

Senate Standing Committee on Environment and Communications
Answers to Senate Estimates Questions on Notice
Additional Estimates Hearings February 2016
Communications Portfolio
National Collecting Institutions

Question No: 212(k)

National Collecting Institutions

Hansard Ref: Written, 19/02/2016

Topic: Departmental Staff Misconduct

Senator Ludwig, Joe asked:

National Cultural Institutions

- Australian National Maritime Museum
- National Film and Sound Archive
- National Gallery of Australia
- National Library of Australia
- National Museum of Australia
- National Portrait Gallery
- The Museum of Australian Democracy

Since the change of Prime Minister on 14 September, 2015:

1. Please provide a copy of the departmental staff code of conduct.
2. Have there been any identified breaches of this code of conduct by departmental staff?
 - (a) If yes, list the breaches identified, broken by staffing classification level.
 - (b) If yes, what remedy was put in place to manage the breach? If no remedy has been put in place, why not?
 - (c) If yes, when was the breach identified? By whom? When was the Minister made aware?
 - (d) If yes, were there any legal ramifications for the department or staff member? Please detail?

Answer:

Australian National Maritime Museum

1. Australian National Maritime Museum's staff are expected to follow the APSC Code of Conduct. The '*APSC Code of Conduct In Practice*' can be located at the following link-
<http://www.apsc.gov.au/publications-and-media/current-publications/values-and-conduct>
2. No.

Senate Standing Committee on Environment and Communications

Answers to Senate Estimates Questions on Notice

Additional Estimates Hearings February 2016

Communications Portfolio

National Collecting Institutions

National Gallery of Australia

1. Code of Conduct

The Code provides that each Gallery employee must, in the course of or in connection with their employment:

- (a) behave honestly and with integrity;
- (b) work with care and diligence and with consideration for all others;
- (c) treat everyone with respect, consideration and courtesy, and act without coercion, bias, bullying or harassment of any kind;
- (d) comply with any lawful and reasonable direction given by someone in the Gallery who has authority to give the direction;
- (e) comply with all applicable Australian laws;
- (f) have regard to the undertakings included in the Gallery's Service Charter with respect to client services;
- (g) disclose to the Gallery, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with their employment;
- (h) use Gallery resources in a proper manner;
- (i) not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's Gallery employment;
- (j) not make improper use of inside information that the employee generates or obtains in the course of their employment, or of their duties, status, power or authority in order to gain, or seek to gain, a benefit or advantage for themselves or any other person;
- (k) at all times behave in a way that upholds the Gallery's Values and the integrity and good reputation of the Gallery;
- (l) while on duty overseas behave at all times in a way that upholds the good reputation of Australia;
- (m) not disclose to any person outside the Gallery information which the employee obtains or generates in connection with their employment if it is reasonably foreseeable that the disclosure could be prejudicial to the good reputation or the effective working of the Gallery, including the formulation or implementation of policies or programs;
- (n) not disclose to any person information which the employee obtains or generates in connection with their employment if the information:
 - i was, or was intended to be communicated in confidence within the Gallery; or
 - ii was received by the Gallery in confidence from a person or persons outside the Gallery, whether or not the disclosure would found an action for breach of confidence;
- (o) maintain as confidential dealings that the employee has with any Minister or member of a Minister's office.

2. No.

Senate Standing Committee on Environment and Communications

Answers to Senate Estimates Questions on Notice

Additional Estimates Hearings February 2016

Communications Portfolio

National Collecting Institutions

National Library of Australia

1. National Library of Australia staff are required to act in accordance with the *Code of Conduct* set out in section 13 of the *Public Service Act 1999*. The *Code of Conduct* is publicly available through this link: <http://www.apsc.gov.au/working-in-the-aps/your-rights-and-responsibilities-as-an-aps-employee/code-of-conduct> In accordance with subsection 15(3) of the *Public Service Act 1999*, the National Library of Australia has established procedures for determining whether an employee has breached the Code of Conduct.
2. Yes.
 - (a) 13(3), An APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment – 1x APS6
 - (b) Employee was reminded about appropriate workplace behaviours and directed not to email external clients without supervisor review.
 - (c) 16 December 2015. The internal Library delegate. The Minister was not made aware.
 - (d) No.

National Museum of Australia

1. All department and portfolio agencies are required to act in accordance with the *Code of Conduct* set out in section 13 of the *Public Service Act 1999*. The *Code of Conduct* is publicly available through this link: <http://www.apsc.gov.au/aps-employment-policy-and-advice/aps-values-and-code-of-conduct/code-of-conduct>. In accordance with subsection 15(3) of the *Public Service Act 1999*, the National Museum of Australia has established procedures for determining whether an employee has breached the Code of Conduct.
2. No.

National Portrait Gallery

1. NPGA staff are employed under the *Public Service Act 1999* and are subject to the APS Values and Code of Conduct.
2. No breaches have been formally identified.

The Museum of Australian Democracy

1. All department and portfolio agencies are required to act in accordance with the *Code of Conduct* set out in section 13 of the *Public Service Act 1999*. The *Code of Conduct* is publicly available through this link: <http://www.apsc.gov.au/aps-employment-policy-and-advice/aps-values-and-code-of-conduct/code-of-conduct>
2. No.

Senate Standing Committee on Environment and Communications

Answers to Senate Estimates Questions on Notice

Additional Estimates Hearings February 2016

Communications Portfolio

National Collecting Institutions

National Film and Sound Archive

1. See policy attached on next page.
2. Yes.
 - (a) 1 breach, APS4, sections 13(3) and 13.11 of the APS Code of Conduct.
 - (b) Termination of employment.
 - (c) January 2016 by the CEO. The Minister was not made aware.
 - (d) No.

DETAILS

Policy No:

Subject: Procedures for determining breaches of the APS Code of Conduct and for determining sanction

Date of Issue: 1 July 2013

Date of Effect: 1 July 2013

Approved by: CEO

Section responsible: Human Resources

Contact Officer(s): HR Manager, Human Resources

Supersedes Policy No:

POLICY CONTROL SHEET

POLICY INFORMATION

Policy Name: HR Policy – Procedures for determining breaches of the APS Code of Conduct and for determining sanction

Location: HR

Owner: HR

CHANGE HISTORY

Version	Date	Amendment	Author
1	14 November 2014		Jill Torpy

CONSULTATION

Version	Date	Group/s
1	28 November 2014	WCC
1	28 November 2014	Workplace Harassment Officers

APPROVAL

Title: Chief Executive Officer

Name: Michael Loebenstein

Signature:

Date: 1 July 2013

NFSA Policy documents are managed by the Governance Section. Please submit all requests for changes to the Governance Section and owner of the policy, Changes will be issued only as a complete replacement document. Recipients should remove superseded versions from circulation.

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

Policy and Procedures

CONTENTS		
1	Application of procedures	Page 4
2	Availability of procedures	Page 4
3	Breach decision maker and sanction delegate	Page 4
4	Person or persons making breach determination and imposing sanction to be independent and unbiased	Page 5
5	The determination process	Page 6
6	Sanctions	Page 7
7	Record of determination and sanction	Page 8
8	Procedure when an ongoing employee is to move to another agency	Page 8
9	Compliance	Page 9

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

I, Michael Loebenstein, Chief Executive Officer (CEO) of the National Film and Sound Archive of Australia ('the NFSA'), establish these procedures under subsection 15 (3) of the *Public Service Act 1999* ('the Act') and the *Public Service Amendment Act 2013*.

These procedures commence on 1 July 2013.

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

MICHAEL LOEBENSTEIN
CEO

1 APPLICATION OF PROCEDURES

1.1. These procedures apply in determining whether a person who is an APS employee in the NFSA, or who is a former APS employee who was employed in the NFSA at the time of the suspected misconduct, has breached the APS Code of Conduct ('the Code') in section 13 of the *Public Service Act 1999* ('the Act').

1.2. These procedures apply in determining any sanction to be imposed on an APS employee in the NFSA who has been found to have breached the Code.

1.3. 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 1 July 2013 to begin an investigation to determine whether there had been a breach of the Code.

1.4. 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 1 July 2013.

1.5. 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.

Note: 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.

2 AVAILABILITY OF PROCEDURES

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

3 BREACH DECISION MAKER AND SANCTION DELEGATE

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

Note: The Australian Public Service Commissioner's Directions 2013 provide that where the conduct of an APS employee raises concerns that relate both to effective performance and possible breaches of the Code, the Agency Head must, before making a decision to commence formal misconduct action, have regard to any relevant standards and guidance issued by the Australian Public Service Commissioner.

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

3.3 The breach decision maker may seek the assistance of an investigator with matters including investigating the alleged breach, gathering evidence and making a report of recommended factual findings to the breach decision maker.

3.4 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 must hold a delegation of the power under the Act to impose sanctions ('the sanction delegate').

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

Note: Any delegation of powers under the Act that is proposed to be made to a person who is not an APS employee must be approved in writing in advance by the Australian Public Service Commissioner. This is required by subsection 78 (8) of the Act. This would include delegation of the power under subsection 15 (1) to impose a sanction.

Note: Appointment as a breach decision maker under these procedures does not empower the breach decision maker to make a decision regarding sanction. Only the CEO 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.

4 PERSON OR PERSONS MAKING A BREACH DETERMINATION AND IMPOSING ANY SANCTION TO BE INDEPENDENT AND UNBIASED

3.6 The breach decision maker and the sanction delegate must be, and must appear to be, independent and unbiased.

3.7 The breach decision maker and the sanction delegate must advise the CEO 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.

5 THE DETERMINATION PROCESS

5.1 The process for determining whether a person who is, or was, an APS employee in the NFSA 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.

5.2 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 adverse to the person or their interests and that is credible, relevant and significant)*
- *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.*

5.3 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;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.

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

5.4 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.

5.5 For the purpose of determining whether a person who is, or was, an APS employee in the NFSA has breached the Code, a formal hearing is not required.

5.6 The breach decision maker (or the person assisting the breach decision maker, if any) where they consider in all the circumstances that the request is reasonable, must agree to a request made by the person who is suspected of breaching the Code to have a support person present in a meeting or interview they conduct.

6 SANCTIONS

6.1 The process for deciding on sanction must be consistent with the principles of procedural fairness.

6.2 If a determination is made that an APS employee in the NFSA 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) the determination that has been made;

ii) the sanction or sanctions that are under consideration; and

iii) the factors that are under consideration in determining any sanction to be imposed; and

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.

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

7 RECORD OF DETERMINATION AND SANCTION

7.1 If a determination in relation to a suspected breach of the Code by a person who is, or was, an APS employee in the NFSA is made, a written record must be made of:

a) the suspected breach; and

b) the determination; and

c) where the person is an APS employee--any sanctions imposed as a result of a determination that the employee has 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 an employee, regarding the sanction decision--that statement of reasons or those statements of reasons.

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

8 PROCEDURE WHEN AN ONGOING EMPLOYEE IS TO MOVE TO ANOTHER AGENCY

8.1 This clause applies if:

- a) a person who is an ongoing APS employee in the NFSA is suspected of having breached the Code, and
- b) the employee has been informed of the matters mentioned in 5.3.(a); and
- c) the matter has not yet been resolved, and
- 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).

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

8.3 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 CEO decides that a determination is not necessary.

9 COMPLIANCE

7.1 The Human Resources Section monitors NFSA's human resources policies and procedures on a regular basis. Compliance by staff and managers may also be assessed by Human Resources Section, internal audit or the Australian National Audit Office with breaches reported to the NFSA Audit and Risk Committee.