



# DVA People Policy – Procedures for Dealing with Suspected Breaches of the Code of Conduct

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## 1. Introduction

The Secretary is required by section 15(3) of the [Public Service Act 1999](#) (the PS Act) to establish Procedures for determining whether a DVA employee has breached the APS Code of Conduct (The Code).

The Procedures must be complied with when determining whether an employee has breached the Code. These Procedures provide information on the formal misconduct process in DVA and must be adopted when determining whether an employee has breached the Code.

## 2. Commitment

DVA will ensure that policy advice is available so all employees are aware of the values by which DVA and the APS operate, the behaviour expected, their rights and responsibilities as well as the processes to be adopted if an employee is suspected of breaching the APS Code of Conduct.

## 3. Purpose

These Procedures are established by the Secretary under section 15(3) of the PS Act to:

- Identify what behaviour may constitute misconduct
- Identify what actions can or should be taken in matters of suspected misconduct
- Identify when suspected misconduct should be dealt with by formal suspected misconduct action

## 4. Topic principles

The APS Values are a set of values intended to be integrated into an employee's day to day work and behaviour and underscore every aspect of APS employment.

The APS Values are complemented by the set of APS Employment Principles which deal with employment and workplace relationships in the APS.

The APS Code of Conduct clarifies the levels of connectedness with the APS Values and APS Employment principles and together they are intended to shape the organisational culture of the APS. The APS Values and APS Employment Principles are set out in section 10 of the PS Act and the APS Code of Conduct is set out in section 13.

Not all suspected breaches of the Code may need to be dealt with by way of a formal determination. Other approaches such as counselling, performance management, training or mediation may be considered.



## 5. Roles and Responsibilities

### DVA Responsibilities

- Ensure clear guidelines describe the standards of personal behaviour to be observed by employees
- Provide support to managers and employees dealing with suspected or actual breaches of the Code
- Take a consistent and fair approach to the management of breaches of the Code
- Provide a constant resource in any suspected misconduct process to ensure it proceeds in a timely manner and that expert guidance and advice is provided

### Manager Responsibilities

Managers should ensure their employees are familiar with the Code and provide advice or guidance, as necessary, on any issues concerning the application of the Code.

## 6. Policy

### 6.1. Identifying Suspected Breaches of the Code of Conduct

Suspected breaches of the Code may be identified in a number of ways including:

- Internal monitoring mechanisms such as checking internet/intranet usage
- Complaints about the behaviour of DVA employees in the course of their duty, behaviour external to the workplace, or misuse of Commonwealth resources
- Reports from DVA employees about conduct they have observed or discovered

### 6.2. Interaction between the APS Code of Conduct and the Public Interest Disclosure Act 2013

The *Public Interest Disclosure Act 2013* (PID Act) came into operation in January 2014 to encourage public officials to disclose suspected wrongdoing in the Commonwealth public sector.

The PID Act establishes a framework to encourage and facilitate the disclosure of information by public officials about suspected wrongdoing in the APS. It also ensures public officials who make public interest disclosures are supported and protected from adverse consequences and that disclosures are



properly investigated. These requirements are detailed in the [DVA People Policy – Public Interest Disclosure Procedures](#).

### 6.3. Reporting Suspected Misconduct

Reporting actions or behaviours which are suspected of breaching the Code is vital to maintaining the integrity of the APS. APS employees have a responsibility to report misconduct, and not to turn a blind eye to unacceptable behaviour.

Employees who make reports in good faith will be protected from victimisation and discrimination.

There are several ways of reporting suspected misconduct in DVA:

- To a supervisor or a Manager
- To the Assistant Secretary People Services Branch (PSB)
- To the Director Workplace Relations, PSB
- To the senior PSB employee in a location or any other location
- To any SES or Executive Level officer
- In the case of a PID, an employee may make a disclosure to their supervisor, or Manager or to an Authorised Officer, or in certain circumstances, to the Ombudsman

### 6.4. Consideration of a Report of Suspected Misconduct

When a report is received that an employee may have breached the Code, the person receiving the report should make a preliminary assessment of the kind of management response that should be made.

In making this preliminary assessment, advice should be sought from the Assistant Secretary PSB, the Director Workplace Relations, or the local senior PSB employee. Other people management options may be more appropriate than taking formal misconduct action. These options include procedures outlined in DVA's Managing Underperformance, Review of Actions and Resolving Workplace Issues or Complaints Handling policies.

If the report relates to the suspected misconduct of an SES employee, consultation will first occur with the Australian Public Service Commissioner on the process for determining whether the employee has breached the Code and, if a sanction is being considered, on the sanction to be imposed.

Taking action in cases of suspected misconduct is primarily aimed at protecting the integrity of DVA and the APS and thereby maintaining public confidence in public administration.



## 6.5. Conduct Not Warranting Formal Misconduct Action

If the suspected breach is minor and not part of a pattern of misconduct, the manager should (in consultation with PSB) consider whether it is sufficient to counsel the employee rather than refer the matter for formal action. It may also be appropriate to consider issuing a formal warning, arranging mediation, conciliation, training or planning a performance improvement strategy. Examples of conduct which may not warrant formal action include an error/mistake in undertaking normal duties, an uncharacteristic outburst of anger in the workplace or an argument between employees.

In considering whether or not to use take formal misconduct action, it is important that the nature of the suspected misconduct is considered. Formal misconduct action should be used if it is likely that a sanction would be imposed (either termination of employment, reduction in classification, re-assignment of duties, reduction in salary, fine or a reprimand) if the suspected misconduct is determined to have occurred and is determined to be a breach of the Code.

Minor incidents of inappropriate conduct must still be addressed so there is no suggestion of tacit acceptance of the behaviour. A written record must be made of the internal action taken and placed on the employee's Personnel file. If the inappropriate conduct is repeated it should then be dealt with by formal misconduct action. Where previous efforts to resolve inappropriate conduct have been unsuccessful or where the manager considers the current circumstances warrant formal investigation, the situation must be referred to the Assistant Secretary PSB for consideration.

## 6.6. Suspected Misconduct Warranting Formal Action

Where a breach of the Code is suspected and is not of a minor nature able to be resolved within the workplace, the matter must be referred to the Assistant Secretary PSB.

The Assistant Secretary PSB will then decide whether to initiate formal misconduct action, and make arrangements for this to take place.

## 6.7. Criminal Offences – Inside and Outside the Workplace

If the suspected misconduct could be a criminal offence, the Assistant Secretary PSB will consider whether to refer the matter to the Australian Federal Police or Commonwealth Director of Public Prosecutions. In these considerations, advice should be sought from the Principal Legal Adviser with the purpose of assessing administrative versus criminal actions. Any action must be consistent with the *Public Governance, Performance and Accountability Act 2013* (PGPA Act) and the Commonwealth's Fraud Control Framework.

Examples of matters where a criminal offence may be involved are theft, forgery, falsification of documents such as medical certificates or recruitment documentation, sexual or physical assault, transmission or use of pornographic material or other inappropriate use of DVA electronic facilities or equipment.



If a DVA employee has committed a criminal offence not directly related to their employment, careful consideration will need to be given to as whether the Code has been breached. Subsection 13(11) of the Code requires that APS employees must at all times behave in a way that upholds the APS Values, APS Employment Principles and the integrity and good reputation of DVA and the APS.

Where a DVA employee has been charged with or convicted of a criminal offence, the Assistant Secretary PSB must be advised so a decision can be made as to whether formal misconduct action should be initiated or action deferred pending the outcome of any criminal investigation or prosecution.

## 6.8. Possible Suspension or Re-Assignment of an Employee Suspected of Misconduct

The Assistant Secretary PSB is the person authorised to decide whether there is the need to re-assign an employee to other duties or to suspend the employee from duty whilst a suspected misconduct process takes place. PS Regulation 14 provides for suspension from duty.

Each case for suspension or reassignment should be considered according to its own circumstances taking into account the following factors:

- The seriousness of the suspected misconduct
- The safety of other employees
- The effect that allowing the employee to remain on duty may have on the maintenance of a cohesive and effective workplace
- The protection of public revenue
- The risk that the investigation may be compromised
- The integrity of data about members of the public held by DVA
- Public confidence in DVA or the APS as a whole.

Care must be taken to ensure a re-assignment or suspension decision is based solely on the criteria outlined above, that is, for operational reasons and not as a punitive measure or a sanction.

The re-assignment or suspension must convey no presumption of the employee's guilt or innocence, nor imply any presumption the Code has been breached.

The Assistant Secretary PSB will decide whether any suspension is to be with or without pay in accordance with PS Regulation 14.1 (8).





If the suspension is to be without pay, then the period without pay should usually not exceed 30 days. A longer period may be applied in exceptional circumstances such as when an employee has been charged with a criminal offence and is waiting to have the charge heard and determined, or the investigation is prolonged due to the need to gather evidence or afford procedural fairness.

Any suspension without pay will be reviewed at regular intervals but not less than every 30 days. The review would usually be undertaken by the Assistant Secretary PSB but there may be an occasion where procedural fairness issues make it desirable for another Decision Maker to undertake the review. If this situation arises, the Secretary will determine the person to undertake the review.

If an employee is suspended without pay, consideration should be given to the likelihood of financial hardship for the employee. The onus is on the employee to substantiate a claim of hardship by providing persuasive evidence in support of their case.

Any suspension will end when the formal misconduct process is completed.

An employee who has been suspended without pay may apply to access their Recreation or Long Service Leave during the period of their suspension.

Where the determination is that the employee did not breach the Code, any period of suspension without pay should be amended to with pay, but reduced by any salary received during the period of suspension.

Employees who are assigned to different duties are not entitled to seek a review of the re-assignment decision under section 33 of the PS Act, unless the re-assignment involves relocation to another place or being assigned duties the employee cannot be reasonably expected to perform.

## 6.9. Appointing the Breach Decision Maker

If formal misconduct action is undertaken, the Assistant Secretary PSB will select the Breach Decision Maker, who will determine whether the suspected misconduct occurred and whether it constitutes a breach of the Code. The Breach Decision Maker must be independent, unbiased and free from any reasonable apprehension of bias. The Breach Decision Maker could be considered to be biased if they have a personal interest in the decision, have a work or personal relationship with the employee suspected of misconduct or any witnesses, or if they have provided a report about the suspected misconduct or any previous matter in relation to the employee.

The Breach Decision Maker may be a DVA employee at the executive or SES level or a Statutory Office Holder.

The Assistant Secretary PSB may also outsource the making of a determination concerning a suspected breach by appointing a special consultant or senior employee of another APS agency to be the Breach Decision Maker.





The Breach Decision Maker will be instructed by the Assistant Secretary PSB of the need to comply with the DVA Procedures for dealing with suspected breaches of the Code of Conduct established under section 15(3) of the PS Act.

Ultimately the Breach Decision Maker has responsibility to ensure the decision making process adheres to administrative law requirements including procedural fairness and these Procedures.

## 6.10. Appointing the Investigator

Although the circumstances of some suspected misconduct may be relatively straightforward (if the facts are clear), there are situations where an investigation may be needed to assist in compiling evidence.

The Assistant Secretary PSB may appoint an Investigator to assist and advise the Breach Decision Maker.

The Investigator may be a DVA employee, a statutory office holder or an external person such as a private consultant or an employee from another APS agency.

The Investigator requires judgement, attention to detail and established investigation and administrative decision making experience, including a planned approach to undertaking the investigation.

Like the Breach Decision Maker, the Investigator must be independent and unbiased.

In some circumstances, the Merit Protection Commissioner, at the request of the Secretary and with the agreement of the affected employee, may undertake an investigation into an alleged breach of the Code. Such inquiries must be carried out in accordance with written procedures established by the relevant Commissioner, and their findings reported to the Secretary. In some circumstances the MPC may also recommend whether a breach has occurred and/or appropriate sanction.

An external investigator may be appointed where:

- The misconduct is suspected to be of a very serious nature
- The circumstances of the suspected misconduct are such that an employee may claim that everyone in DVA is the subject of apprehended bias
- DVA cannot afford to divert any suitable person from their usual duties to conduct the investigation in a timely manner
- A cost benefit analysis indicated it is more efficient to appoint an external investigator as an internal employee may have to be taken off line for some period of time and replaced.



## 6.11. Conducting the Formal Misconduct Process

The Breach Decision Maker and the Investigator (if one is appointed) must undertake and be seen to undertake the misconduct action in accordance with the principles espoused by the APS Code of Conduct.

The Breach Decision Maker and the Investigator will follow the principles of natural justice and procedural fairness and will undertake the investigation with as little formality and as expeditiously as possible.

The Breach Decision Maker and the Investigator need to have the skills and resources to undertake the task effectively and may need to be released from some or all of their normal duties to ensure a quality and timely process.

## 6.12. Notification to the Employee

Part 7 of the *Australian Public Service Commissioner's Directions 2022* (the Directions) requires that a person suspected of misconduct be informed of certain matters before a determination is made.

Once a Breach Decision Maker has been appointed, the Assistant Secretary PSB or the Breach Decision Maker will write to the employee suspected of misconduct at the earliest reasonable time to advise that formal suspected misconduct action is to commence, the procedures to be followed and the following specific information:

- The details and nature of the alleged behaviour or incident giving rise to the suspected misconduct
- The name, contact details and role of the Breach Decision Maker and the Investigator
- The opportunity to provide the Breach Decision Maker with either a written statement or oral comments in relation to the suspected misconduct within 7 days
- Details of the PSB employee who will provide administrative support and procedural information during the misconduct process
- A copy of these Procedures
- A list of the possible sanctions that might be imposed if a breach of the Code is found to have occurred
- Information to make the employee aware that personal information about the employee relating to the outcome of the misconduct action may in some circumstances be disclosed to the complainant and other witnesses



- Advice of the support available to the employee, such as procedural information, access to the Employee Assistance Program and information from PSB or the APSC Ethics Advisory Service.

It will not always be possible to provide complete details of the suspected misconduct at the outset of the formal misconduct process. If this is the case, the initial letter should advise the employee that the formal misconduct action is only beginning and there will be a further opportunity to comment and present material in relation to the allegations later in the process.

After the initial notification to the employee, it is possible that some of the details outlined will change after evidence is gathered or new information may come to light. If this is the case, the Assistant Secretary PSB will write to the employee suspected of misconduct, to inform them of the new details, provide copies of any relevant documents and invite further comments.

Any evidence gathered during the investigation must only be gathered by lawful and reasonable means and must be retained.

### **6.13. Investigator to Report to Breach Decision Maker**

Where an Investigator has been appointed, he/she will prepare a written report for the Breach Decision Maker after completing their investigation. The report will include material which will:

1. Outline the nature of the suspected misconduct
2. Outline the steps taken to collect the evidence and list the evidence gathered
3. Outline the factual matters established to determine whether the alleged behaviour occurred
4. Include genuine and fair consideration of the employee's response to the allegations and the response to any new or conflicting evidence discovered in the course of the investigation
5. Present the evidence in a balanced way, highlighting key areas where different versions of events have been presented
6. Identify any extenuating circumstances, including if there is a conflict in the evidence and an explanation why one set of evidence is preferred over another
7. Outline the conclusions the Investigator considers should to be made on the available evidence, which flow logically from the evidence
8. Include reasons why the action or behaviour found on the evidence could be determined to be a breach of the Code

Where there is a serious dispute as to the validity of the evidence, or where the credibility of witnesses is a crucial issue in the process, it may not be sufficient for the Investigator alone to decide on the



relative merits of the accounts of witnesses. The Breach Decision Maker may need to see or hear evidence themselves, so they can form their own view on the relative credibility of the witnesses.

The Investigator (and the Breach Decision Maker), when taking evidence from witnesses, should advise witnesses that the information they provide may be passed on, as a matter of natural justice, to the employee suspected of misconduct.

## 6.14. The Preliminary Decision

The Breach Decision Maker will separately and independently from the investigator (if appointed) satisfy themselves the evidence has been gathered in accordance with the section 15(3) Procedures and will make preliminary findings of fact as to whether the alleged behaviour occurred or did not occur. A preliminary decision should also be made as to whether the behaviour constitutes a breach of the Code.

The standard of proof to be used when making the preliminary decision (and later, the final decision) is the civil standard (balance of probabilities) as opposed to the criminal standard (beyond reasonable doubt). This means the Breach Decision Maker must be satisfied that a breach of the Code is more probable than not.

The Breach Decision Maker will prepare a preliminary decision, in writing, incorporating reasons for the preliminary decision including:

- The allegations considered
- How the allegations have been addressed
- The main steps in the process
- The information and documents before the Breach Decision Maker
- The preliminary findings of fact
- The preliminary decision as to whether misconduct has occurred and if so, which parts of the Code have been breached.

The logic of the preliminary decision should be apparent as should the reasoning linking the preliminary decision to the preliminary findings of fact.

Other administrative law principles must be observed. It is important the Breach Decision Maker understands a decision an employee has breached the Code may be invalid if the Breach Decision Maker:

- Has not been appointed in accordance with the section 15(3) Procedures



- Fails to comply with these Procedures
- Makes a decision motivated by improper purpose
- Exercises discretionary power in bad faith
- Takes into account irrelevant considerations or fails to take into account relevant considerations
- Acts at the direction or behest of another person
- Acts unreasonably
- Act in accordance with a rule or policy without regard to the merits of the case
- Acts on the basis of insufficient evidence

There are comprehensive guidelines for Decision Makers in suspected Misconduct matters in the APSC Handling Misconduct – A Human Resource Manager's Guide.

## 6.15. Employee to be Notified of Preliminary Decision

If the Breach Decision Maker has reached the preliminary conclusion that a breach has occurred, he/she will write to the employee suspected of misconduct setting out the evidence considered, the preliminary conclusions on the evidence and indicate why the evidence supports a preliminary determination a breach of one or more parts of the Code has occurred.

The employee will be invited to comment on the preliminary decision.

## 6.16. The Final Decision

The Breach Decision Maker will carefully consider any response from the employee, then make their final decision and communicate this to the employee.

If a breach of the Code is found, the decision letter will include the name of the person appointed to determine the sanction (if this is a different person).

If the Breach Decision Maker is also the Sanction Decision Maker, the final breach decision letter will set out the sanction or the factors under consideration in determining the sanction.

In some circumstances a separate letter advising the proposed sanction will be issued.

The employee should also be notified of their right to seek a review of the decision under section 33 of the PS Act noting that seeking a review will not operate to stay the findings of a breach or consideration of sanctions.



## 6.17. Sanction and Date of Effect

If there is a decision that a breach of the Code has occurred, then a further decision has to be made as to what, if any, sanction should be imposed.

The Assistant Secretary PSB will choose the Sanction Delegate from the group of employees who hold a delegation from the Secretary to impose sanctions. This may be the same person who determined there was a breach of the Code.

Like the Breach Decision Maker, the Sanction Delegate responsible for determining any sanction to be imposed must be independent and unbiased.

Any sanction imposed must focus on:

- The seriousness of the misconduct
- The degree of relevance of the misconduct to the employee's duties
- The circumstances of the misconduct
- The reputation of DVA and the APS
- The effect of the sanction on the employee
- Any other relevant factors such as prior misconduct, age, experience and length of service, whether there is remorse or contrition.

The Sanction Delegate will inform the employee of the sanction or sanctions under consideration as well as the factors under consideration.

The employee will be given the opportunity to comment either orally or in writing within 7 days before the final decision on the sanction is made.

Sanctions must be proportionate to the nature of the breach, provide a clear message that the behaviour is not acceptable and act as a deterrent to the employee involved and to others. Prior misconduct is relevant to the choice of a sanction and might be taken into account by the sanction delegate where it:

- Indicates the employee was, or should have been, aware of the standard of conduct expected and the potential consequences of misconduct
- Demonstrates the employee may be unwilling to adhere to the standard of conduct expected

Section 15(1) of the PS Act provides that one or more of the following sanctions may be imposed:

- a. Termination of Employment



This should be considered for misconduct where it is no longer desirable the employee should remain in the APS. This should also be considered where repeated behaviour indicates a refusal to accept reasonable direction or acceptance of the Code or APS values.

b. Reduction in Classification

This should be considered where an employee can no longer be trusted to perform the duties of their current position or another position of the same level of responsibility.

A reduction in classification is a one off event and cannot be made for a specific period. An employee reduced in classification will stay at the reduced level indefinitely, or until promoted or temporarily assigned duties at a higher level in line with normal merit-based selection.

c. Re-assignment of Duties

This is intended to be used in situations where the integrity and effectiveness of the APS may be compromised if the employee is not removed from a particular location or from their present duties, even though the misconduct does not warrant termination of employment.

d. Reduction in Salary

This may be appropriate where the employee's conduct does not indicate they understand the seriousness of the breach. It signals that the behaviour is inappropriate. A reduction in salary can be imposed for a set period or for an indefinite period.

e. Deduction from salary (fine)

This sanction is appropriate for breaches, where it is appropriate to demonstrate the seriousness with which the misconduct is viewed, but it may not be appropriate for the sanction to have long term financial implications for the employee. The deduction is limited to 2% of the employee's annual salary.

f. A Reprimand

This is the least severe form of sanction and is most appropriate in situations where the misconduct is not of a grave nature, or where it is clear the employee has learned from the process and presents no appreciable risk of further misconduct. It acts as both a mark of disapproval of the misconduct and as a warning for the future.

g. No Sanction

It is also possible not to impose a sanction even though it has been determined that a breach of the APS Code of Conduct has occurred. This may be appropriate where the breach was inadvertent or unknown, where it was of a minor nature and where the employee has shown





remorse and undertaken actions to rectify their misconduct or where the misconduct occurred some time ago, was minor and there has been no repeat of the misconduct.

## 6.18. No Other Sanction

It is not possible to impose sanctions other than those listed above as the result of a formal misconduct process. A Sanction Delegate cannot, for example, impose a sanction requiring an employee to apologise.

Where a decision is taken that no sanction is necessary, other remedial action may be appropriate, such as counselling, mentoring, training or performance review and monitoring, to reduce the risk of further misconduct.

## 6.19. Date of Effect of Sanction

Where termination of employment or a reprimand is the sanction imposed, the sanction can take effect immediately after the employee is notified of the final decision on sanction.

In the case of termination, this can be achieved by making a decision to terminate employment under section 29 of the PS Act. The termination notice should be included with the letter informing the employee of the sanction.

In the case of a reprimand, this can occur by having a formal letter of reprimand enclosed with the sanction decision, or by a note in the sanction decision which states the decision constitutes the reprimand. In some cases a reprimand may take place via a meeting between the employee and a senior Manager.

All other sanctions will take effect one month following notification to the employee of the sanction, unless a different date is agreed.

## 6.20. Reasons for Decision

The employee must be provided with reasons for the particular sanction imposed and any rights of review.

## 6.21. Termination

Termination of employment is the most severe of sanctions. The sole right of review for termination of employment is to the FWC. Under section 387 of the *Fair Work Act 2009*, in considering whether it is satisfied that a termination was harsh, unjust or unreasonable, the FWC must take into account the following factors:

- Whether there was a valid reason for the termination related to the person's capacity or conduct (including its effect on the safety and welfare of other employees)



- Whether the person was notified of that reason
- Whether the person was given an opportunity to respond to any reason related to the capacity or conduct of the person
- Any unreasonable refusal by the employer to allow the person to have a support person present to assist at any discussions relating to the dismissal
- Any other matters the FWA considers relevant

A decision-maker should bear these factors in mind when considering a decision to terminate employment.

## 6.22. Notice Requirements for Termination

An employee whose employment is to be terminated must be given the minimum period of notice as prescribed in the *Fair Work Act 2009*, or receive payment in lieu of that notice.

The minimum periods of notice of termination of employment in accordance with the length of APS service are:

- Not more than 1 year of service - At least 1 week.
- More than 1 year but not more than 3 years of service - At least 2 weeks.
- More than 3 years but not more than 5 years of service - At least 3 weeks.
- More than 5 years of service - At least 4 weeks.

The minimum period of notice is increased by one week if the employee is over 45 years of age and has completed 2 years of service.

It is not required to give a notice period or payment in lieu of notice for an employee whose employment is terminated because of serious misconduct.

## 6.23. Resignation during Misconduct Process

Where an employee resigns during a formal misconduct process, the misconduct process does not automatically cease. A determination of a breach of the Code may be made after an employee has separated from the APS. In such cases the decision-making process should continue in accordance with these Procedures.



## 6.24. Employee Moves to Another APS Agency before a Determination or Sanction is made

If a DVA employee suspected of misconduct receives a job offer from another APS agency, the Assistant Secretary PSB will decide what action should occur.

Part 5 of the *Australian Public Service Commissioner's Directions 2022* provides guidance for handling these situations.

Unless the Secretary of DVA and the head of the new (gaining) agency agree otherwise, the movement to the new agency should not occur until the suspected misconduct action is resolved.

## 6.25. Machinery of Government Changes

Section 72 of the PS Act outlines machinery of government (MOG) changes.

When a DVA employee suspected of misconduct moves to another agency due to a MOG change, it is open to the gaining agency to decide whether to continue the action under their section 15(3) Procedures.

The Australian Public Service Commissioner may in certain circumstances determine special arrangements for an employee moved under a MOG change in certain circumstances.

Section 72(5A) of the PS Act and Regulation 87 set out these circumstances.

## 6.26. Effect of Misconduct Finding on an Employee's Security Clearance

The Australian Government Security Vetting Agency (AGSVA) requires security clearance holders to report to AGSVA any changes in their circumstances, including disciplinary procedures. AGSVA will assess the change in circumstances.

If an employee with a security clearance is found to have breached the Code, the Assistant Secretary PSB will consult with the DVA Security Adviser to decide whether this affects their security clearance status.

## 6.27. Record Keeping

The *Archives Act 1983*, the *Freedom of Information Act 1982* and the *Privacy Act 1988* are relevant to the keeping and access to records of misconduct action.

PSB will keep a secure central record of any misconduct action taken in DVA.



Misconduct investigation records are kept separate from the personnel file of a DVA employee. The existence of a separate misconduct file is to be made apparent on the personnel file by a file notation.

Material placed on the Misconduct file should include:

- All correspondence with the employee subject to misconduct action
- Any attachments to correspondence
- All material associated with the investigation, such as records of telephone calls, letters or emails organising interviews
- The investigation report with all the evidence relevant to the breach and sanction decisions attached, such as IT records and transcripts of witness interviews and emails
- Copies of draft material provided to the employee for comment
- The employee's response to the correspondence
- Decision records and/or statements of reasons with respect to the breach determination and any suspension or sanction decisions

## 6.28. Access to Misconduct Records

Misconduct records contain sensitive information and should only be accessible on a strictly "need-to-know" basis. Regulation 103 of the PS Regulations allows misconduct records to be disclosed and used where:

- The use is relevant or necessary for the exercise of any employer power, *and*
- The use or disclosure is consistent with any guidelines issued by the Australian Public Service Commissioner

Misconduct records form part of an employee's Personnel file although not attached to the electronic file. Any misconduct records follow the employee if they move to another agency (as does the Personnel file).

## 6.29. Retention and Disposal of Records

The National Archives of Australia's Administrative Functions Disposal Authority Express (AFDA Express) of February 2013 sets out the minimum retention requirements for various classes of records. AFDA Express is a legal instrument issued under the *Archives Act 1983*.

Records relating to counselling and misconduct which need to be kept include:



- Allegations of misconduct where no investigation occurs
- Investigations carried out under DVA's section 15(3) Procedures even if a breach of the Code is not found
- Reviews of, or litigation about misconduct action
- Decisions about the imposition and implementation of a sanction

AFDA Express sets out the minimum retention period for these types of documents. Full details can be accessed through the [National Archives of Australia](#) website.

1. If there is an unsubstantiated or vexatious complaint or where no misconduct is found, records will be retained for 18 months after the last action. However the employee concerned may request the records be kept until the employee reaches age 75 or 7 years after the last action relating to the misconduct.
2. If an investigation is unable to be finalised due to the resignation of the employee, documents related to the misconduct process should be kept for at least 18 months.
3. If misconduct is found, documents should be retained for 5 years after the last action.

If the employee has a further instance of suspected misconduct within 5 years, the records of earlier breaches will be kept for a further period of 5 years.

## 6.30. Rights of Review

A non-SES may apply directly to the Merit Protection Commissioner, (MPC) for review of a determination they have breached the Code and for review of any sanction imposed (other than the sanction of termination of employment).

The breach and the sanction decisions are separate decisions and a separate review application needs to be made for each action. Any request for review of action needs to be made within 60 days:

- Of the determination of a breach of the Code or
- Of the determination of a sanction

SES employees are not entitled to seek a review of action under section 33 of the PS Act.

Where the sanction is termination of employment, the employee may have the right under the *Fair Work Act 2009* to seek a remedy from the Fair Work Commission. Depending on the grounds, an application for remedy or resolution of dispute should be lodged within 21 days of the decision.

If there is an objection to the person involved in the suspected misconduct action, (e.g. the Breach Decision Maker, the Investigator or the Sanction Delegate) or to any part of the misconduct process,



then the application for review should be lodged with the Secretary of DVA via the Assistant Secretary, PSB.

If an employee is suspended during a suspected misconduct process, any application for review should be lodged with the Secretary of DVA via the Assistant Secretary, PSB. The MPC is not authorised to investigate applications for suspension which have not first been investigated by DVA unless:

1. The Secretary of DVA was directly involved in the action or suspension decision
2. It is not appropriate, because of the seriousness or sensitivity of the Secretary of DVA to deal with the review action
3. Employee claims the relevant action or decision is victimisation or harassment for having made a previous application for review

## 6.31. Disclosure of Information Relating to Misconduct Action

### Personal Information

Personal information is defined in section 6 of the Privacy Act 1988 as “information or an opinion about an individual whose identity is apparent or can reasonably be ascertained, from the information or opinion.”

DVA will ensure that personal information about an employee involved in a misconduct investigation will not be used or disclosed unless it is necessary, appropriate and reasonable to do so and the use or disclosure is consistent with the Privacy Act 1988.

## 6.32. To Whom May Personal Information Concerning Misconduct Action be disclosed

During the course of misconduct action, or after the investigation is complete, personal information about the employee under investigation may, where it is consistent with the *Privacy Act 1988*, the PS Act, the Regulations, and where it is necessary, appropriate and reasonable, may be disclosed to others.

DVA will comply with the Australian Privacy Principles when disclosing information.

PSB will as a general rule inform the employee's manager of the substance of any suspected misconduct, keep them informed during the investigation process and advise the outcome.

Complainants have a legitimate interest in knowing that matters reported have been addressed. DVA will endeavour to give complainants sufficient information to provide assurance that DVA:



- Has taken the complaint/allegation seriously
- Does not tolerate behaviour inconsistent with the APS Code of Conduct
- Has imposed an appropriate sanction where a breach has been found and
- Has taken appropriate steps to ensure the problem will not recur

However when considering what information should be provided to complainants, the Assistant Secretary PSB will ensure there is a balance between:

- The employee's right to privacy and the protection of personal information about employees and DVA obligations under the PS Act, the Regulations, and the *Privacy Act 1988* and
- The need to be transparent and accountable

The Assistant Secretary PSB will:

- Provide general information to complainants about the outcome of investigations
- Consider the circumstances of each individual case when deciding if, and to whom, personal information might be released
- Decide on a case by case basis what personal information will be released about the outcome of the investigation

Consistent with the PS Act, the Regulations, and the *Privacy Act 1988*, the issues the Assistant Secretary PSB will consider are:

- The content and level of detail of personal information to be released
- The need to disclose information
- To whom the information should be released
- The nature and seriousness of the misconduct
- The employee's right to privacy or any potential damage to their career or reputation
- The public interest aspect

The Assistant Secretary PSB will be guided by the APSC Circular No 2008/3 entitled '[Providing information on Code of Conduct investigation outcomes to complainants](#)'.

If any information is to be released, the employee concerned will be advised by the Assistant Secretary PSB and given the opportunity to provide feedback/make a case prior to the information being released as to why their personal information should not be disclosed.





## 7. Scope and coverage

The APS Code of Conduct applies to the following:

- APS employees, including ongoing and non-ongoing employees
- The Secretary
- Statutory office holders to the extent that they supervise, or have a day-to-day working relationship with APS employees as defined in section 14 of the PS Act and regulation 8 of the Public Service Regulations 2023 (PS Regs). All parties covered by this policy must comply with the content and seek guidance in the event of uncertainty as to its application.

## 8. Dispute resolution

Employees must discuss concerns about employment decisions with their managers in the first instance.

Employees may seek a review of a decision under one of the following avenues:

- The dispute resolution procedures in the [DVA Enterprise Agreement](#) or
- Review of action provisions provided for in the [Public Service Act 1999](#) and the [DVA People Policy – Review of Action and Resolving Workplace Issues](#).

Where these concerns cannot be resolved locally, contact the [People Operations](#) team for advice and/or assistance.

## 9. Legal and other authorities

[APS Values](#)

Code of Conduct is set out in section 13 of the [Public Service Act 1999](#).

Employment Principles are set out in section 10A of the [Public Service Act 1999](#).

Public Service Regulations 2023

Australian Public Service Commissioner's Directions 2022

Privacy Act 1988

Fair Work Act 2009

Public Interest Disclosure Act 2013

Freedom of Information Act 1982



Administrative Decisions (Judicial Review) Act 1977

Public Governance, Performance and Accountability Act 2013

Work Health and Safety Act 2011

DVA People Policy – Conduct

DVA People Policy – Public Interest Disclosure Procedures

DVA People Policy – Complaints Handling

APSC Handling Misconduct: A Human Resource Manager's Guide

APSC Values and Code of Conduct – Respect Summary Guide August 2012

APSC Values and Code of Conduct in practice: A guide to official conduct for APS employees and agency heads July 2013

APSC Circular No 2007/02 – The Privacy Act and employee information concerning Code of Conduct matters

APSC Circular No 2008/3 – Providing Information on Code of Conduct investigation outcomes to complainants

AGS Legal Briefing – Misconduct in the Australian Public Service No. 118 – 15 December 2021

This policy must be read in conjunction with the [DVA Enterprise Agreement](#).

## 10. Advice and assistance

Any concerns with or queries relating to this policy may be directed to [HR Connect](#), unless otherwise noted throughout.

This policy will be reviewed on implementation of a new DVA Enterprise Agreement or earlier, if required.



## Version control

Date of change	Summary of change	Reason	Approved by
05 February 2016	Updated reference to DVA EA	To reflect DVA EA	Karen Philpot
02 August 2017	Changed PSB title	Organisational Change	Roger Winzenberg
01 June 2018	Change of template	Change of template	Karen Philpot
02 August 2018	Changed PSB title	Organisational Change	Karen Philpot
12 December 2018	Correct Formatting	Incorrect formatting	Karen Philpot
10 February 2022	Updated references to the APSC Commissioner's Directions	To reflect new <i>Australia Public Service Commissioner's Directions 2022</i>	Jeffrey Grey, Director People Operations
11 August 2022	Updated requirements around sanction	To reflect <i>Australia Public Service Commissioner's Directions 2022</i>	Nick Gozzi, A/Director Workplace Relations
	Policy put into new format and updated section titles	Reflect People Services Branch Policy Framework	
19 December 2023	Update document references as per PS Regulation updates	To reflect updated Public Service Regulations numbering	Leslie Bennett, Director Strategy, Governance, and Culture