



Guide for handling conduct issues

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Purpose

1. The purpose of this guide is to inform employees and those handling conduct issues of the principles and processes for handling conduct issues, including suspected breaches of the Australian Public Service (APS) Code of Conduct (**the Code**), in the Agency and should be read in conjunction with the *Procedures for handling suspected Code of Conduct breaches (the Procedures)* and the *Public Interest Disclosure Act* (the **PID Act**).
2. The mandatory procedures related to formal investigation of misconduct are set out in the Procedures. The contents of this guide have the status of guidelines, recognising that each circumstance is different and it is not desirable or practical to prescribe rigid rules to apply in all cases.
3. Where the conduct issue includes allegations of bullying and/or harassment, this guide should be read in conjunction with the Agency’s Bullying and Harassment Policy.
4. This guide promotes good practice and consistency in decisions relating to conduct issues.

Principles

5. All employees have a responsibility to behave in a manner that upholds the [APS Values](#) and adheres to the [Code](#). An APS employee whose conduct does not comply with an element of the Code can be found to have breached the Code. The term ‘misconduct’ is used throughout this document as a convenient and readily understood label for behaviour that breaches the Code.
6. The primary aim of taking action in cases of suspected misconduct is protecting the integrity of the APS and maintaining public confidence in public administration. Sanctions are intended to

be proportionate to the nature of the misconduct, to be a deterrent to others and confirm that misconduct is not tolerated in the Agency.

7. The disciplinary provisions relating to suspected misconduct are essentially administrative, rather than judicial, but the principles of natural justice and procedural fairness must be observed throughout the process. This means that employees suspected of misconduct should be:
 - 1) informed about what it is suspected they have done in clear and unambiguous terms, so that they can understand details of the suspected misconduct;
 - 2) generally shown the material that will be taken into consideration; and
 - 3) allowed the opportunity to respond and have any information put forward be considered.
8. The processes of assessing and investigating a potential breach of the Code, as outlined within Agency documents related to suspected misconduct, is intended to be timely, fair, transparent and easy to follow.

The legal framework

9. The *Public Service Act 1999* (**the Act**) includes, at **s.13**, a legally enforceable statutory Code of Conduct as a public statement of the standards of behaviour and conduct that are expected of those who work in the APS. The Code incorporates the APS Values, which are set out at s.10 of the Act, and the APS Employment Principles (s. 10A) by requiring APS employees to uphold those values and principles. The Code also has had added to it a duty not to disclose certain information (see **Public Service Regulation 2.1**).
10. Under s.15(3) of the Act, there is a requirement for Agency Heads to establish procedures for determining whether an APS employee has breached the Code. The procedures that apply in the Agency are available to all employees on inSite.
11. Section 28 (Part 4) of the Act allows regulations to be made providing that employees can be suspended from duty with or without pay. **Public Service Regulation 3.10** allows an Agency Head to suspend an APS employee whom the Agency Head believes, on reasonable grounds, may have breached the Code, if it is in the public or Agency's interest to do so.
12. Section 15(1) of the Act allows an Agency Head to impose sanctions on an APS employee in the Agency who is found to have breached the Code.

Avoiding apprehension of bias

13. The breach decision maker, sanction decision maker and investigating officer must guard against any bias, real or perceived, when carrying out their duties.
14. It is important that the breach decision maker and investigating officer approach the suspected misconduct with an open mind aimed at finding out all of the relevant facts and circumstances.

Reporting a suspected breach of the Code

15. Misconduct may be identified through a number of sources, including:
 - 1) identification by employees. All employees need to report possible misconduct. It may be a breach of the Code for an employee, particularly those who have supervisory responsibilities, not to report behaviour that they suspect to be misconduct.
 - 2) internal monitoring mechanisms. For example, regular checking of email accounts, data matching of leave and attendance records, as well as general audit processes.
 - 3) complaints from clients or members of the public. For example, complaints about behaviour toward a client or identified misuse of Commonwealth resources.
16. When a report has been made by an employee, client or member of the public, that person is referred to in this guide as the 'complainant.'
17. Employees can report suspected misconduct via a range of avenues including their supervisor, SES Officer or a member of Human Resources (HR). These reports can be made

either verbally or in writing. Employees are encouraged, in the first instance, to report suspected misconduct to their Director (EL2) or SES Officer. If that is not possible or appropriate, the matter should be reported to an authorised person.

18. An authorised person includes FWBC's Group Manager Operations; Chief Counsel; Assistant Director, HR; or another person to whom these duties have been appropriately delegated.
19. Employees are able to make anonymous reports, although they are encouraged to openly make reports, as this can assist with successful investigation of the report an anonymous report is problematic, as this may limit the ability to verify the allegation(s).
20. Where an employee considers the matter to be of such sensitivity that they feel unable or unwilling to report the suspected breach within the Agency, they may report it to the Public Service Commissioner, the Merit Protection Commissioner or a person authorised by one of these.
21. If an employee reports disclosable conduct to an authorised officer in the Agency, the employee will have protections under Part 2 of the *Public Interest Disclosure Act*. The contact details for authorised officers can be found [here](#).
22. In most cases it is desirable, although not essential, for a report of suspected misconduct to include an outline of the incidents and events suspected to have occurred and any supporting documentation or material.
23. Whilst employees are encouraged to report suspected misconduct, employees should be aware that making frivolous or vexatious reports may result in misconduct action being taken against the employee who made the report.

Protections if a disclosure is made under the *Public Interest Disclosure Act 2013*

24. Employees are strongly encouraged, and should feel supported, to report any suspected disclosable conduct without fear of recrimination or repercussion. Disclosable conduct includes:
 - 24.1 conduct that contravenes a Commonwealth Law
 - 24.2 corruption or maladministration
 - 24.3 wastage of public money
 - 24.4 conduct that unreasonably endangers the health and safety of other people or the environment, and
 - 24.5 conduct that could give rise to disciplinary action, including a breach of the Code.
25. There are provisions for the protection of employees who have reported breaches or suspected breaches of disclosable conduct including those provided under [Part 2 of the *Public Interest Disclosure Act 2013*](#). Victimization or discrimination against such employees is prohibited by s. 10 and 13 of the PID Act. The [Commonwealth Ombudsman](#) handles external disclosures if an employee is unsatisfied with the way the Agency has handled a public interest disclosure matter. The Agency's [Principal's Officer's Procedures](#) in relation to the PID Act are available to all employees on inSite.

Confidentiality

26. The identity of the employee reporting suspected misconduct and the identity of those accused of the suspected misconduct will be dealt with confidentially as far as is practicable and consistent with a proper investigation of the report.
27. In line with the principles of procedural fairness, the information provided within a report of a suspected breach of the Code is likely to be provided to the person that is being accused of the suspected breach. The identity of the person that has made the report or provided statements in relation to a matter may also be required to be disclosed. This would occur only when it is essential to the investigation, determination or sanction process. The report and that information may also be required to be provided to a representative of the person who is being accused of the suspected breach, and also to the Merit Protection Commissioner.

28. An important component of the investigation is to maintain the highest level of confidentiality about all aspects of the investigation. The breach decision maker and investigating officer should ensure that information (such as progress reports) is only provided to those who have a genuine “need to know.” Any information provided should ensure that the privacy of any individual involved is maintained as far as practicable and does not jeopardise the investigation.
29. Details of when information may be disclosed to others, including the complainant, are outlined later in this guide.

Privacy

30. Employees who report a suspected breach of the Code can be assured that their identity will be regarded as “personal information” for the purposes of the **Privacy Act 1988**. That personal information is the identity of the person who has made the report, or provided statements in relation to the matter. As set out above, this may be required to be disclosed to satisfy the requirements of procedural fairness. This would only occur if it is essential in relation to the investigation, determination or sanction process, or in tribunal or legal proceedings. Should this be required, the employee will be advised prior to any such disclosure.
31. The protections if a disclosure is made under the PID Act as set out in paragraphs 24-25 apply to those employees who report breaches and/or make statements in relation to the suspected misconduct. Employees whose identities are disclosed as set out above should report any action that they consider to be taken as a result of them having reported suspected misconduct. Employees can access further information about their privacy rights at <http://www.privacy.gov.au>, by contacting the Office of the Australian Information Commissioner on 1300 363 992, or if it's in relation to a PID Act matter, at ombudsman@ombudsman.gov.au or by telephone on 1300 362 072.

Consideration of the report of suspected misconduct

32. A flow chart of the process of investigation, determination and sanction decisions of a suspected breach of the Code is attached to this guide (See Attachment A).
33. The relevant Director or SES Officer, upon receiving a report of a suspected breach, should consult with the Assistant Director, HR. The purpose of this is to:
 - 1) clarify whether the suspected conduct warrants further assessment as possible misconduct or whether it is appropriate to be addressed through informal mechanisms; and
 - 2) ensure consistency in the treatment of conduct matters across the Agency.
34. As part of the consideration of the report of suspected misconduct, after consultation with Assistant Director, HR, a preliminary assessment may be undertaken by the Director or Executive Director within the business unit. The decision about whether to proceed with a formal investigation rests with the relevant authorised person.
35. Not all cases of suspected misconduct need to be dealt with via formal investigation and determination procedures as set out in the Procedures. As a general rule, the Procedures are used if it is likely that a sanction would be applied if the suspected misconduct was determined to be a breach. Examples of suspected breaches of the Code that would be investigated under the Procedures include, but are not limited to, aggressive or violent behaviour directed at colleagues or accessing pornography using Commonwealth IT systems.
36. Where the suspected misconduct is considered minor, and is not part of a pattern of misconduct, consideration should be given to address the issue via informal mechanisms.
37. Informal mechanisms may include:
 - 1) providing appropriate counselling or a warning letter, either by the Director or SES Officer, and reminding the employee of their obligations as an APS employee;
 - 2) engaging processes for resolution of workplace issues, such as mediation;

- 3) underperformance management or close monitoring of conduct over a period of time;
 - 4) education or training to improve employee's awareness of required standards of conduct;
 - 5) initiatives to eliminate workplace harassment; or
 - 6) referral to professional services, e.g. the Employee Assistance Program (EAP).
38. Where informal mechanisms are undertaken to address misconduct, discussions or warnings identifying that the employee may have breached the Code should be documented, signed by both parties and a copy kept on file.
39. If an employee who has reported a suspected breach to a Director or SES Officer is dissatisfied with the handling of the report, that employee may report the matter to; FWBC's Director; the Group Manager Field Operations; the Chief Counsel or the Assistant Director, HR.

Process of investigation of a suspected breach of the Code

40. The Procedures set out what must occur in determining whether an Agency employee has breached the Code, including compliance with basic procedural requirements set out in *Public Service Commissioner's Directions 1999*.
41. The role of the breach decision maker, investigating officer and sanction decision maker are also described in the Procedures. The investigating officer and breach decision maker identified to investigate and determine if a breach of the Code has occurred must:
- 1) carry out the investigation with as little formality and as much expedition as proper consideration of the matter allows;
 - 2) be vigilant about circumstances that may give rise to claims of bias; and
 - 3) comply with requirements of procedural fairness and other relevant administrative law principles.
42. The process of determining whether there has been a breach of the Code consists of investigating the allegation, making a finding about whether the employee has committed the suspected behaviour (based on the available material) and determining whether the behaviour constitutes a breach of the Code.
43. If there is no dispute about the facts of the case or if the employee admits the suspected behaviour, the process may be as simple as the breach decision maker making a decision on the details reported and on the employee's response. There may be no need for further investigation. When the facts are in dispute, it may be necessary to do a more detailed investigation, including interviewing and/or seeking statements from other people and considering relevant material.
44. As the circumstances of each allegation is likely to affect how the investigation proceeds, the investigating officer will keep the affected employees, including the person suspected of misconduct and relevant managers, informed of how the particular process is being managed.

Employee response to suspected misconduct

45. As outlined in the Procedures, an employee must be informed of the details of the suspected misconduct as soon as practicable and given a reasonable opportunity to make a verbal and/or written statement in relation to the suspected misconduct. The employee is also to be provided with all relevant material that it is proposed to take into consideration in making the breach determination decision.
46. The employee should be given a copy of the relevant material that the breach decision maker has available to them when the employee is formally notified of the suspected breach. If further information becomes available during the course of the investigation, it should be provided to the employee at the time of seeking comment regarding the draft determination or at such earlier time as may be appropriate and a further opportunity provided for comment.
47. Generally, seven calendar days is considered to be a reasonable period for submission of a statement in response to a notice of suspected misconduct; however, an employee is entitled to request a longer period to respond. Any request for extension should be considered on its

merits. The breach decision maker should balance the requirement to be fair to the employee with the Agency's interest in having the suspected misconduct dealt with in a timely manner.

Other statements

48. As the relevant material generated during an investigation generally needs to be made available to the employee suspected of misconduct, the breach decision maker and/or investigating officer should advise any interviewee that any comments they provide will be recorded and may be disclosed to the employee who is suspected of misconduct.
49. In circumstances where there is risk or concern for the wellbeing of a witness, it may be appropriate to protect the identity of that witness; however, such cases are considered rare. The breach decision maker will decide if such measures are necessary in a particular case.

Documenting interviews

50. There should be a written record made of any verbal statement or interview given during an investigation. The interviewee should be advised of their right to make any amendment to the record and/or attach any addendum. The interviewee should be requested to countersign the written record. If the interviewee refuses to sign the written record, it should be noted that they have been provided a copy and have declined to sign the record.

Determination report

51. When the breach decision maker has reached a preliminary view that the employee has breached the Code, the breach decision maker will provide the employee with a copy of the draft determination, together with relevant material, for comment prior to the decision being made. The determination should be a written report stating the breach decision maker's preliminary view as to whether or not the employee has been found to have breached the Code. The report should:
 - 1) set out key findings, including reference to the evidence or other material on which the findings were based;
 - 2) specify any subsections of the Code breached by the employee; and
 - 3) provide reasons for the determination.
52. The content and length of the report will vary depending on the circumstances of the case. Sufficient information to support and explain the decision and to consider the relevant material should be included, bearing in mind that it is possible that the report could be the subject of an external review process. After receiving comment from the employee, the breach decision maker will take the employee's response into consideration before making a final decision. A copy of the final determination report will then be provided to the employee.

Action to be taken following determination

53. In the case where it is determined that the employee has breached the Code and a sanction is to be imposed, the sanction decision maker will set out the reasons for the proposed sanction in writing to the employee and include an invitation to respond to the draft sanction decision. The timeframe for this response will usually be seven calendar days.
54. The sanction decision maker will then take any comments made by the employee into consideration before making a final decision. A copy of the final sanction report will then be provided to the employee.
55. Sanctions which may be imposed are:
 - a) termination of employment,
 - b) reduction in classification,
 - c) re-assignment of duties,
 - d) reduction in salary,

- e) deductions from salary, by way of a fine*, and/or
- f) a reprimand.

*no more than two percent of an employee's annual salary (PS Reg 2.3)

56. The sanction decision maker may also decide to impose 'no sanction'.

Advice and support

- 57. Employees participating in a Code investigation may have a support person with them during interviews or discussions relating to the Code investigation.
- 58. As an investigation must be finished as quickly, and with as little formality, as proper consideration of the matter allows, it is preferable that employees participating in a Code investigation engage directly with the investigating officer, breach decision maker and sanction decision maker, where necessary. An employee may choose to be represented by another person, such as a workplace delegate, during an investigation. If an employee chooses to have a person perform this role, they must inform the breach decision maker, in writing, of this decision.
- 59. Employees are also strongly encouraged to access the Employee Assistance Program (EAP) for support.
- 60. Further, employees participating in a Code investigation are able to seek information from the breach decision maker, investigating officer or specified HR contact on the processes involved in the Code investigation.

Possible reassignment or suspension from duties during the process

- 61. Some cases may require the consideration of temporarily reassigning or suspending an employee suspected of misconduct. Either one of these actions can occur at any time prior to or during the process of determining whether a breach of the Code has occurred and applying a sanction.
- 62. In exercising these powers, it is important for the decision maker not to prejudge, or be seen to prejudge, whether misconduct has occurred. Reassignment or suspension during the process are not considered to be sanctions.
- 63. Careful consideration of a range of issues should occur when making a decision to re-assign or suspend an employee. For example:
 - 1) the nature and seriousness of the allegation(s) and the evidence presently to hand;
 - 2) any opportunity for the employee to continue inappropriate behaviour; and whether the employee has behaved inappropriately since it was made clear to the employee that the behaviour had been inappropriate;
 - 3) the damage to the reputation of the agency if no action is taken to remove the opportunity to continue the behaviour;
 - 4) the availability to the employee of leave entitlements.

Reassignment

- 64. A decision to temporarily reassign an employee suspected of misconduct to other duties can only be made by the appropriate delegate within the relevant business unit, who must consult with the Assistant Director, HR, prior to making the decision.

Suspension

- 65. An APS employee may be suspended from duties if the delegate believes, on reasonable grounds, that they have or may have breached the Code and the employee's suspension is in the public or the Agency's interest. The suspension may be with or without remuneration. A decision to suspend an employee, with or without pay, can be made by someone with the authority to do so within FWBC's HR delegations.

66. In making the decision to suspend an employee, the delegate must have due regard to procedural fairness and generally inform the employee of the intention to suspend them, and the reasons, with an invitation to respond before the decision is made.
67. In some circumstances it may not be appropriate to provide the employee with this information prior to suspending the employee; for example, where there is an imminent and serious threat to the safety of other employees if suspension were to be delayed. Where the suspension has come into immediate effect, the suspension will be reviewed as soon as the employee has had an opportunity to respond.
68. The delegate must review the suspension at reasonable intervals and must immediately end the suspension if they no longer consider either that the employee has or may have breached the Code, or that it is no longer in the public or the Agency's interest to continue the suspension; or if a sanction has been imposed for the relevant breach of the Code.

Record keeping

69. Any records relating to an investigation and determination about a suspected breach of the Code will be maintained in a "Staff-In-Confidence" misconduct file to be kept in a secure storage area separate to, but cross referenced with, the employee's personnel records.
70. Where a sanction is imposed on an employee for breaching the Code, an Official Conduct Record will be created and held within the misconduct file. Each entry on the Official Conduct Record will set out the nature of the breach of the Code, the sanction imposed and the date of the delegate's decision.
71. For the retention of records, see the National Archives of Australia publication, *Administrative Functions Disposal Authority (2010)*, which provides information on the retention of records and sets out minimum periods for which various classes of records relating to counselling and misconduct matters should be retained.

Review

72. Non-SES employees are entitled to apply for a review of:
 - 1) a determination that the affected employee has breached the Code; and/or
 - 2) a sanction imposed for breach of the Code.
73. Any application for review must be directed to the Merit Protection Commissioner. More information on this review mechanism is available from the Act (s. 33), the *Public Service Regulations 1999* and the APS Commission website at www.apsc.gov.au.
74. In the event that an employee is dismissed for a breach of the Code, then action regarding termination of the employee's employment needs to be made pursuant to the *Fair Work Act 2009*.

Disclosure of personal information to others, including the complainant

75. When a report has been made by an employee, client or member of the public, that person is referred to in this guide as the 'complainant.'
76. During the course of the investigation, or after the investigation is complete, personal information about an employee under investigation may, where necessary, appropriate and reasonable, be disclosed in accordance with the *Privacy Act 1988* Information Privacy Principles (IPPs) 2, 9,10 and 11, including to:
 - 1) the complainant;
 - 2) any other Commonwealth bodies who have been involved in the matter, such as the Commonwealth Ombudsman, the Office of the Privacy Commissioner;
 - 3) an APS agency where the employee moves, or seeks to move, in the future.
77. Complainants have a legitimate interest in knowing that suspected "wrongs" identified by them have been addressed. Where appropriate, complainants will be given sufficient information to provide assurance that:

- 1) the Agency has taken the allegation seriously and does not tolerate behaviour inconsistent with the Code, an appropriate sanction has been applied where a breach has been found, and
 - 2) the Agency has taken appropriate steps to ensure the problem will not recur.
78. General information may be provided to complainants about the outcome of the investigation. Each individual case will be assessed on its own merits and a decision relating to how much (if any) personal information it is appropriate to release will be made by the Assistant Director, HR, or the Director.
79. Information may be referred to other Commonwealth bodies, where these bodies referred the complaint to the Agency and may have an interest in knowing that suitable action was taken.
80. The information about the breach or allegation(s) may be disclosed to an APS agency to which the employee suspected of misconduct is potentially moving if an employee:
- 1) becomes the subject of a misconduct allegation and leaves the Agency before the matter is resolved;
 - 2) is found to have breached the Code and leaves the Agency before a decision about imposing a sanction is made; or
 - 3) found to have breached the Code and been sanctioned and subsequently leaves the Agency.
81. It is the usual practice of the Agency to pass misconduct related information to another APS agency where the Agency believes that the information may be relevant for consideration by another APS agency when making employment related decisions.

Use of information within the Agency

82. It is also the usual practice of the Agency to consider information about any breach and sanctions when making employment related decisions regarding the employee found to have breached the Code. This includes, but it is not limited to, employment related decisions such as an application for promotion or reassignment.
83. It is a requirement that an employee appointed as a Fair Work Building Industry Inspector (FWBII) under the *Fair Work Act 2009*, *Fair Work (Building Industry) Act 2012*, remains of good character to continue to be employed in that role. When an employee who is employed in the Agency as a FWBII has been found to have breached the Code, the delegate for FWBII appointments will be notified of the outcome in order to decide whether it is appropriate to review the assessment of the employee's good character.
84. If an employee who holds a security clearance has found to have breached the Code, the Agency Security Advisor will be notified of the outcome in order to decide whether it is appropriate to review the employee's security clearance.

Movement of a different APS agency or resignation during the investigation

85. Where an employee in another agency is suspected of misconduct but no determination has been made and the employee subsequently moves to this Agency, any determination of whether the employee has breached the Code will be made in accordance with the Procedures.
86. Where an employee of this Agency moves to another APS agency before any determination is made in this Agency in relation to a suspected breach of the Code, the matter will be dealt with by the gaining APS agency in accordance with their procedures.
87. Where an employee resigns during the course of an investigation, the breach decision maker will cease the investigation. Any documents that have been created or obtained up until the date of the resignation will be retained on a misconduct file which will be cross referenced to the employee's personnel file.
88. If an employee who resigns during the course of a misconduct investigation later seeks reengagement in the APS, the records on the misconduct file can be used as part of the pre-employment checks, provided the records are not more than five years old (as measured by

the resignation date). In the interests of procedural fairness, the former employee should be advised by the decision maker that this information is being taken into consideration and be given an opportunity to comment.

Further Information and assistance

More detailed information is available from the:

- *Public Service Act 1999*
- *Privacy Act 1988*
- APS Commission Website, including
 - The [APS Code of Conduct](#), section 13 of the *Public Service Act 1999*
 - The [APS Values](#), section 10 of the *Public Service Act 1999*
 - The APS Employment Principles, section 10A of the *Public Service Act 1999*
 - [APSC Circular No 2008/3: Providing information on Code of Conduct investigation outcomes to complainants](#)
 - [APSC publication APS Values and Code of Conduct in Practice](#)
 - [APSC publication Handling Misconduct: A human resources practitioner's guide to reporting and handling of suspected and determined breaches of the APS Code of Conduct](#)
 - The APSC's [Ethics Advisory Service](#)
 - [Review of actions](#), Section 33 of the *Public Service Act 1999*
 - National Archives of Australia publication [Administrative Functions Disposal Authority](#) (2010)

Information is also available through the Agency's intranet, including:

- Procedures for handling suspected Code of Conduct breaches
- *Public Disclosure Act 2013* Principal Officer's Procedures
- Performance and Development Framework
- Managing Underperformance Guide
- Bullying and Harassment Policy
- Fraud Control Plan

Change History				
Update the following table as necessary when this document is changed:				
Approval authority	Point of contact	Date of Review	Reviewer	Changes
	Director, Legal VIC	14/01/2014		To reflect the commencement of the Public Interest Disclosure Act 2013
Glyn Cryer Executive Director, PPI	Assistant Director, HR.	June 2013	Senior HR Advisor	To reflect changes to the PS Act 1999
Glyn Cryer Executive Director, PPI	Assistant Director, HR.	March 2013		Align with FWO

Attachment A

Flow Chart of the Process of Reporting, Investigating, Determination and Sanction of an Alleged Breach of the Code of Conduct

