



**Australian Government**  
**Australian Public Service  
Commission**

*Australian Public Service  
Commissioner*  
***annual report***

**2007-08**

Incorporating the Annual Report of the Merit Protection Commissioner



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*Part four*

*Annual report of the  
Merit Protection  
Commissioner*





## MERIT PROTECTION COMMISSIONER

The Honourable Kevin Rudd MP  
Prime Minister  
Parliament House  
CANBERRA ACT 2600

Dear Prime Minister

I am pleased to present the Merit Protection Commissioner's report for the period 1 July 2007 to 30 June 2008 as part of the Australian Public Service Commissioner's annual report required by section 51 of the *Public Service Act 1999*.

This report is prepared in accordance with the 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*. In accordance with the provisions of the *Public Service Act 1999* detailing the administrative arrangements to support the performance of the Merit Protection Commissioner's functions, some of the required information is published within the Australian Public Service Commissioner's annual report.

In presenting you with the report on the activities of the Merit Protection Commissioner I would like to pay tribute to Mr Boris Budak who acted in the role for the first five months of this period and, made a significant contribution to this function over many years. After an APS career spanning some 48 years, he advised of his intent to retire from the Australian Public Service early in the new financial year. I also 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 'Annwyn Godwin'.

Annwyn Godwin

October 2008



## MERIT PROTECTION COMMISSIONER'S REVIEW



Annwyn Godwin  
Merit Protection  
Commissioner

Under the *Public Service Act 1999*, a key part of the role of Merit Protection Commissioner is to provide independent external review of employment related actions affecting individual APS employees. This provides support for the APS Value that 'the APS provides a fair system of review of decisions taken in respect of APS employees'—paragraph 10(1)(o) of the Act.

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

As in previous years, in 2007–08 virtually all recommendations made in relation to applications for review of action were accepted in full by the relevant agency heads.

Information on the number of applications for review during the year, their subject matter and discussion of trends is provided under 'Review of performance'. Compared with last year, the numbers of individual cases have increased in most categories. In particular, there was nearly a 30% increase in the number of PRC cases from the previous year. Uncertainty in the context of an election year, combined with the current efficiency dividend measures, may have had a bearing in this respect. Compared with previous years, there was also a large increase, nearly 56%, in the number of applications for secondary review of actions.

On the other hand, there was a 32% decrease in the number of requests for fee-for-service activities from the previous year. This may also have been due, in part, to the current efficiency dividend measures. It also reflects a decrease in selection work undertaken for the Australian Federal Police.

Over the year the Australian Taxation Office has continued to use streamlined Independent Selection Advisory Committee (ISAC) processes for major national recruitment exercises, using innovative selection methodologies supported by third party industry providers. Indicators show the use of these processes has ensured that the placement of successful candidates is more timely and efficient.

During the year, the Merit Protection Commissioner took advantage of a number of opportunities to promote the role and functions, addressing several APS agencies and other government organisations, including the Departments of Defence and Veterans' Affairs, the Australian Taxation Office and Centrelink. The Merit Protection Commissioner also presented at a number of APS development programmes and conferences, hosted events and provided information on the role and that of the Australian Public Service Commission generally to international delegations, including groups from Bhutan, Thailand, Iraq and Bangladesh. The keen interest of these international delegations in the Australian approach to merit and the review function is a testament to our high standing in these fields.

The National Public Sector Appeals Conference, held in Perth in October 2007, was attended by the Acting Merit Protection Commissioner and the Regional Director, Western Australia. The conference is held annually and provides an opportunity for the exchange of views by senior Commonwealth, State and Territory public sector representatives engaged in external review of employment-related decisions.

Last year new timeliness targets were set for completion of review work, which included a benchmark of 70% of cases to be completed within the new targets. This year, there was an improvement in the percentage of cases completed within target times in two of the three review categories in which applications were reviewed (Tables M1 and M1.1). The exception was applications for secondary review. The decrease in the percentage of these applications completed within the target time can be attributed in part to the large increase in the number of applications received and reviewed, and the increasing complexity of those cases. In particular, the cases are presenting more complex and intertwined issues such as overlaps with bullying and harassment allegations, performance management, stress related claims and earlier formalisation of cases by agencies which leads to more firmly held positions and extended timeframes. The benchmark for completion of cases within target times was reached in relation to PRCs with 73% of cases finalised within the target time even though there was a substantial increase in cases.

The practice of including case studies to illustrate the more significant issues encountered during the year has been continued. The four case studies in question can be found on pages 115–119.

## OUTLOOK

The Merit Protection Commissioner is committed to enhancing the understanding among APS agencies of the role and how statutory and other responsibilities support a high performing APS. Independent reviews are an important pillar in the integrity and accountability framework by holding APS decision makers accountable for the integrity of their decision-making processes—not just the outcomes. In particular, the Commissioner's role involves providing support to improve the quality of APS employment-related decision making and professional working relationships.

In providing these services the Merit Protection Commissioner seeks to:

- uphold fair, consistent, transparent and quality employment related decision making
- encourage positive, respectful and professional working relationships between all parties
- provide ongoing learning and thought leadership based on unique insights into the APS.

The Merit Protection Commissioner's internal priorities for the coming year are to review and streamline our case management methodologies and identify and enhance capability development. A number of key staff are currently devoting their time to updating support material for our review staff and ensuring they have comprehensive and up-to-date tools to support their activities. The Merit Protection Commissioner will be looking at both formal and informal training and development interventions to continue to build the capability of the staff who undertake the review work as members of the dedicated review team and consider opportunities to extend this to the wider APS review community where appropriate.

The Merit Protection Commissioner's external priorities for the coming year are to develop and implement an external communication strategy and look at scoping a project to define and provide better practice advice to agencies on conducting reviews. The Merit Protection Commissioner expects to be sending out a new suite of pamphlets covering the role, the review scheme and the use of ISACs, to agency heads in July 2008. Further development is under way on complementing these pamphlets with more detailed information on the Australian Public Service Commission website.

## ROLE, FUNCTION AND STRUCTURE

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 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.

### FUNCTION

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 review of certain promotion decisions)
- (e) such other functions as are prescribed by the Regulations.

In relation to paragraph (e) above, 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**

In accordance with section 49 of the Act, the staff necessary to assist the Merit Protection Commissioner are made available by the Public Service Commissioner. They are accountable to the Merit Protection Commissioner for the functions they perform on her behalf.

The staff involved are members of the Commission's Regional Services Group who are located in the Commission's six regional offices and comprise both ongoing and non-ongoing employees. Each regional office maintains a register of appropriately trained and qualified people who are available, as required, for non-ongoing employment. This is in addition to a separate register of APS employees approved to act as members of 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. In addition, the Victorian office deals with cases arising in Tasmania and the South Australian office deals with cases arising in the Northern Territory. The review casework is managed by a dedicated review team, which draws on regional office employees with the appropriate skills and capabilities. With support from other offices as needed, the Australian Capital Territory office also provides 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](http://www.apsc.gov.au)>.

## **MANAGEMENT ACCOUNTABILITY**

### **CORPORATE GOVERNANCE**

Mr Boris Budak, Adviser to the Merit Protection Commissioner, acted as Merit Protection Commissioner for the period July to November 2007. Ms Annwyn Godwin acted as Merit Protection Commissioner until her appointment was confirmed in January 2008.

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

The Merit Protection Commissioner and the Public Service Commissioner have in place a memorandum of understanding for provision of staff necessary to assist the Merit Protection Commissioner. The Adviser to the Merit Protection Commissioner acts as the main delegate of the Merit Protection Commissioner.

### **REVIEW OF PERFORMANCE**

#### **OUTPUTS AND CONTRIBUTION TO OUTCOMES 2007–08**

The Commission is included in the Department of 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 Portfolio Budget Statement 2007–08 that 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 M1.1 compares the timeliness in handling reviews between 2006–07 and 2007–08.

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 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 specifically excluded by the Regulations.

There are three main categories of reviews of actions conducted by the Merit Protection Commissioner: review of certain promotion decisions, review of breaches of the APS Code of Conduct, and other reviews. Table M1 provides information on the reviews of actions received and completed and the timeliness of these reviews during the year.

Applications for review of promotion decisions up to and including APS classification group 6 jobs can be made by APS employees who were applicants for promotion to those jobs. After assessing the relative merits of the person or persons promoted and of the applicant or applicants for review, a three-member PRC will either confirm or vary the original promotion decision. The PRC’s decision is binding but may be subject to judicial review (see Promotion Review Committees in Table M1).

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 may be made directly to the Merit Protection Commissioner (see Primary reviews—Code of Conduct in Table M1).

Certain other applications for review may also be lodged directly with the Merit Protection Commissioner, for example where the relevant agency head was directly involved in the action (see Primary reviews—other in Table M1).

Other applications for review of an action that may be lodged with the Merit Protection Commissioner are where the applicant has been advised by the agency head that the action is not reviewable or where the applicant is dissatisfied with the outcome of the primary review conducted by the agency head (see Secondary reviews in Table M1).

Former APS employees can apply to the Merit Protection Commissioner for review of their entitlements on separation from the APS (see Complaints by former employees in Table M1).

This part of the report also provides information about the Merit Protection Commissioner’s other functions including: inquiring into whistleblowing reports, establishing ISACs, and performing certain other employment-related functions on a fee-for-service basis.

The following tables provide information on reviews of action the Merit Protection Commissioner undertook during the period 1 July 2007 to 30 June 2008.

**TABLE M1: REVIEW OF ACTIONS—WORKLOAD, WORK COMPLETED AND TIMELINESS, 1 JULY 2007—30 JUNE 2008**

Cases	Promotion Review Committees	Primary reviews—Code of Conduct	Primary reviews—other	Secondary reviews	Complaints by former employees
On hand at start of year	13	14	4	19	0
Received during the period	100	40	14	106	1
Reviewed	78	24	0	54	0
Not accepted	4	9	14	35	1
Lapsed or withdrawn	26	9	0	11	0
Total finalised during period	108	42	14	100	1
On hand at end	5	12	4	25	0
Target completion time (weeks)	8	14	14	14	14
Average completion time for reviewed cases (weeks)	6.71	19.58	0	19.80	0
Completed within target time (number)	57	12	0	20	0
Completed within target time (percentage)	73	50	0	37	0

Table M1.1 compares timeliness figures for 2007–08 with those for 2006–07. In 2007–08 there was an improvement in the percentage of cases completed within target times in two of the three review categories in which applications were reviewed.

**TABLE M1.1: COMPARISON OF TIMELINESS IN HANDLING REVIEWS, 2006–07 AND 2007–08**

Review type	2006–07 Average time to complete reviews and percent completed within target times Weeks (%)	2007–08 Average time to complete reviews and percent completed within target times Weeks (%)
Promotion Review Committees	7.72 (69)	6.71 (73)
Primary reviews – Code of Conduct	19.00 (43)	19.58 (50)
Primary reviews – other	9.75 (80)	0 (0)
Secondary reviews	15.50 (44)	19.80 (37)
Former employees	19.59 (57)	0 (0)

**TABLE M2: FEE-FOR-SERVICE FUNCTIONS—WORKLOAD AND WORK COMPLETED, 1 JULY 2007–30 JUNE 2008**

	Independent Selection Advisory Committees	Other fee-for-service functions
On hand at start of year	36	73
Received during the period	73	213
Completed	90	248
Lapsed/withdrawn	0	29
Total finalised during the period	90	277
On hand at end	19	9

### REVIEW OF CERTAIN PROMOTION AND ENGAGEMENT DECISIONS

Compared with last financial year, there was an increase in the number of both applications for promotion review and of the cases completed this year. In this report, a case means an application by one or more APS employees for review of a promotion decision or decisions arising from a discrete agency selection exercise.

In 2007–08, there were 439 individual applications for promotion review (303 in 2006–07) and 78 cases were completed during the year (45 in 2006–07). However, the number of applications for promotion review and of the cases completed this financial year were still lower than in 2005–06 (783 individual applications for review, and 105 cases completed) and 2004–05 (658 individual applications for review and 99 cases reviewed). The increase in the number of applications for promotion review this year compared to last year is broadly consistent with an increase in the number of reviewable promotions and engagements gazetted in 2007–08 compared to 2006–07.

Table M3 provides information on the agencies involved in promotion reviews as well as a breakdown of the number of ‘active’

and ‘protective’ applications. Unsuccessful candidates for a promotion may lodge an ‘active’ application in which they are applying for review of the promotion in the classification groups of APS 1–6 decision. Employees who have been promoted and whose promotion may be subject to review may lodge a ‘protective’ application.

During the year, applications for reviews were received in relation to promotion decisions made in 21 agencies. Six agencies with 10 or more applications for review are identified in Table M3. Fifteen other agencies that had less than 10 applications for review are not separately identified.

Requests for review by a PRC varied 19 (4.3%) of the 440 promotion decisions reviewed. While this is higher than the percentage of promotion decisions varied last financial year (2.6%), it is comparable with variation rates of about 5% of decisions reviewed in previous years. The largest promotion reviews were those involving promotion decisions in the Department of Immigration, Multicultural and Indigenous Affairs, one with over 100 applications and one with over 60 applications. Most other promotion reviews involved fewer than 10 applications each.

**TABLE M3: REVIEW OF PROMOTION DECISIONS, BY AGENCY 1 JULY 2007—  
30 JUNE 2008**

Agency	Total applications received	'Active' applications received	'Protective' applications received	Promotion decisions considered	Promotion decisions varied*
Department of Immigration Multicultural and Indigenous Affairs	196	31	165	191	3
Australian Taxation Office	114	60	54	78	8
Australian Customs Service	46	23	23	47	1
Centrelink	22	15	7	43	1
Department of Defence	15	10	5	11	2
Australian Bureau of Statistics	14	2	12	26	0
15 other agencies	32	25	7	44	4
Total	439	166	273	440	19

\* An APS employee may make an application for review of one or more promotion decisions. Not all applications are considered by a Promotion Review Committee. 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 2007–08, 161 applications for review, other than for review of promotion decisions, were received. In addition, 37 applications were carried over from the previous reporting period. During the year, the Merit Protection Commissioner completed 78 reviews in this category (two more than in 2006–07).

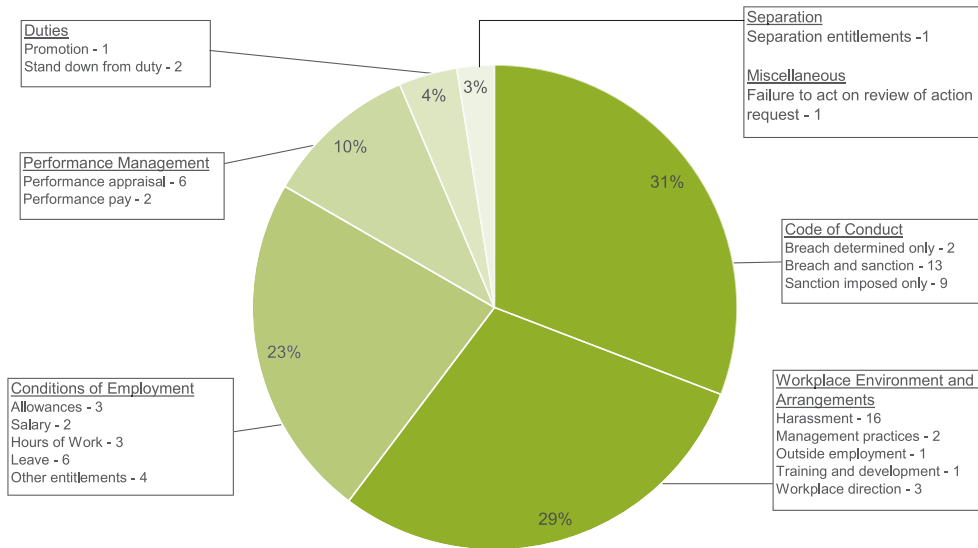
The types of issues raised in the applications are shown in Figure M1. Breaches of the Code of Conduct accounted for 24 applications (31%) of the total. This was a slightly lower percentage than in 2006–07 (37%). Other matters reviewed related to workplace environment, including bullying and harassment, management practices, outside employment, training and development, and workplace direction, 23 (29%); conditions of employment, including allowances, salary, hours of work, leave and

other entitlements, 18 (23%); performance management, including performance appraisal and pay, eight (10%); issues about duties, including promotion and stand down from duty, three (4%); entitlements on separation, one (1.5%); and failure to act on review of action request, one (1.5%).

While it is positive that there has been a decrease in both the number and percentage of reviews in the categories of 'duties', 'separation and miscellaneous' and 'code of conduct' from last year it is also of concern that there is an increase in both the number and percent of reviews on 'harassment' and 'performance appraisal reviews' from last year.

Table M4 provides a breakdown of the number of reviews by agency. As has been the case for the last four years, the agencies with the highest number of applications for review were the Australian Taxation Office, Centrelink and the Department of Defence.

**Figure M1: Cases reviewed by subject**



**Breaches of the Code of Conduct**

This year, there was an increase in the number of applications received that related to breaches of the Code of Conduct, 40 in 2007–08 compared with 35 in 2006–07.

During the year, 24 reviews were completed. They included: inappropriate use of email or Internet; harassment and failure to show courtesy and respect; unauthorised accessing of client information (‘browsing’); and unauthorised use of Commonwealth vehicles.

Of these reviews, 13 involved review of both the determination that the applicant breached the Code of Conduct and the sanction imposed for the breach. Nine applicants sought review only of the sanctions that were imposed on them and two applicants sought review only of the determination that they breached the Code of Conduct.

In each of the 24 completed reviews, the Merit Protection Commissioner made a formal recommendation to the relevant agency that the decision under review be either confirmed (15), varied (7) or set aside (2).

**Other reviews**

This year, 121 applications for review involving matters other than promotion decisions or breaches of the Code of Conduct were received. Of the 54 cases reviewed, the Merit Protection Commissioner made recommendations to set aside or vary the decision in 10 (18%) cases. In all other cases the original actions of the agencies were confirmed.

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

In certain circumstances, the Regulations provide for applications for primary review to be made directly to the Merit Protection Commissioner.

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; or 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

**TABLE M4: REVIEWS COMPLETED, BY AGENCY 1 JULY 2007—30 JUNE 2008**

Agency*	Primary reviews - Code of Conduct	Primary reviews - other	Secondary reviews	Complaints by former employees	Total
Australian Taxation Office	4		16		20
Centrelink	8		10		18
Department of Defence	4		8		12
Australian Customs Service			4		4
Australian Quarantine Inspection Service	2		2		4
Department of Immigration and Citizenship	2		2		4
Australian Securities and Investments Commission			3		3
Child Support Agency			3		3
Department of Education, Employment and Workplace Relations			2		2
Department of Health and Ageing	1		1		2
Department of Employment and Workplace Relations			1		1
Department of Education, Science and Training			1		1
Australian Bureau of Statistics	1				1
Department of Families, community Services and Indigenous Affairs			1		1
Department of Transport and Regional Services	1				1
Department of Veterans' Affairs	1				1
<b>Total</b>	<b>24</b>	<b>0</b>	<b>54</b>	<b>0</b>	<b>78</b>

\* 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.

harassment of the employee for having made a previous application for review of action. Also, regulation 5.25(1) allows the agency head, with the agreement of the Merit Protection Commissioner, to refer an application to the Merit Protection Commissioner in similar circumstances.

During the year, 14 employees made direct application to the Merit Protection Commissioner under regulation 5.24(3), however no cases were reviewed under these provisions. The most common reasons for this were that the cases were not assessed as meeting the specified criteria to be reviewed under this provision, or the actions raised were not reviewable actions. Where applications were assessed as not meeting the specified criteria for primary review by the Merit Protection Commissioner, applicants were advised to lodge their applications with their agency head in the first instance. No applications were made during the year under regulation 5.25(1).

### ***Secondary reviews***

Regulation 5.29(1)(a) enables the Merit Protection Commissioner to undertake a secondary review where the agency head has told the employee an action is not a reviewable action. Also, regulation 5.29(1)(b) enables an APS 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.

During 2007–08, 106 applications for secondary review were received. Compared with 2006–07, this was an increase of 56%. Fifty-four cases were completed during the period.

Matters covered in the review of these applications included issues relating to conditions of employment such as leave arrangements, salary, allowances and hours of

work; bullying and harassment; performance management and performance pay; training and development; and outside employment.

### ***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. During 2007–08, one application was received but could not be reviewed as it was out of jurisdiction.

## **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 nominated by the Merit Protection Commissioner and two members, one nominated by the Merit Protection Commissioner and one nominated by the agency head. The Merit Protection Commissioner has issued binding instructions about the procedures to be followed by ISACs, but they 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 exercises of any size, given that a promotion decision made on the recommendation of an ISAC is not subject to promotion review and that ISACs are independent and impartial, they are particularly suitable for large or sensitive

selection processes. An order of merit established by an ISAC can be used to fill future similar vacancies for 12 months from the initial notification of the employment opportunity.

Table M5 provides information on the number of ISACs established, by agency, and the number of candidates considered and recommendations made. While in 2007–08 there was a decrease in the number of requests for new ISACs (73 compared to 101 in 2006–07), the number of ISACs that were established and that completed their selection exercises during 2007–08 was higher than in 2006–07 (90 compared to 84 in 2006–07). This was due to the high number of ISACs (36) that were on hand at the start of the reporting period. These numbers indicate that the trend established over the last few years of increased use and acceptability of ISACs is continuing. During the year, ISACs considered 10,811 job applications and made recommendations in respect of 2243 candidates.

The Australian Taxation Office and the Department of Defence continued to be the highest users of ISACs during the year. Several other agencies also used ISACs to consider large numbers of candidates which resulted in high numbers of candidates recommended.

## WHISTLEBLOWING

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

**TABLE M5: INDEPENDENT SELECTION ADVISORY COMMITTEES CONVENED, 1 JULY 2007—30 JUNE 2008**

Agency	Committees established and completed	Candidates considered	Candidates recommended
Australian Taxation Office	33	6866	1185
Department of Defence	31	845	191
Australian Customs Service	8	570	123
Australian Quarantine Inspection Service	6	417	171
Department of Immigration and Citizenship	4	1225	348
Department of Foreign Affairs and Trade	3	572	123
Department of Agriculture, Fisheries and Forestry	2	215	77
Centrelink	1	80	15
Department of Families, Community Services and Indigenous Affairs	1	12	5
Department of Education, Employment and Workplace Relations Indigenous Affairs	1	9	5
<b>Total</b>	<b>90</b>	<b>10,811</b>	<b>2243</b>

Commissioner. Information on whistleblowing reports made to the Public Service Commissioner is contained in her annual report.

At the start of 2007–08, there was one whistleblowing report on hand. During the year, five reports were received, five less than in 2006–07. Three of the reports were not accepted as the Merit Protection Commissioner considered that the relevant matters could more appropriately be considered by the relevant agency head, at least in the first instance. Allegations made included failure to act in relation to occupational health and safety issues and non-compliance with merit in a selection decision.

Inquiries were conducted into two reports, both of which concerned allegations of bullying and harassment by managers in the same agency. The inquiries found that there was insufficient evidence available to support recommendations to the agency head that action be commenced under the agency's procedures for determining breaches of the APS Code of Conduct. There was one report on hand at the end of the reporting period.

### **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 Minister on the results of the inquiry. No such 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 to report to the Presiding Officers on the results of such inquiries. No such allegations were received during the reporting period.

### **EMPLOYMENT-RELATED SERVICES (FEE-FOR-SERVICE)**

The Regulations provide that the Merit Protection Commissioner may, but is not required to carry out a range of employment-related functions on behalf of various non-APS bodies such as Commonwealth authorities to which the Act does not apply. The Merit Protection Commissioner may charge a fee for such services. Some of the services are provided on an ongoing basis under a standing memorandum of understanding.

Fee-for-service work undertaken on behalf of the Merit Protection Commissioner included various training and staff selection services for a number of non-APS agencies, including the establishment of Independent Selection Advisory Panels for the Australian Federal Police, as well as investigation of grievances and career advising.

Table M6 reports on the employment-related services provided during 2007–08. Table M7 provides details in relation to the Independent Selection Advisory Panels established for the Australian Federal Police during the same period. In the second half of the year there was a decrease in the use of Independent Selection Advisory Panels—21 completed compared to 197 in the first half of the year.

**TABLE M6: EMPLOYMENT-RELATED SERVICES, 1 JULY 2007—30 JUNE 2008**

Nature of service	Number completed
Australian Federal Police Independent Selection Advisory Panels	218
Training	11
Member of Selection Advisory Committee	10
Scribing services for Selection Advisory Committees	6
Investigation of grievances	2
Career advising	1
<b>Total</b>	<b>248</b>

**TABLE M7: INDEPENDENT SELECTION ADVISORY PANELS CONVENED, 1 JULY 2007—30 JUNE 2008**

Organisation	Number of panels established	Candidates considered	Candidates recommended
Australian Federal Police	218	3461	863

## REVIEW OF ACTIONS CASE STUDIES

The following four review case studies highlight some of the more significant issues encountered during the year by the Merit Protection Commissioner, including that:

- sanctions should be proportionate to the seriousness of the breach
- investigations into complaints of staff must have regard to procedural fairness which includes the right for a person whose interests could be adversely affected by a decision to be notified that the decision is to be made, and provided with sufficient information to allow them to make effective use of the right to respond and present arguments
- administrative law requires decision makers to be free from both actual bias and any reasonable apprehension of bias
- Chapter 5 of the Public Service Commissioner's Directions 1999 includes as a minimum requirement that before a determination is made in relation to a suspected breach, the affected employee must be informed of the details of that

suspected breach and given a reasonable opportunity to make a statement in relation to the suspected breach

- in this context, it is not acceptable to tell the employee that a 'draft', 'in principle' or 'preliminary' decision has been made before the employee has been provided with the opportunity to be heard; this opportunity should precede the formation of a 'draft' decision
- workplace harassment can be intended or unintended, and some subtle patterns of behaviour seen as harassment or bullying, or failing to act with respect and courtesy, involve taking responsibility away from staff without explanation and criticising work without offering constructive feedback
- where managers carry out legitimate management actions or decisions, undertaken in a reasonable way and with respect and courtesy, their actions are not workplace harassment
- managers and their employees have a joint responsibility to address employees' career management issues.

## CASE STUDY ONE

### **Breach of the APS Code of Conduct—late lodgement of application—legal representation—severity of sanction**

#### **Application**

An APS employee applied for review of a decision that by using and home garaging departmental motor vehicles without authorisation they breached subsections 13(2), (5) and (8) of the Act and of the sanction imposed for the breaches—reduction in classification from EL2 to EL1. In addition, they sought review of the decision to recover an amount to cover home garaging charges and Fringe Benefits Tax. These decisions had occurred more than 12 months before the application was made, and the application was lodged on the employee's behalf by their legal representative.

#### **Review**

The Regulations provide that an action is not reviewable if lodged more than one year after the action happened, unless there are exceptional circumstances; and that an applicant appearing before a person conducting a review must do so without representation unless the Merit Protection Commissioner (MPC) agrees otherwise.

Here it was argued that the applicant suffered from serious medical problems which had prevented them from dealing with the matter. After consideration, the MPC agreed to accept the late application for review and allow legal representation.

After investigation, the MPC was reasonably satisfied that the applicant had breached subsections 13(2) and (5) of the Act, when after the earlier approval for permanent home garaging expired, the applicant failed to follow correct procedures in relation to the use and temporary home garaging of vehicles

as required under the agency Chief Executive Instructions.

The agency also found that the applicant had used the cars for private purposes thereby breaching subsection 13(8). After investigation, the MPC could not be reasonably satisfied that the applicant had breached this subsection as there was no evidence of private use of the vehicles.

According to the Commission's *Handling Misconduct* sanctions, apart from acting as a deterrent to other staff by sending messages that bad behaviour will not be tolerated, should be proportionate to the seriousness of the breach. In this case, it was the view of the MPC that the sanction was far too severe. A number of factors led to this view, including that there was no evidence that the applicant derived personal gain from use of the vehicles, rather they were used to further the agency's business; the failure to comply with instructions was a result of procedural breakdown and work pressures, rather than any deliberate misbehaviour; and while the more senior and experienced an employee, the higher the expectation of appropriate behaviour, there was no evidence that the applicant could not be trusted with EL2 responsibilities.

With regard to the debt recovery aspect, it was the view of the MPC that the Chief Executive Instructions did not provide authority to raise the debt as they allowed charges only for permanent home garaging.

#### **Outcome**

Consequently, it was recommended that the agency decision be varied to say that the applicant breached only subsections 13(2) and (5) of the Act, and that the sanction imposed be a reduction in salary for 12 months. Over the year, this reduction roughly equated to the debt originally raised for garaging and Fringe Benefit Tax.

## CASE STUDY TWO

### Complaint about denial of procedural fairness—use of frivolous and vexatious application exemption—adverse findings in departmental report

#### Application

An APS employee applied for secondary review by the MPC after an agency rejected their application for primary review. The applicant contended that they had not been afforded procedural fairness in the conduct of an investigation into staffing matters in their team. The agency rejected their application on the grounds that it was frivolous or vexatious, and that further review was not justified in the circumstances, given the extensive investigation that had already been undertaken.

The MPC decided that the application was not frivolous or vexatious, and the findings in the investigation report were sufficiently critical of the applicant to justify their perception that the outcome was not entirely favourable to them.

#### Review

The agency undertook an investigation into a number of allegations and counter allegations by members of the applicant's work group, including allegations that the applicant had bullied and harassed two members of the team. While this was not an investigation under the agency's Code of Conduct procedures, as the applicant had been accused of behaviour that may ultimately have been found to be a breach of the Code, any investigation would normally be expected to afford them procedural fairness.

The investigation found that the applicant had not demonstrated bullying and harassing behaviour, but also found that a reasonable person would assess the applicant's behaviour towards a team member to have been, at times, lacking in respect and courtesy. While, the agency decided not to commence an investigation under its procedures for determining whether the applicant had breached the Code of Conduct, the applicant remained concerned that the findings included adverse comments about their behaviour and management of the situation.

The applicant asserted that they were denied procedural fairness, since they had not been given the opportunity to respond to criticisms about their behaviour in the final report.

The MPC considered the advice of the Administrative Review Council Best Practice Guide *Decision Making: Natural Justice* which notes that where a person's interests could be adversely affected by a decision, they should be notified that the decision is to be made, and provided with sufficient information to allow them to make effective use of the right to respond and present arguments.

The MPC concluded that in order for the applicant to be afforded procedural fairness they should have been provided with the draft report, including at least the substance of the information provided by witnesses and the investigator's preliminary conclusions, and given the opportunity to comment, before the report was finalised. It was also the opinion of the Commissioner that there was insufficient evidence to support the finding of the investigation that their behaviour lacked respect and courtesy.

## Outcome

The MPC recommended that the agency note the need for investigations into complaints of staff to have regard to procedural fairness and ensure this is reflected in relevant policies; and that a copy of the recommendation be attached to all copies of the report of the investigation to communicate the view that the applicant did not act without respect and courtesy in their dealings with the staff members.

## CASE STUDY THREE

### **Breach of APS Code of Conduct— unauthorised release of information— severity of sanctions—deficiencies in departmental process**

#### **Application**

An APS employee applied for review of a decision that by releasing a document under the FOI Act which contained confidential information about another person they had breached subsections 13 (2), (5), (11) and (13) of the Public Service Act and of the sanctions imposed for these breaches—a reprimand and a fine of 1% of annual salary.

#### **Review**

Subsection 15(3) of the Act provides that agency heads must establish procedures for determining whether an APS employee has breached the Code of Conduct. Chapter 5 of the Public Service Commissioner's Directions 1999 (the Directions) sets out the basic requirements with which such procedures must comply.

When reviewing a decision about a breach of the Code of Conduct, the MPC must consider, as a threshold matter, whether the agency procedures comply with the Directions and, if so, in the case in question, there was substantial compliance with those

procedures – see generally *Walworth v Merit Protection Commissioner & Anor* (2007) FMCA (23 February 2007).

In this case, although the agency procedures complied with the Directions and there was substantial compliance with the procedures, there were a number of areas where, in the opinion of the MPC, the conduct of the agency investigation did not demonstrate good practice. These included that the investigator had been involved in earlier meetings about the case which had led to the decision to undertake Code of Conduct action. In these circumstances, appointing another investigator would have removed any perception of bias.

Also, the applicant was not provided with written notification of the investigation until after it was effectively completed. The notice was attached to a copy of the draft report of the investigator, which included the investigator's conclusions that the applicant had breached the Code of Conduct and the recommended sanctions to be imposed. In respect of the hearing rule, the Administrative Review Council best practice guide *Decision Making: Natural Justice* notes that a notice that refers to a 'provisional' or 'draft' decision, could give rise to an impression that the matter has been decided before the hearing.

Additionally the applicant, after initially refusing to participate in a taped interview—as they were entitled to do—was not given a later opportunity to meet the investigator to put their case. It was only after the draft report was presented to them that they were given a formal opportunity to respond. Finally, much of the evidence collected did not seem to have been relevant to the matter under investigation.

In the Commissioner's opinion, there were reasonable grounds for the agency to find that the applicant had acted without appropriate care and diligence in the course of their employment (subsection 13(2)) and that, by placing their agency in what could have been an embarrassing position, the applicant did not comply with subsection 13(11) of the Act. However, there was insufficient evidence that the applicant failed to comply with a direction to submit their work for quality assessment and therefore breached subsection 13(5).

To support the finding that the applicant breached subsection 13(13), the agency relied on Public Service Regulation 2.1(4) which relates to the duty of an APS employee not to disclose confidential information they obtain in connection with their employment. In the opinion of the MPC, the practical intent of this regulation was not to cover where an FOI officer makes a mistake and releases information that should have been withheld.

### **Outcome**

Consequently it was recommended that the decision that the applicant breached subsections 13(2) and (11) of the Act be confirmed and that the decision that they also breached subsections 13(5) and (13) be set aside. Noting in particular that there were several, fairly significant procedural deficiencies in the subsequent agency investigation, and that the investigation failed to establish that the applicant's mistake was deliberate, it was recommended that the sanction of a reprimand be confirmed while the sanction of a fine be set aside.

## **CASE STUDY FOUR**

### **Alleged bullying and harassment by management—lack of career advancement—responsibility of employee in performance management**

#### **Application**

An APS employee applied for secondary review of their allegations of bullying and harassment by their managers. The agency's review had found that there was insufficient evidence to support the allegations.

#### **Review**

The applicant cited their lack of career progression as the most compelling evidence that they had been subjected to bullying and harassment by their managers over a period of years. The applicant argued they were both well qualified and hard working and found it inexplicable that they had not won the promotions they deserved. In particular, the applicant alleged that previous managers had not allocated work appropriately, questioning the applicant's technical judgement. It appeared that the applicant felt that not allocating technical work was one of the ways in which their manager's behaviour was disrespectful.

The Commissioner's review considered a range of evidence from the applicant, their agency and other witnesses including the managers in question. The perspective of one manager with regard to the behaviours that the applicant saw as disrespectful was somewhat different, and indicated that the applicant was not accepting of feedback and that they continually questioned the allocation of work. The manager was of the view that it was open to them to allocate tasks on the basis of the capabilities of their staff.

The MPC concluded that the applicant's technical skills had been found wanting at times, that it did not seem unreasonable for managers to allocate tasks to those most able to achieve outcomes and that, to a large degree, such decisions were organisational rather than personal.

### **Outcome**

The MPC noted that the lack of career progression had been a long-standing issue and earlier professional intervention and assistance to the applicant to address their career management issues may have prevented the application for review. Equally, it was the responsibility of the applicant to engage in constructive discussion with their supervisors to address developmental issues.

Having said that, there was no evidence to support the applicant's allegations of bullying and harassment and it was recommended that the agency's decision be confirmed.