

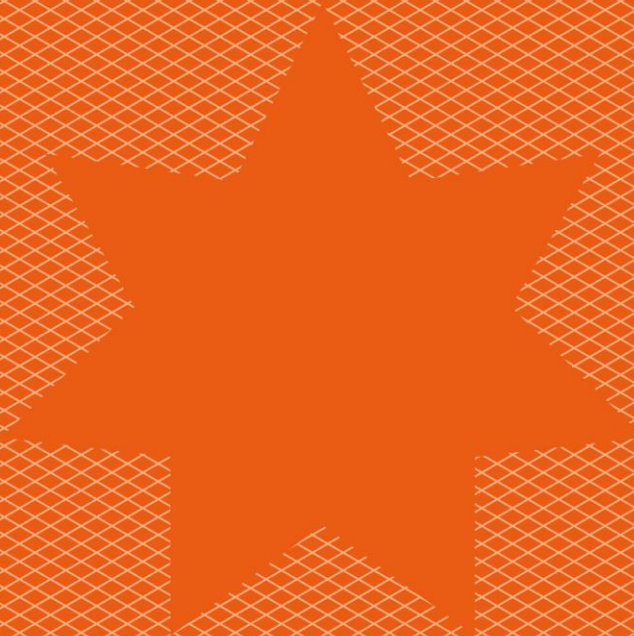


CDPP

*Australia's Federal Prosecution Service*

**People Branch**

**SUSPECTED MISCONDUCT GUIDELINES**





## SUSPECTED MISCONDUCT

### OVERVIEW

These guidelines provide employees of the office of the Commonwealth Director of Public Prosecutions (CDPP) engaged under the *Public Service Act 1999* (the PS Act) with information about how the CDPP generally addresses suspected breaches of the APS Code of Conduct (the Code) by CDPP APS employees and former CDPP APS employees, including:

- how suspected breaches of the Code are handled
- how sanctions can be imposed
- employee's and former employee's rights and responsibilities if they are suspected to have breached the Code.

These guidelines have been formulated to complement other related CDPP policy, procedures and guidelines documents including:

- [Workplace Respect and Courtesy Guidelines](#)
- [Procedures for Determining Suspected Breaches of the APS Code of Conduct](#)
- [APSC Social Media Guidance](#)
- [Email and Internet Use Policy](#)
- [CDPP Values and Behaviours Statement](#)

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

The APS Values at s10 of the Act (and s11 to s17 of the Directions), the APS Employment Principles at s10A of the Act and the APS Code of Conduct at s13 of the Act set out the standards of conduct required of APS employees. They are statements of expected standards designed to shape the APS organisational culture.

Each of the **APS Values** is supported by a short statement that expands and clarifies its intent. The APS Values are as follow:

- **Impartial:** The APS is apolitical and provides the Government with advice that is frank, honest, timely and based on the best available evidence.
- **Committed to service:** The APS is professional, objective, innovative and efficient, and works collaboratively to achieve the best results for the Australian community and the Government.
- **Accountable:** The APS is open and accountable to the Australian community under the law and within the framework of Ministerial responsibility.
- **Respectful:** The APS respects all people, including their rights and their heritage.
- **Ethical:** The APS demonstrates leadership, is trustworthy, and acts with integrity, in all that it does.

The **APS Employment Principles** set out that the APS is a career-based public service that:

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

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

The **APS Code of Conduct** at s13 of the Act provide the following:

- (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 the Public Service Act 1999), 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 seek to gain, a benefit or an advantage for the employee or any other person; or
  - (b) to cause, or 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; and
  - (b) the 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.

### WHO DOES THE CODE APPLY TO?

The Code applies to:

- all APS employees engaged under the Act i.e. ongoing and non-ongoing employees (s7, 3, and s39 of the Act)
- all Agency heads, including Secretaries of Departments, Heads of Executive Agencies and Heads of Statutory agencies (s14(1) & s14(2) of the Act)
- certain Statutory Office holders to the extent that they supervise, or have a day-to-day working relationship with APS employees (s14 of the Act and Regulation 2.2 of the Regulations).

The Code also extends to behaviour when applying for employment in the APS. Under s15 (2A) of the Act an APS employee can be found to have breached the Code if, in connection with their engagement as an APS employee, they:

- provided false and misleading information or
- willfully failed to disclose relevant information or
- failed to act with honesty and with integrity.

Regulation 3.16 of the Regulations requires that each APS employee **must** inform himself or herself about the Act, the Regulations and the Commissioner's Directions.

It is therefore a statutory obligation for all CDPP APS employees to ensure that they:

- familiarise themselves with the APS Values, the APS Employment Principles and the Code
- fully comply with the requirements of the Code.

Section 35 of the Act sets out the constitution and role of the Senior Executive Service (SES). This section also requires that each SES employee promote the APS Values, the APS Employment Principles and compliance with the Code by personal example and other appropriate means.

### REPORTING SUSPECTED MISCONDUCT

While all APS employees have a duty to act with honesty and integrity and with the highest ethical standards, Value 14(f) of the Directions also imposes a reporting obligation on all APS employees with regard to suspected misconduct. Value 14(f) requires that all APS employees, having regard to their duties and responsibilities, report and address misconduct and other unacceptable behavior by public servants in a fair, timely and effective way.

In some circumstances, a failure to report suspected misconduct by another APS employee may in itself constitute a breach of the Code.

Employees also need to be aware that disciplinary action may also be taken against an employee who makes a frivolous, vexatious and/or false report of suspected misconduct about another employee or former employee.

If a CDPP employee becomes aware of behaviour that is or appears to be inconsistent with the Code, they have a responsibility to:

- raise the matter with their supervisor and/or manager

- report the matter to the HR Advisor and/or
- report the matter to an Authorised Officer in accordance with the [CDPP's Public Interest Disclosure – Principal Officer's Procedure](#).

## PROCEDURAL FAIRNESS

Section 15(4)(b) of the Act explicitly recognises that the administrative law principles of procedural fairness apply to the misconduct action process. This generally requires that an employee suspected of breaching the Code:

- be informed of the details of the suspected breach and the sanctions that may be imposed if a breach is found
- be given a reasonable opportunity to properly respond and put forward their case 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).

## AUTHORISATIONS AND DELEGATIONS

### Commencing Formal Misconduct Action

The following CDPP positions are authorised by the Director to make decisions whether or not to commence a formal misconduct process under the CDPP's Procedures concerning an allegation of a suspected breach of the Code:

- Chief Corporate Officer (CCO)
- National Manager People (NMP).

### Suspension & Reassignment of Duties

The Regulations provide that an Agency Head may suspend an APS employee if, on reasonable grounds, the Agency Head believes:

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

The Director or their Delegate may give consideration to suspending an employee from duties, with or without remuneration or temporarily transferring the employee to another area of the CDPP, either prior to or after the commencement of a formal misconduct process.

### Appointing a Breach Decision-Maker

Where a decision has been made to commence a formal misconduct process, the Chief Corporate Officer will usually be the person who will appoint a Breach Decision-Maker to make a determination under the CDPP's Procedures.

### Appointing a person to assist the Breach Decision-Maker

The following CDPP positions are authorised by the Director to appoint a suitably qualified and/or experienced person to assist the Breach Decision-Maker:

- CCO

- NMP
- MPS.

### **Imposing a Sanction**

The following CDPP positions hold the Delegation to exercise the Director's powers under subsection 15(1) of the Act to impose sanctions on a CDPP APS employee who is determined in accordance with the CDPP's Procedures to have breached the Code:

- Commonwealth Solicitor (CSPP)
- CCO
- NMP.

### **PRELIMINARY INQUIRIES AND ASSESSMENTS**

The People Services Team has responsibility, where necessary, for making initial preliminary inquiries into, and assessing allegations received by the CDPP about suspected breaches of the Code by APS employees and former APS employees of the CDPP. The role of the People services team is to:

- provides assistance to managers and employees with concerns raised about the conduct and behaviour of the CDPP's employees
- conducts preliminary inquiries and assessments of allegations made about suspected breaches of the Code and makes recommendations about any further action that may be required in the circumstances of the particular matter
- assists the NMP and the CCO with respect to managing cases of suspected breaches of the Code
- liaises with all areas of the CDPP and other Commonwealth agencies including the Australian Public Service Commission (APSC) and the Merit Protection Commissioner (MPC) about APS Code of Conduct and ethical behaviour issues
- provides education, guidance and advice to CDPP employees and managers on the Code to promote integrity in the performance of employee's duties and in the use of the CDPP's and the Commonwealth's resources and Information and Communications Technology (ICT) systems.

When allegations of suspected breaches of the Code are received, staff from the People Services Team will in most cases undertake discreet and confidential preliminary inquiries into the matter to assess the issues raised and make recommendations to the MPS as to any further action that may be required or considered appropriate in the circumstances.

Initial preliminary inquiries are in most cases essential to enable a thorough and informed assessment of the issues with a view to establishing the seriousness of the allegations and whether they can be substantiated. The initial preliminary inquiries may also determine if further action is required to appropriately address and resolve the matter either through less formal administrative mechanisms or through a formal misconduct process under the CDPP's Procedures.

### **ALTERNATIVE DISPUTE RESOLUTION**

It is important for employees to be aware that an allegation made that an employee has behaved inappropriately and/or is suspected to have breached the Code, does not necessarily mean that a formal misconduct process under the CDPP's Procedures is necessarily required or will be undertaken. In many cases less formal management/administrative action may be adopted where considered appropriate to the circumstances to address and resolve the matter.

When deciding whether to commence formal misconduct processes using the CDPP's Procedures, consideration may be given, for example, to whether the matter could be better dealt with under the *CDPP's Promoting Excellence in Performance Scheme* or through other alternative dispute resolution and/or remedial measures such as informal/formal counselling, training and development, mediation, and/or mentoring programs.

Examples include cases where the inappropriate behaviour and/or the suspected breach is considered to be more minor in nature, and where the person readily admits to the conduct of concern and/or accepts that their conduct fell short of the appropriate standards and expectations of an APS employee in the CDPP.

Further information about addressing, managing and resolving inappropriate workplace behaviour is contained within the [CDPP's Workplace Respect and Courtesy Guidelines](#).

### FORMAL MISCONDUCT ACTION

Where a decision has been made that the circumstances of a particular matter warrants the commencement of a formal misconduct process under the CDPP's Procedures, the CCO will appoint a Breach Decision-Maker.

A suitably qualified and/or experienced person will usually be appointed to assist the Breach Decision-Maker by investigating the suspected breach, gathering evidence and providing a report containing recommended factual findings to the Breach Decision-Maker for their consideration.

As soon as is considered practicable during the formal misconduct process, the person who is the subject of the alleged suspected breach of the Code will be provided with a *Suspected Breach Notice* to provide the person with information about the misconduct process. That information will usually include:

- details about the suspected breach of the Code
- reference to the subsections of the Code that may have been breached if the allegations were found by the Breach Decision-Maker to be substantiated
- the sanctions specified in subsection 15(1) of the Act
- advice on the next steps being taken in accordance with the CDPP's Procedures and who will be taking them
- advice about the opportunity to provide a written statement about the suspected breach
- advice about the opportunity to participate in an interview to discuss the suspected breach
- advice about the person's entitlement to have a support person of their choice present during an interview.

The person does not have to respond to the Suspected Breach Notice, participate in an interview or provide a written statement if they do not wish to do so.

The person is entitled to have a support person of their choice, such as a manager or supervisor, another colleague or friend, or a union or legal representative, present during any interview about the suspected breach. However, the support person's role is restricted to be one of support only and they will not be entitled to advocate for the person who is the subject of the allegation of a suspected breach during the interview or answer questions on their behalf. A support person cannot be a person who either is or may be a potential witness, or is otherwise involved, in any of the matters subject of the interview or the formal misconduct process.

If the details of the suspected breach of the Code vary during a formal misconduct process under the CDPP's Procedures, the person will be informed of the variation of those details in writing.

The opinions/views and recommended factual findings presented in an investigation report to the Breach Decision-Maker about whether a breach of the Code has or has not occurred will be reached through applying a 'balance of probabilities' test.

### **THE BREACH DECISION-MAKER'S ROLE**

The Breach Decision-Maker has the authority to determine whether a person has or has not breached the Code and will make a written determination whether or not the person has breached the Code.

#### **No Breach Determined**

If the Breach Decision-Maker forms the view that the person has not breached the Code, which will in most cases be after receiving an investigation report, the Breach Decision-Maker will inform the person in writing of the determination that no breach of the Code has been found to have occurred and the formal Misconduct process will then be finalised and closed.

#### **Preliminary Views that a Breach Has Occurred**

If the Breach Decision-Maker forms a preliminary view that the person has breached the Code, the Breach Decision-Maker will provide the person with a copy of the investigation report, including any attachments to the report, as well as written advice of the Breach Decision-Maker's preliminary views on breach of the Code.

The Breach Decision-Maker's written advice on their preliminary views that the person has breached the Code will provide the person with an opportunity to make a written statement to the Breach Decision-Maker, should the person wish to do so, about the investigation report and the Breach Decision-Maker's preliminary views on the breach of the Code.

The timeframe provided to the person to make a written statement to the Breach Decision-Maker will be a period of 7 days, or any longer period agreed to by the Breach Decision-Maker.

The opportunity to make a written statement to the Breach Decision-Maker about a preliminary view that a breach of the Code has occurred will be provided to the person by the Breach Decision-Maker regardless of any previous opportunities to make a statement or respond to the allegations provided to the person by a person assisting the Breach Decision-Maker.

#### **Final Determination**

Following the timeframe provided to the person to make a written statement, and after considering any written statement received from the person, the Breach Decision-Maker will make a final determination if the person has or has not breached the Code.

The standard of proof used by the Breach Decision-Maker in determining whether a breach of the Code has or has not occurred is the 'balance of probabilities' civil standard of proof. This means that the Breach Decision-Maker must be satisfied that a breach having occurred is more probable than not. This civil standard of proof differs from the criminal standard of proof which is 'beyond reasonable doubt'.



The Breach Decision-Maker will make a written record of the final determination on a breach of the Code and will provide the person with a copy of that written determination and advice about the person's review rights.

If the person is a current employee of the CDPP, the Breach Decision-Maker's written advice will also provide information concerning the next steps in the formal misconduct process – for example: referral of the matter to a Sanction Delegate for consideration of the imposition of a sanction or sanctions.

## **SANCTIONS**

Following a Breach Decision-Maker determining that a current employee of the CDPP has breached the Code, the relevant material considered by the Breach Decision-Maker in reaching the determination and a copy of the Breach Decision-Maker's written determination on the breach of the Code, will be referred to a Sanction Delegate for consideration of an appropriate sanction/s.

The CDPP positions Delegated to exercise the Director's powers under subsection 15(1) of the Act to impose sanctions on a CDPP APS employee who is determined in accordance with the CDPP's Procedures to have breached the Code are listed above in these guidelines. The Director can also delegate the sanction to an APS member outside the CDPP.

s15(1) of the Act provides that the Sanction Delegate may impose one or more of the following sanctions on an employee who has been found under the CDPP's Procedures to have breached the Code:

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

A Sanction Delegate may also determine that no other action is necessary or that other remedial management/administrative action such as counselling, training, mentoring, closer supervision and/or mediation may be more appropriate to the circumstances than imposing a sanction/s.

The employee's APS employment history, including any records of previous informal or formal counselling and/or misconduct matters may be examined by the Sanction Delegate as part of the process of considering and determining an appropriate sanction/s to be imposed or other remedial management/administrative action to be taken.

After considering all of the material relevant to the particular case, the Sanction Delegate will write to the employee who has been found to have breached the Code and advise them of the sanction/s under consideration of being imposed and the factors that are being considered in determining the appropriate sanction/s.

The Sanction Delegate's written advice will also provide the employee with an opportunity to make a written statement to the Sanction Delegate on the proposed sanction/s before a final decision on the sanction/s is made.

The timeframe provided to the employee to make a written statement to the Sanction Delegate about the proposed sanction/s will be a period of 7 days, or any longer period agreed to by the Sanction Delegate.

Following the timeframe provided to the employee to make a written statement, and after considering any written statement received from the employee, the Sanction Delegate will make a final decision on the imposition of sanction/s.

The Sanction Delegate will make a written record of the sanction decision and will provide the employee with a copy of that written decision and advice about the employee's review rights.

## REVIEW OF ACTIONS

In accordance with the review of action provisions of the Act and the Regulations, a non-SES employee is entitled to seek a review by the Merit Protection Commissioner of a determination that the employee breached the Code, and of a sanction imposed for breach of the Code, other than a sanction of termination of employment. Applications for review are made directly to the Merit Protection Commissioner.

*The Fair Work Act 2009* sets out the available rights and remedies in relation to the termination of employment.

Where a person has ceased to be an employee and it has been determined that the person breached the Code, they may also apply directly to the Merit Protection Commissioner for review of the determination that they breached the Code.

Employees should be aware that making an application seeking a review of an action does not operate to stay the action. For example, an employee can seek review of a breach determination without waiting for a decision on sanction, but this does not prevent a decision being made about the sanction or application of the sanction.

## EMPLOYEE MOVEMENT TO ANOTHER APS AGENCY

Where a decision has been made that would result in the movement of an employee under section 26 of the Act to another Agency (including on promotion) and the employee suspected of having breached the Code has been provided with a Suspected Breach Notice but the formal misconduct process under the CDPP's Procedures has not yet been completed, unless the Director and the new Agency Head agree otherwise the movement (including on promotion) will not take effect until the formal misconduct process under the CDPP's Procedures has been completed.

In the context of an employee movement to another APS agency, the formal misconduct process under the CDPP's Procedures is taken to be completed when:

- final written determinations are made by a Breach Decision-Maker about whether the employee has or has not breached the Code; or
- it is decided that such a determination to investigate the matter is not necessary.

Employees should also be aware that an Agency Head's powers under s15 of the Act to impose a sanction/s extends not only to imposing sanctions on employees in their agency, with respect to determinations of breaches of the Code made under that agency's Code of Conduct procedures, but also in respect to determinations made under another agency's Code of Conduct procedures.

## RECORDKEEPING

Records relating to suspected misconduct are classified as 'Personal information' which is defined at section 6 of the Privacy Act 1988 (Privacy Act) as:

*‘information or an opinion about an identified individual, or an individual who is reasonably identifiable:*

*(a) whether the information or opinion is true or not; and*

*(b) whether the information or opinion is recorded in a material form or not.’*

Misconduct records are handled by the CDPP in strict accordance with the provisions of the Archives Act 1983, the *Freedom of Information Act 1982* (FOI Act) and the Privacy Act. The CDPP’s records of misconduct action are held on separate misconduct files classified as ‘Sensitive – Personal’. These files are held in separate secure storage to an employee’s Personnel file with a cross-reference only to the misconduct file recorded in the employee’s Personnel file.

### **Retention and Disposal of Misconduct Records**

Misconduct files are retained and destroyed by the CDPP in accordance with the provisions of the relevant Disposal Authority under the *Archives Act 1983*.

### **Disclosure of Misconduct Information**

The CDPP strictly complies with the requirements of the Act, the Regulations, the FOI Act and the Privacy Act when managing access to or the disclosure of misconduct information.

The CDPP may use or disclose personal information, including information relating to misconduct matters, where it is necessary and relevant to the employer powers of the CDPP, another APS Agency head, the Australian Public Service Commissioner or the MPC.

### **APPLYING THESE GUIDELINES**

These guidelines are not intended to be restrictive about the manner in which every situation or possible circumstance that may arise concerning inappropriate workplace behaviour and/or suspected misconduct in the CDPP is addressed, managed and resolved. Further detailed guidance information about the handling of suspected misconduct in the APS is contained in the APSC’s publication: [‘Handling Misconduct – A Human Resource Manager’s Guide’](#). The CDPP generally refers to the guidance material available from the APSC with respect to APS employee misconduct issues and the application of the Code.

These guidelines are therefore also not intended to restrict the CDPP from adopting a more flexible and/or informal approach where the particular circumstances of an individual matter may warrant it. As outlined earlier in these guidelines, not every allegation of inappropriate workplace behaviour and/or a suspected breach of the Code or every failure to act consistently with the Code will need to be addressed and resolved formally utilising the CDPP’s Procedures. Formal misconduct action is only part of a range of people management practices that the CDPP adopts to support appropriate standards of conduct and behavior by its employees.

In some circumstances, alternative dispute and remedial options may provide a more expedient and less formal mechanism to achieve an appropriate outcome and resolution to a suspected breach of the Code.

APSC guidance supports a flexible approach being taken by agencies and also recognises that it can be appropriate to not institute a formal misconduct process even in situations where a suspected breach of the Code may still warrant some form of management response.

## FURTHER GUIDANCE MATERIAL

Several APSC publications provide useful information in the context of appropriate standards of conduct and behaviour in the APS and include the following:

- [\*Respect: Promoting a culture free from harassment and bullying in the APS\*](#)
- [\*In whose interests? Preventing and managing conflicts of interest in the APS\*](#)
- [\*Circular 2008/3: Providing information on Code of Conduct investigation outcomes to complainants\*](#)

## EMPLOYEE ASSISTANCE PROGRAM (EAP)

Situations involving suspected misconduct can be distressing for the parties involved. If you are affected, you are encouraged to draw on the confidential counselling services of the CDPP's EAP. EAP is available free of charge 24 hours a day, 7 days a week to CDPP employees and their families.

To access EAP services refer to the [EAP page](#).

## NEED MORE ADVICE OR ASSISTANCE?

Please refer to the [CDPP Employee Conduct ehub page](#) or contact [People Branch](#) if you require any further information, advice or assistance concerning these guidelines or any aspect of the APS Values, the APS Employment Principles, the APS Code of Conduct or any issues concerning APS employee conduct and behaviour in general.

## APPROVAL FOR RELEASE/DOCUMENT OWNER

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<b>Position</b>	Chief Corporate Officer
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## VERSION CONTROL

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