



Australian Government

Australian Public Service Commission

Australian
Public Service
Commissioner
Annual Report

2005–06



Incorporating the Annual Report of the Merit Protection Commissioner

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Part 4

Annual Report of the
Merit Protection Commissioner





Australian Government
Australian Public Service Commission

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 2005 to 30 June 2006 as part of the Australian Public Service Commissioner's Annual Report as required by section 51 of the *Public Service Act 1999*.

The 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 section 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 Australian Public Service Commissioner's Annual Report.

In presenting you with the report on my activities I 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 dark ink, appearing to read 'Jeff Lamond'.

Jeff Lamond
October 2006

Merit Protection Commissioner's review



Jeff Lamond,
Merit Protection
Commissioner

The APS Values, articulated in the *Public Service Act 1999* (the Act), provide a framework of enduring principles of good public administration. One of those Values is that 'the APS provides a fair system of review of decisions taken in respect of APS employees' (section 10(1)(o) of the Act). A key part of my role as Merit Protection Commissioner is to provide support for this Value by providing independent external review of actions affecting individual APS employees.

The review system established under section 33 of the Act and associated regulations enables non-Senior Executive Service (SES) APS employees to apply for review of actions that relate to their employment. My powers as Merit Protection Commissioner are recommendatory only except in the case of a review of a promotion decision by a Promotion Review Committee (PRC), where the decision of the PRC is binding on the agency head. In all other cases, agency heads are required to advise me and the relevant employee of their decision on the recommendation and the reasons for the

decision. The Act provides that, if I am not satisfied with the response to a recommendation I may, after consulting the Public Service Minister, give a report on the matter to the agency minister, the Prime Minister and the Parliament.

In 2005–06, agency heads accepted our recommendations in all but two cases arising from reviews. One of these cases dealt with a review in the Australian Taxation Office (ATO), where the agency accepted the recommendation to vary the findings relating to a breach of the Code of Conduct, but did not agree with the recommendation to vary the sanction imposed. After meeting with the agency to discuss this issue, I agreed with the position taken not to accept the second recommendation. Another case dealt with a review in the Department of Employment and Workplace Relations (DEWR) that was finalised in 2004–05 where, after discussing the relevant issues with the department, I decided not to pursue the matter further.

Information on the number of applications for review, the nature of reviews, and discussion of trends, is provided under Analysis of performance. While the numbers of applications made fluctuates from year to year, I note that numbers this year were not greatly dissimilar to those for 2004–05 in most of the review categories.

Performance information for 2005–06 shows that the achievement of timeliness targets in relation to review work continues to be an issue. I am currently analysing this situation to ascertain whether the current targets should be

revised, focusing in particular on whether the current timelines are reasonable and in the main achievable; whether the current benchmark of 90% of reviews completed within the target time is achievable; what the more common reasons are for not meeting timeliness targets; and what we can change to more effectively complete review work within any specified timelines. I am conscious that the Public Service Regulations provide that it is intended that employees' concerns be dealt with quickly, impartially, and fairly, and that realistic timeliness targets must reflect this tension between responding in a timely manner, and ensuring a fair opportunity for applicants to put forward their case.

I have noted from the *State of the Service Report 2004–05* that, during that financial year, 45 agencies finalised investigations into the behaviour of 865 employees suspected of breaching the Code of Conduct. Around eight percent of employees who were found to have breached the Code of Conduct subsequently lodged an application for review of that determination and/or the sanction imposed, which is a similar result to both 2003–04 and 2002–03. The report noted that release of a good practice guide on the management of suspected breaches of the Code of Conduct was expected to occur in 2006. This guide should help agencies to review and where necessary improve processes associated with determining whether a breach has occurred and to apply sanctions more consistently.

This year I have continued to provide input to the Commission's review of the Act and associated subordinate legislation, as have Commission employees who help me perform my functions. At the start of the review, I accompanied the Public Service Commissioner to meetings with a number of Secretaries and heads of large agencies to identify their concerns. The final settlement this year with the Australian Government Solicitor (AGS) of a

number of threshold issues relating to my role and the review function was particularly useful in terms of assisting with the development of options for change.

In November 2004, under its Linkage Project Scheme, the Australian Research Council approved funding for the *Whistling While They Work: enhancing the theory and practice of internal witness management in public sector organisations* project. The Commission is providing some small non-financial support for this three-year project that is being led by the Key Centre for Ethics, Law, Justice and Governance at Griffith University. This year, the Commonwealth Ombudsman and I jointly sent out letters and surveys to a wide group of Commonwealth agencies to invite their participation in the first stage of data collection for the project. The survey sought advice on agency procedures for managing issues surrounding internal reports of wrongdoing, and asked agencies to indicate whether they would be available to participate in subsequent stages of research.

The Commonwealth Ombudsman is currently undertaking a review of the *Ombudsman Act 1976*. In 2005–06, I met with employees of the office of the Commonwealth Ombudsman and the Department of the Prime Minister and Cabinet, as well other Commission employees, to discuss options for change. The input that I provided in this context was around ensuring that the relevant legislation retains coherence with the rest of the administrative review system.

This year I attended, along with my Adviser and the Regional Directors of the ACT and Victorian regions, the 12th National Public Sector Appeals Conference in Melbourne, 12–14 October 2005. The conference provides an annual forum for the exchange of experiences, ideas and views by senior Commonwealth, State and Territory public sector representatives. Discussions occurred around issues such as review of decisions in public sector employment;

the range of sanctions available in the public sector; consistency of sanctions within agencies; and consistency of sanctions between agencies.

I have continued to take advantage this year of a number of opportunities to promote my role and functions. I have addressed, at their invitation, several APS agencies, including Comcare, the Australian Bureau of Statistics, the Department of Defence (Defence), the ATO and the Department of Agriculture, Fisheries and Forestry. I have presented at a number of APS development programmes and conferences, as well as to several international delegations, including groups from Korea, Indonesia, Thailand and Kazakhstan, on issues related to the APS Values and Code of Conduct.

On two occasions in 2005–06 I was invited, along with the Group Manager Regional Services, to participate in the ATO people issues Technical Quality Review. This process has its source, in the main, from the Technical Quality Review principles used for the review of the technical work associated with the ATO taxpayer clients. It involves the review of a range of case types, including primary reviews of action, code of conduct, non-attendance, multi-faceted, formal under-performance and Australian Industrial Relations Commission or Human Rights and Equal Opportunity Commission complaints.

The Technical Quality Review process measures the quality of decision making processes, through an assessment of transparency, consistency, integrity and administrative soundness, timeliness, effectiveness, and efficiency. It also measures the quality of decisions, through an assessment of correctness at law and appropriateness to clients' requirements and circumstances. It is a commendable and transparent process that provides assurance to the ATO that its people processes and decisions are, in the main, robust and of good quality, while at the same time providing information

about some areas around the margins where improvements could be made.

This year has seen a greater focus on communication within the Regional Services Group through a new combination of regular meetings. Bi-monthly meetings of the Group Manager and Regional Directors are now held in Canberra. These meetings enable the senior managers in the group to meet face to face to plan and discuss review and other issues of strategic importance. A regular fortnightly phone hook-up with all staff is held to provide the opportunity for the Group Manager to provide feedback to the group on outcomes of the Commission Management Committee meetings, and for the group to talk about other relevant issues.

A meeting of all group employees was also held in Canberra, 20–21 June 2006. This was the first time that all employees have met as a group and it provided a valuable opportunity for the exchange of ideas on a range of issues affecting both the Commission and the group, including issues around managing and performing reviews. In particular, the group was able to consider the implications for the review work of the advice, referred to previously, from AGS on my role.

The final settlement of this advice has also enabled work to commence on the evaluation and revision of the information available on review rights. The focus of this work is on both the material available to APS employees and agencies seeking information on review rights, and also material available within the Commission to support the work of the employees who help me perform my functions. My aim is to ensure that clear and up-to-date information is provided on my functions in ways that best meet the needs of employees, their agencies, and the relevant Commission staff. I expect that this work will be finalised in 2006–07.

My statutory functions also include establishing Independent Selection Advisory Committees (ISACs) and other employment-related functions on a fee-for-service basis. The number of ISACs established in 2005–06 was particularly high compared with the number established in previous years, which suggests a greater recognition by agencies of the many benefits offered by using these Committees.

After my discussions last year with the ATO about the benefits of using ISACs, the Regional Director of our ACT office was invited to participate in Core Design team workshops working on improving recruitment and selections. The ATO Workforce Availability Initiative was instigated to develop and implement innovative recruitment, mobility and promotion approaches and processes.

The report from this initiative identified five fundamental changes that will result in substantive improvement in recruitment, promotion and mobility in the ATO, one of those being the combined use of ISACs and third party recruitment industry providers. Work is continuing with the ATO on the practical application of some of the recommendations from this initiative.

The number of fee-for-service functions, other than ISACs, undertaken in 2005–06 was lower than in 2004–05. The majority of the fee-for-service work undertaken on my behalf for non-APS bodies continued to be selection work undertaken under a memorandum of understanding for the Australian Federal Police (AFP).

Outlook for 2006–07

In 2006–07 I will continue to contribute to the review of the Act. I will also continue to focus on the review and update of information on review rights, and to perform activities associated with education about the review function, including my role and functions. This will include the continuation of activities such as speeches and presentations, which 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 focus on the evaluation of timeliness targets for review work with a view to assessing whether revision of these targets is necessary, and how we can more effectively complete review work within any specified timelines.



Jeff Lamond
October 2006

Role, function and structure

Role

The office of the Merit Protection Commissioner, established under section 49 of the Act, is an independent office located with the Australian Public Service Commission (the Commission).

The Merit Protection Commissioner helps agencies meet the requirements of the APS Values and Code of Conduct through administering the statutory review of actions scheme and performing other statutory functions.

Functions

The Merit Protection Commissioner's functions are set out in section 50 of the Act 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 inquiries 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 section 50(1)(e) is concerned, the Public Service Regulations enable the Merit Protection Commissioner to:

- (a) establish ISACs to make 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.

The Merit Protection Commissioner charges a fee for establishing ISACs and for performing employment-related functions.

Organisational structure

The Public Service Commissioner makes employees available to the Merit Protection Commissioner to undertake his casework through the six Commission regional offices.

Each regional office maintains a register of appropriately trained and qualified people 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 nominee to PRCs and ISACs.

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 deals with casework arising in the Northern Territory. The ACT office, with support from other offices as needed, provides employees for coordination and policy support for the Merit Protection Commissioner.

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

Management accountability

Corporate governance

Mr Jeff Lamond continued his appointment as Merit Protection Commissioner during the reporting period.

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

The Public Service Commissioner makes Commission employees available under section 49(2) of the Act to help the Merit Protection Commissioner fulfil his role. These employees are accountable to the Merit Protection Commissioner for performing functions he has authorised.

The Merit Protection Commissioner and the Public Service Commissioner have in place a memorandum of understanding for provision of staff necessary to help the Merit Protection Commissioner perform his functions. The Adviser to the Merit Protection Commissioner is the delegate of the Merit Protection Commissioner in the more substantial review matters.

Review of performance

Outputs and contribution to outcomes 2005–06

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

Performance information, as described in the 2005–06 Portfolio Budget Statement which relates to the Merit Protection Commissioner's functions, can be aggregated, where relevant, from Tables M1 and M2 of this report. Table M1 comprises casework arising from APS agencies and Table M2 includes casework arising from both APS and non-APS agencies.

Table M1: Reviews of actions: workload, work completed and timeliness, 1 July 2005 to 30 June 2006

Cases	Promotion Review Committees	Primary review–Code of Conduct	Primary review–other	Secondary review	Review–former employees
On hand at start of year	34	12	4	11	3
Received during the period	117	42	21	76	4
Reviewed	105	30	4	37	4
Not accepted	1	5	16	33	1
Lapsed or withdrawn	38	7	1	4	0
Total finalised during period	144	42	21	74	5
On hand at end	7	12	4	13	2
Target completion time (weeks)	6	10	10	8	10
Average completion time for reviewed cases (weeks)	8.1	20.74	11.6	17.01	31.57
Completed within target time (number)	37	7	1	7	0
Completed within target time (percentage)	35.23	23.33	25	18.9	0

Table M2: Fee-for-service functions: workload and work completed, 1 July 2005 to 30 June 2006

	Independent Selection Advisory Committees	Other services requested
On hand at start of year	43	42
Received during the period	87	298
Completed	99	249
Lapsed/withdrawn	1	33
Total finalised during the period	100	282
On hand at end	30	58

Analysis of performance

This section provides information on reviews of action the Merit Protection Commissioner undertook during the period 1 July 2005 to 30 June 2006. The review scheme under section 33 of the Act and Part 5 of the Public Service Regulations provides that an APS employee is entitled to review, in accordance with the Public Service Regulations, of an action that relates to their employment. Most matters that affect employees personally in the course of their employment can be dealt with in this way, except where the Public Service Regulations specifically exclude that action from review.

The types of reviews the Merit Protection Commissioner undertakes fall into three main categories: review of certain promotion and engagement decisions; review of breaches of the APS Code of Conduct; and other reviews of actions.

Applications for a promotion review can be made to the Merit Protection Commissioner in certain circumstances by applicants for levels up to and including APS Classification Group 6. A three-member PRC reviews the original selection decision and makes a decision that is binding on the agency head.

Applications for review of a determination that an employee has breached the Code of Conduct or of a sanction imposed for a breach of the Code of Conduct must also be made directly to the Merit Protection Commissioner. An employee may lodge an application directly with the Merit Protection Commissioner in some other specified circumstances, including where

the relevant agency head was directly involved in the action. An application for secondary review of an action can be lodged with the Merit Protection Commissioner where the 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.

Table M1 provides information on the reviews of action received and completed and the timeliness of these reviews during the period 1 July 2005 to 30 June 2006.

This section also provides information on the Merit Protection Commissioner's other responsibilities including that of inquiring into whistleblowing reports, establishing ISACs, and performing other employment-related functions on a fee-for-service basis.

Review of certain promotion and engagement decisions

During 2005–06, 783 individual applications for promotion review were considered relating to 105 cases reviewed. In this report, a case means an application by one or more APS employees for a promotion review of a decision or decisions arising from a discrete agency selection exercise. No applications for review by a PRC of engagement in the APS of a Parliamentary Service employee were received this year.

The numbers of individual applications for promotion review, and PRCs established, increased in 2005–06 compared with 2004–05: 783 individual applications relating to 105 cases

reviewed in 2005–06, 658 individual applications relating to 99 cases reviewed in 2004–05, an increase of 125 applications (19%) and 6 cases reviewed (6%). These figures are not inconsistent with an increase of about 13% in the number of reviewable promotions and engagements gazetted in 2005–06 compared with 2004–05.

Table M3 provides information on the agencies involved in promotion reviews as well as a breakdown of the number of ‘active’ and ‘protective’ applications. Employees who were not promoted in a selection process would make an active application in which they are applying for review of the promotion decision. Employees who have been promoted and may be subject to review or be part of the active applicant promotion review process would make a protective application.

Applications for a promotion review were received in relation to selection decisions made in 20 agencies. The number of agencies in which promotion decisions attracted applications for review is higher this year than in the last two years: 20 in 2005–06, 13 in both 2003–04 and 2004–05. Bulk recruitment exercises in the ATO and the Department of Immigration and Multicultural Affairs (DIMA) that resulted

in high numbers of promotions to reviewable classifications contributed to the number of applications for review lodged during this reporting period. Those agencies, along with two other agencies that had ten or more applications for review, are identified in Table M3. Sixteen other agencies that had less than ten applications for review are not separately identified.

PRCs overturned 48 (5.4%) of the 889 promotion decisions reviewed. This compares to 42 (5%) of 840 promotion decisions in 2004–05, 24 (5.9%) of 404 promotion decisions in 2003–04, 30 (2.8%) of 1071 promotion decisions in 2002–03, and 15 (5.4%) of 277 promotion decisions in 2001–02.

The average time taken to complete promotion reviews was 8.1 weeks; 37 reviews (35.2%) were completed within the target time of 6 weeks. The large number of applications lodged relating to the promotions made as a result of the bulk selection rounds in the ATO and DIMA, and the complexity of determining those applications, given the numbers involved, impacted on the timeliness outcomes for 2005–06. For example, three of these cases each involved more than 100 parties, while ten each involved between 31 and 77 parties.

Table M3: Applications for review of promotion decisions and promotions overturned 1 July 2005 to 30 June 2006 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*
Australian Taxation Office	526	413	113	559	43
Department of Immigration and Multicultural Affairs	162	22	140	194	2
Australian Customs Service	49	33	16	65	1
Department of Defence	12	12	0	21	0
16 other agencies	34	27	7	50	2
Total	783	507	276	889	48

* 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 2005–06, 143 applications for review, other than for review of promotions decisions, were received. In addition, 30 applications were carried over from the previous reporting period. Of the total applications on hand in 2005–06, 75 were reviewed.

The types of matters raised in the applications are shown in Figure M1. Reviews of actions relating to the Code of Conduct accounted for 30 (40%) of the applications reviewed, a higher

percentage of total applications reviewed than for 2004–05 (31%). Other matters reviewed related to conditions of employment, including allowances, salary and leave, 13 (17%); the workplace environment and arrangements, including harassment, management practices and workplace direction, 11 (15%); performance management, including performance appraisal and pay, seven (9%); duties, including selection processes, six (8%); separation entitlements, three (4%); misconduct procedures, two (3%); reimbursement of legal costs, one (1%); and alleged false comment, one (1%).

Figure M1: Cases reviewed by subject

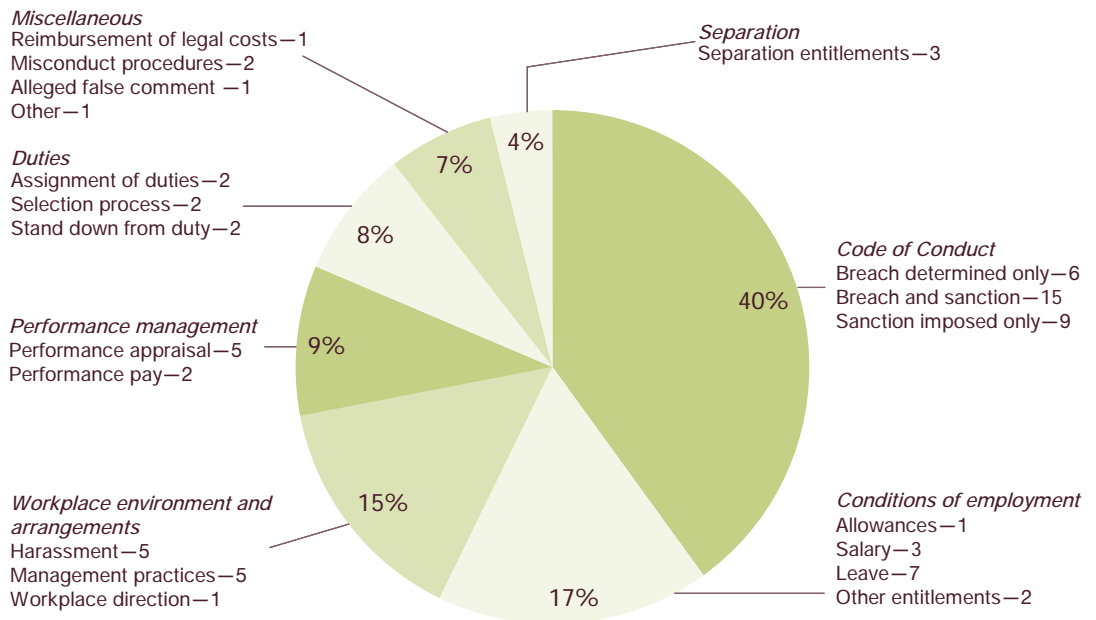


Table M4 provides a breakdown of the number of reviews by agency. As has been the case for the last three years, the agency with the highest number of reviews was the ATO, followed by Centrelink and the Department of Defence.

Breaches of the Code of Conduct

2005–06 saw a slight increase in the number of applications the Merit Protection Commissioner received that related to breaches of the Code of Conduct by APS employees, with 42 applications received in comparison with 41 in 2004–05. In addition, we carried over 12 applications from 2004–05. While the number of applications received this year was lower than the number received in 2003–04 (58 applications), the number received this year is consistent with the number of applications received in both 2001–02 and 2002–03 (43 applications in both years).

The number of reviews completed increased this year to 30, compared with 26 in 2004–05. While

the number completed this year is less than the number completed in 2003–04 (46 completed), it is similar to the number completed in 2001–02 (25 completed) and 2002–03 (29 completed). Of the total applications on hand this year, five were not accepted, seven lapsed or were withdrawn, and twelve were carried over to 2006–07.

Matters considered in reviews of breaches of the Code of Conduct during 2005–06 included: unacceptable behaviour towards employees, clients and managers; excessive or inappropriate use of emails, telephones or the Internet; failure to comply with lawful and reasonable directions; inappropriate browsing of information on clients; failure to act with honesty and integrity, including during the course of a Code of Conduct investigation; incorrect time keeping; failure to disclose or appropriately manage conflicts of interest; failure to report a suspected conflict of interest on the part of another employee; use of Commonwealth vehicle without approval; unapproved absenteeism;

Table M4: Applications reviewed 1 July 2005 to 30 June 2006 by agency

Agency*	Primary review-Code of Conduct	Primary review-Other	Secondary Review	Complaints by former employees	Total
Australian Taxation Office	13	0	6	1	20
Centrelink	4	1	13	0	18
Defence	3	0	4	1	8
Immigration and Multicultural Affairs	0	0	3	1	4
Department of Industry Tourism and Resources	1	1	1	0	3
Geoscience Australia	2	0	0	0	2
Department of Veterans' Affairs	1	0	1	0	2
Comcare	0	0	2	0	2
Department of Education, Science and Training	0	0	2	0	2
14 other agencies	6	2	5	1	14
Total	30	4	37	4	75

* 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.

misuse of resources; failing to act in accordance with the *Privacy Act 1988*; engaging in physical altercations and name calling; incorrectly filling out forms for official purposes; and failing to complete leave applications in a timely manner.

Of the 30 applications reviewed, 14 were for review of both a determination of a breach of the Code of Conduct, and the sanction imposed for the breach. Seven applications sought review of the determination of a breach of the Code of Conduct only, and nine were for review of the sanction imposed. 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 30 completed reviews. Of these, 23 recommended confirming the agency decision (compared with 12 in 2004–05, 20 in 2003–04 and 10 in 2002–03) and seven recommended varying the decision (compared with 12 in 2004–05, 17 in 2003–04 and 14 in 2002–03). There were no recommendations that the decision be set aside. This compared with two such recommendations in 2004–05, nine in 2003–04 and five in 2002–03. Three reviews included a recommendation to vary the sanction imposed, which was the same number of reviews in which such a recommendation was made in 2004–05.

The average time taken to complete a review of a breach of the Code of Conduct was just under 21 weeks. In 2004–05 the average time taken was just under 19 weeks. As noted in the Merit Protection Commissioner's review, an analysis of the factors which are impacting on achievement of timeliness targets has been commenced and will be completed in 2006–07.

Other applications for review

This year we received 101 applications for reviews other than promotion reviews and those related to the Code of Conduct. This was a decrease of 18 (15%) applications for review compared to 2004–05. Eighteen cases were carried over from 2004–05 and 45 (38%) of

the total cases on hand were reviewed during 2005–06 (compared with review of 58 (44%) of the total cases on hand in 2004–05), 50 cases were not accepted, five lapsed or were withdrawn and 19 were on hand at the end of 2005–06. The number of applications received and reviewed this year has continued a downward trend that has been evident in recent years.

Of the 45 cases reviewed, a response about issues raised during the review was requested from agencies in 8 (18%) cases. The number of applications received in 2005–06 that were not accepted, as a proportion of all applications received, was higher than for previous years: 42% in 2005–06 compared with 38% in both 2004–05 and 2003–04, and 36% in 2002–03. The most common reasons for not accepting applications were that the agency head had not yet undertaken the primary review, or that no right of review existed.

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

The Regulations provide for primary review by the Merit Protection Commissioner in certain circumstances.

Regulation 5.24(3) allows employees to apply directly to the Merit Protection Commissioner 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 5.25 allows the agency head, with the agreement of the Merit Protection Commissioner, to refer an application directly to the Merit Protection Commissioner. Examples of situations where this might occur 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 2005–06, 16 employees made direct application to the Merit Protection Commissioner under regulation 5.24(3). Four applications were on hand at the start of the year. Fourteen cases were not accepted, one lapsed, and three were reviewed. Two cases were on hand at the end of 2005–06.

The Merit Protection Commissioner received five applications for review under regulation 5.25(1) during the year. No applications were on hand at the start of the year. Two cases were not accepted and one was reviewed. Two cases were on hand at the end of 2005–06.

Review of the cases under regulations 5.24(3) and 5.25(1) took an average of 11.6 weeks to finalise.

Applications for secondary review

The Regulations also enable 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)). The Merit Protection Commissioner may also undertake a secondary review where the agency head has told the employee the action is not a reviewable action (regulation 5.29(1)(a)).

During 2005–06, 76 applications for secondary review were received: six under regulation 5.29(1)(a) and 70 under regulation 5.29(1)(b). This is a decrease of 11 (13%) applications compared with 2004–05. In addition, 11 applications were on hand at the start of the year: one received under regulation 5.29(1)(a) and ten received under regulation 5.29(1)(b).

Of the 80 applications on hand in 2005–06 under regulation 5.29(1)(b), 30 were not accepted and 4 lapsed or were withdrawn. Thirty-four cases were reviewed during the

period, compared with 42 in 2004–05. Twelve cases were on hand at the end of 2005–06.

Of the seven applications on hand in 2005–06 under regulation 5.29(1)(a), three were not accepted. In relation to two of the cases not accepted, the Merit Protection Commissioner agreed that the actions were not reviewable actions. The third case was not accepted as the application had not been made through the relevant agency head. The Commission considered three cases to determine whether the actions were reviewable actions. In each case, the Merit Protection Commissioner determined that the actions were not reviewable actions. One case was on hand at the end of 2005–06.

Review of the applications for secondary review took an average of 17 weeks to finalise.

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. Four applications under regulation 7.2 were received during 2005–06, and three applications were carried over from 2004–05. Four applications were reviewed, one was not accepted, and two were on hand at the end of the reporting period.

Independent Selection Advisory Committees

The Merit Protection Commissioner may establish an ISAC at an agency head's request, usually on a fee-for-service basis. An ISAC is an independent three-member committee that makes recommendations to an agency head about the suitability of candidates for employment opportunities at classifications in APS Classification Groups 1 to 6.

An ISAC consists of a convenor and APS employee, both nominated by the Merit

Protection Commissioner, and an agency nominee. The Merit Protection Commissioner has issued binding instructions on the procedures and functions of ISACs, but the members of an ISAC are otherwise not subject to direction in carrying out their duties, except by a Court.

ISACs provide streamlined, cost-effective, merit-based selection processes which offer flexibility to accommodate a range of selection assessment techniques. While they can be used for selection processes of any size, they are particularly appropriate for large or sensitive selection processes given that an ISAC is independent and impartial, and that a promotion decision made on the recommendation of an ISAC is not subject to promotion review. An order of merit established by an ISAC can be used to fill future vacancies for 12 months from the initial notification of the employment opportunity.

There is further information on ISACs on the Commission's web site at www.apsc.gov.au/merit/isac.htm.

Table M5 provides information on the number of ISACs established by agency and the number of candidates considered and recommendations made. The number of committees established during 2005–06 was substantially higher than the number established in recent years: 99 committees established in 12 agencies in 2005–06, compared with 58 committees established in 11 agencies in 2004–05, and 53 committees established in 15 agencies in 2003–04. The number of candidates considered and recommended this year was also much higher compared with the last two years, with 7331 candidates considered and 1639 candidates recommended in 2005–06, compared with 2210 candidates considered and 559 candidates

Table M5: Independent Selection Advisory Committees convened 1 July 2005 to 30 June 2006

Agency	Committees established and completed	Candidates considered	Candidates recommended
Department of Defence	27	1248	189
Australian Taxation Office	24	1338	203
Department of Immigration and Multicultural Affairs	18	2820	667
Australian Customs Service	12	976	235
Department of Veterans' Affairs	4	101	14
Department of Foreign Affairs and Trade	3	388	127
Australian Quarantine and Inspection Service	3	348	177
Social Security Appeals Tribunal	2	38	8
Centrelink	2	23	10
Department of Education, Science and Training	2	7	3
Department of Health and Ageing	1	33	5
Australian Public Service Commission	1	11	1
Total	99	7331	1639

recommended in 2004–05, and 3338 candidates considered and 648 candidates recommended in 2003–04.

While the number of ISACs established continues to vary year to year in line with agency recruitment patterns, the increased use this year demonstrates that a number of agencies continue to recognise the many benefits the committees offer. The number of committees established, and candidates considered and recommended, was particularly high this year largely due to increased use of such committees by Defence, DIMA, and the Australian Customs Service. While both Defence and DIMA have regularly used ISACs in the past, their use in 2005–06 was much higher than in recent years: Defence, which established 27 committees in 2005–06, established 15 committees between 2002–03 and 2004–05; and DIMA, which established 18 committees in 2005–06, established 13 committees between 2002–03 and 2004–05. The use of 12 ISACs by the Australian Customs Service in 2005–06 was that agency's first use of ISACs in several years. The ATO continued to be a high user of ISACs, using 24 committees to assess 1338 candidates, from which 203 placements were recommended. The Department of Foreign Affairs and Trade and the Australian Quarantine and Inspection Service continued the employment of strategic approaches towards using ISACs, with high numbers of candidates recommended from small numbers of ISACs.

Whistleblowing

The Act and Regulations provide a scheme for APS employees to report alleged breaches of the Code of Conduct (known as whistleblowing). Agency heads are responsible for establishing procedures for dealing with whistleblower reports. In the first instance, it is expected that such reports will be made to, and investigated by, the relevant agency head. A report may be referred to the Public Service Commissioner or Merit Protection Commissioner where the

APS employee is not satisfied with the findings of the agency-based investigation, or in other specified circumstances, such as where it is not appropriate for the agency head to deal with the matter. Information on reports made to the Public Service Commissioner is contained in her annual report.

The Merit Protection Commissioner received five reports during 2005–06, one more than he received in 2004–05. No reports were on hand at the start of the year. One of the reports received was withdrawn, two reports did not provide evidence in support of the allegations made to justify an inquiry, and two reports were on hand at the end of the reporting period. Issues raised included falsifying information, performance management issues and bullying and harassment.

Other functions

Under the Act, the Public Service Minister can ask 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 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 inquiries. There were no allegations of breaches during the reporting period.

Employment-related services (fee-for-service)

The Regulations provide for the Merit Protection Commissioner to carry out a range of employment-related functions for non-APS people or bodies where the Merit Protection Commissioner is not required by a law of the Commonwealth to perform the function. The Merit Protection Commissioner may charge a fee for these services.

Some of the services are provided under a standing memorandum of understanding on an

ongoing basis. For example, the Merit Protection Commissioner has had for some time an arrangement in place with the AFP to provide convenors for selection panels for vacancies that arise in that organisation. In 2005–06, the AFP reviewed the arrangements that apply to their selection processes with a view to streamlining those processes, and incorporating additional flexibility wherever possible. While that review resulted in some changes to those processes, the AFP confirmed their commitment to the continuation of the existing arrangements, outlined in the memorandum of understanding, for the Merit Protection Commissioner to provide convenors for what are now called Independent Selection Advisory Panels, rather than Joint Selection Committees. The Merit Protection Commissioner also provides related selection training to AFP employees.

Table M6 reports on the services provided during 2005–06. Table M7 provides details of the number of Joint Selection Committees/Independent Selection Advisory Panels established during the same period.

During 2005–06, 227 Joint Selection Committees/Independent Selection Advisory Panels were conducted for the AFP. This number is slightly lower than the number for 2004–05, when 239 such committees were conducted, but higher than the number for 2003–04, when 166 committees were conducted, and reflects that the number of committees established fluctuates each year according to AFP needs. Other fee-for-service work undertaken on behalf of the Merit Protection Commissioner included staff selection training for the AFP; career counselling; and participation as a convenor on selection advisory committees for other non-APS agencies.

**Table M6: Employment-related services
1 July 2005 to 30 June 2006**

Nature of service	Number completed
Joint Selection Committees/ Independent Selection Advisory Panels	227
Training	12
Scribing service for Selection Advisory Committees	4
Career counselling	2
Convenor on Selection Advisory Committees	3
Other	1
Total	249

**Table M7: Joint Selection Committees/
Independent Selection Advisory Panels
convened 1 July 2005 to 30 June 2006**

Organisation	Separate Committees established	Applicants	Placements recommended
Australian Federal Police	227	2608	758

CASE STUDY 1

Breach of the APS Code of Conduct—failure to report suspected misconduct by another employee

Application

An APS employee, an Executive Level 2, applied for review of a decision that they had breached the APS Code of Conduct, in particular:

- by using their time as an APS employee, APS computer facilities and APS information to assist two other persons to establish a private business—subsections 13(1), (2), (8), (10) and (11) of the Act;
- by failing to report to senior management that one of those persons, who also was an APS employee, had a potential conflict of interest—subsections 13(1), (2) and (11) of the Act;
- by failing to disclose to senior management, and failing to take any reasonable steps to avoid, a conflict of interest on the applicant's own part arising from the applicant's job in the agency as a section head in the procurement area and their role in assisting in the establishment of the business in question—subsections 13(1), (2), (7) and (11) of the Act; and
- by breaching the relevant agency's policies on the use of computer resources—subsections 13(1), (2), (8) and (11) of the Act.

Review

Having reviewed the matter, the Merit Protection Commissioner was satisfied that, on occasion, the applicant had used the agency's email facilities to correspond with the two persons in question. For example, after reviewing their website for spelling, grammar and readability, the applicant made some suggestions in that context and also sent them a standard services contract that the applicant had drafted for them. However, the actual work involved in reviewing the website and drafting the contract was performed in the applicant's own time; the relevant policies of the agency in question allowed reasonable personal use of telephone, email and internet services, subject to technical, operational and security considerations; and the agency accepted that the volume of the email involved was "minimal". Also, there was no evidence that, in drafting the contract or reviewing the website, the applicant had actually used any "APS information"—the assistance the applicant provided in these matters was no more than any lawyer could do, particularly one from an English-speaking background.

In the circumstances, the Merit Protection Commissioner could not be reasonably satisfied that the applicant had breached the agency's policies on the use of computer resources, nor that the applicant had used APS information to help establish a private business. Also, as there was insufficient evidence that the proposed business was established with the aim of supplying goods or services to the applicant's agency, the Merit Protection Commissioner could not be reasonably satisfied that, in assisting two friends in a private capacity, the applicant had a conflict of interest.

The more important issue in this case was whether the applicant breached the APS Code of Conduct by failing to report to senior management that one of their friends, who also was an APS employee, had a potential conflict of interest. The decision under review included a finding that the applicant knew that the friend's activities might involve them in a conflict of interest.

Whether there is a duty to report suspected breaches of the APS Code of Conduct will depend on the circumstances of the case. Under the common law contract of employment, there is no general duty to report a fellow employee's misconduct, or even to disclose one's own misconduct. However, a duty to report suspected misconduct may arise as part of the implied duty of loyalty and good faith where the employer's property is involved, or where an employee is in a position of responsibility or trust, such as in a managerial or supervisory role.

Given the relevant statutory framework, a higher standard may apply in the APS. One of the APS Values is that "*the APS has the highest ethical standards*" (paragraph 10(1)(d) of the Act refers) and subsection 13(11) of the Public Service Act provides that "*an APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS*". This indicates that, even if there were no general duty on APS employees to report suspected breaches of the APS Code of Conduct, a duty to report will arise in particular circumstances. In assessing whether an employee has a duty to report suspected misconduct, case law suggests the following factors would be relevant:

- whether there are any specific agency instructions or policies on the issue
- the nature and seriousness of the alleged breach, and whether it involved fraud
- the level of involvement or knowledge, and the level of responsibility, of the employee who may have a duty to report
- whether the employee who may have a duty to report was responsible for the conduct of the employee who committed the suspected breach.

In this case, there was no mention of a "duty to report" in the relevant agency's instructions or policies. Regarding the nature and seriousness of the alleged breach, there were differences of opinion within the management of the agency whether the employee in

question actually had a conflict of interest, and there was no suggestion of fraud. Also, the applicant was not responsible for the conduct of that employee as they worked in a different area of the agency. On the other hand, the applicant was an EL2 employee and, as such, performed a managerial role. In particular, as a section head in the procurement area, the applicant should have appreciated the heightened potential for conflict of interest in procurement-related matters.

Outcome

For these reasons, the Merit Protection Commissioner agreed that the applicant had breached the Code of Conduct, but only on one count—for failing to report that one of their friends, who also was an APS employee, had a potential conflict of interest. As an EL2 section head, the applicant could reasonably have been expected to be aware of their responsibilities as a manager. In the alternative, at the very least, they should have sought advice in the matter.

In the circumstances of the case, the Merit Protection Commissioner recommended that, instead of a sanction being imposed for that breach, the applicant be counselled in relation to their duty to report suspected breaches of the APS Code of Conduct by other employees. In accepting the recommendation, the agency advised that it believed that a fair outcome had been achieved and thanked the Commissioner for his assistance.

CASE STUDY 2

Breach of the APS Code of Conduct—reduction in classification for six months not valid as sanction

Application

In this case, an APS employee, an Executive Level 2, applied for review of a decision that, by misusing their agency's computer resources, they had breached the APS Code of Conduct and of the sanction imposed on them for that breach—a reduction in classification, to EL1, for six months.

Review

The first-mentioned decision was made more than a year before the application for review was lodged. In this context, regulation 5.23(3) of the Public Service Regulations provides among other things:

“Also, the action is not or ceases to be, reviewable action if the person or committee that is, or would be, conducting the review considers that the action should not be reviewable for any of the following reasons:

- (a) the application for review of the action is made more than 1 year after the action happened, or did not happen, and there are no exceptional circumstances explaining why the application was not made within the year;”

Consequently, the Merit Protection Commissioner advised the applicant that, unless they could demonstrate exceptional circumstances explaining why their application for review of the decision that they had breached the Code of Conduct was not made within the year, no further action would be taken in relation to that matter. In the event, no such circumstances were demonstrated.

More importantly, the sanction imposed on the applicant for the breach in question, a reduction in classification for six months, was not a sanction available under subsection 15(1) of the Act. Generally, once an employee's classification has been validly reduced, any move back to the higher classification can occur only by way of promotion (this may be contrasted with a reduction in salary which may, and usually would, be expressed as applying to a specified period). The APS statutory employment framework requires that certain mandatory procedures be complied with before a promotion can occur.

In this context, in another case, the Australian Government Solicitor had advised:

“We do not think, however, that a reduction in classification can be made to operate only for a specified period. We think this sanction is intended to operate until it is worked out – until, for example, the employee is able to secure for themselves a higher classified

job. Unlike a re-assignment of duties at level, a higher classification is not something an Agency Head can give an employee at will. The PS Act framework requires certain procedures to be gone through before a promotion can occur. We do not think a reduction in classification can function as a temporary demotion.”

As an exception, where two classification levels are broadbanded within an agency, there may be other considerations as a move between two classifications in a broadband, if permitted under the relevant certified agreement or AWA, would be excluded from the definition of promotion in direction 4.6 of the *Public Service Commissioner's Directions 1999*. However, EL1 and EL2 classifications had not been broadbanded in the relevant agency.

Outcome

Consequently, the Merit Protection Commissioner advised the agency that:

- the sanction imposed on the applicant was not a sanction that could lawfully be imposed under subsection 15(1) of the Public Service Act and that, for avoidance of doubt, it should be formally set aside
- the matter should be reconsidered and, if the agency head (or delegate) thought it appropriate, a new sanction—one of those available under subsection 15(1) of the Public Service Act, imposed on the applicant
- the applicant would have the right to apply to the Merit Protection Commissioner for review of any new sanction, but any such application would have to be made within the year from the date of that new decision.

CASE STUDY 3

Breach of the APS Code of Conduct—inappropriate behaviour influenced by medical condition

Application

An APS employee applied for review of a decision that, by sending inappropriate email messages to senior management and thereby failing to treat them with respect and courtesy and without harassment, they had breached subsection 13(3) of the Act. This was the latest in a number of similar messages about which the applicant had previously been counselled, reprimanded, directed to attend the Commission training course ‘*Understanding APS Values*’ and had authority to use email suspended for four months. For the latest breach, the applicant was fined \$1230 and required to attend another training course on the APS Values and Code of Conduct.

The applicant argued among other things that at least some of the emails in question could not have been disrespectful as they were “statements of fact”. In particular, as the applicant believed that their divisional head had lied to them, calling the divisional head a liar was “factual” and therefore could not be disrespectful.

Review

The Merit Protection Commissioner sought to explain to the applicant that all APS employees are bound by the APS Values and Code of Conduct. Specifically, subsection 13(3) of the Act provides:

“An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment”.

While the Act does not define these terms, there are general community standards in such matters and they apply to the APS too. There is little doubt that the community expects a standard of behaviour that allows each of us to go to work each day and carry out our duties, including interaction with our co-workers, without having our personal dignity diminished. Also, it would be impossible for a workplace to function effectively if employees were permitted to launch discourteous and disrespectful personal attacks on co-workers and managers where the employer, through its management team, took a decision with which an employee disagreed.

It can never be appropriate to send emails or letters couched in discourteous terms or to speak to or about any other APS employee in a discourteous or disrespectful manner. To accuse a manager, or any other employee, of being dishonest and untrustworthy, or to attach other disparaging labels to them, demonstrates a lack of respect and courtesy, no matter how strongly one may hold to those views. This does not mean that reasonably robust discussion

cannot take place in a work environment, but a line must be drawn where a reasonable person would feel insulted or aggrieved. The Merit Protection Commissioner did not see it as an excuse that the applicant held strong views of the shortcomings of others or that this would mitigate the applicant's responsibility to act with respect and courtesy in the workplace.

Where an APS employee has a dispute with another employee or is aggrieved by a management decision or action, there are clearly defined review or dispute resolution provisions in the Public Service Regulations and various agency certified agreements and these should be used in a constructive manner.

In response, the applicant referred to their medical condition; in effect, that they suffered from chronic depression. In this context, the Merit Protection Commissioner noted that the Australian Government Solicitor had advised in another case that the APS is entitled to demand appropriate standards of conduct, even where an employee's inappropriate behaviour is influenced by medical conditions, and that generally this will not give rise to issues of unlawful discrimination on the ground of disability.

Outcome

The Merit Protection Commissioner recommended that the decisions under review, both in relation to the breach and in relation to the sanction, be confirmed.

CASE STUDY 4

Breach of the APS Code of Conduct—bullying and harassment by an office manager

Application

An APS employee, an Executive Level 1, applied for review of a decision that, by inappropriate behaviour over many months, they had breached the Code of Conduct—in particular, subsection 13(3) of the Act, which provides that:

“An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment”;

and of the sanctions imposed on them for the breaches in question, a \$250 fine and a reprimand.

The applicant argued among other things about the definition of ‘harassment’ and that, during the investigation conducted by their agency, they were denied procedural fairness. In particular, the applicant claimed that the investigator took into account, but did not make the applicant aware of, certain information that the investigator obtained after the interview with the applicant.

Review

Dealing with the procedural issues first, the Merit Protection Commissioner was satisfied that—at least to the extent that the review under the Public Service Regulations provided the applicant with additional opportunity to respond to the substantive evidence on which the conclusions that they had breached the Code of Conduct were based—the applicant was, eventually if not earlier, given adequate opportunity to present their case.

As for what is ‘harassment’, as the matter is generally understood in the Commission, workplace harassment:

- encompasses not only unlawful harassment under anti-discrimination legislation (such as sexual harassment or racial vilification) but a wide range of workplace behaviours that are capable of causing unnecessary hurt or distress to other APS employees;
- involves unwelcome, uninvited and unacceptable behaviour or actions directed at an individual or group, where a reasonable person, having regard to all the circumstances, should have anticipated that the individual or group would be humiliated, offended, intimidated or distressed by the behaviour or actions;
- where intended, can include actions that were intended to humiliate, offend, intimidate or distress, whether or not the behaviour did in fact have that effect;

- where unintended, can include behaviour, which although not intended to humiliate, offend, intimidate or distress, did cause and should reasonably have been expected to cause that effect.

In this case, the applicant was found to have intimidated, lectured and hectored junior staff; inappropriately contacted them at home while they were on sick leave; intensively questioned one of them after one day's leave taken to support their partner during a critical medical procedure; and inappropriately questioned another on return from sick leave, within the hearing of other staff.

As for the sanctions imposed on the applicant, the Merit Protection Commissioner noted that, generally, imposing sanctions for breaches of the Code of Conduct is not primarily about 'punishing' an employee who has failed to meet the required standards of conduct but is intended to operate as a deterrent to others and to confirm that inappropriate conduct is not tolerated in the APS. Also, the more senior the employee, the more they are expected to exemplify the APS Values and Code of Conduct and hence respect and courtesy in their behaviour.

Given the management role the applicant exercised at the time of the relevant incidents, not to mention their training as Harassment Contact Officer, the Merit Protection Commissioner concluded that the reprimand and a fine of \$250, both of which are at the lower end of sanctions provided for in section 15 of the Act, could not be said to have been too severe in the circumstances of the case.

Outcome

The Merit Protection Commissioner recommended that the decisions under review, both in relation to the breach and in relation to the sanctions, be confirmed.

CASE STUDY 5

Complaint by former employee—section 72 of the *Public Service Act 1999*—payment in special circumstances

Application

Section 73 of the Act provides among other things that the Public Service Minister may authorise the making of one or more payments to a person, up to \$100,000 in total, where it is appropriate to do so because of special circumstances that relate to, or arise out of, the payee's employment by the Commonwealth. This power has been delegated to agency heads.

In this case, a former APS employee complained that, because of mistakes by their agency, their income in retirement was less than they could reasonably have expected. The former employee's complaint was referred to the Merit Protection Commissioner by the Commonwealth Ombudsman and investigated under regulation 7.2 (Investigation of complaints by former employees).

Review

The applicant resigned from the APS after some 23 years of service. Before then, for a lengthy period, the applicant performed shift work at the APS6 level and became eligible to have their salary for superannuation purposes increased by the amount of a shift allowance. Subsequently, the applicant was promoted to an EL1 job and, from that date, they were no longer receiving shift allowance and this had implications for their superannuation. Then, after receiving the applicant's intended resignation letter, the agency discovered certain errors affecting the applicant's salary for superannuation purposes and advised ComSuper accordingly—but not the applicant. In fact, the applicant was not informed of these errors until after their resignation took effect and then only indirectly by the inclusion of a 'refund of overpaid super contributions' in a letter from the agency setting out their final entitlements. Because of those errors, the applicant's salary for superannuation purposes had been materially overstated for some years.

The applicant's financial plans for retirement were made with regard to ComSuper annual statements they received over the previous three years. These turned out to be incorrect because of the errors by the agency (which the agency admitted and later apologised for). In the event, the applicant's actual superannuation pension was about \$3,000 a year less than they could reasonably have expected. However, when the applicant applied to the agency for compensation under the CDDA (compensation for detriment caused by defective administration) scheme, their application was rejected on the following grounds:

- despite the fact that the agency provided incorrect information to ComSuper, the applicant did not suffer financial "loss" as they were in receipt of their correct superannuation entitlements

- instead, what they suffered was financial “disappointment” for which no compensation was payable
- ComSuper statements are provided as an estimate and should not be relied upon for making decisions relating to resignations and retirement.

In this context, the Merit Protection Commissioner noted that ComSuper PSS annual member statements clearly included the advice that amounts on the statement were based on information supplied by employers and may be subject to adjustment. However, the purpose of such advices is to protect ComSuper from claims due to errors by employers and not the other way round.

The Merit Protection Commissioner also noted that, even though the applicant may, technically, be in receipt of their correct superannuation entitlements, they were receiving about \$3,000 a year less than they had been led to expect from information provided to them for some years by their agency. The applicant used their annual ComSuper statements (which were based on information provided by the agency) to make key decisions about their retirement, including when to submit their resignation. Moreover, even though the agency discovered the errors when processing the applicant’s final entitlements *before* their resignation date, no advice was given to the applicant until *after* their resignation had taken effect. In other words, because of actions or inaction by their agency, the applicant was not able to reconsider their options while there was still time to do so.

Having considered the matter, the Merit Protection Commissioner concluded that, even if this case did not qualify for payment under the CDDA, it should be reconsidered under section 73 of the Act. As explained in paragraph 14 of APS Commission Circular 2004/4: “Payments in special circumstances under section 73 of the *Public Service Act 1999*”:

“A payment under section 73 might be made where the particular circumstances of a case lead to the publicly defensible conclusion that there is a moral obligation on the Commonwealth to make the payment.”

In the opinion of the Merit Protection Commissioner, this was such a case, particularly but not only in relation to the real financial detriment suffered by the applicant, due to the errors by their agency, in relation to lost opportunities to invest their excess superannuation contributions. The Merit Protection Commissioner also noted that, in *Cornwell v Commonwealth* [2005] ACTSC 14, the Court ordered the Commonwealth to pay the difference between the benefits paid or payable to the plaintiff and the benefits that would have accrued, less the expense of contributing to it, had he joined the superannuation fund in 1965–66 (when he would or could have joined it but for negligent advice by his agency). That decision was subsequently confirmed on appeal.

Outcome

For these reasons, acting under regulation 7.2(2), the Merit Protection Commissioner recommended that the agency compensate the applicant under section 73 of the Public Service Act for the detriment they suffered as a result of the agency's errors. Subsequently, the agency advised the Merit Protection Commissioner that the recommendation had been accepted and that an offer of settlement had been made to the applicant.

CASE STUDY 6

After injury applicant not fit to perform normal duties—whether entitled to payment of salary

Application

An APS employee applied for secondary review by the Merit Protection Commissioner of a decision that, after an injury to a finger due to which they were said not to be fit to perform their normal duties, they were not entitled to salary from December 2001 until August 2002 when they returned to work.

Review

After suffering an injury in October 2001, the applicant applied for compensation but Comcare denied liability. However, on appeal, the Administrative Appeals Tribunal (AAT) decided in December 2003 that the applicant was entitled to compensation, but only until December 2001. The applicant was subsequently medically assessed as fit for modified duties but no such work was found for them until August 2002.

In this context, section 40 of the *Safety, Rehabilitation and Compensation Act 1988* requires employers to take all reasonable steps to provide employees who are undertaking, or have completed, a rehabilitation programme with suitable employment. What is “reasonable” or “suitable” in a particular case will of course depend on the circumstances of the case.

The applicant applied for review of this and related matters a number of times. Finally, in November 2005, the applicant’s agency decided that further review of the relevant action was not justified—regulation 5.23(3)(g) refers. The agency noted that the applicant had previously appealed to or applied for review not only to the Merit Protection Commissioner but also to the AAT and the Human Rights and Equal Opportunity Commission (HREOC).

In particular, in May 2003, the applicant applied to the HREOC for compensation alleging disability discrimination in employment, on the basis that the relevant agency had mismanaged their return to work and, in April 2004, the HREOC terminated the complaint on the ground that it lacked substance. The issues of disability discrimination in employment and inherent requirements of a particular job were discussed by the Full Bench of the Federal Court in *Commonwealth of Australia v HREOC* [1998] 3 FCA. In effect, an employer is not obliged by the Disability Discrimination Act 1992 to change the inherent requirements of a job to suit an employee.

Then, in March 2005, when the applicant sought to re-argue their case before the AAT, the AAT dismissed the application as frivolous or vexatious. The AAT agreed with the applicant’s agency that, in addition to the applicant having a clear sense of entitlement, both as to compensation and a job more fitting to their qualifications than the work they were

engaged to do, the applicant had made no serious attempt to return to work during the relevant period.

In any case, in relation to the applicant's entitlement to salary, as the Merit Protection Commissioner understands the general position under the common law of employment, if an employee is unable to do his or her particular job (that is, not some other job or any other work) because of illness or injury, then—subject to any statutory or contractual compensation entitlements and/or paid leave credits the employee might have, and unless and until they are found another job, their employer is not obliged to pay their salary. However, in certain cases, depending on their means, they might be eligible for some assistance from Centrelink.

In the applicant's case, the applicant was not fit to perform their normal duties and, acknowledging that their redeployment might not have been handled as well as it could have been, no suitable alternative duties could initially be found for them by their agency. Consequently, once the applicant's compensation entitlements ran out in December 2001, their subsequent entitlement to salary depended on their leave credits and—because the applicant had no paid leave credits left, they were not entitled to salary until August 2002 when they returned to work.

Outcome

Having considered the matter, the Merit Protection Commissioner agreed with the applicant's agency that further review of the relevant action was not justified—regulation 5.23(3)(g) refers.

CASE STUDY 7

Site allowance payable to part-time employees—whether HR policy may be legally binding

Application

A part-time APS employee applied for secondary review by the Merit Protection Commissioner of a decision relating to the rate of site allowance they were entitled to while working in a remote locality. When the matter was first reviewed by the relevant agency, the agency head's delegate did not accept the primary reviewer's recommendation that the applicant be paid an additional amount.

Review

On review, it was established that the relevant certified agreement provided that:

“Regular part time employees will receive, on a pro rata basis (other than entitlements in the form of reimbursements, such as travel allowance or motor vehicle allowance), equivalent pay and conditions to those of a full time employee.”

However, following a review of site allowance, the agency endorsed a new remote site allowance policy which allowed employees in receipt of site allowance to seek recalculation of their allowance. The policy specifically provided that, to ensure equitable application of the allowance, the amount of the allowance would be calculated for eligible staff according to a prescribed formula.

In relation to part-time employees, the policy stated:

“When calculating the amount of the allowance for part timers the components in respect of leave fares and additional leave should be reduced to reflect the reduced hours of work. The DA (District Allowance) should be included at the full rate [emphasis added].”

In the applicant's case, when recalculating the applicant's allowances in November 2004, it appears that the agency had calculated their leave fares, additional leave and DA as if they were a full-time employee (a formula not fully consistent with the policy) and then pro rated this according to the certified agreement.

The Merit Protection Commissioner noted that the new site allowance policy, which is more beneficial to part-time employees than the certified agreement, was made *after* the certified agreement was negotiated and formally issued as the agency's (Remote) Site Allowance Guidelines. It is of course open to the agency to change that policy, but not retrospectively.

In the meantime, however, it is the Merit Protection Commissioner's view that, as a matter of fairness and equity to its staff, the agency should honour its published site allowance policy. Further, it is in any event possible that a court would regard such HR policies as legally binding—see, for example, *Nikolich v Goldman Sachs J B Were* [2006] FCA 78 of 23 June 2006.

Outcome

For these reasons, the Merit Protection Commissioner recommended that the agency recalculate the applicant's site allowance in accordance with its (Remote) Site Allowance Guidelines. Subsequently, the agency advised the Merit Protection Commissioner that the recommendation had been accepted.

CASE STUDY 8

Re-assignment of duties under section 25 (for reasons other than misconduct)

Application

An APS employee applied for secondary review by the Merit Protection Commissioner of an assignment of duties decision by their agency and some related matters. The applicant was transferred to another office in the same capital city and raised a number of issues relating to the context in which that decision was made, including that the decision maker was biased against the applicant and that the applicant was assigned to different duties despite the fact that several investigations into allegations against the applicant of harassment of subordinate staff had cleared them of any wrongdoing.

Review

Regulation 5.23(2)(a) provides that an action is not reviewable if it is mentioned in Schedule 1 to the Regulations. Item 10 of Schedule 1 provides that an assignment of duties decision is not reviewable unless it involves:

- a reduction in classification; or
- a relocation to another place; or
- a promotion that meets certain criteria; or
- the assignment of duties that an employee could not reasonably be expected to perform.

As the decision under section 25 of the Public Service Act to assign different duties to the applicant did not involve any of the exceptions in Item 10, the Merit Protection Commissioner concluded that the relevant decision was not reviewable under the Regulations. Nevertheless, for avoidance of doubt, the Merit Protection Commissioner reviewed the issues raised by the applicant relating to the context in which the decision in question was made.

In June 2005, the applicant submitted a formal complaint of unacceptable behaviour by one of their subordinates. The subordinate laid a counter complaint against the applicant. In accordance with the relevant internal instructions, the applicant's manager arranged for a quick assessment to help determine the nature and gravity of the matter. The result of the quick assessment was a recommendation that there should be a more detailed review of all issues surrounding the complaints.

The investigator subsequently engaged by the agency reported in October 2005 that:

- although there may have been a few instances where someone had not treated someone else respectfully and courteously, there were no specific episodes which warranted commencement of Code of Conduct action against anyone
- both the applicant and their subordinate had in several instances considerably overstated the alleged significance of particular episodes
- the allegations by the applicant and their subordinate of systemic workplace harassment or otherwise unacceptable behaviour did not warrant commencement of Code of Conduct action against either of them
- it was neither in the agency's interests, nor in the interests of the directly affected staff, that the persons concerned should continue to work together if there was some responsible and practicable alternative
- it was not desirable that the applicant should continue to work in close organisational proximity with either the subordinate in question or another named person for a least some time (most likely, a period of years).

The investigator recommended, among other things, that one or more of the current staff should be transferred to another office in the city as soon as possible and that:

- whatever transfer(s) were to take place, they were not to involve any express or implied finding of fault on the part of those persons, and that this should be strongly and firmly conveyed to the other(s)
- the least disruptive arrangement would be for the applicant to be moved, since it would be the only single move that would address the relationship issues between all three parties.

Upon receiving the report, the relevant manager provided the applicant with an abridged version of it and the opportunity to comment before a decision in relation to the recommendations in the report was made. The applicant provided a detailed response. In November 2005, the manager advised the applicant that, after considering the report and the applicant's response, and having consulted the HR area, it was decided that the applicant would be transferred to another office of the agency.

Section 25 of the Public Service Act allows an agency head to assign new duties to an APS employee and, as noted above, a right of review of such decisions applies only in certain prescribed circumstances. Further, even if it were moot whether procedural fairness must be afforded in relation to assignment of duties decisions generally, it is nevertheless the case that actions taken under the Public Service Act must be consistent with the overall scheme of the Act, including the APS Values.

In this context the Commission's booklet *Ongoing Employment: recruitment and related issues* relevantly provides (at paragraph 3.19 on page 48) that:

“If a proposed change of duties or relocation has not been sought by the employee, to ensure compliance with the APS Values it is advisable that the employee be consulted before a final decision is made...”

“The extent of consultation and the degree to which an agency takes into account the needs of the employee must be balanced against the operational efficiency of the agency. In the end, while the agency head is required to act fairly and have regard to individual needs, the agency head has the prerogative to make the final decision regarding any assignment of duties, with limited review rights for the employee.”

In this case, it was clear that the decision maker had considered the applicant's views and had also sought independent advice about how to proceed. In particular, at the conclusion of the investigation, the manager gave the applicant adequate opportunity to put forward their views before acting on any of the report's recommendations. In assigning the applicant to different duties, the manager adopted the recommendation that the investigator thought would be the least disruptive, since moving the applicant was the only single move that would address the relationship issues between all three parties.

Outcome

In the circumstances, the Merit Protection Commissioner was reasonably satisfied that the decision to assign the applicant to new duties was consistent with the requirement to act fairly and to balance the needs of individuals with those of the operational efficiency of the agency.