



Australian Government
Australian Public Service Commission

Summary

Guide

Handling Misconduct

A summary guide to the reporting and handling of suspected and determined breaches of the APS Code of Conduct



WHAT IS EXPECTED BEHAVIOUR?

Section 13 of the *Public Service Act 1999* (the Act) sets out the standards of behaviour expected of Australian Public Service (APS) employees. Collectively, these standards are known as the Code of Conduct.

WHO IS COVERED?

The APS Code of Conduct applies to:

- all APS employees, including ongoing and non-ongoing employees and heads of overseas missions who are APS employees, but excluding locally engaged employees (section 7, section 13, section 39, section 74 of the Act)
- all agency heads, including secretaries of departments, heads of executive agencies and heads of statutory agencies (section 14(1) of the Act)
- certain statutory office holders (sections 14(2) and (3) of the Act and Regulation 2.2).

AGENCY-BASED CODES

Misconduct procedures referred to in section 15(3) of the Act can be triggered only by a suspected breach of the APS Code of Conduct. Agency-based codes cannot in themselves form the basis of misconduct action. It would be wise to link any provisions in agency-based codes to the APS Code.

WHY TAKING ACTION IN CASES OF SUSPECTED MISCONDUCT IS IMPORTANT

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, rather than aiming to 'punish' the employee per se. Sanctions are intended to be proportionate to the nature of the breach, to be a deterrent to others and confirm that misconduct is not tolerated in the agency.

CONDUCT THAT BREACHES THE APS CODE OF CONDUCT

In broad terms, an APS employee whose conduct does not comply with an element of the Code of Conduct can be found to have breached the Code. It is important to note the following three points:

- where an element of the Code contains more than one item, it may not be necessary for the employee to have breached all items in order for a breach of the Code to be determined
- the Code specifies three different levels of connectedness between the standard of conduct and APS employment, as follows:
 - 'in the course of employment'
 - 'in connection with employment'
 - 'at all times'
- the term 'at all times' used in section 13(11) of the Act means that conduct which is apparently unrelated to the performance of duties may be subject to the Code—as long as it can be demonstrated that there is a real connection between the conduct and its effect on the workplace.

In the employment context, it is not discriminatory to expect all employees to abide by a single conduct standard, regardless of physical or mental capability. In these circumstances, agencies should not take into account an employee's disability in the course of determining a breach, but should consider it as a potential mitigating factor if applying a sanction.

UNSATISFACTORY PERFORMANCE OR MISCONDUCT?

Agencies will need to consider each case of unsatisfactory behaviour on its merits to determine whether it should be best handled through misconduct or performance management procedures.

Not all suspected breaches of the Code need to be dealt with by implementing misconduct procedures. With minor misconduct or in cases involving personality clashes, other approaches such as using the performance management system or using alternative forms of dispute resolution (such as mediation or counselling) may be the most effective way to manage the behaviour.

Not all suspected breaches of the Code need to be dealt with by way of determination. For example, where a suspected breach appears to be a minor infringement and/or atypical behaviour, it may be sufficient to warn the employee about his or her conduct, noting that any further similar conduct could lead to formal action.

AGENCY PROCEDURES FOR DEALING WITH SUSPECTED MISCONDUCT

Agency heads are required to establish procedures under section 15(3) of the Act for determining whether an APS employee in their agency has breached the Code of Conduct. Agency heads must take reasonable steps to ensure that every employee in their agency has ready access to the documents that set out the procedures.

If supporting advisory material is also developed within the agency, it must be made clear which procedures are mandatory and which material is advisory only.

PROCESS FOR HANDLING MISCONDUCT

The process for handling misconduct can be divided into a number of stages:

- receiving a report of suspected misconduct
- initial consideration of the report to decide how best to handle the suspected misconduct
- commencing a misconduct action under the misconduct procedures and undertaking an investigation
- deciding whether the misconduct has occurred
- imposing the appropriate sanction where necessary.

Recommended steps in a process for handling misconduct are illustrated in the flowchart in Figure 1 at the end of this document.

REPORTING SUSPECTED MISCONDUCT

Agencies should have more than one way for employees to report suspected misconduct, such as:

- central conduct/ethics units
- employee advice/counselling services
- fraud prevention and control units
- email reporting addresses
- identified contact officers (authorised personnel) to receive complaints or reports.

Agencies need to provide training and raise awareness of the expected standards of behaviour for APS employees, on the rights and responsibilities of managers in adhering to the standards and on the avenues available to raise concerns if it is suspected these standards are not being upheld.

Under the common law contract of employment, there is no general duty to report a fellow employee's misconduct. However, there are special obligations that come from being an APS employee, both arising from the fact that employees are bound by the APS Values and Code of Conduct and their status as public servants.

The Australian Public Service Commission considers that the duty to act with integrity and with the highest ethical standards imposes a reporting obligation on all employees with regard to suspected misconduct. In some circumstances, particularly for employees with managerial responsibilities, it could be a breach of the Code for an employee not to report suspected misconduct.

PROTECTION OF EMPLOYEES REPORTING SUSPECTED BREACHES

Agencies are required to protect employees who report suspected misconduct from any retribution, such as victimisation or discrimination. This protection extends to witnesses in misconduct cases.

Agencies should consider the circumstances of each report of suspected misconduct to determine if a formal assessment of the possibility of retribution is necessary. On the basis of this assessment, protective mechanisms, if required, should be put in place.

As far as the law allows, the identity of an employee who reports suspected misconduct should be kept confidential. Where it is necessary, or likely (for example, in court proceedings) that their identity be disclosed, the employee should be advised of the disclosure beforehand.

ROLES AND RESPONSIBILITIES IN INVESTIGATING AND DETERMINING MISCONDUCT

The allocation of decision making tasks associated with reporting and dealing with misconduct must not be inconsistent with the agency misconduct procedures and should be consistent with any associated agency guidance material. The range of different processes would include:

- an investigator with no decision-making function who prepares a brief for a decision-maker who may or may not have the delegation to impose a sanction
- the decision-maker conducts the investigation, determines a breach and exercises the sanction delegation
- the decision-maker conducts the investigation, determines a breach and makes recommendations to a separate sanction delegate
- briefing an external investigator to determine breach and make recommendations as to the appropriate sanction.

Agencies must ensure that all persons with responsibility for decision-making in handling a misconduct action have the appropriate authority to make that decision and that they both are, and are perceived as, independent and free of bias.

RIGHTS OF EMPLOYEES SUSPECTED OF MISCONDUCT

At the minimum, the rights of an employee who is being investigated for a suspected breach of the Code include:

- their identity should be kept confidential as far as possible and managed on a 'need to know' basis, consistent with the *Privacy Act 1998*
- they should be presumed innocent until a determination is made as to whether they have breached the Code
- they cannot lawfully be directed to answer questions relating to the matter under investigation where this may incriminate them
- the investigation into suspected misconduct should be handled in a timely, systematic and effective manner and be consistent with procedural fairness
- appropriate recordkeeping should be observed, including disposal of misconduct records in line with agency policy.

PROCEDURAL FAIRNESS

Under section 15(3)(b) of the Act, an agency's procedures are required to have due regard for procedural fairness. In the context of decisions associated with suspected misconduct, procedural fairness generally requires that:

- the employee suspected of breaching the Code must be informed of any allegations against them
- the employee must be provided with an opportunity to properly respond and put their case, in accordance with the agency's section 15(3) procedures before any decision is made (the 'hearing' rule)
- the decision-maker must act without bias or an appearance of bias (the 'bias' rule)
- there must be facts or information to support adverse findings (the 'evidence' rule).

Other administrative law principles must be considered. It is important that decision-makers understand that a finding that an employee has breached the Code may be invalid if there are flaws in the decision-making process.

STANDARD OF PROOF

The standard of proof applicable to findings of fact or findings that the Code has been breached is the civil standard. That is, findings should be based on the conclusion that it is more probable than not that the matter found to have occurred in fact occurred.

Before reaching a finding the decision-maker needs to have regard to the seriousness of the matter under consideration and the gravity of the adverse consequences which might flow to the employee. In that sense the civil standard of proof increases in accordance with the seriousness of the matter under consideration.

RE-ASSIGNMENT OF DUTIES OR SUSPENSION DURING INVESTIGATION

Action to temporarily re-assign duties, or to suspend, may be taken at any time prior to, or during, the process of determining whether a breach of the Code has occurred and applying a sanction.

In exercising these powers, it is important for the decision maker not to prejudge, and not to be seen to prejudge, whether misconduct has occurred. Reassignment or suspension are not to be used as sanctions.

The factors to take into account in reaching a decision to reassign duties or suspend an employee are whether it would be in the public, or agency's interests to do so. Relevant considerations might include, for example, that there is:

- potential for the employee to interfere with the investigation (destroying evidence, speaking to witnesses)
- a risk that the misconduct will continue or be repeated, or
- a risk to the maintenance of a cohesive and effective workplace or to the safety of other employees or the public.

The usual practice is to inform the employee suspected of misconduct, in writing, of the agency's intention to re-assign their duties or to suspend them and the reasons for this proposal, and to give the employee a reasonable opportunity to respond before the decision is taken. In some circumstances it may be appropriate for the re-assignment or suspension to immediately come into effect without first inviting the employee to comment. An employee may comment subsequently (re-assignment) or seek a review of the decision (suspension).

An employee may be suspended with or without pay. If without pay, the employee may be able to access paid leave entitlements (recreational or long service leave) or seek outside employment. A suspension without pay should not be for longer than 30 days, except in exceptional circumstances, such as where:

- a strong *prima facie* case of serious misconduct is apparent
- a finding has been made of a serious breach of the Code and a sanction is yet to be imposed—any delay between a determination and imposing a sanction should be minimised
- an employee has been charged with a criminal offence and is waiting for the charge to be heard and determined
- an employee has appealed against a conviction and is waiting for the appeal to be heard.

Continuing suspension must be reviewed at reasonable intervals.

Suspension must immediately end when the agency head no longer believes on reasonable grounds that the employee has, or may have, breached the Code, or that it is in the public, or agency's interests to continue the suspension. In addition, suspension must cease as soon as any sanction is imposed for the relevant breach of the Code.

SANCTIONS

Sanctions are intended to be proportionate to the nature of the breach, provide a clear message to the relevant employee that their behaviour was not acceptable, and act as a deterrent to the employee and others.

A sanction can be imposed on an employee only after it has been determined that the employee has breached the Code of Conduct, using procedures established by the agency head under section 15(3) of the Act.

Where such a determination has been made, an agency head (or a delegate or sub-delegate) may impose one or more of the following sanctions on the employee (section 15(1) of the Act):

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

There is no provision in the Act for any other form of sanction, but other management action may be warranted in order to reduce the risk of further misconduct (such as restricting an employee's access to the internet following a finding of internet misuse). Any such action should clearly be cast as management action and not as a sanction.

A determination that misconduct has occurred does not necessarily mean that a sanction must be imposed. A decision can be taken that other remedial action may be appropriate.

REVIEW OF ACTIONS

Non-SES employees who have been found to have breached the Code of Conduct and who wish to challenge either the determination that a breach has occurred or the sanction imposed may seek a review under the Act (except in the case of termination of employment which may only be reviewed under the *Workplace Relations Act 1996*).

An employee must lodge an application to the Merit Protection Commissioner for a review of a determination that they have breached the Code of Conduct or of the sanction that has been imposed. Any application made must be in writing, preferably within 12 months, and state why the review is sought.

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

In general terms, any review that is conducted will address the following issues:

- whether the agency's Code procedures comply with the Commissioner's Directions
- whether those procedures have been followed by the agency in the course of determining whether there was a breach of the Code
- on the evidence available, what act or acts were committed by the employee
- did their action(s) amount to a breach of the Code
- and, if yes, was the sanction appropriate in all the circumstances.

An agency is not bound to accept the Merit Protection Commissioner's recommendation(s).

There is no further right of review under the Public Service Act or Regulations.

RECORDKEEPING AND ACCESS TO RECORDS

Agencies need to establish policies which set out how long different records relating to counselling and misconduct matters are to be retained in the agency. Agencies should make these policies readily available to all employees.

Records relating to misconduct action need to be kept separate from an employee's personal file, but a misconduct file's existence be made apparent on the employee's personal file (for example, by cross-referencing). The misconduct file should be classified 'In Confidence' and held in secure storage. Access should be allowed only on a strict 'need to know' basis.

Material placed on a misconduct file should include:

- all correspondence with the suspect employee. In particular, the letters informing them of the suspected misconduct, of the case against them, of the final determination and of the sanction to be imposed (if the breach is proven) and their review rights
- any attachments to the correspondence
- all email and other correspondence or documents (including notes of telephone calls) relating to the investigation (including its planning, arranging interviews, etc)
- the investigation report with all relevant evidence including transcripts of evidence and/or submissions made by the parties involved
- any draft material provided to the employee for comment
- the employee's response/s to correspondence.

PROVIDING EMPLOYEE INFORMATION CONCERNING MISCONDUCT TO OTHER AGENCIES

To comply with the Privacy Act's Information Privacy Principles, agencies should set out in their privacy or human resource management policies the purposes for which they collect information in relation to misconduct and their usual practices in how information might be used and to whom it might be disclosed. It would be good practice to remind an employee who is the subject of a misconduct investigation of the agency's policies at the commencement of the investigation.

CONSIDERING MISCONDUCT IN THE SELECTION PROCESS, INCLUDING REFEREE REPORTS

The selection process is a key means by which an agency gains relevant information regarding eligibility and suitability from applicants. As candidates are not bound to identify any problems if not specifically asked, they should be specifically asked for relevant information on their previous work history.

Having a work history that includes a finding that the employee has breached the Code or is being investigated for a suspected breach does not automatically exclude that employee from consideration in a selection process.

It is a common practice for APS agencies to ask applicants seeking promotion or movement at level to obtain a referee report from their current supervisor or manager. Referees should avoid any comment in a referee report that is unrelated to the employee's work performance and work-related qualities relevant to the selection criteria for the job.

If an applicant is involved in a misconduct action that has yet to be finalised, in assessing the applicant's suitability a selection committee should not prejudge the outcome of any investigation. While an investigation is still underway, referees should, if relevant, indicate at most that there are as yet unresolved concerns.

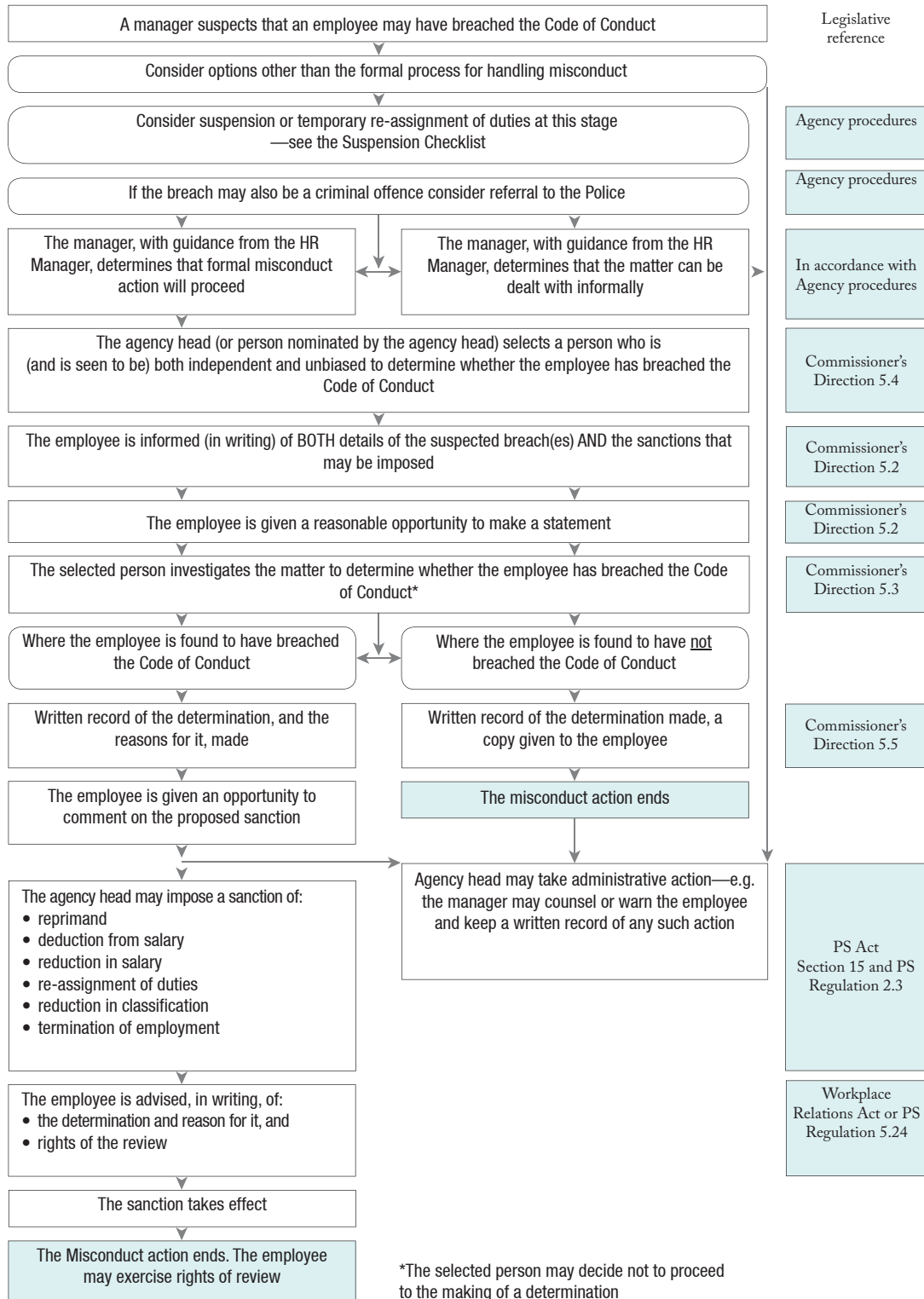
When deciding the relevance of a previous breach of the Code to a selection process, selection committees and referees should consider the following factors:

- the nature and seriousness of the breach or suspected breach
- the sanction imposed
- how long ago the breach or suspected breach occurred
- the nature of the duties being performed at the time and the duties of the current employment opportunity
- whether it was a one-off action or part of a pattern of behaviour
- the employee's conduct since the breach.

In all cases, the weight to be given to determined misconduct will diminish over time.

HANDLING MISCONDUCT

Figure 1: Recommended steps in a process for handling misconduct*



*This guide provides a brief overview of the steps and actions that may be involved in handling misconduct. You should consult *Handling Misconduct: A human resources practitioner's guide* if you need further information or guidance.