



Fair Work  
Commission

# Reporting and handling of breaches of the Code of Conduct (Misconduct)

Procedures



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# Reporting and handling of breaches of the Code of Conduct (Misconduct)

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## Purpose

1. These procedures inform Australian Public Service employees (APS employees) working at the Fair Work Commission (Commission) of their obligations to act in accordance with the APS Code of Conduct (the Code of Conduct) as provided in s.13 of the *Public Service Act 1999* (PS Act).
2. These procedures give guidance to the Commission on how to respond effectively to suspected breaches of the Code of Conduct, as well as determining sanctions, if any, imposed on an employee found to have breached the Code of Conduct.
3. As provided for under s.15(7) of the PS Act, these procedures are publically available on the Commission's website.

## Background

4. The Code of Conduct at s.13 of the PS Act sets out the standards of behaviour expected of APS employees. Section 14 of the PS Act binds the General Manager (GM) and the Commission to the same Code of Conduct.
5. Further, s.13(13) provides that 'An APS employee must comply with any other conduct requirement that is prescribed by the regulations'. Part 2 of the *Public Service Regulations 2023* (PS Regulations) relates to the Code of Conduct.
6. Subsection 15(3) of the PS Act requires the GM to establish these procedures for determining whether a Commission employee, or former Commission employee, has breached the Code of Conduct, which must:
  - comply with the procedural requirements set out in the *Australian Public Service Commissioner's Directions 2022*, primarily Part 7.



- have due regard to procedural fairness (covered by Part 7, Div 2).
7. Subsection 15(5) of the PS Act says every Commission employee must have ready access to this document that sets out the GM's procedures.

## Conduct that breaches the Code of Conduct

8. In broad terms, an employee whose conduct does not comply with an element of the Code of Conduct can be found to have breached the Code of Conduct.

*Note: Where an element of the Code of Conduct contains more than one item, it may not be necessary for an employee to have breached all items for a breach of the Code of Conduct to be determined.*

9. In the employment context, it is not discriminatory to expect all employees to abide by the Code of Conduct, regardless of physical or mental capacity.

## Unsatisfactory performance or misconduct

10. Not all suspected breaches of the Code of Conduct need to be dealt with by implementing misconduct procedures. A minor misconduct breach or, for example, a 'personality clash' may be better handled informally by the parties working co-operatively to attempt to resolve the issue or through dispute resolution (such as mediation or counselling).
11. Likewise, not all suspected breaches of the Code of Conduct need be dealt with by way of a determination. A minor infringement and/or atypical behaviour may be better handled by warning the employee about their behaviour and advising that any further similar conduct could lead to formal action. In these circumstances, the People and Culture team would be consulted in determining an appropriate response.

## Reporting suspected misconduct

12. APS employees have special obligations that come from both being bound by the APS Values under s.10 of the PS Act, the Code of Conduct, and their status as a public servant.
13. The Australian Public Service Commission considers that the duty to act with integrity and with the highest ethical standards imposes a reporting obligation on all employees regarding misconduct. In some circumstances, particularly for managers, it could well be a breach of the Code of Conduct for an employee not to report misconduct.



14. Commission employees can report suspected misconduct to their Executive Director, manager, the Director, People and Culture or the GM. It is generally expected that a report be in writing (which includes via email).
15. The Commission is required to protect an employee who reports misconduct from any retribution, such as victimisation or discrimination. As far as reasonably practicable, an employee's identity will be kept confidential. It may be necessary in limited circumstances (for example, in court proceedings) for an employee's identity to be disclosed. In any event where this is applicable, the employee will be advised of the disclosure beforehand.

## Rights of employees suspected of misconduct

16. An employee being investigated for a suspected breach of the Code of Conduct has, as a minimum, the following rights:
  - their identity being kept confidential as far as possible and managed on a 'need to know' basis consistent with the *Privacy Act 1988*
  - being presumed 'innocent' until a determination is made as to whether they have breached the Code of Conduct
  - they cannot lawfully be directed to answer questions relating to a matter under investigation where this may incriminate them
  - the investigation being handled in a timely, systematic and effective manner; and being consistent with procedural fairness
  - appropriate record keeping being observed, including the disposal of misconduct records in line with Commission policy.

## Procedures for dealing with misconduct reports

### Application of procedures

17. These procedures must be complied with in determining whether a Commission employee has breached the Code of Conduct.

*Note: These procedures apply only in relation to a suspected breach of the Code of Conduct by an employee in respect of which a determination is to be made. Not all suspected breaches of the Code of Conduct may need to be dealt with by way of a determination (see paragraphs 8-9).*



## Selection of decision-maker

18. The GM will appoint a decision-maker and delegate powers to that person in determining whether an employee has breached the Code of Conduct, which may include any person named under an instrument of delegation, or an impartial person external to the Commission (appointed to conduct an assessment into any suspected breaches by gathering evidence and presenting their findings).
19. Where a Senior Executive Service (SES) employee is suspected of breaching the Code of Conduct, pursuant to the *Australian Public Service Commissioner's Directions 2022* the GM must consult with the Australian Public Service Commissioner on the process for determining whether the SES employee had breached the Code of Conduct.
20. The role of a decision-maker is to:
  - investigate the suspected breach
  - determine whether any breach has occurred
  - prepare a written record stating whether the employee has been found to have breached the Code of Conduct
  - advise the GM and employee of the determination.

## Formal hearing not required

21. A formal hearing is not required to determine whether an employee has breached the Code of Conduct.

## Information to be given to employee before determination is made

22. Before a determination is made in relation to a suspected breach of the Code of Conduct by an employee, the employee must be:
  - informed of the details of the suspected breach of the Code of Conduct (including any subsequent variation of those details)
  - informed of the sanctions that may be imposed on the employee under s.15(1) of the PS Act, including any limitations on that power contained in regulations made for the purposes of s.15(2) of the PS Act



- given reasonable opportunity to properly respond and put forward their case by making a statement, in writing, in relation to the suspected breach within seven days (or any longer period as is allowed).

23. If the employee makes a written statement within seven days (or any allowed longer period) of being given the opportunity to do so, the employee must also be given the opportunity to make an oral statement in relation to the suspected breach.

24. Where an employee suspected of a breach makes an oral statement to the decision-maker, or where they may be interviewed by the decision-maker, they are entitled to be accompanied by a support person. The role of the support person is:

- to confer with the employee suspected of breaching the Code of Conduct
- raise procedural concerns with the employee where necessary.

A support person must not advocate for, or provide responses to questions on behalf of, the employee suspected of a breach. Where an employee requests to have a workplace delegate as a support person, the decision-maker must be informed in writing prior to any interview taking place, or oral statement being made.

25. An employee who does not make a written statement in relation to a suspected breach is not, only for that reason, to be taken to have admitted committing the suspected breach.

## **Determination process to be informal**

26. The process for determining whether an employee has breached the Code of Conduct must be carried out with as little formality and as much expedition as a proper consideration of the matter allows.

## **Person making determination to be independent and unbiased**

27. The GM must take reasonable steps to ensure that the person who determines whether an employee has breached the Code of Conduct is, and appears to be, independent and unbiased.

28. In particular, a person must not determine whether an employee has breached the Code of Conduct if the person has previously made a report in relation to any of the matters suspected of constituting a breach of the Code of Conduct by the employee.



## Standard of proof

29. Findings of the decision-maker must be based on the conclusion that it is more probable than not that the suspected breach in fact occurred.
30. Before reaching a finding, the decision-maker must have regard to the seriousness of the suspected breach under consideration and the gravity of any adverse consequences that might flow to the employee. In that sense the civil standard of proof increases in accordance with the seriousness of the breach.

## Written report, including record of determination

31. The decision-maker is required to provide a written report about their investigation, which is to also include their determination. A copy of the determination must be given to the employee suspected of the breach of the Code of Conduct.
32. If the employee is found to have **not** breached the Code of Conduct, the misconduct action ends.
33. If the employee is found to have breached the Code of Conduct, the determination must contain the reasons for it.

*Note: The Archives Act 1983 and the Privacy Act 1988 apply to written records.*

## Action that may be taken if breach found

34. If a determination is made that an employee has breached the Code of Conduct, the employee may be counselled or a sanction may be imposed on the employee under s.15 of the PS Act.
35. Subsection 15(1) of the PS Act provides for the following sanctions:
  - termination of employment
  - reduction in classification
  - re-assignment of duties
  - reduction in salary
  - deductions from salary, by way of a fine—reg 2.3(2) under the PS Regulations state a deduction must not be more than 2% of an employee's annual salary
  - a reprimand.





36. Where the decision-maker determines a breach has occurred, they will make recommendations to the GM (or GM's delegate) regarding the severity of the breach(es), and any sanction recommended to be imposed. Following these discussions, if a sanction is (or sanctions are) to be imposed, the employee will be advised in writing of the sanction(s) under consideration and of the factors in determining any sanction to be imposed.
37. The employee will be given a reasonable opportunity to make a submission/comment on the proposed sanction(s).
38. Following receipt of any submission from the employee, the GM or the GM's delegate, will then advise the employee, in writing, of their:
  - final consideration regarding the sanction, their reasons for it and, if there is to be a sanction or sanctions, when they take effect
  - rights of review under s.33 of the PS Act

### **Procedures if the employee is to move to a different agency**

39. In circumstances where:
  - an employee is suspected of having breached the Code of Conduct
  - the employee has been informed of the matters mentioned within these procedures under '[Information to be given to employee before determination is made](#)'
  - the matter has **not yet** been resolved
  - before any determination is made in relation to the suspected breach, the basis of the employee's engagement with the Commission changes, or the employee moves to a different Agency;

Unless the GM and the new Agency Head agree otherwise, any movement (including on promotion) does not take effect until the matter is resolved.

40. The matter is taken to be resolved when:
  - a determination is made and any imposed sanctions are dealt with
  - it is decided that a determination is not necessary.



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## Further Guidance

41. Further guidance regarding the application of Commission's procedures is available by reference to the APSC best practice guide [Handling Misconduct: A human resource manager's guide](#).