



Procedures for determining suspected breaches of the Code of Conduct

Procedural Instruction

Document ID (PPN)	SM-1547
TRIM Record Number	ADD2022/5368116
BCS Function	Strategic Management and Governance
Document Owner	Assistant Secretary, Integrity and Professional Standards Branch
Approval Date	11 December 2023
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1. Purpose

In accordance with subsection 15(3) of the *Public Service Act 1999* (Cth) (Public Service Act), this Procedural Instruction sets out procedures for determining suspected breaches of the Australian Public Service (APS) Code of Conduct and sanctions within the Department of Home Affairs.

Section 13 of the Public Service Act is part of the legislative framework setting out the standards of behaviour expected of APS employees. Collectively, the subclauses in section 13 are known as the APS Code of Conduct (Code of Conduct). Employees of the Department of Home Affairs (the Department) are APS employees and are legally bound by the Code of Conduct.

These *Procedures for determining suspected breaches of the Code of Conduct* (the Procedures) establish the process for determining breaches of the Code of Conduct and imposing sanctions under section 15(1) of the Public Service Act consistent with the basic principles of procedural fairness and the requirements set out in the *Australian Public Service Commissioner's Directions 2022* (the Directions).

This document satisfies the obligations of the Department's Secretary (as Agency Head) under section 15(3) of the Public Service Act, which are to develop procedures for determining:

- whether an employee of the Department, or former employee of the Department, has breached the Code of Conduct; and
- the sanction (if any) that is to be imposed on an employee in the Department who is found to have breached the Code of Conduct.

Section 15(7) of the Public Service Act requires that the Agency Head ensure these procedures are made publicly available.

2. Scope

2.1. In Scope

This Procedural Instruction establishes written procedures for determining, in accordance with subsection 15(3) of the Public Service Act:

- whether an employee of the Department, or former employee of the Department, has breached the Code of Conduct; and
- the sanction (if any) that is to be imposed on an employee in the Agency who is found to have breached the Code of Conduct (section 13 of the Act).

2.1.1. Application of Procedures

The Procedures apply to all APS ongoing and non-ongoing employees within the Department, and former employees of the Department who are suspected of breaching the Code of Conduct while employed by the Department. However, a sanction cannot be imposed on a former employee of the Department.

For the avoidance of doubt, a reference to the Secretary in these Procedures includes a delegate of the Secretary or a person authorised by the Secretary to exercise the relevant power or function.

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

2.1.2. Repeal of the former Procedures

The Procedures are to be reviewed annually. If changes are required, each yearly review substitutes new Procedures and repeals the previous. Otherwise, the Procedures will undergo substantive review every three years.

3. Procedural Instruction

3.1. Procedures for determining suspected breaches of the Code of Conduct

3.1.1. Selection and role of breach decision maker

A decision maker, (the breach decision maker) will be appointed by the Secretary, the Chief Operating Officer, or a person authorised by the Secretary or the Chief Operating Officer.

The role of the breach decision maker is to determine, in accordance with these Procedures, whether the employee has breached the Code of Conduct based on the balance of probabilities.

3.1.2. Breach decision maker must be independent and unbiased

All reasonable steps must be taken by the Secretary, the Chief Operating Officer, or a person authorised by the Secretary or the Chief Operating Officer, to ensure that breach decision makers appointed under these Procedures are, and appear to be, independent and unbiased.

3.1.3. Determination process to be informal

The process for determining whether an employee has breached the Code of Conduct must be carried out in a timely and efficient manner, and with as little formality as proper consideration of the matter allows.

3.1.4. Selection of investigator

Once a suspected breach of the Code of Conduct has been identified, and a decision is made to deal with the suspected breach under these Procedures, the Secretary, Chief Operating Officer, or person authorised by the Secretary or the Chief Operating Officer, may appoint an investigator to assist the decision-maker in conducting an inquiry into the suspected breach.

The investigator may be an employee of Home Affairs or another person.

The Secretary, Chief Operating Officer, or person authorised by the Secretary or the Chief Operating Officer, must take all reasonable steps to ensure the investigator is, and appears to be, independent and unbiased.

3.1.5. Information to be given to an employee

Prior to making any determination as to whether or not an employee has breached the Code of Conduct, the employee must be informed, in writing, of the following matters:

- a. the details of the suspected breach, including details of which elements of the Code of Conduct are suspected to have been breached (including any subsequent material variation of those details);
- b. that the suspected breach will be investigated under these Procedures;
- c. that a breach decision maker has been/will be appointed (as appropriate) to make a determination;

- d. the sanctions that may be imposed on the employee under subsection 15(1) of the Public Service Act (this information does not apply or is not required for former employees);
- e. that the employee may have a person present to support them and may be represented by a union or legal representative, if there is a meeting or interview concerning the investigation and determination of the suspected breach; and
- f. that the employee will be given reasonable opportunity (usually seven calendar days) to make a statement in writing and/or verbally, and provide further evidence in relation to the suspected breach.

A person who does not make a statement in relation to a suspected breach is not, for that reason alone, to be taken to have admitted to committing the suspected breach.

An investigation into a suspected breach of the Code of Conduct may be conducted 'on the papers' (i.e. based on the information available without the need to seek additional documents, conduct interviews or take witness statements).

3.2. Procedures for determining sanction

The following steps set out the procedures for determining the sanction(s), if any, to be imposed on an APS employee who is found to have breached the Code of Conduct. The following Procedures are established pursuant to subsection 15(3)(b) of the Public Service Act by the Secretary as Agency Head and do not apply to former employees of the Department.

3.2.1. Selection and role of sanction delegate

A decision maker (the sanction delegate) will be appointed by the Secretary, the Chief Operating Officer, or a person authorised by the Secretary or the Chief Operating Officer.

The role of the sanction delegate is to make a decision in relation to the appropriate sanction(s) (if any) to be imposed on an employee in respect of whom a breach determination has been made in accordance with these Procedures.

The breach decision maker and the sanction delegate may be the same person.

The sanction delegate may decide that appropriate remedial action will be taken, either instead of, or in addition to, imposing a sanction under subsection 15(1) of the Public Service Act.

3.2.2. All sanction delegates must be independent and unbiased

The Secretary, Chief Operating Officer, or person authorised by the Secretary or the Chief Operating Officer, must take all reasonable steps to ensure that sanction delegates appointed under these Procedures are, and appear to be, independent and unbiased.

3.2.3. Information to be given to an employee

Prior to making a decision to impose a sanction, the sanction delegate must ensure that reasonable steps have been taken to:

- a. ensure the employee has been notified in writing of the breach determination;
- b. inform the employee of the sanction(s) that are under consideration;
- c. inform the employee of the factors that are under consideration in determining what (if any) sanction(s) may be imposed; and
- d. give the employee a reasonable opportunity (usually seven calendar days) to make a statement in writing and/or verbally in relation to the proposed sanction(s) under consideration.

3.3. Record of determination and sanction

If a determination in relation to a suspected breach of the Code of Conduct by an APS employee is made, the breach decision maker or sanction delegate, as appropriate, must make a written record setting out:

- a. the suspected breach;
- b. the determination that the employee has, based on the balance of probabilities, breached the Code of Conduct;
- c. details of the sanction(s) (if any) to be imposed (if a current employee);
- d. the reasons for the sanction(s)(as appropriate); and
- e. if a statement of reasons was given to the person regarding the determination in relation to a suspected breach of the Code, and/or regarding a sanction decision, that statement of reasons or those statements of reasons.

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

In accordance with the Protective Security Policy Framework (PSPF) Separating Personnel—for individuals who hold an Australian Government security clearance, the Department must advise the vetting agency of any identified risks or security concerns associated with the separation of an employee from the Department, including if the individual was subject to a Code of Conduct investigation, whether completed or not.

3.4. Other matters

3.4.1. Transitional Arrangements

These Procedures apply to inquiries into suspected breaches of the Code of Conduct begun prior to any Machinery of Government changes, including inquiries into suspected breaches of the Code of Conduct that were begun under a transferring employee's former agency's procedures.

3.4.2. Review of determination or imposition of sanction or sanctions

Any non-Senior Executive Service (SES) employee who is employed under the Public Service Act is entitled to seek review of an employment-related action (under section 33 of the Public Service Act), including a determination that the Code of Conduct has been breached and the imposition of a sanction(s) (other than termination of employment). An application for review of these determinations must be made to the Merit Protection Commission, under Section 38 of the *Public Service Regulations 2023* (the Public Service Regulations).

Former non-SES employees who were employed under the Public Service Act are also provided with rights under section 73 of the Public Service Regulations to seek a review of a determination that they have breached the Code of Conduct. An application for review of these determinations must be made directly to the Merit Protection Commission.

Any individual is entitled to seek independent legal advice on other avenues of review.

3.4.3. Procedure when an ongoing employee is to move to another agency

This clause applies if:

- a. the employee who is an ongoing APS employee of the Department is suspected of having breached the Code of Conduct;
- b. the employee has been informed of the details of the suspected breach of the Code of Conduct (including any subsequent variation of those details) and the sanction(s) that may be imposed on them under subsection 15(1) of the Public Service Act;

- 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 the employee to another agency in accordance with section 26 of the Public Service Act (including on promotion).

Unless the Secretary and the new Agency Head agree otherwise, the movement of an APS employee (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. determination in relation to a suspected breach of the Code of Conduct is made in accordance with these Procedures; or
- b. the Secretary decides that a determination is not necessary.

3.4.4. Suspension or temporary reassignment of duties

In accordance with section 14 of the Public Service Regulations, the Secretary, or a person authorised by the Secretary, may suspend an APS employee employed by the Department from duties if they believe on reasonable grounds that:

- a. the employee has, or may have, breached the Code of Conduct; and
- b. the employee's suspension is in the public interest, or the Department's interest.

Suspension may be with, or without, remuneration.

In accordance with the Public Service Regulations, if the suspension is to be without remuneration, the period without remuneration is as determined by the Secretary, or a person authorised by the Secretary, to be:

- a. not more than 30 days; or
- b. if exceptional circumstances apply – a longer period.

3.4.5. Notice of Suspension

The Secretary, or a person authorised by the Secretary, must provide the employee with a written notice of the decision to suspend as soon as practicable after the decision has been made. The notice should include:

- a. the reason for the decision;
- b. the date of effect;
- c. the intervals at which the suspension will be reviewed; and
- d. the employee's right of review.

3.4.6. Review of Suspension

The Secretary, or a person authorised by the Secretary, must review the suspension at reasonable intervals.

The Secretary, or a person authorised by the Secretary, must immediately end the suspension if he or she no longer believes on reasonable grounds that:

- a. the employee has, or may have, breached the Code of Conduct; or
- b. the employee's suspension is in the public interest or the Department's interest.

3.4.7. Impact of Breach/Sanction Decision

The Secretary, or a person authorised by the Secretary, must immediately end the suspension and notify the employee in writing, if a sanction has been imposed on the employee for the relevant breach of the Code of Conduct.

Where an employee who has been suspended from duty is subsequently found not to have breached the Code of Conduct, consideration must be given to salary and allowances forgone during the period of suspension.

3.4.8. Procedural Fairness

In accordance with the Public Service Regulations, when exercising suspension powers, the Secretary, or a person authorised by the Secretary, must have due regard to procedural fairness unless he or she is satisfied on reasonable grounds that, in the particular circumstances, it would not be appropriate. A written record should be kept of the decision and the reasons for it.

3.4.9. Temporary Reassignment

The Secretary, or a person authorised by the Secretary, may decide that it is appropriate to temporarily reassign the employee's duties. Any reassignment of duties will be undertaken in accordance with section 25 of the Public Service Act.

Action to suspend or temporarily re-assign duties may be taken at any time prior to, or during, the investigation of the suspected breach of the Code of Conduct. Suspension, or temporary reassignment of duties while an investigation is proceeding, are administrative actions and not sanctions in themselves.

Where a temporary reassignment renders an employee ineligible for allowances or entitlements they have to date received, those allowances and entitlement shall continue to be paid for the period of temporary reassignment.

3.4.10. Additional procedural requirements for SES employees

Pursuant to section 64 of the *Australian Public Service Commissioner's Directions 2022* (the Directions), if an SES employee is suspected of breaching the Code of Conduct, the Secretary, or a person authorised by the Secretary, is required to consult with the Australian Public Service Commissioner (APS Commissioner) about suspected breaches of the Code of Conduct by SES employees. The Secretary, or a person authorised by the Secretary, must consult with the APS Commissioner on:

- a. the process for determining whether the employee has breached the Code of Conduct; and
- b. if the Agency Head is considering imposing a sanction, what sanction will be imposed.

Note: the APS Commissioner may issue guidance about matters relating to breaches of the Code of Conduct.

4. Accountabilities and Responsibilities.

Role	Description
Breach decision maker	To determine whether an employee has breached the Code of Conduct based on the balance of probabilities.
Investigator	Assist the breach decision maker in conducting the investigation into the suspected breach.

Role	Description
Sanction delegate	Make a decision in relation to sanction.
Suspension delegate	Make and review suspension decisions in accordance with the Public Service Act and the Public Service Regulations.

5. Version Control

Version number	Date of issue	Author(s)	Brief description of change
1.2	March 2023	Integrity and Professional Standards Branch	Review of 2018 version Inclusion of SES employee consultation requirements
1.2	May 2023	Integrity and Professional Standards Branch	Update to delegations under <i>Public Service Regulations 2023</i>
1.3	December 2023	Integrity and Professional Standards Branch	Approval by Chief Operating Officer

Attachment A – Definitions

Term	Acronym (if applicable)	Definition
Reasonable intervals		When an employee is suspended, under the PS Act, the suspension from duties must be reviewed at reasonable intervals. Reasonable intervals is not defined in legislation, however may be every 30 days, three (3) months or another period defined during suspension.
Public Service Act		<p><i>Public Service Act 1999</i> (Cth)</p> <p>The main objects of the Public Service Act are:</p> <ul style="list-style-type: none"> (a) to establish an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public; and (b) to provide a legal framework for the effective and fair employment, management and leadership of APS employees; and (c) to define the powers, functions and responsibilities of Agency Heads, the Australian Public Service Commissioner and the Merit Protection Commissioner; and (d) to establish rights and obligations of APS employees.
Code of Conduct		Section 13 of the Public Service Act is part of the legislative framework setting out the standards of behaviour expected of APS employees. Collectively, the subclauses in section 13 are known as the Code of Conduct.
Australian Public Service Commissioner's Directions 2022	the Directions	<p>The <i>Australian Public Service Commissioner's Directions 2022</i> are made under the <i>Public Service Act 1999</i> and are necessary for its effective operation.</p> <p>The Directions prescribe standards that Agency Heads and APS employees must comply with in order to meet their obligations under the Act.</p> <p>The Directions also support APS agencies to incorporate and uphold the APS Values and Employment Principles, conduct recruitment activities and undertake performance management.</p> <p>The Directions were remade on 1 February 2022 and replace the 2016 Directions in their entirety.</p>

Attachment B – Assurance and Control Matrix

1.1 Powers and Obligations

Please Note: Staff exercising any powers, delegations or authorisations outlined in this PI (listed here) must check the latest delegation advice on the Intranet or the relevant instrument in LEGEND to ensure they currently hold the applicable power, delegation or authorisation.

Legislative Provision			Is this power delegated ?	If delegated, list the relevant instruments of delegation
Legislation	Reference (e.g. section)	Section heading/provision description		
Public Service Act	Section 15(1)	Impose any of the sanctions on an employee found to have breached the Code of Conduct	Yes	<u>S1 of 2018 S1 of 2019</u> SES Band 3 SES Band 2 SES Band 1 Regional Commanders/Regional Directors FAS Health Services Policy & Child Wellbeing/CMO <u>Instrument 15 of 2023</u> SES Band 3 SES Band 2 SES Band 1, including Regional Commanders/Regional Directors
Public Service Act	Section 29(1)	Terminate, in writing, the employment of an APS non-SES employee specifying the ground or grounds for the termination as per PS Act s29(2) and PS Act s29(3).	Yes	<u>S1 of 2018 S1 of 2019</u> SES Band 3 Assistant Secretary People and Culture Division EL2 Performance and Workplace Behaviour Group Manager <u>Instrument 15 of 2023</u> SES Band 3 SES Band 2 SES Band 1, including Regional Commanders/Regional Directors
Public Service Regulations	Section 14	Suspend from duty or temporarily reassign, in	Yes	<u>P1 of 2023 (Schedule 1)</u>

Legislative Provision			Is this power delegated ?	If delegated, list the relevant instruments of delegation
Legislation	Reference (e.g. section)	Section heading/provision description		
		accordance with the Public Service Regulations 2023, an APS non-SES employee employed in the Agency if there is a belief on reasonable grounds that:(a) the employee has, or may have, breached the Code of Conduct; and(b) the employee's suspension is in the public, or the Agency's, interest.		<p>ABF Commissioner</p> <p>Chief Operating Officer</p> <p>SES B2 People and Culture Division</p> <p>SES Band 2 of Integrity, Security and Assurance Division</p> <p>SES Band 1 of Integrity and Professional Standards Branch</p> <p>EL2 of Integrity and Professional Standards Branch</p> <p><u>Instrument I5 of 2023</u></p> <p>SES Band 2 of Integrity, Security and Assurance Division</p> <p>SES Band 1 of Integrity and Professional Standards Branch</p> <p>EL2 of Integrity and Professional Standards Branch</p>

Reference	Description	Is this power delegated?	If delegated, list the relevant instrument of delegation.
Code of Conduct Procedures	Appoint an investigating officer to assist the Decision-Maker in the conduct of the enquiry into a suspected breach of the Australian Public Service Code of Conduct.	Yes	<p><u>S1of 2018 S1 of 2019</u></p> <p>SES Band 3</p> <p><u>Instrument I5 of 2023</u></p> <p>SES Band 1 of Integrity and Professional Standards Branch</p> <p>EL2 of Integrity and Professional Standards Branch</p>
Code of Conduct Procedures	Determine that a suspected breach of the Code of Conduct be dealt with formally or informally for the purposes of s.15(1) of the Act and the s.15(3) Procedures	Yes	<p><u>S1of 2018 S1 of 2019</u></p> <p>SES Band 3</p> <p><u>Instrument I5 of 2023</u></p> <p>SES Band 2 of Integrity, Security and Assurance Division</p>

Reference	Description	Is this power delegated?	If delegated, list the relevant instrument of delegation.
			SES Band 1 of Integrity and Professional Standards Branch
Code of Conduct Procedures	Appoint a Breach Decision-Maker for the purposes of subsection 15(3) of the Act and the Procedures.	Yes	<u>Instrument I5 of 2023</u> SES Band 1 of Integrity and Professional Standards Branch EL2 of Integrity and Professional Standards Branch
Code of Conduct Procedures	Determine whether an APS employee has breached the Code of Conduct.	Yes	<u>Instrument I5 of 2023</u> SES Band 3 SES Band 2 SES Band 1 EL2 EL1 Integrity and Professional Standards Branch

1.2 Controls and Assurance

Related Policy	The Department's Integrity Framework can be viewed: Integrity and professional standards (homeaffairs.gov.au)
Procedures / Supporting Materials	Nil
Training/Certification or Accreditation	Nil
Other required job role requirements	Nil
Other support mechanisms (e.g. who can provide further assistance in relation to any aspects of this instruction)	integrity@homeaffairs.gov.au
Escalation arrangements	Director, Integrity Investigations integrity.investigations@homeaffairs.gov.au
Recordkeeping (e.g. system based facilities to record decisions)	Content Manager, Objective Content Manager, JADE Case Management.

Program or Framework (i.e. overarching Policy Framework or Business Program)	Integrity and Professional Standards
Job Vocational Framework Role	Monitoring and Audit Job Family Integrity Assurance and Protective Security Job code: 30001111

Attachment C – Consultation

1.1 Internal Consultation

- Integrity and Professional Standards Branch
- Employment Law and Litigation Section
- Policy Procedure and Control Framework (PPCF) Legal Advice Section
- All staff consultation

1.2 External Consultation

- CPSU