



## Determining Suspected Breaches of Codes of Conduct Procedure

10 September 2020 v1.1

Approved for internal use

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*Please note the procedure, while still in practice within the Agency, is undergoing review to ensure currency. Once approved, the new version will be updated on this site.*

## Key information

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## Approval

This document has been approved on the basis that the appropriate input has been obtained during its development.

Bettina McMahon

10 September 2020

Acting Chief Executive Officer



## Document version history

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Version	Date	Comments
1.0		Initial publication
1.1	11.09.2020	Minor amendments and final review

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### Document control

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### Security

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# 1 Context

## 1.1 Rationale and purpose

The Agency Code of Conduct, Values and Employment Principles sets out the standards of conduct and behaviour expected of all the Agency's Workers, including APS employees, common law employees and contractors. In addition to this, APS employees of the Agency are legally bound by the APS Code of Conduct and Common law employees are legally bound by the terms of their employment contract with the Agency.

This procedure document (Procedure) establishes a process for:

- determining breaches of the APS Code of Conduct and Agency Code of Conduct and imposing sanctions under section 15(1) of the Public Service Act for APS employees that are consistent with the basic principles of procedural fairness and the requirements set out in the *Australian Public Service Commissioner's Directions 2016*.
- determining breaches of the Agency Code of Conduct and/or employment contract and deciding disciplinary outcomes for common law employees that are consistent with the Agency's legal obligations and the principles of procedural fairness.

This Procedure satisfies the obligations of the Agency's Chief Executive Officer under section 15(3) of the Public Service Act to develop a procedure for determining:

- whether an APS employee of the Agency, or former APS employee of the Agency, has breached the APS Code of Conduct; and
- the imposition of any sanction on an APS employee of the Agency (excluding former employees) who is found, in accordance with this procedure, to have breached the APS Code of Conduct (section 13 of the Act).

## 1.2 Commencement date

This procedure commenced on the date of approval (which is the date on the front page).

## 1.3 Scope and application

This Procedure applies to APS employees within the Agency, and former employees of the Agency, who are suspected of breaching the APS Code of Conduct while employed by the Agency (with the exception that references to the imposition of a sanction do not apply to former APS employees).

This Procedure also applies to common law employees of the Agency who are suspected of breaching the Agency Code of Conduct or a term of their employment contract.

Managers (whether they are employed by the Agency or are contractors) who are responsible for Agency APS and common law employees are required to consider, but are not bound by, this Procedure in relation to suspected breaches of the Codes of Conduct.

This Procedure does not apply to any suspected breaches of the Agency Code of Conduct by contractors engaged by the Agency.

A departure from this Procedure does not necessarily render a breach, sanction or disciplinary outcome decision purportedly made in accordance with this Procedure invalid and of no effect. This Procedure is not incorporated into and is not an express or implied term of any employment contract.

#### 1.4 Agency expectations of managers

The processes in this Procedure are not a substitute for management action and the need for managers to undertake early intervention to address unacceptable conduct. An early conversation, even in the context of a possible Code of Conduct process, provides the best support for:

- the cessation of unacceptable conduct;
- early resolution; and
- preserving working relationships.

Not all suspected breaches of the Codes of Conduct need to be dealt with by way of determination under this Procedure. In particular circumstances, another way of dealing with a suspected breach of a Code of Conduct may be more appropriate, including performance management.

#### 1.5 Definitions

Term	Definition
Agency	Australian Digital Health Agency
Agency Code of Conduct	Agency Code of Conduct Policy as in place from time to time.
APS Code of Conduct	The provisions in section 13 of the Public Service Act which set out the standards of behaviour expected of APS employees.
APS employee	An employee engaged by the Agency on behalf of the Commonwealth of Australia pursuant to the <i>Public Service Act 1999</i> (Cth).
Chief Executive Officer	The Chief Executive Officer of the Agency.
Code/s of Conduct	The APS Code of Conduct and the Agency Code of Conduct, Values and Employment Principles as relevant.
Common law employee	An employee of the Agency employed pursuant to a common law contract of employment.
Delegate	HR Delegate in accordance with Agency <a href="#">Human Resources (HR) Delegations</a>
Merit Protection Commission	Statutory office holder who conducts independent reviews of employment actions and merit-based decisions.

#### 1.6 Support documents and associated policies

- Agency Code of Conduct Policy
- *Public Service Act 1999* (Cth)
- *Public Service Regulations 1999* (Cth)
- APS Commissioner Directions 2016

- APS Code of Conduct
- APS Values and Code of Conduct in Practice
- Public Governance, Performance and Accountability Act 2013 (Cth)
- Public Governance, Performance and Accountability Rule 2014 (Cth)
- [Section 24 Determination](#)
- [Agency Raising Workplace Concerns guidelines](#)
- [Agency Human Resource Delegations](#)

## 2 Procedure content

### 2.1 Appointment of decision maker

The Agency will appoint a decision maker in accordance with the Agency's HR Delegations. A breach decision maker can be appointed from inside or outside the Agency. Any appointment of a person outside the Agency must be made by the CEO, and in situations involving an APS employee, must also be an APS officer.

All reasonable steps must be taken by the Chief Executive Officer, or delegate, to ensure that the decision maker appointed is, and appears to be, independent and unbiased.

The decision maker who determines whether there has been a breach of a Code of Conduct and the decision maker who determines the appropriate sanction or disciplinary outcome may be the same person.

### 2.2 Process for determining suspected breach

This section sets out the process for determining whether an employee has breached the relevant Code of Conduct.

For common law employees, a reference to a suspected breach of the Agency Code of Conduct in this Procedure should be read as also including a suspected breach of a term of their employment contract.

#### 2.2.1 Role of decision maker in breach determination process

The role of the decision maker is to determine and record in writing, in accordance with this Procedure, whether the employee has breached the relevant Code of Conduct based on the balance of probabilities (i.e. it is more probable than not). The strength of evidence necessary to establish an allegation on the balance of probabilities may vary according to the seriousness of the issues involved.

#### 2.2.2 Determination process to be informal

The process for determining whether an employee has breached the Code of Conduct must be carried out in a timely and efficient manner and with as little formality as proper consideration of the matter allows. A formal hearing is not required.

#### 2.2.3 Selection of investigator

Once a suspected breach of the Code of Conduct has been identified and a decision is made to deal with the suspected breach under this Procedure, an investigator may be appointed by the Agency in accordance with the Agency's HR Delegations, to assist the decision maker in conducting the inquiry into the suspected breach.

The investigator may be an employee of the Agency or another person.

All reasonable steps must be taken by the Chief Executive Officer, or a person authorised by the Chief Executive Officer, to ensure the investigator is, and appears to be, independent and unbiased.

The inquiries undertaken by an investigator do not need to be formal, and a formal investigation report does not need to be produced.

#### **2.2.4 Information to be given to an employee**

Prior to making any determination as to whether or not an employee has breached the relevant Code of Conduct, the employee will be informed in writing of the following matters:

- the details of the suspected breach, including details of the elements of the relevant Code of Conduct suspected to have been breached (including any subsequent material variation of those details);

*Note: an investigation into a suspected breach of the Code of Conduct may be conducted 'on the papers' (i.e. based on the information available without the need to seek additional documents, conduct interviews or take witness statements)*

- that a decision maker has been/will be appointed (as appropriate) to make a determination as to whether the employee's alleged conduct breaches the Code of Conduct;
- for APS employees, the sanctions that may be imposed on the employee under subsection 15(1) of the Public Service Act if a determination of a breach of the APS Code of Conduct is made (this does not apply in relation to former APS employees);
- for common law employees, that disciplinary action, including possible termination of employment, may result if a determination of a breach of the Agency Code of Conduct is made;
- that the employee may have a support person at any meeting related to the Agency's inquiries into the suspected breach of the Code of Conduct; and
- that the employee will be given reasonable opportunity to provide a response in writing and/or verbally, including providing any further documents the employee believes are relevant for the decision maker to consider when making the determination.

A person who does not provide a response in relation to a suspected breach is not, for that reason alone, to be taken to have admitted to committing the suspected breach.

### **2.3 Process for determining sanction for APS employees**

This section sets out the process for determining the sanction(s), if any, to be imposed on an APS employee, who is found to have breached the APS Code of Conduct, in accordance with this Procedure. The following process is established pursuant to subsection 15(3)(b) of the Public Service Act by the Chief Executive Officer and does not apply to a former APS employee of the Agency.

#### **2.3.1 Role of decision maker in sanction determination process**

The decision maker will make a decision in relation to the appropriate sanction(s) (if any) to be imposed on an APS employee in respect of whom a breach determination has been made in accordance with this Procedure.

The decision maker may decide that appropriate remedial action will be taken, either instead of, or in addition to, imposing a sanction under subsection 15(1) of the Public Service Act.

### 2.3.2 Information to be given to employee

Prior to making a decision to impose a sanction, the decision maker must ensure that reasonable steps have been taken to:

- ensure the employee has been notified in writing of the breach determination;
- inform the employee of the sanction(s) that are under consideration and the factors that are under consideration in determining any sanction to be imposed; and
- give the employee a reasonable opportunity to provide a response in writing and/or verbally in relation to the proposed sanction(s) under consideration.

### 2.3.3 Record of determination and sanction

If a determination in relation to a suspected breach of the APS Code of Conduct by an APS employee is made, the decision maker must make a written record setting out:

- the suspected breach;
- the determination that the APS employee has, based on the balance of probabilities, breached the Code of Conduct;
- details of the sanction(s) (if any) to be imposed and the reasons for the sanction(s) (as appropriate); and
- if a statement of reasons for the decision was given to the employee - the statement of reasons.

If a decision is made that no breach occurred, this should also be made in writing.

**Note:** The *Archives Act 1983 (Cth)* and the *Privacy Act 1988 (Cth)* apply to Agency records.

## 2.4 Process for determining disciplinary outcome for common law employees

The following sets out the process for determining the appropriate disciplinary outcome, if any, to be imposed on a common law employee, who is found to have breached the Agency Code of Conduct, in accordance with this Procedure.

### 2.4.1 Role of decision maker in disciplinary outcome determination process

The decision maker will make a decision in relation to the appropriate disciplinary outcome (if any) to be imposed on a common law employee in respect of whom a breach determination has been made in accordance with this Procedure.

The decision maker may decide that appropriate remedial action will be taken, either instead of, or in addition to, imposing a disciplinary outcome.

### 2.4.2 Information to be given to employee

Prior to making a decision to impose a disciplinary outcome, the decision maker must ensure that reasonable steps have been taken to:

- inform the employee of the disciplinary outcome(s) that are under consideration and the factors that are under consideration in determining any disciplinary outcome to be imposed; and
- give the employee a reasonable opportunity to provide a response in writing and/or verbally in relation to the proposed sanction(s) under consideration.

**2.4.3 Breach determination and disciplinary outcome determination processes may be concurrent**

For common law employees, the breach determination and the disciplinary outcome determination process may be undertaken concurrently, so long as the decision maker ensures that procedural fairness is accorded to the common law employee.

## 3 Suspension or temporary reassignment of duties

### 3.1 Suspension or temporary reassignment of duties of APS employees

**This section only applies to the Agency's APS employees.**

Action to suspend or temporarily reassign duties may be taken at any time prior to, or during, the Agency's consideration of the suspected breach of the APS Code of Conduct.

#### 3.1.1 Suspension

In accordance with section 28 of the Public Service Act and Regulation 3.10 of the Public Service Regulations, the delegate may suspend an APS employee employed by the Agency from duties if they believe on reasonable grounds that:

- the APS employee has, or may have, breached the APS Code of Conduct; and
- the APS employee's suspension is in the public interest or the Agency's interest.

Suspension may be with or without remuneration.

In accordance with the Public Service Regulations, if the suspension is to be without remuneration, the period without remuneration is as determined by the delegate to be:

- not more than 30 days; or
- if exceptional circumstances apply, a longer period.

#### 3.1.2 Notice of suspension

The delegate should provide the APS employee with a written notice of the decision to suspend as soon as practicable after the decision has been made. The notice should include:

- the reason for the decision;
- the date of effect;
- the intervals at which the suspension will be reviewed; and
- the APS employee's right of review.

#### 3.1.3 Review of suspension

The delegate must review the suspension at reasonable intervals.

The delegate must immediately end the suspension if he or she no longer believes on reasonable grounds that:

- the APS employee has, or may have, breached the APS Code of Conduct; or
- the APS employee's suspension is in the public interest or the Agency's interest.

**3.1.4 Impact of breach/sanction decision**

The delegate must immediately end the suspension and notify the APS employee in writing, if a sanction has been imposed on the APS employee for the relevant breach of the Code of Conduct.

Where an APS employee who has been suspended from duty is subsequently found not to have breached the Code of Conduct, consideration must be given to salary and allowances foregone during the period of suspension.

**3.1.5 Procedural fairness**

In accordance with the Public Service Regulations, when exercising suspension powers, the delegate must have due regard to procedural fairness unless he or she is satisfied on reasonable grounds that, in the particular circumstances, it would not be appropriate. A written record should be kept of the decision and the reasons for it.

**3.1.6 Temporary reassignment of duties**

The delegate may decide that it is appropriate to temporarily reassign the APS employee's duties. Any reassignment of duties will be undertaken in accordance with section 25 of the Public Service Act.

**3.2 Suspension or temporary reassignment of duties of common law employees**

<b>This section only applies to the Agency's common law employees.</b>
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This procedure does not restrict the Agency's powers to suspend or temporarily reassign the duties of a common law employee in circumstances other than a suspected breach of the Agency Code of Conduct.

**3.2.1 Suspension**

The delegate may suspend a common law employee if the delegate believes on reasonable grounds that the employee has, or may have, breached the Agency Code of Conduct or a term of their contract of employment.

During a period of suspension, the delegate may direct the common law employee not to:

- attend the workplace;
- access any Agency systems; and/or
- contact any Agency employees, contractors, clients or suppliers other than a nominated contact person.

Suspension may be with or without remuneration.

**3.2.2 Temporary reassignment of duties**

The delegate may decide that it is appropriate to temporarily reassign a common law employee's duties or direct that they work from a different location during the period where the Agency is considering the suspected breach of the Agency Code of Conduct.

**3.3 Administrative action**

Suspension or temporary reassignment of duties while the Agency is considering a suspected breach are administrative actions and not sanctions or disciplinary outcomes in themselves.

## 4 Other matters for APS employees

### 4.1 Review of determination or imposition of sanction or sanctions

A non-Senior Executive Service APS employee is entitled under section 33 of the Public Service Act to seek a review of an employment-related action, including a determination that the APS Code of Conduct has been breached and the imposition of a sanction(s) (other than termination of employment). The application must be made to the Merit Protection Commission.

### 4.2 Procedure when an ongoing APS employee is to move to another agency

This section applies if:

- a person who is an ongoing APS employee in the Agency is suspected of having breached the Code of Conduct;
- the employee has been informed of the details of the suspected breach of the Code of Conduct (including any subsequent variation of those details) and the sanction(s) that may be imposed on them under subsection 15(1) of the Public Service Act;
- the matter has not yet been resolved; and
- a decision has been made that, apart from this section, would result in the movement of the employee to another agency in accordance with section 26 of the Public Service Act (including on promotion).

Unless the Chief Executive Officer and the head of the agency to which the APS employee is moving agree otherwise, the movement of an APS employee (including on promotion) does not take effect until the matter is resolved.

For the purpose of this clause, the matter is taken to be resolved when:

- a determination in relation to suspected breach of the Code of Conduct is made in accordance with this procedure; or
- the Chief Executive Officer decides that a determination is not necessary.