

# 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.



© Commonwealth of Australia 2021



With the exception of the Commonwealth Coat of Arms and where otherwise noted, all material presented in the *Handling Misconduct: A human resource manager’s guide* by the Australian Public Service Commission is licensed under a Creative Commons Attribution 4.0 International licence (CC BY 4.0). To view a copy of this licence visit https://creativecommons.org/licenses/by/4.0/.

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

## Table of contents

[Handling Misconduct 1](#_Toc89674799)

[Contents 3](#_Toc89674800)

[Introduction 6](#_Toc89674801)

[Purpose 7](#_Toc89674802)

[Structure 7](#_Toc89674803)

[Abbreviations and terminology 8](#_Toc89674804)

[Further information 13](#_Toc89674808)

[Legal advice on the PS Act 13](#_Toc89674809)

[Disclaimer 13](#_Toc89674810)

[The APS Conduct Framework 14](#_Toc89674811)

[The APS Values 16](#_Toc89674812)

[APS Employment Principles 16](#_Toc89674813)

[The APS Code of Conduct 17](#_Toc89674814)

[Raising behavioural concerns and reporting suspected misconduct 21](#_Toc89674815)

[Options for raising concerns 22](#_Toc89674816)

[Complainants: role and considerations 23](#_Toc89674817)

[When behaviour doesn’t meet expectations: preliminary considerations 28](#_Toc89674818)

[Understand the circumstances 29](#_Toc89674819)

[Assess the seriousness 32](#_Toc89674820)

[Respond proportionately 34](#_Toc89674821)

[Options for managing lower-risk behaviours 36](#_Toc89674822)

[Counselling 37](#_Toc89674823)

[Performance management 38](#_Toc89674824)

[Alternative dispute resolution 39](#_Toc89674825)

[Warnings and directions 40](#_Toc89674826)

[Changing employee’s role or duties 43](#_Toc89674827)

[Recordkeeping 43](#_Toc89674828)

[Misconduct action: legislative basis and roles 44](#_Toc89674829)

[Section 15(3) procedures 45](#_Toc89674830)

[Available sanctions 50](#_Toc89674831)

[Key roles 51](#_Toc89674832)

[Taking misconduct action: initial considerations 57](#_Toc89674833)

[Changes in role, assigning different duties, and suspension 58](#_Toc89674834)

[Preparing for an investigation 65](#_Toc89674835)

[Investigation and determination 72](#_Toc89674836)

[Gathering evidence 73](#_Toc89674837)

[Reviewing and assessing evidence 75](#_Toc89674838)

[Standard of proof 77](#_Toc89674839)

[Procedural fairness 77](#_Toc89674840)

[Investigation report 78](#_Toc89674841)

[Making a breach determination 79](#_Toc89674842)

[Sanctions 83](#_Toc89674843)

[Factors to be considered in deciding a sanction 84](#_Toc89674844)

[Considerations in imposing particular sanctions 87](#_Toc89674845)

[Recording the sanction decision and advising the outcome 91](#_Toc89674846)

[Date of effect 91](#_Toc89674847)

[Procedural fairness in the sanction decision 92](#_Toc89674848)

[Other considerations 92](#_Toc89674849)

[Misconduct action in unusual circumstances 94](#_Toc89674850)

[Misconduct action and criminal matters 95](#_Toc89674851)

[Employee movement or separation 100](#_Toc89674852)

[Employees on probation 103](#_Toc89674853)

[Review rights 104](#_Toc89674854)

[Review of action 105](#_Toc89674855)

[Other avenues for review or remedy 106](#_Toc89674856)

[Termination of employment 106](#_Toc89674857)

[Recordkeeping and managing information 107](#_Toc89674858)

[Recordkeeping requirements 108](#_Toc89674859)

[Access to records 111](#_Toc89674860)

[Considering misconduct in a selection process 111](#_Toc89674861)

[Effect of misconduct finding on security clearance 115](#_Toc89674862)

[Learning from the process: improving practice and culture 116](#_Toc89674863)

[Using data 117](#_Toc89674864)

[Supporting proportionate responses 119](#_Toc89674865)

[Supporting quality decision-making 120](#_Toc89674866)

[Supporting integrity awareness and capability 120](#_Toc89674867)

[Statutory office holders and the APS Code of Conduct 122](#_Toc89674871)

[Legislative framework 123](#_Toc89674872)

[Statutory office holders bound by the Code 123](#_Toc89674873)

[Statutory office holders not bound by the Code 123](#_Toc89674874)

[Code does not apply if inconsistent with statutory functions 124](#_Toc89674875)

[Managing suspected misconduct by statutory office holders 124](#_Toc89674876)

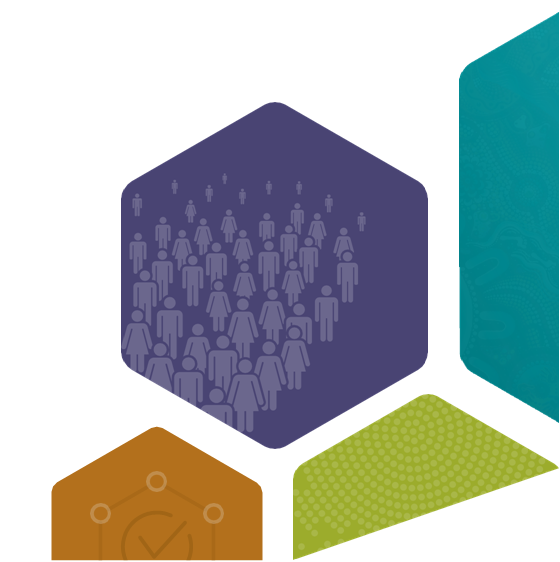
[Elements of the APS Code of Conduct 125](#_Toc89674868)

[General principles 126](#_Toc89674869)

[Guidance on the elements of the Code—s.13 of the PS Act 127](#_Toc89674870)

**Chapter 1**

# Introduction



## Purpose

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

**‘ADJR Act’**  *The Administrative Decisions (Judicial Review) Act 1977*

**‘Archives Act’** *The Archives Act 1983*

**‘Commissioner’s Directions’** *The Australian Public Service Commissioner’s**Directions 2022*

**‘Fair Work Act’** *The Fair Work Act 2009*

**‘FOI Act’** *The Freedom of Information Act 1982*

**‘Privacy Act’** *The Privacy Act 1988*

**‘PGPA Act’**  *The Public Governance, Performance and Accountability Act 2013*

**‘PID Act’** *The Public Interest Disclosure Act 2013*

**‘PS Act’** *The Public Service Act 1999*

**‘PS Regulations’** *The Public Service Regulations 2023*

**‘WHS Act’** *The Work Health and Safety Act 2011*

#### Terminology

* 1. 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. Further information on the APS conduct framework is available from the Ethics Advisory Service on 02 6202 3737 and [ethics@apsc.gov.au](mailto:ethics@apsc.gov.au).

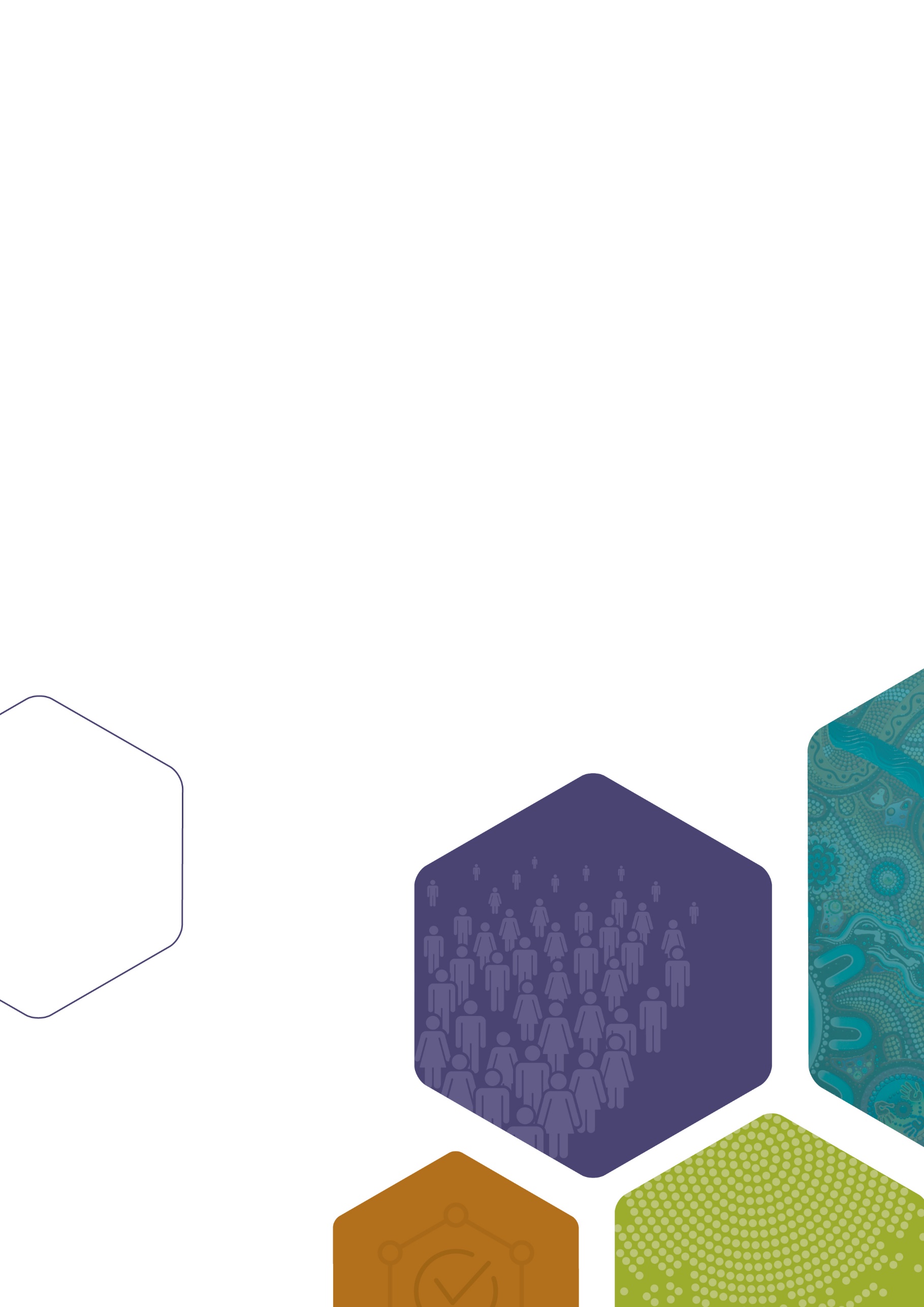
## Legal advice on the PS Act

* 1. Agencies are asked to contact the Legal Services Team in the Commission at [legal@apsc.gov.au](mailto:legal@apsc.gov.au) when obtaining legal advice on the PS Act.
  2. 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

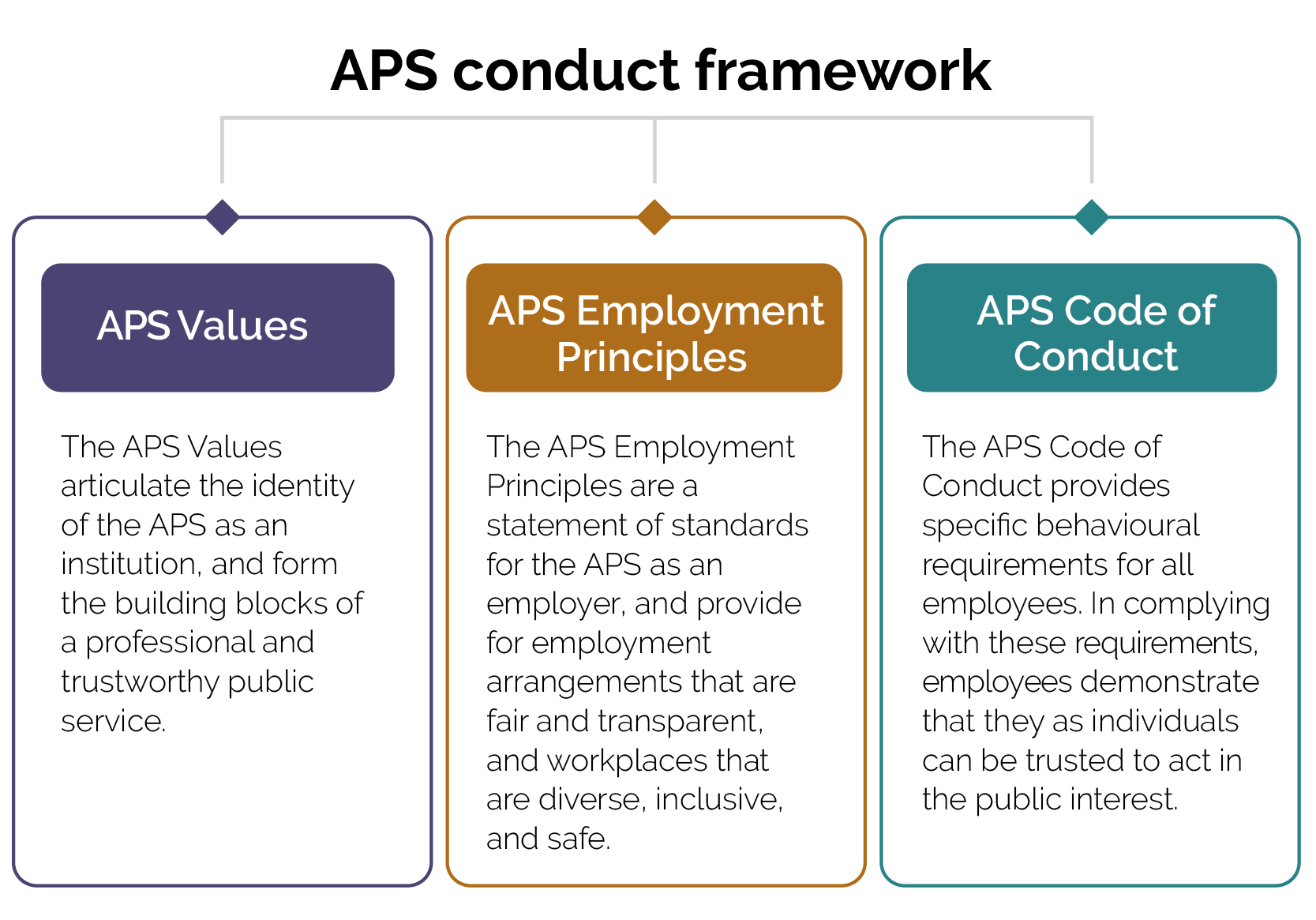
* 1. The Commission has used its best endeavours to ensure the accuracy of the material at the time of writing, and will update the document from time to time. However, the Commission is unable to guarantee that this guide is complete, correct and up-to-date, or that it is relevant to the particular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

3

**Chapter 2**

# The APS Conduct Framework

* 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. 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.
  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

* 1. 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. 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.
  3. 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

* 1. 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

* 1. 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. 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.
  3. 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

* 1. 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

* 1. The Code is set out in s.13 of the PS Act and s.7 of the PS Regulations.
  2. 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

* 1. 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. 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

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

#### Some statutory office holders

* 1. 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

* 1. 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

* 1. 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. 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.
  3. If in doubt, agencies or contractors should seek their own legal advice on the application and enforcement of these standards.

### Agency-specific conduct requirements

* 1. 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. 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

* 1. 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.



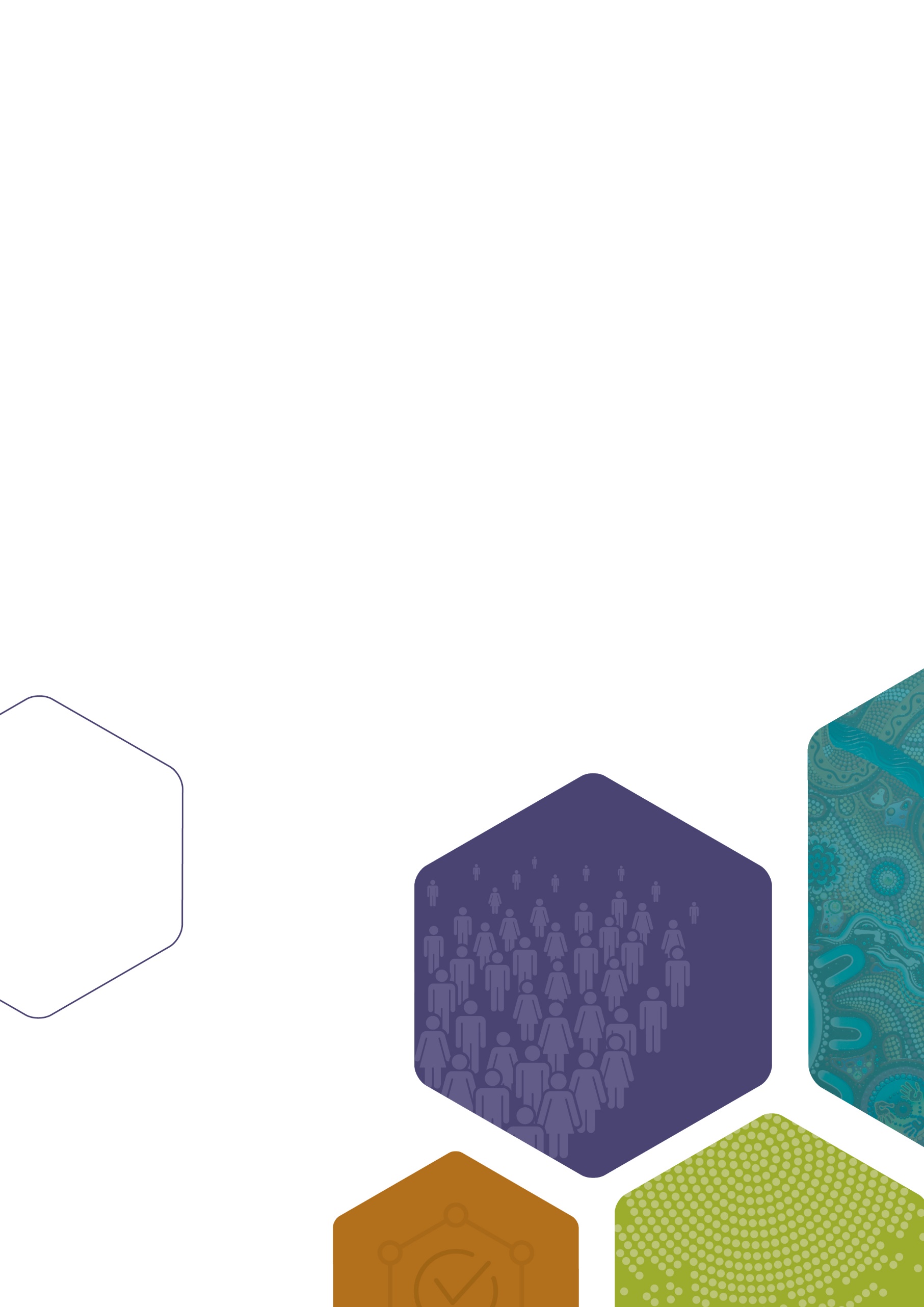
**Information about each element of the Code is in Appendix 2.**

#### In connection with APS employment

* 1. 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

* 1. 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. 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.
  3. 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.
  1. 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

* 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).
  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

* 1. 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.
  1. Agencies should ensure employees are aware of these options and have easy access to them.
  2. 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. 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

* 1. 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.
  2. 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. 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.
  4. 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.
  5. 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

* 1. 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

* 1. 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**

* 1. Agencies are encouraged to provide avenues for anonymous reporting, as this can bring to light behavioural concerns that might not otherwise become apparent.
  2. 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. 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**

* 1. In some cases, a complainant will make their identity known to the agency, but request that it not be disclosed further.
  2. 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. 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.
  4. 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

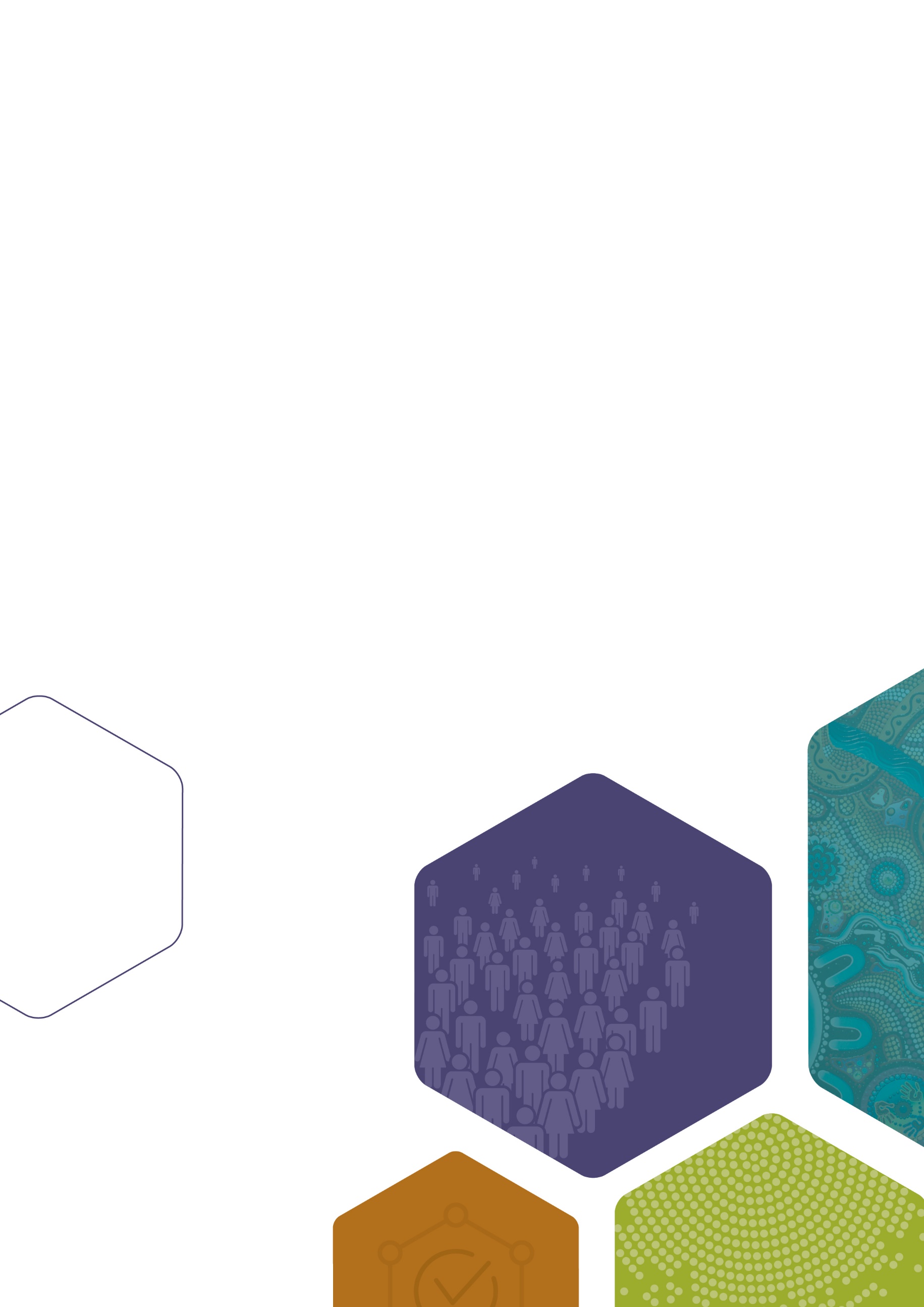
* 1. Employees who make allegations of misconduct are protected from reprisal. Retaliation against someone who has made a complaint in good faith could be a potential breach of a number of elements of the Code, including the requirements to:
* behave with integrity in connection with employment
* comply with all applicable Australian laws
* treat everyone with respect and courtesy, and without harassment.
  1. In general, these protections also extend to witnesses in misconduct investigations.
  2. 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. 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.
  1. 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

* 1. 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.
  2. 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. 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.
  1. 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.
  2. 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

* 1. 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.
  2. 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

* 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.
  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.
  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. 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.
  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.
  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

* 1. 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.
  2. 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.
  1. 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?

* 1. 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.
  2. 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.
  3. 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?

* 1. 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.
  2. 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

* 1. 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.
  2. 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.
  1. 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.
  2. 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.
  3. 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

* 1. 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

* 1. 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.
  2. 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

* 1. 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.
  2. 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

* 1. 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.
  2. 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

* 1. 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.
  2. 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.
  3. 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

* 1. 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.
  2. 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.

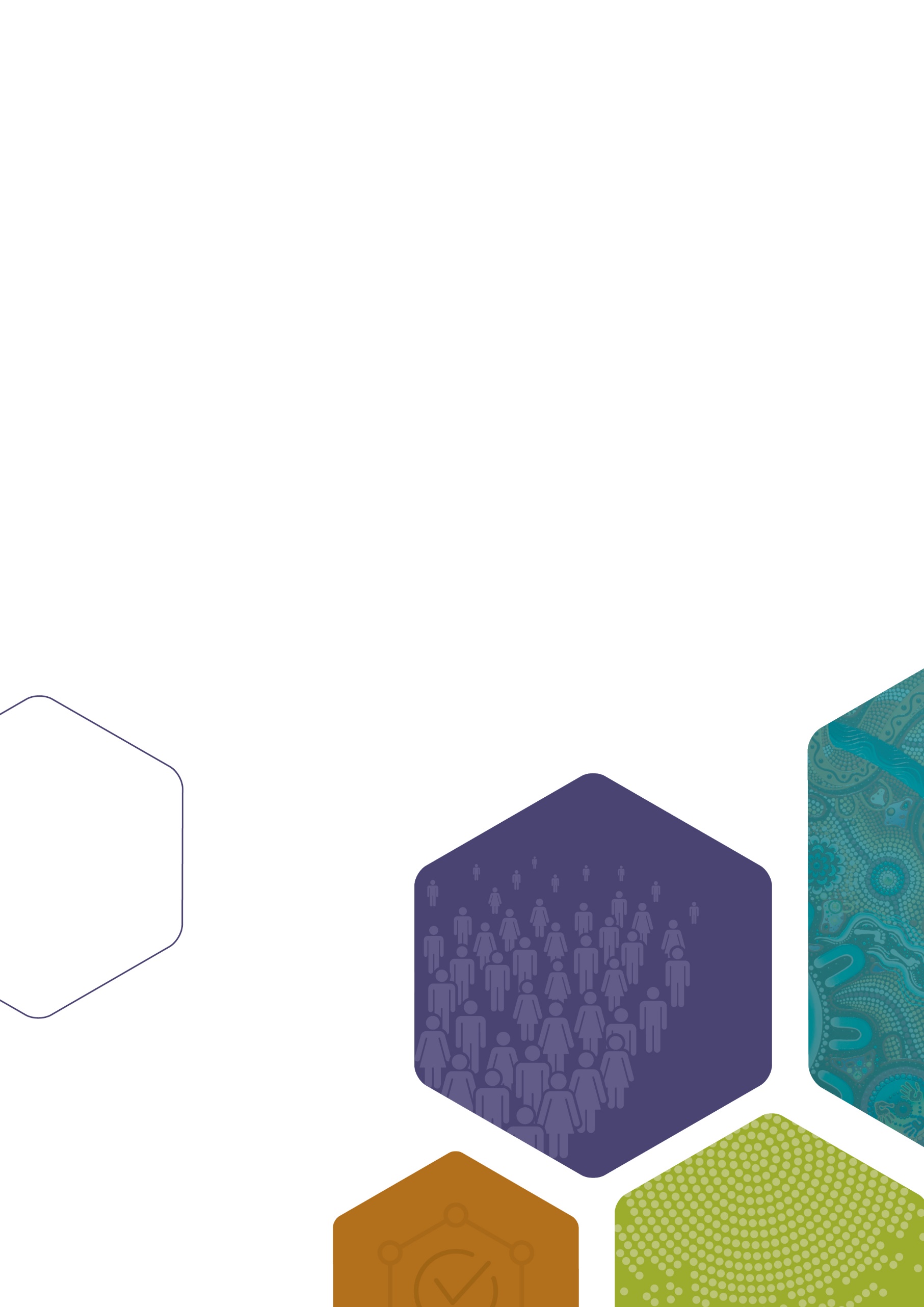


**Options for managing lower-risk matters are set out in Chapter 5.**

* 1. 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.
  2. 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.
  3. 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

* 1. 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.
  2. 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.
  3. 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

* 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.
  2. Agencies should empower managers to address lower-risk matters constructively, and as informally as practicable.
  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.
  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

* 1. 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.
  2. 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.
  3. 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.
  4. 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

* 1. 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.
  2. 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.
  3. 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

* 1. 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.
  2. 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.
  3. 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.
  4. 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

* 1. 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

* 1. 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

* 1. 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

* 1. 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.
  2. 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

* 1. 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

* 1. 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

* 1. 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

* 1. 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.
  2. 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

* 1. 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.
  2. 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.
  3. Care should be taken to ensure the wording of a warning or a direction does not presuppose a breach of the Code.

### Warnings

* 1. 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.
  2. 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

* 1. 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.
  2. 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.
  3. 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.

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

#### Drafting and scope

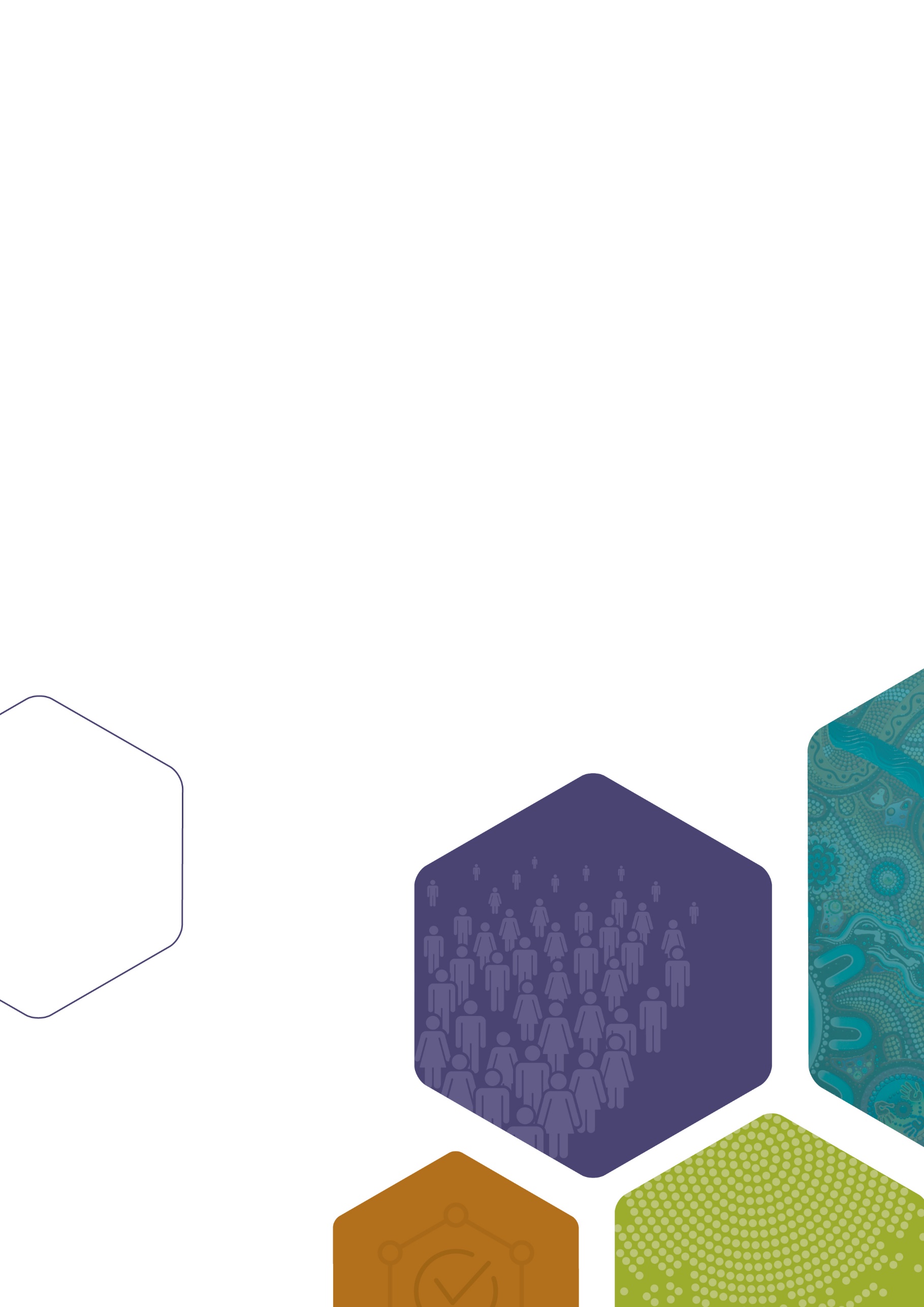
* 1. Directions should be drafted in the language of command, and impose a clear and specific obligation. A poorly worded direction can make it difficult both for the employee to follow and for the agency to establish whether the employee has complied with it. Agencies should also ensure the wording of a direction does not presuppose a breach of the Code.
  2. 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.
  3. 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

* 1. 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.
  2. 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

* 1. 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.
  2. 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.
  3. 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

* 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

* 1. 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.
  1. 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).
  1. Section 15(4)(b) of the PS Act explicitly recognises that the administrative law principle of procedural fairness applies to the misconduct process.
  2. 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.
  3. 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

* 1. 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**).
  1. 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.
  2. 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

* 1. 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))

* 1. 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.
  2. 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))

* 1. 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.
  1. 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.
  2. 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)

* 1. 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.
  2. 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.
  3. These requirements are consistent with the hearing rule of procedural fairness.

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

* 1. 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.
  2. 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.
  1. 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)

* 1. 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)

* 1. 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.
  2. Where a breach is determined and a sanction imposed, a record must also be made of the sanction decision.
  3. 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)

* 1. 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.
  2. Agency heads must also consult the Commissioner before imposing a sanction on an SES employee.

### Drafting agency 15(3) procedures

* 1. 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.
  1. 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.
  1. 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.**

* 1. 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.**

* 1. 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.
  2. 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

* 1. 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.
  2. 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.**

* 1. 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.
  1. There is no provision in the PS Act for any other form of sanction.
  2. 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.
  3. 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

* 1. 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

* 1. 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

* 1. 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

* 1. 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.
  2. 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.
  3. 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.
  4. 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.
  1. 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

* 1. 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

* 1. 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

* 1. 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.
  1. 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

* 1. 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

* 1. 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.
  2. 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*.
  3. 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

* 1. 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.
  2. 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

* 1. 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

* 1. 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

* 1. 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.
  2. 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

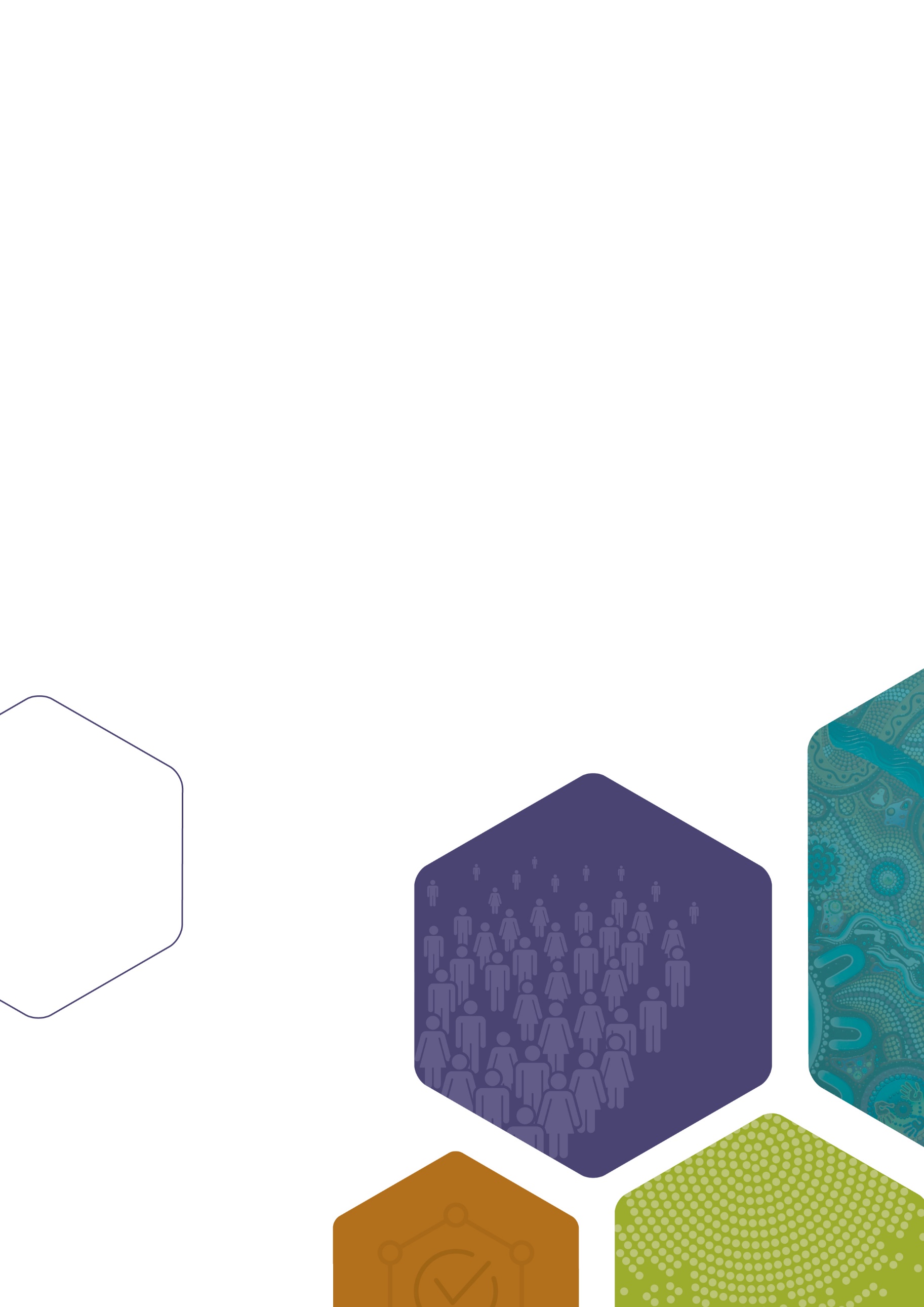
* 1. ‘Case manager’ is a term used in a range of ways across agencies. In a misconduct process, agencies may wish to have a dedicated person who liaises with the person under investigation, manages the contract for an external investigator if applicable, and overall acts as a single point of contact 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.
  2. 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

* 1. 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.
  2. 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

* 1. 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

* 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

* 1. 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.
  2. 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.
  3. 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.
  4. 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.
  1. 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.
  2. 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

* 1. 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.
  2. 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.
  3. 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

* 1. 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.
  2. 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.
  3. 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.
  1. 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.
  2. 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

* 1. 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)**

* 1. 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.
  1. 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.
  1. **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))**

* 1. 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.
  2. 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:**

1. **the employee has, or may have, breached the Code, or**
2. **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))**

* 1. 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.
  1. 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

* 1. 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**

* 1. 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**

* 1. 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**

* 1. 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**

* 1. 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**

* 1. 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

* 1. 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.
  2. 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?’
  3. 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

* 1. 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.
  2. 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.
  3. 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.
  4. 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.
  5. 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

* 1. 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.
  2. 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.
  3. 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.
  4. 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

* 1. 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.
  2. 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.
  3. 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.
  4. 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.
  1. 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.
  2. 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

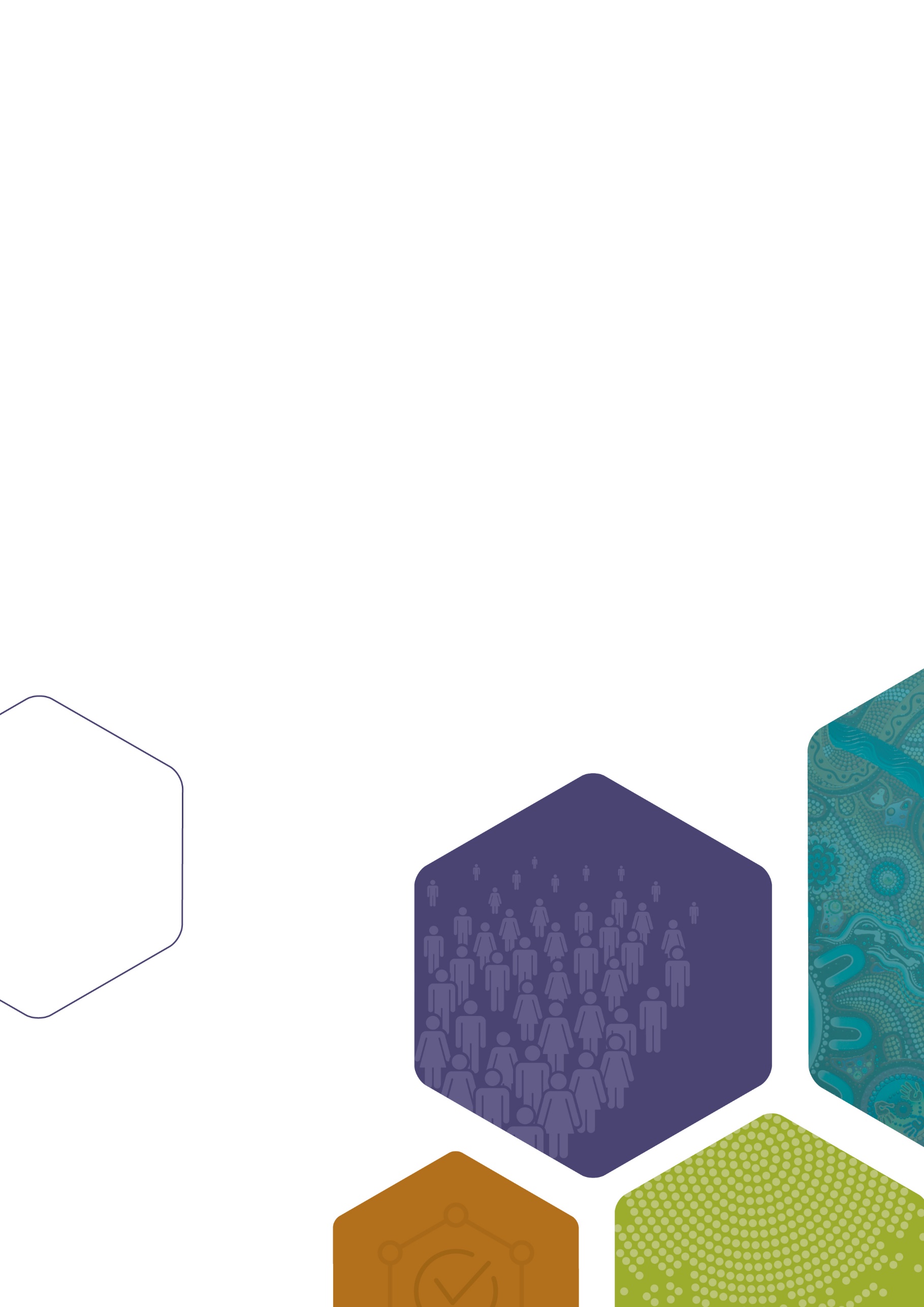
* 1. It is good practice to develop an investigation plan at the beginning of the process to articulate what needs to be done to establish the facts. A plan can include the following considerations:
* Who is being investigated? What is the specific behaviour they are alleged to have engaged in?
* What 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

* 1. 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.
  2. 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.
  3. 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

* 1. 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.
  2. 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.
  3. 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.
  4. 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.
  1. 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.
  2. 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.
  3. 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.
  4. 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*).
  5. 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

* 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.
  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

* 1. 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.
  2. 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

* 1. 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

* 1. 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.
  2. 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.
  1. Agencies may wish to seek legal advice where an employee seeks to claim privilege against self-exposure to penalty.
  2. An employee choosing not to answer such questions cannot, for that reason alone, be taken to have breached the Code.
  3. 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

* 1. 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

* 1. 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

* 1. 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

* 1. 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’

* 1. 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.
  1. 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.
  1. 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

* 1. 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.
  2. 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.

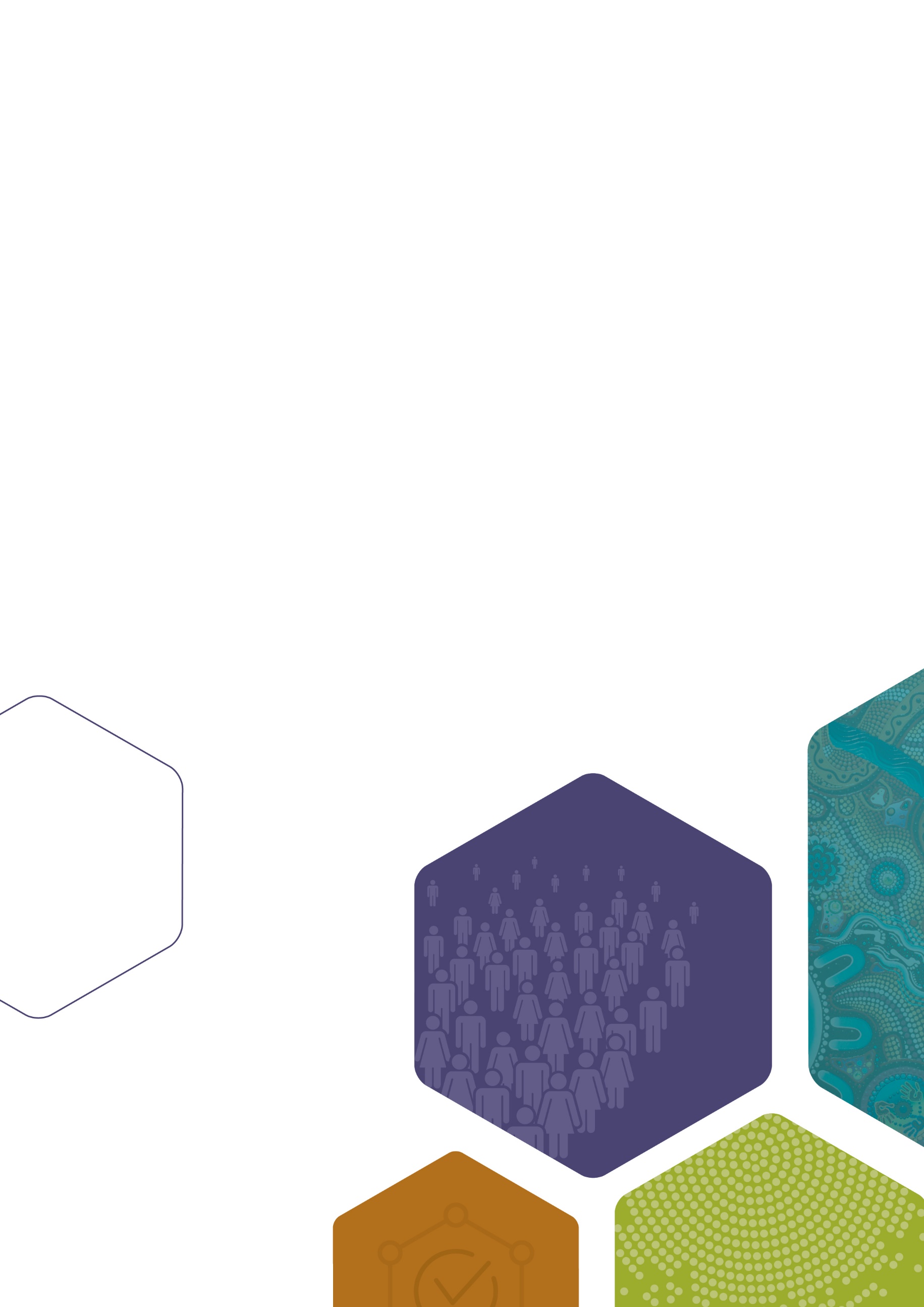
## Making a breach determination

* 1. 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.
  2. 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.
  3. 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.
  4. 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.
  5. 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.
  6. 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.
  7. 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

* 1. 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.
  2. 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

* 1. 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.
  2. 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.
  3. 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

* 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.
  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).
  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.
  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

* 1. 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.
  2. 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.
  3. 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.
  4. 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.
  1. 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

* 1. 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

* 1. 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

* 1. 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

* 1. 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

* 1. 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

* 1. 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.
  1. 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

* 1. 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

* 1. 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.
  2. 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.
  3. The agency should ensure that duties are available at the proposed classification before the sanction of reduction in classification is imposed.
  4. 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.
  5. 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’.
  6. 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.
  1. 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.
  2. 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

* 1. 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.
  1. A sanction of re-assignment of duties requires that alternative duties be available within the agency at the employee’s substantive classification.
  2. 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.
  3. 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.
  4. 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

* 1. 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.
  2. 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.
  3. 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.
  4. 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)

* 1. 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.
  2. 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

* 1. 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.
  2. 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.
  3. 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.
  4. 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

* 1. 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.
  2. 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.
  1. 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.**

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

## Date of effect

* 1. 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.
  2. 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

* 1. 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.
  2. 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:

1. inform the employee of:
2. the determination, and
3. the sanction or sanctions that are under consideration, and
4. the factors that are under consideration in determining any sanction to be imposed, and
5. give the employee a reasonable opportunity to make a statement in relation to sanction(s) under consideration.
   1. 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.
   2. 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

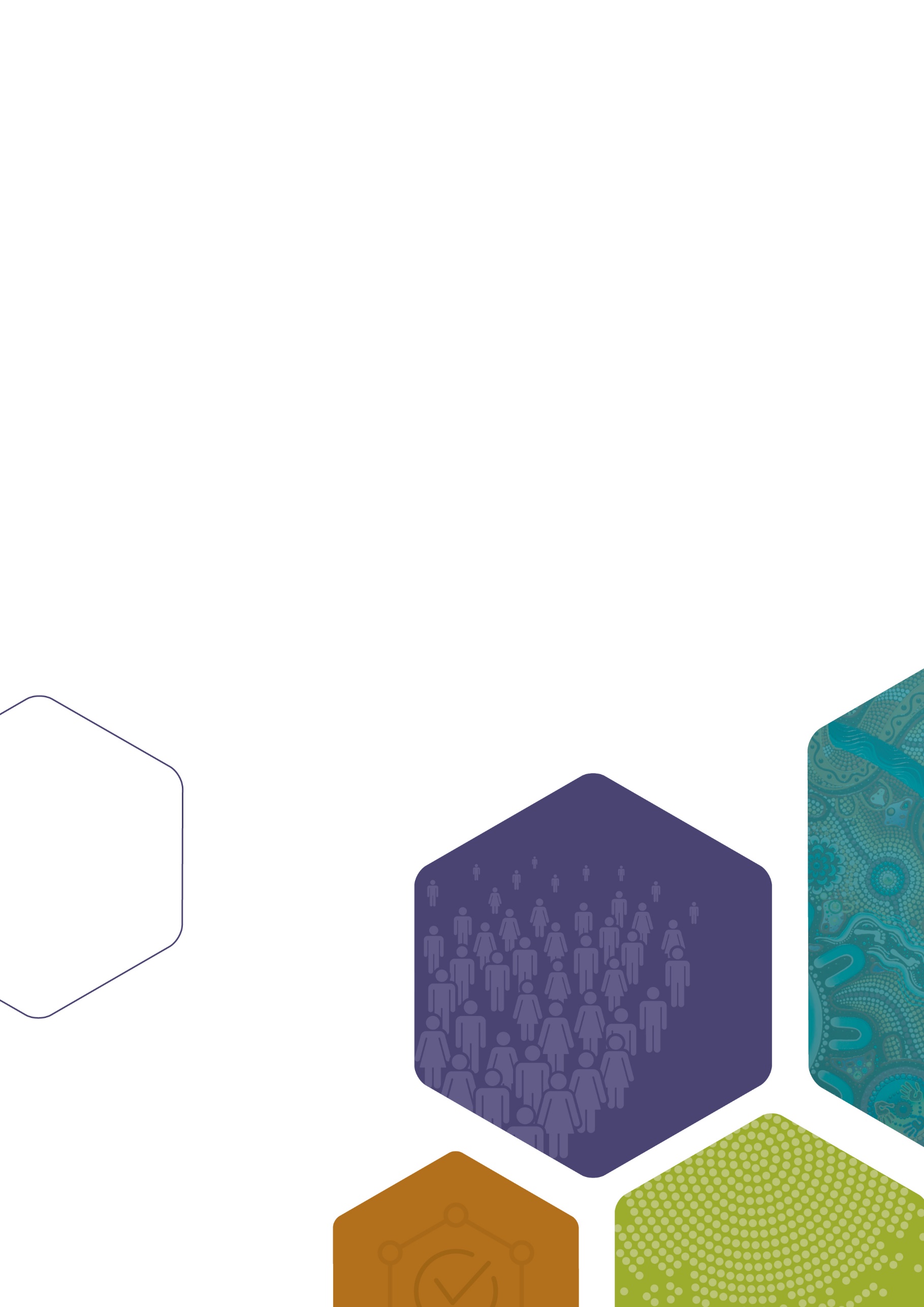
* 1. It is possible to impose more than one sanction, if the sanction decision-maker is satisfied that more than one sanction is appropriate in the circumstances. For example, an employee may be re-assigned duties and have a fine imposed, or be reprimanded and re-assigned duties, or, as described above,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

### Applying sanctions for multiple breaches

* 1. 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.
  2. 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

* 1. 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.
  2. 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.
  1. 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

* 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

* 1. 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.
  2. 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.
  1. 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

* 1. 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.
  2. 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

* 1. 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).
  2. 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.
  3. 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

* 1. 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.
  2. 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

* 1. 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.
  1. 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.
  2. 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’.
  3. 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

* 1. 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.
  1. 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

* 1. 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.
  2. 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.
  3. 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.
  4. 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

* 1. 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.
  2. 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.
  1. 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.
  2. 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 103of 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.
  3. 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.
  4. 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

* 1. 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.
  2. If the gaining agency decides to conduct an investigation, the investigation must be conducted under the gaining agency’s s.15(3) procedures.
  3. 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.
  1. 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’)

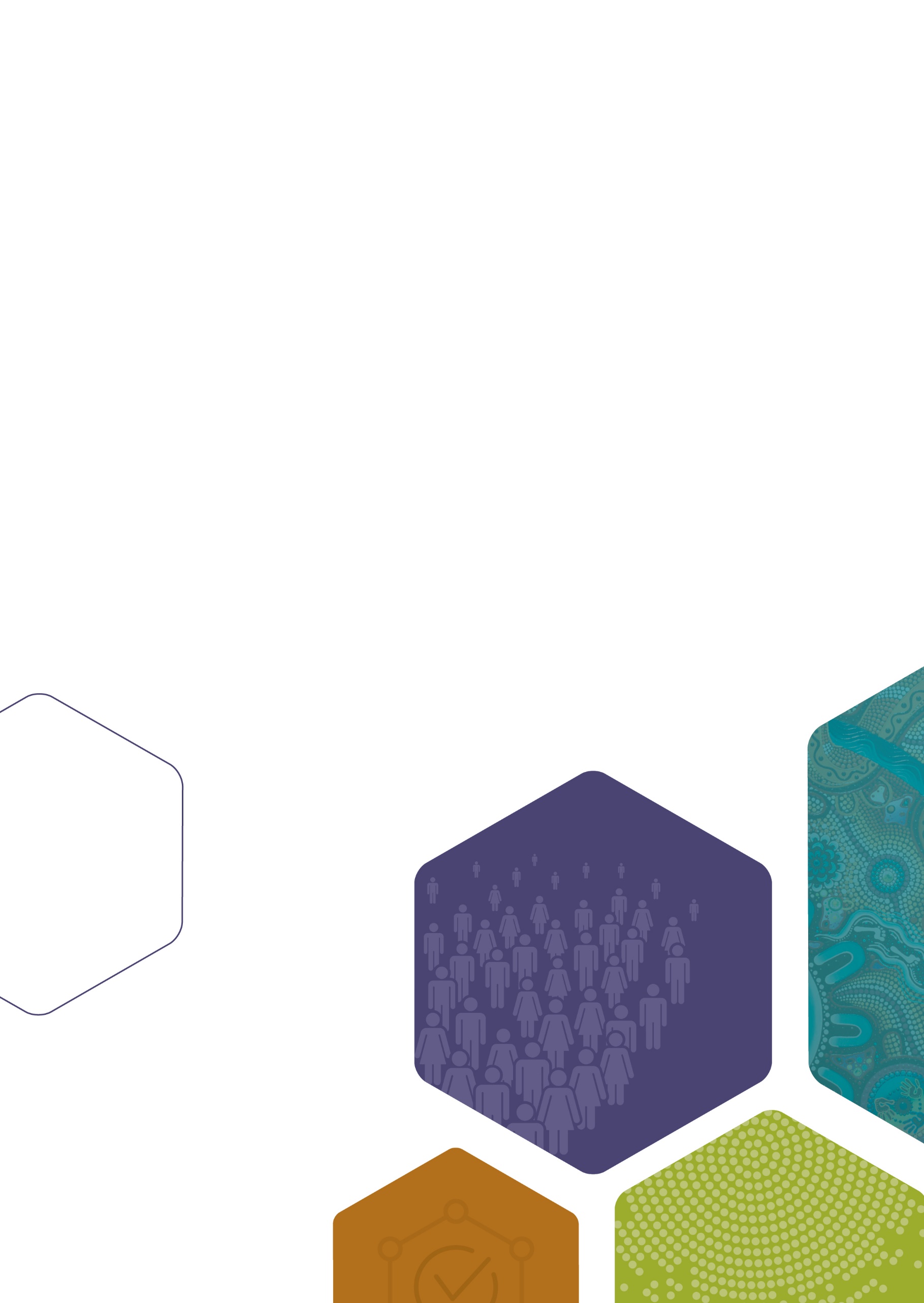
* 1. Where a person under investigation resigns from APS employment, the agency may continue the investigation, and determine whether there has been a breach of the Code, if it decides this is justified in the circumstances.
  2. An agency may also commence a misconduct investigation in relation to a 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.
  3. 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

* 1. 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.
  1. 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.
  2. Agencies should advise former employees determined to have breached the Code of their right to seek review by the MPC of that determination.
  3. 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

* 1. 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.
  2. 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.
  3. 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.
  4. 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

* 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.
  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.
  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

* 1. 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 4of the PS Regulations. However, a sanction of termination of employment is not reviewable under this framework.
  2. 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

* 1. 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

* 1. 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

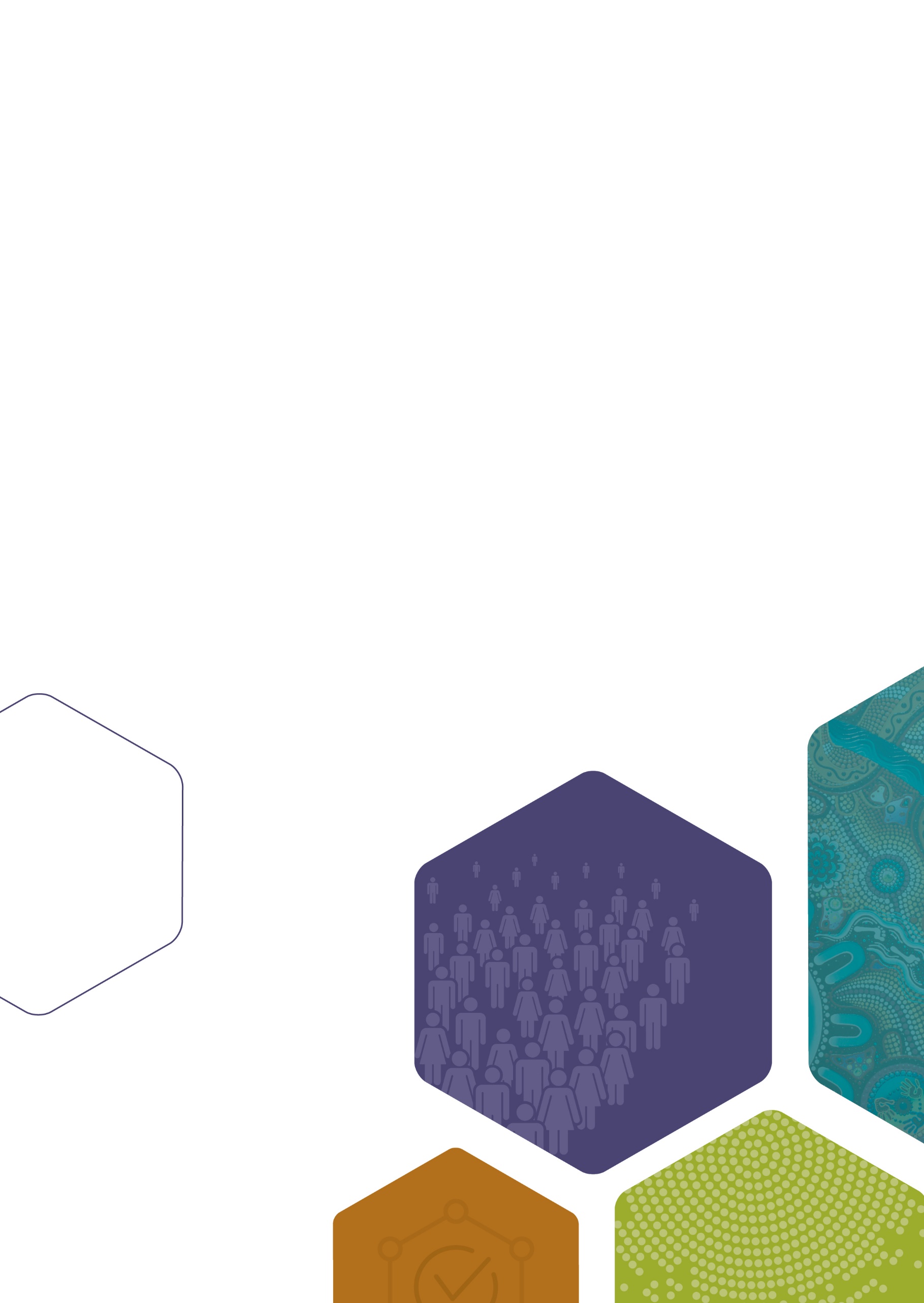
* 1. Employees and former employees may have other grounds for seeking remedy under the Fair Work Act, including the general protections provisions in that Act. Further information is available from the Fair Work Commission.

### Judicial review

* 1. 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

* 1. 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

* 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

* 1. 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.
  2. 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.
  3. 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.
  1. 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

* 1. 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.
  2. 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.
  3. 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.
  1. 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.
  2. 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.
  3. 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

* 1. 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.
  1. The employee or former employee may also request that the records be destroyed at a specified time.
  2. 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

* 1. 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

* 1. 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.
  1. 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

* 1. 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.
  1. 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.
  2. 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

* 1. 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.
  2. 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

* 1. 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).
  2. 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?

* 1. 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.
  2. 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?

* 1. 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.
  2. 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.

* 1. In providing this information, candidates are obliged to meet the standards of honesty and integrity expected by the Code.
  2. 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?

* 1. 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.
  2. 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.
  3. 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

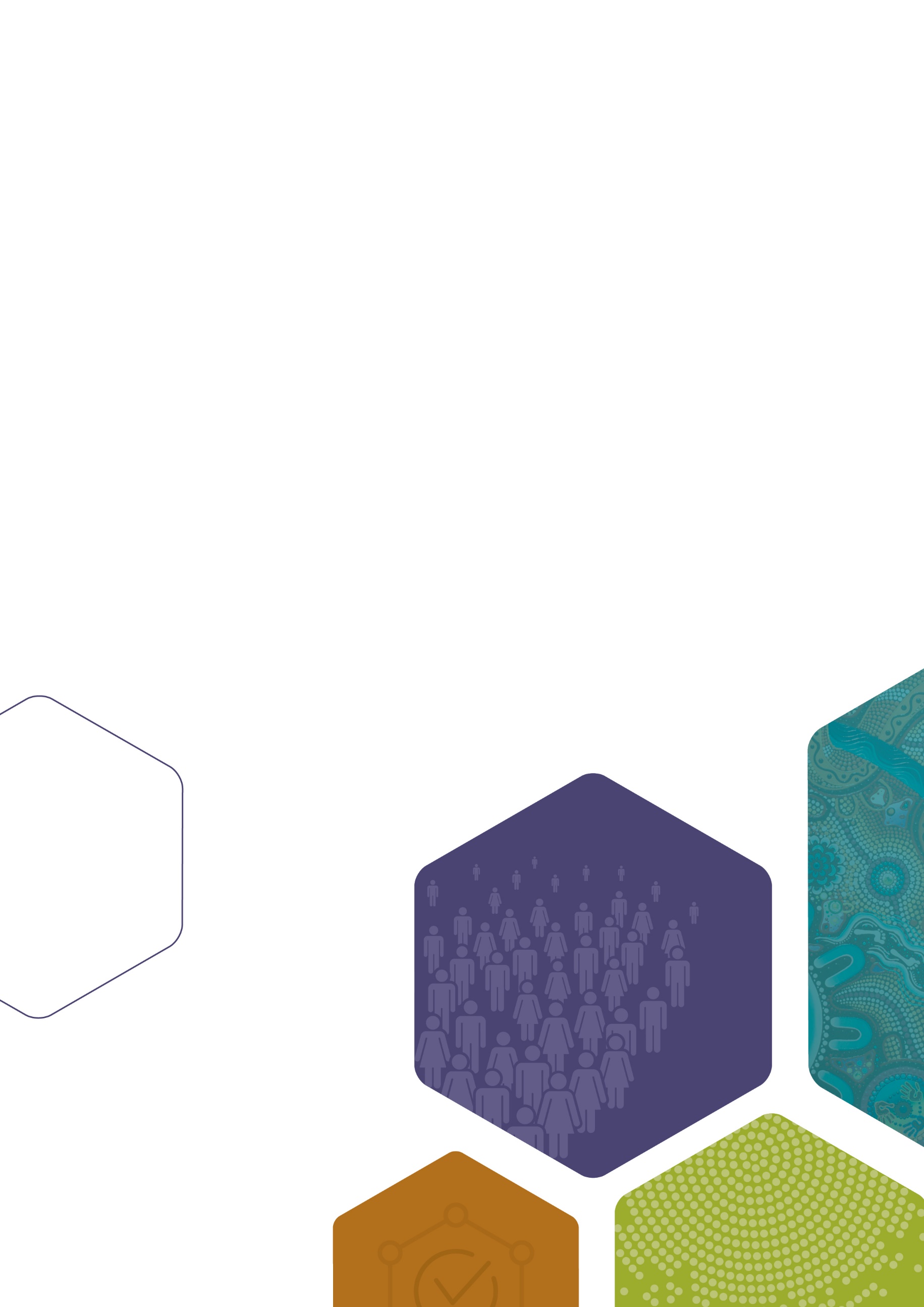
* 1. If a candidate is the subject of a misconduct process that has yet to be finalised, care needs to be taken not to prejudge the outcome of the process while ensuring the candidate’s work-related qualities are appropriate for the duties to be performed. If, after the assessment of the candidate’s 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

* 1. 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.
  2. The APPs in the Privacy Act apply to providing references, including with respect to previous misconduct.
  3. 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.
  4. 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.
  1. 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.
  2. 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.
  3. 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

* 1. 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.
  2. 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.
  3. 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

* 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

* 1. 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.
  2. 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.
  3. The following approaches may be useful.

### Databases

* 1. 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.
  2. 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.
  1. 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.
  2. 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

* 1. 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.
  2. 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

* 1. 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.
  2. 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.
  1. 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.
  1. 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.
  2. 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

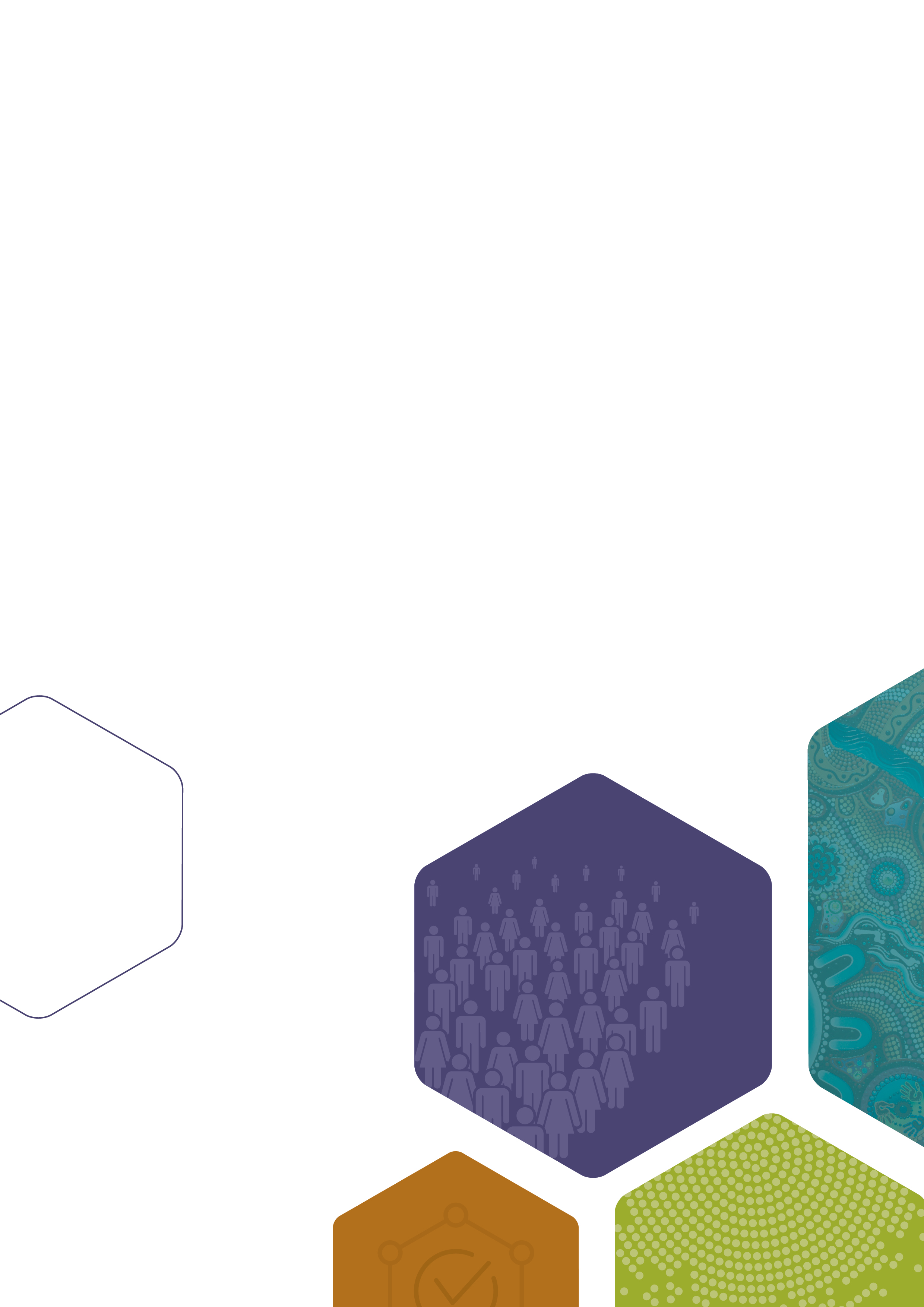
* 1. Agencies may wish to consider the following approaches to developing policy and procedural guidance and support on the conduct framework:
* Having advice available to all employees about the management and reporting of suspected misconduct, including internal agency arrangements for reporting suspected 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

* 1. 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.
  1. 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.
  2. 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

* 1. 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.
  2. 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.
  3. 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.
  4. Case studies can be used in both stand-alone and on-the-job training, and as resources available on the agency intranet.
  5. 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. 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. 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. 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. 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.
  2. 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. 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.

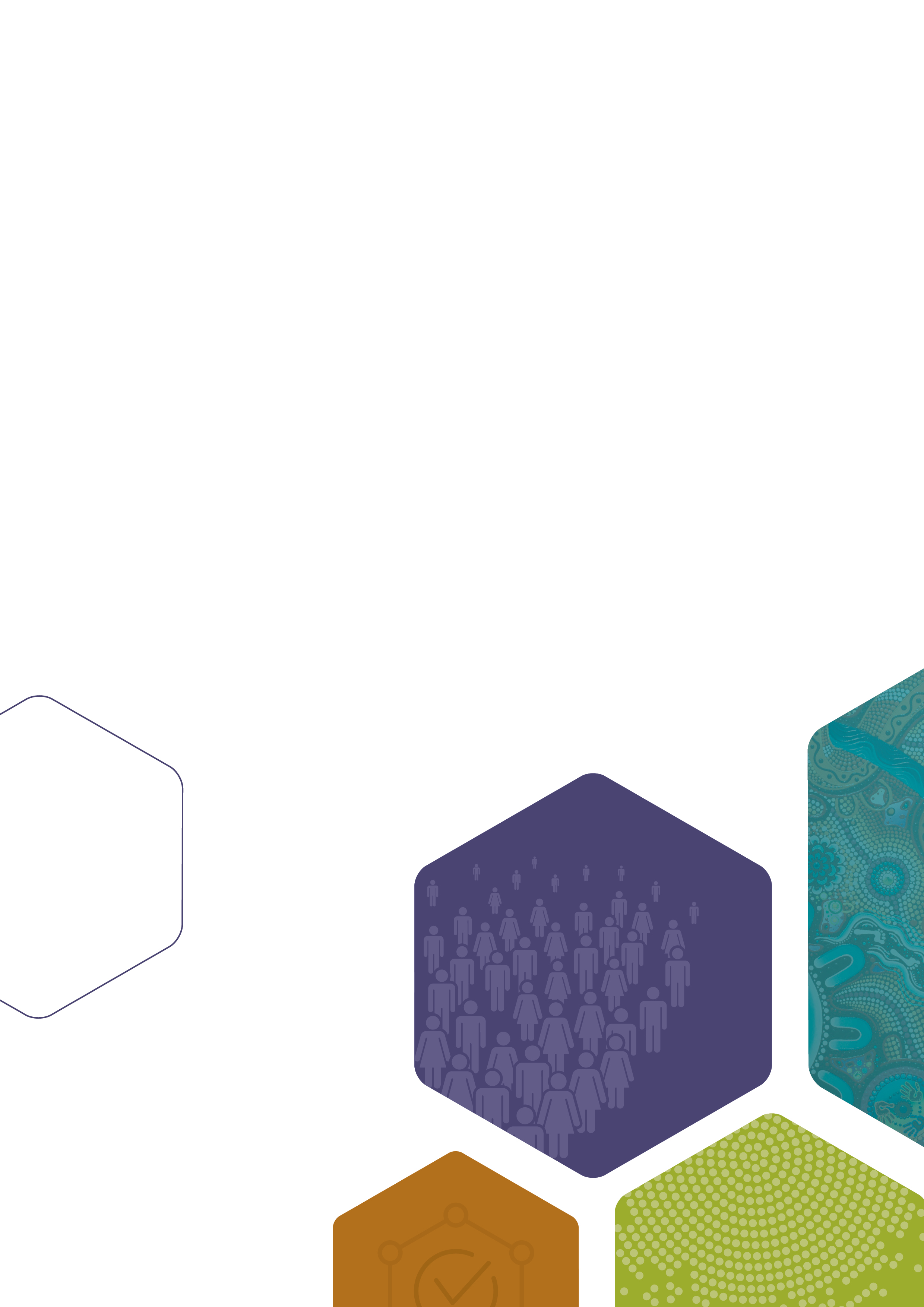
## Code does not apply if inconsistent with statutory functions

* 1. 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.
  2. 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. 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.
  2. 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.
  3. 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

* 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. 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

* 1. 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

* 1. 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

* 1. 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. 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

* 1. 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

* 1. 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. 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

* 1. 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. 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

* 1. 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. 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

* 1. 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. 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.
  3. 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.
  4. In some cases, the personal attributes of the employee may be relevant to whether they have acted with care and diligence. For example:

1. 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
2. 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

* 1. 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. 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.
  3. 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.
  4. 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.
  5. 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.
  6. ‘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

* 1. 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. 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.
  3. 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).
  4. 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’.
  5. 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.
  6. 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.
  7. 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

* 1. 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**

* 1. 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. 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.
  3. 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**

* 1. A direction must be both lawful and reasonable. Whether it is reasonable will depend upon all the circumstances.
  2. 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.
  3. 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**

* 1. 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

* 1. 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. 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:

#### take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee’s APS employment; and

#### disclose details of any material personal interest of the employee in connection with the employee’s APS employment

* 1. 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. 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’.
  3. 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.
  4. *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

* 1. ‘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. 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.
  3. 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

* 1. 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. 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.
  3. 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:

#### to gain, or seek to gain, a benefit or an advantage for the employee or any other person; or

#### to cause, or seek to cause, detriment to the employee’s Agency, the Commonwealth or any other person

* 1. 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. 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.
  3. 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.
  4. 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.
  5. 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:

#### the APS Values and APS Employment Principles; and

#### the integrity and good reputation of the employee’s Agency and the APS

* 1. 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. 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.
  3. 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.
  4. 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.
  5. 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.
  6. Part 2 of the Commissioner’s Directions provides directions on the scope and application of each of the Values.
  7. 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

* 1. 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. 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

* 1. To date, only one other conduct requirement has been prescribed under the *Public Service Regulations 2023* (PS Regulations).
  2. 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.
  3. 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.
  4. 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.