



Australian Government
Department of Education

Procedures for Determining Breaches of the APS Code of Conduct and Deciding Sanctions

Department of Education

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1. Application of procedures

- 1.1 These procedures apply in determining whether a person who is an APS employee in the Department of Education, Skills and Employment (the department), or who is a former APS employee who was employed in the department at the time of the suspected misconduct, has breached the APS Code of Conduct (the Code) in section 13 of the *Public Service Act 1999* (the Act).
- 1.2 These procedures apply in determining any sanction to be imposed on an APS employee in the department who has been found to have breached the Code.
- 1.3 These procedures, as they apply to determining whether there has been a breach of the Code, apply to any suspected breach of the Code except for one in respect of which a decision had been made before 1 July 2013 to begin an investigation to determine whether there had been a breach of the Code.
- 1.4 These procedures, as they apply to determining any sanction for breach of the Code, apply where a sanction decision is under consideration on or after 1 July 2013.
- 1.5 In these procedures, a reference to a breach of the Code by a person includes a reference to a person engaging in conduct set out in subsection 15(2A) of the Act in connection with their engagement as an APS employee.

Note: Not all suspected breaches of the Code need to be dealt with by way of determination under these procedures. In particular circumstances, another way of dealing with a suspected breach of the Code may be more appropriate, including performance management.

2. Availability of procedures

- 2.1 As provided for in subsection 15(7) of the Act, these procedures are publicly available on the department's website.

3. Breach decision maker and sanction delegate

- 3.1 As soon as practicable after a suspected breach of the Code has been identified, and the Secretary, or a person authorised by the Secretary has decided to deal with the suspected breach under these procedures, an appropriate Delegate (the breach decision maker) will take responsibility for making a determination under these procedures.

Note: The Australian Public Service Commissioner's Directions 2016 provide that where the conduct of an APS employee raises concerns that relate both to effective performance and possible breaches of the Code, the Agency Head must, before making a decision to commence formal misconduct action, have regard to any relevant standards and guidance issued by the Australian Public Service Commissioner (clause 40).



- 3.2 The person occupying one of the following roles will be the breach decision maker unless it is decided that it is more appropriate to select another departmental employee having regard to all the circumstances:
- First Assistant Secretary, People, Parliamentary, Communication and Assurance Division; or
 - Assistant Secretary, People, Culture and Capability Branch; or
 - Director, People, Culture and Capability Branch
- 3.3 The role of the breach decision maker is to determine in writing whether a breach of the Code has occurred.
- 3.4 The breach decision maker may seek the assistance of an administrative investigator with matters including investigating the alleged breach, gathering evidence and making a report of recommended factual findings to the breach decision maker. It is open to an administrative investigator to make recommendations to the breach decision maker as to whether breaches of the Code have occurred, however it remains the responsibility of the breach decision maker to ultimately determine whether a breach of the Code has occurred.
- 3.5 The person who is to decide what, if any, sanction is to be imposed on an APS employee who is found to have breached the Code must hold a delegation of the power under the Act to impose sanctions (the sanction delegate).
- 3.6 These procedures do not prevent the breach decision maker from being the sanction delegate in the same matter.

Note: Any delegation of powers under the Act that is proposed to be made to a person who is not an APS employee must be approved in writing in advance by the Australian Public Service Commissioner. This is required by subsection 78(8) of the Act. This would include delegation of the power under subsection 15(1) to impose a sanction.

Note: Appointment as a breach decision maker under these procedures does not empower the breach decision maker to make a decision regarding sanction. Only the Secretary or a person who has been delegated the power under section 15 of the Act and related powers, such as under section 29 of the Act, may make a sanction decision.

- 3.7 The breach decision maker and the sanction delegate must have regard to the Australian Public Service Commission's publication, 'Handling Misconduct: A human resources practitioner's guide to the reporting and handling of suspected and determined breaches of the APS Code of Conduct' (<http://www.apsc.gov.au/publications-and-media/current-publications/handling-misconduct>) in making the determination and the decision in relation to sanction.



4. Person or persons making breach determination and imposing any sanction to be independent and unbiased

- 4.1 The breach decision maker and the sanction delegate must be, and appear to be, independent and unbiased.
- 4.2 The breach decision maker and the sanction delegate must, in writing, advise the Secretary or their manager if they consider that they may not be independent and unbiased or if they consider that they may reasonably be perceived not to be independent and unbiased, for example if they are a witness in the matter.

5. The determination process

- 5.1 The process for determining whether a person who is, or was, an APS employee in the department has breached the Code must be carried out with as little formality, and with as much expedition, as proper consideration of the matter allows.
- 5.2 The process must be consistent with the principles of procedural fairness.

Note: Procedural fairness generally required that:

- *the person suspected of breaching the Code is informed of the case against them (i.e. any material that is before the decision maker that is adverse to the person on their interests and that is credible, relevant and significant)*
- *the person is provided with a reasonable opportunity to respond and put their case, in accordance with these procedures, before any decision is made on breach or sanction*
- *the decision maker acts without bias or an appearance of bias*
- *there is logically probative evidence to support the making, on the balance of probabilities, of adverse findings.*

- 5.3 A determination may not be made in relation to a suspected breach of the Code by a person unless reasonable steps have been taken to inform the person of:
 - the details of the suspected breach of the Code (including any subsequent variation of those details); and
 - where the person is an APS employee, the sanctions that may be imposed on them under subsection 15 (1) of the Act.
- 5.4 A person who does not make a statement in relation to the suspected breach is not, for that reason alone, to be taken to have admitted to committing the suspected breach.
- 5.5 For the purpose of determining whether a person who is, or was, an APS employee in the department has breached the Code, a formal hearing is not required.
- 5.6 The breach decision maker or an administrator assisting the breach decision maker, where they consider in all the circumstances that the request is reasonable, must agree to a request made by the person who is suspected of breaching the Code to have a support person present in a meeting or interview they conduct.



6. Sanctions

- 6.1 The process for deciding on sanctions must be consistent with the principles of procedural fairness.
- 6.2 If a determination is made that an APS employee in the department has breached the Code, a sanction may not be imposed in the employee unless reasonable steps have been taken to:

Inform the employee of:

- the determination that has been made; and
- the sanction or sanctions that are under consideration; and
- the factors that are under consideration in determining any sanction to be imposed; and


give the employee a reasonable opportunity to make a written statement in relation to the sanction or sanctions under consideration within seven calendar days, or any longer period that is allowed by the sanction delegate.

Note: the sanction delegate may decide to give the employee the opportunity to make an oral statement as well as a written statement.

7. Record of determination and sanction

- 3.1 If a determination in relation to suspected breach of the Code by a person who is, or was an APS employee in the department is made, a written record must be made of:
- the suspected breach; and
 - the determination; and
 - where the person is an APS employee, any sanctions imposed as a result of a determination that the employee has breached the Code; and
 - if a statement of reasons was given to the person regarding the determination in relation to the suspected breach of the Code, or, in the case of an employee, regarding the sanction decision – that statement of reasons or those statements of reasons.
- 3.2 The *Archives Act 1983* and the *Privacy Act 1988* apply to departmental records.

8. Procedure when an ongoing employee is to move to another agency

- 8.1 This clause applies if:
- a person who is an ongoing APS employee in the department is suspected of having breached the Code; and
 - the employee has been informed of the matters mention in 5.3.(a); and
 - the matter has not yet been resolved; and
 - a decision has been made that, apart from this clause, the employee would move to another agency in accordance with section 26 of the Act (including on promotion).
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8.2 Unless the Secretary or delegate and the new Agency Head agree otherwise, the movement (including on promotion) does not take effect until the matter is resolved.

8.3 For the purpose of this clause the matter is taken to be resolved when:

- a determination in relation to suspected breach of the Code is made in accordance with these procedures; or
- the secretary or delegate decides that a determination is not necessary.

Policy Owner	Health and Wellbeing Team
Document Status	Final
Point of Contact	Director, Performance and Wellbeing People Services Branch People, Parliamentary, Communications Division
Approver	Gemma Smith
Approval Authority	Assistant Secretary Department of Education
Date of Approval	1 February 2020

Document review and change

Version	Date	Author/s	Summary of changes	Date of next scheduled review
1.0	1 February 2020	People, Culture & Capability Branch	Machinery of Government rebranding	1 February 2021
1.1	28 March 2023	People Services Branch	Machinery of Government rebranding	28 March 2024



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