



# Control Sheet

## POLICY INFORMATION

Policy Name: Procedures for determining breaches of the APS Code of Conduct and for determining sanction

Location: Human Resources

Owner: Senior Manager, Human Resources

## CHANGE HISTORY

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1	July 2018		Claire Golding
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## CONSULTATION

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## APPROVAL

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# HR Policy: determining breaches of the APS Code of Conduct and for determining sanction

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## 1 APPLICATION OF PROCEDURES

- 1.1 These procedures apply in determining whether a person who is an Australian Public Service (APS) employee in the National Film and Sound Archive (NFSA), or who is a former APS employee who was employed in the NFSA at the time of the suspected misconduct, has breached the APS Code of Conduct (the Code) in section 13 of the *Public Service Act 1999* (the Act).
- 1.2 NFSA takes misconduct very seriously.
- 1.3 Taking action in cases of suspected misconduct is primarily aimed at protecting the integrity of the APS and thereby maintaining public confidence in public administration, rather than aiming to “punish” the employee per se. Sanctions are intended to be proportionate to the nature of the breach, to be a deterrent to others and confirm that misconduct is not tolerated in NFSA.s
- 1.4 These procedures apply in determining any sanction to be imposed on an APS employee in the NFSA who has been found to have breached the Code.
- 1.5 These procedures, as they apply to determining whether there has been a breach of the Code, apply to any suspected breach of the Code except for one, in respect of which a decision had been made before the date of these procedures commence to begin an investigation to determine whether there has been a breach of the Code
- 1.6 These procedures, as they apply to determining any sanction for breach of the Code, apply where a sanction decision is under consideration on or after the date these procedures commence.
- 1.7 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.*

- 1.8 in accordance with section 15(3) of the Public Service Act 1999 (the PS Act) NFSA has established written procedures for determining whether an APS employee, or former APS employee, has breached the Code. The procedures only apply where suspected misconduct is to be formally dealt with. It does not apply where a decision is made to take alternative action (such as workplace counselling).
- 1.9 . This guide applies to all ongoing and non-ongoing APS employees (including SES). Concerns about the behaviour of independent contractors will be dealt with in accordance with the terms and conditions of their contract under which they are engaged.

## 2 AVAILABILITY OF PROCEDURES

- 2.1 As provided for in subsection 15 (7) of the Act, these procedures are publicly available on the NFSA’s website.

## 3 BREACH DECISION MAKER AND SANCTION DELEGATE

- 3.1 As soon as practicable after a suspected breach of the Code has been identified and the Chief Executive Officer (CEO), or a person authorised by the CEO (See HR Delegations), has decided to deal with the suspected breach under these procedures, the CEO or that person will appoint a decision maker (the breach decision maker) to make a determination under these procedures.

*Note: The Australian Public Service Commissioner's Directions 2022 provide that where the conduct of an APS employee may breach the Code or raises concerns relating to effective performance, the Agency Head must have regard to any relevant standards and guidance issued by the Australian Public Service Commissioner, if the Agency Head is considering whether to initiate an inquiry or a formal investigation under the procedures established by the Agency Head under subsection 15(3) of the Act.*

- 3.2 Nothing prevents the CEO or the CEO's delegates from appointing themselves as the breach decision maker.
- 3.3 The role of the breach decision maker is to determine in writing whether a breach of the Code has occurred.
- 3.4 The breach decision maker may seek the assistance of an investigator with matters including investigating the alleged breach, gathering evidence and making a report of recommended factual findings to the breach decision maker.
- 3.5 The person who is to decide what, if any, sanction is to be imposed on an APS employee who is found to have breached the Code must hold a delegation of the power under the Act to impose sanctions (the sanction delegate).
- 3.6 These procedures do not prevent the breach decision maker from being the sanction delegate in the same matter.

*Note: Any delegation of powers under the Act that is proposed to be made to a person who is not an APS employee must be approved in writing in advance by the Australian Public Service Commissioner. This is required by subsection 78 (8) of the Act. This would include delegation of the power under subsection 15 (1) to impose a sanction.*

*Note: Appointment as a breach decision maker under these procedures does not empower the breach decision maker to make a decision regarding sanction. Only the CEO or a person who has been delegated the power under section 15 of the Act and related powers, such as under section 29 of the Act, may make a sanction decision.*

#### **4 PERSON OR PERSONS MAKING A BREACH DETERMINATION AND IMPOSING ANY SANCTION TO BE INDEPENDENT AND UNBIASED**

- 4.1 The breach decision maker and the sanction delegate must be, and must appear to be, independent and unbiased.
- 4.2 The breach decision maker and the sanction delegate must advise the CEO in writing if they consider that they may not be independent and unbiased or if they consider that they may reasonably be perceived not to be independent and unbiased, for example if they are a witness in the matter.

#### **5 THE DETERMINATION PROCESS**

- 5.1 The process for determining whether a person who is, or was, an APS employee in the NFSA has breached the Code must be carried out with as little formality, and with as much expedition, as a proper consideration of the matter allows.
- 5.2 The process must be consistent with the principles of procedural fairness.

*Note: Procedural fairness generally requires that:*

- *the person suspected of breaching the Code is informed of the case against them (i.e. any material that is before the decision maker that is adverse to the person or their interests and that is credible, relevant and significant);*
- *the person is provided with a reasonable opportunity to respond and put their case, in accordance with these procedures, before any decision is made on breach or sanction;*
- *the decision maker acts without bias or an appearance of bias;*
- *there is logically probative evidence to support the making, on the balance of probabilities, of adverse findings.*

5.3 A determination may not be made in relation to a suspected breach of the Code by a person unless reasonable steps have been taken to:

- a) inform the person of:
  - i. the details of the suspected breach of the Code (including any subsequent variation of those details); and
  - ii. where the person is an APS employee, the sanctions that may be imposed on them under subsection 15 (1) of the Act;

and

- a) give the person a reasonable opportunity to make a written statement, or provide further evidence in relation to the suspected breach, within 7 calendar days or any longer period that is allowed.

*Note: This clause is designed to ensure that by the time the breach decision maker comes to make a determination, reasonable steps have been taken for the person suspected of breach to be informed of the case against them. It will generally also be good practice to give the person notice at an early stage in the process of a summary of the details of the suspected breach that are available at that time and notice of the elements of the Code that are suspected to have been breached.*

*Note: The breach decision maker may decide to give the person the opportunity to make both a written and an oral statement.*

5.4 A person who does not make a statement in relation to the suspected breach is not, for that reason alone, to be taken to have admitted to committing the suspected breach.

5.5 For the purpose of determining whether a person who is, or was, an APS employee in the NFSA has breached the Code, a formal hearing is not required.

5.6 The breach decision maker (or the person assisting the breach decision maker, if any) where they consider in all the circumstances that the request is reasonable, must agree to a request made by the person who is suspected of breaching the Code to have a support person present in a meeting or interview conducted by the breach decision maker (or the person assisting the breach decision maker).

5.7 For the purpose of determining whether a person who is, or was, an APS employee in the NFSA has breached the Code, a formal hearing is not required.

5.8 The breach decision maker (or the person assisting the breach decision maker, if any) where they consider in all the circumstances that the request is reasonable, must agree to a request made by the person who is suspected of

breaching the Code to have a support person present in a meeting or interview conducted by the breach decision maker (or the person assisting the breach decision maker).

## 6 SANCTIONS

6.1 The process for deciding on sanction must be consistent with the principles of procedural fairness.

6.2 If a determination is made that an APS employee in the NFSA 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:
  - iii. the determination that has been made;
  - iv. the sanction or sanctions that are under consideration;
  - v. 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 within 7 calendar days, or any longer period that is allowed by the sanction delegate.

6.3 Where an employee is found to have breached the Code, a sanction may be imposed under section 15 of the PS Act. The possible sanctions are limited to:

- (a) termination of employment;
- (b) reduction in classification;
- (c) re-assignment of duties;
- (d) reduction in salary;
- (e) deductions from salary, by way of fine;
- (f) a reprimand.

*Note: The sanction delegate may decide to give the employee the opportunity to make both a written and an oral statement. A sanction cannot be imposed on a person is a former APS employee.*

6.4 The outcome of the Code action may be made known to:

- (a) future employers;
- (b) complainants;
- (c) NFSA management, including the employee's director manager; and
- (d) other parties on a 'need to know' basis, as determined by Defence.

6.5 Code action is to be treated as Sensitive: Personal and is not to be discussed other than on a 'need to know' basis. Any employee who discloses Sensitive: Personal information other than on a 'need to know' basis could be in breach of the Code.

## 7 HANDLING SUSPECTED BREACHES OF THE CODE OF CONDUCT (SES)

7.1 Relevant NFSA delegate will consult with the APSC Commissioner about suspected breaches of the Code of Conduct by SES employees. The consultation will be advising the commissioner the process for determining whether the employee has breached the Code of Conduct, and if the NFSA delegate is considering imposing a sanction, what sanction will be imposed.

## 8 CONTESTING AN INVESTIGATION AND/OR SANCTION

8.1 Under s33 of the Public Service Act, a person may apply for a review of a breach of the Code of Conduct and/or sanction decision. Reviews must be made to the Merit Protection Commissioner. Information on this process is available online: [Investigations into breaches of the Code of Conduct | Merit Protection Commissioner \(mpc.gov.au\)](https://www.mpc.gov.au/investigations-into-breaches-of-the-code-of-conduct-merit-protection-commissioner)

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

## 9 RECORD OF DETERMINATION AND SANCTION

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

- a) the suspected breach;
- b) the determination;
- c) where the person is an APS employee, 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.

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

*Note: The Archives Act 1983 and the Privacy Act 1988 apply to NFSA records.*

## 10 PROCEDURE WHEN AN ONGOING EMPLOYEE IS TO MOVE TO ANOTHER AGENCY

10.1 This clause applies if:

- a) a person who is an ongoing APS employee in the NFSA is suspected of having breached the Code;
- b) the employee has been informed of the code matter.
- 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).

10.2 Unless the CEO and the new Agency Head agree otherwise, the movement (including on promotion) does not take effect until the matter is resolved.

10.3 For the purpose of this clause the matter is taken to be resolved when:

- a) a determination in relation to suspected breach of the Code is made in accordance with these procedures; or
- b) the CEO decides that a determination is not necessary.

## **11. EMPLOYEE ASSISTANCE PROGRAM**

11.1. The Employee Assistance Program (EAP) is a free, confidential and professional counselling service for all APS employees and their immediate families to help them resolve work-related problems or personal problems that may impact on an employee's working life. Supervisors of APS employees (including ADF members) can also access the manager hotline component of the program to assist them when dealing with difficult workplace issues. Further information about the EAP is available on Sharepoint.

## **12. COMPLIANCE**

12.1 The Human Resources Section monitors NFSA's human resources policies and procedures on a regular basis. Compliance by staff and managers may also be assessed by Human Resources Section, internal audit or the Australian National Audit Office with breaches reported to the NFSA Audit and Risk Committee.