



People Management Paper No. 1.1—Procedures—Procedures for investigating and determining breaches of the Code of Conduct

Date: 30 March 2011 **Expiry:** 30 March 2014
Approved: Secretary **File No:** 11/617
Contact: Director, HR **Extn:** 2706
Services

Introduction	1
Application of procedures	1
Delegation	2
Nomination of person to determine breach	2
Person making determination to be independent and unbiased	2
Determination process to be informal	2
Information to be given to employee about investigation	2
Information to be given to employee before report finalised	3
Review of determination or imposition of sanction	4
Change in basis of engagement or employing Department	4
Other relevant material	4
Attachment A—Record to be made by the Secretary and given to the employee	5
Attachment B—Values and Code of Conduct (extracts from the <i>Parliamentary Service Act 1999</i>)	7
Attachment C—Australian Parliamentary Service Guidelines	9

Introduction

1 These procedures are established under subsection 15(3) of the *Parliamentary Service Act 1999* (the **Act**) and are to be used for determining breaches of the Parliamentary Service Code of Conduct.

Application of procedures

2 Subsection 15(3) of the Act requires Secretaries to establish procedures for determining breaches of the Code of Conduct. These procedures must be complied with in determining whether a Parliamentary Service employee has breached the Code of Conduct.

3 These Procedures apply only in relation to a suspected breach of the Code of Conduct by a Parliamentary Service employee in respect of which a determination is to be made. Not all suspected breaches of the Code of Conduct need to be dealt with by way of a determination. For example where the suspected breach appears to be a minor infringement it may be sufficient (and more beneficial) to counsel the employee and to warn that any further similar behaviour could lead to formal action.

4 These procedures apply where a breach of the Code of Conduct has been alleged, or is suspected, and the Secretary considers that the allegation or suspicion should be investigated.

Delegation

5 The Secretary may in writing delegate to an employee any of his powers or functions under this procedure. Any power or function delegated to the employee by the Secretary cannot be subsequently delegated by the employee to another employee.

Nomination of person to determine breach

6 The Secretary will nominate an investigating officer to determine whether an employee has breached the Code of Conduct and, if so, to recommend an appropriate sanction.

Person making determination to be independent and unbiased

7 The person nominated as an investigating officer may be an employee of DPS or another person. The Secretary must take reasonable steps to ensure that the person nominated as an investigating officer is, and appears to be, independent and unbiased.

8 In particular, a person must not be nominated to determine, and must not determine, whether the employee has breached the Code of Conduct if the person has previously made a report in relation to any of the matters suspected of constituting a breach by the employee of the Code of Conduct.

Determination process to be informal

9 The process for determining whether an employee has breached the Code of Conduct must be carried out with as little formality and as much expedition as a proper consideration of the matter allows.

10 A formal hearing is not required for the purpose of determining whether a Parliamentary Service employee in the department has breached the Code of Conduct.

Information to be given to employee about investigation

11 Before a determination is made in relation to a suspected breach of the Code of Conduct by a Parliamentary Service employee, the employee must:

(a) be informed in writing of:

- (i) the name of the person nominated to investigate the suspected breach;
- (ii) the details of the suspected breach (including any variation of those details);
- (iii) any past conduct of the employee that will or may be considered in making the determination; and
- (iv) the sanctions that may be imposed on the employee under subsection 15 (1) of the Act (including any limitations on that power contained in determinations made for the purposes of subsection 15 (2) of the Act); and

- (b) be given reasonable opportunity to make a statement, in writing, in relation to the suspected breach within 7 days after being informed under paragraph 11(a) or such longer period as is allowed by the investigating officer.

12 The employee may, at his or her discretion, make a statement under paragraph 11(b) in writing, orally, or both.

13 An employee who does not make a written statement in relation to the suspected breach is not, for that reason only, to be taken to have admitted committing the suspected breach.

Information to be given to employee before report finalised

14 Where the investigating officer concludes that there has been a breach of the Code of Conduct, he or she must advise the employee in writing of the finding, and also of what sanction, if any, he or she proposes to recommend.

15 Subsection 15(1) of the Act prescribes the range of sanctions that may be imposed. The investigating officer may recommend that the employee be counselled, either instead of or as well as recommending the imposition of a sanction under section 15 of the Act.

16 The employee must be given an opportunity to provide comments on the investigating officer's finding and the recommended sanction before the report is finalised.

17 If the Secretary has delegated his power under paragraph 6 the investigating officer must provide the delegate with a report. The delegate is to consider the report and make a recommendation to the Secretary on any sanctions or other action recommended in the report. The delegate may provide advice to the Secretary on any aspect of the report.

18 After receiving the report from the investigating officer or delegate, the Secretary will consider the report, and any sanctions or other action recommended, and where applicable any recommendations or advice from the delegate.

19 The Secretary must then make a record setting out:

- (a) any determination that has been made by the investigating officer of whether the employee has breached the Code of Conduct;
- (b) the reasons for any determination that has been made;
- (c) if the determination is that there has been a breach of the Code of Conduct—details of the sanction (if any) to be imposed and the reasons for that sanction; and
- (d) details of the employee's right to have the determination reviewed.

20 **Attachment A** provides a form for that record.

21 A copy of the record must be provided to the employee who was the subject of the investigation. Note that the *Archives Act 1983* and the *Privacy Act 1988* may apply to such a record.

Review of determination or imposition of sanction

22 Section 33 of the Act makes provision for an employee to seek a review of an employment-related action. These actions include a determination that the Code of Conduct has been breached and the imposition of a sanction (other than termination of employment).

23 Part 7 of Parliamentary Service Determination 2003/2 contains detailed provisions about review of employment-related actions. Clause 7.4.1 provides that applications for review of:

- (a) a determination that the affected employee has breached the Code of Conduct; or
- (b) a sanction imposed for breach of the Code of Conduct, except termination of employment;

must be made to the Merit Protection Commissioner.

24 The Fair Work Act 2009 provides a review process for termination of employment.

Change in basis of engagement or employing Department

25 If:

- (a) a Parliamentary Service employee is suspected of having breached the Code of Conduct; and
- (b) a process commences to determine whether there has been a breach;

any determination in relation to the suspected breach must be made in accordance with the Code of Conduct procedures that applied to the employee when that process commenced.

26 Paragraph 25 applies even if, since the process commenced, the basis of the employee's engagement has changed or the employee has moved to a different department.

27 For an employee who moves to DPS after a process commences, this means that any determination made by DPS arising out of that process must be made on the basis of the Code of Conduct procedures applicable to the person when the process commenced (that is, the Code of Conduct procedures applicable in the person's previous department).

Other relevant material

28 This Paper should be read in conjunction with the Parliamentary Service Values and Code of Conduct (**Attachment B**) and the Australian Parliamentary Service Guidelines on *Managing Breaches of the Parliamentary Service Code of Conduct* issued in March 2006 (**Attachment C**).

SIGNED

Alan Thompson
Secretary

Attachment A—Record to be made by the Secretary and given to the employee

Record of Code of Conduct investigation

1 On [date], [I or name of delegate] nominated [*name of investigating officer*] to investigate and determine whether [*name of employee*] had breached the Parliamentary Service Code of Conduct. [I or name of delegate] have received a report from [*name of investigating officer*] dated [date].

Determination about Code of Conduct breach

2 [*Name of investigating officer*] has determined that [*name of employee*] [*has/has not*] breached the Code of Conduct, for the following reason: [*insert details of breaches, including reference to relevant Code of Conduct provisions and reason for the determination, or explanation for determination that there has been no breach, details of any recommendations made by a delegate to the Secretary*].

If the determination is that the Code of Conduct has been breached, include paragraphs 3 and 4, or 5, and/or 6, and 7, 8 or 9 as appropriate.

Sanctions

3 I have decided to impose the following sanction[s] on [*name of employee*]:

Delete inapplicable paragraphs

- (a) termination of employment;
- (b) reduction in classification to [*specify new classification*];
- (c) re-assignment of duties to [*specify new duties*];
- (d) reduction in salary to [*specify new salary, and any time limits etc*];
- (e) deductions from salary, by way of fine of [*specify amount, and period of deductions*];
- (f) a reprimand.

4 The sanction[s] are to be imposed for the following reason: [*insert reason*].

5 I have decided not to impose any sanction, for the following reason: [*insert reason*].

Counselling

6 I have decided that [*name of employee*] should be counselled about matters relating to this breach of the Code of Conduct [*or specify particular matters*].

Review rights

If the determination is that the Code of Conduct has been breached, but no sanction is imposed

7 [Name of employee] may apply to the Parliamentary Service Merit Protection Commissioner for review of the determination.

If a sanction is imposed, but it does not include termination of employment

8 [Name of employee] may apply to the Parliamentary Service Merit Protection Commissioner for review of:

- (a) the determination that [he/she] has breached the Code of Conduct; or
- (b) the sanction that I have imposed.

If the sanction is termination of employment

9 [Name of employee] may apply under the *Fair Work Act 2009* for a review of the termination of employment.

Signed: ----- (Secretary)

Dated : -----

Attachment B—Values and Code of Conduct (extracts from the Parliamentary Service Act 1999)

10 Parliamentary Service Values

- (1) The Parliamentary Service Values are as follows:
- (a) the Parliamentary Service provides professional advice and support for the Parliament independently of the Executive Government of the Commonwealth;
 - (b) the Parliamentary Service provides non-partisan and impartial advice and services to each House of the Parliament, to committees of each House, to joint committees of both Houses and to Senators and Members of the House of Representatives;
 - (c) the Parliamentary Service has the highest ethical standards;
 - (d) the Parliamentary Service performs its functions with probity and is openly accountable for its actions to the Parliament;
 - (e) the Parliamentary Service has leadership of the highest quality;
 - (f) employment decisions in the Parliamentary Service are based on merit;
 - (g) the Parliamentary Service provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community;
 - (h) the Parliamentary Service establishes workplace relations that value communication, consultation, co-operation and input from employees on matters that affect their workplace;
 - (i) the Parliamentary Service provides a fair, flexible, safe and rewarding workplace;
 - (j) the Parliamentary Service focuses on achieving results and managing performance;
 - (k) the Parliamentary Service uses Commonwealth resources properly and cost-effectively;
 - (l) the Parliamentary Service promotes equity in employment;
 - (m) the Parliamentary Service provides a reasonable opportunity to all eligible members of the community to apply for Parliamentary Service employment;
 - (n) the Parliamentary Service is a career-based service to enhance the effectiveness and cohesion of Australia's democratic system of government;
 - (o) the Parliamentary Service provides a fair system of review of decisions taken in respect of Parliamentary Service employees.
- (2) For the purposes of paragraph (1)(f), a decision relating to engagement or promotion is based on merit if:
- (a) an assessment is made of the relative suitability of the candidates for the duties, using a competitive selection process; and
 - (b) the assessment is based on the relationship between the candidates' work-related qualities and the work-related qualities genuinely required for the duties; and
 - (c) the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the duties; and
 - (d) the assessment is the primary consideration in making the decision.

13 *The Parliamentary Service Code of Conduct*

- (1) A Parliamentary Service employee must behave honestly and with integrity in the course of Parliamentary Service employment.
- (2) A Parliamentary Service employee must act with care and diligence in the course of Parliamentary Service employment.
- (3) A Parliamentary Service employee, when acting in the course of Parliamentary Service employment, must treat everyone with respect and courtesy, and without harassment.
- (4) A Parliamentary Service employee, when acting in the course of Parliamentary Service employment, must comply with all applicable Australian laws. For this purpose, *Australian law* means:
 - (a) any Act (including this Act), or any instrument having effect under an Act; or
 - (b) any law of a State or Territory, including any instrument having effect under such a law.
- (5) A Parliamentary Service employee must comply with any lawful and reasonable direction given by someone in the Department in which he or she is employed who has authority to give the direction.
- (6) A Parliamentary Service employee must maintain appropriate confidentiality about dealings that the employee has with either House of the Parliament, with any committee of either House, with any joint committee of both Houses, with any Senator or Member of the House of Representatives or with the staff of any Senator or Member.
- (7) A Parliamentary Service employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with Parliamentary Service employment.
- (8) A Parliamentary Service employee must use the resources of the Commonwealth in a proper manner.
- (9) A Parliamentary Service 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 Parliamentary Service employment.
- (10) A Parliamentary Service employee must not make improper use of:
 - (a) inside information; or
 - (b) the employee's duties, status, power or authority;in order to gain, or seek to gain, a benefit or advantage for the employee or for anyone else.
- (11) A Parliamentary Service employee must at all times behave in a way that upholds the Parliamentary Service Values and the integrity and good reputation of the Parliamentary Service.
- (12) A Parliamentary Service employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.
- (13) A Parliamentary Service employee must comply with any other conduct requirement that is made by either House of the Parliament or by determinations.



Attachment C—Australian Parliamentary Service Guidelines

MANAGING BREACHES OF THE
PARLIAMENTARY SERVICE CODE OF
CONDUCT

GUIDELINES

March 2006



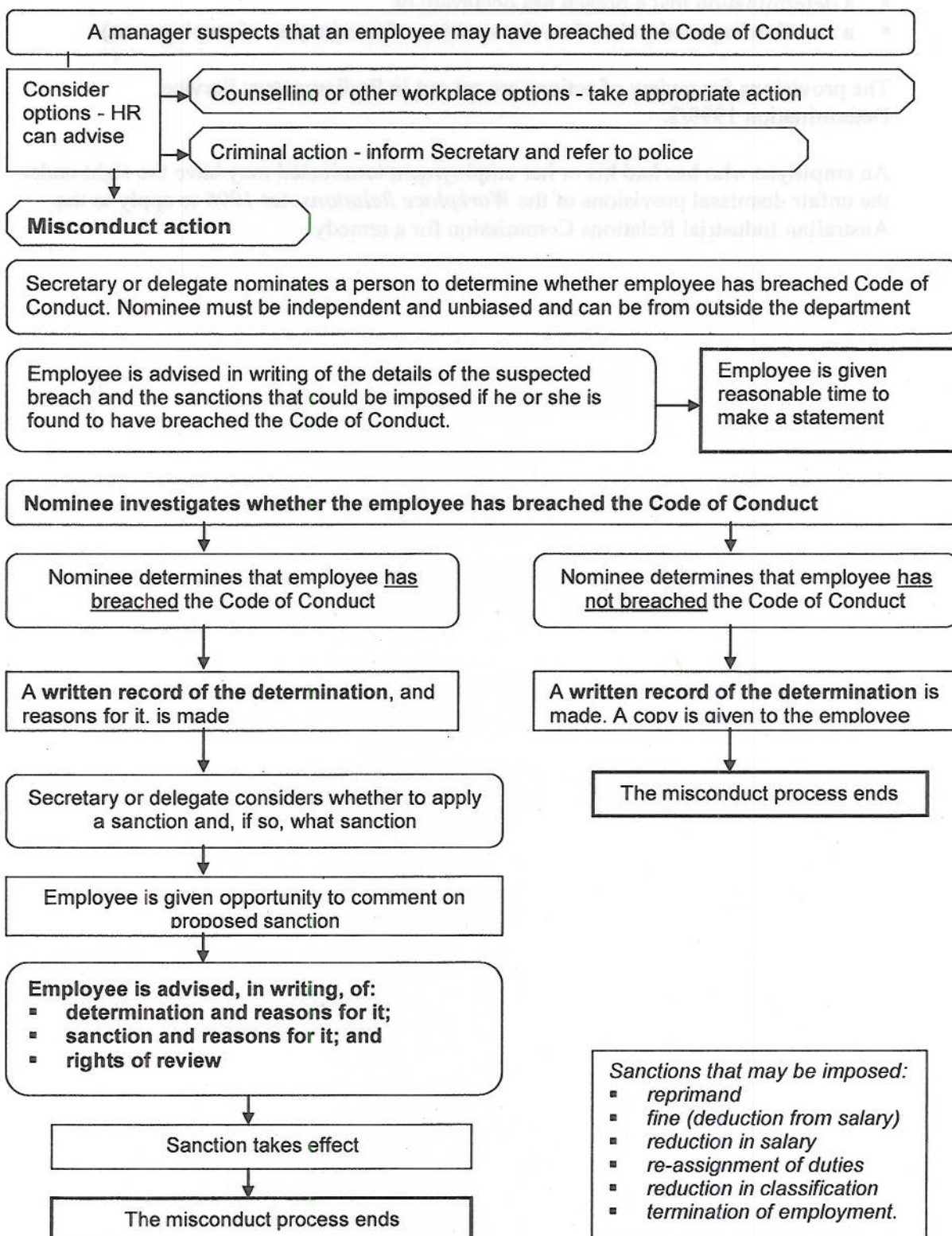
AUSTRALIAN PARLIAMENTARY SERVICE

**MANAGING BREACHES OF THE
PARLIAMENTARY SERVICE CODE OF
CONDUCT**

GUIDELINES

March 2006

A misconduct process



Employees who have been found to have breached the Code may apply to the Parliamentary Service Merit Protection Commissioner for a review of

- a determination that a breach has occurred; or
- a sanction imposed (other than the sanction of termination of employment).

The provisions for review of actions are set out in Parliamentary Service Determination 1999/2.

An employee who has had his or her employment terminated may have the right under the unfair dismissal provisions of the *Workplace Relations Act 1996* to apply to the Australian Industrial Relations Commission for a remedy.



An employee's behaviour in the workplace can be the subject of both criminal action and investigation as a suspected breach of the Code. If the criminal action is being taken as a result of charges laid by or on behalf of the employee's department, the person responsible for those charges should not also be the person investigating the suspected breach (this would be contrary to the principles of procedural fairness).

While it is possible to pursue the misconduct process at the same time as the criminal process, there is some risk that the misconduct process could jeopardise the prosecution of the criminal charge. If the misconduct investigation needs to be pursued while the criminal matter is proceeding, close liaison with the parties involved in the criminal prosecution is important. In serious cases, it may be appropriate to suspend the employee until the decision of the Court is known.

As mentioned earlier, criminal behaviour outside the workplace can also be found to be a breach of the Code of Conduct.

Resignation during misconduct investigation

Where an employee resigns during the course of an investigation, the investigation must be discontinued. The legislative framework does not permit action to be taken against former employees.

Any documents that have been obtained or created up to the date of resignation should be retained, even where the investigation is not complete. If the person later seeks re-engagement, these records can be used as part of the pre-employment checking process, subject to the principles of procedural fairness.

Sanctions

A sanction can be imposed on an employee only after it has been determined that the employee has breached the Code of Conduct.

Where such a determination has been made, the Secretary (or delegate) can impose one or more of the following sanctions:

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

A determination that a breach has occurred does not necessarily mean that a sanction must be imposed. Other action, such as counselling, may be adequate.

Review of actions

Non-SES Parliamentary Service employees are entitled to review of any Parliamentary Service action that relates to their employment, including actions relating to misconduct.

An employee suspected of having breached the Code is presumed not to have committed the breach until a determination has been made. No sanction can be imposed until there is a determination that the Code has been breached.

Alternatives to misconduct action

Not all suspected breaches of the Code need to be dealt with by way of determination under the Code. For example, where a suspected breach appears to be a minor infringement, it may be sufficient (and more beneficial) to counsel the employee and to warn him or her that any further similar conduct could lead to formal action.

In some cases other responses may be appropriate, including:

- specific training,
- changes in the workplace, or
- changes to the employee's duties or line of reporting.

The essence of good management of misconduct is that the response to problems is constructive and appropriate to the circumstances. Where a manager uses alternatives to misconduct action, he or she should take care not to imply that there has been any determination of a breach of the Code.

The process for managing cases

When a suspected breach has occurred, there are several steps in the process:

- deciding if the matter concerned can be dealt with informally, eg, by counselling or by some other action, or if it requires formal action to determine whether a breach has occurred;
- where a serious breach is suspected, determining whether the employee concerned should be suspended or temporarily assigned different duties;
- determination of the case by a person nominated to do so - the process is not required to be set out in procedures but must meet the requirements of procedural fairness and standards of proof;
- a confidential written record of the determination is provided to the employee; and
- the Secretary or a delegate of the Secretary may impose a sanction.

Considerations in deciding cases

Past conduct

The determination of whether a breach has occurred should ordinarily be based only on the incident or incidents in question. However, if the employee concerned has a history which records relevant or related incidents in the past, this and any warnings, counselling or other outcomes may be relevant to the determination. The employee should be advised of any past conduct that will be considered in making the determination.

Criminal matters

Criminal proceedings may result from an employee's behaviour in the workplace as well as through his or her private actions.

Deciding whether something is within an employee's control needs to take account of the person's physical and mental capacities. For example, a persistent failure to comply with directions could be because an employee either is incapable of following directions or chooses not to follow them. Cases where employees are incapable of following directions should be dealt with under the procedures for managing underperformance. Refusal to follow directions should be dealt with under the misconduct procedures.

Procedures for determining breaches of the Code

Procedural fairness and standard of proof

The application of procedural fairness in the handling of a case requires that:

- employees against whom adverse decisions may be made must be informed in detail of any allegations against them;
- wherever possible employees concerned must be provided with an adequate opportunity to put their case, and to hear the case against them, whether at an oral hearing or otherwise;
- where a decision has to be made between competing interests, all parties to a matter must be heard and all arguments considered;
- no person judges their own case or a case in which they have a direct interest; and
- decision-makers must act fairly and without bias.

Consistent with the requirements of administrative law, the standard of proof for determining whether a breach of the Code of Conduct has occurred is *on the balance of probabilities*. This means that the decision-maker must be satisfied that a breach of the Code is more probable than not. This differs from the criminal law standard of proof which is *beyond reasonable doubt*.

Departmental procedures

The Secretary of each parliamentary department has issued basic procedures for determining whether breaches of the Code of Conduct have occurred. These procedures require that, in addition to meeting the principles of procedural fairness :

- employees must be advised of the range of sanctions that may be imposed if they are found to have breached the Code.;
- the process for determining whether a Parliamentary Service employee has breached the Code must be carried out with as little formality and as quickly as a proper consideration of the matter allows;
- reasonable steps must be taken to ensure that the person who determines whether an employee has breached the Code is, and appears to be, independent and unbiased;
- after a determination in relation to a suspected breach of the Code has been made, a written record stating whether the employee has been found to have breached the Code must be prepared and provided to the employee; and
- if the employee's employment is to be terminated following a determination of a breach, the written record must specify the grounds for the determination and must also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

What used to be called 'disciplinary action' under the *Public Service Act 1922* is now called 'misconduct action'. A breach of the Code of Conduct is misconduct.

The principles underlying the application of the Code of Conduct are:

- Parliamentary Service employees must uphold the Parliamentary Service Values and comply with the Code of Conduct. Secretaries, in particular, must also promote the Values;
- taking action in cases of suspected misconduct is primarily aimed at protecting the integrity of the Parliamentary Service and thereby maintaining the Parliament's confidence in the Service;
- misconduct action is part of a range of people management practices intended to encourage high quality performance; and
- procedures for managing the Code should be fair and reasonable, striking an appropriate balance between the needs of staff, the needs of the organisation and the public interest.

What is a breach of the Code?

A breach of the Code is a failure to comply with any element of the Code.

Where a provision of the Code contains more than one element, it is not necessary for the employee to have breached all elements in order for a breach of the Code to be determined. For example, requirement (3) of the Code is that *a Parliamentary Service employee, when acting in the course of employment, must treat everyone with respect and courtesy, and without harassment*. An employee who is discourteous, but has not engaged in harassing behaviour, can be found to have breached the Code.

Requirements of the Code operate in several different contexts.

- some requirements are clearly work-related without any mention of context (eg, the requirement to comply with lawful directions and the requirement to maintain appropriate confidentiality);
- several others are specified to apply either 'in the course of employment', or 'in connection with employment';
- the requirement to *behave in a way that upholds the Parliamentary Service Values and the integrity and good reputation of the Parliamentary Service* applies 'at all times'.

The context in which a suspected breach of the Code occurs can be important in deciding the case. For example the term 'at all times' means that conduct which is apparently unrelated to the performance of duties can be subject to the Code if there is a real connection between the conduct and its effect on the workplace. An employee found guilty of a criminal offence which impacted on the integrity and good reputation of the Service would have also breached the Code.

How does unsatisfactory performance relate to misconduct?

If an employee's unsatisfactory performance is for reasons or causes within their control, it may be able to be dealt with as a suspected breach of the Code of Conduct.

MANAGING BREACHES OF THE PARLIAMENTARY SERVICE CODE OF CONDUCT

Introduction

Each parliamentary department has issued formal procedures for managing breaches of the Parliamentary Service Code of Conduct. These Guidelines are for the information and guidance of all Parliamentary Service employees, including managers and employees involved in cases.

APS booklet on Code procedures

The Public Service and Merit Protection Commission (PSMPC) has issued a booklet *Managing Breaches of the APS Code of Conduct*. The guidance it provides on APS procedures is relevant and useful. The booklet is recommended reading for people involved in managing cases.

The Parliamentary Service Code of Conduct

The Code of Conduct sets out the standards of conduct required of Parliamentary Service employees. The Code is prescribed in the Parliamentary Service Act 1999 (the Act). An important feature of the Code is that it requires Parliamentary Service employees to uphold the Parliamentary Service Values, which are also prescribed in the Act. Together, the Code of Conduct and the Values give very specific information on the standards of conduct required of Parliamentary Service employees at all levels.

Copies of the Code and the Values have been widely distributed. They can be found in sections 13 and 10 of the Act via the link above. They can also be accessed on the Parliament's website at: <http://www.aph.gov.au/parlserv.htm>.

In addition, the objectives of the Parliamentary Service Values have been set out in Parliamentary Service Determination 2003/2 which is also on the website.

Who is covered by the Code?

The Code of Conduct applies to all Parliamentary Service employees up to and including Secretaries.

How the Code of Conduct applies

The purpose of the Code of Conduct is to protect the integrity of the Parliamentary Service and Parliament's confidence in it by setting out a clear framework for managing performance and conduct. The Code is also the legal basis for managing conduct (and misconduct) in the Parliamentary Service. Employees whose conduct does not comply with the Code of Conduct or any element of it can be found to have breached the Code and may be liable to have sanctions imposed on them.

Contents

Introduction	3
APS booklet on Code procedures.....	3
The Parliamentary Service Code of Conduct	3
Who is covered by the Code?.....	3
How the Code of Conduct applies	3
What is a breach of the Code?	4
How does unsatisfactory performance relate to misconduct?	4
Procedures for determining breaches of the Code	5
Procedural fairness and standard of proof	5
Departmental procedures.....	5
Alternatives to misconduct action.....	6
The process for managing cases	6
Considerations in deciding cases	6
Past conduct	6
Criminal matters.....	6
Resignation during misconduct investigation	7
Sanctions	7
Review of actions	7
A misconduct process	9