



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

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Application

I, George-Philip de Wet, in my capacity as Head of Corporate and within the power and authorisation delegated to this position by the Chief Executive Officer of the Digital Transformation Agency for section 15(3) of the *Public Service Act 1999* (the PS Act), establish these procedures under section 15(3) of the PS Act.

These procedures commence on and from the date they are signed and revoke any existing procedures established under section 15(3) of the PS Act for the Digital Transformation Agency.

These procedures must be complied with when determining:

- whether an Australian Public Service (APS) employee in the DTA has breached the APS Code of Conduct (the Code) or section 15(2A) of the PS Act, and
- the sanction to be imposed if an APS employee is found to have breached the Code or section 15(2A) of the PS Act.



Date: 14 November 2022

Availability of procedures

As provided for in section 15(7) of the PS Act, these procedures are publicly available. Requests for a copy of these procedures can be made to performance@dta.gov.au.

Definitions

A reference in these procedures to:

APS employee means a current or former APS employee. However, where these procedures deal with sanction, 'APS employee' only means a current APS employee.

Breach Decision means a decision about whether an APS employee has breached the Code or section 15(2A) of the PS Act.

Breach Decision Maker means a person who can make a Breach Decision under these procedures.

Breach Decision Process means the process for determining whether an APS employee has breached the Code or section 15(2A) of the PS Act. The Breach Decision Process concludes when the Breach Decision Maker makes a Breach Decision.

CEO means the Chief Executive Officer of the Digital Transformation Agency

Code means the APS Code of Conduct in section 13 of the PS Act.

Initial Decision Maker means a person who can decide whether or not a suspected breach of the Code should be dealt with under these Procedures.

Sanction Decision means a decision about what sanction will be imposed, if any, under section 15(1) of the PS Act for a branch of the Code.

Sanction Decision Process means the process for determining which sanction, if any, should be imposed on an APS employee who has been found to have breached the Code or section 15(2A) of the PS Act.

Sanction Delegate means a person to whom the CEO has delegated their power under section 15(1) of the PS Act.

Suspension Delegate means a person who has delegation to suspend an employee from duties.

The Agency means the Digital Transformation Agency.

Decision makers

In making decisions under these procedures, decision makers will have regard to the Australian Public Service Commission's [Handling misconduct: A Human Resource Manager's Guide](#).

The Breach Decision Maker and Sanction Delegate must be, and appear to be, independent and unbiased.

A Breach Decision Maker and Sanction Delegate must advise the CEO or the Director of Human Resources in writing immediately if they reasonably believe they are not (or are no longer) independent and unbiased or may not reasonably be perceived to be so, for example, if they are to be a witness to a matter under investigation.

Initial Decision Maker

The role of the Initial Decision Maker is to determine whether or not a suspected breach of the Code is to be dealt with under these Procedures.

The following persons may be the Initial Decision Maker:

- The CEO
- Head of Corporate
- Director of Human Resources
- A person appointed in writing by the CEO, Head of Corporate or the Director of Human Resources.

If an APS employee has engaged in conduct that may breach the Code or raise concerns relating to effective performance, the Initial Decision Maker must give consideration to relevant information to determine if the concerns should be dealt with under these Procedures.

Not all suspected breaches of the Code need to be dealt with by way of a determination. In particular circumstances an alternative course for dealing with a suspected breach of the Code may be more appropriate.

Where the Initial Decision Maker determines that the matter is to be dealt with under these Procedures, an investigation into the misconduct will commence. The Initial Decision Maker will select both the Breach Decision Maker and Sanction Delegate.

Note: There is no procedural fairness obligations to provide any employee an opportunity to comment before deciding to initiate an inquiry under these Procedures.

Note: These Procedures do not prevent the Initial Decision Maker from being the Breach Decision Maker or Sanction Delegate in the same matter.

Breach Decision Maker

The role of the Breach Decision Maker is to determine whether a breach of the Code has occurred.

The following persons may make a Breach Decision (i.e. a Breach Decision Maker):

- The CEO
- Head of Corporate
- Director of Human Resources
- A person appointed in writing by the CEO, the Deputy CEO, Head of Corporate or the Director of Human Resources.

The Breach Decision Maker may seek the assistance of an investigator with matters including identifying the alleged breach/es, gathering evidence and making a report of the recommended factual findings to the Breach Decision Maker. It may be prudent to appoint an investigator from outside the Agency depending on the circumstances.

Sanction Delegate

The Sanction Delegate decides what, if any, sanction is to be imposed on an APS employee who is found to have breached the Code.

The following persons may make a decision to impose a sanction under section 15(1) of the PS Act, if any, on an APS employee who is found to have breached the Code or section 15(2A) of the PS Act (i.e. a Sanction Delegate):

- The CEO
- Head of Corporate
- Director of Human Resources
- Any other person to whom the CEO delegates this power to in writing.

A Breach Decision and related Sanction Decision may be made by the same person provided the person has the authority and power to make both decisions under these procedures.

Suspension Delegate

The Suspension Delegate will make a determination as to whether the employee who is subject to a process under these Procedures should be suspended from duties, with or without remuneration. This determination will be consistent with:

- Section 28 of the PS Act
- Regulation 3.10 of the Public Service Regulations 1999, and
- The DTA People Delegations.

Handling suspected breaches of the Code

The process for determining whether a person who is, or was, an APS employee in the DTA has breached the Code must be carried out with as little formality, consistent with procedural fairness, and with as much expedition as a proper consideration of the matter allows.

When deciding what information to provide to a complainant about the outcome of their complaint, the DTA will balance the right to privacy for person whom the complaint was made about with:

the complainant's interest in knowing that the agency has dealt properly with the matter and ensuring the agency's good reputation and confidence in the APS upheld.

Note: Procedural fairness generally requires:

- the APS employee suspected of breaching the Code is informed of the case against them (i.e. is informed of any material that is before the Breach Decision Maker that is adverse to the APS employee or their interests and that is credible, relevant and significant)
- the APS employee is given a reasonable opportunity to respond and put their case, in accordance with these procedures, before a Breach Decision is made
- the Breach Decision Maker is and appears to be independent and unbiased, and
- there is evidence that is logically capable of supporting the facts, on the balance of probabilities, of adverse findings.

Breach Decision Process

On conclusion of an investigation into the misconduct, information will be provided to the Breach Decision Maker to assist them to decide whether, based on the evidence and balance of probabilities, a breach of the Code has occurred.

Before making a Breach Decision, reasonable steps must be taken to:

- inform the APS employee, in writing of:
- the details of the suspected breach/es of the Code, and/or section 15(2A) of the PS Act, including any subsequent changes to those details, and
- the sanctions that may be imposed under section 15(1) of the PS Act, and
- give the APS employee a reasonable opportunity to make a statement in relation to the suspected breach/es. The period in which the APS employee may make a statement will be determined by the Breach Decision Maker, but it is usually 7 calendar days. There may be circumstances that do not require or allow for 7 calendar days to be provided and as such a shorter period may be determined by the Breach Decision Maker.

The Breach Decision Maker may decide to give the APS employee the opportunity to make both a written and a verbal 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.

An APS employee may be required to attend an interview as part of a Breach Decision Process or Sanction Decision Process.

An APS employee being interviewed as part of a Breach Decision Process or Sanction Decision Process may ask to have a support person present during the interview. The request may only be refused by the Decision Maker on reasonable grounds. A support person cannot speak on the employee's behalf during the interview.

Note: Section 52 of the *Australian Public Service Commissioners Directions 2022* provides 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.

Sanction Decision Process

Where the Breach Decision Maker has determined, on the balance of probabilities that a breach of the Code has occurred, their final determination will be provided to the Sanction Delegation for consideration of an appropriate sanction.

The process for imposing a sanction under section 15(1) of the PS Act must be consistent with the principles of procedural fairness.

Before making a decision as to the sanction to be imposed, reasonable steps must be taken to:

- inform the APS employee of:
 - the Breach Decision
 - the sanction or sanctions that are under consideration, and
 - the factors that are under consideration in determining the sanction to be imposed, and
- give the APS employee a reasonable opportunity to make statement in response. The period in which the APS employee may make a statement will be determined by the Sanction Delegate, but is usually 7 calendar days to be provided and as such a shorter period may be determined by the Sanction Delegate.

Note: Procedural fairness generally requires:

- the APS employee found to have breached the Code is informed of any material that is before the Sanction Delegate that is adverse to the APS employee or their interests and that is credible, relevant and significant
- the APS employee is given a reasonable opportunity to respond and put their case, in accordance with these procedures, before a Sanction Decision is made
- the Sanction Delegate is and appears to be independent and unbiased, and
- there is evidence that is logically capability of supporting the facts, on the balance of probabilities, of adverse findings and imposition of the proposed sanction/s.

Note: The Sanction Delegate may decide to give the APS employee the opportunity to make both a written and a verbal statement.

Note: There is no power to impose sanctions on former APS employees.

Sanctions

The Sanction Delegate may impose any of the following sanctions to an APS employee who is found to have breached the Code or section 15(2A) of the PS Act.

- termination of employment
- reduction in classification
- re-assignment of duties
- reduction in salary
- deductions from salary, by way of fine, and/or
- a reprimand.

Record of determination and sanction

If a determination is made in relation to a suspected breach of the Code or section 15(2A) of the PS Act by an APS employee, or former employee, a written record must be made of:

- the suspected breach of the Code or section 15(2A) of the PS Act
- the Breach Decision
- the sanction or sanctions imposed because of the Breach Decision, including if none were imposed
- a statement of reasons if one was given to the APS employee.

Procedure when an APS employee is to move to another agency

Unless otherwise agreed to between the CEO and the new Agency Head may agree otherwise, and APS employee cannot move to another APS agency including on promotion, where:

- the APS employee is suspected of having breached the Code or section 15(2A) of the PS Act, and
- reasonable steps have been taken to formally advise the APS employee of the suspected breach, and
- the matter to which the suspected breach relates has not yet been resolved, or
- it is decided that a Breach Decision is not necessary (see sections 46 and 47 of the *Australian Public Service Commissioner's Directions 2022*).

Where an APS employee moves, with the agreement of the CEO and the new Agency Head, the new agency may initiate an investigation in accordance with that agency's procedures established in accordance with section 15(3) of the PS Act.

Where an APS employee moves, after a Breach Decision but before the imposition of a sanction, a Sanction Delegate in the new agency may impose a sanction in accordance with that agency's procedures established in accordance with section 15(3) of the PS Act.

Where an APS employee moves prior to a determination of whether a suspected breach of the Code is to be dealt with under these Procedures, the Agency will work in partnership with the new agency to facilitate an investigation. The findings of the investigation will be provided to the new agency, who may then determine whether the APS employee has breached the Code and determine whether to impose a sanction in accordance with that agency's procedures established in accordance with section 15(3) of the PS Act.

Version	Date	Comments
1.0	20/12/2018	Initial document creation
1.1	20/12/2019	Content moved to new template
2.0	9/4/2021	Review in line with APSC guidelines
3.0	27/10/2022	Update of document to provide clarity in process and update to the Australian Public Service Commissioner's Directions 2022.