

Procedures for Handling Suspected Code of Conduct Breaches

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I, Simon Delamont, acting under subsection 15(3) of the *Public Service Act 1999* (the PS Act) by virtue of the powers and functions delegated to me in the instrument of delegation dated 13 April 2023 made under subsection 78(7) of the PS Act, hereby establish these procedures.

These procedures supersede the previous procedures made under subsection 15(3) of the PS Act, but the previous procedures may continue to apply for transitional purposes. As provided for in subsection 15(7) of the PS Act, these procedures are publicly available on the agency’s website.



Simon Delamont
Executive Director, People
Fair Work Ombudsman

16 August 2023

Introduction

1. This document sets out the procedures that must be complied with in determining whether an Australian Public Service (APS) employee, or former APS employee who was employed in the office of the Fair Work Ombudsman (the Agency) 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 PS Act). This document also sets out procedures for determining what sanction, if any, should be imposed on an APS employee who is found to have breached the Code.
2. In this document, unless the contrary intention appears, a reference to an APS employee includes a reference to a former APS employee who is suspected of having breached the Code while an employee in the Agency.
3. These procedures apply to any suspected breach of the Code where a breach decision maker is appointed after 16 August 2023.
4. If the Fair Work Ombudsman, the Chief Operating Officer, the Executive Director, People, or a person authorised by the Fair Work Ombudsman to decide such matters, becomes aware of a suspected breach of the Code by an employee, they may deal with the suspected breach:
 - a. formally, using these procedures to determine whether there has been a breach; or
 - b. informally (i.e. not going through the process of making a determination whether or not there has been a breach). Not all suspected breaches of the Code need to be dealt with by way of determination. In particular circumstances, another way of dealing with a suspected breach may be more appropriate. Dealing with the matter informally may include taking administrative action; for example, directing the employee's manager to counsel or warn the employee and to keep a written record of this action.

Determination process can be informal

5. A formal hearing is not required in order to determine whether an employee has breached the Code. The process is to be carried out with as little formality and as much expedition as a proper consideration of the matter allows.

Selection and role of breach decision maker and investigating officer

6. The *Australian Public Service Commissioner's (the Commissioner) Directions 2022* provide that where a Senior Executive Service (SES) employee is suspected of breaching the Code, the Agency Head must consult with the Commissioner on the process for determining whether the SES employee has breached the Code.
7. As soon as practicable after a suspected breach of the Code has been identified, and the decision to deal formally with the matter has been made, or consultation with the Commissioner has concluded in the case of an SES employee, the Fair Work Ombudsman, the Chief Operating Officer, the Executive Director, People, or a person authorised by the Fair Work Ombudsman, will appoint a decision maker, which may include themselves. This person is the breach decision maker.

Note: *The Australian Public Service Commissioner's Directions 2022 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.*

8. The breach decision maker must be, and must appear to be, independent and unbiased. Generally, the breach decision maker will not have previously made a determination in relation to any of the matters suspected of constituting a breach of the Code by the employee. The breach decision maker may be an APS employee in the Agency or another person.
9. The role of the breach decision maker is to:
 - a. investigate the suspected breach; and
 - b. determine whether any breach of the Code has occurred; and
 - c. prepare a written record stating whether the employee has been found to have breached the Code; and
 - d. advise the Fair Work Ombudsman and employee of the determination.
10. The Fair Work Ombudsman, Chief Operating Officer, Executive Director, People, or a person authorised by the Fair Work Ombudsman, may also appoint an investigating officer to assist the breach decision maker by investigating the matter and gathering evidence. This may or may not include making a report of factual findings to the breach decision maker.
11. Generally, the investigating officer will not have previously completed a report in relation to any of the matters suspected of constituting a breach of the Code by the employee. The investigating officer may be an APS employee in the Agency or another person.

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

Access to a support person

12. Where an employee who is suspected of a breach of the Code is to make a verbal presentation to the breach decision maker, or where they are to be interviewed by the breach decision maker or investigating officer, they are entitled to be accompanied by a support person. The support person should have had no involvement in the conduct that is the subject of the breach allegation(s).
13. The role of the support person at the presentation or interview is to confer with the employee suspected of a breach of the Code and to raise process issues with the employee, where necessary. The support person's role is not to advocate or answer questions for the employee suspected of a breach of the Code. The breach decision maker or investigating officer should advise the employee suspected of a breach of the Code and their support person of the role of the support person.
14. An employee may choose to be represented by another person, such as a workplace delegate,

during an investigation. If an employee chooses to have a person perform this role, they must inform the breach decision maker, in writing, of this decision.

Information to be given to an employee before a determination is made

15. As soon as is practicable after the breach decision maker has been appointed and, in any event, before making a determination in relation to a suspected breach of the Code by an employee, the breach decision maker must:
 - a. inform the employee of the details of the suspected breach of the Code (including any subsequent variation of those details);
 - b. inform the employee of the sanctions that may be imposed on the employee under subsection 15(1) of the PS Act (including any limitations on those sanctions); and
 - c. give the employee a reasonable opportunity (usually 7 calendar days) to make a verbal and/or written statement, or provide material, in relation to the suspected breach of the Code.
16. The only exception to paragraph 14 is if the Fair Work Ombudsman, Chief Operating Officer, Executive Director, People, or person authorised by the Fair Work Ombudsman, decides that it is necessary to delay notifying the employee until a preliminary investigation has been carried out.
17. An employee is entitled to not make a statement or provide material. An employee who does not make a statement or provide material in relation to the suspected breach is not, only for this reason, to be taken to have admitted committing the suspected breach of the Code.
18. If, during the course of an investigation, it becomes evident that there is significant variation in the nature or extent of the suspected breach from that which was originally notified to the employee, the breach decision maker must notify the employee in writing of the variation and give the employee a reasonable opportunity to make a further statement or provide further material before making a determination as to whether there is a breach of the Code.
19. The breach decision maker will provide the employee with a draft determination in relation to the issue of breach of the Code, together with the material on which that draft determination is based. The breach decision maker will give the employee a reasonable opportunity to comment on the draft determination before making a final determination.

Record of determination

20. Where the breach decision maker determines that the employee has breached the Code, the breach decision maker must provide the employee with a copy of the determination. The determination should set out the findings of facts and material on which the findings are based. A copy may also be provided to the Fair Work Ombudsman.

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

Action that may be taken if breach is found to have occurred

21. Where a non-SES employee has been found to have breached the Code, the Fair Work Ombudsman, Executive Director, People, or a person to whom the Fair Work Ombudsman has delegated the power to decide on sanction, will decide what sanction, if any, should be imposed on the employee. This person is the sanction decision maker.
22. Where an SES employee has been found to have breached the Code, the Agency Head will consult with the Commissioner before the sanction decision maker imposes a sanction.
23. The sanction decision maker:
 - a. may be an APS employee in the Agency or another person;
Note: sub-section 78(8) of the PS Act requires any delegation of Fair Work Ombudsman powers under the PS Act to a non-APS employee to be approved in writing, in advance, by the Commissioner
 - b. may be the same person as the breach decision maker; and
 - c. must be, and must appear to be, independent and unbiased.
24. Where the sanction decision maker proposes that a sanction is to be imposed, the sanction decision maker must inform the employee in writing of the proposed sanction(s) and the basis for the proposed sanction(s). The employee should be given a reasonable opportunity (usually 7 calendar days) to make a verbal and/or written statement to the sanction decision maker in relation to the proposed sanction(s) to be imposed.
25. The only sanctions that can be imposed are those set out in subsection 15(1) of the PS Act.
26. If a sanction is imposed on the employee, the sanction decision maker must record the decision in writing.
27. No sanction can be imposed on a former employee who has been found to have breached the Code.

Procedures where an employee is to move to another APS agency

28. If an ongoing employee who is to move to another agency, is suspected of having breached the Code, has been informed of the suspected breach and the sanctions that may be imposed, they must remain in the agency until the matter is resolved, unless the Fair Work Ombudsman, or a person authorised by the Fair Work Ombudsman, and the new agency head agree otherwise. Resolved means that a breach determination is made or it is decided that a determination is not necessary.

Rights of review under the *Public Service Act 1999*

29. With the exception of SES officers, all APS employees are entitled to apply for a review specified in section 33 of the PS Act.