



Australian Government  
Merit Protection Commissioner



MERIT  
PROTECTION  
COMMISSIONER

# Annual Report of the Merit Protection Commissioner 2023–24







Senator the Hon Katy Gallagher  
Minister for Women, Minister for Finance, Minister for the Public Service  
Parliament House  
Canberra ACT 2600

Dear Minister

I am pleased to present the Merit Protection Commissioner's Annual Report for the reporting period ending 30 June 2024 as required by section 51 of the *Public Service Act 1999*. This report details the activities of the Merit Protection Commissioner during the financial year.

In preparing this report, I have taken into account the annual report guidance approved by the Joint Committee of Public Account and Audit.

Yours sincerely

A handwritten signature in blue ink that reads 'Jamie Lowe'.

Jamie Lowe

**Merit Protection Commissioner**

11 October 2024

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# Merit Protection Commissioner's foreword

I am pleased to present the Merit Protection Commissioner's (MPC) Annual Report for 2023–24.

Having commenced in the role of MPC on 30 September 2024, the Annual Report has been a useful introduction to the work of the MPC team. I acknowledge the hard work and resilience of the staff of the MPC. They have once again tackled the workload challenges while producing positive outcomes and exceptional service delivery to employees and agencies during a period of uncertainty. In particular, I acknowledge and appreciate the leadership of Mr Mark Davidson and Ms Kirsteen Banwell as acting MPCs over the past 12 months.

This year, the Annual Report of the MPC looks different. We have decided to report on our reviews of Code of Conduct decisions in a separate, stand-alone section. There are several drivers for this.

Firstly, we are reporting on an increase in the number of APS employees seeking a review across all types of decision including Code of Conduct related decisions.

Having a system of review for certain employment decisions is an important part of the APS integrity framework. Given the revitalised focus on integrity in the APS, it may not be surprising that there is an associated increase in applications as agencies rightly demand high standards of behaviour and employees feel supported to pursue their review rights.

Secondly, an analysis of MPC annual report data over recent years reveals we have consistently confirmed 70% of agency decisions relating to their handling of employee misconduct allegations. While this figure has remained relatively steady, it does indicate that there is room for improvement. Our section on review of Code of Conduct decisions provides further details on the themes and issues we have identified through our work this year. One trend we have observed is that agencies are outsourcing workplace investigations without ensuring adequate supervision or oversight of the process. This leaves little room for agencies to develop their own investigative capability and can result in poor outcomes for both the employee and agency. Our case studies this year provide some examples.

During the year, the MPC contributed to work being done by the APS Chief Operating Officer's Committee on Human Resource Capability of Code of Conduct Practitioners. Our data provided observations on where agencies could focus their efforts to improve the handling of misconduct allegations.

Next year we will focus our external engagement on how we can enhance our feedback and guidance to support agencies to improve how they handle decision-making around alleged breaches of the Code of Conduct.

The year also saw an increase in applications by APS employees seeking to have a promotion decision reviewed. No doubt this increase was due to the volume and frequency of 'bulk' recruitment activity in the larger agencies.

These 'bulk' recruitment rounds are used to fill hundreds of positions across the country through a single recruitment exercise. This type of recruitment can also use a single recruitment round for different classification levels and roles. In these circumstances, a person who was successful in winning a promotion may exercise their right to seek a review of another employee's promotion decision. This is a type of insurance policy in case their own promotion is overturned. In most instances, these types of applications will not proceed to a review. This causes unnecessary stress for applicants and additional work for the MPC without any viable or tangible outcome.

When the regulation of merit in promotion decisions in the APS was developed, this type of recruitment round did not exist, nor was it envisioned. We will continue to work with the APSC on making important reforms to this part of our functions to build a more effective system of review of merit in recruitment.

On this point I would like to thank all the APS employees from across the APS who agree to sit as an independent member on a Promotion Review Committee. These APS employees take on this important task in addition to their usual duties in their home agency.

For the Review of Actions scheme to be effective, it is critical that employees are aware of their rights, as well as their responsibilities under the *Public Service Act 1999*. This year we conducted a stratified survey of about 10,000 APS employees to test and understand the level of knowledge about the Review of Actions scheme and the role of the MPC. Of the employees who responded to the survey, 80% did not have any prior knowledge of their entitlement or of the MPC. With the benefit of this data, we will continue our campaign to raise awareness of review entitlements and the MPC in 2024–25.

Lastly, I give my thanks to the Australian Public Service Commissioner and staff for their continued support and corporate services essential for the effective operation of the MPC.

Jamie Lowe

**Merit Protection Commissioner**





# Part 1

## Overview



# At a glance

## Types of Decisions

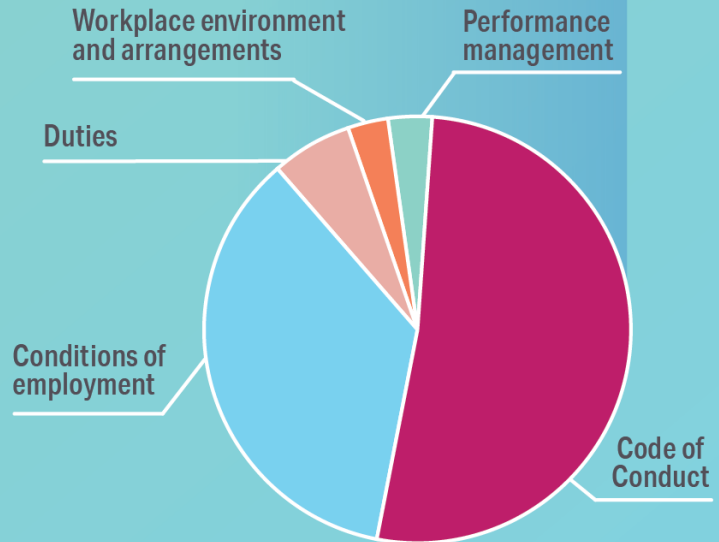
Review of workplace decisions

**10%**  
varied or set aside



Review of APS Code of Conduct decisions

**34%**  
varied or set aside



**31**

stakeholder engagements



**1226**

enquiries and advice



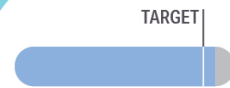
**299,659**  
web page visits



with **29,843**  
active users



**96%** of  
workplace decisions  
completed in time



**91%** of code  
matters  
completed  
in time



**66%** of promotion  
reviews completed in time

**143**

applications for  
review of workplace decisions

**79**

applications for review  
of Code of Conduct decisions

**9**

complaints regarding  
final entitlements

# About us

The MPC is an independent statutory office holder established under Part 6 of the Public Service Act to perform a set of functions for the APS. These functions relate to the implementation of, and compliance with, the APS employment framework and principles. This is achieved principally through reviews of employment-related decisions affecting APS employees and reviews of promotion decisions. The MPC has other complaint and inquiry functions. It also provides recruitment and employment-related services to employers.

# Our vision

To be an independent and impartial public service leader for advancing fair and merit-based employment-related actions and decisions.

# Our purpose

The MPC stands for fair and correct employment-related decisions in the Australian public sector. We assist agencies to meet their obligations set out in the APS Values, Employment Principles and Code of Conduct, to provide fair, flexible, and rewarding workplaces. We are there for Australian Federal Police (AFP) employees to check if they have been fairly and reasonably retired on invalidity grounds, without their consent.

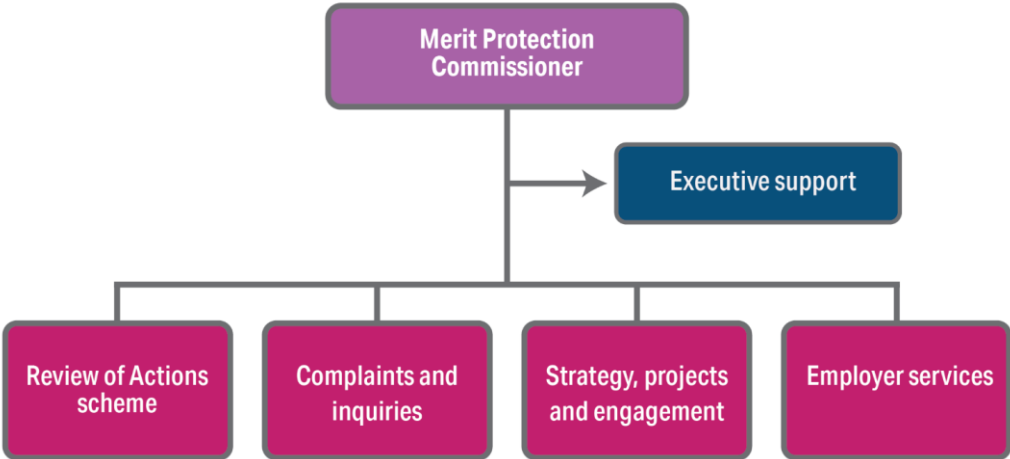
# Our staff and structure

The staff of the office of the MPC are employees of the APSC. Under section 49(2) of the Public Service Act, the staff necessary to assist the MPC must be made available by the APS Commissioner and engaged under that Act. The APSC provides corporate support, information systems and services to the MPC. The MPC is co-located with the APSC in its Canberra and Sydney offices.

We have an average staffing budget of 11.2 and use an organisational structure that best supports the performance of our statutory functions, having regard to where the bulk of work is done.

The high-level organisational structure of the office of the MPC is in Figure 1.

**Figure 1: Organisational structure**



We maintain a pool of 12 skilled employees who are engaged on an as-needed basis. We use this pool for our recruitment services and establishing committees to conduct promotion reviews and to run Independent Selection Advisory Committees (ISAC).

## Our ministers

Our Minister is Senator the Hon Katy Gallagher, Minister for Finance, Minister for the Public Service, Minister for Women.

The Hon Patrick Gorman MPC is Assistant Minister for the Public Service.

## Our legislation and statutory functions

The MPC's statutory functions are set out under Part 6 of the Public Service Act and Parts 4 and 6 of the Public Service Regulations 2023 (the Public Service Regulations). The MPC also has a review function for the AFP, set out in the *Australian Federal Police Act 1979* and the Australian Federal Police Regulations 2018.

The specific statutory authorities for each MPC functions are set out in Appendix A.

## Review of Actions scheme

Section 33 of the Public Service Act gives APS employees an entitlement to seek a review by the MPC of an action that relates to their employment, including decisions relating to a breach of the APS Code of Conduct and subsequent sanction decision (excluding termination decisions).

These types of reviews are independent, fair and conducted in accordance with the Australian Government's policy set out in the Public Service Regulations.

The policy states that:

- APS agencies should achieve and maintain workplaces that encourage productive and harmonious working environments
- there should be a fair system of review of APS actions
- an APS employee's concerns should be dealt with quickly, impartially and fairly
- the review process should be consistent with the use of alternative dispute resolution methods to reach satisfactory outcomes where appropriate. The scheme operates as 2 separate functions: merits review of APS Code of Conduct decisions and other workplace decisions; and review of certain promotion decisions.

### *Review of APS Code of Conduct decisions and other workplace decisions*

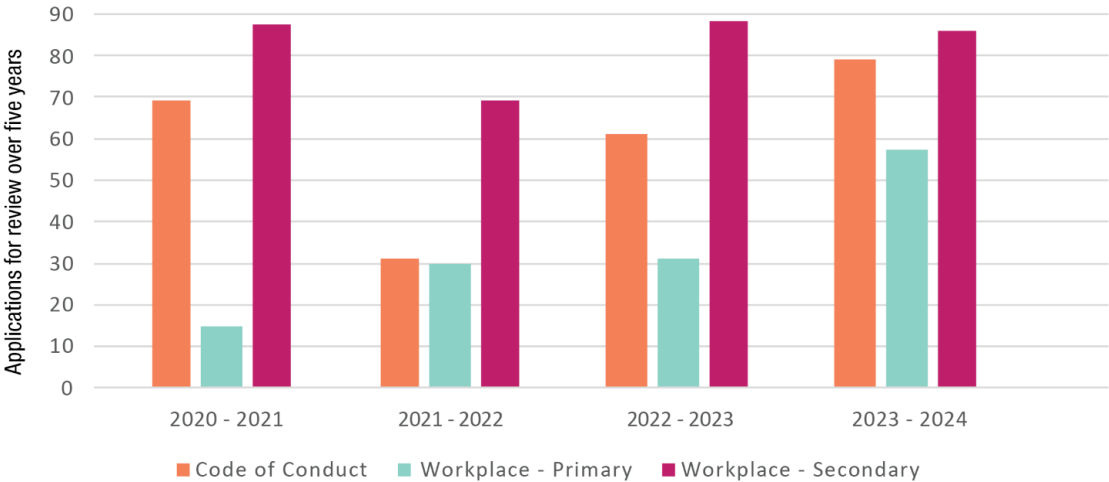
The MPC conducts independent merits review of a decision, to examine the agency's compliance with the law, case law, industrial instruments, policy, and procedures. Under this part of the scheme, the MPC can make a recommendation to confirm the original decision, vary it or set it aside.

Our role is to 'stand in the shoes' of the original decision-maker and take a fresh look at the relevant facts, law and policy the agency relied on to reach the decision. We must have regard to the individual circumstances of each matter. Where necessary we can ask the agency, or the employee, for

additional information to assist with the review. Each review is different. We discuss this unique area of work further in Part 2.

The eligibility criteria to apply for a review depends on the type of decision and on the individual circumstances of the applicant. Figure 2 shows the number of applications for review under this part of the scheme over 4 years for applications about Code of Conduct and applications for the other types of decisions. The number of applicants received under this function has been consistent over time, though we are beginning to see slight overall increase in applications from the small numbers during the COVID19 pandemic.

**Figure 2: Applications for review of a decision (excluding promotion reviews) received over 4 years**

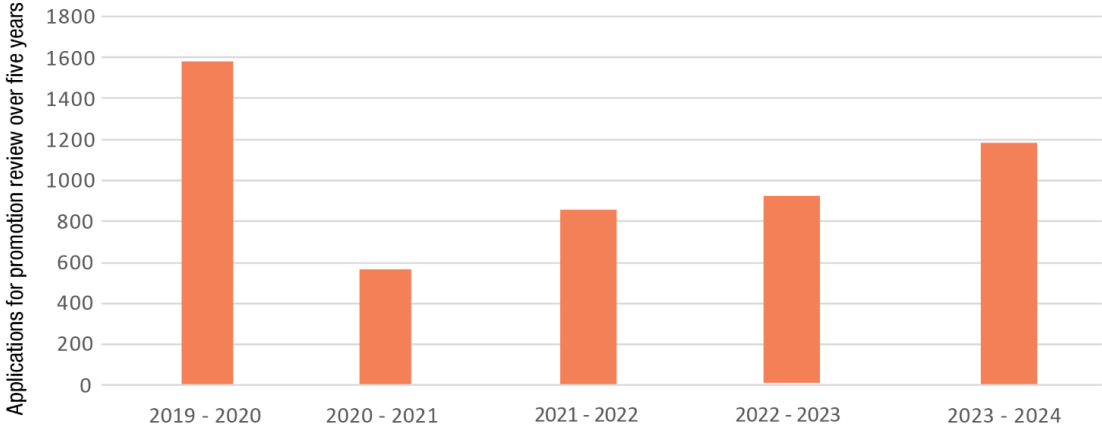


### *Review of promotion decisions*

This function gives APS employees an entitlement to seek a review of certain promotion decisions. The review is conducted by a Promotion Review Committee, established by the MPC under the Public Service Act. A committee can overturn a promotion decision where it considers another applicant has demonstrated more merit for the role.

Figure 3 shows the number of applications from employees seeking a review of a promotion decision received since 2019–20. Applications for a review of a promotion decision vary significantly from year to year, and month to month, depending on the frequency and volume of recruitment activities undertaken by the larger APS agencies.

**Figure 3: Applications for review of promotion decisions over 5 years**



## Enquiries, advice and information

We value the opportunity to engage directly with our stakeholders and use the data we collect to inform our publications, target our education and resources, and improve our service delivery.

We offer a telephone and email enquiry service to APS employees and agencies. Most enquiries are from employees seeking advice on eligibility criteria, how to make an application, and confirmation of time limits to make an application. We receive enquiries from managers and human resources practitioners seeking guidance on their role and responsibilities in the review and Code of Conduct process.

Wherever possible, we try to resolve the enquirer’s issue. If we are not able to, we refer them to the appropriate agency. We regularly refer matters to the APSC’s employment policy team and their ethics advisory team.

A list of the number of enquiries we have responded to, over a 5-year period is in Table 1.

**Table 1: Number of enquiries over 5 years**

Year	2019-20	2020-21	2021-22	2022-23	2023-24
<b>Enquiries</b>	968	822	1,546	1,104	1,226

A further breakdown of the type of enquiries we received in 2023–24 is in Table 2.

**Table 2: Subject of enquiries in 2023–24**

Subject matter	Code of Conduct & Workplace reviews	Promotion reviews
Agency Information/Advice	37	6
How to apply/application process / review entitlement	126	701
General advice/referrals/outside jurisdiction	56	81
Code of Conduct	21	-
Conditions of Employment	14	-
Duties Flexible Working Arrangement	19	-
Management Action and workplace arrangements	21	-
<b>Totals</b>	<b>294</b>	<b>788</b>

## Complaints about final entitlements

A former APS employee can make a complaint to the MPC about their agency's calculation of final entitlements when they separate from the APS. These complaints often relate to payments made for leave accrued but not taken, delays in receiving final payments, or whether the agency has provided adequate information to assist the employee to understand how their final payment was calculated. The MPC can investigate these complaints if it cannot be otherwise resolved.

## Inquiries

The MPC can conduct an inquiry into:

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

## Employer services

We can assist employers by providing a range of recruitment and employment services. These services can assist an employer to make high-quality and timely recruitment decisions or to effectively manage allegations of misconduct or workplace disputes. They are provided on a cost-recovery basis. The key services the MPC can provide to employers are summarised in the rest of this section.

## Recruitment services

We can provide specialised recruitment services to APS and non-APS Commonwealth entities, as well as state and territory agencies and departments. Our services include highly skilled and independent convenors or panel members who can assist with recruitment and make sure it is merit-based and complies with legislative requirements.

### *Independent Selection Advisory Committees (ISACs)*

On request, we can provide APS agencies with an ISAC, which is where the MPC conducts an entire recruitment and selection process on their behalf. A unique feature of an ISAC is that any resulting promotion decision is not subject to a promotion review by a Promotion Review Committee.

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

We can conduct independent merits reviews of workplace decisions or actions. On request, we can provide these services, as well as workplace investigation services, to non-APS agencies, non-APS Commonwealth entities, and state and territory agencies and departments.

### *Review of involuntary retirement decisions for AFP Employees*

The MPC can review decisions taken by the AFP Commissioner to compulsorily retire APS employees on invalidity grounds, because of physical or mental incapacity. This review scheme is set out in sections 32 and 33 of the Australian Federal Police Act and in the AFP Regulations. It applies to all AFP employees, including sworn officers and civilian staff, where the AFP employee has not consented to the compulsory retirement. There have been no applications received since this entitlement was enacted.

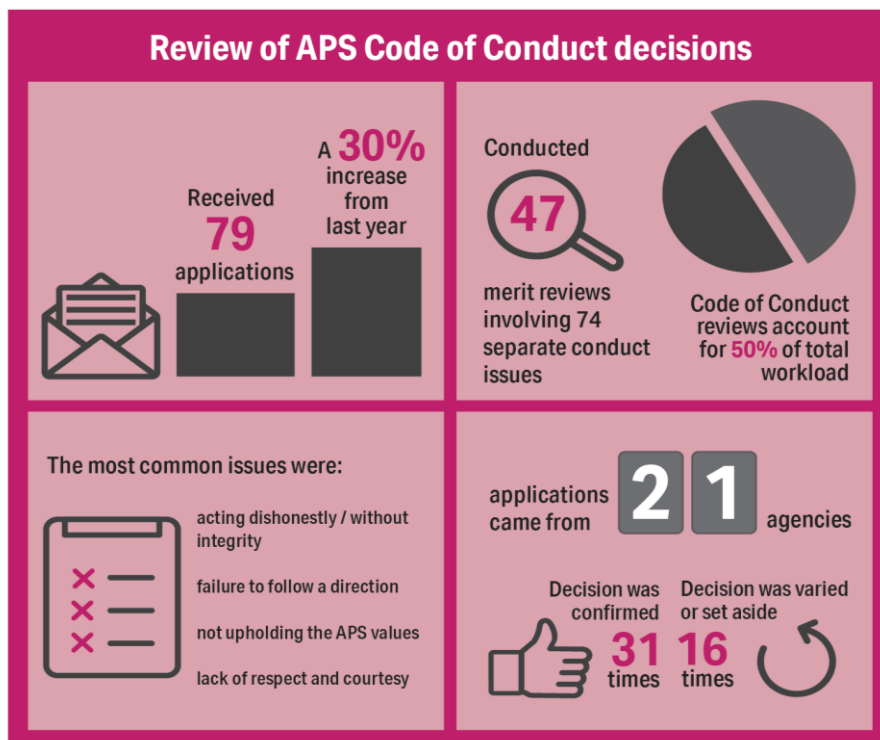


# Part 2

## Performance in reviewing APS actions



# Review of APS Code of Conduct decisions



## The APS Code of Conduct

All APS employees have an obligation to act in a manner that reflects the APS Values, and the Code of Conduct as set out in the Public Service Act. Employees are expected to know, understand, and act in accordance with this framework.

Engaging in behaviour that is contrary to the Code of Conduct can create unsafe workplaces, undermine relationships with other staff and damage public trust and confidence in the public service. For public servants, the Code of Conduct applies whenever they act during, and in connection with, their employment.

Being found to have breached the Code of Conduct can have grave consequences, both for the employee and for the workplace. It is therefore incumbent on agency heads to make sure they manage suspected misconduct effectively, without bias, and to make fair decisions that can be held up to scrutiny.

Under the Public Service Act an agency head must publish how they will determine breaches of the Code of Conduct. Those procedures must comply with principles in the APS Commissioner's Directions 2022 to ensure:

- the employee is informed of the detail of the suspected misconduct
- the process undertaken to investigate, or inquire into, the allegations is clear
- the employee is given a reasonable opportunity to respond to the allegation and to any proposed sanction to be taken.

For an agency head to reach a valid decision on whether an employee has acted contrary to the Code of Conduct, the investigation must follow those procedures.

Employees who have been found to have breached the Code of Conduct can apply to the MPC to review the decision and any sanction decision (except for decisions to terminate their employment).

The entitlement to apply for a review is given to APS employees from APS 1 to EL 2 classifications. Former APS employees can seek review of a breach decision made after they left the APS but for behaviour that occurred during their employment.

## Review of APS Code of Conduct decisions

The MPC has the power to conduct reviews on:

- a decision that an employee's conduct is in breach of an element of the Code of Conduct (a **breach decision**)
- any subsequent **sanction decision** arising from the breach (except for termination of employment decisions).

The MPC can recommend confirming the original decision by the agency head, or to set aside or vary the decision.

### *Breach decisions*

When we conduct a review of a breach decision, we must assess whether:

- the agency's procedures for dealing with the alleged breach comply with the APS Commissioner's Directions
- there was substantial compliance with the agency's procedures and the requirements of procedural fairness
- on the balance of probabilities, there is sufficient evidence to conclude that the employee did what was alleged
- what the employee did amounts to a breach of the Code of Conduct.

We consider all aspects of the decision, including the finding of facts, evidence, the application of policy and the law, and exercise of discretion that is given to the decision-maker.

Importantly, our process is not limited to a review of the original decision but involves a fresh merits review. This means that we may pursue, obtain, and consider additional information and evidence. This can include interviewing the applicant, witnesses, and other employees, obtaining relevant documents and records (emails, CCTV, audit reports), and obtaining expert reports (such as by a psychologist or other health professional).

Case study 1 is an example of where we obtained and considered new evidence as part of our review and that information was relevant to our recommendation to set aside the original decision.

### **Case study 1: New evidence provided by applicant**

An APS employee was found to have breached the Code of Conduct for falsely claiming hours worked over an extensive period.

As part of the review process the applicant provided the MPC with various records and details in support of their application. Those records conflicted with the agency's own calculation of the hours it said had been falsely claimed as work time.

For example, the employee was able to present diary records and records relating to time taken to obtain COVID-19 vaccinations (which employees were permitted to receive during work hours).

The additional information provided by the employee reduced the total time the agency found had been falsely claimed. It also raised considerable doubt about the reliability of the agency's method of calculating hours claimed but not worked. We recommended the decision that the employee had failed to act with integrity be set aside.

We also have regard to, and are guided by, relevant case law. Case study 2 is an example of how our review took a case law decision into account to reach a recommendation on the correct and preferable decision.

### **Case study 2: Anonymity does not circumvent requirement to be impartial**

An APS employee published an article, anonymously, in which they made critical and derogatory comments about a senior member of parliament. The opinion piece was highly political and encouraged readers to not vote for the major parties. An investigation found the employee's conduct did not uphold the APS value of impartiality.

The employee did not dispute being the author of the article. They argued their identity was not known to the public, and the article was not in connection to their APS employment.

Our review considered the importance of public confidence in the system of responsible government and how part of that relies on an impartial and apolitical public service. In recommending the breach decision be confirmed we cited a recent High Court of Australia decision that reasoned even anonymous communication, depending on the circumstances, may breach the Code of Conduct.

## *Sanction decisions*

Getting a sanction decision right is important to the culture and productivity of a workplace. There are rules around what type of sanction can be imposed.

When an employee is found to have breached the Code of Conduct, an agency head can only impose a sanction of the type set out in 15(1) of the Act:

- termination of employment
- reduction in classification
- reassignment of duties
- reduction in salary
- deductions from salary by way of a fine
- reprimand.

The MPC is not empowered under the Public Service Act to review a decision to terminate a worker's employment; however, we can review the breach decision where we receive an application for review prior to the termination date.

When reviewing a sanction decision, we have regard to the original decision and how issues such as the nature and seriousness of the breach, and any other mitigating factors, were balanced.

If a decision that an employee has breached the Code of Conduct has been set aside, any related sanction decision can no longer stand, as can be seen in case study 3.

Feedback from an applicant

*Thank you for your time and professionalism in explaining the issues, considerations and being upfront about your views of my review application*

### **Case study 3: No breach means no sanction decision**

An agency determined that the employee had failed to act with care and diligence when claiming a payment. A sanction decision had also been made by the decision-maker.

Our review found there was cogent evidence which showed the employee had made a genuine mistake and acted without malice or intent. In addition, the employee had followed the reasonable advice of their manager. We recommended the breach be set aside and the agency accepted our recommendation. With the sanction decision, there was no requirement for the employee to seek a review as it could no longer stand. The sanction decision was withdrawn.

## *MPC preliminary view*

In some circumstances we may give an agency or an applicant a preliminary view of our proposed recommendation. This is not a legal requirement but can be a useful practice in some circumstances.

We may issue a preliminary view where the facts are complicated or if we are recommending a significantly different outcome to the original decision. This additional step gives parties notice of our reasons and provides an opportunity for the agency or applicant to reconsider or seek additional advice. Case study 4 is an example of how we used a preliminary view to raise concerns about an investigation.

### Case Study 4: An incurable problem

An employee was found to have bullied and been unprofessional towards their colleagues. The investigation made other findings about inaccurate attendance records, misuse of resources during a work trip and that the applicant was a 'vexatious complainant'.

Our initial review identified significant issues with the investigation conducted by an external investigator. There was no evidence the agency had supervised the process, including making sure the employee was afforded procedural fairness.

In addition to procedural issues, many of the findings were not supported by evidence. For example, the finding the employee had made a vexatious complaint was not supported by the agency's own policy or met its definition of vexatious.

Given the significant deficiencies, the MPC met with the agency's representatives before proceeding with a final report. This meeting was to give our preliminary view that, due to the volume and scope of the flaws we proposed to recommend setting the decision aside. After a useful and constructive discussion, the agency representative withdrew the breach and subsequent sanction decision.

## End of year totals

### *Applications*

This year we received 79 applications from APS employees who were found to have breached the Code of Conduct and/or received a sanction decision. This total includes 3 applications from former APS employees. We finalised 68 applications, which includes those matters on hand at the end of 2022–23. Table 3 shows the trend in applications for Code of Conduct reviews, received and finalised over the previous 4 years.

**Table 3: Applications for Code of Conduct reviews received and finalised**

Applications*	2020–21	2021–22	2022–23	2023–24
Received	68	31	59	79
Finalised	75	31	57	68

\*Note: totals include applications from former APS employees

### *Reviews completed*

#### **Breach decisions**

When an employee is found to have breached the Code of Conduct, the investigation process may involve numerous allegations about different actions, across a range of occasions and places, and include many witnesses. By way of example, this year an employee applied to the MPC for merits review of 51 separate and detailed findings that they had breached the Code of Conduct.

In 2023–24 we completed 47 reviews with the most frequent breaches relating to:

- dishonest conduct or lacking in integrity
- failure to follow a direction or a policy
- failure to declare, avoid or manage a conflict of interest
- conduct or action that did not uphold the APS Values

Table 4 has a comprehensive breakdown of the misconduct categories we received this year.

**Table 4: Code of Conduct breach issues 2023–24**

Subject matter	Percentage	Number
Dishonesty: act without honesty and integrity (incl. false or misleading information or failure to declare in pre-employment)	16%	12
Failure to follow a direction or a policy	16%	12
Conflict of interest	15%	11
Not uphold APS Values, Employment Principles	12%	11
Lack of respect and courtesy	11%	8
Inappropriate access/use of information or technology (including social media)	7%	5
Failure to act with care and diligence	7%	5
Not use Commonwealth Resources in a proper manner or for a proper purpose (incl inaccurate records)	7%	5
Sexual harassment / inappropriate behaviour towards a colleague / bullying and harassment	7%	5

Note: a review can involve numerous breach decisions.

See Table 5 for a list of the most frequent misconduct issues over the last 4 years. Interestingly, there has been a reduction in applications for review of a breach decision about bullying and harassing behaviours in the workplace. This may reflect the considerable work undertaken at the agency level to improve how allegations of inappropriate behaviour are responded to, and managed.

**Table 5: Most frequent APS Code of Conduct breach issues reviewed over 4 years**

Year	Top conduct issues
2023–24	Dishonest conduct or lacking in integrity Failure to follow a direction Conflict of interest
2022–23	Lack of respect and courtesy Care and diligence Dishonesty: lack of integrity
2021–22	Lack of respect and courtesy Unauthorised access of agency database Misuse of Commonwealth resources
2020–21	Bullying and harassment Unprofessional conduct Misuse of Commonwealth resources Unauthorised access of agency database

## Sanction decisions

The types of sanction decisions issued to employees where we have received applications for review are shown in Table 6. We reviewed 25 sanction decisions this year.

**Table 6: Review of sanction decisions by type of sanction in 2023–24**

Sanction	Received	Reviewed
Reprimand	14	10
Deduction from salary by way of a fine	9	5
Reduction in classification	8	6
Reassignment of duties	4	2
Reduction in salary	3	2
<b>Total</b>	<b>38</b>	<b>25</b>

## Reviews by agency

Table 7 lists the agencies about whose Code of Conduct decisions we receive the most applications for review. Unsurprisingly, the highest number of applications received are from agencies with large numbers of employees – noting the exception of the ATO. The relatively small number of applications from the ATO may indicate a higher satisfaction level of its employees with the handling and outcomes of their Code of Conduct matters, rather than a lack of awareness of the review entitlement.



**Table 7: Reviews of Code matters by agency 2023–24**

Agency	Applications
Services Australia	15
Department of Defence	14
Department of Home Affairs	5
Australian Taxation Office	5
Department of Foreign Affairs and Trade	5
Other agencies (28 in total)	24
<b>Total</b>	<b>68</b>

### *Review outcomes*

An MPC recommendation to confirm, set aside or vary a decision can be due to a range of factors. It is a resource-intensive exercise to weigh all relevant considerations and prepare a report with comprehensive and sound reasons for our recommendations.

This year we have prepared a group of case studies which demonstrate the most common reasons for recommendation to set aside or vary an agency’s decision. The reasons range from defects identified in the process to problems with the substantive merits of the decision.

As can be seen in Table 8 the percentage of decisions that the MPC has recommended be set aside or varied has been consistent over recent years. In 2023–24 all our recommendations were accepted and implemented by the agency who made the original decision.

**Table 8: Code of Conduct decisions set aside / varied over 5 years**

Decisions	2019–20	2020–21	2021–22	2022–23	2023–24
Percentage set aside / varied	48%	30%	33%	36%	34%
Total reviewed	52	50	24	39	47

Feedback from an applicant

*I wanted to take a moment to express my gratitude for taking the time to listen to me during this process. Your willingness to engage actively left a lasting impression and I wish to express my sincere appreciation. You made me feel heard – it made a huge difference. Thanks again*

## Case studies

While each case is about an individual employee, we believe merits review can achieve a broader long-term objective of improving the quality of decisions. It is a free mechanism to ensure decisions are lawful, fair and appropriate.

This section has examples of the work we conducted this year in relation to Code of Conduct matters. Our observations are not intended to be a negative commentary on how APS agencies respond to allegations or how they investigate suspected misconduct. Rather, the purpose is to share the themes we have identified through our reviews this year.

### *Procedural defects*

When investigating alleged misconduct, an agency head or their delegate must comply with procedural fairness requirements. If there is a procedural fairness defect that is material to the decision, then the decision must be set aside. Case studies 5 and 6 are examples of this.

#### **Case study 5: Denied a reasonable opportunity to respond**

The employee was found to have breached the Code of Conduct for comments they posted to social media. The number of posts to the account was considerable. The content of many were unremarkable or innocuous opinions, while other comments were variously political and disrespectful to differing degrees.

In proposing a sanction, the sanction decision-maker expressed a view that the employee's conduct was 'serious' on the basis that 'much' of the content was 'offensive and discriminatory' to a group or groups of people. The decision-maker did not identify which posts informed their preliminary view of the seriousness of the employee's conduct.

The failure to identify which posts were offensive was problematic. It meant the employee had to assume or 'guess' which of the more than 200 posts informed the decision-maker's preliminary view. In the MPC's view, as the employee was not sufficiently informed of the case against them, they were denied the opportunity to give a meaningful response to the proposed sanction. This was a denial of procedural fairness. The MPC recommended the sanction decision be set aside.

#### **Case study 6: Notice of investigation lost in mail**

An employee complained about not having an opportunity to respond to allegations of suspected misconduct. We reviewed the breach determination and found the agency had used an incorrect email address to send notices about the suspected breach. On each occasion the emails had bounced back to the sender but were not re-sent. A preliminary view on the suspected breach was eventually sent to the correct email address, but by this stage the applicant had left the agency. The employee only became aware of the breach decision when a hard copy was sent to their home address.

This failure to inform the applicant or give any chance to participate in the process was a significant departure from the agency's procedures and the requirements of procedural fairness. The MPC was satisfied this failure was a material procedural defect meaning the breach decision could not stand. We recommended the decision be set aside.

## *Invalid decision*

A decision will become invalid if an agency's decision-maker exercises a power improperly. For example, the Public Service Act states that an agency head can only impose a sanction for conduct that has been found to have breached the Code of Conduct. In the following case study, we found a sanction decision was not valid as the decision-maker sanctioned the employee for conduct that did not form part of the breach.

### **Case Study 7: No power to make a sanction decision**

An employee had been in a sexual relationship with a junior staff member. The breach decision did not consider whether the relationship was inappropriate or a misuse of authority (given the seniority of the employee), or if there was evidence of sexual harassment. The investigation only considered whether the employee's failure to declare a conflict of interest was a breach of the Code of Conduct.

A sanction decision-maker can only rely on considerations that were central and material to the breach decision. In this case, the sanction decision-maker took the view that the relationship itself was 'misconduct' not simply the failure to declare the conflict associated with it. The MPC determined that the sanction decision had relied upon irrelevant (and untested) considerations and was therefore invalid. As such, the MPC recommended the sanction decision be set aside.

## *Impartiality and bias*

It is critical for decision-makers to be, and be seen to be, impartial and without bias. This is a fundamental principle of procedural fairness in administrative decision-making. The next case study is an example where several factors, taken together, caused the MPC to conclude a reasonable observer might apprehend the decision-maker was partial. It does not always mean the decision-maker was in fact biased or that the conduct was not a breach.

### **Case study 8: A biased decision**

An employee was found to have improperly used their status and authority by engaging in a sexual relationship with a junior colleague.

The decision-maker expressed their personal views about the appropriateness of workplace relationships and disregarded, without sufficient reason, the employee's evidence regarding the private and reciprocal nature of the relationship. In the view of the decision-maker, there were no circumstances where the relationship could be appropriate or managed.

We determined a reasonable person would conclude there was nothing the applicant could say that would change the decision-maker's mind – they did not approach the matter with an open mind. In our view, this amounted to an apprehended bias and recommended the decision be set aside.

## *Insufficient evidence to support a breach*

A finding must be based on evidence which is relevant to the allegation, reliable and credible. The next 2 case studies describe different outcomes. The first case found there was insufficient evidence to support all the breach decisions. In contrast, the second case is an example of where we were satisfied the evidence was logically capable of supporting a breach finding.

### **Case study 9: Poor investigative strategies**

An agency engaged an external contractor to investigate suspected misconduct. The allegations included inaccurate record keeping, acting without integrity and misuse of Commonwealth resources. The suspected misconduct was complex and wide-ranging – involving over 50 allegations.

The drafting of the allegations was vague, repetitive, with some being factually incorrect. This made it difficult for the employee to understand what was being alleged. For example, the employee was breached for non-compliance with an internal policy which did not exist at the time of the alleged misconduct. The poorly framed allegations did not explain who, when, how and why the employee's actions and alleged misconduct were in breach of the Code of Conduct.

Our review also found the investigator had failed to follow clear and relevant lines of inquiry. Had those lines of inquiry been followed, the investigator would have discovered exculpatory evidence for some of the allegations. The investigator also accepted explanations on face value without checking the accuracy or plausibility of the explanation. Conversely, our review was able to establish other lines of inquiry which, if pursued, would have revealed further misconduct. We recommended that 32 of the 51 breach determinations be either set aside or varied. The agency accepted our recommendation.

### **Case study 10: Evidence of inappropriate conduct**

The employee was found to have struck their colleague between the legs, near and targeting the buttocks/genital area. The employee strongly denied the allegation and sought a review of the finding that their conduct had breached the Code of Conduct.

Our review considered whether, on the balance of probabilities, there was sufficient evidence to determine whether the employee's conduct occurred, and if so, was in breach of the agency's Conduct and Behaviour Policy and Sexual Harassment Policy.

We determined the evidence was compelling and confirmed the incident occurred as alleged. The colleague's version of events was consistent and credible. While the incident was not directly witnessed, the investigator obtained accounts from staff who were in the area and who observed the colleague flinching in shocked reaction. These accounts were supported by contemporaneous text messages between the colleague and other staff members immediately after the incident, noting the colleague was 'unsettled' and 'visibly shaken'.

On the evidence presented, it was established the applicant's conduct was unwelcome and inappropriate and amounted to sexual harassment as defined by the agency's own policy. As the applicant was unable to provide a plausible alternative explanation for what occurred, we recommended the agency confirm the decision.

## Sanction decision is not proportionate

When we review a sanction decision we consider if the decision was proportionate and fair. The next case study is a sanction decision we found to be harsh in the circumstances.

### Case study 11: Sanction decision too harsh in all the circumstances

The employee searched for their own personal data in the agency's system to test how the system worked. There was no evidence of personal gain, and the employee was not aware that their actions were inappropriate or that they needed authorisation. The agency determined the employee's conduct was in breach of the Code of Conduct and issued a sanction decision to reduce their classification. The MPC considered the sanction decision harsh. It was noted the agency permitted the applicant to continue to use the database for several months without telling the employee to cease the practice, which resulted in an additional breach. The MPC recommended that the sanction be varied to a fine and reprimand, which was, in our view, more proportionate and consistent with other sanctions imposed across similar APS agencies.

## Service improvement

The APSC's publication *Handling Misconduct – A human resource manager's guide* assists agencies navigate the Code of Conduct process. The next case study demonstrates how we refer to this useful reference material when making a recommendation to improve the original decision.

### Case study 12: 'First and final' warning removed from sanction

The sanction imposed on an employee was a reprimand and a 'first and final warning'. A 'first and final warning' is not an available sanction under the Public Service Act. Further, while previous findings of misconduct can be a factor when determining a sanction decision, a 'first and final warning' wording infers any future misconduct will result in termination of employment, regardless of the circumstances. The MPC delegate did not consider this to be reasonable or consistent with established practice or the APSC's *Handling Misconduct*. The sanction was varied to exclude the wording 'first and final warning'.

## Timeliness

We aim to complete a review of a Code of Conduct decision within 14 weeks from the date we receive the application. We do not count the time when we are waiting for a response from an agency or an applicant. This year we completed 91% of our decisions about Code of Conduct matters in time – which is a similar result to last year.

**Table 9: Average time to complete review of Code of Conduct decisions**

Review type	Average time to complete reviews (weeks)	Completed within target timeframes (%)
Code of Conduct decisions	11	91%
Former employees –Code of Conduct	8	100%

## Review of workplace decisions



## Review of workplace decisions

This chapter is about the types of decisions, other than Code of Conduct breaches (discussed in the previous chapter), that we can review.

With these decisions, an agency is given the opportunity to conduct its own review to determine if the correct and preferable decision has been made. This is called a primary review. If the employee is not satisfied with the agency's primary review, they may apply to the MPC for a further review of the decision.

In limited circumstances, the Public Service Act permits the MPC to accept an application for a review, without requiring the agency to conduct its own review of the decision. We may do this:

- where it is not appropriate for the agency to do its own primary review in the first instance (for a range of reasons)
- where the action or decision was taken by a statutory office holder.

### *Types of decisions*

In accordance with the Public Service Act, we review:

- disputes about conditions of employment, which includes decisions about an employee's allowances, accrual of flex time, fitness for duty and leave entitlements

- concerns about assignment of duties, such as decisions about medical report interpretation, return-to-work arrangements, and decisions to suspend an employee (usually because of a Code of Conduct process has been initiated)
- issues with workplace environments including allegations of bullying and harassment, sexual harassment, failure to act on a complaint, decisions not to investigate, the lawfulness of a direction, management action, and outside employment
- disputes about performance management, such as the outcomes of performance appraisals, salary advancement, training and development and underperformance processes.

Having the MPC review decisions is also a cost-effective way to check on the lawfulness of decisions, and on the application of a policy or use of discretion.

### *How we review these types of decisions*

Deciding what is the correct or preferable decision can be tricky, particularly if there are a range of competing interests or a broad discretion to make a decision, based on the decision-maker's best judgement.

Some decisions are more difficult to review than others. A reviewer is not confined to considering the information available to the original decision-maker. In many cases the reviewer can have regard to all relevant information including fresh evidence or considerations which arise after the original decision was made.

The reviewer may need to develop a level of expertise to consider whether:

- the level of inquiry is appropriate, having regard to the seriousness of the decision under review
- gaps in knowledge can be filled by reading business plans, organisation charts, procedural manuals, and other guidance material about the work area
- there is technical advice available that could be seen to be independent
- the manager's concerns about an employee's performance are supported by evidence
- how credible the manager and employee are in presenting their respective positions.

## End of year totals

### *Applications finalised*

This year we received 143 applications for a review of a workplace decision.

Of the applications we finalised (including those on hand at the end of last financial year) the outcomes were:

- 77 did not meet the eligibility criteria for review
- 47 applications proceeded to review
- 12 were withdrawn before a review was finalised.
- 12 were on hand at the end of the year
- 2 were resolved through a process of facilitated resolutions.



The number of applications for review of a workplace decision received and finalised for the previous 4 years are in Table 10.

**Table 10: Applications for workplace reviews received and finalised over 4 years**

Applications	2020–21	2021–22	2022–23	2023–24
<b>Received</b>	101	99	111	143
<b>Finalised</b>	103	89	128	136

### *Reviews completed*

As seen in Table 11, there was a significant increase in applications about decisions on conditions of employment. We anticipate this increase is due to the introduction of the new common conditions contained within Agency Enterprise Agreements, and the related one-off lump sum payments that were made to employees through APS-wide bargaining. We have provided a further breakdown of this category in Table 12 which supports this view.

**Table 11: Workplace issues reviewed 2023–24**

Type of decisions	Number
<b>Conditions of employment</b>	32
<b>Duties</b>	6
<b>Performance management</b>	3
<b>Workplace environment and arrangements</b>	3
<b>Other</b>	3
<b>Total</b>	47

**Table 12: Conditions of Employment**

Major category	Description	Number
<b>Conditions of employment</b>	Bonus / special payments	15
	Leave	8
	Allowances	5
	Hours of work	2
	Flex accrual	1
	Other entitlements	1

### *Review outcomes*

It is pleasing to report on the high percentage (90%) of reviews of workplace decisions where the MPC has agreed with the agency's original decision. This is markedly different to the outcomes of reviews of Code of Conduct decisions where we agreed with only 66% of agencies' original decisions.

Table 13 shows that this positive result in workplace decisions, other than Code of Conduct matters, has improved steadily over the previous three years.



This result may be due to a general uplift in the quality of primary reviews and capability in agency's review teams. By way of example, we have observed an increase in attendance and active participation of human resource practitioners in our Review of Action and Code of Conduct Community of Practice. We have also seen an increase in contacts from agencies to share our insights on the review process.

**Table 13: Workplace decisions set aside or varied, 2019–20 to 2023–24**

	2019–20	2020–21	2021–22	2022–23	2023–24
<b>Percentage set aside / varied</b>	25%	32%	10%	17%	10%
<b>Total reviewed</b>	44	48	30	31	47

### *Results by agency*

Table 14 lists the top 5 agencies whose decisions were subject to a review and the number of applications received. The larger APS agencies comprised about 50% of APS employees and 75% of review applications made to our office.

The operation of this part of the scheme is dependent on APS employees being aware they can seek a review of a decision they are not happy with. Put simply, an employee is unlikely to seek a review if they are not supported to do so.

For example, senior executives can take on a positive onus to publish information about the review entitlement and who actively support their staff to do so. In this situation, an agency is likely to see an increase in applications. We would see this approach as building a healthy and pro-integrity workplace culture. It also reveals an agency being open to use MPC review outcomes to confirm they are making sound fair and lawful decisions.

**Table 14: Agencies with highest number of applications – workplace decisions over 2 years**

	Top 5 agencies	Application numbers
<b>2023–24</b>	Services Australia	58
	Department of Home Affairs	14
	Australian Taxation Office	11
	Department of Defence	7
	Attorney-General's Department	5
<b>2022–23</b>	Services Australia	64
	National Disability Insurance Agency	22
	Australian Taxation Office	19
	Department of Home Affairs	16
	Department of Defence	15

## Case studies

As noted earlier in the chapter, there are a broad range of decisions which can be subject to review. The following case studies are examples of where the reviewer has undertaken research to develop their own level of knowledge and understanding of the issues to reach the correct decision.

### *Consideration of new evidence*

#### **Case study 13: Inquiries reveals valuable information**

Due to an ongoing health issue, the applicant sought to work from home as a solution to manage the symptoms of their condition. The agency sought a fitness-for-duty report from a specialist which did not support the applicant's request. The applicant sought a review of the decision to accept the recommendations from the specialist for several reasons.

Our review found the specialist's findings and recommendations differed significantly from those of the applicant's treating practitioner and had included statements that were outside their area of specialisation. Our own research found records of previous concerns about the reliability of the specialist, including being the subject of adverse judicial comment in previous court decisions.

During the medical assessment, the applicant had complained to the agency that the specialist conducted the online assessment in their underwear. The specialist was advised of the complaint before they had completed their report on the applicant's fitness to return to work. Once all of the information was provided to the agency, they agreed to start a new medical assessment with a different specialist.

### *Evidence supports a different decision*

Our reviews will consider the evidence relied on by the original decision-maker to assess if we reach the same conclusion. The following case study is where a review of the same policy and circumstances reached a different outcome.

#### **Case study 14: Debt notice cancelled**

An employee had an allowance for duty-related costs but when their circumstances changed it affected their eligibility. Once they became aware, the employee applied for continuation of the allowance and explained the reasons for the delay. After 12 months, the agency declined the application, stating the employee was disingenuous and should have been aware of the requirement to make a new application. A significant debt was raised against the employee.

Our review disagreed with the decision, finding there was no evidence provided to support the claim that the employee had acted in bad faith, or wilfully misrepresented their situation. We carefully reviewed the relevant policy and, critically, we noted it did permit the continuation of the allowance despite a change in circumstances.

Taking all those factors into account, the MPC recommended cancellation of the debt notice. The agency accepted the recommendation.

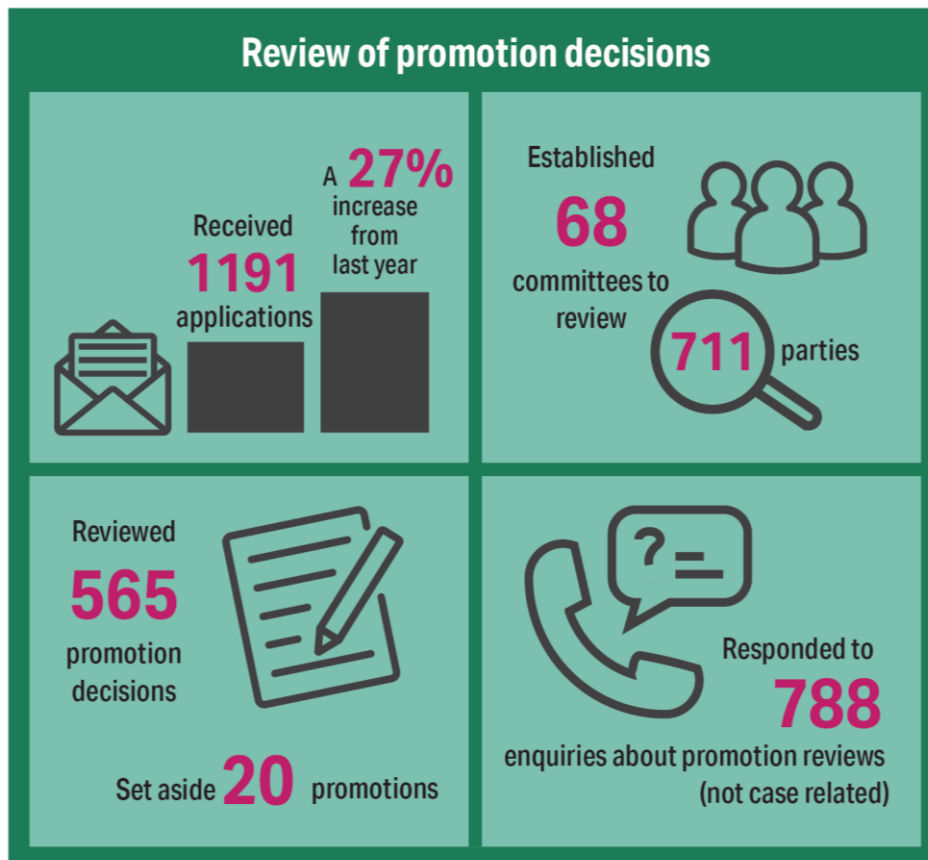
# Timeliness

We aim to complete a review of a workplace decision within 14 weeks from the date of receipt. We do not count the time when we are waiting for a response from an agency or an applicant. This year we completed 97% of our reviews in time. This is a very pleasing result given the size of the MPC review team and the complex nature of many reviews. Table 15 also includes the timeliness of our complaints about final entitlements (which are discussed further in Part 3: Performance of other statutory functions)

**Table 15: Average time to complete review of workplace decisions**

Decision type	Average time (weeks)	% within target time
Workplace decisions (not Code of Conduct)	9	97%
Complaints about final entitlements	4	100%

# Review of promotion decisions



## Merit in recruitment

Merit is the key component of recruitment in the APS. It is defined in section 10A of the Public Service Act, which states that a promotion or engagement decision is based on merit where:

- all eligible members of the community are given a reasonable opportunity to apply
- the assessment is made of the relative suitability of candidates, using a competitive selection process
- the assessment is based on the relationship between the candidates' work-related qualities and the qualities genuinely required to perform the relevant duties
- the assessment focuses on the relative capacity of candidates to achieve outcomes related to the relevant duties
- the assessment is the primary consideration in making the employment decision.

The other important elements of a merit-based selection process are set out in the Australian Public Service Commissioner's Directions 2022, which state that a selection process is based on merit when:

- the aim and purpose of the selection process is determined in advance
- information about the selection process is readily available to candidates
- the selection process is applied fairly to all applicants
- the selection process is appropriately documented.

When deciding on the best candidate, the decision-maker must:

- have merit as the primary consideration
- take secondary considerations into account when candidates are otherwise equal on merit.

At the completion of a merit-based recruitment process, successful candidates are appointed to or engaged in the roles advertised. The MPC can establish a committee to review promotions of ongoing employees up to APS 6 level.

## The value of merit in recruitment

The Review of Actions scheme is one of accountability and scrutiny. It forms part of the broader integrity framework for the APS. In relation to promotion decisions, the scheme is a mechanism that provides an independent check that certain promotion decisions are based on merit.

## Review of a decision

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

The entitlement to seek a review of a promotion decision is limited to certain APS employees and classifications. To be eligible, an applicant must:

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

The entitlement only applies when:

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

In some circumstances, a person who has won a promotion and who also meets the eligibility criteria applies for a promotion review. This only occurs when an agency undertakes a large 'bulk' recruitment activity to fill numerous roles, often across multiple locations.

### *Applications for review of promotion decisions*

We received 1,191 applications for review of a promotion decision during the year.

Bulk recruitment rounds are common in larger agencies and can be used to fill hundreds of positions across the country through a single recruitment exercise. In those circumstances, successful persons may exercise their right to seek a review of another employee's promotion decision in case their own promotion is overturned.

In most instances, these 'protective' applications will lapse and do not proceed to review. If a promotion notice in the APS Gazette only attracts applications from applicants also promoted in the bulk round, there is no reason to proceed with a review (in fact, as their promotion will have proceeded, they will no longer be eligible to seek a review).

A comparison of the number of applications from employees who were promoted but still made a promotion review application, and those who were unsuccessful in the same recruitment round is in Table 16. As previously mentioned, most of these ‘protective’ applications do not proceed to a review.

**Table 16: Eligible applications for promotion review received, by successful and unsuccessful applicants, over 4 years**

Applications received	2020–21	2021–22	2022–23	2023–24
Successful candidate (a ‘protective’)	433	617	623	680
Unsuccessful candidate	61	116	113	286
<b>Total</b>	<b>494</b>	<b>733</b>	<b>736</b>	<b>966*</b>

\* Does not include applications that are withdrawn, invalid, or yet to be assessed

Of the 680 ‘protective’ applications received from employees, 459 eventually lapsed, with no further action taken. Despite a lapsed application not proceeding to review, the application will still have been through an assessment process, including conducting checks to determine eligibility. Table 17 has the outcomes of all the applications we received this year for a promotion review and the previous 3 years.

**Table 17: Outcome of applications for a promotion review, over 4 years**

Application outcomes	2020–21	2021–22	2022–23	2023–24
Eligible	168	247	301	507
Lapsed	326	486	435	459
Ineligible	70	120	140	180
Withdrawn	6	8	22	43
Received – not yet assessed	6	5	37	2
<b>Total</b>	<b>576</b>	<b>866</b>	<b>935</b>	<b>1,191</b>

*Promotion review cases*

A case is how we track eligible applications. It can include numerous parties seeking to have their merit assessed for a role.

For each case, we gather statements of claim, role descriptions, referee reports, selection reports and any interview notes created by the agency’s recruitment panel. If the case proceeds, this information is provided to the Promotion Review Committee to support its decision-making.

Table 18 shows the outcomes of all the applications received, with the data from the previous 4 years.

**Table 18: Promotion review case outcomes over 4 years**

Promotion review cases	2020–21	2021–22	2022–23	2023–24
<b>Proceeded to a review</b>	34 (involving 196 parties)	42 (involving 327 parties)	48 (involving 271 parties)	67 (involving 177 parties)
<b>Did not proceed to review</b>	21	29	29	42
<b>On hand at end of year</b>	5	7	15	37
<b>Total</b>	60	78	92	141

Table 19 shows the agencies whose employees apply for a review of promotion, with the number of decisions, total number of parties, and finalised Promotion Review Committees. The largest users of the scheme were employees from Services Australia. This is a result of the large recruitment to fill vacancies at that Agency.

**Table 19: Promotion reviews applications by agency**

Agency	Parties to review	Decisions reviewed	Committees finalised
<b>Services Australia</b>	304	199	30
<b>ATO</b>	232	216	14
<b>Department of Home Affairs</b>	133	119	12
<b>NDIA</b>	13	9	4
<b>ABS</b>	11	10	1
<b>NDIS Quality &amp; Safeguards Commission</b>	7	5	2
<b>Climate Change Energy Environment &amp; Water</b>	5	4	1
<b>Department of Defence</b>	2	1	1
<b>Employment &amp; Workplace Relations</b>	2	1	1
<b>Industry, Innovation &amp; Science</b>	2	1	1
<b>Totals</b>	711	565	67

### *Outcomes of promotion reviews*

In most cases, a Promotion Review Committee will confirm the original promotion decision. However, when committee members decide an applicant seeking review has more merit, they are required to make a new promotion decision.

A promotion review is a merits review, not a review of the selection process. If there are problems with the selection process the Promotion Review Committee may ask the agency nominee to give the agency constructive feedback. If there are significant or systemic flaws, the MPC may advise the agency of any concerns identified through the process.

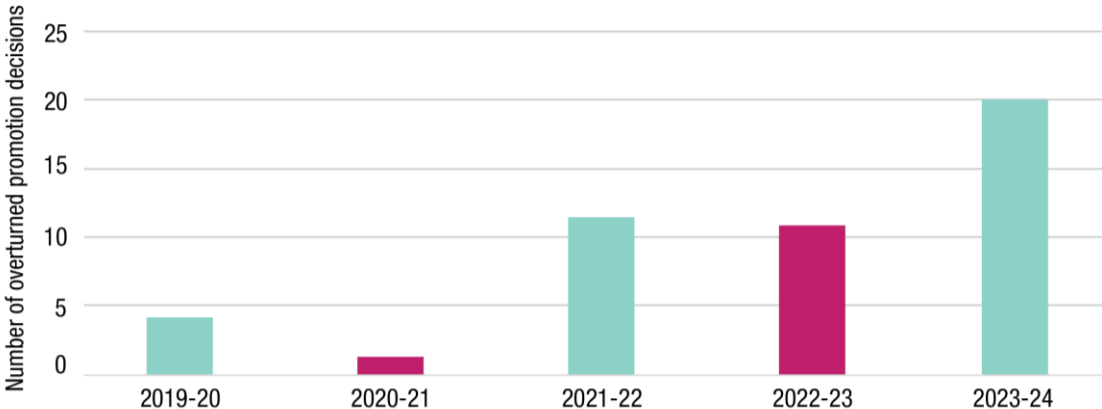
Under the current scheme, the MPC has no authority to identify procedural issues or suggest how to improve a recruitment process.

When considering merit in the context of an application for review, a Promotion Review Committee considers the:

- applicant’s claim that they have greater merit than that of the promotee
- promotee’s statement and claim to the role.

Figure 4 shows the number of promotion decisions set aside by a Promotion Review Committee over the previous 5 years.

**Figure 4: Promotion decisions set aside over 5 years**



*Assessing the work-related qualities to determine merit*

The consideration of comparative merit is as it stands on the day the Promotion Review Committee makes its decision, not at the time the selection committee made the original decision.

At review completion, the Promotion Review Committee reports on the outcome and sets out the reasons for its decisions. The applicants are provided with verbal advice on the outcome and are sent written advice. Unsuccessful parties are offered feedback.

**Timeliness of reviews of promotion decisions**

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

- 8 weeks from the date applications are closed, where there are up to 10 parties to the review
- 12 weeks from the date applications are closed, where there are 10 or more parties to the review.

This year we experienced an extremely high number of applications. As a result, we completed 66% of reviews for promotion decisions within the time frames).

**Table 20: Percentage of promotion reviews completed in time, over 5 years**

	2019–20	2020–21	2021–22	2022–23	2023–24
<b>Promotion reviews completed in time</b>	78%	100%	83%	100%	66%



# Part 3

## Performance of other statutory functions



# Complaints and inquiries

## Complaints about final entitlements

We take complaints from former APS employees (including SES employees) concerned about how their final entitlements have been calculated. Final entitlements are the payments an employee receives when they cease employment. The payments may include:

- final salary payments
- outstanding payment for overtime
- leave that has been accrued but not taken
- calculation of redundancy payments and payments in lieu of notice.

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

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

This year, we received 9 complaints about final entitlements. Of these, 6 were not accepted, 1 was withdrawn and 2 proceeded to review.

## Inquiries

The MPC can conduct inquiries into:

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

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

The MPC declined to conduct an inquiry into a complaint where it was alleged a public interest disclosure had not been handled appropriately, on the basis the complainant had not provided the agency with sufficient time to respond.

We received a request to investigate an alleged breach of the Code of Conduct; however, it did not proceed as all parties did not agree to the MPC undertaking the investigation (a requirement under the legislation for the MPC to investigate).

## Employer services

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

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

We continue to see an increased uptake in APS agencies seeking to use our employer services. We provided chairpersons, independent panel members and support to 16 recruitment panels.

Feedback from agencies who have used our employer recruitment services has been overwhelmingly positive, noting the:

- level of expertise on the application of merit
- willingness to take on tasks
- ability to write comprehensive selection reports
- ability to drive the process to keep to timeframes.

## Review of involuntary retirement decisions for AFP employees

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

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

The MPC has not received an application for review of an AFP retirement decision under this function.



# Part 4

## Engagement, projects, and accountability



# Engagement

Engaging with our stakeholders is critical to achieving our vision of improving services to achieve effective and productive workplaces in the APS.

In 2023–24, we will continue to strengthen our commitment to our engagement work in accordance with our communications strategy, where we set out to:

- raise awareness of the entitlement to seek a review
- educate the APS on the role of the MPC
- assist APS agencies to continuously improve their practice.

Our stakeholder engagement activities this year are outlined throughout this section.

## Awareness of the MPC

This year we conducted a survey of the awareness of a stratified sample of APS employees about their review rights.

Almost 10,000 employees from across all agencies were invited to participate. We had a response rate of 25%, with the majority being APS 4 to EL 1.

The data showed that 78% of those who responded to the survey had not heard of the MPC or the right to seek a review under the Public Service Act. Of those, the groups for APS 1–6 were the most likely to not have been made aware of reviews or of the MPC.

We will continue to address this deficit in knowledge through engaging with the APSC and other important stakeholders to promote the value of our work. We will develop a communications strategy which will include publication of a model Review of Actions policy for agencies to promote and adopt.

## Stakeholder meetings

Throughout the year, we meet with representatives from agencies who have contact with the office. These meetings are an opportunity to provide feedback, identify emerging trends in review outcomes and discuss significant, complex, or sensitive issues.

We gave presentations and engaged in forums for both employer and employee stakeholders this year. This included:

- 12 presentations to the APSC Senior Executive Service Orientation training sessions where we presented on the important role of SES as decision-makers in the Review of Actions scheme
- 9 meetings with agencies
- 11 presentations to international delegations from Indonesia, Fiji, and Vanuatu on the functions of the MPC and its role
- presentation of a paper at an International Forum of Human Resources Leaders in Seoul, South Korea, on the use of AI in the public sector.

The MPC is a member of the government's Integrity Agencies Group chaired by the APS Commissioner, which met twice during the year. This group serves to ensure that integrity is at the centre of APS work and that the APS approach to integrity is integrated and transparent.

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

The MPC continues to support the Review of Actions and Code of Conduct Community of Practice. Its purpose is to raise the quality of reviews and Code of Conduct decisions in the APS and build a network of practitioners who can share information and experiences in a supportive environment.

The Community of Practice is governed by a steering committee. Our role is to provide secretariat support and advice. This involves maintaining the membership list, providing support to agencies where possible, and leading the planning for future meetings.

Membership continues to grow and now sits at around 300 members. Meetings are held quarterly and cover topics of interest to the community. Feedback from our members is incredibly positive. The topics and attendance are in Table 21.

**Table 21: Community of Practice sessions 2023–24**

Presentation topics	Hosts	Attendance
Trauma Informed Practice	APSC	125
Reducing the cost of conflict in the workplace (alternative dispute resolution)	MPC	125
Bias and Conflicts of interest	MPC	113
Fallout: dealing with the after-effects of reviews and investigations	MPC	134

## Feedback

Feedback is critically important to improving our service delivery and making sure we meet our obligations to be a responsive and effective regulator. Given the nature of merits reviews, the MPC does not seek feedback on the outcome of a review. Instead, we focus on the process and how the applicant felt they were treated. We ask for feedback on the quality of our communication, particularly on review scope, clarity of our reasons for decisions, and timeliness.

We send all applicants whose matters are subject to a completed review a confidential survey they can complete online.

## Website visits

We continue to update the key features of our website to improve accessibility, content and resources.

In 2023–24, we had 126,499 visits to our website, with 29,843 active users.

As in previous years the pages which attract the most interest are our promotion review information and application pages and our case studies.

## Accountability

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

The MPC has managerial responsibility for the work of the APSC employees made available to assist us in exercising our functions.

## Business continuity plan

We have a business continuity plan, prepared in accordance with the APSC's Risk Management and Business Continuity Framework. The purpose is to:

- provide guidance for recovering critical business processes at the MPC in the event of a disruption
- define roles and responsibilities of key staff in relation to incident management
- define procedures to minimise the impact of disruptions on critical business functions or activities
- cover disruption responses relating to the review of workplace and assessment decisions processes in line with the MPC's statutory functions for the APS, Parliamentary Service and AFP.

The plan will be reviewed in the 2024–25 financial year.

## 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* (PGPA Act). Rather, the Merit Protection Commissioner is a statutory officer appointed by the Governor-General under section 52 of the Public Service Act. Section 49(2) of the Public Service Act requires that the staff necessary to assist the MPC must be persons engaged under that Act and be made available by the APS Commissioner. The MPC does not have a separate budget allocation and depends on the APSC for staffing and resources to undertake its functions.

The MPC and the APS Commissioner have a memorandum of understanding for the provision of staff and corporate services.

## Freedom of information and privacy

This year we responded to 4 requests for information under the *Freedom of Information Act 1982*, being:

- 3 requests for documents relating to applicant information and review of a workplace decision
- 1 request for documents not held by the MPC

We had no privacy breaches notified to the Office of the Australian Information Commissioner and received no privacy complaints.

## Judicial reviews

During 2021–22, the MPC was joined as a respondent in an application filed in the Federal Court of Australia seeking judicial review of a workplace decision taken by an APS agency under the Public Service Act and Regulations. As of 30 June 2024, the application was ongoing. It is seeking a judicial review of a decision made by an APS agency and the related recommendation made by the MPC regarding breaches of the APS Code of Conduct by the applicant.



In March 2024 an APS employee filed an application in the Federal Circuit and Family Court of Australia seeking judicial review of a workplace decision taken by an APS agency and the related recommendation made by the MPC regarding an application for promotion to an Executive Level position. The employee withdrew their application in April 2024.

In May 2024 an application in the Federal Circuit and Family Court of Australia was filed seeking judicial review of a recommendation made by the MPC about breaches of the APS Code of Conduct by the applicant. The matter remains ongoing.

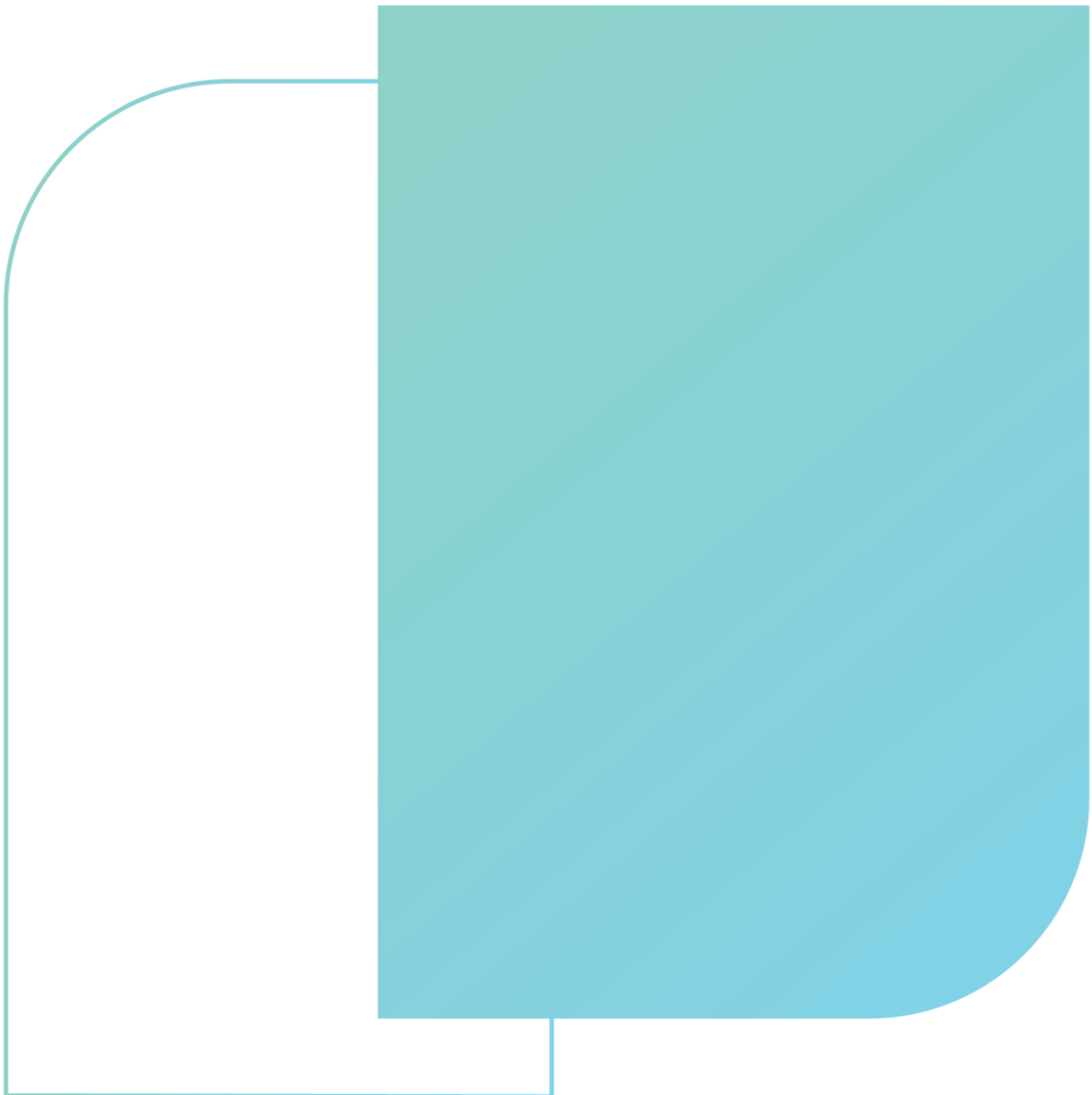
## Information Publication Scheme

Since September 2021, we have published information about our information publication plan on our website. We conducted a review of our plan this financial year.



# Part 5

## The year ahead



# Our key priorities

The APS strives to be a model employer. This objective is underpinned by the APS Values and Employment Principles enshrined in the Public Service Act. The MPC plays an important role in ensuring these values and principles are 'lived' and complied with by employees and agencies.

The MPC and the Review of Actions scheme also form part of the broader APS integrity framework. Our key priorities are driven by the statutory functions we perform and informed by challenges and trends facing the APS.

We will continue to publish guidance on good practice in decision-making and people management and how to conduct effective and expert reviews. We will do this through the activities outlined in this section.

## Engage with and support our stakeholders

We will act in accordance with our communication and engagement strategy to:

- continue our strategy to raise APS employees' awareness of their entitlements and how the Review of Actions scheme operates
- build membership and attendance to the Review of Actions and Code of Conduct Community of Practice sessions and focus on topics and presenters that engage and encourage attendance
- promote our employment services and support compliance with the merits principle by assisting APS agencies in conducting high-quality recruitment processes (for example, ISAC and providing highly experienced recruitment panel convenors and members).

## Improve how we work

We will continue to evaluate our service delivery and foster a culture of continuous improvement through:

- a comprehensive review of our website content, structure and application forms
- lobbying for a case management system for managing our reviews, complaints, and inquiries
- continuing to receive and use feedback about our reviews of workplace decisions from applicants and agencies to inform our work and continuously improve.

# Appendices

## Appendix A: The Merit Protection Commissioner's statutory functions

Function of the Merit Protection Commissioner	Statutory authority – Australian Public Service
<p>Review of Actions scheme – other employment-related actions (workplace decisions)</p> <p>This includes Code of Conduct reviews, direct reviews of other matters and secondary reviews.</p>	<p><i>Public Service Act 1999</i>            Section 33 and subsection 50(1)(d)            Subsection 50(1)(d) (provides for review functions to be prescribed by regulations)            Public Service Regulations 2023            Part 4 Divisions 1 and 3</p>
<p>Review of Actions scheme – promotion and engagement</p>	<p><i>Public Service Act 1999</i>            Section 33 and subsection 50(1)(d)            Public Service Regulations 2023            Part 4 Division 1 and 2</p>
<p>Review agency's determination that a former employee breached the Code of Conduct for behaviour they engaged in while an employee</p>	<p><i>Public Service Act 1999</i>            Section 33 and subsection 50(1)(d)            Public Service Regulations 2023            Part 6 Division 2</p>
<p>Review the actions of statutory office holders who are not agency heads that relate to an employee's APS employment</p>	<p><i>Public Service Act 1999</i>            Section 33 and subsection 50(1)(d)            Public Service Regulations 2023            Part 6, Division 2</p>

Function	Statutory authority – Australian Public Service
Inquire into: <ul style="list-style-type: none"> <li>a public interest disclosure alleging a breach of the Code of Conduct</li> </ul>	<i>Public Service Act 1999</i> Subsection 50(1)(a) Subsection 50(2) Public Service Regulations 2023 Part 6, Division 1
<ul style="list-style-type: none"> <li>the Australian Public Service Commissioner for an alleged breach of the Code of Conduct</li> </ul>	<i>Public Service Act 1999</i> Subsection 50(1)(b)
<ul style="list-style-type: none"> <li>an APS action as requested by the Public Service Minister</li> </ul>	<i>Public Service Act 1999</i> Subsection 50(1)(c) and subsection 50(2)
<ul style="list-style-type: none"> <li>whether a current or former APS employee has breached the Code of Conduct</li> </ul>	<i>Public Service Act 1999</i> Subsection 50(1)(ca) and section 50A Public Service Regulations 2023 Part 6, Division 3
Investigate complaints by former employees relating to entitlements on separation	<i>Public Service Act 1999</i> Subsection 50(1)(e) Public Service Regulations 2023 Part 6, Division 2
Establish an Independent Selection Advisory	Public Service Regulations 2023 Part 6, Division 2
Provide recruitment and employment-related services to a (non-APS) person or body on a fee-for-service basis	<i>Public Service Act 1999</i> Subsections 50(1)(e) and subsection 50(3) Public Service Regulations 2023 Part 6, Division 2
Review the decision of the AFP Commissioner to compulsorily retire AFP employees on invalidity grounds	<i>Australian Federal Police Act 1979</i> Sections 32 and 33 Australian Federal Police Regulations 2018

## Appendix B: Data tables for statutory functions

This Appendix provides information on the activity and performance of the statutory functions of the MPC. Information on our functions is on our website: [www.mpc.gov.au](http://www.mpc.gov.au)

### Review of workplace decisions and complaints

Table B.1 provides information on the review of Code of Conduct decisions, workplace decisions and complaints casework in 2023–24. Table B.2 has information on timeliness. Both tables compare results for 2022–23 with 2023–24.

**Table B.1: Review and complaints workload**

Type	Code of Conduct	Direct reviews	Secondary reviews	Former employee Code of Conduct	Total	Final entitlement complaints	Total cases	
							2023–24	2022–23
<b>On hand at start of year</b>	8	0	5	2	15	0	15	26
<b>Received during the period</b>	76	57	86	3	222	9	231	185
<b>Total cases</b>	84	57	91	5	237	9	246	211
<b>Reviewed</b>	43	17	30	4	94	2	96	72
<b>Facilitated resolution</b>	0	1	1	0	2	0	2	2
<b>Not Accepted</b>	12	32	45	0	89	6	95	109
<b>Lapsed or withdrawn</b>	9	6	6	0	21	1	22	15
<b>Total finalised during period</b>	64	55	81	4	204	9	213	196
<b>On hand at end of the year</b>	20	2	10	1	33	0	33	15

**Table B.2: Timeliness in handling reviews and complaints, 2023–24 compared with 2022–23**

Review type	2023–24		2022–23	
	Average time to complete reviews (weeks)	Completed within target timeframes (%)	Average time to complete reviews (weeks)	Completed within target timeframes (%)
Code of Conduct	11	91%	10	92
Former employees – Code of Conduct	8	100%	6	100
Direct reviews	5	100%	8	100
Secondary reviews	9	97%	10	90
<b>Total reviews</b>	<b>9</b>	<b>95%</b>	<b>10</b>	<b>96</b>
Complaints about final entitlements	4	100%	5	0

*Note: We report separately on reviews of workplace decisions (direct to MPC and secondary reviews) and complaints about entitlements on separations.*

Table B.3 shows the subject matter of all Code of Conduct cases reviewed in 2023–24.

**Table B.3: Subject matter of Code of Conduct reviews completed, 2023–24**

Subject matter	Percentage	Number
Dishonesty: honesty and integrity	13%	10
Failure to follow a direction	13%	10
Not uphold APS Values	12%	9
Lack of respect and courtesy	11%	8
Conflict of interest general	7%	5
Care and diligence	5%	4
Failure to declare a conflict of interest	5%	4
Inappropriate use of agency Information and/or Communications Technology	4%	3
Not use Commonwealth Resources in proper manner or for proper purpose	4%	3
Bullying and harassment	3%	2
Failure to follow a policy	3%	2
Inappropriate behaviour towards a colleague	3%	2
Pre-employment provide false or misleading information or failure to declare	3%	2
Contravention of the law	1%	1
Failure to avoid/manage a conflict of interest	1%	1



Subject matter	Percentage	Number
Failure to record attendance accurately	1%	1
Inappropriate use of email / internet	1%	1
Inappropriate use of social media	1%	1
Not uphold APS Employment Principles	1%	1
Not uphold integrity and good reputation of agency	1%	1
Preferential service	1%	1
Sexual harassment	1%	1
Unauthorised access of agency database	1%	1

Table B.4 shows the subject matter for all reviews, other than the Code of Conduct, completed in 2023–24.

**Table B.4: Subject matter of reviewed cases (other than Code of Conduct), 2023–24**

Subject matter	Secondary subject matter	Number
<b>Conditions of employment</b>	Allowances	5
	Bonus / special payments	15
	Flex accrual	1
	Hours of work	2
	Leave	8
	Other entitlements	1
<b>Duties</b>	<b>Promotion</b>	<b>1</b>
	Assignment of duties - location	1
	Assignment of duties - initial salary	1
	Suspension from duties	3
<b>Flexible working arrangement</b>	Part time work agreement	1
<b>Independent Medical Assessment</b>	Return to work	1
<b>Management action</b>	Formal warning, caution or counselling	1
<b>Performance management</b>	Performance appraisal	1
	Performance pay	1
	Workplace direction	1
<b>Workplace environment and arrangements</b>	Bullying and harassment	2
	Training and development	1
<b>Total</b>		<b>47</b>

Table B.5 has the number of applications received for reviews and complaints about entitlements, by agency.

**Table B.5: Applications for reviews and complaints completed, by agency, 2023–24**

Agency	Code of Conduct	Direct MPC Review	Secondary review	Total	Complaints about entitlements
Services Australia	15	25	33	73	0
Australian Taxation Office	5	5	6	16	2
Department of Defence	14	3	4	21	0
Department of Home Affairs	5	3	11	19	0
Department of Foreign Affairs and Trade	5	0	2	7	0
Attorney-General's Department	1	2	3	6	0
Other agencies (28)	23	17	22	62	7
<b>Total</b>	<b>68</b>	<b>55</b>	<b>81</b>	<b>204</b>	<b>9</b>

## Review of promotion decisions

Table B.6 shows the status of promotion review cases for 2023–24 and last year. Table B.7 shows the promotion review caseload by agency.

**Table B.6: Status of promotion review cases 2022–23 – 2023–24**

Promotion review cases	2022–23	2023–24
On hand at start of year	7	15
Created during the period	85	131
Total caseload	92	146
Reviewed by Promotion Review Committee	48	67
Invalid (for example, applicant not an ongoing APS employee)	2	14
Lapsed (for example, a protective application where no unsuccessful application received) or withdrawn	27	28
Total finalised during period	77	109
On hand at end of year	15	37
Target completion time (weeks)	8 or 12	8 or 12
Number completed within target time	77	44
Percentage completed within target time	100%	66%

**Table B.7: Promotion review caseload by agency, 2023–24**

<b>Agency</b>	<b>Services Australia</b>	<b>Australian Taxation Office</b>	<b>Department of Home Affairs</b>	<b>NDIA</b>	<b>Other</b>	<b>Totals</b>
<b>Applications received</b>	508	487	90	19	87	1,191
<b>Promotion review cases registered (not including cases on hand at the start of the year)</b>	61	29	15	8	18	131
<b>Number of Promotion Review Committees formed and finalised cases reviewed</b>	30	14	12	4	7	67
<b>Parties to a promotion review process where a Promotion Review Committee was formed and finalised</b>	304	232	133	13	29	711
<b>Promotion decisions subject to review</b>	199	216	119	9	22	565
<b>Promotion decisions varied</b>	15	4	1	0	0	20

