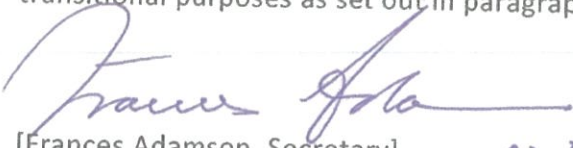


## Procedures for determining breaches of the APS Code of Conduct and for determining sanction

I, Frances Adamson, acting in my capacity as Secretary of the Department of Foreign Affairs and Trade (DFAT), establish these procedures under subsection 15(3) of the Public Service Act 1999 (the Act).

These procedures commence on 22 December 2020.

These procedures supersede the previous procedures made for the department under subsection 15(3) of the Act, but the previous procedures may continue to apply for transitional purposes as set out in paragraph 1.3.



[Frances Adamson, Secretary]

22 December 2020

### 1. Application of procedures

- 1.1 These procedures apply in determining whether a person who is an Australian Public Service (APS) employee in DFAT, or who is a former APS employee who was employed in DFAT at the time of the suspected misconduct, has breached the APS Code of Conduct (the Code) in section 13 of the Act.
- 1.2 These procedures also apply in determining any sanction to be imposed on an APS employee in DFAT who has been found to have breached the Code.
- 1.3 These procedures do not apply in determining whether an APS employee in DFAT has breached the Code, or in determining any sanction for a breach of the Code, where the decision to begin the process of determining whether there was a breach of the Code was made before 20 December 2020. In these circumstances, the previous procedures made by DFAT will continue to apply until the process is concluded.
- 1.4 In these procedures a reference to a person authorised by the Secretary means the Chief People Officer, Assistant Secretary Performance, Development and Safety Branch (or persons undertaking those equivalent roles and functions) or a person authorised by such an officer.
- 1.5 In these procedures, a reference to a breach of the Code by a person includes a reference to a person engaging in conduct set out in subsection 15(2A) of the Act in connection with their engagement as an APS employee.

Note: Not all suspected breaches of the Code need to be dealt with by way of determination under these procedures. In particular circumstances, another way of dealing with a suspected breach of the Code may be more appropriate, including performance management.



## **2. Availability of procedures**

- 2.1 As provided for in subsection 15(7) of the Act, these procedures are publicly available on DFAT's website or as otherwise made publicly available.

## **3. Breach Delegate and Sanction Delegate**

- 3.1 As soon as practicable after a suspected breach of the Code has been identified and the Secretary, or a person authorised by the Secretary, has decided to deal with the suspected breach under these procedures, the Secretary or that person will appoint a decision-maker (the Breach Delegate) to make a determination under these procedures.
- 3.2 The role of the Breach Delegate is to determine in writing whether a breach of the Code has occurred.
- 3.3 The Breach Delegate may undertake an investigation or seek the assistance of an investigator. The investigator may investigate the alleged breach, gather evidence and make a report of recommended factual findings to the Breach Delegate, and, where appropriate, recommendations as to whether it is open to the Breach Delegate to find that the conduct amounts to a breach of the Code.
- 3.4 The person who is to decide what, if any, sanction is to be imposed on an APS employee who is found to have breached the Code (the Sanction Delegate) will be a person holding a delegation of the powers under the Act to impose sanctions.
- 3.5 These procedures do not prevent the Breach Delegate from being the Sanction Delegate in the same matter.
- 3.6 The Breach Delegate and the Sanction Delegate should have regard to the Australian Public Service Commission's publication, 'Handling Misconduct: A human resources practitioner's guide to the reporting and handling of suspected and determined breaches of the APS Code of Conduct', or its replacement, in making the determination and the decision in relation to sanction.

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

- 4.1 The Breach Delegate and the Sanction Delegate must be, and must appear to be, independent and unbiased.
- 4.2 The Breach Delegate and the Sanction Delegate must advise the Secretary or the person authorised by the Secretary to appoint the Breach Delegate and/or the Sanction Delegate, in writing if they consider that they may not be independent and unbiased or if they consider that they may reasonably be perceived not to be independent and unbiased (for example, if they are a witness in the matter).
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Note: The Sanction Delegate (para 3.4) will hold delegated powers pursuant to s15(1) of the Act, as reflected in the Secretary's Instrument of Delegation.

## **5. The determination process**

- 5.1 The process for determining whether a person who is, or was, an APS employee in DFAT has breached the Code must be carried out with as little formality, and with as much expedition, as a proper consideration of the matter allows.
- 5.2 The process must be consistent with the principles of procedural fairness.
- 5.3 A determination may not be made in relation to a suspected breach of the Code by a person unless reasonable steps have been taken to inform the person of:
  - (a) the details of the suspected breach of the Code, including any subsequent variation of those details; and
  - (b) where the person is an APS employee, the sanctions that may be imposed on them under subsection 15 (1) of the Act; and
  - (c) give the person a reasonable opportunity to make a statement in relation to the suspected breach.
- 5.4 The statement may be a written or oral statement and should be provided within seven (7) calendar days or any longer period that is allowed by the Breach Delegate.
- 5.5 A person who does not make a statement in relation to the suspected breach is not, for that reason alone, to be taken to have admitted to committing the suspected breach.
- 5.6 For the purpose of determining whether a person who is, or was, an APS employee in DFAT has breached the Code, a formal hearing is not required.

## **6. Sanctions**

- 6.1 The process for imposing a sanction must be consistent with the principles of procedural fairness.
- 6.2 If a determination is made that an APS employee in DFAT has breached the Code, a sanction may not be imposed on the employee unless reasonable steps have been taken to:
  - (a) inform the employee of:
    - (i) the determination that has been made; 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 written statement in relation to the sanction or sanctions under consideration.

6.3 The statement may be a written or oral statement and should be provided within seven (7) calendar days or any longer period that is allowed by the Sanction Delegate.

## **7. Record of determination and sanction**

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

- (a) the suspected breach; and
- (b) the determination; and
- (c) any sanctions imposed as a result of a determination that the employee has breached the Code; and
- (d) if a statement of reasons was given to the person regarding the determination in relation to suspected breach of the Code, or, in the case of an employee, regarding the sanction decision, that statement of reasons or those statements of reasons.

## **8. Procedure when an ongoing APS employee is to move to another Agency**

8.1 This section applies if:

- (a) a person who is an ongoing APS employee in DFAT is suspected of having breached the Code; and
- (b) the employee has been informed of:
  - (i) the details of the suspected breach (including any subsequent variation of those details);
  - (ii) the sanctions that may be imposed on the employee under subsection 15(1) of the Act; and
- (c) the matter has not yet been resolved; and
- (d) a decision has been made that, apart from this clause, the employee would move to another agency in accordance with section 26 of the Act (including on promotion).

8.2 Unless the Secretary or a person authorised by the Secretary (as applicable), and the new Agency Head agree otherwise, the movement (including on promotion) does not take effect until the matter is resolved.

8.3 For the purpose of this section the matter is taken to be resolved when:

- (a) a determination in relation to the suspected breach of the Code is made in accordance with these procedures; or

- (b) the Secretary or delegate(s) (as applicable), decides that a determination is not necessary.

## **9. Misconduct involving or related to APS employees at an overseas post**

- 9.1 The Secretary or a person authorised by the Secretary may decide to withdraw an APS employee serving overseas at any time, including where the employee is alleged to have breached the Code. A withdrawal might be temporary or permanent.
- 9.2 Members of the household of an APS employee who accompany the employee on an overseas posting are not covered by either the Code or the DFAT Code of Conduct for Overseas Service. However, inappropriate conduct by household members may lead to the termination of the employee's posting.