



Guidelines for determining breaches of the Code of Conduct and for determining sanction

November 2018

Contents

Purpose.....	3
What is a breach of the Code?	3
Reporting suspected misconduct	3
The misconduct process	4
Confidentiality, protection and support for employees	5
Reassignment or suspension	5
Initiating an investigation	6
Investigation process.....	6
Determining a breach	7
Standard of proof.....	7
Record of decision on a suspected breach.....	8
Process if misconduct did occur	8
What determines the sanction?	9
Finalising the process.....	9
Procedure when an ongoing employee is to move to another agency	10
Rights of review.....	10
Recordkeeping	11
Further information	11

Purpose

1. These guidelines supplement the ACCC/AER 'Procedures for determining breaches of the Code of Conduct and for determining sanction' and provide advice for managing suspected breaches of the APS Code of Conduct (the Code).
2. The guidelines help employees and decision makers meet their responsibilities where misconduct is suspected and should be read in conjunction with the Procedures.

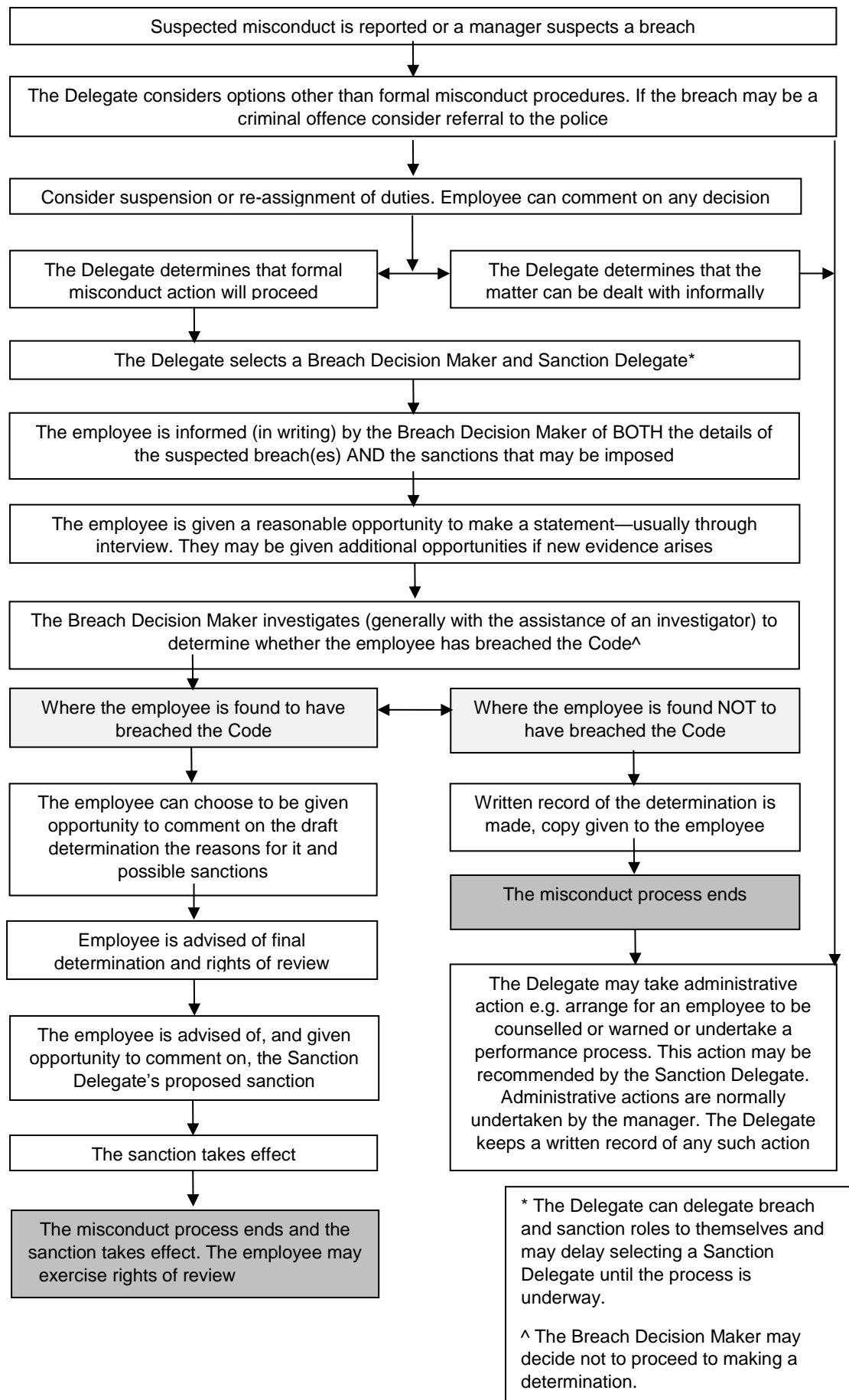
What is a breach of the Code?

3. An APS employee whose action or behaviour does not comply with any element of the Code can be found to have breached the Code. Such action or behaviour must be referred to as 'suspected misconduct' until a decision is made that the action or behaviour amounts to a breach of the Code by a person appointed in accordance with the Procedures.

Reporting suspected misconduct

4. All APS employees, in particular supervisors and managers are obliged to report suspected breaches of the Code.
5. Under the *Public Interest Disclosure Act 2013* (PID Act), where a public interest disclosure relates to conduct that is, or may be, a breach of the Code, it is possible that an investigation will be a two-stage process with the first stage being the PID Act investigation and the second stage being initiating formal misconduct procedures.
6. Suspected breaches should be reported to People and Culture Branch (P&C).
7. Ideally, reports of suspected misconduct are made in writing and include:
 - a description of the suspected breach
 - the names of the people involved
 - details of dates, locations and witnesses (if any)
 - any relevant supporting documentation such as file references, emails, diary notes or other written records.
8. This detail will help the Chairman, or a person authorised by the Chairman through the Human Resources Delegations and Authorisations (the Delegate), determine whether to instigate formal misconduct procedures or if another approach is appropriate. The Chairman or Delegate may consult with the manager of an employee who is the subject of suspected misconduct in determining whether to instigate formal misconduct procedures.
9. Not all suspected breaches of the Code need to be dealt with in accordance with the formal misconduct procedures. With minor misconduct, atypical behaviour, and cases involving personality clashes, other approaches may be more appropriate and may resolve matters more quickly and effectively. In less serious cases, the focus should be on providing constructive feedback and prompt, preferably agreed, remedial action.
10. As a general rule, alleged misconduct should be considered under formal misconduct procedures if it is likely that a sanction would be imposed if the suspected misconduct was found to have occurred and was determined to be a breach of the Code.

The process



Confidentiality, protection and support for employees

11. The identity of employees who report suspected misconduct or who provide witness statements will be kept confidential where practicable or appropriate.
12. P&C will consider the risk of adverse outcomes that may potentially arise in the course of dealing with suspected misconduct (such as retaliatory action). Where necessary, protections against victimisation or discrimination will be provided for the employees involved—this may include the complainant, the accused and/or witnesses. Protections may include, but are not limited to, changes in location, supervisory arrangements, or duties.
13. Where the accused employee is told the identity of the complainant or witnesses during the investigation, the affected employees will be advised of this disclosure.
14. Disclosure may occur where oral or written statements are provided in whole or in part to the accused employee to allow them the opportunity to respond to any allegation, adverse material, or other issues that may influence a decision affecting them.
15. P&C provides support to all employees throughout the process. Any party can discuss concerns with P&C throughout the process and can access the [Employee Assistance Program](#). P&C can expedite EAP access if required. In addition, all parties can invite a person of their choosing to support or represent them at any time. A support person is not to be a fellow employee whose involvement may result in an apparent or possible conflict of interest

Reassignment or suspension

16. A decision to temporarily re-assign duties, or to suspend an employee suspected of breaching the Code may be taken at any time prior to or during the process of determining whether a breach has occurred and what (if any) sanction(s) may be applied. Generally the issue of suspension or re-assignment should be considered at the same time as a decision is made about whether to commence formal misconduct procedures.
17. Decisions regarding suspension and re-assignment may only be made by a person authorised by the Chairman through the Human Resources Delegations and Authorisations (Suspension Delegate).
18. An employee may be suspended, with or without remuneration, where the Suspension Delegate has formed the view on reasonable grounds that the employee may have breached the Code and where the suspension is in the public or the agency's interest. P&C should be kept informed where suspension of an employee is being considered. Suspension decisions must be made in consultation with P&C.
19. Suspension without remuneration for more than 30 days will only occur in exceptional circumstances, for example in criminal cases or where there is a risk to a person's health and safety.
20. Usually an employee will be advised of the reasons for the proposed action and given an opportunity to comment before action is taken. If urgent circumstances (for example security considerations) necessitate reassignment or suspension without prior advice, as soon as practicable, an employee will be given notice of the reasons for the decision and provided with an opportunity to argue why the initial decision should be varied or set aside.

21. Continuing suspension must be reviewed by the Suspension Delegate at reasonable intervals.
22. Suspension must immediately end when the Suspension Delegate 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 interest to continue the suspension; or when a sanction has been imposed.

Initiating an investigation

23. The Delegate will select a Breach Decision Maker and, potentially, a Sanction Delegate (this role may be delegated later). The Breach Decision Maker may select a person to assist with the investigation and report findings to the Breach Decision Maker. This person may be an ACCC/AER employee, or an investigator from outside the agency.
24. As soon as practicable, the Breach Decision Maker will advise the employee suspected of breaching the Code, in writing, that a formal investigation is to commence. There may be cases where some level of prior preliminary inquiry is warranted, or where, for special reasons, a substantive investigation should be undertaken before a notification is made.
25. Where there are incomplete details of the suspected misconduct at the outset of an investigation, the letter will state that
 - the investigation is only just beginning and provide a general description of the suspected misconduct to be investigated
 - the employee will be given further detail about the allegations as the investigation progresses
 - the employee will be given an opportunity to comment on the detailed allegations before a draft finding is made as to whether the Code has been breached
 - the employee is generally bound to answer fair and reasonable questions relating to their activities as an employee. However, they cannot lawfully be directed to answer questions where this would tend to incriminate them in relation to a criminal offence or expose them to a finding of breach, including a possible sanction for that breach. A refusal to respond to allegations of misconduct cannot be evidence that misconduct occurred.
26. After the initial notification to the employee, it is possible that some of the details outlined in it will change, for example, after the Breach Decision Maker or investigator has made further inquiries the scope of the investigation or the provisions of the Code suspected of being breached may change. The employee suspected of misconduct should be informed of these changes, potentially provided with a copy of relevant documents, and invited to make a further statement.

Investigation process

27. The Breach Decision Maker should be actively involved in the planning of the investigation and ensuring the quality of the process. The Breach Decision Maker should approve the terms of reference for any investigation and may ask the investigator for a recommendation in respect of finding whether there has been a breach of the Code. However there is no obligation to agree with the investigator's recommendation as it is the Breach Decision Maker who makes the determination as to whether the Code has been breached—not the investigator.

28. A record should be kept of any oral submissions, and a copy given to the employees and approved by the employees if it is an agreed record. The employees should be made aware that the questions asked during the interview are made for official purposes in connection with their employment. Accordingly, if any answer provided is found to be false or misleading, it could constitute a breach of the Code.
29. Any statement or submission should preferably come directly from the employee personally. However, for various reasons, employees may seek advice or support from other persons, whose reasonable direct or indirect assistance in the making of a statement or submission would usually be permitted.
30. Everyone involved in the process should be advised that they are obliged to maintain absolute confidentiality.
31. Any request by an employee for an extension of time to undertake steps during an investigation, including providing a statement in respect of the suspected misconduct, should be considered on its merits. Consideration will recognise the need to be fair to the employee, but also the requirement for timeliness and expedition. An employee requesting an extension of time will need to provide justifiable reasons to support their request.

Determining a breach

32. When a separate person has undertaken the investigation into suspected misconduct, the Breach Decision Maker must:
 - play an important quality control role by reviewing the process, paperwork and recordkeeping of the case up to this point to ensure correct procedures have been followed
 - be satisfied that the investigation has brought them to a point where they can make a fair, balanced and conscientious decision.
33. The relevant facts, circumstances and evidence specific to the matter under investigation must be the only consideration of the Breach Decision Maker when determining whether or not a breach has occurred. In most cases, the previous history of the employee has no relevance to whether the breach currently being investigated has or has not occurred.
34. However, findings that the employee has breached the Code on previous occasions may, under certain circumstances, be considered. This should arise only when the facts and circumstances of past breaches of the Code establish a systematic course of conduct on the part of the employee.

Standard of proof

35. The standard of proof used in determining breaches of the Code is ‘the balance of probabilities’—the civil standard. That is, in order for the Breach Decision Maker to conclude that the Code has been breached, the evidence must satisfy the Breach Decision Maker that it is “more likely than not” that the breach occurred.
36. However, as the seriousness of the alleged breach escalates, so does the level of proof required to substantiate it, given the adverse consequences for the suspected employee. The Breach Decision Maker needs to act with much care and caution before finding that a serious allegation is established.

Record of decision on a suspected breach

37. The Breach Decision Maker should prepare a written record of the draft decision reached as to whether the Code has been breached (specifying the specific relevant element(s) of the Code), together with a summary of the basis for that decision. This draft decision record should include:
 - a summary of the evidence obtained by the investigator and any other sources of information and evidence
 - an analysis of the evidence, noting where the investigator's analysis and recommendations are accepted
 - key findings of fact, including key issues where one version of events has been preferred to another
 - based on the above, a draft decision as to whether what happened was a breach of the Code and, if so, which elements of the Code have been breached
38. If the Breach Decision Maker makes a draft decision that a breach has occurred, the Delegate should select a Sanction Delegate, if this has not already occurred.
39. The Breach Decision Maker will provide the suspected employee with the opportunity to comment on the draft decision, although it is open to the employee to decline this opportunity in writing.
40. When requesting comment, the Breach Decision Maker should:
 - enclose a copy of the investigator's report and the Breach Decision Maker's decision record
 - inform the employee of the name of the person who has been given the authority to determine any sanction (the Sanction Delegate) and the range of possible sanction(s)
 - invite the employee to respond within 7 days to the draft decision.
41. Once any response from the employee has been received and considered, the Breach Decision Maker should make the final determination and advise the employee in writing of the final determination and their rights of review.
42. If the employee declined the opportunity to comment on the draft decision, the Breach Decision Maker should include the documents the employee would have received had they not declined the opportunity.

Process if misconduct did occur

43. The Procedures define that reasonable steps must be taken to inform the employee of the sanction decision and allow them to provide comment. This process reflects the default reasonable steps and will be varied as required.
44. The Sanction Delegate should write to the employee. The letter should:
 - inform the employee of the proposed sanction(s) and the reasons in support of them
 - invite the employee to comment on the proposed sanction.

45. The employee should be given what the Sanction Delegate determines to be a reasonable opportunity to comment on the proposed sanction(s), in most cases this will be 7 days.

What determines the sanction?

46. The misconduct provisions of the Act are intended to provide an appropriate remedy for inappropriate behaviour, not a punitive mechanism.
47. Once a determination has been made that an employee has breached the Code, an appropriate sanction(s) may be imposed. The Breach Decision Maker may recommend an appropriate sanction(s) to the Sanction Delegate.
48. In deciding an appropriate sanction(s), the Sanction Delegate should consider the following factors:
- the nature and seriousness of the breach
 - any mitigating factors
 - the degree of relevance to the employee's duties and the reputation of the APS
 - response to the misconduct, and the likelihood of recurrence
 - the effect of the proposed sanction(s) on the offender.
49. The Sanction Delegate may impose the following sanctions:
- reprimand
 - deduction from salary by way of fine
 - reduction in salary
 - reassignment to other duties
 - reduction in classification
 - termination of employment.
50. The fact that an employee finds the experience of disciplinary action stressful does not warrant lesser sanction(s).
51. A finding that the employee has breached the Code on previous occasions may be considered when determining sanction(s). The previous history of the employee usually has no relevance as to whether the breach currently being investigated has or has not occurred, but may be relevant to the level of sanction(s) imposed. The nature of previous breaches found against the employee may or may not be relevant to the current matter.

Finalising the process

52. Following receipt of an employee's comments concerning the sanction(s) that might be applied, the Sanction Delegate needs to decide if the employee's comments contain any information that would lead them to reconsider the proposed sanction(s).
53. After making the final decision on the appropriate sanction(s), the Sanction Delegate should ensure that the decision and reasons for it are documented and notify the employee in writing.

54. In a case where termination of employment is being considered, the Sanction Delegate must consult P&C to ensure that all relevant legal and procedural requirements have been met.
55. Where the Sanction Delegate is giving consideration to a sanction of reduction in classification or reassignment of duties, the matter should be discussed with P&C to ensure that duties are available, before the sanction is imposed.
56. A sanction(s) that involves reassignment of duties or relocation of the employee should be explored with the employee's potential new manager's area before a decision is taken.
57. P&C can provide the complainant with basic information about the progress of the case and the ultimate outcome. The information provided will be sufficiently detailed to assure the complainant that suspected Code of Conduct breaches are taken seriously and dealt with properly but constrained by the need to protect the privacy of the respondent.

Procedure when an ongoing employee is to move to another agency

58. Where:
 - (a) a person who is an ongoing APS employee in the Commission is suspected of having breached the Code and
 - (b) the employee has been informed of the matter and
 - (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 PS Act (including on promotion)

Unless the Delegate and the new agency head agree otherwise, the movement does not take effect until the matter is resolved.
59. 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 Delegate decides that a determination is not necessary.

Rights of review

60. During the investigation employees can raise concerns regarding the conduct of the investigation either with the Breach Decision Maker or P&C.
61. Employees may seek a review of a decision relating to suspension to the Delegate. All requests for review should be provided in writing.
62. Employees who have been found to have breached the Code and who wish to challenge the breach finding or the sanction(s) imposed may seek a review by:
 - written request (outlining the reason) to the Delegate
 - the APS Merit Protection Commissioner under the Public Service Regulations
 - the Fair Work Commission for termination of employment.
63. If an employee seeks a review, the application for review does not stay the implementation of the action or decision.

64. An application to the APS Merit Protection Commissioner for review of the breach determination must be made within 60 days of the agency determining that an employee has breached the Code. The application for review of the sanction decision must be made within 60 days of the imposition of the sanction.
65. Further information on the review process can be provided by the APSC. However, the APSC cannot give advice on whether an application for review should be lodged in a particular case or particular circumstance.

Recordkeeping

66. All records relating to misconduct action taken in accordance with Section 15 (Breaches of the Code of Conduct) of the PS Act will be maintained by P&C.
67. These records will be separate from an employee's Personnel file, will only be accessed on a "need to know" basis and will comply with all requirements of the Privacy Act 1988.
68. The National Archives of Australia website provides information on the retention of records and sets out minimum periods for which various classes of records relating to counselling and misconduct matters should be retained.
69. If the Delegate determines that a breach of the Code has occurred, a copy of the formal letter advising the employee/former employee of the determination and sanction(s) will be placed on the employee's Personnel file.

Further information

70. Contact: WorkplaceRelations@acc.gov.au.
71. [Values and code of conduct](#) pages on the intranet and particularly the [APS code of conduct](#) page.
72. [Providing information on Code of Conduct investigation outcomes to complainants](#)
73. APSC [Code of Conduct](#)
74. [APSC's Handling misconduct: a human resource manager's guide](#)