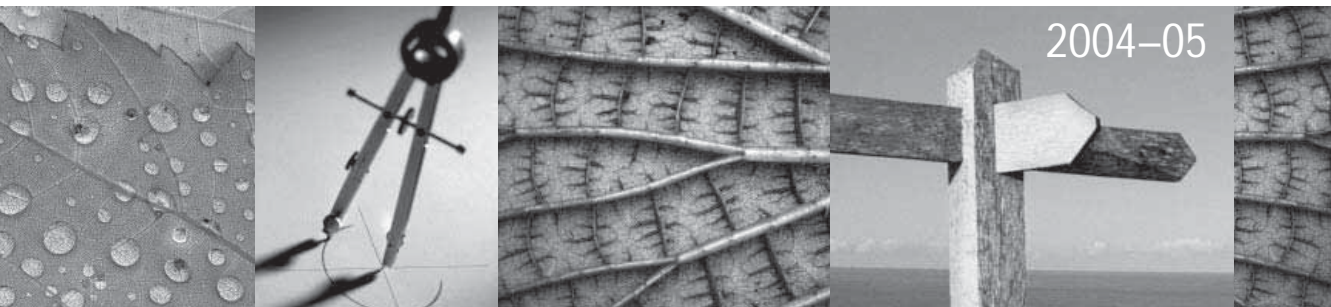




Australian Government
Australian Public Service Commission

State of the Service Report

2004–05



State of the Service Series 2004–05

Personal behaviour

The Code sets out the high standards of behaviour required of APS employees—it establishes behaviours to be achieved rather than proscribing specific offences. An employee whose conduct does not meet the standard of one or more elements of the Code can be found to have breached the Code. Agency heads are required to establish procedures for determining whether an APS employee in their agency has breached the Code.

Taking action in cases of suspected breaches of the Code is primarily aimed at protecting the integrity of the APS and thereby maintaining public confidence in public administration.

This chapter details the extent to which APS employees understand the levels of behaviour expected of them, what agencies are doing to promote this, and how agencies manage, where necessary, instances where employees do not meet the standards expected of them. The statistical information in this chapter, unless otherwise stated, has been drawn from the 2005 agency survey or the corresponding survey of APS employees.

Reporting suspected breaches of the Code of Conduct

Forty-four per cent of the reports of suspected breaches of the Code identified in the agency survey arise from the observations of managers, supervisors or work colleagues. Agencies, therefore, have a strong interest in ensuring that all employees are educated in all aspects of the Code, including how they can report suspected misconduct and the protections against victimisation or harassment for them should they do so.

Awareness

The employee survey indicates almost all employees are either familiar with or have heard of the Code. However, when those employees who said they were familiar with the Code or had heard of it were asked to rate their level of familiarity on a five point scale from very high to low, only 55% of employees rated their level of familiarity as high or very high with a further 39% rating their familiarity as moderate.

APS employees who had either heard of the Code or were familiar with the Code became aware of the Code in a number of ways. The most common method continues to be the steps taken by the current agency (71%), followed by steps taken by the employees themselves (31%), with a further 27% reporting being made aware of the Code through Commission material (an increase of three percentage points).

Around 97% of APS employees consider the Code to be moderately or highly relevant to their daily work.¹ However, there has been a fall in the proportion of employees who consider the Code to be highly relevant to their daily work from 84% in 2003–04 to 81% in 2004–05.

The agency survey continues to show that all agencies use measures of some kind to make employees aware of the Code. These measures are discussed in Chapter 7, ‘Embedding the APS Values and the Code’.²

The employee survey also sought information from employees about their confidence that they would not be victimised or discriminated against by people in their agency, if they made a report about a suspected serious breach of the Code.

Table 6.1: Employee confidence that they would not be victimised or discriminated against for reporting suspected breaches, 2004–05

Person (hypothetically) reported for suspected serious breach	High (%)	Moderate (%)	Low (%)	Not Sure (%)
Employee’s supervisor or manager	45	25	24	6
Manager other than direct supervisor or manager	37	30	25	8
Colleague or peer	41	34	19	6

Source: Employee survey

As shown in Table 6.1, for the different groups, 70%, 67% and 75% of employees had a high or moderate level of confidence that they would not be victimised or harassed as a consequence of making a report that they suspected that another person had seriously breached the Code. Overall, there was a slight decrease since 2003–04 in levels of confidence in relation to reporting people from each group. Employee comments, when provided, commonly reflected this variability in confidence.

I have been made aware that anyone reporting an issue would be protected from victimisation, but at the end of the day it depends who that person is.

¹ Employees who were not familiar with the Code were provided with a copy to read before answering the question on relevance.

² The employee survey gave the following examples of a serious breach: fraud, theft, misusing clients’ personal information, sexual harassment and leaking classified documentation.

I would have to think very seriously about reporting a breach of the Code. Despite an agency's best intentions not to victimise/discriminate against the reporter, I think there is still a high chance that it will happen regardless, especially if the reportee is more senior.

employee survey

While there was a slight fall in employees' confidence about not being victimised or harassed, the percentage of employees who reported they had witnessed a serious breach of the Code remained the same at 11%, and there was no change in the proportion of those employees who reported such suspected breaches (50%).

Employee confidence is positively correlated with the operation of the Values—if an employee agrees that managers and other employees in the agency act in accordance with the Values in their everyday work, then their level of confidence that they would not be victimised or harassed if they reported a suspected breach of the Code is also higher. This is summed up succinctly by one employee.

I have a high degree of trust in my Branch Head, Division Head and the team that I supervise. They are the sort of characters who would not breach the code of conduct so the scenarios in this table do not arise. If they displayed the sort of character that would breach the code of conduct, then they would also probably be the sort of person who may indulge in victimisation.

employee survey

Similarly, the data shows that if an employee has witnessed another employee engaging in behaviour they see as a serious breach of the Code, the employee is more likely to have low confidence in not being victimised or harassed.

Common concerns raised by employees who chose to comment on victimisation or harassment were a perceived lack of any transparent action on the part of agencies and observations of the prior bad experiences of other employees under similar circumstances—though not always as a result of employer action.

I have reported from time to time in my role, but dissatisfied with reporting to know that anything has been actioned and what the outcome is.³

I am aware that reported breaches of the code of conduct in my branch have led to victimisation of the person who reported the breach.

I have been involved in a breach and it was dealt with in a professional manner by my superiors—it was my peers that caused the problem.

employee survey

While this year's results continue to raise concerns about the willingness of many employees to use processes for raising issues relating to misconduct, the APS compares favourably with state and territory jurisdictions.

³ This concern has been observed in previous State of the Service reports. It reveals the tension that exists between the fact that, while APS employees are encouraged to report suspected breaches of the Code, any subsequent investigation of their reports is required to be conducted privately, with the final outcomes being confidential.

In 2004, the WA Commissioner for Public Sector Standards⁴ reported on a survey showing that only 50% of respondents in that jurisdiction believed people who reported wrongdoing were protected from victimisation or harassment. In addition, 21% of the WA public sector employees surveyed indicated that they were aware of an occurrence of unethical behaviour but did not report it, compared to 11% of employees in the APS who reported witnessing a suspected breach of the Code and half of whom did not report it.

Following the survey, the WA Commissioner for Public Sector Standards concluded that WA public sector agencies need to build trust and instil confidence in the process for raising ethical issues and to improve the confidence of employees so that they do not fear adverse consequences if they raise an issue. This finding is also applicable to the APS.

Methods of reporting

Relevant agencies indicated that there had been a significant change since last year in the means by which suspected breaches of the Code had been brought to their attention. The most common means is now through an agency's compliance or monitoring systems such as audit (accounting for 27% of investigations compared to 15% in 2003–04). While conduct identified by supervisors and/or managers (25%) and conduct identified by work colleagues (19%) remain significant, complaints from members of the public or stakeholders have declined as a proportion of investigations from 17% to 12%. Thirteen per cent of investigations arose from other sources, including notification by another agency, state police, external contractors or specialist groups within an agency.

Of the normal methods for reporting suspected breaches, the least-used method continues to be the whistleblowing framework, despite a small increase in such reports from 2% in 2003–04 to 4% this year.

An APS employee who reports a suspected breach of the Code to the Commissioner, the Merit Protection Commissioner or the agency head (or other appropriately authorised persons) through their agency's whistleblower procedures is considered to be a 'whistleblower'.

The APS whistleblowing scheme is provided for in the Act and the Regulations. Section 16 of the Act prohibits the victimisation of, or discrimination against, an APS employee who reports a breach or alleged breach of the Code to an authorised person within the agency. The Regulations require agency heads to establish procedures for dealing with such reports.

One conclusion from the Commission's report, 'Managing Suspected Breaches of the Code of Conduct',⁵ is that, while there is a statutory framework for whistleblowing, many APS employees do not necessarily equate reporting misconduct to a supervisor or other manager with making a whistleblower report.

In last year's State of the Service report, concern was expressed regarding the possible under-reporting of whistleblower complaints because of an inability on the part of both agencies and employees to recognise when a report of an alleged breach of the Code

⁴ Office of the Public Sector Standards Commissioner, *Annual Compliance Report 2004*, November 2004, <<http://www.wa.gov.au/opssc>>

⁵ 'Managing Suspected Breaches of the Code of Conduct' was discussed in the *State of the Service Report 2003–04*.

is also a whistleblowing complaint. This may in part result from agencies designating a wide range of 'authorised persons' to receive reports of suspected misconduct (see below) who may not then treat many of the reports of suspected misconduct as whistleblowing complaints.

Whistleblowing reports

The agency survey indicated that only three small agencies had no procedures in place for dealing with whistleblower reports made by employees under s.16 of the Act the Australian Broadcasting Authority (ABA) (now part of the Australian Communications and Media Authority (ACMA), the Australian Film Commission (AFC) and AIATSIS). A further eight agencies (5 small agencies, 2 medium agencies and 1 large agency) reported that they were developing procedures.

The percentage of employees indicating they had been made aware by their current agency that they could report a suspected breach of the Code to an authorised person in the agency (69%) is similar to last year's. Over three quarters of those employees who were made aware had also been made aware that if they report a suspected breach of the Code to an authorised person they are provided with protection from victimisation and discrimination.

In their responses to the last two surveys, agencies indicated that they received very few reports under the whistleblowing framework. In 2004–05, only 34 (4%) out of a total of 865 formal investigations into suspected breaches of the Code which were finalised were instigated as a result of a report under the agency whistleblower procedures. This is a slight increase from the 2% of finalised cases (25 out of 1083) reported in 2003–04. Even when the intent of the whistleblowing provisions is understood (namely, to protect people making reports), employees may not necessarily have sufficient confidence to initiate the process, despite the protection available against victimisation and discrimination. When employees chose to comment, the potential effect on working relationships was a common concern.

I've never seen a whistle blower survive in the organisation they've tried to protect.

employee survey

The current whistleblowing provisions and their relationship with the Code are to be examined as part of the review of the Act to be conducted by the Commission in 2005–06. The Commission will provide advice to agencies on any changes to the legislative framework that may result from the findings of the review.

People authorised to receive reports

This year's survey asked agencies to provide information on the person or people authorised by the agency head to receive whistleblower reports.

The results in Table 6.2 confirm that there is a wide variation in who is authorised to receive reports within agencies. Only 16 agencies (11 small and 5 medium) rely on the agency head and have not authorised any other people to receive reports.

Overall, the most commonly nominated authorised people are the head of corporate services (44%) and the human resources manager (41%).

Table 6.2: Person(s) authorised to receive whistleblower reports, 2004–05

Categories of 'authorised' persons	Number of agencies reporting each category			
	Small	Medium	Large	All agencies
Head of corporate services	11	14	11	36
HR manager	9	15	10	34
All line managers	0	2	4	6
Employees in a specialist conduct unit	0	0	7	7
Agency head only person	11	5	0	16
All SES	8	5	5	18
SES Band 2s and 3s	1	1	6	8

Source: Agency survey

Size and location influence the numbers of authorised people. The numbers of authorised people tended to increase with agency size. Larger agencies also made greater use of the SES and authorised more people outside Canberra, with five large agencies specifically mentioning having regional, state or territory managers as authorised people. The only agencies which reported authorised people below the EL2 level were the Australian Agency for International Development (AusAID) (an EL1 manager staffing) and Centrelink (APS6 upper).

Whistleblower referrals to the Public Service Commissioner or the Merit Protection Commissioner

In circumstances where it is not appropriate for an agency head to deal with a particular matter, or where the whistleblower is not satisfied with the outcome of the investigation by the agency, an APS employee may refer the report to the Commissioner or the Merit Protection Commissioner.

Table 6.3: Whistleblower reports received during 2004–05

	Carried over from 2003–04	Received	Withdrawn	Not accepted	Under consideration	Finalised
Merit Protection Commissioner	3	4	0	5	0	2
Public Service Commissioner	3	19	0	16	3	3

Source: Merit Protection Commissioner

As Table 6.3 indicates, the Merit Protection Commissioner received four whistleblowing reports during 2004–05, two less than in 2003–04. Three reports were not accepted and

the remaining report and a second report which had not been finalised in 2003–04 were investigated and finalised. Issues raised included: the mismanagement of a range of personnel matters, including leave entitlements and probation; the misuse of Commonwealth funds; and harassment.

The Commissioner received 19 reports in 2004–05, seven more than the number received during 2003–04. Ten of these were from current APS employees, two were from former employees and seven were from private citizens. Only three reports met the criteria for investigation by the Commissioner and these were not finalised in 2004–05. These reports all concerned the conduct of the same person and dealt with a range of matters relating to alleged harassment and the probity of a number of administrative actions and decisions.

The other sixteen disclosures did not meet the criteria for investigation by the Commissioner. As the APS whistleblowing scheme does not cover reporting by members of the public or by former APS employees, advice was provided to complainants on the appropriate ways in which their concerns could be addressed, either by referral to the relevant agency head or to other administrative review bodies. The 10 current APS employees were advised that the scheme requires that, in the first instance, they should direct their allegations to the relevant agency head, unless it is not appropriate for the agency head to deal with a particular matter or where the whistleblower is not satisfied with the outcome of the investigation by the agency.

Matters covered in the sixteen reports ranged from concerns about taxation issues and payments administered by Centrelink to actions in relation to selection processes.

During 2004–05, the Commissioner finalised inquiries into three reports received in the previous year. Two of these contained allegations of abuse of employer powers by an agency head and a senior employee. In these cases the Commissioner concluded that, while some processes and decisions could have been improved and better documented, there were no breaches of the Code. The Commissioner also recommended that the senior employee be counselled about their communication style.

The other report contained allegations that a supervisor provided false information in relation to performance management and, in not approving a leave application, failed to comply with the law. In this matter the Commissioner concluded that there was insufficient evidence to support a recommendation to the agency head to commence action under the procedures for determining breaches of the Code.

Managing suspected breaches of the Code of Conduct

This section examines data on the number of finalised investigations into suspected breaches of the Code by agencies in 2004–05 and how such suspected breaches were managed.

Last year's report contained a summary of the findings of an evaluation conducted by the Commission of the management of suspected breaches of the Code. The Commission acknowledged the desirability of providing agencies with further guidance,

and noted that a good practice guide drawing on the findings of the evaluation would be published in 2005. Work on this good practice guide progressed during the year but, as other priorities intervened, it will not be published until 2006.

Levels of investigation

The agency survey sought information about the number of employees who were the subject of formal investigations into suspected breaches of the Code finalised during 2004–05.

During 2004–05, 45 agencies finalised investigations⁶ into the behaviour of 865 employees suspected of breaching the Code, compared to 48 agencies and 1083 employees in 2003–04. Investigations were finalised in 17% of small agencies, 69% of medium agencies and all large agencies. This result by agency size was similar to that in 2003–04.

Over the last two years the percentage of employees investigated who were found to have breached the Code has remained steady at 63%.

The overall decrease in the number of finalised investigations should be viewed with caution as it is unknown how many cases commenced this year and are still to be finalised (20% of the cases finalised this year commenced prior to 2004–05).

There continues to be a large variation amongst agencies, not explained by agency size, in the proportion of employees subject to investigations into suspected breaches of the Code.

Seven large agencies reported fewer than three investigations for every 1000 employees (ASIC, BoM, FaCS, Finance, Health, DEH, DoTARS) compared to 10 large agencies in 2003–04. CRS, DEST and DIMIA were the only three large agencies to report more than 10 investigations per 1000 employees—DIMIA and CSA both reported more than 20 in 2003–04.

Of the employees investigated for a suspected breach, 68% were from five agencies (Centrelink, ATO, Defence, DIMIA and ComSuper). The inclusion of ComSuper in the five agencies with the highest number of employees investigated is unusual for a medium agency—ComSuper has advised that this was the result of one particular suspected breach where the subsequent investigation identified some degree of involvement of other employees.

Nature of reported breaches

Table 6.4 sets out the frequency with which particular elements of the Code were suspected of being breached in the formal investigations finalised during 2004–05 and the number of agencies that reported having finalised at least one formal investigation involving a suspected breach of that element of the Code.

⁶ 'The agency survey provided the following guidance on what was meant by 'investigation'—'This includes all investigations conducted under an agency's procedures established under section 15(3) of the *Public Service Act 1999* for handling suspected breaches of the Code. It does not include initial investigations that do not proceed to misconduct procedures established under section 15(3) of the *Public Service Act 1999*. It does not include the outcomes of reviews of actions under section 33 of the *Public Service Act 1999*.'

Table 6.4: Elements of the Code suspected of being breached in investigations finalised during 2004–05

Element of the Code	No. of employees investigated for a suspected breach of this element	Percentage of cases where a breach was found	No. of agencies with finalised investigations
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 (s.13(11))	421	58	29
comply with any lawful and reasonable direction given by someone in the employee's agency who has authority to give the direction (s.13(5))	378	69	25
use Commonwealth resources in a proper manner (s.13(8))	360	58	31
when acting in the course of APS employment, treat everyone with respect and courtesy, and without harassment (s.13(3))	284	49	35
behave honestly and with integrity in the course of APS employment (s.13(1))	254	59	33
act with care and diligence in the course of APS employment (s.13(2))	128	73	22
disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment (s.13(7))	118	77	15
when acting in the course of APS employment, comply with all applicable Australian laws (s.13(4))	105	71	17
not make improper use of: inside information, or the employee's duties, status, power or authority; in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person (s.13(10))	63	57	17
not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment (s.13(9))	39	54	12
not disclose certain information without authority (information communicated in confidence or where disclosure could be prejudicial to the effective working of government (s.13(13) and Regulation 2.1—but see the discussion of the <i>Reg 2.1</i> amendments later in this chapter) ⁷	6	33	4
while on duty overseas, at all times behave in a way that upholds the good reputation of Australia (s.13(12))	5	60	3
maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff (s.13(6))	1	100	1

Note: While agencies were asked for data on employees that were the subject of formal investigations, and were specifically asked not to include data on initial investigations that did not proceed to formal misconduct procedures, it is possible that some agencies may have provided information on elements of the Code that were suspected of being breached in both formal and informal investigations.

Source: Agency survey

⁷ The survey question did not distinguish between the two versions of PS Regulation 2.1 that were in force for different periods during 2004–05. Table 6.4 includes the version of the regulation that was in place during the period between 23 December 2004 and 16 June 2005.

While there has been a decrease in the number of employees investigated for suspected breaches of the Code in 2004–05, there has been an increase in the average number of suspected breaches investigated per employee. In 2004–05, 865 employees involved in finalised investigations were investigated for a total of 2162 suspected breaches of elements of the Code representing an average of 2.5 elements of the Code suspected of having been breached by each employee investigated. This compares with 1.8 elements per employee in 2003–04; there was no comparable data from 2002–03.

The increase in the average number of elements of the Code suspected of being breached by employees investigated may not be significant. One event can clearly lead to a suspected breach of more than one element of the Code and an increase could represent a change in an agency's practice to investigate every possible breach of the Code arising from the facts of the case, not just the one originally brought to the agency's attention.

The element of the Code that was suspected of being breached by the highest number of employees overall was s. 13(11) of the Act—'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'. Investigations into possible breaches of s. 13(11) were finalised in three per cent of small agencies (one agency), 42% of medium agencies and 81% of large agencies. The increased use of this element of the Code in 2004–05 (26% more employees investigated for a suspected breach than in 2003–04) may in part reflect its greater use in combination with other elements as noted above.

Table 6.5 identifies the number of employees investigated for particular types of misconduct and the number of agencies that reported having finalised at least one formal investigation for misconduct of that type. By far, the two most common types of misconduct were improper use of the Internet and/or email and improper access to personal information. With the exception of improper use of the Internet and/or email (65%), large agencies accounted for between 82% and 100% of employees investigated for the different types of misconduct.

Table 6.5: Number of employees by types of misconduct in investigations finalised during 2004–05

Type of misconduct	No. of employees investigated for this type of misconduct	Percentage of cases where a breach was found	No. of agencies with finalised investigations
Improper use of Internet/email	294	58	23
Improper access to personal information (e.g. browsing)	140	83	9
Harassment and/or bullying	85	49	19
Inappropriate behaviour of employees (other than harassment or bullying) during working hours (e.g. treating clients or stakeholders disrespectfully)	72	60	19
Conflict of interest	71	73	16
Improper use of resources other than Internet/email (e.g. vehicles)	64	75	16
Improper use of position status (e.g. abuse of power, exceeding delegations)	39	56	14
Fraud other than theft (e.g. identity fraud)	31	52	8
Theft	24	71	12
Private behaviour of employees (e.g. at social functions outside working hours)	13	62	8
Unauthorised disclosure of information (e.g. leaks)	11	73	9
Misuse of drugs or alcohol	4	50	4

Note: An individual employee may be counted against more than one type of misconduct.

Source: Agency survey

The above data suggests that misconduct in areas where the investigation of the suspected breach relies more on physical evidence (e.g. computer records or actions identified through routine audit practices) than on opinion or observation is more likely to result in a finding that the Code has been breached. The Commission's research as part of its report, 'Managing Suspected Breaches of the Code of Conduct', also suggests that another factor influencing the likelihood of a finding that the Code was breached is the different practices in agencies as to the amount of evidence required before commencing an investigation. As noted in last year's report, some agencies delay commencing a formal investigation until a preliminary investigation has been conducted whereas other agencies routinely commence formal investigations as soon as they are notified of a suspected breach.

Data from 2003–04 is not directly comparable with 2004–05 data, as this year's agency survey sought details on the numbers of employees who were investigated for a particular type of misconduct, whereas last year's survey only asked agencies to report on the subject matter of investigations finalised.

Outcomes of finalised investigations

Table 6.6 shows the outcomes of investigations into suspected breaches of the Code finalised by agencies during 2004–05.

Table 6.6: Outcomes of finalised investigations into suspected breaches of the Code (in order of severity), 2004–05

Outcome	No. of employees affected ^(a)	No. of agencies that reported the outcome
Termination of employment	70	18
Reduction in classification	50	14
Reduction in salary	49	15
Reassignment of duties	23	13
Deduction from salary by way of a fine	192	18
Reprimand	257	32
No breach found	229	25
Breach found but no sanction imposed	12	8
Investigation discontinued because of resignation of employee under investigation	91	16
Investigation discontinued but employee counselled	13	6
Other	27	12

^(a) An employee may be counted against more than one outcome.

Note: While agencies were asked for data on employees who were the subject of formal investigations, and were specifically asked not to include data on initial investigations that did not proceed to formal misconduct procedures, it is possible that some agencies may have provided information on elements of the Code that were suspected of being breached in both formal and informal investigations.

Source: Agency survey

In 91 cases (11%), the formal investigation into a suspected breach of the Code was discontinued when the employee under investigation resigned from the APS. There has been no change to the resignation rate in such circumstances since 2003–04.

The employment of 70 employees from 18 agencies was terminated as a consequence of misconduct investigations finalised during 2004–05. Seven medium agencies each terminated the employment of one employee and the remaining terminations occurred in 11 large agencies. Defence, Centrelink and ATO accounted for nearly two-thirds (64%) of terminations. Reductions in classification occurred in three medium agencies and 11 large agencies with two thirds of the reductions reported in Centrelink, ATO and Defence. Fifteen agencies reduced the salary of 49 employees—Centrelink and ATO accounted for 65% of the salary reductions. The most common ‘other’ outcome reported in 15 cases was counselling of an employee found to have breached the Code.

The last two State of the Service reports have noted variation between large agencies in the extent of their use of ‘high impact’ sanctions. High impact sanctions are those

that have the greatest impact on employees—termination of employment, reduction in classification and reduction in salary.

The data from this year's survey, calculated as a proportion of the total number of sanctions imposed by each of the 21 large agencies (ranging from 2 to 239), is consistent with previous findings. The imposition of the 'high impact' varied between 0% and 50% of total sanctions imposed amongst large agencies. 'High impact' sanctions were not used in five large agencies and were greater than a third of total sanctions in two large agencies.

Reviews related to Code of Conduct matters

The Regulations provide non-SES employees with a review right in relation to a determination that they breached the Code and/or the sanction imposed for a breach (other than termination decisions). An application for such a review is lodged directly with the Merit Protection Commissioner.

Table 6.7: Reviews related to Code breaches or sanctions, 2001–02 to 2004–05

	2001–02	2002–03	2003–04	2004–05
Number received	43 ^(a)	43	58	41
Percentage of finalised cases where the original decision was confirmed	64%	34%	43%	46%

Note: ^(a) This figure now excludes a matter dealt with under the *Public Employment (Consequential and Transitional) Amendment Act 1999*.

Source: Merit Protection Commissioner

In 2004–05, the Merit Protection Commissioner received 41 applications for review compared to 58 in 2003–04. This represents a review rate of around 8% of finalised investigations where employees were found to have breached the Code.

During 2004–05, the Merit Protection Commissioner made a formal recommendation to an agency head in 26 cases. In 12 (46%) of these, the Merit Protection Commissioner recommended the decision be confirmed. In a further 12 cases the Merit Protection Commissioner recommended that the agency head vary the decision and in the remaining two cases he recommended setting aside the decision. Only three reviews included a recommendation to vary the sanction imposed. No systemic issues were identified through these reviews.

The data indicates that the percentage of cases in which original decisions are set aside can vary greatly from year to year. This reflects both the small number of reviews and the diverse nature of the different cases.

Bullying and harassment

The Code requires that an APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment (s. 13(3) of the Act).

In 2004–05, 17% of employees reported that they had been subjected to bullying or harassment in the previous 12 months, compared to 15% in 2003–04. In addition, 19 agencies reported that a total of 85 employees had been investigated for bullying or harassment with 49% found to have breached the Code. This was the third most frequent type of misconduct reported in 2004–05; however, it represents only 10% of employees investigated for misconduct.

It is disappointing that there has been a slight increase across the APS in the proportion of employees who report having been subjected to bullying or harassment in their workplace. There is no evidence that this increase can be attributed to particular agencies—where comparable data is available for 20 large agencies, only one agency showed a statistically significant increase⁸ in employees reporting being subjected to bullying and harassment over the last two years. It is not clear from the employee survey data whether the two percentage point increase is a result of increased incidence, or greater awareness, of the types of behaviour that are classed as bullying⁹ or harassment.¹⁰ The slight increase observed this year may also be partially affected by not including a question on the related issue of discrimination in the 2005 employee survey. It may be that this year some employees, in considering their responses to bullying and harassment, included behaviour that may have been reported as discrimination last year.

One response from the employee survey provides a perspective that may be relevant when considering this year's increase.

I do not think this is a systemic issue in [...] but there are certainly individuals at the middle management level who continue to bully and victimise. I think the agency has moved to the point where it has done a good job of changing the culture and raising the issues but it now needs to move to the next (more difficult phase) of actually weeding out individuals who have managed to remain below the radar during the first 'cultural change and awareness raising' type of approach.

employee survey

The Commission is developing a plain English guide on bullying and harassment, provisionally titled 'Respect: A Good Practice Guide to Promoting a Culture Free from Bullying and Harassment in the APS'. It is anticipated that the guide will be released in 2006.

Additional analysis of the employee survey results on reports of bullying and harassment is included in Chapter 9, 'Workplace Diversity'.

⁸ In this context the results were statistically significant at the 95% *Confidence Interval* (see Appendix 2 for more information on confidence intervals).

⁹ Bullying was defined in the employee survey as 'repeated workplace behaviour that could reasonably be considered to be humiliating, intimidating, threatening or demeaning to an individual or group of individuals. It can be overt or covert'.

¹⁰ Harassment was defined in the employee survey as 'offensive, belittling or threatening behaviour directed at an individual or group of APS employees. The behaviour is unwelcome, unsolicited, usually unreciprocated and usually but not always repeated.'

Conflict of Interest

The Code requires that an APS employee:

- must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment (s. 13(7) of the Act)
- must not make improper use of inside information or the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person (s. 13(10) of the Act).

Agencies have a responsibility to ensure that APS employees are aware of the circumstances in which conflict issues may arise and of how to resolve these issues. More commonly, conflict issues will arise where private interests, financial or personal, could conflict with official duties. Cases can also arise where employees have conflicting duties—particularly if an employee performs more than one role. Agencies must ensure employees are aware of the procedures in place to support them in avoiding or managing such conflicts of interest. Agencies also have a responsibility for defining and communicating their expectations of ethical behaviour to non-APS employees including service providers, consultants and people supplied by labour hire firms.

Public confidence in the integrity and impartiality of the APS may be jeopardised if the community perceives that actions of APS employees may have been influenced by conflicts of interest. While the desired course of action is to avoid conflict, this is not always practical and agencies also need to have processes to manage situations where a conflict of interest or duty arises.

Policies and procedures for APS employees

Overall, the agency survey found a significant improvement in agencies' provision of support for employees in relation to their conflict of interest obligations. An increasing percentage of agencies (55%) are providing learning and development activities relating to conflict of interest to particular groups of employees—compared to 48% in 2003–04 and 38% in 2002–03. Agencies were not asked to identify the particular groups.

It is government policy that senior public servants (including those working in statutory authorities) and statutory office holders (as well as Ministers and ministerial employees) provide written statements of their private interests. The percentage of relevant agencies requiring written statements of interests from their SES employees has risen to 87% in 2004–05 from 80% in 2003–04 and 75% in 2002–03. The proportion of all agencies with specific policies and procedures in place on the acceptance of gifts and benefits, including hospitality, has also increased from 84% in the two previous surveys to 90%.

Last year's report noted that the *Review of the Corporate Governance of Statutory Authorities and Office Holders* by John Uhrig (the Uhrig report)¹¹ had highlighted the scope for conflicts of duty to arise where APS employees sit as representatives on boards or committees. While the progressive implementation of the recommendations of the Uhrig report accepted by the Government should reduce the scope for such conflicts of duty for employees sitting on the boards of statutory authorities, APS employees must continue to exercise considerable care in identifying, declaring and managing conflicts

¹¹ J. Uhrig, *Review of the Corporate Governance of Statutory Authorities and Office Holders*, June 2003, <http://www.finance.gov.au/governancestructures/docs/The_Uhrig_Report_July_2003>

of interest and conflicts of duty. Over the last three years, the proportion of agencies with procedures for alerting employees who sit on boards or committees of the need to declare and manage any conflict of interest, has continued to increase from around half to nearly three-quarters (49% in 2002–03 and 74% in 2004–05), with a further 7% of agencies currently developing measures in this area.

Policies and procedures for non-APS employees

Non-public servants are increasingly providing direct services to public sector agencies and government services to the general public, on behalf of APS agencies. The *Commonwealth Procurement Guidelines* specify that officials, departments and agencies are answerable and accountable for any plans, actions and outcomes involving the expenditure of public money. Agencies are expected to include provisions in tender documentation and contracts alerting prospective providers to the public accountability requirements of the Commonwealth.

The Values and the Code are particularly relevant where contractors are delivering services to the public on behalf of the APS. When establishing relationships with providers, agencies need to consider how the Values and the Code might be relevant, how they will be drawn to the attention of contractors (and their employees), and how compliance is to be monitored.

Since last year's agency survey, there has been an increase from 77% to 85% in the percentage of agencies reporting and communicating to non-public servants the agency's expectations that they would behave in accordance with the relevant Values and the Code. Of these agencies, 69% did this through information set out in tender documentation; 70% reported using general clauses in contracts referring to the Values and the Code; and 49% reported including specific contractual clauses regarding only relevant aspects of the Values and the Code. This year there has been a decline in agencies using information in tender documentation and including general clauses in contracts but a corresponding increase in the use of specific contractual clauses.

Twenty-four per cent of relevant agencies reported using non-contractual arrangements such as briefing sessions, protocols, the provision of information and training.

Policies and procedures for both APS employees and non-APS employees

As part of promoting the Values, agencies also need to ensure that contractors are aware that APS employees are bound by the Values and the Code, and that contractors do not place public servants in a position where their impartiality or professionalism may be compromised.¹² In particular, any action that would give rise to a real or apparent conflict of interest on the part of the agency decision-maker must be avoided.

One means of minimising conflicts of interest in contracting out is to develop and promote agency policies dealing with the issue of avoiding conflict of interest when taking up employment after leaving the APS. Over the last three surveys, the proportion of agencies with such arrangements in place has increased from 30% to 48% with a further 15% of agencies reporting measures under development in 2004–05.

¹² Australian Public Service Commission, *APS Values and Code of Conduct in Practice: A Guide to Official Conduct for APS Employees and Agency Heads*, 2003, <<http://www.apsc.gov.au>>

The use of contractual restrictions on the employment of key participants in the tender process by successful tenderers has risen to 50% of agencies. This follows a fall from 52% in 2002–03 to 44% in 2003–04. In 2004–05, there has been a large increase in the proportion of agencies reporting having policies (other than the contractual provisions above) for employees involved in market testing and contracting out processes to manage conflicts of interest from 45% to 60%.

Amendments to Regulation 2.1

Last year's report noted the decision by the Federal Court (*Bennett v HREOC* (2003) FCA 1433) that cast doubt on the validity of Regulation 2.1. This regulation dealt with the unauthorised disclosure of work-related information by APS employees.

To remove uncertainty about the validity of the provision, a replacement Regulation 2.1 was developed; it became effective on 23 December 2004.

The amended Regulation was subject to a notice of disallowance in either House of Parliament and on 16 June 2005 the Senate voted in favour of a motion put by the Opposition to disallow the amended regulation.

Immediately following the vote to disallow the amended regulation, the Commission issued interim advice to agencies about the disallowance, and noted that the Government was considering what steps it might take to ensure an appropriate balance between the ability of public servants, as citizens, to discuss important issues, and the need to ensure the confidentiality of government information where appropriate. In the meantime, the original regulation has revived. Further information on this issue can be found in the Commission's circular 2005/3 *Disallowance of Amendments to the Public Service Regulations 1999—Regulation 2.1 (Disclosure of Information)*.

The uncertainty about Regulation 2.1 and subsequent advice provided by the Commissioner may have resulted in agencies not regarding it as an effective part of the Code. Only six employees in four agencies were investigated for disclosure of information without authority in 2004–05.

Relevant AIRC Decisions

The issue of the behaviour of APS employees has been highlighted in a number of the Australian Industrial Relations Commission (AIRC) decisions during 2004–05, including one finalised on appeal in October 2005. These cases are briefly outlined in the section below.

Failure to show respect and courtesy

An employee in the ATO sought relief from the AIRC¹³ in relation to his demotion and subsequent termination of employment due to findings of breaches of the Code. In dismissing the application, the AIRC noted concern that, despite warnings, the approach

¹³ *Curr v Australian Taxation Office*, U2004/3067 PR953053, 8 November 2004

of the employee in relation to providing co-workers with respect and courtesy did not change and that while the employee may have had legitimate grievances, he chose not to process grievances in the appropriate way.

This decision is significant in a number of respects as it:

- held that where reduction in classification is imposed as a sanction for termination, such a demotion is not reviewable by the AIRC under the unfair termination provisions
- provides useful guidance on the standard of respect and courtesy that applies under the Code. The AIRC held that the correct standard is the 'general community standard' and emphasised the importance of the context and circumstances of the conduct.

Relationship between the Code of Conduct and criminal processes

An employee in DEWR was dismissed for misuse of a departmental credit card. DEWR Code proceedings were delayed until court proceedings were completed and, in the meantime, the employee was assigned other restricted duties. The AIRC¹⁴ in the first instance found it difficult to understand the delay in pursuing the Code process. It said that DEWR had decided that the misconduct did not justify instant dismissal but rather assigned him to other duties. As nothing had changed but the court decision, termination was harsh and DEWR was ordered to reinstate the employee.

An appeal against the reinstatement was upheld by the Full Bench of the AIRC. This decision is significant as it holds that it is appropriate and reasonable to delay taking Code action so as not to prejudice criminal proceedings about the same matter, and that DEWR's decision to place him on alternative restricted duties pending resolution of the criminal proceedings was appropriate and preferable to suspension.

Poor investigatory processes concerning improper use of client records

The employment of an employee in CSA was terminated following an investigation that found a breach of the Code in that the employee improperly accessed the computer records relating to clients, one of whom the employee probably knew. The AIRC¹⁵ concluded the investigation was flawed for a number of reasons and that the termination of employment was harsh, unjust and unreasonable. The employee was awarded compensation but not reinstated.

False and misleading statements at security interview, improper use of email

The employment of an employee in the Attorney-General's Department (AGD) was terminated for breaching the Code by providing misleading information during interviews for an upgrade of a security clearance, failing to handle a conflict of interest

¹⁴ Oakley v Department of Employment and Workplace Relations, U2004/3474 PR952429 and PR954267, 15 December 2004

¹⁵ Demicoli v Commonwealth Minister for Community Services—Child Support Agency, U2004/5583 PR953670, 25 November 2004

appropriately and failing to abide by the department's email policy. The AIRC¹⁶ found that the termination of employment was for a valid reason and that the procedure adopted to effect the termination of employment was appropriate and fair to the employee.

Work-related and private behaviour

An issue that has been problematic in the APS, and the public sector generally, is the extent to which an employer has the right to control the private behaviour of its employees. APS employees are citizens and, like all other employees, are entitled to a private life. Some elements of the Code apply 'at all times'—for example, to behave in a way that 'upholds the APS Values and the integrity and good reputation of the APS'. Other elements of the Code, such as the duty to treat everyone with respect and courtesy and without harassment, apply only 'in the course of APS employment'. Anecdotal evidence suggests that how far these elements of the Code apply to conduct after hours and/or outside the workplace, such as work functions and business trips, continues to be an issue for agencies and employees. One recent APS case about when conduct after hours was work-related is discussed below.

The Commission will be releasing a good practice guide for reporting and dealing with misconduct that will include material on private behaviour outside working hours or the workplace. The forthcoming publication, 'Respect: A Good Practice Guide to Promoting a Culture Free from Bullying and Harassment in the APS', will provide more specific guidance for agencies on measures for preventing and dealing with harassment, including in work-related contexts, after hours and outside the workplace.

An employee's employment at the ABS was terminated after he was found to have breached the Code by using his administrator access to change his football tips in several ABS football tipping competitions after the results were known. The employee contested his termination on the basis that the misconduct was 'out of hours' and did not damage the integrity and reputation of the APS and if any breaches occurred they were minor and the penalty disproportionate.

While the AIRC¹⁷ initially found that the employee had breached the Code, termination was not considered to be an appropriate sanction. The AIRC concluded that because of the range of lesser sanctions available, there was not a valid reason for the termination and ordered the ABS to reinstate the employee.

An appeal by the ABS against the decision to reinstate the employee was upheld by the Full Bench of the AIRC in October 2005.¹⁸ The Full Bench commented that the football tipping was related to the employee's work as most of the other participants in the competition would be co-workers and that he used system administrator privileges for personal gain. The Full Bench considered that these matters gave the conduct a direct and significant relationship to work and concluded the termination was not harsh, unjust or unreasonable. It also commented that 'anything which erodes the trust and honesty between work colleagues is destructive of harmony and cohesion and has the potential to affect the work environment significantly'.

This case reinforces the importance of trust in any employment relationship, particularly for employees in management roles.

¹⁶ *Corey v Attorney-General's Department*, U2004/4942 PR956106, 25 February 2005

¹⁷ *Cunningham v ABS*, U2005/1164 PR958166, 27 May 2005

¹⁸ *Cunningham v ABS*, U2005/3251 PR963720, 10 October 2005

Key chapter findings

Overall, the data supports the finding that the Code is operating appropriately within the APS. Agencies have policies and procedures in place to ensure employees are aware of the standards of behaviour that are required of all APS employees. Almost all employees have heard of the Code and consider the Code to be moderately or highly relevant to their daily work. The number of finalised investigations of suspected breaches of the Code has decreased, along with requests for review of decisions forwarded to the Merit Protection Commissioner. Agency monitoring systems have now become the most common source for reporting suspected breaches of the Code. While the Code itself appears to be working well, the forthcoming good practice guide on managing breaches of the Code will assist agencies to review and improve their procedures for reporting and dealing with suspected breaches.

Improvements are evident in agencies' approaches to handling potential conflicts of interest for both APS employees and non-employees. Policies and procedures such as increased learning and development activities, alerting employees sitting on boards to possible conflicts, and on accepting gifts and benefits are now established in the majority of agencies to assist employees in meeting their obligations. Agencies are making increased use of specific contractual clauses, in addition to general clauses, to ensure non-APS employees are aware of expectations that they will behave in accordance with the Values and the Code.

While the overall situation is satisfactory, some specific results highlight the need to avoid any sense of complacency and for agencies to continue promoting awareness and understanding of the Code. The small increase in the proportion of employees reporting bullying or harassment in the last 12 months cannot be ignored and, similarly, the decrease in the proportion of employees reporting that the Code is highly relevant to their work needs attention. Another cause for concern is the lack of improvement in the number of employees reporting, or prepared to report, a suspected breach of the Code. The Commission has recently developed a learning and development kit called *Being Professional in the Australian Public Service—Values Resources for Facilitators*, which addresses this issue by strongly encouraging employees to report suspected breaches of the Code.

It may be that agencies need to examine existing policies and methods used to promote awareness to ensure their continuing relevance in a dynamic APS subject to changing expectations by Government, APS employees and the public. Equally important is the need to develop an environment and culture where employees feel confident that they can raise suspicions of misconduct, that any subsequent investigation will be fair, that appropriate action will be taken by the agency, and that they will not suffer victimisation or harassment as a result.