



Australian Government

Department of Infrastructure, Transport,  
Regional Development, Communications and the Arts

# Procedures for determining breaches of the Australian Public Service (APS) Code of Conduct

I, Jim Betts, Secretary, Department of Infrastructure, Transport, Regional Development, Communications and the Arts (the department), establish these Procedures under subsection 15(3) of the *Public Service Act 1999* (the Act).

**Dated 20 August 2024**

**JIM BETTS**

**Secretary, Department of Infrastructure, Transport, Regional Development, Communications and the Arts**

These Procedures commence on the date signed by the Secretary.

These Procedures supersede the previous Procedures of the same title made for the department under subsection 15(3) of the Act.

These Procedures do not apply to any matters relating to a suspected breach of the Australian Public Service (APS) Code of Conduct (the Code) where a complaint was received, or notice of a suspected breach was issued, by the department before the date these Procedures were signed by the Secretary.

## Application

1. These Procedures apply in determining:
  - a. whether a person who is an APS employee in 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 Code in section 13 of the Act;
  - b. any sanction to be imposed on an APS employee in the department in accordance with subsection 15(1) of the Act, who has been found under these Procedures to have breached the Code.

2. To remove any doubt, this clause also applies to alleged breaches of the Code by SES employees.
3. 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.
4. The Secretary's powers and functions as the Agency Head under legislation (e.g. powers to suspend or reassign duties or determine a breach) may be delegated in writing to other employees of the department.
5. These Procedures are to be made publicly available on the department's website in accordance with subsection 15(7) of the Act.

## Breach decision maker and sanction delegate

### Breach Decision Maker

6. 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, the Secretary or that person will appoint a Breach Decision-Maker to make a determination under these Procedures.
7. The role of the breach decision-maker is to determine in writing whether a breach of the Code has occurred.
8. The breach decision-maker will usually be assisted by a suitably qualified and/or experienced person who will investigate the suspected breach, gather evidence and make a report of recommended findings of fact to the Breach Decision-Maker. The person who assists the Breach Decision-Maker and investigates the suspected breach may be an APS employee or an external consultant or contractor.

### Sanction Delegate

9. 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 (Sanction Delegate) will be a person holding a delegation of the powers under the Act to impose sanctions.
10. These Procedures do not prevent the Breach Decision-Maker from being the Sanction Delegate in the same matter.

### Suspension Delegate

11. The delegate determining whether an employee should be suspended from duties is referred to in these procedures as the suspension delegate and must hold a delegation by the Secretary of the relevant powers and functions under section 28 of the Act and section 14 of the *Public Service Regulations 2023* (Cth) (PS Regulations).
12. Where suspension of an employee from duties is being considered, it is preferable that the delegate to determine if an employee should be suspended is not same person as the Breach Decision-Maker.

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

13. The Breach Decision-Maker and the Sanction Delegate must be, and must appear to be, independent and unbiased.
14. The Breach Decision-maker and the Sanction Delegate must advise the Secretary, or the person authorised by the Secretary, 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.
15. A person must not be the Breach Decision-Maker or Sanction Delegate if the person has previously made a report (or been directly involved in) any of the matters suspected of constituting a breach of the Code by the employee. This addition of this specific rule helps manage the risk of a decision being challenged on the basis of bias.

## Reassignment of duties or suspension from duty

16. A current APS employee who is under investigation for a suspected breach of the Code may be:
  - a. reassigned to alternative duties, either for a temporary period or on an ongoing basis, under section 25 of the PS Act;
  - b. suspended from duty under section 28 of the Act and section 14 of the PS Regulations.
17. In reassigning duties of a current APS employee who is under investigation, the suspension delegate, unless it is not reasonably practicable to do so, will:
  - a. notify the current APS employee in writing of the proposal and reasons for it; and
  - b. give the person reasonable opportunity (usually, 7 calendar days) to respond before any decision to suspend is taken.
18. Sometimes urgent action may be required that will not allow for notification and response outlined at clause 2. In such cases, the suspension delegate may invite the current APS employee who is under investigation to comment after the decision has been made. Depending on their response and presenting circumstances at the time, the suspension delegate has the flexibility to consider alternative arrangements, including suspension or termination of the reassignment of duties.
19. In suspending a current APS employee who is under investigation, the suspension delegate, unless it is not reasonably practicable to do so, will:
  - a. notify the current APS employee, in writing, of the department preliminary intention to suspend them, and the reasons for this proposal; and
  - b. give the person reasonable opportunity to respond (usually, 7 calendar days) before any decision to suspend is taken.
20. Sometimes urgent action may be required that will not allow for notification and response outlined at clause 18. In such cases, the suspension delegate may invite the current APS employee who is under investigation to comment after the decision has been made. The suspension delegate may consider any information provided by the APS employee and affirm, vary it or set it aside.

## Determination process

21. The process for determining whether a person who is, or was, an APS employee, in the department has breached the Code should be carried out with as little formality, and as much expedition as a proper consideration of the matter allows.
22. The process must be consistent with the principles of procedural fairness. Investigations of breaches of the Code are an administrative law process. Accordingly, the standard of proof is 'on the balance of probabilities'.
23. 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 subsection 15(1) of the Act (including any limitations on that power under the regulations made for the purposes of subsection 15(2) of the Act);
  - b. give the person a reasonable opportunity to make a statement in relation to the suspected breach.
24. The statement may be a written or oral statement and should be provided within seven (7) calendar days or any longer period that is allowed by the decision-maker.
25. 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.
26. 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.

## Variation in investigation

27. If during the course of an investigation it becomes evident that there is a material variation in the nature or extent of the alleged breach originally notified to the employee, the employee must be notified in writing of the variation and, as applicable.
28. The employee must be provided with a reasonable opportunity (usually, seven (7) calendar days) to make a further statement or provide further evidence before a determination is made.

## Sanctions

29. The process for imposing a sanction must be consistent with the principles of procedural fairness.
30. If a determination is made that an APS employee has breached the Code, a sanction may not be imposed on the person unless reasonable steps have been taken to:
  - a. inform the person in writing of:
    - i. the determination that has been made; and
    - ii. the sanction or sanctions that are under consideration in accordance with subsection 15(1) of the Act (including any limitations on that power contained in regulations made for the purposes of subsection 15(2) of the Act); and
    - iii. the factors that are under consideration in determining any sanction to be imposed; and

- b. give the APS employee reasonable opportunity to make a statement in relation to the sanction/s under consideration.
31. The statement may be a written or oral statement and should be provided within seven (7) calendar days or any longer period that is allowed by the sanction delegate.
32. A delegate may choose not to impose a sanction, even if a breach has been determined.

## Record of determination and sanction

33. If a determination is made in relation to a suspected breach of the Code by a person who is, or was, an APS employee, a written record must be made of:
- a. the suspected breach; and
  - b. the determination; and
  - c. if person is a current APS employee, any sanctions imposed as a result of the determination that the employee breached the Code; and
  - d. if a statement of reasons was given to the person regarding the determination in relation to suspected breach of the Code, or, in the case of a current APS employee, regarding the sanction decision, that statement of reasons.

## Additional procedural requirements for current Senior Executive Service employees

34. If a current Senior Executive Service (SES) employee in the department is suspected of breaching the Code, the Secretary (as the Agency Head), or a delegate of the Secretary, must comply with the requirements at section 64 of *the Australian Public Service Commissioner's Directions 2022* (Directions) to consult, with either the Commissioner as the APS Commissioner, or a delegate of the Commissioner :
- a. on the process for determining whether the employee has breached the Code; and
  - b. if considering imposing a sanction, before imposing the sanction.

## Procedure when an employee seeks to move to another APS agency during investigation

35. This clause applies if a current APS employee in the department seeks to move to another APS agency under either a voluntary move arrangement (temporary or ongoing) as provided for under section 26 of the PS Act or to take up a promotion, after they have been formally notified that they are suspected of breaching the Code but before the matter has been resolved.
36. In this circumstance, any move between APS agencies will generally be deferred, under subsections 42A(1) and 46(5) of the Directions, until after a decision has been made about whether or not the employee has breached the Code, or it is decided that such a determination is not necessary.

## Contacts

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## Version Control

Version	Author	Authorise by	Date
3.0	People Branch	Jim Betts, Secretary	May 2024
2.0	HR and Property Branch	Jim Betts, Secretary	September 2023
1.0	People and Performance Branch	Mike Mrdak AO, Secretary	29 April 2017