



DEPARTMENT OF THE
HOUSE OF REPRESENTATIVES

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

Procedures for determining breaches of the Code of Conduct and any sanction

I, Claressa Anne Surtees, Clerk of the House of Representatives (the department), establish these procedures under subsection 15(3) of the *Parliamentary Service Act 1999* (the Act).

These procedures commence on 1 November 2019.

These procedures supersede the previous procedures made for the department on 19 September 2013 under subsection 15(3) of the Act, but the previous procedures may continue to apply for transitional purposes.

CLARESSA SURTEES
Clerk of the House

Application of procedures

These procedures apply in determining whether a person who is a Parliamentary Service employee in the department, or who is a former Parliamentary Service employee who was employed in the department at the time of the suspected misconduct, has breached the Parliamentary Service Code of Conduct (the Code) in section 13 (see **Attachment A**) of the Act.

These procedures apply in determining any sanction to be imposed on a Parliamentary Service employee in the department who has been found to have breached the Code.

These procedures, as they apply to determining whether there has been a breach of the Code, apply to any suspected breach of the Code except for one in respect of which a decision had been made before these procedures commenced on 3 January 2020 to begin an investigation to determine whether there had been a breach of the Code.

These procedures, as they apply to determining any sanction for breach of the Code, apply where a sanction decision is under consideration on or after 3 January 2020.

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) (see **Attachment B**) of the Act in connection with their engagement as a Parliamentary Service employee.

Not all suspected breaches of the Code need to be dealt with by way of determination under these procedures. In particular circumstances, another way of dealing with a suspected breach of the Code may be more appropriate, including performance management.

Availability of procedures

As provided for in subsection 15(7) of the Act, these procedures are publicly available on the department's website.

Decision maker and investigator

As soon as practicable after a suspected breach of the Code has been identified and the Clerk, or a person authorised by the Clerk, has decided to deal with the suspected breach under these procedures, the Clerk or that person will appoint a decision maker (breach decision maker) to make a determination under these procedures.

Note: The Parliamentary Service Determination 2013 in section 52 provides that where the conduct of a Parliamentary Service employee raises concerns that relate both to effective performance and possible breaches of the Code, the Clerk must, before making a decision to commence formal misconduct action, have regard to any relevant standards and guidance issued by the Commissioner.

The role of the breach decision maker is to determine in writing whether a breach of the Code has occurred.

The Clerk may also appoint an investigator to assist the decision maker by investigating the matter, gathering evidence and preparing a report of factual findings. The investigator may be an employee of the department or another person. The Clerk will take reasonable steps to ensure the investigator is, and appears to be, independent and unbiased.

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

The Clerk will take reasonable steps to ensure that the breach decision maker and the sanction delegate is, and appears to be, independent and unbiased.

The breach decision maker and the sanction delegate must advise the Clerk 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.

The determination process

The process for determining whether a person who is, or was, a Parliamentary Service employee in the department 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.

The process must be consistent with the principles of procedural fairness.

Note: Procedural fairness generally requires that:

- the person suspected of breaching the Code is informed of the case against them (i.e. any material that is before the decision maker that is credible, relevant and significant in relation to any proposed findings or decision adverse to the person or their interests)
- the person is provided with a reasonable opportunity to respond and put their case, in accordance with these procedures, before any decision is made on breach or sanction
- the decision maker acts without bias or an appearance of bias
- there is logically probative evidence to support the making, on the balance of probabilities, of adverse findings.

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:
 - i. of the details of the suspected breach of the Code (including any subsequent variation of those details)
 - ii. where the person is a Parliamentary Service employee, the sanctions that may be imposed on them under subsection 15(1) of the Act

and

- b. give the person a reasonable opportunity to make a written statement, or provide further evidence in relation to the suspected breach, within 7 calendar days or any longer period that is allowed.

Note: This clause is designed to ensure that by the time the breach decision maker comes to make a determination, reasonable steps have been taken for the person suspected of breach to be informed of the case against them. It will generally also be good practice to give the person notice at an early stage in the process of a summary of the details of the suspected breach that are available at that time and notice of the elements of the Code that are suspected to have been breached.

The breach decision maker may decide to give the person the opportunity to make both a written and an oral statement.

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.

For the purpose of determining whether a person who is, or was, a Parliamentary Service employee in the department has breached the Code, a formal hearing is not required.

The sanction delegate may agree to a request made by the person determined to have breached the Code to have a support person present when making an oral statement. The sanction delegate can restrict the role of support person as considered appropriate, including making clear that the support person cannot act as a representative.

Note: Where a sanction of termination of employment is under consideration, the sanction delegate should not unreasonably refuse to allow the employee to have a support person present to assist at any discussion relating to termination to ensure that any termination of employment will not be found unfair by the Fair Work Commission because of any such refusal (see section 387(d) of the *Fair Work Act 2009*). A breach decision maker should ensure that they also conform to any procedural requirements to which an employee is legally entitled under their terms and conditions of employment such as under an enterprise agreement.

Sanction delegate

The person who is to decide what, if any, sanction is to be imposed on a Parliamentary Service employee who is found to have breached the Code must hold a delegation of the power under the Act to impose sanctions (the sanction delegate).

These procedures do not prevent the breach decision maker from being the sanction delegate in the same matter.

Note: Appointment as a decision maker under these procedures does not empower the decision maker to make a decision regarding sanction. Only the Clerk or a person who has been delegated the power under section 15 of the Act and related powers, such as under section 29 of the Act, may make a sanction decision.

Sanctions

The process for deciding on sanctions must be consistent with the principles of procedural fairness. Subsection 15(1) of the Act prescribes the range of sanctions that may be imposed (see **Attachment C**).

If a determination is made that a Parliamentary Service employee in the department 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. a determination that has been made that they have breached the Code
 - ii. the sanction or sanctions that are under consideration
 - iii. the factors that are under consideration in determining any sanction to be imposed
- b. give the employee a reasonable opportunity to make a written statement in relation to the sanction or sanctions under consideration within 7 calendar days, or any longer period that is allowed by the sanction delegate.

The sanction delegate may decide to give the employee the opportunity to make both a written and an oral statement.

Record of determination and sanction

If a determination in relation to a suspected breach of the Code by a person who is, or was, a Parliamentary Service employee in the department is made, a written record must be made of:

- a. the suspected breach
- b. the determination
- c. where the person is a Parliamentary Service employee—any sanctions imposed as a result of a determination that the employee has breached the Code
- 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 an employee, regarding the sanction decision—that statement of reasons or those statements of reasons.

Note: The *Archives Act 1983* may apply to departmental records.

Procedure when an ongoing employee is to move to another agency

This clause applies if:

- a. a person who is an ongoing Parliamentary Service employee in the department is suspected of having breached the Code
- b. the employee has been informed of the matters
- c. the matter has not yet been resolved
- d. a decision has been made that, apart from this clause, the employee would move to another agency in accordance with section 26 of the Act (including on promotion).

Unless the Clerk and the new agency head agree otherwise, the movement (including on promotion) does not take effect until the matter is resolved.

For the purpose of this clause the matter is taken to be resolved when:

- a. a determination in relation to suspected breach of the Code is made in accordance with these procedures; or
- b. the Clerk decides that a determination is not necessary.

Note: This paragraph restates the requirements of sections 35A and 35B of the Parliamentary Service Determination 2013.