



Procedure for Determining Breaches of the APS Code of Conduct

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Section 15 of the *Public Service Act 1999* requires that:

- (3) An Agency Head must establish procedures for determining whether an APS employee in the Agency has breached the Code of Conduct. The procedures:
- (a) must comply with basic procedural requirements set out in Commissioner's Directions; and
 - (b) must have due regard to procedural fairness; and
 - (c) may be different for different categories of APS employees

Procedures for Determining Breaches of the APS Code of Conduct

I, Claire Howlett, Acting Chief Executive Officer of Cancer Australia, establish these Procedures under Subsection 15 (3) of the *Public Service Act 1999*.



.....
Claire Howlett

Date: 25.3.2024

1. Application of procedures

These procedures must be complied with in determining whether a current APS employee in Cancer Australia, or a former APS employee in Cancer Australia at the time of the suspected misconduct, has breached the APS Code of Conduct in section 13 of the Act.

Note: These Procedures apply only in relation to a suspected breach of the Code of Conduct by a Cancer Australia employee or former employee in respect of which a determination is to be made. Not all suspected breaches of the Code of Conduct will need to be dealt with by way of a determination. In particular circumstances, another way of dealing with a suspected breach of the Code may be more appropriate.

2. Selection of decision maker

The person who determines whether a Cancer Australia employee has breached the Code of Conduct is to be selected by the Chief Executive Officer (CEO) of Cancer Australia or the Deputy CEO as delegate of the CEO.

3. Formal hearing not required

For the purpose of determining whether a Cancer Australia employee has breached the Code of Conduct, a formal hearing is not required.

4. Information to be given to an employee before determination is made

Before a determination is made in relation to a suspected breach of the Code of Conduct by a Cancer Australia employee, the employee must:

- (a) be informed of:
 - (i) the details of the suspected breach of the Code of Conduct (including any variation of those details); and
 - (ii) the sanctions that may be imposed on the employee under Subsection 15 (1) of the PS Act (including any limitations on that power

contained in regulations made for the purposes of Subsection 15 (2) of the Act) ; and

- (b) be given reasonable opportunity to make a statement, in writing, in relation to the suspected breach within 7 days or any longer period as is allowed.

If the employee makes a written statement within 7 days (or, if allowed, any longer period) of being given the opportunity to do so, the employee must also be given the opportunity to make an oral statement in relation to the suspected breach.

An employee who does not make a written statement in relation to the suspected breach is not, only for that reason, to be taken to have admitted committing the suspected breach.

5. Determination process to be informal

The process for determining whether a Cancer Australia employee has breached the Code of Conduct must be carried out with as little formality and as much expedition as a proper consideration of the matter allows.

6. Person making determination to be independent and unbiased

The CEO or delegate must take reasonable steps to ensure that the person who determines whether a Cancer Australia employee has breached the Code of Conduct is, and appears to be, independent and unbiased.

In particular, a person must not determine whether the employee has breached the Code of Conduct if the person:

- has a personal interest in the decision;
- has a work or personal relationship with witnesses or the employee being investigated;
- may be influenced by more senior staff in Cancer Australia who have an interest in the decision; or
- is a witness to the matter.

In some circumstances this may require a person external to Cancer Australia or the APS to be selected to investigate the matter and make a determination.

7. Action that may be taken if breach found to have occurred

If a determination is made that a Cancer Australia employee has breached the Code of Conduct, the employee may be counselled or a sanction may be imposed on the employee under Section 15 of the *Public Service Act 1999*.

Prior to the imposition of a sanction, the employee must be given a reasonable opportunity to make a statement, in writing, in relation to the proposed sanction within 7 days or any longer period as is allowed.

If a sanction is imposed on the employee, the employee must be given a written statement setting out the reasons for the determination and the imposition of the sanction.

8. Record of determination

After a determination in relation to a suspected breach of the Code of Conduct by a Cancer Australia employee is made, a written record stating whether the employee has been found to have breached the Code of Conduct must be prepared.

Note: The *Archives Act 1983* and the *Privacy Act 1988* apply to a record made under this clause.

9. Appropriate procedures if employee moves to a different Agency

This clause applies if:

- (a) a Cancer Australia employee is suspected of having breached the Code of Conduct and
- (b) before any determination is made in relation to the suspected breach the employee moves to a different Agency.

A determination (if any) in relation to the suspected breach must be made in accordance with the procedures applicable in the Agency to which the employee has moved.

10. Review

The Chief Operating Officer will review these procedures every three years, or earlier if required.

Supporting Guidance for Determining Breaches of the APS Code of Conduct

APS Code of Conduct

The APS Code of Conduct sets out the standards of conduct required of APS employees. The Code derives from 2 parts of the legislation: Sections 13(1) to 13(12) of the PS Act contain the first 12 elements of the Code, and there is an additional element in regulation 2.1 (which is an additional conduct requirement permitted by Section 13(13) of the PS Act). See appendix C for a full description of each element that makes up the Code of Conduct.

Who does the APS Code of Conduct cover?

The APS Code of Conduct applies to all Cancer Australia employees, including ongoing and non-ongoing employees and the CEO.

It is important to emphasise that an employee suspected of having breached the Code is presumed not to have committed the breach until a determination has been made, using Cancer Australia's procedures established under Section 15(3) of the PS Act. It is also important to note that a sanction cannot be imposed on an employee until there is a determination that the Code has been breached.

Not all breaches of the Code will necessarily be the subject of formal action. Depending on the seriousness of the conduct, the employee's employment history and an assessment of whether the incident is likely to be an isolated one, a manager may consider counselling or a warning to be more appropriate. Other actions, such as specific training, varying the employee's duties or line of reporting, may also be considered.

Sanctions, including termination of employment, are intended to be proportionate to the nature of the breach and in some cases will signify that Cancer Australia no longer has confidence that the employee has the appropriate qualities to perform certain duties. Sanctions also operate as a deterrent to others and confirm that misconduct is not tolerated in Cancer Australia. See Page 16 of this document for details of sanctions.

What is a breach of the Code of Conduct?

In broad terms, a Cancer Australia employee whose conduct does not comply with an element of the Code of Conduct can be found to have breached the Code.

Who can receive a report of an alleged breach of the Code of Conduct?

The Deputy CEO and the Chief Operating Officer have been authorised by the CEO to receive a report of a breach or alleged breach of the APS Code of Conduct.

Who determines whether a breach has occurred?

The person who determines whether a Cancer Australia employee has breached the Code of Conduct is to be selected by the CEO or Deputy CEO as delegate of the CEO.

Who can exercise powers relating to misconduct?

There are three significant points in the misconduct process where powers may be exercised.

- Suspending or temporarily re-assigning the duties of an employee who is suspected of having breached the Code (Section 25, Section 28 of the PS Act and Regulation 3.10)
 - The CEO has delegated the power to suspend a Cancer Australia employee to the Deputy CEO. Managers can temporarily re-assign duties of an employee suspected of breaching the Code.
- Determining whether an employee has breached the Code (Section 15(3) of the PS Act)
 - This person does not have to hold a delegation. He or she may be selected and authorised by the CEO or delegate in accordance with Cancer Australia's procedures. As required in the Public Service Commissioner's Directions, the CEO or delegate must take reasonable steps to ensure that this person is, and appears to be, independent and unbiased (Clause 5.4 of the Directions).
 - It may be appropriate for the CEO or delegate to select a person from outside Cancer Australia or outside the APS, if it is not possible to satisfy this requirement from within Cancer Australia.
- Imposing a sanction on an employee, following a determination that he or she has breached the Code (Section 15(1) of the PS Act)
 - The CEO has not delegated the power to impose a sanction on an employee who has breached the Code.

Procedural fairness

The principles of procedural fairness require people whose interests will be adversely affected by a decision to be given an opportunity to be heard, and decision makers to act without bias or self-interest, and to base their decisions on compelling evidence.

In its fullest application, procedural fairness requires that:

- employees against whom an adverse decision may be made must be informed of any allegations against them in as much detail as possible;
- wherever possible employees must be provided with an opportunity to put their case, and to hear the case against them, whether at an oral hearing or otherwise;

- where a decision has to be made between competing interests, all parties to a matter must be heard and all arguments considered;
- no person judges their own case or a case in which they have a direct interest; and
- decision makers must act fairly and without bias.

Standard of proof

Consistent with the requirements of administrative law, the standard of proof for determining whether a breach of the Code of Conduct has occurred is *on the balance of probabilities*. This means that the decision maker must be satisfied that a breach of the Code is more probable than not. This differs from the criminal law standard of proof which is *beyond reasonable doubt*.

Counselling available

An employee involved in an investigation of a suspected breach of the Code of Conduct (whether the subject of the investigation or as a witness) can access Cancer Australia's employee assistance program provider for free and confidential counselling and support.

How should a suspected breach of the APS Code of Conduct be managed?

The following basic procedural requirements should be complied with in determining whether a Cancer Australia employee has breached the Code of Conduct:

- Before any determination about whether or not an employee has breached the Code of Conduct is made, the employee must be informed of the details of the suspected breach and the range of sanctions that may be imposed, should there be a finding that the employee has breached the Code. The employee must also be given reasonable opportunity to make a statement in relation to the suspected breach.
- The process for determining whether a Cancer Australia 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.
- Reasonable steps must be taken to ensure that the person who determines whether an employee has breached the Code is, and appears to be, independent and unbiased.
- After a determination in relation to a suspected breach of the Code has been made, a written record stating whether the employee has been found to have breached the Code must be prepared. The *Archives Act 1983*, the *Privacy Act 1988* and the *Freedom of Information Act 1982* apply to records of this kind. Where the written record is to form the basis of a statement specifying the grounds for termination of employment (as required by Section 29(2) of the *PS Act*), the statement must also have regard to the requirements of Section 25D of the *Acts Interpretation Act 1901*.

- ie, as well as specifying the grounds, it must also set out the findings on material questions of fact and refer to the evidence or other material on which those findings were based.

Not all suspected breaches of the Code need to be dealt with by way of determination. For example, where a suspected breach appears to be a minor infringement, it may be sufficient to warn the employee about his or her conduct, noting that any further similar conduct could lead to formal action. In such circumstances, it may be appropriate for the manager to make a note of the discussion. In this case, however, the manager must be careful not to imply that there has been any actual determination of a breach.

If the employee moves to a different Agency, the applicable procedures are those that apply to the employee's Agency at the time when the process for determining the breach is commenced. This is particularly important where an employee comes into Cancer Australia before a suspected breach of the Code which occurred in a former Agency comes to light.

Other considerations when determining a breach of the APS Code of Conduct

Unsatisfactory performance

If a person's unsatisfactory performance is for reasons or causes within their control and can be linked to the Code of Conduct, it can be dealt with as a possible breach of the Code of Conduct (*an employee must act with care and diligence in the course of APS employment and an employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction*). If the person is incapable of following instructions they should be dealt with under Cancer Australia's procedures relating to underperformance; if they are unwilling (or refuse) to follow instructions, they should be dealt with under the Code of Conduct procedures.

Past conduct

The person who is determining whether or not a breach has occurred should ordinarily consider only the incident(s) in question to make that determination. In some cases, however, evidence of prior 'similar facts', or evidence which shows a particular tendency, may be relevant to a determination about the incident(s) in question. The employee should be advised of any past conduct that it is proposed to take into account in this regard.

When deciding on an appropriate sanction, a decision maker may consider past behaviour, and in particular whether previous warnings, counselling or sanctions have relevance. For example, if repeated counselling has not changed the employee's conduct, a more serious sanction may be appropriate. The employee should be advised of any past conduct (both satisfactory and unsatisfactory) that it is proposed to take into account when deciding a sanction. In any event, the rules of procedural

fairness would require that, in imposing a sanction, a statement of reasons should be provided to the employee.

Levels of breach and connectedness

Where a provision of the Code contains more than one element, it may not be necessary for the employee to have breached all elements in order for a breach of the Code to be determined. For example, in the case of Section 13(3) of the PS Act, which requires that an APS employee, when acting in the course of employment, must treat everyone with respect and courtesy, and without harassment, an employee who was discourteous, but who has not engaged in harassing behaviour, could be found to have breached the Code.

- The Code specifies three different levels of connectedness between the standard of conduct and APS employment, as follows:
 - 'in the course of employment'
 - 'in connection with employment'
 - 'at all times'

There are other elements of the Code where the level of connectedness is not specified including elements (5), (6), (8) and (10). In these cases, connectedness is inherent in the element itself (eg. the requirement to comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction). These different levels of connectedness need to be considered in determining whether a breach of the Code has occurred. The term 'at all times' used in Section 13(11) of the PS Act means that conduct which is apparently unrelated to the performance of duties may be subject to the Code-as long as there is a real connection between the conduct and its effect on the workplace. This element of the Code may provide one of the bases for determining whether an employee who has been found guilty of a criminal offence has also breached the Code. In order for a breach to be found in these cases, it would be necessary to assess whether the criminal behaviour has compromised the integrity and good reputation of the APS, and the extent to which that behaviour has adversely affected the employee's position in the workplace.

Sanctions

A sanction can be imposed on an employee only after it has been determined that the employee has breached the Code of Conduct, using procedures established by the CEO under Section 15(3) of the PS Act.

Where such a determination has been made, the CEO may impose one or more of the following sanctions on the employee (Section 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.

There is no legislative impediment to the imposition of more than one sanction, but the CEO must be 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. A determination that a breach has occurred does not necessarily mean that a sanction must be imposed. A decision can be taken that other action may be appropriate. For example, the employee may be counselled, with a view to preventing a recurrence of the conduct in question.

Reduction in salary

In relation to reduction in salary or classification or re-assignment of duties, the PS Act does not contain explicit capacity to impose these sanctions for a fixed period, as was possible under the PS Act 1922. While Subsection 15(1) of the PS Act is silent about the possibility of reducing an employee's salary for a specified period, the CEO is not excluded from doing so. Paragraph 15(1) (d) - reduction in salary - can be imposed for a temporary period or for an indefinite period, and in either case the reduction will be subject to any subsequent salary event, such as a promotion or a salary increase provided for in an agreement. For example, if a sanction of reduction in salary from the top salary point of an APS 5 to the bottom salary point of an APS 5 were imposed for a period of 12 months and after 6 months the person was promoted to APS 6, the salary reduction would clearly be overtaken by the promotion. Where an employee's salary is temporarily reduced and that temporary period ends, then provided no event has intervened to take the employee's salary higher than the original rate (salary point X), it would move back to salary point X in the relevant scale.

Deductions from salary are limited to no more than 2% of an employee's annual salary (regulation 2.3). Remuneration arrangements in the employee's Enterprise Agreement should be considered.

Suspension and temporary re-assignment of duties

Section 28 of the PS Act and Regulation 3.10 set out the legislative basis for suspending an employee who is suspected of having breached the Code. In brief, the provisions are as follows:

- An employee may be suspended, with or without remuneration, where the Agency Head believes on reasonable grounds that the employee has, or may have, breached the Code and where the suspension is in the public interest, or the Agency's interest (Regulation 3.10(1), (2), (3)).
- Where the suspension is without remuneration, the maximum period is generally to be no more than 30 days. A longer period of suspension without remuneration is permitted only where there are exceptional circumstances (Regulation 3.10(3)).
- Exceptional circumstances are not defined, but could include:
 - where an employee has been charged with a criminal offence and is waiting to have the charge heard and determined

- where an employee has appealed against a conviction and is waiting to have the appeal heard.
- Continuing suspension must be reviewed at reasonable intervals (Regulation 3.10(4)).
- Suspension must immediately end when the Agency Head no longer believes on reasonable grounds that the employee has, or may have, breached the Code, or that it is in the public interest, or the Agency's interest, to continue the suspension. In addition, suspension must cease as soon as any sanction is imposed for the relevant breach of the Code (Regulation 3.10(5), (6)).
- In exercising suspension powers, the Agency Head must have due regard to procedural fairness, unless on reasonable grounds he or she believes that it would not be appropriate to do so in the particular circumstances (Regulation 3.10(7)), for example, where there is an imminent serious threat to the safety of other employees if suspension were to be delayed, or where there is a real possibility that the employee will destroy evidence or otherwise tamper with it. These considerations apply, regardless of whether the suspension is to be with or without remuneration.
- In general terms, suspension may be appropriate where, should the employee be found to have breached the Code, the likely sanction would be termination of employment. It may be appropriate to suspend, even in respect of less serious suspected breaches, if it is in the public, or the Agency's, interest to do so.

If an employee is suspended with remuneration, allowances which are regular and routine should continue to be paid. An employee who is not receiving remuneration may be able to access leave credits during suspension - although this may depend on the provisions of Cancer Australia's Enterprise Agreement. In addition, an employee who is suspended without remuneration should be advised about the length of the suspension and the fact that he or she may seek outside employment while the suspension is in place.

As an alternative to suspension, the CEO or delegate may decide that it is more appropriate to temporarily re-assign the employee's duties.

Action to suspend, or to temporarily re-assign duties, may be taken at any time prior to, or during, the process of determining whether a breach of the Code has occurred. In exercising these powers, it is important for the decision maker not to prejudge, and not to be seen to prejudge, whether a breach has occurred.

Where an employee who has been suspended is subsequently found not to have breached the Code, any salary forgone during the period of suspension should ordinarily be reinstated. Suspension while an investigation is proceeding is an administrative action that must be taken for sound reasons. It should not be characterised as a sanction in itself.

The sanction involving a re-assignment of duties (including to a different location) is intended to be used in situations where the integrity and effectiveness of the APS may be compromised if an employee is not removed from a particular location, for example, a small office, even though the conduct in question does not warrant

termination of employment. Where the reassignment involves a change of location, the sanction should be used only after careful consideration of all the circumstances, taking into account the impact on the employee, such as the financial costs and the effect of dislocation on the employee and his or her family.

Referee reports during and after misconduct investigation

Where an employee whose conduct is under investigation asks a referee from Cancer Australia to provide a report, for example, in connection with an application for promotion, where the investigation may be relevant to the work-related qualities required for the job, he or she could indicate that there have been concerns as yet unresolved where the situation warrants it. To go beyond that could be seen as prejudging the situation, particularly where there is no clear determination of misconduct.

Where an investigation has concluded that the employee did not breach the Code, it would be inappropriate for the referee to make any reference to the investigation, unless the investigation resulted in some findings relating to matters of performance or attitude which, although not amounting to misconduct, may nevertheless reflect on the employee's suitability for the position in question.

If a breach of the Code has been found to have occurred, and where the breach is relevant, the referee may include an outline of the circumstances surrounding the breach and comment on the relevance of the matter to the position. Whether the investigation is in progress or has been concluded, an employee's conduct, or misconduct, record is relevant only to the extent that the circumstances have a bearing on the duties and the qualities required for the position for which the reference is being sought. In all cases, the weight to be given to records of determined misconduct will diminish over time.

Resignation during misconduct investigation

Where an employee resigns during the course of an investigation of suspected misconduct, the investigation must be discontinued. The legislative framework does not permit action to be taken against former employees: Section 15(3) of the PS Act refers only to the conduct of an APS employee, not to former employees. Any documents that have been obtained or created up to the date of resignation should be retained, even where the investigation is not complete.

If the person later seeks re-engagement to the APS, these records can be used as part of the pre-employment checking process, but those using them for that purpose will need to ensure that the principles of procedural fairness are applied, including advising the former employee that the decision maker was taking such records into account and giving him or her the opportunity to comment.

Record keeping

The *Archives Act 1983*, the *Freedom of Information Act 1982* and the *Privacy Act 1988* are relevant to the keeping of written records. Records relating to misconduct action should not be placed on the personal file of the employee concerned, but rather on

a separate misconduct action file or, where appropriate, an investigation file. The existence of a separate misconduct file should, however, be made apparent on the personal file (eg by cross-reference). Files of this kind are to be classified 'In Confidence' and should be held in secure storage. Access for management purposes should be allowed only on a strict need-to-know basis.

Decision-makers who are either determining whether the Code has been breached or who are deciding an appropriate sanction should have access to these records. The weight they give to the conduct record in the decision making process, however, will depend on the recency and the nature of the misconduct that has been recorded.

For further advice on retention of records, reference should be made to the *Administrative Functions Disposal Authority* produced by the National Archives of Australia which provides specific information on the retention of records relating to counselling and misconduct matters. It should be noted that where the sanction imposed is a reprimand, it is subject to the same standards of record-keeping as apply to other sanctions.

Criminal matters

Criminal proceedings may result from an employee's behaviour in the workplace as well as through his or her private actions. Where an employee is being dealt with in connection with both criminal action in the workplace and a suspected breach of the Code, procedural fairness would require that the two matters are dealt with by different people. While it is possible to pursue the misconduct process at the same time as the criminal process, care must be taken not to risk jeopardising the prosecution of the criminal charge. Close liaison with the external investigating authority and the prosecuting authority is recommended.

Where it comes to light that an employee, *through their private actions*, has been charged with a criminal offence, and where the criminal charge relates to behaviour that could have an impact on the person's ability to maintain honesty and integrity in their APS employment, or if the employee's behaviour is otherwise inconsistent with the APS Values or is likely to damage the integrity and/or good reputation of the APS, it may be appropriate to take action to investigate the matter as a possible breach of the Code. In serious cases, it may be appropriate to suspend the person until the decision of the Court is known. The CEO, or delegate, may take action to suspend an employee only where they believe there are reasonable grounds that the employee has, or may have, breached the Code; and that the employee's suspension is in the public or Cancer Australia's interest (regulation 3.10). If a criminal charge has been heard, the CEO may commence a misconduct process on the basis of its effect on the employee's employment.

Reviews of decisions in relation to breaches of the APS Code of Conduct

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, may lodge an application for a review of actions under Division 5.3

of the Regulations. A decision to suspend an employee can also be the subject of review. A decision to temporarily re-assign the employee's duties would be subject to review only where the reassignment involved any of the circumstances provided for in Schedule 1 of the Regulations.

An application for review of a determination that an employee has breached the Code of Conduct, or of a sanction imposed for a breach of the Code, must be made to the Merit Protection Commissioner (regulation 5.24(2)). Applications for the review of decisions relating to suspension will generally be made in the first instance to the CEO (regulation 5.24(1)). The making of an application for review does not operate to stay the action (regulation 5.36).

While there is no strict time limit applying to the lodgement of a request for a review of action relating to a determination that the Code has been breached or consequent sanction imposed, the person conducting the review has a discretion to say that actions that are more than 12 months old may not be reviewed (regulation 5.23(3)(a)).

Appendix A: Flow chart of possible actions

A report is received by a delegate alleging that an employee may have breached the Code of Conduct



Consider options other than the formal misconduct process



Consider suspension or temporary re-assignment of duties at this stage - see the suspension checklist



If the breach may also be a criminal offence consider referral to the Police



The delegate **with guidance from the Chief Operating Officer**, determines that formal misconduct action will proceed



The delegate **with guidance from the Chief Operating Officer** determines that the matter can be dealt with informally



The CEO or delegate selects a person who is (and is seen to be) both independent and unbiased to determine whether the employee has breached the Code of Conduct



The employee is informed (in writing) of BOTH details of the suspected breach(es) AND the sanctions that may be imposed



The employee is given a reasonable opportunity to make a statement



The selected person investigates the matter to determine whether the employee has breached the Code of Conduct *



Where the employee is found to have breached the Code of Conduct



Where the employee is found not to have breached the Code of Conduct



Written record made of the determination, and the reasons for it is made and CEO proposes a sanction

Written record of the determination is made, a copy given to the employee



The employee is given an opportunity to comment on the proposed sanction

The Misconduct process ends



The CEO may impose a sanction of:

- reprimand
- deduction of salary
- reduction in salary
- re-assignment of duties
- reduction in classification
- termination of employment

CEO may take administrative action - e.g. the manager may counsel or warn the employee and keep a record of any such action



The employee is advised, in writing, of:

- **the determination and reasons for it**
- **the sanction and reasons for it, and**
- **rights of review**

Note: Elements in **bold type** are not requirements under the *Public Service Act 1999* or the *Public Service Commissioner's Directions 1999* but are considered to be good practice



The sanction takes effect



The Misconduct process ends. The employee may exercise rights of review

*The selected person may decide not to proceed to the making of a determination

Appendix B: Suspension Checklist of Actions and Considerations

Deciding whether or not to suspend:

- Is it in the public interest, or Cancer Australia's interest, to remove the employee from the workplace?
- Has re-assignment of duties been considered as an option?
- Is it clear that the decision maker is not prejudging and is seen as not prejudging whether the employee has breached the Code of Conduct?

When imposing suspension:

- Will the suspension be with pay or without pay?
- Has there been an opportunity for the employee to make a statement before the suspension is implemented?
- Has the employee been advised of the possible length of the suspension and of his/her ongoing status? (e.g. attendance at training courses previously booked, entitlement to apply for vacancies, access to the work premises)

Where suspension is without pay:

- Has the employee been advised about possible access to leave credits?
- Has the employee been advised about the length of the period of suspension and the fact that he/she could seek outside employment?

During suspension:

- Is the suspension being reviewed at reasonable intervals?
- Are there exceptional circumstances warranting the extending of unpaid suspension beyond 30 days?

Where it is determined that the employee suspended without pay has not breached the Code of Conduct:

- Is salary forgone during suspension to be reinstated or is there a case for not doing so?
- Is it appropriate to re-credit any paid recreation leave or long service leave applied for during suspension?
- Is it appropriate to take outside earnings into account before reinstating forgone salary?

Terminating the suspension:

- Has a sanction been imposed on the employee for the relevant breach? OR
- Does the CEO no longer believe that the employee has or may have breached the code? OR
- Does the CEO no longer believe that the suspension is in the public interest or in Cancer Australia's interest?

At the conclusion of the period of suspension:

- Is it necessary to decide whether the period of suspension counts as service?
- Has the appropriate documentation been completed?

Appendix C: Legislative Framework

Public Service Act 1999 - Section 13: The APS Code of Conduct

1. An APS employee must behave honestly and with integrity in the course of APS employment.
2. An APS employee must act with care and diligence in the course of APS employment.
3. An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment.
4. An APS employee, when acting in the course of 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 disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.
8. An APS employee must use Commonwealth resources in a proper manner.
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 make improper use of:
 - a. inside information; or
 - b. the employee's duties, status, power or authority;in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.
11. An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.
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.

Public Service Regulations 1999: Reg 2.1 Duty not to disclose information (Act S 13)

1. This regulation is made for subsection 13(13) of the Act.
2. This regulation does not affect other restrictions on the disclosure of information.
3. An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if it is reasonably foreseeable that the disclosure could be prejudicial to the effective working of government, including the formulation or implementation of policies or programs.
4. An APS employee must not disclose information which the APS employee obtains or generates in connection with the APS employee's employment if the information:
 - a. was, or is to be, communicated in confidence with the government; or
 - b. was received in confidence by the government from a person or persons outside the government; whether or not the disclosure would found an action for breach of confidence.
5. Subregulations (3) and (4) do not prevent a disclosure of information by an APS employee if:
 - a. the information is disclosed in the course of the APS employee's duties; or
 - b. the information is disclosed in accordance with an authorisation given by the Agency Head; or
 - c. the disclosure is otherwise authorised by law; or
 - d. the information that is disclosed:
 - (i) is already in the public domain as the result of a disclosure of information that is lawful under these Regulations or another law; and
 - (ii) can be disclosed without disclosing, expressly or by implication, other information to which subregulation (3) or (4) applies.
6. Subregulations (3) and (4) do not limit the authority of an Agency Head to give lawful and reasonable directions in relation to the disclosure of information.

Note: Under section 70 of the *Crimes Act 1914*, it is an offence for an APS employee to publish or communicate any fact or document which comes to the employee's knowledge, or into the employee's possession by virtue of being a Commonwealth officer and which it is the employee's duty not to disclose.

Public Service Act 1999 - Section 15: Breaches of the Code of Conduct

1. An Agency Head may impose the following sanctions on an APS employee in the Agency who is found (under procedures established under Subsection (3)) to have breached the Code of Conduct:

- a. termination of employment;
 - b. reduction in classification;
 - c. re-assignment of duties;
 - d. reduction in salary;
 - e. deductions from salary, by way of fine;
 - f. a reprimand.
2. The regulations may prescribe limitations on the power of an Agency Head to impose sanctions under Subsection (1).
 3. An Agency Head must establish procedures for determining whether an APS employee in the Agency has breached the Code of Conduct. The procedures:
 - a. must comply with basic procedural requirements set out in Commissioner's Directions;
 - b. must have due regard to procedural fairness
 - c. may be different for different categories of APS employees.
 4. The Commissioner must issue directions in writing for the purposes of Subsection (3).
 5. An Agency Head must take reasonable steps to ensure that every APS employee in the Agency has ready access to the documents that set out the procedures referred to in Subsection (3).

Public Service Regulations 1999: Reg 3.10 Suspension from Duties (Act S 28)

1. An Agency Head may suspend an APS employee employed in the Agency from duties if the Agency Head believes on reasonable grounds that:
 - a. the employee has, or may have, breached the Code of Conduct
 - b. the employee's suspension is in the public, or the Agency's, interest.
2. The suspension may be with remuneration.
3. If the suspension is to be without remuneration, the period without remuneration is to be:
 - a. not more than 30 days; or
 - b. if exceptional circumstances apply - a longer period.
4. The Agency Head must review the suspension at reasonable intervals.
5. The Agency Head must immediately end the suspension if the Agency Head no longer believes on reasonable grounds:
 - a. that the APS employee has, or may have, breached the Code of Conduct; or
 - b. that the employee's suspension is in the public, or the Agency's, interest.

6. The Agency Head must immediately end the suspension if a sanction has been imposed on the APS employee for the relevant breach of the Code of Conduct.
7. In exercising powers under this regulation, the Agency Head must have due regard to procedural fairness unless the Agency Head is satisfied on reasonable grounds that, in the particular circumstances, it would not be appropriate.

Public Service Regulations 1999: Reg 5.24 Application for Primary Review

1. An affected employee may apply in writing to the relevant Agency Head for primary review of a reviewable action.
2. However, the application must be made to the Merit Protection Commissioner if the application is for review of:
 - a. a determination that the affected employee has breached the Code of Conduct; or
 - b. a sanction imposed for breach of the Code of Conduct.
3. Also, the employee may apply in writing to the Merit Protection Commissioner for review of the action if:
 - a. the Agency Head was directly involved in the action; or
 - b. it is not appropriate, because of the seriousness or sensitivity of the action, for the Agency Head to deal with the application; or
 - c. the action is claimed to be victimisation or harassment of the employee for having made a previous application for review of action.
4. The application must state briefly:
 - a. why the review is sought; and
 - b. if a particular outcome is sought-the outcome sought.

Examples of outcomes

1. Reconsideration of the action.
2. Re-assignment of duties.

Public Service Regulations 1999: Reg 5.36 Making of application does not operate as stay

The making of an application for review of an APS action under this Division does not operate to stay the action.

Public Service Commissioner's Directions 1999: Chapter 5 - Basic requirements for procedures for determining breaches of the Code of Conduct

5.1 Purpose of Chapter 5

The purpose of this Chapter is to set out the basic procedural requirements that must be complied with by the procedures established by an Agency Head under subsection 15 (3) of the Act for determining whether an APS employee in the Agency has breached the Code of Conduct.

Note The requirements set out in this Chapter and the procedures established under subs 15 (3) of the Act apply only in relation to a suspected breach of the Code of Conduct by an APS employee in respect of which a determination is to be made. Not all suspected breaches of the Code of Conduct may need to be dealt with by way of a determination. In particular circumstances, another way of dealing with a suspected breach of the Code may be more appropriate.

5.2 Information to be given to employee before determination is made

Before any determination is made in relation to a suspected breach of the Code of Conduct by an APS employee, the employee must:

- a. be informed of:
 - (i) the details of the suspected breach of the Code of Conduct (including any variation of those details); and
 - (ii) the sanctions that may be imposed on the employee under subsection 15 (1) of the Act (including any limitations on that power contained in regulations made for the purposes of subsection 15 (2) of the Act); and
- b. be given reasonable opportunity to make a statement in relation to the suspected breach.

5.3 Determination process to be informal

The process for determining whether an APS employee has breached the Code of Conduct must be carried out with as little formality and as much expedition as a proper consideration of the matter allows.

5.4 Person making determination to be independent and unbiased

An Agency Head must take reasonable steps to ensure that the person who determines whether an APS employee has breached the Code of Conduct is, and appears to be, independent and unbiased.

5.5 Record of determination

After a determination in relation to a suspected breach of the Code of Conduct by an APS employee is made, a written record stating whether the employee has been found to have breached the Code of Conduct must be prepared.

Note The *Archives Act 1983* and the *Privacy Act 1988* apply to a record made under this clause.

5.6 Appropriate procedures if basis of APS employee's engagement in an Agency changes or employee moves to a different Agency

(1) This clause applies if:

- (a) an APS employee in an Agency is suspected of having breached the Code of Conduct; and
- (b) before any determination is made in relation to the suspected breach:
 - (i) the basis of the employee's engagement in the Agency changes; or
 - (ii) the employee moves to a different Agency.

Note Examples of a change in the basis of an APS employee's engagement in an Agency are as follows:

- (a) a change from engagement for a specified term, or for the duration of a specified task, to engagement as an ongoing APS employee;
- (b) a change from engagement for duties that are irregular or intermittent to engagement as an ongoing APS employee.

(2) A determination (if any) in relation to the suspected breach must be made:

- (a) if the basis of the employee's engagement in the Agency has changed -- in accordance with the procedures applicable to the basis of the employee's engagement in the Agency at the time the process for determining whether the employee has breached the Code of Conduct is commenced; and
- (b) if the employee has moved to a different Agency -- in accordance with the procedures applicable in the Agency to which the employee has moved at the time the process for determining whether the employee has breached the Code of Conduct is commenced.