



**Australian Government**

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**Department of Broadband,  
Communications and the Digital Economy**

## **Guidelines for Handling Misconduct**

**July 2013**

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## Conduct in the APS

All APS employees must comply with the APS Code of Conduct and agency procedures. Adherence to the Code contributes to a positive working environment.

The Code of Conduct requires that an employee must:

- > behave honestly and with integrity in connection with APS employment
- > act with care and diligence in connection with APS employment
- > when acting in connection with APS employment, treat everyone with respect and courtesy, and without harassment
- > when acting in connection with APS employment, comply with all applicable Australian laws
- > comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction
- > maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff
- > disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment
- > use Commonwealth resources in a proper manner
- > 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 APS employment
- > not make improper use of:
  - inside information
  - the employee's duties, status, power or authority, in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person
- > at all times behave in a way that upholds the APS Values and Employment Principles and the integrity and good reputation of the employee's Agency and the APS
- > while on duty overseas, at all times behave in a way that upholds the good reputation of Australia
- > comply with any other conduct requirement that is prescribed by the regulations

Instances of suspected misconduct must be addressed by using agency procedures to determine whether a breach of the Code of Conduct has occurred.

### What is considered misconduct

If an employee does not comply with the Code of Conduct, including the obligation to uphold the [APS Values](#) and [Employment Principles](#), the employee may be found to have breached the Code of Conduct.

The fact that a breach of the Code of Conduct can occur outside the office environment is made clear by the phrases 'in connection with employment' and 'at all times' in the Code of Conduct.

APS employees are entitled to a private life. However, conduct by an employee, such as using social media on the weekend to make adverse comments about a work colleague touches on the working environment and could be found to constitute misconduct. Furthermore, providing false or misleading information before commencing working in the APS, for example at interview, could also constitute misconduct if it comes to light after the engagement of the employee because the conduct can be characterised as being 'in connection with employment'.

Misconduct is not limited to conduct carried out on the Department's premises or during standard business hours, it extends to meetings, functions, events and business trips or other activities that may be outside standard working hours or away from the workplace.

## The rights of employees suspected of misconduct

The identity and details of employees that are suspected of misconduct are kept confidential as far as possible and managed on a 'need to know' basis, as is the identity of the person reporting the suspected breach. When making a statement regarding misconduct, the guilt of the person suspected of misconduct cannot be presumed.

## Relevant legislation, policies and resources

Legislation relevant to handling suspected misconduct or misconduct includes the:

- > [Public Service Act 1999](#)
- > [Public Service Regulations 1999](#)
- > [Australian Public Service Commissioner's Directions 2013](#)
- > [Fair Work Australia Act 2009](#)
- > [Administrative Decisions \(Judicial Review\) Act 1977](#)
- > [Freedom of Information Act 1982](#)
- > [Work Health and Safety Act 2011](#)
- > [Privacy Act 1988](#)

Internal policies

- > [Whistleblowing Policy](#)
- > [Review of Actions Policy](#)

Australian Public Service Commission resources

- > [APS Values and Code of Conduct in practice: A guide to official conduct for APS employees and agency heads](#)
- > [Review of breaches of the Code of Conduct](#)
- > [FAQ: Who can report a suspected breach of the Code of Conduct?](#)

## Reporting Misconduct

Employees are strongly encouraged to report incidents of suspected misconduct. All APS employees are covered by the Code of Conduct which requires, among other things, that employees when acting in connection with APS employment, must treat everyone with respect and courtesy and without harassment. These protections extend to employees who report, or who are witnesses to, suspected misconduct.

Employees who believe that misconduct has occurred should contact their manager, branch or division head or the Workplace Relations team in People Branch. There is no particular format for providing evidence when reporting suspected misconduct.

## Handling Suspected Breaches

All reports of suspected misconduct need to be considered in the first instance to see whether further investigation is warranted, and if so, the extent of the investigation required. The manager of the employee suspected of misconduct, in consultation with the Manager, HR Services, Workplace Relations and Safety will discuss and decide how a suspected breach will be handled.

Note: Suspected misconduct of a former APS employee that occurred in the Department can also be investigated and a determination made about the conduct. However, a sanction cannot be imposed on a former employee.

### Gathering of information

Information associated with the suspected misconduct should be gathered as soon as possible after the report has been received and before the employee is advised that they may be the subject of misconduct. The process of reviewing a report of suspected misconduct is generally informal. As the process progresses, it may become evident that the misconduct is of a serious nature and as such, will be dealt with in a formal manner.

### Alternative options for handling suspected misconduct

If it is identified that handling the misconduct is not appropriate through the Department's Procedures for Determining Breaches of the Code of Conduct (the Procedures), alternative options may be more appropriate:

- > address the misconduct through the performance management process, including specifying the standard of future conduct required;
- > provide awareness, training and coaching on the Code of Conduct and the obligation of an APS employee to comply;
- > close monitoring of, and advice/assistance on, future conduct;
- > provide informal or formal counselling;
- > assigning new duties;
- > dispute resolution approaches such as mediation or conciliation.

Where an alternative approach is taken to handle the misconduct, it is advisable that key discussions and outcomes are documented. A short file note should be prepared recording the content of the meeting, particularly where an agreement is reached on any conduct and remedial action to be

taken. The note should be signed by the employee and supervisor/manager, and the complainant if the alternative approach involved a mediation, for example. A copy should be retained by both/all parties and a copy provided to Workplace Relations, People Branch.

Where alternative action does not satisfactorily resolve concerns about an employee's conduct, and/or a future suspected breach occurs, consideration should be given to whether the Procedures should be applied on the basis that a repeating or continuous pattern of suspected misconduct has developed.

## Suspension or temporary re-assignment of duties

In some circumstances, it may be necessary for an employee to be suspended from their duties pending an investigation or re-assigned to other duties due to the nature of the suspected breach. For instances that may be considered a criminal offence, it will be necessary to assess whether the criminal behaviour has compromised the integrity and good reputation of the Department and the APS and whether the behaviour at hand has adversely affected the employee's position in the workplace.

## Investigating a suspected breach

If a decision is made to commence a formal investigation, the decision maker may select a person to investigate (the investigator) whether the employee has breached the Code. The Secretary has delegated his power as the decision maker to the Deputy Secretaries, the General Manager Corporate and Business and the Assistant Secretary People Branch. The investigator may be a DBCDE employee or another person (for example the services of a private consultant or employee in another APS Agency). The decision maker will take reasonable steps to ensure that the investigator appears to be independent and unbiased. At the completion of the investigation the investigator will submit a report to the decision maker. It is the decision maker who makes the determination as to whether the Code has been breached – not the investigator unless they are the same person. In limited circumstances, the APS Commissioner or the Merit Protection Commissioner can undertake investigations into suspected Code breaches. (See s41, s41A and s41B of the [Public Service Act 1999](#) and [Commission Advice 2013/05](#)).

## Advising the employee of the commencement of an investigation

The employee suspected of breaching the Code will be notified in writing that an investigation has commenced as soon as practical after the investigator has been selected. However, if immediate notice would prejudice the investigation, notice may be deferred.

The notice to the employee will explain in detail:

- > the misconduct they are suspected of committing;
- > the element(s) of the Code they are suspected of breaching;
- > the possible sanctions that may apply;
- > the name and contact details of the investigator (if different from the decision maker);
- > the decision maker who will make the determination;
- > a statement of the employee's right to the support of a fellow employee, union representative, legal representative or other person, both in responding to the notice and throughout the investigation;
- > advice that the employee is not bound to say or do anything in response to the investigator's questions, suggestions or allegations;

- > a copy of these guidelines and the Procedures for Determining Breaches of the Code of Conduct;
- > a copy of any documents or other material available at the time which the investigator may rely on;
- > where relevant and practicable, a reference to reassignment of duties or suspension (with or without remuneration) from duties; and
- > a notice explaining the Department's usual practice in relation to the disclosure of an employee's personal information concerning Code of Conduct information.

## Procedural Fairness

The investigation is to observe the overriding principles of procedural fairness. The application of procedural fairness may vary, depending on the circumstances of the particular case. Generally, procedural fairness requires that:

- > employees against whom an adverse decision may be made must be informed of any allegations against them in as much detail as possible;
- > wherever possible, employees will be provided with an opportunity to put their case, and to know the case against them;
- > where a decision has to be made between competing interests, all parties to the matter will be heard and all arguments considered;
- > there must be facts or information to support adverse findings, and
- > the decision maker will not be a person with a direct interest in the case and must act without bias.

Procedural fairness does not require that an employee is provided with every document relevant to the allegation, but the employee must be sufficiently aware of the nature of the case against them in order to respond properly.

## Standard of proof

Investigations of breaches of the Code are an administrative law process. Accordingly, the standard of proof is 'on the balance of probabilities', as opposed to the criminal law standard 'beyond reasonable doubt'. This means the decision maker must be satisfied that a breach of the Code is more probable than not.

## Formality and timeliness

The investigation should be carried out with as little formality as possible. Informality however, must not be at the expense of satisfying procedural fairness or other administrative law principles. The investigation should also be undertaken expeditiously.

## Determination and Sanction

Once the decision maker considers that the investigation process has been completed in accordance with the Procedures and that all relevant evidence has been obtained, a determination will be made as to whether or not misconduct has occurred.

## Finding of no breach

If it is clear that no breach has occurred, or that there is insufficient evidence to support a finding that a breach has occurred, the decision maker will advise the suspected employee as soon as possible.

## Decision that misconduct did occur

Where the decision maker determines that a breach has occurred, the Secretary or delegate will choose a person who is and who appears to be independent and unbiased to be the sanction delegate. The sanction delegate may be the same person as the decision maker. The role of the sanction delegate is to determine whether a sanction or sanctions will be imposed.

The decision maker will write to the employee informing them of the following:

- > the determination;
- > the name of the person who has been given the authority to determine any sanction;
- > the sanction(s) that are under consideration;
- > the factors that are under consideration in determining any sanction to be imposed;
- > the employee's right to seek a review of the findings under section 33 of the PS Act.

The employee will be given an opportunity to make a written statement within 7 days of being informed of the determination, or a longer period as provided. The sanction delegate will consider the statement before making a final decision.

## Sanctions which may be imposed

Section 15(1) of the *Public Service Act 1999* provides that one or more of the following sanctions may be imposed, where an employee has been found to have breached the Code of Conduct:

- > termination of employment;
- > reduction in classification;
- > reassignment of duties;
- > reduction in salary;
- > a fine, by way of deductions from salary;
- > reprimand.

## Moving to another agency

Where an employee who is scheduled to move to another Agency (including on promotion) has been informed they are suspected of a breach of the Code, the move will not take effect until the matter is resolved, unless the Secretary and the receiving Agency Head agree otherwise. The matter is taken to be resolved when a determination is made or it is decided that a determination is not necessary.

## Resignation during an investigation

Where an employee resigns during the course of an investigation, the Secretary or delegate may decide to continue the investigation. Where it is determined that a former employee has breached the Code, sanctions cannot be imposed. If the person later seeks re-engagement by the APS, these records can be used as part of the pre-employment checking process. A resignation will not stop any criminal action that has been instigated.

## Review of Actions

In broad terms, employees have the same rights to seek review, in relation to any matters arising through the application of the Procedures as they do in relation to most other employment matters directly affecting them, except for two important procedural distinctions:

- > a decision to terminate employment is excluded from the APS review process, and
- > whilst most review requests are initially considered internally, requests for review of a determination of, or the imposition of a sanction for, a breach of the Code are to be forwarded directly to the Merit Protection Commissioner.

Refer to the [Review of Actions Policy](#) or the [APSC website](#) for further information.

## Record Keeping

Records relating to misconduct action should be kept separate from the personnel file of the employee concerned. The existence of a separate misconduct file should, however, be made apparent on the personnel file (e.g. by cross reference).

Access for management purposes to the misconduct file should be allowed only on a strict need-to-know basis. The person(s) involved in the investigation and decision making should be responsible for the maintenance and security of the file records. Material placed on the misconduct file should include:

- > all correspondence with the employee suspected of misconduct, including the letter informing them they are suspected of breaching the Code, the letter that outlines the case against them, the letter advising them of the final determination and their review rights;
- > any attachments to the correspondence;
- > all relevant email correspondence relating to the investigation, decision making or imposition of a sanction;
- > all material associated with planning the investigation such as records of telephone calls, letters or emails organising interviews;
- > copies of any draft material provided to the employee for comment;
- > the investigation report with all relevant evidence attached including such items as transcripts of evidence;
- > the employee's response to the correspondence.

At the conclusion of an investigation the file records relating to a misconduct action should be provided to People Branch to be retained and disposed of accordingly.

Attachment A

## DBCDE PROCEDURES FOR DETERMINING BREACHES OF THE CODE OF CONDUCT 2013

I, DREW CLARKE, Secretary of the Department of Broadband, Communications and the Digital Economy (DBCDE), under subsection 15(3) of the *Public Service Act 1999* (the Act):

- revoke the *DBCDE Procedures for Determining Breaches of the APS Code of Conduct 2008* issued on 30 March 2008; and
- issue the *DBCDE Procedures for Determining Breaches of the APS Code of Conduct 2013* (the Procedures) as follows:

The Procedures commence on 1 July 2013.

Dated: 1 July 2013

Drew Clarke



### 1. The purpose of the Procedures

The purpose of the Procedures is to set out the basic requirements that must be complied with for:

- (a) determining whether an APS employee, or a former APS employee, in the Department of Broadband, Communications and the Digital Economy (DBCDE) has breached the Code of Conduct; and
- (b) determining what sanction, if any should be imposed on an APS employee for a breach of the Code of Conduct.

Note: The requirements set out in the Procedures, established under subsection 15(3) of the Act apply only in relation to a suspected breach of the Code of Conduct by an APS employee in respect of which a determination may be made. Not all suspected breaches of the Code of Conduct need to be dealt with by way of a determination. In particular circumstances, another way of dealing with a suspected breach of the Code may be more appropriate (for example, see clause 4.2 of the *Australian Public Service Commissioner's Direction 2013*).

### 2. Application to former APS employees

- (1) In the Procedures, unless the contrary intention appears, a reference to an APS employee in DBCDE includes a reference to a former APS employee who is suspected of having breached the Code of Conduct while an employee in DBCDE.
- (2) Clause 3(a)(ii) and clause 4 of the Procedures do not apply in relation to a former employee.

### **3. Employee must be informed that a determination is being considered**

A determination may not be made in relation to a suspected breach of the Code of Conduct by an APS employee unless reasonable steps have been taken to:

- (a) inform the employee of:
  - (i) the details of the suspected breach (including any subsequent variation of those details);
  - (ii) the sanctions that may be imposed on the employee under subsection 15(1) of the Act; and
- (b) give the employee a reasonable opportunity to make a statement in relation to the suspected breach.

### **4. Employee must be informed before a sanction is imposed**

If a determination is made that an APS employee has breached the Code of Conduct, a sanction may not be imposed unless reasonable steps have been taken to:

- (a) inform the employee of:
  - (i) the determination;
  - (ii) the sanction(s) that are under consideration;
  - (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 statement in relation to sanctions under consideration.

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

The Secretary of DBCDE must take reasonable steps to ensure that:

- (a) the person who determines whether an APS employee has breached the Code of Conduct is, and appears to be, independent and unbiased; and
- (b) the person who determines any sanction to be imposed is, and appears to be independent and unbiased.

### **6. Determination process to be informal**

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

### **7. Record of determination and sanctions**

If a determination is made in relation to a suspected breach of the Code of Conduct by an APS employee, a written record must be made of:

- (a) the suspected breach;
- (b) the determination;
- (c) any sanctions imposed as a result of a determination that the employee breached the Code of Conduct; and
- (d) if a statement of reasons was given to the employee – the statement of reasons.

Note: The *Archives Act 1983* (Cth) and the *Privacy Act 1988* (Cth) apply to a record made under this clause of the Procedures.

### **8. Procedure when an employee is to move to another Agency during an investigation**

(1) This clause applies if:

- (a) an ongoing APS employee in DBCDE is suspected of having breached the Code of Conduct; and

- (b) that employee has been informed of the matters mentioned in clause 3(a) of the Procedures; and
- (c) the matter has not yet been resolved; and
- (d) a decision has been made that, apart from this clause, would result in the movement of that employee under section 26 of the Act to another Agency (including on promotion).

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

(3) For this clause, the matter is taken to be resolved when:

- (a) a determination is made, as described in clause 3 of the Procedures; and
- (b) it is decided that a determination is not necessary.