

# PROCEDURES FOR DETERMINING BREACHES OF THE CODE OF CONDUCT AND SANCTIONS

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## DOCUMENT CONTROL

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### Record of Endorsement

Status	Name	Date
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### Record of Amendments

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# Contents

<b>INTRODUCTION</b>	<b>4</b>
<b>1 APPLICATION OF PROCEDURES AND DECISION TO APPLY PROCEDURES</b>	<b>5</b>
<b>2 SELECTION OF DECISION-MAKERS</b>	<b>6</b>
<b>3 PROCESS TO BE INFORMAL</b>	<b>6</b>
<b>4 EMPLOYEE MUST BE INFORMED BEFORE FINAL BREACH DETERMINATION</b>	<b>7</b>
<b>5 EMPLOYEE MUST BE INFORMED BEFORE A SANCTION IS IMPOSED</b>	<b>8</b>
<b>6 RECORD OF DETERMINATION AND SANCTIONS</b>	<b>9</b>
<b>7 PROCEDURE WHEN AN EMPLOYEE IS TO MOVE TO ANOTHER AGENCY DURING AN INVESTIGATION</b>	<b>9</b>
<b>8 PROCEDURE FOR FORMER APS EMPLOYEES AND EMPLOYEES WHO RESIGN BEFORE A SANCTION IS IMPOSED</b>	<b>10</b>
<b>ATTACHMENT A APS VALUES, APS EMPLOYMENT PRINCIPLES AND THE APS CODE OF CONDUCT</b>	<b>11</b>
<b>ATTACHMENT B SANCTIONS FOR BREACHES OF THE CODE OF CONDUCT</b>	<b>15</b>
<b>ATTACHMENT C RECORD KEEPING AND PROVISION OF INFORMATION</b>	<b>16</b>
1. Defining personal information	16
2. To whom personal information of the employee subject to a Code of Conduct process may be disclosed	16
3. Handling personal information during a Code of Conduct process	17
4. ANAO may disclose general information	18
<b>ATTACHMENT D SUSPENSION FROM DUTY</b>	<b>19</b>



I, BEN SLADIC, Delegate for the Auditor-General for the Commonwealth of Australia, establish these procedures for the Australian National Audit Office, under subsection 15(3) of the *Public Service Act 1999*.



Date: 1 October 2015

These procedures commence on 1 October 2015.

These procedures supersede the previous procedures made by me under subsection 15(3) of the *Public Service Act 1999*, but the previous procedures may continue to apply for transitional purposes.

## Introduction

The APS Code of Conduct establishes the standards of conduct required of APS employees. The APS Code of Conduct is set out in section 13 of the *Public Service Act 1999* (the Act). The Act also sets out the APS Values and APS Employment Principles which apply to APS staff. [The APS Values, APS Employment principles and the APS Code of Conduct are at Attachment A]. A breach of the Code of Conduct constitutes misconduct.

A person who is or was an APS employee is also taken to have breached the Code of Conduct if the person is found to have provided false or misleading information in connection with their engagement as an APS employee [s 15(2A) of the Act is also at Attachment A].

The Auditor-General must, under subsection 15(3)(a) of the Act, establish procedures for determining breaches of the Code of Conduct by APS employees or former APS employees (suspected of having breached the Code whilst an employee in the ANAO or in connection with the person's engagement as an ANAO employee). It is a requirement that the procedures must comply with procedural requirements set out in the Australian Public Service Commissioner's Directions 2013 and must have due regard to procedural fairness.

The procedures may be different for: different categories of APS employees or former APS employees; or for APS employees or former APS employees who have been convicted of an offence against a Commonwealth, State or Territory law in respect of conduct that is alleged to constitute a breach of the Code of Conduct; or for APS employees or former APS employees who have been found to have committed such an offence but no conviction is recorded.

The Auditor-General must, under s 15(3)(b), establish procedures for determining the sanction (if any) that is to be imposed pursuant to section 15(1) of the Act on an APS employee in the ANAO who is found to have breached the Code of Conduct. [The sanctions that may be imposed are at Attachment B.]

Having regard to the Privacy Act 1988 and s72E of the Act, the ANAO must have due regard to the requirements for the release and keeping of records. [Attachment C explains how information can be used]

Section 28 of the Act provides that the Public Service Regulations 1999 may make provision for the suspension from duties of APS employees with or without remuneration (see Regulation 3.10) [Information on suspension from duties is at Attachment D.]

Further information is available from:

- (i) The Australian Public Service Commission publication, APS Values and the Code of Conduct in practice: Guide to official conduct for APS employees and Agency Heads; and
- (ii) The ANAO's Guideline to Handling Alleged Breaches of the Code of Conduct and Guide to Conduct at Attachment E.

## 1 Application of Procedures and decision to apply Procedures

- 1.1 These procedures must be complied with in determining whether an APS employee has breached the Code of Conduct and in determining what, if any, sanction is to be imposed on an APS employee who has breached the Code of Conduct.

*Note:* These procedures 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.

- 1.2 The Auditor-General, Deputy Auditor General or the Executive Director, CMB can decide whether or not to deal with a suspected breach of the Code of Conduct under these procedures or whether to deal with a suspected breach another way (e.g. by counseling or warning the employee).
- 1.3 Where the conduct of an APS employee raises concerns that relate both to effective performance and to possible breaches of the Code of Conduct, the Auditor-General, Deputy Auditor General or the Executive Director, CMB must, before making a decision to initiate an inquiry under these procedures, have regard to any relevant standards and guidance issued by the Australian Public Service Commissioner.



## 2 Selection of decision-makers

- 2.1 The Auditor-General or delegate will select the person who determines whether an APS employee has breached the Code of Conduct. The person selected will be called the breach decision-maker.
- 2.2 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.
- 2.3 The Auditor-General or delegate will determine what, if any, sanction to impose. The person who determines sanction will be called the sanction delegate. The sanction delegate and breach decision-maker may be the same person. A non-APS employee may be selected as the breach decision-maker or as the sanction delegate only if prior written approval is obtained from the Australian Public Service Commissioner.
- 2.4 The sanction delegate must hold a delegation of the power under the Act to impose sanctions as well as any related powers, such as under s 29 of the Act.
- 2.5 The breach decision-maker and the sanction delegate must advise the Auditor-General or Deputy Auditor General in writing if at any stage in the process they consider that they may not be independent and unbiased or if they consider that they may reasonably be perceived not to be independent and unbiased, for example if they are a witness in the matter.

## 3 Process to be informal

- 3.1 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 a proper consideration of the matter allows. A formal hearing is not required.
- 3.2 The breach decision-maker should not make a final decision until the employee the subject of the process has been afforded procedural fairness:

Note: Procedural fairness generally requires that:

- ▶ the person suspected of breaching the Code is informed of the case against them (i.e. any material that is before the decision-maker that is adverse to the person or their interests and that is credible, relevant and significant)
- ▶ the person is provided with a reasonable opportunity to respond and put their case, in accordance with these procedures, before any decision is made on breach or sanction
- ▶ the decision-maker acts without bias or an appearance of bias

- ▶ there is logically probative evidence to support the making, on the balance of probabilities, of adverse findings.

## 4 Employee must be informed before final breach determination

4.1 A determination may not be made in relation to a suspected breach of the Code by a person unless reasonable steps have been taken to:

- a) inform the person of:
  - i. the details of the suspected breach of the Code (including any subsequent variation of those details); and
  - 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) give the person a reasonable opportunity to make a written statement, or provide further evidence in relation to the suspected breach, within 7 calendar days or any longer period that is allowed by the breach decision-maker.<sup>1</sup>

*Note: This clause is designed to ensure that by the time the breach decision-maker comes to make a determination, reasonable steps have been taken for the person suspected of breach to be informed of the case against them. It will generally be good practice to give the person notice at an early stage in the process of a summary of the details of the suspected breach that are available at that time and notice of the elements of the Code that are suspected to have been breached.*

*Note: The breach decision-maker may decide to give the person the opportunity to make both a written and an oral statement.*

4.2 An employee who does not make a statement in relation to the suspected breach is not, only for that reason, to be taken to have admitted committing the suspected breach.

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<sup>1</sup> In relation to both paragraphs 4.1 and 5.1 the person must advise without delay if they wish to make an oral statement. The person will be granted reasonable requests to bring a support person but not a representative.



## 5 Employee must be informed before a sanction is imposed

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

- a) inform the employee of:
  - i. the determination that has been made;
  - ii. the sanction or sanctions that are under consideration; and
  - 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 the sanction or sanctions under consideration within 7 calendar days, or any longer period as is allowed by the sanction delegate.<sup>2</sup>

5.2 The process must be consistent with the principles of procedural fairness.

*Note: Procedural fairness generally requires that:*

- ▶ the employee found to have breached the Code must be informed of any information before the sanction delegate that is adverse to the employee or their interests and that is also credible, relevant and significant
- ▶ the employee must be provided with a reasonable opportunity to respond and put their case, in accordance with these procedures, before any decision is made on sanction
- ▶ the decision-maker must act without bias or an appearance of bias

5.3 Alternatively, no sanction may be imposed. If no sanction is imposed then the sanction delegate (if the sanction delegate is an APS employee in the ANAO, otherwise an SES employee in the ANAO) may decide that no action is required or may decide to select one or more of the following options:

- a) informal discussions between a manager and the employee who has breached the Code of Conduct;
- b) counselling of the employee;
- c) formal direction and warning;

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<sup>2</sup> Section 29 of the Act deals with termination of employment. Additional requirements are imposed for SES employees under s 38.



- d) requiring the employee to attend a training program;
- e) adverse performance assessment.

## 6 Record of determination and sanctions

- 6.1 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; and
  - b) the determination regarding breach; and
  - 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 and the Privacy Act 1988 apply to records of determination and sanction.*

## 7 Procedure when an employee is to move to another Agency during an investigation

- 7.1 This paragraph applies if:
- a) an ongoing APS employee in an Agency is suspected of having breached the Code of Conduct; and
  - b) the employee has been informed of the matters mentioned in paragraph 4.1(a); and
  - c) the matter has not yet been resolved; and
  - d) a decision has been made that, apart from this paragraph, would result in the movement of the employee under section 26 of the Act to another Agency (including on promotion).
- 7.2 Unless the Auditor-General and the new Agency Head agree otherwise, the movement (including on promotion) does not take effect until a determination is made about whether or not the employee has breached the Code of Conduct or it is decided that a determination is not necessary.

## 8 Procedure for former APS employees and employees who resign before a sanction is imposed

- 8.1 A former employee can be found to have breached the Code of Conduct. A sanction cannot be imposed on a former employee. Therefore everything in these procedures applies to persons who were formerly APS employees in the ANAO, except the provisions regarding sanction (e.g. paragraph 4.1 (a)(ii) and paragraph 5).
- 8.2 If an employee's resignation takes effect before a sanction is imposed, a sanction will not be imposed and the employee's separation will be treated and recorded as a resignation. Any determination of a breach of the Code of Conduct will remain on the employee's records. Once termination of an employee's employment comes into effect, the ANAO is required to gazette the employee's name and the section of the Act under which their employment was terminated (i.e. there will be a public record if an employee's employment was terminated for a breach of the Code of Conduct).
- 8.3 Where an employee leaves the ANAO and moves (including following a resignation or break in service) to a new agency after a breach determination but before the application of a sanction, then the new Agency Head can apply a sanction in accordance with the new Agency's procedures, on the basis of the ANAO's finding of breach.

## **ATTACHMENT A**

### **APS VALUES, APS EMPLOYMENT PRINCIPLES AND THE APS CODE OF CONDUCT**

#### **10 APS Values**

##### **Committed to service**

- (1) The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.

##### **Ethical**

- (2) The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

##### **Respectful**

- (3) The APS respects all people, including their rights and their heritage.

##### **Accountable**

- (4) The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.

##### **Impartial**

- (5) The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.

#### **10A APS Employment Principles**

##### **APS Employment Principles**

- (1) The APS is a career based public service that:
  - a) makes fair employment decisions with a fair system of review; and
  - b) recognises that the usual basis for engagement is as an ongoing APS employee; and
  - c) makes decisions relating to engagement and promotion that are based on merit; and
  - d) requires effective performance from each employee; and
  - e) provides flexible, safe and rewarding workplaces where communication, consultation, cooperation and input from employees on matters that affect their workplaces are valued; and



- f) provides workplaces that are free from discrimination, patronage and favouritism; and
- g) recognises the diversity of the Australian community and fosters diversity in the workplace.

#### Decisions based on merit

- (2) For the purposes of paragraph (1)(c), a decision relating to engagement or promotion is based on merit if:
  - a) all eligible members of the community were given a reasonable opportunity to apply to perform the relevant duties; and
  - b) an assessment is made of the relative suitability of the candidates to perform the relevant duties, using a competitive selection process; and
  - c) the assessment is based on the relationship between the candidates' work related qualities and the work related qualities genuinely required to perform the relevant duties; and
  - d) the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the relevant duties; and
  - e) the assessment is the primary consideration in making the decision.

*Note: Commissioner's Directions may determine the scope or application of the APS Employment Principles (see subsections 11A(2) and (3)).*

### 13 The APS Code of Conduct

- (1) An APS employee must behave honestly and with integrity in connection with APS employment.
- (2) An APS employee must act with care and diligence in connection with APS employment.
- (3) An APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment.
- (4) An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws. For this purpose, Australian law means:
  - a) any Act (including this Act), or any instrument made under an Act; or
  - b) any law of a State or Territory, including any instrument made under such a law.
- (5) An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.
- (6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.

- (7) An APS employee must:
  - (a) take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with the employee's APS employment; and
  - (b) disclose details of any material personal interest of the employee in connection with the employee's APS employment.
- (8) An APS employee must use Commonwealth resources in a proper manner and for a proper purpose.
- (9) An APS employee must 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.
  - (10) An APS employee must not improperly use inside information or the employee's duties, status, power or authority:
    - (a) to gain, or to seek to gain, a benefit or an advantage for the employee or any other person; or
    - (b) to cause, or to seek to cause, detriment to the employee's Agency, the Commonwealth or any other person.
- (11) An APS employee must at all times behave in a way that upholds:
  - a) the APS Values and APS Employment Principles; andthe integrity and good reputation of the employee's Agency and the APS.
- (12) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.
- (13) An APS employee must comply with any other conduct requirement that is prescribed by the regulations.

## 15 Breaches of the Code of Conduct

### Providing false or misleading information etc. in connection with engagement as an APS employee

- (2A) A person who is, or was, an APS employee is taken to have breached the Code of Conduct if the person is found (under procedures established under subsection (3) of this section or subsection 41B(3) or 50A(2)) to have, before being engaged as an APS employee:
  - a) knowingly provided false or misleading information to another APS employee, or to a person acting on behalf of the Commonwealth; or
  - b) wilfully failed to disclose to another APS employee, or to a person acting on behalf of the

Commonwealth, information that the person knew, or ought reasonably to have known, was relevant; or

- c) otherwise failed to behave honestly and with integrity; in connection with the person's engagement as an APS employee.

Note: If the person is an APS employee at the time a finding referred to in paragraph (2A)(a), (b) or (c) is made in relation to the person, the Agency Head of the employee's Agency may impose sanctions on the person as permitted by subsection (1)



## **ATTACHMENT B**

### **SANCTIONS FOR BREACHES OF THE CODE OF CONDUCT**

The Auditor-General (or delegate) may impose the following sanctions on an APS employee who is found (under the procedures established) to have breached the Code of Conduct:

- a) termination of employment;
- b) reduction in classification;
- c) re-assignment of duties;
- d) reduction in salary;
- e) deductions from salary, by way of a fine (up to 2% of annual salary);
- f) a reprimand.

## ATTACHMENT C

### RECORD KEEPING AND PROVISION OF INFORMATION

#### 1. Defining personal information

- 1.1 Personal information is defined in the Privacy Act 1988.
- 1.2 Section 72 E of the Act permits the use and disclosure of certain personal information.

#### 2. To whom personal information of the employee subject to a Code of Conduct process may be disclosed

- 2.1 The ANAO considers information about employees or former employees who are or have been subject to a Code of Conduct process<sup>3</sup> at the ANAO should be made readily available in relation to:
  - (a) any applications for transfer or promotion within the ANAO; or
  - (b) the relevant Human Resources personnel in any other Commonwealth agency the employee approaches e.g. regarding a transfer or engagement.
- 2.2 Personal information may be used or disclosed where necessary for or relevant to the performance or exercise of any employer powers or where the ANAO considers it is appropriate for employment purposes.
- 2.3 For example, during the course of a Code of Conduct process, or after the process is complete, personal information about the person under investigation or who is found to have breached the Code of Conduct may be disclosed to others by the ANAO, without notice to the person, including to:
  - a) the employee's managers (for employment purposes);
  - b) any person undertaking recruitment, promotion or employment selection in relation to the person;
  - c) advise the complainant of the outcome (see paragraphs 2.6 - 2.9 below);
  - d) 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; and/or
  - e) any Commonwealth Department or Agency the person approaches e.g. regarding a transfer or engagement, any enforcement body (e.g. the Australian Federal Police), any

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<sup>3</sup> And the completed process has resulted in a determination that the employee has breached the Code of Conduct.

security assessment agency and/or any future or prospective future employer.

- 2.4 All information about a Code of Conduct process will be destroyed in accordance with the *Archives Act 1983* and will generally not be disclosed after the passing of 5 years from the date of a breach determination.<sup>4</sup>
- 2.5 In disclosing information about outcomes to complainants, the ANAO will have regard to guidance from the Australian Public Service Commissioner. However, the overriding concern will be to ensure effective staff management at the ANAO. This requires weighing of the interest if parties in the protection of their privacy, the need to ensure accurate information is disseminated where appropriate and the need to effectively manage staff.
- 2.6 Where a breach of the Code of Conduct is found, it may be appropriate to advise a complainant of some specific details. For example, if an employee makes numerous allegations of bullying against a manager, the complainant and the manager's managers will usually be informed of the detail of any allegations that were found not to be substantiated and any allegations found to be substantiated. This is particularly appropriate where both employees will continue to work together and the alleged misconduct was of an interpersonal nature. The detail of particular allegations that are substantiated can be highly relevant to managing and monitoring an employee who is found to have engaged in misconduct and in supporting any employees who have been the subject of e.g. bullying.
- 2.7 There may be cases where it is appropriate to only advise a complainant in very broad terms of the outcome of a process. For example, where there is a concurrent criminal process and the complainant is a witness or where the alleged misconduct does not involve the complainant as a witness.
- 2.8 Where the result of a Code of Conduct process is a finding of no breach, it will often be appropriate to advise relevant witnesses (including the complainant) and managers that the employee was found to have not breached the Code. If a Code process arose from a complaint by an APS employee, and many or all of the complainant's allegations are found to be unsubstantiated, this may result in action being taken against the complainant. Every matter will be considered individually on its merits.

### **3. Handling personal information during a Code of Conduct process**

- 3.1. During the course of a Code of Conduct process, the person subject to the Code of Conduct process will usually be provided with personal and/or sensitive information to ensure the person is afforded procedural fairness. Other employees or persons may also be provided with information or documents as part of the process.
- 3.2. Everyone involved in a Code of Conduct process, including witnesses, must treat any information they receive or possess regarding the process as 'sensitive: personal' and should

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<sup>4</sup> A decision under regulation 5.32 of the *Public Service Regulations 1999* may also constitute the date of a breach determination for the purpose of this clause.



only use or disclose it for the purpose of the Code of Conduct process and in accordance with the Act and the *Privacy Act 1988*.

- 3.3. The ANAO will also treat information about a Code of Conduct process as 'sensitive: personal' but may make disclosures to facilitate undertaking the Code of Conduct process, implementing any consequences of the process or in accordance with paragraph 2 above.

#### **4. ANAO may disclose general information**

- 4.1 The ANAO regularly provides de-identified information to fulfill reporting requirements

## ATTACHMENT D

### SUSPENSION FROM DUTY

1. Section 28 of the Act provides for regulations to be made for suspension from duty with or without pay.
2. Regulation 3.10 provides:

#### **3.10 Suspension from duties (Act s 28)**

1. An Agency Head may suspend an APS employee employed in the Agency from duties if the Agency Head believes 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.
2. The suspension may be with remuneration.
3. If the suspension is to be without remuneration, the period without remuneration is to be:
  - a) not more than 30 days; or
  - b) if exceptional circumstances apply — a longer period.
4. The Agency Head must review the suspension at reasonable intervals.
5. The Agency Head must immediately end the suspension if the Agency Head no longer believes on reasonable grounds:
  - a) that the APS employee has, or may have, breached the Code of Conduct; or
  - b) that the employee's suspension is in the public, or the Agency's, interest.
6. The Agency Head must immediately end the suspension if a sanction has been imposed on the APS employee for the relevant breach of the Code of Conduct.
7. In exercising powers under this regulation, the Agency Head must have due regard to procedural fairness unless the Agency Head is satisfied on reasonable grounds that, in the particular circumstances, it would not be appropriate