

Procedures under section 15(3) of the Public Service Act 1999

I, Michael Manthorpe, Commonwealth Ombudsman, establish these procedures under subsection 15(3) of the *Public Service Act 1999* ('the Act').

These procedures commence on the date signed.

Michael Manthorpe

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Dated: 1 December 2017

1. Application of procedures

- 1.1 These procedures apply in determining whether a person who is an Australian Public Service (APS) employee in the Office of the Commonwealth Ombudsman (the Office), or who is a former APS employee who was employed in the Office at the time of the suspected misconduct, has breached the APS Code of Conduct ('the Code') in section 13 of the Act.
- 1.2 These procedures also apply in determining any sanction to be imposed on an APS employee in the Office 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 where a decision had been made, before 1 December 2017, 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 1 December 2017.
- 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 of Conduct are required/need to be dealt with by way of a determination under these procedures. In particular circumstances, another way of dealing with a suspected breach of the Code may be more appropriate, including performance management.

2. Availability of procedures

- 2.1 As required under subsection 15(7) of the Act, these procedures are publicly available on the Office's website.

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 Commonwealth Ombudsman (the Ombudsman) or one of the following Office Holder/employees of the Office:

- the Deputy Ombudsman
- the Chief Operating Officer, or
- Director, Human Resources

has decided to deal with the suspected breach under these procedures, the Ombudsman or that office holder/employee will appoint a decision maker ('the breach decision maker') to make a determination under these procedures.

Note: The *Australian Public Service Commissioner's Directions 2016* provide that where the conduct of an APS employee may breach the Code or raises concerns relating to effective performance, the Agency Head must have regard to any relevant standards and guidance issued by the Commissioner if the Agency Head is considering whether to initiate an inquiry or a formal investigation under the procedures established by the Agency Head under subsection 15(3) of 'the Act'.

3.2. Nothing prevents the Ombudsman, the Deputy Ombudsman or the above employees from appointing themselves as the 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 undertake the investigation, or seek the assistance of an investigator. The investigator may investigate the alleged breach, gather evidence and make 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 ('the sanction delegate') will be a person holding a delegation of the powers under the Act to impose sanctions.

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 under 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 Secretary or a person who has been delegated the power under section 15 of the Act and related powers, such as under section 29 of the Act, may make a sanction decision.

4. Person or persons making breach determination and imposing any sanction to be independent and unbiased

- 4.1 The breach decision maker and the sanction delegate must be, and must appear to be, independent and unbiased.
- 4.2 The breach decision maker and the sanction delegate must advise the Ombudsman, Deputy Ombudsman, Chief Operating Officer or Director Human Resources 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.

5. The determination process

- 5.1 The process for determining whether a person who is, or was, an APS employee in the Office 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.

- 5.2 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, and
- there is logically probative evidence to support the making, on the balance of probabilities, of a finding.

- 5.3 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 by the decision maker.

- 5.4 A person who does not make a statement in relation to the suspected breach is not, for that reason alone, to be taken to have admitted to committing the suspected breach.
- 5.5 For the purpose of determining whether a person who is, or was, an APS employee in the Office has breached the Code, a formal hearing is not required.

6. Sanctions

- 6.1 The process for imposing a sanction must be consistent with the principles of procedural fairness.
- 6.2 If a determination is made that an APS employee in the Office 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 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.

7. Record of determination and sanction

- 7.1 If a determination is made in relation to a suspected breach of the Code by a person who is, or was, an APS employee in the Office, a written record must be made of:
- a) the suspected breach
 - b) the determination
 - c) 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.