



safe work australia

Guide to Suspected Misconduct

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1. PURPOSE AND CONTEXT

- 1.1 This guide is intended to assist anyone suspected of having breached the APS Code of Conduct (respondents), anyone considering reporting suspected misconduct (complainants) and managers of employees who are suspected of misconduct (managers).
- 1.2 Readers must note that this document is not a policy but only a guide and is not meant to be prescriptive. Accordingly:
 - advice contained in this document will not apply in all circumstances,
 - Safe Work Australia and administrative investigators have discretion not to follow the advice in this document, and
 - what constitutes a breach of the APS Code of Conduct (the Code) is subject to evolving case law.
- 1.3 Safe Work Australia is required to establish procedures for managing suspected breaches of the Code. They only apply where suspected misconduct is to be dealt with through the appointment of an administrative investigator. They do not apply where a decision is made to take alternative action.

2. APPLICATION

- 2.1 This guide applies to all ongoing and non-ongoing employees of Safe Work Australia. Any concerns about the behaviour of independent contractors will be dealt with in accordance with the terms and conditions of the contract under which they are engaged.

3. APS CODE OF CONDUCT

- 3.1 APS employees are required to familiarise themselves with, and uphold, the Code and APS Values (the Values), which are contained in the *Public Service Act 1999* (the Act) at sections 10 and 13 respectively. Together with Public Service Regulation 2.1, these establish the standards of conduct required of APS employees.
- 3.2 Managers have an added responsibility for ensuring employees under their supervision are aware of and meet their responsibilities in upholding the Values and complying with the Code.
- 3.3 The Code specifies three levels of connection with the workplace:
 - “in the course of employment”,
 - “in connection with employment”, and
 - “at all times”.
- 3.4 This means that actions undertaken outside of the workplace may be considered a breach of the Code in some circumstances.
- 3.5 The Code is aimed at protecting the integrity of the APS and maintaining public confidence in public administration. The purpose of imposing a sanction on an employee who is found to have breached the Code is to deter the employee from repeating the behaviour in future, to deter others and to confirm that misconduct is not tolerated.



4. WHAT IS MISCONDUCT?

- 4.1 Within the APS legal framework misconduct can be defined as any action or behaviour by an employee which is determined to be a breach of the Code.
- 4.2 Suspected misconduct refers to any behaviour which may be in breach of the Code and Values. It may relate to use of resources including Agency email and behaviour during working hours, use of information including inappropriate access, disclosure or failure to disclose, or interaction with other people including colleagues, stakeholders and members of the public. Misconduct can occur deliberately or, where an employee should have taken more care, inadvertently. It can vary in nature and seriousness and in the impact it has on other employees and the reputation of the Agency. Failure to follow an Agency policy may constitute a failure to follow a lawful or reasonable direction and the onus is on employees to familiarise themselves with policies.
- 4.3 Areas of particular relevance to Safe Work Australia include appropriate use of electronic resources, particularly social media and emerging technologies, and the declaration and management of conflicts of interest, particularly in the contract management context and in respect of tender processes.
- 4.4 Misconduct is not underperformance. The *Safe Work Australia Performance and Development Agreement Guideline* and *Safe Work Australia Underperformance Policy* provide the framework and the appropriate steps to be followed in managing an employee's performance. Underperformance can involve matters such as poor attendance, poor quality work, failing to meet deadlines or not working constructively as a member of the team.
- 4.5 It is important to note that behaviour which is being addressed through performance management processes can still lead to a breach of the Code, and that underperformance and Code processes are not mutually exclusive.
- 4.6 Not all suspected breaches of the Code require a determination. In consultation with the People and Planning Section, managers may address minor infringements and/or behaviour which are out of character. Alternatives include, but are not limited to:
 - mediation and/or conciliation,
 - improving the employee's awareness of the required standards of conduct;
 - monitoring future conduct,
 - counselling and warning the employee that similar conduct in future may lead to formal action,
 - assigning new duties, or
 - managing the behaviour under the Agency's performance management processes.
- 4.7 Suspected misconduct should be reported to the People and Planning Section for advice even if it appears insufficient to warrant an investigation. The misconduct may be part of a broader pattern of behaviour.
- 4.8 Any alternative action must be documented appropriately and procedural fairness must be afforded to the employee. If the employee's conduct does not improve, or deteriorates, the matter should again be referred to the People and Planning Section.

5. REPORTING SUSPECTED MISCONDUCT

- 5.1 Where an employee observes suspected breaches of the APS Code of Conduct, they should report it consistent with their obligations under the Values and Code. In some circumstances it could be a breach of the Code for an employee not to report a suspected breach.

- 5.2 Consistent with the *Safe Work Australia Procedures for Dealing with Whistleblower Reports*, suspected misconduct should be reported to an appropriate SES officer or to the People and Performance Team. In some instances, such as when the matter involves the SES officer, it may be appropriate to report the matter directly to the Branch Manager, Policy and Services or the Director, People and Planning Section. Managers who witness, or receive verbal or written reports of, suspected misconduct should refer the matter to the People and Performance Team.
- 5.3 Suspected fraud or other criminal activity should be reported in accordance with instructions from the Investigations Branch within DEEWR. The People and Planning Section will facilitate this advice.
- 5.4 An employee who reports suspected misconduct may ask the Agency to keep their identity confidential. This request should be met as far as the law and the process allows. For further advice, please contact the People and Planning Section.
- 5.5 Employees must have the confidence to report suspected misconduct in good faith to an authorised person, secure in the knowledge that their actions will not result in later victimisation. Safe Work Australia will not tolerate any form of retaliatory behaviour towards individuals who have been involved in reporting suspected misconduct. Safe Work Australia has procedures in place for whistleblower protection. The *Safe Work Australia Workplace Harassment Policy* applies to suspected retaliatory behaviour. Retaliatory behaviour may itself be a breach of the Code.
- 5.6 Provided the disclosure is made with an honest belief on reasonable grounds, the protections outlined in the *Safe Work Australia Procedures for Dealing with Whistleblower Reports* will apply. A disclosure is not considered to be made in bad faith simply because, upon investigation, it is not substantiated. Disciplinary action may be taken against an employee who makes an allegation in bad faith. This includes making allegations that the discloser knows to be false or misleading.
- 5.7 See Attachment A for a diagrammatic overview of the process for handling suspected misconduct.

6. ADMINISTRATIVE INVESTIGATIONS

- 6.1 Under these procedures, the Branch Manager, Policy and Services Branch (the Delegate) will decide whether or not an administrative investigation is the most appropriate course of action. If an investigation is necessary, an administrative investigator will be appointed to determine whether the allegations are factually proven and if so, whether or not the employee has breached the Code.
- 6.2 Conduct that may constitute a breach of the Code may also be the subject of criminal proceedings. Code action need not await the determination of any criminal charges, as long as the police or prosecuting authorities believe the action will not prejudice criminal investigations.
- 6.3 Code investigations are administrative in nature. The standard of proof for administrative investigations (which is 'on the balance of probabilities' or 'more likely than not') and criminal investigations (which is 'beyond a reasonable doubt') are different. Findings should be made on the basis that it is more probable than not that the matter found to have occurred in fact occurred. A breach of the Code can be sustained even if the criminal charges are not proven.

7. REASSIGNMENT AND SUSPENSION FROM DUTIES



- 7.1 Under sections 25 and 28 of the Act, an employee can be temporarily assigned alternative duties or suspended from duties at any time prior to or during a Code of Conduct investigation. Reassignment or suspension of duties is not a sanction. The rules governing suspension from duties are set out in Public Service Regulation 3.10.
- 7.2 Suspension without remuneration is limited to 30 days unless exceptional circumstances apply. Suspension must end immediately when the Branch Manager, Policy and Services no longer believes on reasonable grounds that the employee may have breached the Code.
- 7.3 An employee may be entitled to take annual or long service leave while suspended from duties. Employees cannot use personal leave while suspended from duties. For further advice, please contact the People and Planning Section.

8. PROCEDURAL FAIRNESS

- 8.1 Procedural fairness requires that before an unfavourable decision is made the affected person must be offered an opportunity to respond. Procedural fairness also requires that decision-makers must be, and appear to be, without bias. Procedural fairness can also be referred to as 'natural justice'.
- 8.2 During an administrative investigation, respondents will be informed of any allegations against them and given an opportunity to comment. If they are found to have breached the Code they may be given the opportunity to comment prior to a sanction decision being made.

9. SUPPORT FOR EMPLOYEES

- 9.1 The evidence sought by the administrative investigator may need to be requested directly from the employee. However, in some cases it may be sufficient to obtain it through a third party or representative. With the agreement of the administrative investigator an appropriate support person may be present during meetings or interviews.
- 9.2 Employees may consult the People and Planning Section or their Branch Manager for advice. All employees are entitled to make use of the Employee Assistance Program, a free confidential counselling service. Further details are available on *safetynet*.

10. SANCTIONS

- 10.1 Where an employee is found to have breached the Code, a sanction may be imposed under section 15 of the Act. Sanctions are intended to deter future misconduct rather than punish the employee. The possible sanctions are limited to:
 - a reprimand,
 - a fine (to a maximum of 2% of annual salary),
 - reduction in salary,
 - re-assignment of duties,
 - reduction in classification, or
 - termination of employment.
- 10.2 Factors that the Branch Manager, Policy and Services may consider when deciding the sanction include but are not limited to:
 - the nature and seriousness of the breach,

- the relevance to the employee's duties or the reputation of the APS,
- the likely effect of the proposed sanction on the employee,
- whether the sanction is equitable when compared to the sanctions imposed in other similar cases, and
- any other mitigating or aggravating factors.

10.3 Multiple sanctions for one breach may be applied if the Delegate considers this to be appropriate. A determination that misconduct has occurred does not mean that a sanction must be imposed.

10.4 The Delegate may provide the employee with the opportunity to comment on a proposed sanction. This is mandatory in the case of proposed termination of employment.

11. RIGHTS OF REVIEW

11.1 Under section 33 of the Act, non-SES employees may seek a review of a decision that relates to their employment, except in the case of termination of employment

11.2 Decisions relating to reassignment and suspension from duties are reviewable under section 33. An application for review does not stay the action. For instance, an employee continues to be suspended from duties while a review of a decision to suspend them occurs.

11.3 Applications for review of a determination that the Code has been breached or a decision to impose a sanction following a breach of the Code must be made directly to the Merit Protection Commissioner.

11.4 A respondent may seek judicial review of a decision relating to a sanction under the *Administrative Decisions (Judicial Review) Act 1977*. In broad terms, judicial review is concerned with the process by which the decision was made and is not a review of the merits of the case.

12. PRIVACY AND RECORD-KEEPING

12.1 All parties are obliged to comply with the *Privacy Act 1988*. This applies to any personal information whether it relates to the complainant, the respondent or any witnesses.

12.2 Personal information is collected in the course of reporting, assessing and investigating suspected misconduct. This information will be used:

- in order to deal with the reported breach, including investigating the matter, determining whether there has been a breach of the APS Code of Conduct, and
- to deal with systemic issues arising from the complaint.

12.3 The outcome of Code action may be made known to:

- future employers,
- complainants,
- Safe Work Australia management, including the employee's direct manager, and
- other parties on a 'need to know' basis.

12.4 Code action is to be treated as staff-in-confidence and is not to be discussed other than on a 'need to know' basis. Any employee who discloses staff-in-confidence information other than on a 'need to know' basis could be in breach of the Code.

12.5 Records relating to Code matters will be maintained in an 'In-Confidence' file and kept in a secure storage area. For the retention of records, reference should be made to the *Administrative Functions Disposal Authority* published by the National Archives of Australia.

13. FURTHER INFORMATION

13.1 Policies and procedures related to this guide include:

- *Safe Work Australia Procedures for Dealing with Whistleblower Reports*
- *Safe Work Australia Workplace Harassment Policy*
- *Safe Work Australia Outside Employment Policy*

13.2 The Code obliges Safe Work Australia employees to familiarise themselves with all Agency policies and procedures, including the *Safe Work Australia Travel Policy*, the *Chief Executive Officer Instructions* and the *Financial and Human Resource delegations*.

13.3 The Ethics Advisory Service is managed by the Australian Public Service Commission and includes services such as a telephone and email advice facility available to all APS employees, including the CEO and SES, a website, a communications program involving hard copy and online ethics tools and a network of agency Ethics Contact Officers.

13.4 APS-wide policy guidelines on a range of topics are available in the Australian Public Service Commission publication *APS Values and Code of Conduct in Practice: A Guide to Official Conduct for APS Employees and Agency Heads*.

13.5 The *Standards of Ministerial Ethics* guide the interaction between ministers and public servants. The *Code of Conduct for Ministerial Staff* applies to ministerial staff dealing with Safe Work Australia employees. The *Lobbying Code of Conduct* and the publically available Register of Lobbyists are intended to ensure transparency about the interests being represented to public servants.

The Process for Handling Suspected Misconduct

