

## **Procedures for determining breaches of the Code of Conduct and for determining sanction.**

**Authority under the *Public Service Act 1999*.**

I, Kathryn Harris, Head of People and Culture Division of the National Disability Insurance Agency (the Agency) establish these procedures under subsection 15 (3) of the *Public Service Act 1999* ('the Act').

These procedures commence on 24 April 2023.

*These procedures supersede the previous procedures made for the Agency under subsection 15 (3) of the Act, but the previous procedures may continue to apply for transitional purposes.*

**Signed:**

A handwritten signature in black ink, appearing to be 'Kathryn Harris', is written over a horizontal line.

Dated 24 April 2023

# Procedures for determining breaches of the Code of Conduct and for determining sanction

## Table of Contents

Procedures for determining breaches of the Code of Conduct and for determining sanction. ....	2
Document Control.....	2
1. Application of procedures .....	4
2. Availability of procedures.....	4
3. Breach decision maker and sanction delegate.....	4
4. Suspected breach of the Code by Senior Executive Service (SES) employees .....	5
5. Person or persons making breach and suspension determinations and imposing any sanction to be independent and unbiased.....	5
6. Suspensions.....	6
7. The determination process .....	6
8. Sanctions.....	7
9. Record of determination and sanction .....	7
10. Australian Government Security Vetting Agency (AGSVA) reporting requirements .....	8
11. Movement between Agencies .....	8

## Document Control

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- **Version Control**

<b>Version</b>	<b>Revision</b>	<b>Details of Amendment</b>	<b>Date</b>
1	New procedure	Signed by Head of P&C	2 December 2019
2	AGSVA reporting	Added AGSVA requirements	1 July 2020
3	Suspension information	Added for clarity regarding service	12 April 2021
4	Suspension information	Removed specific reference to delegation	18 October 2021
5	Updated in line with the APS Commissioners Direction 2022 regarding SES employees	Amended Part 4	14 June 2022
6	Updated reference to new legislative instrument	Updated reference to <i>Public Service Regulations 2023</i>	23 April 2023
7	Administrative change	Dates in paragraphs 1.3 and 1.4 updated to current version of procedures	25 July 2023

- *Note: Document uncontrolled in hardcopy*

## 1. Application of procedures

- 1.1. These procedures apply in determining whether a person who is an Australian Public Service ('APS') employee in the Agency, or who is a former APS employee who was employed in the Agency at the time of suspected misconduct, has breached the APS Code of Conduct ('the Code') in section 13 of the *Public Service Act 1999* ('the Act'). An APS employee includes Senior Executive Service ('SES') employees.
- 1.2. These procedures apply in determining any sanction to be imposed on an APS employee in the Agency who has been found to have breached the Code.
- 1.3. These procedures, as they apply to determining whether there has been a breach of the Code, apply to any suspected breach of the Code except for one in respect of which a decision was made before 24 April 2023 to begin an investigation to determine whether there had been a breach of the Code.
- 1.4. These procedures, as they apply to determining any sanction for breach of the Code, apply where a sanction decision is under consideration on or after 24 April 2023.
- 1.5. In these procedures, a reference to a breach of the Code by a person includes a reference to a person engaging in conduct set out in subsection 15 (2A) of the Act in connection with their engagement as an APS employee.

*Note: Not all suspected breaches of the Code need to be dealt with by way of determination under these procedures. In particular circumstances, another way of dealing with a suspected breach of the Code may be more appropriate, including issuing directions, warnings or performance management.*

## 2. Availability of procedures

- 2.1. As provided for in subsection 15 (7) of the Act, these procedures will be published on the external NDIS website and the Agency's intranet to be readily available for all employees.

## 3. Breach decision maker and sanction delegate

- 3.1. As soon as practicable after a suspected breach of the Code has been identified and the Chief Executive Officer of the Agency ('the CEO') or one of the following Agency employees:
  - Head of People and Culture,
  - Branch Manager within Workplace Integrity, People and Culture, or
  - Director within Workplace Integrity, People and Culture,has decided to deal with the suspected breach under these procedures, the CEO or that employee will appoint a decision maker ('the breach decision maker') to make a determination under these procedures.
- 3.2. The CEO or above employees may appoint themselves as breach decision maker.
- 3.3. The role of the breach decision maker is to determine in writing whether a breach of the Code has occurred.
- 3.4. The breach decision maker may seek the assistance of an investigator to deal with matters including investigating the alleged breach, gathering evidence and making a report of recommended factual findings to the breach decision maker.
- 3.5. The person who is to decide what, if any, sanction is to be imposed on an APS employee who is found to have breached the Code must hold a delegation of the power under the Act to impose sanctions ('the sanction delegate').

- 3.6. These procedures do not prevent the breach decision maker from being the sanction delegate in the same matter.

*Note: Any delegation of powers under the Act that is proposed to be made to a person who is not an APS employee must be approved in writing in advance by the Australian Public Service Commissioner. This is required by subsection 78 (8) of the Act. This would include delegation of the power contained in subsection 15 (1) to impose a sanction.*

*Note: Appointment as a breach decision maker under these procedures does not empower the breach decision maker to make a decision regarding sanction. Only the CEO or a person who has been delegated the power contained in section 15 of the Act and related powers, such as that contained in section 29 of the Act, may make a sanction decision.*

- 3.7. The breach decision maker, the suspension delegate and the sanction delegate must have regard to the APS Commission's publication, 'Handling Misconduct: a human resource manager's guide' in making the determination and the decision in relation to suspension and sanction.

#### **4. Suspected breach of the Code by Senior Executive Service (SES) employees**

- 4.1 As per section 64 of the *Australian Public Service Commissioner's Directions 2022*, if an SES employee is suspected of breaching the Code, the CEO (or delegate) must consult with the APS Commissioner (or delegate) regarding:

- a) The process for determining whether the SES employee has breached the Code and;
- b) Before imposing a sanction.

- 4.2 SES employees are advised that the Agency will provide the APS Commissioner the following information during this consultation:

- a) Their SES classification
- b) The nature of the alleged misconduct
- c) The proposed process for determining breach
- d) An outline of any breach findings
- e) If breach is determined, the specific sanction(s) under consideration
- f) The final sanction imposed by the Agency including any decision not to impose a sanction.

- 4.3 The APS Commissioner's role is advisory and is not a formal decision making role.

#### **5. Person or persons making breach and suspension determinations and imposing any sanction to be independent and unbiased**

- 5.1 The breach decision maker, suspension delegate and the sanction delegate must be, and must appear to be, independent and unbiased.
- 5.2 The breach decision maker, suspension delegate and sanction delegate must advise the Director People and Culture, in writing if they consider that they may not be independent and unbiased or if they consider that they may reasonably be perceived not to be independent and unbiased, for example if they are a witness in the matter.

## 6. Suspensions

6.1 Where suspension is considered, the suspension delegate must have regard to section 28 of the Act and regulation 14 of the *Public Service Regulations 2023* in determining whether, on reasonable grounds:

- a) The employee may have breached the Code; and
- b) It is in the public, or the Agency's interest to suspend them from duty.

6.2 Suspension may be applied with or without pay:

- a) Suspension with pay will count toward service.
- b) Suspension without pay will not count toward service.

6.3 Where the delegate decides suspension without pay is appropriate, whilst there are no ongoing employer obligations to grant leave, the employee may:

- a) Apply for recreation leave or long service leave.
- b) Apply to engage in outside employment.
- c) Access maternity leave entitlements.

6.4 Personal leave shall not be granted during a period of suspension. Personal leave is available where an employee is prevented by illness or caring responsibilities from attending for duty. Therefore, providing personal leave during a period of suspension from duty is inconsistent with the purpose of the leave of absence.

6.5 Should an employee be found not to have breached the Code, any unpaid salary and annual or long service leave (applied for after the suspension was imposed and taken during the suspension period) will be reimbursed and service restored, including any associated leave accruals.

## 7. The determination process

7.1 The process for determining whether a person who is, or was, an APS employee in the Agency has breached the Code must be carried out with as little formality, and with as much expedition, as a proper consideration of the matter allows.

7.2 The process must be consistent with the principles of procedural fairness.

*Note: Procedural fairness generally requires that:*

- *the person suspected of breaching the Code is informed of the case against them (i.e. any material that is before the decision maker that is adverse to the person or their interests and that is credible, relevant and significant)*
- *the person is provided with a reasonable opportunity to respond and put their case, in accordance with these procedures, before any decision is made on breach or sanction*
- *the decision maker acts without bias or an appearance of bias*
- *there is logically probative evidence to support the making, on the balance of probabilities, of adverse findings.*

7.3 A determination may not be made in relation to a suspected breach of the Code by a person unless reasonable steps have been taken to:

- a) inform the person of:
  - i. the details of the suspected breach of the Code (including any subsequent variation of those details); and
  - ii. where the person is an APS employee, the sanctions that may be imposed on them under subsection 15 (1) of the Act; and

- b) give the person a reasonable opportunity to make a written or oral statement, or provide further evidence in relation to the suspected breach, within seven calendar days or any longer period that is allowed.

*Note: This clause is designed to ensure that by the time the breach decision maker comes to make a determination, reasonable steps have been taken for the person suspected of breach to be informed of the case against them. It will generally also be good practice to give the person notice at an early stage in the process of a summary of the details of the suspected breach that are available at that time and notice of the elements of the Code that are suspected to have been breached.*

7.4 For the purpose of determining whether a person who is, or was, an APS employee in the Agency has breached the Code, a formal hearing is not required.

7.5 The breach decision maker (or the investigator assisting the breach decision maker, if any) where they consider in all the circumstances that the request is reasonable, must agree to a request made by the person who is suspected of breaching the Code to have a support person present in a meeting or interview they conduct.

## **8. Sanctions**

8.1 The process for deciding on sanction must be consistent with the principles of procedural fairness.

8.2 If a determination is made that an APS employee in the Agency has breached the Code, a sanction may not be imposed on the employee unless reasonable steps have been taken to:

- a) inform the employee of:
  - i. the determination that has been made;
  - ii. the sanction or sanctions that are under consideration; and
  - iii. the factors that are under consideration in determining any sanction to be imposed; and
- b) give the employee a reasonable opportunity to make a written and/or oral statement in relation to the sanction or sanctions under consideration within seven calendar days, or any longer period that is allowed by the sanction delegate.

*Note: A sanction cannot be imposed on a person who is a former APS employee.*

8.3 As set out in section 38 of the Act, a certificate from the APS Commissioner is required to terminate the employment of an SES employee.

## **9. Record of determination and sanction**

9.1 If a determination in relation to a suspected breach of the Code by a person who is, or was, an APS employee in the Agency is made, a written record must be made of:

- a) the suspected breach; and
- b) the determination; and
- c) where the person is an APS employee – any sanctions imposed as a result of a determination that the employee has breached the Code; and
- d) if a statement of reasons was given to the person regarding the determination in relation to suspected breach of the Code, or, in the case of an employee, regarding the sanction decision – that statement of reasons or those statements of reasons.

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

## **10. Australian Government Security Vetting Agency ('AGSVA') reporting requirements**

Employees holding security clearances through AGSVA should be aware that any disciplinary procedures involving themselves are required to be reported to AGSVA. This is regardless of whether the clearance is required for work within the NDIA or if it was sponsored or not by the NDIA. The NDIA Security team will report these matters to AGSVA.

## **11. Movement between Agencies**

If an ongoing employee is suspected of having breached the Code of Conduct, and:

- a) the employee has been informed of the matters mentioned in cl 2.5(a); and
- b) the matter has not yet been resolved, and
- c) a decision has been made that, apart from this clause, the employee would move to another agency in accordance with section 26 of the Act (including on promotion),

then unless the CEO and the new Agency Head agree otherwise, the movement (including on promotion) does not take effect until a determination is made in accordance with these procedures or the CEO decides that a determination is not necessary.