

DFAT Performance and Behaviour Case Management Spreadsheet

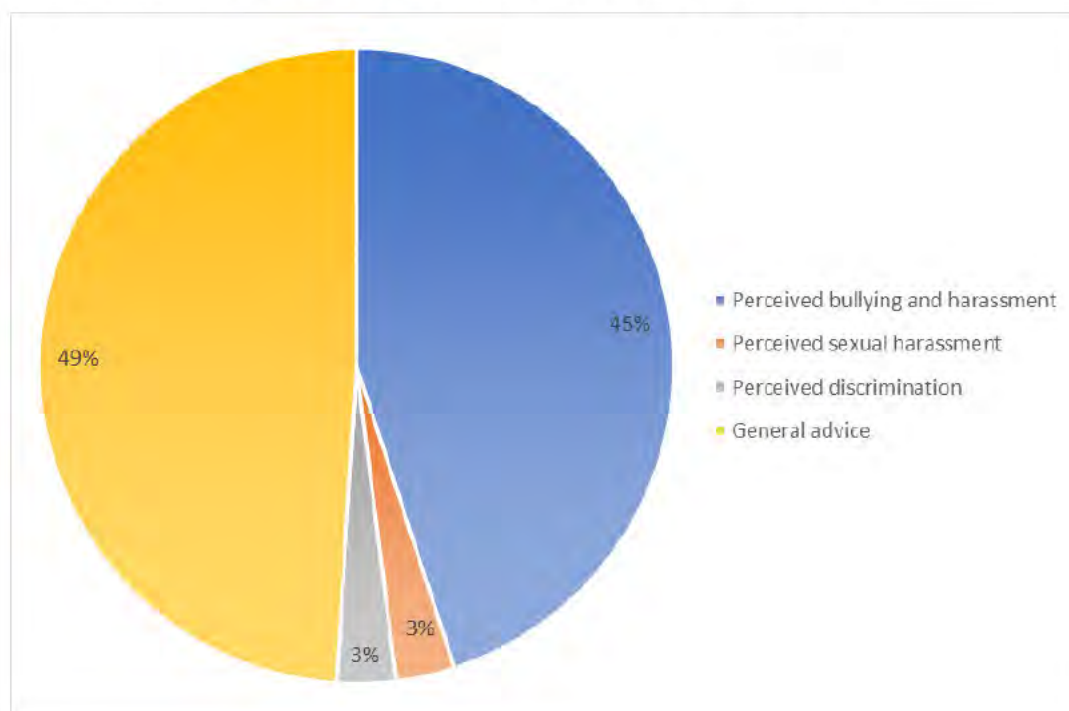
A	B	C	D	E	F	G	H	I	J	K	L	M	N	O	P	Q	R	S	T
Sensitive Case	Month case opened	Subject First Name	Subject Last Name	Classification (Dropdown List)	Group	Division/ Post location/ State office/ APO location	Branch	Section	Case Type (Dropdown List)	Reporting Officer First Name	Reporting Officer Last Name	Classification (Dropdown List)	Issue with: (Dropdown List)	Comments	EMP Officer	Status (Dropdown List)	Primary Action (Dropdown list)	Outcome (Dropdown list)	EDRMS Record number
1				APS1					Bullying			APS1	Staff			Open	General Advice	Change of Role	
2				APS2					Harassment			APS2	Manager			Closed	Self-Resolution	Change of Manager	
3				APS3					Sexual Harassment			APS3	Colleague				Facilitated Meeting	Returned from Post	
4				APS4					Discrimination			APS4	Other				Managerial Action	Formal Direction	
5				APS5					FDV			APS5	Unknown				Mediation	Referred to Performance Mng	
6				APS6					Poor Communication			APS6					Management Coaching	Referred to EES	
7				EL1					Performance			EL1					Staff Coaching	Referred to EHS	
8				EL2					Disrespectful Communication			EL2					Support Person	Referred to PPD other	
9				SESB1					Inappropriate and unfair application of work policies or rules			SESB1					Training	Referred to other area	
10				SESB2					Other			SESB2					Referral to EES	Changed departments	
11				SESB3								SESB3					Referral to other	Resigned	
12				Contractor								Contractor					Other		
13				LES								LES							
14												Other Agency							
15																			
16																			



Safe Space Quarterly Report

Overview of referrals to the Safe Space team of unacceptable behaviour over the period 1 October 2025 to 31 December 2025.

Total of 121 contacts to Safe Space, broken down in the following graph.



Key themes that emerged from this caseload include:

- Alleged or perceived bullying
- Communication and/or management style difficulties between individuals and their managers.
- Managers seeking advice on managing performance and/or behaviour concerns with staff.
- General advice including information on flexible working arrangements, remote working, family and domestic violence provisions, attendance, health and recruitment concerns.

Advice and assistance from Safe Space resulted in the following resolutions and referrals:

Referral Type	No. of referrals
Coaching for self-resolution	14
Management action	21
Facilitated conversations	9
Referrals to the Ethics, Integrity and Professional Standards Section	2
Referrals to other sections in People Division	4
External referrals	0
General advice and support	89
Other (advice for noting only, family and domestic violence)	21

Please note numbers reflected in the table include multiple resolution actions, for example a contact may receive coaching for self-resolution and also participate in a facilitated conversation.

Of the 121 contacts, 63% were from Canberra, 27% were from posts and 10% were from State and Territory offices.

There were 100 contacts for the same period in 2024. The increase this year is likely due to the EMP visits to posts and promotion of the Safe Space function on the lock screen during October.

In addition to Safe Space, staff may choose to report their concerns to the **Ethics, Integrity and Professional Standards Section (EES)**. EES provide formal and informal advice on dealing with suspected staff misconduct and can initiate formal Code of Conduct investigations.

EES received 7 complaints about suspected breaches of the APS Code of Conduct over the period related to bullying or harassment by DFAT APS staff.

- Seven matters remain under assessment.

DFAT Ethics, Integrity and Professional Standards Section Case Management Spreadsheet

FY22/23 - 1 January 2023 to 30 June 2023

Case number	EDRMS Ref #	Case Name	Investigatr	Priority	Allegation	If Fraud or Corruption	Referred to NACC Yes or No	Subject	Position	Date referred	Summary of Allegation	Location	Outcome	Comment	Open/Closed
					Sexual Harassment				APS6				Formal Warning		Closed
					Misconduct - COI				SES1				NFA		Closed
					Bullying and Harassment				BB2				Formal warning		Closed
					Bullying and Harassment				SES1				Training		Closed
					Bullying and Harassment				EL2				Formal warning		Closed
					Bullying and Harassment				SES1				NFA		Closed
					Bullying and Harassment				SES1				NFA		Closed
					Bullying and Harassment				EL2				NFA		Closed
					Bullying and Harassment				APS 6				Formal warning 28/4/23		Closed
					Bullying and Harassment				APS 6				Investigation Sanction		Closed
					Bullying and Harassment				EL2				Management action		Closed
					Misconduct - COI				APS 6				Training		Closed
					Bullying and Harassment				APS 6				NFA		Closed
					Harassment				EL2				For info only		Closed
					Bullying and Harassment				EL2				Internal referral		Closed
					Bullying and Harassment				E11				Training		Closed
					Bullying and Harassment				EL 2				NFA		Closed
					Bullying and Harassment				APS 5				NFA		Closed
					Bullying and Harassment				EL 2				For info only		Closed

FY23/24 – 1 July 2023 to 30 June 2024

Case #	EDRMS folder #	Case Name - Reference	Assessor / Investigator	Priority	Allegation	If Fraud or Corruption	Referred to HACC Yes or No	Subject Name	Officer Level	Date referred to EES	Summary of Allegations	Location	Outcome	How reported? Describe complaint	Open/Closed
					Bullying and Harassment				APS 6				NFA	Email	closed
					Bullying and Harassment				SES Band 1				NFA	Email	Closed
					Misconduct - COI				APS6				Formal Warning	Internal referral	Closed
					Bullying and Harassment				APS6				NFA	Email	closed
					Discrimination				EL1				NFA	Email	Closed
					Misconduct - COI				EL1				Investigation - no sanction	internal referral	Closed
					Sexual Harrassment				APS6				Investigation - no sanction	Email	closed
					Discrimination				EL2				NFA	Email	closed
					Bullying and Harassment				EL1				NFA	Email	Closed
					Bullying and Harassment				APS6				Formal warning	Email	Closed
					Misconduct - COI				EL1				Formal warning	Email	Closed
					Sexual Harrassment				EL2				NFA	Email	Closed
					Sexual Harrassment				Contractor				Referred to Contracting Agency	Email	Closed
					Sexual Harrassment				APS6				NFA	Email	Closed
					Recruitment Integrity				APS5				Formal warning	Internal referral	Closed
					Bullying and Harassment				APS				NFA	Email	Closed
					Bullying and Harassment				EL2				NFA	Email	Closed
					Bullying and Harassment				EL2				NFA	Email	Closed
					Bullying and Harassment				SES1				NFA	Email	Closed
					Bullying and Harassment				APS6				Internal referral	Phone and email	Closed
					Bullying and Harassment				EL2				NFA	Email	closed

Case #	EDRMS Folder #	Case Name - Reference	Assessor / Investigator	Priority	Allegation	If Fraud or Corruption	Referred to NACC Yes or No	Subject Name	Officer Level	Date referred to EES	Summary of Allegations	Location	Outcome	How reported? Describe complaint	Open/Closed
					Bullying and Harassment				SES Band 2				NFA	In person	Closed
					Bullying and Harassment				EL1				NFA	Email	Closed
					Bullying and Harassment				LES				NFA	Email	Closed
					Misconduct - COI				EL2				COI outreach	Email	closed
					Harassment				EL1				Management action	Email	Closed
					Bullying and Harassment				APS6				Internal referral	Email	Closed
					Bullying and Harassment				LES				Referral	Internal referral	closed
					Bullying and Harassment				LES				Referral	Email	closed
					Bullying and Harassment				EL2				NFA	Email	closed
					Recruitment Integrity				SES1				NFA	Email	Closed
					Bullying				EL1				counselling	Email	closed
					Misconduct - COI				EL1				NFA	Internal referral	closed

FY24/25 - 1 July 2024 to 30 June 2025

Case #	EDRMS folder #	Case Name - Reference	Assessor / Investigator	Priority	Allegation	If Fraud or Corruption	Referred to NACC Yes or No	Complainant Name	Subject Name	Officer Level	Date referred to EES	Summary of Allegations	Location	Outcome	How reported? Describe complaint	Open/Closed
					Favouritism					EL2				NFA	Internal referral	Closed
					Harassment					APS4				Investigation - Sanction	Email	closed
					Misconduct - COI					APS4				Investigation - Sanction	Internal referral	closed
					Bullying & Harassment					Multiple				NFA	Email	Closed
					Harassment					EL1				NFA	Email	closed
					Discrimination					SES1				Management Action	Email	closed
					Misconduct - COI					EL1				NFA	Internal referral	closed
					Misconduct - COI					APS4				Management Action	Email	Closed
					Misconduct - COI					APS4				Management Action	Email	Closed
					Bullying and harassment					EL1				NFA	Email	Closed
					Misconduct - COI					Multiple				Line management action recommend	Email	Closed
					Bullying and harassment					EL2				NFA	Email	closed
					Bullying and harassment					EL1				NFA - management action had occurred.	Email	closed
					Bullying/Harassment					EL2				NFA/ filed as intel.	Email	closed
					Bullying/Harassment					EL2				NFA	Email	closed
					Misconduct - COI					APS6				Line management action taken	Email	Closed
					Misconduct - COI					EL2				Line management action taken	Email	Closed
					Misconduct - COI					EL1				Counselling	Microsoft Teams	closed
					Misconduct - COI					APS6				Counselling	Internal referral	closed
					Bullying and Harassment					EL1 / SESB2 / EL2				NFA	Email	closed
					Misconduct - COI					EL1				EES management action	Internal referral	Closed
					Bullying and harassment					EL2 & SES1 & EL2				NFA	Email	closed
					Bullying and Harassment					EL2				EES issue formal warning and referral to EMP	Internal referral	closed
					Bullying and Harassment					EL2				Management Action	Email	closed

FY25/26 - 1 July 2025 to 27 February 2026

Case #	EDRMS folder #	Case Name - Referen	Assessor / Investigator	Priority	Allegation	If Fraud or Corruptio	Referred to NACC Yes or	Complainant Name	Subject Name	Officer Level	Date referred to EES	Summary of Allegations	Location	Outcome	How reported? Describe complaint	Open/Closed
					Sexual Harassment and Discrimination					EL1				EES Management Action (Opportunity to respond)	Email	Closed
					Bullying and Harassment					EL1				NFA	Email	Closed
					Bullying and Harassment					APS6, APS6, APS5				Formal warning issued	Email	Closed
					Bullying and Harassment					EL2				Internal referral to EMP	Email	closed
					Bullying and Harassment					EL1				NFA	Email	closed
					Bullying and Harassment					EL1				Internal referral to EMP	Email	closed
					Harassment					EL1				NFA	Email	closed
					Sexual Harassment					EL1					Email	Open
					Misconduct - COI					EL2					Email	Open
					Bullying and Harassment					SES1				For info only	Email	closed
					Discrimination					EL2				For info only	Email	closed
					Bullying and Harassment					APS3				Management Action	Email	closed
					Bullying and Harassment					APS3				NFA	Email	closed
					Bullying and Harassment					APS5				NFA	From UWB	closed
					Harassment					EL1				NFA	Letter (mail)	Closed
					Bullying					EL2				NFA	Email	closed
					Bullying and Harassment					SES2					Email	Open
					Bullying					APS5				Formal warning issued	Email	Closed
					Sexual Harassment					APS4				Formal warning issued	Email	Closed
					Discrimination					EL2				NFA	Email	Closed
					Bullying					EL1				NFA	Email	closed
					Discrimination					SES1				NFA	Email	closed
					Bullying and harassment					EL2					Email	Open
					Bullying and Harassment					APS5				NFA	Email	closed
					Bullying and Harassment					MO4				NFA	Email	closed
					Misconduct - COI					EL1				NFA	Email	Closed
					Bullying					EL1				NFA	Email	Closed
					Bullying					EL2				NFA	Email	Closed
					Harassment					APS4				Formal warning issued	Email	closed
					Harassment					EL1				Counselled	Email	closed
					Bullying and Harassment					SES1					Email	open

Case #	EDRMS folder #	Case Name - Referen	Assessor / Investigator	Priority	Allegation	If Fraud or Corruptio	Referred to NACC Yes or	Complainant Name	Subject Name	Officer Level	Date referred to EES	Summary of Allegations	Location	Outcome	How reported? Describe complaint	Open/Closed
					Bullying and Harassment					EL2					Email	open
					Bullying and Harassment					EL2				NFA	ICMS	Closed
					Bullying and Harassment					EL2					ICMS	Open
					Bullying and Harassment					EL1					ICMS	Open
					Harassment					Contractor					Email	Open
					Bullying and Harassment					EL2					ICMS	Open
					Bullying and Harassment					APS4					Email	Open
					Sexual Harassment					EL1					Email	Open
					Bullying and Harassment					APS4					Email	Open
					Sexual Harassment					APS4					Email	Open
					Misconduct - COI					EL1					ICMS	Open
					Harassment					SES1					ICMS	Open
					Misconduct - COI					EL1					ICMS	Open
					Bullying and Harassment					EL2					Internal referral	Open



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INSPECTOR REPORT

COMCARE REFERENCE NUMBER	s 22(1)(a)(ii)
PCBU DETAILS	Name: Commonwealth of Australia acting through its responsible agency the Department of Foreign Affairs and Trade ABN: 47 065 634 525 ACN:
REPORT ISSUED TO	Name: s 22(1)(a)(ii) Position: Director, WHS unit. Cc:
BACKGROUND	
<ol style="list-style-type: none"> 1. On 7 September 2023 Comcare received information alleging the Department of Foreign Affairs and Trade's (DFAT) systems and processes do not adequately address the psychosocial impact of bullying and harassment due to cultural reliance on informal complaint/dispute resolution processes. The information indicates DFAT Workers are reluctant to use formal systems and processes due to concerns of discrimination. These informal processes also do not consider the psychosocial impact to workers of not resolving issues/complaints in a timely and effective manner. This information specifically related to overseas operations or postings, and incidences of bullying and harassment by Head of Mission (HoM) and/or Head of Post (HoP). 2. Comcare commenced an inspection in relation to this matter on 9 November 2023 to monitor and enforce compliance with the <i>Work Health and Safety Act 2011</i> (Cth) (WHS Act) and the <i>Work Health and Safety Regulations 2011</i> (Cth) (WHS Regulations). 3. The scope of the inspection was to determine the validity of the WHS concern and determine if DFAT systems and processes adequately detect and address the risk to health and safety arising from bullying and harassment by HoM's and/or HoP's so far as reasonably practicable. 4. The risks to health and safety identified during the inspection was the psychosocial harm arising from poor organisational justice when relying on informal processes to report bullying and harassment. 	
OUTCOMES	
<ol style="list-style-type: none"> 5. I formed a reasonable belief that DFAT did not comply with its duties under the WHS Act. DFAT has contravened the following: <ol style="list-style-type: none"> a. WHS Act section 19 – Primary duty of care 	



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- (1) A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:
 - (a) workers engaged, or caused to be engaged by the person; and
 - (b) workers whose activities in carrying out work are influenced or directed by the person; while the workers are at work in the business or undertaking.

Refer to the reasons set out in paragraph #16.

Remedial actions

6. DFAT has developed a plan to remedy the contravention as outlined in the Compliance Assessment and is in the process of implementing the necessary control measures. While control measures should be implemented as soon as possible, Comcare will conduct a Verification Inspection within six (6) months to verify implementation of these measures.

Information and advice

7. DFAT must ensure risks to health and safety are eliminated so far as is reasonably practicable, or if not reasonably practicable to do so, are minimised so far as reasonably practicable: s 17 of the WHS Act. PCBUs should have regard to Part 3.1 of the WHS Regulations and the *Code of Practice: How to Manage Work Health and Safety Risks* when managing risks to health and safety. DFAT must monitor and maintain control measures, particularly any interim controls, to ensure that they remain in use and effective.
8. In relation to this matter, DFAT should consider the following:
 - a. Safe Work Australia: Model Code of Practice – *Managing psychosocial hazards at work*. Particular attention to ‘Poor organisational justice’ and associated controls with regard to safe work systems and procedures. Also of potential significance is Appendix B on ‘Identifying harmful behaviours’.
 - b. WHS Act sections 104-109 on discriminatory conduct. DFAT should consider how the implementation and use of formal processes will protect workers who raise valid WHS concerns and promote relevant use of DFAT support mechanisms.
9. Information available suggests workers of DFAT prefer utilising informal complaints and dispute resolution processes. This presents a risk of achieving poor outcomes, if any, and in unreasonable timeframes. Informal processes also prevent natural justice. Workers of DFAT appear to favour these informal processes due to the belief they will be discriminated against, with regard to desirable promotion or position, if formally raising a complaint. DFAT must investigate all psychosocial complaints and concerns to ensure:
 - a. Conversion of informal complaints through formal processes will provide DFAT the opportunity to improve safety outcomes relating to psychosocial behaviours



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in a transparent manner. Additionally, DFAT will demonstrate to workers the effectiveness of systems and affirm DFAT's stance on bullying and harassment.

- b. Informal enquiries into off-the-record complaints encourages workers to utilise informal processes because it achieves a modicum of action, even if it is neither timely nor effective. Consistent application of formal process will diminish burden of informal or vexatious complaints by setting the expectation all informal complaints will be actioned, to afford all parties a right of reply as part of natural justice.
 - c. Clear distinction when utilising support services which are to provide support when a worker is experiencing difficulty (performance, geographical isolation, etc), as distinctly different to raising concerns about misconduct including bullying and harassment which require DFAT to action via complaint mechanisms. This will ensure support workers are empowered to initiate complaints on behalf of others if made aware of a potential misconduct issue. This process can be made confidential/anonymous but must exist to prevent additional psychosocial harm arising from an inability to action a concern once made aware.
 - d. Lack of investigation prevents the identification of hazards and the application of controls which hold guilty parties to account. Instead, an informal victim-centric approach has the potential to affect workers career progression through discrimination, further increasing reliance on informal systems.
 - e. Conclusion of timely and effective investigations provide tangible outcomes which when communicated to the appropriate parties (complainant if validated, defendant if vexatious etc) provide positive confirmation that DFAT provides organisational justice to address and improve psychosocial health and safety. Public reward and recognition of outcomes from senior managers within DFAT will further reinforce behavioural expectations.
 - f. There exists a substantial risk to workers, Officers (as defined in the WHS Act), and the organisation, if DFAT was found to have been aware of a risk to health and safety but had not taken action to resolve the hazard, as DFAT has chosen to accept the risk and by extension, the outcome.
10. DFAT should consider appropriate training for responsible managers to enable them to determine formal investigation triggers, and ensure implementation of support mechanisms, as appropriate in each circumstance. This will ensure DFAT is able to implement its planned controls effectively.
11. DFAT has committed to the recording and monitoring of WHS data to assist in the identification of psychosocial hazards arising from its business or undertaking. The



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purpose of which is to analyse trends and allow granularity in identification and application of appropriate controls. DFAT's intent appears to be coverage of remaining gaps in its incident management system by identifying potential hot-spots which support formal victim-centric complaints mechanisms.

12. Learnings regarding control measures as a result of the inspection should be applied across the organisation where applicable.

COMPLIANCE ASSESSMENT

13. I attended 44 Sydney Ave, Canberra, in the conduct of the inspection. The site visit was conducted as an announced inspection. I undertook actions to make relevant Health and Safety Representatives aware of my attendance at the workplace to afford the opportunity to engage in the inspection process. I was not accompanied by the relevant Health and Safety Representative.
14. Based on the information reviewed, control measures implemented by DFAT in relation to the risk were:
- a. Workplace Behaviour Team engage with workers proactively to provide support and awareness.
 - b. Work Health and Safety Unit conduct systematic audits of locations.
 - c. Ethics, Integrity, and Professional Standards Unit respond to formal complaints through investigation.
 - d. Application of APS code of conduct where appropriate.
15. Section 19 of the WHS Act places a primary duty of care on PCBU's to ensure the health and safety of workers at work or whose work is influenced by the business or undertaking, so far as reasonably practicable. Psychosocial harm can occur from work related stresses when they exceed the workers ability or resources to cope. Bullying and harassment of workers from others in positions of authority is not only a risk to physical health and safety, but unresolved bullying and harassment potentially creates psychosocial harm when resources to resolve incidents are missing or ineffective. The WHS Act in conjunction with the WHS Regulations therefore require PCBU's to eliminate or minimise the risk arising from psychosocial hazards as part of health and safety duties, so far as reasonably practicable.
16. My enquiries into anonymous concerns raised with Comcare indicate to me DFAT have failed to ensure, so far as reasonably practicable, the health and safety of workers and others engaged in or influenced by DFAT's business or undertaking because:



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- a. DFAT has acknowledged it does not have a system to adequately investigate and resolve, in a timely manner, informal complaints regarding risks to health and safety arising from bullying and harassment by senior managers such as HoM/HoP. DFAT instead attempts to resolve informal and/or anonymous concerns through informal discussions; visits by fly-away teams; exit surveys, etc, whilst encouraging workers to utilise formal complaint processes.
 - b. Once a complaint is initiated by the complainant, DFAT's formal systems appear effective at resolving the matters individually. Although apparently effective on a case-by-case basis, DFAT does not appear to provide support to the complainant if the matter is substantiated and action to resolve the issue is taken. Psychosocial harm is then created due to poor organisational justice. Through inconsistent application of systems, and reliance on complainants to initiate process, DFAT is increasing the likelihood complaints will remain informal. Without resolution, this creates a self-feeding potential to escalate into psychosocial harm.
17. Discussions with representatives of DFAT during site attendance revealed that DFAT is aware of the potential psychosocial risk to health and safety arising from bullying and harassment by workers within senior management positions such as HoM/HoP, and are dedicating resources to resolve this risk by:
- a. Conducting a baseline assessment across the organisation to identify psychosocial hazards. This data is intended to allow DFAT to monitor the efficacy of other controls.
 - b. Implementation of a psychosocial survey tool to allow ongoing monitoring of controls.
 - c. Recording de-identified data from responsible areas in DFAT into trends that will allow DFAT to identify and proactively respond to areas of increasing concern.
 - d. Introduce new performance criteria for senior management positions with 50% weighting on behavioural outcomes with the intent this will drive positive change toward psychosocial hazards.
18. I commend DFAT's intended actions to resolve this issue, given DFAT appear to possess significant inherent risk due to the nature of the business. DFAT are undertaking a substantial task of relevance to the Commonwealth jurisdiction. As such DFAT must consider the importance of appropriately resourcing efforts to identify and implement an effective process that will eliminate or minimise the psychosocial risk to health and safety so far as reasonably practicable in the circumstance.



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19. I remain available to discuss matters with DFAT in relation to identifying potential gaps in the implementation of systems, and DFAT may wish to consider if resources within their organisation may also be of benefit through consultative duties, as outlined in Part 5 of the WHS Act – Consultation, representation, and participation.
20. Based on this assessment I form the reasonable belief DFAT has committed to remedying the contravention and is in the process of implementing the necessary control measures, and the inspection is now closed.
21. While control measures should be implemented as soon as possible, Comcare will conduct a Verification Inspection (VI) within six (6) months to verify implementation of these measures.

REPORT ISSUED BY	Inspector	s 22(1)(a)(ii)
	Inspector ID number	s 22(1)(a)(ii)
	Email	s 22(1)(a)(ii) @comcare.gov.au
	Phone	s 22(1)(a)(ii)
	Date	3/4/2024
	Signature	s 22(1)(a)(ii)

DISCLAIMER

This report contains information that may assist you to take steps regarding your obligations under the WHS Act. You must refer to the Commonwealth *Work Health and Safety Act 2011* (WHS Act) and the *Work Health and Safety Regulations 2011* (WHS Regulations) to understand your duties and obligations. Comcare's external website contains links to WHS legislation.

Comcare does not accept liability for any errors or omissions or for any loss or damage suffered by you or any person which arises from your reliance on this report or for any breach by you of your obligations under the WHS Act. Where a Comcare inspector has inspected a particular workplace, it is not a representation by Comcare that the particular workplace is in any way free of hazards.

IF YOU DO NOT AGREE WITH A DECISION

If you disagree with the outcome of this inspection, you may seek an internal reconsideration of the inspector's decision. A request for a review should be sent to statutory.oversight@comcare.gov.au including any additional information or evidence you have to support your request. Comcare will review your request and advise of the outcome in writing within 20 business days. If you would like to clarify any aspect of this report, you can contact the inspector directly.



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Comcare has a range of publications and fact sheets to help explain your responsibilities and provide guidance to make your workplace safer. The Compliance and Enforcement Policy provides guidance as to how Comcare approaches regulation. To access these, visit our website.

PRIVACY STATEMENT

Your privacy is important to us. Comcare will only collect, use or disclose personal information in accordance with the Commonwealth Privacy Act 1988 and if it is reasonably necessary for, or directly related to, one or more of our functions, powers and/or activities. These include functions and activities under the following Commonwealth legislation: Safety, Rehabilitation and Compensation Act 1988, the WHS Act, the Seafarer's Rehabilitation and Compensation Act 1992, and the Asbestos related Claims (Management of Commonwealth Liabilities) Act 2005. If Comcare is unable to collect, use and disclose your personal information for our WHS regulatory requirements, we may not be able to provide these services and respond appropriately.

Comcare may also need, in accordance with the Privacy Act 1988, and subject to confidentiality of information provisions under the WHS Act, to collect your personal information from, and disclose your personal information to, a number of parties, including but not limited to:

- Comcare's internal and external legal advisers
- the Safety, Rehabilitation and Compensation Commission
- a court or tribunal
- state or territory work health and safety regulatory agencies
- personnel engaged by Comcare to conduct research related activities
- enforcement agencies or bodies
- state and territory Coroners
- Commonwealth, state or territory industry regulators
- any other person assisting Comcare in the performance of its functions or exercise of its powers, including contractors and consultants
- any other person where there is an obligation under law to do so (for example but not limited to, responding to the direction of a court to produce documentation).

It is unlikely Comcare will provide personal information to anyone in an external territory or outside Australia, unless the information relates to an incident, investigation, injury or illness sustained while overseas, or treatment provided by an overseas practitioner. If disclosure of personal information is made to someone overseas, Comcare will follow the Australian Privacy Principles that relate to disclosure to overseas entities.

Accuracy of personal information. Comcare wants to ensure personal information is up to date and complete. Our Privacy Policy explains how to access personal information held about you and how to go about making any corrections.

Complaints. If you think Comcare has interfered with or breached your privacy (relevant to the Privacy Act 1988), our Privacy Policy contains information about what you should do and how we will respond.

For a copy of our Privacy Policy, to request a change of your personal information or to make a privacy complaint please refer to www.comcare.gov.au/privacy. You can also contact us on 1300 366 979 or email us at privacy@comcare.gov.au.



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INSPECTOR REPORT

COMCARE REFERENCE NUMBER	s 22(1)(a)(ii)
PCBU DETAILS	Name: Commonwealth of Australia acting through its responsible agency the Department of Foreign Affairs and Trade ABN: 47 065 634 525
REPORT ISSUED TO	Name: s 22(1)(a)(ii) Position: Director, Employee Health and Safety Section People Culture Branch, People Division
BACKGROUND	
<ol style="list-style-type: none"> 1. On 7 September 2023, Comcare received information alleging the Department of Foreign Affairs and Trade's (DFAT) systems and processes do not adequately address the psychosocial impact of bullying and harassment due to a reliance on 'informal' complaint/dispute resolution processes. 2. The initial information indicated that the PCBU's workers are reluctant to use formal systems and processes due to concerns of discrimination. The example provided to Comcare related to overseas operations or postings, and incidences of alleged bullying and harassment by Head of Mission (HoM) and/or Head of Post (HoP). 3. Comcare commenced an initial inspection in relation to this matter on 9 November 2023 to monitor and enforce compliance with the <i>Work Health and Safety Act 2011</i> (Cth) (WHS Act) and the <i>Work Health and Safety Regulations 2011</i> (Cth) (WHS Regulations). DFAT sought review of the original inspector report dated 3 April 2024. Comcare withdrew this report and reopened an inspection on 4 July 2024. 4. The scope of the inspection was to determine if DFAT, including its Officers, had, use, and maintain, a safe system of work to respond to allegations of bullying and/or harassment as raised in the concern; inclusive of appropriate training, information and instruction, that is provided to workers. 5. The scope does not include systems and or processes implemented by DFAT after September 2023 when the concern was initially raised to Comcare. 6. The risks to health and safety identified during the inspection was the risk of psychosocial harm arising from 'informal' arrangements used to address instances of bullying and harassment. These risks include decreased ability to assure conformance with processes, the ability to assure the effectiveness of responses to incidents, the ability to detect and respond to repeated behaviours, and for officers to effectively exercise due diligence. 	
OUTCOMES	



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7. I formed a reasonable belief that DFAT did not comply with its duties under the WHS Act and has contravened the following:
- a. WHS Act section 19 (1) - A person conducting a business or undertaking must ensure, so far as is reasonably practicable, the health and safety of:
 - i. workers engaged or caused to be engaged by the person.
 - ii. workers whose activities in carrying out work are influenced or directed by the person; while the workers are at work in the business or undertaking. Refer to the reasons set out in the compliance assessment.
8. I consider there were reasonably practicable measures available to minimise the risk, including the provision of a safe system of work that provided clear guidance and instruction for all workers to manage 'informal' allegations of unacceptable behaviour including bullying and harassment in the workplace.

Remedial actions

9. DFAT advised it was undertaking actions that would likely remedy the contravention outlined in the compliance assessment of this report. DFAT advised that following amendments to the *Sex Discrimination Act 1984* (**Respect@Work**) and the *Work Health and Safety Act 2011* (including psychosocial risk amendments), in August 2023 DFAT initiated a review of its ABHD policy aimed at improving management of unacceptable behaviour in the workplace and strengthening responsibilities of employees and managers. The review led to the development of the Unacceptable Workplace Behaviour policy (**UWB policy**).
10. Comcare will conduct a Verification Inspection (**VI**) within six months to verify implementation and confirm the approach has effectively resolved identified risks.

Information and advice

11. In developing its policy, DFAT made use of the Australian Public Service Commission *Handling Misconduct, A human resource manager's guide* (**the guide**). The guide acknowledges there is not always a clear distinction between a failure to meet performance standards and a failure to meet expected behaviours. The guide encourages agencies to take a 'targeted, proportionate, and restorative approach to behaviour that does not meet expectations, having regard to its nature and seriousness'. This is reflected in the differentiation between matters that warrant initiation of a code of conduct response and those that warrant a response under the agency's performance



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management framework. I encourage DFAT to consider adopting these terms, rather than using terms such as 'formal' and 'informal'.

12. Comcare draws DFAT's attention to their duties to consult, so far as is reasonably practicable, with workers and HSRs on work health and safety matters. Comcare encourages DFAT to share inspector reports, or to provide access to relevant content or information regarding hazards and associated risks, with their workers, including HSRs. DFAT must, so far as is reasonably practicable, 'consult with workers who carry out work for the business or undertaking who are, or are likely to be, directly affected by a matter relating to work health and safety' (s47).
13. Compliance with this duty may be assisted by sharing health and safety information from inspector reports with relevant workers and/or their representatives. DFAT should also note that HSRs are empowered to receive information relevant to their work groups, and that as a function of their role, may request access to inspector reports, or relevant information within them. Comcare encourages DFAT to have regard to their consultation duties, and to their obligations to HSRs under the WHS Act when responding to such requests (see s49, 70(1)(a), 70(1)(c), 71 and 79(3)).
14. Learnings regarding control measures as a result of the inspection should be applied across the organisation where applicable.

COMPLIANCE ASSESSMENT

15. I determined a site visit was not necessary to examine the allegation raised by the complainant. Information was obtained through the use of statutory powers.
16. Based on information reviewed, I noted the following:
 - a. The ABHD policy permits '*formal*' and '*informal*' methods for resolving allegations of bullying and harassment, however '*informal*' is not defined. The term '*informal*' itself introduces risks of people considering the response being outside the construct of the official conduct or performance management frameworks. The lack of clarity as to what an informal response entails could reasonably be expected to discourage workers from using the system. The policy also includes references to related processes that are similarly undefined (e.g. it permits managers to conduct '*informal inquiries*' in response to informal allegations). No guidance is given in the policy on the scope of an '*informal inquiry*', what information can be gathered and stored by the department, under what powers such an inquiry would be conducted, how the potential impact on affected parties is managed, what triggers escalation to a formal process, and



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what the rights of the affected parties are.

- b. The ABHD policy also lacks arrangements for assuring application of the policy and its requirements to informal allegations (e.g. reporting and oversight mechanisms of informal allegations that would ensure allegations are escalated when appropriate, responses are considered/proportionate, and responses are completed in a timely and effective manner). While a reasonable time frame is not defined, with no provision of oversight in relation to informal allegations, there appears to be a lack of a systematic approach to ensuring this important control is applied placing all involved persons at risk of psychosocial injuries.
- c. The ABHD policy indicates that *'informal'* resolution *'may'* be documented, but this is not a requirement. The potential lack of documentation and guidance on where such documentation should be stored, if recorded, restricts the ability of the PCBU to conduct oversight and assurance, and introduces secondary risks to workers (e.g. the ability for managers/supervisors to respond to challenges regards the appropriateness of their responses is limited, breaches of privacy, inability to conduct analysis of data to focus efforts to improve systems/individual behaviours).
- d. The ABHD policy does not contain guidance for those who may receive an allegation on what circumstances warrant escalation (e.g. criteria). It is not clear how, when and to whom an escalation from *'informal'* to *'formal'* may be required or actioned. The lack of such guidance places unnecessary stresses on managers/supervisors and risks inconsistent application with potentially detrimental outcomes.
- e. The ABHD policy identifies several areas from which a person may seek assistance or guidance regarding managing and/or reporting unacceptable behaviour. This includes seeking support from a supervisor/manager; Senior Administration Officer (**SAO**); HoM; HoP; Employee Conduct and Ethics Section; Workplace Bullying and Harassment, Employee Health and Safety Section; Staff and Family Support Office (**SFO**); or Diversity and Anti-Harassment Officers. Several of these sources of advice/support also process allegations. A series of risks arise from such an approach, including people mistakenly believing they have 'reported' the matter, moral injury to managers/supervisors who are unable to effectively resolve the matter because the person was only seeking advice/support, managers/supervisors using information obtained to initiate 'informal' actions that denies affected persons natural justice. I further note that when persons within the management chain (e.g. supervisor/manager, SAO/HoM/HoP) are approached for advice or support, the PCBU is aware of alleged inappropriate behaviour (i.e. risks to workers/others). At this juncture, the PCBU must initiate appropriate action to manage associated risks. I acknowledge that this



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approach is challenging, however differentiating between areas/persons that provide support, and those that provide organisational responses can resolve these risks.

- f. The ABHD policy permits reporting of unacceptable behaviour via multiple areas including the Workplace Bullying & Harassment, Employee Health & Safety Section; or Employee Conduct and Ethics Section. As noted above, these areas/persons are also able to receive requests for advice and support. These areas may also receive informal and formal issues. The policy does not clearly articulate how information is shared between these areas, and this risks inconsistent approaches.
 - g. The ABHD does not require the provision of natural justice/fairness when applying 'informal' responses. I acknowledge this is likely an oversight, given the policy does require it for formal responses. The omission of this statement, in combination with the lack of definition and guidance on what and how informal processes are applied, risks inadequate consideration of this important principle.
 - h. No central data collection point is identified in the policy for the management and storage of personal behaviours/complaints, to monitor trends and/or individuals whose behaviours are persistent and therefore require a more comprehensive response. This prevents DFAT from consistently and systematically considering past behaviours during appointment processes, which is exacerbated when there is no transition of this information between managers as people move within DFAT. This creates an opportunity for persons to behave in an inappropriate manner, for an extended period, and potentially across multiple departments/posts.
17. Considering the points above, I have formed a reasonable belief that the arrangements introduce risk to the psychological health and safety of workers at DFAT and that these risks could be either eliminated or reduced so far as reasonably practicable by adjusting the existing system.
18. The inspection is now closed however should an incident of a similar nature occur anywhere within the organisation in the future, Comcare will seek to confirm that DFAT has ensured the control measures are effective and are maintained so that they remain effective.



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REPORT ISSUED BY	Inspector	s 22(1)(a)(ii)
	Inspector ID number	s 22(1)(a)(ii)
	Email	s 22(1)(a)(ii)@comcare.gov.au
	Phone	s 22(1)(a)(ii)
	Date	10 January 2025
	Signature	s 22(1)(a)(ii)



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DISCLAIMER

This report contains information that may assist you to take steps regarding your obligations under the WHS Act. You must refer to the Commonwealth *Work Health and Safety Act 2011* (WHS Act) and the *Work Health and Safety Regulations 2011* (WHS Regulations) to understand your duties and obligations. Comcare's external website contains links to WHS legislation. Comcare does not accept liability for any errors or omissions or for any loss or damage suffered by you or any person which arises from your reliance on this report or for any breach by you of your obligations under the WHS Act. Where a Comcare inspector has inspected a particular workplace, it is not a representation by Comcare that the particular workplace is in any way free of hazards.

IF YOU DO NOT AGREE WITH A DECISION

If you disagree with the outcome of this inspection, you may seek an internal reconsideration of the inspector's decision. A request for a review should be sent to statutory.oversight@comcare.gov.au including any additional information or evidence you have to support your request. Comcare will review your request and advise of the outcome in writing within 20 business days.

If you would like to clarify any aspect of this report, you can contact the inspector directly.

Comcare has a range of publications and fact sheets to help explain your responsibilities and provide guidance to make your workplace safer. The Compliance and Enforcement Policy provides guidance as to how Comcare approaches regulation. To access these, visit our website.

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Your privacy is important to us. Comcare will only collect, use or disclose personal information in accordance with the Commonwealth *Privacy Act 1988* and if it is reasonably necessary for, or directly related to, one or more of our functions, powers and/or activities. These include functions and activities under the following Commonwealth legislation: *Safety, Rehabilitation and Compensation Act 1988*, the WHS Act, the *Seafarer's Rehabilitation and Compensation Act 1992*, and the *Asbestos related- Claims (Management of Commonwealth Liabilities) Act 2005*. If Comcare does not collect personal information from you, for the purposes of its legislated functions or related functions, we may not be able to respond appropriately.

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- the Safety, Rehabilitation and Compensation Commission
- a court or tribunal
- state or territory work health and safety regulatory agencies
- personnel engaged by Comcare to conduct research related activities
- enforcement agencies or bodies
- state and territory Coroners
- Commonwealth, state or territory industry regulators
- any other person assisting Comcare in the performance of its functions or exercise of its powers, including contractors and consultants
- any other person where there is an obligation under law to do so (for example but not limited to, responding to the direction of a court to produce documentation).

For further information on how Comcare handles personal information, please read the Privacy Policy on Comcare's website. To request a change to your personal information or to make a complaint, please phone or email privacy@comcare.gov.au.

www.comcare.gov.au | 1300 366 979



Australian Government
Australian Public Service Commission

Handling Misconduct

A human resource manager's guide





The Australian Public Service Commission acknowledges the traditional owners and custodians of Country throughout Australia and acknowledges their continuing connection to land, waters and community. We pay our respects to the people, the cultures and elders past, present and emerging.

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This document must be attributed as the *Handling Misconduct: A human resource manager's guide*.

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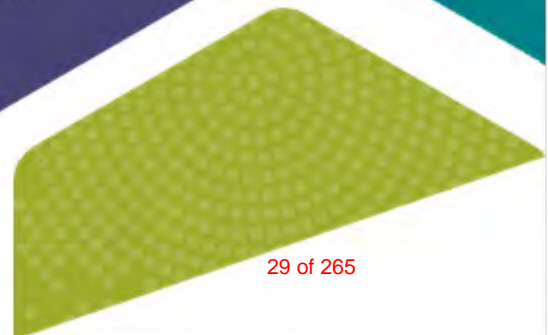
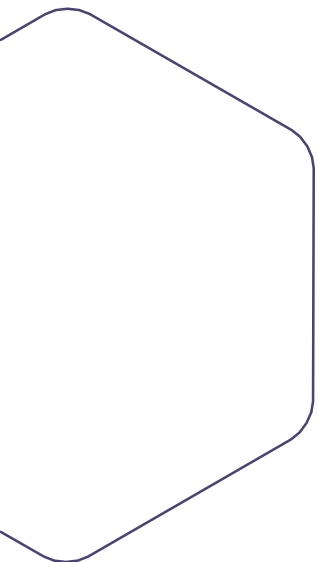
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Chapter 1

Introduction




Purpose

- 1.1. This guide is intended to assist Australian Public Service (APS) agencies to respond effectively and proportionately to employee conduct that does not meet expectations, consistent with the purpose of the APS conduct framework to maintain public confidence in the integrity of the APS.
- 1.2. It provides guidance on assessing the nature and seriousness of behavioural concerns to inform agency responses that address the specific conduct, seek to prevent recurrence, and uphold or restore public confidence in the agency or APS.
- 1.3. The guide also supports agencies to use data to improve their processes and practices in addressing conduct matters, and to identify and address systemic issues, with the aim of sustaining workplace cultures that operate within the highest professional and ethical standards.

Structure

- 1.4. This guide is structured as follows:
 - **Chapter 2** sets out the APS conduct framework—the Values, Employment Principles, and Code.
 - **Chapter 3** provides guidance on raising behavioural concerns and reporting suspected misconduct, and on the role of complainants.
 - **Chapter 4** provides a framework for preliminary consideration of behavioural concerns to help agencies assess the seriousness of an incident and decide on a proportionate response.
 - **Chapter 5** sets out options for agencies to manage less serious matters outside the misconduct process, having regard to the nature of the issue to be addressed.
 - **Chapter 6** sets out the legislative basis for misconduct action and key roles in a misconduct process.
 - **Chapter 7** sets out initial considerations in a misconduct process, including decisions about assigning different duties or suspending an employee, deciding the scope of an investigation, drafting allegations, and issuing a notice of investigation.
 - **Chapter 8** provides guidance on the investigative process and determining a breach, including gathering and evaluating evidence, procedural fairness obligations, and recording and advising of a determination.
 - **Chapter 9** sets out the available sanctions and the factors to be considered in making a sanction decision.

- **Chapter 10** provides guidance on misconduct action that can intersect with other considerations, including criminal matters, employee movement or separation, Machinery of Government changes, and probation.
- **Chapter 11** sets out review rights for employees and former employees found to have breached the Code.
- **Chapter 12** provides guidance on requirements for recordkeeping and managing information relating to misconduct, including retention periods, access to records, and considering prior misconduct in selection processes.
- **Chapter 13** provides guidance on using conduct data to improve agency processes, identify systemic issues, and support a culture of integrity.

 **The Appendices provide further information, including guidance on the elements of the Code and the application of the Code to statutory office holders.**

Abbreviations and terminology

Abbreviations

Common terms

1.5. The following abbreviations for common terms are used throughout this guide:

'APS'	The Australian Public Service
'Code'	The APS Code of Conduct set out in s.13 of the PS Act
'Commission'	The Australian Public Service Commission
'Commissioner'	The Australian Public Service Commissioner
'Employment Principles'	The APS Employment Principles set out in s.10A of the PS Act
'MPC'	The Merit Protection Commissioner
'SES'	The Senior Executive Service
'Values'	The APS Values set out in s.10 of the PS Act

Legislation

- 1.6. The following abbreviations are used for legislation frequently referred to in this guide:

'ADJR Act'	<i>The Administrative Decisions (Judicial Review) Act 1977</i>
'Archives Act'	<i>The Archives Act 1983</i>
'Commissioner's Directions'	<i>The Australian Public Service Commissioner's Directions 2022</i>
'Fair Work Act'	<i>The Fair Work Act 2009</i>
'FOI Act'	<i>The Freedom of Information Act 1982</i>
'Privacy Act'	<i>The Privacy Act 1988</i>
'PGPA Act'	<i>The Public Governance, Performance and Accountability Act 2013</i>
'PID Act'	<i>The Public Interest Disclosure Act 2013</i>
'PS Act'	<i>The Public Service Act 1999</i>
'PS Regulations'	<i>The Public Service Regulations 2023</i>
'WHS Act'	<i>The Work Health and Safety Act 2011</i>

Terminology

- 1.7. Terms used in this guide have the same meanings as set out in the PS Act (s.7) and subordinate legislation. Where the legislation does not define specific terms, they have the following meanings:

‘Alleged misconduct’	A circumstance where a person has been notified that they are the subject of an investigation under agency s.15(3) procedures to determine whether they have breached the Code . (Distinct from suspected misconduct .)
‘APS conduct framework’	The combined conduct requirements in the Values, Employment Principles, and Code .
‘Assignment of duties’	The action of an agency head, under s.25 of the PS Act , in determining the duties of an employee and the place or places where the duties are to be performed. The power to assign duties under s.25 of the PS Act can be used as a management action as needed. Assignment of duties is distinct from ‘re-assignment of duties’, which is one of the sanctions available under s.15(1) of the PS Act.
‘Breach’	A failure to comply with the Code , as determined in accordance with an agency’s s.15(3) procedures .
‘Breach decision-maker’	The person appointed or authorised under an agency’s s.15(3) procedures to determine whether or not an APS employee or former employee has breached the Code .
‘Determination’	A decision made by the breach decision-maker under an agency’s s.15(3) procedures about whether an APS employee or former employee has been found to have breached the Code .
‘Employee’	A person employed under the PS Act. Used interchangeably with ‘APS employee’ as defined in s.7 of the PS Act.

'Ethics Advisory Service'	The Commission's Ethics Advisory Service, which provides information, policy advice, and guidance on the application of the APS conduct framework, and on options, considerations, and strategies to help APS employees and agencies work through ethical issues and dilemmas and make sound choices.
'Former employee'	A person who was, but is no longer, an APS employee; a person who has separated from the APS.
'Human Resources' or 'HR'	A broad term used to refer to an agency's people management, corporate management, conduct, or integrity areas or practitioners.
'Misconduct'	Conduct by a person while an APS employee that is determined under an agency's s.15(3) procedures to be in breach of the Code. Before such a determination is made, the conduct is referred to as ' suspected misconduct ' or ' alleged misconduct '.
'Misconduct action'	Also ' misconduct process '. Refers to the range of processes and decisions that an agency carries out consistent with its s.15(3) procedures .
'Misconduct investigation'	An investigation of an alleged breach of the Code in accordance with agency s.15(3) procedures .
'Movement'	A voluntary move of an ongoing employee between agencies under s.26 of the PS Act .
'Must'	Used where an action is a requirement in the PS Act, PS Regulations, Commissioner's Directions , or another law.
'Person under investigation'	An employee or former employee who is the subject of a misconduct process .
'Public interest disclosure'	A disclosure made under the PID Act .

‘Section 15(3) procedures’	Also ‘s.15(3) procedures’ . The procedures established by an agency head in accordance with s.15(3) of the PS Act for determining whether an employee or former employee in the agency has breached the Code , and the sanction , if any, that is to be imposed on an employee where a breach of the Code has been determined.
‘Sanction’	One of the actions set out in s.15(1) of the PS Act .
‘Sanction decision-maker’	A person to whom an agency head has delegated their power to impose a sanction under s.15(1) of the PS Act .
‘Should’	Indicates good practice.
‘Suspected misconduct’	A circumstance where there is a concern that a person may have behaved in a way that is not consistent with the Code , but no investigation has commenced. (Distinct from ‘alleged misconduct’ .)
‘Suspension’	The action of standing an employee down from their duties while a misconduct process takes place, as set out in s.28 of the PS Act and s.14 of the PS Regulations .
‘Suspension decision-maker’	A person to whom an agency head has delegated their power under s.28 of the PS Act and s.14 of the PS Regulations to decide whether an employee should be suspended from duty.

Further information

- 1.8. Further information on the APS conduct framework is available from the Ethics Advisory Service on 02 6202 3737 and ethics@apsc.gov.au.

Legal advice on the PS Act

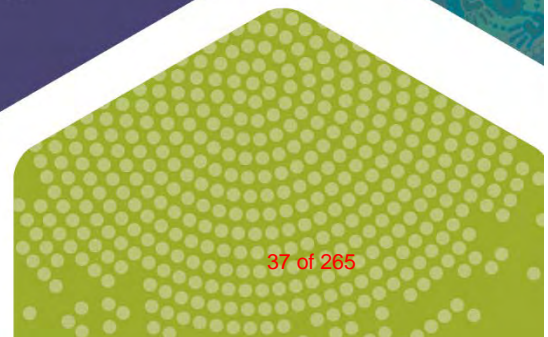
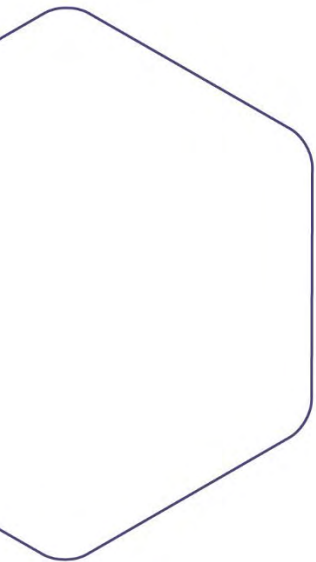
- 1.9. Agencies are asked to contact the Legal Services Team in the Commission at legal@apsc.gov.au when obtaining legal advice on the PS Act.
- 1.10. This is consistent with agencies' obligations under clause 10 of the *Legal Services Directions 2017*, which include consulting on the request for advice, consulting on the finalised advice, and providing a copy of the advice.

Disclaimer

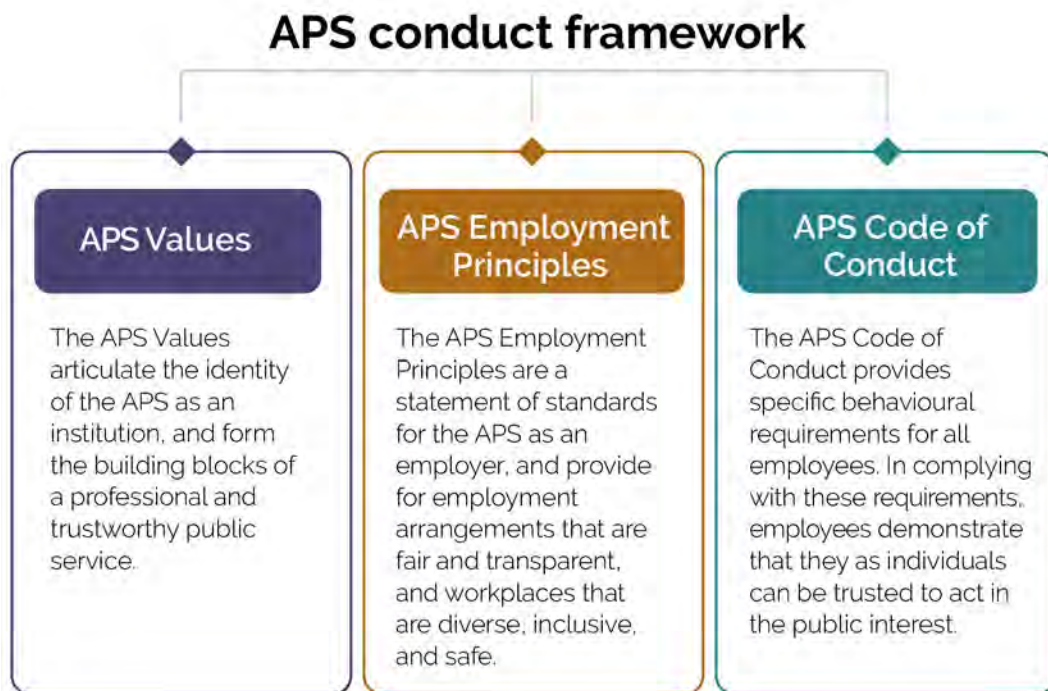
- 1.11. The Commission has used its best endeavours to ensure the accuracy of the material at the time of writing, and will update the document from time to time. However, the Commission is unable to guarantee that this guide is complete, correct and up-to-date, or that it is relevant to the particular circumstances of any matter. Agencies may wish to consider obtaining legal advice before making a decision if they are uncertain of their obligations.

Chapter 2

The APS Conduct Framework



- 2.1. Trust is at the heart of public service. In Australia's democratic system, the government is trusted to represent the community and act in its best interests, and is accountable to it at elections. The APS, in turn, is trusted to serve the public good by advising the elected government and implementing its policies professionally and impartially.
- 2.2. To earn the trust of the community, the government, and the parliament, the APS and its employees are required to meet high standards of integrity and conduct. For the APS as an institution, these are expressed in the Values and Employment Principles; for individual employees, they are also distilled in the elements of the Code. Among other things, the Code requires employees at all times to behave in a way that upholds the Values and Employment Principles, and the good reputation of their agency and the APS.
- 2.3. Together, the Values, Employment Principles, and Code make up the APS conduct framework. They set a consistent high standard of performance and behaviour for each public servant, every agency, and the entire institution of the APS.



The APS Values

- 2.4. The Values are set out in s.10 of the PS Act. They articulate the identity of the APS as an institution, and form the building blocks of a professional and trustworthy public service.
- 2.5. The Commissioner's Directions (ss.13–17) explain the scope and application of the Values. These provisions set out what is required of each employee, having regard to their duties and responsibilities, in upholding each of the Values.
- 2.6. Among other things, these requirements include the following under the 'Ethical' Value (s.14 of the Commissioner's Directions), which are especially relevant to the consideration, reporting, and management of employee conduct matters:
 - acting in a way that models and promotes the highest standard of ethical behaviour
 - having the courage to address difficult issues
 - acting in a way that is right and proper, as well as technically and legally correct or preferable
 - reporting and addressing misconduct and other unacceptable behaviour by public servants in a fair, timely, and effective way.


APS Employment Principles

- 2.7. The Employment Principles are set out in s.10A of the PS Act. They are a statement of standards for the APS as an employer, and provide for employment arrangements that are fair and transparent, and workplaces that are diverse, inclusive, and safe.

Effective performance


- 2.8. Among other things, the Employment Principles require effective performance from each employee (s.10A(1)(d) of the PS Act). The Commissioner's Directions set out the obligations of employees, supervisors, and agency heads in achieving effective performance (ss.51, 50 and 49 respectively). These provisions recognise that behaviour and performance are closely linked, and make clear that the way in which employees and agencies work is just as important as what they deliver.
- 2.9. The provisions relating to employees and supervisors include behavioural elements, and those relating to agency heads include establishing clear expectations and fair processes to enable effective performance by employees.

- 2.10. Where an employee has engaged in behaviour that raises concerns about their performance or their conduct, s.52 of the Commissioner's Directions requires agency heads to have regard to standards and guidance issued by the Commissioner if they are considering a misconduct investigation in relation to the matter.

 **These standards and guidance are set out in Chapter 4 of this guide.**

A fair system of review

- 2.11. The Employment Principles also provide that the APS makes fair employment decisions with a fair system of review (s.10A(1)(a) of the PS Act). Section 33 of the PS Act provides for employees to seek review of actions and decisions relating to their employment, including the right to seek independent review by the MPC of a breach determination or a sanction decision they believe to be unfair, unreasonable, or otherwise flawed.

 **Further information about this review right, and the role of the MPC, is set out in Chapter 11.**

The APS Code of Conduct

- 2.12. The Code is set out in s.13 of the PS Act and s.7 of the PS Regulations.
- 2.13. The Code provides specific behavioural requirements for all employees. In complying with these requirements, employees demonstrate that they as individuals can be trusted to act in the public interest.

Who is bound by the Code?

All APS employees engaged under the PS Act

- 2.14. This includes ongoing and non-ongoing employees, SES employees, and heads of overseas missions (ss.7, 13, and 39 of the PS Act). It generally does not apply to locally engaged employees in overseas missions—these employees may seek advice from their head of mission about applicable conduct requirements if in doubt.
- 2.15. In addition:
- **The Code extends to behaviour when applying for employment in the APS**
Under s.15(2A) of the PS Act, an employee can be found to have breached the Code if they provided false or misleading information, wilfully failed to disclose relevant information, or otherwise failed to act with honesty and integrity in connection with their engagement.

- **Former employees can be found to have breached the Code**

APS agencies may investigate the conduct of an individual who is no longer an employee, and determine a breach, if the conduct took place when the person was an APS employee.

All APS agency heads

- 2.16. This includes secretaries of departments, heads of executive agencies, and heads of statutory agencies (s.14 of the PS Act).

Some statutory office holders

- 2.17. The Code applies to certain statutory office holders to the extent that they supervise or have a day-to-day working relationship with employees (s.14 of the PS Act and s.8 of the PS Regulations).

 **More information is in Appendix 1.**

Additional obligations of SES and agency heads

- 2.18. In addition to their personal obligation to uphold the Values and Employment Principles, and comply with the Code, agency heads and SES employees have broader duties as role models and advocates of APS integrity.
- Agency heads are required to uphold and promote the Values and Employment Principles (s.12 of the PS Act).
 - SES employees are required, by personal example and other appropriate means, to promote the Values and Employment Principles and compliance with the Code (s.35(3)(c) of the PS Act).

Conduct requirements for contractors

- 2.19. Individuals who perform work for the APS on a contractual basis are not APS employees under the PS Act, and are subject to the arrangements in their contracts. Agency s.15(3) procedures do not apply to contractors. It is open to agencies to embed specific conduct requirements in contracts, including requirements that are broadly equivalent to those of the Code, having regard to the nature of the work to be performed.
- 2.20. Agencies should ensure that contractors in roles that are equivalent to SES positions understand their ethical obligations, including the expectation to model and promote the highest standards of integrity in the unique context and operating environment of the APS. SES-equivalent contractors should be held to standards of behaviour similar to those set out in the Code.

- 2.21. If in doubt, agencies or contractors should seek their own legal advice on the application and enforcement of these standards.

Agency-specific conduct requirements

- 2.22. Some agencies choose to promote their own set of expected behaviours. For example, agencies may identify specific behavioural standards for employees based overseas, or in cases where the agency has both APS and non-APS employees.
- 2.23. These standards apply in addition to the Code, rather than replacing it. When an employee does not comply with an agency-based set of expected behaviours, the agency needs to be able to link the conduct in question to a particular element of the Code if it is to form the basis for misconduct action. For example, where an agency-based set of behaviours constitutes a lawful and reasonable direction by the agency head to all employees in the agency, an infringement can be enforced if it is a breach of s.13(5) of the PS Act.

Scope of the Code

- 2.24. Some elements of the Code explicitly apply 'in connection with employment'; in others, a connection is implied; while still others apply 'at all times'. There is a limit to the extent to which agencies can take action in response to employees' private behaviour—a reasonable connection is needed between the behaviour and the employee's APS employment.



Information about each element of the Code is in Appendix 2.

In connection with APS employment

- 2.25. The term 'in connection with employment' is not confined to the performance of job-related tasks or other conduct in the course of employment. Employees are required to abide by the Code when engaged in activities outside work hours and away from the workplace where there is reasonable connection with their APS employment. This includes, for example, on work-related travel, during training, or at work social events such as Christmas parties.

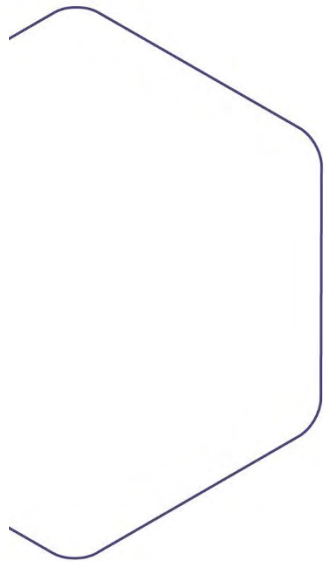
At all times

- 2.26. APS employees are entitled to a private life. However, the Code may apply to behaviours that, on their face, appear to be largely private.
- 2.27. The term 'at all times' is used in s.13(11) and s.13(12) of the PS Act, and provides for broader application to conduct outside of work hours than most other elements of the Code.

- 2.28. Under s.13(11), employees must at all times uphold the Values and Employment Principles and behave in a way that upholds the integrity and good reputation of their agency and the APS. This means that APS employees' behaviour outside work is subject to the Code to the extent that:
- it could reasonably be viewed as failing to uphold the integrity and good reputation of the employee's agency or the APS, or
 - it could reasonably call into question the employee's capacity to comply with the Values and Employment Principles in their work—for example, their ability to be impartial or respectful.
- 2.29. Under s.13(12) of the PS Act, APS employees on duty overseas must at all times behave in a way that upholds the good reputation of Australia. An employee on duty overseas, who is on a posting or travelling for work purposes, is representing Australia and may be identifiable as an Australian Government employee even when not undertaking official duties. This means that a broad range of activities by an APS employee while overseas on duty may fall within the provisions of the Code.

Chapter 3

Raising behavioural concerns and reporting suspected misconduct



- 3.1. The Commissioner's Directions provide that upholding the 'Ethical' Value requires each employee, having regard to their duties and responsibilities, to report and address misconduct and other unacceptable behaviour by public servants in a fair, timely, and effective way (s.14(f) of the Commissioner's Directions).
- 3.2. This means that every employee has, at a minimum, an obligation not to ignore concerning behaviour by others. To enable employees to meet this obligation, agencies should foster a culture in which employees feel empowered to raise concerns and confident that they will not be penalised for doing so in good faith. Employees should be able to expect their concerns to be taken seriously and addressed in an appropriate, timely, and proportionate way.

Options for raising concerns

- 3.3. The PS Act does not provide for a specific statutory reporting mechanism. Agencies may have a range of avenues for their employees to raise concerns about behaviour, report suspected breaches of the Code, or make public interest disclosures. Such avenues may include:
 - line managers
 - harassment contact officers (while they cannot accept reports or complaints, these officers can provide advice on options available to employees for dealing with concerns, including avenues for reporting suspected misconduct)
 - central conduct or integrity units
 - nominated individuals or teams in HR, including employee advice units or hotlines, or fraud prevention and control units or hotlines
 - email reporting addresses
 - 'authorised officers' who receive public interest disclosures.
- 3.4. Agencies should ensure employees are aware of these options and have easy access to them.
- 3.5. Agencies should also ensure that employees understand that 'reporting' concerning behaviour can be as simple as an informal conversation, and will not automatically trigger a formal investigation. Employees may be more comfortable raising concerns if they can do so relatively informally in the first instance.

- 3.6. Agencies may wish to provide guidance to employees on what to do if they have witnessed concerning behaviour. This may include:
- making notes about what they have seen or heard (as close to verbatim as possible)
 - keeping any relevant documents and not making any written annotations on them
 - reporting the matter through the appropriate channels but otherwise keeping it confidential.

Complainants: role and considerations

- 3.7. Generally, the role of a person making a complaint or report of concerning behaviour is to bring the matter to the agency's attention, and, in a formal investigation, to cooperate as a witness.
- 3.8. It is not the complainant's role to decide how their complaint will be addressed, including whether misconduct action will be taken. However, it is not uncommon, or in itself unreasonable, for a complainant to have preferences about the handling of their complaint, especially if they have been personally affected—for example, if they have alleged bullying or harassment. A complainant may, for instance, prefer a matter to be handled informally if they simply would like the behaviour to stop—or, conversely, they may believe the behaviour to be so serious that it can only be addressed through formal misconduct action. In such cases, the complainant's views may be taken into account, but should not determine the agency's response. Agency decisions should have regard to factors such as the apparent seriousness of the reported conduct, the availability of prima facie evidence, the agency's statutory obligations (such as those under the WHS Act or the PID Act), and the potential impact on public confidence in the APS.
- 3.9. Whether or not an agency's response to a complaint aligns with the complainant's wishes, agencies should consider the support that can be offered to the complainant. Agencies may, for example, nominate a contact person in HR to provide information to the complainant and answer questions; or facilitate access to the Employee Assistance Program, or, where necessary and practicable, to specialised counselling or support targeted to the complainant's needs.
- 3.10. Where an agency decides to start a misconduct process, it is not obliged to provide the complainant with progress reports of the investigation, though it may be reasonable to advise the complainant that an investigation is taking place and that they will be informed when it has concluded.
- 3.11. In some cases, a complainant may be entitled to seek review, under the review of action scheme in s.33 of the PS Act, of an agency's response to their complaint—including a decision not to start a misconduct investigation. A decision is more likely

to be reviewable if it directly affects the complainant's APS employment—for example, if the complaint relates to alleged bullying or harassment which the complainant believes is unresolved.

Protecting complainants and witnesses

- 3.12. Agencies should ensure they have measures in place for protecting complainants and witnesses from adverse consequences of coming forward with concerns or information, and should ensure complainants and witnesses are made aware of these, and of the support available to them.

Anonymity and confidentiality

- 3.13. Some employees may be concerned that reprisal action will be taken against them as a result of raising concerns or reporting suspected misconduct. For this reason, they may make reports anonymously, or ask that their identity be kept confidential.

Anonymous reports

- 3.14. Agencies are encouraged to provide avenues for anonymous reporting, as this can bring to light behavioural concerns that might not otherwise become apparent.
- 3.15. There may be limits to the extent to which anonymous reports can be investigated and addressed, and agencies should explain this to anonymous complainants where possible. Agencies should carefully consider how an anonymous complaint can be considered or investigated, including the available relevant information and avenues of inquiry. Where an agency has exhausted available lines of inquiry, it may be reasonable to decide that no further action will be taken. It may be appropriate to inform the complainant, where contact information is available, that inquiries have been made to the extent possible, but that without identifying the complainant no further action can be taken.
- 3.16. That said, even if no further action can be taken on an individual matter, the report can assist agencies in identifying relevant trends and patterns.

 **More information about this is in Chapter 13.**

Confidentiality

- 3.17. In some cases, a complainant will make their identity known to the agency, but request that it not be disclosed further.
- 3.18. While agencies may undertake to maintain confidentiality to the extent possible, it can often be necessary to reveal the identity of the complainant or a witness in order to provide the person under investigation with the information they need to respond fully to the allegations. In some cases, identities may become apparent simply by virtue of the nature of the complaint.

- 3.19. As well, even if an agency considers that it is not necessary to reveal identities of complainants and witnesses during the course of its own investigation, identities may be revealed on review by the MPC or the Fair Work Commission, in related criminal proceedings, or in the context of a legal challenge to the decision.
- 3.20. This means it is advisable for agencies to notify complainants and individuals who provide witness statements that the agency will seek to keep their identity confidential as far as practicable, but cannot give any guarantee of confidentiality. Agencies should advise complainants at the outset of how information about their complaint and their identity will be dealt with, and of any potential limitations on the ability to keep their identity confidential. Limits may apply, for example, if the recipient of the information is subject to reporting obligations, or if information needs to be provided to the person under investigation if an investigation is pursued.

Protection from reprisal

- 3.21. Employees who make allegations of misconduct are protected from reprisal. Retaliation against someone who has made a complaint in good faith could be a potential breach of a number of elements of the Code, including the requirements to:
- behave with integrity in connection with employment
 - comply with all applicable Australian laws
 - treat everyone with respect and courtesy, and without harassment.
- 3.22. In general, these protections also extend to witnesses in misconduct investigations.
- 3.23. Employees and witnesses may feel more confident about providing evidence in misconduct processes if they are assured that an assessment has been made of the risk of retaliation, or other adverse outcomes, and that the agency has taken steps to mitigate these risks.
- 3.24. Agency guidance material should therefore provide assurance that employees who report in good faith will be protected from reprisal, and should have in place strategies for ensuring this. Mitigation strategies should be proportionate to the type and level of risk identified, and may include:
- issuing a direction to an employee about whom a complaint has been made regarding their behaviour towards the complainant and witnesses, including not entering into discussions about the incident with the complainant or others
 - arranging for a person under investigation to be temporarily assigned duties in another location during the misconduct process, without appearing to prejudge the matter

- assigning the complainant or witness other appropriate duties in another location, while ensuring that this is not perceived as a reprisal in itself
- developing and implementing a specially tailored protection plan in circumstances where there is a real risk to the physical security of employees, their families, or property
- taking steps to ensure the fairness of employment decision-making affecting the complainant or witnesses, where there is a risk these may be influenced (or be perceived to be influenced) by the making of the complaint or by the person who is the subject of the complaint—such as appointing an independent member to the selection committee for any selection exercise in which they are a candidate.

3.25. In cases where suspected misconduct is reported under the PID Act, agencies must take into account the specific protections in the PID Act for disclosers, and should seek legal advice if in doubt.

Informing complainants of the outcome of their complaint

- 3.26. In deciding what information to provide to a complainant about the outcome of their complaint, agencies need to balance the right to privacy of the person about whom the complaint was made with the complainant's legitimate interest in knowing that the agency has dealt properly with the matter.
- 3.27. Balancing these interests and obligations can be a matter of careful judgement, taking into account all the circumstances of a given case. Agencies should ultimately have regard to the need to maintain confidence in the integrity of the APS.
- 3.28. In this context, agencies should consider the information that may appropriately be disclosed in order to provide reasonable assurance that they:
- have an interest in maintaining proper standards of conduct
 - act with transparency in upholding the integrity of the APS
 - take misconduct allegations seriously
 - impose appropriate and proportionate sanctions where a breach has been found
 - take appropriate steps to ensure unacceptable behaviour will not recur.
- 3.29. When disclosing information to an APS employee, an agency may direct the employee not to disclose the information further, in order to protect the privacy of the person about whom the complaint was made, and, where relevant, the integrity of an investigation.

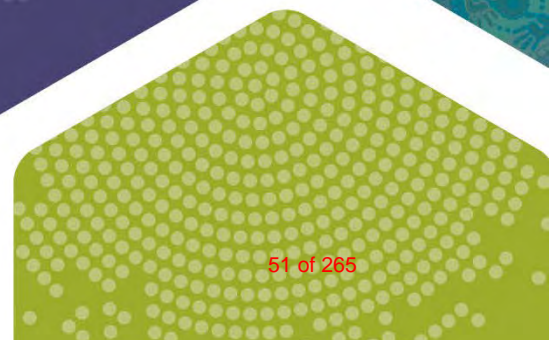
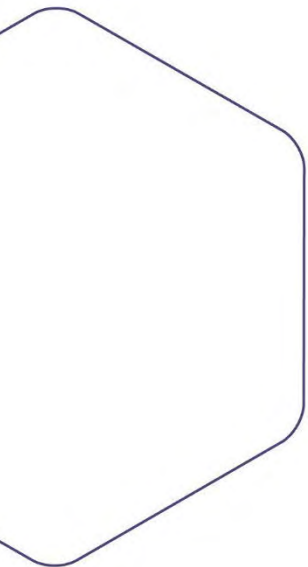
- 3.30. When disclosing information to a complainant who is not an APS employee, an agency may request that the information not be circulated further, but should be mindful of the risk of the information being distributed more widely than intended. This should not preclude agencies from lawfully disclosing information—however, agencies should carefully balance risks to an employee’s privacy and reputation against the need for transparency in these circumstances.

Vexatious or misconceived complaints

- 3.31. Some allegations of misconduct may be misconceived or without substance, or may have been made vexatiously. Where an agency has concerns about the way, or the circumstances, in which a complainant has reported suspected misconduct, it should take steps in the first instance to find out more. The cause may be a misunderstanding that can be remedied relatively simply—or instead might indicate a more serious concern, such as an interpersonal dispute or dissatisfaction with a performance management process, which may need to be managed in a specific way.
- 3.32. In some cases, it may be appropriate to advise an employee that making a frivolous or vexatious report of suspected misconduct could in itself be inconsistent with the Code—or to issue a direction to the employee in relation to making complaints. Care should be taken in the wording of such directions to ensure they do not impose limits on employees’ statutory rights to make complaints or reports, including public interest disclosures, or to seek reviews of action. If in doubt, agencies should seek legal advice to ensure the direction is lawful and reasonable.

Chapter 4

When behaviour doesn't meet expectations: preliminary considerations



- 4.1. The integrity of the APS is built on the integrity of every employee. If an employee's behaviour does not meet the required standard, it can undermine trust in the APS as a whole—and work will need to be done for that trust to be restored.
- 4.2. At the same time, confidence and trust in the APS can be influenced as much by an agency's response to an employee's behaviour as by the behaviour itself. This means that the response should be proportionate, specific to the nature of the conduct, and aimed at restoration—be that of the reputation of the agency or APS, workplace relationships and morale, or employee productivity and capability.
- 4.3. A formal misconduct process is one option available to agencies when behaviour does not meet expectations, but it will not be a suitable or proportionate response in every case. As such, the preliminary consideration of a conduct concern should be broader than a decision about whether or not to take misconduct action: it should, instead, take the form of a diagnosis of the issue and the formulation of a tailored response that addresses the behaviour in context.
- 4.4. Gathering further evidence to inform a decision about how to proceed is distinct from the process in a misconduct investigation of establishing facts on the balance of probabilities. Preliminary fact-finds do not establish whether the alleged conduct occurred, and should be undertaken only to the extent necessary for the agency to make a sound decision about how the matter should be handled.
- 4.5. Agencies should ensure this process of assessment and deliberation is kept as short as possible without compromising the quality of the work undertaken, and should seek to avoid duplicating a misconduct investigation prior to deciding whether to notify the employee of an alleged breach of the Code.
- 4.6. Agencies should be mindful that preliminary investigations or assessments, fact-finds, or other formal investigative processes that include, for example, terms of reference, interviewing witnesses and taking statements, and developing a report with recommendations, may attract procedural fairness obligations and can be subject to review or legal challenge.

Understand the circumstances

- 4.7. Where an employee appears not to be meeting the standards expected of them, action needs to be taken to understand the nature and context of the behaviour to inform an effective response.

- 4.8. While a single incident or allegation may indicate improper behaviour by an individual, consideration should also be given to factors that might have led to or underpinned the behaviour, and which may need to be addressed to prevent recurrence, support workplace harmony, or maintain or restore public confidence in the APS. These factors may be:
- **Personal**—an incident may indicate that an employee needs additional support, training, or supervision, or that issues outside work may be affecting their behaviour that need to be addressed either with agency support (such as referral to the Employee Assistance Program or use of flexible work arrangements), or, if this is not appropriate or possible, outside the work context.
 - **Interpersonal**—an incident of poor behaviour by an individual may arise from a dispute between employees, and could indicate relationships that need to be repaired or managed with agency support or intervention.
 - **Institutional**—an individual’s behaviour may indicate systems, practices, or norms that do not support employees to meet their behavioural obligations. In such cases, institutional or cultural change may be needed.
- 4.9. In some cases an employee’s behaviour may be so serious, or its impact so severe, that it would be appropriate for an agency to take misconduct action notwithstanding these additional factors. In such cases, it may be appropriate to take other management or restorative action in addition to the misconduct process—for example, to mend workplace relationships or address systemic issues.

Conduct or performance?

- 4.10. In the APS, performance is understood to be more than the completion of assigned tasks and duties—effective performance lies not only in *what* we do but also in *how* we do it. As such, agencies are expected to embed behavioural requirements in employees’ performance expectations—for example, by including in performance agreements statements of how an employee will demonstrate aspects of the Values, Employment Principles, and Code in undertaking their duties.
- 4.11. The overlap between conduct and performance expectations means that there will not always be a clear distinction between a failure to meet performance standards and a failure to comply with expected behaviours. As discussed throughout this guide, agencies should take a targeted, proportionate, and restorative approach to behaviour that does not meet expectations, having regard to its nature and seriousness.

- 4.12. For this reason, this chapter as a whole should be considered the ‘relevant standards and guidance’ referred to in s.52 of the Commissioner’s Directions, which requires agencies to have regard to such standards and guidance when considering conduct that may relate to an employee’s effective performance or to potential breaches of the Code.



See ‘Performance management’ for information on addressing lower-risk performance issues.

Does intent matter?

- 4.13. The Code does not use words such as ‘wilful’, ‘reckless’ or ‘negligent’ to qualify behaviour, and, generally speaking, intent does not need to be shown to determine that an employee has breached the Code. It can, for example, be inconsistent with the Code to act without respect and courtesy even if the employee did not intend to be disrespectful or discourteous. However, at the preliminary stage of considering conduct that appears not to meet expectations, it is reasonable for agencies to have regard to intent among other factors in deciding on a proportionate response.
- 4.14. Conduct that is the result of an honest and reasonable mistake, accident, or a lack of capability can generally be addressed through process improvements or management action such as training, performance management, or counselling. On the other hand, behaviour by an employee that is within their control—for example, a wilful refusal to follow lawful and reasonable directions, or a blatant disregard for expected behavioural standards—may be better dealt with through misconduct action.

Health conditions and disability

- 4.15. A health condition or disability does not exempt an employee from the requirements of the APS conduct framework. At the same time, where a health condition or disability is, or appears to be, affecting an employee’s behaviour, agencies should exercise sensitivity and care in their response.
- 4.16. Different considerations may apply depending on the interaction between a health condition or disability and an employee’s conduct—for example:
- where behaviour is caused or exacerbated by a health condition or disability
 - where a manager notices unusual patterns of behaviour in an employee who has not disclosed a health condition or disability
 - where an employee has disclosed a health condition or disability, but there is no apparent causal link between the disclosed condition and their conduct

- where a health condition or disability may affect the employee's capacity to change their behaviour, engage constructively with management action, or participate in a misconduct process.
- 4.17. Wherever possible, these situations should be addressed in the first instance through a sensitive conversation between the employee and their manager. Agencies should ensure that managers have the capability and support to do this well. Such conversations should seek to clarify the situation, identify the employee's needs and the support the agency can provide (including reasonable adjustments), and confirm the employee's understanding of the behavioural standards expected of them.
- 4.18. Depending on the circumstances, the agency may seek the employee's consent to engage with their treating healthcare professional to inform an appropriate and safe approach to ensuring behaviour meets the expected standard. There may be cases where the most effective and suitable response is to work with the employee and their treating doctors to assist the employee to manage the impact of their condition or disability on the workplace.
- 4.19. In some circumstances, it may be appropriate for the agency to refer an employee for an independent medical assessment, consistent with **s.11** of the PS Regulations. This can help ensure the agency has a clear understanding of the nature of the condition, and its impact on an employee's behaviour, in order to inform an appropriate response.

Assess the seriousness

- 4.20. As a general principle, the more serious the alleged behaviour or the greater its potential impact on public confidence in the APS, the more likely it is that misconduct action will be appropriate. In assessing this, agencies should consider how the behaviour would be viewed by a reasonable member of the community, having regard to factors such as those below. This assessment does not require the behaviour actually to be known to the community, or to demonstrably have undermined confidence in the APS, at the time of the assessment. Rather, agencies should consider whether the behaviour is capable on its face of undermining trust in the APS, from the perspective of a reasonable observer.

Factors to consider

Seniority

- 4.21. The more senior an employee, the greater the impact their behaviour can have on public confidence in the integrity of the APS. Senior employees are expected to exercise a greater degree of judgement, and to model expected behaviours. They occupy a greater position of trust, and consequently are held to the highest standards of accountability.
- 4.22. SES employees in particular have an obligation to uphold and promote the Values, Employment Principles, and Code, by personal example and other appropriate means. An agency's response to concerns about the conduct of SES employees should have regard to these additional obligations, and to the greater impact of the conduct of SES employees on public confidence in the APS. Consistent with this principle, agencies are required under s.62 of the Commissioner's Directions to consult the Commissioner on SES conduct matters.

Role

- 4.23. Agencies should consider whether the nature of the conduct, if proved, would reasonably call into question the employee's ability to perform their current duties.
- 4.24. This can have regard to any specific expectations, job requirements, or ethical standards that apply to the role, such as the obligations that attach to legal or procurement positions. As well, if the employee is a subject matter expert, there may be greater impact on public confidence if they appear to have provided misleading information about their area of expertise, or to have used inside information or expert knowledge for personal gain, or to the benefit or detriment of others.

Nature and extent of conduct

- 4.25. The greater the extent to which the conduct appears to fall outside expected standards of behaviour, the more likely it is to undermine public confidence in the APS. For example, sustained and large scale fraud is more likely to undermine confidence than a single angry outburst.
- 4.26. Agencies should also consider whether a specific incident appears to form part of a pattern of behaviour or follows previous remedial action, or whether the employee has shown, through their behaviour, that they are unlikely to respond constructively to management action.

Unconscious bias

- 4.27. Agency assessments of the seriousness of employee conduct should take into account the impact of unconscious bias. Unconscious bias, or implicit bias, refers to

the assumptions and associations that influence a person's judgements of others, without the person's conscious awareness of this taking place.

4.28. It may not be possible for anyone to be entirely free from unconscious bias— however, awareness of its nature and effects can assist in overcoming its influence and help ensure decisions are made fairly.


4.29. Different types of unconscious bias can affect decisions—for example:

- **In-group bias** can lead to assessments and decisions that are more favourable towards people who are similar to the decision-maker in attributes such as gender, culture or background, experience, interests, or personality.
- **Anchoring bias** can cause decision-makers to rely on information or beliefs they associate with the situation at hand, but which are actually irrelevant—for example, where a decision-maker has managed 'someone like this' previously with a poor outcome.
- **Confirmation bias** can lead to decisions that take account of information that conforms to existing beliefs and discounting information which does not.
- **Availability bias** can cause decision-makers to rely disproportionately on readily available information and data, rather than seeking out and utilising all available and relevant information.
- **The bandwagon effect** can lead decision-makers to be influenced by the behaviour of others to make decisions that do not accord with the circumstances of the particular case.

Respond proportionately

4.30. Public confidence in the APS is maintained not only by the conduct of its employees, but also by their agencies responding reasonably and proportionately to behaviour that falls outside expected standards. Managing inappropriate behaviour promptly and proportionately also supports a safe, harmonious, and productive workplace.

4.31. Where behaviour is less serious, or poses a lower risk to public confidence in the APS, management action is likely to be the more appropriate and proportionate response.

 **Options for managing lower-risk matters are set out in Chapter 5.**

4.32. In more serious cases, or those that pose a higher risk of undermining public confidence, misconduct action is more likely to be suitable. A formal misconduct

investigation makes a clear statement about the seriousness with which the agency views the matter, and provides a transparent and fair process to an employee who may face adverse consequences of their behaviour.

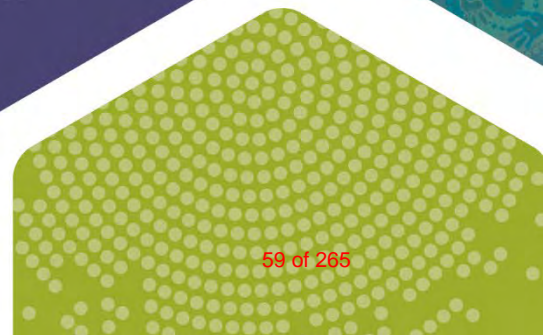
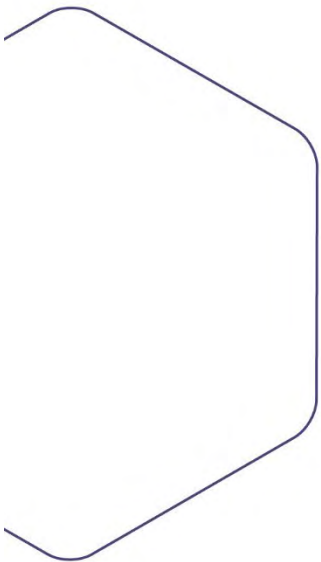
- 4.33. In very serious, high-risk cases where any delay in acting raises a real risk that the safety of employees or clients may be compromised, or evidence destroyed, immediate consideration should be given to whether the employee will remain in their current role or location while the investigation takes place (see 'Changes in role, assigning different duties and suspension'). In such cases, agencies may also choose to commence a misconduct process promptly rather than extending their preliminary deliberations.
- 4.34. Regardless of their assessment of the behaviour, agencies should also consider the effects of the behaviour, and of any misconduct process, on the workplace—for example, any impact on employee safety, trust, morale, relationships, or productivity—and take steps to manage these effectively.

Historical matters

- 4.35. From time to time an agency may receive allegations of historical misconduct, or otherwise become aware of suspected misconduct from some considerable time in the past.
- 4.36. How long ago the alleged behaviour occurred may be a relevant consideration in deciding what action to take, having regard, for example, to the availability of evidence, the resources that can reasonably be allocated to considering the matter, and the impact of the allegation and its handling on the agency or on public confidence in the APS.
- 4.37. If an agency decides to take misconduct action in relation to a historical matter, this will need to be done in accordance with the Code as it applied at the time of the alleged misconduct. If the allegations relate to a former employee, misconduct action can only be taken if the former employee separated from the APS on or after 1 July 2013. Misconduct action relating to historical matters must be carried out under the agency's current s.15(3) procedures. If in doubt, agencies should seek legal advice.

Chapter 5

Options for managing lower- risk behaviours



- 5.1. Management action may be considered where agencies have assessed an employee's behaviour to be less serious, or to pose a lower risk to public confidence in the APS.
- 5.2. Agencies should empower managers to address lower-risk matters constructively, and as informally as practicable.
- 5.3. Agencies should ensure a clear distinction is drawn between a formal misconduct process and remedial or management action of the kinds set out below. Care should be taken to ensure the employee understands that they are not subject to a misconduct process and are not taken to have breached the Code.
- 5.4. In some cases, management action may not satisfactorily resolve concerns about an employee's conduct—or the employee may repeat the behaviour. It may be necessary in such cases to consider misconduct action on the basis that a pattern of suspected misconduct may be developing, even if the initial incident was relatively minor.

Counselling

- 5.5. Counselling is a discussion with an employee that brings to their attention concerns about their behaviour, reminds them of their obligations, makes a plan for avoiding recurrence, and advises them of action that may be taken should the conduct continue. Care should be taken to avoid expressing a view that the employee has breached or is suspected of breaching the Code. Counselling should be framed as an opportunity to improve or change behaviour, rather than as a punishment.
- 5.6. Effective counselling is more of a conversation than a lecture—employees are more likely to change their behaviour if they feel they have been heard, and have taken an active part in planning how they will behave differently in the future. An interactive approach to counselling also helps ensure the employee feels safe to ask questions or seek clarification, and feels supported in making the needed changes.
- 5.7. Counselling may take the form of a single conversation about expected behaviours, but could also include a follow-up with the employee to check their understanding over the longer term and facilitate reflection.
- 5.8. Who is best placed to counsel the employee will depend on the circumstances. In most cases, it would be appropriate for the employee's manager to take this role, as part of the ongoing management and development of their staff; however, in some cases this may not be suitable—for example, if there is an interpersonal issue between the manager and employee. In such cases the manager might reasonably be perceived to be unable to deliver the required feedback impartially, and the role should be given to someone in the agency who will be viewed as objective—such as a manager once removed, or a representative of HR.

Performance management

- 5.9. Where a concern about an employee's behaviour is relatively low risk, action can be taken under the agency's performance management framework. In some cases, a formal underperformance process will be warranted; in others, depending on the issues identified, close supervision may be sufficient—or any of the strategies below may be put in place.
- 5.10. When taking action under their performance management framework, agencies should ensure that the employee's performance agreement has clearly articulated the behaviours expected of them; that the appropriate procedures are followed; and that the assessment of the employee's behaviour and performance is evidence-based.
- 5.11. When using the strategies below to remedy a shortfall in expected behaviours, care should be taken not to presuppose a breach of the Code, or to frame the strategies as misconduct action.

Learning and development

- 5.12. In some cases, a failure to meet expectations may indicate a gap in an employee's knowledge or skill. Remediating gaps of this kind should generally form part of an agency's performance management framework.
- 5.13. Learning and development is not limited to formal training, though this can be useful in addressing specific skill or information gaps. Such training programs should be supplemented with on-the-job training, self-directed learning, and ongoing development work supported by the employee's manager, in order to integrate the employee's learning into their role and check their understanding and development over the longer term. These supplementary strategies can also be used as alternatives to formal training programs.
- 5.14. Learning and development can relate not only to technical knowledge or skills, but also to interpersonal capabilities, such as having difficult conversations, representing the agency effectively in meetings or presentations, or working productively with others.
- 5.15. A gap in an individual's knowledge may also reveal the need for further training and development for a team or work group as a whole to ensure that everyone can meet expectations going forward. It may also indicate systemic issues that need to be addressed within a work area or across the agency.

Coaching or mentoring

- 5.16. Coaching and mentoring are more targeted development tools that can help employees meet expectations, and can support them over the longer term to demonstrate the required skills and attributes.

Coaching

- 5.17. Coaching is a time-limited, case-specific intervention that provides an employee with intensive support in a specific area of skill or knowledge. This may be more suitable than a one-off training program in cases where, for example, the skill is more complex, or where the employee's duties have changed significantly, and where the employee has demonstrated willingness to improve. Like training, coaching should be supplemented by on-the-job opportunities to test and demonstrate learning, and can be used to address both technical and interpersonal skill gaps.

Mentoring

- 5.18. Mentoring is an ongoing relationship that seeks to develop an employee as a professional over the longer term. Unlike coaching, which seeks to remedy a skill deficit or develop an employee in a specific area, mentoring can help an employee reflect on and crystallise their career goals, their skills and areas for development, and ways they can identify and overcome any professional or personal barriers to achieving goals. Mentoring may be useful where, for example, a behavioural concern is in the area of management style or supervision skills, or managing time or competing priorities.

Alternative dispute resolution

- 5.19. Alternative dispute resolution (ADR) is a relatively informal, though structured, approach to managing interpersonal disputes. It encompasses a range of processes in which an impartial person assists those in dispute to resolve the issues between them.
- 5.20. ADR is generally a collaborative process between the parties, aimed at understanding one another's point of view and building or restoring a functional, productive working relationship. ADR can range from a relatively informal conversation between the parties to a more structured intervention.

Options

Mediation

- 5.21. Mediation is generally a voluntary process in which the parties to a dispute, with the assistance of a neutral third party (the mediator), identify issues, consider alternatives, develop options, and endeavour to reach agreement. The mediator has no advisory or determinative role regarding the content or outcome of the dispute, but may advise on the process for resolving it. Mediation is usually conducted in private, and the outcomes are confidential to the parties to the mediation.

Workplace conferencing

- 5.22. Workplace conferencing brings a group of colleagues together with a neutral and qualified facilitator in situations where there is conflict in the workplace or past disputes that have not been adequately resolved. The intention of the conference is to enable everyone affected by the dispute to consider what happened, the impact it has had, and the best way forward to resolve the issue.

Conciliation

- 5.23. Conciliation is a process in which the parties, with the assistance of a dispute resolution practitioner (the conciliator), identify the issues in dispute, develop options, consider alternatives, and endeavour to reach agreement. A conciliator may provide advice on the matters in dispute, or options for resolution, but does not make a determination. The conciliator is responsible for managing the conciliation process.

Factors to consider

- 5.24. ADR is most suitable where the parties are genuinely willing to work on building or restoring the relationship, and to approach one another and the process respectfully and in good faith. Agencies should consider whether all parties feel safe to communicate their point of view and their needs, and have demonstrated an interest in working together safely and productively. As such, agencies should think carefully about directing an employee to participate in ADR, especially if there is a power imbalance between the parties.
- 5.25. Where an interpersonal dispute has affected the broader workplace, agencies should also consider whether further restorative action may be needed—for example, with the parties' consent, letting their team or work group know ADR is taking place and that the employees are committed to working together more harmoniously; or conducting a facilitated discussion in the team or work group with a view to hearing and addressing concerns respectfully.

Warnings and directions

- 5.26. A warning or direction may be used on its own, in conjunction with any of the above strategies, or after implementing one or more strategies where behaviour has not improved. If an agency is seeking to respond to an employee's behaviour with a warning or direction, consideration should be given to counselling the employee as well, if this has not been done already. This can help the employee understand why they need to change their behaviour, as well as bringing to light any underlying issues that need specific intervention.

- 5.27. A warning or direction can be used where the employee appears to understand the seriousness of the matter and the consequences of repeating the behaviour, and where it is reasonably likely that they will change their behaviour as a result.
- 5.28. Care should be taken to ensure the wording of a warning or a direction does not presuppose a breach of the Code.

Warnings

- 5.29. A warning is a statement to an employee that they are required to adhere to standards of conduct that may include demonstrating or refraining from specific types of behaviour, and that specific consequences will attach to a failure to do so (usually, but not always, misconduct action—alternatives may include, for example, a formal underperformance process if this is more appropriate). Warnings are consistent with the Commissioner's Directions relating to effective performance, and to the requirement under the 'Ethical' Value to deal with inappropriate behaviour fairly and effectively.
- 5.30. As a matter of good practice, a written warning should be accompanied by a conversation with the employee to ensure they understand its purpose and the consequences of failing to comply. In the event that a verbal warning is given in the first instance, a written record should be made and a copy provided to the employee.

Directions

- 5.31. An agency may wish to direct an employee to do, or to refrain from doing, a specific thing. Under s.13(5) of the PS Act, the Code requires employees to comply with a lawful and reasonable direction given by someone in their agency who has the authority to give the direction. A failure to comply with a direction can be considered as a potential breach of the Code in itself.
- 5.32. An agency may issue a direction to an employee if, for example, there is a specific behavioural change that the employee needs to make, and the agency has formed the view that misconduct action would not be proportionate or appropriate in the circumstances.
- 5.33. To meet the requirements of s.13(5), a direction must fulfil three criteria: it must be lawful; it must be reasonable; and it must be given by someone with the appropriate authority.

- **Lawfulness**

A direction to an APS employee can be lawful if it does not involve any illegality and is consistent with the legitimate interests or obligations of the Commonwealth as an employer. A lawful direction also would not undermine an employee's statutory rights, including the right to seek a review of action under s.33 of the PS Act, or to make a disclosure under the PID Act.

- **Reasonableness**

Whether a direction is reasonable or not will always depend on all the circumstances—however, as a general principle, a reasonable direction is one that helps maintain public confidence in the integrity of the APS. A reasonable direction has a connection with APS employment, and is also likely to be clear, specific, and capable of being followed.

- **Person with authority**

Agency heads are not required under the PS Act to provide an express authorisation or delegation to give a direction. There is an implied authority for managers to give directions to the employees they manage, and for employees with responsibility in an area to give directions on matters relating to their field of responsibility.

- 5.34. Agencies are encouraged to seek legal advice if in doubt as to whether a particular direction meets these criteria.

Drafting and scope

- 5.35. Directions should be drafted in the language of command, and impose a clear and specific obligation. A poorly worded direction can make it difficult both for the employee to follow and for the agency to establish whether the employee has complied with it. Agencies should also ensure the wording of a direction does not presuppose a breach of the Code.
- 5.36. APS employees' obligations to uphold the Values and Employment Principles, and to comply with the Code, are prescribed in legislation, and a direction that duplicates these requirements has no additional force. A direction must be consistent with the Code (in order to be 'lawful'), but is effectively futile if it is a restatement of existing requirements.
- 5.37. When issuing a direction to an employee, agencies should advise the employee of the consequences of not following the direction. It is good practice also to inform them of their review rights consistent with s.33 of the PS Act, and of relevant agency policies and processes.

Changing employee's role or duties

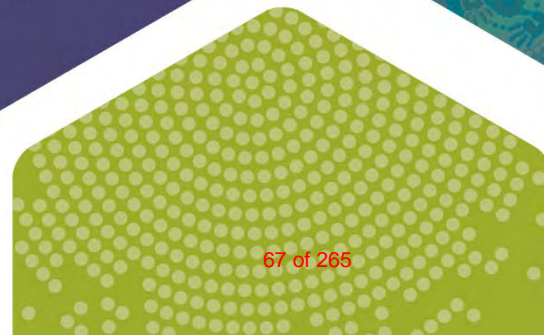
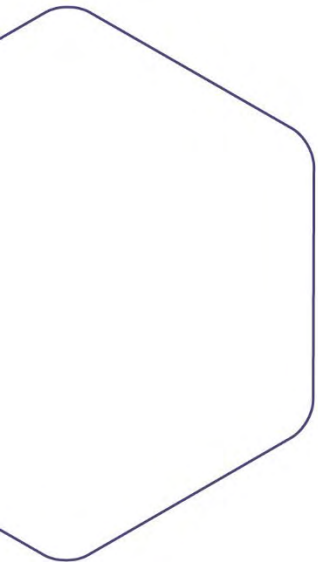
- 5.38. In some cases, it may be beneficial for an employee whose conduct has not met expectations to move to a different role in the agency. This option could be considered, for example, where interpersonal relationships have deteriorated to the extent that the employee can no longer work productively or harmoniously in their team, or where a role requiring a different skill set would enable the employee to perform more effectively. This is consistent with an agency head's power to assign duties under s.25 of the PS Act.
- 5.39. A decision to change an employee's role or duties should not be taken to presuppose that the employee has breached the Code or used as a punishment or de facto sanction.

Recordkeeping

- 5.40. Where managers take any of the approaches set out above, it is advisable that the key discussions and outcomes be documented. At a minimum, a short note should be prepared recording the content of any relevant meeting, particularly where agreement is reached on the remedial action, if any, to be taken. The note should preferably be signed by both the employee and the manager, with copies being retained by both parties. The agency copy should be retained in accordance with agency policy. Notes concerning any follow-up discussions or counselling should also be prepared, agreed, and retained.
- 5.41. Care should also be taken to ensure that any written records to employees about remedial, management, or corrective action avoids referencing more serious action (such as an investigation) and instead encourages the employee to take responsibility in correcting the behaviour and meeting the expectations set for them.
- 5.42. The employee should be informed that where conduct is maintained at a satisfactory level, the records relating to counselling or other action will be destroyed in accordance with agency policies, and that the records will only be relied on if further allegations of misconduct arise during the document retention period specified in the agency policy.

Chapter 6

Misconduct action: legislative basis and roles



- 6.1. The PS Act provides a framework for determining whether an APS employee or former employee has breached the Code, and, where necessary, for imposing sanctions.

Section 15(3) procedures

- 6.2. Section 15(3) of the PS Act requires agency heads to develop written procedures for determining:
- whether an employee, or former employee, in their agency has breached the Code, and
 - the sanction, if any, that is to be imposed on an employee where a breach of the Code has been found.
- 6.3. The s.15(3) procedures must:
- comply with the basic procedural requirements set out in the Commissioner's Directions (s.15(4)(a) of the PS Act), and
 - have due regard to procedural fairness (s.15(4)(b) of the PS Act).
- 6.4. Section 15(4)(b) of the PS Act explicitly recognises that the administrative law principle of procedural fairness applies to the misconduct process.
- 6.5. Agency heads must ensure that the agency's s.15(3) procedures are made publicly available (s.15(7) of the PS Act). Many agencies meet this requirement by publishing their procedures on their websites.
- 6.6. Section 15(5) of the PS Act provides that agency procedures may include different procedures to deal with:
- different categories of employees—for example, probationers,
 - determining breach for former employees, or
 - determining breach for employees, or former employees, who have been found to have committed an offence against a Commonwealth, State, or Territory law.

Procedural fairness

- 6.7. Generally, administrative decisions, such as those taken in the misconduct process, must have regard to procedural fairness. Procedural fairness requires that:
- a decision-maker is impartial, and free from actual or apparent bias (**the bias rule**),
 - a person whose interests will be affected by a proposed decision receives a fair hearing, including the opportunity to respond to any adverse material that could influence the decision (**the hearing rule**), and

- findings are based on evidence that is relevant and logically capable of supporting the findings made (the evidence rule).
- 6.8. The right to procedural fairness arises only in relation to a person whose rights or interests may be adversely affected by a decision. Usually this will only be the employee whose conduct is in question, rather than, for example, witnesses or complainants.
- 6.9. Procedural fairness obligations do not apply to decisions about whether to commence a misconduct investigation. However, such decisions may be reviewable in accordance with s.33 of the PS Act in some circumstances.

 See 'Procedural fairness—investigation and determination' for information about procedural fairness in a breach decision. See 'Procedural fairness in the sanction decision' for information about procedural fairness in a sanction decision.

Basic procedural requirements

- 6.10. Part 7 of the Commissioner's Directions sets out the basic procedural requirements with which agency s.15(3) procedures must comply.
- An employee alleged to have breached the Code must be informed that a determination is being considered (s.59(a))*
- 6.11. A determination cannot be made in relation to an alleged breach of the Code unless reasonable steps have been taken to inform the employee or former employee of the details of the alleged breach, and, for an employee, the sanctions that may be imposed.
- 6.12. In practice, agencies should:
- inform the person under investigation of the substance of what they are alleged to have done and what elements of the Code they are alleged to have breached
 - provide the person under investigation with information on any variation in the alleged breach.

The person under investigation must be given a reasonable opportunity to make a statement in relation to the alleged breach (s.59(b))

- 6.13. In practice, agencies should:
- give the person under investigation a reasonable opportunity to respond to the substance of the evidence gathered during the investigation, including adverse claims or evidence, before a decision is made
 - ensure the breach decision-maker gives proper consideration to the person's statement and response to the evidence before making a determination.
- 6.14. If, during the investigation, new evidence comes to light about the actions or behaviours of the person under investigation, reasonable steps must be taken to notify the person of the substance of this additional evidence, or any new allegations, and give them an opportunity to respond, before a determination is made. This could include information suggesting possible additional breaches of the Code, or that the alleged conduct may be more serious than initially assessed.
- 6.15. These requirements are consistent with the hearing rule of procedural fairness.

An employee determined to have breached the Code must be informed before a sanction is imposed, and given reasonable opportunity to comment on sanctions under consideration (s.60)

- 6.16. If a determination is made that an employee has breached the Code, a sanction cannot be imposed unless reasonable steps have been taken to inform the employee of the determination and each sanction being considered, and give them reasonable opportunity to comment. A sanction cannot be imposed on a former employee.
- 6.17. Informing the employee means more than simply advising them of the range of sanctions available under s.15(1) of the PS Act. The agency must also take reasonable steps to inform the employee of the factors that are being considered in deciding on a sanction, and give the employee a reasonable opportunity to make a statement in relation to the sanctions under consideration.
- 6.18. These requirements are consistent with the hearing rule of procedural fairness.

Decision-makers must be independent and unbiased (s.61)

- 6.19. Reasonable steps must be taken to ensure that the individuals who determine whether there has been a breach of the Code, and decide any sanction, are free from actual bias or any reasonable apprehension of bias. The test for reasonable apprehension of bias is whether a hypothetical fair-minded person, properly informed of relevant circumstances, could reasonably form the view that the decision-maker might not have brought an impartial mind to the decision.

- 6.20. Examples of circumstances where bias could arise, or could reasonably be thought to arise, include the following:
- The decision-maker has a personal interest in the decision, including, for example, a personal relationship or a close working relationship with the person under investigation, a complainant, or a witness.
 - The decision-maker has previously expressed a concluded view on a matter that needs to be determined.
 - The decision-maker has had access to prejudicial information, not relevant to the matters to be determined, but which could reasonably be believed to be capable of influencing the decision-maker's views.
 - A senior manager makes comments on the case in a manner which could reasonably be perceived to influence a more junior decision-maker.
 - The decision-maker is a witness in the matter.

- 6.21. Decision-makers should keep an open mind about the matters under investigation, and weigh the evidence fairly and dispassionately. Any favourable or adverse findings must be based on information or evidence that logically supports those findings, consistent with the evidence rule of procedural fairness. For this reason, among others, it is good practice for decision-makers to document the reasons for their decisions.

Determination process should be informal and prompt (s.62)

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

Decisions must be recorded in writing (s.63)

- 6.23. If a determination is made in relation to an alleged breach of the Code, a written record must be made of the determination—whether or not a breach was found.
- 6.24. Where a breach is determined and a sanction imposed, a record must also be made of the sanction decision.
- 6.25. If a statement of reasons is given to the person under investigation, that statement must be included in the written record.
- While there is no legislative requirement to provide a statement of reasons for breach or sanction decisions, it is good practice to inform an employee or former employee in writing of the reasons for a breach or sanction decision to ensure they understand why the decision was made and can meaningfully consider whether to pursue any avenue of review.

Additional requirements—SES employees (s.64)

- 6.26. When the conduct of an SES employee is called into question, the agency head must consult with the Commissioner on the process for handling the matter, including the decision on whether to start misconduct action.
- 6.27. Agency heads must also consult the Commissioner before imposing a sanction on an SES employee.

Drafting agency 15(3) procedures

- 6.28. Agencies should keep their s.15(3) procedures relatively brief and as flexible as possible while still meeting the legislative requirements.
- For example, it may provide greater flexibility not to mandate that the person under investigation must receive an oral hearing, or must receive evidence in a particular form (including a draft investigation report), as it may not be possible to meet these requirements in all cases.
 - If agencies wish to provide practitioners and employees with detailed advice, this can be set out in separate guidance material. Agencies should ensure, however, that such guidance avoids language that appears to impose mandatory requirements, such as 'must', unless this is intended and appropriate—for example, references to the requirements of the statutory framework.
- 6.29. It is good practice for agency s.15(3) procedures to include a statement about how the person who determines whether a breach has occurred is to be appointed or authorised.
- While an agency head may nominate any person to make that selection, it is generally good practice for agency s.15(3) procedures to identify clearly at least one person or position responsible for selecting a decision-maker.
- 6.30. Agency procedures should not seek to regulate when it is appropriate to start an investigation, as this is a matter of broad discretion having regard to all the circumstances.



Information about preliminary considerations of employees' behaviour is in Chapter 4 of this guide.

- 6.31. Agency s.15(3) procedures should be established as soon as practicable after the creation of a new agency.
- Where agencies are affected by Machinery of Government (MoG) changes, including a name change or changes to administrative functions, agencies should review their procedures, and update or remake them if necessary. Agencies should seek legal advice if in doubt about the validity of procedures applied to alleged misconduct after a MoG change.



Information on the impact of a MoG change on misconduct processes is in Chapter 10.

- 6.32. Where a new agency head is appointed, the agency's s.15(3) procedures continue to apply. The new agency head may choose to issue new procedures but is not required to do so.
- 6.33. Where an agency is seeking to change or remake its s.15(3) procedures, it is good practice to provide for transitional arrangements.

Available sanctions

- 6.34. If an employee is found to have breached the Code, an agency head may impose sanctions. A sanction cannot be imposed on a former employee.
- 6.35. Sanctions are intended to be proportionate to the nature of the breach, to be a deterrent to the employee and others, and to demonstrate that misconduct is not tolerated in the agency.



Further information about sanctions is in Chapter 9.

- 6.36. A sanction decision-maker may impose one or more of the following sanctions (s.15(1) of the PS Act):
- termination of employment
 - reduction in classification
 - re-assignment of duties
 - reduction in salary
 - deductions from salary, by way of fine
 - a reprimand.
- 6.37. There is no provision in the PS Act for any other form of sanction.
- 6.38. A determination that an employee has breached the Code does not necessarily mean that a sanction will or should be imposed. A decision can be taken that no other action is necessary, or that other remedial action may be appropriate, or that management action has resolved the issue.

- 6.39. Agencies may take reasonable management action at any time, including where no breach is found, or where there has been a breach of the Code but no sanction imposed, or in addition to a sanction. For example, an agency could require an employee to participate in coaching to improve their skills or capability in a specific area, or provide mediation where there is an interpersonal dispute, or issue a warning in relation to specific behaviour, or require all employees to undergo training where a need is identified, regardless of whether a breach has been found or a sanction imposed. Any such response should clearly be identified as management action, rather than a sanction under s.15(1) of the PS Act.

Key roles

- 6.40. There are a number of key roles in a misconduct process, and agencies need to consider whether it is appropriate for the same person to fulfil more than one. Subject to agency s.15(3) procedures, it is possible for one person to act as both breach decision-maker and sanction decision-maker, though in some circumstances appointing separate decision-makers can avoid a perception of bias. Where suspension is being considered, it is desirable that a separate person with delegation under s.14 of the PS Regulations makes the suspension decision.

Breach decision-maker

Role

- 6.41. The role of the breach decision-maker is to determine, in accordance with the agency's s.15(3) procedures, whether or not a person has breached the Code. In effect, the breach decision-maker should establish two things:
1. whether the alleged conduct in fact occurred, and
 2. if it did, whether that conduct is inconsistent with one or more elements of the Code.

Appointment

- 6.42. A breach decision-maker is appointed or authorised in accordance with an agency's s.15(3) procedures. Determining a breach of the Code is not a delegable power or function under the PS Act. An agency's s.15(3) procedures may identify the classification or position of persons with authority to appoint the breach decision-maker, and, if so, the breach decision-maker must be appointed in accordance with these requirements. It is advisable for the breach decision-maker's appointment or authorisation to be in writing.

Considerations

- 6.43. The breach decision-maker should be a person who exercises sound judgement, understands the legislative framework and requirements for making a breach determination, and is familiar with the agency's business to the extent required to appreciate the context of the alleged misconduct and the evidence collected. They should be someone who is trusted to make autonomous decisions that have significant impact on individuals and the agency.
- 6.44. The person who appoints or authorises the breach decision-maker should consider any previous involvement a proposed decision-maker has had in the matter, or a related matter. If there is any doubt about a proposed decision-maker's actual or apparent impartiality, the agency should make another choice. It may be appropriate, subject to agency s.15(3) procedures, for a person from outside the agency or the APS to be appointed, if it is not possible to find a decision-maker free from apparent bias within the agency.
- 6.45. The breach decision-maker may conduct the investigation themselves, or use an investigator. Where an investigator is used, the breach decision-maker still needs to form an independent view of the evidence, and remains responsible for making findings of fact and for any determination of breach of the Code.
- 6.46. The breach decision-maker also has ultimate responsibility for ensuring that the decision-making process adheres to administrative law requirements, including procedural fairness, and the agency's s.15(3) procedures. It is important for the breach decision-maker to be satisfied with the approach to and quality of the investigation, including:
- the quality and quantity of the evidence, and whether or not the evidence establishes the facts on which any finding of misconduct is based
 - the way the evidence has been collected
 - that the agency's s.15(3) procedures have been complied with and other legal requirements met, including procedural fairness.
- 6.47. Where the decision-maker or investigator are internal to the agency, it may be helpful for them to be released from some or all of their normal duties while they conduct the investigation to ensure a timely process. Agencies may also need to consider special accommodation arrangements for decision-makers or investigators, such as the provision of an office or a secure cabinet for storage of sensitive material, as well as access to specialist advice to assist them in interpreting evidence or dealing with legal questions.

Investigator

Role

- 6.48. The role of an investigator is to gather evidence, including, where appropriate, interviewing witnesses, and to communicate with the person under investigation and any witnesses. The investigator may provide the decision-maker with their own opinions about the facts of the case, and prepare a report with recommendations, where this is consistent with agency s.15(3) procedures.

Appointment

- 6.49. Investigating alleged breaches of the Code is not a delegable power or function under the PS Act. An investigator is appointed or authorised by someone in the agency with the authority to make such appointments or authorisations. If agency s.15(3) procedures include provisions for appointing an investigator, the investigator must be appointed in accordance with the procedures.

Considerations

- 6.50. A person who investigates alleged breaches of the Code should have:
- a good understanding of the APS employment framework; in particular, the PS Act and subordinate legislation, and the relevant requirements of the Fair Work Act
 - a good understanding of relevant requirements of the Privacy Act and the PID Act
 - a good understanding of administrative decision-making, including the requirements of procedural fairness and the need for balanced, reasonable, and fair decisions
 - sound skills in gathering evidence and conducting interviews
 - sound analytical skills, good judgement, strong interpersonal skills, and strong oral and written communication skills
 - a capacity to conduct administrative investigations, including weighing conflicting evidence for the purpose of making findings of fact
 - a capacity to provide a written report that is evidence-based, demonstrates sound reasoning, and sets out the process followed in the investigation, and the findings, in a logical, clear way.
- 6.51. It may be useful for agencies to consider the options available to them in the event that they need to conduct an investigation. Some agencies may have a pool of employees with experience or training in misconduct investigations and knowledge of administrative law principles, while others may seek assistance from their

portfolio department or another agency, or engage an external provider to conduct an investigation.

Sanction decision-maker

Role

- 6.52. The role of the sanction decision-maker is to decide whether a sanction should be imposed on an employee found to have breached the Code, and, if so, the sanction or sanctions that are appropriate and proportionate in the circumstances.

Appointment

- 6.53. A sanction decision-maker is a person who has been given a delegation to impose a sanction from the range set out in s.15(1) of the PS Act.
- 6.54. The framing of the delegation instrument should use broad language, bringing in relevant powers and functions under the PS Act and the *Public Service Classification Rules 2000*.
- 6.55. The sanction decision-making power may be delegated to a person outside the agency or outside the APS. However, the prior written consent of the Commissioner must be obtained if an agency wishes to delegate the sanction decision-making power to an 'outsider'—i.e. a person who is neither an APS employee, nor a person appointed to an office by the Governor-General, or by a Minister, under a law of the Commonwealth (ss.78(7) and (8) of the PS Act).

Considerations

- 6.56. A sanction decision-maker should be, and should appear to be, independent and unbiased, and should exercise good judgement. They should be familiar with the agency's business and trusted to make autonomous decisions that have significant impact on individuals and the agency.
- 6.57. To help ensure the quality and consistency of sanctions, agencies may wish to limit the delegation to apply a sanction to a small number of people within the agency, and further limit the number of people with the delegation to impose more serious sanctions.

Suspension decision-maker

Role

- 6.58. The role of the suspension decision-maker is to decide whether it is appropriate to suspend an employee alleged to have breached the Code, having regard to the public interest and the agency's interest. The suspension decision-maker is required to decide whether suspension is to be with or without remuneration, and must

review the suspension at reasonable intervals.

Appointment

- 6.59. A suspension decision-maker must be given a delegation to exercise the powers and functions in s.28 of the PS Act and s.14 of the PS Regulations. These powers and functions can be delegated to a person outside the agency or outside the APS— however, delegation to an ‘outsider’ requires the prior written consent of the Commissioner (ss.78(7) and (8) of the PS Act).

Considerations

- 6.60. A suspension decision-maker may make necessary inquiries to decide whether suspension is appropriate in the circumstances. This may include informing themselves of the results of any preliminary considerations to inform their assessment of the nature and seriousness of the alleged misconduct.
- 6.61. To avoid the perception of bias or any real or apparent conflicts of interest, it is generally good administrative practice for the suspension decision-maker not to be involved in the related misconduct investigation under the agency’s s.15(3) procedures.

Support roles

Case manager

- 6.62. ‘Case manager’ is a term used in a range of ways across agencies. In a misconduct process, agencies may wish to have a dedicated person who liaises with the person under investigation, manages the contract for an external investigator if applicable, and overall acts as a single point of contact throughout the process. This person can also consider whether the person under investigation, or witnesses, require additional support from the agency. In some agencies, a case manager may also be the person responsible for investigating the alleged misconduct.
- 6.63. This role would generally be undertaken by someone in the HR area with a good understanding of the misconduct process, experience in procurement and contract management if relevant, and the ability to deal sensitively with individuals who are involved in a process they may find personally difficult.

Support person

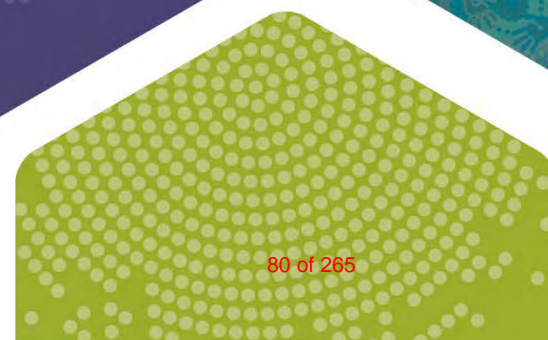
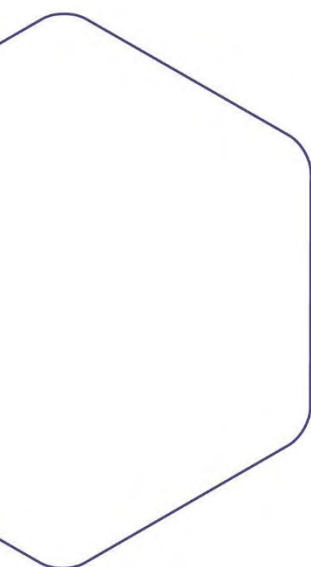
- 6.64. Agencies should advise the person under investigation, and relevant third parties such as witnesses, of their right to a support person at any stage of their involvement in a misconduct process. A support person is chosen by the person under investigation or witness.
- 6.65. Decisions of the Fair Work Commission indicate that while a support person cannot advocate for an employee or speak on their behalf, they may do more than simply provide emotional support. For example, a support person can help facilitate mutual understanding between an agency and an employee if the employee is having difficulty understanding the process or the agency is misconstruing the employee's perspective. It may also be reasonable for a support person to assist the person under investigation, or witness, in preparing for a discussion or interview, or to take notes.

Representation and advocacy

- 6.66. Agency industrial instruments or s.15(3) procedures may provide a right to representation or an advocate for a person involved in a misconduct process. Where a person involved in a misconduct process has indicated that they would like to be represented by a third party, agencies may wish to seek legal advice about whether it is appropriate to permit such representation.

Chapter 7

Taking misconduct action: initial considerations



- 7.1. Once an agency has decided to commence a misconduct process, certain matters need to be considered at the outset. These may include deciding whether the person under investigation should remain in their role while the misconduct action takes place; deciding on the scope of the investigation; drafting the allegations; preparing an investigation plan; and notifying the person under investigation that a misconduct process has commenced.

Changes in role, assigning different duties, and suspension

- 7.2. Agencies should consider whether it is appropriate for the person under investigation to remain in their current role, or in the workplace, while the misconduct process takes place.
- 7.3. Decision-makers in these matters should not prejudge, or be seen to prejudge, the outcome of the misconduct action. At this stage, the relevant measures are precautionary, aimed at protecting the interests and reputation of the agency, the public interest, and the interests of other employees, including the complainant or witnesses. In some cases, these decisions will also be made in the interests of the person under investigation. They are not to be used as a punitive tactic, or as a de facto sanction.
- 7.4. Decisions about these measures may be made at the same time as a decision to start misconduct action, or at any stage during the misconduct process if there are further developments—for example, concerns raised by other employees, repetition of the behaviour, or new allegations coming to light during the investigation.
- 7.5. Decisions about the role or presence in the workplace of the person under investigation during the misconduct process should have regard to the nature and severity of the specific risks, and should be proportionate to these risks. As appropriate, consideration may be given to options such as the following while misconduct action is on foot:
- directing the person under investigation not to contact a specific person or people
 - directing the person under investigation not to discuss the matter openly, to maintain the confidentiality and integrity of the process
 - limiting the person's access to particular data, files, or electronic systems or applications

- limiting direct or unsupervised contact with clients or stakeholders
 - removing supervisory responsibilities
 - assigning different duties to the person under investigation, including in a different location.
- 7.6. If it is not possible to mitigate the risks in a given case through measures that would enable the person under investigation to remain at work, agencies may consider suspending the person from duty.
- 7.7. Agencies should ensure that decision-makers in these matters have the authority under the PS Act or PS Regulations to make decisions to assign duties or suspend an employee. It is preferable for these decision-makers not to be involved in investigating the alleged breach of the Code or making a related determination.

Assigning different duties

- 7.8. An agency may decide that it is appropriate to assign different duties to the person under investigation, either for a temporary period or on an ongoing basis. The power to do so is the general assignment of duties power in s.25 of the PS Act.
- 7.9. In order to ensure that all relevant facts are considered before making a decision to assign different duties, agencies should notify the person under investigation of the proposal and seek their views. Sometimes urgent action may be required that will not allow for that opportunity. In such cases, it would be appropriate to invite the person to comment after the decision has been made. Depending on their response, the agency has the flexibility to consider alternative arrangements, including suspension.
- 7.10. Employees who are assigned to different duties are not entitled to seek review of the decision under s.33 of the PS Act unless it involves relocation to another place, or assignment of duties that the employee cannot reasonably be expected to perform.

Suspension

- 7.11. Where other options cannot mitigate the risks posed by the person under investigation remaining in the workplace, it is open to the agency to consider suspending them from duty.
- 7.12. The starting point for considering whether to suspend an employee is whether the agency head (or delegate) believes on reasonable grounds that the employee may have breached the Code, and that suspension is in the public interest or the agency's interest.

- 7.13. It may be in the public or the agency's interest to suspend an employee from duty where their continued presence in the workplace poses risks to, for example:
- the safety and wellbeing of other employees or members of the public, including agency clients
 - the integrity of data held by the agency, including data about members of the public
 - the integrity of Commonwealth resources, including the public revenue—for example, where the allegations relate to fraud or misappropriation
 - public confidence in the agency or the APS as a whole, including where the allegations may undermine public confidence in the agency's capacity to perform its functions.
- 7.14. Agencies may also wish to consider suspension where the alleged misconduct is serious—especially if there is a risk that the conduct may be repeated—or where there is a real risk of the investigation being compromised by the presence in the workplace of the person under investigation, and the risk cannot be mitigated in other ways.
- 7.15. Advice to the person under investigation about a suspension decision should make clear that the decision is not a prejudgement of whether they have breached the Code.

Legislative framework for suspension

- 7.16. Section 28 of the PS Act and s.14 of the PS Regulations set out the legislative basis for suspending an employee who is alleged to have breached the Code.

An employee may be suspended, with or without remuneration, where the agency head believes, on reasonable grounds, that the employee may have breached the Code, and where the suspension is in the public interest, or the agency's interest (ss.14(2), (3), and (4) of the PS Regulations)

- 7.17. The term 'remuneration' is not defined by the PS Act or PS Regulations, but, in accordance with its ordinary meaning, includes:
- annual salary, excluding performance-based allowances, that would have been paid to the employee for the period they would otherwise have been on duty, including any approved higher duties allowances
 - other salary-related payments, including those associated with the performance of extra duties, such as overtime, but excluding overtime meal allowance, and shift penalty payments where there is a longstanding and regular pattern of extra duty or shift work being performed which would have been expected to continue but for the suspension from duty
 - any other allowances of a regular or ongoing nature, including, for example,

cost reimbursement allowances such as a temporary accommodation allowance.

7.18. Factors to consider in deciding whether to suspend with or without remuneration may include:

- the seriousness of the alleged misconduct—suspension without remuneration would usually be appropriate in cases where the sanction imposed might be termination of employment if the alleged misconduct is determined to be a breach of the Code
- the agency's obligations under s.15 of the PGPA Act with respect to the proper use and management of public resources. In the circumstances of the case, decision-makers should consider whether it is appropriate for the suspended employee to be remunerated if they are not working
- the estimated duration of the misconduct action
- the likely financial hardship, if any, for the employee:
 - The decision-maker can balance the seriousness of the alleged breach against the severity of the financial impact of the suspension. In some circumstances, the hardship imposed may be disproportionate to the alleged misconduct. In others, the alleged misconduct may be so serious that it outweighs claims of hardship.
 - While the onus is on the person under investigation to substantiate a claim of hardship by providing persuasive evidence to support their case, a decision-maker should give them reasonable opportunity to provide information about the nature of the hardship. For example, where the person claims that their bank would take possession of their house, the decision-maker might seek a statement to this effect from the bank, and/or a signed statutory declaration from the person under investigation.

7.19. **If the suspension is to be without remuneration, the period without remuneration must not be more than 30 days unless exceptional circumstances apply (s.14(4))**

'Exceptional circumstances' are not defined in the legislation, but could include:

- where a strong prima facie case of serious misconduct is apparent
- where a finding has been made of a serious breach of the Code and a sanction is yet to be imposed—any delay between a determination and imposing a sanction should be minimised
- where the person under investigation has been charged with a criminal offence and is waiting to have the charge heard and determined
- where the person under investigation has appealed against a criminal conviction and is waiting to have the appeal heard.

A suspension, with or without remuneration, must be reviewed at reasonable intervals (s.14(5))

7.20. A review of suspension under s.14 is not a review of the original suspension decision. It is a fresh decision as to whether the person under investigation should remain suspended, having regard to the risks posed by the person's presence in the workplace and whether suspension remains the most effective way to mitigate these risks.

7.21. Agency guidance to employees should draw a clear distinction between the right to have a suspension from duty reviewed at regular intervals (s.14(5) of the PS Regulations) and the review of action provisions in s.33 of the PS Act.

- Review of suspension under s.14(5) has a prospective effect. It examines whether a suspension from duty is to continue from the time of the review decision. It does not involve a reconsideration of the original decision to suspend the person under investigation.
- By contrast, a review of action under s.33 of the PS Act involves re-examination of the original decision. It is good practice to advise the person under investigation of their right to seek a review, under s.33 of the PS Act, of the decision to suspend.

Suspension must end immediately if the agency head no longer believes, on reasonable grounds, that:

- a) the employee has, or may have, breached the Code, or
- b) that it is in the public interest, or the agency's interest, to continue the suspension **(s.14(6))**

Suspension must end as soon as any sanction is imposed for the relevant breach of the Code **(s.14(7))**

In exercising suspension powers, the agency head must have due regard to procedural fairness, unless they believe, on reasonable grounds, that it would not be appropriate to do so in the particular circumstances **(s.14(8))**

- 7.22. Cases where the decision-maker believes that it is not appropriate to have regard to procedural fairness are likely to be unusual. It may be considered where there is a need to act urgently due to safety concerns or a risk that evidence will be destroyed, or where there is some other overriding public interest. In most cases, however, decision-makers will be able to have due regard to procedural fairness.

The usual practice is to:

- inform the person under investigation, in writing, of the agency's preliminary intention to suspend them, and the reasons for this proposal, and
- give the person a reasonable opportunity to respond before any decision to suspend is taken.

- 7.23. An employee who is suspended without first being given an opportunity to comment should be advised of the reasons for the suspension decision, and for proceeding without seeking their comments, and invited to comment. On receipt of the employee's comments, a review of the decision to suspend can promptly occur.

Additional considerations

- 7.24. It is advisable for agencies to inform the person on suspension about the agency's policies regarding access to the workplace, entitlement to apply for jobs in the agency or other agencies, and attendance at training courses previously booked or approved. Further considerations are set out below.

Keeping suspension delegate informed

- 7.25. The requirements in the regulations concerning review and revocation of suspension decisions mean that the suspension decision-maker must be informed of progress in the misconduct investigation. They need this information to ensure that they can properly review, at reasonable intervals, the decision to suspend the person under investigation, or to revoke the suspension in the circumstances provided for in **ss.14(6) and (7)**.

Accessing leave during suspension

- 7.26. An employee who is suspended without remuneration may be able to access paid leave credits during suspension. This will depend on what is reasonable in the circumstances, and is subject to the provisions of the relevant industrial instrument setting out terms and conditions of employment, as well as agency policies. Some agencies allow suspended employees to access accrued annual or long service leave credits, but not personal leave. The rationale for drawing this distinction is that personal leave is generally only available where an employee is prevented by illness or caring responsibilities from attending for duty.

Outside employment during suspension

- 7.27. An employee who is suspended may want to seek outside employment while the suspension is in place. Agency policies and procedures on outside employment would continue to apply, including consideration of whether any outside employment might create a real or apparent conflict of interest with the employee's APS employment. A suspension with or without remuneration does not affect the employee's obligation to comply with agency policies, lawful and reasonable directions, or the Code overall.

Recognition of service during suspension

- 7.28. Whether the period of suspension from duty counts as 'service' for purposes such as annual leave, long service leave, or maternity leave is dependent on the terms of the relevant legislation and any industrial instrument or contract that confers the entitlement to leave. For example:

- Generally, it is considered that suspension from duty does not constitute a break in an employee's continuous employment as defined in s.11(1) of the *Long Service Leave (Commonwealth Employees) Act 1976* (LSL Act). Periods of suspension, with or without remuneration, would not affect an employee's long service leave entitlements in the sense of breaking continuity of service.

However, suspension without remuneration may not count as service for the purposes of the LSL Act, which means an employee suspended without remuneration generally would not accrue long service leave during the suspension. Suspension without remuneration would be considered leave without pay (LWOP) under the LSL Act, and would not count as service unless the agency head determines it should do so. Such decisions should be made by agency heads on a case-by-case basis, having regard to all the circumstances.

- Suspension without remuneration may also be regarded as LWOP for the purpose of the *Maternity Leave (Commonwealth Employees) Act 1973* (ML Act). The ML Act requires a qualifying period of 12 months' continuous

service before an employee is eligible for paid maternity leave. LWOP during the qualifying period does not break continuity of employment for this purpose.


- A period of suspension with or without remuneration would generally count as service for annual leave purposes if the employee's conditions of employment do not exclude the accrual of annual leave during periods of suspension.

Repayment if no breach found

- 7.29. An agency may consider whether an employee who was suspended without remuneration and subsequently found not to have breached the Code can seek repayment of any salary foregone, or leave credits taken, during the period of suspension. There is no express provision in the PS Act or PS Regulations allowing for salary to be repaid in the event that an employee is found not to have breached the Code. Agencies should seek legal advice if they are considering repayment in these circumstances.

Preparing for an investigation

- 7.30. Preparing for a misconduct investigation includes scoping and planning, formulating allegations, and notifying an employee or former employee that they are the subject of a misconduct investigation.
- 7.31. Fundamentally, the investigative process is a fact-finding exercise. Its aim is to establish what occurred, so that a fair and informed decision can be made, on the basis of the facts, about whether a person's behaviour has breached the Code. At the investigation stage, the question to be answered is 'what happened?', rather than 'was there a breach?'
- 7.32. Establishing facts in a misconduct investigation is distinct from any preliminary fact-finding process, the purpose of which is to inform a proportionate decision about how a conduct matter should be managed.

 **More information is in Chapter 4.**

Deciding the scope of the investigation

- 7.33. An agency may decide to take misconduct action in circumstances ranging from a single allegation of a specific behaviour to broad concerns about many aspects of a person's conduct. Regardless of where a matter falls on this spectrum, a decision will need to be made about what, specifically, the investigation is to consider. This includes both the particular incidents of alleged misconduct, and the particular elements of the Code that may have been breached.
- 7.34. Considering what specific conduct should be investigated may have regard to, for example, the seriousness of the allegations, whether there is a reasonable

possibility of identifying evidence that could prove or disprove the allegations, and the cost of gathering particular forms of evidence.

- 7.35. Which elements of the Code will be in play will be a matter of judgement for the breach decision-maker. The decision-maker may opt to consider multiple elements of the Code, depending on the alleged misconduct, with a view that any final determination is more likely to be exhaustive. Alternatively, the decision-maker may choose one or two elements of the Code that are most relevant to the alleged misconduct if they believe that considering extra elements would add needless complexity to the decision or dilute the message about the seriousness with which the behaviour is viewed.
- 7.36. Where an element of the Code contains more than one obligation, it is not generally necessary for the person under investigation to have failed to comply with all of these in order for a breach of the Code to be determined. For example, s.13(3) of the PS Act states that an employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment. A person found to have behaved discourteously, but not also found to have engaged in harassing behaviour, could nonetheless be found to have breached the Code. Thus, a breach decision-maker may choose in some cases to consider a subset of the obligations in an element of the Code.
- 7.37. Agencies may provide general guidance to a breach decision-maker on which element(s) of the Code the person under investigation may have breached. However, the breach decision-maker needs to form their own judgements as to the scope of the investigation, as they are ultimately responsible for establishing independently whether the person under investigation has breached specific elements of the Code.

Varying the scope

- 7.38. As an investigation progresses, the investigator or breach decision-maker may discover additional allegations, or consider that the behaviours under investigation suggest additional elements of the Code may have been breached. In these circumstances, it may be reasonable to broaden the scope of the investigation.
- 7.39. Where a decision is made to do so, the person under investigation must be advised of the additional allegations or elements of the Code, and given a further opportunity to comment, consistent with the requirements of procedural fairness.
- 7.40. In some cases, agencies may need to consider whether new evidence or allegations should be dealt with separately, rather than varying the scope of the original investigation. This may be a matter of careful judgement, having regard to, for example, the degree of connection between the substance of the new and the original allegations, or any concerns about a decision-maker's real or apparent bias in relation to the new matter.

- 7.41. If an agency is considering dealing separately with new allegations, a decision needs to be made about whether a new misconduct process is the proportionate response in the circumstances, or whether other management action would be preferable, having regard to the considerations in Chapter 4.

Drafting allegations

- 7.42. An 'allegation' in a misconduct investigation is a statement to the effect that the agency believes a person to have done a specific thing, at a specific time and place, which on its face appears to be inconsistent with one or more obligations in one or more elements of the Code.
- 7.43. Allegations need to be capable of being proved or disproved. If a complaint or concern about a person's behaviour is not capable of being expressed as a testable allegation, agencies should consider ways of managing the issue outside the misconduct framework.
- 7.44. Allegations presented to the person under investigation in a notice of investigation are an articulation of the scope of the investigation, and of the 'case against them' to which the person is expected to respond. They form the basis for the investigation and the framework for the investigation report.
- 7.45. An effective allegation is one that enables the person under investigation to understand exactly what they are alleged to have done, and to feel confident that the agency has not prejudged the outcome of the investigation. Effective allegations can also help agencies meet the requirements of procedural fairness:
- Procedural fairness requires the person under investigation to be given a reasonable opportunity to respond to the allegations against them before a decision is made. This means that allegations should be presented in a way that is clear, specific, and unambiguous.
 - Procedural fairness also requires a decision-maker to be free from real or apparent bias—thus allegations also need to be drafted using language that is neutral and objective.
- 7.46. Drafting allegations in clear and neutral terms can also ensure they are easier to prove or disprove. For example, an allegation that a person 'raised their voice and struck a table with their fist' in a meeting is more easily tested than one stating that the person 'got angry and abusive' in the meeting. The first is framed in terms of observable behaviour, and the person under investigation and any witnesses can be asked whether the person did in fact raise their voice and strike the table, and this evidence assessed on the balance of probabilities. It is much harder to establish whether the person was 'angry and abusive', however, as these are terms that can be interpreted subjectively. As well, this framing appears to require the person's mental state to be established, which is not necessary for a determination of a Code breach.

7.47. As such, allegations should:

- set out specific incidents of observable behaviour in clear, objective language
- state when and where the behaviour is alleged to have happened
- separate multiple incidents so that each can be tested on its own
- avoid using terms with specific legal definitions that need to be established, such as 'assault', 'discrimination', 'fraud', 'theft', etc. A determination of a Code breach does not require behaviour to meet the definitions or standards of such terms
- if a policy is alleged to have been breached, state the specific provision of the specific policy
- state which elements of the Code may be in breach if the allegation is proven on the facts.

Investigation plan

7.48. It is good practice to develop an investigation plan at the beginning of the process to articulate what needs to be done to establish the facts. A plan can include the following considerations:

- Who is being investigated? What is the specific behaviour they are alleged to have engaged in?
- What needs to be found out in order to establish the facts—i.e. to prove or disprove whether the person did what they were alleged to have done?
- What evidence needs to be gathered and assessed in order to make findings of fact, and what are the potential difficulties in obtaining that evidence, if any? Are there timing considerations in gathering particular forms of evidence?
- What is the quality of evidence needed in order to support a reasoned and reasonable determination of whether there has been a breach?
- Who needs to be interviewed?
- Are there any risks that need to be managed? For example, medical considerations, cultural considerations, absences from the workplace, or impact on the workplace.
- Is legal advice needed?
- Do any reasonable adjustments need to be made to enable the person under investigation, or any witnesses, to participate in the process?

- On the basis of these factors, how long can the investigation be expected to take? What are the timeframes for key milestones?
- How will confidentiality be handled in relation to the identity of the person who reported the alleged misconduct, or witnesses? This is particularly important if the allegation was made as a disclosure under the PID Act.
- What are the privacy issues raised by this matter, and what steps need to be taken to meet the agency's obligations under the Privacy Act?

Timeliness

- 7.49. The Commissioner's Directions stipulate that the process for determining whether a person has breached the Code must be carried out with as little formality and as much expedition as a proper consideration of the matter allows. This means that the investigation needs to be conducted efficiently—but that this should not come at the expense of a properly conducted process, or of procedural fairness obligations.
- 7.50. Agencies should ensure timeliness in their investigations to the extent practicable, noting that some delays may be outside the agency's control—for example, those due to unscheduled absences, or to criminal matters that are awaiting resolution. Decision-makers should also consider whether requests from a person under investigation for multiple extensions of time to respond, or requests for an extended period of time to respond, are reasonable in the circumstances.
- 7.51. Ensuring timeliness is important for a number of reasons. Delays can affect the availability of reliable evidence, and the capacity of the person under investigation to respond fully to the case against them. For these reasons, among others, delays in investigations can reduce the likelihood of reaching a concluded view on whether the person did what they were alleged to have done. Unreasonable or extended delays in the investigative process, because of their effect on the person under investigation, can be a mitigating factor when deciding sanction. They are also a factor that may be considered by external review bodies.

Notice of investigation

- 7.52. Section 59 of the Commissioner's Directions provides that a person alleged to have breached the Code must be informed of certain matters before a determination is made. Many agencies do this in the form of a written notice of investigation.
- 7.53. A person under investigation should be notified at the earliest reasonable time of the decision to start a misconduct investigation, and of the identities of the person or people involved in investigating the allegations, making the breach determination, and making the sanction decision (if that person has been appointed at this stage). This allows the person under investigation to raise any concerns about apprehension of bias. Advising the person earlier rather than later can also

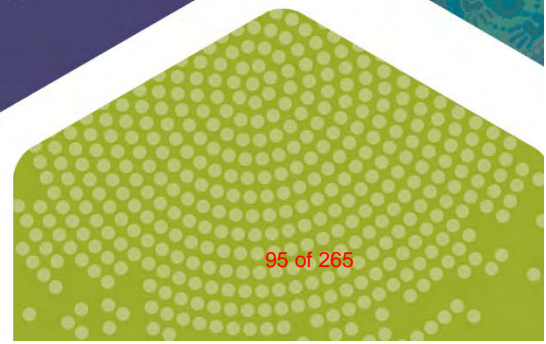
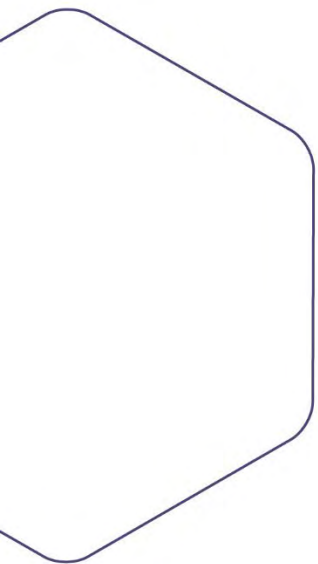
help to avoid the undesirable risk of the person finding out through unofficial sources that an investigation is underway.

- 7.54. Any notice to the person under investigation must be consistent with the requirements of the agency's s.15(3) procedures, which in turn must be consistent with s.59 of the Commissioner's Directions.
- 7.55. As a matter of good practice, a notice of investigation generally should set out:
- the specific behaviour the person is alleged to have engaged in
 - the element(s) of the Code they are alleged to have breached
 - the full range of sanctions that may apply
 - who will be investigating the alleged misconduct, if this is different from the decision-maker
 - the decision-maker who will make the determination.
- 7.56. The notice should be drafted in neutral language to avoid the risk of appearing to have prejudged the outcome of the investigation. Notices should not include expressions of disappointment in the person or their behaviour, or language that presuppose that the person has behaved improperly or breached the Code.
- 7.57. The notice may include a statement advising the person under investigation that their personal information is being collected, the uses to which it will be put, and the circumstances in which it will be disclosed.
- 7.58. The notice may be signed, physically or electronically, by the person who has authorised the misconduct action, or by the decision-maker or investigator, in accordance with the agency's s.15(3) procedures and relevant guidance or policies. A copy of this notice should be retained on the misconduct file—see section 12.1: Recordkeeping requirements.
- 7.59. As a matter of good practice, agencies are advised to attach to the notice information about how the misconduct process will proceed, a copy of the agency's s.15(3) procedures, and any relevant guidance material. Agencies may also consider including information about the support and advice available to the person under investigation. Employees may be offered support from, for example, their manager, HR, or the agency Employee Assistance Program, and both current and former employees may seek advice from the Ethics Advisory Service. Generally, employees and former employees are not entitled to assistance in meeting legal expenses incurred in relation to misconduct action (paragraph 2A of Appendix E to the *Legal Services Directions 2017*).
- 7.60. It may not always be possible to give the person under investigation complete details of the alleged breach at the outset of an investigation. In such cases, it is appropriate to inform the person in writing that an investigation has started, and outline the allegations as they are known at the time. The person should be advised

that they will be given further detail about the allegations as the investigation progresses, and an opportunity to make a statement in relation to the allegations and evidence, once the evidence has been gathered and before a determination is made.

Chapter 8

Investigation and determination



- 8.1. Undertaking a misconduct investigation includes gathering and assessing evidence, and, in many cases, preparing an investigation report, to inform a breach determination that is sound and defensible.
- 8.2. It is recommended that the breach decision-maker not be informed that the person under investigation has previous findings of breaches of the Code, if that is the case. Where this is not possible, the decision-maker should not take previous findings into consideration. This allows the decision-maker to make their determination solely on the evidence relating to the matter under investigation. However, it may be reasonable for a decision-maker to take into account previous warnings, directions, or other management action that has been taken in relation to the same matter. The relevance of prior misconduct should be considered in making a sanction decision.

Gathering evidence

- 8.3. Evidence can be collected from a range of sources. These can include interviews with witnesses, electronic records (for example, system logs or building access), or written statements. In some cases, physical evidence may be sufficient to establish the facts—for example, in cases involving suspected improper access to personal information, or improper use of email or internet, the investigation is likely to be founded on records of computer use. In other cases, witness statements or other evidence will need to be collected and considered.
- 8.4. Where the person under investigation suggests there may be additional evidence that could corroborate their version of events, or otherwise disprove the allegations against them, this evidence should be gathered where practicable. Such requests should be evaluated in light of the relevance of the evidence and the requirements of procedural fairness.

Conducting interviews

- 8.5. The purpose of an interview is to gather and test evidence to assist in establishing factual matters. An investigator or decision-maker should consider the following good practice in conducting interviews:
 - Providing the interviewee with sufficient notice to allow for adequate preparation
 - Where appropriate, advising the interviewee that they may be accompanied by a support person (see 'Support roles' for more information)
 - Considering whether it would be appropriate to make available to the interviewee, before the interview, any documents that will be discussed at the interview

- Preparing a set of questions
 - Questions should be framed in clear and neutral terms, and witnesses should not be prompted, even inadvertently, to confirm a particular set of facts or version of events
- Advising interviewees that personal information relating to them, or any other person, and any evidence they provide, may be disclosed to others, including the person under investigation, where necessary and appropriate
- Ensuring, where practicable, that the interview is conducted in a private location free from interruption. This may be a location outside the workplace
- Wherever possible, seeking corroborating evidence from the interviewee of any claims they make
- Advising the interviewee that a record of the discussion will be prepared and will be provided to them
 - The objective is to have jointly agreed records of interviews. If this cannot be achieved, it is good practice to document the areas of disagreement
- Informing the interviewee of the arrangements for confirming the accuracy of the record of the interview, recording any disagreements, and setting a timeframe for the interviewee to respond
- Deciding before the interview whether it is desirable for it to be audio-recorded, and, if so, establishing the interviewee's consent to the recording. It is usually appropriate to make a copy of the recording available to the interviewee
- Ensuring notes of the interview are accurate and are recorded in the interviewee's own words. Where a written record of interview is to be prepared, it may be convenient to use a note-taker
- After the interview, considering whether evidence provided by the interviewee needs to be checked, either with the interviewee or against other sources of evidence.

Interviewing the person under investigation

- 8.6. Investigators are often required to interview the person under investigation for the purpose of establishing facts. An interview in these circumstances is not an avenue for procedural fairness, and the investigator may need to explain this to the person, and assure them that they will be given other opportunities to respond to the case against them before a decision is made.

- 8.7. An employee can be given a lawful and reasonable direction to answer questions relating to their activities as an employee. However, they cannot lawfully be directed to answer questions where the answer would:
- incriminate them in relation to a criminal offence. This is consistent with the common law privilege against self-incrimination
 - disclose confidential information the employee cannot lawfully provide
 - disclose information that is subject to legal professional privilege, such as discussions the employee has had with their lawyer.
- 8.8. Agencies may wish to seek legal advice where an employee seeks to claim privilege against self-exposure to penalty.
- 8.9. An employee choosing not to answer such questions cannot, for that reason alone, be taken to have breached the Code.
- 8.10. Any direction requiring an employee to attend an interview must also be reasonable. What is reasonable will depend on the particular circumstances, including considerations relating to the employee and the details of the investigation.

Reviewing and assessing evidence

- 8.11. The investigator's role includes seeking out the available evidence, and then weighing that evidence, including inconsistencies in accounts, to form a view (whether as a finding of fact, or as a recommendation to a decision-maker) about what occurred, applying the standard of 'on the balance of probabilities'. In evaluating evidence, investigators should have regard to the impact of unconscious bias on their assessments.

 See 'Unconscious bias' for more information.

Reviewing the evidence

- 8.12. In reviewing the evidence it is advisable to keep the following considerations in mind:
- Has the person under investigation been given a reasonable opportunity to respond to the evidence, including to new or conflicting evidence that has arisen during the investigation?
 - Has the response of the person under investigation been genuinely and fairly considered, and have lines of inquiry suggested by that person been pursued where it is reasonable to do so?
 - Have witnesses been questioned about evidence that conflicts with their witness statements?

- Is any evidence missing? Is there enough credible, relevant, and significant (i.e. logically probative) evidence to support findings of fact on which a breach determination can be made?

Assessing and evaluating evidence

8.13. When making a judgement about the reliability of the evidence, investigators and decision-makers should consider the following:

- Primary sources of evidence are preferable to secondary sources. For example, hearsay evidence is of less value than a first-hand account.
 - First-hand evidence of an event is what a witness to the event relates, while hearsay evidence is what someone says they were told about an event by another person who witnessed it.
- Test disputed facts, or seek corroboration from other witnesses or evidence, where possible.
 - Evidence is more likely to be reliable if it can be confirmed or verified from another independent source.
- Consider the credibility of witnesses, having regard to, for example, inconsistencies in evidence, honesty, or the possibility of collaboration or improper purpose.
 - Be mindful that conflicting versions of an event do not necessarily mean someone is lying. It is possible for different people to perceive or remember events differently. Consider what the balance of evidence suggests is the truth of the matter—for example, whether someone's account is consistent with other evidence.
 - Be mindful of the impact of unconscious bias in assessing the credibility of witnesses. For example, a witness not making eye contact is not in itself a reason to conclude they are evasive or untruthful. More information about unconscious bias is in section 4.2.2.
- A record of an event made contemporaneously is generally preferable to a record made days or weeks later.
 - For example, a diary note made close to the time of a conversation is likely to be more reliable than someone trying to recall the details of the conversation several months after it occurred.
- An opinion generally has greater weight if it is given by someone with expertise on the matter.
 - For example, a medical practitioner's diagnosis of a person's state of health will be more reliable than a lay person's opinion. Expert evidence may be evaluated by, for example, looking at the expert's area of

expertise and its relevance to the opinion or evidence they have provided. However, an investigator should be wary of relying on their own non-expert opinion in a matter that requires expert judgement.

Standard of proof

- 8.14. The standard of proof applicable to findings that the Code has been breached, including the findings of fact that support the breach determination, is the civil standard. That is, findings are based on the conclusion that it is more likely than not, having regard to credible evidence, that the person under investigation has done what they were alleged to have done. This is referred to as ‘the balance of probabilities’.

Procedural fairness—investigation and determination’

- 8.15. Subject to agency s.15(3) procedures, the investigator should provide the person under investigation with the relevant, credible, and significant evidence collected during the investigation and allow them to respond, comment, or correct the record. This may take the form of a summary of the substance of the evidence or witness statements, rather than the full documentation.
- The hearing rule does not require all investigation material relevant to the allegations to be provided, but the person under investigation must be given sufficient details of the case against them to be able to respond properly.
 - Credible, relevant, and significant material may include adverse material that the decision-maker does not propose to rely on in making a particular finding or the decision on breach. Depending on the circumstances, it may be necessary for the person under investigation to be given an opportunity to comment on this.
 - If new or conflicting evidence comes to light that is relevant, credible, and significant, reasonable steps must be taken to provide the person under investigation with a reasonable opportunity to respond to that evidence before a decision on breach is made.
 - Procedural fairness does not always require that adverse material be put in writing. Subject to any requirement in agency s.15(3) procedures, it may be appropriate in some cases to put adverse material to the person at an interview.
- 8.16. The investigator should also ensure that the person under investigation has a reasonable opportunity to state their case, including any extenuating circumstances.

- The length of time given to respond to adverse material may depend on the complexity of the allegations and the evidence, and the particular circumstances of the person under investigation, having regard to the requirement in the Commissioner's Directions to conduct the determination process with as much expedition as a proper consideration of the matter allows.
- The person under investigation should be informed, consistent with the agency's s.15(3) procedures, of how long they have to respond and whether the response can be oral or in writing. What can be considered a 'reasonable opportunity' to respond depends on the relevant circumstances, including the extent and seriousness of the alleged misconduct and the capacity of the employee to respond. Whether the response is oral or in writing may depend on the complexity of the matters the employee wishes to raise, or the capacity of the employee to provide a written statement.
- Procedural fairness requires the person under investigation to be given a reasonable opportunity, not a perfect opportunity, to put their case. This is determined by an objective standard—that is, what a reasonable person would believe was a reasonable opportunity given the circumstances.
- Declining to respond to allegations of misconduct cannot be assumed to be evidence that the alleged misconduct occurred.

8.17. The breach decision-maker may advise the person under investigation of their preliminary views about the alleged breach, and give them an opportunity to respond. This might be in the form of a draft decision or report if the decision-maker deems this appropriate in the circumstances, or if it is a requirement of an agency's s.15(3) procedures.

Investigation report

8.18. An investigation report is an explanation of how the available evidence leads to a particular conclusion about what happened. It is not enough to set out only the allegations, evidence, and conclusion—the report also needs to articulate the analytical process and explain how the evidence leads to the specific conclusion that has been reached.

- 8.19. A good quality investigation report should:
- set out clearly the nature of the alleged misconduct—well-drafted allegations will assist with this
 - outline the factual matters that need to be established to determine whether the person under investigation did what was alleged. In order to do this, the investigation report may need to establish a clear chronology of events
 - set out the steps taken to collect evidence and information
 - present the evidence in a balanced way, including both evidence that supports and challenges the allegations
 - acknowledge and consider the response of the person under investigation to the allegations, and their response to any new or conflicting evidence uncovered in the course of the investigation
 - if there is a conflict in the evidence, explain why one set of evidence is preferred over another
 - outline the conclusions that are able to be reached on the available evidence—these need to flow logically from the evidence
 - include reasons why the action or behaviour that is found on the evidence could or could not be determined to be a breach of an element or elements of the Code.

Making a breach determination

- 8.20. The process of determining a breach of the Code requires the decision-maker to decide, after weighing the evidence, whether or not the person under investigation has, on the balance of probabilities, done what they were alleged to have done, and then to decide, as a consequence, whether or not the person has breached a particular element or elements of the Code.
- 8.21. When a different person has undertaken the investigation, the breach decision-maker remains responsible for the decision. The decision-maker needs, separately and independently, to consider the evidence where an investigator has made a recommendation about whether a breach of the Code has occurred. The decision-maker must then reach their own conclusions, both on the findings of fact and about breach.

- 8.22. Where a breach decision-maker has concerns about the recommendations made by an investigator, or about the investigative process, the decision-maker may act on those concerns and take additional steps to correct procedural flaws or satisfy themselves on particular matters. This might include writing to the person under investigation and giving them an opportunity to comment on the decision-maker's preliminary view about findings of fact or breaches of the Code before a decision is made.
- 8.23. In determining which elements of the Code have been breached, it is important to focus on the elements most relevant to the behaviour. A targeted approach is consistent with the premise that misconduct action in the APS has a corrective function. It is easier to explain to a person found to have breached the Code that their conduct was inappropriate if the elements of the Code are relevant to the misconduct. The person is also more likely to change their behaviour in the future if they have a clear understanding of the link between their conduct and the breach. Where more than one element of the Code has been breached, each element will need to be considered separately in the final decision.
- 8.24. It may become clear to the breach decision-maker in the course of the investigation that no breach has occurred, or that there is insufficient evidence on which to base a finding that a breach has occurred. In some cases, this can be because the breach decision-maker forms the view that the person under investigation has done what was alleged but has made an honest and reasonable mistake due to, for example, systemic issues, such as a lack of adequate training or problems with technology, leading to a number of similar mistakes by colleagues, or that the action was taken at the direction of a manager.
- 8.25. If evidence does not support a finding of a breach, the decision-maker can either terminate the decision-making process, or, alternatively, finalise the decision-making-process with a determination that the employee has not breached the Code. The person under investigation should be advised of the outcome.
- 8.26. Generally, there is no practical difference between an investigation that is discontinued without a finding of breach and one that determines no breach has occurred. However, in deciding how to proceed, a decision-maker should have regard to all the circumstances, including whether the time and resource costs of finalising the investigation are justified, and the impact on the person under investigation of discontinuing or of finalising the investigation.

Preparing a record of the determination

- 8.27. Under s.63 of the Commissioner's Directions, a written record must be made of the breach determination. Agency s.15(3) procedures may prescribe the form of such a written record, though they are not required to do so.
- 8.28. As a matter of good practice, a record of a breach determination should generally include:
- a summary of the evidence considered by the decision-maker
 - where the decision-maker also considered a recommendation from an investigator, the decision-maker's response to the recommendation, including reasons for accepting or not accepting the investigator's recommendation. The investigator's report could be attached to avoid the need to reproduce the detail of the report in the decision record
 - findings of fact about what the person under investigation has done or not done. The findings need to be as specific as possible, and, wherever possible, linked to specific events
 - a decision as to whether what happened amounts to misconduct, and, if so, which element(s) of the Code were breached
 - the reasons for reaching these conclusions.

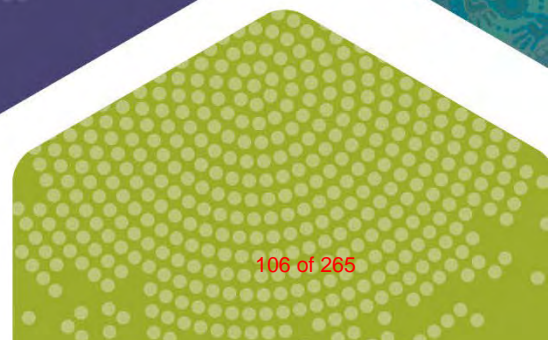
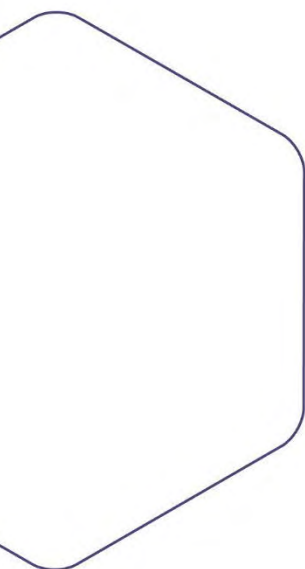
Advising the person under investigation of the breach determination

- 8.29. Under s.60 of the Commissioner's Directions, reasonable steps must be taken to inform an employee found to have breached the Code of the breach determination, the sanctions(s) under consideration, and the factors under consideration in determining the sanction, before any sanction can be imposed. It is good practice to provide this information in writing.
- 8.30. Where a former employee is found to have breached the Code, agencies should take reasonable steps to inform them in writing of the breach determination and their review rights.

- 8.31. As a matter of good practice, a letter to the person under investigation should generally also:
- enclose a copy of the breach determination record, and, if appropriate, the investigation report
 - for an employee, provide information about the process for making a sanction decision
 - In some cases it may be appropriate at this stage to advise the employee of the sanctions being considered, and the factors under consideration in determining a sanction
 - notify the employee or former employee of the right to seek review of the determination under s.33 of the PS Act
 - Both employees and former employees found to have breached the Code have the right to seek review by the MPC of the determination.
 - Applying for a review will not operate to stay the finding of breach or, in the case of a current employee, consideration of any sanction.

Chapter 9

Sanctions



- 9.1. Once a determination has been made that an employee has breached the Code, the next stage in the misconduct process is the consideration of an appropriate sanction. A sanction can only be imposed on an employee who has been found under agency s.15(3) procedures to have breached the Code.
- 9.2. Before a sanction may be imposed, the employee must be informed of the sanctions under consideration and the factors under consideration in deciding a sanction, and given reasonable opportunity to make a statement in relation to the sanctions under consideration (s.60 of the Commissioner's Directions).
- 9.3. Where there are separate decision-makers for breach and sanction, it is open to the breach decision-maker to make recommendations about sanction. However, the sanction decision-maker needs to exercise the sanction power independently, based on their own consideration of the relevant matters. In making the sanction decision, the sanction decision-maker accepts, and acts on the basis of, the findings of the breach decision-maker.
- 9.4. If the sanction decision-maker forms the view that there has been a serious procedural flaw affecting the validity of the breach decision—for example, a failure to give the person under investigation an opportunity to comment on adverse material—they do not have the power to amend the breach determination or to review the decision-making process. In these circumstances, it is recommended that agencies seek legal advice on available options.

Factors to be considered in deciding a sanction

- 9.5. A sanction should provide a clear message to the employee that their behaviour was not acceptable, and deter them from repeating the behaviour. The ability of agencies to impose sanctions on employees found to have breached the Code is also intended to act as a general deterrent to all employees.
- 9.6. Sanctions should always be proportionate to the nature of the breach—where a sanction is too lenient, it is unlikely to change behaviour; if it is too severe, it is likely to be seen as unfair and may be counterproductive. There is no necessary link between the number of elements of the Code that an employee has breached and the severity of the sanction.
- 9.7. Management action such as counselling, training, mentoring, closer supervision, or alternative dispute resolution may be considered more appropriate than a sanction in some cases. If this is decided, agencies should make clear to the employee that no sanction has been imposed. Such actions may also be taken in addition to a sanction if they are likely to assist the employee to change their behaviour. Again, agencies should clearly distinguish sanctions from management actions in such cases.

- 9.8. Prior misconduct is relevant to the imposition of a sanction, and should be taken into account by the sanction decision-maker where it:
- indicates that the employee was, or should have been, well aware of the standard of conduct expected and the potential consequences of misconduct, or
 - demonstrates that the employee may be unwilling to adhere to the standard of conduct expected.
- 9.9. Sanction decision-makers should have regard to the impact of unconscious bias on their deliberations and decisions.

 See 'Unconscious bias' for more information.

Some considerations in deciding sanction

- 9.10. Case law indicates a range of other factors that are, or may be, relevant in determining the level of a sanction.

Nature and seriousness of the breach

- 9.11. Considerations may include:
- the type of conduct involved
 - amounts, values, or quantities
 - the period over which the misconduct occurred
 - evidence of any personal benefit from the breach
 - the actual and potential consequences of the employee's conduct.

Degree of relevance to employee's duties and the reputation of the agency or APS

- 9.12. Considerations may include:
- the seniority of the employee—more senior employees are generally expected to set an example for more junior staff, and are required to exercise a greater degree of judgement
 - whether a breach of trust was involved
 - whether the nature of the breach has affected the confidence of the agency in the employee's ability to perform their current duties

- any special job requirements—for example, to maintain specific professional or ethical standards
- the extent to which the misconduct affects, or may have affected, the reputation of the agency or the APS.

Whether the misconduct was uncharacteristic

9.13. Considerations may include:

- the employee's length of service, balancing a previously unblemished record against the expectation of greater awareness of behavioural requirements
- whether there are records of previous counselling
- the extent to which there is evidence that the behaviour is atypical. To assess this, the behaviour over a longer period may need to be examined—for example, any records of discussion with the employee within the last two years. Relevance of previous behaviour diminishes over time
- the employee's attempts to stabilise any personal situations affecting their behaviour
- support by colleagues and supervisors—for example, reports or references in relation to general character.

Employee response and likelihood of recurrence

9.14. Considerations may include:

- cooperation with the investigation
- whether the employee has reflected on the action, admits the breach and understands its seriousness, shows a willingness to take responsibility, and shows remorse and a commitment not to repeat the behaviour.

Mitigating factors

9.15. Considerations may include:

- the degree of responsibility for the breach and whether there was any provocation, persuasion, or even coercion, by other employees
- the intention of the employee to breach the Code, and whether the breach was premeditated or involved a spur-of-the-moment decision
- the extent to which an employee's disability, health, or other factors may have influenced their conduct—however, care needs to be taken not to imply different standards of conduct based on the personal circumstances of employees

- whether sufficient guidance has been provided by the agency in relation to the Code in general and explicit guidance or directions about the particular behaviour, including whether policies are clear and consistently applied
 - the extent to which the breach may have reflected a culture or common practice in the work area which needs to be addressed as a systemic problem
 - any procedural issues—for example, unreasonable delay between the matter first coming to the agency’s notice and the sanction being imposed
 - the effect of the proposed sanction on the employee, including any loss of earnings already incurred by the employee as a result of suspension without remuneration.
- 9.16. Factors that may not be relevant include claims that the employee found the misconduct process stressful or that the employee has incurred legal expenses.

Considerations in imposing particular sanctions

Termination of employment

- 9.17. Termination of employment is the most severe of sanctions. It may be appropriate where:
- the misconduct is so serious that it is no longer appropriate that the employee remain in the APS
 - the employee, through their behaviour, has repudiated a basic element of the employment relationship—for example, by indicating that they do not accept the need to follow lawful and reasonable directions.

Reduction in classification

- 9.18. Reduction in classification is an appropriate sanction where, due to the misconduct, the employee can no longer be trusted to perform the duties of their current position or of any other position at the same classification or level of responsibility. For example, a reduction in classification may be the best sanction where an employee has demonstrated through their behaviour that it is not appropriate for them to have any supervisory responsibilities.
- 9.19. Reduction in classification is also appropriate where termination of employment would be warranted but there are mitigating factors which suggest that the employee should be given a chance to redeem themselves.
- 9.20. The agency should ensure that duties are available at the proposed classification before the sanction of reduction in classification is imposed.

- 9.21. A sanction of reduction in classification cannot be imposed for a specific period. The employee remains at the reduced classification until they secure higher duties or a promotion to their original classification, or a higher classification, in line with normal merit-based selection.
- 9.22. It is not reasonable for an agency to direct an employee whose classification has been reduced to refrain from applying for promotion or higher duties. However, an employee's misconduct record can be considered in selection processes where it is relevant to the duties to be performed—see 'Considering misconduct in a selection process'.
- 9.23. An employee whose classification is reduced under s.15(1)(b) of the PS Act would have their salary reduced commensurately. The sanction decision-maker needs to consider the agency's pay scales and specify not only the new classification but also the appropriate pay point within the classification. Factors to consider include the following:
- The level to which an APS employee's salary is to be reduced may be informed by the terms of the industrial instrument applying to their employment.
 - Where the level to which an employee's salary is to be reduced is not clear from the relevant industrial instrument, it is recommended that the sanction decision-maker impose two sanctions—a reduction in classification under s.15(1)(b) and a reduction in salary under s.15(1)(d)—to ensure that there is authority to reduce the salary to a particular point. It is possible for more than one sanction to be applied to an employee found to have breached the Code, if the sanction decision-maker is satisfied that more than one sanction is appropriate in the circumstances.
- 9.24. Where a sanction decision-maker has relied on the power in s.15(1)(b) to reduce an employee's classification, but not on the power in s.15(1)(d) to specify a lower salary, it would be appropriate to place the employee on the top pay point at the lower classification.
- 9.25. A reduction in classification may be obvious to colleagues, and the subject of gossip and speculation. Agencies need to consider options to manage this in a way that minimises speculation and other possible adverse consequences.

Re-assignment of duties

- 9.26. The sanction of re-assignment of duties at the same classification, including to a different location, may be appropriate where the conduct in question does not warrant termination of employment but there may be adverse consequences if an employee is not removed from a particular location or from their current duties. For example, this could occur where:

- the nature of the employee's conduct is such that it may be difficult for colleagues to continue working harmoniously with them
 - the employee is no longer trusted to perform a particular aspect of their current duties.
- 9.27. A sanction of re-assignment of duties requires that alternative duties be available within the agency at the employee's substantive classification.
- 9.28. As with a reduction in classification, agencies should consider whether they need to take steps to mitigate risks of gossip and other possible adverse consequences to the employee as a result of the re-assignment.
- 9.29. Where the re-assignment of duties involves a change of location, it is advisable to take into account the impact on the employee, such as financial costs and the effect of dislocation on the employee and their family. The sanction decision-maker should also take into account the financial impact on the employee of loss of allowances, such as shift work allowances, where relevant.
- 9.30. A re-assignment of duties may be imposed for a defined period if it is considered appropriate to return the employee to their former duties after a specific period of time.

Reduction in salary

- 9.31. A reduction in salary can be used to reinforce the seriousness with which the employee's conduct is viewed. It may be appropriate where the employee's behaviour during the misconduct process does not indicate that they understand the seriousness of the breach. A reduction in salary can be imposed for a specified and temporary period or an unspecified period.
- 9.32. A reduction in salary should be imposed in a reasonable and proportionate way. For this reason, it is advisable that agencies set the reduction for a specified and temporary period and state that period clearly in the sanction decision. At the end of the period of reduced salary, the employee is entitled to be paid the salary at the level they would have received if they had not been subject to a temporary reduction in salary.
- 9.33. The amount by which salary is to be reduced is a matter for the sanction decision-maker. However, as this is a different and generally a lesser sanction than a reduction in classification, the reduction in salary could be an amount valued at less than a reduction in classification.
- 9.34. Generally, any reduction in salary will be subject to a subsequent salary event, such as a promotion or a salary increase provided for in an industrial instrument. The likelihood of such events occurring during a specified period of temporary reduction should be considered by the sanction decision-maker, given that the effectiveness of the sanction may be reduced. It is, however, possible for an agency to impose a

salary reduction for a specified period that makes provision for how the reduction would interact with any subsequent salary event. The sanction decision could state, for example, that there will be 'a reduction of 10% in the salary which would otherwise be payable for a period of 12 months'.

Deductions from salary (fine)


- 9.35. This sanction may be appropriate for less serious breaches, where the agency needs to reinforce its concerns about the employee's conduct by way of short-term financial impact. A sanction of a fine may be imposed by way of a one-off deduction, or by deducting an amount from salary each pay for a short, defined period. Deductions over a lengthy period would minimise the impact of the sanction. It is appropriate for the sanction decision-maker to decide the period of deductions taking into account any mitigating factors, including financial hardship, raised by the employee.
- 9.36. Deductions from salary are limited to no more than two per cent of an employee's annual salary (s.9 of the PS Regulations). In determining the upper limit of a fine in a particular case, the decision-maker needs to consider the meaning of the term 'salary' as provided for in the agency's remuneration arrangements.

Reprimand

- 9.37. A reprimand is the least severe form of sanction. It is most appropriate in situations where the misconduct is of a less serious nature, and where it is clear that the employee has learned from the misconduct process and presents little appreciable risk of further misconduct.
- 9.38. A reprimand acts as both a mark of disapproval of past conduct and as a warning for the future. A reprimand is not counselling—rather, it delivers a clear message to the employee that their behaviour was found to be below the required standard.
- 9.39. Consideration needs to be given to the most effective person to deliver the reprimand. Generally, a reprimand delivered by a higher-level manager will carry greatest weight.
- 9.40. A reprimand is subject to the same standards of recordkeeping as other sanctions. For this reason, it may be practical for the reprimand to be delivered at a face-to-face meeting, with a written record of the reprimand provided to the employee at the conclusion of the meeting, and a copy placed on the misconduct file.

Recording the sanction decision and advising the outcome

- 9.41. Under s.63 of the Commissioner's Directions, a written record must be made of the sanction decision, and, if the employee was provided with a statement of reasons, the record must include that statement. Agency s.15(3) procedures may prescribe the form of such a written record.
- 9.42. As a matter of good practice, a sanction decision record should generally include:
- a description of the relevant actions and behaviours, and the elements of the Code that were breached
 - the decision-maker's assessment of the seriousness of the breach
 - the decision-maker's assessment of aggravating and mitigating factors, if any
 - the decision on whether or not a sanction needs to be imposed, and, if not, the factors the decision-maker considers relevant to taking other management action as an alternative
 - the sanction to be imposed.
- 9.43. The employee should be promptly notified in writing of the sanction decision and of their review rights.

 Information about review rights is in Chapter 11.

- 9.44. Any suspension from duty must end at this point (s.14(7) of the PS Regulations).

Date of effect

- 9.45. The date of effect of a sanction will not necessarily be the same as the date on which the sanction is decided. It may be necessary to allow time for administrative action to be taken to put the sanction into effect—for example, organising an appropriate placement for a re-assignment of duties.
- 9.46. The date a sanction takes effect is not delayed where an employee applies for a review of the breach or sanction decision by the MPC.

Procedural fairness in the sanction decision

- 9.47. Provisions in the PS Act and the Commissioner's Directions emphasise the need to ensure procedural fairness in relation to any decision to impose a sanction on an employee.
- 9.48. Sanctions may only be imposed consistent with the agency's s.15(3) procedures. In line with s.60 of the Commissioner's Directions, agency s.15(3) procedures must include a requirement to the effect that a sanction may not be imposed unless reasonable steps have been taken to:
- a) inform the employee of:
 - i. the determination, and
 - 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 statement in relation to sanction(s) under consideration.
- 9.49. The employee must be given a reasonable opportunity to comment on the proposed sanction(s), and the factors under consideration, before a decision on sanction is made. The sanction decision-maker must consider the employee's comments before finalising the sanction decision. This deliberative process should include an impartial consideration of the employee's comments concerning both the sanction(s) that might be applied, and any information or personal factors that may be relevant to that decision. It is good practice for the decision-maker to document this deliberation.
- 9.50. If, after receiving the employee's comments, the sanction decision-maker is inclined to impose a more severe sanction than was communicated to the employee, the decision-maker must advise the employee of this and give them a further reasonable opportunity to comment.

Other considerations

Applying multiple sanctions

- 9.51. It is possible to impose more than one sanction, if the sanction decision-maker is satisfied that more than one sanction is appropriate in the circumstances. For example, an employee may be re-assigned duties and have a fine imposed, or be reprimanded and re-assigned duties, or, as described above, an employee may have both their salary and their classification reduced.

Applying sanctions for multiple breaches

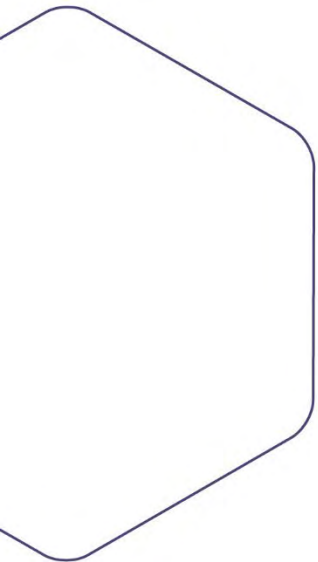
- 9.52. It is not necessary to impose a separate sanction for each breach of an element of the Code. However, where the breaches are unrelated—for example, a harassment incident and an unrelated theft—separate sanctions may be appropriate.
- 9.53. When an employee has breached several elements of the Code, it is necessary to consider the totality of the behaviour and its seriousness when considering sanctions to ensure the total effect is in proportion. The total effect should be neither too harsh nor too lenient, in relation to the seriousness of the breach or breaches when considered as a whole.

Consistency of sanctions

- 9.54. It is important to maintain a degree of consistency within an agency in the use of sanctions imposed for similar types of misconduct in similar circumstances. However, agencies should avoid a formula-driven approach. Differences in sanctions between cases within an agency should reflect the particular circumstances of both the misconduct and the employee.
- 9.55. To assist in maintaining consistency, agencies may find it helpful to:
- consider limiting the delegation to apply a sanction to a small number of people within the agency, and further limiting the number and the seniority of people with the delegation to impose more serious sanctions
 - provide clear guidelines on the factors to be considered in deciding on sanctions
 - have available specialist corporate and/or legal resources that can be consulted by sanction decision-makers
 - establish a database of cases and sanctions and indicate that this can be consulted, having regard to privacy requirements, when deciding sanction.
- 9.56. The MPC publishes case studies of decisions made after reviewing agency breach determinations and sanction decisions. These case studies provide guidance on how the MPC may view a case. While helpful, the case studies should not be relied upon to make sanction decisions—a sanction decision must be made having regard to the circumstances of the particular matter.

Chapter 10

Misconduct action in unusual circumstances



- 10.1. A misconduct process may sometimes intersect with other considerations or processes, either within or outside the workplace. This chapter deals with the impact on misconduct processes of criminal matters, employee movement and separation, and probation.

Misconduct action and criminal matters

- 10.2. Agencies may become aware of conduct by an employee that could be in contravention of the criminal law, or may become aware of criminal proceedings or convictions relating either to an employee's behaviour in the workplace or to their private actions. In these cases, agencies can face difficult decisions—including whether to take misconduct action, and how any such action may be affected by criminal proceedings that are in train.
- 10.3. If an agency becomes aware of possible criminal behaviour by an employee, consideration should be given to:
- reporting the matter to the appropriate law enforcement or investigative agency
 - whether to commence a misconduct investigation, or, if the suspected criminal behaviour has come to light in the course of a misconduct investigation, whether to continue or modify the investigation
 - whether it is appropriate or necessary for the agency to conduct a specialised internal investigation (for example, a fraud investigation) if it is authorised to do so.
- 10.4. Agencies may also need to consider assigning different duties or suspending an employee (see 'Changes in role, assigning different duties, and suspension').

Referring the matter to law enforcement or investigative agency

- 10.5. Agencies should have clear processes for receiving and dealing with reports of conduct by their employees that may contravene the criminal law, including self-reporting by employees, having regard to relevant reporting obligations.
- 10.6. If an agency or an employee wishes to report a suspected contravention of the criminal law directly to a law enforcement agency, they will need to consider which agency is appropriate. While many crimes against the Commonwealth are dealt with by the Australian Federal Police (AFP), there may be cases where State or Territory law applies and suspected contraventions may need to be reported to other law enforcement agencies.
- The AFP has primary responsibility for investigating serious or complex crimes, including fraud, against the Commonwealth. Generally, agencies

should refer allegations of serious crime against the Commonwealth to the AFP, which will determine whether it will investigate the matter. The AFP may recommend a joint investigation with the agency or other law enforcement bodies.

- Where there is doubt about the proper avenue for reporting suspected contraventions of the criminal law, agencies can consult the AFP or State or Territory police, or seek legal advice. The AFP has published advice on its website about the types of criminal incidents that can be reported to the AFP or to State or Territory police.

Obligations to report

- 10.7. Agencies are required under the PID Act to establish procedures for dealing with disclosures made under that Act. It is open to employees who become aware of a suspected contravention of the criminal law by another employee to make a public interest disclosure consistent with the procedures established by their agency. Should an investigator, in the course of an investigation under the PID Act, suspect that the disclosure includes an offence against a law of the Commonwealth that may be punishable by imprisonment for a period of at least two years, the investigator must notify a member of an Australian police force of that suspected offence (s.56 of the PID Act).
- 10.8. In addition, some State or Territory jurisdictions may have their own obligations regarding matters that must be reported to police. If in doubt, agencies are encouraged to seek advice from the relevant law enforcement agency.
- 10.9. Agencies also have obligations relating to receiving and dealing with reports of suspected contraventions of the criminal law under the Australian Government's Protective Security Policy Framework, administered by the Attorney-General's Department. Some agencies may also have obligations to refer certain corruption matters to the Australian Commission for Law Enforcement Integrity (ACLEI).

Taking misconduct action

- 10.10. Where an employee's behaviour may be both a breach of the Code and a criminal offence, it is open to an agency to start a misconduct process. A misconduct process may precede, be concurrent with, or be subsequent to a criminal investigation, or may be an alternative to a criminal investigation for allegations about matters that on their face may appear to contravene the criminal law but are relatively minor (for example, alleged stealing from store cupboards). However, if it becomes evident during the misconduct process that the matter is of a more serious nature, the agency may refer it to the relevant law enforcement body.
- 10.11. Where an agency becomes aware that the police are investigating a suspected contravention of the criminal law, or a prosecution is being conducted by a State or

Territory prosecution authority or the Commonwealth Director of Public Prosecutions (CDPP), advice should be sought from the police or the prosecuting authority before starting, or continuing with, a misconduct process. Agencies would generally not proceed with misconduct action if the police, another investigative body, or the prosecuting authority has advised them that misconduct action may prejudice criminal proceedings or investigations. If there is a risk of prejudicing the criminal proceedings or investigation, agencies may:

- put the employee on notice that action under the agency's s.15(3) procedures is being considered, but not start that action
- start action under the agency's s.15(3) procedures, but then put that action on hold while the criminal investigation is undertaken
- decide whether to suspend the employee for a period of time until circumstances are clearer or criminal proceedings are finalised
- liaise with the investigative body on the appropriate collection and security of evidence.

Interaction between criminal matters and the Code

- 10.12. A finding by a court in relation to a criminal prosecution is not determinative of whether an employee has breached the Code.
- Where an employee has been convicted of a criminal offence, they should not by virtue of that alone be taken to have breached the Code.
 - Likewise, it is open to agencies to take misconduct action in relation to conduct found by a court not to have contravened the criminal law.
- 10.13. Each case will need to be considered on its merits, and a decision made as to whether an investigation under an agency's s.15(3) procedures is warranted.
- 10.14. Where an investigation is undertaken, a breach decision-maker cannot simply adopt findings of fact made by courts—decision-makers have their own duty to establish the facts that would inform a breach determination, and, consistent with the requirements of procedural fairness, must provide the person under investigation with an opportunity to comment on these before making a decision. As well, findings of fact in a misconduct investigation require a different standard of proof—they are made on the balance of probabilities, rather than the criminal standard of 'beyond reasonable doubt'.

10.15. When deciding whether to inquire into an employee's behaviour as a potential breach of the Code where they are subject to a criminal charge or conviction, agencies should consider the following factors:

- **Is there a relationship between the act and the employee's employment? What is the impact, if any, on the workplace?**

APS employees are also citizens, and, like all other citizens, are entitled to a private life. Some criminal acts committed in a private capacity will not warrant consideration under an agency's s.15(3) procedures where they are not relevant to, or have no impact on, the employee's employment or workplace. For example, a criminal conviction for drink driving outside the workplace, which does not result in a custodial sentence and where the employee is not required to drive a car as part of their duties, may not have sufficient relationship with the employee's employment to warrant misconduct action.

- **If the employee has been convicted, has the conviction affected their ability to carry out their duties or role?**

Criminal convictions may prevent the employee from performing their duties if the conviction results in a custodial sentence, or affects their suitability to hold a security clearance. Agencies must advise the relevant security vetting agency of criminal charges or convictions by employees with a security clearance. The vetting agency will determine how that information will affect the employee's clearance. The employing agency will need to assess the impact of a change to, or loss of, security clearance on the employee's ability to carry out their duties.

- **Have the employee's actions brought the employee's agency or the APS into disrepute?**

Criminal charges or convictions may have different impact in different agencies depending on the nature of the act and the role of the agency. For example, possession of an illicit drug may be viewed particularly seriously, and have a stronger relationship to the workplace and its reputation, where the employee is employed by a law enforcement or health regulatory agency.

Undertaking a specialised internal investigation

- 10.16. This option may be appropriate where, for example, the AFP has decided not to investigate the matter but the agency considers it serious enough to investigate, and has the appropriate authority and expertise to do so.
- In cases of suspected fraud or other criminal behaviour, the person conducting the investigation must follow the agency's fraud control policy and procedures. These must be consistent with the PGPA Act and the Commonwealth Fraud Control Framework administered by the Attorney-General's Department.
 - Consistent with the Commonwealth Fraud Control Policy, agency fraud investigations must meet the requirements set out in the Australian Government Investigation Standards administered by the AFP. This includes competency standards for people undertaking fraud investigations.
- 10.17. An internal investigation may result in referral of the findings to the CDPP for consideration of prosecution—see the Prosecution Policy of the Commonwealth. At the start of an internal investigation, if it is apparent that a finding may be referred to the CDPP care must be taken that the collection of evidence complies with rules of evidence to ensure admissibility of evidence in court.

Privacy and handling of sensitive information relating to criminal convictions

- 10.18. Agencies have responsibilities under the Privacy Act in respect of employees' personal information, including information about criminal records. Under the Privacy Act, a person's criminal record is treated as 'sensitive information' and attracts additional protections.
- 10.19. Criminal records may also be covered by the Commonwealth Spent Convictions Scheme under the *Crimes Act 1914*, or by a state or territory spent conviction scheme. The Commonwealth Spent Convictions Scheme allows an individual not to disclose a conviction for a less serious offence after a period of good behaviour, and prohibits unauthorised use and disclosure of information about the conviction.
- 10.20. The Australian Human Rights Commission (AHRC) has also published guidelines for the prevention of discrimination in employment on the basis of criminal record, and provides information on spent conviction laws.
- 10.21. Agencies are advised to refer to guidance material produced by the Office of the Australian Information Commissioner and the AHRC when dealing with information relating to criminal convictions.

Employee movement or separation

Employee moves to another agency

- 10.22. An agency may become aware that an employee has received a job offer from another APS agency after the employee has been notified, in accordance with the agency's s.15(3) procedures, that they are alleged to have breached the Code.
- 10.23. In these circumstances, any move between APS agencies under s.26 of the PS Act will generally be deferred by the operation of ss.46 and 47 of the Commissioner's Directions. Under these provisions, the movement, including on promotion, does not take effect until the misconduct action is resolved, unless the head of the original agency and the head of the new agency (the 'gaining agency') agree otherwise. The misconduct action is resolved by either:
- a determination being made under the original agency's s.15(3) procedures about the suspected misconduct, or
 - a decision by the original agency that a determination is not necessary.
- 10.24. Where an employee suspected of having breached the Code moves, with the agreement of the agency heads, before the misconduct action is resolved, the gaining agency may initiate an investigation in accordance with its s.15(3) procedures. When an employee moves to a different agency, the procedures of the original agency no longer apply to them, and the gaining agency needs to start its own investigation into the matter under its s.15(3) procedures.
- 10.25. It would be open to the head of the gaining agency to use information and any assessment conducted by the original agency in undertaking a misconduct investigation. Section 103 of the PS Regulations allows the original agency to disclose information to the gaining agency where it is relevant to an agency head's employer powers, including a misconduct investigation in the gaining agency.
- 10.26. Where an employee moves after a finding of a breach, but before the imposition of a sanction, it is not necessary for a fresh investigation and breach determination to be carried out under the gaining agency's s.15(3) procedures, unless the procedures require otherwise.
- 10.27. A sanction delegate in the gaining agency can impose a sanction, subject to the gaining agency's s.15(3) procedures, on the basis of the original agency's finding of breach. An agency head's power under s.15(1) of the PS Act to impose a sanction extends not only to employees found under that agency's s.15(3) procedures to have breached the Code, but also to employees found to have breached the Code under another agency's s.15(3) procedures. Agency s.15(3) procedures should avoid seeking to limit this power.

Machinery of government changes

- 10.28. Section 72 of the PS Act deals with Machinery of Government (MoG) changes. When an employee under investigation is moved from their agency to another under s.72 of the PS Act, it is open to the gaining agency to decide whether it wishes to continue action to determine whether the employee breached the Code in the previous agency. This might be influenced by, for example, the seriousness of the alleged misconduct, its relevance to the business of the gaining agency, or the seniority of the employee.
- 10.29. If the gaining agency decides to conduct an investigation, the investigation must be conducted under the gaining agency's s.15(3) procedures.
- 10.30. The Commissioner may determine special arrangements in respect of an employee moved under MoG changes if certain circumstances exist concerning the employee's employment. Section 72(5A) of the PS Act and s.87 of the PS Regulations set out these circumstances. They include, among other things, circumstances where:
- a misconduct investigation is underway in the former agency
 - a sanction is imposed in relation to a misconduct finding, including a sanction that may have continuing effect
 - an employee is suspended in their former agency in response to an alleged breach of the Code.
- 10.31. It is important that agencies consider this when a MoG change is under discussion. Agencies can seek further advice from the Commission if a determination of this type is considered appropriate.

Employee separates from the APS ('former employee')

- 10.32. Where a person under investigation resigns from APS employment, the agency may continue the investigation, and determine whether there has been a breach of the Code, if it decides this is justified in the circumstances.
- 10.33. An agency may also commence a misconduct investigation in relation to a former employee's behaviour if that behaviour took place when the person was still an APS employee. Although a former employee can be found to have breached the Code, an agency head has no power to impose a sanction on a former employee.
- 10.34. It is only possible to take misconduct action in relation to a former employee who left the APS on or after 1 July 2013.

Considerations

- 10.35. In deciding whether to start an investigation after an employee has left the APS, or to continue an investigation after an employee has resigned, the following matters could be considered:
- Whether it would be possible to give the former employee a fair hearing, including a reasonable opportunity to answer the case against them
 - Factors to consider include the passage of time since the incident(s) and any constraints on the former employee accessing records in order to be able to respond effectively to the allegations.
 - Agencies may need to consider whether to provide a former employee with supervised access to agency premises or resources in order to identify relevant records.
 - Where an agency has failed to contact a former employee to inform them of the allegations, and is satisfied that reasonable attempts have been made to do so, the agency may continue the investigation. What is considered 'reasonable attempts' to contact the former employee will depend on the circumstances, but may include contact attempts by telephone, email, registered mail, or publicly listed individual workplace contact information.
 - The risks of not undertaking an investigation, such as damage to the reputation of the agency or APS, or the message that not pursuing the matter would send to other employees or the community about the seriousness with which the agency responds to conduct or integrity concerns
 - The costs associated with any investigation
 - The availability of evidence and the ability to collect it.
- 10.36. As well, once a person is no longer an APS employee, they are under no obligation to cooperate with an investigation, and an agency head has no power to direct a former employee to provide information or attend interviews, or to maintain confidentiality. That said, a former employee may be motivated to cooperate in an investigation because of the impact an adverse outcome could have on their reputation or employability.
- 10.37. Agencies should advise former employees determined to have breached the Code of their right to seek review by the MPC of that determination.

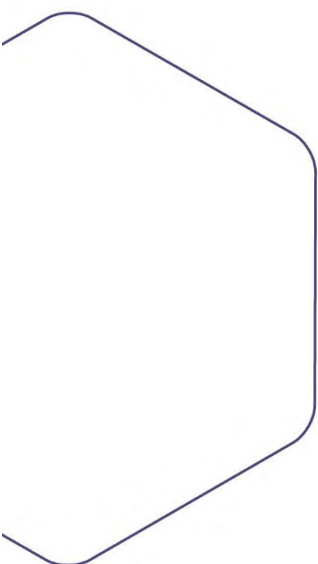
- 10.38. Whether or not an agency conducts an investigation under its s.15(3) procedures, it should also consider whether additional measures are needed to restore public confidence or workplace harmony—for example, reviewing systems, or rebuilding relationships to address matters that may persist even after the person has left the APS.

Employees on probation

- 10.39. Employees subject to probation are required to abide by the Code in the same way as other employees. Probationers who fail to adhere to behavioural and performance standards may have failed to meet a condition of their probation. In these circumstances, there may be grounds for termination of employment under s.29(3)(f) of the PS Act.
- 10.40. Agencies are advised to bring to a probationer's attention on their engagement their obligations to uphold the Values and Employment Principles, and to comply with the Code, as essential elements underpinning their employment in the APS.
- 10.41. Where it is suspected that a probationer may have breached the Code, it is open to an agency to take misconduct action under its s.15(3) procedures. The agency head may impose a sanction on a probationer found to have breached the Code.
- 10.42. If, as a result of an investigation, it is established that there has been a serious breach of the Code, the agency head can terminate the engagement immediately, without waiting for the period of probation to run its normal course. In establishing procedures under s.15(3) of the PS Act, agencies may need to consider whether they should include different provisions to apply to employees who are still serving a period of probation.

Chapter 11

Review rights



Review of action

- 11.1. The Employment Principles provide, among other things, that the APS makes fair employment decisions with a fair system of review. Under s.33 of the PS Act, APS employees are entitled to reviews of actions or decisions that relate to their APS employment, with some exceptions. The PS Regulations provide the framework for the review scheme, and the limits and exceptions that apply.
- 11.2. Agencies should advise employees of their review rights when taking significant actions or decisions that affect their employment. These include breach determinations, sanction decisions, and decisions to suspend or assign different duties to an employee while an investigation is underway.
- 11.3. The MPC is an independent statutory officer established under the PS Act. In conducting a review of a breach determination or a sanction decision, the MPC will consider, among other things, whether the agency has complied with its s.15(3) procedures, whether procedural fairness has been afforded, and whether the breach determination or sanction decision is reasonable, proportionate, and fair.

Eligibility for review

Current employees

- 11.4. Non-SES employees who have been found to have breached the Code, and wish to challenge the determination of breach, the sanction imposed, or both, may lodge an application for review directly with the MPC under **Division 3 of Part 4** of the PS Regulations. However, a sanction of termination of employment is not reviewable under this framework.
- 11.5. Other decisions relating to the misconduct process may also be reviewable, including, for example, a decision to suspend the employee from duties, or to assign them to different duties temporarily while misconduct action is underway. Unlike breach and sanction decisions, these decisions are reviewable in the first instance by the employee's agency head. If the employee is not satisfied with the outcome of the review conducted by their agency head, they can seek secondary review by the MPC.

Former employees

- 11.6. Former employees (other than SES) may also seek a review by the MPC of a determination that they breached the Code where the determination was made after their APS employment ceased. The relevant provisions are in **Subdivision D of Division 2, Part 6** of the PS Regulations. As no sanction can be imposed on a former employee, the PS Regulations do not provide for review rights for former employees in relation to sanction decisions.

Other avenues for review or remedy

Termination of employment

- 11.7. An employee whose APS employment has been terminated for misconduct cannot apply for review of that decision under s.33 of the PS Act, but may have access to the remedies under the Fair Work Act by making an application to the Fair Work Commission.

Other grounds for remedy by the Fair Work Commission

- 11.8. Employees and former employees may have other grounds for seeking remedy under the Fair Work Act, including the general protections provisions in that Act. Further information is available from the Fair Work Commission.

Judicial review

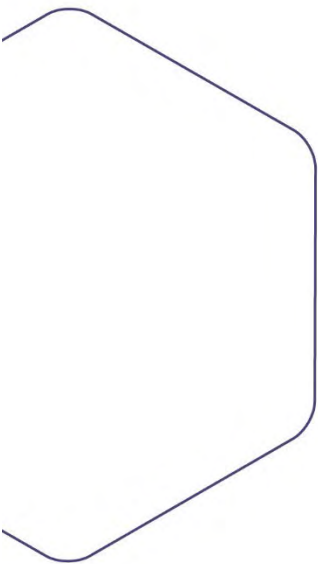
- 11.9. Employees and former employees may also have access to review by the courts—though this is generally on questions of law, rather than the merits of a decision. For example, under the ADJR Act the Federal Circuit and Family Court of Australia and the Federal Court of Australia have the power to review certain decisions. Generally, the courts' role is to ensure that decision-makers acted fairly and within the law and followed proper procedures in coming to a decision. The time limit for such applications is usually 28 days from being notified of the relevant decision.

Grounds for review under the ADJR Act

- 11.10. Decision-makers need to be familiar with the grounds for review in ss.5 and 6 of the ADJR Act. A finding that a person has breached the Code may be invalid if the decision-maker:
- has not been appointed under the agency's s.15(3) procedures
 - fails to comply with the agency's s.15(3) 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
 - acts in accordance with a rule or policy without regard for the merits of the case
 - acts on the basis of insufficient evidence.

Chapter 12

Recordkeeping and managing information



- 12.1. There are requirements for how information about conduct matters should be kept, used, and disclosed, including in relation to recruitment and selection processes. Legislation relevant to recordkeeping and access to, and use and disclosure of such records in respect of misconduct action includes the Archives Act, the FOI Act, and the Privacy Act.

Recordkeeping requirements

- 12.2. Records relating to misconduct action need to be kept separate from the personnel file of the employee or former employee. The existence of a separate misconduct file should, however, be noted on the personnel file—for example, by cross-reference. Files of this kind are to be classified ‘Official: Sensitive’, consistent with the Australian Government’s Protective Security Policy Framework, and held in secure storage.
- 12.3. Access for management purposes should be allowed only on a need-to-know basis. Delegates who are deciding a sanction for subsequent misconduct should have access to these records to allow them to give proper weight to the employee’s prior misconduct in deciding a suitable sanction.
- 12.4. It is appropriate for the misconduct file to include material such as:
- all correspondence with the person under investigation, including the letter(s):
 - informing them they are alleged to have breached the Code
 - explaining the ‘case against them’
 - advising them of the final determination decision
 - outlining the proposed sanction and the reasons for it
 - advising them of the sanction and their review rights
 - any attachments to the correspondence
 - decision records and any statements of reasons with respect to the breach determination and any suspension or sanction decisions
 - all relevant electronic correspondence relating to the investigation, decision-making, or imposition of a sanction—this can include, for example, emails or chat logs
 - all material associated with planning the investigation, such as records of telephone calls, letters, or emails or other electronic correspondence organising interviews
 - the investigation report with all the evidence relevant to the breach and sanction decisions attached, such as IT records or transcripts of witness interviews.

- 12.5. Where the agency has engaged an external investigator, the agency should require the investigator to provide the following on completion of the investigation:
- the investigation report, and the evidence relevant to the breach decision and any sanction decision, for the file
 - copies of any draft material provided to the employee for comment
 - the employee's response to the correspondence.

Retention periods and disposal

- 12.6. The National Archives of Australia's *Administrative Functions Disposal Authority Express Version 2* (AFDA Express) sets out the minimum retention requirements for various classes of records relating to misconduct matters. AFDA Express is a legal instrument issued under the Archives Act and the advice provided below is consistent with this.
- 12.7. Agencies should have regard to any current disposal freezes and retention notices that may be relevant to misconduct records, and determine whether these apply. Disposal freezes and retention notices generally state that agencies must not destroy any relevant records. Agencies should seek advice from the National Archives of Australia if in doubt.
- 12.8. Records relating to misconduct matters include records of:
- allegations of misconduct where no investigation is undertaken
 - misconduct action, including matters which formed the basis for such action, and breach determinations
 - misconduct investigations that find no breach of the Code
 - decisions about the imposition and implementation of a sanction
 - reviews of, or litigation about, misconduct action.
- 12.9. AFDA Express sets a minimum standard for retention, rather than an absolute limit. The decision about whether records should be kept for a period longer than the minimum rests with the agency. Agencies are advised to establish policies that set out how long different records are to be retained, make these policies readily available to all employees, and ensure that records are destroyed in accordance with these policies.
- 12.10. In determining how long records are to be retained, including whether they should be retained longer than the minimum standard, agencies should be guided by the underlying purpose of taking misconduct action—that is, to maintain public confidence in public administration. Misconduct action seeks to maintain proper standards of conduct by employees and protect the reputation of the APS, rather than to punish a person for the duration of their working life. Timeframes for

retaining records therefore need to be fair and reasonable, and reflect a balance between the interests of the agency, the interests of the employee, and the public interest.

- 12.11. Included below are the minimum requirements relating to records of misconduct matters set out in AFDA Express. AFDA Express also provides direction on the retention of other records that may be relevant to misconduct matters.

Findings of no misconduct, including allegations where an investigation is not undertaken

- 12.12. Where an investigation results in a finding of no breach of the Code, records should be kept for 18 months after that decision is taken. However, a longer period, as specified below, may apply where the employee or former employee requests it. That longer period is:
- until the employee or former employee reaches the age of 75, or
 - seven years after the last action relating to the alleged misconduct.
- 12.13. The employee or former employee may also request that the records be destroyed at a specified time.
- 12.14. If a decision is made not to investigate an allegation of misconduct—for example, because there is no utility in investigating the matter, or the allegation is considered frivolous or vexatious or without substance—all records are to be kept for at least 18 months after the last action in the file.

Investigation not finalised

- 12.15. If an agency decides to discontinue an investigation into alleged misconduct—for example, if the employee resigns during the course of an investigation—documents that have been obtained or created up to the date on which the investigation is discontinued should be retained on a separate misconduct file and kept in accordance with agency policies for at least 18 months.

Findings of misconduct

- 12.16. If, in the period of five years after a finding of breach is made in relation to an employee or former employee, there have been no new breaches of the Code:
- the misconduct record may be destroyed and any cross-reference in the personnel file removed
 - the employee or former employee should be informed in writing that the misconduct record has been destroyed and that any reference in their personnel file has been removed.

- 12.17. If an employee or former employee who has been determined to have breached the Code is found to have breached the Code again within five years of that determination, the records of prior misconduct should be kept for a further period of five years, dating from the time of the new determination.

Access to records

- 12.18. Misconduct records contain sensitive information and are to be available within an agency on a need-to-know basis. **Section 103** of the PS Regulations allows misconduct records to be disclosed or used where:
- the use is necessary or relevant to the exercise of an employer power, and
 - the use or disclosure is consistent with any guidelines issued by the Commissioner.
- 12.19. This issue arises most frequently in relation to the consideration of sanctions for later misconduct, or in the context of recruitment and selection processes. However, it can also arise in other contexts, such as security clearances, organisational suitability assessments, or performance management processes.
- 12.20. Misconduct records should only be disclosed on a case-by-case basis, having careful regard to Commissioner guidelines and the Australian Privacy Principles (APPs), and, where relevant, the requirements of the FOI Act. Agencies should also have regard to any internal policies or procedures that relate to handling of and access to records in accordance with the Protective Security Policy Framework.

Transferring to a new agency

- 12.21. Misconduct records form part of the personnel file, although they are not physically attached to the personnel file, and follow the employee as they move between agencies as the personnel file does.
- 12.22. When passing misconduct records to a new agency, agencies should ensure that the employing agency is aware of the recordkeeping guidelines that apply to the misconduct record, including retention periods, and advise the gaining agency when any material can be destroyed in accordance with AFDA Express.

Considering misconduct in a selection process

- 12.23. An APS selection process is the means by which an agency gains relevant information about the 'work-related qualities' of candidates for APS jobs. These qualities may include skills and abilities, the standard of work performance, and relevant personal qualities genuinely required for the duties (see s.10A(2) of the PS Act).

- 12.24. A work history that includes a finding of misconduct, or an investigation of alleged misconduct, is not necessarily a relevant factor in deciding whether a candidate is suitable for a job vacancy. If a candidate discloses prior misconduct, or the selection delegate or panel is aware of prior misconduct, a decision on whether the candidate is suitable must be based on an assessment of the work-related qualities of the candidate against the work-related qualities genuinely required for the duties.

What do agencies need to consider when asking about prior misconduct?

- 12.25. It is not the intention of the APS conduct framework that historical misconduct should affect an employee's career indefinitely, without regard to its relevance to a particular position. Agencies should not default to excluding candidates for engagement or promotion on the basis of historical misconduct alone, and should consider misconduct history in the context of genuine business needs and the inherent requirements of a role.
- 12.26. When considering a previous breach of the Code in the context of a selection process, the following factors may be relevant:
- the nature of the breach
 - any sanction imposed
 - how long ago the breach occurred
 - the nature of the duties being performed at the time
 - the duties of the job that is being filled
 - whether this was a one-off action or indicative of a pattern of behaviour.

What do candidates need to disclose?

- 12.27. Candidates should be asked for information on their previous work history. This can include whether they are or have been the subject of a misconduct process—and, where relevant, any processes relating to any codes of conduct or professional standards applying to non-APS employment.
- 12.28. Agencies may exercise discretion in the extent of information sought, consistent with the principle that historical incidents of minor misconduct should not limit an employee's career indefinitely. Agencies may, for example, ask candidates whether they have been subject to a misconduct investigation in the last five years, and, if so, what the result of that investigation was. Where a candidate indicates they have been the subject of a misconduct investigation, application forms should allow them to make clear that no breach was found where this is the case. To capture

more serious matters, agencies may also wish to ask candidates whether they have ever had their employment terminated for conduct or performance issues.

- 12.29. In providing this information, candidates are obliged to meet the standards of honesty and integrity expected by the Code.
- 12.30. Candidates who are not APS employees at the time they provide this information are also obliged to meet these standards. Section 15(2A) of the PS Act provides that APS employees can be found to have breached the Code if, as candidates for engagement, they:
- knowingly provide false or misleading information,
 - wilfully fail to disclose information that they knew, or ought reasonably to have known, was relevant, or
 - otherwise fail to behave honestly and with integrity.

What can be done with the information that is disclosed?

- 12.31. Where information about a candidate's past misconduct is being taken into account as part of a selection process, the candidate should be advised of the matters being considered, and provided with reasonable opportunity to comment, before the selection decision is made. In all cases, the weight to be given to records of determined misconduct will diminish over time.
- 12.32. A delegate in a selection process may choose to rely on the honesty of candidates' declarations about their prior conduct records. It would, nonetheless, be prudent for a delegate to confirm that information with the candidate's current agency or employer. If the candidate is an APS employee, s.103 of the PS Regulations allows for the disclosure of this information where it is necessary for, or relevant to, agency head employer powers—including with respect to a selection process.
- 12.33. Agencies may wish to consider advising candidates that information regarding their previous behaviour, including any history of misconduct, will be sought from current or previous employers.

Candidates with misconduct action in progress

- 12.34. If a candidate is the subject of a misconduct process that has yet to be finalised, care needs to be taken not to prejudge the outcome of the process while ensuring the candidate's work-related qualities are appropriate for the duties to be performed. If, after the assessment of the candidate's work-related qualities, the candidate is preferred, the available options include:
- awaiting the outcome of the investigation, if practical
 - proceeding with the assignment of duties or movement if the alleged breach is relatively minor and not significant in the operational context of the employing agency
 - offering the employee a temporary assignment or movement pending the finalisation of the investigation.

Referee reports and misconduct

- 12.35. It is a common practice for APS agencies to ask employees seeking promotion or movement at level to obtain a referee report from their current supervisor or manager.
- 12.36. The APPs in the Privacy Act apply to providing references, including with respect to previous misconduct.
- 12.37. Supervisors should avoid any comment in a referee report that is unrelated to the employee's work performance. Any comment that is made should be relevant to the work-related qualities of the job the person has applied for, as advised by the selection panel.
- 12.38. In determining whether to disclose information about a prior, or alleged, breach of the Code, factors to take into account include:
- the nature of the breach or alleged breach
 - how long ago the breach occurred
 - the duties being undertaken at the time
 - the proposed duties of the new role
 - the employee's conduct since the breach.
- 12.39. An employee whose conduct is under investigation may ask a referee from their agency to provide a reference to support a job application. Where the matters being investigated may be relevant to the work-related qualities required for the job, the referee could indicate that there have been concerns as yet unresolved. Care needs to be taken to avoid being seen to prejudge the situation.
- 12.40. Where an investigation has concluded that the employee did not breach the Code, it would generally be inappropriate for the referee to refer to the investigation

except to confirm, if necessary, that no breach was found. That said, the referee may also refer to the investigation where it resulted in decisions relating to the performance or behaviour of the employee, which, although not amounting to misconduct, may nevertheless reflect on the employee's suitability for the job in question.

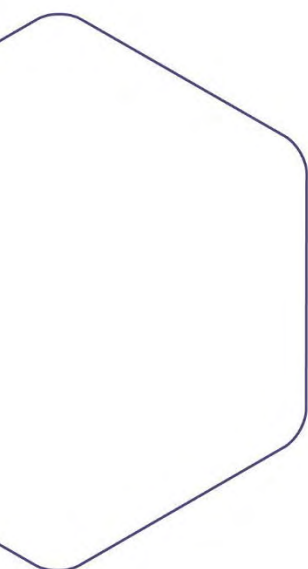
- 12.41. If a breach of the Code has been determined, and where the breach is considered relevant, the referee may include an outline of the circumstances surrounding the breach and comment on the relevance of the breach to the work-related qualities required for the job.

Effect of misconduct finding on security clearance

- 12.42. The Australian Government's Protective Security Policy Framework requires sponsoring agencies to actively monitor and manage the ongoing suitability of their security cleared employees. This means that agencies are responsible for ensuring their employees remain suitable to access Australian Government resources for the entire period of their engagement. The core requirement in the Protective Security Policy Framework for ongoing assessment of employees is that agencies share relevant information of security concern with the appropriate vetting agency. The assessment of whether information is relevant or of security concern can only be made by the agency assessing that concern.
- 12.43. Only authorised vetting agencies can make a determination about an individual's eligibility and suitability to hold a security clearance. However, vetting agencies can only assess an individual's eligibility and suitability based on the information available to them. This is why the effective sharing of information of security concern is so important.
- 12.44. It is good practice for agency guidance material to include information on how findings of breaches of the Code by security clearance holders are to be reported to the authorised vetting agency. It is recommended that this be done in consultation with the agency's security area.

Chapter 13

Learning from the process: improving practice and culture



- 13.1. Every instance of misconduct or inappropriate behaviour by an employee provides an opportunity for agencies to gather information that can be used to improve processes and culture. Insights can be gained about employee needs and susceptibilities, management strategies, team and workplace cultures and norms, systems and processes, and, ultimately, how integrity is understood and embodied in the agency.

Using data

- 13.2. Agencies are encouraged to gather and consider information about the conduct of their employees in order to guide them in improving both the behaviour of individuals and the culture of the organisation.
- 13.3. In collecting information, and using databases, agencies should be mindful of their obligations to protect certain information under the Privacy Act and other legislation, and should seek legal advice if in doubt.
- 13.4. The following approaches may be useful.

Databases

- 13.5. Agencies are encouraged to establish a database of cases, which could range from a case management system to a spreadsheet depending on agency needs and the volume of cases.
- 13.6. A database can support quality assurance and provide data to senior management on the number and types of:
- behaviours considered
 - matters addressed through a misconduct process
 - breaches determined
 - sanctions imposed
 - reviews sought, and the outcomes of any such reviews.
- 13.7. Using a database to monitor cases and outcomes (including, where possible, management action as well as breach determinations and sanctions) can assist agencies to identify trends—for example, in types and numbers of conduct matters across the agency or in specific cohorts. Databases can also bring to light concerns raised by multiple complainants about the behaviour of a single individual, helping agencies put together disparate evidence to form a more complete picture to inform proportionate action. Databases can also assist in ensuring consistency in handling cases and imposing sanctions.
- 13.8. As well, databases can assist agencies in responding to any request for information from the Commissioner—for example, in relation to the annual State of the Service

Report.

File audits and reviews

- 13.9. Agencies may periodically conduct file audits of a sample of misconduct files to evaluate the extent to which correct procedures and recordkeeping requirements are being followed. Where procedural or other flaws in investigations have been detected through such audits or reviews, agencies are encouraged to seek legal advice.
- 13.10. Agencies should also assess the outcomes of reviews conducted by the MPC to identify any concerns about the quality of decision-making in the agency that may point to systemic issues or a need to improve capability.

Census and survey data

- 13.11. Agencies can use their own agency-specific data from the annual APS Employee Census, or include questions in their own pulse surveys or regular internal surveys, to collect information relating to employee conduct.
- 13.12. Survey data can assist in establishing the level of employee knowledge and understanding of the APS conduct framework, as well as the overall integrity culture of the agency. For example, the APS Employee Census data includes information relating to:
 - the proportion of employees witnessing corruption
 - whether witnessed corruption is reported on, and reasons given by employees for not reporting. Analysis of the reasons for not reporting can indicate whether employees feel safe to raise issues, or whether they are concerned about reprisals.
- 13.13. Bespoke internal survey questions can explore related aspects, such as:
 - whether employees are aware of the range of ways to raise behavioural concerns and report misconduct
 - if other forms of misconduct are reported, whether or not serious misconduct has been observed in the last 12 months, and views on whether colleagues and managers behave in accordance with the conduct framework.
- 13.14. As well as collecting and considering data relating directly to the conduct framework, agencies may also consider data that may correlate with trust. The Census collects a range of metrics such as perceptions of organisational support for wellbeing; employee engagement; levels of bullying and harassment; and general impressions of the agency and its leadership.

- 13.15. Agencies are also encouraged to take account of information arising through informal means. This can include questions employees are raising in staff meetings or on internal online forums, or discussion of challenges in a focus group or team meeting session.

Supporting proportionate responses

- 13.16. Agencies may wish to consider the following approaches to developing policy and procedural guidance and support on the conduct framework:
- Having advice available to all employees about the management and reporting of suspected misconduct, including internal agency arrangements for reporting suspected misconduct and making public interest disclosures, and regularly reviewing this material to ensure it is up to date, including contact details of agency practitioners and external sources of advice such as the Ethics Advisory Service.
 - Ensuring systems are in place to support complainants. Where designated roles or areas exist to accept reports, employees in those areas or roles should have the knowledge and skill to accept reports on sensitive matters. Agency reporting frameworks should ensure complainants are given reasonable expectations in relation to confidentiality, how the matter will be handled, and what information they will be given about the outcome of their complaints.
 - Providing managers with support and guidance on responding appropriately and proportionately to unacceptable behaviour, including whether or not to refer a matter for misconduct action, to ensure fairness and consistency in the treatment of conduct concerns. Agencies should ensure managers are resourced and supported to take appropriate management actions in low-risk cases, as well as in cases where misconduct action needs to be supplemented with other workplace interventions.
 - Agencies may wish to develop guidance or checklists to support conversations between managers and HR where a manager seeks to refer a matter for misconduct action, including assisting the manager to conduct a risk assessment and consider whether other options may be preferable to a misconduct process.
 - Agencies should ensure that behavioural expectations are embedded in the performance management framework, and that supervisors understand their obligations in ensuring effective performance.

Supporting quality decision-making

- 13.17. Agencies may wish to consider the following approaches for ensuring the quality of decisions about misconduct:
- Processes for ensuring that the decision-maker who determines whether a breach has occurred has the necessary skills, experience, and capability—and providing that decision-maker with support and resources to do their job effectively.
 - Having decision support tools for decision-makers, including checklists to ensure that procedural steps have been completed appropriately and good records kept.
 - A quality assurance process for misconduct investigations and decisions, independent of the decision-maker, to check for compliance with procedures, consistency of decisions, timeliness, and quality of outcomes.
 - Considering whether to have separate breach and sanction decision-makers.
 - Limiting the number of people in the agency who hold a delegation to make sanction decisions.
 - Keeping central records of sanctions on a database, without including names, to guide decision-makers.
- 13.18. Agencies should take a deliberate and systematic approach to considering and learning from the information obtained through these channels. This may include regular reports to the agency executive on trends or systemic issues arising from conduct matters.
- 13.19. Agencies may also wish to consider developing templates, checklists, and sample letters in accordance with agency misconduct procedures and other related policies. These will assist investigators and decision-makers to address more quickly any administrative and procedural fairness issues and provide a consistent approach across the agency.

Supporting integrity awareness and capability

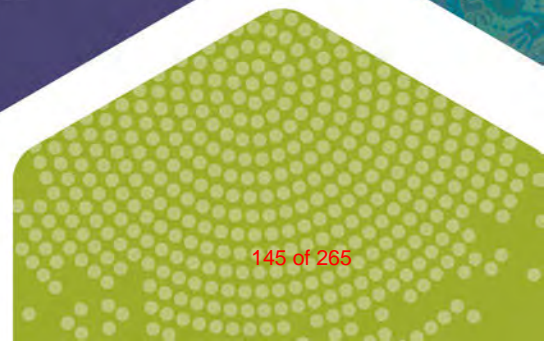
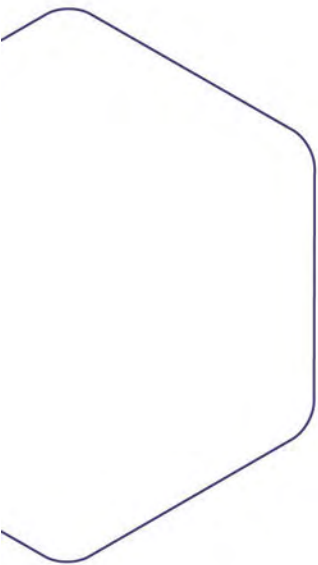
- 13.20. It is good practice for agencies to conduct periodic training on the APS conduct framework, including its relevance to employees' day-to-day work, and make written guidance available to all employees. Such training and guidance should be underpinned by agency data on employee conduct, including whether behavioural trends may indicate particular gaps in awareness or capability.
- 13.21. Training and guidance can also include information on the options for raising and reporting behavioural concerns within the agency. In this context, agencies may find it useful to provide bystander training and guidance to employees to help them

raise concerns in the moment, support their peers, and report incidents where appropriate. In doing so, agencies should consider whether their broader culture supports employees to feel safe in raising concerns—and, if not, what can be done to drive change in this regard.

- 13.22. Case studies are useful for informing and educating employees about appropriate standards of behaviour, risks in the agency's operational environment, and the ways the agency may respond to various types of conduct that does not meet expectations. Case studies should also showcase instances of good behaviour, including good processes and decision-making in difficult situations.
- 13.23. Case studies can be used in both stand-alone and on-the-job training, and as resources available on the agency intranet.
- 13.24. If agencies use real case examples for this purpose, they should take reasonable steps to de-identify material to ensure that a person's identity cannot be reasonably ascertained. Alternatively, agencies can amalgamate cases or use plausible hypothetical scenarios for training purposes. Case studies prepared by the MPC may also be a useful resource.

Appendix 1

Statutory office holders and the APS Code of Conduct



- 1.1. This appendix explains the provisions in the *Public Service Act 1999* (PS Act) and the *Public Service Regulations 2023* (PS Regulations) relating to certain statutory office holders and the Australian Public Service (APS) Code of Conduct (the Code). In broad terms, the Code applies to statutory office holders who are not agency heads, to the extent that they supervise APS employees or have a day-to-day working relationship with APS employees.

Legislative framework

- 1.2. Section 14 of the PS Act provides that statutory office holders are bound by the Code to the extent prescribed by the PS Regulations. **Section 8** of the PS Regulations details the statutory office holders to whom the Code does and does not apply.

Statutory office holders bound by the Code

- 1.3. The Code applies to statutory office holders who are:
- engaged, employed, or appointed under an Act, and
 - assisted by, or have dealings with APS employees, in a supervisory capacity, or in another capacity related to the office holder's day-to-day working relationship with APS employees.
- 1.4. In this context, a statutory office holder having a 'day-to-day working relationship' with APS employees refers to circumstances in which an office holder and APS employees work together as colleagues, or where the office holder otherwise comes into contact with APS employees on a day-to-day working basis.
- 1.5. This means, among other things, that statutory office holders, in their dealings with the APS employees with whom they work, are required to meet the same standards of respect and courtesy as APS employees. An APS employee does not have to be in the same agency as the statutory office holder for the Code to apply.

Statutory office holders not bound by the Code

- 1.6. **Section 8** of the PS Regulations provides that certain statutory office holders are not bound by the Code. These include agency heads, judicial officers, members of the Defence Force, and members of certain other bodies listed in **paragraph 8(4)(c)** of the PS Regulations.

Code does not apply if inconsistent with statutory functions

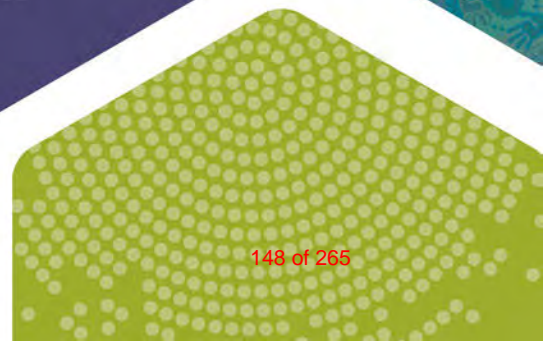
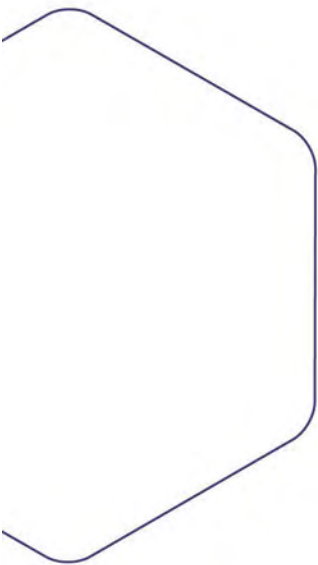
- 1.7. There may be times when the requirements of the Code, including the requirement to uphold the APS Values and Employment Principles, may not be consistent with a statutory office holder's functions, or may have the effect of compromising their statutory independence. In these circumstances, it is expected that the statutory office holder will adhere to the requirements of their primary legislation, rather than the Code.
- 1.8. **Section 8 of the PS Regulations** provides that if there is an inconsistency between the requirements of the Code and another law relating to the statutory office holder's office or appointment, the statutory office holder's own legislation will take precedence. These arrangements preserve the independence of statutory office holders.

Managing suspected misconduct by statutory office holders

- 1.9. The legislation under which statutory office holders are appointed or hold office will usually contain provisions relating to the circumstances in which a statutory office holder may be removed from office. Some legislation includes provisions setting out conduct obligations for statutory office holders that are separate from the arrangements in s.14 of the PS Act.
- 1.10. The Australian Public Service Commissioner (the Commissioner) has the function of inquiring into suspected breaches of the Code by statutory office holders, and determining whether the statutory office holder has breached the Code (s.56 of the PS Regulations). While the Commissioner is able to determine that a statutory office holder has breached the Code, the Commissioner is unable to impose a sanction. However, the Commissioner may make recommendations about the matter.
- 1.11. Where it is suspected that a statutory office holder covered by the Code may have breached the Code in relation to their treatment of an APS employee, it is advisable to discuss the matter with the Australian Public Service Commission.

Appendix 2

Elements of the APS Code of Conduct



- 2.1. The Australian Public Service (APS) Code of Conduct (the Code) is set out in section 13 of the *Public Service Act 1999* (the PS Act). The Code has 13 elements, set out in subsections 13(1)–13(13) of the PS Act.
- 2.2. This appendix provides guidance on the interpretation and application of each element of the Code to assist decision-makers and others involved in the misconduct process.

General principles

Interpretation

- 2.3. The terms used in the Code are generally given their ordinary meaning. Decision-makers may rely on sources such as the Macquarie Dictionary for authority on definitions of terms used in the Code—for example, ‘honestly’, ‘diligence’, ‘courtesy’, ‘improperly’, etc.

Connection with employment

- 2.4. Some elements of the Code explicitly apply in connection with APS employment; others apply at all times. In the remaining elements a connection with APS employment is implied. Connection with employment is discussed in detail in paragraphs 2.24 – 2.29 of this guide.

Objective standard

- 2.5. The standard of behaviour expected of APS employees is an objective one. This means that the question of whether particular conduct is in breach of the Code is not determined by the subjective standard of the particular employee who has engaged in the conduct.
- 2.6. An employee’s genuine belief that the action they took was proper is not relevant to a decision about whether that action was in breach of the Code. For example, an employee may genuinely have intended to compliment a colleague by remarking on their physical appearance, but such behaviour may not meet the objective standard of ‘respect and courtesy, and without harassment’ required by the Code.

Intent or motive

- 2.7. A determination that a person has breached the Code does not generally require intent. More information is in paragraphs 4.13 – 4.14 of this guide. However, there are some exceptions. These are discussed below.

Multiple obligations

- 2.8. Some elements of the Code contain several obligations. For example, s.13(1) of the PS Act requires APS employees to behave honestly and with integrity in connection with APS employment. An employee is required to uphold all obligations of each element of the Code in order to comply with the Code.
- 2.9. It is not necessary to find that an employee has breached every obligation within an element in order to make a determination that the Code has been breached. For example, an employee can be found to have failed to behave with integrity, and therefore be in breach of s.13(1), without also being found to have behaved without honesty.

Overlapping concepts

- 2.10. There is some overlap between different elements of the Code and between obligations in the same section of the Code. For example, not taking reasonable steps to avoid a conflict of interest could also be a lack of care and diligence. Behaving dishonestly may also be a lack of integrity. It is generally unnecessary to determine the degree of overlap; a breach of one obligation is a breach of the Code.
- 2.11. Where multiple elements are in play it is appropriate to consider the allegation against each element separately to the extent needed. A breach of one element does not in itself mean any other element has been breached. For example, the fact that a person has acted without care and diligence does not mean they cannot have acted with integrity.

Guidance on the elements of the Code—s.13 of the PS Act

13(1) An APS employee must behave honestly and with integrity in connection with APS employment

- 2.12. Behaving honestly and with integrity involves concepts such as ‘truthfulness’, ‘sincerity’ and ‘frankness’. Integrity at the individual level involves a ‘soundness of moral principle and character’ (Macquarie Concise Dictionary).
- 2.13. Failure to act honestly includes deliberate behaviour that the employee knows to be wrong. However, employees may make honest mistakes without breaching this element of the Code. Such action will usually be better dealt with through management action such as training or counselling. In more serious cases, it may be dealt with as a potential breach of s.13(2) of the PS Act if the behaviour in the circumstances appears to indicate a lack of care and diligence. In some cases, however, behaviour that is not engaged in deliberately may nonetheless indicate a lack of integrity, and should be considered as a potential breach of s.13(1).

13(2) An APS employee must act with care and diligence in connection with APS employment

- 2.14. Care and diligence have their ordinary meanings of ‘serious attention and solicitude to work’ and ‘earnest effort to accomplish what is undertaken’ (Macquarie Concise Dictionary). The standard of care and diligence required is objective and can be assessed by applying the standard of a ‘reasonable person’ in the same circumstances as the APS employee. The level of care and diligence required of senior managers responsible for the delivery of a program of work may be higher than that of other employees delivering single elements of that program.
- 2.15. Things done carelessly or without appropriate attention, i.e. without diligence, might be dealt with as a performance issue, through training, or through counselling—or might be dealt with as a breach of the Code, particularly for more serious examples. The relevant decision-maker will need to decide which option best meets the circumstances—see Chapter 4: ‘When behaviour doesn’t meet expectations—preliminary considerations’ of this guide.
- 2.16. Once it has been decided that a Code investigation is warranted, the breach decision-maker can then consider whether the conduct was careless or lacked diligence. It is not, however, enough for the breach decision-maker merely to come to a view that it would have been preferable to deal with the matter in question differently. A difference of opinion on how a matter should have been handled does not necessarily mean that the matter was handled without appropriate care or diligence. The question will be what a reasonably careful and diligent employee in the same position should have done in all the relevant circumstances. This may include, for example, a consideration of whether the employee’s conduct was consistent with any professional standards that might apply in that role, in addition to those under the Code, Values, and Employment Principles.
- 2.17. In some cases, the personal attributes of the employee may be relevant to whether they have acted with care and diligence. For example:
- a) an employee who has received training in a specialist skill may be expected to exercise that skill. A person who was known not to have those skills could not reasonably be expected to exercise them
 - b) an employee with many years of relevant experience might reasonably be expected to discharge their duties more effectively than an employee who had no previous directly relevant experience.

13(3) An APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment

- 2.18. The terms ‘respect’ and ‘courtesy’ have their ordinary meanings: ‘esteem felt or shown’; ‘excellence of manners or behaviour; politeness’ (Macquarie Concise Dictionary). Workplace harassment entails offensive, belittling, or threatening behaviour directed at an individual or group. The behaviour is unwelcome, unsolicited, usually unreciprocated, and often repeated. The use of the word ‘treat’ does not require direct communication with a particular person, or that the behaviour is directed at a particular person.
- 2.19. The requirement to treat everyone with respect and courtesy, and without harassment, is an objective one. The subjective opinion of a complainant that behaviour is disrespectful, discourteous, or harassing does not establish that a behaviour is in breach of s.13(3). Similarly, a breach of this element does not require that the person who was the subject of the behaviour be offended by it—or even aware of it. The question is whether a reasonable person observing the behaviour would consider that the behaviour in question met the standard of the Code.
- 2.20. It may be necessary to consider patterns and overall behaviour when looking at allegations of disrespect, discourtesy, or harassment. Individual actions may not appear to be very significant but, taken in conjunction with other actions, might reveal a pattern of behaviour.
- 2.21. Care should be taken with general allegations of disrespect, discourtesy, or harassment, such as vague claims of ‘passive aggressive’ behaviour or feelings of being undermined. Allegations of this sort may be a description of the complainant’s subjective response to the person they are complaining about. For a breach of the Code to be determined, it is necessary to identify specific incidents and events that can be assessed objectively.
- 2.22. In addition, a lack of such specificity in allegations of misconduct will make it more difficult to ensure that the person who is the subject of those allegations is able to respond to them in a fair and meaningful way. If an agency is taking into consideration a pattern of behaviour, that pattern has to be linked to observable incidents that are capable of being proven as misconduct.
- 2.23. ‘Respectful’ is one of the APS Values. It requires employees to respect all people, including their rights and their heritage. Further information on the application of this Value can be found in section 15 of the *Australian Public Service Commissioner’s Directions 2022* (Commissioner’s Directions).

13(4) An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws

- 2.24. This element of the Code can arise where a person, in connection with their APS employment, does not comply with laws such as work health and safety legislation, financial legislation, or criminal law. It may also arise where an agency's work is governed by specific legislation. For the purposes of s.13(4), Australian laws include any Commonwealth, State, or Territory legislation, and any instruments made under such legislation.
- 2.25. Not all Australian laws will be relevant for the purpose of s.13(4). Only those laws which establish a particular standard of individual conduct will be relevant. For example, laws regarding banking regulation are not laws an individual can breach. By contrast, a law requiring an individual to lodge a tax return is a law which imposes a particular standard of conduct on individuals.
- 2.26. Some of the applicable laws, for the purposes of s.13(4), are criminal laws. A person who has breached a law which is a criminal law can be tried by a court and found guilty of a criminal offence. Only a court can make a decision that a person is guilty of a criminal offence. However, this does not prevent a breach decision-maker in an agency from making a finding that a person has engaged in behaviour that is inconsistent with a criminal offence provision. This may include findings relating to relatively minor matters (for example, stealing stationery from the workplace).
- 2.27. In these circumstances, a breach decision-maker is not making a finding of criminal guilt and is not bound by the laws relating to evidence. Further, the burden of proof on a breach decision-maker is that they be satisfied 'on the balance of probabilities'. In a criminal prosecution, the burden of proof must generally be discharged 'beyond reasonable doubt'.
- 2.28. The specific offence provision will generally define the physical and fault elements of an offence, such as whether there was the necessary level of intent. The breach decision-maker will need to satisfy themselves about the employee's conduct in that context. In cases of doubt, agencies are encouraged to seek legal advice.
- 2.29. Care should be exercised before deciding to investigate an APS employee for suspected breach of this element of the Code. The fact that a person has been charged with a criminal offence and is awaiting trial does not prevent an agency from investigating an employee for breach of this element. However, there may be circumstances where the investigation may prejudice the outcome of criminal proceedings.
- 2.30. Where a court has recorded a conviction or otherwise determined criminal guilt a breach decision-maker can have regard to this in determining whether the employee breached s.13(4). Equally, the fact that a person has been convicted of a criminal offence does not mean that the person is automatically in breach of s.13(4). A decision-maker proposing to take into account a criminal conviction must provide the individual with a reasonable opportunity to comment before doing so.

13(5) An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction

- 2.31. This element of the Code contains a number of limbs in relation to the giving of a direction, all of which must be met before a breach of the element can be determined. This section should be read in conjunction with paragraphs 5.31 – 5.37 of this guide.

Clarity of the direction

- 2.32. A direction needs to be tightly drafted, using the language of command throughout, and specify exactly what actions should and should not be taken. It is appropriate to use language that is clear and directive, and that which provides the employee with no discretion in relation to their behaviour.
- 2.33. A general policy or guideline is not a direction for the purposes of the Code. Where a policy document is intended to be a direction from an agency head, the document should be written using the language of command, and specify that it is a direction for the purposes of the PS Act.
- 2.34. A direction also needs to be clear in its terms and capable of being complied with. A direction to 'behave appropriately', for example, may be difficult to comply with and enforce as it is not clear what is meant by the term.

Reasonableness of the direction

- 2.35. A direction must be both lawful and reasonable. Whether it is reasonable will depend upon all the circumstances.
- 2.36. A reasonable direction has been described as one with the object of securing proper values to be required of a public servant, and, in particular, the maintenance of public confidence in the integrity of the public service and public servants. A reasonable direction needs to be proportionate to the end to be achieved.
- 2.37. Using that test, directions concerning private behaviour may be reasonable, but the circumstances would be critical. For example, directing an employee not to contact a co-worker at work and outside work, including using private telephone, email, or social media, may be reasonable to protect that other employee's health and safety. Generally, directions aimed at private conduct with no apparent connection with the employee's work would not be reasonable.

Authority to give the direction

- 2.38. Section 13(5) of the PS Act implies a power to give directions. Therefore, a supervisor has implied authority to direct subordinate staff and an employee with functional responsibility for a particular matter generally has implied authority to give directions relevant to that matter.

13(6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with a Minister or Minister's member of staff

- 2.39. APS employees who deal with Ministers or with Ministers' offices may be privy to sensitive information in the course of their employment. APS employees must treat any such dealings with appropriate confidentiality. The phrase 'appropriate confidentiality' allows for disclosure to whomever else within the APS or the government might have a proper need to know.
- 2.40. The Commission's publication, *APS Values and Code of Conduct in practice*, provides guidance on working with the Government and the Parliament, and on managing official information.

13(7) An APS employee must:

- a) take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment; and*
- b) disclose details of any material personal interest of the employee in connection with the employee's APS employment*

- 2.41. A conflict of interest, including a material personal interest, can arise out of a work, private, or social context. It might arise due to an APS employee's private shareholdings, or those of their immediate family, other personal interests, acceptance of a gift, benefit, or hospitality, cultural obligations, political activities, or personal relationships. It can also arise through outside work—paid or voluntary.
- 2.42. To be 'material' a personal interest needs to be of a type that can give rise to a real or apparent conflict of interest. Personal interests do not give rise to a conflict of interest unless there is a real or sensible possibility of conflict and not simply a remote or theoretical possibility of conflict. If no reasonable person could draw a connection between the employee's personal interest and their duties, then the personal interest is not 'material'.
- 2.43. Once a material personal interest is identified, the employee must disclose that interest. If an employee is in a position to, or perceived to be in a position to, influence an outcome or a decision then that person needs to take reasonable steps to avoid that conflict of interest.
- 2.44. *APS Values and Code of Conduct in practice* provides detailed guidance on conflicts of interest.

13(8) An APS employee must use Commonwealth resources in a proper manner and for a proper purpose

- 2.45. 'Commonwealth resources' is a broad term, and includes money, goods, services, vehicles, office equipment, official records, office premises, telephones or other telecommunication devices, and computers. It also includes the salary costs of APS employees.
- 2.46. Most agencies have policies advising their employees on the appropriate use of Commonwealth resources. It is not appropriate for Commonwealth resources to be used for private gain. However, subject to agency policies, it is reasonable for APS employees to have limited private use of office equipment—for example, reasonable and necessary telephone or email communication with family. Inappropriate use of an agency's ICT resources at work or out of office hours is covered by this section of the Code.
- 2.47. Damage to Commonwealth resources, however caused, can come within this section, but each case will need to be considered carefully on its merits before deciding that misconduct action is appropriate and proportionate in the circumstances. More information is in Chapter 4 of this guide: 'When behaviour doesn't meet expectations: preliminary considerations'.

13(9) An APS 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 APS employment

- 2.48. APS employees are required to provide responsive, efficient, and effective services consistent with the APS Values, Employment Principles and associated Directions. Requests for information for official purposes may be made by members of the public, businesses, members of the media, other jurisdictions (national or international), members of Parliament, other Commonwealth agencies, by the employee's agency or another APS agency, or by work colleagues.
- 2.49. The information provided by APS employees in connection with their APS employment should not be misleading, and should be appropriate to the request being made. An objective consideration of the information given and the circumstances in which it was given is necessary to determine whether the information was misleading. That a person receiving the information was misled does not make the information misleading in and of itself.
- 2.50. This element of the Code applies to requests for information made for official purposes in connection with an employee's APS employment. This is broader than requests for information that an employee may receive as part of their duties, and includes requests for information that relate to their own employment, such as information relevant to the job, applications for promotion, or to leave applications.

13(10) An APS employee must not improperly use inside information or the employee's duties, status, power or authority:

- a) to gain, or seek to gain, a benefit or an advantage for the employee or any other person; or*
- b) to cause, or seek to cause, detriment to the employee's Agency, the Commonwealth or any other person*

- 2.51. A breach of this element could occur if, for example, an APS employee gains, or seeks to gain, an advantage for themselves, a friend, family member, or associate. It can also occur if a senior officer in a supervisory role uses their status to gain favours from a member of their team or other junior staff. The benefit or advantage is not defined and is not limited to financial gain.
- 2.52. Whether or not any person actually obtained a benefit from the employee's actions does not determine whether the behaviour is in breach of this element of the Code. This element can be breached if the employee merely sought a benefit or advantage. Similarly, actual detriment to the agency, the Commonwealth, or another person does not have to have occurred for a breach to be found.
- 2.53. Inside information could include any official information which is not public. For example, it could include confidential information the employee has access to as a consequence of their employment, or information that was provided on the basis that it was to be used only for a specific purpose. There may also be other agency-specific legislation limiting the use of information.
- 2.54. Whether a use is improper will depend on the circumstances of each case. It is appropriate, generally, to assess the case by considering whether a reasonable person would, having regard to any relevant agency guidance, form the view that the use was improper. Employees of the APS are expected to undertake their duties in the public interest. On that basis, deciding whether a use was improper would have regard to the nature of the benefit or advantage they were attempting to gain, or the detriment they were attempting to cause.
- 2.55. The phrases 'seek to gain' a benefit and 'seek to cause' detriment indicate that the employee's conduct was intentional. In considering behaviour against this element of the Code, agencies will need to be able to establish that the employee acted with some degree of intention to achieve the gain or cause the detriment.

13(11) An APS employee must at all times behave in a way that upholds:

a) the APS Values and APS Employment Principles; and

b) the integrity and good reputation of the employee's Agency and the APS

- 2.56. This element of the Code applies to an APS employee's behaviour 'at all times'. It may be breached by an APS employee outside normal work hours and at non-work premises. There is no explicit requirement in the section that the suspected conduct of the employee must be connected to their APS employment. In practice, however, determining that an action has breached the Code will generally require some degree of connection to the employee's employment.
- 2.57. This element of the Code places a positive obligation on APS employees to behave in a way that maintains confidence in their ability to serve the government of the day professionally and does not undermine public confidence in their agency or the APS.
- 2.58. Because this element of the Code places a positive obligation on employees, it is not necessary to establish actual damage to the reputation of the agency or the APS in order to find that this section of the Code has been breached. A lack of damage may be relevant to a decision to start an investigation under an agency's s.15(3) procedures, or relevant to mitigation when deciding a sanction.
- 2.59. Where an agency is alleging that an employee has breached s.13(11) of the Code for behaviour that fails to uphold the Values or the Employment Principles, it is necessary to identify which Values or Employment Principles are at issue.
- 2.60. The concept of integrity in this section of the Code is different to integrity in s.13(1). Under s.13(1), it is necessary to behave with integrity; here, an APS employee has to behave in a way that upholds the integrity of the employee's agency and the APS. For example, an employee's public agreement with critical comments made by a client about government policy may not be consistent with a requirement to behave in a way that upholds the integrity of their agency and the APS, in the sense of upholding their sound or unimpaired condition, but it may not in itself indicate that the public servant lacks integrity.
- 2.61. Part 2 of the Commissioner's Directions provides directions on the scope and application of each of the Values.
- 2.62. Information on the relationship between private behaviour of a criminal nature and the Code is in 'Misconduct action and criminal matters' in Chapter 10 of this guide.

13(12) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia

- 2.63. The Code applies to APS employees on duty overseas at all times, encompassing the private behaviour of APS employees overseas. It is recognised that Australia expects the highest levels of professional and ethical behaviour by its representatives overseas. Given that employees serving overseas are particularly visible, inappropriate or unethical conduct in their private lives is likely to reflect negatively on the good reputation of Australia.
- 2.64. Most agencies with employees overseas have policies that articulate the responsibilities of those employees. If such policies do not exist, it is advisable for agencies to advise staff who travel and work overseas of their obligations under the Code and the agency's expectations of their behaviour.

13(13) An APS employee must comply with any other conduct requirements prescribed by the regulations

- 2.65. To date, only one other conduct requirement has been prescribed under the **Public Service Regulations 2023** (PS Regulations).
- 2.66. **Section 7** of the PS Regulations imposes a duty on APS employees not to disclose certain information without authority. The duty applies to information communicated in confidence or where disclosure could be prejudicial to the effective working of government. **Subsection 7(5)** of the PS Regulations sets out circumstances where APS employees are not prevented from disclosing information.
- 2.67. The regulation is not designed to regulate the disclosure of official information comprehensively. It operates alongside other provisions and obligations, including agency-level directions and authorisations.
- 2.68. This regulation may constitute a relevant Commonwealth statutory duty for the purposes of s.122.4 of the *Criminal Code Act 1995* (Criminal Code). That section makes it an offence for a current or former Commonwealth officer, which includes an APS employee or a contractor, from communicating information obtained by reason of being a Commonwealth officer, or otherwise being engaged to perform work for a Commonwealth entity, if there is a Commonwealth statutory duty not to disclose this information. A breach of s.122.4 of the Criminal Code carries a maximum penalty of two years' imprisonment.



Managing psychosocial hazards at work

Code of Practice

JULY 2022

Disclaimer

Safe Work Australia is an Australian Government statutory agency established in 2009. Safe Work Australia includes Members from the Commonwealth, and each state and territory, Members representing the interests of workers and Members representing the interests of employers.

Safe Work Australia works with the Commonwealth, state and territory governments to improve work health and safety and workers' compensation arrangements. Safe Work Australia is a national policy body, not a regulator of work health and safety. The Commonwealth, states and territories have responsibility for regulating and enforcing work health and safety laws in their jurisdiction.

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Foreword

This Code of Practice on managing psychosocial hazards at work is an approved code of practice under section 274 of the [Work Health and Safety Act](#) (the WHS Act).

An approved code of practice provides practical guidance on how to achieve the standards of work health and safety required under the WHS Act and the [Work Health and Safety Regulations](#) (the WHS Regulations), and effective ways to identify and manage risks.

A code of practice can assist anyone who has a duty of care in the circumstances described in the code of practice. Following an approved code of practice will assist the duty holder to achieve compliance with the health and safety duties in the WHS Act and WHS Regulations, in relation to the subject matter of the code of practice. Like regulations, codes of practice deal with particular issues and may not cover all relevant hazards or risks. The health and safety duties require duty holders to consider all risks associated with work, not only those for which regulations and codes of practice exist.

Codes of practice are admissible in court proceedings under the WHS Act and WHS Regulations. Courts may regard a code of practice as evidence of what is known about a hazard, risk, risk assessment or risk control and may rely on the code in determining what is reasonably practicable in the circumstances to which the code of practice relates. For further information see the Interpretive Guideline: [The meaning of 'reasonably practicable'](#).

Compliance with the WHS Act and WHS Regulations may be achieved by following another method if it provides an equivalent or higher standard of work health and safety than the code.

An inspector may refer to an approved code of practice when issuing an improvement or prohibition notice.

Scope and application

This Code is intended to be read by a person conducting a business or undertaking (PCBU). It provides practical guidance to PCBUs on how to manage psychosocial health and safety risks at work.

This Code may be a useful reference for other persons interested in the duties under the WHS Act and WHS Regulations.

This Code applies to the performance of work and to all workplaces covered by the WHS Act.

How to use this Code of Practice

This Code includes references to the legal requirements under the WHS Act and WHS Regulations. These are included for convenience only and should not be relied on in place of the full text of the WHS Act or WHS Regulations. The words 'must', 'requires' or 'mandatory' indicate a legal requirement exists and must be complied with.

The word 'should' is used in this Code to indicate a recommended course of action, while 'may' is used to indicate an optional course of action.

1 Introduction

Psychosocial hazards can cause psychological and physical harm. On average, work-related psychological injuries have longer recovery times, higher costs, and require more time away from work. Managing the risks associated with psychosocial hazards not only protects workers, it also decreases the disruption associated with staff turnover and absenteeism, and may improve broader organisational performance and productivity.

1.1 Psychosocial hazards at work

Psychosocial hazards are hazards that:

- arise from or in relation to:
 - o the design or management of work
 - o the working environment
 - o plant¹ at a workplace, or
 - o workplace interactions or behaviours; and
- may cause psychological and physical harm.

Psychosocial hazards and the appropriate control measures may vary between workplaces and between groups of workers, depending on the work environment, organisational context and the nature of work.



Psychosocial hazards that may arise at work

- Job demands
- Low job control
- Poor support
- Lack of role clarity
- Poor organisational change management
- Inadequate reward and recognition
- Poor organisational justice
- Traumatic events or material
- Remote or isolated work
- Poor physical environment
- Violence and aggression
- Bullying
- Harassment including sexual harassment
- Conflict or poor workplace relationships and interactions

[Appendix A Job characteristics, design and management](#) and [Appendix B Harmful behaviours](#) provide further guidance and examples for each hazard.

Psychological harm or injuries from psychosocial hazards include conditions such as anxiety, depression, post-traumatic stress disorder (PTSD) and sleep disorders.

Physical injuries from psychosocial hazards include musculoskeletal injury, chronic disease, and physical injury following fatigue-related workplace incidents.

¹ WHS laws use the term plant to describe machinery, equipment, appliances, containers, implements and tools, any part of those things or anything fitted or connected to those things.

How do psychosocial hazards cause harm?

Psychosocial hazards can create stress. Stress is the body's reaction when a worker perceives the demands of their work exceed their ability or resources to cope.

Stress creates a physiological and psychological response in the body by releasing adrenaline and cortisol, raising the heart rate and blood pressure, boosting glucose levels in the bloodstream and diverting energy from the immune system to other areas of the body.

Stress itself is not an injury but if it becomes frequent, prolonged or severe it can cause psychological and physical harm.

Some hazards cause stress when a worker is exposed to the risk of that hazard occurring as well as when they are directly exposed to the hazard itself. For example, workers exposed to workplace violence are likely to experience stress if they perceive that the risk has not been controlled, even if the violence does not occur again. In this situation, despite the hazard rarely occurring, the stress itself may be prolonged.

1.2 Work health and safety duties

Person conducting a business or undertaking

WHS Act section 19

Primary duty of care

WHS Regulations Division 11

Psychosocial risks

WHS Regulations Part 3.1

Managing risks to health and safety

A PCBU must ensure, so far as is reasonably practicable, workers and other persons are not exposed to risks to their psychological or physical health and safety. A PCBU must eliminate psychosocial risks in the workplace, or if that is not reasonably practicable, minimise these risks so far as is reasonably practicable.

For more information see the Interpretive Guideline: [The meaning of 'reasonably practicable'](#).

The WHS Regulations include specific requirements for PCBUs to manage risks arising from psychosocial hazards.

Under the WHS Regulations, to manage psychosocial risks, a duty holder must:

- identify reasonably foreseeable hazards that could give rise to psychosocial risks
- eliminate risks, so far as is reasonably practicable
- if it is not reasonably practicable to eliminate the risks – minimise the risks so far as is reasonably practicable
- maintain implemented control measures so they remain effective, and
- review, and if necessary revise, control measures so as to maintain, so far as is reasonably practicable, a work environment that is without risks to health and safety.

In determining control measures to be implemented, a PCBU must have regard to all relevant matters, including:

- the duration, frequency and severity of the exposure of workers and other persons to the psychosocial hazards
- how the psychosocial hazards may interact or combine
- the design of work, including job demands and tasks
- the systems of work, including how work is managed, organised and supported
- the design and layout, and environmental conditions, of the workplace, including the provision of:
 - o safe means of entering and exiting the workplace
 - o facilities for the welfare of workers
- the design and layout and environmental conditions of workers' accommodation
- the plant, substances and structures at the workplace
- workplace interactions or behaviours, and
- the information, training, instruction and supervision provided to workers.

Officers

WHS Act section 27

Duty of officers

Officers, such as company directors, have a duty to exercise due diligence to ensure the PCBU complies with its duties under the WHS Act and WHS Regulations. For psychosocial risks this means the officer must take reasonable steps to:

- acquire and keep up-to-date knowledge of psychosocial work health and safety matters
- gain an understanding of the nature of the operations of the business or undertaking of the PCBU and generally of the psychosocial hazards and risks associated with those operations
- ensure the PCBU has available for use, and uses, appropriate resources and processes to eliminate or minimise psychosocial risks from work carried out by the business or undertaking
- ensure the PCBU has appropriate processes for receiving and considering information regarding incidents, psychosocial hazards and risks to health and safety and responding in a timely way to that information
- ensure the PCBU has, and implements, processes for complying with any duty or obligation they have under the WHS Act and WHS Regulations, and
- verify the provision and use of the resources and processes mentioned above and that they are performing effectively.

For information on officers and their duties see the Interpretive Guideline: [The health and safety duty of an officer under section 27](#).

Workers

WHS Act section 28

Duties of workers

Workers must take reasonable care for their own psychological and physical health and safety and to not adversely affect the health and safety of other persons. Workers must comply with reasonable health and safety instructions, as far as they are reasonably able, and cooperate with reasonable health and safety policies or procedures that have been notified to workers.

For example, workers must follow any notified workplace policies setting standards for appropriate behaviour aimed at preventing bullying and harassment.

Other persons in the workplace

WHS Act section 29

Duties of other persons at the workplace

Other persons at the workplace, like visitors, must take reasonable care for their own psychological and physical health and safety and must take reasonable care not to adversely affect other people's health and safety. They must comply, so far as they are reasonably able, with reasonable instructions given by the PCBU to allow them to comply with the WHS Act and WHS Regulations.

For example, a customer in a retail store must not behave violently, nor abuse or harass staff.

Other relevant duties

Other relevant duties under WHS laws are set out throughout this Code of Practice. See [Consulting workers](#), [Consulting, cooperating and coordinating activities with other duty holders](#), [Information, training, instruction and supervision](#), and [Remote or isolated work](#).

WHS laws do not operate in isolation and other laws may also apply. For example, industrial relations, criminal, anti-discrimination, privacy and workers' compensation laws.

1.3 Consultation

Consulting workers

WHS Act section 47

Duty to consult workers

A PCBU must consult, so far as is reasonably practicable, with workers who carry out work for the business or undertaking and who are (or are likely to be) directly affected by a work health and safety matter.

If you and your workers have agreed procedures for consultation, it must be conducted in accordance with those procedures.

Effective consultation with workers improves decision-making about health and safety matters and assists in reducing work-related injuries and illness. Workers can identify tasks or aspects of their work that cause or expose them to psychosocial hazards and may have practical suggestions or potential solutions to address those hazards. For example, workers may have ideas to improve work design to minimise the risks of psychological harm.

The definition of 'worker' under the WHS Act is broad. In addition to employees, it includes anyone working for the business or undertaking, including contractors and their employees, labour-hire workers, outworkers, apprentices, trainees, work experience students and volunteers.

You must consult with workers when assessing risks or making decisions about the psychosocial risks to health and safety including what control measures are implemented.

Workers from diverse backgrounds may be exposed to different psychosocial hazards. You must consult with all workers, in particular workers with vulnerabilities, who are likely to be directly affected by particular psychosocial hazards. For example, women, young workers, those from culturally and linguistically diverse (CALD) backgrounds, LGBTIQ+ workers and workers with disability are more likely to experience workplace sexual harassment and should be provided with the opportunity to participate in these consultations (which may take different forms), along with all workers who are likely to be directly affected.

WHS Act section 48

Nature of consultation

All consultation must include any Health and Safety Representatives (HSRs) representing your workers. References to consultation with workers in this Code includes consultation with any HSRs.

You must provide workers with a reasonable opportunity to raise psychosocial health and safety issues, express their views and contribute to decision-making. You must consider whether existing consultation arrangements are appropriate for psychosocial risks. You must consult with workers and their representatives on implementing new consultation arrangements if required.

When consulting with your workers you must:

- share relevant information
- give workers a reasonable opportunity to express their views, raise health and safety issues and contribute to the decision-making process
- take those views into account before making decisions on health and safety matters, and
- advise workers of the outcome of consultations in a timely manner.

Management commitment and open communication between managers and workers is important in achieving effective consultation. Your workers are more likely to engage in consultation when their knowledge and ideas are actively sought and concerns about psychosocial health and safety are taken seriously. You should encourage workers to:

- share their knowledge and experience, and
- report psychosocial hazards so risks can be managed before an injury occurs.

Effective methods of consultation can vary according to the needs of your workers, workplace size, worker distribution across sites and shifts, the nature of the work and the type of hazards in a workplace. You and your workers should agree the form consultation will take.

For example, consultation could include:

- pre-job-start or toolbox discussions
- focus groups
- worker surveys
- WHS committee meetings
- team meetings, and
- individual discussions.

Each consultation method has benefits and limitations. For example, some forms of consultation are better for workers who do not have regular access to computers, while others allow workers to raise sensitive issues anonymously, or to provide detail and context.

CALD workers may need, or benefit from, different forms of consultation. For example, providing materials and conducting consultation in workers' preferred language(s) and using culturally appropriate people and messages.

Workers may be hesitant to raise and discuss some psychosocial hazards due to privacy or other concerns, particularly in relation to hazards like bullying or sexual harassment. You should consider consultation processes that address such concerns like anonymous surveys or reporting, particularly where workers may be concerned raising safety issues could impact on their employment or career progression.

You may need to use multiple methods of consultation for psychosocial hazards. The form and methods of consultation must be decided in consultation with workers.

WHS Act section 49

When consultation is required

As a PCBU you must consult with workers when:

- identifying hazards and assessing risks to health and safety arising from the work carried out or to be carried out
- making decisions about ways to eliminate or minimise those risks
- making decisions about the adequacy of facilities for the welfare of workers
- proposing changes that may affect the health or safety of your workers, and
- making decisions about procedures for consulting with workers; resolving health or safety issues at the workplace; monitoring health of your workers; monitoring the conditions at the workplace under your management or control and providing information and training for your workers.

However, it may be useful to also consult workers about matters not listed above.

Regular consultation is better than consulting only as issues arise on a case-by-case basis, or as a reaction to a particular event, because it allows you to identify and fix potential problems early. Further guidance is available in the Code of Practice: [Work health and safety consultation, cooperation and coordination](#).

Consulting, cooperating and coordinating activities with other duty holders

WHS Act section 16

More than 1 person can have a duty

More than one person can have the same WHS duty at the same time. The WHS Act requires that where more than one person has a duty for the same matter, each person retains responsibility to meet their duty in relation to the matter and must do so to the extent to which they can influence and control the matter.

WHS Act section 46

Duty to consult with other duty holders

Duty holders must consult, cooperate and coordinate activities with all other persons who have a WHS duty in relation to the same matter, so far as is reasonably practicable. Where you share a duty (e.g. you share a workplace or are involved in the same activity), each duty holder should:

- exchange information
- find out who is doing what about their respective WHS obligations, and

- work together in a cooperative and coordinated way so risks are eliminated or minimised.

Consulting, cooperating and coordinating with other duty holders can help you more easily and effectively control risks, and assist each of you to comply with your duty.

For example, both a PCBU who engages workers through a labour-hire company and the labour-hire company who supplies the workers have WHS duties to ensure the health and safety of the workers. They may consult and cooperate as part of contract negotiations about how to minimise psychosocial hazards, such as high job demands, by agreeing realistic timeframes, and ensuring workers have the skills and support to perform the work. Further guidance is available in the Code of Practice: [Work health and safety consultation, cooperation and coordination](#).

2 Overview of the process to manage psychosocial risks

To meet your duties to ensure health and safety, you must eliminate or minimise psychosocial risks so far as is reasonably practicable. To achieve this, just as for any other hazard, you can apply the risk management process described in the Code of Practice: [How to manage work health and safety risks](#).



The risk management process involves four steps:

1. **Identify hazards** - find out what could cause harm ([Chapter 3](#)).
2. **Assess risks**, if necessary - understand the nature of the harm the hazard could cause, how serious the harm could be and the likelihood of it happening. This step may not be necessary if the risks and controls are known ([Chapter 4](#)).
3. **Control risks** - implement the most effective control measures that are reasonably practicable in the circumstances and ensure they remain effective over time. This means:
 - you must eliminate risks, if reasonably practicable to do so
 - if it is not reasonably practicable to eliminate the risks, implement the most effective control measures to minimise the risks so far as is reasonably practicable in the circumstances, and
 - ensure those control measures remain effective over time ([Chapter 5](#)).
4. **Review control measures** to ensure they are working as planned and make changes as required ([Chapter 6](#)).

All of these steps must be supported by consultation (see [Section 1.3](#) of this Code).

Risk management requires planning and is an ongoing process. However, considering risks early prevents costly changes later and allows for more effective control measures to be used, resulting in less harm to workers. For example, you should consider psychosocial hazards at the design phase when planning an organisational restructure.

The risk management process may be implemented in different ways depending on the size and nature of your business or undertaking. Larger businesses and those in sectors where workers are exposed to more or higher risks are likely to need more complex, sophisticated risk management and consultation processes.

Before you start the process:

- explain the process
- get commitment and engagement from senior leaders and managers
- identify who needs to be involved, for example managers, workers, HSRs and subject matter experts, and
- decide how the process and its outcomes will be recorded and communicated.

Matters to consider when controlling risks

How long (**duration**), how often (**frequency**) and how significantly (**severity**) your workers are exposed to psychosocial hazards impacts the level of risks. Hazards **interacting** or **combining** with each other may also change the risks.

As you work through the risk management process you must consider things that may give rise to hazards, influence the level of risks workers are exposed to, or could be changed to help control those risks, including:

- **the design of work, including job demands and tasks involved**

Considering how the work is designed will support you to eliminate hazards at the source and at the organisational level.

Your workers should have an appropriate amount of work to match their skills and experience. For example, a job designed with too much work for a worker of that skill level to complete with the resources provided, or tasks that do not match that worker's skillset will create hazards. Matching tasks to workers' skills and scheduling non-urgent tasks for times of lower demand may assist to control risks.

- **systems of work, including how work is managed, organised and supported**

Systems of work are organisational rules, policies, procedures and work practices used to organise, manage and carry out work. These systems can introduce psychosocial hazards, but if carefully considered can also help control them.

For example, a system of work that does not allow workers to seek assistance from supervisors, or that allocates tasks without regard for other work demands may introduce hazards. A system of work which provides for support and manages job demands may assist to control risks.

- **the design and layout and environmental conditions, of the workplace, including safe means of entering and exiting the workplace and welfare facilities**

A poor physical working environment can be a psychosocial hazard, however the way a workplace is set up can also control other psychosocial hazards.

For example, ensuring workers can get away from aggressive customers or can observe when another worker may need assistance.

- **the design and layout, and environmental conditions of workers' accommodation**

Like the working environment, accommodation provided for workers can introduce or control psychosocial hazards.

For example, worker accommodation which does not provide adequate privacy or security can contribute to the risk of violence or harassment. Well-designed accommodation can help control these risks.

- **plant, substances and structures at the workplace**

Plant (e.g. machinery, equipment, appliances and tools), structures and substances used at work can introduce psychosocial hazards where they create a physical hazard that is not adequately controlled. For example, plant can create loud noises, dust and vibrations which creates poor physical environments and contributes to psychosocial risks.

Well-designed and maintained plant can prevent these hazards but can also be used to control other psychosocial hazards. For example, safe plant that allows work to be performed more efficiently can reduce high work demands.

- **workplace interactions or behaviours**

The way workers interact with each other and other persons in the workplace, their behaviour and relationships can introduce psychosocial hazards. However, supportive leadership, positive relationships and professional and respectful interactions can help to minimise a range of psychosocial hazards.

Poor organisational culture can hamper efforts to improve work health and safety by preventing workers seeking and providing support and discouraging workers from reporting hazards and participating in consultation. Leaders demonstrating poor behaviour are likely to contribute to poor organisational culture.

- **information, training, instruction and supervision provided to workers**

Information, training, instruction and supervision may be necessary to implement control measures effectively (see [Section 5.2](#) for further information and relevant duties). They may also assist in controlling some psychosocial risks, for example where low role clarity is creating a risk, information and training on the worker's role will assist in controlling the risks.

Leadership and management commitment

Genuine commitment by the PCBU, officers, and other organisational leaders is essential. These leaders, through their governance arrangements and resourcing decisions, actively shape the organisation and the way work is undertaken. These decisions will, directly and indirectly, impact how effectively you can control psychosocial risks.

This commitment can be built by ensuring leaders understand their duties under WHS laws, the risk management process these require, the business case for effectively managing psychosocial hazards, and the roles of various organisational leaders (e.g. human resources and WHS managers).

Consulting workers throughout the risk management process

At each step of the risk management process you must consult workers who are, or are likely to be, directly affected by a work health and safety matter and any HSR(s). For example, on proposed changes affecting work health and safety such as:

- new policies, procedures and systems of work
- organisational restructures, changes to staffing levels, new reporting arrangements and work locations
- changes to tasks, workload, duties and working arrangements, including rosters
- new technology, plant, equipment, substances, structures and production processes
- the redesign of existing workplaces, or
- changes to the way information, training, instruction and supervision are provided.

Consultation on changes that may affect work health and safety should occur as early as possible.

See [Section 1.3](#) for more information on consultation.

Further guidance on the risk management process is available in the Code of Practice: [How to manage work health and safety risks.](#)

3 Identify psychosocial hazards

The first step in the risk management process is to identify psychosocial hazards. This involves identifying the aspects of work and situations that could potentially harm your workers or others at your workplace and why these may be occurring. This step should also assist PCBUs to identify where and when workers are exposed to psychosocial hazards, and if controls are not adequately eliminating or minimising risks from known hazards.



3.1 Common psychosocial hazards

Below is a list of some common examples of psychosocial hazards you should consider when identifying psychosocial hazards in your organisation. The list and the examples in the descriptions are not exhaustive. Workers are likely to be exposed to a combination of psychosocial hazards; some risks may be constantly present, while others arise sporadically.

Some hazards by themselves may cause serious harm, such as experiencing workplace violence. In most circumstances, it will be a combination of psychosocial hazards which together may cause harm. Harm can be caused by a single instance or over time with repeated or prolonged exposure.

Hazards can be grouped or described in different ways. How they are categorised is less important than ensuring you and your workers have the same understanding of what is happening and how it may be causing harm.

Hazard	Descriptions
Job demands	<p>Intense or sustained high mental, physical or emotional effort required to do the job.</p> <p>Unreasonable or excessive time pressures or role overload.</p> <p>High individual reputational, legal, career, safety or financial risk if mistakes occur.</p> <p>High vigilance required, limited margin of error and inadequate systems to prevent individual error.</p> <p>Shifts/work hours that do not allow adequate time for sleep and recovery.</p> <p>Sustained low levels of physical, mental or emotional effort is required to do the job.</p> <p>Long idle periods while high workloads are present, for example where workers need to wait for equipment or other workers.</p>

Hazard	Descriptions
Low job control	<p>Workers have little control over aspects of the work including how or when the job is done.</p> <p>Workers have limited ability to adapt the way they work to changing or new situations.</p> <p>Workers have limited ability to adopt efficiencies in their work.</p> <p>Tightly scripted or machine/computer paced work.</p> <p>Prescriptive processes which do not allow workers to apply their skills and judgement.</p> <p>Levels of autonomy not matched to workers' abilities.</p>
Poor support	<p>Tasks or jobs where workers have inadequate support including practical assistance and emotional support from managers and colleagues, or inadequate training, tools and resources for a task.</p>
Lack of role clarity	<p>Uncertainty, frequent changes, conflicting roles or ambiguous responsibilities and expectations.</p>
Poor organisational change management	<p>Insufficient consultation, consideration of new hazards or performance impacts when planning for, and implementing, change.</p> <p>Insufficient support, information or training during change.</p> <p>Not communicating key information to workers during periods of change.</p>
Inadequate reward and recognition	<p>Jobs with low positive feedback or imbalances between effort and recognition.</p> <p>High level of unconstructive negative feedback from managers or customers.</p> <p>Low skills development opportunity or underused skills.</p>
Poor organisational justice	<p>Inconsistent, unfair, discriminatory or inequitable management decisions and application of policies, including poor procedural justice.</p>
Traumatic events or material	<p>Experiencing fear or extreme risks to the health or safety of themselves or others.</p> <p>Exposure to natural disasters, or seriously injured or deceased persons.</p> <p>Reading, hearing or seeing accounts of traumatic events, abuse or neglect.</p> <p>Supporting victims or investigating traumatic events, abuse or neglect.</p>
Remote or isolated work	<p>Working in locations with long travel times, or where access to help, resources or communications is difficult or limited.</p>

Hazard	Descriptions
Poor physical environment	Exposure to unpleasant or hazardous working environments.
Violence and aggression	Violence, or threats of violence from other workers (including workers of other businesses), customers, patients or clients (including assault). Aggressive behaviour such as yelling or physical intimidation.
Bullying	Repeated unreasonable behaviour directed towards a worker or group of workers that creates a risk to health and safety. ² This includes bullying by workers, clients, patients, visitors or others.
Harassment including sexual harassment	Harassment due to personal characteristics such as age, disability, race, nationality, religion, political affiliation, sex, relationship status, family or carer responsibilities, sexual orientation, gender identity or intersex status. Sexual harassment - any unwelcome sexual advance, unwelcome request for sexual favours or other unwelcome conduct of a sexual nature, in circumstances where a reasonable person, having regard to all the circumstances, would anticipate the possibility that the person harassed would be offended, humiliated or intimidated. ³ Harmful behaviour that does not amount to bullying (such as single instances) but creates a risk to health or safety.
Conflict or poor workplace relationships and interactions	Poor workplace relationships or interpersonal conflict between colleagues or from other businesses, clients or customers. Frequent disagreements, disparaging or rude comments, either from one person or multiple people, such as from clients or customers. A worker can be both the subject and the source of this behaviour. Inappropriately excluding a worker from work-related activities.

[Appendix A](#) and [Appendix B](#) provide further examples of these hazards.

Barriers that may put some workers at higher risk

Like for physical hazards, some workers may be at greater risk from psychosocial hazards due to barriers to understanding or participating in safety processes. This means there is a greater likelihood or severity of harm for these workers. For example, workers with:

- limited experience in the workplace (e.g. young workers)
- barriers to understanding safety information (e.g. literacy or language)
- perceived barriers to raising safety issues (e.g. power imbalance or stigma), or
- previous exposure to a hazard.

² Bullying is defined in Safe Work Australia Guidance and the *Fair Work Act 2009 (Commonwealth)*.

³ Legal definitions of 'sexual harassment' may vary in each state and territory.

For example, inexperienced workers may not identify harmful behaviours or have the confidence to report them. You could address this by providing more detailed induction training and greater support and supervision until they gain experience and understand these hazards.

Consulting your workers will assist you to identify any groups who are at greater risk, and whether there are additional reasonably practicable controls you must implement to eliminate or minimise the risks for these workers.

Addressing risks to individual workers

It may also be reasonably practicable to accommodate the needs of an individual worker to prevent harm where the worker has disclosed those needs or the PCBU is aware. For example, a worker with an injury or disability may need a quiet work area or different equipment to do their work. As well as making changes for individual workers you must still eliminate or minimise psychosocial risks for all workers so far as is reasonably practicable.

These changes may include, but are not limited to, changing workload and work hours, the nature of work, the work environment, or support and supervision.

3.2 How to identify psychosocial hazards

You must identify all reasonably foreseeable psychosocial hazards arising from the work carried out by your business or undertaking.

As well as identifying common hazards, ensure your process identifies hazards for less common but serious incidents, such as sexual or physical assault.

Examples of psychosocial hazards are included in [Appendix A](#) and [Appendix B](#).

Consult your workers

You must consult with your workers (see [Section 1.3](#) of this Code) when identifying hazards to health and safety arising from the work they carry out or are going to carry out.

If your workers are represented by HSRs you must include them in this consultation. HSRs may have specific training in work health and safety, which can assist you to manage risks. HSRs can also provide workers some anonymity which may encourage better engagement on psychosocial hazards.

Your workers may use different terms to describe exposure to psychosocial hazards. For example, they might say they feel:

- stressed, burnt-out or emotionally exhausted about their workload
- anxious or scared about talking to or dealing with an aggressive person
- humiliated, degraded or undermined by sexual harassment or discrimination
- angry about policies being applied unfairly
- confused about what their role involves, torn between competing priorities or 'feeling like a failure' for not being able to meet unrealistic expectations, or
- distressed, unable to sleep, or traumatised by exposure to traumatic situations or content.

Good consultation should allow for differences in how workers may describe hazards and seek to identify the underlying cause. You should provide your workers with information to help them understand and recognise psychosocial hazards.

Use surveys and tools

You can use surveys to gather information from workers, HSRs, supervisors and managers. Surveys are particularly useful when:

- anonymity is important, this is because anonymous surveys or tools protect workers from stigma or other adverse outcomes when reporting hazards or concerns
- workers are physically dispersed. For example, they work across multiples sites or shifts
- you need to consult with a large number of workers
- workers need time to consider your questions and their response, or
- workers may struggle to understand or otherwise participate in other forms of consultation.

Surveys must not replace agreed consultation procedures unless agreed with your workers, however they can be used as an additional tool for consultation.

You can seek advice on the tools available from the work health and safety regulator, industry associations, unions, technical specialists and safety consultants.

Medium to large businesses or organisations, particularly those with high psychosocial risks, should consider implementing a validated psychosocial risk assessment process.

Observe work and behaviours

Psychosocial hazards may be identified by observing:

- the workplace (e.g. are workers isolated or exposed to poor conditions)
- the work and how work is performed in practice (e.g. are workers rushed, is work delayed, do certain tasks result in confusion or frequent mistakes), and
- how people interact with each other (e.g. are workers, customers and clients respectful, or are harmful behaviours present).

In some circumstances, poor workplace behaviours may be an inappropriate response to other psychosocial hazards, such as high job demands, lack of role clarity and inadequate support. Also consider whether the workplace culture supports or tolerates harmful behaviours, including lower level (but still harmful) behaviours like name-calling, teasing, sexual or gendered jokes, and crude language.

Review available information

Review relevant information and records which may include:

- records of injuries, incidents or workers' compensation
- worker complaints and investigations
- reports from workplace inspections (e.g. HSR or safety officer walk arounds)
- staffing, resourcing, procurement and refurbishment decisions (e.g. will outsourcing some work increase work demands for another area, like contract managers)
- work systems, policies, governance arrangements and procedures
- duty statements and performance agreements
- records of hours worked (e.g. regular extra hours indicating high work demand)
- absenteeism and turnover data and exit interviews
- Health and Safety Committee (HSC) meeting records, and
- previous psychosocial risk assessments and any material feeding into them.

Not all psychosocial hazards will be associated with reported incidents, so it is important to gather additional information.

Information and advice about psychosocial hazards and risks relevant to particular industries and work activities are available from the work health and safety regulator, industry associations, unions, technical specialists, similar workplaces and safety consultants. Advice

is particularly helpful in complex or high-risk situations. For example, where workers are exposed to violence or aggression from a person they owe a duty of care to, such as nurses or teachers.

Look for trends

You may be able to identify trends from the information you collect. Trends may show certain tasks have more hazards associated with them, or some hazards are more common in certain roles. Trends may show workers in a particular location are exposed to more hazards than in other areas, which may indicate a problem with the design of that work area or the way work is carried out there. This can inform your risk assessment.

Have a reporting mechanism and encourage reporting

You should establish a mechanism for workers to report hazards. This should protect the privacy of workers who make reports and allow for anonymous reporting where possible. Your reporting mechanism should suit your business size and circumstances and be proportional to the risks in your business. For example, a small café could have a board in the kitchen for workers to write up hazards they identify, a locked box for making confidential reports and the duty manager taking reports of any hazards posing an immediate risk.

When hazards aren't being reported

Workers might not report psychosocial hazards because they:

- see them as just 'part of the job' or the work culture
- believe it's not serious enough to report
- feel they do not have time to report frequently occurring hazards
- think reports will be ignored, or not handled respectfully and confidentially
- fear they will be blamed or believe reporting may expose them to additional harm, discrimination or disadvantage, or
- do not know or understand how to report a hazard.

If a worker is being bullied, harassed or is exposed to other harmful behaviours they might not report it when the other person is in a position of authority (e.g. a manager or supervisor) or a position of influence (e.g. a client). Workers may be worried about the consequences of reporting, such as the person finding out about the complaint and the behaviour escalating.

It is important for hazards reported by workers be taken seriously. Workers can be encouraged to report hazards by:

- treating all reports of psychosocial hazards seriously and appropriately
- using agreed mechanisms, such as HSRs who can raise safety concerns for workers anonymously
- regularly discussing psychosocial hazards at team meetings or toolbox talks
- providing workers with a range of accessible and user-friendly ways to make a report informally, formally, anonymously or confidentially
- making it clear that victimising those who make reports will not be tolerated
- training key workers (e.g. supervisors, managers, contact persons and HSRs)
- ensuring processes and systems for reporting and responding to complaints of bullying, harassment or other poor behaviours are appropriate, transparent and well understood, and
- acting decisively to control the risks your workers identify.

Your hazards and risks reporting system should be appropriate and proportional for your organisation and the risks in your workplace. For example, a large organisation with previous instances of violent behaviour should consider a formal system with documented procedures. In contrast, a small business with no previous instances of violent or aggressive behaviour may not require a formal system, and could instead encourage workers to discuss hazards with supervisors as required and have a method of reporting and recording details.

4 Assess the risks

4.1 When should a risk assessment be conducted?

Once you have identified psychosocial hazards in your workplace, the next step is to assess the risks they create. This will help you determine what is reasonably practicable in managing the risks.

You should carry out a risk assessment, in consultation with workers and their HSRs if they have them, for any hazards you have identified. However, if you already know what the risks are and how to control them effectively, you can implement the controls without undertaking a risk assessment and then check to confirm these have been effective.

A risk assessment can help you determine how severe risks are, and therefore what is reasonably practicable in managing the risks.

Further information on risk assessments is available in the Code of Practice: [How to manage work health and safety risks](#).



4.2 How to assess psychosocial risks

To assess the risk of harm, you need to identify the workers affected and consider the duration, frequency and severity of their exposure. [Appendix C](#) may assist you to capture this information.

Once you have identified all the hazards you should assess the risks. To do this, consider:

- **Duration** – how long is the worker exposed to the hazards or risks?
- **Frequency** – how often is the worker exposed to the hazards or risks?
- **Severity** – how severe are the hazards and the workers' exposures?

Consider psychosocial hazards collectively rather than in isolation. Workers and others may be exposed to more than one psychosocial hazard at any time and hazards can interact or combine. For example, a worker exposed to aggressive customer behaviour is more likely to be harmed if at that time they do not have other workers present to support them and do not have the control to alter the way they work to de-escalate the situation. Assessing risks collectively may also assist you to identify more effective control measures.

Psychosocial risks increase when exposure to hazards is more severe (e.g. exposure to a traumatic incident), more frequent (e.g. regularly performing tasks without adequate support), or is longer in duration (e.g. high job demands over weeks or months).

The risks also increase when workers are exposed to a combination of the above mechanisms. For example, short term but severe exposure to a psychosocial hazard (e.g. a violent incident) is more likely to harm workers if they are also exposed to chronic (long duration), but less severe hazards (e.g. ongoing low support).

Psychosocial risks can cause both physical and psychological injuries. The severity of psychological injuries varies, but in comparison to physical injuries, on average, they require longer off work and are more costly.

5 Control the risks

Once you know which psychosocial hazards are present and you have assessed the risks they create, you are in a position to control them.

You must eliminate risks to health and safety if it is reasonably practicable to do so. If it is not reasonably practicable to eliminate the risks, you must minimise risks so far as is reasonably practicable.

Every workplace is different. The best combination of control measures will be tailored to your organisation's size, type and work activities to manage risks during both everyday operations and emergencies. Example control measures are provided in [Appendix A](#) and [Appendix B](#).



To determine what is reasonably practicable to manage psychosocial risks:

1. identify as many possible control measures as you can
2. consider which of these control measures are most effective, and
3. consider which controls are reasonably practicable in the circumstances.

5.1 Identify and select control measures

Identify possible control measures

To identify what can be done you should, in consultation with your workers, identify as many possible control measures as you can. This gives you the greatest scope to choose and apply the most effective control measures to eliminate or minimise risks. Consultation with workers will assist you to identify control measures you might not otherwise think of.

Consider which control measures are most effective

From the possible control measures you have identified, consider which control or combination of controls will be most effective.

You must first aim to eliminate the risks, so identify any control measures which would achieve this. Then order the remaining controls, or combinations of controls, from most to least effective at minimising the risks. Controls that are reliable and offer the highest level of protection are the most effective.

Minimising the risks can be achieved by changing the:

- design of work, including job demands and tasks involved
- systems of work, for example:
 - o allocating tasks to match skills
 - o ensuring sufficient time to complete tasks
 - o support from supervisors and other workers
- work environment and conditions
- workplace interactions including ensuring respectful behaviours and relationships, or
- objects or tools used in the task, for example ensuring plant, substances and equipment are safe and fit for purpose.

Physical risks contributing to psychosocial risks can be minimised through relevant substitution, isolation and engineering controls.

Administrative controls and personal protective equipment (PPE) are the least reliable controls and provide the lowest level of health and safety protection. You should consider these last and use them in combination with more effective controls.

For example, policies may be ignored, systems of work may not be understood and followed, and PPE may not always be worn. Further controls, such as supervision, may be needed to make a control more likely to be effective.

Select reasonably practicable control measures

For each of the controls you have identified, consider if it is reasonably practicable to implement in the circumstances. When determining what is reasonably practicable, you must consider all relevant matters, including:

- the likelihood of the psychosocial hazard or the risk occurring
- the degree of harm that might result from the hazards or the risks
- the availability and suitability of ways to eliminate or minimise the risks
- what the person concerned knows, or ought reasonably to know about the hazards or risks, and about the ways of eliminating or minimising the risks, and
- after assessing the extent of the psychosocial risks and the available ways of eliminating or minimising risks, the cost associated with eliminating or minimising the risks, including whether the cost is grossly disproportionate to the risks.

The greater the risks, the more that is required to be done to eliminate or minimise it. This may mean using more than one, or a combination of control measures.

Where psychosocial hazards are only present for short periods, infrequently and are not severe, it may not be reasonable to implement expensive and time-consuming control measures. It may, however, be reasonable to apply less expensive controls.

Multiple control measures may be required. The aim must be to keep trying to lower the likelihood and degree of harm until further steps are not reasonably practicable in the circumstances.

Psychosocial hazards can interact or combine with other psychosocial hazards to increase the risks. This means controlling the risks associated with one hazard can also minimise the risks from other psychosocial hazards.

When considering each control or combination of controls, a duty holder must take into account the likelihood of a particular control being effective.

Cost of control measures

Cost is a matter to be taken into account and weighed up with other relevant matters to identify what is reasonably practicable, but this must only be done after assessing the extent of the risk and the ways of eliminating or minimising it.

Where the cost of implementing control measures is grossly disproportionate to the risks, it may be that implementing them is not reasonably practicable and therefore not required. This does not mean that you are excused from doing anything to minimise the risks. A less expensive way of minimising the risks must instead be used. If two control measures provide the same level of protection and are equally reliable, you can implement the less expensive option.

The question of what is reasonably practicable is determined objectively, not by reference to your particular business or undertaking's capacity to pay, or other individual circumstances. You cannot provide workers with a lower level of protection simply because you are in a

lesser financial position than another PCBU facing the same hazards or risks in similar circumstances.

Your goal to produce a product or provide a service at a particular price cannot override your duty to ensure, so far as is reasonably practicable, the health and safety of your workers and others.

5.2 Implementing control measures

It is important to ensure a particular control measure will work before relying on it. You may need to test control measures, provide information, training or instruction to workers and supervise work to ensure control measures are effective.

Test control measures

Testing control measures allows you to ensure they are suitable for your workplace, operate as intended and do not introduce new risks.

You should allow enough time for your workers to adjust to changes (e.g. new work processes) before assessing the effectiveness of control measures. At this stage, you should frequently check with your workers on how they think the improvements are working and supervise workers to ensure controls are implemented effectively.

Information, training, instruction and supervision

WHS Act section 19

Primary duty of care

WHS Regulation 39

Provision of information, training and instruction

As you are planning to implement control measures, you must consider what information, training, instruction or supervision is required to ensure the control measures are effective.

Training must be suitable and adequate, having regard to:

- the nature of the work to be carried out
- the associated psychosocial hazards and risks, and
- the control measures to be implemented.

Training should require workers to demonstrate they are competent in performing the task. It is not sufficient to simply tell a worker about the procedure and ask them to acknowledge they understand and can perform it. Training may include formal training courses, in-house training or on the job training.

For example, if supervisors and managers have a role in implementing workplace policies on addressing harmful behaviours, you must provide them with any training necessary to ensure safety. This may include training, so they know what to do if they witness, experience or have a worker approach them about violence and aggression, bullying or sexual harassment at work or know who to seek guidance from if they have questions.

Information, training and instruction must be provided in a form all workers can understand, for example training may need to be provided in other languages. Information and instruction may also need to be provided to others who enter the workplace, such as customers or visitors.

The level of supervision required will depend on the risks and the experience of the workers involved. High levels of supervision are necessary where inexperienced workers are expected to follow new procedures or carry out difficult and critical tasks.

Maintenance

You must ensure that control measures are maintained so that they remain effective, including by ensuring they are fit for purpose, suitable for the nature and duration of the work; and set up and used correctly. You should decide what maintenance a control measure will require when you implement the control and establish a schedule for routine checks and maintenance. You may prepare a risk register identifying the hazards, what action needs to be taken, who will be responsible for taking the action and by when.

Workplace policies

Workplace policies can provide important information and help ensure everyone involved understands the business or undertaking's processes for managing psychosocial risks. Policies alone should not be relied on to control psychosocial risks, but they can detail responsibilities and help set clear expectations, particularly about behaviours at the workplace and during work-related activities.

You may have separate policies or one policy that covers several work health and safety issues.

Where you have policies relating to psychosocial risks, these must be developed in consultation with your workers and any HSRs. All workers must be made aware of the policies and what is expected of them.

Controlling risks arising from management action

Management action, such as managing unsatisfactory performance or poor behaviour is a necessary part of conducting a business or undertaking. Management action may also be necessary to prevent or control psychosocial hazards, for example:

- increased demands on other workers due to unsatisfactory performance, or
- behaving in a way that may harm others.

PCBUs may be concerned about balancing the need to undertake performance action with the duty to eliminate or minimise psychosocial risks that may arise from the process, so far as is reasonably practicable. This can be done by:

- addressing psychosocial hazards contributing to unsatisfactory performance or poor behaviour, and
- designing the management process in a way that eliminates or minimises psychosocial risks.

Addressing psychosocial hazards contributing to unsatisfactory performance or poor behaviour

Unsatisfactory performance or poor behaviour may be the result of multiple factors, including psychosocial hazards affecting the worker. Confirming whether all psychosocial hazards have been eliminated or minimised so far as is reasonably practicable will help you to ensure you are meeting your duties. A range of psychosocial hazards can contribute to poor performance and harmful behaviour, such as:

- lack of support or training to perform the role
- lack of clarity on the role and requirements

- poor interpersonal relationships.

Eliminating or minimising psychosocial risks in the management process

You must ensure you have eliminated or minimised any risks in your management process, so far as is reasonably practicable. For example, control risks associated with:

- poor organisational justice by ensuring you apply policies transparently and fairly, and
- poor interpersonal relationships by conducting the process in a respectful and constructive way.

6 Review control measures

The last step of the risk management process is to review the effectiveness of the implemented control measures to ensure they are working as planned. If a control measure is not working effectively, it must be reviewed and modified or replaced.

Reviewing control measures should be done regularly and is required:

- when the control measure is not eliminating or minimising the risks so far as is reasonably practicable
- before a change at the workplace that is likely to give rise to a new or different health and safety risk that the control measure may not effectively control
- if a new hazard or risk is identified
- if the results of consultation indicate a review is necessary, or
- if an HSR requests a review because they reasonably believe one of the above has occurred and it has not been adequately reviewed already.

Reports, complaints (including informal complaints) or grievances from workers may identify new psychosocial hazards or risks that are not adequately controlled. This should trigger a review of whether your existing control measures are effective, if your response procedures worked the way they were supposed to and whether new risks have been identified that also need to be managed.

Common review methods include inspecting the workplace, consultation, and analysing records and data. You can use the same methods as in the initial hazard identification step to check control measures. You must also consult your workers and their HSRs.

The person reviewing your control measures should have the authority and resources to conduct the review thoroughly and be empowered to recommend changes where necessary. Questions to consider may include:

- Are control measures working effectively, without creating new risks?
- Have workers reported feeling stressed or are they showing signs of harm?
- Have all psychosocial hazards been identified?
- Have risks changed or are they different to what you previously assessed?
- Are workers actively involved in the risk management process?
- Are workers openly raising health and safety concerns and reporting problems promptly?
- Has instruction and training been provided to all relevant workers?
- Are there any upcoming changes that are likely to result in a worker being exposed to psychosocial hazards?
- Are new control measures available that might better control the risks?
- Have risks been eliminated or minimised as far as is reasonably practicable?

If the effectiveness of the control measures is in doubt, go back through the risk management steps, review your information and make further decisions about control measures.



7 Recording the risk management process and outcomes

You should record your risk management process and the outcomes, including your consultation with workers. This allows you to demonstrate you have met your work health and safety duties and will assist you when you need to monitor or review the hazards you have identified and controls you have put in place.

Your records may include the outcomes of consultation, the hazards you identified, how you assessed the risks, the control measures implemented, and the training provided.

You should select a method of recording the risk management process and outcomes to suit your circumstances. For example, you can use a risk register such as the one in the Code of Practice: [How to manage work health and safety risks](#) or in [Appendix C](#).

It is also useful to have a record of the processes used to investigate and resolve issues. You could choose to include only high-level information in the general risk register where you are concerned about the need to maintain confidentiality.

A work health and safety inspector may ask to see a copy of records relating to the risk management processes if they visit your workplace. If you do not have a written record, you will need to demonstrate by other means how you have met your duties.

8 Conducting work health and safety investigations

Any work health and safety investigations into reports of incidents involving psychosocial hazards should primarily aim to identify hazards or new or improved control measures.

Investigations must maintain appropriate privacy and confidentiality of all workers involved to the extent permitted by law. For example, do not discuss reports in public areas or with anyone not involved in the investigation. Ensuring confidentiality should not prevent the parties involved from seeking support.

Nature of investigation

The nature of your investigation should be proportional to the risks and suit the circumstances. When deciding the nature of an investigation consider the:

- level of risks involved
- complexity of the situation, and
- number of workers involved or affected.

A formal investigation may not always be the most effective option. For example, the best response to a single low-level incident may be immediate informal discussions with the workers involved and changes to the relevant control measures. The earlier problems can be identified and addressed, the less likely a formal and complex investigation will be required.

Small businesses may require assistance if a matter is complex or high risk. You can seek advice from the work health and safety regulator, your industry body or a work health and safety expert.

Selecting an investigator

It is important to find an investigator who has the confidence of all parties involved where possible. They should be impartial and have the skills and knowledge to identify psychosocial hazards, assess the risks and recommend appropriate controls.

An external investigator may be required if an impartial internal investigator is not available, for example where a matter involves a senior manager.

Balancing a fair and transparent process

The investigation should be fair, transparent and timely to ensure due process for both those who raised the issue and any workers who have had allegations made about them.

Throughout the investigation affected workers should be:

- informed of their rights and obligations during the process
- provided with the opportunity to respond to any allegations made against them
- provided with a copy of relevant policies and procedures
- kept informed about possible outcomes, timeframes, rights of appeal and reviews, and
- provided with adequate and fair support.

Concurrent investigations

Harmful behaviours, such as bullying and harassment can be inappropriate responses from workers exposed to other hazards, for example high job demands and poor support. Where these behaviours breach employment codes of conduct or professional standards you may require a separate investigation into these breaches as a disciplinary matter, as well as a

systematic work health and safety investigation looking at any hazards present and ensuring they are controlled.

Where breaches of a code of conduct or professional standard are not proven there may still be an underlying work health and safety risk which needs be controlled.

Appendix A – Job characteristics, design and management

This appendix provides examples of control measures for psychosocial hazards related to job characteristics, design and management, and the working environment and equipment including:

- high or low job demands
- low job control
- poor support
- traumatic events or material
- remote or isolated work
- lack of role clarity
- poor organisational change management
- inadequate recognition
- poor organisational justice, and
- poor environmental conditions.

However, it is not an exhaustive list and you should use the process outlined in this Code to ensure you identify all hazards in your workplace and assess and control the associated risks.

A single or irregular exposure to these hazards may not create psychosocial risks, or the risks may be very low. However, if workers' exposure to a hazard (or a combination of these hazards) is frequent, prolonged or severe it can cause psychological and physical harm.

The controls provided are examples. You must consider what is reasonably practicable to eliminate or minimise the risks in your workplace.

Job demands

Sustained or intense high levels of physical, mental or emotional effort which are unreasonable or chronically exceed workers' skills, or sustained low levels of physical, mental or emotional effort. A job can include periods of high and low job demands. A job can also involve a combination of low or high mental, emotional and physical demands.

Note: Some of these examples of hazards may not create psychosocial risks on their own, but may do so if combined with other hazards. Some hazards may only create risks on their own when severe. Consider all hazards present and the circumstances to determine what is reasonably practicable to manage the risks.

High physical demands may include:

- long, irregular or unpredictable work-hours (e.g. doing shift work or being on call)
- insufficient breaks (e.g. breaks are infrequent, too short, strictly scheduled or regularly interrupted)
- not being able to recover between periods of work (e.g. being expected to work afterhours, be on call, or return to work with insufficient rest and sleep)
- not having opportunities to use leave entitlements
- high workloads (e.g. having too much to do)
- physically demanding, challenging or tiring work (e.g. undertaking hazardous manual tasks or strenuous physical tasks), and

- time pressures or fast paced work (e.g. unreasonable deadlines or computer/machine paced work).

High mental or cognitive demands may include:

- complex tasks frequently or severely exceeding a worker's capacity or competency (e.g. workers' lack the training, resources, skills, authority or experience to reasonably or successfully do tasks)
- sustained levels of concentration or vigilance particularly when accuracy is required or workers are looking for infrequent events (e.g. long-distance driving or security monitoring)
- work where errors may have high reputational, legal, career, safety or financial risks (e.g. air traffic control, medical care or decisions affecting a large number of people)
- absence of systems to prevent individual errors (e.g. relying on workers to memorise information or perform manual calculations without checks), and
- repeatedly or rapidly switching tasks so it is difficult to concentrate and complete tasks (e.g. being frequently interrupted or having to do numerous things at once).

High emotional demands may include:

- responding to distressing or emotional situations (e.g. dealing with confrontation)
- managing other people's emotions (e.g. de-escalating an aggressive situation, undertaking disciplinary processes or assisting people who are distressed)
- providing support or empathy (e.g. conveying bad news, providing advocacy or counselling), and
- suppressing emotions or displaying false emotions (e.g. nursing staff hiding distress for patients or retail workers pretending friendliness with difficult customers).

Low job demands may include:

- having too little to do (e.g. running out of work) or long idle periods where workers cannot perform other tasks (e.g. where a worker must monitor a process and cannot perform other tasks until it is complete)
- highly monotonous or repetitive tasks which require low levels of thought processing and little variety (e.g. packing products or monitoring production lines)
- work that is too easy (e.g. significantly below a worker's skills or abilities), and
- idle periods when high workloads are present (e.g. having urgent work but being unable to proceed until equipment, resources or support become available).

Controlling job demands

Note: These are examples only. You must identify and implement control measures that eliminate or minimise the risks in your workplace, so far as is reasonably practicable.

Job/work design

- Schedule tasks to avoid intense or sustained low or high job demands (e.g. schedule non-urgent work for quieter periods).
- Manage supply chains to avoid large fluctuations in demand (e.g. delays in supplies causing backlogs of orders).
- Plan shifts to allow adequate rest and recovery, particularly between periods of high demand.

Physical work environment

- Design the workplace to eliminate demanding tasks or jobs (e.g. locate the storeroom next to the loading dock so deliveries do not require double handling).
- Provide quiet spaces for workers doing mentally demanding work.
- Implement systems to reduce human error (e.g. use IT systems to capture important information and generate reminders).

- Provide appropriate break areas (e.g. air-conditioned or shady areas for physically demanding work or staff-only areas for workers dealing with difficult customers).

For information on safe physical work environments see the Code of Practice: [Managing the work environment and facilities](#). For information on designing structures which will, or could reasonably be, used as a workplace see the Code of Practice: [Safe design of structures](#).

Modifying job demands

- Plan your workforce so you have an adequate number of appropriately skilled staff to do the work and so that tasks utilise your workers' skills.
- Roster enough workers to ensure they can take required breaks over long or busy shifts.
- Rotate workers through demanding or repetitive tasks.
- Reschedule non-urgent tasks if demand is unexpectedly high or low.
- Provide additional support during periods of high demand (e.g. provide more workers, better equipment or outsource tasks).
- Schedule enough time for difficult tasks to be completed safely. Inexperienced workers may require additional time, supervision or support.
- Outsource tasks to external companies with the capacity to deliver services safely (e.g. outsource tasks to companies that have appropriately skilled workers or specialised equipment).

Safe work systems and procedures

- Empower workers in situations where they face high emotional demands (e.g. allow discretion in providing refunds where appropriate to avoid customer aggression or distress).
- Have regular conversations about work expectations, workloads, deadlines and instructions to ensure job demands are understood and can be managed.
- Regularly review and update work policies and procedures to avoid unnecessary work (e.g. ensure reporting lines are suitable for current workloads).
- Have systems for escalating problems and getting support from managers.

The worker

- Set achievable performance targets, with consideration for the worker's experience and skills.
- Provide training if required to ensure workers have the skills to meet work demands.
- If emotional demands are an unavoidable part of a worker's role, ensure these are captured in the position description and applicants are informed at the pre-selection stage (e.g. at interview) of the demanding nature of the role.

Low job control

Having little control or say over the work or aspects of the work including how or when the job is done.

Note: Some of these examples of hazards may not create psychosocial risks on their own but may do so if combined with other hazards. Some hazards may only create risks on their own when severe. Consider all hazards present and the circumstances to determine what is reasonably practicable to manage the risks.

Low job control may include:

- requiring permission or sign-off before progressing routine or low risk tasks (e.g. before ordering standard monthly supplies or sending routine internal emails)

- workers' level of autonomy not matching their abilities (e.g. inexperienced and highly skilled workers are given the same level of autonomy)
- prescriptive processes and not allowing workers to apply their skills or judgment (e.g. work is tightly scripted and workers cannot adapt to the specific situation)
- lack of consultation about changes impacting their work (e.g. changing processes for interacting with clients)
- limited scope for workers to adapt the way they work to changing situations or adopt efficiencies in their work (e.g. not allowing workers to adapt processes which do not suit the situation)
- workers have little influence on how they do their work, when they change tasks or take breaks (e.g. work is machine or computer paced)
- workers are unable to avoid dealing with aggression or abuse (e.g. police or healthcare services), and
- workers do not have control over their physical environment (e.g. working in uncomfortable temperatures).

Controlling low job control

Note: These are examples only. You must identify and implement control measures that eliminate or minimise the risks in your workplace, so far as is reasonably practicable.

Job/work design

- Match workers' level of autonomy to their skills and experience.
- Implement consultation arrangements to regularly discuss the work, how it is done and any changes impacting workers.
- Develop governance arrangements and approval processes that balance risks and efficiency to streamline lower risk tasks.
- Design processes and systems to deal with new situations and provide autonomy for workers to apply their judgement when processes are not fit for purpose.

Physical work environment

- Design processes and systems so workers control their workflow (e.g. use electronic systems to filter client queues and give workers control over when the next client is called).
- If work is machine or computer paced, design processes so workers can alter the pace of work, change tasks, or pause the workflow to take breaks.
- Provide workers with reasonable control over their physical environment (e.g. workers can adjust their workstation).

Improving job control

- Plan any regular additional work hours or changes to work in advance with workers (e.g. if additional hours are usually required during peak season, plan this in advance with workers).
- Involve workers in organisational decision-making processes and encourage suggestions for continuously improving work practices.
- Plan deadlines, performance targets, work allocations and work plans in consultation with workers.
- Hold regular team meetings and discuss any work challenges with workers and discuss how problems could be solved.
- Monitor staff in way that is not excessive or punitive.

Safe work systems and procedures

- Create an environment where workers feel empowered to raise safety concerns about work requirements.
- Encourage workers to suggest changes or adopt efficiencies in their work.

- Provide leadership and supervision that supports workers to take reasonable control over their work.

The worker

- Develop a performance management system that ensures workers have input into the way they do their work rather than focusing only on output.
- Hire workers with the right mix of skills and experience for the position including the level of autonomy the job will have.

Poor support

Inadequate support, including insufficient support from supervisors or other workers.

Not having the resources they need to do the job or support work performance.

Note: Some of these examples of hazards may not create psychosocial risks on their own but may do so if combined with other hazards. Some hazards may only create risks on their own when severe. Consider all hazards present and the circumstances to determine what is reasonably practicable to manage the risks.

Poor support may include:

- insufficient, unclear or contradictory information (e.g. necessary information is not passed on or is communicated poorly)
- not having the things to do their job properly or on time (e.g. not having the necessary tools, systems, equipment or resources)
- frequently needing to compete for the things needed to do the job (e.g. where multiple workers need to use equipment at the same time)
- poorly maintained or inadequate tools, systems and equipment (e.g. tools are broken or IT systems do not work as intended)
- inadequate training for the task (e.g. new workers are asked to do complex tasks or workers are expected to use new tools without training)
- jobs where supervisors are unavailable to make decisions or provide support (e.g. they work from a different location or are frequently in meetings)
- inadequate guidance from supervisors or assistance from other workers (e.g. other workers are not available to help safely complete tasks)
- workers cannot ask for help when needed (e.g. workers are not able to pause work, leave their workstations or are working remotely without means to contact supervisors)
- workplace cultures that discourage supervisors or co-workers supporting each other (e.g. highly competitive, insecure, critical, uncooperative or uncollaborative workplaces)
- working environments that discourage discussion (e.g. lack of suitable spaces to discuss sensitive issues or where workers are physically separated)
- limited emotional support or unempathetic leadership (e.g. supervisors do not notice when workers are struggling, do not take issues seriously or provide a safe space to raise issues), and
- infrequent or poor performance feedback and discussions (e.g. feedback is unclear, unhelpful or not provided).

Controlling poor support

Note: These are examples only. You must identify and implement control measures that eliminate or minimise the risks in your workplace, so far as is reasonably practicable.

Job/work design

- Implement good information sharing systems so workers have quick access to the information they need to do their jobs (e.g. ensure databases are kept up to date and are user friendly).
- Design work so supervisors have manageable workloads, sufficient resources and their span of control allows effective supervision (e.g. supervisors have time to answer questions or assist with challenging tasks).
- Establish systems to ensure regular, fair, goal-focused and constructive feedback discussions occur between workers and supervisors to discuss work tasks, and any support or development needs (e.g. implement end of shift debriefs or require supervisors to do quarterly check ins).
- Provide clear management structures and reporting lines (e.g. provide organisational charts or ensure workers understand who to go to for help).

Physical work environment

- Provide workers with the things they need to do their jobs properly and safely (e.g. the right tools, equipment, systems and resources) and ensure workers have sufficient access to them (e.g. they are conveniently located and workers do not need to compete for access).
- Provide workers with access to supervisors (e.g. locate workers close to their supervisor or if working remotely provide tools like videoconferencing).
- Design the work environment to facilitate cooperation and ensure people can ask for help (e.g. workers can easily have discussions with others and there are suitable meeting spaces).

Increasing support

- Hold regular team meetings, and discuss any challenges, issues and support needs (e.g. ask workers about any new challenges or training they may need).
- Build a workplace culture that values collaboration and cooperation instead of competition (e.g. establish team rather than individual goals or praise cooperation).
- Maintain tools, systems and equipment, and review whether they are suitable for the work (e.g. ensure equipment works and consider whether other equipment might work better or more efficiently).
- Schedule meetings to ensure supervisors have availability during workers' usual hours to meet with them so workers can raise issues or ask questions.
- Increase the level of support during peak periods or challenging tasks (e.g. roster more workers on during peak season or check in more often for challenging tasks).
- Backfill roles or redistribute work when workers are out of the office or on leave.
- Design rosters so supervisors are available to help during difficult or busy times.
- Set clear work goals and clearly explain tasks.

Safe work systems and procedures

- Train workers on how to do their jobs and use relevant tools, equipment, systems, policies, or processes.
- Establish open communication (e.g. have an open-door policy) and encourage workers to share concerns early (e.g. by taking their concerns seriously and ensure they have safe spaces to raise them).
- Encourage and reward workers supporting each other.
- Encourage the development of positive working relationships (e.g. invest in team planning and building activities and encourage team discussions).

- Build interpersonal capabilities across the team (e.g. emotional intelligence, conflict resolution, or communication and feedback skills).
- Encourage supervisors to be empathetic in their leadership, including taking workers' concerns seriously, sensitively managing problems and helping when workers are struggling.
- Ensure supervisors understand their role in supervising workers.
- Encourage supervisors to provide timely, task specific, constructive feedback.

The worker

- Hire supervisors with the skills, experience and training to perform their role and support their team.
- Provide development programs to improve supervisors' skills.
- Establish inductions, training and mentoring (e.g. buddy programs) for new workers.

Lack of role clarity

Unclear, inconsistent or frequently changing roles, responsibilities or expectations.

Lack of important job-related information.

Note: Some of these examples of hazards may not create psychosocial risks on their own but may do so if combined with other hazards. Some hazards may only create risks on their own when severe. Consider all hazards present and the circumstances to determine what is reasonably practicable to manage the risks.

Lack of role clarity may include:

- unclear, inconsistent, or frequently changing jobs or role responsibilities
- overlap in responsibilities between workers (e.g. workers are given the same task and are not clear who is responsible for what)
- conflicting, uncertain, or frequently changing expectations and work standards (e.g. workers are given conflicting deadlines or instructions)
- conflicting, unclear or changing reporting lines
- missing or incomplete task information, or
- a lack of clarity about work priorities (e.g. which tasks or stakeholder relationships are most important).

Controlling lack of role clarity

Note: These are examples only. You must identify and implement control measures that eliminate or minimise the risks in your workplace, so far as is reasonably practicable.

Job/work design

- Provide position descriptions that clearly outline all key tasks, responsibilities and role expectations.
- Design management structures with clear reporting lines.
- Provide workers with a single immediate supervisor.
- Detail reporting lines in an organisational chart.

Physical work environment

- Provide a workplace which is compatible with workers' responsibilities (e.g. seat workers with their teams).

- Provide systems, tools and equipment which is compatible with workers' responsibilities (e.g. IT systems with profiles set up for different users and access to programs they need for their role).

Providing role clarity

- Provide clear work instructions and expectations, explain why roles, responsibilities and tasks have been allocated, and ensure workers understand.
- Ensure workers assigned to the same task understand who is doing what.
- Change tasks or processes that frequently create conflict, confusion, or result in frequent mistakes (e.g. provide clearer explanations or redesign the tasks).
- Update job descriptions and any role expectations following changes.
- Implement regular check-ins and encourage open discussion among team members to ensure they are clear about who is doing what.
- Provide all workers with an induction and ensure they understand their role.
- Provide clear guidelines for what to do when expectations do not align (e.g. between workers, workers and supervisors, or workers and clients).
- Implement systems to help workers identify issues or conflicts and resolve them.

Safe work systems and procedures

- Talk to workers to ensure they understand their role, your expectations, who they report to and the organisations work more broadly.
- Encourage feedback on changes that affect workers' job tasks
- Design a performance feedback system where employees receive regular feedback and provide them an opportunity to raise concerns about role clarity.
- Check with employees to ensure they understand any additional or different responsibilities or duties following an organisational change or restructure.

The worker

- Encourage workers to talk to their supervisor or manager early if they are unclear about the scope or responsibilities of their role.
- Provide a realistic job summary and overview during recruitment and selection processes so applicants are aware of the role, expectations and responsibilities.

Poor organisational change management

Organisational change management that is poorly planned, communicated, supported or managed.

Note: Some of these examples of hazards may not create psychosocial risks on their own but may do so if combined with other hazards. Some hazards may only create risks on their own when severe. Consider all hazards present and the circumstances to determine what is reasonably practicable to manage the risks.

Poor organisational change management may include:

- not consulting workers on changes in the workplace (e.g. not talking to workers or genuinely considering their views)
- poor consideration of work health and safety risks or performance impacts of a change (e.g. not considering health and safety risks when downsizing, relocating or introducing new technology or not allowing for drops in productivity while workers learn new processes)

- poorly planned changes (e.g. changes are disorganised, do not have a clear goal or do not account for workers' needs; inadequate communication with stakeholders causing disruption)
- poor communication about planned changes (e.g. allowing rumours to spread without providing timely, authoritative information)
- insufficient information is provided regarding changes (e.g. information is unclear or does not provide enough guidance for workers to understand and engage with the change)
- inadequate support for workers through the change process (e.g. not allowing time for workers to learn new tasks), or
- providing insufficient training to support changes (e.g. how to perform a new role or use a new process).

Controlling poor organisational change management

Note: These are examples only. You must identify and implement control measures that eliminate or minimise the risks in your workplace, so far as is reasonably practicable.

Job/work design

- You must consult workers who are, or are likely to be, affected by a work health and safety matter. You must agree consultation arrangements with your workers and should design them to suit your workplace. You must use agreed consultation arrangements when planning changes that raise work health and safety concerns.
- Modify work plans to allow for a period of change (e.g. adjusting performance targets while workers learn new roles).
- Plan any changes to duties, tasks, objectives and reporting arrangements to ensure they are reasonable and fair (e.g. ensure workers will not have too much to do).

Physical work environment

- Provide practical support for changes in duties, tasks or objectives (e.g. ensure workers have access to the tools and resources they need to perform a new task).
- Provide mechanisms to guide workers and managers through the change process (e.g. provide information or feedback sessions to address any concerns).

Managing and communicating organisational change

- Provide authoritative information about upcoming changes and options being considered as soon as possible, keep workers up to date, and ensure workers understand the changes (e.g. provide updates at team meetings or on notice boards).
- Inform customers and suppliers about changes and any impacts this will have.
- Provide workers with the reasons for changes.
- Provide emotional support to help workers deal with challenges or frustrations resulting from change and uncertainty.

Safe work systems and procedures

- Encourage workers to engage with the development of new position descriptions and work processes.
- Encourage workers to engage with consultation and raise any issues, concerns or suggestions.
- Respect individual differences and recognise workers will respond to change in a range of ways and will have different needs in consultation and engagement.

The worker

- You must provide workers any information, training, instruction and supervision necessary to safely complete their work (e.g. train them on safely using new equipment).

- Ensure the person communicating changes has the skills and authority to do so, and supervisors have the skills to support workers through periods of change.

Inadequate recognition and reward

Jobs where there is an imbalance between workers' effort and recognition or rewards, both formal and informal.

Note: Some of these examples of hazards may not create psychosocial risks on their own but may do so if combined with other hazards. Some hazards may only create risks on their own when severe. Consider all hazards present and the circumstances to determine what is reasonably practicable to manage the risks.

Inadequate recognition and reward may include:

- receiving unfair negative feedback (e.g. criticism on things workers cannot control or on things for which they have received insufficient training and support)
- receiving insufficient feedback or recognition (e.g. workers do not receive feedback on their work or are not given information to help them improve; workers are not acknowledged or rewarded for high effort or supporting colleagues)
- unfair, biased, opaque, or inequitable distribution of recognition and rewards (e.g. workers being rewarded for the efforts of others)
- limited opportunities for development (e.g. a lack of job training or development), or
- not recognising workers' skills (e.g. closely supervising or directing an experienced staff member on simple tasks).

Controlling inadequate recognition and reward

Note: These are examples only. You must identify and implement control measures that eliminate or minimise the risks in your workplace, so far as is reasonably practicable.

Job/work design

- Use fair, transparent and meaningful ways of providing recognition and rewards to reflect workers' efforts (e.g. avoid only recognising the workers doing high profile work; recognise teamwork and corporate contributions).
- Design fair and transparent performance management processes (e.g. ensure performance measures relate to aspects of work within a worker's control and consult workers on performance expectations).

Providing appropriate recognition and reward

- Provide recognition or feedback promptly and ensure it is specific, practical, fair and clearly relates to workers' performance.
- Consult workers when designing reward and recognition systems.

Safe work systems and procedures

- Develop leaders' abilities to provide constructive feedback and recognise good performance.
- Ensure performance management systems focus on aspects of work that are within the worker's control.
- Ensure you attribute work correctly and ensure the right workers receive recognition for achievements.
- Train supervisors on how to have difficult conversations and manage underperformance in a way that prioritises improvement over blame.

The worker

- Implement systems to support performance (e.g. training and mentoring) and provide opportunities for development (e.g. allow workers to take ownership of particular tasks).
- Recruit or train supervisors with the skills to provide constructive feedback and recognise the contributions of workers.

Poor organisational justice

Poor organisational justice involves a lack of procedural justice (fair processes to reach decisions), informational fairness (keeping people informed), or interpersonal fairness (treating people with dignity and respect).

Note: Some of these examples of hazards may not create psychosocial risks on their own but may do so if combined with other hazards. Some hazards may only create risks on their own when severe. Consider all hazards present and the circumstances to determine what is reasonably practicable to manage the risks.

Poor organisational justice may include:

- failing to treat workers' information sensitively or maintain their privacy (e.g. having performance discussions in front of others or using information for a purpose it was not disclosed for)
- policies or procedures that are unfair, biased or applied inconsistently (e.g. promotion based on favouritism, or applying disciplinary policies inconsistently or discriminatorily)
- penalising workers for things outside their control (e.g. for not producing a sufficient number of products when they did not have access to the required materials)
- failing to recognise or accommodate the reasonable needs of workers (e.g. failing to provide an accessible workplace)
- discriminating against particular groups or not applying policies fairly to some groups
- failing to appropriately address (actual or alleged) underperformance, inappropriate or harmful behaviour, or misconduct (e.g. not investigating allegations of sexual harassment or not providing procedural justice for workers accused of bullying)
- allocating work, shifts and opportunities in a discriminatory or unfair way (e.g. giving 'good' shifts based on friendships with supervisor), or
- no or inadequate processes for making decisions affecting workers (e.g. policies and processes do not set out the key considerations for disciplinary decisions).

Controlling poor organisational justice

Note: These are examples only. You must identify and implement control measures that eliminate or minimise the risks in your workplace, so far as is reasonably practicable.

Job/work design

- Design unbiased and transparent workplace processes, policies and procedures in consultation with workers (e.g. decision making, recruitment, promotion, performance management, task allocation, work health and safety or workplace entitlement policies).
- Consult workers when setting work standards or performance expectations. Ensure they are achievable and workers will not be penalised for things outside their control.

Physical work environment

- Design a workplace environment where private conversations can be held and ensure confidential information is kept secure.

- Ensure the workplace accommodates reasonable needs of workers (e.g. provide accessible ramps, doors or IT equipment).

Safe work systems and procedures

- Provide mechanisms for workers to report issues, raise concerns or appeal workplace decisions.
- Regularly review policies, processes, procedures, performance expectations and decisions to ensure they are appropriate, fair and reflect the needs of the workplace.
- Communicate processes and information to workers in a timely and appropriate way (e.g. notify unsuccessful applicants privately before you publicly announce promotion decisions).
- Provide systems to protect workers who raise safety concerns from discrimination (Sections 104-109 of the WHS Act prohibit discriminatory, coercive or misleading conduct).

The worker

- Encourage workers to use available processes to raise concerns, issues or complaints early, and use appeal processes when necessary.
- Ensure workers understand expectations and performance targets.
- Hire and promote workers based on merit using transparent selection methods.

Traumatic events or material

Witnessing, investigating or being exposed to traumatic events or material. A person is more likely to experience an event as traumatic when it is unexpected, is perceived as uncontrollable or is the result of intentional cruelty. This includes vicarious exposure and cumulative trauma.

Traumatic events involving work-related violence are covered in [Appendix B](#).

Note: Some of these examples of hazards may not create psychosocial risks on their own but may do so if combined with other hazards. Some hazards may only create risks on their own when severe. Consider all hazards present and the circumstances to determine what is reasonably practicable to manage the risks.

Traumatic events or material may include:

- witnessing or investigating a fatality, serious injury, abuse, neglect or serious incident (e.g. working in child protection)
- exposure to seriously injured or deceased persons (e.g. working in an emergency department or as a forensic scientist)
- experiencing fear or extreme risks (e.g. being in a motor vehicle accident, workplace incident or near miss)
- exposure to natural disasters (e.g. emergency services workers responding to floods or bushfires)
- witnessing or investigating terrorism or war (e.g. police officers responding to terrorist attacks or journalists reporting on wars)
- supporting victims of painful and traumatic events (e.g. providing counselling services)
- listening to or reading descriptions of painful and traumatic events experienced by others (e.g. lawyers reviewing evidence or advocates helping with victim testimonies)
- finding evidence of crimes or traumatic events (e.g. customs workers or online moderators), and
- exposure to events that bring up traumatic memories.

Controlling exposure to traumatic events or material

Note: These are examples only. You must identify and implement control measures that eliminate or minimise the risks in your workplace, so far as is reasonably practicable.

Job/work design

- Design work to minimise the number of workers exposed to traumatic events (e.g. design roles so tasks that can be carried out away from an accident or disaster scene are performed from another location).
- Coordinate and schedule tasks at traumatic scenes so workers are not exposed to unnecessary trauma (e.g. arrange for less urgent tasks to be performed after a body has been removed).

Physical work environment

- Eliminate physical risks to health and safety in the workplace to prevent trauma from a workplace incident or near miss.
- Remove or secure potentially lethal means of self-harm (e.g. medications or hazardous chemicals) from the workplace or secure them (e.g. require two workers to enter codes to access storage units or require higher level authorisation processes).
- Provide physical barriers to discourage suicide attempts (e.g. install fences to prevent access to train tracks or railings on bridges, locking windows and limiting roof access).
- Implement file flagging processes or password requirements on potentially distressing files to eliminate inadvertent exposure to distressing content.

Minimising exposure to traumatic events or material

- Reduce exposure to traumatic materials, particularly if there is no operational need for workers to view or listen to all the materials or consider them in detail (e.g. allow online moderators to remove users based on a single serious breach or encourage officers discovering suspected child abuse material to pass that material to identified investigations without reviewing it).
- Use screening software to remove explicit material.
- Minimise the number of workers exposed to traumatic materials or events (e.g. do not bring unnecessary workers into an investigation or natural disaster area).
- Minimise the amount of traumatic materials or events each worker is exposed to (e.g. rotate police officers through different roles to provide periods of respite).
- Reduce workloads so workers can investigate thoroughly and provide adequate support to victims (e.g. prevent workers from feeling they 'failed someone').
- Increase breaks and recovery time after exposure to a traumatic event (e.g. provide time to disconnect from work).

Safe work systems and procedures

- Provide guidelines and procedures for dealing with incidents, train workers in these procedures and ensure they understand them (e.g. reduce the number of decisions workers make during a traumatic event).
- Implement reporting systems for exposure to traumatic or distressing events. Implement systems that prompt supervisors to support workers, trigger a review of the incident and a review of whether control measures are working as planned.
- Create a safe space for workers to report traumatic or distressing events and deal with these disclosures sensitively and seriously.
- Implement peer support programs.
- Implement procedures for providing support after traumatic events (e.g. provide counselling and professional support).
- Train supervisors on responding to trauma and where they can get assistance.

The worker

- Ensure recruitment and selection practices incorporate a realistic job preview so applicants are aware the role has the potential to expose them to trauma.
- Monitor the health of your workers following traumatic events, or when dealing with traumatic materials, using processes developed in consultation with workers.
- Provide training to workers so they understand their role, know how to respond effectively, and know where to access advice and assistance during a traumatic event.
- Provide training to workers who may be exposed to traumatic events or have a role in supporting workers who are exposed, so they can recognise signs and symptoms of stress and ensure they know where and how to access support.
- Monitor and support workers following traumatic events (e.g. are there any changes to their behaviours or increased absenteeism).
- Provide employee assistance programs and encourage workers to use them.

Remote or isolated work

Work that is isolated from the assistance of other persons because of the location, time or nature of the work.

Working in environments where there are long travel times, poor access to resources, or communications are limited and difficult.

Note: Some of these examples of hazards may not create psychosocial risks on their own but may do so if combined with other hazards. Some hazards may only create risks on their own when severe. Consider all hazards present and the circumstances to determine what is reasonably practicable to manage the risks.

Remote or isolated work may include:

- working in locations requiring long commutes to work sites
- significant delays to entering or exiting the worksite (e.g. prisons, tower cranes or confined spaces)
- limited access to resources (e.g. supplies are delivered infrequently or there are significant delays in getting additional equipment if needed)
- limited access to recreation or opportunities to escape work issues (e.g. living in workers' accommodation in remote areas)
- reduced access to support networks and lower capacity to meet family commitments (e.g. fly-in fly-out or offshore work)
- working alone (e.g. lone workers on night shift)
- working away from the usual workplace (e.g. working in clients' homes, offsite or from home)
- where there is limited access to reliable communication and technology (e.g. no phone reception or IT systems are frequently offline), and
- difficulties or long delays accessing help in an emergency (e.g. community nurses in remote areas, working in underground mines).

Controlling remote or isolated work

WHS Regulation 48

Remote or isolated work

You must manage the risks associated with remote or isolated work, including providing effective communication with the worker carrying out remote or isolated work.

The Code of Practice: [Managing the workplace environment and facilities](#) provides information on how the risks associated with remote or isolated work can be controlled including information on:

- workplace layout and design
- communication systems
- buddy systems
- movement records, and
- training information and instruction.

Poor physical environment

Exposure to unpleasant, poor quality or hazardous working environments or conditions.

Note: Some of these examples of hazards may not create psychosocial risks on their own but may do so if combined with other hazards. Some hazards may only create risks on their own when severe. Consider all hazards present and the circumstances to determine what is reasonably practicable to manage the risks.

Poor physical environments may include:

- performing hazardous tasks
- working in hazardous conditions (e.g. near unsafe machinery or hazardous chemicals)
- performing demanding work while wearing uncomfortable PPE or other equipment (e.g. equipment that is poorly fitted, heavy, or reduces visibility or mobility)
- workplace conditions that affect concentration or ability to complete tasks (e.g. high noise levels, uncomfortable temperatures or poor lighting)
- unpleasant workplace conditions such as poorly maintained amenities, unpleasant smells or loud music
- working with poorly maintained equipment (e.g. equipment that has become unsafe, noisy or started vibrating), and
- work-related accommodation, facilities and amenities that cause or contribute to worker fatigue (e.g. conditions are noisy, uncomfortable or stop workers getting enough sleep).

You can find more information on physical hazards and the working environment on the Safe Work Australia website.

Controlling a poor physical environment

Like psychosocial hazards, you must eliminate or minimise physical hazards in the workplace as far as is reasonably practicable. Specific duties may also apply under WHS laws, for information on how to manage a poor physical environment please see the Safe Work Australia website.

Appendix B – Harmful behaviours

This appendix provides information on psychosocial hazards related to harmful behaviours. Harmful behaviours include:

- violence and aggression
- bullying
- harassment including sexual harassment or gender-based harassment, and
- conflict or poor workplace relationships and interactions.

These can cause physical and psychological harm to the person they are directed at and anyone witnessing the behaviour.

A single or irregular exposure to these hazards may not create psychosocial risks or the risks may be very low. However, if workers are exposed to a hazard (or a combination of these hazards) over a prolonged period or in a severe way they can cause psychological and physical harm.

The controls provided are examples, you must consider what is reasonably practicable to eliminate or minimise the risks in your workplace.

Identifying harmful behaviours

Overt or extreme forms of these behaviours (such as physical violence) may be easier to identify and are not tolerated in most workplaces. However, more subtle forms like crude language, sexist remarks and an overall workplace culture that is degrading or intimidating may not be taken as seriously and can be more difficult to identify.

Some of the things that may increase the likelihood of workers being exposed to harmful behaviours are set out below. This can help you identify when, where and why these behaviours may happen at work. For example, workplaces with low worker diversity (e.g. the workforce is dominated by one gender, age group, race or culture), some workforce characteristics (e.g. new and young workers, casual workers, workers in minority groups) and a workplace culture which tolerates or ignores harmful workplace behaviours are more likely to experience harmful behaviours.

Workers may be more likely to experience harmful behaviours or be more severely affected by it, because of their sex, gender, sexuality, age, migration status, disability and literacy. The risk of experiencing harm rises when a person faces multiple forms of discrimination. Attributes that make a person more vulnerable to these behaviours can also make workers less likely to report concerns or incidents.

Harmful behaviours can come from a range of sources including:

- **External** behaviours from customers, clients, patients, members of the public or from other businesses (e.g. between a plumbing and an electrical sub-contractor at the same work site, or a delivery person and a retail worker).
- **Internal** behaviours from other workers, supervisors or managers.

Harmful behaviours may be an inappropriate response to other psychosocial hazards (e.g. high job demands or inadequate support). To effectively control risks, you must control the underlying causes as well as directly addressing harmful behaviours.

Violence and aggression

Things that increase the likelihood of violent or aggressive behaviour include:

- providing care or services to people who are distressed, confused, afraid, ill, affected by drugs or alcohol or receiving unwelcome or involuntary treatment
- enforcement activities (e.g. the activities of police, prison officers or parking inspectors)
- working in high crime areas
- handling valuable or restricted items (e.g. cash or medicines)
- poor visibility in the workplace (e.g. poor lighting or barriers)
- restricted movement in the workplace (e.g. limited exit points)
- working alone, in isolation or in a remote area with the inability to call for assistance
- working offsite or in the community
- working in unpredictable environments (e.g. where other people may pose a risk to workers' safety such as at a client's home)
- interacting with customers, either face-to-face, on the phone or online, or
- service methods or policies that cause or escalate frustration, anger, misunderstanding or conflict (e.g. low staffing levels, customer service policies, setting unreasonable expectations of the services an organisation or workers can provide).

Bullying

Things that increase the likelihood of bullying include:

- presence of other psychosocial hazards:
 - o high job demands
 - o low job control
 - o low support
 - o organisational change, such as restructuring or significant technological change
 - o lack of role clarity, or
 - o poor organisational justice
- leadership or management styles:
 - o autocratic behaviour that is strict and directive and does not allow workers to be involved in decision making
 - o behaviour where little or no guidance is provided to workers or responsibilities are inappropriately and informally delegated to subordinates, and
 - o abusive and demeaning behaviour that may include inappropriate or derogatory language, or malicious criticism and feedback, and tolerance of this behaviour
- systems of work
 - o lack of resources or training
 - o inappropriate work scheduling, shift work and poorly designed rostering
 - o unreasonable performance measures or timeframes
 - o poor workplace relationships
 - o poor communication
 - o isolation
 - o low levels of support, or
 - o work group hostility.

Harassment including sexual harassment

Things that increase the likelihood of harassment include:

- acceptance of inappropriate behaviour (e.g. racially or sexually crude conversations, innuendo or offensive jokes are part of the accepted culture)
- power imbalances along gendered lines (e.g. workplaces where one gender holds the majority of management and decision-making positions)

- workplaces organised according to a strict hierarchical structure (e.g. police and enforcement organisations, medical and legal professions)
- use of alcohol at work activities and attendance at conferences and social events as part of work duties, including overnight travel
- workers are isolated, in restrictive spaces like cars or working from remote locations with limited supervision or restricted access to help and support
- working from home which may provide an opportunity for covert sexual harassment to occur online or through phone communication
- interacting with customers, either face-to-face, on the phone or online, and
- poor understanding among workplace leaders of the nature, drivers and impacts of sexual harassment.

While anyone can experience harassment there are certain groups who are more likely to experience it. Some workers may be at greater risk because of their age, gender, sexuality, migration status, disability and literacy.

Conflict or poor workplace relationships and interactions

Things that increase the likelihood of conflict or poor workplace relationships include:

- culture of tolerating swearing, name calling, spreading rumours or rudeness within the workplace
- lack of policies or processes to handle reports of unacceptable behaviour, and
- the presence of other psychosocial hazards (workers are more likely to be uncivil when they are stressed).

Controlling risks from harmful behaviours

Behaviours such as those listed above are known to cause harm. You must put control measures in place to eliminate or minimise risks so far as is reasonably practicable.

This section provides examples of control measures for managing the risks of violence, aggression, sexual harassment and bullying at the workplace.

Note: These are examples only. You must identify and implement control measures that eliminate or minimise the risks in your workplace, so far as is reasonably practicable.

Physical work environment and security

The physical work environment can affect the likelihood of violence, aggression, harassment and bullying occurring and the ability to respond if it does happen. Consider the following control measures which may provide the highest protection for workers.

Security

- Security personnel or night-time security patrol.
- Video surveillance.
- Fixed and portable alarm systems.
- Communication systems like phones, intercoms and alarm systems are in place, regularly maintained and tested.
- Ensuring vehicles are fit for purpose (e.g. have central locking devices, tracking devices such as GPS systems to allow drivers in distress to be located, lighting inside the vehicle to allow the driver to be aware of passenger behaviour, vehicles are well maintained so they do not break down in unsafe locations or times).

Access

- Controlling access to the premises (e.g. electronically controlled doors with viewing panels that allow surveillance of public areas before the doors are opened from the inside).
- Preventing public access to the area when people are working alone or at night (e.g. via a security card or code, asking guests to leave the room while workers clean).
- Providing facilities and amenities which give privacy and security (e.g. private and secure change rooms or facilities for workers to use which are separate from customers).
- Separating workers from the public with fixed or removable barriers (e.g. high counters, furniture, screens on counters or screens between a driver and passenger).
- Installing a service window for night transactions and systems like pay-at-the-pump.

Visibility

- Ensuring internal and external lighting provides good visibility, including in car parks.
- Arranging furniture and partitions within the workplace to ensure good visibility of service areas, improve natural surveillance and avoid restrictive movement.
- Improving natural surveillance in areas such as offices, storerooms and other segregated areas (e.g. using semi opaque glass or screens).

Environment

- Ensuring there are no areas where workers could become trapped, such as rooms with keyed locks.
- Implementing appropriate temperature and noise controls, such as in waiting areas to reduce customer frustration.
- Securing any objects that could be thrown or used to injure someone.
- Providing workers and others with a safe place to retreat. In other situations, it may be possible to move the person behaving inappropriately (e.g. an aggressive student could be removed from the classroom while the behaviour continues).
- Ensuring a safe working environment for workers during travel (e.g. workers being in a vehicle together), at conferences, off site, at client or customer premises, and any other location where work is performed.

Safe work systems and procedures

Safe work systems and procedures are administrative controls that should be part of your approach to managing risks at your workplace.

Communication

- Communicate with workers when they are working in the community or away from the workplace (e.g. a supervisor regularly checking in with the worker throughout their shift).
- Clearly define jobs and seek regular feedback from workers about their role and responsibilities.
- Clearly communicate to clients and customers that any form of violence, aggression harassment or bullying is not tolerated (e.g. in service agreements, contracts or on signs).
- Manage expectations of clients and customers by clearly communicating the nature of the products or services you are providing (e.g. online and using signage).
- Put up signs at the workplace (e.g. zero tolerance of aggression and violence; limits on products or services; security cameras are in use; or limited cash held on the premises).

Procedures

- Ban or refuse service to persons with a history of poor behaviour (e.g. patrons at pubs or clients gyms). If service is necessary, such as for medical care, put in place additional measures to protect workers and others.

- Provide alternative methods of customer service to eliminate face-to-face interactions (e.g. online or click-and-collect services, or no contact delivery drops).
- Establish procedures for dealing with harmful behaviour from customers or clients and how workers and managers can respond.
- Limit the amount of cash, valuables and medicines held on the premises and handle them securely (e.g. only accept cashless payments) see the *Guide for Transporting and Handling Cash* for more information.
- Use face shields where spitting or intentionally coughing is a risk.
- Avoid the need for workers to work alone where possible (e.g. working in pairs, closing the business with security personnel present, or providing a safe escort to a worker's transport).
- Provide supervision of work and support for workers, especially new, young and inexperienced workers.
- Procedures for working in isolation and uncontrolled environments (e.g. carrying out situational risk assessments to determine at each visit the safety of a client's home before commencing duties).
- Provide a sufficient number of workers (e.g. during peak periods of customer attendance and for the level of care needed for clients).
- Alternate tasks in the workplace - particularly tasks requiring high levels of customer interaction - with other work tasks and ensure workers have regular breaks if aggression or incivility is likely.
- Encourage workers to keep records and screenshots if harmful behaviour occurs online or through phone communication and report the behaviour to their supervisor.
- Assess risks of client aggression and violence and whether additional control measures are required for dealings with some clients.
- Implement management plans where a client is known to have a history of aggression or violence. Develop the plan in consultation with appropriately qualified people and communicate it to all relevant workers.
- Reduce waiting times and missed calls (e.g. by training 'relief' workers to take calls or transferring calls to other areas).
- Encourage workers to escalate problem calls to senior workers.
- Encourage workers to report incidents and behaviours of concern.
- Provide a range of accessible and user-friendly ways to make a report informally, formally, anonymously and confidentially.

Information and training

- Improve role clarity by ensuring workers have well-defined roles and clear expectations.
- Provide adequate resources and training to workers so they are able to perform their role confidently and competently.
- Provide information on the standards of behaviour expected in the workplace, including the use of social media or other technologies.
- Train workers in how to deal with difficult customers, conflict resolution and de-escalation techniques, when and how to escalate issues to managers or supervisors, and procedures to report incidents.
- Train managers and supervisors on how to deal with difficult customers and conflict resolution when issues are escalated.
- Plan for regular handover and information exchange with workers, other agencies, carers and service providers.
- Understand client condition/disability/triggers/care and behaviour management plans.
- Ensure workers understand how to make a report, their right to representation and the support, protection and advice available.
- Make it clear that victimisation of those who make reports will not be tolerated
- Train key workers (contact persons) to receive reports and give support and advice.

Policies

- Implement appropriate workplace policies as part of managing work health and safety risks.
- Set, model and enforce acceptable behaviour standards for all people in the workplace.
- Foster a positive and respectful work culture where violence, aggression, harassment and bullying are not tolerated.
- As power imbalances and inequality increase the risk of gendered and sexual harassment, consider implementing policies and strategies to address gender inequality, lack of diversity and power imbalances at the workplace.
- For work-related events, reinforce workplace policies and behaviours expected of workers, ensure responsible service of alcohol policies are followed and that workers know who to turn to if they experience or witness inappropriate behaviour at the event.
- Avoid sexualised uniforms and ensure clothing is practical for the work undertaken.
- Act in a consistent manner when dealing with reports of violence, aggression, harassment and bullying, including providing sufficient and appropriate feedback to workers who have raised concerns.
- Allow workers to refuse or suspend service if people fail to comply with the expected standard of behaviour.
- Ensure processes and systems for reporting and responding to incidents are widely communicated and regularly reviewed.
- Provide supportive, consistent and confidential responses to reports.

Review

- Regularly evaluate work practices, in consultation with workers and their representatives, to see if they contribute to poor behaviours.
- Review control measures after incidents or changes in behaviour.
- Review and monitor workloads, staffing levels and time pressures.
- Collect de-identified details of all reports, including those that are not pursued formally by the complainant, to help you identify systemic issues at the workplace.

Appendix C - Risk register

Location: [Click here to enter text.](#)

Date: [Click here to enter a date.](#)

Hazard	How frequently are workers exposed to this hazard?	How long does this exposure last?	How severe is their exposure?	Are other hazards present this may interact with?	How effective are the current controls?	What further controls are required?	Actioned by	Date Due	Date Complete	Maintenance and review
<i>E.g. High work demand (end of financial year sales)</i>	<i>Once a year</i>	<i>1 month</i>	<i>Moderate, most staff are unable to complete essential tasks and report feeling stressed.</i>	<i>Yes, aggressive customers and low support from supervisors.</i>	<i>Moderately, workers are encouraged to leave non-essential tasks but still struggle to keep up with demands.</i>	<i>Additional workers to be assigned to busy shifts.</i>	<i>J. Blogs</i>	<i>31/05/2022</i>	<i>Click here to enter a date.</i>	<i>To be reviewed after first week of this year's sales.</i>
Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter a date.	Click here to enter a date.	Click here to enter text.
Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter a date.	Click here to enter a date.	Click here to enter text.
Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter text.	Click here to enter a date.	Click here to enter a date.	Click here to enter text.
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s 22(1)(a)(ii)

From: Conduct
Sent: Tuesday, 9 April 2024 12:35 PM
To: s 22(1)(a)(ii)
Subject: FW: Assessment Outcome Complaint [SEC=OFFICIAL:Sensitive]
hptrimdataset: CH

OFFICIAL: Sensitive

On Thu, Mar 7, 2024 at 4:03 PM [REDACTED] wrote:

OFFICIAL: Sensitive

Dear [REDACTED],

I am writing to advise you that your complaint received by Ethics, Integrity and Professional Standards Section (EES) on 29 January 2024 on relation to [REDACTED] has been assessed in accordance with EES processes.

We have considered your complaint carefully and in this instance the matter will not be proceeding to investigation.

This matter is finalised with EES and is now closed.

I understand that this is not the result you may have desired. Please be aware of the below support services which are available to you:

- The Anti-Bullying, Harassment and Discrimination (ABHD) team can provide mediation or facilitated discussions. The team can be contacted via: s 22(1)(a)(ii)
- Staff and Family Support Office (SFO) can assist with strategies in dealing with workplace difficulties. The team can be reached via: s 22(1)(a)(ii)

Many thanks,

[REDACTED]

[REDACTED] | Ethics, Integrity and Professional Standards Section (EES)

People Culture Branch (PDB) | People Division (PPD)

Department of Foreign Affairs and Trade

T | [REDACTED] M | [REDACTED]
dfat.gov.au | [Twitter](#) | [Facebook](#) | [Instagram](#) | [LinkedIn](#)



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[We acknowledge](#) the Traditional Custodians of Country throughout Australia, and their continuing connection to land, waters and community. We pay our respects to all First Nations peoples, their cultures and to their Elders, past, present and emerging.

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--000000000000051d206136cdb2e-

s 22(1)(a)(ii)

Subject: FW: Investigation Process Completed [SEC=OFFICIAL:Sensitive]

From: [REDACTED]
Sent: Thursday, December 14, 2023 6:33 PM
To: [REDACTED]
Subject: Investigation Process Completed [SEC=OFFICIAL:Sensitive]

OFFICIAL: Sensitive

Hello [REDACTED],

I am writing to advise you that your complaint to the Ethics, Integrity and Professional Standards Section (EES) has been assessed in accordance with EES processes.

I wish to advise that the investigation into the allegations has been completed, and the matter has now been finalised.

Due to privacy considerations, we are unable to disclose to the results of the investigation. I am able to share with you, the matter was treated seriously and an appropriate outcome has been achieved which DFAT management have approved, although it may not be visible to you.

I am cognisant that this process may have been distressing, so please be aware you are entitled to access the Staff and Family Support Office (SFO) to provide you with an opportunity for counselling and support services. They are free and confidential and can be accessed by email s 22(1)(a)(ii) As an alternative, the SFO can assist you to arrange counselling support through the department's Employee Assistance Program. The staff counsellors can be contacted on s 22(1)(a)(ii) or also at s 22(1)(a)(ii)

Thank you for your courage in reaching out to EES, it was very much appreciated.

Kind regards,

[REDACTED]

[REDACTED] | Ethics, Integrity and Professional Standards Section (EES)
People Operations Branch (OPB) | People Division (PPD)
Department of Foreign Affairs and Trade

T | [REDACTED] M | [REDACTED]
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Australian Government
Department of Foreign Affairs and Trade



ANTI-BULLYING, HARASSMENT AND DISCRIMINATION POLICY

March 2021

Document Revision History

Version	Date	Change	Approved by (position)
1	June 2014	New policy following integration of AusAID and DFAT Incorporating new Anti-bullying provisions under the <i>Fair Work Act 2009</i>	FAS CMD
2	November 2018	Updated to incorporate additional information on sexual harassment exploitation and abuse.	Secretary
3	July 2019	Updated to incorporate: <ul style="list-style-type: none"> • Additional phone number on page 14 under Support – Anti-bullying, Harassment and Discrimination Officer • Additional phone numbers on page 10 under Internal Reporting Options • Adding the words 'relationship status and intersex status' under Discrimination on pages 6 and 16. 	A/g Director, EES
4	November 2019	Updated to amend definition of discrimination on pages 6 and 16.	Director, EES
5	November 2020	Updated to reflect structural changes in Performance Development and Safety Branch. <ul style="list-style-type: none"> • Updated to remove reference to an Anti-Bullying, Harassment and Discrimination Officer on pages 3, 12 and 14. • Name of branch updated on page 4. • Name of section updated on pages 10 and 12. • Various contact numbers and emails updated on page 10. 	Director, EHS

SECRETARY'S FOREWORD



I am pleased to present the revised version of the Department of Foreign Affairs and Trade's (DFAT) *Anti-Bullying, Harassment and Discrimination Policy*. This update builds on, and strengthens, the policy since its last update in June 2014.

Our work, in Australia and overseas, requires us to operate in a range of difficult and challenging environments. As a result, it is even more vital that we have a strong workplace culture that makes all staff feel supported and valued.

This revised policy seeks to further embed a workplace culture where all staff exhibit respect, integrity, courage and accountability.

Every one of us is responsible for challenging unacceptable behaviour and all employees are encouraged to speak out against bullying, harassment and discrimination. Our focus is on prevention, but we also take a zero tolerance stance against bullying, harassment and discrimination of any kind.

We all set the tone and take responsibility for achieving our shared goal, to have safe, respectful, positive and inclusive work environments for all.

DFAT works hand-in-hand with other government agencies and non-government partners, and they are an important part of our workplace at post. We will collaborate closely with them in implementing this policy and seek their commitment to embody the values it espouses.

As we seek to strengthen our work culture and practices, we will need to keep a close eye on our progress, measuring and reporting on both our successes and where we fall short. This policy update will provide the basis for us to do that. It is everyone's responsibility to ensure that DFAT leads by example and that our workplaces are safe and welcoming for all.

Frances Adamson, Secretary

November 2018

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POLICY

This policy applies to all DFAT Australian Public Service (APS) employees (ongoing and non-ongoing). It also applies to locally engaged staff and persons providing contractual services for the department to the extent that the policy is consistent with local law and/or the terms of any contract.

The department is committed to providing a workplace that is free from workplace bullying, harassment and discrimination behaviours and is fair, flexible, safe and rewarding. Employers, employees and other workers have shared obligations for creating respectful and courteous workplaces.

Workplace bullying, harassment and discrimination are a risk to health and safety and are not tolerated in DFAT. Under the Work Health and Safety Act 2011, the department has a duty to ensure, so far as is reasonably practicable, that the health and safety of all DFAT employees are not put at risk from work carried out in conducting the department's business. All employees and other workers must take reasonable care that they do not adversely affect the health and safety of others. This includes eliminating incidents of bullying, harassment and discrimination.

Bullying, harassment and discrimination are breaches of the APS Values and APS Code of Conduct as set out in the Public Service Act 1999. For employees serving overseas, bullying, harassment and discrimination are also a breach of the department's LES Code of Conduct and/or Code of Conduct for Overseas Service. Such behaviour can also be unlawful under various Commonwealth, State and Territory legislation and foreign jurisdictions.

We must all uphold the APS Values, which require us all to be *Impartial, Committed to service, Accountable, Respectful and Ethical*. In addition, we place particular importance on DFAT values that define how we work and shape our culture, being *Achievement; Leadership and Accountability; Valuing People and Collaboration*.

DFAT has a zero tolerance for bullying, harassment and discrimination. Such behaviours may also be unlawful under anti-discrimination legislation (such as sexual harassment or racial vilification).

DFAT also has a zero tolerance for sexual exploitation and abuse of any kind. Any allegations of such criminal conduct must be reported immediately through the appropriate channels. While this policy focuses predominately on anti-bullying, harassment and discrimination, it also provides guidance on how to report such allegations.

The department encourages all employees to speak out against bullying, harassment and discrimination where they experience or witness it and will do all it can to ensure people feel safe and supported when doing so. Section 14(f) of the Australian Public Service Commissioner's Directions 2016 provides a positive obligation to report and address misconduct and other unacceptable behaviour by public servants in a fair, timely and effective way.

In circumstances where bullying, harassment or discrimination issues arise, the department will take prompt action to address the issues.

RESPONSIBILITIES

Everyone is responsible for making the department a safe and inclusive workplace and we should call out unacceptable behaviour if we experience it or see it. We are all responsible for treating others with respect and courtesy.

Leaders must demonstrate inclusive leadership and create an environment where staff feel valued and respected. Leaders are to be role models for professional, respectful behaviour. Senior Executive Service (SES) in particular have an obligation to promote the APS Employment Principles and compliance with the Code of Conduct by personal example.

The department is responsible for ensuring:

- appropriate policies are implemented and maintained regarding bullying, harassment, sexual harassment and discrimination and sexual exploitation and abuse;
- information and training material is easily accessible;
- reporting processes are in place for reporting bullying, harassment and discrimination;
- reporting processes are in place for reporting sexual exploitation and abuse including against children and vulnerable people;
- the early intervention in allegations of workplace bullying, harassment and discrimination and fair treatment of all concerned;
- appropriate and timely resolution of any allegations of workplace bullying, harassment and discrimination; and
- a network of trained Diversity and Anti-Harassment Officers (DAHOs) is maintained.

All employees have a responsibility to:

- treat everyone with respect and courtesy and behave in accordance with the APS Values, Employment Principles and Code of Conduct as set out in the *Public Service Act 1999* and Commonwealth and/or State/Territory Legislation (where applicable in accordance with the employment relationship);
- comply with any lawful and reasonable instruction including, but not limited to, reasonable management actions associated with performance management processes, work tasking and directions and on compliance with departmental policies;
- complete any required training including the mandatory e-learning modules on Anti-bullying, Harassment and Discrimination;
- raise any concerns quickly so they can be addressed;
- report inter-personal conduct and behaviour they believe are not consistent with the APS Values and Code of Conduct to their supervisors, managers, Senior Administrative Officers (SAOs), Heads of Missions (HOMs), Heads of Posts (HOPs) or workplacebullyingandharassment@dfat.gov.au;
- report suspected breaches of the Code of Conduct to the Employee Conduct and Ethics Section; and
- take reasonable care for their own health and safety.

Managers, supervisors, SAOs, Heads of Missions (HOMs), Heads of Posts (HOPs) are responsible for:

- implementing this policy and being alert to bullying, harassment and discrimination issues in the workplace;

- considering the impact unacceptable behaviour can have on staff;
- addressing concerns in a fair way for all those involved and taking timely action in response to any issues;
- being aware of responsibilities to report relevant conduct to the Employee Conduct and Ethics Section;
- supporting the Diversity and Anti-Harassment Officer (DAHO) network across the department;
- ensuring that staff are safe from bullying, harassment and discrimination and vexatious claims of bullying, harassment and discrimination; and
- ensuring that staff understand the differences between legitimate exercise of authority and bullying behaviour.

If an employee does not wish to pursue action when reporting unacceptable behaviour to their manager, this does not mean that a manager should take no action. Failure to address real or perceived bullying, harassment or discrimination, and provide appropriate support, may be seen as condoning such behaviour and may breach both the manager's and the department's duty-of-care obligations. More importantly, it can leave people in circumstances where serious harm can occur.

Diversity and Anti-Harassment Officers (DAHOs) are responsible for:

- undertaking required training;
- providing support options and information to employees on the internal and external processes available to resolve issues;
- raising awareness of diversity and inclusiveness and promoting events throughout the year;
- ensuring information on workplace policies are appropriately disseminated;
- acting as a point of contact for their Branch/Division/Post/work area;
- maintaining confidentiality and appropriate records;
- providing quarterly statistical reporting to the Performance, Development and Safety Branch (PDB) ; and
- keeping management informed of general issues arising in relation to diversity and workplace bullying, harassment and discrimination.

DAHOs undertake this role on a voluntary basis. DAHOs are available to listen to colleagues who wish to have a confidential conversation. DAHOs cannot advise or tell someone what they can do. Nor can they take any action on your behalf.

PDB will coordinate DAHO training and maintain records. Posts/Divisions/State and Territory Offices/APO managers are responsible for funding training including appropriate travel and accommodation for DAHOs.

BULLYING

Under the *Fair Work Act 2009*, bullying occurs when a person or group of people behaves unreasonably and repeatedly towards a worker or group of workers while at work, and the behaviour creates a risk to health and safety. Bullying does not include reasonable management action carried out in a reasonable manner.

Repeated behaviour refers to the persistent nature of the behaviour and can involve a range of behaviours over time.

Unreasonable behaviour means behaviour that a reasonable person, having regard to the circumstances, would see as unreasonable, including behaviour that is victimising, humiliating, intimidating or threatening. A **risk to health and safety** means the possibility of an injury or illness occurring. This may include physical or psychological injury or illness.

At work does not just relate to actions that are confined to the physical workplace but can relate to activities of the employee at another location or while the employee is not actively engaged in work. For example, a work trip conducted outside of normal working hours, working from home or out of hours functions attended by work colleagues.

When using social media in any capacity, it is important to remember you are still bound by the [Code of Conduct](#). This includes social media use outside the physical workplace and at any time. Any inappropriate posts and comments connected to DFAT or colleagues could constitute bullying or harassment or some other breach of the Code of Conduct. The Australian Public Service Commission's guidance on the use of social media is instructive (<https://www.apsc.gov.au/making-public-comment-social-media-guide-employees>).

HARASSMENT

Harassment is unwanted and offensive, humiliating or intimidating conduct or behaviour by a person or persons directed towards another person. If based on an attribute such as a person's age, gender, race, religion, disability, sexual orientation, gender identity and/or expression it could also be discrimination.

Some forms of harassment if repeated may also be bullying.

Examples of workplace bullying and harassment include:

- telling insulting jokes about particular groups;
- sending inappropriate emails or text messages;
- displaying racially offensive or pornographic posters or screen savers;
- making derogatory comments or taunts about someone's personal characteristics;
- asking intrusive questions about someone's personal life;
- physical behaviour – assault, intimidating or aggressive body language;
- verbal abuse – offensive language or derogatory remarks about lifestyle choices, physical or mental abilities, or racial or ethnic background;
- behaviour or language that threatens, frightens, humiliates or degrades – shouting and screaming, tone of voice, sarcasm and insults, whether face-to-face, in emails, online, or other electronic forums;
- 'initiations' or pranks; or
- unduly interfering with a person's personal property or work equipment.

Some subtle patterns of behaviour can also be considered bullying or harassment, for example:

- ostracism – physical or social isolation, unreasonable exclusion from work-related activities, not acknowledging or responding to an individual's presence or comments, leaving the room when a person enters;
- undermining – persistent and baseless criticism, unwarranted removal of responsibility, ridicule, taunts, hectoring, spreading gossip and rumours (either verbally, by email or social media), including inappropriate

remarks in emails about a person sent to and/or copied to others, belittling or derogatory remarks or actions that diminish a person's dignity (such as eye-rolling responses); and

- purposefully confusing and/or contradictory instructions, inappropriately and frequently changing targets and work deadlines, unnecessary disruptions, deliberately withholding important information, deliberately failing to complete tasks or missing deadlines, insisting on petty work requirements.

Workplace bullying or harassment can occur:

- between employees at the same or different classifications - it can be directed sideways, upwards at supervisors or managers as well as downwards;
- between employees in the same or a different work area or agency;
- between employees and contractors and/or labour hire staff or funded partners;
- during work-organised events or possibly even outside work hours;
- face-to-face or by remote, including via email or social media; and
- while off-site, for example external meetings, on regional or interstate visits, or on short-term missions or overseas postings.

DISCRIMINATION

The *Australian Human Rights Commission Act 1986* defines discrimination as any distinction, exclusion or preference made on the basis of age, race, including colour, national or ethnic origin or immigrant status, sex, pregnancy, religion, political opinion, family responsibilities or breastfeeding that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. Discrimination can also occur in distinguishing or preferencing people on the grounds of disability, sexual orientation, relationship status, intersex status, gender identity and/or expression.

Discrimination can be direct or indirect. Direct discrimination occurs where a person or group receives less favourable treatment on the basis of a prohibited ground. Indirect discrimination occurs where a policy, procedure or practice treats everyone equally on its face but has the effect of disadvantaging a person or group.

Importantly, not all discrimination is unlawful. Unlawful discrimination does not include any distinction, exclusion or preference in respect of a particular job based on the inherent requirements of the job.

Further information is available on the Australian Human Rights Commission web site, www.humanrights.gov.au.

REASONABLE MANAGEMENT ACTION

It is important to distinguish between a person reasonably exercising their legitimate authority at work and an instance of bullying and harassment. Under the *Fair Work Act 2009*, reasonable management action carried out in reasonable manner does **not** constitute bullying or harassment.

Examples of behaviours that are not workplace bullying or harassment include:

- performance management processes;
- providing constructive and courteous feedback, counselling or advice about work-related behaviour and performance that is given in a manner that is neither humiliating or threatening;
- informing a worker about unsatisfactory work performance or unacceptable behaviour;
- maintaining reasonable workplace goals and standards;
- carrying out legitimate or reasonable management decisions or actions, undertaken in a reasonable way and with respect and courtesy, for example:
 - taking action to transfer an employee
 - allocating work to an employee, and setting reasonable goals, standards and deadlines
 - making a decision not to select an employee for promotion, placement, posting or overtime
 - warning employees about unsatisfactory performance
 - transferring or terminating excess employees;
- disciplinary action for misconduct; and
- respectfully expressing differences of opinion.

Some behaviours do not in themselves amount to a breach of the Code of Conduct and in context, are both legitimate and appropriate. For example:

- openly recording meetings – audio or video recording conversations is not common practice for private meetings. However, for internal meetings focused on performance or management issues, audio or video recordings of meetings may be taken but only with full knowledge and consent of each participant. Secretly recording meetings without the knowledge of all participants is not only highly inappropriate, but could also be unlawful in some circumstances;
- refusing to accept ‘no’ for an answer – within reason, an employee is entitled to press their position, just as a supervisor is entitled to take that position into account and make a management decision that disagrees with it;
- asserting authority - when opinions differ, it is legitimate for a manager to make the final decision and end a discussion, after listening to the various points of view, by asserting their management prerogative; and
- discussing difficult issues - while potentially stressful, a frank, polite, calm and rational discussion between an employee and a supervisor is an appropriate way of resolving grievances. It may also have the effect of clearing up any misunderstanding or inaccurate assumptions. Discussions should remain work related and focus on particular behaviours and issues, rather than on the individual.

Managers should be sensitive about how they are perceived by others and should know the best ways to communicate difficult or sensitive matters. In some situations, behaviour that is not intended to be humiliating, threatening or demeaning may cause distress and be perceived as bullying. Being open to another person’s perspective and genuinely listening to their concerns before coming to a conclusion may assist in defusing a potentially troublesome situation.

There may be instances where bullying, harassment or discrimination amounts to an offence under criminal law. For example, physical or indecent assault, stalking or sending obscene material through the mail or via email, Facebook or other electronic fora. Such cases may be referred to the relevant authorities by the Employee Conduct and Ethics Section (EES).

SEXUAL HARASSMENT

A person sexually harasses another person if the person makes an unwelcome sexual advance or an unwelcome request for sexual favours, or engages in other unwelcome conduct of a sexual nature, in circumstances in which a reasonable person, having regard to all the circumstances, would have anticipated the possibility that the person harassed would be offended, humiliated or intimidated. Sexual harassment is unlawful regardless of the sex, sexual orientation or gender identity of the parties.

Sexual harassment can take various forms. It can be obvious or indirect, physical or verbal, repeated or one-off and perpetrated by males and females against people of the same or opposite sex. Some examples of behaviour that may be sexual harassment include:

- staring or leering;
- unnecessary familiarity, such as unwelcome affection or touching;
- suggestive comments or jokes;
- insults or taunts of a sexual nature;
- intrusive questions or statements about your private life;
- displaying posters magazines or screen savers of a sexual nature;
- sending sexually explicit emails or text messages;
- inappropriate advances on social networking sites;
- accessing sexually explicit internet sites;
- requests for sex or repeated unwanted requests to go out on dates; and
- behaviour that may also be considered to be an offence under criminal law such as physical assault, indecent exposure, sexual assault, stalking or obscene communications.

The department takes allegations of sexual harassment seriously and will take prompt action to address allegations and to support staff who report instances of sexual harassment. A-based officers, locally engaged staff and contractors who experience sexual harassment should report it as soon as possible to any of the following authorised internal options:

- their supervisor or manager;
- Head of Mission (HOM)/Head of Post (HOP) in cases of alleged misconduct at posts;
- Chief People Officer;
- The Secretary; and
- The Employee Conduct and Ethics Section (EES) via [s.22\(1\)\(a\)\(ii\)@dfat.gov.au](mailto:s.22(1)(a)(ii)@dfat.gov.au)

An external mechanism for reporting sexual harassment in Australia is via the [Sex Discrimination Commissioner](#) at the Australian Human Rights Commission.

SEXUAL EXPLOITATION AND ABUSE

Sexual exploitation is any actual or attempted abuse of a position of vulnerability, differential power, or trust for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.

Sexual abuse is actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.

DFAT does not tolerate sexual exploitation or abuse. Interim guidance is available on handling reports of incidents of sexual exploitation and abuse of vulnerable adults in DFAT-funded activities including in the Australian aid and humanitarian programs. This interim protocol outlines steps for handling voluntary reporting of sexual exploitation and abuse of vulnerable adults in DFAT-funded programs. Refer to the department's Aid Risk Management, Fraud Control and Safeguards policies on the intranet for additional information and guidance.

A vulnerable adult is an individual aged 18 years and above who is, or may be, unable to take care of themselves, or protect themselves against harm or exploitation by reason of illness, trauma or disability, or any other reason.

CHILD EXPLOITATION AND ABUSE

Broadly defined, child abuse (maltreatment) is the act or failure to act by a person that results in actual or potential harm to a minor (person under 18 years of age). It includes all forms of physical abuse, sexual abuse, emotional abuse or neglect and can occur in private or public spaces.

Child exploitation is the act of using a minor for profit, labour, sexual gratification, or some other personal or financial advantage.

Child harm is a detrimental effect on a child's physical, psychological or emotional well-being. Harm may be caused by financial, physical or emotional abuse, neglect, and/or sexual abuse or exploitation, whether intended or unintended.

DFAT maintains a zero tolerance approach to child abuse, and exploitation. Chapter 10 of the Conduct and Ethics Manual sets out the department's expectations on all staff in relation to protection of children, drawing together the full suite of DFAT's child protection policies and guidelines including consular, passports and public diplomacy.

Any suspected or alleged instances of child abuse, exploitation or harm arising in connection to official duties or business must be reported to the Employee Conduct and Ethics Section via childwelfare@dfat.gov.au.

Individuals or organisations funded by DFAT, and who have contact with children, are required to undertake a risk assessment and implement appropriate child safe practices in their operations and activities. Refer to the Child Protection Section for additional information (email: [s.22\(1\)\(a\)\(ii\) @dfat.gov.au](mailto:s.22(1)(a)(ii)@dfat.gov.au)).

DFAT staff required to manage contracts with funded partners should comply with Aid Risk Management, Fraud Control and Safeguards policies on the department's intranet.

REPORTING UNACCEPTABLE BEHAVIOUR

The department encourages all employees to speak out against bullying, harassment and discrimination where they experience or witness it and will ensure people feel safe and supported when doing so.

DFAT staff who experience unacceptable behaviour from external people when working at overseas posts are encouraged to raise the matter as soon as possible, both in the interests of their welfare and security.

Access to professional advice and assistance is available for all staff should they require it.

DFAT's funded partners and contractors are to report child welfare concerns and sexual exploitation and abuse matters to DFAT as soon as possible.

The reporting process is outlined below:

INTERNAL

EXTERNAL

Seek assistance and support from:

Supervisor/manager
SAO/Head of Mission/Head of Post
Employee Conduct and Ethics Section
Workplace Bullying and Harassment, Employee Health and Safety Section
Staff and Family Support Office
Diversity and Anti-Harassment Officers

Report unacceptable behaviour to:

Department of Foreign Affairs and Trade
+61 2 6261 3380
www.dfat.gov.au / [contact us](#)

Internal Reporting Options

Workplace Bullying & Harassment, Employee Health & Safety Section

[s.22\(1\)\(a\)\(ii\)@dfat.gov.au](mailto:s.22(1)(a)(ii)@dfat.gov.au)

+61 2 6261 ^{s.22(1)(a)(i)}

DFAT Employee Conduct and Ethics Section

[s.22\(1\)\(a\)\(ii\)@dfat.gov.au](mailto:s.22(1)(a)(ii)@dfat.gov.au)

+61 2 6261 ^{s.22(1)(a)(i)}

Child Exploitation and Abuse

+61 2 6261 9048
childwelfare@dfat.gov.au

External Options

Bullying
Fair Work Commission
www.fwc.gov.au/
1300 799 675

Sexual Exploitation, Abuse, and Harassment

+ 61 2 6261 3380
seah.reports@dfat.gov.au

Harassment and Discrimination
Australian Human Rights Commission
www.humanrights.gov.au
1300 656 419

RESOLUTION OPTIONS

Incidents and concerns about unacceptable behaviour should be resolved at the lowest appropriate level. DFAT has at its disposal both informal and formal resolution processes to address instances of unacceptable behaviour. In addition, external options to resolve complaints exist in some cases.

Informal resolution (This is when matters are resolved through management or some other action, other than a formal or investigation process).

Efforts should be made to resolve any bullying, harassment or discrimination issues informally in the first instance and, where practicable, prior to lodging a complaint. However, where informal resolution has not been possible or is not appropriate (e.g. due to the seriousness of the issues), alternate resolutions options may be pursued.

The aim of an informal process is to resolve the issue with as little conflict or distress as possible for everyone involved. The benefits of resolving workplace bullying and harassment issues informally are:

- the process is generally quick, less adversarial and cumbersome;
- the process may result in improved communication between those involved; and
- it is easier to maintain confidentiality and establish good working relationships by clarifying what is acceptable behaviour and what is not.

An informal process might include or comprise any of the following:

- conversation with all parties (supervisors, managers, SAOs, Head of Missions (HOMs), Head of Posts (HOPs) or the Anti-bullying, Harassment and Discrimination Officer might have a discussion with those involved to assist in resolving any issues);
- mediation with all parties (if required, the Anti-bullying, Harassment and Discrimination officer can assist in arranging this with a **qualified mediator**);
- facilitated meeting with all parties (supervisors, managers, HOMs or HOPs might arrange a meeting with those involved and/or could request facilitation by SAO, the Anti-bullying, Harassment and Discrimination officer or another supervisor or manager); and
- supervisors, managers, HOMs or HOPS might initiate an informal discussion or feedback on individual performance.

An informal process should be managed within a reasonable timeframe and agreement reached that the issue is resolved.

The department can initiate an informal inquiry to gather information about bullying claims and whether they should proceed to a formal process.

Note: Even for an informal process, records may be kept of the issue and how it was resolved for future reference.

Self-resolution: Any person who believes they are being treated unacceptably may choose to speak directly with the person(s) demonstrating the unacceptable behaviour. Discuss the matter with the person/s demonstrating the unacceptable behaviour, explaining how their actions are being perceived and the effect

they are having, and ask them to stop. The information should be delivered in a confidential, non-confrontational way, with a view to resolving the issue.

Supported self-resolution: Barriers may exist which interferes with a person's ability to communicate with the person demonstrating unacceptable behaviour.

If you feel you are not able to approach the person/s directly about the unacceptable behaviour, you could:

- discuss the issue with your supervisor, manager, SAO, HOM or HOP and seek their support in resolving the issue;
-
- seek assistance from a Diversity and Anti-Harassment Officer (DAHO); or
- seek assistance from the Employee Health and Safety Section (EHS) [s 22\(1\)\(a\)\(ii\) @dfat.gov.au](mailto:s22(1)(a)(ii)@dfat.gov.au).

Further tools and guidance can be accessed via the [Anti-bullying, Harassment and Discrimination](#) page on the intranet.

If you are being bullied, harassed or discriminated against, in the course of your duties, by a person who is not a DFAT employee, you are encouraged to raise the matter and seek assistance to resolve the issue.

DFAT Formal Process

Formal mechanisms may be used if the informal process does not address an employee's concerns, or where an employee is not comfortable about raising the issues informally or where a matter is considered too serious to be dealt with informally.

Suspected breaches of the Code of Conduct should be reported to the [Employee Conduct and Ethics Section \(EES\)](#) [s 22\(1\)\(a\)\(ii\) @dfat.gov.au](mailto:s22(1)(a)(ii)@dfat.gov.au).

Any person wishing to make a formal complaint should lodge their complaint in writing (where possible) and in accordance with [Chapter 11 of the Conduct and Ethics Manual](#). Suspected breaches of the Code of Conduct should be reported to the Employee Conduct and Ethics Section (EES).

All complaints will be assessed and a decision made on how to most appropriately address the issues. In some cases a decision will be made for management resolution to be enacted, such as a written warning, lawful direction or some other course.

If a formal complaint proceeds to an investigation, an investigation officer will be appointed to make prompt, fair and impartial enquiries. A detailed outline of the department's processes for formal Code of Conduct inquiries is available at [Chapter 12 of the Conduct and Ethics Manual](#). The manual details how the department manages alleged misconduct by APS employees, LES employees, contractors and those on probation or secondment from other APS agencies.

Employees will be required to engage in relevant processes to ensure resolution of issues within a reasonable timeframe.

Natural justice and procedural fairness is to be applied at all times.

What if the bullying is not substantiated?

During the formal resolution process, if the investigation finds bullying has not occurred or cannot be substantiated, the department may still take appropriate action to address any workplace issues leading to the complaint.

What happens if the complaint is found to be vexatious or fraudulent?

During the formal resolution process, if the investigation finds that bullying has not occurred and the complaint is vexatious or fraudulent, the complaint may itself be considered a breach of the Code of Conduct. Vexatious complaints are those made without sufficient grounds, but made especially so as to cause annoyance or disruption or to distract from reasonable management action. Any such conduct will be dealt with in accordance with [Chapter 12 of the Conduct and Ethics Manual](#).

What if an issue occurs at a small or micro post?

At small posts it may be difficult to approach a colleague or manager if someone feels confidentiality may be compromised. In these instances, staff have the option to contact the department's Anti-Bullying, Harassment and Discrimination Officer for support and advice.

External Resolution Options

Merit Protection Commissioner

If an APS employee is not satisfied with action the department has taken that relates to their APS employment, they may be able to seek a review by the [Merit Protection Commissioner](#) in certain circumstances.

Under [section 33 of the Public Service Act 1999](#), an APS employee may apply directly to the Merit Protection Commissioner for a primary review of a reviewable action if, among other things, it is not appropriate due to the seriousness or sensitivity of the action for the review to be handled within the department.

Fair Work Commission

In the case of bullying, a worker (including APS employees and contractors) can make an application to the Fair Work Commission for an Order to Stop Bullying. For an application to be granted, the person must demonstrate that the alleged bullying is **repeated, unreasonable** and creates **a risk to health and safety**.

The Fair Work Commission will only be able to make an order to stop bullying at work where there is a risk that bullying will continue.

Human Rights Commission

For harassment (including sexual harassment) and discrimination matters that occur in Australia, employees may lodge a complaint with the [Australian Human Rights Commission](#).

Extreme cases of harassment may constitute a criminal offence and warrant police investigation.

Options for DFAT locally engaged staff at Post

DFAT encourages locally engaged staff and supervisors, managers, SAOs, HOMs and HOPs at posts to explore informal dispute resolution procedures, including mediation, which are appropriate to their local culture, law and workplace environment.

In the event that a workplace bullying, harassment or discrimination matter is not resolved informally to the satisfaction of those involved, it should be raised by the locally engaged staff with the HOM or HOP. The SAO at post is also available to assist. When necessary, any formal resolution process should be undertaken in accordance with Section 12 of the Conduct and Ethics Manual.

Where an employee becomes aware of serious criminal misconduct at post by another Australian who is not an APS employee, the employee should report the matter to the Head of Mission or Head of Post, who will consider the most appropriate course of action, which may include reporting the matter to the local law enforcement authorities or the Australian Federal Police.

What if you are being accused of workplace bullying, harassment or discrimination?

You have the same options as the person making the complaint. Try to resolve the matter informally in the first instance.

If you become the subject of a formal process, you have the right to a fair and impartial hearing by the department's investigating officer. You will be informed of the substance of the allegations made against you and will be given the opportunity to respond. A detailed outline of the department's processes for formal Code of Conduct inquiries is available at [Chapter 12 of the Conduct and Ethics Manual](#).

A vexatious complaint of bullying may itself constitute bullying behaviour.

SUPPORT

Anti-bullying, Harassment and Discrimination

Email [s 22\(1\)\(a\)\(ii\)](#) [@dfat.gov.au](mailto:dfat@dfat.gov.au) for advice and assistance in the early intervention and resolution of issues.

Diversity and Anti-Harassment Officers (DAHOs)

DAHOs are available across the department to provide support and information to staff. A full list of DAHOs can be accessed via the [intranet](#). DAHOs take on this role voluntarily and can be a first point of contact for staff seeking options for resolving issues. The DAHOs also support the department's Diversity program and promote inclusiveness.

Staff and Family Support Office (SFO)

The Staff and Family Support Office (SFO) provides DFAT and its staff with a range of support services designed to promote personal well-being and workplace effectiveness. These services include personal counselling. For Canberra based staff, consultations can be arranged by contacting the SFO Program Manager on [s 22\(1\)\(a\)\(ii\)](#) or by contacting an [SFO psychologist or social worker](#) directly.

For staff and families overseas, and DFAT-funded locally engaged staff, it is recommended that initial contact is made via email to [s 22\(1\)\(a\)\(ii\)](#)

Psychologists and social workers have strict ethical guidelines and legal responsibilities in relation to client privacy and confidentiality, these will be discussed during the first appointment.

Employee Assistance Program (EAP)

As an alternative to the SFO services, face-to-face counselling for DFAT A-based staff, their immediate families and DFAT-funded locally engaged staff (LES) is available at a number of overseas posts using an external counselling provider (the EAP). This service is also available to staff (and their immediate family) working in Australian locations. A 24/7 EAP telephone counselling service is also available at all posts, as well as within Australia. The current EAP service provider is Lifeworks. Appointments can be made as follows:

- Within Australia: 1300 361 008 (this is also the 24/7 Australian phone number).
- From overseas: +61 3 9658 0025
- The SFO can also assist with setting up an appointment – [s 22\(1\)\(a\)\(ii\)](#)

Support for non DFAT-funded locally engaged staff with attached agencies at post

Non DFAT-funded LES are advised to either contact the human resource (HR) area of their home agency, or the post's SAO for advice regarding the support provided by the attached agency's EAP.

PRIVACY AND RECORDKEEPING

All complaints will be handled confidentially, which means a complaint will only be discussed with those legitimately and directly involved.

Accurate records of complaints and any action taken are vital, as any decisions might lead to or inform further processes or misconduct action.

All records are to be stored securely and in a confidential manner and retained in accordance with the [Privacy Act 1988](#) and the National Archives of Australia [Administrative Functions Disposal Authority](#).

GLOSSARY

Bullying	Bullying occurs when a person or group of people behaves unreasonably and repeatedly towards a worker or group of workers while at work, and the behaviour creates a risk to health and safety. Bullying does not include reasonable management action carried out in a reasonable manner.
Child exploitation and abuse	Child abuse (maltreatment) is the act or failure to act by a person that results in actual or potential harm to a minor (person under 18 years of age). It includes all forms of physical abuse, sexual abuse, emotional abuse or neglect and can occur in private or public spaces. Child exploitation is the act of using a minor for profit, labour, sexual gratification, or some other personal or financial advantage.
Contractor	A person engaged by DFAT for a specific purpose to provide goods or services.
Discrimination	The <i>Australian Human Rights Commission Act 1986</i> defines discrimination as any distinction, exclusion or preference made on the basis of age, race, including colour, national or ethnic origin or immigrant status, sex, pregnancy, religion, political opinion, family responsibilities or breastfeeding that has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation. Discrimination can also occur in distinguishing or preferencing people on the grounds of disability, sexual orientation, relationship status, intersex status, gender identity and/or expression.
DFAT employee	A person engaged as an employee under section 22 of the Public Service Act 1999 as either an ongoing or non-ongoing employee, or a person engaged under a contract of employment by the Commonwealth outside of Australia.
Funded partner	Any organisation funded by DFAT for the delivery of Australian activities and programs overseas.
Harassment	Harassment is unwanted and offensive, humiliating or intimidating conduct or behaviour by a person or persons directed towards another person. If based on an attribute such as a person's age, gender, race, religion, disability, sexual orientation, gender identity and/or expression to could also be discrimination. Some forms of harassment if repeated may also be bullying. Harassment does not include reasonable management action carried out in a reasonable manner.
Reasonable management action	Reasonable management action is action undertaken in a reasonable manner. Performance management processes and providing constructive and courteous feedback are examples of reasonable management action.
Sexual exploitation and abuse	Sexual exploitation is any actual or attempted abuse of a position of vulnerability, differential power, or trust for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another. Sexual abuse is actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions.
Sexual harassment	Sexual harassment is any unwanted or unwelcome sexual behaviour where a reasonable person would have anticipated the possibility that the person harassed would feel offended, humiliated or intimidated. Sexual harassment is unlawful regardless of the sex, sexual orientation or gender identity of the parties.
Vulnerable people	A vulnerable adult is an individual aged 18 years and above who is, or may be, unable to take care of themselves, or protect themselves against harm or exploitation by reason of illness, trauma or disability, or any other reason.

REFERENCES

Legislation

[Public Service Act 1999](#)

[Fair Work Act 2009](#)

[Work Health and Safety Act 2011](#)

[Australian Human Rights Commission Act 1986](#)

[Age Discrimination Act 2004](#)

[Disability Discrimination Act 2004](#)

[Racial Discrimination Act 1975](#)

[Sex Discrimination Act 1984](#)

Australian Public Service Commission References

[APS Values and Code of Conduct in Practice](#)

DFAT References

[Conduct and Ethics Manual](#)

[Child Protection Policy](#)

[Preventing Sexual Exploitation and Abuse Policy](#)

[Workplace Diversity Program](#)

[DFAT Values](#)

[WIL](#)

[IMD WIL](#)

Other

[Fair Work Commission](#)

[Australian Human Rights Commission](#)

[Merit Protection Commission](#)

[Safe Work Australia](#)

[Heads Up](#)



Australian Government
Department of Foreign Affairs and Trade

10 May 2024

BY EMAIL

Statutory Oversight Team

Comcare

Email: statutory.oversight@comcare.gov.au

Dear Statutory Oversight Team,

Comcare Monitoring Compliance activity - s 22(1)(a)(ii) – Request for reconsideration

The department requests reconsideration of the inspector report dated 3 April 2024, by Comcare inspector s 22(1)(a)(ii) (Inspector Report). The reasons for this request, as well as the additional information the department requests be taken into account, are set out below. Additionally, the documents submitted by the department to Comcare on 18 January 2024 in the course of this inspection are also relevant (even though not referenced in the Inspector Report). The department requests that those materials also be taken into account in Comcare's reconsideration of this matter.

Reasons for seeking reconsideration of the Inspector Report

In summary, the department considers that:

1. Its systems for raising and actioning complaints with the conduct/behaviour of Heads of Mission (HOMs) or Heads of Post (HOPs) comply fully with duties under the WHS Act, including s19(1) of the Act.
 - a. These systems address risks to health and safety so far as reasonably practicable, and are deliberately aligned to Australian Public Service Commission guidance on handling misconduct.
 - b. The department considers that inadequate consideration was given to the design and operation of the department's systems in the Inspector Report.
2. There are factual inaccuracies or misunderstandings included in the Inspector Report.
3. There is a lack of clarity to the recommendations/actions in the Inspector Report, which make it difficult for the department to identify appropriate actions arising from the report.
4. The department was not afforded procedural fairness in preparation of the Inspector Report.

- a. specifically, the Inspector Report does not set out the basis on which many of its findings are made and the department was not afforded an opportunity to review and comment on the report and its proposed findings prior to it being finalised.

These matters are discussed in turn below.

Request for reconsideration of the finding that the department has contravened the Work Health and Safety Act 2011

The Inspector Report provides that s 22(1)(a)(ii) formed a reasonable belief that the department did not comply with its duties and has contravened s 19(1) of the WHS Act (at [5] of the Inspector Report). The department seeks reconsideration of this finding.

The department is concerned that the Inspector Report findings flow from an incorrect distinction of the department's complaint processes as 'informal' or 'formal'. While the term 'informal' is often used across the APS—including in the department—as a short-hand to distinguish certain dispute resolution processes from Code of Conduct investigations, the department does not maintain 'informal' procedures in the way it appears the Inspector has interpreted the term. The key features of the department's systems and the ways in which our systems and procedures address risks to health and safety so far as reasonably practicable are detailed below.

Overview of the department's procedures in relation to unacceptable workplace behaviour complaints

The processes which appear to have been considered by the Inspector to be deficient because they are 'informal' are in fact well developed and documented, including as outlined in the Anti-Bullying, Harassment and Discrimination Policy (ABHD Policy) provided at **Attachment E** (pp 10 – 12, and 14). Specifically, the internal and external reporting processes, the resolution options available ranging from conversations with all parties, mediation, facilitated meetings and performance discussions and the support services in place. Further, the ABHD policy has been updated to better reflect the continual improvements the department has made to these systems and processes over the past few years. The ABHD Policy will soon be relaunched as an Unacceptable Workplace Behaviours Policy, which is broader in scope than the ABHD Policy and will apply to a range of unacceptable workplace behaviours, including bullying, harassment and discrimination. The department is in the process of finalising the Unacceptable Workplace Behaviours Policy.

The department has a zero-tolerance approach to unacceptable behaviour. Every allegation is managed in a fair and reasonable manner, with actions and consequences appropriate and proportionate. Unacceptable behaviour may be addressed by line management via various types of dispute resolution, supported by the department's Workplace Behaviour team and/or Performance Management team, or through referral for a conduct assessment for consideration of Code of Conduct investigation. Serious cases that may be criminal in nature are referred to the appropriate law

enforcement agencies in Australia and sometimes also in overseas jurisdictions, where it is safe and appropriate to do so.

The department actively encourages all workers to speak out about unacceptable behaviour where they experience or witness it and takes steps to ensure people feel safe and supported when doing so. This includes a program of regular proactive outreach across our global network by the department's conduct and ethics; health and safety; and workplace behaviour/performance teams. The ABHD Policy provides a range of options to resolve unacceptable behaviour through facilitated conversations, dialogue, and other forms of management action, where practicable, prior to lodging a formal Code of Conduct complaint. This approach is deliberately aligned to the 'Australian Public Service Commission – Handling Misconduct – A human resource manager's guide' in managing unacceptable behaviours (**Attachment A**, Chapter 5).

Under this framework, the department's Workplace Behaviour Unit supports employees and managers to work through a range of workplace issues including (among other things) behavioural concerns or complaints. When a complaint is made or a concern raised about conduct or behaviour of a HOM or HOP, the Workplace Behaviour Unit facilitates conversations and counselling about ways to address the conduct/behaviour through the options listed on page 11 of the ABHD Policy (**Attachment E**) specifically conversations with all parties, mediation, facilitated meetings and performance discussions.

The department considers that this structured facilitation of conversations and counselling is entirely appropriate as one process for seeking to resolve workplace conduct/behaviour concerns in a reasonable and practical way with regard to psychological risks and potential mitigation measures in relation to both the complainant and the person against whom a complaint is made. Raising inappropriate behaviour with an individual through facilitated discussions can often be sufficient to address the hazard. Sometimes circumstances surrounding alleged poor behaviour are ambiguous, such that facilitated conversations deliver clarity to both parties, and in doing so resolve the issue. In some situations, it is appropriate to pursue mediation, counselling and/or education to address the identified psychosocial hazards. The complainant is supported throughout these interventions with ongoing contact from the Workplace Behaviour Unit, and regular referrals to our Employee Assistance Program provider and Staff and Family Support Office services.

The process outlined above is 'formal' insofar as it is clearly set out in workplace policy and procedures. Records are retained of all conversations and actions, enabling trend analysis. Data is also compared with the APS Census report and other relevant metrics (such as the department's annual Upwards Feedback process) to identify if any issues are ongoing or systemic. As part of a suite of measures to emphasise psychosocial safety, the department has also begun to aggregate de-identified

data on psychosocial harm from multiple sources for presentation to the Departmental Executive Board, as part of regular WHS due diligence discussions.

The department supports workers within the Workplace Behaviour Unit, who operate within these procedures, are experienced across the full range of interpersonal conflict, whether perceived or actual. They make assessments based on their professional experience and training, manage responses appropriately commensurate with the incident, and escalate complaints for management action as required. These support workers also contribute to formal Code of Conduct investigations where this is assessed as the most appropriate pathway.

Where issues or complaints persist in relation to a particular individual, the Workplace Behaviour Unit conducts active outreach with the work area/Post, for example through dedicated visits, education sessions, and further one on one / facilitated conversations. Where the issues cannot be resolved or are of a serious nature, they are escalated for more senior management intervention, and ultimately can be referred for assessment to determine if a Code of Conduct investigation is warranted.

The processes which the Inspector Report appears to identify as 'formal' relate to the process of investigating of a formal Code of Conduct complaint ([14.c.] of the Inspector Report). The Inspector Report is correct that the department's policies and procedures provide for investigation of complaints. Any Code of Conduct investigation is conducted in accordance with the department's procedures made under s 15(3) of the *Public Service Act 1999*¹. Those procedures specifically address misconduct involving or related to APS employees at an overseas post and provide (among other things) (at [9.1]) that the Secretary (or her delegate) may decide to withdraw an APS employee serving overseas at any time, including where the employee is alleged to have breached the Code. As Comcare would be aware, the Code set out in s 13 of the *Public Service Act 1999* includes (among other things) that an APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment (s 13(3)) and an APS employee must at all times behave in a way that upholds the APS Values (s 13(11)(a), which include that the APS respects all people, including their rights and their heritage (s 10(3)).

The department's approach is consistent with APSC Guidance and the Model Code of Practice

The department's procedures align with Australian Public Service Commission guidance, and generally accepted best practice, in terms of including non-investigatory mechanisms alongside investigation mechanisms. This provides for a victim-centric approach and allows for a range of

¹ <https://www.dfat.gov.au/sites/default/files/procedures-determining-breaches-aps-code-conduct-and-determining-sanction-signed.pdf>

management responses to behaviour concerns. Specifically, the department's processes are consistent with:

1. The use of a victim/survivor-led approach, recognised domestically and internationally.
2. The Australia Public Service Commission's guidelines on handling misconduct (**Attachment A**, Chapter 5)
3. The approach adopted by many Australian Public Service entities, i.e. a hybrid model of formal and less structured pathways.

Moreover, the department's processes align with the guidance provided in the Model Code of Practice for Managing psychosocial hazards at work (**Attachment B**). The Code of Practice stipulates that:

- reporting mechanisms should provide 'workers with a range of accessible and user-friendly ways to make a report informally, formally, anonymously or confidentially' (pp 21, 52)
- reports, complaints (including informal complaints) or grievances from workers may identify new psychosocial hazards or risks that are not adequately controlled (p 29) and
- a formal investigation may not always be the most effective option. For example, the best response to a single low-level incident may be immediate discussion with the workers involved and changes to the relevant control measures. The earlier problems can be identified and addressed, the less likely a formal and complex investigation will be required (p 31).

This alignment to best practice is relevant to the assessment of whether the department has taken reasonably practicable steps to risk manage the risks to health safety of its workers arising from psychosocial hazards. Specifically, the department considers that these matters are relevant to an assessment of the matters in s 18(c) and 18(d) of the WHS Act. The department therefore requests reconsideration of the finding that it has not taken reasonably practicable steps to manage risks and therefore contravened s 19 of the WHS Act.

There are factual inaccuracies in the Inspector Report which require reconsideration

The department considers that the following aspects of the report are inaccurate and require reconsideration.

- At [1], the Inspector Report provides that 'These informal processes also do not consider the psychosocial impact to workers of not resolving issues/complaints in a timely and effective manner.' The department considers this statement is incorrect. As discussed above, the process of facilitating conversations and counselling as a step in a process to resolve workplace behaviour concerns is specifically designed to resolve issues/complaints in a timely and effective manner and without the need for a lengthier investigation (if it is possible to satisfactorily resolve an issue without an investigation).
- At [2], the Inspector Report identifies that the inspection commenced on 9 November 2023 however, the department was first informed of a potential issue on 12 December 2023 via a

brief phone call between s 22(1)(a)(ii) and s 22(1)(a)(ii). Additional detail of the issue was later communicated in an email on 15 December 2023 from s 22(1)(a)(ii) to s 22(1)(a)

- At [4], the Inspector Report provides that ‘... when relying on informal processes to report bullying and harassment.’ As discussed above, the department considers the nature of our processes have been misconstrued by an inaccurate interpretation of the word ‘informal’. This mischaracterisation of established, documented, and well-communicated pathways (e.g. facilitated conversations and counselling) as ‘informal’ has led to the conclusion that they are deficient. The department does not agree with this characterisation.
- At [16a], the Inspector Report provides that ‘DFAT has acknowledged it does not have a system to adequately investigate and resolve, in a timely manner, informal complaints’. No such acknowledgment was made by the department. The Inspector’s interpretation of the word ‘informal’ may be a factor in this inaccuracy.
- At [16b], the Inspector Report provides that, ‘DFAT does not appear to provide support to the complainant if the matter is substantiated and action to resolve the issue is taken’. The basis for this statement is not clear, and department disagrees with this finding. The department considers its processes appropriately seek to support a complainant. All complainants are offered support from the Workplace Behaviour Unit, the Staff and Family Support Office (which includes in-house clinical psychologists) and the Employee Assistance Program.
- At [16b], the Inspector Report provides that ‘Through inconsistent application of systems, and reliance on complainants to initiate process, DFAT is increasing the likelihood complaints will remain informal’. The department does not agree with this characterisation. For the reasons set out above, the department considers its processes for responding to each compliant/issue raised are reasonably practicable processes which accord with the Model Code of Practice and other guidance material. s 22(1)(a)(ii) did not seek to obtain any evidence to inform the finding in [16b]. For information in this regard, the department attaches a copy of its outcome notification template for complainants covering both the ‘assessment’ (**Attachment C**) and Code of Conduct investigation (**Attachment D**) stages within its complaint system.

The evidentiary basis for certain findings in the Inspector Report are unclear, and require reconsideration

The department considers that the following aspects of the report are lack any evidentiary basis and require reconsideration:

- At [1], the Inspector Report provides that ‘The information indicates DFAT Workers are reluctant to use formal systems and processes due to concerns of discrimination.’ The basis of this finding is unclear and should be specified in the Inspector Report.
- At [9], the Inspector Report provides that:
 - ‘Information available suggests workers of DFAT prefer utilising informal complaints and dispute resolution processes.’
 - ‘Workers of DFAT appear to favour these informal processes due to the belief they will be discriminated against, with regard to desirable promotion or position, if formally raising a complaint’.
 - ‘Instead, an informal victim-centric approach has the potential to affect workers career progression through discrimination, further increasing reliance on informal systems’.

The department requests reconsideration of these statements and (if they stand following reconsideration) that the evidence upon which s 22(1)(a)(ii) relied be identified in the Inspector Report.

- At [14], the Inspector Report provides, ‘Based on the information reviewed ...’. Details of the information reviewed should be included in the Inspector Report.

There is a lack of clarity to the recommendations/actions in the Inspector Report

The department considers that the following aspects of the recommendations/actions in the Inspector Report require clarification. The department requests reconsideration of these matters so that the actions (if they continue to be pressed following reconsideration) are made clear:

- At [6], the Inspector Report provides that ‘DFAT has developed a plan to remedy the contravention’. The reference to the ‘plan’ is unclear in circumstances when the department was not, prior to the receipt of the Inspector Report, aware of the alleged contravention and the measures identified at [14] are measures already implemented by the department.
- At [9], the Inspector Report purports to give the department recommendations, but its subparagraphs appear to be a mixture of recommendations and findings, making the meaning of each subparagraph unclear. It is also not clear the extent to which Comcare requests that these are included in any remedial action plan. Further, some recommendations lack clarity and are difficult to understand– for example ‘public reward and recognition of outcomes from senior managers ... will further reinforce behavioural expectations’ [9e]. The department requests that reconsideration be given to this aspect of the Inspector Report so that recommended actions are clear.

The department was not afforded procedural fairness

The department considers that there are two key failings in providing the department with procedural fairness. First, the Inspector Report makes a number of findings where the evidentiary basis of such finding is not clear (see details above) and therefore the department is unable to adequately consider and respond to such findings. The department therefore requests that reconsideration be given to the Inspector Report as a whole, with specific attention to those matters where the evidentiary basis for a finding has not been specified. In circumstances where the Inspector Report concludes that s 22(1)(a)(ii)

formed a reasonable belief of a contravention of the WHS Act, the basis for that reasonable belief must be fully articulated. In the absence of such detail being provided, it is not clear the credible and relevant evidence on which s 22(1)(a)(ii) made his findings.

The department notes that other than a high-level discussion on 9 February 2024 between departmental SES representatives and s 22(1)(a)(ii) and s 22(1)(a)(ii) the inspector did not seek to obtain a copy of the department's complaints resolution processes. A copy is provided at **(Attachment E)**.

In addition, the department is concerned that when Comcare reached a preliminary view in regard to the finding of non-compliance with the WHS Act, the department was not provided with the opportunity to consider and respond to Comcare's preliminary view prior to the finalisation of the Inspector Report. In this respect the department considers it was not afforded procedural fairness.

The department looks forward to a response to its request for reconsideration within 20 business days. If the department can provide any further information to assist with the request for reconsideration, please contact James O'Brien at james.obrien@dfat.gov.au

Yours sincerely

James O'Brien
Assistant Secretary
People Culture Branch, People Division
Department of Foreign Affairs and Trade

Attachments

- A. Australia Public Service Commission – Handling Misconduct – A human resource manager's guide.
- B. Model Code of Practice – Managing Psychosocial Hazards at Work.
- C. Notification template to complainants advising of the formal assessment outcome.
- D. Notification template to complainants advising of the formal Code of Conduct investigation outcome.
- E. Anti-Bullying, Harassment and Discrimination Policy.

OFFICIAL - SENSITIVE

Key:	Posts	Divisions	Branches
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2025 Census & Upwards Feedback Analysis - Bottom 40 divisions/posts/branches

Branch/Post	Division	Group	HOM/HOP/Branch Head/ Division Head	Analysis	Action
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s 47E(c), s 47E(d) – this section, together with the following pages (246-265) are exempt and have been removed.

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