

Public Service
Commissioner
Annual Report
2003-04

Incorporating The Annual Report 2003-04
of the Merit Protection Commissioner



Australian Government

Australian Public Service Commission

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MERIT PROTECTION COMMISSIONER

The Honourable John Howard MP
Prime Minister
Parliament House
Canberra ACT 2600

Dear Prime Minister

I am pleased to present my report for the period 1 July 2003 to 30 June 2004 as part of the Public Service Commissioner's Annual Report as required by section 51 of the *Public Service Act 1999*.

This report is prepared in accordance with guidelines approved on behalf of the Parliament by the Joint Committee of Public Accounts and Audit as required by subsection 51(2) of the *Public Service Act 1999*. However, in accordance with the provisions of the *Public Service Act 1999* detailing the administrative arrangements to support the performance of my functions, some of the required information is published within the Public Service Commissioner's Annual Report.

I also have continuing functions under the repealed *Merit Protection (Australian Government Employees) Act 1984* and the *Public Service Act 1922* arising from regulations made under the *Public Employment (Consequential and Transitional) Amendment Act 1999*. This report includes activities that may have occurred under the transitional arrangements.

In presenting you with the report on my activities I would like to take this opportunity to express my thanks to the staff of the Australian Public Service Commission for their assistance.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Jeff Lamond', written in a cursive style.

Jeff Lamond
OCTOBER 2004

MERIT PROTECTION COMMISSIONER'S REVIEW

This Annual Report focuses primarily on the review system established under section 33 of the *Public Service Act 1999* (PS Act) and the Public Service Regulations which provides review rights for Australian Public Service (APS) employees who are not members of the Senior Executive Service (SES) in relation to actions taken in relation to their employment by the Agency Head or another APS employee. My role as Merit Protection Commissioner includes the administration of the framework for review. This framework provides one avenue for supporting the Value that 'the APS provides a fair system of review of decisions taken in respect of APS employees' (section 10(1)(o) of the PS Act). It also makes specific provision through Promotion Review Committees (PRCs) for support of the Value that 'the APS is a public service in which employment decisions are based on merit' (section 10(1)(b) of the PS Act).

My powers as Merit Protection Commissioner are generally recommendatory only. However, in the case of a review of a promotion, the decision of a PRC is binding on an Agency Head. Where a recommendation is made to an Agency Head, they are required to advise me and the relevant employee of their decision on the recommendation and the reasons for the decision. I may, after consulting with the Public Service Minister, report to an Agency Minister, the Prime Minister and the Parliament if I am not satisfied with a response to a recommendation.

Agency Heads accepted all but three recommendations arising from reviews during 2003–04. The recommendations not accepted dealt with reviews of action in Centrelink, the Australian Taxation Office and the Department of Employment and Workplace Relations. In all three cases, the issues involved were worked through with the relevant agencies and resolved to my satisfaction. The Annual Report for 2002–03

noted that there was one case in the Australian Taxation Office where the Agency Head had determined not to accept the recommendation made. The report noted that the matters raised in that case were under consideration. Those matters have now also been resolved, with the agency accepting the recommendation.

This financial year the following number of applications for review by a Promotion Review Committee and other reviews of action were received:

- Promotion reviews—requests for the establishment of 101 Promotion Review Committees were received (requests for 193 were received in 2002–03). Seventy-three promotion review cases were reviewed (131 cases were reviewed in 2002–03).
- Applications concerning breaches of the Code of Conduct—58 applications were received (43 were received in 2002–03). Forty-six applications were reviewed (29 were reviewed in 2002–03).
- Applications for review other than promotion reviews and those related to the Code of Conduct—167 other applications were received (128 were received in 2002–03). One hundred and four applications were reviewed (54 were reviewed in 2002–03).

The number of applications for review by a PRC was lower this financial year than in the previous year while the figures relating to applications concerning other reviews of action indicate that the number of Code of Conduct and other reviews has increased in comparison with the previous financial year. The reduction in the number of applications for review of promotions corresponds with a similar reduction in the number of promotions in those employment categories where existing employees have the capacity to seek a review of the decision. The increase in the number of applications

concerning Code of Conduct reviews of 35% is at odds with a trend established over the last few years, which has seen the number of reviews remain static. The increase in the number of applications for other reviews of 30% is a reversal of the downward trend observed last financial year. The increase can largely be attributed to the high number of applications for review submitted by employees of the Australian Taxation Office in relation to a bulk selection exercise undertaken by that agency.

I reported last year that the then current target time frames for the different forms of reviews had been established 15 years earlier and, as they had not been reviewed to comprehend changes in the legislative framework, I had established new time frames for the completion of primary and secondary reviews. Performance information for 2003-04 shows that the bulk of reviews—apart from promotion reviews—were not completed within the expected timeframes. I will continue to monitor performance and work to ensure that reviews are completed as quickly as possible consistent with the appropriate consideration of the circumstances of each case. I will also continue to monitor review processes and workload factors and to take those into account in considering the appropriateness of timeliness targets.

There is further information on the nature of the reviews and discussion of trends under Analysis of Performance. The information in that section is structured slightly differently this year than in previous Annual Reports. It is presented in a more streamlined format, and repetition has been reduced, in order to make the information more readable and accessible.

It is interesting to note from the State of the Service Report 2002-03 that, during that financial year, agencies commenced 926 formal investigations into suspected breaches of the Code of Conduct. Applications for review resulted

from less than 10% of those cases that were finalised during the financial year and resulted in a sanction. As this was the first year that information had been collected from agencies on the number of investigations undertaken, it is not possible to say how the numbers vary from previous years. The continued collection of this information will enable future comparisons to be drawn about the number of determinations that result in applications for review.

Last year's State of the Service Report also provided some commentary about the consistency of sanctions, noting that the agency survey had indicated that there is wide variation among agencies in the number of investigations into suspected breaches of the Code of Conduct, the nature of the breaches investigated as well as the imposition of sanctions. The Review and Evaluation Group within the APS Commission is building on the information collected for the State of the Service Report through an evaluation of management of breaches of the Code of Conduct in APS agencies, which will consider the issue of consistency of sanctions. APS Commission employees who assist me in the performance of my functions are also contributing to the evaluation.

While it will be useful to see how different agencies are dealing with Code of Conduct matters it must be recognised that, as cases of alleged breaches and the imposition of sanctions must be decided on the circumstances of the case, it is inevitable that there will be different outcomes from different cases, both within and between agencies. What is important is that the process that is followed is fair, appropriate and rigorous and that, within agencies, mechanisms are in place to ensure consistency of decision making. Consideration will need to be given to any broad issues that emerge from the findings of the abovementioned evaluation, such as the

application of procedural fairness, that have implications for the APS as a whole. I note that the review applications that I am receiving have not indicated that there are any systemic issues across the APS that need to be addressed.

This report continues the use of case studies on a number of reviews conducted during the year. They are based on cases from a number of regions and illustrate the range of issues dealt with, and the approaches taken in addressing those issues. The APS Commission is undertaking a Foundations project which involves a review of the formal arrangements governing organisational management within the APS. I have noted views expressed by agencies represented on the Reference Group for this review that some agencies experience difficulties in determining issues such as whether actions are reviewable and how particular cases should be handled. Agencies indicated that they would welcome more information on these and other issues, such as my role and approach to reviews. The inclusion in this report of case studies is one avenue for providing some guidance on these issues. I am also looking at including case studies on the APS Commission website.

This year I attended, along with the acting Group Manager of Regional Services (North East) and the Regional Director of the Queensland Office, the 10th National Public Sector Appeals Conference, which was held in Brisbane from 3 to 5 September 2003. The conference provides an annual forum for senior representatives who are engaged in the review of employment decisions in Commonwealth, State or Territory public sector employment to share their experiences, ideas and views. I also attended the Eastern Regional Organization for Public Administration (EROPA) 19th General Assembly and Conference and 49th Executive Council in New Delhi from 5 to 10 October 2003, where I presented a paper on ethical

governance. I continued to promote my role and functions through attendance at a number of other conferences, seminars and forums during the year where I spoke about a range of issues relating to the APS Values and the APS Code of Conduct.

I held the annual meeting with all Regional Group Managers, Regional Directors and Regional Advisers in June 2004 in Sydney. The aim of this year's meeting was to discuss both legislation and policy related issues. The meeting included a presentation from the Commonwealth Ombudsman, Professor John McMillan, and a discussion with a senior lawyer from the Office of the Australian Government Solicitor (AGS). Outcomes of the meeting included agreement on a number of policy related issues and, as a result of the discussion with AGS, progress towards settlement of a number of threshold issues relating to the review function. A number of activities that I had planned for this financial year to further promote my role and the services provided, including the production of new, simplified pamphlets on the review process and changes to the website, have been delayed pending the settlement of these threshold issues. Progressing these awareness-raising activities will be a priority in 2004–05.

Last year's report indicated that I had co-ordinated the development of a national database of all review of action cases. The database, which provides for the collection of data in relation to most of my functions, has been operational for the financial year. This has assisted with the collection of statistics on a national level. More ready availability of statistical data has facilitated better analysis and use of the data. Refinement of the database is continuing to enable it to more fully meet my needs and the needs of the employees who assist me in the performance of my functions.

This financial year has also seen the development of an on-line system for notification to agencies of applications for review by a PRC. This system became operational in April 2004 and is now being accessed by most agencies. Facilities that will enable electronic lodgement of applications for review by a PRC are currently being investigated and are expected to be operational early in 2004-05.

In addition to the above, my other statutory functions include the establishment of Independent Selection Advisory Committees (ISACs) and a range of employment-related functions undertaken for non-APS persons or bodies, for which I may charge a fee.

The use of ISACs continues to offer agencies a number of benefits, including a cost-effective way of conducting selection exercises. While the number of agencies that use ISACs has continued to increase, the number of committees established decreased this financial year in comparison with the previous financial year (53 completed in 2003-04 compared with 93 in 2002-03). However, the high number last financial year was primarily due to an unusually large number of exercises undertaken by the Australian Taxation Office. In 2003-04, 3338 applications were considered by ISACs in recommending 648 applicants for placement. The Australian Taxation Office was still the highest ISAC user this financial year, establishing 16 committees.

The majority of the fee-for-service work undertaken on my behalf for non-APS bodies continued to be Joint Selection Committees (JSCs) established under a Memorandum of Understanding with the Australian Federal Police (AFP). The number of AFP JSCs decreased from 276 in 2002-03 to 166 in 2003-04. Additionally, training for AFP employees on selection processes was provided to ensure that there was a trained pool of staff available

for future selection committees. JSCs were also undertaken for some ACT Government agencies.

OUTLOOK FOR 2004-05

The anticipated settlement of some threshold issues, referred to above, relating to my role and the review function, will enable priority to be given in 2004-05 to further efforts in relation to the education of both individuals and agencies about review rights. This will involve my continued engagement in activities such as speeches and presentations as well as the review and update, where required, of information available about the review function. These activities will also assist Agency Heads in their obligation to promote and uphold the APS Values and to meet the requirements of the Code of Conduct.

I will also continue to promote the range of other services available to assist in merit-based selections, including ISACs.

ROLE, FUNCTIONS AND STRUCTURE

ROLE

The office of the Merit Protection Commissioner, established under section 49 of the PS Act, is an independent office located with the APS Commission.

The Merit Protection Commissioner assists agencies to meet the requirements of the APS Values and the APS Code of Conduct through the administration of the statutory review of actions scheme and the performance of other statutory functions.

FUNCTIONS

The Merit Protection Commissioner's functions under the PS Act are set out in section 50 and include:

- (a) inquiring into reports alleging breaches of the APS Code of Conduct made to the Merit Protection Commissioner, or to a person authorised by the Merit Protection Commissioner (whistleblowing reports)
- (b) inquiring into alleged breaches of the Code of Conduct by the Public Service Commissioner and reporting to the Presiding Officers on the results of such enquiries including, where relevant, recommendations for sanctions
- (c) inquiring into an APS action at the request of the Public Service Minister and to report to the Public Service Minister on the results of the inquiry
- (d) such functions as are prescribed by regulations made for the purposes of section 33 (review of actions, including the review of certain promotion decisions)
- (e) such other functions as are prescribed by the regulations.

So far as subsection 50(1)(e) is concerned, the PS Regulations enable the Merit Protection Commissioner to:

- (a) establish Independent Selection Advisory Committees for the purposes of making recommendations to an Agency Head about the suitability of candidates for engagement, promotion or assignment to duties included in APS Classification Groups 1–6
- (b) perform employment-related functions where the Merit Protection Commissioner is not required by a law of the Commonwealth to perform the function
- (c) review an action of a statutory office holder who is not an Agency Head that affects an APS employee in their employment
- (d) investigate complaints by former APS employees concerning separation entitlements.

A fee is charged for the establishment of Independent Selection Advisory Committees and for the performance of employment-related functions.

The Merit Protection Commissioner also has continuing functions under the repealed *Merit Protection (Australian Government Employees) Act 1984* and the *Public Service Act 1922*. This consists of casework arising under regulations made under the *Public Employment (Consequential and Transitional) Amendment Act 1999*.

ORGANISATIONAL STRUCTURE

The Merit Protection Commissioner's casework is undertaken through the six regional offices of the APS Commission by APS Commission employees who are made available by the Public Service Commissioner.

Each regional office also maintains a register of appropriately trained and qualified persons who are available, as required from time to time, for

employment as non-ongoing employees. The Merit Protection Commissioner maintains a separate register of APS employees to perform the role of nominees to Promotion Review Committees and Independent Selection Advisory Committees.

Applications for review are generally lodged and dealt with in the office of the State or Territory in which the applicant resides. The Victorian office also deals with casework arising in Tasmania and the South Australian office also deals with casework arising in the Northern Territory. Co-ordination and policy support for the Merit Protection Commissioner is provided by employees of the ACT office, with support from other offices as necessary.

This report and further information about the Merit Protection Commissioner's role and services are available on the APS Commission website at www.apsc.gov.au.

MANAGEMENT ACCOUNTABILITY



Merit Protection Commissioner, Jeff Lamond

CORPORATE GOVERNANCE

Mr Jeff Lamond, who had acted as Merit Protection Commissioner since 7 June 2002, was appointed Merit Protection Commissioner by the Governor-General for a five year term from 1 September 2003.

The Public Service Commissioner, as the head of the APS Commission, is responsible for its corporate governance practices. The Merit Protection Commissioner is a member of the APS Commission Executive, a senior management group chaired by the Public Service Commissioner.

The Commission employees who assist the Merit Protection Commissioner are made available by the Public Service Commissioner under section 49(2) of the PS Act. These employees are accountable to the Merit Protection Commissioner for the performance of functions authorised by him.

The Merit Protection Commissioner and the Public Service Commissioner have in place a Memorandum of Understanding for the provision of staff necessary to assist the Merit Protection Commissioner in the performance of his functions.

The Group Manager of Regional Services (North/East), covering regional offices in Canberra, Sydney and Brisbane, and the Group Manager of Regional Services (South/West), covering regional offices in Melbourne (which also deals with cases from Tasmania), Adelaide (which also deals with cases from the Northern Territory), and Perth, are delegates of the Merit Protection Commissioner in review matters.

REVIEW OF PERFORMANCE

OUTPUTS AND CONTRIBUTION TO OUTCOMES 2003–04

The APS Commission is included in the Portfolio Budget Statements of the Department of Prime Minister and Cabinet. The Public Service Commissioner, as the head of the APS Commission, is responsible for the financial and human resources of the APS Commission and

for assessing the level of the APS Commission's achievements against its output structure.

Performance information, as described in the 2003–04 Portfolio Budget Statement which relates to the functions of the Merit Protection Commissioner, can be aggregated, where relevant, from Tables M1 and M2 of this Report. Table M1 comprises casework arising from APS agencies. Table M2 includes casework arising from both APS and non-APS agencies.

TABLE M1: Reviews of actions: workload, work completed and timeliness, 1 July 2003–30 June 2004

Cases	Promotion Review Committees	Primary review—Code of Conduct	Primary review—other	Secondary review	Review—Former employees
On hand at start of year	6	12	7	19	1
Received during the period	101	58	16	144	7
Reviewed	73	46	5	94	5
Not accepted	6	6	17	46	1
Lapsed or withdrawn	19	12	1	9	2
Total finalised during period	98	64	23	149	8
On hand at end	9	6	0	14	0
Target completion time (weeks)	6	10	10	8	10
Average completion time for reviewed cases (weeks)	5.47	14.85	10.46	11.66	12.54
Completed within target time (number)	54	9	2	59	2
Completed within target time (percentage)	74	20	40	63	40

TABLE M2: Fee-for-service functions: workload and work completed, 1 July 2003–30 June 2004

	Independent Selection Advisory Committees	Other services requested
On hand at start of year	17	63
Received during the period	60	216
Completed	53	197
Lapsed/withdrawn	9	47
Total finalised during the period	62	244
On hand at end	15	35

ANALYSIS OF PERFORMANCE

The review scheme under section 33 of the PS Act and Part 5 of the PS Regulations provides that an APS employee is entitled to review, in accordance with the PS Regulations, of an action that relates to their employment, except where the PS Regulations specifically exclude that action from review. In most cases, an employee must first apply to their Agency Head for a review of action.

The types of reviews undertaken by the Merit Protection Commissioner under the provisions of the PS Act and Regulations fall into three main categories: review of certain promotion and engagement decisions; reviews in relation to breaches of the APS Code of Conduct; and other reviews of actions.

Applications for review by a PRC can be made in certain circumstances by applicants for employment opportunities included in APS Classification Groups 2–6. Selection decisions are reviewed by a three-member PRC, which reviews the original decision and makes a decision which is binding on the Agency Head. Where an employee wishes to apply for review of a determination that they have breached the APS Code of Conduct or of a sanction imposed for breach of the Code of Conduct, they must apply directly to the Merit Protection Commissioner. Applications for review may also be lodged directly with the Merit Protection Commissioner in some other specified circumstances, including where the relevant Agency Head was directly involved in the action. Where an employee is dissatisfied with the outcome of a primary review conducted by an Agency Head, or has been advised by the Agency Head that an action is not reviewable, the employee may apply to the Merit Protection Commissioner for a secondary review.

Table M1 provides information on the reviews of actions received and completed and the timeliness of these reviews during the period 1 July 2003 to 30 June 2004.

REVIEW OF CERTAIN PROMOTION AND ENGAGEMENT DECISIONS

Amendments to the Public Service Regulations dealing with the mobility arrangements between the Australian Public Service and the Parliamentary Service, which came into effect on 23 December 2003, introduced review rights for ongoing employees of both Services against the promotion of an ongoing APS employee or the engagement of a Parliamentary Service employee in the APS at a higher classification. This means that, in a selection exercise to Classification Groups 2–6 involving promotion of an APS employee or engagement of a Parliamentary Service employee at a higher classification than that employee's current Parliamentary Service classification, an ongoing APS employee who is an unsuccessful applicant for promotion, and an ongoing Parliamentary Service employee who is an unsuccessful applicant for engagement than to the employee's classification as a Parliamentary Service employee, may apply to the Merit Protection Commissioner for review of the promotion or engagement decision.

During 2003–04, 443 individual applications for review by a PRC were considered relating to 73 cases reviewed. This compared with 3642 individual applications in 2002–03 relating to 131 cases reviewed. In addition, applications relating to six cases were on hand at the start of the year. In this report, a case means an application by one or more APS employees for a review by a PRC of a decision or decisions arising from a discrete agency selection exercise. No applications for review by a PRC were received this financial year in relation to the engagement in the APS of a Parliamentary Service employee.

The number of PRCs established decreased this financial year compared with 2002-03 (73 established in 2003-04 compared with 131 established in 2002-03, a decrease of 58 or 44%). The number of PRCs established has generally been in decline in recent years. Last financial year, when the number of committees established was particularly high, was an exception to this trend and coincided with the unusually high number of promotions that were gazetted during that financial year in those employment categories where existing employees have the capacity to seek a review of the decision (10,248 promotions gazetted in 2002-03 compared with 6884 promotions in 2001-02). The number of reviewable promotions and engagements gazetted this financial year was 6071, a decrease of 41% when compared with the number of reviewable promotions for 2002-03, but only 12% less than the number for 2001-02. The number of PRCs established this financial year was only three less than the number established in 2001-02, and it may be that the trend toward an overall decline in PRC numbers has reached a plateau. It is, however, to be anticipated that volatility in patterns of recruitment in the future will continue to have an effect on PRC numbers.

Table M3 provides information on the agencies involved in the promotion reviews as well as a breakdown of the number of active and protective applications. Active applications are made by employees who were not promoted in the selection exercise and are applying for a review of the decision. Protective applications are made by employees who have been promoted and may be subject to review or be a part of the promotion review process that has active applications for review.

Applications for review by a PRC were received in relation to selection decisions made in 13 agencies. The four agencies that had more than 20 applications for review are identified in Table M3. There were nine other agencies that had less than 20 applications for review that are not separately identified. A total of 24 (or 5.9%) of the 404 promotion decisions reviewed were overturned by a PRC. This compares to 30 or 2.8% of 1071 promotion decisions in 2002-03 and 15 or 5.4% of 277 promotion decisions in 2001-02.

The average time taken to complete reviews by a PRC was 5.5 weeks and 54 reviews or 74% were completed within the target time of six weeks.

**TABLE M3: Applications for review of promotion decisions and promotions overturned
1 July 2003 to 30 June 2004 by agency**

Agency	Total number of applications for review	Number of active applications	Number of protective applications	Number of promotions considered*	Number of promotions overturned*
Department of Immigration and Multicultural and Indigenous Affairs	161	31	130	169	1
Australian Taxation Office	145	55	90	126	12
Australian Protective Service	76	38	38	43	4
Department of Defence	31	26	5	24	5
9 Other Agencies	30	23	7	42	2
Total	443	173	270	404	24

* An APS employee may make an application for review of one or more promotion decisions. Not all applications made are considered by a PRC. Some applications are withdrawn, invalid or, in the case of protective applications, may not be activated.

BREACHES OF THE CODE OF CONDUCT AND OTHER REVIEWS

During 2003–04, 225 applications for review, other than for review of promotion decisions, were received. In addition, 39 applications were carried over from the previous financial year. Of the total applications on hand in 2003–04, 150 applications were reviewed.

The types of matters raised in the applications reviewed are shown in Figure M1. Reviews

of actions relating to the Code of Conduct accounted for 46 or 31% of the applications reviewed. Other matters reviewed were matters relating to duties and, in particular, selection processes (51 or 34%); workplace environment and arrangements, including harassment (22 or 15%); conditions of employment, including leave and other entitlements (19 or 13%); performance management, including performance appraisals and performance pay (seven or 5%) and entitlements on separation (five or 3%).

FIGURE M1: Review of action applications reviewed 1 July 2003–30 June 2004

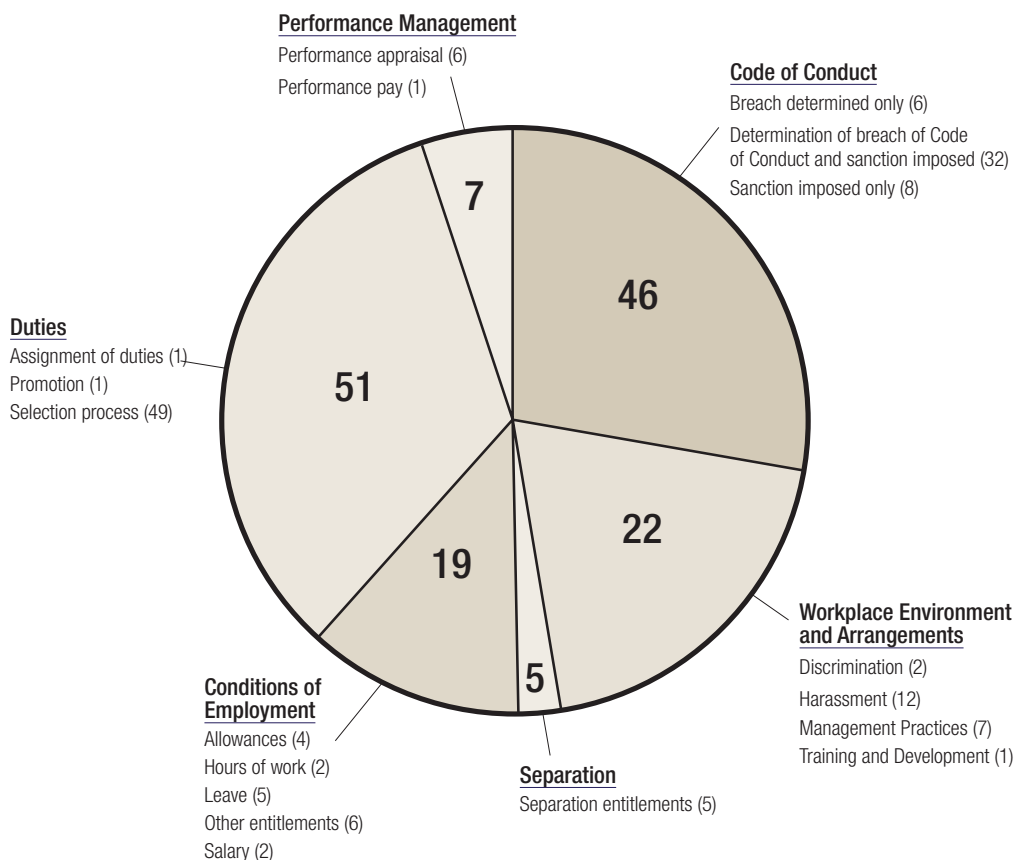


Table M4 provides a breakdown of the number of reviews by agency. Similar to last year, the Australian Taxation Office and Centrelink accounted for over 50% of these reviews, reflective of the proportion of APS employees in these agencies. However, where in 2002-03 the number of applications reviewed in these two agencies was very similar, the number reviewed in the Australian Taxation Office in 2003-04 was nearly twice the number reviewed in Centrelink. This was due to a bulk selection exercise in the Australian Taxation Office which resulted in a large number of secondary review applications.

TABLE M4: Applications reviewed 1 July 2003-30 June 2004 by agency

Agency*	Primary review-Code of Conduct	Primary review-Other	Secondary Review	Complaints by former employees	Total
Australian Taxation Office	8	0	56	1	65
Centrelink	21	0	13	1	35
Defence	1	1	9	2	13
Australian Customs Service	3	0	3	0	6
Child Support Agency	4	0	1	1	6
Immigration and Multicultural and Indigenous Affairs	3	0	1	0	4
Bureau of Meteorology	0	0	3	0	3
Aboriginal Hostels Limited	1	1	0	0	2
Australian Electoral Commission	0	0	2	0	2
Australian Quarantine and Inspection Service	1	1	0	0	2
12 Other Agencies	4	2	6	0	12
Total	46	5	94	5	150

* The agency taking the action or, if the action is action by an APS employee, the agency in which the employee was employed at the time of the action.

CASE STUDY

WITHDRAWAL OF APPLICATION FOR REVIEW

4

Application

The applicant sought a review under regulation 5.24(2)(a) & (b) of a decision that they had breached the APS Code of Conduct and of the sanctions imposed for that breach. The agency had determined that the employee had breached several elements of the Code of Conduct by using their position within the agency to advantage a family member.

The employee was determined to have breached several elements of the Code of Conduct as follows:

- s13(7): failure to disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment in that the employee prepared a claim for submission to the agency on behalf of the family member—in relation to this breach, a sanction of a reprimand was imposed
- s13(5): failure to comply with a lawful and reasonable direction, in that the employee requested a substantial amount of money as payment for preparation of the claim, in contravention of agency instructions—in relation to this breach a reduction in classification by one level was imposed
- s13(10): make improper use of inside information or the employee's duties, status, power or authority to gain a benefit or advantage, in that the employee indicated to the family member that the employee's knowledge would assist in advantageous/ preferential consideration of the claim—in relation to this breach a fine was imposed
- s13(8): failure to use Commonwealth resources in a proper manner, for which the employee was counselled

- s13(11): failure to uphold the APS Values and good reputation of the APS, in that the employee was the subject of a complaint by a member of the public in relation to this matter—the sanction imposed for this was a reprimand.

Review

After considering the evidence in relation to this case, the Merit Protection Commissioner's reviewer conducted several discussions with the employee to clarify their actions, the context and the inconsistency of the employee's actions with the APS Values. The employee recognised that they had mistakenly viewed their actions as personal (even though they were accessing official information and resources) and that this had compromised their conduct and responsibilities as an APS employee. In addition, the employee occupied a supervisory position within the agency but had failed to recognise their influence as a role model to other staff.

Outcome

After gaining a better understanding of the APS Values and Code of Conduct, and the purpose of the sanctions, the employee was able to accept the agency's decision, and the sanctions imposed, as reasonable. The employee subsequently withdrew their application for review.

Breaches of the Code of Conduct

This year there was an increase in the number of applications received by the Merit Protection Commissioner that related to breaches of the Code of Conduct by APS employees, with 58 applications received in comparison with 43 in the last financial year. In addition to this, there was a carry over of 12 applications from last financial year. The increase in the number of these applications of 35% departs from the trend established over the last few years, which has seen the number of reviews remain static.

While it is difficult to be specific about the reasons for the increase, it is not necessarily a sign that the number of employees who are being found to have breached the Code of Conduct is increasing, or that employees are increasingly dissatisfied with the outcomes of any such investigations. Rather, it may indicate greater awareness among employees of review mechanisms. Raising awareness of such mechanisms, and ensuring that people trust the system, means an inevitable rise in the number of reviews, at least in the short to medium terms. The issue of the awareness of employees of the review regime will continue to be looked at in the State of the Service Report which will provide an indication of whether awareness of review mechanisms is increasing. The Merit Protection Commissioner will also continue to monitor closely the employee survey results in the State of the Service Report relating to employee perceptions about the fairness of agency review processes.

There was also an increase in the number of reviews completed this financial year, with 46 reviews completed during 2003-04 compared to 29 during 2002-03, an increase of 59%. Six of the applications received were not accepted and 12 lapsed or were withdrawn. There were six reviews carried over to the next financial year.

Matters considered in reviews of breaches of the Code of Conduct during this financial year included: inappropriate browsing of information on clients; harassment of other employees; inappropriate use of emails or the internet; disrespect to clients, supervisors and other employees; failure to follow directions; excessive private telephone use; and misuse of resources, including departmental vehicles.

The Merit Protection Commissioner made a formal recommendation to confirm, vary or set aside an agency decision to the relevant Agency Head in relation to each of the 46 completed reviews. Of these 20 recommended confirming the agency decision (compared with 10 in 2002-03), 17 recommended varying the decision (compared with 14 in 2002-03) and nine recommended setting aside the decision (compared with five in 2002-03). A total of 11 reviews included a recommendation to vary the sanction imposed.

The average time taken to complete a review of a breach of the Code of Conduct was just under 15 weeks. In 2002-03 the average time taken was just under 13 weeks. The difference is in part reflective of the complexity of the reviews undertaken this financial year. However, it also reflects the process that is undertaken to conduct a review. As applications for review of a breach of the Code of Conduct do not need to be referred to the Merit Protection Commissioner through the appropriate Agency Head, it is usually necessary for the relevant papers to be sought from the agency after the application is received by the Merit Protection Commissioner. As a review is considered to have commenced once an application is received, the time taken for the agency to supply the relevant papers is included in the time taken to undertake the review. Delays in receiving the relevant papers

CASE STUDY

FACILITATED AGREEMENT

4

Application

The applicant sought a review under regulation 5.24(3)(c) claiming victimisation as a result of pursuing the Merit Protection Commissioner's recommendation flowing from an earlier application under regulation 5.29(1)(a). The recommendation requested the Department to support and encourage the applicant to explore a particular career development option. The recommendation was accepted by the agency.

The applicant alleged that efforts to progress the Merit Protection Commissioner's recommendation were undermined by the supervisor who behaved in a recriminatory way towards the applicant when concerns were expressed about inaction in dealing with the issue.

Review

During the course of discussions with the applicant and relevant agency personnel, the Merit Protection Commissioner's reviewer established that full information about the Merit Protection Commissioner's recommendation had not been conveyed to all relevant parties and that staffing decisions regarding the applicant were made on the basis of operational imperatives rather than an attempt to avoid implementation of the Merit Protection Commissioner's recommendation. In these discussions, the applicant accepted that actions perceived to be victimisation were not so. However, some time had lapsed since the Merit Protection Commissioner's recommendation had been provided to the agency, and during this period there had been a serious breakdown in workplace relationships. It became apparent that the most effective way forward was to mediate an improvement in workplace

relationships and establish a common desire to resolve the issue.

Outcome

As a result of a meeting, facilitated by the Merit Protection Commissioner's reviewer, an agreement was struck between the applicant and the agency, which ensured the Merit Protection Commissioner's recommendation was implemented.

have at times contributed to review completion times exceeding the target time set by the Merit Protection Commissioner. This situation will be monitored over the next 12 months in the context of whether an amendment to the Regulations in respect of this process aspect should be considered. The need to resolve matters as quickly as possible will continue to be of prime importance.

Other applications for review

This year there were 167 applications received for review other than promotion reviews and those related to the Code of Conduct. This was an increase of 39 applications for review or 30% compared to 2002-03. Twenty-seven cases were carried over from the previous financial year and 104 or 54% of the total cases on hand were reviewed during 2003-04 (during 2002-03, 54 or 39% of the cases on hand were reviewed), 64 cases were not accepted, 12 cases lapsed or were withdrawn and 14 cases were on hand at the end of the financial year.

The increase in the number of applications for review received and the number reviewed can largely be attributed to an increase in the number of applications for secondary review. This is discussed further below. Of the 104 cases reviewed, a response in relation to issues raised during the review was requested from agencies in 28 or 27% of cases.

While the number of applications received that were not accepted increased this year compared with 2002-03, the number of applications not accepted as a proportion of all applications received was broadly comparable with the proportion not accepted last financial year (64 cases or 38% were not accepted in 2003-04 compared with 46 cases or 36% in 2002-03). The most common reasons why applications were not accepted continued to be

that the Agency Head had not yet undertaken the primary review, or that no right of review existed. The Merit Protection Commissioner will be giving some priority in 2004-05 to promoting a better understanding among employees of their review rights, including through the review and update of information available about the review function.

Other applications for primary review made directly to the Merit Protection Commissioner

The Regulations provide that an APS employee may apply directly to the Merit Protection Commissioner for review of action where the Agency Head has been directly involved in the action; it is not appropriate, because of the seriousness or sensitivity of the action, for the Agency Head to deal with the application; or where the action is claimed to be victimisation or harassment of the employee for having made a previous application for review of action (regulation 5.24(3)).

The Regulations also provide that an Agency Head may, with the agreement of the Merit Protection Commissioner, refer an application directly to the Merit Protection Commissioner in certain circumstances (regulation 5.25(1)). These include where the Agency Head has been directly involved in the action or it is not appropriate, because of the seriousness or sensitivity of the action, for the Agency Head to deal with the application.

During the year, there were 16 applications made directly to the Merit Protection Commissioner by APS employees under regulation 5.24(3). In addition, five applications were on hand at the start of the year. Of the total cases on hand during the year, 16 were not accepted, one was withdrawn and four were reviewed.

No applications for review under regulation 5.25(1) were received during the year,

CASE STUDY

BREACH OF APS CODE OF CONDUCT—“ALTERCATION”, SELF-DEFENCE AND REASONABLE FORCE

4

Application

An APS employee applied for review of a decision that they had breached the APS Code of Conduct as a result of a "physical altercation" with a fellow employee at work. Sanctions imposed for these breaches were a re-assignment of duties and a fine set at 1% of annual salary or about \$800.

The applicant acknowledged that they were one of the parties in the incident but claimed that they did not start the "altercation", were essentially defending themselves and, when they had the opportunity to disengage, did so.

Review

According to the applicant, after the other person bumped into them in a corridor and then came back aggressively towards them, the applicant reacted to defend themselves and the "altercation" ensued.

There was no witness to the commencement of the incident. However, several people said that, ignoring requests to stop, the applicant and the other person continued to struggle and throw punches until physically separated.

Having considered the matter, the Merit Protection Commissioner was reasonably satisfied that even if the applicant thought they were acting in self-defence, by throwing the first punch and hitting the other employee on the temple with a closed fist, the force used by the applicant was disproportionate to the danger they said they thought they faced. The Merit Protection Commissioner also noted that the applicant had a material advantage in strength and physical bulk against the other person involved.

Outcome

Consequently, the Merit Protection Commissioner agreed with the applicant's agency that the applicant had breached the APS Code of Conduct, in particular subsections 13(3) and (11) of the PS Act 1999. The breach of subsection 13(3), failure to treat the other person with respect and courtesy, was self-evident. Subsection 13(11) was breached because information about the workplace incident had subsequently to be given to the State police and a medical centre, thereby adversely affecting the reputation of the APS. The Merit Protection Commissioner recommended that the decisions under review be confirmed.

although two were on hand at the start of the year. Of these, one was not accepted and one was reviewed.

The reviews of the five applications made under regulations 5.24(3) and 5.25(1) took an average of 10.5 weeks each to finalise.

Applications for secondary review

The Regulations also provide for an APS employee, other than an SES employee, to apply to the Merit Protection Commissioner for a secondary review where the employee is dissatisfied with the outcome of the primary review conducted by the Agency Head (regulation 5.29(1)(b)). A secondary review can also be undertaken by the Merit Protection Commissioner where the Agency Head has told the employee that the action is not a reviewable action (regulation 5.29(1)(a)).

During 2003–04, 144 applications for secondary review were received—six under regulation 5.29(1)(a) and 138 under regulation 5.29(1)(b). This is an increase of 43 applications, or 43%, compared with 2002–03. In addition, 19 applications were on hand at the start of the year. Of the total applications on hand in 2003–04, 46 were not accepted and nine lapsed or were withdrawn. A total of 94 cases were reviewed during the period, compared with 48 cases reviewed in 2002–03. The increase in the number of applications received and the number reviewed this financial year is primarily due to a bulk selection exercise in the Australian Taxation Office which resulted in a high number of applications for review. When that group of applications is discounted, the number of applications received and the number reviewed are similar to those for the last financial year.

Of the six applications received under regulation 5.29(1)(a), one had not been made through the relevant Agency Head and was not accepted, and one is still on hand. In relation to two cases

the Merit Protection Commissioner agreed that the actions were not reviewable actions. The two remaining applications involved a number of separate matters. The Merit Protection Commissioner reviewed some aspects of these applications.

The average time taken to finalise applications for secondary review was just under 12 weeks.

Investigation of complaints by former employees

Regulation 7.2 provides that the Merit Protection Commissioner may investigate a complaint by a former APS employee that relates to the employee's entitlements on separation from the APS. Seven applications were received under regulation 7.2 during 2003–04 compared with eight in 2002–03, and one application was carried over from the previous financial year. Of the total applications on hand during 2003–04, five were reviewed, one was not accepted, one lapsed and one was withdrawn.

INDEPENDENT SELECTION ADVISORY COMMITTEES

An Independent Selection Advisory Committee (ISAC) is a three member committee that makes recommendations to an Agency Head about the suitability of candidates for engagement at, promotion to, or assignment of duties at classifications in APS Classification Groups 1 to 6. ISACs are established by the Merit Protection Commissioner at the request of an Agency Head, usually on a fee-for-service basis. A promotion decision made by the agency on the recommendation of an ISAC is not subject to review by a PRC.

An ISAC consists of a Convenor and APS employee, both nominated by the Merit Protection Commissioner, and an agency nominee. The committee is independent and impartial. The members of an ISAC must comply

CASE STUDY

AGENCY-BASED TERM TRANSFER OR CAREER MOVEMENT POLICY

4

Application

Under an agency-based term transfer or career movement policy, after three years in their then work location in a coastal city, the applicant was due to be transferred back to the State capital. The employee's application to remain in the coastal city, to allow them to better manage parenting responsibilities, was rejected by the agency. The employee applied for secondary review of that decision by the Merit Protection Commissioner.

While the applicant originally accepted a fixed three-year term assignment to the coastal city, the applicant applied to stay there permanently after their marriage broke up and the applicant's spouse took their children abroad. A Family Court order required the applicant's spouse to send the children to stay with the applicant every school holidays and, according to the applicant, they could best manage to look after the children during those periods in their present location where the applicant's parents also lived.

Review

The Merit Protection Commissioner found that, having already obtained two short-term extensions, the applicant would have spent almost five years in their present location, the maximum allowed under the agency's term transfer or career movement policy. According to the agency, under the policy, there were no permanent jobs in that location and the time had come to give other interested staff an opportunity to gain experience offered by a placement in a highly sought after district office.

Outcome

Having considered the matter, the Merit Protection Commissioner concluded that the agency had made reasonable attempts to balance organisational requirements with the applicant's needs. By extending the term transfer on two previous occasions, the agency provided the applicant with adequate time to plan for parental responsibilities. That said, the Merit Protection Commissioner recommended that the agency allow the applicant a further, reasonably short period beyond the notional transfer date to allow them to put into place any special arrangements associated with parenting responsibilities and return to the capital city, and further discuss their parenting and development needs as these would relate to the applicant's new job. The applicant's agency accepted the recommendation.

with the Merit Protection Commissioner's binding instructions on procedures but are otherwise not subject to direction in carrying out their duties, except by a Court. There are many advantages to using an ISAC, including their cost effectiveness, flexibility in terms of process and that promotions made on the recommendation of an ISAC are not subject to review. An order of merit established by an ISAC can be used to fill future employment opportunities for twelve months from the date of the original advertisement of the employment opportunity.

There is further information on ISACs on the APSC web page at www.apsc.gov.au/merit/indesac.htm.

Table M5 provides information on the number of ISACs established by agency and the number of candidates considered and recommendations made. During 2003-04, 53 committees were established in 15 agencies. While the number of committees established this financial year decreased by 40 from 2002-03, the number of ISACs established last financial year was unusually high, primarily due to the large number of committees used by the Australian Taxation Office (69 of the 93 committees established in 2002-03 were for the Australian Taxation Office). When the number of committees established this financial year is compared with numbers in recent years in which no unusual recruitment patterns occurred to elevate the ISAC numbers, a general upward trend in the use of ISACs is apparent. For example, the number of ISACs established this financial year is an increase of 23% on the number established in 2001-02, when no unusually large recruitment exercises using ISACs were conducted.

The 53 ISACs established in 2003-04 considered 3338 applications and recommended 648 placements. While these numbers are substantially less than the number of applications considered and placements recommended in 2002-03 given the much higher number of committees established last financial year, they represent a substantial increase on the number of applications considered and the number of placements recommended in 2001-02—an increase of 94% and 103% respectively.

The Australian Taxation Office used 16 committees to assess 1203 applicants, from which 183 placements were recommended. The second highest user was the Department of Immigration and Multicultural and Indigenous Affairs, which used eight committees to consider 1043 applicants and recommend 172 placements. The Department of Foreign Affairs and Trade, which employs a strategic approach to recruitment, regularly conducts bulk rounds for a number of classifications and employs ISACs for these processes. Recommendations for 108 placements were made from just two ISACs used by the Department of Foreign Affairs and Trade in 2003-04. The remainder of the agencies which used ISACs in 2003-04 established between one and four committees to consider between six and 160 applications and make between two and 77 recommendations.

CASE STUDY

BREACHES OF APS CODE OF CONDUCT— PROCEDURAL FAIRNESS AND EVIDENTIARY ISSUES

4

Application

An APS employee applied for review of a decision made by their agency that they had breached the APS Code of Conduct by making offensive comments to their supervisor and by not following, in a prompt and professional manner, directions given to them by the supervisor. Sanctions imposed for these breaches were a reprimand and a reduction in salary.

At the same time these matters were being investigated by the agency, the person who made the above decision was dealing also with another, unrelated allegation made against the same employee.

Review

Having reviewed the matter, the Merit Protection Commissioner concluded that:

- Subject to one exception, the agency had generally complied with its procedures for dealing with suspected breaches of the APS Code of Conduct. The exception related to the requirement set out in Public Service Commissioner's Direction 5.4 that the person who determines whether an APS employee has breached the APS Code of Conduct should be, and appear to be, independent and unbiased. The fact that at the time of the investigation the decision maker was also dealing with another, earlier allegation against the applicant might have caused a reasonable person to conclude that the decision maker was not, or at least did not appear to be, independent and unbiased in this matter.
- There was sufficient evidence that the applicant had failed to follow their supervisor's direction in a prompt manner and had therefore breached subsection 13(5) of the PS Act.

- On the other hand, there was insufficient evidence that the applicant made offensive comments to their supervisor and therefore breached 13(3) of the Act by failing to treat the supervisor with respect and courtesy. That decision relied on a statement by an anonymous witness that the applicant made a particular offensive comment to the supervisor. However, the supervisor did not hear the alleged comment. In the circumstances, even if the comment had been made, the supervisor could not have been offended by it. It is also questionable how much weight can be given to a statement which was both anonymous and not brought to the applicant's attention before it was accepted by the agency.

Outcome

The agency accepted the Merit Protection Commissioner's recommendation that the decision under review be varied to the effect that the applicant breached subsection 13(5) of the Act only and that they be only reprimanded for that breach.

TABLE M5: Independent Selection Advisory Committees Convened 1 July 2003–30 June 2004

Agency	Committees established and completed	Candidates considered	Candidates recommended
Australian Taxation Office	16	1203	183
Department of Immigration and Multicultural and Indigenous Affairs	8	1043	172
Defence	4	42	22
IP Australia	4	32	4
Aboriginal and Torres Strait Islander Services	3	31	4
Social Security Appeals Tribunal	3	43	11
Department of Education, Science and Training	3	55	4
Department of Employment and Workplace Relations	3	75	40
Department of Foreign Affairs and Trade	2	493	108
Department of Health and Ageing	2	33	2
Aboriginal and Torres Strait Islander Commission	1	6	2
Australian Electoral Commission	1	51	8
Australian Protective Service	1	51	9
Australian Public Service Commission	1	20	2
Australian Quarantine and Inspection Service	1	160	77
Total	53	3338	648

WHISTLEBLOWING

The PS Act and Regulations provide a scheme for the reporting of alleged breaches of the Code of Conduct (known as whistleblowing) by APS employees. The scheme provides that Agency Heads must establish procedures for dealing with whistleblowers reports. It is expected that such reports will be made to, and investigated by, the relevant Agency Head in the first instance. A

report may be referred to the Public Service or Merit Protection Commissioner where an APS employee is not satisfied with the outcome of the agency-based investigation or in other specified circumstances, such as where it would be inappropriate for the Agency Head to deal with the report. Information on reports made to the Public Service Commissioner is contained in his Annual Report.

CASE STUDY

FURTHER REVIEW BY MERIT PROTECTION COMMISSIONER NOT ALWAYS JUSTIFIED

4

Application

An APS employee applied for review of a decision made by their agency under regulation 5.23(3)(g) that, in all the circumstances of the case, review, or further review, of the matters raised in their application was not justified.

Review

Having reviewed the matter, the Merit Protection Commissioner established that the applicant had made several allegations about certain actions by their team leaders and manager more than a year earlier. The agency undertook an internal investigation into those allegations and, while it did not find all of the allegations substantiated, it did take appropriate action in relation to those that were substantiated. The agency also acknowledged the applicant's value to the workplace and encouraged the applicant to move forward from those events.

Outcome

The Merit Protection Commissioner concluded that, in all the circumstances of the case, the actions by the agency were reasonable.

Given the age, nature and number of matters raised by the applicant, it was very unlikely that even if they were to be re-reviewed, the applicant would get a very different result or much more satisfaction than from the internal review already conducted by the agency. Often, the only achievable outcome, even when a complaint is otherwise upheld, is an undertaking that a similar matter would be handled differently in the future and this had effectively already happened in this case.

The Merit Protection Commissioner received six whistleblowing reports during 2003-04, four more than he received in 2002-03. One of these reports was withdrawn, two were not accepted, and the remaining three are being considered. Issues raised included management of personnel matters, including leave entitlements and probation, harassment and aspects of recruitment processes.

OTHER FUNCTIONS

Under the PS Act the Public Service Minister can request the Merit Protection Commissioner to inquire into an APS action and report to the Public Service Minister on the results of the inquiry. No requests were received during the reporting period. The PS Act also provides for the Merit Protection Commissioner to inquire into alleged breaches of the Code of Conduct by the Public Service Commissioner and report to the Presiding Officers on the results of such enquiries. There have been no allegations of breaches during the reporting period.

EMPLOYMENT-RELATED SERVICES (FEE-FOR-SERVICE)

The Public Service Regulations provide for the Merit Protection Commissioner to carry out a range of employment-related functions for non-APS persons or bodies. The Merit Protection Commissioner may charge a fee for these services. These services can only be provided in circumstances where the Commissioner is not required by a law of the Commonwealth to perform the function. Some of these services are provided under a standing Memorandum of Understanding and are provided on an ongoing basis. For example, the Merit Protection Commissioner successfully negotiated arrangements with the AFP to provide convenors for Joint Selection Committees (JSCs) for vacancies that arise in that organisation. Related

selection training to AFP employees is also provided.

The Merit Protection Commissioner also has agreements in place with the ACT Government, the Civil Aviation Safety Authority and the Health Insurance Commission to provide a range of selection, appeal and review functions.

Table M6 reports on the services that were provided during the financial year. Table M7 provides details of the number of JSCs established during the same period.

During the financial year there were 170 JSCs conducted, 166 of these for the AFP. While the number of JSCs conducted for the AFP was less than in 2002-03, this work nevertheless continued to provide a substantial amount of the fee-for-service work undertaken on behalf of the Merit Protection Commissioner. Other fee-for-service activities included staff selection training for the AFP; grievance investigations; promotion reviews; disciplinary appeals and other training activities.

TABLE M6: Employment-related services
1 July 2003-30 June 2004

Nature of Service	Number completed
Joint Selection Committees	170
Staff selection training	8
Other Employment-related training	8
Grievance investigations	5
Promotion Review Committees	2
Disciplinary Appeal Committees	2
Mediation	1
Scribing service for Selection Advisory Committee	1

CASE STUDY

PAYMENT OF ALLOWANCE WHERE INCORRECT ADVICE ABOUT ENTITLEMENT PROVIDED

4

Application

An APS employee applied for review of a decision that they would not be reimbursed certain costs on sale of a house following their relocation to take up duty with the agency.

According to the applicant, they had been given incorrect advice about their entitlement to the allowance which they acted on and in so doing incurred costs on the sale of their house which they might not otherwise have incurred.

Review

The Merit Protection Commissioner found that, while the agency's Certified Agreement did not provide an entitlement for new employees who relocate to take up engagement to receive sale and purchase allowance, the applicant had in fact been given incorrect oral advice that they were entitled to this allowance. The agency had acted quickly to correct the advice by sending new advice by email to the applicant at home, however no steps were taken to ensure that the correct information had been received by the applicant.

The applicant claims not to have seen this advice until several days after it was sent, by which time they had entered into an agreement with an agent to sell their home. Due to the timing of the applicant's relocation, the exclusive agreement with the selling agent effectively left the applicant with no option but to proceed with a sale through the agent and pay the agent the commission for the sale, an amount of approximately \$10,000.

Having considered the matter, the Merit Protection Commissioner found that there was no evidence that the applicant had not

acted in good faith on the incorrect information given to them by the agency. The Merit Protection Commissioner explored an option whereby the agency might reach an agreed resolution with the applicant by offering a reasonable amount in settlement of the issue, but agreement could not be reached in this context.

The Merit Protection Commissioner therefore formally recommended to the agency that the applicant be reimbursed a reasonable proportion of the selling agent's fees and advised that it was his view that about 50% of the sum incurred would be a reasonable amount.

Outcome

The agency accepted the Merit Protection Commissioner's recommendation and authorised payment to the applicant under section 73 of the PS Act.

TABLE M7: Joint Selection Committees convened 1 July 2003–30 June 2004

Organisation	Separate Committees established	Applicants	Placements recommended
Australian Federal Police	166	1496	291
ACT Government	4	35	19
Total	170	1531	310

CASE STUDY

RECOMMENDED CHANGE TO SANCTION

4

Application

The agency determined that an employee had unlawfully accessed agency records (their own records and those records of people known to them) in breach of the agency's privacy and confidentiality policy.

The applicant sought a review under regulation 5.24(2)(b) of a decision to impose a sanction of reduction in salary (approximately \$5,000 per year) following a finding of a breach of the Code of Conduct (sections 13(1), (4), (7) and (11) of the Act).

Review

Having reviewed the matter, the Merit Protection Commissioner concluded that the sanction of a salary reduction of 4 pay points was too severe. The Agency concerned provided no substantive reasons in writing for their choice of the most appropriate pay point for the imposition of the sanction. Under the Agency's Certified Agreement, this required substantial studies (or a discretionary agency decision to waive these requirements) supported by on-the-ground and other assessments, before the applicant could be advanced beyond the pay point chosen.

In the Merit Protection Commissioner's view, this implication arising from the pay point chosen had not been adequately addressed, and given other mitigating circumstances it was recommended that the original sanction be set aside and replaced with a lesser sanction of a reduction by 2 pay points. It was, however, suggested the applicant be provided with specific further instructions on the APS Values, Code of Conduct and agency specific behaviours, with an emphasis on those elements that relate to privacy and confidentiality.

Outcome

The agency accepted the Merit Protection Commissioner's recommendation that the decision under review be varied to the effect that the lesser sanction be imposed.