



# Procedures for determining breaches of the APS Code of Conduct and for determining sanctions

I, Michael Brennan, Chair of the Productivity Commission ('the Commission'), establish these procedures under section 15 (3) of the [Public Service Act 1999](#) ('the Act').

These procedures commence on the date signed, and supersede the Commission's previous procedures under section 15 (3) of the Act.

Signed:

Dated:

11 August 2023

## 1. Our culture of integrity

- 1.1. The Productivity Commission is committed to maintaining a safe and respectful workplace, and enabling enable a culture that upholds the highest ethical standards and accountable conduct. To support this commitment, the Commission maintains a suite of integrity policies, along with supporting procedures.
- 1.2. Where allegations of a suspected breach are considered under these procedures, the principles of natural justice and procedural fairness are fundamental to the process.

## 2. Application of procedures

- 2.1. These procedures apply in determining:
  - a. whether an Australian Public Service (APS) employee in the Productivity Commission, or a former APS employee who was employed in the Commission at the time of the suspected misconduct, has breached the APS Code of Conduct ('the Code'), as set out in section 13 of the Act; and
  - b. the sanction/s, if any, to be imposed on an APS employee in the Commission, in accordance with section 15(1), where a breach of the Code has been determined under these procedures.
- 2.2. In these procedures, a reference to a breach of the Code includes a reference to a current or former employee who has engaged in conduct set out in section 15(2A) of the Act in connection with their engagement as an APS employee.
- 2.3. Further procedural guidance to support these procedures can be found in the [APS Commissioner's Directions 2022](#) ('the Directions') and the [Public Service Regulations 2023](#) ('the Regulations').
- 2.4. Not all suspected breaches of the Code need to be dealt with by way of determination under these procedures.
  - a. In some circumstances, another way of dealing with a suspected breach of the Code may be more appropriate – for example, issuing directions, formal counselling, or performance management<sup>1</sup>.
  - b. The Commission should also have regard to the APS Commission's publication 'Handling Misconduct: a human resource manager's guide' when considering a misconduct issue.

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<sup>1</sup> Section 52 of the Directions require the Agency Head to have regard to any relevant standards and guidance issued by the APS Commissioner in considering whether to determine a suspected breach, where the conduct of an APS employee raises concerns that relate both to effective performance and may breach the Code.

### 3. Availability of procedures

- 3.1. These procedures are made publicly available on the Commission's website, in accordance with section 15(7) of the Act.

### 4. Breach decision-maker and sanction delegate responsibilities

#### Initial decision-maker

- 4.1. As soon as practicable after a suspected breach of the Code has been identified, the Chair or delegate ('initial decision-maker') will decide whether to deal with the suspected breach under these procedures.
- 4.2. Commission employees who hold the delegation to act as initial decision-maker are those employees occupying the positions of:
- a. Head of Office;
  - b. Assistant Commissioner Corporate; and
  - c. Director Human Resources.
- 4.3. Where the initial decision-maker decides to initiate an inquiry under these procedures, they may appoint a decision-maker ('the breach decision-maker') to make a determination under these procedures<sup>2</sup>. These procedures do not prevent the initial decision-maker from being the breach decision-maker in the same matter.

#### Breach decision-maker

- 4.4. The role of the breach decision-maker is to determine in writing whether a breach of the Code has occurred.
- a. The breach decision-maker may undertake an investigation or seek the assistance of an investigator. The investigator may investigate the alleged breach, gather evidence and make a report of recommended factual findings to the breach decision-maker and provide any other assistance requested by the breach decision-maker.
  - b. The breach decision-maker is responsible for independently finding what conduct the employee engaged in and for determining whether or not that conduct was in breach of the Code.

#### Sanction delegate

- 4.5. 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 ('the sanction delegate') must hold a delegation of the power under the Act to impose sanctions.
- 4.6. Commission employees who hold the delegation to impose sanctions are those employees occupying the positions of:
- a. Head of Office; and
  - b. Assistant Commissioner Corporate.
- 4.7. These procedures do not prevent the breach decision-maker from being the sanction delegate in the same matter.

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<sup>2</sup> In accordance with section 78 (8) of the Act, any proposed delegation of powers under the Act to a person who is not an APS employee must be approved in writing in advance by the APS Commissioner.

## Independence

- 4.8. The breach decision-maker and the sanction delegate must be, and must appear to be, independent and unbiased.
- 4.9. The breach decision-maker and the sanction delegate must advise the Chair or initial decision-maker, in writing 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 Commission has breached the Code must be carried out with as little formality, and with as much expedition, as a proper consideration of the matter allows.
- 5.2. The process must be consistent with the principles of procedural fairness.
- 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:
  - a. inform the person of:
    - i. the details of the suspected breach of the Code (including any subsequent variation of those details) and,
    - ii. where the person is an APS employee, the sanctions that may be imposed on them under section 15 (1) of the Act; and
  - b. give the person a reasonable opportunity to make a statement in relation to the suspected breach.
- 5.4. The statement may be a written or oral statement and should be provided within seven calendar days or any longer period that is allowed by the decision-maker.
- 5.5. 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.
- 5.6. For the purpose of determining whether a person who is, or was, an APS employee in the Commission has breached the Code, a formal hearing is not required.
- 5.7. The breach decision-maker (or investigator, if any) where they consider in all the circumstances that the request is reasonable, will 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 sanction must be consistent with the principles of procedural fairness.
- 6.2. If a determination is made that an APS employee in the Commission has breached the Code, a sanction may not be imposed on the employee unless reasonable steps have been taken to:
  - a. inform the employee of:
    - i. the determination that has been made;
    - ii. the sanction or sanctions under consideration, in accordance with section 15 (1) of the Act;
    - iii. the factors that are under consideration in determining any sanction to be imposed; and
  - b. give the employee a reasonable opportunity to make a written statement in relation to the sanction or sanctions under consideration.
- 6.3. The statement may be a written or oral statement and should be provided within seven calendar days or any longer period that is allowed by the sanction delegate.

## 7. Record of determination and sanction

- 7.1. If a determination is made in relation to a suspected breach of the Code by a person who is, or was, an APS employee in the Commission, a written record<sup>3</sup> must be made of:
- a. the suspected breach;
  - b. the determination;
  - c. any sanctions imposed as a result of the determination; and
  - d. any statement/s of reasons provided to the employee in respect of the breach or sanction decision.

## 8. Other procedural matters

- 8.1. In accordance with section 64 of the Directions, the Chair or delegate will consult with the APS Commissioner on the process for determining whether an SES employee has breached the Code, and before any sanction is imposed.
- 8.2. An employee suspected of breaching the Code may be reassigned to alternative duties pursuant to section 25 of the Act, or may be suspended from under duty section 28 of the Act.
- 8.3. Commission employees who hold the delegation to act as suspension delegate are those employees occupying the positions of:
- a. Head of Office;
  - b. Assistant Commissioner Corporate; and
  - c. Director Human Resources.
- 8.4. Where suspension is considered, the suspension delegate must have regard to section 14 of the Regulations in:
- a. determining whether, on reasonable grounds, the employee may have breached the Code; and it is in the public, or the Agency's interest to suspend them from duty;
  - b. considering whether suspension should be with or without pay; and
  - c. reviewing any suspension at reasonable intervals.
- 8.5. Sections 46 (5) and (6) of the Directions provides that movement between agencies (including on promotion) for employees suspected of a breach of the Code will not take effect until the matter is resolved, unless agreed by the respective Agency Heads.
- 8.6. Advice to complainants about the outcomes of investigations into alleged breaches of the Code will be consistent with the requirements of the *Privacy Act* and any applicable guidance from the Australian Public Service Commission.

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<sup>3</sup> The *Archives Act 1983* and the *Privacy Act 1988* apply to agency records.

## A. Procedure governance

<b>Related legislation</b>	<p>This policy supports the Commission's compliance with the following legislation:</p> <ul style="list-style-type: none"> <li>• <a href="#">Public Service Act 1999</a></li> <li>• <a href="#">Public Service Regulations 2023</a></li> <li>• <a href="#">APS Commissioner's Directions 2022</a></li> </ul>
<b>Other resources</b>	<p>Circulars, guidance and publications as issued by the Australian Public Service Commission, including:</p> <ul style="list-style-type: none"> <li>• <a href="#">APS Values and Code of Conduct in practice</a></li> <li>• <a href="#">Handling Misconduct: A human resource manager's guide</a></li> </ul>
<b>Category</b>	Integrity and ethical framework
<b>Policy owner</b>	Assistant Commissioner Corporate
<b>Approval by</b>	Chair
<b>Approval date</b>	11 August 2023
<b>Date effective</b>	11 August 2023
<b>Review date</b>	Generally 3 years from approval date, unless otherwise specified

## B. Version control

Date	Version	Changes made	Author
March 2000	1.0	Issued	
February 2013	2.0	Revised – PS Act amendments	
July 2021	3.0	Significant update to reflect APSC guidance and streamline	A. Byrne
July 2023	4.0	Significant update to reflect changes in PS Regulations and Directions, and move to new Ethical Framework template	T. Blakiston