



Australian Government

Department of Infrastructure and Regional Development

Guidelines

Title: **APS Code of Conduct**

References: *Public Service Act 1999*
APS Code of Conduct Procedure – July 2013

INTRODUCTION

Purpose

The purpose of these Guidelines is to assist the Department's employees to understand how the Department:

- will handle allegations of a suspected breach of the APS Code of Conduct (Code of Conduct);
- determines whether there has been a breach of the Code of Conduct; and
- where applicable, provides guidance on determining appropriate sanctions.

The APS Code of Conduct, APS Values and APS Employment Principles

The [Public Service Act 1999](#) (the Act) prescribes the standards of behaviour and conduct expected of all public service employees. These are expressed in the [APS Code of Conduct](#) (Code of Conduct); [APS Values](#) (the Values) and the [APS Employment Principles](#), which are set out in the Act.

Note: Commissioner's Directions may determine the scope or application of the APS Employment Principles (see subsections 11A(2) and (3) of the PS Act).

When does the Code of Conduct apply?

The Code of Conduct may apply whenever there is a connection between the employee's behaviour and its effect on the workplace or employees, the reputation of the Department, the APS or the Commonwealth. The Code of Conduct considers the following levels of connection between the standard of conduct and APS employment.

- *in connection with APS employment* – addresses situations where an employee's actions or behaviour may affect the operations of the workplace more generally, or public perceptions of the public service;
- *at all times* – concerns conduct which occurs outside work hours but may impact the workplace, the reputation of the public service or the employment relationship.

The Code of Conduct and criminal offences

A breach of the APS Code of Conduct may also be a criminal matter. For example, cases involving program or administrative fraud may be referred to the Australian Federal Police (AFP). Where criminal action is commenced, action under the Department's APS [Code of Conduct Procedure](#) (the Procedures) will generally be undertaken at the same time the criminal process is underway.

Subject to advice from relevant authorities, in some cases a decision may be made to delay action under the Procedures on the basis that such action may jeopardise the criminal proceeding.

In very serious cases, the evidence from any criminal proceedings may negate the need for the Department to undertake action under the Procedures. In this circumstance, the employee will be advised.

Departmental principles

Informality

The Procedures endeavour to address the suspected breach(es) of the Code of Conduct as swiftly and with minimal formality as the circumstances allow.

The suspected breach(es) of the Code of Conduct will generally be dealt with by a formal investigation to determine whether a breach of the Code of Conduct has occurred. However, where a matter is minor, the Delegate may decide that the matter is best managed informally through mediation, informal counselling or other appropriate options.

Procedural fairness

Procedural fairness embraces three key 'rules':

- the 'hearing' rule – which requires that persons whose interests or rights may be adversely affected by a decision will be given an opportunity to be heard;
- the 'no bias' rule – which requires a decision maker to act without bias or self-interest; and
- the 'evidence' rule – which requires that a decision be based upon compelling evidence that is relevant to the matter being determined.

Privacy and confidentiality

The reporting of a suspected breach of the Code of Conduct will be dealt with in a private and confidential manner in keeping with the Department's obligations under the [Privacy Act 1988](#).

Information, communications and technology

Consistent with Regulation 9.2 of the [Public Service Regulations 1999](#) (Use and disclosure of personal information), personal information that is collected from the Department's Information and Communication Technology resources, including closed circuit television systems and swipe pass terminals, email and system logs may be used by the Department if the use is necessary for, or relevant to, the performance or exercise of the Secretary's employer powers.

Disclosures

Disclosure of the information pertaining to the handling of aspects of the complaint is to be in accordance with the [APSC Circular 2008/03 – Providing Information on Code of Conduct Investigation Outcomes to Complainants](#).

Record keeping

Records which relate to the investigation of a breach of the Code of Conduct action including the sanction imposed will be kept on a separate file classified "Sensitive: Personal". Access to these files is strictly on a 'need-to-know' basis.

The handling of information relating to investigations of a breach of the Code of Conduct is subject to the provisions of the [Privacy Act 1988](#).

Records disposal

The Department is required to destroy records relating to breach of the Code of Conduct cases after a certain period of time in accordance with the National Archives of Australia [Administrative Functions Disposal Authority](#).

REPORTING A BREACH OF THE CODE OF CONDUCT

Who can report a breach of the Code of Conduct?

Any employee can report a suspected breach of the Code of Conduct. In the first instance a suspected breach of the Code of Conduct may be:

- discussed with any of the following people:
 - Direct supervisors/managers;
 - Workplace Harassment Contact Officer (WHCO)
 - Any SES Officer; or
- reported (verbally or in writing) to:
 - the Performance and Conduct team, People and Performance Branch;
 - General Manager, People and Performance Branch;
 - Chief Operating Officer; or

If the alleged breach involves the Secretary of the Department, the Public Service Commissioner or the Merit Protection Commissioner may accept the written allegation and conduct an investigation or otherwise deal with the matter.

Protections for reporting a breach of the Code of Conduct

Public Interest Disclosures

Further information is detailed in the [Public Interest Disclosure Procedure](#) on ENTR.

Victimisation or retaliation

An employee reporting a suspected breach of the Code of Conduct is protected from victimisation or retaliation (i.e. being harassed to change their complaints) by the Code of Conduct.

Subsection 13(3) of the PS Act requires APS employees to treat everyone with respect and courtesy and without harassment. These protections also extend to any witness being victimised. The Department will not tolerate victimisation in any circumstance and any allegation(s) will be dealt with in accordance with the Department's Procedures.

Frivolous or vexatious claims

Frivolous claims are those that are unsustainable, such as minor matters that are not motivated by any serious concerns.

Vexatious claims are those that are made as a means of obtaining an advantage for which the Department's complaint handling procedures are not designed, such as a desire to annoy and harass another person.

Employees should be mindful that frivolous and vexatious complaints will not be tolerated. It is the Delegate's role to make a decision on whether the suspected breach(es) of the Code of Conduct need to be investigated.

Anonymous reporting

It is possible to report a breach of the Code of Conduct anonymously. Employees are encouraged to come forward and report the suspected breach(es) of the Code of Conduct as this assists the Delegate to understand the allegations and/or decide whether to investigate them.

Confidentiality will be provided as far as the law allows.

INVESTIGATING A BREACH OF THE CODE OF CONDUCT

Preliminary assessment

On receiving allegations of the suspected breach(es) of the code of conduct, the Performance and Conduct team in consultation with the General Manager, People and Performance will conduct a preliminary assessment of the matter for consideration by the Delegate.

The preliminary assessment should detail the following:

- a description of the suspected breach(es) of the Code of Conduct outlining the element(s) of the Code of Conduct allegedly breached;
- the names of any employees suspected of being responsible for the breach(es);
- the date on which the suspected breach(es) occurred;
- any relevant information to support the allegation including names and contact details of any witnesses; and
- what action is proposed or has been undertaken to date regarding the complaint.

The Delegate may decide that:

- a formal investigation to determine whether there has been a breach of the Code of Conduct is required;
- the employee suspected of breaching the Code of Conduct be suspended or temporarily reassigned to another work area pending the outcome of the matter;
- the matter be referred to AFP for criminal investigation;
- the matter is not as serious as first considered, does not warrant formal investigation and that more informal management action be exercised.

Formal Code of Conduct investigation

Once the Delegate has decided that a formal investigation of the matter is required, the Delegate will:

- where relevant, make a determination on the application of a suspension or temporary reassignment of duties;
- select and authorise a Decision Maker.

Suspension for a suspected breach(es) of the Code of Conduct

In some cases, the Delegate will decide that the employee suspected of breaching the Code of Conduct should either be assigned to other duties or suspended from duty while the alleged breach(es) of the Code of Conduct is investigated.

This decision is not a punishment or a prejudgement that a breach of the Code of Conduct has occurred.

Remuneration during suspension

Suspension can be with or without remuneration. If it is without remuneration, it will not be for more than 30 days, unless there are exceptional circumstances. Exceptional circumstances will be determined on a case-by-case basis and may include:

- the investigation of the allegations takes longer than 30 days;
- where the employee has appealed against a conviction and is waiting to have the appeal heard.

Depending on the particular circumstances, the Delegate may decide that particular allowances can continue to be paid, for example, where allowances are paid because an employee is required to live in a particular region, however generally allowances are not paid during a period of suspension, even when the suspension is with remuneration.

A suspended employee, who wishes to do so, should normally be permitted to access paid leave as an alternative to suspension (without remuneration). Requests to engage in outside employment during a period of suspension without pay will be considered on their merits.

Any period of suspension on full remuneration will ordinarily count as service for all purposes.

Review of suspension

The suspension decision will normally be reviewed at 30 day intervals. The nature and timing of such reviews will normally be a matter for the Delegate. The timing is primarily a matter for their judgement, but any reasonable requests for review, by the employee, could be acted upon.

The Delegate will end a suspension when they no longer believe that the employee has, or may have, breached the Code of Conduct, or the employee's suspension is not in the public or the Department's interest.

Where a suspension is lifted as a result of a finding that there has been no breach of the Code of Conduct, and where some or all of the period of suspension was without remuneration, that remuneration will be restored and paid as a lump sum.

Notification of suspected breach(es) of the Code of Conduct

The employee suspected of the breach(es) of the Code of Conduct will be notified by the Delegate in writing and be advised of:

- the nature of the suspected breach(es) of the Code of Conduct;
- the elements of the Code of Conduct that they are suspected of breaching;
- if applicable, the application of a suspension or temporary reassignment;
- the possible sanctions that may apply for breaching the Code of Conduct;
- who will be investigating the alleged breach(es) of the Code of Conduct;
- who will be making the decision about whether there has been a suspected breach of the Code of Conduct (the Decision Maker);
- their entitlement to seek the assistance of a support person such as a fellow employee, union representative or legal representative in responding to the notification and throughout the investigation;
- if applicable, notification of potential personal information collected through the Department's [information, communications and technology](#) resources that has been identified to date; and
- notification that information relevant to the investigation including personal information may be released in whole or in part for the purposes of making a decision.

If at any time during the investigation it becomes clear that the element(s) of the Code of Conduct that the employee is suspected of breaching changes in any way, the employee will be informed in writing.

The Decision Maker

The Decision Maker should be, and be seen to be, both independent and unbiased. They can be an APS employee or external person who is appointed by the Secretary or the Delegate to decide:

- whether a breach of the Code of Conduct is established; and
- whether a breach of the Code of Conduct has or has not occurred.

The Decision Maker may make whatever enquiries they consider necessary to discover and collect evidence about the suspected breach of the Code of Conduct. The Decision Maker may undertake the investigation personally or may appoint another person to investigate the matter.

The Decision Maker will advise the employee in writing of the suspected breach(es) of the Code of Conduct and include a statement of their responsibilities. The Decision Maker will invite the employee to make a statement (either written or oral) in response to the allegations made against them.

The Decision Maker will:

- comply with the Department's Procedures;
- comply with these guidelines; and
- consult with the General Manager, People and Performance Branch, when required, to ensure compliance.

A Code of Conduct investigation will be completed within 30 days, unless mitigating circumstances arise such as the employee or witnesses being absent, or the scope of the investigation changes.

Right to respond

The employee suspected of breaching the Code of Conduct will be provided with a reasonable opportunity to respond to the allegations made against them.

If at any time the details of the suspected breach(es) change, the employee will be informed and invited to make a further statement.

The employee is entitled to respond to allegations by a written statement. Where an employee requests an opportunity to make an oral statement either as a supplement to, or instead of, a written statement, such a request will be agreed to. A record will be kept of any oral statement and a copy given to the employee.

An employee is entitled to decline to provide a statement. The Decision Maker is not entitled to draw any conclusions from the fact that the employee may have elected not to make a written or oral statement.

Any request for an extension of time should be considered on its merits, recognising the need to be fair to the employee, but also the requirement for timeliness and expedition. Accordingly an extension of time will not automatically be approved and the employee will need to show justifiable reasons in support of a request to extend a response time.

Investigations

Investigations can be undertaken by the Decision Maker, or by an independent investigator.

The Decision Maker may engage an independent investigator appointed to establish the facts concerning the allegations of the suspected breach(es) of the Code of Conduct. This usually involves interviews with the parties and witnesses, assessing any evidence, and providing an Investigation Report to the Decision Maker.

Investigations should, where practicable, take into consideration:

- any/all facts that are not in dispute;
- any/all facts that are in dispute, and need further investigation;
- any person/s who may have information relevant to the matter under investigation who need to be contacted, and their contact details;

- any documents he/she is aware of that could be relevant to the matter under investigation;
- any questions he/she is aware of that need to be answered, and the best person/s to ask;
- any additional information to be sought;
- any gaps in information that he/she has identified; and
- an expected timetable for the course of the investigation, including completion.

As part of Investigations, interviews may be held with any person believed to have information relevant to the matter, including the employee suspected of committing the breach. Every effort should be given to provide 24 hours' notice that the interview is to take place. All employees are to cooperate fully and openly with any requests for information or documents. Failure to cooperate could be seen as a breach of the Code of Conduct.

Interviews

Interviews are to be guided by the following principles:

- Interviews can be in person, by telephone or by videoconference, or can be conducted as an exchange of written correspondence;
- An employee suspected of having breached the Code of Conduct may bring a person to support him/her to any discussion/interview. The support person is not to answer on behalf of the employee being interviewed;
- An official record of interview will be prepared as soon as practicable after the interview. The employee interviewed will be provided with a record of interview. Any disputes over the content of the record should be noted. An official record of the interview should be retained and held on file;
- More than one interview can be conducted with an employee;
- Detailed notes should be taken of any discussion/interview, including the date, the time and the place the interview was conducted.

Standard of proof

The standard of proof for determining whether a breach of the Code of Conduct has occurred is on the 'balance of probabilities'. This means that the Delegate must be satisfied that a breach is more probable than not.

The Decision Maker must be satisfied that the investigation process has gathered enough evidence to enable them to make a fair, balanced and conscientious decision. Where a decision has to be made between competing interests, all parties to the matter must have been heard and all arguments considered.

The level of satisfaction required for each case will depend upon the circumstances. The factors which must be taken into account are:

- the seriousness of the suspected breach;
- more likelihood than not that the suspected breach occurred; and
- the gravity of the consequences for the employee if the suspected breach is found.

Information during and after the investigation

The Department will strive to finalise a complaint as quickly as proper consideration of the matter allows. In normal circumstances, complainants will not be kept informed of progress of an investigation. However, there may be occasions where delay cannot be avoided, or where the handling of a case takes a new direction. In such circumstances, the Decision Maker may keep key stakeholders informed of progress if appropriate.

In the normal course of events the employee will be notified in writing of the outcome as soon as possible. If the Decision Maker determines there has not been a breach of the Code of Conduct, the employee will be notified in writing of the reasons for this conclusion.

If the Decision Maker determines there has been a breach of the Code of Conduct, the employee will be informed in writing:

- of the element(s) of the Code of Conduct that have been breached;
- of the reasons for their findings including a copy of the investigation report;
- advising that the matter has been referred to the Delegate for sanctioning including reiteration of the range of possible sanctions; and
- detail their rights of review.

Once a Decision Maker has determined a breach of the Code of Conduct has occurred, the Decision Maker will prepare a recommendation to the Delegate advising that the matter has been determined.

OUTCOMES OF A BREACH OF THE CODE OF CONDUCT

Sanctions

Sanctions are intended to be proportionate to the nature of the breach, to provide a clear message to the relevant employee that their behaviour was not acceptable, to reduce or eliminate the likelihood of future similar behaviour, and to confirm that a breach or breaches of the Code of Conduct are not tolerated.

The possible sanctions for breaching the Code of Conduct are:

- termination of employment
- reduction in classification
- reassignment of duties
- reduction in salary
- deduction in salary by way of fine (which must not be more than 2% of annual salary)
- a reprimand

The decision to apply a sanction

The Delegate is responsible for imposing a sanction. The Delegate may decide that no sanction will be imposed and that the matter is best managed informally through mediation, informal counselling or other appropriate options.

In deciding what sanction, if any, should be applied, the Delegate takes account of:

- previous employment and the general character of the employee;
- the nature and seriousness of the breach and the type of conduct involved;
- the degree of relevance of the breach(es) of the Code of Conduct to the employee's duties or to the reputation of the APS;
- the circumstances of the breach(es), including whether it also entails a criminal offence;
- the effect of the proposed sanction on the employee;
- any loss of earnings already incurred by the employee as a result of suspension;
- alternative action other than a sanction; and
- any additional information that might be considered relevant.

Mitigating factors

Evidence of mitigating factors (that is, factors that may explain or justify the breach(es) of the Code of Conduct) may persuade the Delegate to apply a lesser sanction than might otherwise have been imposed.

Mitigating factors can include:

- the degree of responsibility for the breach and whether there was any provocation, persuasion or even coercion by other employees;
- the intention of the employee to breach the Code of Conduct and whether the breach was premeditated or involved a spur of the moment decision;
- the extent to which the employee's disability, health or other factors may have influenced their conduct;
- the age, experience and length of service of the employee;
- the level of guidance provided by the agency in relation to the Code of Conduct in general and explicit guidance or directions about the particular breach
- the extent to which the breach may have reflected a culture or common practice in the work area;
- any procedural issues, for example, an unreasonable delay between the matter first coming to notice, and the sanction being imposed.

Notification of proposed sanction

The Delegate will advise the employee, in writing, of the proposed sanction and the reasons they are considering that sanction.

The employee will be given the opportunity to make a statement in response to the proposed sanction (minimum seven calendar days).

Notification of sanction

On consideration of the comments the Delegate will advise the employee of the sanction/s and of their rights of review.

Applying multiple sanctions for one breach

It is possible for more than one sanction to be imposed on an employee found to have breached the Code of Conduct. For example, an employee may be re-assigned duties *and* have a fine imposed.

Applying sanctions for multiple breaches

It is usually appropriate to reflect the existence of multiple related breaches in a more severe sanction rather than separate sanctions for each breach. Where the breaches are unrelated, for example a harassment incident and an unrelated theft, separate sanctions may be appropriate.

Advice to complainants

Advice to complainants will be undertaken in accordance with the Procedures. The complainant and witnesses do not receive a copy of the Investigation Report.

Right of review

Where it has been determined that the employee's employment be terminated, the employee may have a right to make an application to the Fair Work Commission, to have the matter heard on the grounds that the termination is unfair, or in breach of the [Fair Work Act 2009](#).

Where an employee receives a sanction other than termination of employment, they may request a review under section 33 of the *Public Service Act 1999* by the Merit Protection Commissioner of:

- the determination of a finding of a breach of the Code;
- the sanction imposed; or
- both of these decisions.

A review of decision regarding a breach of the Code of Conduct or a sanction that was imposed because of a breach of the Code of Conduct is to be made directly to the Merit Protection Commissioner. More information is available on at www.apsc.gov.au/merit.

Process where basis of an employee's engagement changes

Where an employee suspected to breaching the Code of Conduct is moving to another Agency as a result of transfer or promotion during an investigation of the matter, and the matter is yet to be finalised, the movement will not take effect until the matter is resolved (i.e either determined or it is decided a determination is not necessary). Note that the movement may be approved subject to agreement between Agency Heads.

Other references

The Guidelines complement and expand on the Department's existing [APS Code of Conduct Procedure](#) and other related policy and procedures, including:

- *Workplace Harassment and Bullying Policy and Procedures*
- *Employee Social Media Acceptable Use Policy*
- *Code of Conduct for the use of Email and Internet Services*

These documents are available on [ENTR](#).

The Australian Public Service Commission also provides information and advice about the Code of Conduct and how it applies in the workplace.

Support

Employee Assistance Program

Situations involving a breach of the Code of Conduct and conflict at work can be distressing. If you are affected, you are encouraged to draw on the confidential counselling services of the Employee Assistance Program (EAP). EAP is available free of charge 24 hours a day, 7 days a week to Departmental employees and their families.

To access EAP services refer to the [EAP page](#) on ENTR.

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