



Australian Government

Australian Public Service Commission

Australian Public Service Commissioner's procedures for inquiring into alleged breaches of the Code of Conduct by an Agency Head or former Agency Head

Procedure

I, Gordon de Brouwer, Australian Public Service Commissioner (**Commissioner**), have established these procedures in accordance with subsection 41A(1A) of the *Public Service Act 1999* (Cth) (**PS Act**) for the purpose of inquiring into and determining, under paragraph 41(2)(m) and section 41A of the PS Act, whether an Agency Head or former Agency Head has breached the APS Code of Conduct (**Code**) in section 13 of the PS Act.

1. Application

- (a) These procedures must be complied with when conducting an inquiry into, and determining whether an Agency Head or former Agency Head has breached the Code.
- (b) These procedures apply to any inquiry conducted for the purposes of paragraph 41(2)(m) that started on or after 27 August 2024.¹
- (c) Any reference to the Commissioner in these procedures is also a reference to a delegate of the Commissioner.

Note: Pursuant to subsections 78(5) and (5A) of the PS Act, the Commissioner may in writing, delegate to a senior official or former senior official the functions and powers to inquire into, determine and report on whether an Agency Head, or former Agency Head, has breached the Code. "Senior official" means: (a) a person who holds any office or appointment under an Act; or (b) an SES employee or acting SES employee. "Former senior official" means: (a) a person who held, but no longer holds, an office or appointment under an Act; or (b) a person who was, but is no longer, an SES employee, and who does not hold an office or appointment under an Act.

2. Background

- (a) These procedures are made publicly available in accordance with subsection 41A(1C) of the PS Act.

¹ *Public Service Amendment Act (No. 2) 2024*, Schedule 1, item 8(3)



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- (b) An inquiry under paragraph 41(2)(m) of the PS Act must be conducted in accordance with section 41A of the PS Act.
- (c) Under subsection 41A(1) the Commissioner may, for the purposes of paragraph 41(2)(m), inquire into and determine whether an Agency Head or a former Agency Head has breached the Code of Conduct.
- (d) Under subsection 41A(3) of the PS Act and in accordance with section 51 of the *Public Service Regulations 2023* (Cth) (**PS Regulations**), the Commissioner may decline to conduct, or discontinue, an inquiry into an alleged breach of the Code by an Agency Head or former Agency Head if the Commissioner concludes that conducting or continuing the inquiry would not be justified in all the circumstances.
- (e) Section 51 of the PS Regulations provides that in deciding whether to decline to conduct, or discontinue, an inquiry on the basis it would not be justified in all the circumstances, the Commissioner may have regard to:
 - (i) whether the allegation is vexatious, frivolous, misconceived, or lacking in substance;
 - (ii) whether sufficient detail about the allegation has been provided;
 - (iii) whether the allegation refers to specific decisions or actions by the Agency Head or former Agency Head;
 - (iv) whether the allegation identifies conduct which, if proven, would constitute a breach of the Code;
 - (v) whether the allegation relates to a decision properly taken, or to policy properly adopted, by the Agency Head or former Agency Head, with which the person making the allegation disagrees;
 - (vi) whether the cost of conducting an inquiry is justified in the circumstances.



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- (f) An inquiry that is conducted by the Commissioner for the purpose of paragraph 41(2)(m) of the PS Act is a "special inquiry".²
- (g) In relation to a "special inquiry", the Commissioner has the same inquiry powers as the Auditor-General in sections 32, 33 and 35 of the *Auditor-General Act 1997 (Cth)*.³
- (h) Where an inquiry under subsection 41A(1) is completed, the Commissioner must report on the results of the inquiry in accordance with subsection 41A(2).
- (i) Information obtained in connection with an inquiry under paragraph 41(2)(m) and section 41A of the PS Act is subject to protections in respect of its use and disclosure. The Commissioner, and any other "entrusted person" (within the meaning of subsection 72A(1) of the PS Act), are required to handle "protected information" (within the meaning of subsection 72A(1) of the PS Act) in accordance with section 72A of the PS Act.
- (j) Personal information should be handled consistently with the *Privacy Act 1988 (Cth)* and section 103 of the PS Regulations.

3. Person making breach determination to be independent and unbiased

- (a) The Commissioner or any delegate who inquires into and determines an alleged breach of the Code under subsection 41A(1), must be, and must appear to be, independent and unbiased.
- (b) A delegate must advise the Commissioner if they consider that they may not be independent or unbiased, or if they consider that they may reasonably be perceived not to be independent or unbiased.

² Paragraph 43(1)(b) of the PS Act.

³ Paragraph 43(2) of the PS Act.



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4. The inquiry process

- (a) The process for inquiring into and determining whether an Agency Head or former Agency Head has breached the Code must be carried out as quickly and with as little formality as a proper consideration of the matter allows.
- (b) The process must be consistent with the principles of procedural fairness.
- (c) In conducting a process for inquiring into and determining whether an Agency Head or former Agency Head has breached the Code the Commissioner may have the assistance of an investigator, who may be external to the Australian Public Service Commission. An investigator may inquire into the alleged breach, gather evidence, make a report of recommended findings and perform any other functions required to assist the inquiry, at the direction of the Commissioner.
- (d) The Commissioner must not make a determination in relation to an alleged breach of the Code by an Agency Head or former Agency Head unless:
 - (i) reasonable steps have been taken by the Commissioner to inform the person of the details of the alleged breach of the Code (including any variation of those details); and
 - (ii) the person has been given a reasonable opportunity to make a statement, or provide evidence in relation to the alleged breach.
- (e) A response provided by the person may include a written or oral statement, or both.
- (f) An Agency Head or former Agency Head who does not make a statement in relation to the alleged breach is not, for that reason alone, to be taken to have admitted to committing the suspected breach.



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- (g) For the purpose of inquiring into and determining whether an Agency Head or former Agency Head has breached the Code, a formal hearing is not required.
- (h) The Commissioner will agree to any reasonable request made by the Agency Head or former Agency Head who is alleged to have breached the Code to have a support person present in a meeting or interview they conduct.

5. Report on results of inquiry

- (a) A written record must be prepared setting out the determination whether or not the Agency Head or the former Agency Head has breached the Code.
- (b) The Commissioner must report on the results of an inquiry and determination in relation to the Agency Head or the former Agency Head to:⁴
 - (i) if the Agency Head or former Agency Head is/was a Secretary, to the Prime Minister; or
 - (ii) if the Agency Head or former Agency Head is/was the Head of an Executive Agency, to the Agency Minister;⁵ or
 - (iii) if the Agency Head or former Agency Head is/was the Head of a Statutory Agency that is prescribed by the PS Regulations, to the Presiding Officers;⁶ or
 - (iv) if the Agency Head or former Agency Head is/was the Head of a Statutory Agency that is not prescribed by the PS Regulations, to the Agency Minister.⁷

⁴ Required by subsection 41A(2) of the PS Act.

⁵ “**Agency Minister**” in relation to an Executive Agency means the Minister who administers the Agency.

⁶ The prescribed Statutory Agencies are referenced in section 50 of the PS Regulations.

⁷ “**Agency Minister**” in relation to a Statutory Agency means the Minister who administers the provision of the Act that provides for the appointment of the Head of the Agency.



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- (c) Where it is determined that the Agency Head has breached the Code, the Commissioner’s report must include, if relevant, recommendations for sanctions.⁸ The Commissioner’s report may include other recommendations.⁹
- (d) Once an inquiry has concluded and a determination has been made, the Agency Head or former Agency Head will be notified of the determination and any recommendation(s) of the inquiry, if the Commissioner considers notification appropriate.

Note: The Commissioner is required to handle information in accordance with section 72A of the PS Act, section 103 of the PS Regulations and the *Privacy Act 1988* (Cth)

- (e) Where it is found that an Agency Head has breached the Code, the Commissioner may recommend that the relevant authorities consider appropriate action which might include (but is not limited to):
 - (i) in respect of the Secretary of a Department, termination of appointment pursuant to subsection 59(1) of the PS Act;
 - (ii) in respect of the Head of an Executive Agency, termination of appointment pursuant to subsection 67(3) of the PS Act;
 - (iii) in respect of the Head of a Statutory Agency, any action permitted by the relevant enabling legislation appointing the Head of that Statutory Agency (for example, termination of appointment pursuant to that legislation).

Version	Approved by	Commencement Date	Next Review
1.0	Dr Gordon de Brouwer, Commissioner	29 November 2024	

⁸ Section 41A(2) of the PS Act.

⁹ Subsection 41(3).