

PARLIAMENTARY COUNSEL

Procedure No. 6.6
Procedures for determining breaches of the Code of
Conduct

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Part 1—Introduction

1 This document forms the procedures that FPC has established under subsection 15(3) of the *Public Service Act 1999 (PS Act)* for determining whether an employee, or former employee, has breached the APS Code of Conduct (*the Code*), and the sanction, if any, that is to be imposed on an employee where a breach of the Code has been found. It complies with ‘Part 7 - Handling suspected breaches of the Code of Conduct’ of the *Australian Public Service Commissioner’s Directions 2022 (the Directions)*.

2 These procedures must be complied with in determining, for the purposes of subsection 15(3) of the PS Act, whether an employee of OPC has breached the Code, and in relation to the imposition of any sanction.

3 This document will be made available on OPC’s intranet for current employees, and on OPC’s website¹.

¹ Subsection 15(7) of the PS Act.

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4 The principles underlying these procedures for managing suspected breaches of the Code are:

- misconduct action is part of a range of people management practices which OPC has in place to support integrity and high quality performance. This document complements, and does not replace, OPC procedures relating to underperformance, public interest disclosure, and fraud investigation;
- OPC's response is to be aimed at restoration—be that of the reputation of the OPC or APS, workplace relationships and morale, or employee productivity and capability;
- taking action in cases of suspected misconduct is primarily aimed at protecting the integrity of the APS and thereby maintaining public confidence in public administration;
- an employee suspected of having breached the Code is presumed not to have committed the breach until a determination has been made;
- sanctions are to be proportionate and specific to the nature of the conduct, are to act to be a deterrent to the employee and others, and are to demonstrate that misconduct is not tolerated in the agency. Sanctions are not about punishing an employee who has failed to meet the required standards of conduct;
- taking action on suspected misconduct must occur with due regard to procedural fairness².

Key terms

APS Code of Conduct

5 APS employees³ must comply with the Code, which is set out in section 13 of the PS Act. It may be viewed on the site [APS Code of Conduct](#).

APS Values and Employment Principles

6 The Code provides that APS employees must at all times behave in a way that upholds the APS Values and Employment Principles, and the integrity and good reputation of the employee's Agency and the APS.

7 The APS Values are set out in section 10 of the PS Act, and may be viewed on the site [APS Values](#).

8 The APS Employment are set out in section 10A of the PS Act, and may be viewed on the site [APS Employment Principles](#).

² Paragraph 15(4)(b) of the PS Act.

³ There are limitations on the application of the Code to Statutory Office holders set out in regulation 8 of the *Public Services Regulations 2023 (the Regulations)*.

Part 2—Preliminary considerations

9 Where an employee appears not to be meeting the standards expected of them, action should be taken to understand the nature and context of the behaviour to inform an effective response. Gathering further evidence to inform a decision about how to proceed precedes and does not form part of these procedures.

10 FPC may suspend an OPC employee who is suspected of having breached the Code⁴.

11 If an SES employee is suspected of breaching the Code, FPC must consult with the APS Commissioner on the process for determining whether the employee has breached the Code⁵.

Part 3—Procedures for determining breaches of the Code of Conduct

Selection of decision-maker

12 FPC must appoint a person to determine whether an OPC employee or former employee has breached the Code (the breach decision-maker) and a person to determine any sanction to be imposed (the sanction decision-maker). This may be the same person.

13 FPC will take reasonable steps to ensure that decision-makers are, and appear to be, independent and unbiased⁶. As OPC is small agency, this may mean appointing a person who is not an OPC employee.

14 In particular, a person must not determine whether the employee has breached the Code of Conduct if the person has previously made a report in relation to any of the matters suspected of constituting a breach, by the employee, of the Code of Conduct.

Misconduct investigation

15 The process for determining whether an OPC 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 allows⁷.

16 A person under investigation should be notified in writing at the earliest reasonable time of the decision to start a misconduct investigation.

17 The notification must include:

- (a) the identities of and contact details for the person or people involved in investigating the allegations, making the breach determination, and making the sanction decision; and

⁴ Section 28 of the PS Act and section 14 of the Regulations.

⁵ Paragraph 64(a) of the Directions.

⁶ Section 61 of the Directions.

⁷ Section 62 of the Directions.

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- (b) the specific behaviour the person is alleged to have engaged in, the element(s) of the Code they are alleged to have breached, as well as the sanctions that may be imposed⁸.

18 The investigation must ensure that the person under investigation has a reasonable opportunity to state their case⁹, including any extenuating circumstances. The length of time given to respond to adverse material may depend on the complexity of the allegations and the evidence, and the particular circumstances of the person under investigation, having regard to paragraph 15. However, a reasonable opportunity will usually be considered to be a minimum of 5 working days.

19 The person under investigation should be advised whether their response can be oral or in writing. Whether the response is oral or in writing may depend on the complexity of the matters the employee wishes to raise, or the capacity of the employee to provide a written statement.

Employee support

20 The person under investigation, and relevant third parties such as witnesses, have right to a support person at any stage of their involvement in a misconduct process. A support person is chosen by the person under investigation or witness.

21 Decisions of the Fair Work Commission indicate that while a support person cannot advocate for an employee or speak on their behalf, they may do more than simply provide emotional support. For example, a support person can help facilitate mutual understanding between an agency and an employee if the employee is having difficulty understanding the process or the agency is misconstruing the employee's perspective. It may also be reasonable for a support person to assist the person under investigation, or witness, in preparing for a discussion or interview, or to take notes.

Past conduct

22 The decision-maker should ordinarily consider only the incident(s) in question to make that determination. In some cases, however, evidence of prior 'similar facts', or evidence which shows a particular tendency, may be relevant to a determination about the incident(s) in question. The person under investigation should be advised of any past conduct that it is proposed to take into account in this regard.

23 When deciding on an appropriate sanction, a decision-maker may consider past behaviour, and in particular whether previous warnings, counselling or sanctions have relevance. For example, if repeated counselling has not changed the employee's conduct, a more serious sanction may be appropriate. The employee should be advised of any past conduct (both satisfactory and unsatisfactory) that it is proposed to take into account when deciding a sanction. In any event, the rules of procedural fairness would require that, in imposing a sanction, a statement of reasons should be provided to the employee.

⁸ Paragraph 59(a) of the Directions.

⁹ Paragraph 59(b) of the Directions.

Breach determination

24 Consistent with the requirements of administrative law, the standard of proof for determining whether a breach of the Code has occurred is on the balance of probabilities. This means that the decision-maker must be satisfied that a breach of the Code is more probable than not.

Sanctions

25 If, under these procedures, an employee is found to have breached the Code, a sanction may be imposed on that employee. The sanctions are as follows¹⁰:

- (a) a reprimand;
- (b) deductions from salary, by way of fine, of no more than 2% of an employee's salary¹¹;
- (c) reduction in salary;
- (d) re-assignment of duties;
- (e) reduction in classification;
- (f) termination of employment.

26 Before a sanction may be imposed the employee must be:

- (a) informed in writing of the breach determination, the sanctions under consideration and the factors under consideration in deciding a sanction; and
- (b) given reasonable opportunity¹² to make a statement in relation to the sanctions under consideration¹³.

27 Before a sanction may be imposed on an SES employee, FPC must consult with the APS Commissioner¹⁴.

Record of determination and sanctions

28 If a determination in relation to a suspected breach of the Code of Conduct by an employee of OPC is made, a written record must be prepared and given to FPC of:

- (a) the suspected breach; and
- (b) the determination; and
- (c) any sanctions imposed as a result of the determination; and

¹⁰ Subsection 15(1) of the PS Act.

¹¹ Section 9 of the Regulations.

¹² Refer to paragraph 18 for information about 'reasonable opportunity'.

¹³ Section 60 of the Directions.

¹⁴ Paragraph 64(b) of the Directions.

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(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 a record made under this paragraph.

29 Where the written record is to form the basis of a statement specifying the grounds for termination of employment (as required by subsection 29(2) of the PS Act), the statement must also have regard to the requirements of section 25D of the *Acts Interpretation Act 1901*. That is, as well as specifying the grounds, it must also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

Privacy

30 Consistent with the *Privacy Act 1988*, any personal information collected as part of a misconduct investigation will be used for the determining whether an employee has breached the Code, and in relation to the imposition of any sanction.

31 Records will be placed on an electronic file marked “Sensitive: Personal”.

32 This information may be accessed by FPC, and by decision-makers and investigators appointed by FPC.

33 The information may also be accessed by People Services employees for the purpose of supporting the misconduct process, enacting any sanctions and to develop de-identified reports.

34 This information will be managed in accordance with the requirements set out by the National Archives of Australia in the Administrative Functions Disposal Authority, which authorises destruction of records about investigations into allegations of employee misconduct 5 years after the action is completed¹⁵.

35 Policy No. 2.13 *Privacy Management Framework* outlines how individuals can access the personal information that is held by OPC in relation to them.

Review rights

36 A non-SES employee who has been suspended from duty or assigned to different duties temporarily while misconduct action is underway may lodge an application for a review of actions under Part 4 of the Regulations. Applications for the review of decisions relating to suspension or reassignment of duties will generally be made in the first instance to FPC¹⁶.

37 A non-SES employee who has been found to have breached the Code of Conduct may lodge an application for a review of actions under Part 4 of the Regulations. An application for review of a determination that an employee has breached the Code must be made to the Merit Protection Commissioner¹⁷.

¹⁵ [AFDA Express Version 2 class](#) 62634 viewed 7 June 2023

¹⁶ Subsection 38(1) of the Regulations.

¹⁷ Subsection 38(2) of the Regulations.

38 A non-SES employee who has had a sanction imposed may lodge an application for a review of actions under Part 4 of the Regulations, except in the case of termination of employment. An application for review of a sanction imposed for a breach of the Code must be made to the Merit Protection Commissioner¹⁸.

39 An employee who has been dismissed may have the right under the unfair dismissal provisions of the *Fair Work Act 2009* to apply to the Fair Work Commission for a remedy.

40 The making of an application for review does not operate to stay the action¹⁹.

41 An application for a review of action relating to a determination that the Code of Conduct has been breached or consequent sanction imposed must be made to the Merit Protection Commissioner within 60 days of the determination being made or the sanction being imposed²⁰.

Part 4—Related documents

42 The following documents are related to this procedure:

- (a) *Public Service Act 1999*
- (b) *Public Service Regulations 2023*
- (c) *Australian Public Service Commissioner's Directions 2022*
- (d) Further information can be found in the APSC publication '[Handling Misconduct: A human resource managers guide](#)'.

Part 5—Review

43 This procedure will be reviewed at least every 3 years.

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¹⁸ Subsection 38(2) of the Regulations.

¹⁹ Section 49 of the Regulations

²⁰ Items 2 and 3 of subsection 37(5) of the Regulations

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Note: Before May 2017, this OPC was called Office Procedural Circular No. 69