

# Procedures for Determining Breaches of the Code of Conduct and Sanctions

I, Robert Bruce Nicholl, Chief Executive Officer (CEO) of the Australian Office of Financial Management (AOFM) and delegate of the Secretary of the Department of The Treasury establish these Procedures under subsection 15(3) of the *Public Service Act 1999* for the AOFM.



25 January 2020

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These procedures commence on signing and supersede any previous procedures that might apply to AOFM.

## 1. Application of procedures

- 1.1. These procedures apply in determining whether a person who is an Australian Public Service (APS) employee employed in the AOFM, or who is a former APS employee who was employed in the AOFM 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. 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 (e.g. performance management<sup>1</sup> or criminal proceedings).
- 1.3. These procedures apply in determining any sanction to be imposed on an APS employee in the AOFM who has been found to have breached the Code.
- 1.4. 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 (e.g. providing false or misleading information, failing to provide relevant information, or other misbehaviour).

## 2. Availability of procedures

- 2.1. As provided for in subsection 15 (7) of the Act, these procedures are publicly available on the AOFM'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 has decided to deal with the suspected breach under these procedures, the CEO will appoint a decision maker ('the breach decision maker') to make a determination under these procedures.

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<sup>1</sup> 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<sup>2</sup>.
- 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 CEO will decide what, if any, sanction is to be imposed on an APS employee who is found to have breached the Code (the CEO is 'the sanction delegate').
- 3.5. These procedures do not prevent the breach decision maker from being the sanction delegate in the same matter.

#### **4. Person or persons making breach determination and imposing any sanction to be independent and unbiased**

- 4.1. The breach decision maker and the sanction delegate must be, and must appear to be, independent and unbiased<sup>3</sup>.
- 4.2. The breach decision maker must advise the CEO in writing if he or she considers that he or she may not be independent and unbiased or may reasonably be perceived not to be independent and unbiased (e.g. 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 AOFM has breached the Code must be carried out with as little formality, and with as much expedition, as a fair and proper consideration of the matter allows.
- 5.2. The AOFM process requires that the person suspected of breaching the Code is:
  - a) informed of
    - i. the details of the suspected breach of the Code (including any subsequent variation of those details),
    - 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) provided with a reasonable opportunity to respond and put their case, before any decision is made on breach.
- 5.3. There must be logically probative evidence to support the making, on the balance of probabilities, of adverse findings.
- 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.

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<sup>2</sup> 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 may make a sanction decision.

<sup>3</sup> Where the CEO is directly involved in a matter, these Procedures allow for an alternate sanction delegate to be appointed by the CEO.

- 5.5. For the purpose of determining whether a person who is, or was, an APS employee in the AOFM 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) must, where the request can be reasonably accommodated, 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 AOFM 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,
    - i. the sanction or sanctions under consideration, and
    - ii. the factors under consideration in determining any sanction to be imposed; and
  - b) give the employee at least two working days to make a statement (either written or oral) in relation to the sanction or sanctions under consideration.

## **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 AOFM is made, a written record must be made of:
  - a) the suspected breach; and
  - b) the determination; and
  - c) 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.

## **8. Disclosure of information concerning a breach**

- 8.1. Where a breach has been found for a current or former APS employee of AOFM, AOFM may disclose information concerning the breach:
  - a) where necessary for or relevant to the performance or exercise of any employer powers or where the AOFM considers it is appropriate for employment purposes;
  - b) to a complainant who identified or witnessed the breach;
  - c) to relevant human resources personnel in any other Commonwealth agency the subject of the breach approaches (e.g. regarding a transfer, promotion or engagement);

- d) to external bodies or agencies who are or have been involved in the matter, such as the Merit Protection Commissioner, Commonwealth Ombudsman, Office of the Privacy Commissioner or the Inspector General of Intelligence and Security;
- e) to any enforcement body (e.g. the Australian Federal Police);
- f) to a security assessment agency (e.g. the Australian Government Security Vetting Agency); or
- g) to any future or prospective future employer of the subject.

8.2. All information about a Code of Conduct process will be destroyed in accordance with the Administrative Functions Disposal Authority (as made or varied from time to time under the Archives Act 1983) and will generally not be disclosed after the passing of five years from the end of the process (usually the date of the breach determination unless appeals are heard by the Merit Protection Commissioner).

8.3. The AOFM may disclose general de-identified information concerning any breach to fulfil reporting requirements.

## **9. Procedure when an ongoing employee is to move to another agency**

9.1. This clause applies if:

- a) a person who is an ongoing APS employee in the AOFM is suspected of having breached the Code;
- b) the employee has been informed of the matters mentioned in 5.3.(a);
- 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).

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

9.3. 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.