment under the case prioritisation and triage model weighs all relevant factors that determine the treatment of the review case. It considers and balances a range of factors including the seriousness of the subject matter and the possible consequences for the review applicant, agency and this office.

Governance and 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 2019–20, the MPC had managerial responsibility for the work of the APSC employees made available to work in the Office of the MPC.

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 engaged under that Act and made available by the Australian Public Service Commissioner. Consequently the MPC does not have a separate budget allocation and depends on the APSC for its staffing levels and resources more generally to undertake her functions.

For 2019–20, the MPC was allocated an annual budget (excluding corporate costs) of \$1.95 million and an average staffing level of 12.2.

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.

Staffing and office locations

The MPC is based in the APSC's Sydney office and has staff in the APSC's Sydney and Canberra offices. During 2019–20, the MPC was supported by 12 staff in 11 ongoing positions. A number of staff were on temporary assignment largely backfilling staff on extended leave. Figure 1 shows the organisation chart. The 11 ongoing positions comprise:

- three positions at the EL2 level
- five positions at the EL1 level
- one position at the APS 6 level
- one position at the APS 5 level
- one position in the APS level 3/4 broadband.

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 and team areas are: reviews of actions and promotion review casework; policy and projects; fee for service casework; and MPC inquiries.

The MPC also maintains a register of suitably skilled people who are engaged as casual employees at the Executive Level 1 or 2. 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 18 employees listed as casual employees during 2019–20. Throughout the year, casual employees undertook work equivalent to approximately one average staffing levels.

Interaction of the roles of the Merit Protection Commissioner and the 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 by providing 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 by conducting reviews of determinations of breaches of the Code of Conduct and/or sanctions.

Business planning and risk management

During 2019–20, we finalised 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 completed an internal risk assessment, identifying our key operational and corporate risks and actions to mitigate higher risks. These actions have been incorporated into our business plan as projects to be completed over the next two financial years.

Freedom of information and privacy

We received and finalised six applications under the Freedom of Information Act during 2019–20. Three requests were for papers relating to the applicant’s review of action case file and two requests related to promotion review decisions. The remaining case was for any document containing the applicant’s personal information and was closed as no documents were found.

Two requests were withdrawn after we provided the information to the applicant outside the Freedom of Information Act framework. In three cases, we released the documents sought by the applicant, in one case with some redactions.

There were no privacy breaches notified to the Office of the Australian Privacy Commissioner and no privacy complaints received by the MPC in 2019–20.

Information publication scheme

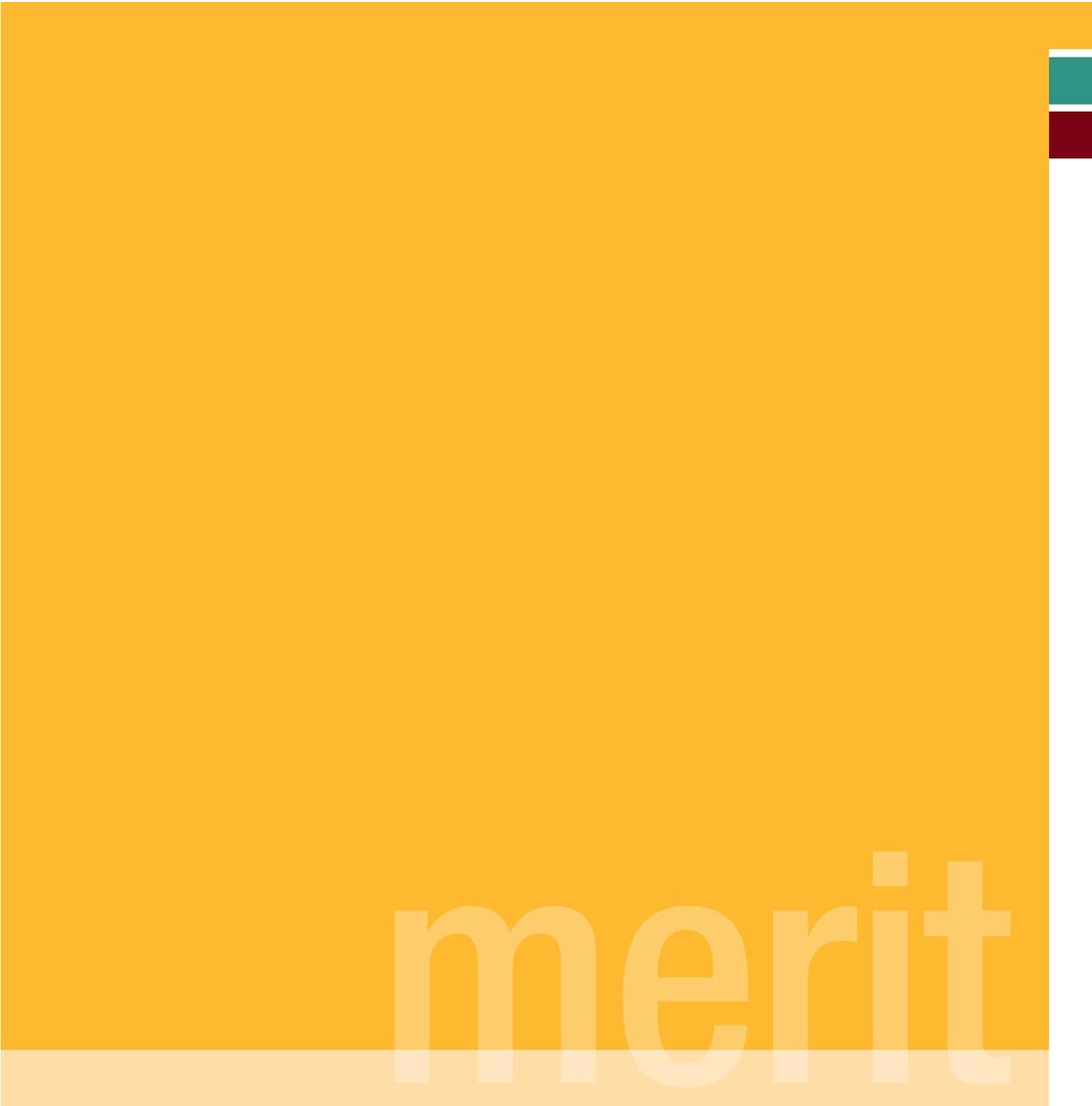
Information on the MPC and her role and functions is available on her website:

<https://www.meritprotectioncommission.gov.au>

Information is also in the APSC’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 2020–21

2020–21 offers unique challenges with COVID-19 continuing to have an impact on APS working arrangements and the traditional ways the MPC has engaged with stakeholders. A key priority for 2020–21 will be using technology to continue engaging with APS employees and agencies to provide guidance on good practice in decision making and people management. The MPC will continue to adapt to provide this information in accessible ways such as by:

- publishing tip sheets, case summaries and good practice guides for agency decision makers on our website
- reviewing and updating our website to ensure easier navigation for our stakeholders and removing out-of-date or superseded information
- engaging with stakeholders by way of video conference and teleconference
- conducting webinars with key stakeholder groups
- seeking additional stakeholder feedback by broadening our feedback survey to new client groups.

Consistent with previous years, the priorities for 2021–22 also include:

- raising the profile of the office with APS employees and agencies by implementing our communication and engagement strategy and redeveloping the MPC's website
- continuously improving the quality and timeliness of our work, including through effective mentoring and by supporting the ongoing professional development of review staff
- supporting agencies in complex case management, including through the Code of Conduct inquiry service
- continuing to implement effective and accountable governance arrangements and risk management processes for the office
- working with the APSC on integrity and people management issues and better integrating lessons learned from review work to inform policy development.

Appendices



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Appendix A

The Merit Protection Commissioner's Statutory Functions

Function of the Merit Protection Commissioner	Statutory authority—APS
<p>Review of Actions scheme—other employment-related actions.</p> <p>(This includes Code of Conduct reviews, primary reviews of other matters and secondary reviews.)</p>	<p><i>Public Service Act 1999</i> Section 33 and Subsection 50(1)(d)</p> <p>Subsection 50(1)(d) provides for review functions to be prescribed by regulations</p> <p>Public Service Regulations Part 5 Regulations 5.1, 5.2, 5.4, 5.5, 5.22–5.37 Schedule 1 to the Public Service Regulations</p>
<p>Review of Actions scheme—promotion and engagement. (This involves merit-based review of promotion decisions and engagement decisions of certain Parliamentary Service employees.)</p>	<p><i>Public Service Act 1999</i> Section 33 and Subsection 50(1)(d)</p> <p>Public Service Regulations Part 5 Regulations 5.1, 5.2, 5.3, 5.5, 5.6–5.21</p>
<p>Review of an 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 Part 7, Division 7.3</p>
<p>Review 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 Part 7, Division 7.4</p>
<p>Inquire into:</p> <ul style="list-style-type: none"> – a PID alleging a breach of the Code of Conduct – the APS Commissioner for an alleged breach of the Code of Conduct – an APS action as requested by the Public Service Minister – whether a current or former APS employee has breached the Code of Conduct. 	<p><i>Public Service Act 1999</i> Subsection 50(1)(a) Subsection 50(2) – provisions relating to Merit Protection Commissioner's powers when conducting the inquiry Public Service Regulations Part 7 Division 7.1 (regulations 7.1 and 7.1A)</p> <p>Subsection 50(1)(b)</p> <p>Subsection 50(1)(c) and Subsection 50(2)</p> <p>Subsection 50(1)(ca) and Section 50A Public Service Regulations Part 7 Division 7.6 (Merit Protection Commissioner's procedures)</p>
<p>Investigate complaint by former employee relating to entitlements on separation.</p>	<p><i>Public Service Act 1999</i> Subsection 50(1)(e)</p> <p>Public Service Regulations Part 7, Division 7.2</p>
<p>Establish an Independent Selection Advisory Committee.</p>	<p><i>Public Service Act 1999</i> Subsection 50(1)(e)</p> <p>Public Service Regulations Part 4</p>
<p>Provide recruitment and employment-related services to any (non-APS) person or body on a fee for service basis.</p>	<p><i>Public Service Act 1999</i> Subsection 50(1)(e) and Subsection 50(3)</p> <p>Public Service Regulations Part 7, Regulation 7.4</p>

Appendix B

Data tables for statutory functions

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

Review of promotion decisions

Table 1 shows the status of promotion review cases for 2019–20, as at 30 June 2020, compared with 2018–19.

Table 1: Status of promotion review cases 2019–20, compared with 2018–19

Promotion review cases	2019–20	2018–19
On hand at start of year	13	24
Established during the period	151	112
Total caseload	164	136
Reviewed (by Promotion Review Committee)	108	82
Invalid (for example applicant not an ongoing APS employee)	18	8
Lapsed (for example a protective application where no unsuccessful application received) or withdrawn	29	32
Total finalised during period	155	122
On hand at end of year	9	14
Target completion time (weeks)	8 or 12	8 or 12
Number completed within target time	121	78
Percentage completed within target time	78.06%	95%

Table 2 shows the promotion review caseload by agency for 2019–20.

Table 2: Promotion review caseload, by agency, 2019–20

Agency	Australian Taxation Office	Services Australia	Department of Home Affairs	Department of Defence	Other APS Department and Agencies	Totals
Number of promotion review applications received	988	374	166	12	50	1590
Number of Promotion Review cases registered (not including cases on hand at the start of the year)	71	43	14	7	16	151
Number of Promotion Review Committees formed and finalised—cases Reviewed	52	31	9	7	9	108
Number of parties to a promotion review where a Promotion Review Committee was formed and finalised	655	156	79	14	36	940
Number of promotion decisions subject to review	565	101	61	7	26	760
Number of promotion decisions varied	3	0	0	1	0	4

Review of general employment actions and complaints casework

Table 3 provides information on the review (other than promotion review) and complaints casework in 2019–20. Table 4 provides information on the timeliness with which we performed our review and complaints functions. Both tables compare results for 2019–20 with results for 2018–19.

Table 3: Review and complaints workload for 2019–20 compared with 2018–19

Cases	Primary reviews: Code of Conduct	Primary reviews: other	Secondary reviews	Former employee Code of Conduct (Regulation 7.2A)	Total reviews	Complaints about final entitlements (Regulation 7.2)	Total cases	
	2019–20						2019–20	2018–19
On hand at start of the year	21	0	14	0	35	0	35	40
Received during the period	78	14	101	2	195	5	200	171
Total cases	99	14	115	2	230	5	235	211
Reviewed	51	3	41	1	96	0	96	78
Facilitated resolution	0	0	3	0	3	3	6	2
Not Accepted	18	11	52	1	82	1	83	52
Lapsed or withdrawn	14	0	9	0	23	0	23	44
Total finalised during period	83	14	105	2	204	4	208	176
On hand at end of the year	16	0	10	0	26	1	27	35

Note: Primary 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 Merit Protection Commissioner considers it is.

Table 4: Timeliness in handling reviews and complaints, 2019–20 compared with 2018–19

Review type	2018–19		2019–20	
	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	10.9	86.1	11.1	80.4
Former employees – Code of Conduct (Regulation 7.2A)	N/A	N/A	13.3	100
Primary reviews—other	14.1	75	12.9	66.7
Secondary reviews	9.8	81.1	10.7	79.5
Total reviews	N/A	N/A	11	79.7
Complaints about final entitlements (Regulation 7.2)	N/A	N/A	1.9	100

Note: We have reported separately on reviews of employment actions (primary and secondary reviews) and complaints about entitlements on separation (regulation 7.2) in this annual report. Previous annual reports included complaints about entitlements in the overall review figures. For this reason some of the data calculations are not available for 2018–19.

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

Table 5: Reviews and complaints completed, by agency, 2019–20

Agency	Primary Review—Code of Conduct	Primary Review—Non Code	Secondary Review	Total	Complaints about entitlements—former employees
Department of Human Services/Services Australia	13	0	18	31	0
Department of Defence	11	0	2	13	0
Australian Taxation Office	2	0	10	12	0
Department of Home Affairs	3	0	5	8	1
Department of Agriculture, Water and the Environment	3	0	3	6	1
National Disability Insurance Agency	3	0	3	6	0
The Department of Infrastructure, Transport, Regional Development and Communications	5	0	1	6	0
Twelve agencies with less than six completed matters each	12	3	2	17	1
Total	52	3	44	99	3

Table 6 shows the subject matter for all reviews, other than Code of Conduct, completed in 2019–20.

Table 6: Subject matter of reviewed cases (other than Code of Conduct), 2019–20

Subject matter	Secondary subject matter	Number
Salary allowances and other payments	Allowances/Entitlements	3
	Salary	5
Subtotal		8
Flexible working arrangements	Home based work	2
Subtotal		2
Performance management	Unsatisfactory performance, including performance rating	10
Subtotal		10
Duties	Assignment to different duties	1
	Relocation	1
	Selection process	1
Subtotal		3
Workplace behaviour	Workplace directions or warnings including about attendance	3
	Handling of bullying complaints	3
Subtotal		6
Leave	Personal or carers' leave	6
	Unauthorised absence	3
	Other	5
Subtotal		14
Other	Outside employment	1
	Flexitime/Time off in lieu of overtime	2
	Direction about attendance	1
Subtotal		4
Total		47

Table 7 shows the subject matter for all Code of Conduct cases reviewed in 2019–20. The number of subject matters by category in Table 7 is greater than the number of reviewed Code of Conduct cases because an employee may have been found to have breached the Code of Conduct, or been sanctioned for more than one behaviour.

Table 7: Subject matter of Code of Conduct reviews completed, 2019–20

Subject matter	Number
Unauthorised disclosure of information	4
Bullying, harassment and discourtesy	13
Unauthorised access agency database	9
Uncooperative/unprofessional behaviour	5
Misuse of Commonwealth resources	7
Misuse of position	4
Failure to record attendance accurately	5
Conflict of interest	8
Other	6
Total number of matters identified	61

Erratum

There was an error in Figure 6 ‘Review of action other (primary and secondary) by agency’ in the MPC’s *Annual Report, 2018–19*. The figure provided data on the number of primary and secondary applications for review by APS agency. The legend for primary and secondary reviews was transposed for all agencies except the Department of Defence. The data given for primary reviews was in fact data for secondary reviews and vice versa for all agencies except the Department of Defence.

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