



Procedures for determining breaches of the Australian Public Service (APS) Code of Conduct and the imposition of sanctions

I, Jody Broun, Chief Executive Officer, National Indigenous Australians Agency (NIAA), establish these procedures in accordance with subsection 15(3) of the *Public Service Act 1999* (the PS Act).

These procedures supersede previous procedures made for the NIAA under subsection 15(3) of the Act and commence on the date they are made.

Jody Broun

Chief Executive Officer

National Indigenous Australians Agency

22 April 2024

1. Application

- 1.1. These procedures apply in relation to a suspected breach of the APS Code of Conduct as set out in section 13 of the PS Act (the Code), at **Attachment A**, by an Australian Public Service (APS) or Senior Executive Service (SES) employee in the NIAA, a former APS or SES employee who was employed in the NIAA at the time of the suspected misconduct, or the actions of an employee before commencing with the NIAA, in respect of which a determination is to be made.
- 1.2. In these procedures, a reference to a breach of the Code by a person includes a reference to a person engaging in conduct set out in subsection 15(2A) of the PS Act in connection with their engagement as an APS employee.
- 1.3. Not all suspected breaches of the Code may need to be dealt with by way of a determination under these procedures. In particular circumstances, another way of dealing with a suspected breach of the Code may be more appropriate.





1.4. These procedures must be complied with in determining:

- i. whether an employee of the Agency, or former employee of the NIAA, has breached the Code as set out in section 13 of the PS Act.
- ii. the sanction/s, if any, that should be imposed on a current APS employee in accordance with subsection 15(1) of the PS Act, where a breach of the Code has been determined.

1.5. These procedures should be read in conjunction with the NIAA Workplace Respect Policy and Internal Complaints Management Framework.

2. Availability of procedures

2.1. These procedures are made publicly available on the NIAA's website in accordance with subsection 15(7) of the PS Act.

3. Key Appointments

- 3.1. As soon as practicable after a suspected breach of the Code has been identified, and the NIAA has determined it appropriate to deal with the suspected breach under these procedures, an investigator will conduct an investigation.
- 3.2. The investigator may be an NIAA employee or an appointed external investigator and will investigate the suspected breach, gather evidence and make a report of recommended findings of fact to the breach decision-maker.
- 3.3. If the investigator makes recommendations that a suspected breach has occurred, the Agency Head, or an authorised delegate, will appoint a breach decision-maker to make a determination under these Procedures and in accordance with the *NIAA HR Delegations*.
- 3.4. The role of the breach decision-maker is to form an independent view of the evidence. They are responsible for, based on findings of fact, any determination of breach of the Code and will determine in writing whether a breach of the Code has occurred.
- 3.5. After a breach of the Code has been determined, the Agency Head, or an authorised delegate, will appoint a sanction delegate to decide what, if any, sanction/s is to be imposed on a person who is found to have breached the Code.
- 3.6. The breach decision-maker and sanction delegate will be a person holding a delegation of the powers under the PS Act and the *NIAA HR Delegations*.

4. Procedural fairness

4.1. The process for determining whether a breach has occurred and what, if any, sanctions are appropriate must be consistent with the principles of procedural fairness. Procedural fairness generally requires that:





- i. The breach decision-maker and the sanction delegate must be, and must be perceived to be, independent and unbiased. The proposed breach decision-maker and the sanction delegate must advise the Agency Head in writing if they consider that they may not be independent and unbiased or if they consider that they may reasonably be perceived not to be independent and unbiased. For example, if they are a witness in the matter;
 - ii. The person suspected of breaching the Code is informed of the case against them;
 - iii. The person is provided with a reasonable opportunity to respond to any adverse material that could influence the decision and put forward their case, before any decision is made on breach or sanction; and
 - iv. Findings are based on evidence that is relevant and logically capable of supporting the findings made.
- 4.2. The process for determining whether a person who is, or was, an APS or SES employee within NIAA has breached the Code must be carried out with as little formality, and with as much expedition, as a proper consideration of the matter allows.
- 4.3. 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 person whose conduct is in question rather than, for example, witnesses or complainants.

5. The determination process

- 5.1. A determination may only be made in relation to a suspected breach of the Code by a person who is, or was, an APS or SES employee in the NIAA at the time of the suspected misconduct, if reasonable steps have been taken to:
- i. Inform the person of:
 - (1) The details of the suspected breach of the Code, including what elements of the Code they are suspected to have breached, and any subsequent variation of those details such as additional evidence or new allegations; and
 - (2) Where the person is a current APS or SES employee, the current sanctions that may be imposed on them under subsection 15(1) of the Act.
 - ii. Give the person a reasonable opportunity to make a statement, or provide further evidence in relation to the suspected breach, within a minimum period of 7 calendar days or any longer period that is considered reasonable by the breach decision-maker.
- 5.2. A person who chooses not to submit a statement in relation to the suspected breach is not assumed to have admitted to committing the suspected breach.
- 5.3. The breach decision-maker or an investigator must agree to a request made by the person who is suspected of breaching the Code to have a support person at any stage in the misconduct process. For example, during





a meeting or interview they conduct. The support person should not be a person who is or may be either a potential witness, or is otherwise involved, in any of the matter/s relating to the subject of the interview.

5.4. The breach decision-maker must give proper consideration to the person's statement, if any, and response to the evidence before making a determination.

6. Sanctions

6.1. Under subsection 15(1) of the Act, the sanction delegate may impose one or more of the following sanctions:

- i. termination of employment;
- ii. reduction in classification;
- iii. re-assignment of duties;
- iv. reduction in salary;
- v. deductions from salary, by way of fine (maximum 2% of the employee's total annual salary); or
- vi. a reprimand.

6.2. A determination that a person has breached the Code does not require a sanction to be imposed.

6.3. If a determination has been made that an APS or SES employee in the NIAA has breached the Code, a sanction can only be imposed on the employee if reasonable steps have been taken to:

- i. Inform the person of:
 - (1) The determination that has been made;
 - (2) The sanction/s that are under consideration; and
 - (3) The factors that are being considered in deciding on any sanction.
- ii. Give the employee a reasonable opportunity to make a statement in relation to the sanction/s under consideration, within a minimum period of 7 calendar days or any longer period that is considered reasonable by the sanction delegate.

6.4. The sanction delegate must give proper consideration to the person's statement, if any, before making a determination.

6.5. 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 NIAA.

7. Senior Executive Services (SES)

7.1. The [APS Commissioner's Directions 2022](#) require an Agency Head to consult with the Commissioner on the process for handling matters involving suspected breaches of the Code by SES employees, including the decision on whether to start misconduct action and when considering to impose a sanction.





8. Considering suspension or reassignment of duties

- 8.1. Under section 25 and section 28 of the PS Act, an employee can be assigned alternative duties or suspended from duties. The provisions relating to suspension from duties are set out in section 14 of the *Public Service Regulations 2023* (the Regulations).
- 8.2. The Agency Head, or delegate as per the *NIAA HR Delegations*, may suspend an employee in the NIAA if, on reasonable grounds, they believe:
 - i. the employee has, or may have breached the Code; and,
 - ii. the employee's suspension is in the public, or the NIAA's, interest.
- 8.3. Actions to re-assign or suspend an employee may be made at the same time as the decision to commence an investigation or at any stage during the process of determining whether a breach of the Code has occurred, or where new adverse information has been identified.
- 8.4. Suspension from duties must end immediately when the Agency Head or delegate no longer believes on reasonable grounds that the employee may have breached the Code or that the employee's suspension is in the public, or the NIAA's, interest.
- 8.5. The NIAA will review any suspension at reasonable intervals.
- 8.6. A period of suspension on full remuneration will count as service for all purposes.
- 8.7. Suspension without remuneration is limited to 30 days before being subject to a review unless exceptional circumstances apply. Suspension without remuneration will ordinarily not count as service for any purpose but generally it will not constitute a break in an employee's continuous employment. An employee who is suspended without remuneration may access their accrued paid leave credits. These leave credits are confined to the entitlements that would usually be paid to an employee on separation from NIAA, specifically annual and long service leave. Where this occurs, the duration of the leave will count as service.
- 8.8. Employees cannot use personal leave or miscellaneous leave while suspended from duties as they are not obliged to attend work.
- 8.9. Employees should contact their superannuation fund directly for advice on the impact of suspension without pay.

9. Procedure when an employee seeks to move to another APS Agency during an investigation

- 9.1. This clause applies if:
 - i. an employee in the NIAA is suspected of having breached the Code; and
 - ii. reasonable steps have been taken to formally advise the employee of the suspected breach in accordance with clause 5.1; and





- iii. a decision is made to promote an employee and the matter to which the suspected breach relates has not yet been resolved before the employee moves to take up the promotion; or
- iv. a decision has been made, apart from these procedures, that would result in the movement of the employee under section 26 of the PS Act to another APS Agency.

9.2. Unless the original Agency Head and the new Agency Head agree otherwise, the movement (including on promotion) will not take effect until the matter is resolved.

9.3. For this clause, the matter is taken to be resolved when:

- a. a determination is made as to whether the employee has breached the Code; or
- b. it is decided that such a determination is not necessary.

10. Performance progression and the Code

10.1. Where an employee in the NIAA is found to have breached the Code, their supervisor should consider a number of factors before deciding on how much bearing the incident or behaviour should have on the annual performance progression decision. These include:

- i. The nature and seriousness of the breach;
- ii. Whether the employee is currently performing to a standard that warrants progression;
- iii. The time elapsed since the breach;
- iv. The severity of any sanction imposed; and
- v. Whether the employee has made an effort to improve their behaviour.

10.2. The decision to approve performance progression rests with the SES Band One in the employee's line of management.

10.3. If a Code investigation is underway during the annual performance review, please contact the Integrity, Performance and Employment Policy team before making a decision in relation to performance progression.

11. Rights of review

11.1. Under section 33 of the PS Act, non-SES employees who have been found to have breached the Code and who wish to challenge either the determination that a breach has occurred, or the sanction imposed (except in the case of termination) may lodge an application to the Merit Protection Commissioner under section 36 of the Regulations.

11.2. Making an application for review does not prevent the NIAA from proceeding with an action, or implementing a decision, that is subject to a review application.

11.3. An employee who has been terminated may have remedies under the *Fair Work Act 2009*, or other Commonwealth laws.





12. Privacy and record keeping

- 12.1. All parties are obliged to comply with the *Privacy Act 1988*. This applies to any personal information whether it relates to the complainant, the respondent or any witnesses.
- 12.2. Personal information is collected in the course of reporting, assessing and investigating complaints and/or suspected misconduct. This information will be used in order to deal with the suspected breach, including investigating the matter, determining whether there has been a breach of the Code and any appropriate sanctions.
- 12.3. The Code process may be made known to:
- i. Another APS agency to which the employee has moved or seeks to move in the future;
 - ii. NIAA management, including the employee’s line management; and/or
 - iii. Other parties on a ‘need-to-know’ basis, as determined by NIAA or authorised by law.
- 12.4. Complainants will be given sufficient information to provide assurance that NIAA:
- i. does not tolerate behaviour that is inconsistent with Code;
 - ii. has taken the allegation/s seriously;
 - iii. has taken appropriate steps to ensure the problem will not recur; and
 - iv. has imposed an appropriate sanction where a breach has been found.
- 12.5. Documents relating to complaints and/or any Code action are to be treated as *OFFICIAL: Sensitive*. They are to only be discussed on a ‘need-to-know’ basis. Any employee who discloses personal information other than on a ‘need-to-know’ basis could be in breach of the Code.
- 12.6. Records will be maintained and retained in accordance with the *Archives Act 1983* and the *Privacy Act 1988*.
- 12.7. If a determination is made in relation to a suspected breach of the Code, a written record must be made of:
- i. the suspected breach;
 - ii. the determination;
 - iii. any sanctions imposed as a result of the determination that the person breached the Code; and
 - iv. any statement of reasons provided to the employee.

13. Revision history

Version	Date	Author	Approved by
1.0	July 2019		Raymond James Griggs. AO, CSC
1.1	January 2024	Integrity, Performance and Employment Policy	Jody Broun





14. Attachment A – APS Code of Conduct

14.1. As outlined in section 13 of the PS Act, the Code requires:

- 1) An APS employee must behave honestly and with integrity in connection with APS employment.
- 2) An APS employee must act with care and diligence in connection with APS employment.
- 3) An APS employee, when acting in connection with APS employment, must treat everyone with respect and courtesy, and without harassment.
- 4) An APS employee, when acting in connection with APS employment, must comply with all applicable Australian laws. For this purpose, Australian law means:
 - a. any Act (including this Act), or any instrument made under an Act; or
 - b. any law of a State or Territory, including any instrument made under such a law.
- 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.
- 6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.
- 7) An APS employee must:
 - a. take reasonable steps to avoid any conflict of interest (real or apparent) in connection with the employee's APS employment; and
 - b. disclose details of any material personal interest of the employee in connection with the employee's APS employment.
- 8) An APS employee must use Commonwealth resources in a proper manner and for a proper purpose.
- 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.
- 10) An APS employee must not improperly use inside information or the employee's duties, status, power or authority:
 - a. to gain, or seek to gain, a benefit or an advantage for the employee or any other person; or
 - b. to cause, or seek to cause, detriment to the employee's Agency, the Commonwealth or any other person.
- 11) An APS employee must at all times behave in a way that upholds:
 - a. the APS Values and APS Employment Principles; and
 - b. the integrity and good reputation of the employee's Agency and the APS.





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- 12) An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.
- 13) An APS employee must comply with any other conduct requirement that is prescribed by the regulations.

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